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Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories

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The practice of house demolition in the Occupied Palestinian Territories ('the Territories') pursued by Israel for the purpose of deterring potential terrorist activities (as opposed to planning or operational purposes) has attracted voluminous literature, most of which is critical. Scholarship postulates that the practice is immoral and ineffective, that it is contrary to Jewish morals and international law, and that it may amount to an international crime. Some of the critical writings focus on the practice of the Israel Defence Forces; others concentrate on the failure of the Israeli Parliament to curb the practice, while others examine the practice in its wider context, namely the Israeli–Palestinian conflict. This article focuses on the regulation of the practice by the Israeli Supreme Court ('the Court'). This theme has already been examined by numerous scholars including, in particular, Kretzmer and Simon, who found that the Court's jurisprudence is contrary to public international law and its reasoning is unpersuasive. This article aims to add to the existing scholarly corpus by using a different prism. It contrasts the Court's house demolition jurisprudence with its own jurisprudence in comparable areas in which it is called upon to resolve tensions between security and human rights in the Territories, postulating that in handling house demolition measures the Court is unfaithful to its own jurisprudence. Building upon these findings, the article distils the manifestations of that unfaithfulness and its negative repercussions in normative, coherence and legitimacy terms. It concludes with the call that when the issue of house demolition is brought back before the Court, it should apply the same approach, spirit, techniques and benchmarks that it has employed in analogous areas of law.

Keywords: laws of belligerent occupation, Supreme Court of Israel, house demolition, judicial review

1. Introduction

The practice of house demolition (HD) in the Occupied Palestinian Territories ('the Territories') pursued by Israel for the purpose of deterring potential terrorist activities (as opposed to HD pursued for planning or operational purposes) has attracted voluminous literature, most of which is critical.[1]

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[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

Scholarship has established that the practice is immoral[2] and ineffective,[3] that it is contrary to Jewish morals[4] and international law,[5] and that it may amount to an international crime.[6] Some of the critical writings focus on the practice of the Israel Defence Forces (IDF); others concentrate on the failure of the Israeli Parliament to curb the practice,[7] while others examine the practice in its wider context, namely the Israeli–Palestinian conflict.[8] This article focuses on the regulation of the practice by the Israeli Supreme Court ('the Court'). This theme has already been examined by numerous

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); 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; Amos Guiora, 'Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism' (2006) 20 *Temple International and Comparative Law Journal* 363; 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 Book on Public Law* (Harry Sacher Institute 1993) 305 (in Hebrew); John Quigley, 'Punitive Demolition of Houses: A Study in International Rights Protection' (1992–93) 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.

[2] George P Fletcher, 'Collective Guilt and Collective Punishment' (2004) 5 *Theoretical Inquiries in Law* 163, 166.

[3] See, for example, Zilber (n 1).

[4] 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, 510–12.

[5] Section 3.3 below.

[6] Quigley (n 1) 379–83; Ariel Zemach, 'The Limits of International Criminal Law: House Demolitions in an Occupied Territory' (2004) 20 *Connecticut Journal of International Law* 65.

[7] 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, 27–8.

[8] For analysis, see Quigley (n 1) 374. See also Kretzmer (2002) (n 1); Backer (n 1); Baruch Bracha, 'Judicial Review of Security Powers in Israel: A New Policy of the Courts' (1991) 28 *Stanford Journal of International Law* 39; Cohen, ibid; Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 *Israel Year Book of Human Rights* 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; Simon (n 1) 11.

scholars including, in particular, Kretzmer[9] and Simon,[10] who found that the Court's jurisprudence is contrary to public international law and its reasoning is unpersuasive.

This article aims to add to the existing scholarly corpus by using a different prism. It contrasts the Court's HD jurisprudence with its own jurisprudence in comparable areas in which it is called upon to resolve tensions between security and human rights in the Territories.[11] This comparison supports the article's thesis: in handling HD measures the Court is unfaithful to its own jurisprudence.[12] Building upon these findings, the article distils the manifestations of that unfaithfulness and its negative repercussions and concludes with the call that if and when the issue of HD is brought back before the Court, it should apply the same approach, spirit, techniques and benchmarks that it has employed in analogous areas of law. The findings of this article serve as a stepping stone for an analysis, to be published elsewhere, of the alternative explanations for the Court's deviation from its own principles.[13]

2. LEGAL APPARATUS

In its capacity as the 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).[14] Regulation 119 of this enactment ('the Regulation') granted the

[9] Kretzmer (1993) (n 1), Kretzmer (2002) (n 1).

[10] See n 1. See also Hofnung and Weinshall-Margel (n 1); Gil, Tuval and Levy (n 1); Yoav Dotan, 'Public Lawyers and Private Clients: An Empirical Observation on the Relative Success Rates of Cause Lawyers' (1999) 21 *Law and Policy* 401.

[11] The methodology used throughout the article is an analysis and comparison of two sets of verdicts: the first consists of HD verdicts; the second consists of verdicts pertaining to other major security measures employed by the security forces. With respect to the first set, an analysis was conducted of over 100 HD cases, 70 of which were reported and were read and analysed by the author; the remaining HD verdicts were analysed based on analysis appearing in secondary sources, which include, in particular, those referred to in n 1. The HD verdicts are thus analysed by using no sampling techniques. The HD cases are then compared with the leading, seminal cases pertaining to prominent, comparable security measures, including those related to administrative detention, detention for bargaining purposes, deportation orders, physical means of interrogation, orders of assigned residence, orders limiting the right of free movement, military techniques involving human shields, targeted killings and orders pertaining to the Wall/security fence. Sampling was conducted in relation to the second set. Thus, for example, in relation to targeted killing the article relies on the doctrinal, seminal verdict that adjudicated the very legality of the policy (see n 26). The same is true, for example, with respect to the Court's scrutiny of the legality of orders of assigned residence (see n 31).

[12] Yet we still subscribe to Kretzmer's broad description, according to which HD verdicts 'typify its jurisprudence on the Occupied territories', in the sense that '[t]he Court has not seen itself as a body that should question the legality under international law of policies or actions of the authorities, or should interpret the law in right-minded fashion. On the contrary, it has accepted and legitimized policies and actions the legality of which is highly dubious and has interpreted the law in favor of the authorities. The Court's main role has been bolstering procedural requirements and interfering on the margins so as to prevent "excesses"': Kretzmer (2002) (n 1) 163. For a short, first reference to the Court's deviation from its own administrative-constitutional principles, see Kretzmer (1993) (n 1) 348.

[13] See Guy Harpaz, '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* (forthcoming).

[14] Defence (Emergency) Regulations 1945, Palestine Gazette No 1442 Supp II (27 September 1945) reg 119(2). For analysis, see Gross (2002) (n 1) 180–82; Carroll (n 1) 1202–05.

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British Commander in Palestine broad discretionary authority to demolish and seal off houses and that authority was exercised inter alia, for deterrence purposes.[15] With respect to the West Bank and East Jerusalem, Jordan inherited the Regulation following the end of the Mandate and adopted 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, East Jerusalem and the Gaza Strip, Israel applied the Regulation with respect to the Territories in its capacity as a belligerent occupant.[16] In times of relative tranquillity, the practice is rarely used, whereas in times of escalation of terrorist activities – such as during the first Intifada (1987–91) and the second Intifada (2000–05) – the IDF has more readily resorted to the practice.[17] Over the years, the more reversible and hence less severe measure of sealing off houses has largely replaced demolitions; this article will use the generic term of 'house demolitions' to cover both practices, unless otherwise stated. HD, carried out as an administrative procedure by an executive order of the Military Commander of the relevant geographical area, is considered an administrative sanction.[18] This sanction may be imposed in addition to the criminal-judicial sanction, yet it is usually performed in lieu of criminal proceedings.[19] Regulation 119 does not explicitly grant the owners of the house a right to a hearing prior to demolition. Yet the IDF's practice, developed in light of the Court's jurisprudence, is that, as a general rule, demolition is carried out after the inhabitants 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.[20]

3. Being Unfaithful to One's Own Principles

3.1. Excessive Deference

The Court's supervisory role with regard to Israel's conduct in the Territories has been reinforced since the early 1990s. During this period, it has displayed less deference towards the military

[15] '(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'. For analysis, see Dinstein (n 1) 287; Simon (n 1) 30.

[16] For a historical account, see Zemach (n 6) 67.

[17] It is estimated that since then, over 2,000 houses have been either demolished or sealed. For facts and figures of the practice in the Territories, see Halabi (n 1); Darcy (n 1) 478–80; Farrell (n 1) 898–99; Zemach (n 6) 67–70; Hofnung and Weinshall-Margel (2010) (n 1) 674. From 2000 to 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.

[18] Hofnung and Weinshall-Margel (2011) (n 1) 159.

[19] See Halabi (n 1) 254 and 266–67.

[20] ibid, but see HCJ 6696/02 *Amer v Commander of IDF Forces in the West Bank* 2002 PD 56(6) 110 (for an exception to the general rule, with the Court's approval rather than refusal to offer a prior hearing in circumstances in which such notice would endanger the soldiers executing the order).

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authorities, exerting a growing degree of formal and informal, overt and covert pressure,[21] requiring the military authorities to ascribe more importance to the need to abide by international law,[22] showing a willingness to undertake 'live' judicial review with regard to operational decisions,[23] to prohibit some operational techniques[24] and to mitigate others.[25] During the same period, the Court has subjected the military authorities to both Israeli administrative law and to international law.[26] This reinforced scrutiny has been facilitated by reliance on the doctrines of reasonableness, necessity and proportionality.

Initially it was the doctrine of reasonableness that served the Court as the main ground for curbing the exercise of discretion by administrative authorities.[27] The doctrine was first used within Israel 'proper', but soon such usage was extended to cover the exercise of emergency powers in the Territories,[28] holding that in cases where the security authorities seek to deny existing rights, the evidentiary apparatus upon which such denial takes place must be 'clear, unequivocal and convincing'.[29] The Court has also relied on the doctrine of necessity, insisting that emergency measures may be resorted to only 'when there is no alternative legal way' of safeguarding state security.[30] This criterion has been applied in numerous areas analogous to HD, such as targeted killings, detention of those classified as illegal combatants and orders of assigned residence.[31] Since the early 2000s, the Court has placed more reliance on the principle of proportionality.[32] Most judicial reversals of administrative decisions in the Territories were in fact premised on the doctrine of proportionality.[33] The more robust reliance on the doctrines of reasonableness, necessity and proportionality have rendered the Court's scrutiny of the military authorities more meaningful. This conclusion is supported by the work of Davidov and Reichman, who examined petitions submitted between 1990 and 2005 and found a dramatic

[21] Yoav Dotan, 'Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the *Intifada*' (1999) 33 *Law and Society Review* 319.
[22] Cohen (n 7) 61.
[23] See, for example, HCJ 4764/04 *Doctors for Human Rights v IDF Commander in the Gaza Strip* 2004 PD 58(5) 385, as analysed by Cohen (n 7) 74.
[24] For analysis, see ibid.
[25] For analysis, see ibid 63.
[26] See, for example, HCJ7957/04 *Mara'abe v The Prime Minister* 2005 PD 60(2) 477, para 14, official translation at http://elyon1.court.gov.il/files_eng/04/570/079/A14/04079570.a14.pdf; HCJ 769/02 *Public Committee against Torture v Government of Israel* 2006 (unpublished, 14 December 2006), para 18, official translation at http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf.
[27] For analysis, see Bracha (n 8) 81–83.
[28] ibid 63–64.
[29] EA 2, 3/84 *Naiman v Chairman of the Central Elections Committee for the Eleventh Knesset* 1985 PD 39(2) 225.
[30] HCJ 769/88 *Abu Obeid v IDF Commander in Judea and Samaria* 1988 PD 42(4) 569, Justice Goldberg, para 5.
[31] In the assigned residence case the Court found that the measures may not be imposed if the elimination of the danger can be achieved by criminal prosecution: see HCJ 7015, 7019/02 *Ajuri v IDF Commander* 2002 PD 56(6) 352, para 26.
[32] For analysis, see Moshe Cohen-Eliya, 'The Formal and the Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence' (2005) 38 *Israel Law Review* 262.
[33] For analysis, see Hofnung and Weinshall-Margel (2011) (n 1) 161, who established that in 79% of a large sample of the Court's cases examined in which the Court reversed the executive's decision, proportionality was the legal basis for such intervention.

decline in the deference accorded to the Military Commander – manifested, inter alia, by a significant increase in the willingness to intervene in the context of Palestinian petitions concerning infringement of proprietary rights.[34]

Thus, in proceedings related to administrative detention, the Court has inquired whether there is sufficient evidence to demonstrate that if the detainee were to be released, he would *almost certainly* pose a danger to public or state security;[35] in the case of detention of those classified under Israeli legislation as 'illegal combatants', the Court has demanded proof 'that the prisoner took a substantial, direct or indirect part in hostile acts against the state, or that he belonged to an organization that perpetrates hostile acts'. Internment in such circumstances has been held to be legal only when it 'may be necessary in order to remove him from the cycle of hostilities that prejudices the security of the citizens and residents of … Israel'.[36] Similarly, with regard to assigned residence orders issued under Article 78 of the Fourth Geneva Convention,[37] the Court has established that such authority 'may usually only be exercised if there exists administrative evidence that … shows 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'.[38]

The Court proceeded in that case to hold that the authority to assign residence should be carefully exercised 'only in extreme and exceptional cases',[39] and that '*just as with any other measure*, the measure … must be exercised proportionately'.[40]

These high thresholds, combined with the Court's growing willingness to intervene in cases in which the authorities failed to reach them, must be contrasted with the Court's jurisprudence in the HD area, where the Court displays only an amorphous and broad reliance on the doctrines of reasonableness and proportionality. It must be stressed that the argument raised is not a binary one, according to which there is absolute deference in HD cases and no deference in the comparable areas. Indeed, the Court's tendency is to display considerable deference in relation to all security measures, in general, and in relation to the authorities' cost–benefit analysis, in particular (such as in respect of targeted killings and deportations). The argument of this article is more nuanced and relativist: the deference granted in the HD cases is by and large much greater than that granted in the comparable cases.

[34] Guy Davidov and Amnon Reichman, 'Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel' (2010) 35 *Law and Society Inquiry* 919 (explaining that trend on account of the prolonged occupation, the gradual increase in the emphasis given by the legal system to the protection of human rights and to international norms pertaining to the use of force and belligerent occupation).
[35] AAD 1/88 *Agbariyya v State of Israel* 1988 PD 42(1) 840, 844–45: 'The danger to public or State safety must be so grave as to leave no choice but to hold the suspect in administrative detention', as analysed by Gross (2001) (n 1) 762–63.
[36] CrimA 6659/06 *A and Others v State of Israel* PD 62(4) 329, para 22.
[37] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.
[38] *Ajuri* (n 31) President Barak, para 25.
[39] ibid para 24.
[40] ibid para 25 (author's emphasis).

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As will be established below, the legality of HD orders depends, according to the Court's own jurisprudence, on their deterrent impact.[41] In the first years of their use, the official line was that demolitions were required for military operational purposes;[42] yet it soon became clear they were being carried out for general deterrent purposes.[43] Outside the security circles there is general consensus that the HD policy does not support its stated rationale. Highly convincing legal scholarship provides qualitative and quantitative analysis that refutes the deterrence rationale,[44] forcefully arguing that demolition orders are more of a reprisal measure than a deterrent measure.[45] This scholarship is supported by the work of 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.[46] The empirical work of Zilber adds strong probative support for such critical scholarship.[47] These works are supported, in turn, by extensive research conducted by Israeli non-governmental organisations (NGOs),[48] forming together a systematic, consistent and well-substantiated argument against the policy's rationale. Numerous prominent Israeli politicians such as Abba Eban,[49] and high-ranking IDF officers upon their retirement, have expressed their doubts as to the deterrent effect.[50] In fact, Amnon Strasnov, former IDF Attorney General, has acknowledged that the IDF has never

[41] HCJ 802/89 *Nasman and Others v Commander of IDF Forces in the Gaza Strip* 1989 PD 43(4) 461, 464–67; HCJ 2722/92 *Alamarin v IDF Commander in the Gaza Strip* 1992 PD 36(3) 693; HCJ 572/82 *Muslah v Minister of Defence* 1982 PD 36(4) 610, 612–13; HCJ 228/89 *Eljamal v Minister of Defence* 1989 PD 43(2) 66; HCJ 5667/91 *Jabarin v Commander of IDF Forces in the Judea and Samaria Region* 1992 PD 461(1) 858, 859–60; HCJ 948/91 *Hodli and Others v Commander of IDF Forces in the Judea and Samaria Region* 1993 PD 47(1) 612, 616.

[42] According to Shamgar, who served as the Attorney General of the Army (and subsequently as the State Attorney and as the President of the Supreme Court), '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': Shamgar (n 1) 275–76, as analysed by Quigley (n 1) 366.

[43] See Ariel Merari, 'Israel Facing Terrorism' (2005) 11 *Israel Affairs* 223, 230. See also Carroll (n 1) 1207.

[44] Kretzmer (n 1); Dinstein (n 1); Halabi (n 1); Simon (n 1). But contrast these views with Reicin (n 1) 547.

[45] Dinstein (n 1) 303–04, referring to Gerhard von Glahn, *Law among Nations* (7th edn, Longman 1996) 677.

[46] Merari (n 43) 231 and 235: '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.'

[47] A study conducted by Zilber (n 1) showed that the number of terror incidents generated by Palestinian communities in which houses were demolished did not decline after the demolitions.

[48] See, for example, Ronen Shnayderman (Zvi Shulmman, tr), '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.

[49] Former Israeli Foreign Minister, Abba Eban, described the policy as a 'desecration of Israel's heritage and a blatant violation of the legal and societal rules of the civilized world': Abba Eban, 'Blowing Up Homes – A Desecration of Israel's Heritage', *Ma'ariv*, 22 November 1981, 6 (in Hebrew), cited and analysed by Simon (n 1) 13.

[50] See, for example, Former Brigadier General Binyamin 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 criticised 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 (n 1) 13.

published evidence to show that the practice does indeed deter terrorists,[51] leading Merari to speculate that the Army actually never carried out such a study.[52] Another legal adviser to the IDF, Amos Guiora, has also expressed his strong doubts about the policy's *effet utile*.[53]

This critical approach should be examined in its wider scholarly context – namely, the research that has established that harsh counter-terrorism measures backfire by fostering hatred and promoting attempts to exact revenge,[54] and that indiscriminate measures particularly might prove to be counter-productive because they create new grievances, fail to generate a clear structure of incentives, and allow insurgents to resolve collective action problems, which lead to an increase in popular support for terrorism resulting in larger cadres and increased violence.[55] 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 a particularly heavy burden of proof regarding the likely effectiveness of any proposed measure.[56]

Yet the Court has chosen to ignore this scholarship. It has refused to examine the question of whether demolition orders serve as an effective instrument of deterrence,[57] and has preferred to accept the military's position as virtually axiomatic.[58] The above-mentioned ordinary evidentiary benchmark of 'clear, unequivocal and convincing' evidence was replaced in the domain of HD

[51] Amnon Straschnov, *Justice under Fire: The Judicial System during the Intifada* (Yediot Aharanot 1994) 92 (in Hebrew).

[52] Merari (n 43) 231.

[53] Guiora (n 1) 375–76. But see the recent economic analysis which established that HD measures are an effective deterrence tool only in the aftermath of the demolition and in its close vicinity; yet it may not be an efficient policy because it may cause some undesirable consequences such as an increase in non-suicidal terror attacks: Efraim Benmelech, Esteban F Klor and Claude Berrebi, 'Counter-Suicide Terrorism: Evidence from House Demolitions', 16493 NBER Working Paper (2010).

[54] Kevin Siqueira and Todd Sandler, 'Terrorists versus the Government: Strategic Interaction, Support, and Sponsorship' (2006) 50/6 *Journal of Conflict Resolution* 878–98, as analysed by Benmelech, Klor and Berrebi, ibid.

[55] Benmelech, Klor and Berrebi (n 53) (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.

[56] For further analysis, see Bracha (n 8) 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.'

[57] 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 (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 HD 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).

[58] See, for example, HCJ 986/89 *Calbani v Commander of Central Command* (unpublished, 1990), slip op at 3; HCJ 361/82 *Khamri v Military Commander of Judea and Samaria Region* 1982 PD 36(3) 439; HCJ 179/89 *Batash v Military Governor of Gaza* (unpublished, 18 March 2009). For more recent examples, see HCJ 5696/09 *Mugrabi v Commander of Home Front Command* (unpublished, 15 February 2012), Justice Melcer, para 13, http://elyon2.court.gov.il/files/09/960/056/K04/09056960.K04.htm; HCJ 124/09 *Dawiat v Minister of Defence* (unpublished, 18 March 2009), Justice Levy, para 4, http://elyon1.court.gov.il/files/09/240/001/o03/09001240.o03.pdf.:

by an almost blind faith in the military's stance.[59] This, in turn, has led the Court to dismiss calls for the submission of supportive statistical data[60] or expert evidence:[61] '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'.[62] By abandoning the requirement of statistical evidence or expert evidence, the Court could content itself with anecdotal arguments or axiomatic assumptions supporting deterrence, establishing a uniquely lenient burden of proof. In one case this enabled the Court to approve measures if 'the pressure of the families *may* deter the saboteurs',[63] and in 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*'.[64] Such a low threshold cannot be reconciled, for example, with the judicial utterance in the assigned residence verdict under which 'not any degree of danger is sufficient.'[65]

Such low standards, moreover, have been caused by and manifested in a cautious reliance on the doctrines of necessity, reasonableness and proportionality. As to necessity, in deviating from the normal judicial course and in ignoring academic findings that established that the test of necessity should be applied particularly to measures based exclusively on emergency powers, such as HD,[66] the Court has either ignored that requirement or merely paid lip service to it.[67] In contrast, at least rhetorically, the Court has imported the reasonableness doctrine into the sphere of HD.[68] Yet, when it came to applying the doctrine in concrete cases, it has not offered

> 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 HCJ 4597/14 *Awawedh and Others v Military Commander of the West Bank Area*, para 20, Deputy President Naor, Justice Danziger and Justice Shoham concurring (unpublished, 1 July 2014), http://www.hamoked.org/files/2014/1158434_eng.pdf. For analysis of this judicial approach, see Kretzmer (1993) (n 1); Simon (n 1) 27–45. But compare with Dotan (n 21) 349: 'The Court tempered, to some extent, the harshness of HD measures by creating procedural protections and by imposing substantive limitations.'

[59] HCJ 1730/96 *Sabih v Commander of IDF Forces in the Judea and Samaria Region* 1996 PD 50(1) 353, Justice Cheshin, para 9: 'I am unable to understand how the Court can tell a military commander not to destroy the house of a terrorist-murderer, for deterring purposes because the Court may take a different view.'

[60] HCJ 1005/89 *Aga and Others v Commander of IDF Forces in the Gaza Strip* 1990 PD 44(1) 536, 538, as analysed by Dinstein (n 1) 292.

[61] See n 58. See also HCJ 2209/90 *Shwahin v Commander of IDF Forces in the West Bank Region* 1990 PD 44(3) 875, 878, as analysed by Dinstein (n 1) 292.

[62] HCJ 2006/97 *Ghanimat v Officer Commanding Central Command* 1997 PD 51(2) 651, Justice Goldberg (author's translation and emphasis).

[63] HCJ 2418/97 *Abu Fara v Commander of IDF Forces in the Judea and Samaria Region* 1997 PD 51(1) 226, 228, analysed by Dinstein (n 1) 297.

[64] *Ghanimat* (n 62) 653–54 (author's emphasis).

[65] *Ajuri* (n 31) President Barak, para 25.

[66] Bracha (n 8) 101–02.

[67] For analysis of the Court's jurisprudence, see ibid 91.

[68] *Khamri* (n 58) 442.

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guidelines regarding the reasonableness of HD decisions, nor has it been willing to employ the test, as it has in other spheres, in an assertive manner. The end result has, once again, been a deferential approach.[69]

Instead of focusing on the tests of necessity and reasonableness, the Court placed heavier reliance on the doctrine of proportionality.[70] Yet, when it applied the doctrine, it did so in two alternative ways: either in order to approve the proposed measures by summarily concluding that they are proportionate,[71] or by using it as a judicial 'micro-management' instrument, transforming HD measures into sealing-off measures or restricting the scope of the measures only to certain parts of the relevant house.[72] Admittedly, this use of the doctrine of proportionality as a mitigating instrument is not unique. In fact, it may be argued – drawing, for example, on the string of verdicts pertaining to the Wall/security fence – that the principal use of that doctrine by the Court is in fact as a micro-management, mitigating tool vis-à-vis the enforcement of occupation by the Israeli security authorities. Yet, contrary to other comparable areas of law (such as assigned residence orders,[73] the security barrier cases,[74] restrictions of movement of Palestinians[75] and prohibiting entry onto one's own agricultural terrain),[76] the doctrine was used in the HD context in a much more guarded, submissive, deferential manner,[77] either as a means to legitimise the proposed measures or in order to mitigate them, not as a prelude to establishing their illegality either *in abstracto* or *in concreto*.

Moreover, the doctrine of proportionality has been used only partially. Its application entails a balancing act and, as the Court established, without an assessment of the likely prejudicial impact on the Palestinian rights, it is impossible to assess the proportionality of the alternative measure chosen.[78] Yet, in the vast majority of HD cases, there is no meaningful attempt to analyse such adverse effects. Voices within the Court itself, which suggested the need for a stricter judicial approach,[79] remained unheeded.

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[69] But see the following verdicts in which the Court did elaborate on these issues: HCJ 798/89 *Shukri v Minister of Defence* (unpublished, 10 January 1990); *Alamarin* (n 41) 698.
[70] For analysis of that reliance, see Bracha (n 8) 86; Gross (2002) (n 1) 185.
[71] HCJ 9353/08 *Abu Dahim v Commander of the Home Front Command* (unpublished, 1 May 2009), Justice Naor, para 5, http://elyon1.court.gov.il/files/08/530/093/c05/08093530.c05.pdf.
[72] See, for example, *Khamri* (n 58) 443; *Awawedh* (n 58) For a critical judicial approach towards such a use, see HCJ 4772/91 *Khizran v Commander of IDF Forces in the Judea and Samaria Region* 1992 PD 46(2) 160, para 15, dissenting opinion of Justice Cheshin. For an extensive analysis of the micro-management use of proportionality in demolition cases, see Simon (n 1) 35.
[73] *Ajuri* (n 31) paras 31–39.
[74] See *Mara'abe* (n 26) paras 110–16.
[75] HCJ 2150/07 *Abu Safiya v Minister of Defence* (unpublished, 29 December 2009), paras 27–36, http://elyon1.court.gov.il/files/07/500/021/m19/07021500.m19.pdf.
[76] HCJ 9593/04 *Morar v Military Commander* (unpublished, 26 June 2006), paras 17–28, http://elyon1.court.gov.il/files/04/930/095/N21/04095930.n21.pdf.
[77] See, for example, *Abu Halawe* (n 57); HCJ 6288/03 *Sa'ade v Commander of the Home Front Command* 2003 PD 58(2) 289, Justice Türkel, para 2.
[78] HCJ 940/04 *Abu Tiret and Others v Commander of IDF Forces in the Judea and Samaria Region* 2004 PD 59(2) 320, para 12.
[79] HCJ 2630/90 *Machmod v Commander of IDF Forces in the West Bank* (unpublished, 12 February 1991), para 3. Justice Levine stated: 'I am inclined to believe that in light of the severe effect of applying Article 119 … the Court ought to limit its use and interpret it narrowly.'

It must, however, be noticed that the comparison between the thresholds employed in the HD domain and those employed in comparable areas of security measures (such as detention or deportation) is not free from methodological problems. As argued elsewhere, in dealing with HD measures aimed at general deterrence, the Court faces a greater challenge than it does in dealing with pre-emptive measures aimed at particular individuals. The Court takes up that challenge by adopting in the HD domain a deferential approach, and such approach entails a deviation from its own principles with respect to similar (non-deterrent) security measures.[80]

The timid reliance on the doctrines of necessity, reasonableness and proportionality and the resultant light evidentiary burden of proof imposed upon the military authorities have provided the military authorities with almost a *carte blanche*. The military authorities used this benchmark in proposing measures and when the issue came back to the Court, it approved the proposed measures. A vicious circle was thus created, the military authorities and the Court reinforcing each other in setting a low evidentiary bar. Thus, in one case the Court stated that the burden to adduce evidence showing that HD may have a deterrent effect may be lifted simply by asserting that the proposed measures are deterrent in nature.[81] In such a case the burden would, in effect, shift to the petitioner who is not in a position to furnish contradictory information. In fact, there are instances in which the Court explicitly refers to the petitioner's need to lift the evidentiary burden with regard to deterrence.[82] This insignificant burden of proof and the shift of the evidentiary burden are in conflict with Israel's *lex lata* and *lex ferenda* administrative law.[83] In the same verdict, the Court added the following statement, ignoring prima facie evidence of the lack of deterrent effect: 'The fact that disruptions of the public order in the area continue does not mean that resort thereto is not effective … We have no reason not to accept Respondent 2's claim that were it not for use of Regulation 119, the disruptions of public order would be more numerous and more severe.'[84] 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.[85] Other judicial utterances were equally deferential. 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 phenomenon, the competent authorities are entitled, inter alia, to adopt the measures of seizure, and

[80] Harpaz (n 13).

[81] See, for example, *Shukri* (n 69), as analysed by Gross (2002) (n 1) 187–88: '… Respondent … claims that this is an efficient deterrent method and we were not presented with any data that negated the reasonability of that assumption.'

[82] *Dawiat* (n 58) para 6: 'I am of the opinion that in the matter before us the Petitioner's arguments do not raise the burden of proof. The Petitioner did not raise any claim that could negate the deterrent power of the act of demolition. He was unable to undermine the State's claim that this measure could not be avoided so as to achieve the desired purpose – reduction of the harmful effects of terror.'

[83] This conflict led Bracha to conclude that 'the Courts should shift the burden of proving the legality of an action onto the security authorities whenever those actions are based on privileged evidence withheld from the individual but available to the Court' (Bracha (n 8) 101).

[84] *Shukri* (n 69), as analysed by Gross (2002) (n 1) 187–88.

[85] HCJ 242/90 *Alkatsaf v Commander of IDF Forces in the Judea and Samaria Region* 1990 PD 44(1) 614, 616.

demolition of the home of the suicide bomber'.[86] This reasoning does not, in fact, address the questions of necessity and deterrence. Contrary to its other verdicts, the Court was not searching for proof of the necessity of the measure but for the necessity of a response. In the same verdict, the Court added that the measures 'may even preclude any chance that those living together with the terrorist, and who are aware of his intention to do a suicide bombing, will attempt to prevent him'.[87] Yet again, this reasoning is irrelevant to the numerous verdicts, including the most recent measure of sealing-off, in which the Court approved proposed measures notwithstanding the fact that the family members who lived in the house to be sealed off had been unaware of and uninvolved in the terrorist activities.[88]

In one more line of reasoning, which can be attributed only to the very lenient evidentiary burden of proof employed by the Court, President Shamgar stated that 'if it is clear to the suicide terrorist that his death will constitute a sufficient condition for leaving his house intact, he is liable to choose to go through with the suicide attack. Thus instead of being deterred from the perpetration of murderous acts, the suicide terrorist will be encouraged to do them. I see no reason for disputing this approach'.[89] The Court may thus be seen to transform its passive, submissive, almost blind support for the measures and to adopt an active, supportive stance, again unsupported by statistical data or other convincing evidence.

Another flaw in this line of reasoning is the assumption, based on no hard evidence, that the very prospect of demolition might deter the prospective suicide bomber from pursuing his heinous activity. Yet this reasoning neglects to address the very fact that a person who is willing to kill so many innocent citizens and to lose his own life might not adopt such a rational line of thinking. Moreover, if a terrorist is not deterred, notwithstanding his understanding that he would leave his parents and other close family members to face the consequences of the loss of their beloved relative, why would he be deterred by much milder consequences, namely the demolition of the family's house? In contrast with the spirit of its judicial approach in analogous cases, never has the Court taken up that challenge; nor has it addressed the works of scholars and NGOs which establish that HD provides the family with enhanced communal status and the award of significant compensation granted by Palestinian organisations – facts that may encourage prospective suicide bombers. These works, together with the extensive scholarship analysed above, undermine the deterrence rationale of the policy, yet the Court has chosen to ignore them altogether – further proof of the blind faith that it places in the security forces.[90]

[86] HCJ 6026/94 *Nazaal v IDF Commander in Judea and Samaria* (1994) PD 48(5) 338, as analysed by Gross (2002) (n 1) 190–91.
[87] ibid, as analysed by Gross (2002) (n 1) 190–91.
[88] *Abu Dahim* (n 71).
[89] See *Nazaal* (n 86) para 9, as analysed by Gross (2002) (n 1) 204.
[90] For a very recent example, see *Awawedh* (n 58). For support see Simon (n 1) 11: 'The army unit exits, leaving the family devastated, angered, humiliated, and homeless. The penalty for challenging the government is unmistakable. But the spectacle of power is not over. The remaining heap of gravel, now a piece of government property, is deliberately left in place as a monument to the military government's dominance. The debris, however, is no less symbolic in Palestinian eyes. From their perspective, it epitomizes the injustice of Israeli rule and reinforces their self-image as virtuous victims.'

In one of the most recent verdicts 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',[91] while Justice Rubinstein based the deterrence rationale on no more than a 'hope':[92]

> 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.

In sum, in demolition cases the Court adopts a deferential attitude towards the military authorities, manifested in and facilitated by a very low evidentiary burden of proof, and that low burden is inconsistent with its own approach in comparable reviews.[93] The HD judgments are in most instances unanimous, jurisprudentially brief, abstract, formalistic and unrefined,[94] displaying 'almost uniform support of the practice'.[95] Moreover, little effort is made to provide in-depth analysis, or to substantiate the verdicts with a comparative dimension. No genuine attempt is made to effectively regulate the practice, or to outline the considerations that should influence the exercise of the discretion embodied in Regulation 119.

Such a judicial approach is both the cause and the consequence of some of the Court's most unconvincing attempts to subscribe to the underlining rationale of the policy. Consequently, the military authorities are entrusted with unsatisfactorily monitored discretion in an area which entails severe consequences in terms of fundamental human rights. Out of the dozens of justices dealing with HD over 35 years, only one – Justice Cheshin – has acknowledged the exceptionally low standard of proof required;[96] yet, as Kretzmer noted, his voice 'has been alone in a judicial wilderness'.[97]

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[91] *Abu Dahim* (n 71) Justice Naor, para 8.
[92] ibid, Justice E Rubinstein, paras A, G.
[93] For support see Kretzmer (1993) (n 1) especially 347–49: 'This approach is inconsistent with the Court's traditional jurisprudence because it defies the restrictive interpretation normally applied to governmental actions that infringe on fundamental rights and moreover it lacks any attempt to present, weight, and balance the Palestinians' competing interests.'
[94] For support see Simon (n 1) 37–38 and Dinstein (n 1) 304.
[95] See Simon (n 1) 4. For further critical analysis of the Court's record, examining specific verdicts, see Kretzmer (n 1); Nimer Sultany, 'The Legacy of Justice Aharon Barak: A Critical Review' (2007) 48 *Harvard International Law Journal Online* 83; Simon (n 1).
[96] *Sabih* (n 59) 368, para 10: 'Even when the trumpets of war blow, the rule of the law sounds its voice. But we must confront the truth. At those times its voice is like the sound of the piccolo, refined and pure, but swallowed up in the tumult.' In the same judgment (368–69) Justice Cheshin offered the following self-aware, self-critical explanation: 'In reviewing demolition orders, we have a sense of being in a foreign environment and this is not due to our lack of power or authority to interfere with the decision of the military commander … The feeling of not belonging derives essentially from the fact that the demolition of houses is an act performed in accordance with the Defense Regulations, which by their very nature and substance are acts of war. Acts of war are not the kind of acts that the courts are required to deal with in regular day to day life.'
[97] Kretzmer (2002) (n 1) 150.

It should thus not come as a surprise that a recent empirical study conducted by Hofnung and Weinshall-Margel, which examined the Court's verdicts and classified them under six categories (administrative detentions, HD, confiscation of private land for the purpose of erecting the security barrier, restrictions related to due process of law, curfews and closures, and military operations), established that HD cases are not susceptible to covert or overt judicial intervention. In fact, these cases had the second highest rate of verdicts expressing full approval of the military's orders[98] and judicial deference was even more noticeable in that category compared with the category of military operational activities. In the same vein and in contrast to the categories of confiscation of private land for erecting the security barrier and curfews and closures, the Court has not been willing to exert overt pressure on the military authorities in HD cases.[99]

This deferential approach in HD cases was caused by and manifested in the Court's refusal to pursue a more restrictive interpretation of Regulation 119 (see below, Section 3.2), in its neglect to require proof of the individual responsibility or dangerousness of the person inhabiting the house (Section 3.3), in its failure to scrutinise the policy in accordance with public international law (Section 3.4) and in its failure to engage international and national courts (Section 3.5).

3.2. Refusal to Pursue a Dynamic Interpretation

The Regulation's historical context is that of an unelected and undemocratic ruler, struggling to enforce law and order against Jewish and Arab national movements which were conducting a violent struggle. Admittedly, the Israeli occupation authorities in the occupied Palestinian territory serve too as an unelected and undemocratic ruler; yet the new conditions of post-British Mandate are very much different from those prevailing in the era of the British Mandate. Thus, for example, the Court could have adapted the interpretation of the Regulation to meet these new conditions, in particular:

- the creation of a democratic, Jewish State (1948);
- the occupation by Israel of the West Bank and Gaza Strip and East Jerusalem, with these Territories becoming subject to the laws of belligerent occupation (1967);
- Israel's ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1991);
- the adoption by the Israeli Parliament in 1992 of two Basic Laws and the corollary pursuance by the Court of a 'constitutional revolution' (1990s); and
- the enhanced robustness of international law and international institutions (1990s onwards).

Some of these events led the Court to adopt in the mid-1990s a much more activist stance, drawing, inter alia,[100] on the dynamic canon of interpretation. Indeed, this canon was, by and

[98] Hofnung and Weinshall-Margel (2011) (n 1) 161–65 (close to 70%). The first category was detentions.
[99] ibid 164–65.
[100] See President Barak in CA 6821/93 *Bank Mizrahi v Migdal Cooperative Village* 1995 PD 49(4) 221, official translation at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf. In the opening paragraph of his judgment: 'Israel is a constitutional democracy. We have now joined the community of democratic countries … with constitutional bills of rights. We have become part of the human rights revolution that characterizes the

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large, the interpretive route chosen in the last two decades with respect to the Territories, manifested, for example, in the security barrier cases and the assigned residence case.[101] In the words of President Barak, a judge 'should not advance the intent of an undemocratic legislator. He … must avoid giving expression to undemocratic fundamental values'.[102] Had the Court employed this canon of interpretation, this would have painted Regulation 119 with more democratic, human-rights laden colours, thereby establishing its illegality or promoting its more restrictive interpretation. Yet, when it has come to HD measures, the Court has adopted the opposite interpretative path. Although in some cases it did pay lip service to the need to construe the Regulation in a democratic, human-rights laden context,[103] it continued to contextualise it in the era in which it was adopted, thereby adhering to its broad interpretation, one that even if appropriate during that era is inappropriate today.

This choice enabled it to widen the *ratione materiae* of the Regulation. Initially HD measures were carried out in response to alleged grave security offences. Over the years their usage was expanded to cover suspected offences of much less gravity in nature.[104] Similarly, orders were initially confined to properties from which offences had been committed, but were subsequently extended to apply to homes where offenders merely resided,[105] and ultimately to cases of constructive residency in the absence of actual, permanent or continuous residency[106] or to cases where the occupants are mere tenants.[107] The refusal to carry out a dynamic interpretation also facilitated the expansion of the Regulation's *ratione personae*. Initially, the military authorities avoided demolishing houses owned by family members who were unaware of the terrorist's activities.[108] Yet, over the years that limitation has been set aside and the degree of (un)awareness

second half of the twentieth century. The lessons of the Second World War, and at their center the Holocaust … as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda. International accords on human rights have been reached. Israel has acceded to them. International tribunals have been established to address issues of human rights. The new constitutions include extensive sections treating human rights … Judicial review of the constitutionality of laws infringing human rights has become the norm in most countries. This revolution has not passed us by. We joined it in March 1992.'

[101] See, for example, *Ajuri* (n 31) paras 20–21.

[102] Aharon Barak, *A Judge in a Democratic Society* (Haifa University Press 2004) 16 (in Hebrew).

[103] See, for example, *Sa'ade* (n 77) para 2; *Awawedh* (n 58) para 17. But see *Ghanimat* (n 62), in which Justice Cheshin relied on the Basic Laws as means to advance a dynamic and hence a narrow construction of Regulation 119.

[104] See, for example, HCJ 3740/90 *Mantzur v Military Commander of Judea and Samaria Region* (unpublished, 1 January 1991).

[105] Simon (n 1) 30–31.

[106] ibid, analysing *Khamri* (n 58), in which the Court approved the demolition despite the absence of permanent or continuous residents: the mere fact that the sons are away from their parents' homes during the school year 'does not prevent them from staying in, or being considered "inhabitants" of, the homes of their parents during vacation periods'; *Alamarin* (n 41) para 6.

[107] Dinstein (n 1) 287.

[108] Statement of Moshe Dayan in *The Jerusalem Post*, 30 October 1968, as appearing in Julius Stone, *No Peace – No War in the Middle East: Legal Problems of the First Year* (Maitland Publications for the International Law Association (Australia Branch) 1969) 15, quoted and analysed by Carroll (n 1) 1196; HCJ 4697/91 *Salam v Commander of IDF Forces in the West Bank* 1992 PD 46(5) 467, 473: 'We have repeatedly emphasized that the issue is one of a deterrent sanction only, directed against those who could have, had they so chosen, prevented the asset from being used for illegitimate purposes, and that this sanction also serves as a deterrent for the public at large.' For analysis, see Gross (2002) (n 1) 186; Carroll (n 1) 1214. Shefi, former Brigadier-General, Military

of the family member was held not to affect the very existence of the authority to demolish, but only the scope of its exercise.[109] When the Court was willing to depart from this historical interpretive approach and to adopt a more dynamic one, it chose to take cognisance of those developments that could have supported the expansion of the Regulation's interpretation, thereby broadening rather than narrowing the boundaries of the discretion held by the Military Commander. Thus, for example, when the second Intifada broke out in 2000, it took into account the extreme modes of Palestinian violence associated with it in order to relax the procedural requirement of a hearing prior to the execution of demolition orders.[110]

3.3. No Requirement of Individual Responsibility, Complicity or Dangerousness

According to the principle of individual responsibility, an individual is responsible for his or her own actions and not for those of another.[111] The corollary 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,[112] are nowadays enshrined under international humanitarian law and international human rights laws,[113] under the laws of belligerent occupation,[114] as well as under Israeli law.[115] Accordingly, criminal sanctions should be premised on individual responsibility and administrative sanctions upon individual responsibility and dangerousness. Deviation from that principle amounts to prohibited, collective punishment. This truth is also enshrined in the Court's jurisprudence,[116] which prohibits collective punishment, both under Israeli administrative and criminal law[117] and under international law.[118] The Court has reiterated and reinforced that principle vis-à-vis the military authorities in the Territories in different areas, citing the Old Testament to the effect that 'a person will be liable for his own offences and die for his own sins'.[119]

One comparable area of law in which this principle was implemented is that of administrative detentions. Detention is justified on the basis of the danger posed by a particular person against

Advocate General of the IDF, argued that '[n]o such action is taken unless … there [is] a direct connection between the building and terrorist and other violent activities': Dov Shefi, 'The Reports of the UN Special Committees on Israeli Practices in the Territories: A Survey and Evaluation' in Meir Shamgar (ed), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects* (Harry Sacher Institute for Legislative Research and Comparative Law 1982) 285, 301.

[109] *Alamarin* (n 41) Justice Bach writing for the majority, para 9. For analysis, see Simon (n 1) 65.

[110] For analysis, see Cohen (n 7) 70.

[111] Simon (n 1) 53–65.

[112] Deuteronomy 24:16.

[113] For analysis, see Gross (2002) (n 1) 196; Halabi (n 1) 270; Simon (n 1) 53–56. See also Quigley (n 1) 369 for an analysis of art 50 of the International Covenant on Civil and Political Rights.

[114] Quigley (n 1) 369.

[115] Gross (2001) (n 1) 750.

[116] CrimA 6147/92 *State of Israel v Cohen* 1993 PD 48(1), 62, 67–76: 'A person will be liable for his own offenses and die for his own sins'; *Ghanimat* (n 62) 654.

[117] For analysis, see Simon (n 1) 56–57.

[118] See, for example, HCJ 591/88 *Taha v Minister of Defense* 1991 PD 45(2) 45, 54, as analysed by Simon (n 1) 55.

[119] *Ghanimat* (n 62) 654.

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whom the detention order was issued.[120] Thus the Court has established that detention would be legal only where there is sufficient evidence that if the detainee were released, *he, in his personal capacity,* would almost certainly pose a danger to public or state security:[121] 'One of the first principles of our legal system is that administrative detention is conditional upon the existence of a cause of detention that derives from the individual threat posed by the detainee'.[122] Another analogous area of law is the administrative detention of enemies as 'bargaining chips'. In the Further Hearing proceedings in *A v Minister of Defence*, President Barak, leading the majority in an expanded bench of nine justices, held that a democratic society may hold a person in administrative detention *only if such person* poses a 'direct threat and real danger to the state'. Thus, the detention of a person who did not pose such a threat and who was being held solely as a 'bargaining chip' for the release of a captured Israeli soldier was found to be in breach of both Israeli law and international law.[123] The Court insisted that without such personal dangerousness, his detention would amount to an infringement of his human dignity, the detainee being treated as a means of achieving an objective and not as the object himself.[124] The Court underscored that the prohibition against inflicting harm on a person in the absence of personal responsibility is absolute and hence the Court may not entertain an interpretation of a legislative instrument that would lead to such a result.[125] The same approach was adopted by the Court in the case of detention of those classified under Israeli legislation as 'unlawful combatants'.[126] Similarly, in respect

[120] HCJ 4400/98 *Baraham v Legal Judge* 1998 PD 52(5) 337, 342–43.

[121] *Agbariyya* (n 35).

[122] *A v State of Israel* (n 36) President Dorit Beinisch, para 18. See also President Aharon Barak in HCJ 3239/02 *Marab* v *Commander in Judaea and Samaria* 2003 PD 57(2) 349, 367, official translation at http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf: '[For a cause of detention to exist] the circumstances of the detention must be such that they arouse, with respect to [the prisoner] – to him personally and not to someone else – concern that threatens security, whether because he was apprehended in the combat area when he was actually fighting or carrying out acts of terrorism, or because there is a concern that he is involved in fighting or terrorism.'

[123] 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, as analysed by Gross (2001) (n 1) 727–28 and Grebinar (n 8) 268 (author's emphasis).

[124] See Gross (2001) (n 1) 743–44 (President Barak quoting himself in the initial decision).

[125] *A v State of Israel* (n 36) para 19: 'The damage to liberty and dignity, in the administrative detention of a person who himself does not pose a threat to national security, is extremely severe, to the point where the interpreter is not entitled to presume that the statute intended to achieve such severe harm … the transition from the administrative detention of a person from whom a danger is posed to national security to the administrative detention of a person from whom no danger is posed to national security is not a "quantitative" transition but a "qualitative" transition. The state detains, via the executive branch, a person who committed no crime, and from whom no danger is posed, and whose entire "wrongdoing" is in being a "bargaining chip". The harm to liberty and dignity is so substantive and deep, that it is not to be tolerated in a liberty and dignity seeking state, even if the rationales of national security lead to undertaking such a step … Each person will be detained based on their wrongdoing and each will be held in administrative detention based on their offense. One is not to detain in administrative detention any other than one that himself poses a risk, with his own actions, to national security.'

[126] *A v State of Israel* (n 36) para 21: 'The statutory definition of "unlawful combatant" contains two alternatives: the first, "a person who has participated either directly or indirectly in hostile acts against the State of Israel", and the second, a person who is "a member of a force perpetrating hostile acts against the State of Israel" … These two alternatives should be interpreted with reference to the security purpose of the Law and in accordance with the constitutional principles and international humanitarian law … which require proof of an individual threat as grounds for administrative detention … Even when the law created a presumption that the release of the detainee would pose a security threat, the Court insisted that the law does not "negate the obligation of the state to prove the

of targeted killing aimed at pre-empting terrorist activities, the Court found that one of the pre-requisites of the legality of this practice was the existence of well-supported intelligence showing that the targeted terrorist is classified as a combatant who takes part directly in hostilities against Israel.[127]

Yet another analogous area where the Court has supported the requirement of individual responsibility and dangerousness is the area of orders of assigned residence, issued by the military authorities 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.[128] President 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'.[129]

Thus the Military Commander may take into consideration only the need for 'preventing [further] danger … *by a person whose place of residence is being assigned*'.[130] Orders may be issued only against those who have committed a terrorist act and who, in addition, continue to present a danger to the security of the area;[131] 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'.[132] Consequently, any assignment of those who had not taken part in terrorist activities was held to be illegal, even if such assignment would have deterred others from pursuing terrorist activities.[133] 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.

The golden threads that run through these judgments are the principle of individual responsibility and individual threat posed by the subject matter of the security measures and the prohibition of measures intended to advance general deterrence as the sole or primary purpose thereof.[134] The principle of individual culpability was found by the Court to be consistent

threat represented by the prisoner", as ... the state must furnish administrative proof that "… the prisoner took a direct or indirect part that involved a contribution to the fighting … or that the prisoner belonged to an organization that perpetrates hostile acts, in which case we should consider the prisoner's connection and the nature of his contribution to the cycle of hostilities of the organization … proving the conditions of the definition of an "unlawful combatant" in the aforesaid sense naturally includes proof of an individual threat that derives from the type of involvement in the organization.'

[127] See (n 26) para 40.
[128] *Ajuri* (n 31).
[129] ibid para 19.
[130] ibid (author's emphasis).
[131] ibid para 24.
[132] ibid para 25 (author's emphasis).
[133] ibid para 27.
[134] ibid para 23.

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with the norms of international humanitarian law and 'our Jewish and democratic values'.[135] In the words of President Barak:[136]

> From our Jewish heritage we have learned that 'Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing' (Deuteronomy 24, 16[38]) … [E]ach person shall be arrested for his own wrongdoing – and not for the wrongdoing of others.

The following statement of the President is of particular importance, because, as demonstrated below, it stands in sharp contrast to the HD jurisprudence: 'The character of Israel as a democratic, freedom-seeking and liberty-seeking State implies that one may not assign the place of residence of a person unless that person himself, by his own deeds, constitutes a danger'.[137] In the same vein, even in the decisions on deportation, where the Court has invested a great deal of effort in establishing the legality of such measures notwithstanding their prima facie illegality under the Fourth Geneva Convention, it still demanded that those whom the military authorities wished to deport be shown to be dangerous.[138]

The HD jurisprudence does not correspond with this large corpus of judgments. Initially the Court insisted on the existence of some individual responsibility.[139] Yet, soon after, acting under the pressure of the military authorities, it relinquished that requirement: lack of such knowledge was found not to preclude the imposition of the demolition order.[140] Indeed, there are dozens of verdicts, including the latest one reviewing a sealing off order, in which orders were approved despite the lack of any individual responsibility on the part of the owner of the demolished house and his family residing with him. As demonstrated above, the degree of (un)awareness of the family member was held to be relevant to the exercise of the authority under Regulation 119 (that is, affecting the extensiveness and severity of the demolition order) but was not deemed to affect the very existence of the authority.[141]

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[135] ibid para 24.

[136] ibid para 24; CrimA 4920/02 *Federman v State of Israel* (unpublished, 20 June 2002), Justice Türkel, http://elyon1.court.gov.il/files/02/200/049/M04/02049200.m04.pdf.

[137] ibid paras 20–21.

[138] HCJ 785/87 *El Affu v Military Commander of the West Bank* 1988 PD 42(2) 4, 31. See also HCJ 814/88 *Nasralla v IDF Commander in West Bank* 1989 PD 43(2) 265, 271: 'The respondent may not use this sanction of making deportation orders merely for the purpose of deterring others. Such an order is legitimate only if the person making the order is convinced that the person designated for deportation constitutes a danger to the security of the area, and that this measure seems to him essential for the purpose of neutralizing this danger.'

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

[140] *Alamarin* (n 41) 700; *Sabih* (n 59) 360; *Ghanimat* (n 62) 653–54; HCJ 893/04 *Faraj v Commander of IDF Forces in the West Bank* (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* (n 62) 654–55. See also his dissenting opinions in *Khizran* (n 72).

[141] *Alamarin* (n 41) Justice Bach for the majority, para 9. See also *Abu Dahim* (n 71) 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

The willingness of the Court to uphold the legality of the measures notwithstanding their collective nature has evoked fierce academic criticism.[142] Numerous scholars concluded that the Court was giving its imprimatur to illegal, collective punishment. Zemach went further than that, arguing that such illegality stemming from the collective nature of the measures may amount to a war crime.[143]

Being aware of its deviation from its own jurisprudence, the Court has employed various means to dismiss this criticism. In an earlier case, Justice Ben-Dror offered an analogy between HD and a sentence of imprisonment, the two imposed on the criminal with negative spillover to his family.[144] This analogy is an affront to common sense and cannot furnish a cogent explanation of the Court's willingness to depart from its own jurisprudence.[145] Another judicial technique to disguise the collective nature of the punishment is to refer to its administrative nature.[146] Yet, as Kremnitzer and Hörnle 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.[147] Moreover, the Court's reasoning in denying the collective punishment nature contradicts a consistent line of verdicts analysed above, under which other administrative measures were subjected to the prohibition on collective punishment, notwithstanding their administrative apparatus or the administrative nature of the entity imposing them. The collective nature of the punishment was not considered in these cases to be a matter of legal formalism but one of substance (namely its well-calculated impact on unknowing members of the family). Another line of reasoning employed in denying the collective nature of the punishment placed emphasis on the declared purpose of the measures.[148] Yet the collective nature of the measure should be determined by its inherent nature and its likely impact, and not by its declared purpose.[149]

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.'

[142] Dinstein (n 1) 299; Halabi (n 1) 270; Kretzmer (2002) (n 1) 149–53; Mordechai Kremnitzer and Tatjana Hörnle, 'Human Dignity and the Principle of Culpability' (2011) 44 *Israel Law Review* 115, 129–30; Merari (n 43); Quigley (n 1) 370; Simon (n 1) 53–64.

[143] Zemach (n 6) 70–74.

[144] *Dejalas* (n 139) 44, para 3.

[145] In support of my view, see Dinstein (n 1) 298–99: 'The comparison is spurious: the children of a felon behind bars do not undergo imprisonment, although they suffer from the repercussions of his enforced absence. 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.' See also Halabi (n 1) 270, who treated that analogy as 'false'; Kremnitzer and Hörnle (n 142) 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.'

[146] *Shukri* (n 69).

[147] Kremnitzer and Hörnle (n 142) 129–30, referring to specific Court verdicts.

[148] *Shukri* (n 69), as analysed by Gross (2002) (n 1) 187–88.

[149] For support see Simon (n 1) 60: 'Justifications based on the government's alleged intentions can lead to disingenuous portrayals of government policies and render judicial review meaningless. Such justifications can legitimize and institutionalize indefensible punitive practices, as the case of the demolition policy suggests.'

In more recent HD verdicts one may discern other means to disguise the Court's deviation from its own approach towards collective punishment – namely the alleged existence of an abstract, passive, communal support for terrorism by the community in which the petitioner lived.[150] Yet this reasoning cannot be justified under international law,[151] nor can it be found in analogous cases. Another recent judicial justification is the enunciation that the family link with the suicide bomber per se imposes moral culpability and hence legal responsibility on his family members.[152] This justification, like the others, cannot be found elsewhere in the Court's jurisprudence.

[150] HCJ 10467/03 *Sharbati v Commander of the Home Front Command* PD 58(1) 810, para 3e: 'The phenomenon of Jewish attacks … belongs to a few individuals only, while the greater part of the Jewish public in Israel condemns them and is disgusted by them … on the other hand, lamentably, the situation is different within the Palestinian public … large number of attacks carried out and to many others that were avoided, and it is even more correct to point to the cries of joy that have followed acts of killing of Jews, and the "days of feasting" declared by the family members of those defined as "martyrs" when the families learn of the death of their sons. In my view, all the aforesaid goes to show to what extent the population of the territories held by Israel encourages acts of suicide attacks. This also explains the increasing number of those who are prepared to serve as "live bombs". In that situation, the need to search for deterrence factors so as to reduce the circle of killing is an existential need and there is no greater need. Consequently, there is no discrimination here, but rather the measured and balanced application of Regulation 119.'

[151] See Jean S Pictet (ed), *Commentary: IV Geneva Convention: Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 225. But compare with Backer (n 1) 541–43, 553, 554–57 and 567 for a contrasting scholarly position, arguing that communities collectively provide the normative foundation within which suicide bombers can be recruited, trained and deployed, but only the bomber is liable for his or her acts of violence. Yet where the bomber dies along with the targets, then responsibility is altogether avoided.

[152] Thus, in *Sa'ade* (n 77), in which the Court was faced with a petition of the mother of a terrorist who acted as a suicide bomber and who was unaware of her son's activities, the Court came to the following conclusion (para 4):

> Counsel for the Petitioners requested that … a period of time be determined after which the Petitioner would be entitled to request an annulment of the injunction for confiscation and sealing. That request is difficult for us to entertain. No more than a year has elapsed since the shocking attack took place … The sound of explosives still echoes in our ears, the cries of the injured screech through our universe, the suffering of the victims cries out to us from the earth and the stricken families weep for their dear ones. This is not a time for pardon.

It is submitted that the reliance on the word 'pardon' clearly indicates that the Court is operating under the assumption that the mother is at fault and hence to be punished for her wrongdoings notwithstanding her non-awareness and non-involvement.

Similarly, in a recent judicial pronouncement on this issue, *Abu Dahim* (n 71), Justice Rubinstein drew upon several sources of Jewish law in order to justify, in a paragraph riddled with self-contradictions, that the collectiveness of the measures may be approved even when they cause the father to suffer the sins of his son (para E):

> It was said that the petitioner claims that he was unaware of his son's intentions, and [had] he [known] he would have taken moves to stop him; and there is no information according to which the terrorists' family members were aware of the planning of the terror attack. ... I shall add that with respect to the verse 'Take off the soiled garments from him' (Zecharia 3:4) referring to Joshua, the Great Priest, that wore soiled garments, unclean, the Babylonian Talmud says that the intention is not to such real garments, but that 'his sons married women who were unbecoming to the Kehunah, and he did not protest' (Sanhedrin 93:1 …). I will add that versus the mentioned verses, and the moral principle derived therefrom, it was also said 'I the Lord your God am a jealous God, visiting the sin of the fathers on the children to the third and the fourth generation' (Exodus 20:4) – and our Sages of Blessed Memory have already noticed the rebutment and explained it: 'This is (the verse from Exodus) – when they hold fast to their fathers' ways, this is (the verse from Deuteronomy) – when they do not hold fast their fathers' ways' (Babylonian, Berakhot 7:1). Namely, when children support their fathers, and fathers support their children – their sin is sometimes visited

Thus in sharp contrast with comparable areas of law, the Court is willing to approve a sanction which to all intents and purposes is a collective punishment. Only a few justices were courageous enough to critically recognise this willingness. Justice Cheshin's distinct voice in the Court led him to refuse 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.[153] The collective nature of HD measures was also indirectly acknowledged when the Court addressed the issue of administrative detention for bargaining purposes.[154]

3.4. No Meaningful Scrutiny According to International Law

On submission of a petition opposing security measures, based on international law, the Court in most instances adopts a consistent 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.[155] The instances in which the Court chooses to ignore international law have diminished

upon the other, and should we like, it becomes a joint sin, factually and judicially. It is possible that in this case indeed the terrorist's father would have protested against his son if he knew of the planning of the terror attack, although question marks remain, due to the information brought about the atmosphere whereby the terrorist lived. However, in a forward-looking perspective, it is appropriate that families shall pay attention to the atmosphere in which their children grow up, in order to prevent them from reaching terror and death and all kinds of afflictions.

[153] See *Ghanimat* (n 62).

[154] *A* (n 123) 748, in which 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 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 that verdict Justice Kedmi provided an ambiguous acknowledgement of the collective nature of the demolition measures (ibid 732):

> 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.

See also Justice Cheshin, *Alamarin* (n 41) para 4: 'In a minority judgment that I wrote in Hizran … 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.'

[155] Cohen (n 7) 56–57.

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significantly over the years, while the instances in which considerable effort is made to establish compatibility with it have been growing both quantitatively and qualitatively.[156] Scholarship indicates that such an ever-growing rigorousness may be explained as part of an attempt to convince the international legal community that international norms are taken seriously in Israel.[157]

The approach towards petitions against HD is similar to the general approach of the Court jurisdictionally and procedurally, but rather different substantively. Prominent scholars argue that the HD policy is in direct contradiction to the spirit and letter of international humanitarian law.[158] More specifically, extensive scholarship argues that it breaches the following provisions of the 1907 Hague Regulations:[159] Article 23 (which prohibits the destruction of enemy property 'unless such destruction or seizure be imperatively demanded by the necessities of war'), Article 46 (which requires the respect of family honour and rights)[160] and Article 50 (which prohibits collective punishment).[161] Similarly, an extensive corpus of scholarship blames Israel for violating Article 27 of the Fourth Geneva Convention (which stipulates that the civilian population 'shall at all times be humanely treated'),[162] and Article 33 of the same Convention (which prohibits collective punishment).[163] Similarly, numerous scholars[164] postulate that the HD policy contradicts 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'. Similar arguments are raised with respect to Article 64 of the Fourth Geneva Convention, which requires an Occupying Power to repeal existing laws which represent 'an obstacle to the application of the present Convention'. Numerous scholars,[165] as well as the

[156] *Ajuri* (n 31).
[157] See Davidov and Reichman (n 34) 926–27; 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.
[158] Dinstein (n 1) 295–96, querying '[h]ow could the Supreme Court deny the existence of a contradiction which is so glaring and multifaceted?'; see also Carroll (n 1) 1206.
[159] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461.
[160] For analysis, see Simon (n 1) 55.
[161] For analysis, ibid 53–57.
[162] For analysis, ibid 63.
[163] For analysis, see Carroll (n 1) 1213–15; Cohen (n 7) 49.
[164] Backer (n 1) 543–44; Gross (2002) (n 1) 198–201; Cohen (n 7) 69; Simon (n 1) 68; Dinstein (n 8) 128; Carroll (n 1) 1209–12: 'Demolition cannot be rendered "absolutely necessary by military operations". Allowing such justification on the basis that such action is needed to control the population would greatly expand the scope of the exception beyond what is acceptable if Article 53 is to retain its vitality. Since demolitions are justified for deterrence reasons, it cannot be claimed that they have taken place in the midst of conflict or are of immediate military necessity.'
[165] See, for example, Carroll (n 1) 1216: 'The argument that Article 64 permits the implementation of Regulation 119 despite Articles 53 and 33 is without merit. 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".'

United Nations,[166] the United States,[167] and foreign and Israeli NGOs,[168] argue too that the demolition orders do not comply with international humanitarian law.

In light of these alleged breaches and an almost international consensus, it is no wonder that petitions have been premised on arguments drawn from international humanitarian law.[169] At times the petitions have been supported by expert opinions, including that of the International Committee of the Red Cross.[170] Yet, contrary to the Court's overall approach and the significant effort that it usually invests in establishing compatibility between the various security measures and international humanitarian law, in the HD domain the Court adopts two alternative approaches: the first is to ignore that law or to state that it is irrelevant;[171] the second 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.[172] This distinct approach is manifested, more concretely, in relation to the doctrine of proportionality. As Shany establishes, this doctrine may be treated as a general principle of international law and of international human rights, in particular.[173] Moreover, under international humanitarian law, it restricts the exercise of army authorities, particularly in the Territories.[174] The principle is construed broadly by the Court, which treats it as a general principle, applicable to any form of military action pursued under international law:[175] '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.'[176] Yet, when it enters the HD arena, the Court refuses to engage in

[166] For analysis of the position of the General Assembly, see Quigley (n 1) 374.
[167] For analysis of the position of the Department of State, see ibid.
[168] 'Israel and the Occupied Territories: Under the Rubble: House Demolition and Destruction of Land and Property', *Amnesty International*, 17 May 2004, http://web.amnesty.org/library/index/ENGMDE150332004.
[169] See, for example, *Dejalas* (n 139).
[170] For analysis of its position, see Simon (n 1) 3.
[171] See the most recent verdict of *Awawedh* (n 58) 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, 525–26, President 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.

[172] For analysis, see Dinstein (n 1) 295–96.
[173] Yuval Shany, 'The Principle of Proportionality under International Law', *The Israel Democracy Institute,* Policy Paper 75, 2009, 119–42, especially 131 and 139.
[174] ibid 86.
[175] ibid 87.
[176] HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 2004 PD 58(5) 807, para 39, official translation at http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf.

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judicial review based on the principle of proportionality under international law, confining itself to a summary review according to that principle under Israeli administrative law.[177]

Even in the rare cases in which the Court has quashed the proposed measures or in which a dissenting opinion challenged the majority that approved the measures,[178] the justices relied on Israeli law. International law thus did not serve as the legal grounds for establishing the illegality of measures in even one single case out of over one hundred cases in which the legality of the policy was adjudicated. In none of these cases did international humanitarian law receive any meaningful judicial attention. Thus, the Court's treatment of international humanitarian law is different in the HD context.

The same is true with respect to its treatment of the laws of belligerent occupation. Since 1967, the Court has delivered a vast number of judgments dealing with most aspects of the Israeli occupation.[179] 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 this body of law have been growing.[180] Much criticism of the Court's jurisprudence has been expressed,[181] yet the fact remains that this jurisprudence is detailed and analytical. 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 that impinge on proprietary rights, an area which was prominent in the Court's balancing act between security interests and the Palestinian civilian needs.[182] Such extensive reliance on the laws of belligerent occupation is particularly apt in relation to HD, given the significant protection granted by it to proprietary rights.[183]

Yet, contrary to its overall approach, in the HD domain the Court either ignores the laws of belligerent occupation[184] or summarily holds that Regulation 119 and the HD policy are consistent with the Hague Regulations[185] and the Fourth Geneva Convention.[186] The only meaningful treatment of the laws of belligerent occupation may be detected in the context of reviewing procedural aspects of HD (such as the right of prior hearing).[187] The judicial willingness to ignore the laws of belligerent occupation in the context of HD in East Jerusalem may be explained, from

[177] See, for example, *Abu Dahim* (n 71) Justice Naor, para 5; *Awawedh* (n 58) para 27.
[178] See, for example, *Khizran* (n 72) Justice Cheshin dissenting, 155–61.
[179] For analysis, see Kretzmer (n 1); Cohen (n 7); Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003–04) 37 *Israel Law Review* 17; 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.
[180] For analysis, see Harpaz and Shany, ibid.
[181] See, for example, ibid.
[182] *Beit Sourik Village Council* (n 176).
[183] See, for example, *Morar* (n 76).
[184] See, for example, *Nazaal* (n 86). See the most recent verdict of *Awawedh* (n 58) in which the Court ignored the laws of belligerent occupation.
[185] For analysis of this jurisprudence, see Dinstein (n 1) 295–96.
[186] ibid.
[187] HCJ 358/88 *Association for Civil Rights in Israel and Others v Central District Commander* [1989] IsrSC 43(2) 529, paras 5–8.

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the perspective of Israeli law, on the grounds that East Jerusalem is part of the State of Israel.[188] Such explanation cannot, however, account for the failure to review HD orders in the West Bank in accordance with the laws of belligerent occupation.

The Court's treatment of HD under international human rights law is similar. In no small number of cases the Court has relied upon, or at least referred to, that body of law when examining measures justified on security grounds.[189] This is not the case with the HD jurisprudence. In a consistent and sweeping manner the Court ignores a significant number of scholarly works and reports issued by human rights NGOs which establish that HD measures are in breach of substantive international human rights law, including the right to protection of property,[190] the right to shelter,[191] the prohibition against cruel, inhuman or degrading punishment,[192] and the prohibition against collective punishment.[193] The same is true of the Court's disregard for, or dismissal of, the argument that the execution of HD without a prior hearing – which is legal under the Court's case law albeit under narrow conditions – amounts to a breach of the procedural international human rights to due process.[194] In more than one hundred HD cases, there is not one recorded case in which the Court addressed these prima facie breaches. The same is true with regard to international criminal law, notwithstanding the research that has established that Israel's HD policy may amount to a war crime. The restricted reliance on international humanitarian law and on the laws of belligerent occupation, and the failure to rely on international human rights and international criminal law may be caused by and manifested in a lack of any meaningful engagement with international and foreign national courts.

3.5. Engagement with International Law and National Courts and Tribunals

Scholarship has devoted much attention to the ever-increasing transnational dialogue taking place between national and international courts and tribunals.[195] Such a dialogue manifests itself

[188] Israeli law considers East Jerusalem to be under Israeli sovereign territory, but the international community treats it as occupied territory. See the International Court of Justice case, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] 43 ICJ Rep 136 (the *Wall* case) for the Court's approach; HCJ 1661/05 *Hof Aza Regional Council v Knesset of Israel* PD 59(2) 481.
[189] HCJ 7052/03 *Adalah – The Legal Center for Arab Minority Rights in Israel and Others v Minister of Interior Affairs and Others* (unpublished, 14 May 2006), President Barak, paras 36–37, http://elyon1.court.gov.il/files/03/520/070/A47/03070520.a47.pdf.
[190] For analysis, see Quigley (n 1) 371–72.
[191] For analysis, see Halabi (n 1) 267; Quigley, ibid.
[192] For analysis, see Quigley (n 1) 373–74; Farrell (n 1) 903–04. The European Court of Human Rights held that Turkey's demolition of the houses amounted to 'inhuman or degrading treatment or punishment' prohibited under the ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222), see n 218 below.
[193] For analysis, see Halabi (n 1) 267; Quigley (n 1) 372–73.
[194] For analysis, see Halabi (n 1) 267; Gross (2002) (n 1) 207.
[195] See, for example, Jennifer Martinez, 'Towards an International Judicial System' (2003) 56 *Stanford Law Review* 429; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; Guy Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 *Common Market Law Review* 73.

formally and informally,[196] explicitly and implicitly,[197] thereby advancing the creation of a supranational body of laws,[198] supported, institutionally, by 'a global community of courts'.[199] In this context national judges may be seen as strategic players who take into account the long-term implications of their adjudication, including interests that are external to their domestic perception of justice, such as the willingness to belong to the international judicial community.[200]

The Court has not remained detached from that development. In the last two decades, especially under the leadership of President Barak, it has participated, albeit diffidently, in that dialogue.[201] Its human rights jurisprudence corresponds more frequently and more extensively with that of international tribunals (such as that of the International Court of Justice (ICJ),[202] the European Court of Justice (ECJ)[203] and the European Court of Human Rights (ECtHR)[204]) as well as to that of the national constitutional courts of the United States, the United Kingdom, Canada, Germany and South Africa.[205] Thus in numerous important cases – such as those relating to the security barrier,[206] physical means of interrogation,[207] detaining terrorists for bargaining purposes,[208] the prohibition of the acquisition by Palestinians of Israeli citizenship through marriage to an Israeli-Palestinian,[209] sovereign immunity[210] and diplomatic immunity[211] – the Court has quoted from, relied upon and at times distinguished foreign national and international judgments in the course of developing its own jurisprudence. Admittedly, not all justices participate in that dialogue, not all cases are substantiated by it[212] and not all references to foreign jurisprudence are comprehensive. Still, an ever increasing dialogue has been taking place in the Court, culminating in the *Alfei Menashe* verdict concerning the legality of the security

[196] See, for support, Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273.
[197] See Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499, 511.
[198] See Helfer and Slaughter (n 196) 373: 'The verdicts that stem from dialogue and global cooperation create a set of principles informed by and building on one another, textually and culturally differentiated as necessary but acknowledging the promise of universality.'
[199] See Slaughter (n 195) 192–93, and Martinez (n 195) 436.
[200] Amichai Cohen, 'Strategies of Domestic Justice: Domestic Courts' Response to International Criticism' in Yedidia Stern (ed), *My Justice, Your Justice – Justice across Cultures* (Zalman Shazar Center/Israel Democracy Institute 2010), 483, 484–85 (in Hebrew).
[201] Guy Harpaz, 'The Israeli Supreme Court in Search of Universal Legitimacy' (2006) 65 *Cambridge Law Journal* 7.
[202] ibid
[203] *Adalah* (n 189) para 37.
[204] ibid para 36.
[205] For analysis of that reliance, see Daphna Barak-Erez, 'Comparative Law as a Practice: Institutional, Cultural and Applicative Aspects' (2008) 4 *Din Udvarim* (*Haifa Law Review*) 81 (in Hebrew).
[206] See *Mara'abe* (n 26).
[207] HCJ 5100/94 *Public Committee against Torture in Israel v State of Israel* 1999 PD 53(4) 817, official translation at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf.
[208] See n 123.
[209] See, for example, *Adalah* (n 189).
[210] 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.
[211] CA (Tel-Aviv) 4289/98 *Shalom v Attorney General and Others* (unpublished, 10 October 1999) 2.
[212] HCJ 5973/92 *Association for Civil Rights in Israel v Minister of Defence* 1993 PD 60(3) 67.

barrier,[213] in which the Court's reasoning vividly demonstrates that it is gingerly conducting a delicate dialogue with the ICJ, the political and juridical international community, and the international public at large.[214] One manifestation of this ever growing attempt to engage with international and foreign national courts is the official translation into English offered by the Court of some of its seminal judgments relating to the balance between human rights and security. The translation of these judgments and their posting on the Court's official internet site reflect its desire to overcome linguistic barriers. The Court's official internet site in its English version serves as a platform for conveying to the international judicial community the message that Israel operates under the rule of law. In fact, the Court's search engine in English includes a banner bearing the motto 'Fighting Terrorism within the Law'.[215]

Yet when it comes to HD, the Court's jurisprudence does not correspond with international and other national judgments. The Court does not even avail itself of verdicts delivered by the ICJ,[216] the ECJ[217] and the ECtHR[218] which specifically address the equilibrium between security and proprietary rights in the context of the struggle against terror. Similarly, it ignores the jurisprudence of the ECtHR, which has established that a fair balance is to be achieved between proprietary rights and the conflicting interests at stake in the context of national security.[219] When it refers to relevant US constitutional judgments it does so only in relation to HD procedural aspects.[220] The Israeli HD verdicts, uninfluenced by relevant foreign jurisprudence, are in turn not being translated into English and hence are unavailable to the international legal community. In fact, out of the hundreds of verdicts appearing in English on its official site, only two relate to HD, one of which deals with procedural aspects of HD.[221]

[213] *Mara'abe* (n 26).
[214] Harpaz (n 201).
[215] http://elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx.
[216] The ICJ, in the *Wall* case (n 188) [135], opined that it is not convinced that the destruction of property for the purpose of constructing the security barrier 'carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention was rendered absolutely necessary by military operations'.
[217] See, for example, the salient verdict of *Kadi*, as analysed 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.
[218] See Zemach (n 6) 105–09, who analyses the two cases in which the ECtHR held that the burning of the homes of Turkish citizens of Kurdish origin by Turkish soldiers constitutes illegal interference with the applicants' rights to respect for their homes and to peaceful enjoyment of their possessions under the ECHR: *Akdivar v Turkey*, App no 21893/93, ECtHR 16 June 1996; *Selçuk and Asker v Turkey*, App nos 23184/94 & 23185/94, ECtHR, 24 April 1998. In the latter case the Strasbourg Court held that under the circumstances of the case at hand the demolition amounted to 'inhuman or degrading treatment or punishment', prohibited under the ECHR.
[219] See Shany (n 173) 40–41, relying on *Sporrong and Lönnroth v Sweden*, App nos 7151/75 & 7152/75, ECtHR, 23 September 1982, paras 69–74; *James and Others v United Kingdom*, App no 8793/79, ECtHR, 21 February 1986, para 50; *AGOSI v United Kingdom*, App no 9118/80, ECtHR, 24 October 1986, paras 52–54.
[220] *Association for Civil Rights* (n 212) para 7.
[221] *Alamarin* (n 41); *Association for Civil Rights* (n 212).

4. NORMATIVE CRITIQUE AND CONCLUSIONS

The judiciary's counter-majoritarian role in the realm of national security is of paramount importance: '[C]ourts are assigned the crucial task of prevention of populist lynching in the broad sense; i.e. the victimisation of individuals who are perceived by the majority to be enemies and a threat … the prevention of the violation of rights … of individuals and groups simply because the *vox populi* requires such violation.'[222] By and large, and notwithstanding severe socio-political pressures, the Israeli Supreme Court, since the early 1990s, has taken cognisance of this truism and has imposed significant procedural and substantive restrictions on the Israeli military authorities. Yet, when faced with proposed HD measures, it has adopted a different stance. This article contrasts the Court's case law on HD 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 HD jurisprudence the Court is unfaithful to its own jurisprudence. Building upon these findings, this article has distilled five sub-manifestations of that distinct stance, the three principal ones being (i) willingness to jettison the requirements of individual responsibility and of dangerousness, (ii) almost no substantive intervention to curtail or constrain the exercise by the military authorities of their authority; and (iii) judicial review which is devoid of any meaningful scrutiny of the measures according to international law. These findings form the basis of further research to focus on the alternative explanations for the Court's deviation from its own principles.[223]

It is submitted that this distinct judicial approach carries negative normative repercussions. When responsibility is imposed upon a resident of a house for the deeds of others, in the absence of any 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.[224] When the Court is willing to accept such practice it becomes an accomplice to it, as it has become in the HD context.

Moreover, the willingness of the Court to deviate from its own principles adversely affects the coherence of its jurisprudence. We refer in this context to coherence as a multi-layered concept which relates to both cohesiveness and connectedness as well as to logical, orderly, consistent and comprehensive relations between the various judicial positions.[225] The concept encompasses the notions of harmony, non-contradiction, synergy and complementarity.[226] Coherence may furthermore be connected with consistency and the synergy between norms, objectives, values, actors and instruments (promoted through principles of cooperation and complementarity designed to achieve well-oiled and well-articulated links between the different parts of the

[222] Ruth Gavison, 'The Role of Courts in Rifted Democracies' (1999) 33 *Israel Law Review* 216, 241.
[223] Harpaz (n 13).
[224] Kremnitzer and Hörnle (n 142) 122, 129.
[225] Marise Cremona, 'Coherence in European Union Foreign Relations Law' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011) 55.
[226] Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 15, 35.

legal system).[227] The promotion of coherence carries with it an inherent value.[228] As Bertea demonstrates, internal coherence may assist in presenting the law as a meaningful whole, the components of which are mutually supportive and independent rather than merely the result of the claims of an authority:[229] 'Those responsible for creating and administering a body of legal rules will always be confronted by a problem of system. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure'.[230] The importance of legal coherence as a guiding interpretive principle is also relevant in the Israeli context. As President Barak acknowledged, 'I regard the judge as a partner in creating law. As a partner, the judge must maintain the coherence of the legal system as a whole';[231] '[t]he development of law … must maintain normative coherence within the legal system. It must reflect the fundamental values of the legal system. Every ruling must be integrated into the framework of that system. Indeed, a judge who develops the law does not perform an individual act, isolated from an existing normative system. The judge acts within the context of the system, and his ruling must integrate into it'.[232] This coherence is prejudiced when the Court applies the principle of individual culpability and engages with international law in a manner different from that adopted in analogous areas.

The Court's willingness to renege on its own judicial doctrines also compromises its external legitimacy. Judicial reliance on international law as an independent system of law may grant the relevant domestic judicial body external legitimacy vis-à-vis foreign states, international organisations and the entire international community.[233] Such legitimacy may in turn assist the Court, as Benvenisti demonstrates, in utilising international law in a strategic manner, empowering itself in relation to the executive and protecting the executive from external pressures and intervention.[234] Such strategic reliance is of particular importance given the increasing willingness of international law to intervene in matters that were once considered to be internal matters under the sole jurisdiction of the state. In order to prevent external judicial intervention, domestic courts need external legitimacy and such legitimacy may be obtained by proving themselves willing to and capable of genuinely relying on international law.[235] This analysis is particularly relevant to the Israeli

[227] ibid.
[228] See Aharon Barak, 'The Role of the Supreme Court in a Democracy' (1999) 33 *Israel Law Review* 1, 6: 'The weighing process should be rational and harmonious with the rest of the legal system.'
[229] Stefano Bertea, 'Looking for Coherence within the European Community' (2005) 11 *European Law Journal* 154, 157.
[230] Lon L Fuller, *Anatomy of the Law* (Praeger 1968) 94.
[231] Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2003) 116 *Harvard Law Review* 19, 25.
[232] Barak (n 102) 12.
[233] Osnat Grady Schwartz, 'International Law in Domestic Judges' Decisions: The Relationship between Broad Role – Perception and a Strong Internationalist Inclination' (2011) 34 *Tel Aviv University Law Review* 475, 522, relying on Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241.
[234] Benvenisti, ibid.
[235] Robert O Keohane, Andrew Moravcsik and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational' (2000) 54 *International Organizations* 457, 472; Grady Schwartz (n 233) 518–23.

Supreme Court and its judicial review in the Territories. The Court's traditional role required it to obtain internal legitimacy, whereas the significant attention paid by the international community to Israel's use of force,[236] the evolving concept of national, universal criminal jurisdiction as well as the strengthening of the International Criminal Court, all require the Court to attain external legitimacy.[237] The Court has not remained distant from these developments and in recent years it has invested much effort in portraying Israeli's security practices as compatible with international law. Indeed, according to Cohen's analysis, the Court perceives the potentially intrusive nature of the ICC as a strategic threat to the State of Israel[238] and the critical review of the military authorities' conduct as an appropriate means of addressing that threat.[239] Yet such review is lacking with respect to HD, thus prejudicing the Court's ability to gain external legitimacy and to fulfil its self-perceived roles of providing the State of Israel with a bullet-proof vest[240] (and at times a fig leaf).[241] Thus the Court's deviation from its own principles may erode its external legitimacy and such erosion may prejudice its ability to effectively advance strategic interests in the domain of HD and beyond. It must be emphasised that the argument that the failure to address public international law prejudices the Court's external legitimacy does not mean that the Court could have achieved improved legitimacy had it relied on international law in the field of HD in a manner that is contrary to a near consensus within the international community. Thus it is not clear, for example, what is a more prejudicial judicial practice in terms of external legitimacy: ignoring the issue of the prohibition against collective punishment under international law, or referring to this issue but arriving at the conclusion that the HD sanction, which is imposed in circumstances of no individual culpability, does not amount to collective punishment.

The negative repercussions in terms of morality, coherence, external legitimacy and effectiveness, stemming from the Court's deviation from its own principles, lead to the conclusion that if and when the issue of HD is brought back before the Court, it should apply the same approach, spirit, techniques and benchmarks that it has employed in analogous areas of law, drawing on the words of President 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.'[242]

[236] Hofnung and Weinshall-Margel (2011) (n 1) 153: 'The Court is tasked with the responsibility of ensuring trust and legitimacy in the policies of other political branches, while preserving a neutral political posture.'
[237] Cohen (n 200) 501–02. See HCJ 7195/08 *Abu Rahma v Chief Military Advocate General* (unpublished, 24 June 2013), Justice Melcer, para 7, http://elyon1.court.gov.il/files/08/950/071/r09/08071950.r09.pdf.
[238] Cohen (n 7) 75; Yuval Shany, 'The Ramifications of the Entry into Force of the Rome Statute of the International Criminal Court from the Israeli Perspective' (2003) 15 *Hamispat* 28 (in Hebrew).
[239] See Nomi Levitsky, *The Supremes: Inside the Supreme Court* (New Library 2006) (in Hebrew) 176, 178–79, citing the importance ascribed by President Barak to the need to adjudicate in a manner that would avoid the adjudication of the ICC.
[240] Grady Shwartz (n 233) 519–23, notes 111, 112 and 114, relying, inter alia, on Miles Kahler, 'Conclusions: The Causes and Consequences of Legalization' (2000) 54 *International Organizations* 661, 681.
[241] Ronen Shamir, '"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 *Law & Society Review* 781.
[242] *A* (n 123) para 22.

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