Expert Opinion

The Lawfulness of Israel's House Demolition Policy under International Law and Israeli Law

We the undersigned, Prof. Orna Ben-Naftali (of the School of Law at the College of Management Academics, member of the public council of Yesh Din, one of the petitioners), Prof. Guy Harpaz (of the Faculty of Law, and the Department of International Relations, Hebrew University of Jerusalem), Prof. Yuval Shany (of the Faculty of Law, Hebrew University of Jerusalem) and Prof. Mordechai Kremnitzer (Prof. Emeritus at the Law Faculty at the Hebrew University of Jerusalem, currently of the Israel Democracy Institute and member of the Public Council of B'Tselem, one of the petitioners in this petition), hereby provide our Opinion regarding the lawfulness of Israel's policy of demolishing/sealing off houses, carried out in the Territories for the purpose of deterrence, in support of the petition by HaMoked: Center for the Defence of the Individual et al. v. IDF Commander in the West Bank, wherein this Opinion is submitted and inasmuch as the matter falls in our area of expertise in international public law and/or criminal law, according to the matter. Our Opinion was authored based on a review of Petitioners' petition.

We provide this Opinion in lieu of testimony before the Court and hereby declare that we are fully aware of the provisions of criminal law with respect to perjury. Our signed Opinion is to be construed as an oath sworn in Court.

1. INTRODUCTION

This Opinion focuses on the question of legality under both public international law and Israeli law of the policy of house demolition in territories brought under Israel's control following the Six Days War ('**Territories**'), pursued by Israel for the declared purpose of deterring potential terrorist activities (as opposed to demolitions pursued for planning and building or military operational purposes). This Opinion examines the legality of this policy under public international law.

In our Opinion we explain why we hold the view that the policy of house demolition and/or sealing off of houses for the purpose of deterrence (the "**Policy**"), carried out by Israel's military commanders in the Territories under Regulation 119 of the Emergency Defence (Temporary Provisions) Regulations of 1945 ("**Regulation 119**") amounts to a serious breach of Israel's obligations under public international law (including the laws of belligerent occupation, international humanitarian laws and international human rights laws).

In our view, such breaches may constitute, under certain circumstances, a war crime under international criminal law, and may fall, if certain conditions are met, under the jurisdiction of the International Criminal Court, under the Rome Statute.

We further take the view that the jurisprudence of the Supreme Court of Israel sitting as the High Court of Justice (the "**Court**") in the domain of house demolitions, which confirms, in principle, the legality of the Policy, contradicts the Court's own jurisprudence on other issues, since it lacks meaningful scrutiny of the measures according to international law.

The Opinion's analysis leads us to the conclusion that the Court should declare the illegality of the Policy and order the authorities to cease its implementation.

These conclusions are reinforced by international legal developments that took place after the first judgments of the Court which upheld the Policy's legality (1970s-1980s), including the enhanced recognition of the customary character of the Fourth Geneva Convention, the adoption of the Rome Statute and the establishment of the International Criminal Court.

The Opinion is structured along the following lines: Following this introductory Chapter, Chapter Two will provide the factual and legal basis of the Policy, Chapter Three will analyse the illegality of the Policy under international law, and Chapter Four will conclude the Opinion by calling the Court to declare the illegality of the Policy and order the cessation of its implementation.

The Policy has attracted voluminous literature, most of which is critical.[1] This Opinion will refer to some of the scholarship, including in particular that of Simon[2] and

[1] See Larry Backer, 'The Führer Principle of International Law: Individual Responsibility and Collective Punishment' (2002) 21 *Penn State International Law Review* 509; Martin B Carroll, 'The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of its Legality in International Law' (1990) 11 *Michigan Journal of International Law* 1195; Shane Darcy, 'Punitive House Demolitions, The Prohibition of Collective Punishment, and the Supreme Court of Israel' (2002) 21 *Penn State International Law Review* 477; Alan Dershowits, 'Symposium on Human Rights' (1971) 1 *Israel Yearbook on Human Rights* 361, 376-77; Yoram Dinstein, 'The Israeli Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses' (1999) 29 *Israel Yearbook on Human Rights* 285; Brian Farrell, 'Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119' (2003) 28 *Brookline Journal of International Law* 871; Elad Gil, Yogev Tuval and Inbar Levy, *Exceptional Measures in the Struggle Against Terrorism*, Israel Democracy Institute, 2010; Amos Guiora, 'Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism' (2006) 20 *Temple International and Comparative Law Journal* 363; Emanuel Gross, 'Democracy's Struggle against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area' (2002) 30 *Georgia Journal of International and Comparative Law* 165; Emanuel Gross, 'Human Rights, Terrorism and the Problem of Administrative Detention In Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?' (2001) 18 *Arizona Journal of International and Comparative Law* 721; Usamar Halabi, 'Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis' (1991) 5 *Temple International and Comparative Law Journal* 251; Menachem Hofnung and Keren Weinshall-Margel, 'Judicial Rejection as Substantial Relief: The Israeli Supreme Court and the "War on Terror"' in Mary L Volcansek and John F Stack Jr (eds), *Courts and Terrorism: Nine National Balance Rights and Security* (Cambridge University Press 2011) 150; Menachem Hofnung and Keren Weinshall-Margel, 'Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice' (2010) 7 *Journal of Empirical Legal Studies* 664; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press 2002) 145; David Kretzmer, 'The High Court of Justice's Monitoring of Demolishing and Sealing Houses in the Territories' in Yitzhak Zamir (ed), *Klinghoffer's Book on Public Law* (1993), 305 (in Hebrew); Kretzmer, 'The

Kretzmer,[3] while drawing upon two publications by Harpaz, one in the *Israel Law Review* and one forthcoming in the *Leiden Journal of International Law*.[4]

2. FACTUAL AND LEGAL FOUNDATION

In its capacity as a Mandatory Power in Palestine, the United Kingdom promulgated the Emergency Defence (Temporary Provisions) Regulations of 1945, pursuant to the Emergency Powers (Defence) Act, 1945 (British Imperial Statute).[5] Regulation 119 of this enactment (the '**Regulation**' or '**Regulation 119**') granted the British Commander in Palestine broad discretionary authority to demolish and seal off houses:

Supreme Court of Israel: Judicial Review During Armed Conflict' (2005) 47 *German Yearbook of International Law* 392; John Quigley, 'Punitive Demolition of Houses: A Study in International Rights Protection' (1992-1993) 5 St. *Thomas Law Review* 359; Cheryl Reicin, 'Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories' (1987) 8 *Cardozo Law Review* 515; Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262; Dan Simon, 'The Demolition of Homes in the Israeli Occupied Territories' (1994) 19 *Yale Journal of International Law* 1; Efrat Zilber, 'The Demolition and Sealing of Houses as a Means of Punishment in the Areas of Judea and Samaria During the Intifada up to the Oslo Agreement', MA thesis, Bar Ilan University, Israel, 1997; George P Fletcher, 'Collective Guilt and Collective Punishment' (2004) 5 *Theoretical Inquiries in Law* 163; Ralph Ruebner, 'Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel: A Comparative Perspective' (2003) 31 *Georgia Journal of International and Comparative Law* 493; Ariel Zemach, 'The Limits of International Criminal Law: House Demolitions in an Occupied Territory' (2004) 20 *Connecticut Journal of International Law* 65; Amichai Cohen, 'Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories' (2005) 38 *Israel Law Review* 24; Baruch Bracha, 'Judicial Review of Security Powers in Israel: a New Policy of the Courts' (1991) 28 *Stanford Journal of International Law* 39; Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 *Israel Year Book of Human Right* 104, 128; Jonathan Grebinar, 'Responding To Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law' (2003) 31 *Fordham Urban Law Journal* 261.

2 Simon, *ibid*.

3 Kretzmer, *supra* n.1.

4 Guy Harpaz, 'Being Unfaithful to One's Own Principles: The Israel Supreme Court and House Demolitions in the Occupied Palestinian Territories' (2014) 47/3 *Israel Law Review* 401; Guy Harpaz (forthcoming), 'When Does a Court Systematically Deviate from its Own Principles? The Adjudication by the Israel Supreme Court of House Demolitions in the Occupied Palestinian Territories' *Leiden Journal of International Law*.

[5] Defence (Emergency) Regulations 1945, Palestine Gazette No 1442 Supp II (27 September 1945) Reg 119(2). For analysis, see Gross, *supra* n.1, 180-82; Carroll, *supra* n.1, 1202-05.

'(I) 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, 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 offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure of anything growing on the land'.

The authority provided by the Regulation was exercised by the British Commander in Palestine *inter alia* for deterrence purpose.[6]

It is the traditional position of the State of Israel that Jordan, who occupied the West Bank in 1948, inherited the Regulation from the British Mandate and applied it to its territory, including the West Bank, it through its internal laws. In the aftermath of the Six Days War (June 1967) and in the wake of the occupation of the West Bank and the Gaza Strip, Israel made use of the Regulation in the Territories, as part of the law applicable prior to the occupation, in its capacity as a belligerent occupant.[7]

In times of relative tranquillity, the Policy has been rarely used, whereas in times of escalation of terrorist activities, such as during the first *Intifada* (1987-1991), the second *Intifada* (2000-2005) and the recent eruption of violence in the Territories and East Jerusalem (2014), the IDF has more readily resorted to that practice. Over the years, the more reversible and hence less severe measure of sealing off of houses has to a large extent replaced demolitions. Still, since in most cases, orders for the demolition of houses raise the same, or very similar, legal questions as orders for the sealing off of houses, this Opinion will use the generic term of 'house demolitions' to cover both practices, unless otherwise stated.

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[6] For analysis, see Dinstein, *supra* n.1, 287; Simon, *supra* n.1, 30.
[7] For a historical account, see Zemach, *supra* n.1, 67.

It is difficult to ascertain the precise number of houses that were subjected, since 1967, to house demolition orders under Regulation 119; however, it is safe to assume that the number exceeds one thousand demolitions.[8]

House demolitions, carried out through administrative proceedings following an executive order of the Military Commander of the relevant geographical area, are considered under Israeli law an administrative sanction.[9] This sanction may be imposed in addition to the judicial-criminal sanction imposed on terror suspects, yet it is sometimes executed alone in lieu of prosecution.[10]

Regulation 119 does not explicitly grant the owners of the house a right of hearing prior to demolition. Yet the practice, developed in light of the Court's jurisprudence, is that, as a general rule, a demolition is only carried out after the inhabitants and/or proprietors of the house are given an opportunity to appeal to the Military Commander to reconsider his decision and to petition the Court against the demolition order.[11]

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[8] For facts and figures of that practice in the territories, see Halabi, *supra* n.1; Darcy, *supra* n.1, 478-480; Farrell, *supra* n.1, 898-99; Zemach, *supra* n.1, 67-70; Hofnung and Weinshall-Margel, *supra* n.1, 674: During the years 2000-2005, 675 dwellings were demolished. See also figures as supplied by B'tselem, the Israeli Information Center for Human Rights in the Occupied Territories, http://www.btselem.org/punitive_demolitions/statistics.

[9] Hofnung and Weinshall-Margel, *supra* n.1, 159.

[10] See Halabi, *supra* n.1, 254 and 266-67.

[11] HCJ 358/88 *Association for Civil Rights in Israel v. Officer Commanding Central Command*, Judgment of 30 July 1989, Piskei Din, vol. 43 (2), 1989, 529, English summary: Isr. YHR, vol. 23, 1993, 294. But see HCJ 6696/02 *Amer v Commander of IDF Forces in the West Bank* 2002 PD 56(6) 110 at http://elyon1.court.gov.il/files/02/960/066/A03/02066960.a03.pdf for an exception to the general rule, under which refusal to offer prior hearing in circumstances in which such notice would endanger the soldiers executing the order.

3. HOUSE DEMOLITION AS A VIOLATION OF PUBLIC INTERNATIONAL LAW

3.1. Introduction

The magnitude and severity of the Policy's violation of international law, analysed in this Chapter, led Dinstein to query in 1999: 'How could the Supreme Court deny the existence of a contradiction which is so glaring and multifaceted?'[12] We add our voice to his concern.

We address three specific arguments in this Chapter: (i) The Policy amounts to a serious breach of Israel's obligations under public international law (including under the laws of belligerent occupation, international humanitarian laws and international human rights laws); (ii) Such a breach may amount, under certain circumstances, to a war crime, and may be subjected, should certain legal conditions be met, to the jurisdiction of the International Criminal Court, and (iii) The judicial review conducted by the Court with respect to the Policy does not adequately address the question of the legality of the policy under international law.

3.2. Illegality under the International Humanitarian Laws (including the Laws of Belligerent Occupation)

We are of the opinion that the Policy contradicts the general spirit and specific letter of international humanitarian law ('**IHL**'),[13] including the laws of belligerent occupation. The Policy furthermore cannot be reconciled with the interpretation the Court has given to the laws of belligerent occupation.

The starting point of our analysis is that, as the Court itself recognised, every legal authority and competence that Israel holds with respect to the Territories, including

[12] Dinstein, *supra* n.1, 295-96.
[13] For support, see Dinstein, *supra* n.1 295-96. See also Carroll, *supra* n.1 1206.

Regulation 119, must be exercised according to the laws of belligerent occupation. As Justice Barak (as he was then) postulated:

'Judea and Samaria are held by Israel under military occupation, or "belligerent occupation." A military government was established in the Area, headed by a military commander. The military commander's powers and authorities imbibe from the rules of public international law concerning military occupation. Under the provisions of these rules, all powers of governance and administration are held by the military commander (HCJ 619/78 [3]). These powers may imbibe from the law that was in place in the Area prior to the military occupation and from new legislation enacted by the military commander. In the first instance, the military commander exercises existing local executive powers. In the second instance, the military commander exercises new executive powers. In both cases, the exercise of power must uphold the rules of public international law concerning belligerent occupation and the principles of Israeli administrative law regarding the exercise of executive powers by a public servant…" (emphasis added: the authors).[14]

Thus Regulation 119 is to be read to be subject to the laws of belligerent occupation, including, in particular, Article 43 of the Hague Regulations which stipulates that: '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.'[15] The occupant, must therefore rely on the laws in effect in the country, unless absolutely prevented from doing so. A provision of international law that is applicable to the occupied territory, but contradicts a provision of the law in effect in the country is undoubtedly considered to be circumstances preventing the occupant from relying on the law in effect in the country.[16]

As the Court itself recognized, Article 43 is the most central article of the Hague Regulations and in the context of the laws of occupation enjoys a quasi-constitutional status: 'Article 43 has been recognized in our judgments as a quasi-constitutional

[14] HCJ 393/82, *Jam'iat Ascan Elma'almoon Eltha'aooniah Elmahduda Elmaolieh v. Commander of the IDF Forces in the Area of Judea and Samaria*, Judgment of 28 December 1983, Piskei Din, vol. 37 (3), 1983, 785, 795, para.10 English summary: Isr. YHR, vol. 14, 1984, 301.

[15] The Hebrew version thereof is quoted in HCJ 202/81 *Saeed Mahmud Tabib v Minister of Defense*, PD 36(2) 622, 629 (1981).

[16] See, for example, Hans-Peter Gasser, Protection of the Civilian Population' in *The Handbook of the International Law of Military Operations* (OUP, Terry Gill and Dieter Fleck eds., 2008) 237, 287.

framework provision of the laws of belligerent occupation that establishes a general framework for the manner the Military Commander should exercise his duties and powers in the occupied territory'.[17] Each and every exercise of authority by the State of Israel in the Territories should be informed by Article 43. Regulation 119 is no exception.

Thus Regulation 119 should be read in light of the core principles of the laws of occupation, including the principle that in exercising its authority, the occupier must uphold the laws of occupation and exercise this authority in keeping with these laws. The occupant must also maintain, as much as possible, the *status quo* present in the occupied territory at the moment of occupation and the need to balance the occupant's security interests against the interests of the local residents. Justice Barak (as was his title at the time) addressed this balance in the *Jam'iyat Iskan* verdict:

'The Hague Regulations revolve around two central axes: one – ensuring the legitimate security interests of the occupier in a territory which is under belligerent occupation; the other – safeguarding the needs of the civilian population in a territory under belligerent occupation…The Hague Regulations seek to strike a certain balance between these two axes…"The laws of war usually strike a delicate balance between two magnetic poles: military necessity on one hand, and humanitarian considerations on the other.' (Y. Dinstein "The Legislative Authority in the Held Territories" *Iyunei Mishpat*, 2 (5732-33) 505, 509)'.

In particular, the legality of relying on Regulation 119 should be examined in light of the strong protection granted by the laws of belligerent occupation to the property rights of residents of the Territories, including pursuant to article 46 of the Hague Regulations. This protection requires broad interpretation of the prohibitions imposed upon the Occupying Power with respect to property rights and a narrow interpretation of any exception to these prohibitions. The strength of the property right requires a particular strong justification for any infringement of that right. This purposive interpretation would have led, as detailed below, to the finding that the Policy is illegal, even in the absence of explicit provisions in the laws of belligerent occupation that regulate the authority to damage private property for security reasons. This conclusion would be reached, *a*

[17] HCJ 2164/09 *Yesh Din and others v. The Commander of the IDF Forces in the West Bank*, para. 8.

fortiori, from a review of the explicit arrangements that do allow intervention in property rights but only in specific, particularly narrow security circumstances.

Specifically, it is our opinion that the Policy vitiates Article 53 of the Fourth Geneva Convention, which states that 'Any destruction by the Occupying power of real or personal property belonging individually or collectively to private persons…is prohibited, except where such destruction is rendered absolutely necessary by military operations'.

A reasonable reading of the 'military operations' exception, informed by the aforesaid objectives of the laws of belligerent occupation, the central importance attributed thereunder to protection of property rights and the language of articles 53 alluding to "absolutely necessary" circumstances, requires a narrow construction of the exception.

Thus, a policy of house demolitions aimed at generating general deterrence does not seem to fall under the phrase 'absolutely necessary by military operations', as it is either 'absolutely necessary' nor related directly to 'military operations'.

Our position regarding the non-applicability of the 'military operation' exception to the context of house demolitions is supported by the position of the International Committee of the Red Cross which insists that Article 53 only covers acts of destruction pursued for the purpose of fighting: 'movements, maneuver, and other action taken by the armed forces with a view to fighting'.[18] Similarly, the Commentary on the Additional Protocols to the Geneva Conventions treats the notion of 'Military operations' as 'movements, maneuvers and actions of any sort, carried out by the armed forces with a view to combat'.[19]

Administrative house demolitions are not carried out in the framework of combat, and therefore they cannot be considered as a 'military operation'.

18 Commentary on Additional Protocol I of 1977 to the Geneva Conventions of 1948, p. 67, para. 152 (Jean Pictet ed. 1987).

[19] ICRC ,Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 ,para 152, p. 67.

Indeed, Israel's security forces themselves do not consider the demolition orders as a battlefield measure, as they define demolition orders as an administrative sanction. Furthermore, the authorities themselves make the distinction between demolitions carried for general deterrence purpose (being the subject matter of this Opinion) and demolitions which are carried in the midst of military operations against houses that are situated in a manner that poses a concrete operational risk to the IDF soldiers (demolitions that fall beyond the scope of the Opinion).[20] In other words, Israel's security forces themselves effectively contrast between house demolitions carried out for deterrence purposes and those carried out for operational reasons. Israel, therefore, cannot contradict itself and argue before the Court that deterrence measures are operational measures in their meaning under the aforesaid Article 53.

Consequently, we do not believe it can justify the application of the Regulation according to 'military operation' exception.[21] True, during the early implementation of the Policy, its declared objective was that demolitions were required for military operational purposes. This was expressed, for example, by President Shamgar, who served then as the Attorney General of the Army and asserted that 'the necessity to destroy the physical base for military action when persons in the commission of a hostile military act are discovered. The house from which hand grenades are thrown, is a military base, not different from a bunker in other parts of the world'.[22] Yet, this rationale was subsequently abandoned and it is nowadays officially asserted that demolitions are performed for general deterrent purposes and hence not for concrete operational purposes.[23]

Not only does the policy fail to meet the "military operations" requirement", but it also fails to meet the other, cumulative requirement of "absolutely necessary" stipulated, as

[20] For that distinction, see Kretzmer (2005), *supra* n 1.
[21] Our stance regarding the violation of Article 53 is also supported by numerous scholars: Backer, *supra* n.1, 543-44; Gross, *supra* n.1, 198-201; Cohen, *supra* n.1, 69; Simon, *supra* n.1,68; Dinstein, *supra* n.1, 128; Carroll, *supra* n.1, 1209-12; Zemach, *supra* n.1. See also Kretzmer (2002), *supra* n.1, 147-148.
[21] Shamgar, *supra* n.1, 275-276, as analyzed by Quigley, *supra* n.1, 366.
[22] Shamgar, *supra* n.1, 275-276, as analyzed by Quigley, *supra* n.1, 366
[23] See Ariel Merari, 'Israel Facing Terrorism' (2005) 11 *Israel Affairs* 223, 230; Carroll, *supra* n.1, 1207.

aforesaid, in international law. The State of Israel has never met the required threshold for proving the effectiveness of the policy and hence, has not been able to prove its necessity under international law.

Indeed, outside security circles, there is a broad view that the Policy does not support its stated rationale. Legal scholarship on this issue provides a highly convincing legal corpus that presents qualitative and quantitative analysis that refutes the deterrence rationale.[24]

Ariel Merari, a renowned scholar who devoted his research to the psychology of terror and who concluded that such measures not only fail to deter terrorist activities but they may actually incite them:

'The little evidence in existence suggests that collective punishment of this kind does not influence the affected population in the desired direction.… In general, collective anti-terrorism measures are likely to have two opposing effects on the population from which the insurgents emerge: on the one hand, they breed fear and, on the other hand, hatred to the government. The actual behaviour of the affected public…depends on whether fear is stronger than anger, or vice-versa...demolition of houses has, probably, in the long run generated hatred more than fear, thus augmenting terrorism, instead of reducing it'.[25]

The empirical work of Zilber adds strong probative support for Merari's work.[26] Research conducted by Benmelech, Klor and Berrebi, which found that house demolitions act as somewhat of a deterrent in very specific circumstances, also states that this is true only for the time immediately following the demolition and only with respect to suicide attacks, but not other types of attacks.[27] These works, that cast doubt on the long-term efficacy of the Policy are supported, in turn, by extensive research conducted by Israeli NGOs[28] forming together a systematic, consistent and well-substantiated

[24] Kretzmer, *supra* n.1, Dinstein, *supra* n.1; Halabi , *supra* n.1; Simon *supra* n.1.But contrast these views with Reicin, *supra* n.1, 547.
[25] Merari, *supra* n.23, 231 and 235.
[26] A study conducted by Zilber, *supra* n.1 showed that the number of terror incidents generated by Palestinian communities in which houses were demolished did not decline after the demolition.
[27] Efraim Benmelech, Esteban F Klor and Claude Berrebi, 'Counter-Suicide-Terrorism: Evidence from House Demolitions', 16493 NBER Working Paper (2010)
[28] See, for example, Ronen Shnayderman (Zvi Shulmman, trl.), 'Through No Fault of Their Own: Israel's Punitive House Demolitions in the al-Aqsa Intifada', B'Tselem, November 2004, http://www.btselem.org/publications/summaries/200411_punitive_house_demolitions

argument against the Policy's rationale. Numerous high ranking IDF officers upon their retirement, expressed over the years their strong doubts about the deterrent effect.[29]

In fact, Amnon Strasnov, former IDF Attorney General, acknowledged that Israel has never published evidence that the practice does deter terrorists.[30] This lack of evidence led Merari to speculate that the Army actually never carried out such a study.[31] Another legal advisor to the IDF, Amos Guiora, also expressed his strong doubts about the Policy's *effet utile*.[32]

In a very recent publication of Cohen and Mimran, the authors advance a highly critical analysis of the State's failure to furnish evidence of the deterring impact of the Policy. They further assert that the Policy appears to generate hatred and motivation for terrorist attacks that might outweigh its benefits in deterrence terms.[33]

We were unable to locate data that supports the position that house demolitions promote deterrence, whereas on the other hand, we have seen others offering data they believe to indicate the absence of deterrence and even the opposite result – encouraging terrorism… In light thereof, inasmuch as there is no data to support the efficacy of a certain policy, it is quite difficult to rely on utilitarian arguments. The proponents of the utilitarian approach in the context of house demolitions have been unable to "bring to the table", as it were, data to prove their position. In the absence of such data it appears that the dispute between the non-outcome based approach and the utilitarian approach loses its significance, given that the proponents of the latter approach are unable to substantiate their position.[34]

This critical approach should be examined in its wider scholarly context, namely the research that has established that harsh, untargeted counter-terrorism measures that harm

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[29] See, for example, Former Brigadier General Benyamin Ben-Eliezer, who served as both the Military Commander in the West Bank and as the Coordinator of Government Activities in the Territories, and personally signed demolition orders. Subsequently he served as the Defence Minister. Following his retirement from the IDF he criticized the Policy with respect to both its moral and effective dimensions (Interview with Binyamin Ben-Eliezer, Former Brigadier General (Israel Radio Broadcast 30 July 1985), cited in Simon *supra* n.1, 13.

[30] Amnon Straschnov, *Justice Under Fire: The Judicial System During the Intifada* (Yediot Aharanot 1994) 92 (Hebrew).

[31] Merari, *supra* n.23, 231.

[32] Guiora, *supra* n.1, 375-76.

[33] Amichai Cohen and Tal Mimran, *Cost without Effectiveness in the House Demolition Policy: Following* 4597/14 *Awawedh and others v Military Commander of the West Bank Area*, **Law Online – Human Rights – Jurisprudence Short Comments** 31, 5 (2014), (Hebrew)

[34] Amichai Cohen and Tal Mimran *Figures and Cognitive Bias in Decision Making – the House Dmolition Policy as a Test Case,* Policy Research, Jerusalem, The Israel Democracy Institute (In preparation, Hebrew, translated by HaMoked: Center for the Defence of the Individual).

individuals who are not involved in terrorism backfire in the long-run by fostering hatred and promoting attempts to exact revenge.[35] It was found that house demolitions which are predicated on a lack of distinction between those involved in terrorism and those who are not may create new grievances,, lead to an increase in popular support for terrorism, resulting of larger cadres and increased violence.[36]

The extremely detrimental impact of the Policy in terms of human rights combined with this scholarship, has led even those scholars who did not insist on the illegality of the policy, *per se*, to demand that the Courts impose on the military authorities a particularly heavy burden of proof regarding the likely effectiveness of demolition orders.[37]

The remarks made by Kremnitzer are relevant: "Another matter should have been examined, and without these data, we do not have the true utility balance. What we have is a bluff. I suggest we see how many people chose terrorism as a result of having been victims or witnesses of these acts, because you cannot judge effectiveness by what it did for a specific person who may have decided not to do something. You also have to look at what motivation it gives other people, what forces are gained for terrorism by these types of actions, which are unjust and inhuman".[38]

Yet the Court has chosen to ignore this scholarship. It has refused to examine the question whether demolition orders serve as an effective deterrent instrument,[39] i.e. whether they decrease violence or generate more of it.

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[35] Kevin Siqueira and Todd Sandler, 'Terrorists versus the Government: Strategic Interaction, Support, and Sponsorship' (2006) 50/6 *Journal of Conflict Resolution* 878–898, as analyzed by Benmelech, Klor and Berrebi, *ibid*.

[36] Benmelech, Klor and Berrebi, *ibid*, referring to Peter Rosendorff and Todd Sandler, 'Too Much of a Good Thing? The Proactive Response Dilemma' (2004) 48/4 *Journal of Conflict Resolution* 657.

[37] For further analysis, see Bracha *supra* n.1, 91 and 101. See also Eyal Zamir and Barak Medina, 'Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law' (2008) 96 *California Law Review* 323: Even moderate deontologists who would consider intentional infliction of harm on innocent people as not absolutely prohibited but as justified, in extreme circumstances, would still require a high threshold to justify such an action.

[38] See Protocol No. 342, The Knesset's Constitution Law and Justice Committee, session on human rights and purity of arms when fighting terrorism, December 2004 (Hebrew, translated by HaMoked: Center for the Defence of the Individual).

[39] See for example, HCJ 2/97 and 11/97 *Abu Halawe v Commander of the Home Front Command* (unpublished, 11 November 1997), http://elyon1.court.gov.il/files/97/020/000/A03/97000020.a03.pdf,

This had led the Court to uncritically accept the military's position as to the deterrent effect of house demolitions, despite the uncertainty as to whether the military itself has adequately researched the question.[40] This approach led the Court to dismiss calls for the submission of supportive statistical data[41] or expert evidence. Instead the Court contended itself with the fact that the theory that the Policy is not effective has not been proven either:[42] 'scientific research has not and cannot be conducted that shows how many attacks were prevented and how many lives were saved as a consequence of the deterrent effect…but the opinion that a **certain** deterrence existed was sufficient to desist from interfering in the judgment of the Military Commander…' (emphasis added: the authors).[43]

By abandoning the requirement of statistical evidence and/or expert evidence (which as stated above, do in fact exist and often point in the opposite direction, namely the non-deterrence of the Policy), the Court has contented itself with anecdotal arguments or

ignoring the opinion of Professor Martin van Creveld of the History Department of the Hebrew University, who submitted to the Court an expert opinion which indicated that despite the broad use of house demolition measures throughout the world, this measure has been proven to be ineffective and in most cases it does not reduce violent acts but, on the contrary, even increases them.

[40] See, for example, HCJ 361/82 *Khamri v Military Commander of Judea and Samaria Region* 1982 36(3) PD 439; HCJ 179/89 *Batash v Military Governor of Gaza* 1989 (unpublished, 18 March 2009). For more recent examples, see HCJ 5696/09 Mugrabi v Commander of Home Front Command (15 February, 2012, not yet reported), per Justice Melcer, para.13, http://elyon2.court.gov.il/files/09/960/056/K04/09056960.K04.htm; HCJ 124/09 *Dawiat v Minister of Defense* 2009 para 4, http://elyon1.court.gov.il/files/09/240/001/o03/09001240.o03.pdf: "It is difficult to dispute the appropriateness of the goal. The need to deter violent attacks that are often carried on a wave of terror that began with the act of one individual and threatens to sweep others along with it, causes the security authorities to conclude that it is a compelling need because deterrence is a central layer in that cruel evil. I do not see room to interfere and it is difficult to assume that anyone would dispute that position". For the latest example, see *Awawedh*, *supra* n.136, para. 20. (Deputy Chief Justice Naor, Justice Danziger and Justice Shoham concurring, delivered 1 July, 2014, not yet reported), http://www.hamoked.org/files/2014/1158434_eng.pdf. For analysis of this judicial approach, see Kretzmer (1993), *supra* n.1;Simon, *supra* n.1, 27-45. But compare with Dotan, *supra* n.**Error! Bookmark not defined.**, 349: the Court tempered, to some extent, the harshness of demolition measures by creating procedural protections and by imposing substantive limitations.

[41] HCJ 1005/89 *Aga et al v Commander of IDF Forces in the Gaza Strip* 1990 PD 44(1) 536, 538, as analyzed by Dinstein (2000), *supra* n.1, 292.

[42] See HCJ 2/97 and 11/97 *Abu Halawe*, *supra* n.**Error! Bookmark not defined.**. See also HCJ 2209/90 *Shwahin v Commander of IDF Forces in the West Bank Region* 1990 PD 44(3) 875, 878, as analyzed by Dinstein, *supra* n.1, 292.

[43] HCJ 2006/97 *Ghanimat v Officer Commanding Central Command*, 1997 PD 51(2) 654, http://elyon1.court.gov.il/files/97/060/020/A03/97020060.a03.pdf per Justice Goldberg, (authors' translation and emphasis).

axiomatic assumptions supporting deterrence, establishing a uniquely lenient burden of proof.

In house demolition cases, the Court applied the test of remote possibility. Thus, for example, the Court approved a demolition because 'the pressure of the families may deter the saboteurs' (emphasis added: the authors)[44] and another if '…the Respondent believes that this measure is necessary to prevent further loss of lives. He argues that the families' pressure on the terrorists may deter the latter. There is no absolute certainty that such a measure will be effective but…this measure should not be dismissed either' (emphasis added: the authors).[45]

Such a low, almost meaningless threshold cannot be reconciled with the standard of "absolutely necessary" stipulated, as stated above, in Article 53 of the Fourth Geneva Convention, and as such, contradicts this article and international law.

The Court speculated that even if acts of terrorism had not diminished in number – it is 'conceivable' that, had the Policy been left dormant, conditions would have been far worse.[46] With all due respect, we are of the view that such exceptionally severe human rights infringements cannot be justified solely on the basis that it is 'conceivable' that the measures leading to them may prove to be effective.

Other judicial utterances were equally deferential to the military authorities. Thus in one verdict the Court concluded that:

'this is a case of a terrorist belonging to an extremist Islamic terrorist organization…This is an entirely new dimension of crazy fanaticism. Given the necessity of dealing with this

[44] HCJ 2418/97 *Abu Fara v Commander of IDF Forces in the Judea and Samaria Region* 1997 PD 51(1) 226, 228, http://elyon1.court.gov.il/files/97/180/024/A03/97024180.a03.pdf analyzed by Dinstein, *supra* n.1, 297.
[45] *Ghanimat supra* n.43, 653-54.
[46] HCJ 242/*90 Alkatsaf v Commander of IDF Forces in the Judea and Samaria Region* 1990 PD 44(1) 614, 616.

phenomenon, the competent authorities are entitled, *inter alia*, to adopt the measures of seizure, and demolition of the home of the suicide bomber …'.[47]

This reasoning does not in fact address the questions of necessity and deterrence. Contrary to its judgments in other comparable areas, the Court was not searching for proof of the necessity of the measure but for the necessity of a response to atrocious terror attacks.

In one of the most recent judgments on a sealing-off order, the Court lowered even further the benchmark for reviewing the authorities' discretion. Justice Naor found that '…the impossibility of disproving the view that a certain deterrence exists is sufficient in order not to interfere with the discretion of the military commander',[48] while Justice Rubinstein based the deterrence rationale on not more than a 'hope': '…the inability to disprove the view that a certain deterrence exists, is sufficient in order not to interfere with the discretion of the military commander...At the end of the day, before us is a hope of deterrence for saving human lives versus damage, although painful, to property...'. (emphasis added: the authors).[49]

With all due respect, we are of the view a court of law should not justify such severe human rights infringements, on the basis of a mere 'hope' of effectiveness, as the Court did, particularly given that this "hope" fails to meet the evidentiary standard stipulated in international law, which is, "absolutely necessary".

Our view that the Policy fails to meet the strict test set in international law is supported by the recommendations of the Shani Committee.

In light of the Policy's questionable rationale and effectiveness, in 2005 Chief of Staff Ya'alon established a Committee of high-ranking IDF officers to examine the legality,

[47] HCJ 6026/94 *Nazaal v IDF Commander in Judea and Samaria* (1994) PD 48(5) 338*Nazaal*, as analyzed by Gross, *supra* n.1, 190-91.
[48] HCJ 9353/08 *Abu Dahim v Commander of the Home Front Command* 2009 (unpublished, 1 May 2009), http://elyon1.court.gov.il/files/08/530/093/c05/08093530.c05.pdf, Justice Naor, para 8,.
[49] *Ibid*., Justice E Rubinstein, paras A and G.

morality and effectiveness of the Policy (The '**Shani Committee'**). After a long and thorough process, the Committee found evidence to support the proposition that the Policy failed to achieve deterrence and it recommended freezing it.[50] It is reported that the Committee established that the Policy operates at the 'threshold of legality' and that in terms of deterrence; it may have generated more harm than benefit.[51] The Committee's recommendation was adopted by Prime Minister Sharon.[52]

Thus when appearing before a parliamentary committee, Military Advocate General Mandelblit acknowledged, albeit hesitantly, the questionable basis of the Policy in terms of effectiveness and international law:

'The Committee headed by General Udi Shani…determined that it was very doubtful whether demolitions are effective, but when the Committee examined the subject in depth, and its findings were presented to the Chief of Staff, it transpired that in fact assessing the effectiveness was very difficult. Together with concrete examples, and there are such examples in which the effectiveness of such a step has been proved, concrete examples of families who prevented their sons from going out to conduct acts of suicide, and the ISA presented such examples. There are a few dozen cases like that, but on the other hand prima facie evidence was brought to the effect that the subject of demolition of houses for the purposes of deterrence also created much more hatred, created increased motivation, created refugee collectivity. There are contrary indications and consequently on this subject it was difficult to reach an unambiguous conclusion. Moreover, when we tried to quantify it, quantifying the hidden aspects of effectiveness was not simple, was complicated…It was impossible to reach an unambiguous result in this matter. This is something very, very complicated. The importance of additional reasons entered the picture…subjects connected with international law and I say again…it is possible to make the argument justifying it…and as there is real doubt on the subject of the effectiveness of the demolition of houses, when we attempt to strike a balance there are arguments on both sides of the subject and that led to a decision, a significant and dramatic decision' (emphasis added: the authors).[53]

We emphasize that if an unequivocal result with respect to the deterrent effect of the policy cannot be reached, as determined by the Committee, the Policy indeed fails to

[50] See Guiora, *supra* n.1, at 375-376; G. Myre, 'Israel Halts Decades-Old Practice of Demolishing Militants' Homes', N.Y. Times, (18 Feb. 2005); Hofnung and Weinshall-Margel, *supra* n.1, 159.
[51] Cohen and Mimran, *supra* n.33, 10.
[52] Although he reserved the right to re-examine the need to reactivate the policy, should an extreme change in the security circumstances occur, see Guiora, *supra* n.1; Myre, *supra* n.**Error! Bookmark not defined.**.
[53] The Knesset's Constitution Law and Justice Committee, 22nd February, 2005, own translation from Hebrew).

meet the condition stipulated in international law for lawful destruction of private property, which is that said destruction is "absolutely necessary" for security reasons. We are of the Opinion that the Committee's recommendations and their adoption add much weight to our conclusion that the Policy does not meet the test of necessity.

Even if we are wrong in our position regarding the failure of the Policy to qualify as a permissible 'military operation' exception under Article 53 of the Fourth Geneva Convention, we are of the view that the Policy still falls short of providing the kind of security benefits which could justify an interference with property rights protected, under the general principles of the law of belligerent occupation. This view is supported by the jurisprudence of the Court itself. For example, in the case of *Murar*, the Court dealt with the legality of an order issued by the Military Commander, which prohibited, for security reasons, Palestinian owners of private land from entering their land and cultivating it. Justice Beinisch offered the following conceptual framework which addresses the delicate balance between security concerns and property rights:

'…an additional basic right that should be taken into account in our case is, of course, the property rights of the Palestinian farmers in their land. In our legal system, property rights are protected as a constitutional human right (s. 3 of the Basic Law: Human Dignity and Liberty). This right is of course also recognized in public international law…Therefore, the residents in the territories held under belligerent occupation have a protected right to their property. In our case, there is no dispute that we are speaking of agricultural land and agricultural produce in which the Petitioners have property rights . Therefore, when the Petitioners are denied access to land that is their property and they are denied the possibility of cultivating the agricultural produce that belongs to them, their property rights and their ability to enjoy them are thereby seriously violated. Thus we see that the considerations that the military commander should take into account in the circumstances before us include, on the one hand, considerations of protecting the security of the inhabitants of the territories and, on the other hand, considerations concerning the protection of the rights of the Palestinian inhabitants. The military commander is required to find the correct balance between these opposite poles. The duty of the military commander to balance these opposite poles has been discussed by this court many times…There is no doubt that in cases where the realization of human rights creates a near certainty of the occurrence of serious and substantial harm to public safety, and when there is a high probability of harm to personal security, then the other human

rights yield to the right to life and physical integrity (HCJ 292/83 Temple Mount Faithful v. Jerusalem District Police Commissioner [13], at p. 454; Hass v. IDF Commander in West Bank [3], at p. 465 {76}) (emphasis added: the authors).[54]

Thus, the Court established a high level of protection of Palestinian property rights and a stringent evidentiary threshold that would allow the limitation of these rights on account of security reasons. The importance ascribed under the laws of belligerent occupation to such property rights led the Court to assert that:

'…the protection of the security and property of the local inhabitants is one of the most fundamental duties imposed on the military commander in the territories' and that in appropriate cases, 'forces should be deployed in order to protect the property of the Palestinian inhabitants'[55].

This approach of the Court supports a narrow reading of any exception of 'military necessity' appearing under the laws of belligerent occupation in the context of protection of property rights, as well as a reading the refuses to recognize the occupant's ability to rely on existing law, inasmuch as the latter does not conform with the military commander's duty toward the local population. Hence, the stringent standard for a justification of the temporary and mild limitation of property rights in the *Murar* case should apply *a fortiori* in the context of the policy of house demolition, which results in a permanent and severe harm to property rights (so severe that it is considered to be the harshest administrative security measure employed by the State).[56]

The incompatibility of the Policy with the laws of belligerent occupation, as analysed above, is particularly apparent in all the dozens if not hundreds of cases, analysed below, in which demolition orders are executed against the houses of Protected Persons, who are owners or residents of the house, and who, according to the security forces themselves, were unaware and not involved in the relevant terrorist attacks.

[54] HCJ 9593/04 *Morar, Head of Yanun Village Council and others v. IDF Commander in Judaea and Samaria and others* http://elyon1.court.gov.il/files_eng/04/930/095/n21/04095930.n21.pdf, paras.14-16.
[55] *Ibid*., para.18.
[56] Amichai Cohen and Tal Mimran, *Cost without Effectiveness in the House Demolition Policy: Following* 4597/14 *Awawedh and others v Military Commander of the West Bank Area*, **Law Online – Human Rights – Jurisprudence Short Comments** 31, 5 (2014), (Hebrew).

It should be noted further that the Policy cannot be justified on the basis of its conformity with the pre-existing domestic law of the Territories, since Article 64 of the Fourth Geneva Convention authorizes, and at times obliges, an Occupying Power to repeal existing laws, which represent 'an obstacle to the application of the present Convention'. Thus, even if Regulation 119 was valid on the eve of occupation of the Territories, the State of Israel was obliged, under the laws of belligerent occupation to repeal or at least not apply the powers granted to it by the Regulation in a manner which infringes the property rights enshrined in the Fourth Geneva Convention. Our conclusion is reinforced by the following analysis by Dinstein, offered in the specific context of the Regulation and the Policy:

'The second Paragraph of Article 64 is couched in language of entitlement ("may"), rather than obligation, when conferring on the Occupying Power the authority to alter the preexisting legislation. However, like all other Contracting Parties of the Geneva Convention, the Occupying Power has unconditionally undertaken (in Article 1) "to respect and to ensure respect" for the Convention "in all circumstances". The implementation of the Geneva Convention is not contingent on compatibility with domestic legislation. On the contrary, Contracting Parties have to enact any enabling domestic legislation required to give effect to the Geneva Convention... If this is true of the Occupying Power's own legislation, it should a fortiori be true of the domestic laws in force in the occupied territory. The Geneva Convention must prevail over any conflicting local legislation in the occupied territory. That means that the laws in force in the occupied territory must be adapted where necessary to the Geneva Convention (and, indeed, to any other binding instrument of international humanitarian law). The distinction between what the Occupying Power may or must do in this field has significant practical repercussions when the Occupying Power is pleased with, and more than willing to strictly apply, some legislation — in force in the occupied territory at the commencement of the occupation — which is inconsistent with international humanitarian law. The leading illustration has been the Israeli reliance on Emergency Regulations, in force in the West Bank and the Gaza Strip on the eve of the occupation (and dating back to the British Mandate), permitting the authorities to destroy private property as a punitive measure, and not merely "where such destruction is rendered absolutely necessary by military operations" (as required by Article 53 of the Geneva Convention, based on Article 23(g) of the Hague Regulations)… in the opinion of the present writer, the Occupying Power was bound to repeal or suspend these Regulations and certainly it could not legitimately rely on them' (emphasis added: the authors).[57]

In the circumstances of the matter, we hold the view that the Policy breaches not only the right to property of the residents of the Territories, but also the provisions of Article 50 of the 1907 Hague Regulations and Article 33 of the Fourth Geneva Convention, both of which prohibit collective punishment.[58] Our position is based on the opinion, substantiated below, that the Policy amounts to a collective punishment.

It is indeed our strong view that the Policy amounts to collective punishment and as such it directly and irreconcilably contradicts international law.

According to the principle of individual responsibility, an individual is responsible for his own actions and not those of another.[59] The corollary of this principle is the prohibition on imposing sanctions against those who are not responsible for carrying out the prohibited action. The interrelated principle and prohibition, which have their roots in the Old Testament,[60] are nowadays enshrined under international humanitarian law, international human rights laws,[61] and the laws of belligerent occupation.[62] Accordingly, criminal sanctions should be premised on individual responsibility and administrative sanctions on the basis of individual responsibility and risk. Deviation from that principle amounts to prohibited, collective punishment. This principle is also enshrined in the

[57] Yoram Dinstein, 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding', Program on Humanitarian Policy and Conflict Research, Harvard University, occasional paper series (Fall 2004). Our conclusion is further substantiated by the analysis of Carroll who concludes that the argument that Article 64 permits the implementation of Regulation 119 despite the existence of Articles 53 of the Fourth Geneva Convention, analysed above, and Article 33 of the same Convention, analysed below, is without merit, because such an argument 'ignores the express provision contained in Article 64 which states that the local law should not be implemented if it represents an 'obstacle to the application of the present Convention', Carroll, *supra* n.1, 1216.

[58] For analysis, see Carroll, *supra* n.1, 1213-15; Cohen, *supra* n.1,49 and 53-57.
[59] Simon, *supra* n.1, 53-65.
[60] Deuteronomy 24:16.
[61] For analysis, see Gross *supra* n.1, 196; Halabi, *supra* n.1, 270; Simon, *supra* n.1, 53-56. See also Quigley, *supra* n.1 for an analysis of Article 50 of the International Covenant on Civil and Political Rights.
[62] Quigley, *supra* n.1,369.

Court's jurisprudence,[63] which prohibits collective punishment, both under international law[64] and under Israeli administrative and criminal law.[65]

The Court reiterated and reinforced that this principle applies to the different measures employed by the various security forces in the Territories.[66]

The Court recognizes the prohibition on collective punishment and supports the requirement of individual responsibility and risk. This was the case, for example, with respect to assigned residence by virtue of Article 78 of Fourth Geneva Convention. In *Ajuri* the Court adjudicated the legality, under both Israeli law and international law, of an order, forcing the temporary transfer, from the West Bank to Gaza, of members of families of terrorists who aided and abetted terrorism.[67] Chief Justice Barak, delivering the opinion on behalf of the unanimous bench of nine Justices, found that orders are permitted only if they serve as a means of preventing the assignee 'from continuing to constitute a security danger'.[68]

Thus the Military Commander may only take into consideration the need for '…preventing [further] danger…by a person whose place of residence is being assigned' (emphasis added: the authors).[69] Orders may only be issued against those who have committed a terrorist act and who, in addition, continue to present a danger to the security of the area;[70] administrative evidence must be produced that demonstrates clearly and convincingly that if the measure is not adopted, there is a reasonable possibility that 'he will present a real danger of harm to the security of the territory…' (emphasis added: the

[63] CrimA 6147/92 *State of Israel v Cohen*, 1993 PD 48(1), 62, 67-76, http://elyon1.court.gov.il/files/92/470/061/g02/92061470.g02.pdf: 'A person will be liable for his own offenses and die for his own sins'; HCJ 2006/97 *Ghanimat v Officer Commanding Central Command*, 1997 PD 51(2) 654, http://elyon1.court.gov.il/files/97/060/020/A03/97020060.a03.pdf
[64] See, for example, HCJ 591/88 *Taha v Minister of Defense* 1991 PD 45(2) 45, 54, as analyzed by Simon, *supra* n.1, 55.
[65] For analysis, see Simon, *supra* n.1, 56-57.
[66] Ghanimat, *supra* n.**Error! Bookmark not defined.**, 654.
[67] HCJ 7015, 7019/02 *Ajuri v IDF Commander* 2002 PD 56(6) 352, http://elyon1.court.gov.il/files/02/190/070/L01/02070190.l01.pdf.
[68] *Ibid*., para 24.
[69] *Ibid* (authors' emphasis).
[70] *Ibid*.,para. 24.

authors).[71] Consequently, any assignment of those who have not taken part in terrorist activities was held to be illegal, even if such assignment would have deterred others from pursuing terrorist activities.[72] The Court reaffirmed that general deterrence may be legitimately achieved as a secondary objective to that of the principal objective, namely tackling the individual danger posed by the assigned person. In other words, considerations of deterrence can influence the decision whether or not to impose the individual sanction, but cannot substitute the need for an individual basis for the sanction.

The golden threads that run through many of the Court's judgments on security measures in the context of international law, are the principle of individual responsibility and individual threat posed by the subject of the security measures and the prohibition of measures intended to advance general deterrence as the sole or primary purpose thereof.[73] The principle of individual culpability was found by the Court to be consistent with the norms of international humanitarian law and 'our Jewish and democratic values'.[74]

Although a house demolition order corresponds to the individual conduct of a terror suspect, the measure differs from other individual sanctions, administrative and penal, in that it is employed regardless of whether the perpetrator is still alive. Furthermore, it is employed against houses in which the perpetrator resided, regardless of the question of whether he owned the said houses, and without establishing the actual use of the house for terrorism-related purpose. As a result, it appears that the main target of the measure is to deter the community and potential future perpetrators rather than the individual perpetrator. Those who have to bear the price for these measures of general deterrence are owners of the house to be demolished or family members who reside in the house, even if they are not at fault and they pose no security threat.

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[71] *Ibid*., para 25. (authors' emphasis).
[72] *Ibid*., para. 27.
[73] *Ibid*., para. 23.
[74] *Ibid*., paras. 24.

Note that in some of its early case law the Court insisted on the existence of some individual responsibility by house dwellers other than the individual perpetrator.[75] Such attempts perhaps underscore that they, and not the perpetrator himself, are being in effect punished by the house demolition. Yet soon afterwards, the Court relinquished that requirement: the house owner's or residents' lack of knowledge about the activities of the person suspected/convicted of security offenses was found not to preclude the imposition of the demolition order.[76] Indeed there are dozens of judgments, including the 2009 judgment reviewing a sealing off order, in which orders were approved despite the lack of any individual responsibility and/or knowledge on the part of the owner of the demolished house and his family residing with him.

We are of the opinion that the imposition of sanctions under these circumstances amounts to a collective punishment, as the bulk of the brunt associated with the demolition is not borne by the perpetrator, but by other individuals without their assuming any blame, or – in any event – a level of blame commensurate to the harsh sanction imposed on them.[77]

The willingness of the Court to uphold the legality of the demolition orders notwithstanding their collective punishment attributes evoked fierce academic criticism.

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[75] HCJ 698/85 *Dejalas v Military Commander of Judea and Samaria Region*, 1986 PD 40(2) 42.

[76] HCJ 2722/92 *Alamarin v IDF Commander in Gaza Strip* 1992 PD 36(3) 693, 700; HCJ 1730/96 *Sabih v Commander of IDF Forces in the Judea and Samaria Region* 1996 PD 50(1) 353, 360; *Ghanima*t, *supra* n.43, 653-54; HCJ 893/04 *Faraj v Commander of IDF Forces in the West Bank* 2004 unpublished, 4 March 2004, http://elyon1.court.gov.il/files/04/930/008/N04/04008930.n04.pdf. Compare with the dissenting opinion of Justice Cheshin who took the view that the Military Commander may not demolish the home of a suicide-bomber where the other residents of the house did not know of the terrorist's intentions, *Ghanimat supra* n. .43, 654-555. See also his dissenting opinions in HCJ 4772/91 *Khizran v Commander of IDF Forces in the Judea and Samaria Region* 1992 PD 46(2), 155-161.

[77] Nonetheless, as demonstrated above, the degree of (un)awareness of the family member was held by both the Executive and the Court to be relevant to the exercise of the authority under Regulation 119 (*i.e.* affecting the extensiveness and severity of the demolition order) but not deemed to affect the very existence of the authority. See 2722/92 *Alamarin v IDF Commander in Gaza Strip* 1992 PD 36(3) 693, Justice Bach, for the majority, para 9. See also *Abu Dahim*, *supra* n.48, Justice Naor, para 6: '...from a moral standpoint the thought that the brunt of the terrorist's misdeed should be borne by members of his family, who did not, as far as is known, assist him and did not know of his actions, is a distressing one. ..However, the possibility that demolition of the house, or sealing it up, will prevent bloodshed in the future obliges us to harden our hearts and to protect the living who may fall victim to dreadful targeted deeds, rather than to protect the inhabitants of the house. This is unavoidable….deterrence considerations sometimes oblige the deterrence of potential performers who must understand that their actions might harm also the well-being of those related to them, and this is also when there is no evidence that the family members were aware of the terrorist's doings'.

Numerous scholars, including, Dinstein,[78] Darcy,[79] Kretzmer,[80] Kremnitzer and Hoernle,[81] Simon,[82] Zemach[83] and Carroll,[84] just to name a few, concluded that in its decisions on the Policy, the Court was giving its imprimatur to illegal, collective punishment. As analysed above, scholarship went further than that, asserting that such illegality stemming from the collective nature of the measures may lead to the classification of the Policy as a war crime.[85]

Being aware of its deviation in house demolition cases from its own jurisprudence, the Court employed various means to dismiss this harsh criticism of its decision on this issue. In various judgments, the Court ruled that the matter did not concern punishment, but deterrence:

> The power vested in the military commander under Regulation 119 is not a power to use collective punishment. Use thereof is not designed to penalize members of the Petitioner's family. This power is administrative and its use is designed to deter, thereby upholding public order".[86]

However, the various reasoning offered by the Court for denying the collective nature of the policy of house demolitions are not persuasive in our view.

The Court's distinction between collective deterrence and collective punishment of the demolition orders are, with all due respect, unpersuasive and run contrary to its own jurisprudence in comparable areas where it attempts to strike the balance between security needs and human rights.

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[78] *Supra* n.1.
[79] Darcy, *supra* n.1.
[80] Kretzmer (2002), *supra* n.1, 149-153.
[81] Mordechai Kremnitzer and Tatjana Hörnle, 'Human Dignity and the Principle of Culpability' (2011) 44 Israel Law Review 115, 129-30.
[82] *Supra* n.1.
[83] *Supra* n.1.
[84] *Supra* n.1
[85] Zemach, *supra* n.1, 70-74.
[86] H.C. 798/89 *Shukri v Minister of Defence* 1990 (unpublished, 10 January 1990).

Such a fine distinction between punishment and deterrence did not persuade various scholars engaged in this field, since one of the purposes of punishment – administrative or criminal – is to create deterrence of others. The key question – who bears the fullest brunt of the sanction – the perpetrator or others - has been left unanswered by the Court.

In an early case, Justice Ben-Dror offered an analogy between house demolition and a sentence of imprisonment, the two imposed on the criminal with severe negative spillover to his family.[87] This analogy, with all due respect, is.[88] As Dinstein postulated: The children of a felon behind bars do not undergo imprisonment, although they suffer from the repercussions of his enforced absence, whereas the children of a terrorist who are left roofless suffer exactly the same penalty as the offender himself (and when the offender is in jail, or dead, they are the only ones who suffer). Any adequate definition of collective penalties must encompass their predicament'.[89] Indeed, the price that children of such a felon pay is a non-intended, collateral one, whereas the price that the homeless children of the terrorist pay is the very specific, direct and intended rationale of the demolition orders.

Another judicial technique to tackle the collective nature of the punishment is to refer to its administrative nature.[90] Yet as Kremnitzer and Hoernle underscore, the fact that an administrative body decides to impose the sanction need not mean that the sanction is administrative, as the classification of the sanction need not derive from the type of entity that imposes it and in any event an administrative sanction can amount to a collective punishment.[91] This conclusion, to which we subscribe, is reinforced by the Commentary to Article 75 of the First Protocol of the Fourth Geneva Convention which calls for a broad interpretation of the notion of collective punishment:

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[87] Dejalas, *supra* n.75, para. 3.
[88] For support of my view, see Dinstein, *supra* n.1, 298. See also Halabi, *supra* n.1, 270, who treated that analogy as 'false'; Kremnitzer and Hörnle, *supra* n.**Error! Bookmark not defined.**, 129-30: A necessary part of the sanction's goal is to cause suffering to the residents of a demolished house (without this element of suffering, the sanction cannot fulfill its preventive aim) and hence the suffering is not only an unavoidable side effect but an essential part of it.
[89] For support of this view, see Dinstein, *supra* n.1, 298.
[90] See *Shukri*, *supra*, n. 86.
[91] Kremnitzer and Hörnle, *supra* n.**Error! Bookmark not defined.**129-30, referring to specific Court's verdicts.

'The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise' (emphasis added: the authors).[92]

Thus, house demolition is a collective punishment under the broad definition granted to the concept of collective punishment under international law. The Policy would also be classified as such, even if we elect the more restricted interpretation offered under public international law to collective punishment, namely an action which violates a right protected by the treaties regulating the laws of war and aimed at innocent people.[93]

It is worth noting that a few Justices have embraced an approach that aligns with our position. Justice Cheshin, for example, refused the approval of the demolition order when its result would be the destruction of the residence of the uninvolved wife of the suicide bomber and of his four small children:

In a minority judgment that I wrote…I said that…the Army commander does not have the authority to inflict collective punishment…Where someone is suspected of an act as a result of which a destruction order is made with regard to his home, I did not agree then, nor do I agree now, that someone else's home may be destroyed merely because he lives next to that person. [94]

The collective nature of demolition was also indirectly acknowledged when the Court addressed the issue of administrative detention for bargaining purposes,[95] where Justice Cheshin found:

There is no truth in the contention that no danger would arise if the detained Lebanese were to be released. The Petitioners, as Hizbullah fighters, have tied their fate to Israel's fight against the Hizbullah. In this, the matter of the Petitioners is distinguishable from the matter of the demolition of the homes of the terrorists, something which once came frequently before this Court. Indeed, it is one of our supreme values that every person is

[92] Pictet, *supra* n.18, 874, para. 3055.
[93] Amichai Cohen, 'Economic Sanctions in IHL: Suggested Principles' (2009) 42/1 *Israel Law Review* 117, 131-132.
[94] Justice Cheshin, 2722/92 *Alamarin v IDF Commander in Gaza Strip* 1992 PD 36(3) 693, para 4: See also See *Ghanimat supra* n.43.
[95] CrimFH 7048/97 *A v Minister of Defence* 2000 PD 54(1) 721, 727 and 743-44, official translation at http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf, 748. See also Justice Cheshin, *Alamarin v IDF Commander in Gaza Strip* 1992 PD 36(3) 693, para 4.

responsible for his own wrong and is punished for his own sin. For this reason I was even of the opinion – in a dissenting judgment – that a military commander was not vested with the right to demolish a home in which the family members of a terrorist murderer resided, even if that terrorist lived in that house…but it is precisely because of this reasoning that each person is responsible for his own wrong, that the case of the Petitioners differs from the case of the families of terrorists; the Petitioners – as enemy fighters, and unlike the families of the terrorists – have knowingly and deliberately tied their fate to the fate of the war.

In the same judgment Justice Kedmi too acknowledged (albeit in a more ambiguous manner) that demolition orders constitute collective punishment:

...the law 'accedes to' the adoption of deterrent measures - the demolition of homes - against the families of terrorists, in order that they should not provide the latter with shelter in their homes, notwithstanding that they themselves are not accomplices to the acts of the terrorists and their 'connection' to the harm to security ensues only from their intention to provide the latter with shelter as aforesaid. It seems that without the existence of the said 'connection' it would not have been possible to implement the power of demolition against the families of the terrorists…[96]

We would argue, drawing support from the *Ajuri* judgment analysed above, that even the grant of such a shelter by a family member would not justify the issuance of a demolition order against the home of the person who provided shelter. It follows, *a fortiori,* that in the absence of even such minimal connection, demolition orders should not be approved.

When responsibility is imposed upon a resident of a house for the deeds of others, in the absence of any (meaningful) culpability or dangerousness on his part, such individual is being instrumentally used by the State not as a subject but as an object, as a means of achieving a purpose external to him, thereby infringing his right to human dignity and ignoring the moral barrier inherent in the principle of personal responsibility.[97] The insistence of the Court in the 'bargaining chips' case, analysed above, that the detention of a person without such dangerousness would amount to an infringement of his human dignity, the detainee being treated as a means of achieving an objective and not as an

[96] *Ibid*., 732.
[97] Kremnitzer and Hörnle, *supra* n.81, 129.

object himself, is applicable, with added force, to the innocent subjects of the house demolition orders.

The recent judgment of *Kawasma* (August 2014) is particularly alarming in that regard. In the case, Justice Danziger was willing to acknowledge, on behalf of a unanimous bench, the collective aspect of the orders, and to implicitly admit that such collective nature is not in conformity with acceptable perceptions of justice and fundamental moral principles.[98] Yet, in his opinion, this legal problem can be ameliorated by subjecting the Policy to the requirement of proportionality.[99] Such a judicial stance ignores the fact, as acknowledged by the Court itself, that prohibition against collective sanctions is absolute under international law. Such judicial stance is, in our understanding, in direct conflict with the Court's findings in the seminal case of *A v Minister of Defence*, analysed above, in which the Court unequivocally underscored that the prohibition against inflicting harm on a person in the absence of personal responsibility is an absolute one and hence the Court may not entertain an interpretation of a legislative instrument that would lead to such a result.

To conclude, the Policy amounts to collective punishment which is prohibited under international law. Furthermore, the policy of house demolition might also amount to illegal act of reprisal, prohibited by Article 33 of the Fourth Geneva, which provides that "…Reprisals against protected persons and their property are prohibited". The authorities argue that house demolitions are not punitive but "preventive". After all, an act of reprisal is precisely meant to instill fear in the population to prevent the repetition of similar acts in the future.[100]

3.3. Illegality of the Policy under international human rights laws

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[98] HCJ 5290/14 *Kawasma et al. v. Military Commander of the West Bank et al.* (unpublished, August 11, 2014), para. 21, http://elyon1.court.gov.il/files/14/900/052/w03/14052900.w03.pdf.
[99] *Ibid*., para.22.
[100] E. Bowett. "Reprisals Involving Recourse to Armed Force" (1972) 66 *AJIL* 1.

It is our opinion that the Policy is in breach of certain substantive international human rights obligations which Israel undertook to comply with. This opinion is premised on the legal position that international human rights law, and in particular the 1966 International Covenant on Civil and Political Rights and the 1996 International Covenant on Economic, Social and Cultural Rights,[101] both ratified by Israel in 1991, govern Israel's conduct as an occupying power in the Territories (an assumption supported by the ICJ as well as the Human Rights Committee and the Committee on Economic Social and Cultural Rights which oversee the implementation of the Covenant)[102] and in all areas where Israeli law is formally applied (in Israel proper as well as in East Jerusalem, which the Supreme Court never opposed).

More specifically, the Policy is in breach of the human right to protection of property, which although not enumerated in the two Covenants of 1966, constitutes part of the Universal Declaration of Human Rights and has the status of binding customary international law.[103] Indeed, various international tribunals, including, for example, the European Court on Human Rights[104] and the European Court of Justice,[105] offer an

[101] International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, art. 17(1), 999 U.N.T.S. 171, 177 (entered into force Mar. 23 1976); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953)

[102] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] 43 ICJ Rep 136, paras. 102-113. See also, Rights Committee on Economic, Social and Cultural Rights, Forty-seventh Session, 14 November-2 December 2011, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights, 16 December 2011, para.8;
International Covenant on Civil and Political Rights, Human Rights Committee, Ninety-ninth Session, Geneva, 12–30 July 2010,CCPR/C/ISR/CO/3, 3 September 2010 Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee (Israel), para. 5, at http://unispal.un.org/UNISPAL.NSF/0/51410EBD25FCE78F85257770007194A8

[103] This statement is applicable in particular to the right of property in the context of belligerent occupation (See, for example, Rule 51 of the 2006 ICRC Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict https://www.icrc.org/eng/resources/documents/publication/p0860.htm) and with respect to property held by foreign nationals (See, for example, US Restatement Foreign Relations 3red Sec 711).

[104] See, for example, in *Cyprus v. Turkey* ([GC], no. 25781/94, ECHR 2001-IV), paragraphs 187 and 189, dealing with violations of property rights in the context of the occupation of Northern Cyprus: 'The Court is persuaded that both its reasoning and its conclusion in the Loizidou judgment (merits) apply with equal force to displaced Greek Cypriots who, like Mrs Loizidou, are unable to have access to their property in northern Cyprus by reason of the restrictions placed by the 'TRNC' authorities on their physical access to that property. The continuing and total denial of access to their property is a clear interference with the right of the displaced Greek Cypriots to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 of Protocol No. 1….there has been a continuing violation of Article 1…by virtue

expansive construction of property rights under international human rights law and place strict limits on any interference with such rights.[106]

The aforesaid indicates that not only does the Policy fail to meet the threshold for justifying harm to property under the laws of belligerent occupation, which give security interests a pride of place, but also that the Policy and the standards set according to it are even less likely to meet international human rights norms (which give human rights a more central place than the laws of occupation).[107]

We are also of the view that at times the Policy runs contrary to the right to non-interference with the home (enshrined in article 17 of the International Covenant on Civil and Political Rights[108] and article 8 of the European Convention on Human Rights) and the right to housing (enshrined in article 11 of the International Covenant on Economic, Social and Cultural Rights). Here too the threshold for providing a justification is high – according to the European Court of Human Rights upon showing a "pressing social need" and establishing a proportionate relationship of the measure taken to the legitimate aim pursued.

Indeed, in light of the paramount importance of the rights enshrined in Article 8, the European Court insisted on a narrow construction of the necessity exception.[109] The breach of property rights in our context is of particular gravity. As the European Court of Human Rights asserted '… Article 8 concerns rights of central importance to the

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of the fact that Greek-Cypriot owners of property in northern Cyprus are being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights'.

[105] See, for example, the salient verdict of *Kadi*, as analyzed by Guy Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the Kadi Dispute' (2009) 14 *European Foreign Affairs Review* 65.

[106] In the *Vrahimi v. Turkey* verdict, which dealt with violations of property rights by the occupying power (Northern Cyprus), the European Court of Human Rights cited its previous decision (Loizidou), in which it established that strict construction should be performed with respect to the test of necessity for the purpose of interfering with one's proprietary rights.

[107] This conclusion is supported by numerous decisions of international tribunals. Thus, for example, in the *Vrahimi v. Turkey* verdict, which dealt with violations of property rights by the occupying power (Northern Cyprus).

[108] See Kretzmer (2005), *supra* n.1, footnote 52.

[109] *Yodanova v. Bulgaria*, para. 123.

individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community…'.[110] The gravity of the breach of property rights is of particular severity in light of the fact that that the loss of one's home is a most extreme form of interference with the duty to respect one's home.[111]

Thus, for example, the same Court held in in *Akdivar v. Turkey*, that destruction of homes by the Turkish army amounted to a violation of the right to family life and home, protected under Article 8 ECHR.[112]

In addition, we are of the opinion that because of its harsh consequences for third parties and the extra-judicial manner of establishing responsibility that prompts its application, the Policy violates the prohibition against cruel, inhuman or degrading treatment or punishment.[113] This conclusion is supported by the findings of the UN Committee against Torture in the specific context of Israel's policy of house demolition.[114] In 2009 the Committee reiterated its position:

'While recognizing the authority of the State party to demolish structures that may be considered legitimate military targets according to international humanitarian law, the Committee regrets the resumption by the State party of its policy of purely "punitive" house demolitions in East Jerusalem and the Gaza Strip despite its decision of 2005 to cease this practice .The State party should desist from its policies of house demolitions where they violate article 16 of the Convention':[115]

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[110] *Ibid*., para.118.
[111] *Ibid.*
[112] Judgment of 16 September 1996, reprinted in: European Human Rights Reports (EHRR), vol. 23, 1997, 143.

[113] For analysis, see Quigley, *supra* n.1, 373-74; Farrell, *supra* n.1, 903-904. See UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR of 21 August 2003, para. 16, available at: http://www.unhchr.ch/tbs/doc.nsf/0/7121cbf0578c594ec1256da5004b25e8.
[114] Conclusions and Recommendations of the Committee against Torture, Israel, U.N. Doc. CAT/C/XXVII/Concl.5 (2001) ,paras. 6(j), 7(g)
[115] Concluding Observations on Fourth Periodic Report Submitted by Israel, CAT/C/ISR/CO/4, 23 of June 2009, para. 33.

The classification of the Policy as a prohibitive, inhuman punishment was also adopted by the UN Human Rights Committee:[116]

'While fully acknowledging the threat posed by terrorist activities in the Occupied Territories, the Committee deplores what it considers to be the partly punitive nature of the demolition of property and homes in the Occupied Territories. In the Committee's opinion, the demolition of property and houses of families, some of whose members were or are suspected of involvement in terrorist activities or suicide bombings, contravenes the obligation of the State party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), freedom to choose one's residence (art. 12), equality of all persons before the law and equal protection of the law (art. 26), and not to be subject to torture or cruel and inhuman treatment (art 7). The State party should cease forthwith the above practice' (emphasis added: the authors).

We further assert below that that the Policy violates the prohibition against collective punishment.[117] Therefore, the collective nature of the Policy may violate other substantive and procedural obligations incumbent on Israel under the 1966 International Covenant on Civil and Political Rights.[118]

We further assert that the Policy may violate certain rights enshrined in the 1989 Convention on the Rights of the Child.[119] Such violations might be of serious severity, quantitatively and qualitatively, in light of the very high number of children adversely affected by the Policy and in view of the very harsh consequences that these children suffer as a result of the demolition of their homes.

Thus, we are of the view the Policy breaches Israel's obligations under international human rights law. Admittedly, the 1966 Covenant on Civil and Political Rights is subject to derogation 'in times of public emergency which threatens the life of the nation'. Yet that exception cannot absolve Israel from responsibility for breaches of the body of human rights laws discussed herein for the following reasons. **Firstly**, the ICCPR imposes some obligations which cannot be derogated under any circumstances (such as

[116] Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (21 August 2003), para. 16.
[117] For analysis, see Halabi, *supra* n.1, 267; Quigley, *supra* n.1, 372-73.
[118] J. M. Henckaerts and L. Doswald-Beck, *Customary International Law* (Cambridge, 2005), 374-375.
[119] See, for example, Articles 3 and 16 of the Convention.

the prohibition under Article 7 against torture or cruel, inhuman or degrading treatment or punishment, which is violated in the circumstances at hand). **Secondly**, for a Contracting Party to rely on such derogation to stipulate upon any specific right, a public statement to that effect must be made. Israel only utilized the derogation with respect to Article 9 of the ICCPR (right to liberty) and hence the derogation cannot cover the above-analysed human rights infringements covered by article 17, for instance. **Thirdly**, the exception stipulates that it is limited 'to the extent strictly required by the exigencies of the situation', yet as analysed above and established below, the necessity and proportionality tests are not met by the Policy.

3.4. Illegality under international criminal law – a War Crime?

This sub-Chapter analyses the Policy in the context of international criminal law, and establishes our view that the Policy may, in certain circumstances, be considered a war crime under international criminal law, in particular the Rome Statute.

Article 8(1) of the Rome Statute states that:

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

Article 8(2) reads that:

For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

…. (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly… '

Thus Article 8 of the Rome Statute treats certain grave breaches of the Geneva Convention as war crimes, stipulating that certain infringements of Article 53 of the

Fourth Geneva Convention amount to a war crime. Whereas said Article 53 prohibits 'any destruction', 'not justified by military necessity', and 'carried out unlawfully', article 8(2)(a)(iv) criminalizes (like article 147 of the Fourth Geneva Convention) 'Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'.

While any individual house demolition operation, executed on the basis of a specific order, will likely fall short of the legal standard of extensive destruction, according to the analysis below, a Policy leading over the years to hundreds or even thousands of house demolition not justified by military necessity, may pass the threshold of wantonness under Article 8(2)(a)(iv). Furthermore, although it is unlikely that most Israeli individuals would be involved in the execution of a large number of demolitions, which would lead to imposition of international criminal responsibility on their shoulders, the very possibility of discussing the overall Policy in terms of war crimes, demonstrates the extent to which it deviates from standards of international legality. Indeed, a scenario wherein an investigation is conducted into whether it is possible to locate an individual who could be held criminally responsible for extensive destruction of property due to the house demolition policy cannot be ruled out. In this eventuality, the fact that house demolitions were approved by the local court, will not prevent such an investigation.

The task of determining who precisely might carry individual criminal responsibility for the formulation and execution of the Policy is beyond the scope of this Opinion. It suffices to state that anyone, belonging to any branch of the State, who significantly contributes to the formulation or execution of the Policy, while being aware of its exceptional scope and wantonness, might carry such responsibility.

The requirement of any individual who has been involved in the execution of the Policy of unlawfulness under Article 8(2)(a)(iv) can be met by the lack of military necessity or other legal justification. So, for example, in *Blaskic* which dealt with the issue of legality of the destruction of property situated in an occupied area, the ICTY, found that destruction may be legal only if it is committed for operational purposes and that any

specific measure must meet the strict test of military necessity: 'An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations'.[120] In another judgment, the ICTY found that in the context of occupation, a war crime is to be considered when the destruction was performed against property protected by the aforesaid Article 53, that the destruction is large-scale and that it does not meet the test of security necessity.[121]

In our view, the 'unlawfulness' required under the Rome Statute is met by the fact that the demolition orders constitute collective punishment..[122]

In light of the aforesaid, we take the view that the violation of property rights by the Policy amounts to an infringement of Article 53 and the latter infringement might constitute, in turn, a war crime under the Rome Statute.[123]

As stated, the Policy may constitute a war crime by the mere fact that it constitutes a collective punishment, even if collective punishment, as such, is not listed as a war crime by the Rome Statute, as it may be regarded as 'inhuman treatment'(see the analysis in Chapter 3.3 above with respect to the concept of 'inhuman treatment') covered by article 8(2)(a)(iv). The legal framework of an IHL prohibition against collective punishment consists, as analysed above, of Article 33 of the Geneva Convention[124] and of Article 50 of the 1907 Hague Regulation.[125] There is almost a consensus among scholars that the various prohibitions under IHL against collective punishment are absolute, regardless of the particular circumstances in hand, and that these prohibitions are not subject to the exception of 'military necessity' or any other exception.[126]

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[120] ICTY Judgment, *The Prosecutor v. Tihomir Blasic*, IT-95-14-T, para. 157.
[121] ICTY Judgment, *The Prosecutor v. Dario Kordiac and Mario Cerkez*, IT-95-14/2, para. 335-341.
[122] Zemach, *supra* n.1, 74.
[123] For analysis see, *Ibid*.
[124] 'No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited'.
[125] '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'.
[126] Zemach, *supra* n.1, 71.

Although the Pictet Commentary to the grave breaches provision of the Fourth Geneva Convention (Article 147) – which parallels parts of Article 8 of the Rome Statute, simply notes that inhuman treatment 'could not mean, it seems, solely treatment constituting an attack on physical integrity or health', and that 'the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them being brought down to the level of animals', the Commentary does mention collective punishment as an example of an unspecified grave breach.[127]

It appears to us that collective punishments are incompatible with the notion of 'human dignity' and, thus, they constitute a form of 'inhuman treatment'. This is, however, provided that the protected persons affected by the punishment experienced 'severe physical or mental pain or suffering', as requires by the ICC Elements of Crime (a factor that should be evaluated on a case by case basis).[128] Our conclusion is further supported by the Statute of the International Tribunal for Rwanda which explicitly referred to collective punishment as a war crime.[129]

In conclusion, it cannot be ruled out that the Policy currently in effect generates house demolitions of such scope and severity that would satisfy the *actus rea* of a war crime under international criminal law. Given the nature of the present proceedings, we see no need to elaborate on the *mens rea* requirement'[130], nor do we wish to speculate at this stage whether the ICC would actually entertain jurisdiction over any such crime, although Chapter 3.6 will address some of the considerations that may affect such a decision.

3.5. Deficient regard for international law by the Court in the context of the policy of house demolition

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[127] See Commentary on Geneva Convention IV of 1949 Relative to the Protection of Civilian Persons in Times of War 594 (Jean Pictet ed. 1958).
[128] ICC Elements of Crime (2011) 14, http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf].
[129] Article 4 of the Statute of the International Tribunal for Rwanda, Security Council Resolution 955, U.N. Doc. S/Res/955 (1994)]
[130] Article 8 as analysed by Zemach, *supra* n.1, 70. The ICTY established that reckless disregard may suffice, Kordiac, *supra* n.121, para. 341.

When a petition opposing security measures employed in the Territories, other than demolition orders, is submitted to the Court, the Court in most instances adopts the following approach: (i) It accepts jurisdiction; (ii) procedurally, it imposes significant restrictions on the authorities; (iii) substantively, it invests judicial efforts in construing the measure as being compatible with the relevant provisions of international law.[131] The instances in which the Court chooses to ignore international law have significantly diminished over the years, while the instances in which considerable effort was made to establish compatibility with it have been growing both quantitatively and qualitatively.[132] Scholarship indicates that such an ever-growing rigorousness may be explained as part of the Court's deep commitment to the rule of law and an attempt on its part to convince the international legal community that international norms are taken seriously in Israel.[133]

The Court's approach towards petitions against house demolition is similar, jurisdictionally and procedurally, to the general approach of the Court to cases involving contested security measures. However, as described in this sub-Chapter, it is rather different in terms of reviewing the legality of the policy in terms the substantive treatment of international law.

In light of the Policy's violation of Israel's obligations under international law, as analysed above, it is no wonder that petitions have been premised on arguments drawn from international humanitarian law.[134] At times the petitions have been supported by expert opinions, including that of the ICRC.[135] Yet contrary to the Court's overall approach, and to the significant effort that it usually invests in establishing compatibility between the various security measures and international humanitarian law, in the house demolition domain the Court has adopted three alternative approaches; the first is to

[131] Cohen, *supra* n.1, 56-57.
[132] See, for example, 7015, 7019/02 *Ajuri v IDF Commander* 2002 PD 56(6) 352, http://elyon1.court.gov.il/files/02/190/070/L01/02070190.l01.pdf
[133] Amnon Reichman, 'When We Sit to Judge We Are Being Judged": The Israeli GSS case, Ex Parte Pinochet and Domestic/Global Deliberation' (2001) 9 *Cardozo Journal of International and Comparative Law* 43.
[134] See, for example, HCJ 698/85 *Dejalas v Military Commander of Judea and Samaria Region*, 1986 PD 40(2) 42..
[135] For analysis of its position, see Simon, *supra* n.1, 3.

systematically ignore that body of law altogether, the second is to state that it is irrelevant as Regulation 119 constitutes 'domestic law',[136] and the third is to simply state, axiomatically, that Regulation 119 and the Policy premised upon it are consistent with The Hague Regulations and the Fourth Geneva Convention.[137]

This approach towards international law, which as stated does not characterize the Court's approach in other cases is, with all due respect, ill-founded. Even if Regulation 119 is classified as 'domestic law' for the purpose of Israeli law (a fact that may be disputed as it is a Mandatory provision and not an Israeli provision, and, moreover, it applies in most cases in the Territories, where Israeli law has not been applied), this classification should not allow it to escape legal and judicial scrutiny under international law, particularly given the provisions of Article 27 of the Vienna Convention on the Law of Treaties 1969 (which has the status of customary law): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[138].

The jurisprudence of the Human Rights Committee according to which interference in the rights enshrined in Article 17 of the ICCPR is illegal, even if it is based on a provision of domestic law, when the legal basis does not require an assessment of proportionality of the interference, is relevant, *mutatis mutandis*, to the Policy.[139]

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[136] See a recent verdict of HCJ 4597/14 *Awawedh and others v Military Commander of the West Bank Area*, para.20. (Deputy Chief Justice Naor, Justice Danziger and Justice Shoham concurring, delivered 1 July, 2014, not yet reported), http://www.hamoked.org/files/2014/1158434_eng.pdf,in which the Court virtually ignored public international law. In another case, the Court found that international law is irrelevant, see HCJ 897/86 *Jaber v Commanding Officer of the Central District*, 1987 PD 41(2) 522, 525-526, per Chief Justice Shamgar: 'The question before us is not the interpretation of Article 53 of the Fourth Geneva Convention. Regulation 119 forms an integral part of the law which was applicable in Judea and Samaria on the eve of the establishment of the governing power of the IDF…. In conformity with rules of public international law … the local law was left in force subject to qualifications that do not affect the present case (see Regulation 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention). It follows that the authority under the above Regulation 119 constitutes domestic law, existing and applicable in the Judea and Samaria Region, not repealed during the former government or during the military government, and we were not presented with legal reasons why it should be viewed as void now'.

[137] For analysis, see Dinstein, *supra* n.1, 295-96.

[138] See Esther Efrat-Smileg, Treaty Law, in Ruby Seibel (Ed.) International Law 5770 (2nd edition, 2010) (Hebrew).

[139] See *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.3; Human Rights Committee, General Comment 16, para. 4.

The willingness of the Court to rely on the Regulation and avoid its scrutiny under international law is also erroneous in the light of our position on the correct interpretation of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention. As Dinstein postulated in the specific context of the Regulation and the Policy: '…the Occupying Power was bound to repeal or suspend these Regulations and certainly it could not legitimately rely on them'.[140]

In addition, we hold the view that the Court's approach towards international law in the context of the Policy is also, with due respect, erroneous due to the customary nature of the prohibitions imposed by the Hague Regulations and the Fourth Geneva Convention, analysed above. As Chief Justice Barak took notice in the *Edelson* judgment (dealing with sovereign immunity under customary international law):

'We are, however, not at liberty to rule as such. Rather, in all matters that touch upon customary international law, the courts must rule in accordance with the rules of customary international law, and we cannot invent our own laws. The rule of law means that the judge too is subject to it. We must therefore act in accordance with the rules of customary international law, which recognize the restricted immunity of foreign states with respect to affairs of state'.[141]

The willingness of the Court to downplay and at times even to ignore the role of international law in house demolition cases is in direct conflict with its own long-standing and consistent jurisprudence, whereby: '…The military commander's powers and authorities imbibe from the rules of public international law concerning military occupation. Under the provisions of these rules, all powers of governance and administration are held by the military commander …the exercise of power must uphold the rules of public international law concerning belligerent occupation and the principles of Israeli administrative law regarding the exercise of executive powers by a public servant…' (emphasis added: the authors).[142]

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[140] Dinstein, *supra* n.57. A similar argument was raised by Kretzmer (2002), *supra* n.1, 125.

[141] PLA 7092/94 *Her Majesty the Queen in Right of Canada v Edelson and Others* (unpublished, 16 February 1995), http://elyon1.court.gov.il/files/94/920/070/A01/94070920.a01.pdf, para. 23.

[142] *Jam'iat Ascan*a, *supra* n.14, para. 10.

This different approach towards international law in the context of house demolition is manifested, more concretely, in relation to the doctrine of proportionality. As acknowledged by Chief Justice Barak, the doctrine of proportionality '…crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation;[143] second, it is a central standard in Israeli administrative law which applies to the area under belligerent occupation'.[144] (See also the work of Shany which establishes that this doctrine may be treated as a general principle of international human rights law and the laws of occupation).[145] Indeed, the principle is broadly construed by the Court, which treats it as a general principle, applicable to any form of military action pursued under international law:[146] 'Indeed, both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing between the authority of the military commander in the area and the needs of the local population….a common thread running through our case law'.[147]

Yet, when it enters the house demolition arena, the Court refuses to engage in a broad judicial review of the Policy itself based on the principle of proportionality under international law. The Court confines itself instead to a review of some possible harm mitigation measures.[148]

Even in the rare cases in which the Court has quashed a specific application of the policy, or in which a dissenting opinion challenged the majority that approved use of the policy,[149] the Justices relied on Israeli law. International law thus did not serve as the

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[143]. Yuval Shany, 'The Principle of Proportionality under International Law' (2009), The Israel Democracy Institute, Policy Paper 75, 86.
[144] HCJ 2056/04 *Beit Sourik Village Council v The Government of Israel* 2004 PD 58(5) 807, para 36, official translation at http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf
[145] Yuval Shany, 'The Principle of Proportionality under International Law' (2009), The Israel Democracy Institute, Policy Paper 75, 119-42, especially 131 and 139.
[146] *Ibid*., 87.
[147] *Beit Sourik*, *supra* n.144, para 39.
[148] See, for example, HCJ 9353/08 *Abu Dahim v Commander of the Home Front Command* 2009 (unpublished, 1 May 2009), Justice Naor, para 5, http://elyon1.court.gov.il/files/08/530/093/c05/08093530.c05.pdf; *Awawedh*, supra n.40, para.27.
[149] See, for example, Justice Cheshin, dissenting in HCJ 4772/91 *Khizran v Commander of IDF Forces in the Judea and Samaria Region* 1992 PD 46(2), 155-161.

legal grounds for establishing the illegality of measures that fall under the Policy in even one single case out of over one hundred cases in which the legality of the policy was adjudicated.

The Court takes the same approach to the review of the Policy in terms of the laws of belligerent occupation. Since 1967, the Court has delivered a vast number of judgments dealing with most aspects of the occupation.[150] The instances in which it ignored the laws of belligerent occupation have significantly diminished over the years, while the instances in which considerable effort was made to examine compatibility between security measures and the laws of occupation have been growing.[151] Currently, in most instances, the exercise of discretion by the Military Commander is subjected to extensive review. This is particularly so in relation to security measures impinging on property rights, an area which was prominent in the Court's balancing act between security interests and the Palestinian, civilian needs.[152] Such extensive and systematic reliance by the Court on the laws of belligerent occupation, particularly in relation to house demolition, would have been expected, given the significant protection granted by them to property rights.[153]

Yet contrary to its overall approach to security measures in the Territories, in the house demolition domain, the Court tends to either ignore the laws of belligerent occupation,[154] or summarily hold that Regulation 119 and the Policy are consistent with The Hague Regulations[155] and with the Fourth Geneva Convention.[156] The only meaningful treatment of the laws of belligerent occupation in the context of the Policy may be

[150] For analysis, see Kretzmer, *supra* n.1; Cohen, *supra* n.1; Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-2004) 37 *Israel Law Review* 17; Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law' (2010) 43 *Israel Law Review* 514, 514.
[151] For analysis, see Harpaz and Shany, *ibid*.
[152] *Beit Sourik*, *supra* n.144.
[153] See, for example, *Morar*, *supra* n.54.
[154] See, for example, HCJ 6026/94 *Nazaal v IDF Commander in Judea and Samaria* (1994) PD 48(5) 338. See also the recent verdict of *Awawedh*, *supra* n.40, in which the Court ignored the laws of belligerent occupation.
[155] For analysis of this jurisprudence, see Dinstein, *supra* n.1, 295-96.
[156] *Ibid.*

detected when the Court reviews procedural aspects of house demolition (*viz* right of prior hearing).[157]

The June 2014 verdict of *Awawedh* and the August 2014 verdict of *Kawasma* clearly illustrate the aforesaid. The Court's decision in these two cases was based solely on Israeli law, ignoring the binding provisions of the laws of belligerent occupation and the obligations that this body of law imposes on Israel. The latter example is particularly illuminating in its deficient treatment of the laws of belligerent occupation. The Petitioners invoked the laws of belligerent occupation to substantiate their claim about the illegality of the Policy. Justice Danziger, leading the unanimous bench of three Justices, referred to the Petitioners' claim, but his decision ignored the laws of belligerent occupation altogether.[158]

The judicial willingness to ignore the laws of belligerent occupation may be explained in the context of house demolition in East Jerusalem, as Israeli law has been applied to it and from the perspective of Israeli law, it is not an occupied territory that comes under the laws of belligerent occupation.[159] Such explanation cannot, however, account for the unwillingness to review demolition orders in the West Bank in accordance with the laws of belligerent occupation, nor the unwillingness to review demolition orders related to East Jerusalem on the basis of international human rights law.

The Court's treatment of the Policy under international human rights law is, unfortunately, similar to its treatment of the Policy under IHL. In no small number of cases did the Court rely upon or at least referred to that body of law when examining measures justified on security grounds.[160] This is not the case when it examines the

[157] The Association for Civil Rights in Israel, *supra* n.11, paras 5-8.
[158] But for one exception: he did refer to one provision of the Oslo Accords between the State of Israel and the Palestinian Authority, by which to his understanding retained Israel the ultimate security responsibility in Area A of the West Bank.
[159] Israeli law considers East Jerusalem to be under Israeli sovereignty territory, but the international community treats it as occupied territory. See the ICJ's Advisory Opinion, *supra* n.102 with the Court's approach, HCJ 1661/05 *Hof Aza Regional Council v Knesset of Israel* PD 59(2) 481.
[160] HCJ 7052/03 *Adalah The Legal Center for Arab Minority Rights in Israel et al. v The Minister of Interior Affairs and Others* 2006 (unpublished, 14 May 2006), Chief Justice Barak, paras 36-37, http://elyon1.court.gov.il/files/03/520/070/A47/03070520.a47.pdf.

legality of the Policy. A study of the Court's jurisprudence on this issue reveals that the Court ignores, in a consistent and sweeping manner, a significant number of scholarly works and reports issued by human rights NGO's which establish the Policy's breaches of substantive and procedural international human rights. In more than one hundred demolition cases brought before the Court, there is not one recorded case in which the Court addressed in any meaningful manner these *prima facie* breaches of international human rights law.

Moreover, over the years the Court has consistently and fully ignored the relevance of international criminal law for the discussion of the Policy's legality, notwithstanding the view, supported by this Opinion, that the Policy, or certain aspects thereof, may amount to a war crime. Admittedly, the Court is engaged with the issue of house demolition in its capacity as an administrative court and not a criminal court. Yet, the application of international criminal law to the area of house demolition only underscores the exceptionality of the Policy and its resultant unreasonable and disproportionate nature. Such (even if indirect) relevance of international criminal law to the area of house demolition should have led the Court to review more assiduously the (administrative and constitutional) legality of the Policy in light of, *inter alia,* international criminal law.

In sub-Chapters 3.2-3.3 we presented our concern that the Policy infringes international law, in sub-Chapter 3.4 we noted that these infringements may amount to a war crime and in this current sub-Chapter we expressed our view that the Court's treatment of the various violations and the possibility that the Policy may constitute a war crime is deficient. In the following sub-Chapter we will address the possibility that in light of the Court's jurisprudence, those engaged in the Policy may be subjected to the jurisdiction of the International Criminal Court.

3.6 Exposure of Israelis to international criminal jurisdiction and international criminal responsibility?

This sub-Chapter is based on the premise that the ICC may, in certain circumstances and under certain conditions, which are beyond the scope of this Opinion, acquire jurisdiction with respect to acts and omissions on the part of Israeli citizens, even if the State of Israel has not ratified the Rome Statute.

The possibility that the Policy may amount to a war crime under the Rome Statute does not mean, *ipso facto*, that the ICC would entertain jurisdiction over it. For such jurisdiction to exist and be implemented, certain cumulative jurisdictional conditions should be met.

One jurisdictional hurdle the ICC faces when assuming jurisdiction over alleged crimes, is the principle of complementarity, enshrined in the Rome Statute. Paragraph 10 of the Preamble of the Statute emphasizes that '… the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions', while Article 1 of the Rome Statue provides that 'An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern…and shall be complementary to national criminal jurisdictions'. These provisions are given practical expression in Article 17 of the Rome Statute which stipulates:

'Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3…'.

Thus, the ICC will not acquire international jurisdiction over an alleged offence if the relevant national legal system deals with the issue effectively and in good faith.

We are of the opinion that in light of the principle of complementarity, the light treatment of international law by the Israeli Supreme Court in house demolition cases and its unsatisfactory treatment of the breaches of international law by the Policy reduces the likelihood that should the question of the legality of the Policy and the responsibility of those involved in it is be referred to the ICC, the latter will decline jurisdiction over the Policy.

Another jurisdictional pre-condition for acquiring jurisdiction is the magnitude and gravity of the alleged crime. The Rome Statute excludes jurisdiction over minor or small-scale infringements of international law. Instead it reserves jurisdiction, under Article 5 read in conjunction with Article 17, to grave, large-scale violations. This threshold is supported, in our specific context, by Article 8(a)(iv), analysed above, which refers to 'extensive' destruction of property. Thus the question whether the ICC may acquire jurisdiction over the Policy should it be referred to it would be influenced by the scope of its implementation and by the degree of proportionality or lack thereof of the measures employed under it. In any event, a future decision to re-activate the Policy against a large number of houses in the Territories might lead the Policy to fall under the jurisdictional scope of the ICC. In contrast, sporadic activation of the Policy might escape the jurisdictional net, although one should take cognizance in this context of the ICTY ruling: 'To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count'.[161]

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[161] *The Prosecutor v. Tihomir Blasic*, *supra* n.120, para. 157.

4. CONCLUSIONS

In this Opinion we state that to the best of our professional understanding, the policy of house demolition and/or sealing off of houses for deterrence purposes, carried out by Israel in the Territories under Regulation 119 of the Emergency Defence (Temporary Provisions) Regulations of 1945 amounts to a serious breach of Israel's obligations under public international law (including under the laws of belligerent occupation, international humanitarian laws and international human rights laws). The Policy constitutes a serious breach of Israel's obligations under the laws of war, international humanitarian law, the laws of belligerent occupation and international human rights law, in light of the language, spirit and purpose of these bodies of law. Thus, the consistent, principled, jurisprudence of the Supreme Court of Israel, which acknowledges, in principle, the legality of the Policy is inconsistent with the accepted interpretation of these bodies of law.

These breaches may amount, under certain circumstances, to a war crime, under international criminal law, and may be subjected, should certain conditions be met, to the jurisdiction of the International Criminal Court, under the Rome Statute.

We further argue that the jurisprudence of the Israeli Supreme Court in the domain of house demolitions, which confirms, in principle, the legality of the Policy, is to be contrasted with the Court's own jurisprudence in comparable areas in which there is tension between security and human rights in the Territories, and where international is required in order to resolve this tension.

Our Opinion contrasts the Court's case law on house demolition with its own jurisprudence in comparable areas in which there is tension between security and human rights in the Territories, and establishes that in its house demolition jurisprudence, the Court departs from its own jurisprudence, in terms of international law. Building upon these findings, this Opinion has distilled two principal manifestations of that distinct stance; (i) willingness to jettison the requirement of individual responsibility and personal

dangerousness, (ii) judicial review which is devoid of a full scrutiny of the measures according to international law.

The State's claim that the policy fulfils its purpose, i.e., deterring potential terrorists, has not been established according to legal requirements, while the Court's determination that the Policy meets the evidentiary threshold international law sets for employing injurious security measures, is, with due respect, erroneous. The policy purports to rely on a single reason: deterring potential terrorist. However, the Court has set an unprecedented low evidentiary threshold for establishing this reason, which falls short of the threshold required in international law.

Moreover, the Court's jurisprudence which denies that the Policy constitutes collective punishment, is, with due respect, erroneous in our view, and contradicts international law and international jurisprudence on this issue. The illegality of the Policy is particularly strong given the conclusions of the Shani Committee, which cast a serious shadow over the Policy's morality, legality and efficacy.

We are of the opinion that this approach on the part of the Court might increase the risk that some of those involved in the execution of the Policy might fall under the jurisdiction of the International Criminal Court, under the Rome Statute. The continued execution of this Policy, in certain conditions detailed in the Opinion, exposes a number of Israeli citizens involved, at various levels and to various degrees, in the implementation and approval of the Policy, to foreign legal action (national or international) and to international criminal liability.

We are of the view that the Supreme Court of the State of Israel should not declare a policy that has collective punishment features to be legal. Furthermore, in our view, it should not provide its judicial stamp to a Policy that causes such serious violations of Israel's obligations under public international law (including the laws of belligerent occupation, international humanitarian laws and international human rights laws). We further contend that the Court should not premise the legality of a policy which entails

severe human rights infringements, as it did, on the basis of a mere ‘hope’ that demolition orders might prove to be effective, nor should it justify the legality of the Policy and the extremely severe human rights infringements it causes, as it did, on the basis of the fact that it is 'conceivable' that the measures may prove to be effective or on the inability to disprove that the Policy does have an element of deterrence.

Our Opinion leads us to the conclusion that the continued application of the Policy is incongruent with international law and therefore, Israel must irrevocably desist from its application. The Court must declare the Policy illegal and order its cessation. Our conclusions are given more force in view of developments on the international scene, including recognition of the Fourth Geneva Convention as having customary status, the establishment of the International Criminal Court in The Hague and increased enforcement of international law. In other words, even if it was possible to find, albeit with difficulty, legal arguments to support the Policy in the 1960s and 1970s (though in our view, this was not the case), legal and other developments in recent years (acknowledged by the Shani Committee) have destroyed the foundation for these arguments.

We underscore that the legal position presented in this Opinion will not be altered even if it is decided that the State of Israel will seal off rather than demolish houses and/or limit the demolition/sealing off to certain parts of a house where a convicted/suspected terrorist lives. Our legal position is that the Policy will continue to contradict international law in these circumstances as well due to the severe infringement of human rights and fundamental tenants of international law (including the requirement for individual responsibility and the prohibition on collective punishment) this Policy embodies.

Admittedly, for the Court to admit that it erred is by no means a light task, particularly in light of its long-standing and consistent line of verdicts that approve the Policy. At the same time, *errare humanum est*, and therefore the Court is not bound by its own precedents. We believe that the Court should reverse its jurisprudence, drawing on the words of Chief Justice Barak’s aphorism: ‘I am not of those who hold that the finality of

a decision attests to its correctness. Any one of us may err. Our professional integrity requires that we admit our errors if we are convinced that we in fact erred'.[162]

November 2014

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Prof. Mordechai Kremnitzer **Prof. Orna Ben-Naftali**

[162] *A v Minister of Defence*, *supra* n.95, para. 22.