

The Demolition of Homes in the Israeli Occupied Territories

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I.	INTRODUCTION	2
II.	THE DEMOLITION PRACTICE	7
A.	<i>Definition</i>	7
B.	<i>Historic Roots</i>	8
C.	<i>The Demolition Policy</i>	9
D.	<i>Legal Justifications</i>	15
III.	THE LEGAL SYSTEM IN THE OCCUPIED TERRITORIES	18
A.	<i>International Law</i>	18
B.	<i>Principles of Israeli Law</i>	21
C.	<i>The Israeli Supreme Court</i>	22
IV.	THE ISRAELI SUPREME COURT ON HOME DEMOLITIONS	27
A.	<i>Demolitions in the Absence of Judicial Review</i>	27
B.	<i>Establishment and Expansion of the Demolition Doctrine</i>	28
C.	<i>Mixed Jurisprudence and the Chilling Effect</i>	32
D.	<i>Demolition Jurisprudence Analyzed</i>	37
1.	<i>Expansive Interpretation of Article 119</i>	37
2.	<i>Cursory Discussions</i>	39
3.	<i>Palliating the Harshness of the Measure</i>	41
E.	<i>Questions of Legitimacy</i>	44
V.	INTERNATIONAL LAW	46
A.	<i>The Local Law Doctrine</i>	46
B.	<i>Collective and Non-Individual Punishment</i>	53
1.	<i>Article 50 of the Hague Regulations and Article 33 of the Geneva Convention</i>	53
2.	<i>Juggling with Justifications</i>	57
3.	<i>Home Demolitions as Non-Individual Punishments</i>	60
C.	<i>Three Shadow Doctrines</i>	65
1.	<i>Destruction of Private Property</i>	66
2.	<i>Confiscation of Private Property</i>	70
3.	<i>Absence of Due Process</i>	72
VI.	CONCLUSION	75

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I. INTRODUCTION

On December 6, 1983, a bomb exploded in an Israeli bus traveling through Jerusalem, killing six passengers and injuring some fifty others. Three years later, an Israeli military court found two Palestinian residents of the West Bank¹ guilty and sentenced them to life imprisonment. Their homes were then demolished pursuant to an order issued by the Military Commander.² The confessions upon which the convictions were based implicated a third person, Nader Jaber, who had fled to Jordan. At the time of the bomb explosion, he had been living with his wife in a room on the roof of his parents' house in the West Bank town of Ramallah. Fearing that his home would be demolished, Nader's father, Ramzi Jaber, petitioned the Israeli Supreme Court for an injunction against a potential demolition order.³ His fears were confirmed when the Military Commander requested approval for the exercise of his authority under Article 119 of the 1945 Defense (Emergency) Regulations (1945 DERs).⁴ Article 119 authorizes the confiscation and destruction of houses in which either an action violating a security-related law was committed or a person who committed such an action resides.⁵ The Military Commander sought to destroy the room on the roof of the Jaber family's house and to seal up the second floor.⁶

Jaber pursued three arguments. First, he argued that the order should not be issued before a criminal court established his son's guilt. The Court,

1. This Article generally refers to the Israeli-occupied regions by the names that are most commonly used in the international debate: "West Bank," "Gaza Strip," or "the Occupied Territories." The biblical terms "Judea" and "Samaria" — as the West Bank is officially called in Israel — are used as they appear in quoted texts or in formal titles. This Article also uses the terms "occupied territories," "military government," "occupying power," and "occupant" as they are normally used in international law.

2. The Military Commander of the Israeli Defense Forces in the Judea and Samaria Region issued the Order. According to international custom, occupied territories are governed by army officers appointed by the occupying army. These military commanders normally establish military governments and execute their policies through them. The Military Commanders of the two regions are hereinafter referred to as Military Commanders. Israel has also established a Civil Administration, which is responsible for the civil and economic facets of its rule.

3. Before August 1989, homes were demolished without giving their residents prior notice. See *infra* text accompanying notes 157 to 160.

4. 1442 Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) [hereinafter 1442 Palestine Gazette], as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947) [hereinafter 1600 Palestine Gazette].

5. For a discussion of Article 119, see *infra* part II.D.

6. The Military Commander explained that he had originally intended to demolish the entire three story structure, but because "Nader had not been living there since 1984 . . . and . . . due to technical reasons it would have been impossible to destroy the second floor without ruining the other floors . . . and since two other families lived in the building . . . [he decided] *ex gratia* . . . to settle for the demolition of the room on the roof and the sealing of the second floor." Brief for the Military Commander at 4, Jaber v. Commander of Central Command, 41(2) P.D. 522 (1987) (HCJ 897/86) (This and all other quotations in this Article have been translated by the author.). According to the Military Commander's brief, the ground floor was used for storage, Nader's parents and siblings lived on the first floor, one of his brothers lived on the second floor with his wife and son, and Nader and his wife resided in the room on the roof. *Id.*

referring to the language of Article 119, responded that "the Military Commander does not need a judicial conviction, neither does he constitute a court himself. He need only determine whether a reasonable person would have found the information before him to be sufficient evidence. No doubt, this standard was met in the case before us."⁷ Second, Jaber claimed that his son should not be considered an "inhabitant" of the family's house, since he had been living outside the country for almost two years when the demolition order was issued. The Court dismissed this claim by ruling that Article 119 does not require continuous residency.⁸

Finally, Jaber argued that the demolition practice is fundamentally inconsistent with the international law of belligerent occupation. In so doing, he set out to overturn a dozen of the Court's previous decisions. Jaber argued that demolitions violate the Regulations Annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Regulations),⁹ and two articles of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention).¹⁰ An opinion of the International Committee of the Red Cross (ICRC) supported Jaber's petition, asserting that Article 53 of the Geneva Convention prohibited the demolition of private property, as performed by the Military Government.¹¹

Most of the Court's three-page decision focused not on these legal challenges, but rather on the importance of demolitions as a means of deterring future offenses. The Court addressed the international law claims only cursorily: "With all due respect to the [ICRC] legal opinion, the question before us does not concern the interpretation of Article 53 of the Fourth Geneva Convention." It stated that international law instructs occupying powers to preserve local law that precedes an occupation and concluded simply, "Article 119 constitutes part of the law that was in force in the Judea and Samaria Region . . . and we have not been presented with any legal reasons why it should now be deemed invalid."¹² The Court thus rejected the international law claims without explaining why local law should take precedence over substantive international law, without discussing Article 53

7. The Court stated that it relied on the "very detailed account of his convicted accomplices depicting Nader's involvement" in the act. *Jaber v. Commander of Central Command*, 41(2) P.D. 522, 524 (1987) (English excerpt in 18 ISR. Y.B. HUM. RTS. 252 (1988)).

8. *Id.* at 525.

9. Regulations Annexed to the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295, T.I.A.S. No. 539 [hereinafter Hague Regulations]. Jaber cited Articles 46, 23(g), and 50. Brief for Appellant at 2, 41(2) P.D. 522 (1987) (HCJ 397/58).

10. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention]. Jaber cited Article 53 (destruction of property) and Article 33 (collective and non-individual punishment).

11. Interpretation by the ICRC of Article 53 of the Fourth Geneva Convention of 12 August 1949 (Nov. 25, 1981) (appended to Brief for Appellant, 41(2) P.D. 522 (1987) (HCJ 397/58)) [hereinafter ICRC Interpretation]. For an excerpt from the letter, see *infra* note 366.

12. Jaber, 41(2) P.D. at 525-26; see also *infra* note 240.

of the Geneva Convention, and without mentioning the five other provisions cited by the petitioner. Even so, the *Jaber* decision is one of the few demolition cases in which the Court made any reference to international law.

The Court has decided ninety-four home demolition cases since it began to adjudicate the practice in 1979.¹³ The Court has addressed this issue more than any other legal question concerning the Occupied Territories. The Court's record displays almost uniform support of the practice. It has upheld demolition orders in ninety-one cases, effectively authorizing the destruction of eighty-seven homes and the sealing of another fifty-eight.¹⁴ The Court has overruled only three demolition orders.¹⁵ In all of these cases, only two dissenting opinions have been written.¹⁶

This Article examines the legality of the Israeli Military Government's home demolition practice in the West Bank and Gaza Strip and evaluates the jurisprudence that endorses it.¹⁷ I intend to show that the practice is prohibited by the international law of belligerent occupation and by Israeli law. This endeavor is crucial. The demolition of a home is a harsh measure that inflicts hardship upon people who are not suspected of any wrongdoing. Rather, they are punished merely because they live in, or own, a home in which someone who committed a security offense resided. The ramifications of the practice, however, transcend the realm of legal rights and financial loss: the practice has frustrated and humiliated Palestinians and exacerbated their antagonism toward Israel. It has also demeaned the image of Palestinians in the Israeli psyche and threatened the Israeli commitment to their well-being. It has thus eroded mutual respect and diminished the prospects for reconciliation. The practice has also affected the Israeli legal system adversely. The Supreme Court's approval of demolitions in the face of legal and moral challenges has corrupted Israeli law and has undermined the legitimacy of the Court itself.

I do not question that the Military Government has had great difficulties in maintaining peace and order in the Occupied Territories. Nor do I deny that

13. This Article systematically surveys the cases delivered until June 1991. To the best of my knowledge, 115 petitions concerning home demolitions had reached the Supreme Court until that date, 24 of which were settled without judgment. *See infra* text accompanying note 161. The Article also discusses three additional cases delivered since then that are of particular significance. These figures do not include petitions that were withdrawn by the petitioners after the Military Government announced that it had no intention to demolish the homes in question or that it had rescinded the demolition orders prior to the court session.

14. Some cases involve more than one house. A total of 145 houses were ordered destroyed or sealed in the cases reviewed by the Court.

15. *Turkeman v. Minister of Defense*, HCJ 5510/92 (1993) (unpublished); *Nimer v. Military Commander of West Bank Region*, HCJ 299/90 (1991) (unpublished); *Nassman v. Military Commander of Gaza Region*, 44(2) P.D. 601 (1990). The Court also restricted an order in another case, *Jabarin v. Minister of Defense*, HCJ 443/86, 515/86 (1987) (unpublished).

16. *Al-Amrin v. Military Commander of Gaza Region*, 46(3) P.D. 693 (1992) (Heshin, J., dissenting); *Khizran v. Military Commander of Judea and Samaria Region*, 46(2) P.D. 150 (1992) (Heshin, J., dissenting).

17. This Article uses the term "demolition" to refer to the practice in general; it uses the terms "sealing" and "destruction" whenever the distinction is relevant.

other available law enforcement measures have been insufficient to contain Palestinian violence. This analysis, however, focuses on the legality of the demolition practice and the character of the case law that has justified it.

This Article is going to press just four months after the signing of the Declaration of Principles between Israel and the Palestine Liberation Organization (PLO).¹⁸ This watershed event has propelled the Israeli-Palestinian conflict into a new era marked by a radical transformation of policies, including the virtual suspension of the home demolition practice. One may doubt today whether the analysis of demolitions is still relevant: whether it is not stranded in the barren land between present-day actualities and history. I believe that it is very relevant.

First, even if the Declaration of Principles is fully implemented, we may have not yet seen the end of the practice. Israeli rule over the West Bank and Gaza Strip has not ended. Indeed, according to the Declaration, Israel will remain responsible for most of the region's overall security even after the Israeli Defense Forces' (IDF) withdrawal from the Gaza Strip and Jericho, and their redeployment in the West Bank.¹⁹ Furthermore, the 1945 DERs will most likely remain in force.²⁰ It is, therefore, possible that, faced with demanding circumstances, the IDF might continue resorting to the demolition practice, as it did on November 17, 1993 in response to the murder of an Israeli soldier.²¹ It is also already apparent that the forthcoming Palestinian entity will be faced with fierce opposition. Armed with the 1945 DERs, this entity might be tempted to rely on harsh security measures in response to those who challenge its rule. Even though it will be based on a form of self rule — the antithesis of belligerent occupation — the Palestinian entity might well benefit from the experience of its predecessor. If it resorts to the home demolition practice, it will be subject to the same kinds of legal and moral criticisms as the Israeli Military Government. The Palestinian entity will be bound in such matters by international human rights law²² and by general principles of law.²³

18. Declaration of Principles on Interim Self-Government Arrangement, Aug. 31, 1993, *reprinted in* N.Y. TIMES, Sept. 1, 1993, at A8.

19. *Id.* art. VII.

20. *Id.* art. IX.

21. The house of the murder suspect's family was sealed, and the eight family members were left with one unsealed room in which to live. David Regev & Arieh Kizel, *The Chief of Staff: Individual Soldiers Determine Their Reaction and the Consequences in a Split Second*, YEDIOT AHRONOT, Nov. 19, 1993 at 2 (Hebrew).

22. See, e.g., International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 14, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Civil and Political Covenant] (right to "fair and public hearing by a competent, independent and impartial tribunal established by law"); *id.* art. 17 (protection from "interference with . . . privacy, family, home"); *id.* art. 23 ("The family . . . is entitled to protection by society and the State."); *Universal Declaration of Human Rights*, art. 17, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*] ("No one shall be arbitrarily deprived of his property."); *id.* arts. 10, 11 & 12.

23. Some of the due process guarantees that are relevant to the demolition practice have apparently attained the status of universally recognized principles of law and are thus binding on all states in accordance with Article 38(1)(c) of the Statute of the International Court of Justice. See THEODOR MERON.

Second, understanding the dynamics underlying the demolition policy and comprehending its ramifications serve as an important legal and historical lesson. They illuminate the political and legal realities of belligerent occupations, the use of force and its limits, the law of occupation, and the role of courts in enforcing this law. They also provide a close evaluation of the actions of Israeli Military Commanders, the decisions of the Israeli Supreme Court, and the legacy of its judges. Judges forge the way in which future law will be decided: they determine jurisprudential methodologies, prescribe power allocations, and endorse modes of resolution and styles of reasoning; they also impress upon us values, standards of morality, and notions of integrity. Their enduring legacy must be presented, comprehended, and evaluated. It is, therefore, contemporary legal understanding, and not merely the integrity of history, that requires that the work of the critic persist.

Part II of this Article provides the historic and legal background of the home demolition practice, and describes the way in which it is administered. Part III delineates the legal system in the Occupied Territories, which is characterized by the partial application of belligerent occupation law, the incorporation of principles from Israeli constitutional and administrative law, and the exercise of judicial review by the Israeli Supreme Court. Part IV examines the Israeli Supreme Court's rulings on the practice. It explores the development of the Court's demolition doctrine, the jurisprudence employed to formulate it, and its influence on government policy. I show that the decisions — cursorily debated and disconnected from their consequences — have been overly protective of the Military Government's position and have avoided a meaningful examination of the practice, despite the substantial legal and moral questions it raises. I also criticize the ways in which the Court has justified its decisions and examine how the Court's decisions have reflected upon the Court itself. I conclude that the demolition jurisprudence has damaged the Court's stature. Part V evaluates the compatibility of the practice with international law. It first examines a crucial aspect of the Court's doctrine, the supremacy of local law over substantive international law, and argues that the Court's conclusion defies international law. It then explores the effects of the practice on offenders' relatives and landlords and argues that demolitions violate the prohibition against non-individual punishment. Finally, it briefly discusses three doctrines of substantive international law that have been circumvented by the Court's preference for local law: the prohibitions against confiscation of property, destruction of property, and punishment

HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 49-50 (1989).

On the convergence of human rights norms and humanitarian norms, see Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 *ISR. L. REV.* 24, 27-30 (1992); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 *AM. J. INT'L L.* 44, 72 (1990). See generally THEODOR MERON, *HUMAN RIGHTS IN INTERNATIONAL STRIFE: THEIR INTERNATIONAL PROTECTION* (1987). *But see* Yoram Dinstein, *Human Rights in Armed Conflicts: International Humanitarian Law*, in *HUMAN RIGHTS IN INTERNATIONAL LAW* 345, 350-52 (Theodor Meron ed., 1985).

without due process. The Article ends with two general observations that arise from a discussion of the demolition issue. First, the practice demonstrates that the balance an occupying power strives to maintain between its own interests and those of a local population is unstable and ultimately unsustainable. Second, I question whether it is desirable to rely on municipal courts to adjudicate claims of human rights violations when the political branches invoke claims of national emergency. The demolition discussion, I conclude, does not provide a solid answer to this perennial dilemma.

II. THE DEMOLITION PRACTICE

A. Definition

This Article examines the Israeli Military Government's practice of destroying or sealing Palestinian houses in the Occupied Territories in which security offenses were allegedly committed or in which suspected offenders resided.²⁴ The Military Government carries out destructions either by blowing up the home with explosives or by razing it with bulldozers.²⁵ When the offending act is less serious or when destructions appear infeasible for technical reasons, the Military Government typically seals homes, blocking their doors and windows with cemented bricks or metal plates. Sealings are considered a less severe sanction, because they are reversible and cause little permanent damage to the premises.

In both destruction and sealing cases, families are forbidden from rebuilding their homes or using their land in any way. The properties are legally forfeited to the government, although, as a matter of policy, the Military Government does not make use of them. The families must find alternative residences themselves. Those who are unsuccessful move into meager tents provided by the ICRC or U.N. relief agencies. Traditionally, families have received financial compensation for the replacement of their homes from various Palestinian organizations, including the PLO.

The practice of home demolition has been employed since the beginning of the Israeli occupation in 1967. It reached its peak after the beginning of the *Intifada* in December 1987,²⁶ but has declined since mid-1989.²⁷ Between

24. The home demolition practice pursuant to Article 119 should be distinguished from the less frequent destruction of properties during pursuit of wanted persons. See B'TSELEM, HOUSE DEMOLITION DURING OPERATIONS AGAINST WANTED PERSONS (1993).

25. Bulldozers are used when the explosion is likely to cause damage to neighboring buildings. Nevertheless, between December 1987 and July 1989, for example, explosions damaged 34 neighboring homes. The Military Government normally compensates owners for unintended damages. See B'TSELEM, DEMOLITIONS AND SEALINGS OF HOUSES 25 (1989) (English version) [hereinafter B'TSELEM, 1989 DEMOLITION REPORT].

26. In the first year of the *Intifada*, 125 houses were demolished and 41 were sealed; in the second year, 158 houses were demolished and 80 were sealed; in the third year, 88 houses were demolished and 96 were sealed; and in the fourth year, 47 houses were demolished and 48 were sealed. In the fifth year (beginning December 1991) 8 houses were demolished and 22 were sealed. B'TSELEM. VIOLATIONS OF

December 1987 and June 1992, 426 homes were destroyed and 287 were sealed. Since the Labor Party ascended to power in June 1992, only two homes have been destroyed and thirty-three sealed.²⁸

B. *Historic Roots*

The roots of Israel's home demolition policy date back to British orders promulgated during the South African Boer War. In June 1900, Lord Roberts, the general in command of British forces in South Africa, issued two proclamations in response to repetitive Afrikaner commando attacks on railroad and telegraph lines. His orders permitted the destruction of homes closest to the sites of such attacks.²⁹ Initially, the British exercised demolitions sparingly,³⁰ but as the war continued the practice was expanded.³¹ The British Army introduced the policy in Palestine during the Great Arab Rebellion of 1936-39.³² Drawing legal authority from Article V(5) of the Palestine (Defense) Order in Council 1931, the British used home demolitions to respond to Arab acts of sabotage.³³ The British, however, never demol-

HUMAN RIGHTS IN THE OCCUPIED TERRITORIES 1992/1993 (forthcoming 1994) [hereinafter B'TSELEM, VIOLATIONS]. B'Tselem's figures are very close to those furnished by the IDF spokesman.

Precise statistics on demolitions prior to 1987 are unavailable. B'Tselem quotes various sources indicating that, between 1979 and 1986, the number of homes demolished or sealed per year ranged from 2 to 49. B'TSELEM, 1989 DEMOLITION REPORT, *supra* note 25, at 11.

27. See *infra* note 187 and accompanying text.

28. B'TSELEM, VIOLATIONS, *supra* note 26.

29. Proclamations of June 16, 1900 and June 19, 1900, cited in S.B. SPIES, METHODS OF BARBARISM? ROBERTS AND KITCHENER AND CIVILIANS IN THE BOER REPUBLICS, JANUARY 1900 — MAY 1902, at 102-03 (1977).

30. In March 1900, Lord Roberts issued a proclamation forbidding the destruction of private property unless it was justified by the usages and customs of civilized warfare. G.B. BEAK, THE AFTERMATH OF WAR 5 (1906). Beak, in defense of the British practice, mentions that on May 20, 1900, Roberts admitted to having ordered the destruction of just two farmsteads, each flying a white flag, from which his troops were fired upon. *Id.* at 4.

31. By September 1900, Roberts allowed his troops to carry out demolitions without inquiring whether the inhabitants of the home in question were implicated in the attacks. SPIES, *supra* note 29, at 109. By October he ordered the destruction of all farms within a radius of ten miles from the site, *id.* at 110, and of whole villages, *id.* at 119. Subsequently, Roberts broadened the practice and began to destroy homes for the mere reason that their owners were absent, even when no raids were committed in the vicinity. *Id.* at 120. Following criticism of such demolitions, Roberts issued the following conciliatory proclamation on November 18, 1900: "[T]he mere fact of a burgher being absent on commando is on no account to be used as reason for burning the house." BYRON FARWELL, THE GREAT BOER WAR 352-53 (1976); see also J.M. SPAIGHT, WAR RIGHTS ON LAND 353 (1911); SPIES, *supra* note 29, at 116-18.

32. See 1 ROBERT JOHN & SAMI HADAWI, THE PALESTINE DIARY 261 (1970); ANN M. LESCH, ARAB POLITICS IN PALESTINE, 1917-1939, at 225 (1979); Y. PORATH, THE PALESTINIAN ARAB NATIONAL MOVEMENT 240 (1977).

33. Article V(5) of the Palestine (Defense) Order in Council 1931, the antecedent of the 1945 DERs' Article 119, stated, "The High Commissioner . . . may, if he thinks it necessary for the purposes of the defense of Palestine, cause any buildings to be pulled down . . . or to be destroyed." 3 THE LAWS OF PALESTINE 2622 (Robert H. Drayton ed., 1934).

The legality of demolitions was contested on one occasion before the British Mandate's High Court of Justice sitting in Jerusalem. The case involved an order to demolish scores of Palestinian homes in the old city of Jaffa. The Court deferred to the government's security claim without hesitation and upheld the demolitions. *El-Qasir v. Attorney General*, H CJ 44/36 (1936), reprinted in 3 THE LAW REPORTS OF PALESTINE 121 (1936).

ished homes of Jews, not even in response to the fiercest attacks of Jewish underground organizations, such as the hangings of British sergeants or the blowing up of British headquarters at the King David hotel in Jerusalem.³⁴

Early Israeli demolition practice emulated the British example. Moshe Dayan, the Defense Minister during the formative years of the Israeli occupation and the architect of the demolition practice, simply applied what he had learned personally during his service in the British army some thirty years earlier.³⁵ Dayan first applied the practice as early as 1939, in his capacity as a commander in the Jewish underground, the *Hagana*. In this role, he commanded an operation in retaliation for the death of a Jewish fighter who had been shot during an Arab ambush. The assailants' trail led to the village of *Lid Al Awadin*. Dayan's unit entered the village dressed in British uniforms, smoking English cigarettes, and speaking English. Adhering to the policy of those whom they were imitating, Dayan's men blew up the home of the village's elder (the *Mukhtar*).³⁶ This event represents the importation of British colonial practice dating back to the Boer War to the current Israeli occupation.

C. *The Demolition Policy*

As long as the Military Government is responsible for governing the Occupied Territories, it must fulfill its moral and legal duty to minimize violence and bloodshed. Its interest in deterring violent offenses, therefore, is compelling. But its task of preventing offenses, detecting perpetrators, and proving their criminal responsibility in court is hampered by popular Palestinian sentiment. Since most Palestinians view security offenses as legitimate — even heroic — acts of resistance, they adamantly refuse to cooperate with the security authorities in their enforcement endeavors. The Israeli government explains that the ordinary criminal system does not adequately deter security offenses, particularly since it does not provide for capital punishment.³⁷ It asserts that the demolition policy is of "utmost

34. See AMOS PERLMUTTER, *THE LIFE AND TIMES OF MENACHEM BEGIN* 176 (1987).

35. During the 1936 Arab Rebellion, Dayan served as a reconnaissance scout (*ghaffir*) for the Scottish regiment along the Iraq Petroleum Company Oil Pipeline. In later years, Dayan described how the British had reacted to Arab acts of sabotage during the 1936-39 rebellion: a British officer would enter the nearest Arab village with a cane under his arm and choose three houses at his whim; without uttering a word he would then point the cane at the selected homes, thus ordering them to be destroyed. Amihai Dagan, *Here is the Stick, But Where is the Carrot?*, HA'ARETZ, Oct. 21, 1988, at 12 (weekend supplement).

36. SHABTAI TEVETH, *MOSHE DAYAN: A BIOGRAPHY* 102 (Leah & David Zinder trans., 1972).

37. Dov Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-80*, at 285, 303 (Meir Shamgar ed., 1982) [hereinafter *MILITARY GOVERNMENT*]. The Military Government has effectively abolished capital punishment, Military Order No. 268 (1968), which existed under previous Jordanian law and is in principle permitted by international law, Geneva Convention, *supra* note 10, art. 68. For an interesting account of both moral and operational reasons for abolishing the death penalty, see SHLOMO GAZIT, *THE STICK AND THE CARROT* 297-99 (1985) (Hebrew) [hereinafter *GAZIT, STICK AND CARROT*].

deterrent importance."³⁸ Proponents of the policy argue that, in this turbulent state of affairs, lengthy legal proceedings wear away the impact of punishment.³⁹ Former Brigadier General Shlomo Gazit argues that "punishment must be immediately visible" in order to achieve deterrence, and that destroying the offender's home one day after the event produces "a 'pillar of smoke' that everyone sees, hears and understands."⁴⁰

Notwithstanding the Military Government's genuine interest in enhancing deterrence, I suggest that exhibition of might is the primary force driving the home demolition practice. The formal legitimacy of belligerent occupations does not emanate from principles of social contract or from the willful acquiescence of subjects. Rather, it is derived, by definition, from sheer force. Since international law recognizes that a belligerent occupation exists only when a state's army holds physical control of a territory,⁴¹ a military government that fails to maintain its authority over the population loses its status as an occupying power.⁴² Control and domination are the foundations of a military government's rule; disobedience, particularly forceful resistance, undermines it.

The Israeli-Palestinian struggle, therefore, is played out in the realm of force. As expressed by Itzhak Rabin, then Minister of Defense, in a 1989 interview: "The first priority [is] to prevent violence in whatever form that it takes, and we'll do it with force. We will show who is running the Territories."⁴³ Indeed there is more than winning and losing involved. Images of triumph and defeat also drive the politics of the conflict. Successfully executed offenses signal a slip in the government's control and encourage the occupied

38. Meir Shamgar, *Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 276 (1971) [hereinafter Shamgar, *Observance*].

39. See *Symposium on Human Rights*, 1 ISR. Y.B. HUM. RTS. 361, 376 (1971) [hereinafter *Symposium*]; Shefi, *supra* note 37, at 303.

40. Shlomo Gazit, *The Administered Territories — Policy and Actions*, 204 MA'ARAHOT 25, 37 (1970) (Hebrew) [hereinafter Gazit, *Administered Territories*]. Former Brigadier General Shlomo Gazit served as the Coordinator of Governmental Activities in the Administered Territories and worked closely with Moshe Dayan in the first years of the occupation.

41. Article 42 of the Hague Regulations determines the status of occupation: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Hague Regulations, *supra* note 9, art. 42. Article 43 conditions the status of belligerent occupation on the event that "[t]he authority of the legitimate power has in fact passed into the hands of the occupant." *Id.* art. 43; see also EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 8 n.9 (1993); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 213-19 (1959); Lassa Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L.Q. REV. 363, 366 (1917).

42. There is, of course, the possibility of winning over the population by exercising a benign and accommodating administration. Initially, Israel's policy was allegedly directed at creating such a framework. In 1971 Gazit stated, "We aim, in occupying the Territories, to do away with at least some of the irrational elements of the conflict. . . . Israel wants to convince their residents that they have a very keen interest of their own in the continuation of coexistence — economic, cultural and social — between the two peoples." Shlomo Gazit, *Policy in the Occupied Territories*, 1 ISR. Y.B. HUM. RTS. 278, 281 (1971); see also MOSHE DAYAN, *THE STORY OF MY LIFE* 399-403 (1976); GAZIT, STICK AND CARROT, *supra* note 37, at 334-40 (discussing Gazit's retrospective disillusionment with demolition practice).

43. Videotape on *Confronting Political and Social Evil: Complicity, Resistance, Human Rights, and U.S. Foreign Policy* (1990) (on file with EPIC, Tufts University).

population to stage even more vigorous and conspicuous acts of defiance. The more strongly the government responds to such acts and castigates offenders, the firmer its rule appears to be.⁴⁴ Hence the importance of spectacles of power.⁴⁵

Few measures display governmental might as poignantly as blowing a person's home into the sky. Every aspect of a demolition is played out in theatrical fashion. A large military unit enters the neighborhood, usually in the late hours of the night, and officers announce the demolition and instruct families to evacuate their homes immediately. The anxious families are kept at bay as the entire neighborhood awaits the explosion. Then, the thunderous bang, the cloud of smoke, the trembling earth: the spectacle is overwhelming. The government has demonstrated its might by destroying the most intimate of a family's possessions. The army unit exits, leaving the family devastated, angered, humiliated, and homeless. The penalty for challenging the government is unmistakable. But the spectacle of power is not over. The remaining heap of gravel, now a piece of government property, is deliberately left in place as a monument to the Military Government's dominance. The debris, however, is no less symbolic in Palestinian eyes. From their perspective, it epitomizes the injustice of Israeli rule and reinforces their self-image as virtuous victims. The conspicuous ruins also serve as testimony to the personal sacrifice that Palestinians are willing to undertake in order to promote their national goal.

On a more abstract level, the demolition policy undermines the Palestinian national identity by destroying Palestinian links to the land. At its most basic, the one-hundred-year Jewish-Palestinian rivalry amounts to a contest over land. For both peoples, physical control and sovereignty over the land of historic Palestine is the single most significant ingredient in their national identity, the ultimate objective of their political vision. For the Jews, *Eretz-Israel* is the land from which they were exiled two thousand years ago. The settlement of the land and the building of a homeland in it mark the realization of the Zionist dream. Their Palestinian counterparts have been living in most of the same land for generations and now find themselves confined to only a portion of it, placed under the control of a hostile occupier. Ownership,

44. Michel Foucault tells of medieval practices of excessively painful punishment intended to manifest the invincibility of the Crown and the fragility of its subjects. MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH* (1977); see also S. GIORA SHOHAM & GAVRIEL SHAVIT, *CRIMES AND PUNISHMENT: AN INTRODUCTION TO PENOLOGY* 148 (1990) (Hebrew).

45. A British commentator on the 1936-39 Arab Rebellion observed, "In troubled times justice, to be an effective deterrent, which is its main function in such times, must be both swift and certain. . . . Unless apprehension and punishment follow hard on the commission of crime the apparent immunity of the criminal will encourage crime." JOHN MARLOWE, *REBELLION IN PALESTINE* 168 (1946). Similarly, Moshe Sneh, commander of the *Hagana*, described the goal of one of the organization's operations as demonstrating the following to the British: "1. They tried to confiscate our weapons; we shall confiscate theirs. 2. They tried to paralyze our national institutions; we shall paralyze theirs. 3. They tried to demonstrate their superiority; we shall demonstrate our national will over theirs." PERLMUTTER, *supra* note 34, at 176 (quoting Moshe Sneh).

habitation, and cultivation of the land constitute the underpinnings of the Palestinian identity. The demolition policy thus goes to the heart of the national rivalry. Every confiscation and destruction severs a family's link to its land, representing yet another defeat inflicted on the Palestinian cause by its Zionist rival.⁴⁶

Another force that appears to motivate the demolition practice is retribution. The Military Government strikes back at offenders ferociously and immediately, without judicial proceedings. Retribution is never explicitly stated as one of the practice's purposes. Gazit, however, describes two incidents in which demolitions were motivated, in his words, by impulses of "retaliation and vengeance."⁴⁷ Retributive motives are closely linked to the government's need to respond to the sentiments of segments of the Israeli public — primarily the political right and victims of Arab terrorism — typically following the murder of Israelis by Palestinians. Demolitions seem to appease those who demand more severe responses to Palestinian violence.⁴⁸

Despite strong support for the practice among members of the military, no consensus has been reached about whether or how well it actually serves the interests of the Military Government. Officially, members of the Israeli executive deem the policy effective and treat it as almost indispensable. The policy constituted a key component of the "stick" side of the "stick and carrot" scheme devised by Moshe Dayan in 1967.⁴⁹ Support for the policy reached its peak under Itzhak Rabin, Israel's Defense Minister during the early stages of the *Intifada*.⁵⁰ Various military officials have sworn by the

46. The deportation practice, by which Palestinians are forcefully removed from the region, has similar effects. Deportations are based on Article 112 of the 1945 DERs. 1442 Palestine Gazette, *supra* note 4, at 1085; see *El-Affu v. Military Commander of the West Bank*, 42(2) P.D. 4 (1988), translated in 29 I.L.M. 139.

47. On October 21, 1969, an Israeli army officer was killed, and two soldiers were injured in a shoot-out with a Palestinian in the town of Khalkhoul. Moshe Dayan, then Defense Minister, visited the site on the same morning; by early afternoon, he had ordered the demolition of eight homes. Four days later he ordered the demolition of ten more homes. Gazit comments, "It is almost certain that unless the minister had visited the scene while it was still smoking, unless he had seen the casualties at the site, he would have rejected the request to demolish the 18 homes, had it been made to him through the regular chain of command." GAZIT, *STICK AND CARROT*, *supra* note 37, at 306. A week later, an Israeli merchant was murdered in a furniture store in Gaza. Dayan rushed to the scene of the murder and was confronted with the fresh puddle of blood. He immediately ordered the destruction of all eight houses along the alley by the store. Gazit observes, "Once again Dayan diverged from his own policy. Here too, the 'Red in the Eyes' took its toll. . . . There weren't many incidents of this kind, and for this reason, the uniqueness of these cases was all the more conspicuous." *Id.*

48. The telephone conversation that took place between the Prime Minister and the wife of Natan Azaryah, who was murdered on a Tel Aviv street, is a telling example of such a response. The recently widowed woman protested, "Mister Prime Minister, if you do not blow up the terrorist's house, I will." Tamar Tarbels, *Mr. Prime Minister, If You Do Not Blow Up the Terrorist's House, I Will*, YEDIOT AHRONOT, May 3, 1993, at 1 (Hebrew); see also *infra* note 128 (discussing suggestions for application of harsher measures).

49. See, GAZIT, *STICK AND CARROT*, *supra* note 37, at 300; Dagan, *supra* note 35.

50. Rabin stated, "The use of Molotov cocktails has recently declined as a result of our punitive policy, which takes the form of house demolition." B'TSELEM, 1989 DEMOLITION REPORT, *supra* note 25, at 29.

practice's effectiveness to the Israeli Supreme Court.⁵¹ Major General Amram Mitsna, for example, testified that "the home demolition policy has caused a significant decrease in the use of Molotov cocktails."⁵² Outside the corridors of the executive branch, however, approval is less widespread.

Indeed, many of those who supported and applied the policy while in office have since criticized it. Former Brigadier General Benyamin Ben-Eliezer personally signed scores of demolition orders, including the order that prompted the seminal *Sakhawil* case of 1979.⁵³ Yet in a 1985 interview with Israel Radio, he stated his "adamant objection" to the measure and condemned the policy for portraying a negative image of Israel, creating an atmosphere of Palestinian solidarity, and strengthening support for the PLO, which helps finance alternative housing. Ben-Eliezer also referred to the moral aspect of collective punishment: "[I]t is the offender who commits the act, not the family."⁵⁴

Former Brigadier General Aryeh Shalev was also responsible for issuing numerous demolition orders.⁵⁵ Yet in his recent research on the *Intifada*, Shalev suggests that demolitions have not contributed to curbing violence and that, instead, they may have exacerbated it.⁵⁶ He reports, quite surprisingly, that in the early 1980s even the General Security Services acknowledged the policy's detrimental effects and advised the Military Government to cease its application.⁵⁷ This retrospective criticism of the practice by its early advocates has helped to intensify the nationwide debate over the merits of the practice.

The demolition policy has been the subject of intense political controversy on the Knesset floor. Abba Eban, Israel's former Foreign Minister, described the policy as a "desecration of Israel's heritage and a blatant violation of the legal and societal rules of the civilized world."⁵⁸ The political unattractive-

51. Al-Raqeb v. Military Commander of Gaza Region, HCJ 878/89 (1989) (unpublished); Shoukeri v. Minister of Defense, HCJ 798/89 (1990) (unpublished).

52. Brief for the IDF, ACRI v. Commander of Central Command, 43(2) P.D. 529 (1989), quoted in B'TSELEM, 1989 DEMOLITION REPORT, *supra* note 25, at 29. Mitsna's testimony attributed the decrease of Molotov cocktail incidents to the "severe and instantaneous" execution of home demolitions.

53. Ben-Eliezer served as both the IDF's Military Commander in the West Bank and as Coordinator of Government Activities in the Administered Territories. He is currently Housing Minister and a Member of Knesset from the Labor Party.

54. Interview with Benyamin Ben-Eliezer, Former Brigadier General (Israel Radio Broadcast, July 30, 1985).

55. Shalev, who served as the IDF's Military Commander in the West Bank in 1974-76, is currently a researcher at the Jaffee Center for Strategic Studies at Tel Aviv University.

56. Shalev examined the correlation between the measures imposed by the Military Government and the rate of security offenses committed in the subsequent months. He found an increase in violent incidents following a high incidence of demolitions. Shalev admits that his examination does not allow for the influence of other factors and is, therefore, not conclusive. Still, he maintains that his findings indicate an actual phenomenon. ARYEH SHALEV, *THE INTIFADA: CAUSES AND EFFECTS* 113-14 (1991). Shalev's general conclusion accords with an analysis of the effectiveness of British demolition practice in the Boer War. See SPIES, *supra* note 29, at 114.

57. SHALEV, *supra* note 56, at 114.

58. Ilan Kfir, *Abba Eban: Blowing Up Homes — A Desecration of Israel's Heritage*, MA'ARIV, Nov. 22, 1981, at 6 (Hebrew).

ness of the practice was highlighted in 1981 in a bizarre exchange in the Knesset between then Prime Minister Menachem Begin and Shimon Peres, the Defense Minister of the preceding government. Each bitterly condemned the other's administration for having demolished more Palestinian homes, although both governments had officially endorsed the policy.⁵⁹ In the same debate, Member of Knesset Amnon Rubinstein criticized the measure, *inter alia*, for being ineffective: "You can blow up one more home, you can blow up ten more homes — it just won't do any good."⁶⁰ As noted in Part IV of this Article, however, this controversy has barely reverberated in the halls of the Israeli Supreme Court.

The demolition policy may do more to inflame Palestinian defiance than to deter it. Palestinians perceive it as a gross injustice; it precipitates anger and humiliation rather than respect for the rule of law. Instead of providing a healthy basis for maintaining peace and order, the policy tends to reaffirm people's belief that they will not receive justice from an alien government. This perception fans, rather than douses, the rebellious quest for liberation. Indeed, Palestinians include the demolition policy among those practices to which they must respond with "heroic tenacious struggle."⁶¹ Historically, policies that are perceived by the population as oppressive and unjust have strengthened the national spirit. The American Revolution,⁶² the Boer War,⁶³ World War I,⁶⁴ and the Jewish struggle against British rule in Palestine⁶⁵ all offer this lesson. This historic pattern was apparently also on

59. DIVREI HAKNESSET [KNESSET PROTOCOLS] 563 (Nov. 25, 1981) (Hebrew); see also Yosef Harif, *Begin: Over 1,000 Houses Demolished in Territories Under Labor Government*, MA'ARIV, Nov. 23, 1981, at 3 (Hebrew).

60. DIVREI HAKNESSET [KNESSET PROTOCOLS] 567 (Nov. 25, 1981) (Hebrew).

61. POLITICAL COMMUNIQUÉ (Palestine National Council Nov. 15, 1988), translated in 18 J. PALESTINE STUD. 216, 218 (1989).

62. The American Declaration of Independence centers around the King's "history of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these states. To prove this, let Facts be submitted to a candid world." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). After listing 27 such injuries, the drafters went on to pronounce the colonies "free and independent states." *Id.* para. 32.

63. Lord Roberts was averse to the farm-burning policy, a practice that he had observed previously in India's Northwest Frontier, warning that it would result in "a rich harvest of hatred and revenge." FARWELL, *supra* note 31, at 352. The Times History, commenting on the British practices in the Boer War, stated, "The policy fitfully adopted after the beginning of June (1900) of burning down farmhouses and destroying crops as a measure of intimidation had nothing to recommend it, and no other measure aroused such deep and lasting feelings of resentment." 4 THE TIMES HISTORY OF THE WAR IN SOUTH AFRICA 494 (Basil Williams ed., 1906).

64. On the excessive use of collective punishments, Garner commented, "[I]nstead of subserving the real military necessity, they only tend to drive the population to desperation, to arouse an undying hatred against the occupying belligerent, to intensify the spirit of revenge, and finally to make it more difficult to overcome effectively the resistance of the people who are made the victims of such severities." James W. Garner, *Community Fines and Collective Responsibility*, 11 AM. J. INT'L. L. 511, 537 (1917); see also Oppenheim, *supra* note 41, at 370 ("[T]here is neither a need nor a right of the occupant to set up a reign of terror and frightfulness. Moreover, such a reign is apt to defeat its own ends because it will sooner or later drive the unfortunate population into desperation so that they rise in arms.").

65. On emergency measures applied by the British, one commentator noted, "Even when applied judiciously, they were excessive and smacked of a 'police state.' Consequently, while they strengthened the hand of government to respond to unrest, they simultaneously undermined its legitimacy." DAVID A.

the minds of the authors of the Geneva Convention's Commentary.⁶⁶ Both history and politics, then, cast doubt on the wisdom of the practice.

D. *Legal Justifications*

The legal foundation of the home demolition practice is Article 119 of the 1945 DERs,⁶⁷ which modified and enhanced the previous Emergency Regulations of 1931 and 1936. The 1945 DERs, which the British Mandatory Government promulgated to combat the Jewish insurgency, originally applied to the entire territory of Palestine.⁶⁸ They remain in force to this day in the state of Israel and, as the official Israeli view maintains, within the Occupied Territories.⁶⁹ Article 119 states, in part:

(1) 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 any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offense against these Regulations involving violence or intimidation or any Military Court offense; 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.

The provision's breadth affords tremendous discretion to the Military Government on a number of levels. First, Article 119 allows the Military Government to issue demolition orders as an exercise of administrative

CHARTERS, THE BRITISH ARMY AND JEWISH INSURGENCY IN PALESTINE, 1945-47, at 87 (1989).

66. See COMMENTARY ON IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (Jean Pictet ed., 1958) [hereinafter THE COMMENTARY] ("Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance."). For the Convention's strong position against collective punishment, see *infra* part V.B.1.

67. 1442 Palestine Gazette, *supra* note 4, at 1089; 1600 Palestine Gazette, *supra* note 4, at 1159.

68. The 1945 DERs vest highly intrusive powers in the hands of the executive branch, exercisable at its discretion without need for judicial approval. The regulations permit the government, *inter alia*, to detain people for periods of up to one year, 1442 Palestine Gazette, *supra* note 4, at 1083 (Article 111); to deport people out of Palestine, *id.* at 1085 (Article 112); to take indefinite possession without compensation of private land, *id.* (Article 114), vehicles, animals, or boats, *id.* at 1087 (Article 115); to order people to accommodate and feed police personnel free of charge, *id.* at 1089 (Article 121); to determine the time and venue of burials without consulting the families of the deceased, *id.* at 1093 (Article 133); to order people to remove glass, nails, or other obstacles from roads, *id.* at 1090 (Article 123); and, as a means to ensure the successful exercise of the above powers, to prohibit the sale of intoxicating liquor to the members of His Majesty's forces, *id.* at 1094 (Article 135).

69. See Shefi, *supra* note 37, at 294-99. Opposing views maintain that the Defense Regulations were revoked before the end of the British Mandate by the Palestine (Revocation) Order in Council 1948 or, alternatively, abolished by the Jordanian Government on May 14, 1948, when the Jordanian Defense Regulations (1935) came into effect. For extensive analyses of the validity of the 1945 DERs in the Territories, see ESTHER B. COHEN, HUMAN RIGHTS IN THE ISRAELI OCCUPIED TERRITORIES 1967-1982, at 94-96 (1985); EMMA PLAYFAIR, DEMOLITION AND SEALING OF HOUSES AS A PUNITIVE MEASURE IN THE ISRAELI-OCCUPIED WEST BANK 10 (1987); Usama R. Halabi, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 TEMPLE INT'L & COMP. L.J. 251, 261-64 (1991).

authority,⁷⁰ without recourse to judicial proceedings.⁷¹ It requires only that the Military Commander "ha[ve] reason to suspect" and "[be] satisfied" that an offense was committed. Since the *ACRI* case of August 1989,⁷² however, most orders have undergone judicial review by the Israeli Supreme Court. The Court routinely issues interim orders preventing execution of demolition orders until it completes its proceedings. Nevertheless, the Court's oversight does not amount to a criminal appeal. The Court does not canvass evidence or determine guilt: it merely decides whether demolition orders meet the relatively lenient standards for review of administrative actions. Furthermore, demolitions do not replace criminal proceedings or regular criminal punishment. Whether or not their homes were demolished, the offenders invariably are prosecuted in military courts for the very same offenses, and generally are sentenced to substantial terms of imprisonment. The procedure, therefore, is quite disconnected from the judicial process.

Second, Article 119 gives the Military Government broad legal authority in determining the scope of the practice. Each of the two parts of the Article (separated by the words "*or any house*") establishes different sets of criteria for applying the measure. The first part pertains only to homes that were used directly in the commission of an offense. The second part authorizes the demolition of houses where the offenders reside — houses that have no connection to the commission of an offense. Initially, the Military Government limited the measure to properties from which offenses had actually been committed;⁷³ it later extended the measure to apply to homes where offenders resided. Indeed, most home demolitions have been carried out on the latter ground. The Military Government has also broadened the scope of the policy to include rented homes, homes in which offenders lived infrequently, and multi-apartment structures. It has even demolished homes of those killed in the course of committing an offense.⁷⁴

Article 119's language goes further. It authorizes the destruction of "any house, structure or land situated in any area, town, village, quarter or street" whose inhabitants have committed an offense. Its scope seems virtually

70. As a matter of internal procedure, the Military Commanders consult the General Security Services (GSS) and their legal advisors before issuing the orders.

71. Out of the 94 cases that the Supreme Court has adjudicated, eight demolition orders were issued following judicial convictions, 31 orders were issued during criminal proceedings in military courts, and 33 orders were based solely on confessions obtained in interrogations.

72. *ACRI v. Commander of Central Command*, 43(2) P.D. 529 (1989).

73. *See, e.g., SHABTAI TEVETH, KLALAT HABRACHA [THE CURSED BLESSING]* 183, 211, 258, 261, 263, 266, 274 (1970) (Hebrew).

74. Six such cases have been reported. *See B'TSELEM, 1989 DEMOLITION REPORT, supra* note 25, at 17. The Supreme Court has not yet adjudicated a case involving the demolition of a slain offender's house. One such petition was submitted, but the Military Government withdrew the demolition order before the Court could adjudicate it, presumably out of fear that the Court would enjoin it. *Calbneh v. Military Commander of Judea and Samaria Region, HCJ 681/89 (1989)* (unpublished). In another case, the Military Commander commuted an order to demolish the entire house into one to seal one room after the slain offender's family indicated to the Military Government that it intended to petition the Supreme Court. *See Israelis Drop Order to Raze Home of a Slain Palestinian*, N.Y. TIMES, May 11, 1991, at 5.

limitless.⁷⁵ In practice, however, the Military Government does not apply its power to the full extent permitted by law. It has not demolished homes that have had nothing to do with an offense or offender. Although it is unlikely that the Military Government would engage in arbitrary demolitions of this kind, or that such a policy, if attempted, would be upheld by the Court,⁷⁶ the mere existence of such unbridled authority is nonetheless troubling.

Article 119 makes no reference to the question of ownership. Homes, therefore, may be demolished even when their owners have no connection to an offense. In the ninety-four cases adjudicated, the Court mentions only seven homes that the offenders themselves owned. Of the remaining 138 homes,⁷⁷ at least sixty-nine were owned by offenders' parents, sixteen by their siblings, and nine by other relatives. Six homes belonged to third parties and were rented out to offenders' families.⁷⁸ In principle the IDF seals, but does not destroy, rented homes.

Finally, the law's breadth does not limit demolitions by type or severity of offense, although the Military Government normally employs the measure only in serious cases. In thirty-two of the ninety-four cases studied, the sanction was triggered by life-taking offenses (eight involved Jewish victims and twenty-four involved Palestinian victims). Demolitions are also often exercised in response to assaults on, or harassment of, fellow Palestinians,⁷⁹ and are routinely applied in response to offenses involving Molotov cocktails, the elimination of which has been one of the Military Government's major goals.⁸⁰ At one point the Military Government began to seal homes in response to stonethrowing, a widespread offense not generally considered to be grave. The Court upheld the orders in the only two such cases that it reviewed.⁸¹ Article 119 thus gives the Military Government almost limitless

75. At one stage during the Boer War, the British demolished all homes that were within a radius of ten miles from the site of the attack. SPIES, *supra* note 29, at 110.

76. See *Al-Amrin v. Military Commander of Gaza Region*, 46(3) P.D. 693, 705 (1992) (Heshin, J., dissenting).

77. See *supra* text accompanying notes 13 to 14.

78. The ownership of the remaining 38 homes cannot be accounted for from the information contained in the rulings. Where the identity of the homeowner is not stated specifically, I have assumed that the person who petitioned the court is the owner. In reality, however, the situation is more complex because many homes are co-owned, often by siblings and cousins. See, e.g., *Zubah v. Military Commander of Judea and Samaria Region*, H CJ 152/91 (1991) (unpublished). According to *B'Tselem*, about 60% of the homes were owned by the offenders' parents, 6% by their siblings, and about 18% by the offenders themselves. See *B'TSELEM*, 1989 DEMOLITION REPORT, *supra* note 25, at 16.

79. At least 37 demolitions followed assaults on fellow Palestinians. The major reason for these assaults is suspicion of collaboration with the security forces. In some cases, however, Palestinians were assaulted because of "immoral conduct," i.e., drug-dealing or prostitution. See, e.g., *Obeida v. Military Commander of Judea and Samaria Region*, H CJ 295/90 (1990) (unpublished).

80. See *Al Fasfus v. Minister of Defense*, 43(1) P.D. 576 (1989); *Tamas v. Minister of Defense*, 43(2) P.D. 559 (1989). When the cocktails cause no damage, the government generally settles for sealing.

81. In *Abu Al'an v. Minister of Defense*, 37(2) P.D. 169 (1983), the Court upheld an order to seal the homes of four Palestinians suspected of throwing the stones that killed an Israeli soldier driving through the town of Khalkhoul. In *Mansur v. Military Commander of Judea and Samaria*, H CJ 3740/90 (1991) (unpublished), the Court upheld an order to seal a repeat offender's room, without mentioning whether any damage was caused by the stones.

authority in determining the circumstances under which it can order home demolitions in the Occupied Territories.

In 1971, then Attorney General Meir Shamgar⁸² presented the government's seminal, and almost sole, legal justification of the demolition practice. Shamgar defended the policy along two alternative lines. First, he asserted that Article 119 was valid "local law" and therefore superior to substantive international law:

The Demolitions are based on Regulation 119 of the Defense (Emergency) Regulations, 1945, which are part and parcel of the penal law in the West Bank and Gaza. . . . Article 64 of the [Geneva] Convention leaves the penal provisions of the local law intact insofar as the local law includes rules permitting demolition.⁸³

Second, Shamgar claimed that Article 119 was consistent with substantive international law. He asserted that the practice falls within the legal boundaries of Article 53 of the Geneva Convention, which makes an exception to the prohibition on destruction of private property under circumstances of *absolute military necessity*:

It is necessary to create effective military reaction. The measure under discussion is of utmost deterrent importance, especially in a country where capital punishment is not used against terrorists killing women and children. . . . In conclusion, it appears that even if Regulation 119 . . . is regarded as suspended, demolition can be based, in appropriate circumstances, on Article 53 of the Convention.⁸⁴

Shamgar further explained that a "house from which hand grenades are thrown is a military base, not different from a bunker in other parts of the world."⁸⁵ He described the measure as "personal," insisting that this "punitive measure . . . is directed personally only against the person who has been culpable of the commission of a certain offense."⁸⁶

III. THE LEGAL SYSTEM IN THE OCCUPIED TERRITORIES

Before examining the Court's treatment of the legal justifications for the demolition policy, I will briefly survey the legal system in the Occupied Territories so as to place the demolition jurisprudence in a legal framework.

A. *International Law*

Since June 1967, the IDF has ruled over the Occupied Territories within the framework of belligerent occupation law. The IDF legislates, adjudicates,

82. Shamgar served as the IDF's Military Advocate General from 1961 to 1968, and as Attorney General of Israel from 1968 to 1975. Shamgar has served on Israel's Supreme Court since 1975 and is currently the President of the Court.

83. Shamgar, *Observance*, *supra* note 38, at 275-76; *see also infra* part V.A.

84. *Id.* at 276; *see also infra* part V.C.1.

85. *Id.* at 275-76.

86. *Symposium*, *supra* note 39, at 380.

exercises police powers, collects taxes, and otherwise administers the regions as this law prescribes.⁸⁷ Considering the systematic disregard by victorious belligerents of this body of law throughout modern history, the Israeli acknowledgment of its relevance is commendable.⁸⁸

Belligerent occupation law, which is a segment of the international law on land warfare, becomes operative after active warfare ceases and one army takes control of its enemy's territory. This field of law neither condones nor outlaws occupations; it treats them as a reality and simply tries to make them more decent.⁸⁹ It is embodied primarily in the Fourth Geneva Convention of 1949⁹⁰ and the Regulations Annexed to the Fourth Hague Convention of 1907.⁹¹ The remainder is found in military manuals, *opinio juris*, and the writings of prominent international legal scholars.⁹² Generally speaking, belligerent occupation law is designed to balance an occupying power's interest in governing a region effectively and securely, with its obligation to protect the interests of the civilian population. The law aims ultimately to regulate and mediate the tension between military necessity and human rights.⁹³

Israel, it should be noted, does not fully apply the law of belligerent occupation. Both the Israeli government and Supreme Court restrict the extent of its application, although they do so on different grounds. Since 1967, the Israeli government has argued that its rule over the West Bank and Gaza is not one of belligerent occupation; it therefore contests the formal *applicability* of belligerent occupation law to this occupation. Israel does not dispute that it is a party to the Geneva Conventions⁹⁴ or that the Hague Regulations have attained the status of customary international law, binding on all states. The government argues, however, that the law of belligerent occupation applies only when the territory in question was previously under the sovereignty of

87. Shamgar, *Observance*, *supra* note 38, at 267-68 (citing proclamations of Military Commander).

88. See Roberts, *supra* note 23, at 63. In a recent book, Eyal Benvenisti thoughtfully examines an array of occupations and shows that this body of law is habitually circumvented by occupying powers. BENVENISTI, *supra* note 41, at 149-90.

89. See THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, at 518 (James B. Scott ed., 1920) (Address of Delegate Martens) [hereinafter CONFERENCE OF 1899 PROCEEDINGS].

90. Geneva Convention, *supra* note 10.

91. Hague Regulations, *supra* note 9.

92. Prominent texts by international legal scholars include the following: GREENSPAN, *supra* note 41; 2 L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY (H. Lauterpacht ed., 7th ed. 1952); 2 GEORG SCHWARZENBERGER, INTERNATIONAL LAW: THE LAW OF ARMED CONFLICT (1968); GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY (1957). For an account of medieval codes of warfare, see Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1 (1992). For a contemporary critical analysis, see generally BENVENISTI, *supra* note 41.

93. Belligerent occupation law also seeks to prevent disruptive changes in the occupied territory, preserve military discipline among occupying forces, reduce risk of renewed conflict, and enhance prospects for an eventual peace agreement. See Roberts, *supra* note 23, at 46; see also *infra* note 252 and accompanying text (discussing Preamble to Hague Convention).

94. Israel ratified the four Geneva Conventions on July 6, 1951. 1 KITVEI AMANAH [TREATY SERIES] 559 (Hebrew).

a "High Contracting Party."⁹⁵ It argues that since neither Jordan nor Egypt held good title to the West Bank and Gaza, the Occupied Territories were not under the sovereignty of a "High Contracting Party." Fearing that acknowledgment of a state of belligerent occupation might imply recognition of the former administrators' titles, the government argues that the legal status of the Occupied Territories precludes application of the law of belligerent occupation.⁹⁶ It has, nonetheless, undertaken to abide by the Conventions' "humanitarian provisions" on a *de facto* basis.⁹⁷

In contrast, the Israeli Supreme Court treats the state's rule over the Occupied Territories as a belligerent occupation.⁹⁸ The Court thus treats the Hague Regulations, which are broadly recognized as customary international law, as fully enforceable. The Geneva Convention, on the other hand, is treated as non-justiciable by the Court. In the Israeli legal system, treaty law binds only state parties among themselves and cannot be invoked before an Israeli court unless it has become part of domestic law by legislation. So far, the Knesset has refrained from making the Geneva Convention the law of the land.⁹⁹

Although not formally enforced, the Geneva Convention has not been ignored. The Court has repeatedly discussed and referred to it to justify the Military Government's actions.¹⁰⁰ In some cases, where the Convention

95. UNITED NATIONS, THE QUESTION OF THE OBSERVANCE OF THE FOURTH GENEVA CONVENTION OF 1949 IN GAZA AND THE WEST BANK, INCLUDING JERUSALEM, OCCUPIED BY ISRAEL IN JUNE 1967, at 4 (1979).

96. Shamgar, *Observance*, *supra* note 38, at 263-66. For a defense of this position, see JULIUS STONE, NO PEACE — NO WAR IN THE MIDDLE EAST 39 (1969) [hereinafter STONE, NO PEACE]; Yehudi Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 301 (1968); Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L. L. 344, 344-45 (1970); *cf.* Julius Stone, *Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank*, in OF LAW AND MAN: ESSAYS IN HONOR OF HAIM H. COHN 79 (Shlomo Shoham ed., 1971). For critical views, see BENVENISTI, *supra* note 41, at 110; YORAM DINSTEIN, DINEI MILHAMA [LAWS OF WAR] 212 (1983) (Hebrew); Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip*, 24 ISR. L. REV. 485, 485-94 (1990); Stephen M. Boyd, *The Applicability of International Law to the Occupied Territories*, 1 ISR. Y.B. HUM. RTS. 258, 259-60 (1971); Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 107 (1978); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L. L.J. 129, 138-44 (1991); Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 109 n.6 (1980); Roberts, *supra* note 23, at 62-66; Amnon Rubinstein, *The Changing Status of the "Territories"*, 1988 TEL AVIV U. ST. L. 59, 64-67. The Israeli position has also been criticized by the U.N. General Assembly and the ICRC. G.A. Res. 43/58, U.N. Doc. A/43/904, part B (1988); *see also* UNITED NATIONS, *supra* note 95, at 3-14 (1979); ICRC, ANNUAL REPORT 83 (1987).

97. Shamgar, *Observance*, *supra* note 38, at 266.

98. The Court affirmed its treatment of Israel's rule as a belligerent occupation in *Dweikat v. Israel*, 34(1) P.D. 1, 13 (1979) (English excerpt in 9 ISR. Y.B. HUM. RTS. 345 (1980)) (invalidating confiscation of private land near Nablus intended for establishment of Jewish settlement).

99. *See* BENVENISTI, *supra* note 41, at 118-19; Bar-Yaacov, *supra* note 96, at 485.

100. *See, e.g.*, *Arjub v. Military Commander of Judea and Samaria Region*, 42(1) P.D. 353 (1988) (English excerpt in 18 ISR. Y.B. HUM. RTS. 255 (1988)) (upholding government's refusal to establish military court of appeals); *El Affu v. Military Commander of the West Bank*, 42(2) P.D. 4 (1988), translated in 29 I.L.M. 139 (upholding deportation of Palestinians from Occupied Territories); *Sajadiyeh v. Minister of Defense*, 42(3) P.D. 801 (1988) (upholding detention of administrative detainees inside

appeared to work against the Military Government, the Court has referred to it and wrestled with it, instead of dismissing it as non-justiciable.¹⁰¹ Over time, the distinction between the two types of international law has almost eroded. It would thus be very difficult for the Court to uphold a policy that it explicitly found violated the Convention.¹⁰²

This ambiguity regarding the justiciability of the Geneva Convention, however, bears but an indirect influence on the demolition practice itself, since the Court's justification of demolitions has not been based on the inapplicability of the Hague and Geneva instruments, nor on the non-justiciability of the latter. The Court has defended the practice, for the most part, within the terms of the Hague Regulations and the Geneva Convention: its central international law argument — that local law supersedes substantive provisions of international law — follows from an interpretation of the instruments. Demolitions, it is argued, are consistent with international law.¹⁰³

B. Principles of Israeli Law

Israel decided in 1971 to apply to the Occupied Territories some of the guarantees of personal rights found in Israeli domestic administrative and constitutional law. Meir Shamgar presented the legal policy as a commitment to "basic principles of natural justice as derived from the system of law existing in Israel."¹⁰⁴ The legal ideals set out to be realized included "justice and fairness," "respect for law," and "prevention of discrimination."¹⁰⁵ Since this policy originated from the recognition that belligerent occupation law does not provide adequate protection for civilian populations, these norms

Israel); *Abu-Aita v. Military Commander of Judea and Samaria Region*, 37(2) P.D. 197 (1983), translated in 7 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1983-1987, at 1 [hereinafter SELECTED JUDGMENTS] (upholding extension of Israeli value-added taxation system to Occupied Territories); *Ayoub v. Minister of Defense*, 33(2) P.D. 113 (1979) (English excerpt in 9 ISR. Y.B. HUM. RTS. 337 (1979)) (upholding requisition of private land for establishment of military bases and Jewish civilian settlements); *Ei Tin v. Minister of Defense*, 27(1) P.D. 481 (1973) (English excerpt in 5 ISR. Y.B. HUM. RTS. 376 (1975)) (upholding government policy of rescinding residency rights of persons who stayed outside Occupied Territories for longer than specified period).

101. For two notable cases, see *El Affu*, 42(2) P.D. at 4, and *Sajadiyeh*, 42(3) P.D. at 801. For criticism of the *El Affu* decision, see sources cited *infra* note 267.

102. See Yoram Dinstein, *The Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 ISR. Y.B. HUM. RTS. 173, 176 (1988); Ruth Lapidoth, *The Expulsion of Civilians from Areas Which Came Under Israeli Control in 1967: Some Legal Issues*, 2 EUR. J. INT'L. L. 97, 101 (1990).

103. See *infra* part V.A.

104. Shamgar, *Observance*, *supra* note 38, at 266-67. The concept of "natural justice" is used in Israeli administrative law in a way comparable to that of procedural due process in American law. Shamgar later described these precepts of natural justice as "reflecting similar principles developed in Western democracies." Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government — The Initial Stage*, in *MILITARY GOVERNMENT*, *supra* note 37, at 13, 49 [hereinafter Shamgar, *Legal Concepts*]. For a favorable account of the legal policies designed by Shamgar, see MOSHE NEGBI, *JUSTICE UNDER OCCUPATION — THE ISRAELI SUPREME COURT VERSUS THE MILITARY ADMINISTRATION IN THE OCCUPIED TERRITORIES* (1981) (Hebrew).

105. Shamgar, *Legal Concepts*, *supra* note 104, at 48.

were "to a large extent beyond any demands of International Law."¹⁰⁶ The key aspect of this policy was that it granted Palestinians access to Israeli courts, in particular to the High Court of Justice, thus providing them with immediate and affordable access to judicial review of almost all actions of the Military Government. The Court adjudicates these matters by reference to customary international law, i.e., the Hague Regulations and other customs recognized by various legal scholars, as well as concepts borrowed from domestic Israeli law.¹⁰⁷

C. *The Israeli Supreme Court*

In its capacity as the High Court of Justice, the Israeli Supreme Court adjudicates petitions to grant relief against the state or any of its administrative authorities, including the IDF.¹⁰⁸ It has original jurisdiction over virtually every power exercised by the branches of government, and is competent to order them to perform or refrain from performing any action.¹⁰⁹ Every act of the Military Government thus falls under the Court's purview.¹¹⁰ The Court has been receptive to affording Palestinians the opportunity to challenge the Military Government's actions. This unprecedented phenomenon of allowing the civilian population access to the occupying power's national courts and subjecting the Military Government's conduct to domestic judicial review has added a unique element to this occupation.¹¹¹ The immediate effect has been the legalization — or what Lon Fuller called the "judicialization"¹¹² — of the conduct of the government. The rich body of case law thus generated has shaped and modified policies of the Military Government.¹¹³

The Israeli Supreme Court is widely recognized as a competent, non-partisan, and principled institution. It is a responsive and active court,¹¹⁴

106. *Id.*

107. See *Abu-Aita v. Military Commander of Judea and Samaria Region*, 37(2) P.D. 197, 230-32 (1983), translated in 7 SELECTED JUDGEMENTS, *supra* note 100, at 1; see also *Cooperative Society v. Military Commander of Judea and Samaria Region*, 37(4) P.D. 785, 810 (1983) (English excerpt in 14 ISR. Y.B. HUM. RTS. 301 (1984)) (Barak, J.) ("Every Israeli soldier carries in his backpack the customary norms of public international law of land warfare, as well as the basic rules of Israeli administrative law.") (upholding expropriation of private land for construction of highway in West Bank).

108. In its other capacity, the Supreme Court hears appeals from the district courts.

109. The Israeli legal system absorbed these powers of review from the English prerogative writs of habeas corpus, mandamus, certiorari, and prohibition. The High Court of Justice also has supervisory jurisdiction over tribunals or people who exercise judicial or quasi-judicial functions. See *Basic Law: The Adjudication*, 1110 Sefer Ha'Khukim 78 (Feb. 28, 1984), as amended by 1383 Sefer Ha'Khukim 72 (Feb. 4, 1992).

110. See *Abu-Aita*, 37(2) P.D. at 197; *Cooperative Society*, 37(4) P.D. at 785. See generally Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in *MILITARY GOVERNMENT*, *supra* note 37, at 114.

111. See *BENVENISTI*, *supra* note 41, at 119.

112. LON L. FULLER, *ANATOMY OF THE LAW* 111-12 (1968).

113. See Ronen Shamir, "Landmark Cases" and the *Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781, 798 (1990); see also *infra* part IV.

114. The Court periodically overrules Israeli administrative actions and secondary legislation on grounds of fairness, reasonableness, equality, and personal freedoms. In addition, it has virtually

and, in the absence of a bill of rights, it has been instrumental in authoring and implementing Israel's much needed code of civil liberties.¹¹⁵ Although the Court could have easily declined requests to adjudicate petitions concerning the Occupied Territories — citing lack of territorial jurisdiction or the "political question" doctrine — it chose instead to undertake the complex and ungratifying task. The Court deserves credit for its willingness to review cases from the Occupied Territories, especially in light of its heavy workload.¹¹⁶

The Court insists that it reviews the actions of security authorities comprehensively and with demanding scrutiny, and has explicitly undertaken to do so in cases involving the Military Government in the Occupied Territories.¹¹⁷ It has repeatedly emphasized its adherence to the fundamental principle of belligerent occupation law: that of striking a balance between military necessities on the one hand, and the rights and well-being of the

neutralized, by means of strict interpretation, some acts of primary legislation, which are, for the most part, immune from judicial review. A good example was the 1927 Theater Censorship Ordinance, which was extensively constricted in *Laor v. Theater Review Board*, 41(1) P.D. 421 (1987). The Knesset repealed the Ordinance shortly after the judgment.

115. The seminal case was *Kol Ha'am*, which recognized free speech as a fundamental right which may be restricted only for probable danger. *Kol Ha'am v. Minister of Interior*, 7(2) P.D. 871 (1953); see Pnina Lahav, *Foundations of Rights Jurisprudence in Israel: Chief Justice Agranat's Legacy*, 24 ISR. L. REV. 211, 251-58 (1990); Pnina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981); see also Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245 (1969); Baruch Bracha, *The Protection of Human Rights in Israel*, 12 ISR. Y.B. HUM. RTS. 110 (1982); Amos Shapira, *The Status of Fundamental Individual Rights in the Absence of a Written Constitution*, 9 ISR. L. REV. 497 (1974); Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 392-405 (1989); Dana Briskman, *National Security Versus Human Rights: An Analysis of the Approach of the Israeli Supreme Court to the Conflict Between National Security and Civil Liberties* (1989) (unpublished LL.M. thesis, Harvard Law School).

116. Unlike the discretionary jurisdiction held by the U.S. Supreme Court, the Israeli Supreme Court has mandatory jurisdiction; it adjudicates every case submitted to it. While the Court cannot technically bar the submission of petitions, it can easily hinder the submission of particular types of petitions. One way would be to impose litigation costs, as it does in most fields of law, on petitioners who fail to show exceptional factual bases or produce convincing arguments. According to the Ministry of Justice, 765 petitions were submitted to the High Court of Justice in 1989, of which 277 concerned security matters. Tova Tzimuki, *Beinish: Increase in HCJ Petitions*, DAVAR, Jan. 16, 1990, at 3 (Hebrew).

117. Justice Barak has ruled that

the judgments of the Supreme Court stated more than once that the security considerations of the army, both inside Israel as well as in Judea, Samaria and Gaza, are subject to judicial review, and that this judicial review is not limited to questions of jurisdiction or the presence of security considerations in the case at hand. It extends to the whole gamut of grounds for review, including the question of reasonableness of the security consideration.

Ressler v. Minister of Defense, 42(2) P.D. 441, 486 (1988). Barak has also asserted that "extensive powers are concentrated in the hands of a Military Government, and for the sake of the rule of law we should apply judicial review according to the normal standards." *Cooperative Society v. Military Commander of Judea and Samaria Region*, 37(4) P.D. 785, 810 (1983).

For a comprehensive survey of the Court's increasing intervention in the actions of the security authorities, see Baruch Bracha, *Judicial Review of Security Powers in Israel: A New Policy of the Courts*, 28 STAN. J. INT'L L. 39 (1991). Bracha's account pertains primarily to the Court's review of government actions inside Israel. *Id.* at 45. Nonetheless, he expresses his concern about treating the two jurisdictions as distinct and separate entities. Bracha reminds us that many of the emergency powers exercised today in the Occupied Territories are available also inside Israel. *Id.* at 95-96. He also dispels the notion that the Supreme Court's jurisprudence towards the Military Government can be isolated from the jurisprudence it applies in reviewing other branches of government. *Id.* at 45.

population on the other.¹¹⁸ Moreover, the Court underscores that the Military Government has undertaken to comply with "substantive" aspects of the rule of law and to abide by progressive standards. The Court purports to hold the Military Government to these standards.¹¹⁹ In reality, however, the Court has sided with the Military Government in most cases, including those involving an array of restrictions on personal liberties.¹²⁰ The Court has thus played a crucial role in legitimating Israeli rule over the Occupied Territories, particularly in the eyes of the majority of the Israeli polity and certain segments of the international community. It has also reinforced the self-image of the Military Government.¹²¹

118. See, e.g., *Abu-Aita v. Military Commander of Judea and Samaria Region*, 37(2) P.D. 197 (1983), translated in 7 SELECTED JUDGMENTS, *supra* note 100, at 310.

119. Justice Shamgar has stated:

It appears from the evidence and arguments presented to us that the Israeli Military Government did not exercise the above powers granted to it by international law to their fullest and most severe degree, but rather sought to limit itself, as far as possible, to those steps which were absolutely vital for the maintenance of safety and public order The exercise of powers of the respondents [the Minister of Defense and the Military Commander of Judea and Samaria Regions] will be reviewed by the same standards this Court applies when it examines the action or omission of any other arm of the executive power, taking into consideration the respondents' obligations that correspond to their duties.

Al Talya v. Minister of Defense, 33(3) P.D. 505, 511 (1979) (English excerpt in 10 ISR. Y.B. HUM. RTS. 333 (1980)); see also *ACRI v. Commander of Central Command*, 42(2) P.D. 529, 538 (1989).

120. The Court has upheld the Military Government's efforts to impose prolonged curfews, including a night curfew that had been imposed every night on the entire Gaza strip for more than two years, *Shawa v. Military Commander of Gaza Region*, 44(4) P.D. 590 (1990); requisition private land for the establishment of military bases and Jewish civilian settlements, *Ayoub v. Minister of Defense*, 33(2) P.D. 113 (1979) (English excerpt in 9 ISR. Y.B. HUM. RTS. 337 (1979)); restrict international telephone communications from and to the Occupied Territories, *Law in the Service of Man v. Military Commander of Judea and Samaria Region*, 42(3) P.D. 260 (1988); expropriate private land for construction of highways, *Cooperative Society v. Military Commander of Judea and Samaria Region*, 37(4) P.D. 785 (1985) (English excerpt in 14 ISR. Y.B. HUM. RTS. 301 (1984)); indefinitely suspend elections to local councils, *Amar v. Minister of Defense*, 38(4) P.D. 645 (1984) (English excerpt in 15 ISR. Y.B. HUM. RTS. 274 (1985)); take temporary possession of private property for military purposes, *Juha v. Military Commander of Judea and Samaria Region*, 43(2) P.D. 116 (1989); *Abu Rian v. Military Commander of Judea and Samaria Region*, 42(2) P.D. 767 (1988); impose time and manner restrictions on funerals of people killed in clashes with security forces, *Baracat v. Commander of Central Command*, H CJ 3393/92 (1992) (unpublished); *Qillani v. Head of Civil Administration*, H CJ 8/84 (1984) (unpublished); deport individuals from the Occupied Territories on security grounds, *El Affu v. Military Commander of West Bank*, 42(2) P.D. 4 (1988), translated in 29 I.L.M. 139; condition the right to travel abroad on receipt of special and revocable permits, *Awad v. Commander of Civil Administration, Ramallah District*, 40(2) P.D. 281, 284 (1986) (English excerpt in 17 ISR. Y.B. HUM. RTS. 305 (1987)); limit duration of stays abroad and, upon default, indefinitely suspend the right to return, *El-Tin v. Minister of Defense*, 27(1) P.D. 481 (1973) (English excerpt in 5 ISR. Y.B. HUM. RTS. 376 (1975)); refuse to allow unification of families where one of the spouses has no residency rights in the Occupied Territories, *Al Saudi v. Head of Civil Administration in Gaza*, 41(3) P.D. 138 (1987) (English excerpt in 18 ISR. Y.B. HUM. RTS. 246 (1988)); impose censorship on the press and all published materials, *Al Talya v. Minister of Defense*, 33(3) P.D. 505 (1979) (English excerpt in 10 ISR. Y.B. HUM. RTS. 333 (1980)); and close schools, universities, trade unions, or social clubs for security reasons, *Hamdan v. Military Commander of Judea and Samaria Regions*, 40(2) P.D. 614 (1986) (English excerpt in 17 ISR. Y.B. HUM. RTS. 316 (1987)).

Ronen Shamir has shown that only five of the 557 petitions that were submitted by Palestinians from the Occupied Territories between 1967 and 1986 were decided in favor of the petitioners. At least sixty-five cases were decided in favor of the Military Government during the same period. Most of the petitions (492) were unaccounted for; it is unlikely that cases decided in favor of the petitioners went unnoticed. Shamir, *supra* note 113, at 802; see also BENVENISTI, *supra* note 41, at 119-20.

121. See generally Shamir, *supra* note 113.

Notwithstanding the criticism due to the Court for its performance on the demolition issue, one ought not discount the difficulties that have constrained the Court's task. The demolition policy had been exercised for twelve years before it was first reviewed by the Court;¹²² several hundred homes had been demolished during this period.¹²³ A sudden judicial censure of this practice would have delivered a blow to the Military Government, and to the representatives of the state who had defended it over the years, thus vindicating critics' reproaches of the state.¹²⁴

The demolition practice involves governmental claims of national security, which present serious jurisprudential difficulties for courts in general.¹²⁵ Ruling against the government is particularly difficult in countries like Israel, where courts do not have formal constitutions on which to rely.¹²⁶ The Military Government insists that the demolition practice is necessary to deter Palestinians from committing acts of violence and to ensure the Military Government's control. Indeed, the intensity and incidence of Palestinian violence — including deadly assaults involving Molotov cocktails, stone-throwing, firearms, stabbings, and kidnappings — put IDF soldiers, Israeli citizens, and fellow Palestinians in grave jeopardy. The need for an effective measure to combat security crimes resonates with the traditional assertion that the Palestinian national movement poses a long-term threat to the state's very survival. Judicial sensitivity to the state's security claims is therefore not surprising.¹²⁷

122. See *infra* part IV.A.

123. The number of homes demolished during this period is not clear. According to the Ha'aretz daily, 686 homes were demolished or sealed in the Occupied Territories between 1967 and 1979. *Increase in the Number of Home Demolitions by Security Forces in the Occupied Territories*, HA'ARETZ, May 18, 1981 at 1 (Hebrew); see also COHEN, *supra* note 69, at 98; cf. MERON BENVENISTI ET. AL., *THE WEST BANK HANDBOOK — A POLITICAL LEXICON* 86 (1986).

124. See, e.g., PLAYFAIR, *supra* note 69, at 10-11; RAJA SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* 41-49 (1985).

125. The U.S. Supreme Court is no exception; it has displayed ardent deference towards policies of military agencies, even when they concern non-operational issues. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (upholding Air Force dress regulations barring Orthodox Jew from wearing yarmulke); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding law which permitted exclusion of women from draft registration). Former Justice William Brennan examines the Court's record with remorse and embarrassment. He salutes the Israeli Court for striking the correct balance between civil rights and security interests and suggests that it be emulated by all states. Brennan describes Barak's ruling in *Kahane v. Minister of Defense*, 35(2) P.D. 253 (1981), as a "monumental" example of upholding free speech in times of crisis. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11 (1988). The Israeli Court's performance cannot be evaluated in such a uniform fashion. It appears that Brennan overlooks, or may be unaware of, the discrepancy between the Court's treatment of Israel proper and its treatment of the Occupied Territories. While the role played by the Court in defense of Israeli civil liberties is beyond dispute, its concern for rights of Palestinians in the Occupied Territories is less than remarkable, as the issue of home demolitions demonstrates.

126. The basis for the Court's review powers is an easily revocable Knesset law. See Basic Law: The Adjudication, 1110 Sefer Ha'Khukim 78 (Feb. 28, 1984), as amended by 1383 Sefer Ha'Khukim 72 (Feb. 4, 1992).

127. Special consideration for notions of national security and preservation of the Jewish nation is not foreign to Israeli jurisprudence. A good example of a broad construction of national security interests can be found in *Ayoub v. Minister of Defense*, 33(2) P.D. 113 (1979) (English excerpt in 9 ISR. Y.B.

The charged character of the issues concerning the Occupied Territories further complicates the Court's task. Many of the Military Government's practices are the subject of intense controversy and are continuously criticized, often vehemently, from both sides of the political spectrum.¹²⁸ Moreover, the Court itself has been criticized by the Israeli executive branch for obstructing its task of curbing unrest in the Occupied Territories.¹²⁹ The Defense Ministry under Itzhak Rabin had apparently lobbied for Knesset legislation to bar the Court from reviewing home demolition orders.¹³⁰ Following the government's defeat in *Dweikat v. Government of Israel*,¹³¹ former Cabinet Minister Ariel Sharon urged a similar attempt to "immunize" the Military Government from the Court's oversight.¹³² Naturally, such a climate inhibits the Court from overriding the security authorities.¹³³ The

HUM. RTS. 337 (1979)). For judicial reference to notions of Jewish self-preservation, see the debate on the question of "who is a Jew" in *Rufeisen v. Minister of the Interior*, 16(3) P.D. 2428 (1962).

128. The Military Government's policies are frequently criticized as violating Palestinian human rights by the Jewish and Arab political parties on the left of the political spectrum, as well as by various non-governmental organizations including *B'Tselem*, Amnesty International, Middle East Watch, the ICRC, UNRWA, and the Lawyers' Committee for Human Rights.

Politicians from the right criticize the policies as being too lenient. For example, Geulla Cohen, as Deputy Minister, maintained that the effectiveness of sealing off houses is "laughable," and called for the deportation of terrorists and their families and for the deportation of all the inhabitants of a village that fails to respond to three warnings. Dan Margalit, *An Arab Village That Does Not Respond to Three Warnings — All Its Inhabitants Will Be Deported*, HA'ARETZ, July 10, 1985, at 3 (Hebrew). Numerous Cabinet Ministers have called for harsher measures. Raphael Eitan suggested that Israel reinstate capital punishment, Gideon Alon, *Ze'evi: You Can't Cure Cancer with Aspirin; Only Sealing the Territories Will Curb the Murder Wave*, HA'ARETZ, Mar. 25, 1991, at 2 (Hebrew), and impose collective fines on the town of Qalqilya for damages caused to the property of the neighboring kibbutz Nir Eliyahu, Ehud Rabinovitz, *Raful: To Punish Qalqilya — Beat Them Once or Twice and It Will Be All Over*, MA'ARIV, June 14, 1990, at 8 (Hebrew). Rehavam Ze'evi called for, among other measures, the deportation of Palestinian "murderers and instigators" and their families, as well as the closure of all "instigating press." Alon, *supra*. Ariel Sharon called for the immediate deportation of hundreds of leaders of the *Intifada* and "other instigators." *Id.* He also suggested ordering soldiers to "shoot to kill" Molotov cocktail throwers, Roni Shaked, *Sharon: We Should Kill Anyone Who Throws a Molotov Cocktail*, YEDIOT AHRONOT, June 13, 1988, at 3 (Hebrew), and outlawing the Palestinian press and organizations that criticize Israel. "Outlaw Press and PLO Groups Which Criticize Us," HA'ARETZ, Jan. 27, 1988 (Hebrew). Avner Shaki called for deporting entire families, Alon, *supra*, reinstating capital punishment for Palestinian terrorists, and outlawing meetings between Palestinian residents of Israel and Palestinians from the Occupied Territories, describing such meetings as "spreading cancer," *Collective Punishment in Judea and Samaria Will Reduce the Rioting*, MA'ARIV, May 12, 1989, at 3 (Hebrew).

129. Itzhak Rabin expressed such criticism in his former capacity as Defense Minister. Akiva Eldar, *Rabin: Laws Enacted Under Begin Hinder the Intifada Battle*, HA'ARETZ, July 18, 1988, at 2 (Hebrew); Kenneth Kaplan, *The Military Has Exhausted Its Ideas*, JERUSALEM POST, Jan. 25, 1989.

130. The Justice Ministry reportedly blocked the request. Baruch Meiri, *Justice Ministry Officials: Won't Agree to Increasing Severity of Punishment*, MA'ARIV, June 23, 1989, at 2 (Hebrew).

131. 34(1) P.D. 1 (1979).

132. See NEGBI, *supra* note 104, at 71.

133. In the politically charged *Dweikat* decision, Justice Landau explained:

There is still a great fear that the court will appear as though it has abandoned its appropriate place and stooped down into the arena of public debate, and that its decision will be received by part of the public with applause and by the other part with emotional and total rejection. In this sense, I see myself here, as one upon whom has been imposed this duty, to rule on the basis of law in every matter properly brought before the court, for I know in advance that the general public will not look to the legal reasoning but rather only to the final conclusion, and the rightful place of the court as an institution may be harmed, beyond the debates upon which the public is divided. Yet what can we do? This is our role and this our duty as judges.

Court's demolition jurisprudence should therefore be understood against a background of an ongoing military struggle and a legal environment in which formal recognition of international law and principles of "natural justice" is strongly contested.

IV. THE ISRAELI SUPREME COURT ON HOME DEMOLITIONS

This part of the Article describes the rulings of the Israeli Supreme Court on the demolition practice. It examines the doctrine produced by the Court, the jurisprudence employed by the Court, and the influence of the Court's decisions on the Military Government's policy. The evolution of the case law can be broken down into three periods. Before 1979, demolitions were not reviewed by the Court. Between 1979 and July 1989, the demolition jurisprudence, based on the seminal cases of *Sakhawil*¹³⁴ and *Khamri*,¹³⁵ consistently allowed the practice to flourish. In the third and current phase, judicial uniformity has ruptured. Some judges have begun to find faults in specific demolition orders, and one newly appointed judge delivers fierce dissents. This mixed jurisprudence has resulted in the curtailment of the demolition practice.

A. *Demolitions in the Absence of Judicial Review*

Before 1979, no demolition order reached adjudication. The Military Government simply avoided the Court's scrutiny by executing demolitions overnight without any warning. The unprepared families were awakened by the army and given between thirty minutes and two hours to evacuate their homes and to recover whatever they could of their personal belongings. The demolition followed immediately. As a result, Palestinian homeowners had no way of learning about their impending fate and were thus unable to take their cases to the Court in time. Anticipating possible demolitions, families of apprehended offenders began to forestall demolition by submitting "preemptive" petitions for injunctions against such possible orders, without knowing whether they had actually been issued. In most cases, the Military Government responded that it did not intend to demolish the petitioners' homes.¹³⁶ The Military Government was apparently concerned that the Court might disapprove of the practice.¹³⁷

Dweikat v. Government of Israel, 34(1) P.D. 1, 4 (1979), *quoted in* AHARON BARAK, JUDICIAL DISCRETION 228 (Y. Kaufman trans., 1989).

134. *Sakhawil v. Military Commander of Judea and Samaria Region*, 34(1) P.D. 464 (1979) (English excerpt in 10 ISR. Y.B. HUM. RTS. 345 (1980)).

135. *Khamri v. Military Commander of Judea and Samaria Region*, 36(3) P.D. 439 (1982) (English excerpt in 17 ISR. Y.B. HUM. RTS. 314 (1987)).

136. *See, e.g., Danon v. Military Commander of Judea and Samaria Region*, HCJ 312/89 (1989) (unpublished); *Salameh v. Minister of Defense*, HCJ 353/86 (1986) (unpublished).

137. *See, e.g., PLAYFAIR, supra* note 69, at 26 (citing opinion of Lea Tsemel).

B. *Establishment and Expansion of the Demolition Doctrine*

The second phase began in 1979, with a two-page *per curiam* judgment in *Sakhawil v. Military Commander of Judea and Samaria Region*.¹³⁸ In this tersely worded ruling, the Court stamped the practice with legal approval and paved the way for hundreds of subsequent destructions and sealings. *Sakhawil* concerned an order to seal a room in the petitioner's house, located in the village of Abuyn near Ramallah. The room was allegedly used by the petitioner's son for storing explosives and for harboring a person responsible for a series of bomb attacks in Jerusalem. Three weeks before the Supreme Court hearing, the son was convicted by a military court and sentenced to five years' imprisonment.

The opinion introduced the central tenet of the demolition doctrine, that "local law" overrides international law:

Neither can we accept Mrs. Tsemel's arguments relying on the Geneva Convention. We have no need to rule on the question whether the respondent was obligated to act in accordance with the provisions of the Geneva Convention, for even if this had been the case, there is no contradiction between the provisions of the Convention . . . and the exercise of the authority vested in the respondent by statutory provisions that were in force at the time when the Judea and Samaria Region was under Jordanian rule, and that have remained in force in Judea and Samaria to this day.¹³⁹

In effect, this paragraph constitutes the Court's entire discussion of the legal justification for the demolition practice.

Despite the terse explanation, the ruling's implication is obvious. Although the Court did not explicate its decision, it is clear that it was applying its understanding of Article 64 of the Geneva Convention, which instructs the occupier to maintain local law.¹⁴⁰ Article 119 of the 1945 DERs, therefore, trumped the substantive provisions of the Hague and Geneva instruments. The Court thus failed to mention a series of pertinent humanitarian doctrines: the opinion made no reference to prohibitions on the confiscation or destruction of private property, to due process concerns arising from the issuance of demolition orders, or to the apparent violation of the prohibition on nonindividual punishment. While the decision gave cursory attention to the Geneva Convention, it completely ignored the Hague Regulations, which the Court had previously acknowledged as enforceable law.¹⁴¹ Interestingly, the Court failed to mention the second of the policy's traditional justifications,

138. 34(1) P.D. 464 (1979) (English excerpt in 10 ISR. Y.B. HUM. RTS. 345 (1980)).

139. *Sakhawil*, 34(1) P.D. at 464. The opinion appears to have been written by Shamgar. It is only natural that Shamgar, an acclaimed expert on belligerent occupation law and a specialist on IDF legal matters, would take the lead. The content of the decision is very similar to the themes that Shamgar presented on behalf of the Israeli government in 1971. See Shamgar, *Observance*, *supra* note 38, at 275-76; *Symposium*, *supra* note 39, at 380. Moreover, the style in which the decision was written strongly resembles that of Shamgar.

140. Geneva Convention, *supra* note 10, art. 64.

141. See *supra* text accompanying note 99.

presented by Shamgar in 1971 — that demolitions are justified because they are administered out of *military necessity*.¹⁴²

It is not surprising that the Military Government chose the *Sakhawil* case to establish the legality of the practice, since the particular circumstances rendered it a safe case to defend. This particular order had minimal effects: just one room, which had been directly used in the commission of the offense, was to be sealed, not destroyed. Furthermore, the petitioner's son had already been convicted in the Ramallah military court of the offense. The Supreme Court could thus have reasonably treated the Military Commander's decision as one founded upon facts proven in a court of law.

In a string of subsequent cases, the Court broadened the demolition doctrine. *Hamed v. Military Commander of Judea and Samaria Region*¹⁴³ relaxed the standard of evidence required for issuing demolition orders. While *Sakhawil* was decided after a military court convicted the offender, the order to seal the rooms in *Hamed* was based solely on pre-trial confessions obtained from the suspected offenders. The Court asserted that the Military Commander can exercise his powers under Article 119 whenever he "is satisfied" that the offense was committed. The Court was not concerned that the Military Commander's information was obtained from the offender in the course of his interrogation.

The Court dramatically expanded the doctrine in its fifth decision, *Khamri v. Military Commander of Judea and Samaria Region*.¹⁴⁴ *Khamri* dealt with orders to destroy the homes of two Palestinians suspected of stabbing a Jewish settler to death. The case marked the first time that the Military Government defended destroying, as opposed to sealing, homes;¹⁴⁵ it was also the first case in which the designated homes had not been implicated in the commission of the offense in any way.

In the decision to uphold the demolition orders, Justice Barak neither acknowledged that he was broadening the demolition doctrine nor articulated the reasons for doing so. Instead, he accepted the broadened practice as though it had always existed. The decision hinges on the principle that the Court's review is limited to the lawfulness of administrative actions and does not extend to their efficacy or wisdom. Barak recognized the conflicting interests and enumerated the factors and considerations on both sides of the

142. One possible explanation for the omission is that the premise of this justification had ceased to exist: in 1971, the army demolished only those homes that were directly involved in the commission of offenses; by 1979, the practice was applied primarily to residences in which offenders lived. The claim of *military necessity* is less convincing when applied to mere residency. See *infra* part V.C.1.

143. 35(3) P.D. 223 (1981) (English excerpt in 11 ISR. Y.B. HUM. RTS. 365 (1981)). In this case, the order was to seal one room in each of the homes of two people who admitted killing several Palestinians suspected of collaborating with the Military Government.

144. 36(3) P.D. 439 (1982) (English excerpt in 17 ISR. Y.B. HUM. RTS. 314 (1987)); see also *Khamamra v. Minister of Defense*, 36(2) P.D. 755 (1982).

145. While a considerable number of homes had previously been destroyed, no cases challenging the practice reached the Court.

dilemma, cautioning that the demolition of a home is "a harsh and severe measure, and that it should be applied only following strict investigation and consideration, and only in special circumstances."¹⁴⁶ Ultimately, however, he left the decision to the autonomous discretion of the Military Government, stating that due to the "extreme severity of the offenses . . . of more than one hundred stabs in cold blood," it was permissible for a "reasonable Military Commander to apply the drastic sanction of demolition."¹⁴⁷ The Court's actual ruling — upholding the orders — thus overshadowed its warning regarding the harshness of the measure.

The *Khamri* opinion also ruled that the "inhabitant" requirement of Article 119 is not limited to permanent or continuous residents. The offenders' parents had argued that their sons should not be considered "inhabitants," because they lived at home only during school vacations. In response, the Court introduced a notion of constructive residency: the mere fact that the sons are away from their parents' homes during the school year "does not prevent them from staying in, or being considered 'inhabitants' of, the homes of their parents during vacation periods." The decision emphasized that at the time of the murder, the offenders were staying at their parents' homes.¹⁴⁸ Similarly, the Court rejected an indirect attack on the collective character of the punishment. The petitioners claimed that the language of Article 119 should bar its application when only one of the house's residents committed the offense.¹⁴⁹ The Court stated that this proposition comports with neither the provision's language nor with its "underlying legislative policy."¹⁵⁰ While the Court often endorses the practice's purpose (deterrence) it rarely endorses the policy underlying Article 119 — the policy of the British Mandatory Government. The reference to the British legislator is an exception to one of the Court's usual jurisprudential mechanisms — that of decontextualizing Article 119 from the Israeli system and treating it as a command made by a foreign legislature in a different era. This approach was later criticized by Justice Heshin.¹⁵¹

Before *Khamri*, the practice of home demolitions had been restricted by the existence of judicial review. At least in those cases where the families reached the Court before the orders were carried out, the homes were likely to be subjected only to sealing. In cases where the houses had not been used directly to commit the offenses, the homeowners stood a fair chance of avoiding the predicament altogether. The *Khamri* precedent thus "lies about

146. *Khamri*, 36(3) P.D. at 443. This warning was not revived until *Turkeman v. Minister of Defense*, HCJ 5510/92 (1993) (unpublished).

147. *Khamri*, 36(3) P.D. at 444.

148. *Id.* at 441.

149. Article 119 uses the plural form. It refers to houses "the inhabitants or some of the inhabitants of which . . . have committed . . . any offense." See *supra* text accompanying notes 69 to 70.

150. *Khamri*, 36(3) P.D. at 442.

151. See *Al-Amrin v. Military Commander of Gaza Region*, HCJ 2722/92 (1992) (unpublished) (Heshin, J., dissenting).

like a loaded weapon;"¹⁵² it vests in the hands of the Military Government the power to destroy any building simply because an offender resided there. No other judgment has affected the demolition practice so dramatically. Since the *Khamri* ruling, most homes have been destroyed rather than sealed, and almost every home destroyed has been an offender's residence, not the site of a crime.

In subsequent cases the Court condoned the sealing of rented homes, despite the absence of any evidence connecting the landlords with the offenses committed by their tenants. The Court reasoned that because the purpose of Article 119 is deterrence, the exemption of rented homes would provide a loophole by enabling a person contemplating an offense to avoid the demolition punishment by moving into a rented house. This loophole, the Court explained, would defeat the objective of the policy.¹⁵³ The Court made no mention of the harm caused to the homeowners.

The Court further expanded its interpretation of Article 119 to permit the destruction of multi-apartment buildings. Typically, such structures house several nuclear families belonging to one extended family. For example, in *Qarabsa v. Minister of Defense*,¹⁵⁴ the Court upheld the destruction of a building comprising five living units, housing twenty-seven members of one extended family. The petitioner asked the Court to restrict the destruction to the particular unit in which the offender resided. In its one-sentence rejection of this proposal, the Court introduced the test of inseparability of "units of residence": "It has not been disputed that the [offender's] 'unit of residence' constitutes an inseparable part of the petitioner's home, and therefore we cannot accept the claim to limit the destruction."¹⁵⁵

Throughout this second phase of jurisprudence, the Court's decisions, almost without exception, projected neither criticism of the demolition practice nor any intent to restrict it.¹⁵⁶ This attitude allowed the practice to proliferate. The Court's legitimization and institutionalization of the practice transformed it into a routine, almost mundane exercise of legal power. Following this judicial sponsorship, the Military Government gradually stretched the policy until it became a tool that was at the same time harsh and

152. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

153. Justice Shamgar, the President of the Court, stated, "We conclude that Article 119 serves as a deterring punitive measure, and if the sanction will be precluded whenever the [terrorist] uses a rented apartment, the deterrent effect which is expected from the Article will be undermined." *Al Gamal v. Military Commander of Judea and Samaria Region*, HCJ 542/89 (1989) (unpublished); see also *Al Sheikh v. Minister of Defense*, HCJ 1056/89 (1990) (unpublished); *Lafruk v. Military Commander of Judea and Samaria Region*, HCJ 869/90 (1990) (unpublished).

154. HCJ 2665/90 (1990) (unpublished).

155. *Id.* at 3.

156. During this period, *Jabarin* was the only case in which the Court substantively overruled a demolition order, albeit marginally. *Hamdi Jabarin* was convicted of committing "serious security offenses" and was sentenced to 18 years imprisonment. The Military Government decided to seal two rooms and the kitchen of the house which *Jabarin* shared with 23 members of his extended family. Without explanation, the Court authorized the sealing of the two rooms but held that sealing the kitchen was indefensible. *Jabarin v. Minister of Defense*, HCJ 443/86 & 515/86 (1987) (unpublished).

easily executed. As the *Intifada* continued and Israel appeared to lose control, the Military Government relied more and more on demolitions. By the middle of 1989, however, the policy had become too pervasive for the Court.

C. *Mixed Jurisprudence and the Chilling Effect*

The third jurisprudential phase began with the Military Government's defeat in *Association for Civil Rights in Israel (ACRI) v. Commander of Central Command*.¹⁵⁷ Petitioning on its own behalf, ACRI requested the Court to obligate the Military Government to notify in advance homeowners whose houses were to be demolished and to afford them the opportunity to appeal demolition orders. Until then, most demolitions were still being executed in the middle of the night, with no possibility for any sort of appeal.¹⁵⁸ ACRI's argument rested primarily on the "right to be heard," a principle firmly embedded in Israeli administrative law and similar to the American procedural due process requirement. The Military Government insisted that to achieve the desired deterrent effect, it was necessary to execute demolition orders swiftly, without granting owners the right to appeal.¹⁵⁹

In its decision, the Court reaffirmed the validity of Article 119, but decided in favor of the petitioners on the procedural question. The Court ordered that before demolishing homes, the Military Government must give families notice and enable them to initiate an administrative proceeding before the Military Commanders and seek the Supreme Court's review of demolition orders. The ruling, however, permitted the sealing of homes without prior notice in urgent cases.¹⁶⁰ The Court has reviewed almost all demolition orders since this decision.

Slowing down the demolition process has opened a channel for communication between families and the Military Government and has facilitated alternative resolutions. At least twenty-four cases have been settled out of court, many through creative arrangements limiting the demolition to only part of the house.¹⁶¹ In some cases, the government has rescinded demolition

157. 43(2) P.D. 529 (1989). The Association for Civil Rights in Israel is a non-profit organization devoted to the promotion of civil liberties and human rights in Israel and in the regions under Israeli rule. For an excellent analysis of *ACRI* and the subsequent *ACRI v. Commander of Southern Command*, 44(4) P.D. 626 (1990), see Bracha, *supra* note 117, at 75-81.

158. Such was the practice in the West Bank; traditionally, however, the Military Commander of the Gaza region notified owners of demolition orders some days prior to their execution.

159. During oral argument Justice Shamgar, the President of the Court, suggested a compromise that would have barred demolitions without prior notice, but permitted sealings without notice in extreme cases. ACRI accepted the suggestion, but the government rejected it.

160. *ACRI*, 43(2) P.D. at 541.

161. *E.g.*, *Abu Sarkhan v. Military Commander*, HCJ 3274/90 (1990) (unpublished) (limiting order to only part of home); *Al Aga v. Military Commander of Gaza Region*, HCJ 141/90 (1990) (unpublished) (discussing out of court settlement to seal rooms instead of destroying house); *Awis v. Military Commander*, HCJ 3923/90 (1990) (unpublished); *Hussein v. Legal Advisor in Judea and Samaria Region*, HCJ 3702/90 (1990) (unpublished) (allowing family to choose rooms to be sealed); *Khalil v. Minister of Defense*, HCJ 431/90 (1990) (unpublished); *Qafisheh v. Minister of Defense*, HCJ 5053/90 (1990)

orders altogether,¹⁶² and in others it has settled for sealing instead of destruction.¹⁶³ The new procedure has mitigated somewhat the unfairness of the families' predicament. Rather than demolition coming as a total surprise in the middle of the night, families have had a chance to prepare themselves, physically and emotionally, for the demolition. The procedural arrangement has also diminished the possibility that the Military Government will demolish the wrong house because of mistaken identification.¹⁶⁴ Furthermore, it has imposed a "cooling down" period that prevents Military Commanders from making hasty decisions in the midst of turbulent and distressing events.¹⁶⁵

Since the *ACRI* decision, the Court has split into three factions.¹⁶⁶ A majority of the Court has adhered to the previous decisions.¹⁶⁷ Consequently, the lion's share of demolition orders have been upheld with little resistance.

Three or four justices have adopted a second approach. These justices are critical of the practice, but refrain from confronting the mainstream view directly. They are obviously aware of the difficulties entailed in condemning the practice outright, and are probably concerned about embarrassing the Court's majority. Furthermore, a direct reproach would be inconsistent with the opinions that these justices themselves have previously delivered. One method chosen by this second group of justices has been to censure demolition orders on the basis of their particular circumstances. They have overruled two demolition orders with judgments that indirectly express judicial discontent with the practice. In *Nassman v. Military Commander of Gaza Region*,¹⁶⁸ the Court remanded the demolition order for reconsideration on the ground that it contained factual errors. In *Nimer v. Military Commander of Judea and Samaria Region*,¹⁶⁹ the Court overruled the order after finding that the

(unpublished) (discussing out of court settlement to seal rooms instead of destroying house); Toama v. Minister of Defense, HCJ 430/90 (1990) (unpublished) (discussing sealing only one apartment and postponing execution until after holy month of Ramadan); Daher v. Minister of Defense, HCJ 863/88 (1989) (unpublished); Mushtaha v. Minister of Defense, HCJ 665/89 (1989) (unpublished) (limiting sealing to one-half of house, on condition that family help seal).

162. *E.g.*, Al-Qadri v. Military Commander of Judea and Samaria, HCJ 598/91 (1991) (unpublished); Marabah v. Military Commander of Judea and Samaria, HCJ 1505/91 (1991) (unpublished).

163. *E.g.*, Al Sayis v. Military Commander of Judea and Samaria, HCJ 3794/90 (1991) (unpublished); Qaraja v. Military Commander of West Bank, HCJ 3921/90 (1990) (unpublished); Jit v. Military Commander of Judea and Samaria, HCJ 120/89 & 121/89 (1989) (unpublished).

164. Such a mistake occurred in the village of Beita in April of 1988. The Military Government admitted the error and compensated the homeowner. Reuven Pedatzur, *Beita Resident Whose House Was Accidently Destroyed to Get 35,330 N.I.S.*, HA'ARETZ, June 5, 1988 (Hebrew). Gazit admits that demolition is an "arbitrary act without a trial and without the possibilities of investigating thoroughly," and that "we are not angels. Here and there a mistake is possible." COHEN, *supra* note 69, at 99.

165. *See supra* note 47.

166. The Israeli Supreme Court does not sit *en banc*; cases are normally adjudicated by only three of the twelve judges. While the Court does adhere to the *stare decisis* principle, judicial outcomes are still somewhat contingent on the personal opinions of the judges assigned to cases.

167. One exception is Justice Barak's recent decision in *Turkeman v. Minister of Defense*, HCJ 5510/92 (1993) (unpublished).

168. 44(2) P.D. 601 (1990).

169. HCJ 299/90 (1991) (unpublished).

offender did not in fact reside in the house that was to be demolished. Both judgments, written by Justice Or, with the Court's Deputy President, Menachem Elon, concurring, are inconsistent with the prevailing doctrine.¹⁷⁰

Another method chosen by these judges has been to criticize the practice in *obiter dicta*. In *Caracra v. Military Commander of Judea and Samaria Region*,¹⁷¹ the Court upheld an order to seal a rented home, but used an unfamiliar judicial tone. Justice Or raised serious doubts about the appropriateness of applying Article 119 to rented homes.¹⁷² More important, Justice Shlomo Levine suggested that the time may have come for the Court to take a more critical approach toward the demolition policy.¹⁷³ True, the Court had spoken of the need to limit the practice as early as *Khamri*,¹⁷⁴ but it had always left discretion in the hands of the Military Commanders. *Caracra* marked the first time that the Court sent the Military Government a clear message that it might take the initiative and begin to restrict the scope of the practice.

The third judicial approach emerged with the appointment of Justice Mishael Heshin in January 1991. Heshin has confronted the demolition doctrine diametrically and forcefully, although he has fallen short of calling for an outright ban on the practice. He revealed his antagonism toward the practice in his very first demolition case, *Khizran v. Military Commander of Judea and Samaria Region*.¹⁷⁵ *Khizran* dealt with an order to destroy the homes of two Palestinians accused of murdering a seventy-six-year-old Jewish gardener in a small town near Netanya. Heshin's principal argument was that the demolition of an entire house is prohibited, because it inflicts punishment on some members of the offender's family. He challenged the prevailing doctrine, which permitted the demolition of an entire house as long as the offender's room could be considered "inseparable" from the rest of the

170. In *Nassman*, the order was based on three facts. The Court denied the order because it found that only two of the three facts were correct. However, under the prevailing doctrine, the remaining two facts would have been sufficient to justify the destruction. Furthermore, the Court seemed almost too eager to hear the case. It expedited the discussion by hearing the arguments "as if an *order nisi* was issued." *Nassman*, 44(2) P.D. at 601.

In *Nimer*, the Military Commander ordered the destruction of the house of the offender's uncle in the West Bank village of Betuniya. Although the offender had led his interrogators to his uncle's house after his apprehension, and his personal belongings were found there, the Court ruled that the offender should be considered an "inhabitant" of his father's home in the Kalandia refugee camp. Justice Or could have easily adhered to the Court's previously expressed broad interpretation of the "inhabitant" provision. His preference for a narrow interpretation is conspicuous. *Nimer*, slip op. at 5.

171. HCJ 2630/90 (1991) (unpublished).

172. Acknowledging the injustice inflicted on owners of rented homes, Justice Or wrote, "[T]he Order is expected to cause severe harm to the buildings' owners, occasionally with no fault on their part, while the harm caused to those who committed the acts of terror — depending on their rights in the property — could be marginal." *Id.* at 4.

173. Justice Shlomo Levine stated, "I am inclined to believe that in light of the severe effect of applying Article 119 . . . the Court ought to limit its use and interpret it narrowly." *Id.* at 3.

174. See *supra* text accompanying note 146.

175. 46(2) P.D. 151 (1992).

house.¹⁷⁶ Heshin lashed out at the Court's formalistic adherence to this legal construct:¹⁷⁷

What is the normative significance — or what should be the significance — of the fact that [the house has] only one roof and that the bathroom is commonly shared? The term "unit of residence" has not been forced upon us; it is the product of our deliberation — viewed within the realm of a particular theory and designated for a particular purpose. . . . We should not concern ourselves with architecture, civil-engineering or graphic design . . . but with establishing *appropriate norms* within the confines of law, regarding the question of what should be destroyed and what should not be destroyed.¹⁷⁸

Heshin concluded that the Military Government could not seal or destroy entire houses. The *Khizran* dissent represents a turning point in the demolition jurisprudence, marking the first time that a Supreme Court justice has declared the practice, as applied, to be unlawful.

The *Khizran* dissent was soon followed by *Turkeman v. Minister of Defense*,¹⁷⁹ which constitutes the most significant intervention in the demolition policy thus far. This unanimous decision, written by Justice Barak, dealt with an order to destroy the house of a Palestinian who had shot and killed a Jewish settler in the West Bank town of Jenin. The offender lived with his mother and eight siblings, as well as with the wife and child of one of his brothers. Most of this short opinion follows the Court's usual affirmation of the power to apply Article 119, but the tone changes in the last two paragraphs. Barak revisited the conflict of interests he had presented in *Khamri*,¹⁸⁰ but evaluated the interests quite differently. In *Khamri*, Barak had found that the severity of the offense rendered the destruction orders "reasonable," regardless of the measure's impact on the offender's relatives; in *Turkeman*, however, the measure's effect on family members took precedence.¹⁸¹ Barak introduced a test of "proportionality": the Military Commander must take into consideration not only the illicit action that is being deterred, but also "the harm caused to those who sustain the deterrent measure."¹⁸² Barak stated that destroying the entire house as a response to Mohammed Turkeman's act of murder would inflict harm on the family of his older brother, and thus would amount to "a disproportionate — and therefore unreasonable — measure."¹⁸³ The Court enjoined the destruction of the entire house, but allowed the sealing of two rooms.

176. See, e.g., Qarabsa v. Minister of Defense, HCJ 2665/90 (1990) (unpublished).

177. In *Khizran*, the respondent conceded that each of the homes "served several families independently," but insisted that because they each had a "common bathroom and kitchen, and are covered by a single roof . . . the entire apartment should be regarded as a 'single unit of residence' worthy of demolition." *Khizran*, 46(2) P.D. at 159.

178. *Khizran*, 46(2) P.D. at 160 (Heshin, J., dissenting).

179. HCJ 5510/92 (1993) (unpublished).

180. See *supra* text accompanying notes 146 to 147.

181. It is common knowledge that many Palestinian homes in the Occupied Territories contain more than one nuclear family. See *infra* text accompanying notes 273 to 274.

182. *Turkeman*, slip op. at 3.

183. *Id.* at 4.

The *Turkeman* decision, more than any other case, has thrown the demolition doctrine into disarray. In effect, it has virtually prohibited the destruction of houses and has limited sealing to the rooms occupied by the offenders and their nuclear families. The *Turkeman* decision is intriguing because it represents a distinct departure from the ninety-three previous cases — including twenty-four cases in which Barak participated — whose factual bases were virtually identical. Just as Justice Barak did not acknowledge or explain his deviation from precedents when he broadened the demolition doctrine in *Khamri*,¹⁸⁴ he refrained from doing so when he narrowed the doctrine. He leaves the reader ignorant as to why, given the backdrop of a line of consistent precedents, Turkeman's home was spared destruction.

The *Turkeman* decision is remarkable in that it has managed to disrupt the demolition doctrine without directly challenging the Court's precedent or openly criticizing the Military Government's conduct. This seems to be what it was intended to do. Indeed, the decision's evasive character and the stealth with which it was handed down have apparently facilitated its acceptance and dampened the reaction of the political right and the security authorities.¹⁸⁵ Given the other justices' high esteem for Barak, and in light of past experience, one can expect that the rest of the Court will eventually accept this opinion.¹⁸⁶ Significantly, nowhere in the *Khizran* and *Turkeman* opinions did Justices Heshin or Barak refer to international law. Heshin mentioned the prohibition against collective punishment, but treated it as a general principle of law, while Barak's analysis was based on principles of Israeli administrative law.

Isolating and ascertaining the exact effect of a court's decisions on the executive branch's behavior is difficult; nevertheless, it seems that the Israeli Supreme Court's output during the third jurisprudential phase has inhibited the demolition practice. The decline in the incidence of demolitions after *ACRI* is striking.¹⁸⁷ Judicial review of all demolition orders has provided those

184. See *supra* text accompanying notes 144 to 152.

185. It is significant that the *Turkeman* case was argued just four days after *ACRI v. Minister of Defense*, H.C.J. 5973/92 (1993) (unpublished), which upheld the bitterly contested expulsion orders of 415 alleged Hamas and Islamic Jihad activists to Lebanon. The Rabin government seemed to acknowledge and appreciate the judiciary's support in upholding the deportation orders in the face of both internal and international criticism. In the tumult that followed, the *Turkeman* ruling (handed down two weeks later) was hardly noticed. For a criticism of the deportation decision, see Eyal Benvenisti, *N'garesh V'nishmah* [*First Deport Then Listen*], 2 MISHPAT U'MIMSHAL [LAW AND GOVERNMENT] 44 (1993) (Hebrew).

186. Neither of the two justices who joined Barak's opinion, Justices Maltz and Matza, had previously expressed any criticism of the practice. For further discussion of the *Khizran* and *Turkeman* decisions, see *infra* text accompanying notes 339 to 345.

187. In the three months preceding the *ACRI* decision, 63 homes were destroyed, whereas in the three months following it, 17 homes were destroyed. This represents a decrease of 73%. Looking at the longer term, in the 12 months preceding the *ACRI* decision, 191 homes were destroyed, whereas in the 36 months following it, 171 homes were destroyed. This represents an annual decrease of 69%. A decrease in the number of sealings and a further decrease in the number of destructions followed *Nassman v. Military Commander of Gaza Region*, 44(2) P.D. 601 (1990), and *Nimer v. Military Commander of Judea and Samaria Region*, H.C.J. 299/90 (1991) (unpublished). See B'TSELEM, VIOLATIONS, *supra* note

justices who hold views critical of the practice ample opportunity to express their disapproval. Although none of the recent opinions has gone so far as to invalidate Article 119 altogether, the importance of these judgments should not be underestimated. Their power lies primarily in the Military Government's fear of being censured. The Military Government displays deep concern about its image as a law-abiding branch of government — an image that relies heavily on the Court's rulings. It values its legitimacy more than the demolition of any one home, and perhaps even more than the entire policy. With four unfavorably disposed justices on the bench, jeopardizing its legitimacy through continued reliance on the demolition practice would simply be unwise.

D. *Demolition Jurisprudence Analyzed*

The demolition jurisprudence of the Court is based on its conception of the political arrangement underlying Israel's rule over the Occupied Territories. This conception views the Military Government as possessing broad discretion within the spheres of power vested in it by local and international law.¹⁸⁸ Within these spheres, the rights of Palestinians are limited to those explicitly guaranteed by law, and only to the extent that they are not perceived by the Military Government as a security threat. Palestinians may possess other rights, outside of the Military Government's explicit sphere of power. The Military Government has less authority to interfere with these rights. As a result, judicial resolutions are rarely a product of the weighing and balancing of conflicting interests, but rather of positioning the dispute either within or outside the spheres of governmental authority.

The Court views the home demolition practice as being squarely within the Military Government's sphere of authority. The Court has therefore interpreted Article 119 expansively, skirting various challenges to the practice based on doctrines of international law. Two additional aspects of the demolition case law are conspicuous: cursory discussions, which allow but minimal attention to contesting claims, and attempts by the Court to palliate the harshness of the measure. These three characteristics of the demolition jurisprudence are discussed below.

1. *Expansive Interpretation of Article 119*

The Court's view of the Military Government's absolute powers in the law enforcement sphere has led it to interpret Article 119 of the 1945 DERs

26 (containing monthly tabulations of destructions and sealings).

188. Duncan Kennedy describes a similar type of judicial consciousness that once dominated American legal thought. See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & Soc. 3, 4-6 (1980).

expansively. It has done so through formalistic arguments presented in a conclusory rather than explanatory manner, arguments that have immunized the practice from moral or legal scrutiny. It has also relied heavily on *stare decisis*, thereby diminishing the possibility of transforming the doctrine.¹⁸⁹ The case law on demolitions consists primarily of mechanical, repetitious, and almost uniform decisions, yielding only two dissents to date, both by the same author.¹⁹⁰ The Court's predominant operational mode is one of deference to the Military Commanders. The deference is often buttressed by expressions of appreciation and respect for the Military Government's interest in law enforcement.¹⁹¹ The judicial inquiry begins and ends as soon as the Court confirms that Article 119 confers the authority in question to the government. Most decisions turn on a laconic statement that because of the severity of the offenses, the Court finds no reason to interfere with the Military Commander's decision.¹⁹² The Court occasionally goes beyond its habitual deference and takes an affirmative stand in support of the Military Government.¹⁹³

189. The approach the Court has taken in these cases can be described as that of "legalism," which Judith Shklar defines as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." JUDITH SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* 1 (1986).

190. *Al-Amrin v. Military Commander of Gaza Regions*, 46(3) P.D. 693 (1992) (Heshin, J., dissenting); *Khizran v. Military Commander of Judea and Samaria Region*, 46(2) P.D. 150 (1992) (Heshin, J., dissenting).

191. In *ACRI*, for example, Justice Shamgar stated:

The commander of the area carries the responsibility for the maintenance of security and public order in the region under his command. His duties include ensuring the safety of the IDF forces and of the civil administration functionaries, and maintaining lines of transportation (see Article 64 of Geneva Convention). He must ensure the proper and effective implementation of the criminal law, and prevent criminality and anarchy. In performing an act of violence against the military forces, a person commits an offense and is thus liable to be tried in court and to undergo the imposition of any sanction permitted by the local law or the security legislation (see also Sir H. Lauterpacht, *The Law of War on Land*, Part III of the *Manual of Military Law* (London 1958) 35-36).

ACRI v. Commander of Central Command, 43(2) P.D. 529, 539 (1989).

192. See, e.g., *Calbani v. Commander of Central Command*, HCJ 986/89, slip op. at 3 (1990) (unpublished); *Abu Al'an v. Minister of Defense*, 37(2) P.D. 169, 172 (1983); *Khamri v. Military Commander of Judea and Samaria Region*, 36(3) P.D. 439, 444 (1982) (Barak, J.); see also *Batash v. Military Governor of Gaza*, HCJ 179/89, slip op. at 3 (1989) (unpublished). As David Kretzmer points out, this approach is inconsistent with the Court's traditional jurisprudence. First, it defies the restrictive interpretation normally applied to governmental actions that infringe on "fundamental rights." Second, the judgments lack any attempt to present, weigh, and balance the Palestinians' competing interests. Such an endeavor, Kretzmer explains, requires more than just examining the severity of the offenses. It would entail paying due regard to whether the families were involved in the offense; the extent of harm inflicted on the families; the proportionality between the demolitions and the government's objective; and the availability of alternative means. David Kretzmer, *Judicial Review of the Demolition and Sealing of Homes in the Occupied Territories*, in *THE KLINGHOFFER BOOK ON PUBLIC LAW* 305, 347-55 (1993) (Hebrew). Kretzmer's compelling critique of the demolition policy is the first critical analysis of the demolition policy to be published in Hebrew.

193. E.g., *Wahadan v. Minister of Defense*, HCJ 348/90 (1990) (unpublished); *Smaana v. Military Commander of Judea and Samaria Region*, HCJ 824/88 (1988) (unpublished); see also Kretzmer, *supra* note 192, at 345-47.

The Court treats Article 119 as a fundamental norm that trumps all others and interprets it in a way that maximizes its effectiveness. The Court has ruled that demolitions are not contingent on prior convictions, because Article 119 requires only that the Military Commander be "satisfied" that an offense has been committed;¹⁹⁴ that homes are not exempted even when some of their inhabitants are innocent;¹⁹⁵ that homes may be demolished for actions of children who do not live there on a regular basis,¹⁹⁶ and for actions of those who have not yet been apprehended;¹⁹⁷ that rented properties are not exempted;¹⁹⁸ and that "multi-unit" buildings may be demolished as long as the offender's "unit" is considered an "inseparable part" of the building.¹⁹⁹ The Court's treatment of Article 119 is particularly noteworthy when compared to the lack of respect that the 1945 DERs generally command.²⁰⁰

2. *Cursory Discussions*

As suggested above in the discussion of deferential formalism, the Court's demolition jurisprudence has developed in cursory opinions lacking any substantial reasoning. The Court heard the seminal *Sakhawil* case without awarding an *order nisi*.²⁰¹ The legal debate was thus based on limited arguments and terse briefs: the petition was one page long, and the state attorney's response consisted of a two-page statement, dated and presumably submitted one day before the hearing. The Court wrote and delivered its

194. *Jaber v. Commander of Central Command*, 41(2) P.D. 522, 524-25 (1987) (English excerpt in 18 ISR. Y.B. HUM. RTS. 252 (1988)); *Khamri v. Military Commander of Judea and Samaria Region*, 36(3) P.D. 439, 442 (1982) (English excerpt in 17 ISR. Y.B. HUM. RTS. 314 (1987)); *Hamed v. Military Commander of Judea and Samaria Region*, 35(3) P.D. 223, 224 (1981) (English excerpt in 11 ISR. Y.B. HUM. RTS. 365 (1981)).

195. *Tamimi v. Military Commander of West Bank*, HCJ 454/86 (1986) (Dov Levine, J.) (unpublished).

196. *Khamri*, 36(3) P.D. at 442; see also *supra* text accompanying notes 148 to 150.

197. *Shahin v. Minister of Defense*, HCJ 970/89 (1989) (unpublished).

198. *Lafrenkh v. Military Commander of Judea and Samaria Region*, HCJ 869/90 (1990) (unpublished); *Al Gamal v. Military Commander of Judea and Samaria Region*, HCJ 542/89 (1989) (unpublished). Along the same lines, a military official justified the demolition of homes of offenders who had not yet been apprehended to "prove that fleeing and hiding does not grant them immunity from home demolition." B'TSELEM, 1989 DEMOLITION REPORT, *supra* note 25, at 27.

199. *Qarabsa v. Minister of Defense*, HCJ 2665/90, slip op. at 3 (1990) (unpublished).

200. The Court has described one of the 1945 DERs as a "draconian [regulation] promulgated by a colonial regime." *Al Asad v. Minister of Interior*, 34(1) P.D. 505, 513 (1980) (Landau, J.); see also *Zamir*, *supra* note 115, at 385-92. Likewise, Draper shows little respect for the 1945 DERs; he protests that "they might be good regulations to decant into the dust bin. They have very little merit. They are the type of regulations that came from the Boer War, and probably from the Crimea War before that." *Symposium*, *supra* note 39, at 368.

201. *Sakhawil v. Military Commander of Judea and Samaria Region*, 34(1) P.D. 464 (1979) (English excerpt in 10 ISR. Y.B. HUM. RTS. 345 (1980)). An *order nisi* is a court order similar to a "show cause order." According to High Court of Justice procedure, all petitions are submitted to a single justice who decides whether or not to issue the *order nisi*. The petition is then argued before a panel of three justices (with or without the *order nisi*). If the initial justice did not award an *order nisi*, the litigants need not submit full briefs. The respondent is also not required to submit affidavits to the panel, although the state often submits them nonetheless. In *Sakhawil* the state did not submit affidavits to the Court.

two-page decision on the same day as the hearing. The opinion is extremely short and its language ambiguous; the Court pronounced its conclusions without attempting to justify them. Only the outcome was clear: the demolition practice had been declared legal.²⁰² Most opinions in home demolition cases are exceptionally short. Some contain no more than one paragraph,²⁰³ others are just two or three pages long. As in *Sakhawil*, the Court writes and delivers many decisions on the same day as the hearing.

Most disturbing, the Court does not always discuss all of the arguments presented by the petitioners. In *Sakhawil*, for example, it stated that it was rejecting the "arguments relying on the Geneva Convention,"²⁰⁴ without specifying the arguments made, and without mentioning the Hague Regulations at all. Similarly, in *Jaber*,²⁰⁵ the Court referred to only one of the six provisions of international law that the petitioner cited.²⁰⁶

This trend of not discussing all of the arguments submitted is especially troubling in Israel, because litigants' briefs are not published and are generally inaccessible. Moreover, not all of the Supreme Court's decisions are published. The *Piskei Din* series is edited and issued by the publishing house of the Israeli Bar Association. Only decisions that, in the opinion of the association's editorial board, contain meaningful judicial discussions or yield significant results are made public. Only twenty-three of the home demolition cases have been published, and the others are very difficult to obtain.²⁰⁷ The justices, therefore, have been not only the official narrators of the facts and the editors of the litigants' arguments, but also, in effect, the guardians and censors of their own work. The more terse the opinion and the less meaning-

202. The Court did not grant *orders nisi* in the eighteen cases that followed *Sakhawil*, so that by the time it awarded the first *order nisi* in *Zaid v. Military Commander of Judea and Samaria Region*, HCJ 788/86 (1987) (unpublished), the *Sakhawil* precedent had become solid law. It is not surprising that in the sixth case, for example, the petitioner's counsel conceded the authority to demolish homes in principle, and limited his arguments to the particular circumstances of the case. *Musslakh v. Minister of Defense*, 36(4) P.D. 610, 612 (1982); see also *Jabarin v. Minister of Defense*, HCJ 443/86 & 515/86 (1987) (unpublished).

203. E.g., *Shawahin v. Minister of Defense*, HCJ 619/90 (1990) (unpublished); *Dar Zeid v. Military Commander of Judea and Samaria Region*, HCJ 451/86, 47/87 (1987) (unpublished).

204. *Sakhawil*, 34 (1) P.D. at 464.

205. *Jaber v. Commander of Central Command*, 41(2) P.D. 522 (1987) (English excerpt in 18 ISR. Y.B. HUM. RTS. 252 (1988)).

206. See *supra* notes 9 to 12 and accompanying text. Likewise in *Jabri*, the petitioner claimed that destroying his house would amount to punishing the innocent, since he had no knowledge of the actions of his 22-year-old son and was not responsible for his adult son's behavior. The Court simply ignored the argument, stating, "It is our opinion that under the circumstances and due to the severe actions of the petitioner's son, the Military Commander's decision to issue the order of confiscation and destruction was reasonable. It has already been decided that certain situations warrant the application of measures to deter others from participating in hostile terrorist activities with the purpose of launching assaults of the kind imputed to [the petitioner's son]." *Jabri v. Minister of Defense*, HCJ 1786/90 (1990) (unpublished).

207. At the request of ACRI, the Ministry of Justice agreed to make available its collection of unpublished home demolition cases. However, a similar request concerning the estimated 40 unpublished cases on the issue of family unification was denied.

ful the legal debate, the less likely it is that the decision has been published.²⁰⁸

3. *Palliating the Harshness of the Measure*

The third characteristic of the demolition jurisprudence is the justices' efforts to palliate the harshness of demolitions. Most decisions are written in a disconnected manner. The justices refer to the demolition act with a dry, dispassionate, and detached rhetoric. They occasionally incorporate apologetic statements,²⁰⁹ and on rare occasion express misgivings about the practice,²¹⁰ but these exert no real influence on the legal outcomes. In contrast, the language used when addressing the IDF is resolutely attentive.²¹¹ At times the Court creates the impression that the government is almost compelled to perform the demolitions.²¹² It refers repeatedly to the fact that the 1945 DERs are creations of the British Mandate and remnants of Jordanian rule.²¹³ It also emphasizes the Military Government's obligation under international law to apply local laws. It is as if a foreign army, not the IDF, is performing the demolitions.

The justices rarely display any qualms about the practice that they legitimate or about the jurisprudence that they employ. Their opinions evidence no hesitation or implied criticism, no trace of self-doubt. The rulings do not reflect any of the controversy surrounding the use of the sanction; it is as if the justices have heard nothing of the vigorous public debate.²¹⁴ Nor do they disclose any concern about relying on pre-conviction factual assertions, most of which are obtained by less-than-benign methods of interrogation.²¹⁵ The justices do not appear to be troubled even in those

208. A computer database set up in 1991 will eventually allow access to all of the Court's decisions.

209. *See, e.g.*, Bakhri v. Military Commander of Judea and Samaria Region, HCJ 610/89, slip op. at 5 (1989) (unpublished) ("The suffering inflicted on the families is extremely disheartening."); *see also* Sanuar v. Military Commander of Gaza Region, 43(2) P.D. 821, 824 (1989); Abu Al'an v. Minister of Defense, 37(2) P.D. 169, 172 (1983).

210. Justice Bach, in a rare display of pathos in his majority opinion in *Al Amrin v. Military Commander of Gaza Region* stated, "I am certain that exercising the [demolition] measure does not bring pleasure to those who are vested with the authority to exercise it, and surely nobody would lament it if the amelioration of the state's security situation . . . will some day lead the legislature to deem this measure unnecessary." Justice Bach, nonetheless, upheld the destruction of the entire house over the dissent of Justice Heshin. 46(3) P.D. 693, 699 (1992).

211. *See supra* text accompanying note 191.

212. *See, e.g.*, Ajrab v. Minister of Defense, HCJ 4616/91 (1991) (unpublished).

213. *See, e.g.*, Hamed v. Military Commander of Judea and Samaria Region, 35(3) P.D. 223, 224 (1981); Jaber v. Commander of Central Command, 41(2) P.D. 522, 525-26 (1987).

214. *See supra* text accompanying notes 49 to 66.

215. One should view the practice of basing demolitions on admissions obtained through interrogation in light of the force used during interrogation by the General Security Services (GSS). A commission headed by former Supreme Court President Moshe Landau examined the GSS's methods of interrogation, and found that the GSS had routinely resorted to physical force to extract information from suspects. Despite its harsh condemnation of the GSS's practices, the Commission concluded that "non-violent psychological pressure through a vigorous and extensive interrogation," is justifiable, and "when [this does] not attain [its] purpose, the exertion of a moderate measure of physical pressure cannot be avoided."

cases where the evidence on which the demolition orders are based is concealed from the petitioners throughout the proceedings.²¹⁶

What is particularly striking, however, is how the justices ignore the consequences of their decisions for the people involved. The opinions refer to Palestinian homes as abstract objects devoid of any personal, economic, cultural, or political significance. They treat demolitions as a neutral exercise of legal powers bringing about no trauma, homelessness, or humiliation. We see occasional attempts to pass the moral responsibility onto the offenders themselves, with the Court emphasizing that their own actions bring hardship onto their families.²¹⁷ Disregarding the Palestinian predicament is made easier — and seemingly morally justified — by the explicit description of the offenses for which the demolition punishment is levied. The Court often exposes the reader to graphic portrayals of repulsive crimes committed by Palestinians with detailed accounts of stabbings,²¹⁸ beatings,²¹⁹ torture and beheading,²²⁰ and strangulations.²²¹

On the other hand, the Court obscures the harm inflicted by the Military Government. The opinions tell the reader nothing about those who are rendered homeless — not their names, ages, or relationship to the offender. We do not know whether they include elderly, chronically ill, or disabled people, nor whether they have a place to go. It was not until Justice Heshin's *Khizran* dissent that the Palestinian predicament was acknowledged by any

The English version of the report is excerpted in 23 ISR. L. REV. 146 (1989). For a powerful critique of the use of force and a disquisition on the danger of extracting erroneous admissions, see Mordechai Kremnitzer, *The Landau Commission Report — Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216, 257 (1989).

The GSS has recently announced the introduction of more restrictive regulations on the application of physical pressure. It stated that only specified means of force are permitted, and that their application is limited to the investigation of serious crimes that are based on substantial evidence. It also stated that physical pressure may not be used in order to "humiliate, hurt, or torture" suspects, and that deprivation of food or drink, exposure to heat or cold, and deprivation of access to a lavatory are explicitly prohibited. The procedure itself, however, remains confidential. Dalia Schori, *GSS Head to HCJ: New Interrogation Policy Implemented*, HA'ARETZ, April 27, 1993, at 4; *Israel Rethinks Interrogation of Arabs*, N.Y. TIMES, Aug. 14, 1993, at 3. The GSS announcement, which was made in response to a petition to the Supreme Court by the Public Committee Against Torture in Israel, comes in the wake of repeated complaints of physical abuse during interrogation. See B'TSELEM, *THE INTERROGATION OF PALESTINIANS DURING THE INTIFADA: ILL-TREATMENT, "MODERATE PHYSICAL PRESSURE" OR TORTURE?* (1991); AMNESTY INTERNATIONAL, *ISRAEL AND THE OCCUPIED TERRITORIES: THE MILITARY JUSTICE SYSTEM IN THE OCCUPIED TERRITORIES: DETENTION, INTERROGATION AND TRIAL PROCEDURES 45-73* (1991).

216. This occurs when the state refuses to disclose the evidence upon which the demolition decision was made. In such cases the Minister of Defense issues a Certificate of Privileged Evidence. The government employs this procedure when it fears that disclosure will expose the identity of informants or the surveillance techniques used to obtain the evidence. See *Caracra v. Military Commander of Judea and Samaria Region*, HCJ 2630/90 (1991) (unpublished); *Shaqir v. Minister of Defense*, HCJ 532/89 (1989) (unpublished). For a debate and criticism of this practice, see Zamir, *supra* note 115, at 397-401.

217. *Shoukeri v. Minister of Defense*, HCJ 798/89 (1989) (unpublished); see also *Dajlis v. Military Commander of Judea and Samaria Region*, 40(2) P.D. 42, 44 (1986) (English excerpt in 17 ISR. Y.B. HUM. RTS. 315 (1987)).

218. *E.g.*, *Abu Zeina v. Minister of Defense*, HCJ 900/90, slip. op. at 2 (1990) (unpublished).

219. *E.g.*, *Nassman v. Military Commander of Gaza Region*, 44(2) P.D. 601 (1990).

220. *E.g.*, *Qarabsa v. Minister of Defense*, HCJ 2665/90 (1990) (unpublished).

221. *E.g.*, *Sanuar v. Military Commander of Gaza Region*, 43(2) P.D. 821, 823 (1989).

member of the Court.²²² Arguing that the houses involved should not be destroyed completely because of the harm that would be inflicted on the offenders' families, Heshin provided a portrait of real life at the receiving end of the law. He noted that Khizran shared the "living room" with his mother and sister; that his parents had been divorced for many years and his father lived elsewhere; that his brother Ahmad Diab lived in one room with his wife and newborn daughter; and that another brother, Fida Diab, shared a room with his pregnant wife. The rectangular house contained one kitchen, a long corridor, a living room, a bathroom, an "inner room," two bedrooms, and a balcony. The second house in question consisted of two structures separated by a courtyard. One contained a kitchen, a storage room, and a bathroom; in the other, the second offender, Abu-Muhsein, shared two bedrooms with his mother, father, brothers, and sisters. His grandmother lived in a separate room where she kept a refrigerator and did her own cooking. Heshin's dissent will be remembered for personalizing the tragedies of the grandmother, pregnant sister-in-law, and baby niece.

The Court's insensitivity to the Palestinian predicament is reflected in the way the Court handles the claim that demolitions punish offenders' families and homeowners, and thus violate the prohibition in international law on non-individual punishment. The Court has offered two curt responses to this argument, both of which treat this acute doctrinal challenge as irrelevant. First, the Court states that the families' predicament is merely an incidental and unavoidable infliction of harm. The most common approach is that presented by President Shamgar in *Sanuar v. Military Commander of Gaza Region*:

Admittedly, the offender's family also suffers for his actions, but this is often the side effect of every punishment (as with imprisonment or a fine) imposed on the accused; it hurts — no less, and occasionally even more — those dependent on him. This alone cannot negate the justification of a deterring punitive measure that the respondent deems necessary for fulfilling his duties and responsibilities.²²³

A second response that is occasionally offered states that the relatives ought not be considered the subjects of punishment because the measure is not intended to punish them. A typical example is Justice Barak's statement in *Abu Al'an*:

We are aware that [the sealing of a house] is by no means light [punishment], and that it causes suffering to offenders' relatives, who are not suspected of violating the Regulations. However, the sanction stipulated in Article 119 is not intended to punish them, but to deter those who disturb the peace, and whose behavior causes grave and deadly injuries to other innocent people.²²⁴

222. *Khizran v. Military Commander of Judea and Samaria Region*, 46(2) P.D. 150, 155 (1992) (Heshin, J., dissenting).

223. *Sanuar*, 43(2) P.D. at 824.

224. *Abu Al'an*, 37(2) P.D. 169, 172-73 (1983); see also *Shoukeri v. Minister of Defense*, HCl 798/89, slip. op. at 3 (1990) (unpublished) ("The authority vested in the Military Commander by Article 119 is not one of collective punishment. Its exercise is not intended to punish the petitioner's family. This

These two propositions, that the punishment of families is "unavoidable" and "unintended," will be examined below under both international and Israeli law.²²⁵

E. *Questions of Legitimacy*

Reading through the demolition cases, one senses the fundamental incongruence that permeates Israel's political and judicial treatment of the Occupied Territories. How can a state that demolishes homes on one side of the Green Line remain a legitimate democracy on its other side?²²⁶ And how does a court that affirms such policies manage to maintain its stature as a legitimate institution? It is the latter question that I explore here, although it is not easily separated from the first. As mentioned, the Court generally affirms the legality of the powers asserted by the Military Government and readily defers to its discretion. More than twenty years of judicial approval and executive acquiescence have created an intricate legalistic framework in which the legitimacy of the Military Government's practices is intimately entangled with the legitimacy of the Court.

The Court, therefore, in order to maintain its own legitimacy, must either enhance the acceptability of these practices or reduce its own legal and moral responsibility for them.²²⁷ We have already observed how the Court promotes the practice's acceptability by palliating its harshness and by disregarding prohibitory doctrines. I now discuss how the Court attempts to escape the responsibility that its acceptance of the demolition practice would normally carry.

First, the Court insists that application of the repugnant 1945 DERs is mandated by international law as laid out in the local law doctrine of Article 43 of the Hague Regulations and Article 64 of the Geneva Convention. The application of the 1945 DERs is thus portrayed as submission to universal principles, rather than deference to a policy of Israeli expediency. In the following Part, I will challenge the Court's understanding of the local law doctrine.

is an administrative authority which is intended to deter and thus maintain the public order."); Sheloun v. Military Commander of Judea and Samaria Region, HCJ 97/89 (1989) (unpublished).

225. See *infra* part V.B.

226. I am taking as accepted the proposition that for a policy to be accepted as legitimate it must win the approval of the judiciary. See generally MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Bedminster Press 1968); ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 84 (1975).

227. Ronen Shamir offers a different explanation as to how the Court has maintained its legitimacy while consistently supporting the government. He argues convincingly that the few cases that the Court decides against the Military Government bolster its legitimacy. These typically controversial and well-publicized "landmark" decisions have the symbolic effect of exhibiting the Court's independence and thus reaffirm its legitimacy. See Shamir, *supra* note 113. The single demolition case that may be considered a landmark case is ACRI v. Commander of Central Command, 43(2) P.D. 529 (1989), which required notice and opportunity for judicial hearing prior to demolition.

Second, the Court has attempted to relieve Israel of any responsibility for using the 1945 DERs, simply because Israel did not promulgate them. The Court views the 1945 DERs, which were introduced by a foreign regime prior to Israeli statehood, as an alien legal artifact. This enables it to enforce the 1945 DERs from a moral distance.²²⁸ This positivist posture, based on the distinction between legislation and application, allows the Court to apply the laws "as it finds them." The demolition decisions imply also that the Court has no alternative but to interpret Article 119 as it does — as if it were "necessary" for the Court to authorize the initial sealings and then allow the gradual broadening of the practice.

Third, the Court has seized upon the notion that the law applied in the Occupied Territories is distinct from Israeli law. This jurisdictional distinction is based on an envisioned geographic division between the Occupied Territories and Israel proper — as if a wall had been erected between the two regions, separating a thriving democracy from a war zone.²²⁹ What the Court decides on one side of the Green Line, then, need not apply on the other.

The last two arguments were attacked by Justice Heshin in his dissenting opinion in *Al-Amrin v. Military Commander of Gaza Region*.²³⁰ The Court's majority decided to allow the destruction of a two story building that housed three nuclear families. Heshin proposed limiting the demolition to the unit in which the offender actually resided. Writing for the majority, Justice Bach stated that Heshin's narrow interpretation of Article 119 was inconsistent with the provision's language as well as its "spirit."²³¹ The majority thus implicitly followed the interpretive principle laid down in *Khamri*.²³² Heshin responded by contrasting the *Al-Amrin* and *Khamri* opinions with Justice Barak's celebrated opinion in *Schnitzer v. Chief Military Censor*,²³³ which represented a major victory of (Israeli) civil rights over claims of national

228. See Baruch Bracha, *Restriction of Personal Freedom Without Due Process of Law According to the Defense (Emergency) Regulations, 1945*, 8 ISR. Y.B. HUM. RTS. 296, 318-19 (1978).

229. This approach is in fact fundamentally inconsistent with the official position of the Israeli government, which has always favored a blurring of the Green Line. Following a Cabinet decision of November 12, 1967, the state of Israel ceased to draw the Green Line on any of its official maps. As a practical matter, it is impossible to tell from any Israeli map where the democratic regime ends and where the stringent laws of warfare begin. See AMNON RUBINSTEIN, *THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL* 96 (1991) (Hebrew).

The situation is further complicated by the fact that homes in the Territories are demolished in response to crimes committed inside Israel proper. This practice has been officially incorporated into military law and has not been questioned by the Court. See Order Concerning Means of Punishment (temporary order) (Gaza Region) (amendment No. 8) (No. 1041) (1991), incorporated into Article 5b of Order Concerning Means of Punishment (Gaza Region) (No. 277) (1969). On judicial approval of this practice, see, e.g., *Al-Amrin v. Military Commander of Gaza Region*, 46(3) P.D. 693, 696-97 (1992).

230. 46(3) P.D. at 693.

231. *Id.* at 699.

232. *Khamri v. Military Commander of Judea and Samaria Region*, 36(3) P.D. 439 (1982).

233. 42(4) P.D. 617 (1988) (allowing publication of criticism regarding General Security Services over government claims of national security).

security.²³⁴ Heshin argued that the "spirit" of Article 119 dictated a broad application of that provision only if one adopted the spirit of the British Mandatory judges in 1945. Heshin posed a distinction between the values of the British Mandatory Government in Palestine and the values of the State of Israel:

But that "spirit" disintegrated and vanished, and [was replaced by] a grander spirit in 1948 upon the founding of the state . . . since the values of the state of Israel — a Jewish, free and democratic state — are fundamentally divergent from those of the possessor of the mandate who ruled the land. Our fundamental principles are — at this time — those of law-abiding democratic states that aspire to liberty and justice, and it is these principles that should breathe the spirit of life into the interpretation of such laws. *See and compare Schnitzer v. Chief Military Censor* (by Justice Barak).²³⁵

Heshin thus demonstrated the peculiarity of resorting to the original intent of a colonial predecessor to determine the legality of a current government's actions. More importantly, he condemned the Court for separating the laws that it interprets and applies from the existing political and legal culture: a court ought to abide by the norms and values it stands for, not those of anachronistic and alien regimes. In the concluding paragraph of the dissent, Heshin faulted the Court's geographical distinction:

True, we are not dealing here with the application of the [1945 Defense] Emergency Regulations inside the boundaries of the state of Israel but in the Gaza Region, which is outside of Israel. But this distinction does not appear to me to be great nor significant. The connection between Israel and the Gaza Region — and the same applies to the Judea and Samaria Regions — is so close in everyday life that it would be artificial for us to talk about the application of these powers in Gaza as if it were somewhere across the ocean.²³⁶

Heshin thus emphasizes the proximity and interconnectedness of the two jurisdictions and exposes the fallacy of the imaginary dividing wall. He reminds the reader, as well as his colleagues, that the questions at hand do not concern a foreign army fighting a distant battle, but the Israeli Defense Forces exercising the state's policies just miles away, in a region that has been virtually incorporated into the state. One may take Heshin to be saying that it is Israeli morality, jurisprudence, and administrative and constitutional law at stake in the debate over the demolition practice.

V. INTERNATIONAL LAW

A. *The Local Law Doctrine*

The central component of the legal reasoning upholding home demolitions is that Article 119 — being "local law" — trumps substantive provisions of international law. Article 43 of the Hague Regulations and Article 64 of the

234. *See* Bracha, *supra* note 117, at 48, 84, 85, 97-102.

235. 46(3) P.D. at 705.

236. *Id.* at 706.

Geneva Convention set forth the local law doctrine. Article 43 of the Hague Regulations states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter 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.²³⁷

Article 64 of the Geneva Convention reads, in part:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.²³⁸

The demolition issue thus raises an apparent conflict within belligerent occupation law. These provisions of the Hague and Geneva instruments call for the preservation of pre-occupation local law, but the local law under which demolitions are carried out conflicts in substance with other provisions of these instruments. Can the Israeli Supreme Court uphold the Military Government's exercise of power under Article 119 even if Article 119 is incompatible with substantive provisions of international law?

The Court has replied affirmatively without fully addressing the issue. Its opinions have simply announced the primacy of Article 119 without acknowledging any competing interests. The Court first sidestepped the issue in the seminal *Sakhawil* case, in which it dismissed the relevance of substantive international law in a single ambiguous sentence.²³⁹ The justices did not mention international law in the home demolition context again until *Jaber*, decided eight years and a dozen cases later. There, too, the Court refrained from examining the apparent conflict and stated its conclusion as if it were obvious.²⁴⁰ The Court's attitude is thus doubly disappointing: not only does it fail to examine the practice's lawfulness against a considerable body of substantive international law, but it also neglects to state the grounds for doing so.

In the context of home demolitions, unlike that of deportations, for example, the Court's conclusion has nothing to do with the non-justiciability

237. Hague Regulations, *supra* note 9, art. 43.

238. Geneva Convention, *supra* note 10, art. 64.

239. *See supra* text accompanying note 139.

240. Justice Shamgar stated:

Article 119 constitutes part of the law that was in force in Judea and Samaria on the eve of the establishment of the IDF rule. According to principles of public international law, which were incorporated in the IDF's Law and Administration Proclamation 1967, the local law remained in force . . . (*see* Hague Regulations, art. 43, and Article 64 of the Geneva Convention). Consequently, the authority under Article 119 is considered local law, which existed in the region of Judea and Samaria, and was not canceled during the previous regime or during the belligerent occupation, and we have not been presented with any legal reasons why it should now be deemed invalid.

Jaber v. Commander of Central Command, 41(2) P.D. 522, 525-26 (1987) (English excerpt in 18 *ISR. Y.B. HUM. RTS.* 252 (1988)).

of the Geneva Convention.²⁴¹ In other words, the Court ignores the substantive provisions of international law, not because it deems the Geneva Convention *non-justiciable*, but rather because of the way the Court interprets Article 64 of the Geneva Convention.²⁴² The late Professor Julius Stone offered the most thorough defense of the Israeli understanding of Article 64. Stone asserted that international law requires the maintenance of pre-occupation laws and that it permits, but does not oblige, the occupying power to repeal a local law that is inconsistent with the Convention.²⁴³

The positions of the Court and Professor Stone are misconceived. A close examination of the relevant provisions of the Hague and Geneva Conventions, the opinions of the official commentators to the Conventions, the provisions' underlying purposes and context, and the Conventions' negotiating histories lead to the conclusion that local law should be applied only to the extent that it is consistent with substantive belligerent occupation law.

Local law cannot confer powers that violate substantive provisions of belligerent occupation law. The official commentary to the Geneva Convention clearly states this principle: "This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail."²⁴⁴ Justice Barak reached the same conclusion in *Cooperative Society v. Military Commander of Judea and Samaria Region*,²⁴⁵ a case that did not deal with home demolitions. Justice Barak explained that the fact that an executive power is permitted by local law is neither a necessary nor a sufficient condition for the exercise of that power. He stated that the application of local law is contingent on its conformity with substantive international law: "It is not enough that the exercise [of an executive power] be in accordance with the local law; it must comport with the principles of Israeli administrative law and with the rules of the interna-

241. See *supra* text accompanying notes 94 to 96.

242. The Court's conclusion resonates with the position advanced by Shamgar on behalf of the Israeli Government in 1971:

[I]t has been asserted that if there is another rule of international law according to which the local law is regarded as inhumane or contrary to a basic norm of international law, this rule of international law supervenes the rule of the local law. The wording of Articles 64 and 68 of the [Geneva] Convention does not support this thesis

Shamgar, *Observance*, *supra* note 38, at 276. The same argument would apply equally to Article 43 of the Hague Regulations. See Hague Regulations, *supra* note 9, art. 43.

243. Stone argued:

[T]he demolitions in question have taken place under provisions of local penal law in force when Israel entered into occupation. Article 64 thus seems even to *require* continuance of this law. Moreover, the same paragraph permits repeal of such a law in force which is a threat to the Occupant's security. It would thus be very strange indeed to hold that the Occupant was forbidden to *maintain* the existing law when *this* was necessary for his security. The paragraph also authorizes him to repeal a law which obstructs the application of the Convention; but it does not *oblige* him to do so.

STONE, NO PEACE, *supra* note 96, at 15.

244. THE COMMENTARY, *supra* note 66, at 336.

245. 37(4) P.D. 785 (1983) (English excerpt in 14 ISR. Y.B. HUM. RTS. 301 (1984)) (dealing with expropriation of private land to construct highway in West Bank).

tional law of belligerent occupation."²⁴⁶ In the same vein, the *U.S. Army Field Manual* states that measures imposed by an occupying power for enforcement of obedience must be "[s]ubject to the restrictions imposed by international law."²⁴⁷

This approach is consistent with the rationale of the local law doctrine. The principle of maintaining the local peacetime law is based on the premise that it is most congenial to the local population and best suited for the prevailing conditions in the region. This was the American understanding of Article 43 of the Hague Regulations:

The existing laws of a country had been created by its people and were presumably the legislation best suited to them. The inhabitants and their officials were familiar with them and any changes made by the occupying authorities would impose additional hardships²⁴⁸

International law aims at anything but enhancement of the powers of the occupant. Rolin, the French Delegate to the 1899 Hague Conference, explained the intent of Article 43: "It is not a question here of stipulating what the victor is authorized to do, but what he ought to be prohibited from doing."²⁴⁹ Similarly, the U.S. delegate to the Geneva Conference pronounced that "the Occupying Power should in no circumstances use the criminal law of the Occupied Power as an instrument of oppression."²⁵⁰

The stated objectives of the Geneva and Hague instruments support the view that local law should not be used to the detriment of the local population, but rather for humane purposes. The Vienna Convention on the Law of Treaties instructs that whenever the ordinary meaning of a treaty's terms are inconclusive, they should be interpreted in light of the treaty's context, object, and purpose. The interpretation should also be guided by the instrument's preamble and annexes.²⁵¹ The humanitarian nature of the belligerent occupation treaties is unmistakable. The Preamble to the Hague Convention states, in part:

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization; Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater

246. *Id.* at 793.

247. U.S. DEPARTMENT OF ARMY, F.M. No. 27-10, THE LAW OF LAND WARFARE: U.S. FIELD MANUAL, art. 432 (1956) [hereinafter U.S. FIELD MANUAL].

248. VON GLAHN, *supra* note 92, at 95.

249. CONFERENCE OF 1899 PROCEEDINGS, *supra* note 89, at 515 (quoting Delegate M. Rolin, explaining rationale underlying Articles 2 and 3 of 1874 Brussels Declaration, which gave rise to Article 43 of Hague Regulations). *See generally* GREENSPAN, *supra* note 41, at 227 (asserting that purpose of doctrine is to safeguard the population "against attempts by the occupant to deprive them of the benefits which they already enjoy, and which are in conformity with the principles of the convention"); SCHWARZENBERGER, *supra* note 92, at 191 (stating that object of doctrine is one of restricting powers of belligerent occupant).

250. FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, § 2-a, at 670.

251. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679.

precision or to confining them within such limits as would mitigate their severity as far as possible²⁵²

Likewise, the Geneva Convention was described by its drafters as "inspired solely by humanitarian aims."²⁵³ Protection of the local population was also the main theme of a draft preamble to the Geneva Convention proposed by the International Red Cross Conference.²⁵⁴

Upholding substantive prohibitions protecting human rights over incompatible provisions of local law is also consistent with the interpretive mechanism specifically prescribed by the preamble to the Hague Convention. Based on the understanding that the Convention could not cover all possible circumstances, the Martens Clause states:

Until a more complete code of the laws of war has been issued, the High Contracting Powers deem it expedient to declare that, in cases not included in the Regulation adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.²⁵⁵

The default rule, therefore, is to prefer humanitarian ideals over the occupying power's interests.

The humanitarian nature of the local law provisions is also evident in their legislative history. Humanitarian considerations permeated the debate concerning the drafting of Article 43.²⁵⁶ Indeed, the French Delegate Rolin, who introduced Article 43, explained that the provision was intended "to bring together the different opinions as far as possible on this humane provision."²⁵⁷ Clearly, between the 1945 DERs and the substantive prohibitions of international agreements, the latter are more consistent with notions of civility, humanity, conscience, and moderation.

Stone also bases his argument on the second exception to Article 64 of the Geneva Convention, which permits, but does not *oblige*, the occupying power, to repeal local laws that "constitute . . . an obstacle" to the Convention.²⁵⁸

252. Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, pmbl., 36 Stat. 2277, T.I.A.S. No. 539 [hereinafter Hague Convention].

253. FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 362.

254. *Id.* at 113 ("These rules, which constitute the basis of universal human law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favor of protected persons."). Ultimately, the preamble was left out of the Convention.

255. Hague Convention, *supra* note 252, pmbl. Draper describes the relevance of the preamble: "It is difficult to do full justice to the importance of these clauses of the Preamble. They color and inform all that comes later in the body of the Convention, and, more pertinently, in the Regulations annexed." Colonel G.I.A.D. Draper, *Military Necessity and Humanitarian Imperatives*, 12(2) REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 129, 133 (1973); *see also* Helmut Strebel, *Martens' Clause*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252 (Rudolf Bernhart ed., 1982).

256. CONFERENCE OF 1899 PROCEEDINGS, *supra* note 89, at 513 (comment by Delegate Odier); *see also id.* at 519 (comment by Delegate Beernaert).

257. *Id.* at 520; *see also id.* at 513 (comments by Delegate Bildt).

258. Geneva Convention, *supra* note 10, art. 64; *see* STONE, NO PEACE, *supra* note 96, at 15. The first exception does not apply. It states that the occupying power is not bound by those laws that hinder its security or impair its control over the region, e.g., laws prescribing recruitment for enemy forces, or awarding the right to bear arms.

The official commentators, however, interpreted this exception differently: "The second reservation is in the interests of the population and makes it possible to *abrogate* any discriminatory *measures* incompatible with humane requirements."²⁵⁹ The commentators added that this exception "refers in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion."²⁶⁰ This exception, therefore, is not intended to regulate the *actions* of the occupying power *qua* executive, but rather to enable the occupying power *qua* legislature to enjoin the local courts from applying "evil" laws. It was included for "exceptional cases," where local law transgressed "elementary conceptions of justice and the rule of law."²⁶¹ This, for example, was the case with the Nazi laws in the post-World War II legal system of Germany.²⁶² Technically, these manifestations of racial ideology were valid local law even after the Allied occupation. Without this exception to Article 64, the local law doctrine might have led to the unacceptable situation in which German courts could not be prevented from continuing to apply Nazi laws.

The second paragraph of Article 64, which deals with the powers that the occupying power may exercise vis-à-vis the population,²⁶³ supports this view. It states that in order to maintain an orderly government and to ensure the safety of its forces, an occupying power may exercise essential police powers, although these measures must be exercised in accordance with the "obligations under the present Convention." The occupying power cannot, therefore, infringe on the Convention's restrictive prohibitions.

The Israeli Supreme Court's formulation of the local law doctrine is further undermined by its different approach to the doctrine in non-demolition cases. In such contexts, the Court has chosen to address the conflict between the 1945 DERs and substantive international law rather than shield its decisions behind the local law doctrine. *Abu Awad v. Military Commander of Judea and Samaria Region*,²⁶⁴ for example, concerned a deportation order issued pursuant to Article 112 of the 1945 DERs.²⁶⁵ Abu Awad, a resident

259. THE COMMENTARY, *supra* note 66, at 335.

260. *Id.*

261. See OPPENHEIM, *supra* note 92, at 446; SCHWARZENBERGER, *supra* note 92, at 195.

262. These included laws for the protection of "German Blood," "German Honor," and the "Hereditary Health of the German People," and laws prohibiting lease agreements with Jews. See Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393, 407 (1945).

263. Geneva Convention, *supra* note 10, art. 64(2) ("The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.").

264. *Abu Awad v. Military Commander of Judea and Samaria Region*, 33(3) P.D. 309 (1979) (English excerpt in 9 ISR. Y.B. HUM. RTS. 343 (1979)).

265. See 1442 Palestine Gazette, *supra* note 4, at 1085.

of Bir Zeit, was ordered deported to Lebanon for alleged hostile activity and dissemination of propaganda. The petitioner claimed that deportations were prohibited by Article 49 of the Geneva Convention, which prohibits "[i]ndividual or mass forcible transfers . . . regardless of their motive."²⁶⁶ Rather than circumventing this provision by applying the local law doctrine, the Court examined the question under the Geneva Convention and found that the deportation power comported with the Convention.²⁶⁷

Similarly, in *Cooperative Society v. Military Commander of Judea and Samaria Region*,²⁶⁸ Justice Barak did not base his decision only on local Jordanian law. Instead, he examined the expropriation order in question in light of substantive provisions of international law and upheld it only after finding that it conformed with them. The Court also resolved *Law in the Service of Man v. Military Commander of Judea and Samaria Region*,²⁶⁹ which dealt with an order based on Article 130 of the 1945 DERs,²⁷⁰ by direct reference to substantive international law. The Court justified the order on the basis of American and British military manuals and the writings of von Glahn, without any reliance on the local law doctrine. The Court's inconsistent employment of the local law doctrine casts further doubt on the soundness of its application in the demolition context.

The proper construction of the "local law" doctrine restricts, rather than empowers, the occupant. Indeed, this doctrine is instrumental to the larger goal of establishing universal standards for protecting the rights of civilian populations. These standards may be relaxed for reasons of military necessity when international law explicitly permits exceptions, and only within the reasonable limits of these exceptions. Neither the fiat of military commanders nor local law or custom can supplant these standards. International law sets universally applicable protections that maintain the "interest of humanity" and the "dictates of public conscience,"²⁷¹ not the varying customs of localities. It certainly does not sanction rules imposed by local tyrants or repressive colonial regimes. According to the Court's logic, however, there is nothing

266. Geneva Convention, *supra* note 10, art. 49(1) ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.").

267. After struggling with the Convention, the Court established that the purpose of Article 49 was to thwart military actions like those exercised by Nazi Germany. The Court then concluded that despite the Convention's language, deportations of individuals were permitted. It explained: "Nothing [about the government's need to maintain order and security] resembles the deportations for forced labor, torture, and extermination that were performed in the Second World War." Abu Awad, 33(3) P.D. at 316. The Court offered the same reason in *El Afu v. Military Commander of the West Bank*, 42(2) P.D. 4, 31 (1988), translated in 29 I.L.M. 139. For criticism of this decision, see MERON, *supra* note 23, at 48-49 n.131; Yoram Dinstein, *Deportations from the Occupied Territories*, 13 TEL AVIV U. L. REV. 403 (1988) (Hebrew).

268. 37(4) P.D. 785 (1983) (English excerpt in 14 ISR. Y.B. HUM. RTS. 301 (1984)).

269. 42(3) P.D. 260 (1988) (dealing with order restricting international telephone service available to West Bank residents).

270. See 1442 Palestine Gazette, *supra* note 4, at 1092.

271. Hague Convention, *supra* note 252, pmb1.

to prevent a military government from hanging people without trial, taking hostages and executing them, or committing torture whenever the local law so permits. This logic is plainly indefensible. By ignoring the substantive protections of international law, the Court turns the "local law" doctrine on its head. It exposes the Palestinian population to a measure that, as the following discussion will show, is proscribed by international law. The Court thus defies international law under the guise of respecting it.

B. *Collective and Non-Individual Punishment*

The criticism most frequently and intensely leveled against the home demolition policy is that it inflicts harm on people other than the offenders — namely, their relatives and landlords.²⁷² Virtually all Palestinian homes house more than one person; indeed, many house more than one nuclear family, and often more than ten people. In *Qarabsa v. Minister of Defense*,²⁷³ for example, the demolition left twenty-seven people homeless. Demolitions are also not contingent on the question of ownership: in the 145 cases that the Court reviewed, only seven homes were reported to be owned by the offenders themselves.²⁷⁴ Over time, proponents of the practice have developed a string of defenses and justifications to thwart criticism of the measure's collective nature. This section presents and evaluates these responses, and challenges the legality and morality of the collective nature of the demolition practice.

1. *Article 50 of the Hague Regulations and Article 33 of the Geneva Convention*

Two provisions of international law are relevant to the debate: Article 50 of the Hague Regulations, commonly referred to as the *collective punishment* provision, and Article 33 of the Geneva Convention, which deals with *non-individual punishment*. Article 50 of the Hague Regulations states, "No 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."²⁷⁵ The first part of Article 33 of the Geneva Convention, entitled "Individual Responsibility," states in part, "No protected person may be punished for an offense he or she has not personally committed."²⁷⁶

272. For the sake of convenience, this discussion refers primarily to the offenders' relatives. The perspective of the property owner is, essentially, identical.

273. HCJ 2665/90 (1990) (unpublished).

274. Most homes belonged to the offenders' parents. A few were owned by their siblings and various relatives, and several were rented from third-party homeowners. See *supra* note 78 and accompanying text.

275. Hague Regulations, *supra* note 9, art. 50.

276. Article 33 continues, "Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Geneva Convention, *supra* note 10, art. 33.

The principle of individual responsibility conveys a simple notion: individual *A* cannot be punished for the actions of individual *B*. The official commentary to the Geneva Convention explains, "Responsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of."²⁷⁷ Insistence on individual punishment permeates the entire Geneva Convention.²⁷⁸ The individual responsibility underscored in Article 33 is unequivocal and conclusive: neither individuals nor groups may be punished unless every member has been found responsible in his or her personal capacity. Punishing groups of any sort, including families, is plainly prohibited.

The prohibitory nature of Article 50 of the Hague Regulations is apparently not conclusive,²⁷⁹ especially when compared to that of the Geneva Convention. Article 50 curtails the imposition of collective punishments, but it does not abolish outright the possibility of assigning criminal responsibility to a collective as a whole. Relying on a strict reading of Article 50, one might infer that Israel is not bound by the principle of non-individual punishment. Such an inference, however, rests on questionable grounds.

First, I maintain that the Geneva Convention does apply to this occupation, and that Israel, therefore, is bound by its provisions.²⁸⁰ Furthermore, Israel has undertaken to abide by the humanitarian provisions of the Geneva Convention,²⁸¹ and it is without doubt that refraining from punishing the innocent falls into the category of humanitarian provisions.

Second, treating the prohibition on non-individual punishment as purely conventional law would be incorrect. The drafters at Geneva did not simply invent this component of Article 33; rather, they sought to build on, improve, and solidify the principle of individual responsibility, which is, as Schwarzenberger points out, the *ratio legis* of Article 50.²⁸² In his important analysis of humanitarian law, Meron suggests that some of the provisions of the Geneva Convention and their underlying principles embody customary international law in their core meaning, if not in their specific language. In this list he includes Article 33's prohibitions against collective punishment, "which have their roots in Hague Regulation 46 and Hague Regulation 50 and the principle of individual responsibility which Regulation 50 articulates."²⁸³

277. THE COMMENTARY, *supra* note 66, at 225.

278. The commentary to Article 78 states, "That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately." *Id.* at 367. The commentary to Article 67 states, "[T]he 'general principles of law,' which are not set out individually here but are referred to as a whole, include the rule concerning the personal nature of punishments, under which nobody may be punished for an offense committed by someone else. This rule is also laid down in Article 33 mentioned above." *Id.* at 342.

279. For a narrow reading of Article 50, see VON GLAHN, *supra* note 92, at 232-34.

280. See *supra* notes 94 to 96 and accompanying text.

281. See *supra* text accompanying note 97.

282. SCHWARZENBERGER, *supra* note 92, at 238; cf. VON GLAHN, *supra* note 92, at 234.

283. MERON, *supra* note 23, at 47; see also OPPENHEIM, *supra* note 92, at 451 (characterizing Geneva Convention as attempt to "supplement and to make more precise the provisions of the Hague

Merón also refers to the possibility that many of the Geneva Convention's norms have developed into customary law since their adoption in 1949. To support this thesis, he notes that the entire international community has accepted the Convention,²⁸⁴ and that states have an interest in universal compliance with treaties that embody deeply felt community values.²⁸⁵

Third, the Court's extensive treatment of the Geneva Convention and its frequent reliance on it have effectively incorporated it into Israeli law. At this stage, it would be inappropriate for the Court to uphold a practice that violates Geneva Article 33 based solely on the issue of the Convention's justiciability.²⁸⁶ Moreover, the Court has acknowledged the relevance of Article 33's principle of individual responsibility.²⁸⁷

Fourth, the punishment of relatives is inconsistent with a correct reading of the Hague Regulations. It is fundamentally at odds with both the letter and the spirit of Article 46 of the Hague Regulations, which requires the respect of "family honor and rights."²⁸⁸ The demolition practice can shatter a family's communal living arrangement, strain family relationships by fostering suspicion, resentment, and rivalry, and uproot families from their homes.

Moreover, the punishment of relatives is inconsistent with a proper reading of Article 50 of the Hague Regulations. Some scholars have found the punishment of relatives permissible under certain circumstances. For example, daily fines imposed by the Germans on relatives of men who escaped conscription in the Franco-Prussian War have been understood to be permissible.²⁸⁹ These practices are, however, clearly inconsistent with the plain language of Article 50. Mere membership in a group does not support imposition of joint responsibility. Article 50 specifically requires that each member of the group be found "jointly *and severally* responsible."²⁹⁰ Only

Regulations on this subject").

284. MERÓN, *supra* note 23, at 50. *But see* Yoram Dinstein, *Expulsion of Mayors From Judea*, 8 TEL AVIV U. L. REV. 158, 167-68 (1981) (Hebrew).

285. MERÓN, *supra* note 23, at 54.

286. *See supra* notes 100 to 102 and accompanying text.

287. *See* Taha v. Minister of Defense, 45(2) P.D. 45, 54 (1991) (Dov Levine, J.).

288. Hague Regulations, *supra* note 9, art. 46; *see* Alwyn V. Freeman, *War Crimes by Enemy Nationals Administering Justice in Occupied Territory*, 41 AM. J. INT'L L. 607, 608 (1947). The Hague Convention's Preamble also supports a broad interpretation of Articles 46 and 50. Hague Convention, *supra* note 252, pmbl. For the interpretive principles prescribed by the Hague Convention, *see supra* note 255 and accompanying text.

289. WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 507-08 n.2 (1917); *see also* SPAIGHT, *supra* note 31, at 409. One should, however, discount the relevance of such opinions because of their inadequate conception of the protection of human rights in time of warfare. Spaight, for example, states, somewhat remarkably:

The gentle reader . . . will doubtless have come to the conclusion that martial law is a very drastic, tyrannous, and primitive law — a law which is a jumble of bad old laws — curfew laws, sumptuary laws, conventicle acts, grandmotherly acts which interfere intolerably with individual liberty, which regulate the life of the citizen out of all conscience. Indeed, it is so; but there is a cogent reason for its being so. Martial law must be despotic because it deals with a primitive condition of things, in which the rule of might prevails.

Id. at 353.

290. Hague Regulations, *supra* note 9, art. 50 (emphasis added).

convincing evidence of acts implicating each member of the group will be sufficient to withstand the Article 50 prohibition: "Any inhabitant against whom no such evidence exists is entitled to enjoy the protection of the rule excluding group punishment."²⁹¹ As previously mentioned, the Military Government makes no inquiries into the involvement of relatives prior to ordering demolitions, nor does it claim that they are personally implicated.

Article 50 has been cited repeatedly in support of flagrant violations of human rights,²⁹² which have been criticized by international legal scholars. In criticizing Article 50, modern scholars emphasize the undesirability of punishing innocent people;²⁹³ the problems associated with leaving judgment of the population's responsibility with military commanders;²⁹⁴ the vagueness of the rule establishing responsibility;²⁹⁵ and the incompatibility of non-individual responsibility with the rule of law. They also lament the desire of military commanders to intimidate the population.²⁹⁶

Finally, the principle of individual responsibility is deeply ingrained in Israeli criminal and administrative law, which the Court has stated that it would apply when reviewing the Military Government's actions.²⁹⁷ It is my assessment that if the Court does formally embrace the principle of individual responsibility, it will do so on grounds of Israeli, rather than international, law.

Israeli domestic law challenges the collective character of the demolition practice more consistently than any other aspect of the practice. This issue received explicit attention in 1964, when the Knesset scrapped the 1936

291. SCHWARZENBERGER, *supra* note 92, at 237.

292. The concept of collective responsibility has been used to justify such actions as the burning of a whole town in response to the sabotage of a railroad bridge during the Franco-Prussian War of 1870-71, *see* Garner, *supra* note 64, at 514; the burning of farms and destruction of homes in response to damages caused to railroads and telegraph wires in the Boer War, *id.*; and the imposition of heavy fines on an entire city because of one person's conduct during the German occupation of Belgium during World War I, *id.* at 515 (discussing fine of 5 million French francs on Brussels after Belgian policeman attacked German officer and facilitated escape of prisoner). *See also* COMMISSION OF RESPONSIBILITIES, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PAMPHLET NO. 32, THE VIOLATIONS OF THE LAWS AND CUSTOM OF WAR 18-19 (1919); James W. Garner, *Contributions, Requisitions and Compulsory Service in Occupied Territory*, 11 AM. J. INT'L. L. 74 (1917). The oppressive and, indeed, cynical use to which the notion of collective responsibility lends itself is exemplified by the War Book of the German General Staff (*Kriegsbrauch im Landkriege*) from the 1870-71 war, which explained that collective pecuniary penalties were found to be the "most effective means of insuring the obedience of the civil population." *See* Garner, *supra* note 64, at 527.

293. Garner, *supra* note 64, at 535.

294. *Id.* at 528-29. Indeed, military commanders face a host of difficult questions. Is the notion of group responsibility for acts of individuals conceptually sound? Does a community's refusal to cooperate in the investigation of offenses give rise to collective responsibility? Does failure to prevent offenses amount to responsibility? What about expression of moral support for an offender? Does collective responsibility encompass all members of the community, including dissenters and the powerless? Must military commanders always presume a community's innocence, or may they presume guilt in certain circumstances? The complexity of these issues increases the likelihood that military commanders will decide against the interests of the population.

295. OPPENHEIM, *supra* note 92, at 443-44.

296. VON GLAHN, *supra* note 92, at 233.

297. *See supra* note 104 and accompanying text.

Collective Punishment Ordinance from the state's law books.²⁹⁸ In abrogating the Ordinance, the Knesset explained, "The mere possibility of imposing collective sanctions in a general manner on the residents of a certain area, offends notions of justice as well as the fundamental postulates of contemporary legal culture."²⁹⁹

The denunciation of non-individual punishment — found in criminal law as early as biblical times³⁰⁰ — stands above dispute in all enlightened societies. This notion has been asserted by, among others, Joel Feinberg,³⁰¹ John Rawls,³⁰² and H.L.A. Hart.³⁰³ For all of these reasons, preferring an archaic interpretation of Article 50 over the principle of individual responsibility is unacceptable.

2. Juggling with Justifications

From the early days of the occupation, policymakers generally repudiated the use of collective punishment and acknowledged its counterproductive effect. Moshe Dayan, for example, often stated that punishing members of the "non-active" population frustrates them and ruins their motivation to acquiesce to Israeli rule.³⁰⁴ He nonetheless supported home demolitions. At first he

298. 436 Sefer Ha'Khukim 4 (Nov. 26, 1964). This law, which was never applied by Israel, authorized administrative bodies under certain circumstances to impose collective fines on communities or towns. 610 Hatsa'ot Khok 165 (May 18, 1964).

299. 610 Hatsa'ot Khok 165 (May 18, 1964). For the same reasons, the Knesset also abrogated the 1936 Collective Fines Ordinance. 436 Sefer Ha'Khukim 4. The Israeli Supreme Court, sitting as the High Court of Appeals, has applied similar reasoning. *See, e.g.,* Attorney General v. Yarkoni, 18(4) P.D. 20, 46 (1964); Goldstein v. Attorney General, 10 P.D. 505, 540 (1956); *see also* J. BAZAK, PUNISHMENT PRINCIPLES AND APPLICATION IN ISRAEL AND IN JEWISH LAW 68 (1979) (HEBREW) ("Punishing members of the criminal's family, and punishing the innocent, even when it has a deterrent effect, is wrong because it contradicts principles of justice and equity."); S.Z. FELLER, 1 Y'SODOT B'DINEI ONSHIN [ELEMENTS OF CRIMINAL LAW] 100 (1984) (Hebrew) ("Everything concerning an offense is personal — the act is personal, guilt is personal, and their fusion occurs within the actor. Therefore, the punishment must be personal.").

300. *See, e.g.,* Deuteronomy 24:16 (King James) ("The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."). Moshe Greenberg explains:

This principle of individual culpability in fact governs all of biblical law. Nowhere does the criminal law of the Bible, in contrast to that of the rest of the Near East, punish secular offenses collectively or vicariously. Murder, negligent homicide, seduction, and so forth, are punished solely on the person of the actual culprit.

Moshe Greenberg, *Some Postulates of Biblical Criminal Law*, in 5 YEHEZKEL KAUFMANN JUBILEE 23 (Menachem Haran ed., 1960).

301. Feinberg states, "Collective-responsibility arrangements are most likely to offend our modern sensibilities when the liabilities are to criminal punishment." JOEL FEINBERG, DOING AND DESERVING 238 (1970).

302. Rawls advocates that "in a just society legal punishments will only fall upon those who display these faults." JOHN RAWLS, A THEORY OF JUSTICE 315 (1971).

303. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11-12 (1968).

304. GAZIT, STICK AND CARROT, *supra* note 37, at 296. In August 1983, the Military Government altered its policy by limiting demolitions only to the offenders' specific rooms, leaving the rest of the buildings untouched, *see* Yosef Tsuriel, *New "Sealing Policy": Only the Guilty Will be Punished*, MA'ARIV, Aug. 3, 1983, at 2 (Hebrew), but returned to the original policy within months, *see* Yosef Tsuriel, *Return to Policy: Terrorists' Houses in Territories Destroyed, Others Sealed*, MA'ARIV, Dec. 13,

chose simply to deny the measure's collective character. In talks with Palestinians, he asserted that demolitions were merely personal measures. His audience, however, remained unconvinced.³⁰⁵ In a second and more notable effort to bypass the measure's unpopularity, Dayan explained that the measure did not constitute collective punishment but merely amounted to what he called *anisha svivatit* — meaning, literally, "vicinity" or "surrounding" punishment. This new description of old policies stirred heated debate within the Knesset and beyond,³⁰⁶ as critics charged that the phrase was merely a euphemism for collective punishment. Dayan succumbed to the criticism. He abandoned the phrase and summed up the issue in his typical style: "I am Minister of Defense, not of phraseology."³⁰⁷

It was next asserted that the relatives were personally involved and thus directly responsible for the illicit actions. During the initial stages of the occupation, proponents of the practice insisted that homes were demolished only when entire families participated or conspired with the offender in the commission of the offense.³⁰⁸ Professors Alan Dershowitz and Julius Stone have defended the demolition practice on this basis. In examining the issue, Dershowitz presumes that the homeowners are in some way involved in the commission of the offense.³⁰⁹ Dershowitz then posits that "in terms of human values . . . it is better to destroy [someone's] house than to detain him," so that even if demolitions constitute "a technical violation of some Convention," they are permissible whenever administrative detention would be allowed by international law.³¹⁰ Dershowitz thus introduces an innovative twist into international law: allowing substitution of unauthorized "benign" punishments for sanctioned measures of a "worse" character. This proposition would pave the way for endless and unprincipled types of punishments devised by military commanders and wreak havoc in humanitarian international law. This approach conflicts directly with a basic goal of international law: maintaining universal standards for protecting human rights. Moreover, even if the motives of the Military Commanders were benign, this approach leaves undetermined which "human values" should be applied to limit the army's powers. Dershowitz' analysis also overlooks the reality that home demolitions

1983, at 3 (Hebrew).

305. TEVETH, *supra* note 73, at 211, 254-55, 263, 272, 279.

306. Shmuel Segev, *Dayan: "Nasser Defeated at Battle for Canal,"* MA'ARIV, Nov. 13, 1969, at 3 (Hebrew); *Dayan: No Change in the Liberal Policy in the Territories,* MA'ARIV, Nov. 28, 1969, at 2.

307. DIVREI HAKNESSET [KNESSET PROTOCOLS] 107 (Dec. 1, 1969); Yehoshua Bitzur, *Dayan: I Am Minister of Defense, Not of Phraseology,* MA'ARIV, Dec. 2, 1969, at 2 (Hebrew).

308. See GAZIT, STICK AND CARROT, *supra* note 37, at 299.

309. Indeed, Dershowitz examines the demolition practice as applied only to homes owned by the offender, by a person who knows of the offense, or by a relative suspected of harboring the offender. He concedes that his justification does not hold when the homeowners are not involved — unaware, like many other commentators, that most cases fall into this category. See *Symposium, supra* note 39, at 377. As previously mentioned, the majority of houses are demolished not because they have been used in the commission of offenses, but merely because offenders lived in them. In such cases, there is no ground to presume that relatives should have known of, or were involved in, the unlawful activities.

310. *Id.* at 376-77 (characterizing demolitions as "a mere pecuniary punishment").

are not applied as an *alternative* to other sanctions, but rather as a *supplement* to them. The proposed comparison of evils is therefore irrelevant.³¹¹

Julius Stone's defense of the demolition practice relies primarily on a *Jerusalem Post* account of a statement made by Moshe Dayan in 1968 before the Knesset, from which Stone understood that the Military Government follows certain procedures in order to determine the guilt of the families before demolitions. Stone concludes that the punishment of the relatives is "individual, not collective."³¹² A close look at Dayan's statement to the Knesset reveals, however, that the procedure is less than reassuring. Dayan admitted, "The security authorities do not undertake the initiative to prove that the family did not know anything. It is on the family to prove that they knew nothing."³¹³ In other words, Palestinian families were required to submit negative proof in order to save their homes. They were, in fact, presumed to be guilty.³¹⁴

In practice, the Military Government did not follow even this procedure. Prior to the *ACRI* case, it executed demolitions without contacting relatives.³¹⁵ Shifting the burden of proof onto relatives, and then demolishing their homes before giving them a chance to make their case, is clearly unfair. The policy's proponents have apparently recognized the flimsiness of the argument that relatives are directly responsible for an offender's acts. Neither they nor the Court now uses this justification.

An alternative justification, based on the concept of vicarious responsibility, makes families and landlords *a priori* bearers of responsibility for the actions of their relatives and tenants. Gazit explains, "In principle, the line we took was not to over-scrutinize these matters. Every homeowner was considered responsible for the acts committed by those who rented his home, and for all acts committed in his property."³¹⁶ To the extent that vicarious responsibility is generally tolerated, it requires that the person being held responsible have authority over an offender. Even within such relationships,

311. Dershowitz also seems to have overlooked that Article 78 of the Geneva Convention, on which he builds his argument, explicitly prohibits all non-judicial security measures except for administrative detention and home arrest. See Geneva Convention, *supra* note 10, art. 78.

312. See STONE, *NO PEACE*, *supra* note 96, at 15.

313. DIVREI HAKNESSET [KNESSET PROTOCOLS] 100 (Oct. 29, 1968).

314. Gazit explains, "[O]nly when there was unmistakable proof that the guerrilla's actions were committed without the knowledge or against the will of the homeowner, the home would be 'absolved.'" GAZIT, *STICK AND CARROT*, *supra* note 37, at 300.

315. The demolition of the Al-Khribawi family's house in 1980 underscores this point. Six Palestinian guerrillas climbed onto the roof of the Al-Khribawi house across the street from *Beit Hadassah*, and shot six Israelis to death. The Khribawi house was immediately destroyed. The peculiarity of this demolition stems from the fact that the Al-Khribawi family is famous for having saved some 100 Jews from fellow Arabs in the 1929 riots, and for its continued cooperation with the Israeli Military Government. The identity of the Al-Khribawi family was overlooked because the Military Government carried out the demolition, as always, without questioning the tenants about their involvement. The punishment of this "loyal" family drew much criticism in the Knesset. See DIVREI HAKNESSET [KNESSET PROTOCOLS] 3034 (May 28, 1980).

316. GAZIT, *STICK AND CARROT*, *supra* note 37, at 300.

one cannot justify the punishment of superiors for actions performed by their subordinates without the superiors' involvement, inducement, or control.³¹⁷ The Military Government has never claimed that these conditions exist in demolition cases. Indeed, it would be difficult to claim that Palestinian parents possess real control over their adult sons, that babies have authority over their fathers, or that grandparents can effectively restrain their adolescent grandchildren. Requiring landlords to monitor and control the actions of their tenants would also be unreasonable. The demolition proponents, having realized the precariousness of the vicarious responsibility argument, no longer resort to this defense.

3. *Home Demolitions as Non-Individual Punishments*

I now turn to examine the justifications offered by the Supreme Court, namely that the harm inflicted on others does not amount to punishment because it is "unintended" and "unavoidable." First, we must reject the argument that the measure may be justified on the ground that it was not intended.³¹⁸ Determining whether an act of government amounts to punishment turns on whether it punishes people *in fact*, not on whether it is *allegedly intended* to do so.³¹⁹ Justifications based on the government's alleged intentions can lead to disingenuous portrayals of government policies and render judicial review meaningless. Such justifications can legitimize and institutionalize indefensible punitive practices, as the case of the demolition policy suggests.

Similarly unacceptable is the Court's implicit proposition that demolitions are permissible because their underlying objective of deterring undesirable behavior is justified. The government may not employ unlawful means to further its interests, however legitimate. Belligerent occupation law, like most areas of law, seeks precisely to subject the actions of occupying powers to certain minimum standards of behavior. While deterrence may be the purpose of the demolition policy, it cannot justify it. Schwarzenberger unequivocally rules out this type of reasoning: "Irrespective of whether such a measure was taken for purposes of prevention or deterrence, it would amount to the punishment of individuals for acts for which they are not personally responsible."³²⁰

The real question then remains: can the harm inflicted on relatives be accepted as the incidental and unavoidable result of the offenders' punishment? I understand the Court's proposition as relying on the "double effect" argument, which is a common construct for justifying actions that are likely

317. Feinberg states that such punishment amounts to "barbarous regression." Feinberg, *supra* note 301, at 230-31; see also HART, *supra* note 303, at 211.

318. See *supra* note 224 and accompanying text.

319. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-69 (1963).

320. SCHWARZENBERGER, *supra* note 92, at 238 (arguing against taking of hostages).

to lead to normally impermissible results.³²¹ The double effect doctrine requires three principal conditions: that the direct effect intended by the act be legitimate; that the purpose of the act be permissible and the impermissible effect be unintended; and that the gravity of the intended permissible effect outweigh the indirect impermissible result. To determine whether these conditions are present in the demolition practice, I examine the deterrence mechanism of the demolition policy.³²²

By imprisoning an offender, the government conveys to a potential offender that he is likely to be sentenced to a similar prison term if he commits a similar offense. The potential offender's calculus will depend, among other things, on his aversion to serving such a jail sentence. By also demolishing an offender's home, the government adds to this calculus the harm brought about by a demolition. But the crucial point is that it is the relatives, not the offender, who actually suffer from the loss of the home. It is the relatives who are uprooted and ejected. Ironically, offenders suffer only indirectly from the demolition measure, since most, with their long prison sentences, are unlikely to live in their houses ever again. We see, then, that the intended goal of deterrence is served by the infliction of harm on relatives.

It follows that the Court's proposition does not meet the second and third conditions of the double effect doctrine. First, the impermissible effect — that of punishing the relatives — is apparently an intended effect. Second, even if harm to the relatives were not intended, it is doubtful that it could be outweighed by the intended goals of the demolition practice. Demolitions thus cannot be justified under the double effect doctrine; the relatives' predicament cannot be discarded as being incidental or unavoidable.

Although the Court generally refrains from articulating how the demolition practice creates deterrence, it did so, seemingly inadvertently, in *Dajlis v. Military Commander of Judea and Samaria Region*:

The objective of Article 119 is to achieve the effect of deterrence, and such an effect, by nature, should be applied not only to the terrorist himself but also to those who surround him, certainly to the members of his family who reside with him. He should bear in mind that his despicable actions will not only harm himself, but they may also cause grave suffering to his family.³²³

321. For a lucid explanation of the doctrine, see MICHAEL WALZER, *JUST AND UNJUST WARS* 153-55 (1977).

322. In this argument I refer to "general deterrence," which is generally understood as aimed at society at large. I am aware that my argument would apply differently if the purpose of the practice were "individual deterrence" (deterrence of the offender himself). Given that both the Military Government and the Court treat the issue as "general deterrence," and that most offenders are imprisoned for very long periods and some are even dead, there is no need to discuss "individual deterrence."

323. 40(2) P.D. 42, 44 (1986) (English excerpt in 17 *ISR. Y.B. HUM. RTS.* 315 (1987)). The Court then went on to examine the collective punishment claim from another perspective:

It warrants no explanation that there is nothing between the concept of "collective punishment" and home demolition; in the case before us it is clear that the guerrillas came out of specific houses, and it is these — not other — houses that are to be destroyed. Clearly, the "punishment" is not imposed on homes of people who are uninvolved, and it is difficult to see from where the claim propagated that we are dealing here with collective punishment.

Although this decision is not an analytical aberration, it is uniquely candid.³²⁴ It simply articulates how the demolition policy is intended to work.³²⁵ To effect deterrence, the government conveys to potential offenders that they and their relatives will be punished; it punishes them by imprisoning the offender and demolishing his family's house. This is precisely what is wrong with the measure: under international and Israeli law, as well as basic precepts of morality, individuals — including relatives — may not be punished for offenses that they did not commit.³²⁶

Demolitions have a devastating impact on the lives of relatives. The measure assaults the most intimate of personal properties. A home is not merely a valuable asset, but an essential component of a person's sense of belonging, a locus for realizing family interaction and personal fulfillment. Overnight, demolitions force families out of their familiar shelters into tents, pitched beside the pile of dirt that was once home. Demolitions abruptly transform wealth into gravel. The sudden loss of property prevents families from fulfilling their obligation to shelter and protect their spouses, parents, and children. It also bars them from bestowing their property to their children, thus disrupting the socioeconomic order of their community. The measure takes on extra significance to Palestinians because of the special importance of the home in their mostly rural culture. As Meron Benvenisti describes:

In the eyes of the Arabs, the destruction of a house assumes almost cataclysmic proportions. The Arab curse "*Yahrbetaq*" [sic] ("May your house be destroyed") is one of the strongest

Id.; see also *Shoukeri v. Minister of Defense*, H CJ 798/89 (1990) (unpublished) (Barak, J.) ("This harsh result is intended to deter potential offenders, who must acknowledge that through their actions they cause injury, with their own hands, not only to the safety and security of the public and not only to the lives of innocent people, but also to the well-being of their own relatives.").

324. A similar explanation was given by Lord Roberts in South Africa. "I am not in favor of lessening the punishment laid down for any damage done to our railway and telegraph lines. Unless the people generally are made to suffer for misdeeds of those in arms against us, the war will never end." *SPIES*, *supra* note 29, at 112 (quoting Lord Roberts).

325. Similarly, Reicin argues that the demolition practice is "justified" because it succeeds. The otherwise uncompromising offenders "might reconsider in light of the visual reality of destruction as well as the awareness that financial disaster could befall their families and landlords." Cheryl V. Reicin, *Preventative Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 *CARDOZO L. REV.* 515, 547 (1984). Reicin complements this reasoning with an ideal vision of Palestinian self-policing. Reicin's argument is based on the premise that "other inhabitants of the house either abetted or knew of the violator's activities," *id.*, a factual premise that has been abandoned by all commentators for nearly two decades.

326. The non-individual character of the measure results in a certain irony. According to the regular criminal law that was promulgated by the Military Government and is currently in effect in the Occupied Territories, harboring a person who has committed a security offense is punishable by up to three years' imprisonment. This law, however, exempts from criminal responsibility offenders' fathers, mothers, sons, daughters, husbands, and wives. Article 17 of the Order Concerning Principles of Criminal Responsibility (No. 225) 1968, reprinted in *HAKHAKIKAH B'YEHUDA V'SHOMRON* [LAWS IN JUDEA AND SAMARIA] 105 (Tzvi Freizler ed., 1984) [hereinafter *LAWS IN JUDEA AND SAMARIA*]. Thus, the Military Government has chosen not to impose criminal penalties upon family members for harboring an offender, but condemns them to the loss of their homes for the very same act.

they can use. They attach a great, almost mystical value to their homes and land. Their house and garden are not a piece of real estate to be bought and sold.³²⁷

Even in Western societies, a person's home is laden with emotional value. The U.S. Supreme Court makes repeated reference to "the sanctity of the home,"³²⁸ describing it as "the last citadel of the tired, the weary, and the sick."³²⁹ Indeed, anyone who has ever had his or her home burglarized has most likely experienced just how sensitive we all are to our living space and how abusive the intrusion feels. The pain is even more severe if it is inflicted as a result of the actions of others. Home demolitions thus constitute an affront to people's identity as autonomous human beings.

The demolition policy thus denies the victims their basic dignity as human beings. The respect due to civilian populations is a central theme that permeates the Hague and Geneva instruments. The Preamble to the Hague Convention introduces standards of "civilized peoples" and the notions of "laws of humanity."³³⁰ Article 46 requires respect for people's "[f]amily honor and rights . . . as well as religious convictions."³³¹ Similarly, Article 27 of the Geneva Convention stipulates that the civilian population "shall at all times be humanely treated."³³² It also states, "Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs."³³³

The nature of the practice also triggers questions of morality. Any policy that overemphasizes deterrence will naturally encourage exaggerated governmental responses to offenses. This phenomenon is exacerbated by the fact that demolitions serve as a means of exhibiting the government's might.³³⁴ A spectacle of power intended for the population at large is carried out against one person or one family. The Court all but admitted the excessiveness of the practice in *Sakhawil*. The petitioner claimed that her family had been discriminated against because, out of the eight people who committed the offense with her son, only her family's house was ordered to be sealed. The Court responded:

There is nothing wrong if the authorities decide to exercise their power *vis-à-vis* one person and do not do so to others, if they believe that under the circumstances, it is sufficient to apply this kind of deterring punishment in one case in order to achieve the desired objective.³³⁵

327. MERON BENVENISTI, *CONFLICTS AND CONTRADICTIONS* 7 (1986).

328. *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

329. *Gregory v. Chicago*, 394 U.S. 111, 125 (1969).

330. Hague Convention, *supra* note 252, pmbl.

331. Hague Regulations, *supra* note 9, art. 46.

332. Geneva Convention, *supra* note 10, art. 27.

333. *Id.*

334. *See supra* part II.C.

335. *Sakhawil v. Military Commander of Judea and Samaria Region*, 34(1) P.D. 464, 466 (1979) (English excerpt in 10 *ISR. Y.B. HUM. RTS.* 345 (1980)).

In effect, the Court stated that there was no reason to seal eight homes when the sealing of one was sufficient to create the required deterrent effect. This statement contains two difficulties. It implies that one family is being made to suffer disproportionate misery, and it does not explain how one of the eight houses was singled out for sealing.³³⁶ In the absence of a mechanism for determining which of the similarly guilty parties should be punished, the policy inevitably incorporates some arbitrary method of administering criminal justice.

The moral dubiousness of the demolition practice is most disturbing when the Military Government demolishes homes of slain offenders.³³⁷ These cases demonstrate the complete separation of punishment from responsibility. When the house of a slain offender is demolished, can the Military Government still claim that the relatives' predicament is merely incidental to the punishment of the offender?

The Court's attitude towards non-individual punishment underwent a significant change in Justice Heshin's dissents in *Khizran* and *Al-Amrin* and Justice Barak's majority opinion in *Turkeman*.³³⁸ Justices Heshin and Barak argued for the restriction of the practice at least as it applied to homes that house more than one nuclear family.³³⁹

From a practical point of view, these decisions hinder implementation of the demolition policy. Still, some doctrinal and analytical questions remain unanswered. These decisions did not ban non-individual punishment outright. While they spared the rooms of married siblings, they do sanction the punishment of parents and unmarried siblings. It is difficult to analyze Barak's opinion in *Turkeman* or to determine precisely what is the current doctrine, because he did not explicate the jurisprudential guidelines or normative principles on which he based the result.³⁴⁰

Heshin's dissent in *Khizran* is commendable for its bold spirit, humanitarian undertones, and its call for normative adjudication. Its final conclusion, however, is somewhat disappointing. Heshin's starting point is that "the basic principle — and this is the crucial point — is that each petitioner, and he

336. The Court did not state whether the guilt of Sakhawil's son was more severe than that of his accomplices.

337. See *supra* note 74.

338. See *supra* notes 175 to 186 and accompanying text.

339. The *Turkeman* Court upheld the sealing of the two bedrooms of the offender, his mother, and seven unmarried siblings, but disallowed the sealing of the kitchen and the room where the offender's brother lived with his wife and son. *Turkeman v. Minister of Defense*, HCJ 5510/92 (1993) (unpublished). For the *Khizran* house, Heshin would have allowed the demolition of the room that the offender shared with his mother and sister, but would have ruled against the demolition of the kitchen, hallway, bathroom, and two rooms in which each of the offender's brothers lived with their wives and children. For the Abu Mukhsein house, Heshin would have upheld the demolition of two rooms of the offender, his parents, his brothers, and one sister, and ruled against the demolition of the offender's grandmother's room, the bathroom, kitchen, and storage room. *Khizran v. Military Commander of Judea and Samaria Region*, 46(2) P.D. 150 (1992).

340. See *supra* text accompanying note 184.

alone, shall bear his own punishment."³⁴¹ He also criticizes, with compelling rigor and at considerable length, the Court's traditional construct that buildings that are deemed "inseparable units of residence" may be demolished *in toto*.³⁴²

Nevertheless, Heshin was unwilling to take his argument to its logical conclusion. Rather, he suggested, by way of example, that when an offender shares a room with another person, the other person would be barred from contesting the demolition on the grounds that it is "his house." Heshin also stated that when a young person lives in his parents' house — in which he roams freely — the whole house should be considered "his house," so that the house could therefore be demolished because of the son's acts.³⁴³ Heshin explained that any other interpretation would strip Article 119 of any meaning.³⁴⁴ This explanation is inconsistent with his starting point. He first argued that the principle of individual responsibility is fundamental, but he later sacrificed it on the altar of Article 119. Ultimately, Heshin deemed Article 119 an unassailable norm and thus failed to fulfill his own promise to subject it to higher normative principles. In his conclusion, Heshin sadly fell into the same conceptual trap that he so severely criticized. He allowed demolitions of the offenders' "places of residence" and "unit of residence."³⁴⁵ It is unclear why Heshin so adamantly condemns the traditional criterion of "inseparable unit of residence," only to substitute it with equally artificial and similarly arbitrary tests. We can direct Heshin's criticism of the "normative significance" of such legal constructs at his own proposed substitutes: in what way does *sharing a bedroom* or the *zone of free roaming* constitute meaningful boundaries to delimit the scope of the punishment of an individual?

Although these decisions have somewhat hampered the demolition practice, the conclusions presented by Heshin and Barak ultimately authorize punishing a group of people — albeit a smaller group — for the actions of one person. No matter how carefully one constructs the guidelines of such punishment, the endeavor will rest on conceptually flawed and morally dubious grounds.

C. *Three Shadow Doctrines*

In addition to violating the prohibition on non-individual punishment, the demolition practice violates international law in three other important ways.

341. Khizran, 46(2) P.D. at 159.

342. *See id.* at 168 ("Indeed, it is hard to avoid the notion that the concept 'separate unit of residence' — originally devised as an ancillary and servant concept — has become, almost in of itself, a quintessence and a master that commands us.").

343. *Id.* at 158.

344. *Id.* at 160.

345. *Id.* at 161.

The Court has not addressed these areas — destruction of private property, confiscation of private property, and absence of due process — because of its adherence to the local law doctrine. An examination of the demolition practice reveals that it violates international law in each of these areas.

1. *Destruction of Private Property*

The first doctrine, concerning destruction of property, consists primarily of a general prohibitive rule and the exception to this rule. The exception permits destruction only when it is required by *absolute military necessity*. The issue to be examined therefore is whether the Israeli demolition policy falls within this exception.

Private property is protected by Article 46 of the Hague Regulations;³⁴⁶ by Article 23(g) of the Hague Regulations, which prohibits the destruction of property "unless such destruction . . . be imperatively demanded by the necessities of war";³⁴⁷ and by Article 53 of the Geneva Convention, which declares the destruction of property "prohibited, except where such destruction is rendered absolutely necessary by military operations."³⁴⁸ This tension between the rights of property ownership and the exigencies of war, commentators agree, is resolved in international law in favor of the former.³⁴⁹ The protection of property is also among the provisions most widely

346. Article 46 of the Hague Regulations states, "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Hague Regulations, *supra* note 9, art. 46.

347. Article 23 of the Hague Regulations states, "In addition to the prohibitions provided by special conventions, it is especially forbidden: . . . (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Hague Regulations, *supra* note 9, art. 23(g); *see also* Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 13(g) (Brussels Declaration), *reprinted in* THE LAWS OF ARMED CONFLICT 25, 29 (Dietrich Schindler & Jiri Toman eds., 2d ed. 1981); A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES 258 (1909). Although Article 23(g) is part of section II of the Hague Regulations (entitled "Hostilities"), it binds armies throughout the duration of the occupation. Hague Regulations, *supra* note 9, art. 23(g). This clarification was emphasized by the official commentary to the Geneva Convention: "Since that rule [Article 23(g)] is placed in the section entitled 'hostilities,' it covers all property in the territory involved in war; its scope is therefore much wider than that of the provision under discussion [Article 53], which is only concerned with property situated in occupied territory." THE COMMENTARY, *supra* note 66, at 301. This is a matter of law as well as a matter of plain logic: what is prohibited under extreme conditions in time of actual warfare is prohibited all the more so after hostilities have ceased. *See also* GREENSPAN, *supra* note 41, at 214, 287; VON GLAHN, *supra* note 92, at 226-27; *cf.* Ayoub v. Minister of Defense, 33(2) P.D. 113 (1979) (English excerpt in 9 ISR. Y.B. HUM. RTS. 337 (1979)).

348. Geneva Convention, *supra* note 10, art. 53 ("Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.").

349. SCHWARZENBERGER, *supra* note 92, at 244. Draper comments that the law "leans almost too heavily in favor of humanitarian aspirations." Draper, *supra* note 255, at 141. Scott refers to "the sanctity of private property." *See* JAMES BROWN SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907: A SERIES OF LECTURES DELIVERED BEFORE THE JOHN HOPKINS UNIVERSITY IN THE YEAR 1908, at 539 (1909). This tension is as ancient as the history of warfare itself. For an early case, see the biblical description of the destruction of Jericho. *Joshua* 4:24.

incorporated in the military manuals of various countries.³⁵⁰

Article 23(g) of the Hague Regulations and Article 53 of the Geneva Convention are distinctly prohibitive rules. The protection of property is stated in general, emphatically worded language. The permitted destructions are formulated as exceptions; they are stated in categorical and restrictive language.³⁵¹ The Hague Regulations require that the military necessity be "imperative,"³⁵² and the Geneva Convention demands that it be "absolute."³⁵³

All commentators insist on a narrow reading of the exceptions.³⁵⁴ Loose or expansive interpretations of military necessities vitiate the underpinnings of warfare law. Consequently, international law has rejected *Kriegsraison* ("argument of war") as a justification for overriding humanitarian concerns:

[B]ecause to accept [the concept of *Kriegsraison*] would reduce "the entire body of the laws of war to a code of military convenience, having no further sanction than the sense of honor of the individual military commander or chief of staff," Article 23(g) of the Hague Regulations makes allowance for military necessity within the rule it lays down, but does not permit military necessity to do away with the rule itself.³⁵⁵

Thus, von Glahn advocates fair and honest application of the necessity exception and warns that "an unrestricted interpretation of the meaning of necessity . . . could serve as a virtually limitless reservoir of excuses for almost any and all acts of an Occupying Power."³⁵⁶

The Israeli home demolition practice has been criticized as an unacceptable application of the military necessity exception by a number of

350. VON GLAHN, *supra* note 92, at 9; *see, e.g.*, U.S. FIELD MANUAL, *supra* note 247, art. 410. It should also be noted that excessive destruction of property amounts to a "War Crime." Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 82 U.N.T.S. 284, 288. Such destruction is considered a "grave breach" of the Geneva Convention as determined by Article 147. Geneva Convention, *supra* note 10, art. 147. These stipulations, however, probably pertain only to large-scale devastation and to "scorched earth" practices.

351. *See* SCHWARZENBERGER, *supra* note 92, at 266; Draper, *supra* note 255, at 133.

352. Hague Regulations, *supra* note 9, art. 23(g).

353. Geneva Convention, *supra* note 10, art. 53. The rigidity of the *absolute military necessity* standard is highlighted when compared to the less demanding standard of *military advantage*. *See* 1923 Hague Rules of Air Warfare, art. 24, *drafted* Dec. 1922-Feb. 1923, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 347, at 147, 150. The 1923 Regulations were never adopted in a legally binding form, but they are widely accepted as being strongly persuasive authority. *See* GREENSPAN, *supra* note 41, at 305. Similar principles are set forth in Article 52(2) of the Protocol Additional to the Geneva Conventions, Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 347, at 551, 582.

354. *See, e.g.*, Draper, *supra* note 255, at 263 (explaining that "exceptive clauses are not capable of a wide interpretation"); VON GLAHN, *supra* note 92, at 226, 227 (urging that military necessity "be very urgent and vital" and "make a decisive contribution to the end of the conflict"); OPPENHEIM, *supra* note 92, at 414 (arguing that necessity must be of imperative nature); SCHWARZENBERGER, *supra* note 92, at 244 (stressing that "alleged necessities of war [must be] kept within narrow confines").

355. GREENSPAN, *supra* note 41, at 279; *see also* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1347 (1950); Draper, *supra* note 255, at 134.

356. VON GLAHN, *supra* note 92, at 225-26.

scholars.³⁵⁷ It has been defended as appropriate on these grounds by Shefi,³⁵⁸ Reicin,³⁵⁹ and even Greenspan, who claims:

It is a tenet of counter guerilla action that the base from which the guerilla operates must be destroyed, because only if he has a base can he operate. . . . All inhabitants are, of course, removed before the houses are destroyed. The Israeli action is, therefore, justifiable under Article 53.³⁶⁰

Similarly, Shamgar relies on a paragraph from the official commentary to the Geneva Convention that states, "[I]t will be for the Occupying Power to judge the importance of such military requirements."³⁶¹ Shamgar interprets this statement as an acknowledgment of the broad discretionary powers of the army. The commentators, however, meant quite the opposite: because the occupying power does, in fact, hold the power to judge its necessities, it must not abuse its discretion. This interpretation flows from the text immediately following the text Shamgar quotes:

It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless; for unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention.³⁶²

The commentators' fears have been realized in the home demolition policy. First, military necessity connotes exigencies that are concrete and contextual, as well as compelling, definite, and immediate. The language, rationale, and common understanding of the exceptions directly conflict with the abstract nature and general application of the demolition policy. The general aim of deterrence, the effectiveness of which is contested,³⁶³ does not meet the standard of the exception.

357. Meron finds the practice to be in conflict with Article 53 as well as with Articles 23(g) and 46 of the Hague Regulations. *See* Meron, *supra* note 96, at 119. Dinstein, in passing, finds the practice to be inconsistent with Article 53 of the Geneva Convention. *See* Dinstein, *supra* note 96, at 128; *see also* Cohen, *supra* note 69, at 103; M.B. Carroll, *The Israeli Demolition of Homes in the Occupied Territories: An Analysis of its Legality in International Law*, 11 MICH. J. INT'L L. 1195, 1207-13 (1990); cf. T. Kuttner, *Israel and the West Bank — Aspects of the Law of Belligerent Occupation*, 7 ISR. Y.B. HUM. RTS. 166, 218-19 (1977).

358. Shefi, *supra* note 37, at 300-04.

359. Cheryl Reicin is open to the proposition that the standard of "imperative military necessity" is met by the mere possibility that "destruction of homes may deter those persons actually contemplating terrorists acts as well as those who might otherwise harbor terrorists or encourage such acts." She emphasizes that "destroying houses serves as a dramatic warning to those contemplating similar actions." Reicin, *supra* note 325, at 547.

360. Morris Greenspan, *Human Rights in the Territories Occupied by Israel*, 12 SANTA CLARA LAW. 377, 391 (1972). It should be noted that Greenspan's conclusion refers only to buildings that were actually used in the commission of an offense, and offers no justification for the demolition of offenders' residences.

Julius Stone, while generally supportive of the demolition policy, takes an ambiguous stand regarding the requirement of military necessity. *See* STONE, NO PEACE, *supra* note 96, at 14-15. Similarly, Alan Dershowitz, who generally justifies the practice, appears to concede that demolitions may not withstand the standard of military necessity. *Symposium, supra* note 39, at 376.

361. Shamgar, *Observance, supra* note 38, at 276 (citing THE COMMENTARY *supra* note 66, at 302).

362. THE COMMENTARY, *supra* note 66, at 302.

363. For divergent opinions among Israeli military commentators, see *supra* part II.C.

Second, the claim of military necessity should apply only to situations where hostilities are still in progress.³⁶⁴ Draper's response to Greenspan's supportive statement is compelling: "The appeal to the humanitarian element by stating, which is true, that the inhabitants are first removed before blowing up the house, destroys the very basis of his argument for the application of Article 53 under its exceptive clause."³⁶⁵ Similarly, the ICRC argues that the exception is limited to instances of "movements, manoeuvres and other action taken by the armed forces *with a view to fighting*. . . . This exception to the prohibition cannot justify destruction as a punishment or deterrent, since to preclude this type of destruction is an essential aim of the article."³⁶⁶

Thus, military necessity can not reasonably be argued except during a phase of ongoing combat or the initial stages of belligerent occupation. Scholars suggest a dichotomy between two phases of belligerent occupation: the initial "combat or wake-of-battle phase" and the subsequent "occupational phase." During the latter phase, the army's primary responsibility shifts from fighting to administration.³⁶⁷ The territory should then be administered by standards "which, for practical purposes, are those of peace."³⁶⁸ Claims of military necessity long after the conclusion of combat ignore this distinction and violate the proper standards of conduct it implies. This observation is especially true for occupations that last as long as the Israeli occupation has.

Third, military necessity cannot be said to apply to civilian properties and to military targets alike. Conflation of the two amounts to a denial of protection of private property. A bedroom is simply not a "bunker" or a "military base" because a grenade was thrown from it,³⁶⁹ and even less so merely because a person who committed an offense sleeps in it. It is plainly unconvincing to claim that destroying a family's residence, especially when the offender is in prison, is militarily "urgent,"³⁷⁰ "vital,"³⁷¹ or "impera-

364. This situation may be different when a particular strategically located property continuously constitutes a severe danger.

365. Draper, *supra* note 255, at 141.

366. ICRC Interpretation, *supra* note 11. In the opinion of the ICRC, "Destruction of property as mentioned in article 53 cannot be justified under the terms of that article unless such destruction is absolutely necessary — i.e. materially indispensable — for the armed forces to engage in action, such as making way for them." *Id.*

367. See GREENSPAN, *supra* note 41, at 214.

368. *Id.* at 225. Von Glahn emphasizes that

necessity proper will be almost impossible to prove, except in a few minor situations during the initial combat phases of the invasion of the enemy territory. . . . It must be remembered that practically all measures of real importance undertaken by an occupant in a hostile territory fall in a period of time when the military phase of active hostilities has passed from the occupied territory and when the occupant attempts to establish an orderly administration. Hence, there is an absence of nationally vital necessity and a lack of real necessity which would enable a successful employment of the defense in question.

VON GLAHN, *supra* note 20, at 226-27.

369. See Shamgar, *Observance*, *supra* note 38, at 276.

370. See VON GLAHN, *supra* note 92, at 226-27.

371. *Id.*

tive.³⁷² Finally, even assuming that demolitions have reduced the rate of security offenses, it is doubtful that the incremental deterrent effect of the routine measure meets the standard of *absoluteness* prescribed by international law.

2. Confiscation of Private Property

Article 119 vests two distinct powers in the hands of the Military Commander: confiscation, which is stipulated in the provision as "forfeiture," and destruction. Every exercise of power in accordance with Article 119 begins with an indefinite confiscation of the property. After confiscation, the Military Commander can choose whether to destroy the property, seal it, or use it for the army's own purposes.³⁷³ The Military Commander preempts all rights in the confiscated property. The owners are prohibited from using the land, entering the sealed home, or rebuilding the ruined house.³⁷⁴

Article 46 of the Hague Regulations states, "Private property cannot be confiscated."³⁷⁵ Belligerent occupation law makes four exceptions to this rule. The legality of home demolitions hinges, therefore, on their compatibility with these exceptions. This section briefly examines each of the four exceptions to show that the practice does not fit within any one of them.

The first exception, *requisition*, stems from the principle *la guerre payant la guerre*, under which the occupying army may demand goods from the local population for its own consumption. The boundaries of permissible requisitions are set out in Article 52 of the Hague Regulations.³⁷⁶ Five conditions must be met for a requisition to be lawful, two of which are incompatible with the demolition practice.³⁷⁷ First, requisitioned goods must be utilized solely for the maintenance and subsistence of the occupying forces during their

372. *Id.*

373. Paragraph (2) of Article 119 authorizes the army to take possession of confiscated buildings. 1442 Palestine Gazette, *supra* note 4, at 1089. This provision, however, has rarely been utilized by the IDF.

374. Order Concerning Prohibition on Building (No. 465) (1972), reprinted in HAKHAKIKAH LAWS IN JUDEA AND SAMARIA, *supra* note 326, at 248. Nonetheless, Article 119 authorizes the government to remit confiscated properties to their original owners. 1947 Defense (Emergency) Regulations (Amendment No. 15), in 1624 The Palestine Gazette, Supp. No. 2, at 1566 (Oct. 23, 1947). The Military Commanders occasionally do remit properties — mostly sealed homes — to their owners. They usually do so some years after the forfeiture, and condition the remittance on the family's subsequent "record" with the authorities.

375. Hague Regulations, *supra* note 9, art. 46.

376. Article 52 of the Hague Regulations reads, in part:

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation . . . Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Hague Regulations, *supra* note 9, art. 52.

377. The remaining three conditions are that requisitions be proportionate to the resources of the occupied territory; that the inhabitants not be required to take part in military operations against their country; and that the demand for requisitions come from the local military commander. Hague Regulations, *supra* note 9, art. 52. These conditions are of little importance to the present analysis.

administration of the occupied territory.³⁷⁸ The IDF does not make use of the demolished properties.³⁷⁹ The second condition is that the owners must be compensated for the requisitioned goods.³⁸⁰ The Military Government does not compensate Palestinians for their demolished homes, nor does it intend to restore the homes. Such compensation would defy the policy's purpose and undermine its deterrent effect.

The second type of permitted confiscation is *seizure*. Article 53(2) of the Hague Regulations allows the occupant to seize various objects that can be directly utilized in warfare.³⁸¹ Seizable items typically include firearms, ammunition, communication installations, and means of transportation. The Israeli practice does not fall within the seizure exception for three reasons. First, Article 53(2) instructs the occupying power to take measures to ensure that seized items are "restored and compensation fixed when peace is made."³⁸² As mentioned above, the IDF does not offer compensation for demolished homes. Second, seizure is generally understood to apply only to movable property.³⁸³ Third, the provision dictates that only items that can be directly utilized in warfare may be seized.³⁸⁴ Most private homes do not fall within this category.

The third type of permitted confiscation is *expropriation for public use*. The authority to expropriate private property is not explicitly stipulated in the Hague Regulations, but is implied in Article 43 as a permitted application of the peacetime laws of the occupied territory.³⁸⁵ Where expropriation powers were available to the ousted government, the occupant, too, may exercise them in its effort to maintain the "*vie publique*." This power is typically used when land is required, for example, for constructing schools or hospitals,

378. See VON GLAHN, *supra* note 92, at 166; SCHWARZENBERGER, *supra* note 92, at 270. Requisitioned goods typically include food, clothes, cattle, etc. The Hague Convention's drafters made a point to clarify the phrase "the needs of the army of occupation." They explained, "This is the rule of necessity; but this necessity is that of maintaining the army of occupation. It is no longer the rather vague criterion of 'necessities of war' mentioned in Article 40 of the Brussels project under which, strictly, the country might be systematically exhausted." THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 150 (James B. Scott ed., 1917).

379. Dayan insisted that the demolitions would not provide "a shadow of benefit to the Military Government." TEVETH, *supra* note 73, at 212.

380. Compensation for requisitioned property is fundamental to the legal exercise of requisition; it is considered "one of the pillars of the rule of law in occupied territories." SCHWARZENBERGER, *supra* note 92, at 271-72; see also OPPENHEIM, *supra* note 92, at 410.

381. Article 53(2) of the Hague Regulations states:

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but they must be restored and compensation fixed when peace is made.

Hague Regulations, *supra* note 9, art. 53(2).

382. *Id.*

383. SCHWARZENBERGER, *supra* note 92, at 269. The *U.S. Field Manual* states that immovable private enemy property may not, under any circumstances, be seized. U.S. FIELD MANUAL, *supra* note 247, art. 407.

384. Hague Regulations, *supra* note 9, art. 53(2).

385. *Id.* art. 43.

paving roads, or developing agricultural projects. Expropriation is legally permitted only when it complies with two conditions. It must be performed solely for the benefit of the local population,³⁸⁶ and the dispossessed owners must be compensated for the loss of their property.³⁸⁷ Both conditions render the concept of expropriation inapplicable to the home demolition policy.

The fourth exception to the prohibition on confiscation is *quarterming* (temporary use of private property for military purpose). This power is not stipulated in the international documents, but is nevertheless accepted by most scholars as permissible authority. Typically, quartered properties are used for troop dormitories, provisional hospitals, and surveillance posts.³⁸⁸ Confiscation pursuant to Article 119 cannot be justified under the exception of quartering, since the IDF does not use the confiscated homes. In addition, the demolition practice violates the fundamental condition of temporariness.³⁸⁹

3. *Absence of Due Process*

With few exceptions, the Court has consistently characterized home demolitions as "punishment."³⁹⁰ Strangely, the Court has not examined the

386. VON GLAHN, *supra* note 92, at 186; *see also* U.S. FIELD MANUAL, *supra* note 247, art. 431 ("[A]n occupant is authorized to expropriate either public or private property solely for the benefit of the local population."); *Cooperative Society v. Military Commander of Judea and Samaria Region*, 37(4) P.D. 785, 808 (1983) (Barak, J.).

387. GREENSPAN, *supra* note 41, at 296; *see also* SCHWARZENBERGER, *supra* note 92, at 245; *Cooperative Society v. Military Commander of Judea and Samaria Region*, 37(4) P.D. 785, 808 (1983) (Barak, J.).

388. The IDF makes frequent use of this authority, periodically taking possession of houses, rooftops, and yards. This practice has been upheld by the Court. In *Abu Rian v. Military Commander of Judea and Samaria Region*, 42(2) P.D. 767 (1988), the Court upheld the order by which the Military Commander took possession of the petitioner's apartment in the town of Khalhoul, on the main road from Jerusalem to Hebron. The order was issued because the army needed to station a unit of soldiers at that location, where stone throwing and other incidents had previously taken place. The order was limited to a period of three months and included notification of the petitioner's entitlement to compensation in the way of alternative accommodation or money. In *Juha v. Military Commander of Judea and Samaria Region*, 43(2) P.D. 116 (1989), a privately owned grove adjacent to the Bethlehem police station was made available for the army's use for the housing of army units. The Court recognized the authority of quartering and accepted the Military Government's alleged need in that particular case, although it stipulated that the order be limited to a predetermined period of time, and that the petitioner be compensated for the use of the property and for the loss of the trees in case it was found that the trees needed to be uprooted. *Cf.* U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.").

389. VON GLAHN, *supra* note 92, at 186.

390. *See, e.g.*, *ACRI v. Commander of the Central Command*, 43(2) P.D. 529, 540 (1989) ("undoubtedly a severe and harsh punitive measure"); *Sakhawil v. Military Commander of Judea and Samaria Region*, 34(1) P.D. 464, 466 (1979) ("exceptional punitive measure"); *Symposium*, *supra* note 39, at 380 ("personal punitive measure . . . part and parcel of the penal law"); *Shamgar, Observance*, *supra* note 38, at 275; 1442 Palestine Gazette, *supra* note 4, at 1089 (labeling part XII of 1945 DERs, which contains Article 119, as "Miscellaneous Penal Provisions").

The Court has occasionally suggested that the practice is not punitive; that demolitions are imposed "not to punish, but to deter." *Al Raqeb v. Military Commander of Gaza Region*, HCJ 878/89 (1990) (unpublished); *see also* *Rajabi v. Military Commander of Judea and Samaria Region*, 43(3) P.D. 177, 179

procedural corollary of this conclusion: whether punitive power may be exercised without judicial process. As previously mentioned, in practice the Military Commanders issue and execute demolition orders as exercises of administrative rather than criminal power, without any judicial involvement. The Military Commanders are not bound to observe any substantial rules of evidence, procedure, or reasoning before issuing demolition orders.³⁹¹ This section examines this practice in light of international belligerent occupation law, which guarantees due process, and the Israeli government's "respect for law" policy, which stresses "the introduction of proper supervisory procedures."³⁹²

On no other issue is the Geneva Convention as explicit as in its requirements for criminal justice. The Convention confines to the judiciary the authority to mete out criminal punishments.³⁹³ Criminal justice should be "impartial, prompt, and efficient," and the rules "should be strictly observed."³⁹⁴ The official commentary states, "The object of the provision is to limit the possibility of arbitrary action by the Occupying Power by ensuring that penal jurisdiction is exercised on a sound basis of universally recognized legal principles."³⁹⁵ These provisions are binding on Israel, not only in accordance with its proclaimed policy and its treaty obligations, but also as

(1989). The denial of the measure's punitive character is unconvincing. True, not every exercise of power that causes people harm necessarily constitutes a "punishment." *Flemming v. Nestor*, 363 U.S. 603, 614 (1960); *see also* *U.S. v. Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J.). In the United States, an executive action will generally not be deemed "punitive" as long as it is rationally related to a regulatory, non-punitive government purpose, and provided that its impact is not excessive in relation to that purpose. *See* *United States v. Halper*, 490 U.S. 435, 448 (1989); *Nixon v. Administrator General*, 433 U.S. 425, 475-76 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The demolition practice, however, does not meet this exception, because it has no regulatory, non-punitive purpose. The measure's sole purpose is deterrence, and deterrence, in and of itself, is part of punishment. The U.S. Supreme Court has stated plainly: "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979); *see also* *Halper*, 490 U.S. at 448. For a similar Israeli case, *see* *Mintser v. Tel Aviv Local Planning Board*, 4 P.D. 492, 494 (1950). *See also* *Kretzmer, supra* note 192, at 320-24.

Demolitions are analytically distinguishable from administrative detentions. The latter is a paradigmatic example of a government action viewed as an "administrative" power that appears at first to be punitive. *See* *Kahane v. Minister of Defense*, 35(2) P.D. 253 (1980). Administrative detentions are based on the expectation that a person is likely to commit a crime; he or she is incarcerated not for actions already committed, but to prevent actions that he or she *may* commit in the future. Demolitions, by their nature and by the very terms of Article 119, are an *ex post* response to an offense that has already occurred. Demolitions, therefore, are nothing but "punishment."

391. The Supreme Court's review of the Military Commanders' decisions does not amount to a criminal appeal. The Court does not purport to canvass evidence or determine guilt; it merely decides whether a decision of the Military Commander met the relatively lenient requirements of administrative law. *See supra* text accompanying notes 70 to 72.

392. *See supra* text accompanying note 105.

393. *See* Geneva Convention, *supra* note 10, art. 71 ("No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial."); *see also* *Universal Declaration, supra* note 22, art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.")

394. GREENSPAN, *supra* note 41, at 241.

395. THE COMMENTARY, *supra* note 66, at 341 (discussing Article 67).

general principles of law.³⁹⁶ The Convention does not leave particular safeguards of justice to the discretion of the occupying power, but elaborates upon them.³⁹⁷ It obliges the government to maintain a proportionate relationship between punishments and offenses,³⁹⁸ to deduct periods of arrest from the sentence,³⁹⁹ and to publish the criminal laws that it enacts.⁴⁰⁰ The Convention also prohibits applying retroactive legislation,⁴⁰¹ as well as prosecuting offenses committed prior to the occupation.⁴⁰² Furthermore, the Convention entitles accused persons to be promptly informed of charges against them, in writing and in a language they understand;⁴⁰³ to produce evidence and call witnesses;⁴⁰⁴ to select their own counsel, who should be allowed to visit them to prepare the defense;⁴⁰⁵ to be aided by an interpreter;⁴⁰⁶ and to appeal the sentence.⁴⁰⁷

The Military Government apparently perceives these fundamental precepts as overly cumbersome. Indeed, circumventing them is precisely "one of the great advantages" of the demolition practice. Gazit explains:

We operate two penal systems: punishment by administrative regulations and punishment by standard legal proceedings. The great advantage of administrative punishment is the swiftness of execution. When combating terror, a government cannot afford to wait three, six or nine months for the completion of investigations, preparation of charges and litigation in the various courts. To achieve deterrence punishment must be immediately visible. Demolition of guerrillas' homes is aimed at achieving that precise goal. If we want to deter young men in Hebron from following the way of Ezz Al-Din Reis, who threw the grenade into the cave of Mahpela — we will not achieve it by a life imprisonment sentence, announced nine months after the affair (Israeli due process requirements prevent us from curtailing the proceedings and resorting to a brief and swift procedure). On the other hand, the demolition of his house the day after his capture and admission — is a "pillar of smoke," which everyone sees, hears and understands.⁴⁰⁸

Gazit's premise — that swift punishment increases the disutility of crime and thus increases the deterrent impact — is probably correct,⁴⁰⁹ but expedience is hardly a criterion for legality. We should be concerned with whether the measure complies with legal principles.⁴¹⁰ Indeed, even Julius

396. See MERON, *supra* note 23, at 49-50.

397. Cf. Civil and Political Covenant, *supra* note 22, arts. 14, 15.

398. Geneva Convention, *supra* note 10, art. 67.

399. *Id.* art. 69.

400. *Id.* art. 65.

401. *Id.* art. 67.

402. *Id.* art. 70.

403. *Id.* art. 71.

404. *Id.* art. 72.

405. *Id.*

406. *Id.*

407. *Id.* art. 73.

408. Gazit, *Administered Territories*, *supra* note 40, at 37. For a similar view held by the British in Palestine, see MARLOWE, *supra* note 45.

409. See generally, JAMES Q. WILSON & RICHARD J. HERRENSTEIN, *CRIME & HUMAN NATURE* 397 (1985) (arguing that increase in speed, certainty, or severity of punishment increases disutility of crime).

410. Even if we had accepted the view that demolitions do not constitute "punishment," the practice would nevertheless be prohibited by Article 78 of the Geneva Convention, which limits the scope of "safety measures" that may be applied in the absence of judicial conviction. Geneva Convention, *supra*

Stone, writing in defense of the demolition practice, concedes that demolitions must comply with the criminal-justice provisions of the Geneva Convention. He candidly states, "The practice would still, on this view, be required to observe the provisions of Articles 71-74 concerning regular trial and conviction after due notice to the accused and other requirements."⁴¹¹

VI. CONCLUSION

The first objective of this Article was to demonstrate that the demolition practice is unlawful. I argued that demolitions inflict non-individual punishments on innocent people, namely the families and landlords of offenders. The demolition practice is therefore inconsistent with international and Israeli law and with universally accepted principles of justice. I showed that the punishment of families and landlords is neither "unintended" nor merely "incidental" to the punishment of the offenders, but is rather the very mechanism by which the policy attempts to generate deterrence. I emphasized that the measure strikes at the sanctity of people's privacy, wealth, tradition, and well-being and denies to the civilian population the respect owed them under provisions of the Hague and Geneva instruments. I suggested that the measure is not as effective as it is claimed to be and proposed that it has likely exacerbated antagonisms between Israelis and Palestinians.

In addition, I argued that the demolition practice violates three doctrines of international law that have, by and large, been absent from the debate. First, the practice exceeds any reasonable interpretation of absolute military necessity and therefore does not meet the requirements for permissible destruction of private property. Second, the practice does not fall within any of the exceptions to the prohibition on confiscation of private property. Third, demolishing homes without affording the alleged offenders a fair trial denies them procedural justice, guaranteed by both international and Israeli law.

I also challenged the principal legal justification that the Israeli Supreme Court has used to circumvent the substantive protections of international law: that local law prevails over international law. Giving priority to local law in this particular case contravenes the language, purpose, and spirit of the Hague and Geneva instruments.

note 10, art. 78; see also GREENSPAN, *supra* note 41, at 253. Rooted in the desire to limit the scope and severity of measures exercised against the civilian population, Article 78 states, in part, "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment." Geneva Convention, *supra* note 10, art. 78. Indeed, the Military Government resorts to the power of administrative detention in a routine fashion. More than 14,000 Palestinians have been incarcerated by administrative orders since the beginning of the *Intifada*. See B'TSELEM, *DETAINED WITHOUT TRIAL: ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES SINCE THE BEGINNING OF THE INTIFADA* (1992). The demolition sanction clearly exceeds the "safety measures" provided for in Article 78.

411. STONE, *NO PEACE*, *supra* note 96, at 15.

On a broader level, the case of demolitions teaches us something about belligerent occupations in general. It provides an illustration of the weakness of belligerent occupation as a political arrangement: in practice, occupations tend to escalate into bitter conflicts in which the occupying power is eventually unable or unwilling to respect occupation law. Consequently, this field of law is rendered ineffective and the interests of the indigenous population are left unprotected.

Even when the occupying power concedes that it is governing the region as a belligerent occupant, the law is sufficiently ambiguous to be easily interpreted to the occupant's advantage. The physical and legal powers are concentrated in the occupying power's hands; the indigenous population is prevented from participating in the government or rallying against it. Further complicating matters, the conflict between the occupying power's security interests and the population's interests pervades all aspects of life. This is so even when the occupant makes an attempt to be fair and considerate, and when the parties do not have diametrically opposed claims or aspirations regarding the region's final status. As soon as the slightest security concern arises, the occupying power may have valid reasons to impose curfews, search homes, restrict travel, and silence speech. Normal activities, such as schooling, trade, and healthcare, may be restricted. Stifled by the occupying power's measures and stripped of any political say, the population has little recourse other than violence. The violence tends to escalate, until someone gives up or a political settlement is reached.

Underlying this unsteady arrangement is an internal conflict that the occupying power experiences in its dual role of adversary and guardian. The occupying power's impulse is to employ its superior force against the defiant population — to vindicate its rule and exhibit its might. But it also has a responsibility to maintain the population's well-being. This latter obligation requires the occupying power to contain its impulses. In a sense, the occupying power must protect the population from the very power it uses to control the population: its restrictive regulations, its security measures, and its wrath.⁴¹² Balancing this conflict becomes all the more burdensome as hostilities intensify and casualties grow. I suggest that it is the unmanageability of this dual role that hinders the protection of civilian populations from the hardships of occupation.

A second question that arises from this study concerns the ability of courts to mend the imperfections of an occupation arrangement. This question is part of a broader inquiry into the role that courts can play in defending

412. The difficulty to control such an impulse was articulated by Shakespeare's Duke of Cornwall:
Though well we may not pass upon his life
Without the form of justice, yet our power
Shall do a court'sy to our wrath, which men
May blame, but not control.

WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR* act 3, sc. 7, 25-28.

human rights against claims of national security. The demolition study proves once again that wars, as Alexander Bickel said, are "very hard on judges."⁴¹³ Indeed, this study may be viewed as support for those who propose that, because of their repeated failure to protect human rights during crises, courts should be removed from this kind of adjudication.⁴¹⁴ Such proposals have even come from the bench. Justice Jackson, for example, deemed judicial protection in such circumstances to be "wholly delusive." He would have left review of the actions of military commanders to the public's political judgment and to the moral judgment of history.⁴¹⁵ The task of protecting human rights in time of war, he admitted with discontent, is too demanding of judges.⁴¹⁶ Because it is so difficult to resolve these matters, courts are likely to uphold virtually any measure advocated by security authorities. The fear, then, is that courts will legitimize governmental acts that are in fact extreme, and, in doing so, they will bend the law and threaten their own legitimacy.⁴¹⁷ The net result could do more harm than good to the social order.

The most obvious consequence of barring this type of adjudication is that aggrieved plaintiffs will have no immediate recourse to counter government actions taken in the name of national security. This may encourage governments to cloak actions in claims of crisis. But the opposite result is also possible. Without the shield of judicial approval, security authorities may be forced to face other kinds of criticism. Even security personnel are ultimately accountable to the polity through the political system; and, like all human beings, they bear moral responsibility for their actions. Self-restraint may, then, serve to protect human rights.

A solution to this dilemma, however, is not offered here. Instead, the demolition study demonstrates the complexity and indeterminacy of the matter, and directs us to questions that must be addressed before we can draw any conclusion. First, how did judicial approval affect the policy in question? At first glance, the Israeli Supreme Court's treatment of the demolition practice appears to provide strong support for barring the involvement of courts. We observed how the demolition practice flourished with the Court's approval. The Military Government began by defending the practice in its narrowest form, and gradually expanded it as the Court broadened the doctrine. For a long period, the Military Commanders had no reason to fear that the Court

413. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 45 (1962).

414. See, e.g., George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 *HUM. RTS. L.J.* 1 (1984).

415. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

416. *Id.* at 245.

417. The decisions concerning Japanese-American internment and their subsequent reversal by Congress and in the courts provide a good example of this phenomenon. See *REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1982), excerpted in *JUSTICE DELAYED* (Peter Irons ed., 1989); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

might disapprove of their actions. It is also quite probable that the Court's attitude soothed moral doubts the Military Commanders might otherwise have entertained. But we also saw how a minority of justices ultimately managed to stifle the demolition practice. The Military Government eventually yielded to three unfavorable decisions and two dissents. Just as the judiciary once fostered the demolition practice, it later undermined and delegitimized it. While I believe that the Court's decisions did more harm than good, the precise net result remains difficult to assess.

Second, is there good reason to believe that the government's conduct would have been better without judicial review? This is equally difficult to determine. An answer to this question requires an assessment of whether the Military Government would have applied self-restraint were it not for the Court's oversight. We can formulate a partial response by examining how the Military Government implemented the demolition practice before it was first upheld by the Court. We saw that at first the Military Government demolished homes without allowing any legal recourse. If petitions managed to get to the Court in time, however, the Military Government relaxed the particular orders. From the Military Government's apparent attempts to preempt judicial review, we can infer that the prospects for self-restraint were poor — that removing the demolition question from the Court's purview would not have curbed the practice. This assessment, however, is based on the Military Government's conduct during a limited period of time. As previously mentioned, it is possible that without the benefit of the Court's legitimation, the Military Commanders might not have been able to sustain the criticism and antagonism engendered by the practice, and might have begun to limit the policy, as the Court ultimately did.

Ultimately, the appropriate role of courts in defending human rights in times of national security must be determined on the basis of their overall performance. Although, as I have argued throughout this Article, the Court's decisions on the demolition issue have marred Israeli law and tarnished the Court's own image, the Court's performance in reviewing the actions of the Military Government has not been homogenous. While the Court has endorsed some unsavory practices, it has also restricted others. Eliminating judicial oversight would, naturally, prevent courts from extending their protection of human rights, as they occasionally do.

Take for example, *Morcous v. Minister of Defense*,⁴¹⁸ which concerned a request to distribute gas masks to Palestinians in the West Bank under the threat of an Iraqi chemical gas barrage. The case was decided some forty-eight hours prior to the outbreak of the 1991 Gulf War, at a time when the Iraqi pledge to obliterate Tel Aviv was generally commended on the Palestinian streets. Justice Barak, speaking for the Court, affirmed the Military Government's obligation under Article 43 of the Hague Regulations

418. 45(1) P.D. 467 (1991).

to attend to the safety of the civilian population — a duty that he interpreted to include supplying the equipment necessary for their physical protection from hostile assaults. The Court also admonished the Military Government for discriminating between the Jewish and Palestinian populations and stressed that the commitment to equality must prevail even in the face of such security tensions.

In sum, weighing the harm caused by judicial legitimization of practices like the home demolition practice against the benefit of decisions such as *Morcous* yields indeterminate conclusions. And within this realm of uncertainty, it would be imprudent to surrender vital rights to unfettered governmental discretion. Rather than suspending judicial oversight on the assumption that courts will always fall short, we should aspire to have good courts. It is our duty to hail them for upholding the law and protecting human rights and to criticize them when they fail to do so.

