The Treatment of Terrorists in the Israeli Occupied Territories

Paula E. Marcus
THE TREATMENT OF TERRORISTS IN THE ISRAELI OCCUPIED TERRITORIES

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INTRODUCTION

The Israeli occupied territories are the focal point of the Arab-Israeli conflict. The hostility of the Arab inhabitants of the territories manifests itself in continuous violence against both the Israeli administration and the civilian population of the occupied territory. Israel has promulgated measures to ensure that those instigating and participating in the violence in the occupied territories are prevented from further threatening state security and public welfare. At the same time, however, international law and the laws applicable to the territories afford security offenders procedural protections and opportunities to challenge the orders issued against them.

The Israeli military administration, in response to the violence in the occupied territories, issues administrative orders against the perpetra-
tors of violent attacks. The Israeli Supreme Court provides judicial review of military orders to ensure compliance with procedural rights. Israeli Supreme Court decisions demonstrate arbitrariness, disproportionality between offense and countermeasure, and the imposition of more stringent sanctions on Arab terrorists than on Jewish terrorists. Both the laws of the Israeli administration and international standards fail to define when emergency situations justify the predominance of security needs over procedural protection. An objective standard is necessary to ensure consistent judicial review of the military orders issued against those engaging in violence.

This Comment examines Israeli security measures employed to deal with those engaged in violence in the occupied territories and endeavors to reconcile national security interests with procedurally fair treatment of those accused of committing violent acts in the territories. Part I of this Comment presents a general history of the Arab-Israeli conflict and the violence in the occupied territories. The continuing violence demonstrates the need to implement measures to counter violent activity in the occupied territories. Part II explores the relevant international conventions that govern Israeli military occupation. This section addresses Israeli administration of the occupied territories, its security measures, and the procedural safeguards that protect the rights of those accused of violent conduct. Part III explains the predominant sanctions the military administration has employed to deter violence in the occupied territories. Part IV analyzes the judicial treatment of security offenders and examines the standards of evaluating security concerns. Part V suggests a judicial formula to reduce the inconsistencies in making decisions based on the predominance of security needs.

I. THE ARAB-ISRAELI CONFLICT

A. THE ROOTS OF THE CONFLICT

Israel has existed in a state of emergency since its inception. The conflict among the Arabs and the Jews, however, preceded the establishment of the State of Israel and commenced as early as 1882, the year of the first immigration of European Jews to Palestine. During the latter Nineteenth Century the population of Palestine was predomi-

5. See D. Hirst, supra note 2, at 13 (tracing the roots of the violence characterizing the history of the State of Israel). The Arab-Israeli conflict has precipitated five wars: The War of Independence in 1948, the 1956 Sinai Campaign, the 1967 Six Day War, the 1973 Yom Kippur War, and the 1982 War in Lebanon. Id.

nantly Arab and subject to the control of the Ottoman Empire. The Arab inhabitants of Palestine resented the arrival of the Jews, and resorted to assaults on the new immigrants and their settlements. Arab violence intensified following the 1917 Balfour Declaration expressing the position of the British government favoring the establishment of a national home for the Jewish people in Palestine.

British troops occupied Palestine from 1917 to 1918, and pursuant to an agreement between the Allied Powers, Palestine was granted to the United Kingdom as a mandated territory in 1922. During the 1920s and 1930s, violence escalated in Palestine under the British Mandate. In 1937, the British Royal Commission, appointed to examine the situation in Palestine, recognized the impossibility of establishing a Jewish or a bi-national state in Palestine and recommended the partition of Palestine. On February 14, 1947 Great Britain announced its plans to

7. D. Hirst, supra note 2, at 15.
8. Id. at 17.
9. Id. at 22. Attacks took the form of plundering cattle or produce, and ambushing, robbing, or killing farmers. Id. In 1907, the Jewish immigrants set up their first organization, the Hashomer (The Guardian), to defend themselves against Arab attacks on their settlements. Id. at 27.
10. Letter from Lord Arthur James Balfour, British Foreign Secretary to Lord Rothschild (Nov. 2, 1917), reprinted in The Israel-Arab Reader 17-18 (W. Laquer ed. 1970) [hereinafter The Israel-Arab Reader]. This letter, known as the Balfour Declaration, states, in pertinent part:
   His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of the non-Jewish community in Palestine, or the rights and political status enjoyed by the Jews in any other country.
   Id. at 18.
12. Shaked, supra note 6, at 181.
13. Sohn, supra note 11, at 417.
14. H. bin Talal, Palestinian Self-Determination 31 (1981). After 1921, increased Zionist land acquisition and settlement activities exacerbated the already strained relationship between the Arab and Zionist communities. Id. at 32. The large increase in Jewish immigration during this period resulted in increasingly violent disorder within the Arab community. Id. The British authorities, however, rejected Arab requests to cease the transfer of Arab-owned land to Jews and to end all Jewish immigration. Id.
15. See The Israel-Arab Reader, supra note 10, at 57 (reprinting the report of the British Royal Commission on Palestine). The Commission concluded that a severe conflict emerged between the two national factions within Palestine. Id. The drastic religious, linguistic, cultural, and ethnic differences separated, rather than united the two peoples, thereby rendering peaceful cohabitation impossible. Id.
16. Id.
terminate the Mandate\footnote{17} because it became unworkable in light of the growing violence among the Arabs and the Jews.\footnote{18}

Subsequently, the United Nations General Assembly voted in favor of a plan to partition Palestine.\footnote{19} When the British Mandate terminated, the Jewish community proclaimed the formation of the State of Israel.\footnote{20} The Arabs, refusing to acknowledge the State of Israel or accept the Partition Plan, commenced a campaign of guerilla activities.\footnote{21} When Egypt, Syria, Jordan, and Lebanon intervened on behalf of their Arab brethren in Palestine, the conflict escalated into a full-scale war.\footnote{22} The war ended with a series of armistice agreements between the new State of Israel and Egypt, Jordan, Syria, and Lebanon.\footnote{23}

The next major clash in the Arab-Israeli conflict was the 1956 Sinai Campaign.\footnote{24} The Israelis invaded the Sinai in reaction to terrorist raids from Gaza and Sinai,\footnote{25} and Egyptian interference with Israeli shipping in the Straits of Tiran.\footnote{26} A cease fire ended the war, lifted the blockade, and prevented major hostilities between Israel and Arab nations.

\footnote{17} A/286 (3 April 1947); GAOR, First Special Session, Vol. I, at 183. The British government announced on May 14, 1948 that it was not prepared to govern Palestine indefinitely and that the Arabs and Jews could not agree upon the means to govern Palestine together. \textit{Id.}

\footnote{18} \textit{Id.}

\footnote{19} G.A. Res. 181 II, U.N. GAOR 131-150 (1947); see Report of the United Nations Special Committee on Palestine, GAOR, II, Supp. II (A/364), Vol. I, 29-35, 39-62 (1947) (appraising both the Jewish and Arab cases seeking the establishment of respective Jewish and Palestinian states); see H. Bin Talal, \textit{supra} note 14, at 36 (stating that the Jewish authorities in Palestine accepted the partition plan to which the Arabs in Palestine as well as those in other Arab states were bitterly opposed).


\footnote{21} A. Gerson, \textit{ISRAEL, THE WEST BANK AND INTERNATIONAL LAW} 49 (1978). \textit{See} H. Bin Talal, \textit{supra} note 14, at 36 (stating that ten hours after the Israeli declaration of statehood, the armed forces of the neighboring Arab states entered Palestine at the request of the Arab inhabitants).

\footnote{22} J. Moore, \textit{supra} note 20, at xxiv (1977). A cease-fire negotiated under the auspices of the United Nations terminated the hostilities. H. Bin Talal, \textit{supra} note 14, at 37. As a result control of the area known as the Gaza Strip, Jordan controlled the area known as the West Bank and the Eastern (Old) City of Jerusalem, and Israel controlled the Western (New) City of Jerusalem, the coastal areas, and the northern part of the former British Mandate. \textit{Id.} Additionally, the war resulted in a massive displacement of Palestinian Arabs who became refugees in neighboring Arab states. \textit{Id.} at 38.

\footnote{23} J. Moore, \textit{supra} note 20, at xxiv.

\footnote{24} \textit{Id.} at xxvii.

\footnote{25} D. Hirst, \textit{supra} note 2, at 200. Egypt pursued a policy of infiltration, sending Palestinians, called "fedayeen" (those who sacrificed themselves), on raids into Israel. \textit{Id.}

\footnote{26} \textit{Id.}
until 1967.27

B. TERRORISM IN THE OCCUPIED TERRITORIES

In April 1967, Syria commenced the bombing of Israeli border vil-
lages while Egypt mobilized its armed forces in the Sinai and imposed
another blockade against Israeli shipping.28 These actions resulted in
the Six Day War of 1967 in which Israeli forces defeated the combined
forces of Syria, Egypt, and Jordan.29 The Six Day War resulted in Is-
raeli occupation of the territories of East Jerusalem,30 the West Bank,31
the Sinai,32 the Gaza Strip, and the Golan Heights.33

In addition to territorial gains, the Six Day War further aggravated
the Arab-Israeli conflict. A large, hostile Arab population came under
Israeli governmental control.34 The Israeli government subsequently set
up a military administration to manage the occupied territories,35

27. J. Moore, supra note 20, at xxvii.
29. See id. at 119-30 (outlining the military maneuvers that occurred during each
day of the Six Day War).
30. See E. Cohen, supra note 1, at 35 (discussing the incorporation of East Jerusa-
lem in the Jerusalem municipality). Israeli law, jurisdiction, and administration were
legally imposed on East Jerusalem following the cessation of hostilities. Administrative
31. See W.T. Mallison & S. Mallison, The Palestinian Problem in Interna-
tional World Order 248 (1986) (indicating that the term “West Bank” refers to
the land on the west bank of the Jordan river).
32. See Egypt-Israel, Camp David Framework for Peace in the Middle East, 1978,
22 Kitvei Amana (Israel Treaty Series No. 857) 510, 512 (providing, as part of the
Camp David Agreement, for the return of the Sinai to Egypt).
33. J. Moore, supra note 20, at xxvii. The Golan Heights were annexed to Israel

The legal justification for Israeli actions in the Six Day War is greatly debated.
Jordan claims that Israel entered the West Bank unlawfully in violation of the United
Nations Charter. A. Gerson, supra note 21, at 71. Article 2(4) of the Charter forbids
the use of force in contravention of the territorial integrity or political independence of
in International Documents on Palestine (F. Jabber ed. 1970) (requesting that
Israel withdraw its armed forces from the territories occupied in 1967).

Israel argues, however, that Egypt, when it closed the Straits of Tiran and deployed
forces on the Israeli borders, indicated an intention to initiate hostilities. A. Gerson,
supra note 21, at 71. The international community has generally accepted Israeli ac-
tions as a legitimate exercise of the right of self-defense. Id. at 73. While the interna-
tional community may accept the validity of the Israeli actions as an exercise of the
right of self-defense, it has not accepted the validity of the continued Israeli occupa-
tion. Id.; see H. Bin Talal, supra note 14, at 69 (asserting that a contention of self-
defense is invalid when applied to territorial claims). Contra J. Stone, Israel and Pal-
estein 52 (1981) (stating that the continued Israeli presence in the territories is
lawful because the Israelis entered in self-defense).
34. R. Halabi, The West Bank Story 51 (1981). The Arab population of the
West Bank and the Gaza Strip is approximately 1.1 million. Id.
35. See infra notes 103-15 and accompanying text (detailing the Israeli system of
within a legal framework composed of principles derived from international law, existing local laws, and Israeli security legislation.

The Palestinian Liberation Organization (PLO), founded in 1964, had an adverse impact on relations between the military government and the people of the occupied territories. The National Covenant of the PLO, issued in 1968, provides the ideological basis for the war against Israel and mandates that the only way to achieve a Palestinian homeland is to launch a continuing armed struggle against Israel. The growth and consolidation of the PLO after the 1967 War resulted in a dramatic increase in violent and subversive activities in the occupied territories.

During the 1970s, the conflict received a new impetus with the establishment of Jewish settlements in the West Bank. A faction of Gush Emunim, the religious party of Israel, initiated a program of massive administration of the occupied territories).

36. See infra notes 68-100 and accompanying text (discussing the applicability of the 1907 Hague Regulations and the Fourth Geneva Convention to the Israeli administration of the occupied territories).

37. See A. Gerston, supra note 21, at 113 (discussing the municipal governmental system that operated in the West Bank under Jordanian law). The Israeli administration retained this governmental system pursuant to the Hague Regulations of 1907. Id.

38. See infra notes 116-21 and accompanying text (discussing the Emergency Defence Regulations authorizing the implementation of measures against terrorists).


40. R. Halabi, supra note 34, at 87. A movement of Palestinian self-determination emerged at the same time the Palestinian National Covenant of 1966 was completed. J. Stone, Legal Controls of International Conflict 12 (1959). The PLO claims to speak in the name of all Palestinian Arabs. H. bin Talal, supra note 14, at 46.


42. R. Halabi, supra note 34, at 190.

43. PLO Covenant, supra note 41, art. 9. Article 9 of the PLO Covenant states: "Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase." Id. Yassir Arafat, leader of the PLO, has said: "Our people . . . have the right to use all means in their fight against oppression." (Reuter, Tunis, Sept. 3, 1985).

44. Vardi, The Administered Territories and the Internal Security of Israel, in Judea, Samaria & Gaza: Views of the Present & Future 174 (D. Elazar ed. 1982). The PLO sought to establish bases of armed resistance and inspire civil disobedience among the local population. See R. Halabi, supra note 34, at 196 (explaining that terrorist training camps were established in the West Bank immediately after the commencement of the occupation).

Jewish settlement in the occupied territories. The settlements were part of a strategic plan to force the Palestinians to abandon the West Bank. The plan has resulted in the increased hostility of the Palestinians towards the Israeli administrators of the West Bank.

The prevailing characteristic of the Arab-Israeli Conflict of the 1980s is the continuous, random terrorist attacks on civilians. Both Palestinian and Jewish inhabitants of the occupied territories have participated in violent attacks on civilians. The military administration responds swiftly to Palestinian attacks on the Jewish inhabitants of the occupied territories with harsh sanctions including curfews and random searches of Palestinians, dismissal of Palestinian mayors in the occupied territories, and deportations. Jewish attacks on Palestinian inhabitants of the occupied territories, however, have not received serious treatment.

This continuous pattern of isolated attacks culminated in an out-

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46. E. Cohen, supra note 1, at 146. The Gush Emunim (Bloc of the Faithful) movement, created in 1974, successfully lobbies for Israeli government approval of the settlement of the occupied territories. Id.


50. See PLO Terrorists Murder Again, appendix A (Oct. 10, 1985) (available at the Israeli Embassy, Washington, D.C.) (stating that between August 1984 and October 1985, 23 Israelis were killed in 16 separate incidents); see also R. Halabi, supra note 34, at 155 (discussing the murder of a student in Hebron, in the occupied West Bank). Hebron, the center of much violence in the West Bank, is considered a "[t]ense microcosm of the Arab-Israeli conflict" because it is the ancient focal point of two religions. Rupert, Faiths Contest Abraham's Tomb, Wash. Post, Sept. 19, 1987, at 16, col. 2.

51. See R. Halabi, supra note 34, at 136 (discussing the car bombing attacks on the Palestinian mayors of Nablus and Ramallah in the occupied territories).

52. Id. at 55.

53. Id. at 36.

54. See infra notes 156-63 and accompanying text (discussing the Mayor of Hebron's appeal of a deportation order to the Israeli Supreme Court).

55. See Friedman, The Case of the Unsolved Bombings, 1982 THE NATION 681, 681 (discussing the failure of military administrators of the occupied territories to investigate the bombing attacks on the mayors of Nablus and Ramallah). Members of the Gush Emunim and the Kach Party of Rabbi Meir Kahane were implicated in the attacks. Id.
break of widespread demonstrations and violence in December 1987.60 Mass demonstrations involving stone throwing, tire burning, and firebombs occurred throughout the occupied territories.67 The Israeli army deployed additional troops in both the Gaza Strip and the West Bank, and responded with tear gas, rubber bullets, and live ammunition killing or injuring both rioters and bystanders.68 In addition, Palestinians have killed Arabs viewed as collaborators with Jewish authorities69 and some Jewish settlers have been killed or wounded.60 In response, the Israeli administration has arrested thousands of Palestinians and deported those individuals allegedly responsible for inciting the riots.61 The arrests and deportations have not, however, deterred further acts of violent protest and confrontations with the military. An underground Palestinian leadership and factions of the PLO have coordinated the protests against military authorities.62 The involvement of armed Jewish settlers of the West Bank has also increased.63

The volume and severity of the terrorist attacks demonstrate the extreme hostility the Arab residents feel toward Israeli occupation. Jewish attacks against Arabs similarly demonstrate a trend of Israeli extremism toward retribution. Israel has developed a military administration to govern the territories and impose countermeasures intended to deter acts of violence and protect both the military administration and the local population.

II. LEGAL STANDARDS GOVERNING THE ISRAELI OCCUPIED TERRITORIES

International legal conventions provide a framework for a military
occipant. Israel has interpreted and implemented these conventions to meet its own security needs. The laws of the Israeli administration of the territories, however, ultimately govern the sanctions enforced against terrorist activity.

A. APPLICABLE INTERNATIONAL STANDARDS

Under accepted principles of international law, an occupant acquires a temporary right of control over the territory it occupies and its inhabitants. The current international legal regime governing the administration of occupied territories includes the Hague Regulations and the Fourth Geneva Convention. These conventions arguably govern the Israeli occupation of the West Bank and Gaza Strip that commenced in 1967.

1. The 1907 Hague Regulations

The Hague Regulations are applicable to the Israeli occupation of the West Bank and Gaza Strip through the operation of article 42 of the Regulations. Article 42 defines "occupied territory" as territory actually placed under the authority of a hostile army. The Israel army occupied the West Bank and the Gaza Strip during the Six Day War


65. Hague Regulations, supra note 4, at vol. 32, p. 1803. The Hague Regulations, drafted before World War I, focus on military necessity and the need to maintain stability in occupied territories. E. COHEN, supra note 1, at 23.

66. Fourth Geneva Convention, supra note 4, art. 2. The Fourth Geneva Convention, which resulted from the brutal practices of the Axis powers in the occupied territories of Europe during the Second World War, emphasizes the protection of civilians living in occupied territories. E. COHEN, supra note 1, at 26. The Convention applies to all situations of partial or total occupation. Fourth Geneva Convention, supra note 4, art. 2.

67. See Goodman, The Need for Fundamental Change in the Law of Belligerent Occupation, 37 STAN. L. REV. 1573, 1573 (1985) (arguing that the current laws of belligerent occupation do not take into account the present reality of international politics and need restructuring to deal with modern occupations).

68. Hague Regulations, supra note 4, art. 42. Article 42 of the Hague Regulations makes no reference to the legitimacy of the sovereign the occupying power displaces. A precondition for application of the Fourth Geneva Convention, however, is that the occupying sovereign expel a legitimate sovereign from the disputed territory. See infra note 80 and accompanying text (discussing the application of the Fourth Geneva Convention only to the occupation of the territory of a "High Contracting Party"). Contra E. COHEN, supra note 1, at 51 (asserting that the drafters of the Hague Regulations intended the Regulations to apply to situations where the previous sovereign of the territory was a legitimate sovereign).
of 1967 and continues to administer those territories.\textsuperscript{69} Both the West Bank and the Gaza Strip are occupied territories as defined in article 42; therefore, the Hague Regulations of 1907 apply to the Israel occupation of the Gaza Strip and the West Bank.

Israel concedes that the Hague Regulations apply to the Israeli occupation of the West Bank and Gaza Strip because the Regulations reflect norms of customary international law.\textsuperscript{70} The Israeli Supreme Court considers customary international law and the Hague Regulations binding upon Israel regardless of whether Israel is a signatory to the Regulations.\textsuperscript{71} The Israeli courts, however, predicate application of the provisions of the Hague Regulations, on the absence of conflicting domestic legislation.\textsuperscript{72} Therefore, where the Hague Regulations conflict with the domestic laws of Israel, the Israeli law prevails.

The Hague Regulations permit an occupying power to act in accordance with its legitimate security concerns. Article 43 provides that the occupying power may take any measures necessary to restore and ensure public order and safety.\textsuperscript{73} This article justifies Israeli security measures.\textsuperscript{74} To deter the violence that threatens the security and public order of the occupied territories, the sanctions that the military admin-

\textsuperscript{69} J. Moore, supra note 20, at xxviii.

\textsuperscript{70} E. Cohen, supra note 1, at 51. The International Military Tribunal at Nuremberg stated “by 1939 the rules of land warfare laid down in the 1907 [Hague] Convention had been recognized by all civili[s]ed nations and were regarded as being declaratory of the laws and customs of men.” Judgment of the International Tribunal for the Trial of Major War Criminals (London 1946), Cmd. No. 6964, at 64. Additionally, the spirit of the Hague Regulations is embodied in military manuals in many countries around the world. E. Cohen, supra note 1, at 24.


\textsuperscript{71} E. Cohen, supra note 1, at 23. Israel has not ratified the Hague Regulations. \textit{Id.}; see Sheikh Suleiman Abu Hilu v. State of Israel, H.C. 302/72, 27(2) Piskei Din 177 (1972), \textit{translated in} 5 Isr. Y.B. Hum. Rts. 384-348 (1975) (holding that the court will examine the propriety of an administrative act in the occupied territories in the light of customary international law when no written Israeli law applies).

\textsuperscript{72} Ayub v. Minister of Defence, H.C. 606/78 33(2) Piskei Din 113 (1978); see Meron, \textit{West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition}, 9 Isr. Y.B. Hum. Rts. 106, 111 (discussing differences between customary and conventional international law).

\textsuperscript{73} Hague Regulations, supra note 4, art. 43. Article 43 provides that after assuming the authority of the previous sovereign power, the occupying power “shall take all the measures in his power to restore and ensure . . . public order and safety.” \textit{Id.} The occupying power is obliged to respect the laws in force in the occupied territory unless absolutely prevented from doing so. \textit{Id.}

\textsuperscript{74} \textit{Id.} See e.g. H.C. 97/79, Abu Awad v. Commander of the Judea and Samaria Region, 33(3) Piskei Din 309 (1979), \textit{translated in} 9 Isr. Y.B. Hum. Rts. 343, 345 (1979) (holding that deportation was ordered to maintain order and security, a legitimate reason under article 43 of the Hague Regulations).
istration imposes include the restrictions of movement, detention, deportation, and demolition of houses.

2. The 1949 Fourth Geneva Convention

The binding nature of the provisions of the Fourth Geneva Convention is a much debated topic.\(^5\) The Convention is generally regarded as contractual in nature, obligating only signatory nations to its requirements.\(^6\) In the Israeli system, a rule of international law is not binding unless Israel has promulgated legislation incorporating the rule of law into the local system.\(^7\)

Although Israel ratified the Fourth Geneva Convention in 1951,\(^7\) the question of applicability to the occupied territories remains open because of interpretive problems.\(^7\) The Convention stipulates that it applies to the occupation of the territory of a "High Contracting Party."\(^8\) This phrase suggests that the territory occupied was previously under the sovereignty of one of the signatory states and, thus, the Fourth Geneva Convention is applicable only when a legitimate sovereign was ousted from the territory.\(^9\) The international community considered Jordanian occupation of the West Bank prior to 1967 a belligerent occupation.\(^8\) Therefore, because the West Bank was not the

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75. See E. COHEN, supra note 1, at 43-56 (presenting conflicting views of the applicability of the Geneva Convention to the Israeli occupied territories).
76. Id.
77. ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, THE LEGAL AND ADMINISTRATIVE SYSTEM 13 (1985). [hereinafter ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL]. Customary international law, on the other hand, does not require legislation to become effective. Id.
78. E. COHEN, supra note 1, at 44. Israel ratified the Fourth Geneva Convention on July 6, 1951, subject to recognition of the Israeli Star of David emblem. Id. at 58 n.51.
80. Fourth Geneva Convention, supra note 4, art. 2(2).
81. E. COHEN, supra note 1, at 44; see NATIONAL LAWYERS GUILD REPORT, supra note 45, at xv (asserting that the provisions of the Fourth Geneva Convention apply where a belligerent occupant has ousted a legitimate sovereign from the occupied territory).
82. See Shamgar, The Observance of International Law in the Administered Territories, in 1 ISR. Y.B. HUM. RTS. 262, 265 (1971) [hereinafter Shamgar] (stating that Jordan annexed the West Bank). Only the United Kingdom and Pakistan recognized the legitimacy of Jordanian sovereignty over the territory. Id.
territory of a "High Contracting Party" at the time the Israeli occupation began, the provisions of the Fourth Geneva Convention do not apply to the Israeli administration of the occupied territory.\(^\text{83}\) The Israeli government, however, has accepted the humanitarian provisions of the Convention.\(^\text{84}\) The military administration of the occupied territories has incorporated the provisions of the Convention and specifically requires every soldier in the Israel Defense Forces to comply with the Convention.\(^\text{85}\) Despite these measures, Israel does not consider the provisions of the Fourth Geneva Convention an internal law of Israel that a person can enforce in the domestic courts.\(^\text{86}\) The United Nations\(^\text{87}\) and the United States,\(^\text{88}\) however, contend that the Fourth Geneva Convention is fully applicable to the Israeli occupied territories.

The Fourth Geneva Convention articulates measures to ensure an orderly administration of an occupied territory. The Convention provides that an occupying power can suspend or repeal the penal laws of the occupied territories if these laws constitute a threat to the security of the occupying power.\(^\text{89}\) The Convention also provides that military courts have jurisdiction over the residents of the territories who have allegedly committed security offenses.\(^\text{90}\) The Convention explicitly per-

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\(^{83}\) See E. Cohen, supra note 1, at 45 (discussing that a formal acknowledgment of the applicability of the Fourth Geneva Convention is tantamount to recognition of Jordanian sovereignty over the West Bank and Egyptian sovereignty over Gaza).

\(^{84}\) See Shamgar, supra note 82, at 263 (asserting that automatic application of the Fourth Geneva Convention would raise complicated political and juridical problems). The humanitarian provisions of the Convention, however, address human beings in distress as victims of war, rather than the political interests of states. Id. But see H. Bin Talal, supra note 14, at 75 (arguing that the Fourth Geneva Convention does not lend itself to a distinction between humanitarian legal protection and territorial application of law).

\(^{85}\) General Staff of the I.D.F., Order No. 33.0133; Military Justice Code No. 1.33, cited in E. Cohen, supra note 1, at 483 n.46.


\(^{89}\) Fourth Geneva Convention, supra note 4, art. 64.

\(^{90}\) Id. art. 66. In accordance with article 64, which allows the occupying power to maintain order in the occupied territory, article 66 provides: "the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on conditions that the said courts sit in the occupied country." Id.
mits the detention of individuals for security reasons and recognizes the possibility of property demolition for security purposes. The Convention, however, proscribes the use of deportations regardless of the motive for using them.

The Convention provides basic protection to those who commit offenses in the occupied territory. When authorities detain or arrest individuals accused of terrorist activity, authorities must specify the charge, place of detention, and time and place of the hearing. The Convention includes a right to counsel and the right to call witnesses. Additionally, the Convention provides for the review of detention orders and a right to appeal all decisions issued against inhabitants of the occupied territory.

Indeed, Hague Regulations and the Fourth Geneva Convention provide Israel with certain powers necessary for administering the occupied territories. Additionally, the Regulations and the Convention af-

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91. Id. art. 78. Article 78 provides that the occupying power may, for imperative reasons of security, subject offenders to assigned residence or internment. Id.

92. Id. art. 53. Article 53 permits the occupying power to destroy real or personal property where military operations render such destruction absolutely necessary. Id.; see also J.S. Pictet, Commentary, IV Geneva Convention 302 (1958) (stating that an occupying power may demolish public or private property in the occupied territory for imperative military objectives).

93. Fourth Geneva Convention, supra note 4, art. 49. Article 49 proscribes the deportation of protected persons from the occupied territory. Id. But see Abu Awad v. Commander of the Judea and Samaria Region, H.C. 97/79, 33(3) Piskei Din 309 (1979), translated in 9 Isr. Y.B. Hum. Rts. 343, 345 (1979) (upholding a deportation order issued to maintain order and security). The Israeli court concluded that such a deportation is legitimate under article 43 of the Hague Regulations. Id. The President of the Supreme Court of Israel reasoned that article 49 of the Fourth Geneva Convention was intended to prevent the perpetration of atrocities similar to those committed in Germany during the Second World War, when millions of people were deported from their homes. Id. Article 49, the court continued, was not intended to proscribe isolated, security-based deportations. Id.

Another argument suggests that article 49 does not apply in the deportation setting, because the article prohibits deportation to the territory of the occupying power or to the territory of another country. Shamgar, supra note 82, at 274. Deporting persons to Jordan is considered a return or exchange of a prisoner to the country on whose behalf he has acted. Id. There is, however, no rule against returning agents of a hostile state to the hostile state. Id.

94. Fourth Geneva Convention, supra note 4, art. 71. The occupying power must immediately inform the accused person in writing of the charges against him or her, and insure that the accused understands the particular charges against him or her. Id.

95. Id.

96. Id.

97. Id. art. 72. Accused persons have the right to present any and all evidence necessary to exculpate themselves. Id.

98. Id.

99. Id. art. 43.

100. Id.
for the inhabitants of the occupied territories protection against arbitrary military actions. This international framework regarding the administration of the occupied territories has a significant influence on the Israel administration of the territories.

B. Israeli Domestic Authority

According to international law, the military administration is required to maintain order and ensure the safety and welfare of the inhabitants of the territory. The Israeli administration endeavors to control the occupied territories within the requirements of international law. Israel's own particular security concerns, however, demand additional legislation to administer the occupied territories.

1. The Military Administration

Following its assumption of power in the occupied territories, the Israeli government issued Proclamation No. 1. This proclamation provided that the Israeli military administration would ensure public order and safety while respecting the laws already in force in the country unless absolutely prevented from doing so. Jordanian law continues to apply to civil matters and criminal conduct that poses no threat to the security of Israel or its administration of the occupied territories.

101. Hague Regulations, supra note 4, art. 43. The occupying power is entitled to take all measures necessary to restore and maintain public order and safety. Id.

102. See Israel National Section of the International Commission of Jurists, The Rule of Law in the Areas Administered by Israel 6 (1981) [hereinafter ICJ Israel Section] (discussing the legislative authority of Israel under international law). Article 43 of the Hague Regulations, that requires an occupying power to restore and ensure public order and safety, and article 64 of the Fourth Geneva Convention, that provides the occupying power the authority to enact penal provisions, forms the basis of Israeli authority to enact security legislation. Id.

103. Proclamations, Orders & Appointments of the IDF's Command (Judea and Samaria), no. 1, at 3, cited in E. Cohen, supra note 1, at 92 n.101. Similar proclamations were issued for the other occupied areas. Id.

104. E. Cohen, supra note 1, at 92; see Arnon v. Attorney General, H.C. 507/72, 27 (1) Piskei Din 233, translated in 9 ISR. Y.B. HUM. RTS. 334, 336 (1979) (holding that the occupation of enemy territory creates the rights to proclaim a military government and to do everything necessary to secure public order and the safety of the population).

The military administration retained the local laws that existed in the territories prior to the June 1967. E. Cohen, supra note 1, at 93. Ottoman law, British mandatory law, and Jordanian law remain in force in the West Bank. Ottoman law, British mandatory law, and Egyptian military orders and proclamations remain in force in the Gaza Strip. Id.

105. Association For Civil Rights in Israel, supra note 77, at 23; see ICJ Israel Section, supra note 102, at 25 (stating that Israeli legislation interfering with the criminal jurisdiction of the local courts applies only to security offenses). The only
The Israeli military courts are the central judicial bodies dealing with security offenders.\textsuperscript{106} According to international law, a military administration is empowered to establish military courts that have jurisdiction over inhabitants of the occupied territory\textsuperscript{107} who breach the peace or security of the territory.\textsuperscript{108} The Regional Commander appoints the president and two judges comprising the military court.\textsuperscript{109} Convictions and sentences of the military courts are subject to the approval of the Area Commander.\textsuperscript{110}

Trials before the military courts are held in accordance with the evidentiary rules and procedures of the common law system.\textsuperscript{111} There is currently no military court of appeals, but verdicts of the military courts are appealable to the regional commanders.\textsuperscript{112} The Israeli Su-
The Supreme Court however, has urged the government to create an appeal court in the occupied territories. The Israeli Supreme Court entitles inhabitants of the occupied territories to a direct appeal concerning decisions and actions of the military authorities. The actions of the military are tested according to existing Israeli laws, local Jordanian laws, orders of the regional commander, and rules of international law incorporated into Israeli law.

2. Administrative Security Regulations

The military administration operates under the Order Concerning Security Instructions (OCSI) which embodies the criminal security code of each territory. The OCSI contains changes made in the Emergency Defence Regulations instituted during the British Mandate that remain in force in the territories. The security measures em-
ployed against terrorists are applied pursuant to the Defence Regulations. The Defence Regulations authorize administrative detention and the deportation of any person who threatens the security, safety, and defense of the area. In addition, the Regulations allow the military commander to order the destruction of any house used in the preparation of terrorist activities.

3. The Procedural Protection of Offenders

The military administration provides juridical safeguards to prevent the abuse of military discretion. The procedural rights guaranteed to the accused security offenders generally include those afforded criminal defendants in common law systems including the right to counsel, the right to specific charges, the right to proceedings in the presence of the accused, and the right to present witnesses.

The military administration has created Appeals Boards to hear appeals of the orders of the military administration. The Regional Commander has historically accepted the recommendations of the Appeals Board. The appellant retains the option to petition the Israel Supreme Court to review the decision of the Regional Commander.
In 1979, the Defence Regulations were amended to afford more legal protection to detained security offenders. An objective standard replaced the former subjective evaluation of security offenses. The new law limits detention to six months, and requires review of the reasons for detention at the three month interval. In addition, the detention order is subject to the district court president’s mandatory review within forty-eight hours of arrest.

The legal framework demonstrates that the Israeli military administration is permitted to focus on the legitimate security interests of Israel in issuing orders against security offenders. The system does, however, allow for the predominance of security concerns to the detriment of procedural concerns. The Supreme Court has yet to articulate a standard of review and a precise definition of Israeli security interests. Without a precise standard of review, the court is not bound to consistent decisions.

III. ARRESTING TERRORIST ACTIVITY IN THE OCCUPIED TERRITORIES

The Israeli military administration in the territories is empowered to order countermeasures when it believes an individual represents a security risk to the state or public. The primary countermeasures employed against suspected terrorists are restriction of movement, administrative detention, deportation, and the demolition of houses. These sanctions are, in theory, tailored to specific offenses.

126. Emergency Powers (Detention) Law 5379-1979, 33 Laws of the State of Israel 89 (1979) cited in Saltman, The Use of the Mandatory Emergency Laws by the Israeli Government, 10 Int’l J. Soc. L. 385, 387 n.3 (1982). Although intended to provide more legal protection to security offenders, the amended regulations still evoke criticism. See id. at 393 (arguing that the 1979 amendments allow Israel to maintain a self-image of democracy both for its Jewish citizens and the outside world, while at the same time enabling Israel to selectively infringe upon the elementary civil rights of its Arab citizens).


129. Id.

130. See supra notes 116-21 (discussing the Order Concerning Security Instructions and the Emergency Defence Regulations, which govern the implementation of sanctions against alleged security offenders).
A. Restriction of Movement

Restriction of the movement of suspected terrorists within the occupied territories is the least severe measure employed to counter terrorist activity. This measure allows the security authorities to monitor the movement of potential terrorists and prevent them from joining other terrorists within and beyond Israeli territory. Restriction of movement is generally used when the actions of individuals do not warrant either deportation or detention. If the individual's activities become more dangerous, authorities may implement more severe measures.

B. Detention Orders

When monitoring the moves of a potential terrorist is insufficient to alleviate the security risks, the military administration issues detention orders as a second countermeasure. Administrative detention involves the confinement of individuals by administration officials to prevent them from participating in terrorist activities and is employed when resort to judicial procedures is ineffective or unavailable. Even though detention orders are characterized as preventive rather than punitive in nature, they are considered a severe sanction. Consequently, Israeli officials issue administrative detention orders only when less re-
C. DEPORTATION

The most severe sanction available to the military administration is the deportation from the occupied territories of saboteurs, members of terrorist organizations, and individuals acting on behalf of neighboring Arab nations. The military commander of the region is authorized to deport a person who threatens the security, safety, and defense of the territory. Deportation is employed when the accused poses a continuous security risk in the occupied territory. Deportation ordinarily occurs after the individual is detained and the military authorities determine that releasing the individual threatens the security, safety, and defense of the occupied territory.

D. DEMOLITION OF HOUSES

The military administration orders the demolition of houses in which terrorists reside, acts of terrorism are prepared or committed, or arms or sabotage materials are found. Demolition is ordered where

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138. See Qawasma v. Minister of Defence, A.A.D. 1/82 36 Piskei Din 666, 669 (1982), translated in Rudolph, supra note 137, at 153 (arguing for limiting the power to detain to where the danger to society is so serious that detention is the only way to avert unrest).

139. Shamgar, supra note 82, at 273.


141. Shamgar, supra note 82, at 274.

142. Id.


144. Shamgar, supra note 82, at 270; see Motzlah v. Minister of Defence, H.C. 572/82, 36(4) Piskei Din 610 (1982), cited in Reicin, Preventive Detention, Curfews, Demolition of Houses and Deportations: An Analysis of Measure Employed by Israel in the Administered Territories, 8 CARDOZO L. REV. 515, 551 n.227 (1987) (upholding the destruction of a house whose inhabitants participated in a fatal bomb attack and other terrorist activities); Sakhwil v. Commander of the Judea and Samaria Region, H.C. 434/79, 34(1) Piskei Din 464 (1980), translated in 10 ISR. Y.B. HUM. RTS. 345, 345-46 (1980) (sustaining an order to seal off the room of petitioner's son who had provided refuge to a member of Al-Fatah and had hidden explosives in the room); Khamed v. Commander of the Judea and Samaria Region, H.C. 22/81, 35(3) Piskei Din 223 (1981), translated in 11 ISR. Y.B. HUM. RTS. 365, 365-66 (1981) (affirming an order to seal a room because one of its occupants was arrested for throwing hand grenades at buses and assassinating Arabs who cooperated with Israel).
the destruction of the home bears a direct relation to the goal of deter-
ring terrorist activity.\textsuperscript{145} Alternately, the military administration seals off houses or rooms associated with terrorist activities.\textsuperscript{146} The military seals off rooms and houses in situations where the terrorist resides in a house or an apartment building with other innocent family members or neighbors.\textsuperscript{147} Sealing off houses or rooms is a less drastic measure than demolition because it provides the authorities the opportunity to revoke the measure at a later date.\textsuperscript{148}

The sanctions available to the military administrators of the occupied territories are designed to alleviate threats of terrorist activity. Although presented in degrees of severity, the measures the Israeli administration has employed are often not proportionate to the crimes committed. An examination of the judicial treatment of the territories demonstrates the inconsistent implementation of these countermeasures.

IV. TREATMENT OF SECURITY OFFENDERS

The Israeli Supreme Court has not followed a uniform standard in evaluating the implementation of military orders against security offenders. The standard the court employs depends on the factual setting of each case. This approach is practicable because it allows the court to uphold a particular measure based on individualized security threats. At the same time, however, this standard affords the military authorities a degree of discretion that is potentially abusive of the procedural rights of offenders.

A. REVIEW OF MILITARY ORDERS DEMONSTRATE ARBITRARINESS

It is unclear under Israeli precedent whether a procedural flaw is severe enough to warrant reversal of a military order. The Israeli Su-

\begin{footnotes}
\item[145] A. Gerson, supra note 21, at 162; see N.Y. Times, Apr. 13, 1984, at A1, col. 2 (discussing the demolition of houses in Gaza undertaken in response to hijacking of a public bus). The houses were demolished to deter subsequent acts of violence. \textit{Id.}


\item[147] A. Gerson, supra note 21, at 167; see E. Cohen, supra note 1, at 96 (discussing criteria for sealing off houses). The military authorities seal rooms rather than order the demolition of houses when the owners of the houses were innocent relatives of the alleged terrorists. \textit{Id.} Khaled v. Commander of the Judea and Samaria Region, H.C. 22/81, 35(3) Piskei Din 223 (1981), translated in \textit{11 Isr. Y.B. Hum. Rts. 365, 365-66} (1981).

\item[148] ICJ ISRAEL SECTION, supra note 102, at 70.
\end{footnotes}
The Supreme Court has cancelled preventive detention orders solely due to procedural flaws with respect to the time and place of detention. The court has, however, upheld a deportation order despite denial of the right to appeal the order before its implementation.

In *Al Karbutli v. Minister of Defence*, the court cancelled a detention order because the advisory committee that considers the objections of detainees was not appointed at the time the order was issued. Similarly, in *Al Kouri v. Chief of Staff*, the court rescinded a detention order for failure to specify the place of detention. In *Kawasme v. Minister of Defence*, the court granted a petition of review to two mayors from Hebron, who were denied the right to appeal a deportation order before an advisory board. The mayors were denied the right to challenge the legality of the order because the deportation was carried out immediately. On appeal to the Israeli Supreme Court, the military authorities, in defense of the expulsions, argued that the strained security situation prevailing on the night of the attack on Jewish residents justified expedient action. The court, however, held that compelling security grounds do not justify ignoring the duty to observe the rule of law. The mayors were given an opportunity to appeal to the advisory board, but the deportation orders remained

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149. See *Al Karbutli v. Minister of Defence* H.C. 7/48, 2 Piskei Din 5, cited in Rudolph, *supra* note 137, at 150 (cancelling a detention order because the committee that reviewed the order had not been appointed at the required time); *Al Kouri v. Chief of Staff* H.C. 95/49, 4 Piskei Din 34A, 46 (cancelling a detention order because it did not specify the location of detention).


152. *Id.*


154. *Id.*


156. *Id.* at 344. The deportations were a response to a Palestinian attack that killed six Jews.

157. *Id.* The deportation order, however, was ultimately sustained. *Id.* at 354.


159. *Id.*

160. *Id.*

161. *Id.* at 346. In the opinion of Justice Landau, a reasonable interpretation of the statutory right to appeal to the board is that the right should be granted before the deportation is carried out. *Id.* at 345.

162. *Id.* at 347. The petition of a third deportee, who had delivered speeches calling for the extermination of the State of Israel, was totally rejected. *Id.*
effective.  

In the alternative, another case demonstrates respect for the rights of security offenders that culminated in the cancellation of a detention order. In Qawasma v. Minister of Defence, the court, on appeal, cancelled an improperly issued detention order. The defendant Qawasma, was sentenced to eighteen years imprisonment for charges of membership in an unlawful organization and planting bombs where likely to cause death or injury. The decision, however, was not based on a unanimous verdict as required under the Defence Regulations. Although given an opportunity to appeal the conviction, the petitioner was detained pending the appeal to prevent any anticipated criminal activity from materializing. The detention order was ultimately cancelled because the Minister of Defence used the detention power to hold defendant until his appeal, a different objective than intended.

B. MEASURES DISPROPORTIONATE TO OFFENSE COMMITTED

It is unclear what degree of terrorist threat warrants a particular security measure. Examination of three Israel Supreme Court decisions indicates that military authorities have issued sanctions that national security concerns do not justify. In one case, individuals were deported

163. Id. at 346. Justice Cahan concurred in the decision upholding the deportation order but he believed that extraordinary circumstances existed which justified an emergency exception and the immediate execution of the deportation orders. Id. at 347.

In dissent, Justice Cohn argued that the law must prevail even where terrorists are concerned and supported annulment of the deportation orders. Id. at 350. He asserted that, "in a law abiding state, no security, political, ideological or other consideration may justify violation of the law by the authorities." Id.; see also Yeridor Chairman Central Elections Committee, 19(3) Piskei Din 365 (1965), cited in Rudolph, supra note 137, at 175 (arguing against the denial of an alleged criminal's rights, no matter how dangerous he may appear).


165. Id.

166. Id.


168. Qawasma v. Minister of Defence, A.A.D. 1/82, 36(1) Piskei Din 666 (1982), cited in Rudolph, supra note 137, at 168. The court held that the security threat was so serious that detention was the only means of avoiding harm. Id. The president of the district court confirmed the detention order based on evidence that the petitioner received special training in explosives while in Damascus, Syria and evidence that he prepared to use explosives against civilians. Id. The president concluded that "detainee's past—that is the offenses attributed to him, constitute a red light as regards the future." Id.

169. Id. at 169. Detaining the petitioner until the appeal was not the objective of the legislature when it empowered the Minister of Defence to issue detention orders. Id.
simply for their membership in terrorist organizations.\textsuperscript{170}

In \textit{Nazal v. Commander of the Judea and Samaria Region},\textsuperscript{171} three West Bank inhabitants were deported because they served in terrorist organizations.\textsuperscript{172} The petitioners had, however, committed no overt activities that would warrant such a punishment.\textsuperscript{173} Alternatively, in \textit{Bathish v. Minister of Defence},\textsuperscript{174} the petitioners actually took steps to incite civil disobedience among the Arab population.\textsuperscript{175} Their actions of incitement, however, did not include physical assaults and were held not to constitute a serious infringement on security.\textsuperscript{176} The Israeli Supreme Court, accordingly, overturned the detention order.\textsuperscript{177} In another case, \textit{Motzlah v. Minister of Defence}, the court upheld a demolition order, despite the fact that the incident leading to the demolition order occurred two years prior to the issuance of the order. The demolition order was not tailored to respond to any immediate threat nor could it serve any deterrent purpose.\textsuperscript{178}

\section*{C. Disparity in Treatment of Arab and Jewish Terrorists}

The disproportionate emphasis the court places on security concerns is also demonstrated in its disparate treatment of Arab terrorists and Jewish terrorists. Jewish settlers are not subject to the judicial system of the military administration. For example, in \textit{Al-Natshe v. Minister of Defence},\textsuperscript{179} the mayor of Hebron requested the removal of Jewish

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 329.
\item \textit{Id.} The court denied the appeal based on a standard of “clear, convincing and unequivocal information” that the requirements for deportation were satisfied. These requirements include: necessity of securing public peace, the protection of the region, the maintenance of public order or the suppression of mutiny, rebellion or riot. \textit{Id.}
\item \textit{Id.} at 173; see also Dweikat v. Government of Israel, H.C. 390/79, 27(1) Piskei Din 113 (1979), \textit{translated in} 9 ISR. Y.B. HuM. RTS. 345, 350 (1979) (holding that the alleged security concerns were insufficient to justify the particular order). The petitioner, Dweikat challenged the legitimacy of the government-established Jewish settlement on his privately-owned land. \textit{Id.} at 345. The government contended that the land was requisitioned for legitimate security purposes. \textit{Id.} The court, however, concluded that military considerations were secondary to political reasons and did not justify the taking of the property. \textit{Id.} at 349.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
inhabitants who were harassing neighboring Arabs in effect to force them out of the area. The authorities, however, refused the request for a removal order despite evidence of unsatisfactory treatment of the Arab inhabitants of Hebron.

In 1982, fifteen members of a Jewish terrorist organization attempted to kill prominent Arab officials. The Jewish terrorists were charged with planting bombs on Arab buses and conspiring to firebomb Moslem places of worship. Three were convicted of murder and received life sentences. Twelve were found guilty of lesser felonies and sentenced to seven-year terms, and one was released. The cases demonstrate that Jewish terrorists have received lighter penalties than Arab terrorists. This disparate treatment could result from subjecting Jews to Israeli law and Arabs to military law.

D. IN SEARCH OF AN OBJECTIVE STANDARD

The court has, on occasion, articulated and applied an objective standard in which the means employed were narrowly tailored to the end that the military sought to prevent. In Zakut v. IDF Commander in the Gaza Strip, the court upheld an order restricting movement as a necessary preventive measure to enable security authorities to supervise the appellant's movements and actions. The military administration ordered the defendant to reside solely in a refugee camp for six months, not to change his residence without permission, and to present himself daily at the Gaza Police Station. These actions were taken in re-

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180. Id. at 359.
181. Id. at 360. The Minister of Defence and the Military Commander subsequently assured the court that they would treat future complaints with due gravity. Id.
183. Id.
184. Id.
185. Id. Foreign Minister Yitzhak Shamir has led a campaign for clemency for the remaining terrorists in prison. Id.
186. See D. Hirst, supra note 2, at 393 (discussing the resignation of Deputy Attorney General Yehudit Karp, who resigned as chairman of a committee investigating Jewish vigilantism in the occupied territories). In her inquiry, Karp concluded that authorities condoned the acts of vandalism, sabotage, and assault attributed to Jews in the territories. Id.
188. Id. at 280; See Abu El-Tin v. Minister of Defence, H.C. 550/72, 27(1) Piskei Din 481, 485 (1973), translated in 5 Isr. Y.B. Hum. Rts. 72, 376, 378 (1975) (holding that a military government is empowered to restrict entry into occupied territories and supervise the movement of persons in the region).
sponse to evidence that he was a member of a terrorist organization that had engaged in hostile activity on his university campus. The appellant’s activities did not include overt dangerous activity and did not justify more restrictive measures than limiting his movement.

In another case, the military administration prohibited an appellant’s travel outside the territory when there was evidence that he would contact subversive elements abroad. Badir was refused an exit permit to travel to Mecca because he had participated in outlawed terrorist organizations. The authorities feared that while in Mecca the petitioner would contact elements of the hostile El-Fatah Organization. The standard the court used in upholding the order was that a reasonable apprehension of prejudice to security justifies the refusal to grant an exit permit for travel to a hostile country.

Similarly, regarding the sealing off of houses, the Israeli Supreme Court has upheld orders where particular terrorist activity justifies the measure implemented. In Sakhwil v. Commander of the Judea and Samaria Region, the petitioner’s son provided refuge to a member of El-Fatah, and hid explosives in his room. The room was sealed off to deter others in the community from establishing bases for terrorist activity within their homes.

One example of proportionate treatment of Jewish terrorists is seen in the Supreme Court decision, Kahane v. Minister of Defence. The court upheld a detention order of Rabbi Kahane, an ultra-nationalist leader of a Jewish vigilante group, to prevent him from implementing intended attacks against Arabs. The court articulated an objective

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190. Id. at 280.
191. Id.
193. Id.
194. Id.
195. Id. The El-Fatah Organization is the largest and dominant faction of the Palestinian Liberation Organization. R. HALABI supra note 34, at 95. Yassir Arafat is the leader of the El-Fatah organization. Id.
198. Id. at 346.
199. Id.
201. Id. On appeal, Kahane asserted that detention is only applicable to those who
balancing test, weighing the severity of the restrictions imposed on the
detainee against the severity of the threat posed to public security.\textsuperscript{202} Concluding that the security threat was so serious that there was no
other reasonable method of averting the danger, the court upheld the
detention order.\textsuperscript{203}

As demonstrated in Israeli precedent,\textsuperscript{204} the Israeli Supreme Court
supports an objective standard that balances offenders' rights and na-
tional security concerns. Additionally, the administration has amended
the detention laws to support this standard.\textsuperscript{205} The lack of a defined
standard and consistent application of it invites severe criticism of the
manner in which the military administration deals with terrorists.\textsuperscript{200} A
specific objective standard would effectively balance Israeli security
concerns and procedural guarantees afforded security offenders.

VI. A FRAMEWORK FOR THE ISRAELI SUPREME COURT:
BALANCING SECURITY INTERESTS AND THE RIGHTS OF
OFFENDERS

The goal underlying Israeli measures used against terrorists is to
place terrorists in a position where they no longer threaten state secu-
ritiy or public welfare.\textsuperscript{207} The measures employed, whether preventive or
punitive, are intended to deter others contemplating similar violence.\textsuperscript{208}
The proportionality standard employed in \textit{Kahane} weighs the severity
of the restrictions imposed against the severity of the security threat.
This standard, when clarified and refined, provides a viable framework
for the court to apply when reviewing all measures employed to counter

\begin{itemize}
  \item want to destroy the State of Israel, thus suggesting that detention orders are only appli-
  cable to Arabs. \textit{Id.} at 153, 162. The court concluded that the laws contain no such
  restriction and are used to detain anyone who contemplates acts likely to impair na-
  tional security regardless of whether that person believes he is acting in the interests of
  the State. \textit{Id.}
  \item \textsuperscript{202} \textit{Id.} at 160.
  \item \textsuperscript{203} \textit{Id.} Although the Supreme Court rejected Kahane's appeal, Menachem Begin,
  while Minister of Defence, cancelled the detention order against Kahane. \textit{Id.} at 162.
  \item \textsuperscript{204} See supra notes 170-77 and accompanying text (discussing cases where the
court upheld orders disproportionate to the threat the actions of the petitioner poses to
public order and safety).
  \item \textsuperscript{205} See supra notes 126-29 and accompanying text (discussing the protections
that the 1979 amendments to the 1945 Defence Regulations afford detainees).
  \item \textsuperscript{206} See Cohen, \textit{International Criticism of Israeli Security Measures in the
international courts, individuals, and government reports on Israeli practices in the
territories).
  \item \textsuperscript{207} See Ginossar, \textit{Outlawing Terrorism}, 13 Isr. L. Rev. 150, 157 (1978) (con-
tending that active terrorists should be placed in a position where they can never again
participate in terrorist activities).
  \item \textsuperscript{208} \textit{Id.} at 153.
\end{itemize}
terrorist activity. To clarify the balancing test employed in Kahane, it is necessary to examine each measure individually.

A. RESTRICTION OF MOVEMENT

Restricting the movement of an alleged terrorist is a preventive measure. This measure is responsive to less severe threats, such as, for example, membership in a terrorist organization. This method is adequate to counter the threat the individual poses to state security or public welfare. The military administration has placed restrictions on the movement of Palestinians between the territories to presumably prevent Palestinians from coordinating efforts against the military. Because membership in a terrorist organization poses a relatively moderate threat, a procedural flaw would justify the Supreme Court overturning an order restricting movement.

B. CONSPIRACY

When an individual is found guilty of conspiring to commit overt acts likely to injure many individuals, a more stringent measure is warranted. Detention ensures that individuals do not complete the intended act and deters them and others from committing other potentially dangerous activities. A procedural flaw might justify reversal of a detention order because of the emphasis of the military administration on the procedural protection of detainees.

C. ACTS OF TERRORISM

If the terrorist act actually occurs, the military could justifiably issue a deportation order. There is a strong likelihood that the individual committing the act, if given the opportunity, would commit other heinous crimes. The Israelis maintain that deportation is the best

210. See id. (holding that an order restricting movement was a necessary preventive measure because the petitioner is a member of a terrorist organization that engaged in hostile activities on his university campus).
212. See Qawasma v. Minister of Defence, A.A.D. 1/82, 36(1) Piskei Din 666 (1982), cited in Rudolph, supra note 137, at 167 (holding that detention is preferred to avert the potential danger).
213. See Friedman, Israeli Army Decides to Deport 9 Arabs in Wake of Rioting, N.Y. Times, Jan. 4, 1988, at A10, col. 1 (discussing the deportation of nine Arabs from the occupied territories who were described as leading activists and organizers). All nine had previously been arrested for subversive activities. Id.
deterrent of subsequent violence in the West Bank and Gaza Strip. Deportation is a permanent and, therefore, severe measure and is justified only to counter an equally serious threat.\textsuperscript{214} As such, the Military Commander must strictly follow procedure. However, because deportation is warranted of the more dangerous offenders, it is doubtful that a procedural flaw would justify overturning an order. The military could, as in Kawasma, return the deportees for an appeal and then, if sufficient evidence exists, reimpose the order.\textsuperscript{215}

\section*{D. Demolition}

Demolition is justified only as a response to acts of violence perpetrated from a terrorist base.\textsuperscript{216} The demolition of the homes of the families of those who engage in terrorist activity does not seem to bear a sufficient relation to acts of terrorists and the military should avoid such measures.\textsuperscript{217} Because demolition or sealing orders are issued immediately, the military must ensure that individuals, both the accused and those whom the order effects, have opportunities to challenge the order before its implementation.\textsuperscript{218}

As the act under investigation moves across the spectrum from preparation to perpetration, state security interests in averting the danger clearly become greater. Each measure is appropriate only when there is no other less restrictive means available to reach the end of deterring a certain degree of terror.\textsuperscript{219} As the measures increase in severity, the

\begin{thebibliography}{99}
\bibitem{217} See \textit{National Lawyers Guild Report}, supra note 45, at 66 (arguing that the destruction of property belonging to persons other than those suspected of a crime is a violation of article 33 of the Fourth Geneva Convention. Article 33 of the Convention proscribes collective punishments. Fourth Geneva Convention, supra note 4, art. 33.
\bibitem{218} See \textit{National Lawyers Guild Report}, supra note 45, at 67 (asserting that demolitions are undertaken within a few days of arrest of a suspect, before any judicial determination of guilt).
need for procedural protection also increases. The extent of the threat to security, however, counterbalances a potential overemphasis on procedural safeguards. Under this approach, a judicial determination of what constitutes military necessity or danger to security is critical.\footnote{See Goodman, supra note 67, at 1578 n.21 (stating that military necessity is a very broad notion that changes over time).}

CONCLUSION

The Israeli military administration advocates the supremacy of security concerns in the Supreme Court decisions reviewing measures issued against terrorists. The court must follow an objective standard to determine whether procedural flaws justify cancelling a preventive measure, or whether security concerns remain predominate and excuse procedurally flawed security orders. The Israeli military administration must promote as many procedural rights as possible to the extent that security concerns allow. A proportionality standard would not diminish the capacity of the court to rule based on individual circumstances, but would reduce the opportunity for arbitrariness.

The present conditions in the West Bank have saddled Israel with a unique and unparalleled situation of instability and legal uncertainty. In this context, when presented with legitimate security threats and real and imminent danger, Israeli authorities are then justified in attempting to thwart terrorist plans prior to perpetration. A judicial standard of proportionality will ensure basic procedural protections for the accused and encourage authorities in the territories to take only those actions necessary to deter and punish those who engage in acts of aggression.