

## **JURISPRUDENTIAL HYPOCRISY UNDER ISRAEL'S NORMATIVE UMBRELLA: PUNITIVE DEMOLITIONS AS PRE-CONVICTION, COLLECTIVE PUNISHMENT IN THE WEST BANK**

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*Since the termination of the British Mandate in 1948 and Israel's subsequent occupation of Palestine, the Israeli government has punitively demolished hundreds of Palestinian homes in the West Bank. After a slight downturn during COVID-19, numbers are once again on the rise. Israel's punitive demolition strategy targets the innocent families of Palestinians allegedly involved in security offenses against Israel. When a suspected offender is detained, Israel orders the demolition of their family home—usually, before the suspect is tried or convicted, and regardless of whether they own or permanently reside in the house. In support of its punitive demolition campaign, Israel cites Regulation 119, a British Mandate-era law sustained by and parasitic to Israel's perpetual “state of emergency.” Regulation 119 affords broad discretion to the Israeli military in ordering punitive demolitions and is met with considerable deference from the Israeli High Court of Justice. However, this Note contends that Israel's punitive housing demolition strategy creates tension with due process norms elsewhere affirmed in Israeli jurisprudence. First, punitive demolitions violate Israel's respect for fair trial rights and the presumption of innocence, unlawfully constituting pre-conviction punishment. Second, they defy Israel's esteem for individual responsibility, manifesting collective punishment. Given Israel's stated desire for legal consistency and normative harmony, it is incumbent on the High Court to resolve the jurisprudential hypocrisy inherent in its treatment of punitive demolition orders and to curtail Regulation 119.*

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## I. INTRODUCTION

On April 30, 2022, Israeli forces arrested Sameeh Mohammed and his oldest son Youssef for suspected involvement in the death of an Israeli guard near Nablus in the West Bank, Palestine.<sup>1</sup> Without trial or conviction, Israel ordered the punitive demolition of their family home in Qarawat Bani Hassan.<sup>2</sup> Moments before sunrise on May 1, 2022—Eid al-Fitr, the last day of Ramadan—Israeli forces blew up the lock on the house without knocking, jolting Sameeh’s wife Nuseiba and her five sleeping children awake.<sup>3</sup> Her son Bilal, then sixteen years old, watched in horror as the soldiers entered under the cover of darkness and prepared the house for demolition, taking photos and making holes in the walls to affix explosives.<sup>4</sup> Their house was built in 1995 and renovated in 2005 before Bilal was born.<sup>5</sup> Bilal’s brother Omair was then nineteen, Imad was thirteen, and Abdullah was eight.<sup>6</sup> Bilal’s youngest brother, Mohammad, was only three-years-old.<sup>7</sup> None of them were involved in the alleged incident giving rise to the punitive demolition order.<sup>8</sup>

Although the soldiers did not execute the demolition that morning, they promised to return.<sup>9</sup> They did not provide written notice specifying the date or rationale for impending demolition, leaving Nuseiba and her children in a

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1. Palestinian Human Rights Organizations Council (PHROC), *Joint Urgent Appeal to the United Nations Special Procedures on Israel’s Punitive Demolition Orders Against the Homes of Nuseiba Assi, Amal Marei, and Awad Marei*, (June 2, 2022); see also Interview with Wa’il A. Qut, Legal Advisor, Jerusalem Legal Aid & Hum. Rts. Center (JLAC), in Ramallah, Palestine (May 19, 2022); HCJ 3401/22 *Nuseiba Assi v. Military Commander* (2022) (unpublished).

2. Interview with Wa’il A. Qut, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

state of apprehension about the fate of their home.<sup>10</sup> On May 19, 2022, counsel for Nuseiba and her family filed a petition with the Israeli High Court of Justice appealing the demolition.<sup>11</sup> The High Court denied the petition on June 2, 2022, and their family home was demolished shortly thereafter, along with four other structures in the community.<sup>12</sup> Nuseiba was left homeless, forced to raise her children without shelter, protection, or support—as many Palestinian women have been made to do before her.<sup>13</sup>

Israel's punitive demolition practice has long attracted the scrutiny of scholars. It operates outside property law regimes like condemnation, instead arising under the auspices of alleged military necessity in the context of Israel's emergency powers.<sup>14</sup> In 1994, Dan Simon published an article examining the legality of Israel's housing demolitions.<sup>15</sup> He observed that “demolitions inflict non-individual punishments on innocent people” and are “therefore inconsistent with [both] international and Israeli law and with universally accepted principles of justice.”<sup>16</sup> Nearly thirty years have passed since Simon's robust analysis, meriting a reevaluation of new case law and demolition data. In 2003, Brian Farrell published a comparable article assessing Israel's punitive demolition practice through an international human rights and humanitarian law lens.<sup>17</sup> He argued that “punitive

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10. *Id.*

11. *Id.*

12. See Situation Report of the United Nations Office for the Coordination of Human Affairs (OCHA), *West Bank Demolitions and Displacement: An Overview* (Oct. 4, 2022), [https://www.ochaopt.org/sites/default/files/Demolition-Monthly-report-July-August\\_2022.pdf](https://www.ochaopt.org/sites/default/files/Demolition-Monthly-report-July-August_2022.pdf) (“On 26 July, Israeli forces raided Qarawat Bani Hassan (Salfit) and demolished two homes with multiple floors of families whose members were accused of killing a guard of an Israeli settlement in April 2022.”); see also *Data on Demolition and Displacement in the West Bank*, OCHA, <https://www.ochaopt.org/data/demolition> (last visited Jan. 8, 2023) (recording five punitive demolitions in Qarawat Bani Hassan on July 26, 2022, of which two were punitive housing demolitions).

13. See Steve Hendrix, *Rare Israeli Ruling Against Practice of Demolishing Homes of Palestinians Accused of Violence*, WASH. POST (Aug. 19, 2020), [https://www.washingtonpost.com/world/middle\\_east/rare-israeli-ruling-against-practice-of-demolishing-homes-of-palestinians-accused-of-violence/2020/08/19/e1996e5e-defb-11ea-b4f1-25b762cdbbf4\\_story.html](https://www.washingtonpost.com/world/middle_east/rare-israeli-ruling-against-practice-of-demolishing-homes-of-palestinians-accused-of-violence/2020/08/19/e1996e5e-defb-11ea-b4f1-25b762cdbbf4_story.html) (“[Israel’s] home-demolition policy puts a particular burden on women . . . [o]ften, . . . the wife or mother of an accused attacker is left scrambling to find shelter for the rest of the family.”); see also Rep. of the Special Comm. to Investigate Israeli Practices Affecting the Hum. Rts. of the Palestinian People and Other Arabs of the Occupied Territories, transmitted by Note dated 3 October 2022 from the Secretary-General, U.N. Doc. A/77/501 (Oct. 3, 2022) (“Punitive home demolitions also disproportionately affect Palestinian women and girls, and have severe impacts on their physical and psychological well-being.”).

14. See discussion *infra* Sections II(B) & III(A) and notes 119–140140, 214–215.

15. Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. INT’L L. 1 (1994).

16. *Id.* at 75.

17. See Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application*

demolitions must be subjected to the full scrutiny of the Hague Regulations and Fourth Geneva Convention.”<sup>18</sup> Although he acknowledged that punitive demolitions violate due process rights under international law, he did not substantively review punitive demolitions in the context of Israeli law.<sup>19</sup> Farrell’s article has also aged twenty years, inviting additional discussion.

Further provoking this Note, Guy Harpaz wrote an article in 2014 discussing demolitions under Israeli law.<sup>20</sup> He contrasted the High Court’s housing demolition jurisprudence with its own jurisprudence in comparable areas.<sup>21</sup> However, Harpaz focused primarily on demolitions as collective punishment without narrowly focusing on the implications of demolitions as pre-conviction punishment.<sup>22</sup> Three years later, Ryan Corbett published a note examining Israel’s use of collective punishment in the West Bank and investigating “the best forum for prosecuting these violations.”<sup>23</sup> Although he analyzed demolitions as collective punishment under both Israeli and international law, his analysis did not focus exclusively on punitive demolitions.<sup>24</sup> Corbett canvassed a portfolio of collective punishment strategies, including road closures, area closures, and home raids in Palestine.<sup>25</sup> And like Harpaz’s article, Corbett’s note did not explicitly address the pre-conviction character of punitive demolitions.<sup>26</sup>

This Note seeks to add fresh analysis to the standing body of scholarly work criticizing Israel’s demolition practice. While acknowledging that Palestinian political violence can cause grievous harm to Israeli civilians, it condemns Israel’s abuse of innocent Palestinian families as a purported

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*of International Law to Regulation 119*, 28 BROOK. J. INT’L L. 871, 900–35 (2003) (analyzing punitive demolitions as a violation of the International Covenant on Civil and Political Rights, the Hague Relations, and the Fourth Geneva Convention).

18. *Id.* at 935; see also HARVARD UNIVERSITY, OPT: THE LEGALITY OF HOUSE DEMOLITIONS UNDER INTERNATIONAL HUMANITARIAN LAW (May 31, 2004) (commenting a year after Farrell’s article on the legality of housing demolitions under international humanitarian law with a cursory review of Israeli jurisprudence).

19. See Farrell, *supra* note 17, at 926–32 (discussing principles of individual responsibility and fair trial rights articulated in the Fourth Geneva Convention, but not Israeli jurisprudence).

20. Guy Harpaz, *Being Unfaithful to One’s Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories*, 47 ISR. L. REV. 401, 403 (2014).

21. *Id.*

22. See *id.* at 416–22 (focusing on the fact that punitive demolitions do not require individual responsibility, complicity, or dangerousness).

23. Ryan Corbett, *Prosecuting Collective Punishment: Israel’s Breach of International Law in the West Bank*, 35 B.U. INT’L L. J. 369, 369 (2017).

24. *Id.*

25. *Id.* at 370, 374, 377.

26. Compare *id.* at 371 (“This Note discusses the collective punishment used by Israel in the West Bank.”), with Harpaz, *supra* note 20, at 416–22 (analyzing punitive demolitions as collective punishment).

deterrent mechanism. With that in mind, I respond to the ongoing surge in West Bank punitive housing demolitions and discuss the tension created with due process norms elsewhere affirmed in Israeli jurisprudence. Specifically, this Note evaluates Israel's position on both pre-conviction and collective punishment, and is the first to discretely identify how Israeli jurisprudence contradicts punitive demolitions on each ground. Section II of this Note previews Israel's housing demolition practice in Palestine, outlining its three primary demolition strategies: (1) administrative, (2) military, and (3) punitive. Focusing on Israel's punitive strategy, Section II then introduces recent trends in open-source demolition data, highlighting the rise in cases following the COVID-19 pandemic. Subsection A summarizes the history of occupation in Palestine, from the Bronze Age through Israel's current posture as the occupying power in Gaza, East Jerusalem, and the West Bank. Subsection B discusses the role of Palestine's occupying powers in shaping Israel's punitive demolition power in the West Bank, with focus on the legacy of the British Emergency Regulations—specifically, Regulation 119—now parasitic to Israel's perpetual “state of emergency.” Subsection C analyzes the scope of Regulation 119, noting the broad discretionary power of the Israeli military to execute punitive demolition orders thereunder and the Israeli High Court's high deference thereto. It also presents Israel's attempt to mask punitive demolitions as administrative sanctions and the limited appeal power of victimized Palestinian families.

Section III argues that Israel's punitive housing demolition practice creates tension with due process norms elsewhere affirmed in Israeli jurisprudence. Section III does not substantively analyze punitive demolitions under international law because Israel denies the applicability of relevant international instruments to Palestine. Without giving merit to that position, I *arguendo* limit my core analysis of punitive demolitions to the domestic stage. Subsection A addresses the pre-conviction character of punitive demolitions and discusses how Israel's usual stance against pre-conviction punishment stops short of Regulation 119. Subsection B frames punitive demolitions as collective punishment, contending Israel's esteem for individual responsibility similarly sidesteps innocent Palestinian families dispossessed of their homes under Regulation 119. Section IV concludes by determining that Israel's punitive housing demolition practice undercuts its own commitments to due process. Overall, the goal of this Note is to raise alarm about the recent surge in punitive housing demolitions in the West Bank and to assert that Israel's punitive demolition power under Regulation 119 ought to be significantly curtailed, if not wholly annulled.

## II. ISRAELI DEMOLITION POWER IN THE WEST BANK

Israel's practice of demolition and displacement in Palestine is longstanding and multifaceted.<sup>27</sup> Although Israel targets a broad range of Palestinian structures, including those purposed for agriculture, infrastructure, and livelihood,<sup>28</sup> this Note focuses specifically on residential housing demolitions. Housing demolitions are executed "by way of explosives or armored bulldozers accompanied by military units."<sup>29</sup> After demolition, the property is forfeited and declared a "closed area," meaning that no one may enter.<sup>30</sup> Operations usually take place during declared curfews or under the cover of darkness to minimize interference.<sup>31</sup> After the fact, "no government assistance is provided to displaced families, who must instead rely on relatives, neighbors, or international organizations, such as the International Committee of the Red Cross."<sup>32</sup>

Israel employs three housing demolition strategies, the first of which is administrative. Thereunder, "[h]ouses may be demolished by Israeli occupation forces because a building permit was not sought prior to their construction, or for some other technical breaches to applicable administrative law."<sup>33</sup> Israel's second housing demolition strategy is militaristic, arising where "destructions are made necessary by the conduct of armed hostilities and fall[ing] under the rules of military necessity."<sup>34</sup> For example, if Palestinian homes are located too close to the Separation Wall—a militarized barrier built by Israel along its alleged border with the West Bank—they may face demolition.<sup>35</sup> Without discounting the harm that

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27. See *Israel's Demolition of Palestinian Homes: A Fact Sheet*, ISRAELI COMMITTEE AGAINST HOUSE DEMOLITIONS (Apr. 20, 2021), <https://icahd.org/2021/04/20/the-demolition-of-palestinian-homes-by-israel-a-fact-sheet/> (noting that at least 130,000 Palestinian homes and other structures have been destroyed since 1948).

28. *Data on Demolition and Displacement in the West Bank*, *supra* note 12.

29. *OPT: The Legality of House Demolitions*, *supra* note 18.

30. *Id.*

31. Farrell, *supra* note 17, at 888 ("These operations usually take place under cover of darkness or during declared curfew to minimize interference.").

32. *Id.* at 888–89.

33. *OPT: The Legality of House Demolitions*, *supra* note 18; see also *Demolition Watch*, UNRWA, <https://www.unrwa.org/demolition-watch> (last visited Nov. 8, 2022) ("The vast majority of demolition orders are issued because a home or structure has been built without an Israeli permit . . . [but] more than 94 per cent of all Palestinian permit applications have been rejected in recent years. This means that when a family expands or a community wants to build infrastructure to meet its basic needs, the choice faced is between building without a permit, or not building at all.").

34. *OPT: The Legality of House Demolitions*, *supra* note 18.

35. See Press Release, Amnesty International, *Israel Continues Policy of Systematic Forced Displacement with Wave of Home Demolitions in Sur Baher* (July 22, 2019), <https://www.amnesty.org/en/latest/press-release/2019/07/israel-continues-policy-of-systematic-forced-displacement-with-wave-of-home-demolitions-in-sur-baher/> ("Israel has attempted to justify these

administrative and military demolitions cause to Palestinian society, this Note centers specifically on Israel's third strategy: punitive housing demolitions, whereby "demolitions may occur outside the scope of military operations or Israel administrative power . . . and be used by the Israel occupation forces as a response against persons suspected of taking part in—or directly supporting criminal or guerrilla activities."<sup>36</sup> Punitive demolitions are also cloaked in military necessity and can occur notwithstanding proper housing permits and title. It is similarly irrelevant whether suspected offenders actually own the house in question or if it belongs to a relative.<sup>37</sup> Suspected offenders are Palestinian political activists or civilians accused of perpetrating violence or other security breaches against Israeli forces or settlers.<sup>38</sup> They are typically detained at Israeli military checkpoints, during Israeli raids of Palestinian villages, and at protests that have escalated into violent clashes.<sup>39</sup> Escalation may ensue when Israelis deploy rubber bullets and tear gas against Palestinian protesters, who respond by throwing stones.<sup>40</sup>

Punitive demolitions target Palestinian families as a means of deterring security breaches.<sup>41</sup> The Israeli government contends that lengthy prison terms and threats of capital punishment are ineffective against security breaches and that punitive demolitions help fill the "deterrence vacuum" by forcing activists to "consider the possible ramifications of their actions upon

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demolitions under the guise of security by claiming the homes are too close to the wall/fence . . .").

36. *OPT: The Legality of House Demolitions*, *supra* note 18.

37. *Id.*

38. *See The HCJ Approves the Punitive Demolition of a West Bank Home of a Palestinian Woman and Her Three Children Following an Attack Allegedly Perpetrated by the Children's Father*, HAMOKED (June 24, 2021), <https://hamoked.org/document.php?dID=Updates2249> ("Following every Palestinian act of violence in which an Israeli is killed, the military issues a demolition order against the home of the perpetrator's family.").

39. *See, e.g., K.F., Israel to Punitively Demolish Prisoners' Family House in Ramallah-District Village*, WAFA (Jan. 2, 2020), <https://english.wafa.ps/page.aspx?id=082hKsa114614855025a082hKs> (noting one suspected offender, Karmel, was detained "at a military checkpoint while returning from a wedding party in Hebron" while the other, Qassam, was detained "during an Israeli raid into his hometown"—both for purported political affiliation with the Popular Front for the Liberation of Palestine).

40. *See Israeli Police Fire Rubber Bullets in New Al-Aqsa IncurSION*, AL JAZEERA (Apr. 21, 2022), <https://www.aljazeera.com/news/2022/4/21/israeli-police-fire-rubber-bullets-in-new-al-aqsa-incursion> ("Israeli forces targeted worshippers with tear gas and rubber bullets during dawn prayers and that Palestinian youth responded with stones and petrol bombs."); Aaron Boxerman, *Palestinians Say Teen Killed by Rubber Bullet in Clashes Near Ramallah*, TIMES OF ISR. (May 11, 2022), [https://www.timesofisrael.com/liveblog\\_entry/palestinians-say-teen-killed-by-rubber-bullet-in-clashes-near-ramallah/](https://www.timesofisrael.com/liveblog_entry/palestinians-say-teen-killed-by-rubber-bullet-in-clashes-near-ramallah/) ("The Israeli army confirms that troops fired rubber bullets at Palestinians who threw stones at an Israeli military outpost near the Psagot settlement.").

41. K.F., *Israeli Court Orders Punitive Demolition of Prisoner's Family House in Jenin-District Town*, WAFA (Apr. 7, 2022), <https://english.wafa.ps/Pages/Details/128711>.

their family.”<sup>42</sup> Punitive demolitions are “meant to harm people who have done nothing wrong and are suspected of no wrongdoing, but are related to Palestinians who attacked or attempted to attack Israeli civilians or security forces.”<sup>43</sup> But “[i]n almost all cases, the individual who carried out the attack or planned to do so no longer lives in the house, as they were killed by Israeli security forces during the attack or were arrested and face a long prison sentence in Israel.”<sup>44</sup> Inversely, Israel does not employ punitive demolitions against “Israeli settlers who were involved in fatal attacks against Palestinians.”<sup>45</sup> According to the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), there were 6,179 Palestinian fatalities and 284 Israeli fatalities in context of the Israeli-Palestinian conflict between January 2008 and January 2023.<sup>46</sup> While most victims are Palestinian civilians and most perpetrators are affiliated with the Israeli forces,<sup>47</sup> all punitive demolitions target Palestinian families.<sup>48</sup> Historically, demolitions occurred without warning, but today, families are supposed to have a forty-eight hour notice period to appeal the order.<sup>49</sup>

Since the start of Israeli Occupation in 1967, thousands of Palestinian homes have been destroyed.<sup>50</sup> However, as Farrell noted in 2003, demolition data carries a margin of error due to underreporting and because the

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42. Mark Regev, *Arguing with the US over House Demolitions*, JERUSALEM POST (Jan. 14, 2022), <https://www.jpost.com/opinion/article-692501>.

43. *Home Demolition as Collective Punishment*, B'TSELEM (Nov. 11, 2017), [https://www.btselem.org/punitive\\_demolitions](https://www.btselem.org/punitive_demolitions).

44. *Id.*

45. K.F., *Israeli Court Orders*, *supra* note 41; *see also* Gideon Levy, *Israel Razed a Palestinian Mansion as Collective Punishment*, HAARETZ (July 16, 2021), <https://www.haaretz.com/israel-news/2021-07-16/ty-article-magazine/.premium/israel-razes-palestinian-home-as-collective-punishment-u-s-intervention-be-damned/0000017f-dbac-db5a-a57f-dbee17a70000> (“The Jewish terrorist whose family’s home is demolished has yet to be born.”); Rep. of the Special Rapporteur on the Situation of Hum. Rts. in the Palestinian Territories Occupied since 1967, A/HRC/44/60, at 13 (2020) (“Punitive demolitions have never been used against the homes of Israeli Jewish civilians who have committed ‘nationalist’ crimes similar to those for which Palestinian homes have been destroyed.”).

46. *See Data on Casualties*, OCHA, <https://www.ochaopt.org/data/casualties> (last visited Jan. 8, 2023) (“Only casualties that are the result of confrontations between Palestinians and Israelis in the context of the occupation and conflict are included.”).

47. *Id.*

48. *Supra* note 45 and accompanying text; *see also* U.S. DEP’T OF STATE, ISRAEL 2016 HUM. RTS. REP. 94 (2016) (noting that Israel has failed “to apply the punitive demolition policy equally by also demolishing the homes of the families of [] Israelis” involved in violence against Palestinians).

49. *Home Demolition as Collective Punishment*, *supra* note 43; *see also* discussion *infra* Sections II(C), notes 175–178.

50. *Atavastic Revenge—The Punitive Demolitions of Palestinian Homes*, ISRAELI COMMITTEE AGAINST HOUSE DEMOLITIONS (May 24, 2019), <https://icahd.org/2019/05/24/atavastic-revenge-the-punitive-demolitions-of-palestinian-homes/> (estimating 48,000 Palestinian homes have been demolished since 1967).



distinction between punitive, military, and administrative demolitions “is sometimes difficult to survey and is often ignored by mass media sources[.]”<sup>51</sup> Unfortunately, his observation remains true almost twenty years later. Although increased social media attention and local reporting efforts have helped close the gap,<sup>52</sup> punitive demolition data is still approximated. Between 1988 and 1992, the First Intifada, it is estimated that Israel punitively demolished around 490 Palestinian homes.<sup>53</sup> Between 2000 and 2005, the Second Intifada, “Israel punitively demolished at least 650 homes, displacing about 4,000 Palestinians.”<sup>54</sup> Demolitions slowed in the years to follow but surged drastically between 2014 and 2016 after three Israeli yeshiva students were killed while hitchhiking in the West Bank—a tragedy that Israel attributed to Hamas, prompting “one of the largest and most aggressive [military] sweeps in the West Bank in a decade” and “igniting new frictions between Israelis and Palestinians, who just three months [earlier] were in the midst of U.S[.]-brokered peace negotiations.”<sup>55</sup> Although numbers dipped again thereafter, especially during the COVID-19 pandemic, they are once more on the rise. Recent trends are depicted in the chart below, which displays data on punitive demolitions in the West Bank collected by OCHA since 2009.<sup>56</sup> With the number of people displaced in 2022 soaring above that of the past five years, it is increasingly important to evaluate the origin and credibility of Israel’s punitive housing demolition practice—a practice deeply rooted in Palestine’s history of relentless subjugation to occupation and Israel’s current posture as the belligerent occupying power in Gaza and the West Bank.

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51. Farrell, *supra* note 17, at 898.

52. See, e.g., Eye on Palestine (@eye.on.palestine), INSTAGRAM, <https://www.instagram.com/eye.on.palestine/?hl=en> (last visited Mar. 2, 2023) (aggregating news, media, and personal accounts of Israel’s occupation of Palestine, including local coverage of punitive demolitions in the West Bank and Gaza).

53. Jillian Kestler-D’Amours, *Israel’s Top Court to Rule on Punitive Home Demolitions*, MIDDLE E. EYE (Feb. 13, 2015), <https://www.middleeasteye.net/news/israels-top-court-rule-punitive-home-demolitions>.

54. *Id.*

55. Ruth Eglash, *Israeli Army Says Three Kidnapped Teenagers Found Dead*, WASH. POST (June 30, 2014), [https://www.washingtonpost.com/world/middle\\_east/three-kidnapped-israeli-teenagers-found-dead-reports-say/2014/06/30/4e6a271a-007a-11e4-8572-4b1b969b6322\\_story.html](https://www.washingtonpost.com/world/middle_east/three-kidnapped-israeli-teenagers-found-dead-reports-say/2014/06/30/4e6a271a-007a-11e4-8572-4b1b969b6322_story.html) (noting that Israeli Prime Minister Netanyahu said “Hamas is responsible, and Hamas will pay”).

56. See *Breakdown of Data on Demolition and Displacement in the West Bank*, *supra* note 12 (aggregating data on the demolition of Palestinian-owned structures); see also Farrell, *supra* note 17, at 899 (collecting data on demolitions and sealings from 1987 until 2002).

<b>Punitive Demolitions in the West Bank</b> (Jan. 1, 2009 – Dec. 31, 2022)									
	<b>Incident</b>			<b>Location</b>		<b>Structure</b>		<b>People Displaced</b>	
<b>Year</b>	Punitive Orders	Full Demolition	Partial Seal	Area A, B, C	East Jerusalem	Housing	Other	Total	Minors
<b>2022</b>	14	13	1	13	1	11	3	71	29
<b>2021</b>	3	3	0	3	0	3	0	15	7
<b>2020</b>	7	6	1	7	0	6	1	33	14
<b>2019</b>	14	14	0	14	0	11	3	36	13
<b>2018</b>	6	5	1	6	0	6	0	45	13
<b>2017</b>	9	6	3	8	1	9	0	49	23
<b>2016</b>	29	23	6	25	4	25	4	142	65
<b>2015</b>	19	17	2	14	5	18	1	121	59
<b>2014</b>	8	7	1	7	1	8	0	52	26
<b>2013</b>	0	0	0	0	0	0	0	0	0
<b>2012</b>	1	1	0	1	0	1	0	6	0
<b>2011</b>	0	0	0	0	0	0	0	0	0
<b>2010</b>	0	0	0	0	0	0	0	0	0
<b>2009</b>	2	1	1	0	2	2	0	30	15
<b>Total</b>	<b>112</b>	<b>96</b>	<b>16</b>	<b>98</b>	<b>14</b>	<b>100</b>	<b>12</b>	<b>600</b>	<b>264</b>

#### A. Palestine under Occupation

Palestine has been trapped in occupation roulette for thousands of years. At the close of the Bronze and Iron Ages, the Assyrians conquered the region,<sup>57</sup> followed by the Babylonians,<sup>58</sup> the Persians,<sup>59</sup> various Greek empires,<sup>60</sup> the Hasmonean Kingdom,<sup>61</sup> and then Rome.<sup>62</sup> Thereafter, several Muslim dynasties fought for control over the Palestinian region until the Crusaders established the Kingdom of Jerusalem,<sup>63</sup> which was subsequently

57. Ariel Bagg, *Palestine Under Assyrian Rule: A New Look at the Assyrian Imperial Policy in the West*, 133 J. AM. ORIENTAL SOC., 119, 122 (2013); GUDRUN KRÄMER, A HISTORY OF PALESTINE: FROM THE OTTOMAN CONQUEST TO THE FOUNDING OF THE STATE OF ISRAEL 11 (2008).

58. LEO PERDUE & WARREN CARTER, ISRAEL AND EMPIRE: A POSTCOLONIAL HISTORY OF ISRAEL AND EARLY JUDAISM 69 (2015); KRÄMER, *supra* note 57, at 11.

59. PERDUE & CARTER, *supra* note 58, at 93, 107.

60. *Id.* at 136.

61. *Id.* at 198; KRÄMER, *supra* note 57, at 10–11.

62. See P. Canon Boylan, *Palestine Under Roman Control*, 29 IRISH Q. REV. 513, 513 (1940).

63. The Crusades of Palestine, Encyc. Britannica, <https://www.britannica.com/place/Palestine/The-Crusades> (last visited Oct. 3, 2022); KRÄMER, *supra* note 57, at 15.

conquered by the Ayyubids,<sup>64</sup> the Mongols,<sup>65</sup> and then the Mamluks.<sup>66</sup> In 1516, the Ottoman Empire took Palestine,<sup>67</sup> followed by a period of Egyptian rule starting in 1831.<sup>68</sup> The Ottoman Empire took Palestine back nine years later,<sup>69</sup> only for it to be captured by the British on the heels of the Balfour Declaration. Issued in 1917 during the First World War,<sup>70</sup> the Balfour Declaration proclaimed the Palestinian region the “national home for Jewish people.”<sup>71</sup> It tailed the Second Aliyah, a period of Zionist migration to Palestine between 1904 and 1914 that yielded an influx of about 35,000 Jewish people.<sup>72</sup> In 1922, upon the dissolution of the Ottoman Empire, the League of Nations gave the British mandatory power over Palestine.<sup>73</sup>

In response to growing calls for self-determination in the mid-20<sup>th</sup> century,<sup>74</sup> the United Nations General Assembly recommended the partition of Palestine upon termination of British mandatory power.<sup>75</sup> It proposed a tripartite division of the region into an Arab State, a Jewish State, and the City of Jerusalem.<sup>76</sup> The British officially surrendered its power on May 15, 1948, and agreed not to oppose the “setting up of a Jewish State or a move into Palestine from Transjordan.”<sup>77</sup> The Arab-Israeli War commenced soon

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64. Bethany Walker, *Militarization to Nomadization*, 62 U. CHI. PRESS J. 202, 202 (1999); KRÄMER, *supra* note 57, at 15.

65. Reuven Amitai, *Mongol Raids into Palestine (A.D. 1260 and 1300)*, 119 J. ROYAL ASIATIC SOC. 236, 236 (1987); KRÄMER, *supra* note 57, at 15–16.

66. Walker, *supra* note 64, at 209; KRÄMER, *supra* note 57, at 15–16.

67. KRÄMER, *supra* note 57, at 16.

68. *Id.* at 63.

69. Abla Muhtadi & Falestin Naïli, *Back into the Imperial Fold: The End of Egyptian Rule Through the Court Records of Jerusalem, 1839-1840*, in ORDINARY JERUSALEM, 1840-1940 186, 186 (2018).

70. BERNARD REGAN, *THE BALFOUR DECLARATION: EMPIRE, THE MANDATE AND RESISTANCE IN PALESTINE* 9, 49–50 (2017).

71. Letter from Arthur Balfour to Lord Rothschild, YALE LAW LIBRARY (Nov. 9, 1917) [Balfour Declaration 1917], [https://avalon.law.yale.edu/20th\\_century/balfour.asp](https://avalon.law.yale.edu/20th_century/balfour.asp).

72. GUR ALROEY, *AN UNPROMISING LAND: JEWISH MIGRATION TO PALESTINE IN THE EARLY TWENTIETH CENTURY* 18 (2014).

73. *See Text of Mandate [for Palestine]*, U.N. Doc. A/292, at 1 (Apr. 18, 1947) (transmitting the Mandate for Palestine, confirmed by the League of Nations on July 24, 1922, and the accompanying memorandum by the British Government, approved on Sept. 16, 1922).

74. *Origins and Evolution of the Palestine Problem: 1917-1947 (Part I)*, UNITED NATIONS, <https://www.un.org/unispal/history2/origins-and-evolution-of-the-palestine-problem/part-i-1917-1947/> (last visited Dec. 12, 2022) (noting that in 1936, “the Palestinian resistance to foreign rule and to foreign colonization broke out into a major rebellion” and acknowledging persistent “demands by the Palestinian people for independence”).

75. G.A. Res. 181 (II), Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question, at 133 (1947).

76. *Id.*

77. Conclusions of a Meeting of the Cabinet Held at 10, Downing Street, CAB/128/12, 167 (1948) (formerly C.M. (48) 24) (UK).

thereafter as Jordan occupied the land earmarked by the United Nations for the creation of an Arab State and Israel declared independence.<sup>78</sup> This period is remembered as *al Nakba*—“the catastrophe”—because in declaring independence, Israel claimed 78% of the land of historic Palestine, leading to the persecution, depopulation, and erasure of Palestinians, and the subjugation of Palestinian Israeli citizens to Israeli military rule.<sup>79</sup>

In the new Arab State, Jordan’s annexation of the West Bank was initially “widely regarded, including by the Arab League, as illegal and void” but was nevertheless accepted “in order to maintain public order.”<sup>80</sup> A number of Palestinian representatives purportedly accepted Jordanian rule at the Jericho Conference of 1948.<sup>81</sup> Jordan signed an armistice with Israel in 1949 and formally annexed the West Bank of the Jordan River in 1950.<sup>82</sup>

Seventeen years later, in the midst of rising Arab-Israeli tensions, Israel launched a preemptive six-day military offensive against Jordan, Syria, and Egypt.<sup>83</sup> The war resulted in Israeli occupation of four Arab territories: the Gaza Strip, the Golan Heights, the Sinai Peninsula, and the West Bank.<sup>84</sup> The United Nations brokered a ceasefire on June 10, 1967.<sup>85</sup> Ignoring calls to withdraw,<sup>86</sup> Israel remained in the four territories, sweeping them under a Military Governorate based on the Fourth Geneva Convention, which

78. Center for Preventative Action, *Israeli-Palestinian Conflict*, COUNCIL ON FOREIGN RELATIONS: GLOBAL CONFLICT TRACKER (Jan. 17, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict>.

79. Nancy Albhaisi, *Towards a Decolonial Curriculum of Human Rights Education in Palestine*, 78 J. SOC. ISSUES 146, 147–48 (2021); see also *The Nakba Did Not Start or End in 1948*, AL JAZEERA (May 23, 2017), <https://www.aljazeera.com/features/2017/5/23/the-nakba-did-not-start-or-end-in-1948> (explaining the “creation of Israel was a violent process that entailed the forced expulsion of hundreds of thousands of Palestinians from their homeland to establish a Jewish-majority state” and that Israel took “more than 78 percent of historic Palestine, ethnically cleansed and destroyed about 530 villages and cities, and killed about 15,000 Palestinians in a series of mass atrocities, including more than 70 massacres”); see also Yair B. .uml, *Shaping the Israeli Segregation System*, in ISRAEL AND ITS PALESTINIAN CITIZENS 103, 103–36 (Nadim N. Rouhana ed., 2017) (“The Zionist movement never sought out a binational state, or any joint Jewish-Arab political or economic framework . . . military rule was forced upon the Arabs through a special military unit.”).

80. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 260 (2d ed. 2012).

81. *The Jericho Conference on Palestine-Jordan Unity*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/the-jericho-conference-on-palestine-jordan-unity> (last visited Oct. 11, 2022) (citing U.S. DEP’T OF STATE, 5 FOREIGN RELATIONS OF THE UNITED STATES, 1948: THE NEAR EAST, SOUTH ASIA, AND AFRICA pt. 2, at 1645–46 (1948)).

82. *Jordanian Parliament Resolution Regarding the Annexation of the West Bank*, ECON. COOP. FOUND. (Apr. 24, 1950), [https://ecf.org.il/media\\_items/464](https://ecf.org.il/media_items/464).

83. *Six-Day War*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/middle-east/six-day-war>.

84. *Id.*

85. *Id.*

86. S.C. Res. 242 (Nov. 22, 1967) (adopted unanimously).

provides guidelines for belligerent military rule in occupied territories.<sup>87</sup> Although it ultimately gave up the Sinai Peninsula,<sup>88</sup> Israel unilaterally annexed the Golan Heights and moved both the Gaza Strip and the West Bank under Israeli Civil Administration in 1981.<sup>89</sup>

i. Contemporary Palestine and its Judicial Landscape

Today, Israel still occupies Palestinian land.<sup>90</sup> Despite purported disengagement in 2005, “Israel continues to control six of Gaza’s seven land crossings, its maritime borders and airspace, and the movement of goods and persons in and out of the territory.”<sup>91</sup> Israel also occupies East Jerusalem, claiming to have unilaterally annexed the territory in 1967.<sup>92</sup> The West Bank—the focus of this Note—is similarly subjected to ongoing Israeli occupation, albeit more complex. In 1993, the Palestinian Authority was established and the West Bank was divided administratively into Areas A, B, and C under the Oslo Accords.<sup>93</sup> Both Area A’s security and civil administration are Palestinian; Area B’s security is Israeli and its civil administration is Palestinian; and both Area C’s security and civil administration are Israeli.<sup>94</sup> To move between Areas, Palestinians must pass through Israeli military checkpoints and travel on a system of segregated roads, wherein Palestinian vehicles are prohibited from using certain Israeli-

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87. MEIR SHAMGAR, HARRY SACHER INST. FOR LEGIS. RSCH. AND COMP. L., *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980* (Cambridge Univ. Press 1982); see Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (outlining the expected behavior of Occupying Powers in occupied territories).

88. Treaty of Peace, Egypt-Isr., Mar. 26, 1979, 1138 U.N.T.S. 59, [https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL\\_790326\\_Egypt%20and%20Israel%20Treaty%20of%20Peace.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_790326_Egypt%20and%20Israel%20Treaty%20of%20Peace.pdf) (“Israel will withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine.”).

89. See Military Order 947, *Order Concerning the Establishment of a Civilian Administration*, translated and reprinted in JERUSALEM MEDIA & COMM’N CTR., APPENDIX III at 210 (2d ed. 1995) (“A Civilian Administration is hereby established in the region.”).

90. See U.N. Secretary-General, *Rep. of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel*, n.10, U.N. Doc. A/77/328 (Sept. 14, 2022) (defining “the territories that Israel occupies” as “East Jerusalem, the Syrian Golan, Gaza and the West Bank outside East Jerusalem”).

91. Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, Y.B. INT’L HUMANITARIAN L. 397, 429 (2010).

92. See Yotam Ben-Hillel, Norwegian Refugee Council, *The Legal Status of East Jerusalem*, 8 (2013) (“Immediately after the 1967 War the Government of Israel unilaterally annexed about 70,500 dunams (approximately 17,400 acres) of the Jordanian Jerusalem and West Bank land to the municipal boundaries of West Jerusalem.”).

93. Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT’L REV. RED CROSS 395, 402 (2007).

94. *Id.*

only bypasses, often built over the demolished homes and land of displaced Palestinians.<sup>95</sup>

Under this arrangement, there are three judicial systems at play inside the West Bank: (1) the local Palestinian courts, (2) the Israeli civilian courts, and (3) the Israeli military courts.<sup>96</sup> The local Palestinian courts have been historically undermined by Palestine's occupying powers, including Israel, and are characterized by "inefficiency and corruption."<sup>97</sup> The Israeli civilian courts have jurisdiction over Israeli settlements in the West Bank as "de facto extensions of Israel"—as such, Israelis living in illegal outposts and settlements inside the West Bank are generally not tried before the local Palestinian courts.<sup>98</sup> The Israeli military courts were established by Israel in 1967 through the arm of international law, which provides that "an occupying power is authorized to establish military courts to try cases of those charged with actions that endanger the security of the occupying power."<sup>99</sup> Accordingly, the military courts have jurisdiction over two categories of offenses: (a) "threat[s] to public order—particularly traffic violations, but also criminal offenses that are not defined as security offenses;" and (b) "any offense enumerated in the security legislation and in statute"—whether committed in areas under control of the Israeli military, outside the West Bank, or in areas A and B, which have been transferred to the [Palestinian Authority]" that "breached or was intended to breach the security of the area."<sup>100</sup> Israel's punitive housing demolition strategy—used against the families of Palestinians "who attacked or attempted to attack Israeli civilians or security forces"—falls under the second category of Israeli military court jurisdiction.<sup>101</sup>

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95. Ahmad Al-Bazz, *In the West Bank, Segregated Roads Displace Palestinians*, NORWEGIAN REFUGEE COUNCIL (Mar. 31, 2022), <https://www.nrc.no/shorthand/stories/in-the-west-bank-segregated-roads-displace-palestinians/index.html> ("'Fabric of life' [roads] . . . refer to highways and roads that divert Palestinian traffic away from Israeli settlers. By contrast, roads that divert settlers away from Palestinians towns and cities are referred to as 'bypass' roads.").

96. See generally Raja Shehadeh, *Multiple Legal System in the West Bank*, 21 PALESTINE-ISR. J. (2016) (explaining the existence of three systems of justice in the West Bank).

97. *Id.* at 2.

98. *Id.* at 4.

99. *Id.* at 2; see Israel Defense Forces, Order Concerning Security Instructions (Judea and Samaria), No. 378, U.N. Doc. A/AC.145/R.41 (1970) (establishing the Israeli military courts in the West Bank); see also Fourth Geneva Convention, art. 64(2) (providing that an occupying power may legislate in an occupied territory if essential for the application of the Convention, maintaining order, and the occupying power's own safety).

100. *The Military Courts*, B'TSELEM (Nov. 11, 2017), [https://www.btselem.org/military\\_courts](https://www.btselem.org/military_courts); see also Weill, *supra* note 93, at 403–05 (explaining the jurisdiction of the Israeli military courts).

101. *Home Demolition as Collective Punishment*, B'TSELEM, *supra* note 43.

Certain legal matters arising in the West Bank may also come before the Israeli High Court of Justice on petition. The High Court applies Israeli law and has jurisdiction over matters “in which it deems it necessary to provide relief for the sake of justice, and [which] are not under the jurisdiction of another court or tribunal.”<sup>102</sup> In effect, the High Court “is competent to review the legality of decisions and acts of the State, its agencies, and the armed forces.”<sup>103</sup> When Israel established its Military Governorate over Palestine in 1967, the High Court’s jurisdiction subsumed “the acts of the military commander” in the West Bank.<sup>104</sup> “This authority flows from the Court’s *in personam* jurisdiction over individual members of the Israeli Defense Forces acting on behalf of the Israeli Government.”<sup>105</sup> Since then, “Palestinian residents and non-governmental organizations (NGOs) [have] filed petitions to the High Court of Justice, in which they challenged the legality of Israeli operations” in Palestine.<sup>106</sup> Although the practice of hearing such petitions was initially *fait accompli*,<sup>107</sup> in 1972, the High Court affirmed that “since military commanders are public servants who belong to the executive branch of the state, and they ‘fulfil public duties according to law,’ they are subjected to the constitutional jurisdiction of the High Court of Justice, even if the acts were committed in [Palestine].”<sup>108</sup> In effect, Palestinians today have recognized petition power before the High Court to oppose Israel’s punitive demolition orders, albeit with little success.

#### B. Legacy of British Emergency Regulation 119

Palestine’s pre-1967 occupation roulette is integral to Israel’s current exercise of demolition power in the West Bank. In 1945, before Israel existed, the British promulgated the Defense (Emergency) Regulations (“Emergency Regulations”).<sup>109</sup> The Emergency Regulations were “issued in response to the double threat of internal [Arab] rebellion and world war” and “reflected the preoccupations of a colonial power facing widespread

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102. Basic Law: The Judiciary, §15(c), Knesset (Feb. 28, 1984), <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawTheJudiciary.pdf>.

103. Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* 79 (2012) (Ph.D. thesis, University of Geneva) (on file at archive ouverte UNIGE).

104. *Id.* at 80.

105. Farrell, *supra* note 17, at 880.

106. Weill, *The Role of National Courts*, *supra* note 103, at 80.

107. Farrell, *supra* note 17, at 880 (“[T]he scope resulted from a conscious decision by Israeli authorities not to contest petitions from the West Bank and Gaza on jurisdictional grounds.”).

108. Weill, *The Role of National Courts*, *supra* note 103, at 81 (citing H CJ 302/72 Abu Hilou et al. v. Government of Israel, 27(2) PD 169, 176 (1972)).

109. The Defence (Emergency) Regulations, 1442 The Palestine Gazette 1058 (Sept. 27, 1945) [hereinafter *Emergency Regulations*].

unrest.”<sup>110</sup> Some of the most extreme regulations enabled the British to seal off land, impose curfews, and restrict immigration.<sup>111</sup> Equally concerning were regulations minimizing due process, for example, through the authorization of “military tribunals to try civilians without granting the right of appeal,” “sweeping searches and seizures,” and the detention of “individuals administratively for an indefinite period.”<sup>112</sup> The Emergency Regulations also afflicted daily life and culture, including through the prohibition of certain books and newspapers.<sup>113</sup> But most relevant to this Note is Regulation 119, which “granted the British Commander in Palestine broad discretionary authority to demolish and seal off houses” that were deemed to pose a security threat.<sup>114</sup> Regulation 119 reads:

- (1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of *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 of the commission of, *any offence against the 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 or anything on growing on the land. Where any house, structure or land has been forfeited by order of a Military Commander as above, the High Commissioner may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall revert in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order or forfeiture had not been made.
- (2) Members of His Majesty’s forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, without compensation, any property in any such area, town, village, quarter or street as is referred to in subregulation (1), after eviction without compensation, of the previous occupiers, if any.<sup>115</sup>

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110. ALAN DOWTY, *THE JEWISH STATE: A CENTURY LATER* 95 (1998).

111. Defense (Emergency) Regulations, B’Tselem, [https://www.btselem.org/legal\\_documents/emergency\\_regulations](https://www.btselem.org/legal_documents/emergency_regulations) (last visited Oct. 11, 2022).

112. *Id.*

113. *Id.*

114. Harpaz, *supra* note 20, at 403–04.

115. Emergency Regulations, *supra* note 109, at 1089 (emphasis added).



Regulation 119 has survived decades of shifting geopolitics. Although the British attempted to repeal the Emergency Regulations before the region split into an Arab State and a Jewish State in 1948, the repealing legislation was not published in *The Palestine Gazette*, then the official local publication.<sup>116</sup> “Therefore, [Regulation] 119 remain[ed] . . . in force in all the territory covered by the British mandate.”<sup>117</sup> Following its annexation of the West Bank in 1950, “Jordan inherited the Regulation[s],” adopting them “through its internal laws.”<sup>118</sup> Israel similarly maintained the Emergency Regulations when it declared independence. During the resultant Arab-Israeli War, Israel’s Provisional State Council issued the Law and Administration Ordinance.<sup>119</sup> The Ordinance empowered Israel to declare a “state of emergency,” effectively incorporating the Emergency Regulations into domestic law and allowing the government to “procure existing resources from the public on behalf of the security effort.”<sup>120</sup> The Arab-Israeli War ended soon thereafter,<sup>121</sup> but Israel’s state of emergency, together with the Emergency Regulations, did not. In 1951, Israel’s legislature, the Knesset, determined that the Emergency Regulations opposed “the foundations of a democratic state.”<sup>122</sup> Despite tasking a Constitution Committee to annul them,<sup>123</sup> the Emergency Regulations endured because

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116. *OPT: The Legality of House Demolitions Under International Humanitarian Law*, *supra* note 18.

117. *Id.*

118. Harpaz, *supra* note 20, at 404.

119. ISR., LAW AND ADMINISTRATION ORDINANCE, NO. 1 OF 5708-1948 (May 14, 1948), <https://www.adalah.org/uploads/oldfiles/Public/files/Discriminatory-Laws-Database/English/49-Emergency-Orders-derived-from-Law-and-Administration-Ordinance-1948.pdf> (repealing Regulations 102 to 107C but maintaining all others, including 199).

120. *Id.*; Yossi Beilin, *Does Israel really need to be in a state of emergency?*, AL-MONITOR (July 18, 2018), <https://www.al-monitor.com/originals/2018/07/israel-state-of-emergency-1948-independence-war-strike.html>; see also Expert Op., at 40 n.136, H CJ 2088/10, 4019/10 HaMoked: Center for the Defence of the Individual et al. v. IDF Commander in the West Bank (2012), [https://hamoked.org/files/2012/155690\\_eng.pdf](https://hamoked.org/files/2012/155690_eng.pdf) (citing H CJ 897/86 Jabar v. Officer Commanding Central Command, 41(2) PD 522, 525–26 (1987) (“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 . . . with [no] legal reasons why it should be viewed as void now.”)).

121. Center for Preventative Action, *Israeli-Palestinian Conflict*, *supra* note 78 (“The war ended in 1949 with Israel’s victory, but 750,000 Palestinians were displaced and the territory was divided into 3 parts.”).

122. DAPHNA GOLAN, *DETAINED WITHOUT TRIAL: ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES SINCE THE BEGINNING OF THE INTIFADA 25* (B’Tselem ed., 1992) (quoting Knesset Record, vol. 9, 1831 (May 12, 1951)) (“The Knesset decides that the Defence (Emergency) Regulations, 1945, which have existed in the State ever since British rule, are opposed to the foundations of a democratic state, and charges the Law and Constitution Committee the task of presenting to the Knesset a bill proposing the annulment of the mentioned Regulations.”).

123. *Id.*

they were integral to controlling the Arab sector of Israeli society at the time.<sup>124</sup>

In the aftermath of its 1967 offensive, Israel applied the Emergency Regulations to occupied Palestine.<sup>125</sup> Under international law, a belligerent occupying power must exercise its powers “in accordance with the existing laws and regulations in the occupied territory and for the benefits of the local population.”<sup>126</sup> To that end, Israel issued a military order “‘freezing’ the legal situation then existing [in Palestine].”<sup>127</sup> “Unless repealed explicitly, laws that were in effect prior to occupation”—including the Emergency Regulations, given effect in the West Bank by Jordan—“were retained by the military government.”<sup>128</sup> Thus, Israel asserted that applying the Emergency Regulations in Palestine complied with international law because they already existed there.<sup>129</sup> But even if true, Israel’s specific application of Regulation 119 falls out of compliance. Occupying powers are “forced to change, suspend or abrogate a domestic law [in] the situation where a local law constitutes an obstacle to the application of the Fourth Geneva Convention,”<sup>130</sup> and Regulation 119 expressly conflicts with Article

124. See Defense (Emergency) Regulations, *supra* note 111 (claiming the Emergency Regulations were not repealed because they “served as the legal basis for the military rule then imposed on Israel’s Arab citizens”); see also Jeff Halper, *Revenge Devoid of Purpose: Punitive Demolitions of Palestinian Homes*, Hamishpat (2014), [https://www.academia.edu/13004848/Revenge\\_Devoid\\_of\\_Purpose\\_Punitive\\_Demolitions\\_of\\_Palestinian\\_Homes](https://www.academia.edu/13004848/Revenge_Devoid_of_Purpose_Punitive_Demolitions_of_Palestinian_Homes) (“[T]heir usefulness for both the Military Government established to rule the Arab sector of Israeli society from 1948-1966, and the usefulness of their subsequent application to the Occupied Territory beginning in 1967 prevented that.”).

125. Harpaz, *supra* note 20, at 404. *But see* Defense (Emergency) Regulations, *supra* note 111 (“[T]he Ministry of Justice established a committee of experts to examine the regulations and draw up proposals for their partial repeal, but the outbreak of the 1967 War, in June 1967, brought the committee’s work to a halt.”).

126. *OPT: The Legality of House Demolitions Under International Humanitarian Law*, *supra* note 18; see Convention (IV) Respecting the Laws and Customs of War on Land, arts. 43, 55 Oct. 18, 1907, 36 Stat. 2277 (entered into force Jan. 26, 1910) (providing that an occupying power “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the [occupied] country” and that it “shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the [occupied] State” with a duty to “safeguard the capital of these properties”).

127. Defense (Emergency) Regulations, *supra* note 111.

128. *OPT: The Legality of House Demolitions Under International Humanitarian Law*, *supra* note 18 (citing Farrell, *supra* note 17, at 877–78); see Fania Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 10 ISR. Y.B. HUM. RTS. 1, 345–46 (1980) (summarizing H CJ 434/79 Sakhwil v. Commander of The Judea and Samaria Region, 34(1) PD 464 (1980), which found the Emergency Regulations “constitute Jordanian legislation that has remained in force since the period of the British Mandate, and which is consequently still in force in the Judea and Samaria Region”).

129. See Farrell, *supra* note 17, at 907–08 (citing H CJ 897/86 Jabar v. Officer Commanding Central Command, 41(2) PD 522, 525 (1987)).

130. *OPT: The Legality of House Demolitions Under International Humanitarian Law*, *supra* note 18.

53 thereof. Article 53 *prohibits* housing demolitions in situations outside military necessity,<sup>131</sup> whereas Regulation 119 *authorizes* them.<sup>132</sup> In effect, the same body of laws that Israel cites to justify application of Regulation 119 duly impeaches it. Israel's response to that claim has been to deny the applicability of the Fourth Geneva Convention to Palestine, contravening the United Nations Security Council.<sup>133</sup> Without assenting to Israel's position, this Note focuses, *arguendo*, on the legality of punitive housing demolitions under Israeli domestic jurisprudence.

In 1992, Israel anchored the aforementioned state of emergency to the "Basic Laws," its quasi-constitutional framework.<sup>134</sup> But Israel's state of emergency is not indefinite; the Basic Laws require the Knesset to reassess and re-declare emergency anew every year.<sup>135</sup> It has done so without exception, such that Israel has been in a purported state of emergency for nearly seventy-four years.<sup>136</sup> However, the Knesset acknowledges Israel's sociopolitical circumstances have changed since the Law and Administration Ordinance was issued in 1948, and admits Israel's state of emergency persists primarily as an act of political expediency.<sup>137</sup> The Knesset reasons Israel "has enacted many laws which include directives that are conditioned by the existence of a state of emergency. The cancellation of the state of

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131. Fourth Geneva Convention, art. 53.

132. See *infra* notes 214–220 and accompanying text.

133. See Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18, 10 (Mar. 16, 2020) ("Israel denies the applicability of the Fourth Geneva Convention on the spurious basis that there is a 'missing reversioner.'). *But see* Israel's Belligerent Occupation of the Palestinian Territory, including Jerusalem and International Humanitarian Law, Conf. of High Contracting Parties to Fourth Geneva Convention (1999) ("The U.N. Security Council has confirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including Jerusalem, in 25 resolutions.').

134. *Basic Laws*, KNESSET, <https://m.knesset.gov.il/en/activity/pages/basiclaws.aspx> (last visited Nov. 17, 2022) ("Since the Constituent Assembly and the First Knesset were unable to put a constitution together, the Knesset started to legislate basic laws on various subjects. After all the basic laws will be enacted, they will constitute together, with an appropriate introduction and several general rulings, the constitution of the State of Israel.').

135. *Id.*

136. See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Israel Human Rights Report 1 (2021) (noting Israel's "state of emergency" has "been in effect since 1948"); see also John Quigley, *Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?*, 15 MICH. J. INT'L L. 491, 502 (1994) ("Israel claims in its declaration that it has been in an emergency situation since 1948.').

137. See ISR., LAW AND ADMINISTRATION ORDINANCE, *supra* note 119; see *Declaring a State of Emergency*, KNESSET, [https://m.knesset.gov.il/en/about/lexicon/pages/declaringstate\\_emergency.aspx](https://m.knesset.gov.il/en/about/lexicon/pages/declaringstate_emergency.aspx) (last visited Nov. 21, 2022) (explaining that Israel's state of emergency "has been regularly extended by the Knesset and the Government due to the fact that over the years the Knesset has enacted many laws which include directives that are conditioned by the existence of a state of emergency").

emergency [would] lead to the annulment of these directives.”<sup>138</sup> But despite the absence of true emergency, the Emergency Regulations are sustained by and parasitic to Israel’s annual re-declarations thereof. While Israel’s state of emergency lasts, even if in name only, so do the Emergency Regulations. Israeli courts continue to assert that the Emergency Regulations remain good law, and cite them to deport residents, administratively detain people, impose road closures, censor written materials, enact curfews, and implement other efforts designed to deter Palestinian activism.<sup>139</sup> While acknowledging the broader scope of harm attached to the Emergency Regulations, this Note centers specifically on Regulation 119, the backbone of Israel’s ongoing punitive housing demolition practice in the West Bank.<sup>140</sup>

It is worth noting that Israel is not alone in using punitive housing demolitions as a tool of sociopolitical repression. In India, the Hindu nationalist government employs a similar practice against Indian Muslim activists involved in “communal clashes” with Hindus.<sup>141</sup> For example, after clashes broke out in April 2022, officials “demolished around 25 shops, vending carts, and houses primarily belonging to Muslims in Jahangirpuri, Delhi.”<sup>142</sup> Similarly, in June 2022, “the home of Javed Mohammad, a political activist with the Welfare Party of India, was razed following his arrest in connection to protests that broke out in Allahabad.”<sup>143</sup> But unlike Israel, India does not ground its demolition power in alleged deterrent value linked to immortalized emergency status. Rather, it cites the Uttar Pradesh Urban Planning and Development Act of 1972, claiming the homes of targeted activists are unauthorized or illegally constructed “encroachments” meriting state-sponsored demolition.<sup>144</sup> Unconvinced, the United Nations

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138. *Id.*; see Beilin, *supra* note 120 (“[M]inisters and legislators alike used [the state of emergency] to justify a long list of legislative acts on price controls and the provision of services.”).

139. Defense (Emergency) Regulations, *supra* note 111; see Yaacov Bar-Natan, *Is Censorship in Israel Getting Worse?*, 17 J. PALESTINE STUD. 149, 151 (1988) (noting the Emergency Regulations “empower the military censor to stop the publication not only of sensitive military secrets, but also of anything he deems prejudicial to public order,” including Palestinian books).

140. See Harpaz, *supra* note 20, at 403 (noting that under Regulation 119, housing demolition “authority was exercised inter alia, for deterrence purposes”).

141. NH Web Desk, *State governments use demolitions as punitive measure*, NAT’L HERALD (Sept. 23, 2022), <https://www.nationalheraldindia.com/india/state-governments-use-demolitions-as-punitive-measure-finds-report>.

142. *Id.*

143. Ladeeda Farzana, *India house demolitions: Another Israeli-style war crime against Muslims*, MIDDLE E. EYE (June 24, 2022), <https://www.middleeasteye.net/opinion/india-house-demolitions-Israeli-style-war-crime-against-Muslims>.

144. See Ananthakrishnan G, *Demolitions in Kanpur, Prayagraj in accordance with law*, INDIAN EXPRESS (June 22, 2022), <https://indianexpress.com/article/india/kanpur-prayagraj-demolitions-uttar-pradesh-supreme-court-7983749/> (claiming the actions were carried out “strictly in accordance with the [Act]” and “had nothing to do with the incidents of rioting”).

Special Rapporteur on Adequate Housing condemned India's demolitions in June 2022 as a tool of collective punishment against the minority Muslim community.<sup>145</sup>

### C. Deference to the Discretionary Power of the Israeli Military

Despite Israel's insistence on the legality of its housing demolition practice, "Israel disputes the punitive nature of these operations."<sup>146</sup> Israeli courts contend that punitive housing demolitions are merely administrative sanctions because they are carried out by an executive order of the Military Commander "in lieu of" or in addition to criminal proceedings.<sup>147</sup> In *Shukri v. Minister of Defense*, the Israeli High Court claimed "[t]he authority which is given to the military commander . . . is administrative and its activation is meant to prevent and by this to maintain the public order."<sup>148</sup> Four years later, in *Nazal v. Commander of the Judea and Samaria Region*, the Court affirmed that the purpose of demolitions is "to deter potential terrorist[s] from carrying out their murderous acts," not to punish offenders, framing Regulation 119 administratively.<sup>149</sup>

Israel's stance reflects a high degree of deference to military discretion, evidenced in Emergency Regulation 119. There, Israel's "ordinary evidentiary benchmark of 'clear, unequivocal and convincing' evidence was replaced in the domain of demolition by an almost blind faith in the military's stance."<sup>150</sup> In short, Regulation 119 provides:

"A Military Commander may by order direct the forfeiture [and destruction] . . . of any house . . . some of the inhabitants of which he is satisfied have committed, or attempted . . . or abetted . . . or been accessories after the fact of . . . any offence against the Regulations involving violence or intimidation or any Military Court offence."<sup>151</sup>

As a threshold matter, "may" is permissive language, not mandatory, suggesting that Regulation 119 does not compel demolitions—it simply

145. See Karan Thapar, *UN Special Rapporteurs Condemn Home Demolitions in India*, THE WIRE (June 18, 2022), <https://thewire.in/rights/un-special-rapporteurs-condemn-home-demolitions-in-india-see-collective-punishment-of-muslims> (noting "demolitions have been carried out without due process and without establishing proof of guilt" and quoting "the Madhya Pradesh home minister and senior state officials as proof of vindictive intention").

146. *OPT: The Legality of House Demolitions*, *supra* note 18.

147. Harpaz, *supra* note 20, at 404.

148. Mordechai Kremnitzer & Lina Saba-Habesch, *House Demolitions*, 4 MDPI LAWS 216, 220 n.13 (2015) (citing HCJ 798/89 *Shukri v. Minister of Defense* (1990) (unpublished)).

149. Fania Domb, *Judgments Relating to Terrorism*, 19 ISR. Y.B. HUM. RTS. 371, 376 (1989) (summarizing HCJ 6026/94 *Nazal v. Commander of the Judea and Samaria Region*, 48(5) PD 338 (1994)).

150. Harpaz, *supra* note 20, at 408–09.

151. Emergency Regulations, *supra* note 109, at 1089.

allows them. In addition, Regulation 119 does not specify which military commander has the power to order the forfeiture and destruction of a house, referring indiscriminately to “[a] Military Commander.” It then vests complete discretion in that individual with a very low evidentiary bar. Demolition hinges subjectively on his satisfaction that criminal intent manifested in *some*, but not *all*, inhabitants of the target house. Regulation 119 does not define who qualifies as an inhabitant and does not proffer a “standard regarding the severity of the offense that must be met.”<sup>152</sup> Moreover, there are no judicial proceedings attached: suspected offenders need not be charged, let alone tried and convicted, prior to demolition.<sup>153</sup> “The decision [to demolish] lies solely within the discretion of the military commander.”<sup>154</sup>

In the absence of greater statutory specificity, case law emerging from challenges to demolition orders offers some guidance for Regulation 119 discretion. For example, it is suggested that military commanders ought to consider the severity of the offense, the strength of the evidence, whether other inhabitants of the house were involved in the offense, and the number of people affected by possible demolition.<sup>155</sup> Military commanders may also consider whether it would suffice to demolish only “that part of the house in which the suspect dwelled; whether the house can be demolished without damaging adjacent houses, and whether it would be possible to suffice in sealing off the house, or parts of it, as a less harmful means relative to demolition.”<sup>156</sup> But Israel’s military commanders retain broad independence in weighing such factors, and the Israeli High Court typically yields to their judgment. In non-demolition cases weighing discretionary actions, the Court is guided by necessity, reasonableness, and proportionality; but when demolition cases arise, “the Court place[s] heavier reliance on the doctrine of proportionality,”<sup>157</sup> assessed “in relation to the severity of the act that is attributed to the suspect, from which the required degree of deterrence is derived.”<sup>158</sup> This Note posits that the High Court typically follows one of two approaches in its assessment, each wielding different degrees of deference: (1) high deference—“approv[ing] the proposed measures by summarily

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152. Farrell, *supra* note 17, at 886.

153. *Id.*

154. *Id.*

155. *Versa: Opinions of the Supreme Court of Israel*, CARDOZO SCH. OF L., <https://versa.cardozo.yu.edu/opinions/center-defense-individual-v-minister-defense-0> (last visited Nov. 24, 2022) (summarizing HCJ 8091/14 Center for the Defense of the Individual v. Minister of Defense (2014), [https://hamoked.org/files/2014/1159000\\_eng.pdf](https://hamoked.org/files/2014/1159000_eng.pdf)).

156. *Id.*

157. Harpaz, *supra* note 20, at 410.

158. *Center for the Defense of the Individual* at 8.

concluding that they are proportionate” with little to no review of the merits or procedural integrity behind a demolition order<sup>159</sup>—or (2) intermediate deference—applying proportionality with some review of the merits or procedural integrity “as a judicial ‘micro-management’ instrument, transforming demolition measures into sealing-off measures or restricting the scope of the measures only to certain parts of the relevant house.”<sup>160</sup> The High Court seldom, if ever, exercises low deference, which would entail a full review of the merits and procedural integrity of a military commander’s demolition order, allowing for the opportunity to find that demolition of any form is disproportionate.<sup>161</sup>

Despite assertions that demolitions are administrative sanctions rather than punitive measures, members of the Israeli High Court itself have seemingly admitted otherwise. In 1982, Justice Barak outlined the severe character of demolitions in *Hamari v. Commander of Judea and Samaria*: “first, it deprives the tenants of their residential home; second, it prevents the possibility of restoring things to their previous condition; and third, it may, occasionally, harm neighboring tenants.”<sup>162</sup> And in 1989, the High Court said, “everybody agrees that a demolition of a building is a tough and severe penalty measure. The preventive [security] power which is concealed inside property demolition does not change the fact that the sanction is punitive.”<sup>163</sup> However, Israel has rebuffed this characterization and continues to assert demolitions’ deterrent effect on security breaches.<sup>164</sup>

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159. Harpaz, *supra* note 20, at 410 (citing HCJ 9353/08 Abu Dahim v. Commander of the Home Front Command 2014 Isr. L. Rep. 487 (2009)); see Farrell, *supra* note 17, at 895 (noting the High Court usually limits its review to “the procedural legality of the decision to issue a demolition order, without addressing the merits of that decision”).

160. Harpaz, *supra* note 20, at 408 (citing HCJ 361/82 Hamari v. Military Commander of Judea and Samaria Region, 36(3) PD 439, 443 (1982)); see Hendrix, *supra* note 13 (“Judges have only occasionally halted such home demolitions but in several recent cases have limited demolition to only parts of structures.”); see also Farrell, *supra* note 17, at 887 (explaining sealing-off measures entail that “doors and windows are cemented or bolted shut, sealing off a room or an entire building” and that “[w]hile not expressly provided for by [Regulation] 119, it is accepted that sealing is implicitly permitted as a less severe sanction”).

161. See Farrell, *supra* note 17, at 895 (“Generally the Court limited its review to the procedural legality of the decision to issue a demolition order, without addressing the merits of that decision. Other issues have been dismissed.”); see, e.g., Hendrix, *supra* note 13 (recounting a *rare* ruling against a punitive demolition wherein the Court determined it would be “‘disproportional’ to displace the accused man’s wife and eight children,” and noting that although “[j]udges have only occasionally halted such home demolitions,” some have been willing if “ordered too long after the fact” or if “not proportional to alleged offenses”).

162. HCJ 4088/22 Alrafai v. Military Commander of the West Bank Area, ¶ 6 (2022) (Kabub, J., dissenting), [https://hamoked.org/files/2022/1665800\\_eng.pdf](https://hamoked.org/files/2022/1665800_eng.pdf) (citing *Hamari*, 36(3) PD at 443).

163. Kremnitzer & Saba-Habesch, *supra* note 148, at 220 n.11 (quoting HCJ 358/88 Association for Civil Rights in Israel v. Head of the IDF Central Command, 43(2) PD 529 (1989)).

164. *Alrafai* at ¶ 11 (citing HCJ 3401/22 ‘Atzi v. GOC Central Command, ¶ 12 (2022) (unpublished)

Legal scholarship refutes Israel's deterrence rationale, claiming demolitions "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 . . . violence."<sup>165</sup> In 2005, "an Israeli military committee chaired by Major General Udi Shani determined that the efficacy of this policy as a deterrent was questionable, and that by engendering hate it caused more damage than good."<sup>166</sup> As a result, punitive demolitions all but ceased for ten years.<sup>167</sup> They resumed in 2014 when the Israeli yeshiva students were killed in the West Bank.<sup>168</sup> However, with "no positive impact on either political policy or security," Israel's return to punitive demolitions in 2014 was more akin to "unfocused revenge" than deterrence.<sup>169</sup> And even if some deterrence was achieved, "it would not render the policy moral or legal. By harming innocents to achieve a goal that has nothing to do with them, the authorities treat these persons as a means rather than as independent human beings with rights."<sup>170</sup> In the words of Justice Kabub in *Alrafai v. Military Commander*, "the severe violation of the rights of the uninvolved tips the scale and defeats the opposing deterring considerations, to the extent that these are indeed deterring and not punitive considerations."<sup>171</sup>

Given Israel's high deference to military discretion and reluctance to own the punitive character of its housing demolition practice, Palestinian petition power is unsurprisingly limited and largely unsuccessful. "Regulation 119 does not explicitly grant the owners of the house a right to a hearing prior to demolition."<sup>172</sup> Before the end of the twentieth century, "[d]emolitions were conducted immediately overnight, and no opportunity existed for the aggrieved party to seek judicial recourse."<sup>173</sup> But in 1989, the Israeli High Court ruled that "prior warning of the impending house demolition must be served, and the occupants must be allowed to challenge the decision before the military commander and if need be, before the High

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("[T]he use of Regulation 119 is not aimed at punishing the innocent, but rather at saving human life by deterring potential perpetrators and their family members.")).

165. Harpaz, *supra* note 20, at 408.

166. *Home Demolition as Collective Punishment*, *supra* note 43.

167. *Id.*

168. *See supra* note 47 and accompanying text.

169. *Atavastic Revenge*, *supra* note 50.

170. *Home Demolition as Collective Punishment*, *supra* note 43.

171. HCJ 4088/22 *Alrafai v. Military Commander of the West Bank Area*, ¶ 9 (2022) (Kabub, J., dissenting), [https://hamoked.org/files/2022/1665800\\_eng.pdf](https://hamoked.org/files/2022/1665800_eng.pdf).

172. Harpaz, *supra* note 20, at 404.

173. Farrell, *supra* note 17, at 893.



Court of Justice.”<sup>174</sup> Given that punitive demolition orders come through the Israeli military and that the High Court has jurisdiction over the acts of military commanders, the High Court has jurisdiction over Palestinian petitions. Generally, families have forty-eight hours to appeal to the Military Commander after a demolition order is delivered, and if that appeal is denied, they can petition to the High Court against demolition.<sup>175</sup> But as with most efforts to implore the High Court’s mercy, “[f]ew have the financial resources for the legal costs and most believe it is futile to engage in a process which invariably fails them.”<sup>176</sup> As discussed, the High Court exercises intermediate or high deference to military discretion and generally limits its review to “the procedural legality of the decision to issue a demolition order, without addressing the merits of that decision.”<sup>177</sup> On such grounds, between July 2014 and August 2020, the High Court abridged only nine punitive demolition orders.<sup>178</sup>

### III. JURISPRUDENTIAL HYPOCRISY

Although many states have seemingly acquiesced to Israel’s invocation of Regulation 119 as the legal basis of its demolition practice, Israel’s jurisprudence boils with hypocrisy. Punitive housing demolitions are carried out in tension with due process norms elsewhere affirmed by Israel’s courts and working constitutional framework, the Basic Laws.<sup>179</sup> Of particular concern, punitive housing demolitions are often executed before the suspected offender has been charged, tried, or convicted,<sup>180</sup> and the only

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174. *Punitive House Demolitions*, HAMOKED, 3 (2014), [https://hamoked.org/files/2014/114633\\_eng.pdf](https://hamoked.org/files/2014/114633_eng.pdf).

175. Harpaz, *supra* note 20, at 404; *see also Home Demolition as Collective Punishment*, *supra* note 43.

176. *Under the Rubble: House Demolition and Destruction of Land and Property*, AMNESTY INT’L, 26 (May 2004), <https://www.amnesty.org/en/documents/mde15/033/2004/en/>; *see Punitive demolitions destroy more than homes in occupied Palestinian territory*, OHCHR (Dec. 28, 2015), <https://www.ohchr.org/en/stories/2015/12/punitive-demolitions-destroy-more-homes-occupied-palestinian-territory> (noting that in 2014, the Al-Shaludi family’s eldest son was accused of committing a “deliberate terrorist attack” when his car crashed into a tram station—the family disputes this, saying it was an accident, and he lost control of his car;” the Al-Shaludi family “chose not to file an appeal, saying they did not believe they would get a fair hearing” and their home was demolished one month later).

177. Farrell, *supra* note 17, at 895; *see supra* notes 159–161 and accompanying text (explaining high, intermediate, and low deference to military discretion).

178. *In a Majority Opinion, the High Court of Justice Cancelled a Punitive Demolition Order for the Home of a Family of Nine, as “the Principle of Proportionality Requires Mitigation of the Harm”: The Military was Allowed to Consider a Partial Sealing of the Home*, HAMOKED (Aug. 10, 2020), <https://hamoked.org/document.php?dID=Updates2188>.

179. *Basic Laws*, *supra* note 134.

180. *OPT: The Legality of House Demolitions*, *supra* note 18; *see also* discussion *infra* Section

“offense” required is mere criminal intent.<sup>181</sup> Moreover, in dispossessing a suspected offender’s innocent family members of their home, punitive demolitions constitute collective punishment.<sup>182</sup> As such, Israel’s punitive housing demolition practice is fundamentally at odds with Israeli legal and moral values, which otherwise condemn pre-conviction and collective punishment.

Israeli courts value legal consistency and normative harmony, suggesting a realignment or annulment of Israel’s punitive demolition practice is due. In *A v. State of Israel*, the High Court discussed the importance of normative harmony, whereby “every possible attempt is made to achieve uniformity in the law and harmony between the various norms.”<sup>183</sup> Exemplifying its commitment thereto, the High Court picked up the gauntlet in *A v. Migdal Insurance Company*, addressing the compensation of escort services.<sup>184</sup> It observed that such compensation is “inconsistent with the general principles of the Israeli legal system” and sought to resolve the tension.<sup>185</sup> In so doing, the High Court referred to a “normative umbrella” of general societal principles that “direct the implementation of legal rules in a way that is consistent with these basic values,” preventing “the introduction of arrangements that are inconsistent with the basic ethical principles of the legal system.”<sup>186</sup> As a key pillar of Israeli law and society, due process belongs in the normative umbrella, directing courts away from pre-conviction and collective punishment. To that end, in *Private Raphael Yissacharov v. Chief Military Prosecutor*—a matter concerning the admissibility of illegally obtained evidence—the High Court observed that legislative inaction “does not exempt the court from its duty to make its case law . . . consistent with the spirit of the Basic Laws, in order to create ‘normative coherence.’”<sup>187</sup> It further noted that “[t]his is especially the case in view of the fact that the court is responsible for the process of discovering the truth and dispensing justice . . . and in view of its duty to achieve these purposes without any disproportionate violation of the accused’s rights.”<sup>188</sup> It is therefore incumbent upon the High Court to resolve the legal

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III(A), notes 206–211.

181. *See supra* notes 150–154 and accompanying text.

182. *See infra* discussion Section III(B), notes 232–2386.

183. CrimA 6659/06 A v. State of Israel, 2008 Isr. L. Rep. 273, 286 (2008) (citing A. BARAK, LEGAL INTERPRETATION – THE GENERAL THEORY OF INTERPRETATION 155 (1992) (internal citations omitted)).

184. CA 11152/04 A v. Migdal Ins. Co. Ltd. 2006(2) Isr. L. Rep. 213 (2006).

185. *Id.* at ¶ 15.

186. *Id.* at ¶ 19 (quoting H CJ 6893/05 Levy v. Gov’t of Israel 59(2) PD 876, 884–85 (2005)).

187. CrimA 5121/98 Yissacharov v. Chief Military Prosecutor 2006(1) Isr. L. Rep. 320, 397 (2006) (citing A. BARAK, A JUDGE IN A DEMOCRACY 63 (2004) (internal citations omitted)).

188. *Id.* at 398.

inconsistencies and normative disharmony between Israel's punitive demolition practice and due process norms, regardless of the Knesset's inaction.

#### A. Punitive Demolitions as Pre-conviction Punishment

Outside its punitive demolition practice, Israel's normative umbrella is positioned against pre-conviction punishment. In 2005, Israel's Constitution, Law, and Justice Committee ("the Committee") held a series of meetings on due process rights.<sup>189</sup> The Committee identified several elements thereof, including sovereign authority, non-retroactivity, proportionality, and fairness of the trial procedure.<sup>190</sup> It also affirmed that due process rights apply "to all people, not just citizens"—necessarily including Palestinians—and that they bind "not only the court, but all state organs, including administrative actions and actors, legislation, enforcement, and investigation."<sup>191</sup> The Committee further specified that "every person has the right to a fair trial, unprejudiced and by an independent judge" and that "the trial process cannot be legally or arbitrarily cancelled."<sup>192</sup> Even more clearly, the Committee proclaimed that "[e]very person is innocent until proven guilty."<sup>193</sup> And under the Pentateuchal text Deuteronomy—cited frequently in Israeli jurisprudence<sup>194</sup>—judges ought to "justify the righteous" (the innocent) and "condemn the wicked" (the guilty).<sup>195</sup> Such are the values driving the Israeli Constitution and court system. On the basis of these texts and values, suspected offenders' homes should not be punitively demolished before they are convicted. Pre-conviction punitive demolition presumes guilt before innocence, contrary to due process, and condemns the righteous by punishing the innocent families of those suspected of criminal intent.

Israeli case law expressly refutes pre-conviction punishment by supporting the presumption of innocence. In *Avraham Ben Haim v. State of Israel*, Justice Danziger recounted that "doing justice in its broad sense also includes the interest of upholding the rights of the accused."<sup>196</sup> To that end,

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189. *Constitution for Israel: The Right to Due Process of Law*, KNESSET, [https://knesset.gov.il/constitution/ConstP21\\_eng.htm](https://knesset.gov.il/constitution/ConstP21_eng.htm) (last visited Nov. 11, 2022).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. See generally H CJ 687/15 Yadid v. The Knesset 2015 Isr. L. Rep. 505 (2015); H CJ 10662/04 Hassan v. Nat'l Ins. Inst. 2012 Isr. L. Rep. 297 (2012); H CJ 7015/02 Ajuri v. IDF Commander, 56(6) PD 352 (2002); CA 2034/9 Amin v. Amin 14 Isr. L. Rep. 611 (1999); CrimApp 3616/92 Dekel Comput. Eng'g Services v. Heshev 51(5) PD 337 (1997).

195. *Deuteronomy* 25:1.

196. LCrimA 10141/09 Ben Haim v. State of Israel, 66 (2012) (Danziger, J., dissenting),

the High Court asserted in *A* that it “has recognized the right to due process as being a protected constitutional right.”<sup>197</sup> It clarified that “due process is a broad right that includes various derivative rights,” including “the right to a fair trial” and “the presumption of innocence.”<sup>198</sup> The High Court explained that Israel’s Basic Laws “fortified the defendant’s right to a fair trial” by anchoring “the right of each person to liberty, through the constitutional recognition of human dignity, of which the defendant’s right to a fair trial is a part.”<sup>199</sup> And in *Private Raphael Yissacharov*, the High Court said, “[i]t is bound by the duty to uphold the rights protected in the Basic Laws and whatever is implied by this with regard to conducting the judicial process.”<sup>200</sup> In *State of Israel v. Beer-Sheba District Court*, the High Court defined the right to a fair trial, stating: “[i]n order that a trial may be considered fair, it should comply with various criteria, which include . . . protection of the presumption of innocence.”<sup>201</sup> It added that a defendant “enjoys the presumption of innocence” during the period between “arrest until the end of proceedings.”<sup>202</sup> In effect, the High Court is precluded from authorizing punitive measures against defendants before a verdict is reached.

However, Israel’s preclusion of pre-conviction punishment stops short of its punitive housing demolitions in the West Bank. Israeli law does not require suspected offenders to be charged, tried, or convicted prior to the punitive demolition of their family’s home.<sup>203</sup> Accordingly, the High Court did not even hear its first demolition case until 1979, though demolitions have been practiced since 1948.<sup>204</sup> In 1982, the High Court held that a military commander may order a demolition without a conviction only in “exceptional circumstances” and “following due discretion and examination.”<sup>205</sup> But pre-conviction demolition is far from an exceptional practice and military discretion is broadly unchecked. Suspected offenders “are *seldom* tried and convicted prior to demolition. In most cases,

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[https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/09/410/101/n10&fileName=09101410\\_n10.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/09/410/101/n10&fileName=09101410_n10.txt&type=4).

197. CrimApp 8823/07 A v. State of Israel 2010 Isr. L. Rep. 352, 353 (2010).

198. *Id.* at 371.

199. *Id.*

200. CrimA 5121/98 Yissacharov v. Chief Military Prosecutor 2006(1) Isr. L. Rep. 320, 397 (2006).

201. HCJ 11339/05 State of Israel v. Beer-Sheba District Court 2006(2) Isr. L. Rep. 112, 150 (2006).

202. *Id.* at 140.

203. *See supra* notes 153–154 and accompanying text; *see also Israel: Stop Punitive Home Demolitions*, HUM. RTS. WATCH (Nov. 21, 2014), <https://www.hrw.org/news/2014/11/21/israel-stop-punitive-home-demolitions> (explaining Israel’s punitive demolition strategy “deliberately and unlawfully punishes people not accused of any wrongdoing”).

204. *See Domb, supra* note 128, at 345–46; *see also Israel’s Demolition of Palestinian Homes: A Fact Sheet, supra* note 27.

205. *Punitive House Demolitions, supra* note 174, at 2 (emphasis added).

demolitions are carried out after an accused offender has been taken into custody, but prior to a formal adjudication of an offender's guilt in the military court systems. In other instances, the accused is not yet in custody."

<sup>206</sup> In 2018, Yousef Abu Hamid allegedly threw "a marble slab from a roof at invading Israeli soldiers during a night time raid of [Ramallah's al-Amari refugee camp]," killing one of the soldiers.<sup>207</sup> In response, the High Court authorized the punitive demolition of Hamid's family home—before Yousef was convicted.<sup>208</sup> Similarly, in 2022, Ass'ad Yusef Alrafai was indicted for the deaths of two Israelis.<sup>209</sup> His family members petitioned the High Court to stop the demolition of their home and were denied before Alrafai stood trial.<sup>210</sup> But worse yet, "[i]n a few cases, demolitions have occurred in spite of the death of the alleged offender."<sup>211</sup> For example, in 2014 when the Al-Shaludi family's eldest son was suspected of deliberately causing a car accident, giving rise to a demolition order, he was killed by Israeli forces on the scene of the incident before he was charged or tried.<sup>212</sup> His extrajudicial killing did not stop the demolition of his family's home.<sup>213</sup>

Overall, it is clear that Israel's disposition against pre-conviction punishment does not extend to Palestinians facing punitive housing demolition orders. In response to criticism, Israel alleges military necessity under Article 53 of the Fourth Geneva Convention.<sup>214</sup> In 1971, Meir

206. *OPT: The Legality of House Demolitions*, *supra* note 18 (emphasis added); *see also* Farrell, *supra* note 17, at 889 ("Most demolitions take place after the inhabitant suspected of engaging in a violent offense has been arrested. Usually, the suspect is simply in custody, sometimes facing charges but often times not.").

207. *Israel's Supreme Court Approves Pre-Conviction Punitive House Demolition*, MIDDLE E. MONITOR (Dec. 3, 2018), <https://www.middleeastmonitor.com/20181203-israels-supreme-court-approves-pre-conviction-punitive-house-demolition/>; *see* Toi Staff, *High Court Okays Home Demolition of Palestinian Charged with Killing IDF Soldier*, TIMES OF ISR. (Dec. 2, 2018), <https://www.timesofisrael.com/high-court-okays-home-demolition-of-palestinian-charged-with-killing-idf-soldier/> ("The Hamid family asked the court to nullify the IDF's demolition order because their son had not yet been convicted of killing Lubarsky, while arguing that demolishing the entire building would cause disproportionate harm to the other occupants who were not involved in the attack . . . Justice Yael Wilner rejected the Palestinian family's petition, saying that Israeli military courts are not legally required to wait for a conviction before issuing demolition orders.").

208. *See also* Hendrix, *supra* note 13 (recounting a similar case involving Abu Bakr and noting that he had "yet to be convicted. But in keeping with its policy, the Israeli military ordered the destruction of his top-floor apartment soon after he was indicted.").

209. HCJ 4088/22 Alrafai v. Military Commander of the West Bank Area, ¶ 2 (2022) (Kabub, J., dissenting), [https://hamoked.org/files/2022/1665800\\_eng.pdf](https://hamoked.org/files/2022/1665800_eng.pdf).

210. *Id.* (noting that "if and when convicted of the offenses attributed to him, [Alrafai] will most likely spend the rest of his life behind bars").

211. *OPT: The Legality of House Demolitions*, *supra* note 18.

212. *Punitive demolitions destroy more than homes in occupied Palestinian territory*, *supra* note 176.

213. *Id.*

214. Shane Darcy, *Punitive House Demolitions, the Prohibition of Collective Punishment, and the*

Shamgar, then the Attorney General for Israel, cited two ends of military necessity achieved by demolitions under the Fourth Geneva Convention: (1) “the necessity of destroying ‘the physical base for military action when persons *in the commission* of a hostile military act are discovered;” and (2) “the need to deter *future law-breaking*, to ‘create effective military reaction.’”<sup>215</sup> Only the latter end is potentially relevant to punitive demolitions, which occur after the commission of a security breach, not “in the commission” thereof.

However, Israel’s argument does not stand. First, Israel denies the applicability of the Fourth Geneva Convention to Palestine in other respects and cannot credibly invoke its authority on a selective basis.<sup>216</sup> Second, “the concept of military necessity is not a ‘carte blanche’” and is subject to three conditions:

- (i) [T]he presence of an immediate and concrete threat, (ii) that the demolition be an adequate response to the threat, and (iii) that, even if the first two conditions are fulfilled, such demolition must respect the principle of proportionality. If the demolition fails to fulfill one of the criteria, it is illegal.<sup>217</sup>

In situations where a suspected offender is in custody or dead, Israel’s alleged military necessity defense fails on the first condition—the immediate or concrete threat presented by a suspected offender is necessarily diffused by their incapacitation. Furthermore, pre-conviction deterrence is moot as a theoretical concept. Societal deterrence can only be effective if it exemplifies a guilty party.<sup>218</sup> Before conviction, parties are presumed innocent such that deterrence has no foothold, rendering punitive demolitions inadequate and disproportional to the aim of preventing future law-breaking.

Moreover, there is “limited scope for the destruction of a house during the course of military operations” and “demolitions that are carried out punitively with the stated goal of deterrence cannot be regarded as being imperative military necessities.”<sup>219</sup> As articulated by Elvina Pothelet, a legal

*Supreme Court of Israel*, 21 PENN ST. INT’L L. REV. 477, 483 (2003).

215. *Id.* (emphasis added).

216. See *supra* note 133 and accompanying text; see also Michael Samuel, *Punitive House Demolitions in the West Bank*, 6 BERKELEY J. MIDDLE E. & ISLAMIC L. 1, 1 (2014) (“Israel systematically disregards belligerent occupation law entirely or interprets the law selectively, enforcing only provisions that do not endanger its goals.”).

217. *OPT: The Legality of House Demolitions*, *supra* note 18; see also RAJA SHEHADEH, OCCUPIER’S LAW: ISRAEL AND THE WEST BANK 154–55 (1985).

218. Efraim Benmelech et al., *Counter-Suicide-Terrorism: Evidence from House Demolitions*, 77 U. CHI. J. POL. 27, 27 (2015) (noting that in the context of punitive demolitions, “selective violence is an effective tool to combat terrorist groups [but] indiscriminate violence backfires”).

219. Darcy, *supra* note 214, at 483.

advisor for the International Committee of the Red Cross, “[t]he *punitive* nature of the demolition cannot possibly be reconciled with even the most generous understanding of military necessity, which is *prospective* in nature. The use of the term ‘deterrent’ by the Israeli government . . . seems to reflect no more than a difference in rhetoric.”<sup>220</sup> With that said, military necessity cannot possibly justify the pre-conviction punitive demolition of a suspected offender’s family home.

## B. Punitive Demolitions as Collective Punishment

As with pre-conviction punishment, Israel’s normative umbrella is positioned against collective punishment. In a report to the United Nations Human Rights Council, the Special Rapporteur on the Situation of Human Rights in Palestine defined collective punishment as actions punishing innocent “communities or groups of peoples for offences committed by individuals” and proclaimed that individual responsibility ought to be “the cornerstone of any rights-based legal order.”<sup>221</sup> In *Gadisi v. Attorney General*, the High Court aligned itself in favor of individual responsibility, declaring that “criminal law encompasses the idea of just punishment, and the sense of justice opposes having a human being punished in vain, meaning to say without bearing any moral blame for behavior infringing a prohibition by law.”<sup>222</sup> Similarly, in *Anonymous v. Minister of Defence*, the High Court found that 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” because “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.”<sup>223</sup> Justice Cheshin added, “It is one of our supreme values that every person is responsible for his own wrong and is punished for his own sin.”<sup>224</sup>

Bolstering the High Court’s position, “the principle of individual culpability” is “consistent with the norms of . . . [Israel’s] ‘Jewish and

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220. Elvina Pothelet, *The ICC and Israel: Prosecuting the Punitive Demolition of Palestinian Homes – Part 1*, OPINIOJURIS (Mar. 22, 2018), <http://opiniojuris.org/2018/03/22/the-icc-and-israel-prosecuting-the-punitive-demolition-of-palestinian-homes-part-1/>.

221. Human Rights Council, *supra* note 45, at 7.

222. AdminA 11/65 *Gadisi v. Attorney General*, 20(1) PD 57, 68 (1965).

223. Harpaz, *supra* note 20, at 417 (citing CrimFH 7048/97 *Anonymous v. Minister of Defence*, 2000 PD 54(1) 721, 727, 743–44 (2000); Emmanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. L. 721, 743–44 (2001)).

224. Gross, *supra* note 223, at 724.

democratic values.”<sup>225</sup> Israel defines itself as a Jewish democratic state.<sup>226</sup> As such, Jewish values are central to Israel’s political and legal fabric. Israel extends religious tenets into a number of state institutions, including “the observance of dietary laws in the army or the observance of Shabbat and Jewish holidays by governmental institutions and authorities.”<sup>227</sup> And under the Foundations of Law Statute, “[w]here a court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in light of the principles of freedom, justice, equity and peace of Israel’s heritage.”<sup>228</sup> In *Ajuri v. IDF Commander*, the High Court incorporated Jewish values in its legal analysis, citing Deuteronomy: “[f]rom our Jewish heritage we have learned that ‘parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin.’”<sup>229</sup> The High Court continued, stating that “[e]ach person bears his own iniquity and each person will die for his own sin;” “[a] person will be arrested for his own sin and not for the sins of others.”<sup>230</sup> Justice Cheshin took a similar approach in *Alamarin v. IDF Commander*, citing scripture from the Law of Moses about Amaziah, King of Judah: “[a]nd it came to pass when the kingdom was firmly in his control that he slew his servants who killed the king his father, but he did not put the sons of the killers to death.”<sup>231</sup> With Judaism in view, the High Court sides with individual responsibility against collective punishment.

However, punitive housing demolitions in the West Bank are the exception to Israel’s pro-individual responsibility, anti-collective punishment mindset. Although the Court initially respected the idea of some individual responsibility in housing demolition cases,<sup>232</sup> “acting under the

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225. Harpaz, *supra* note 20, at 418 (citing *Ajuri*, 56(6) PD at ¶ 26).

226. *Constitution for Israel: The State of Israel as a Jewish State*, KNESSET, <https://knesset.gov.il/constitution/ConstMJewishState.htm> (last visited Nov. 14, 2022) (“‘Jewish and Democratic’ is the Israeli ethos . . . Israel’s Jewish and democratic values are both grounded in its existing constitutional documents . . . Judaism in Israel is reflected in values, politics, and culture as much as it is in religious practice.”).

227. *Id.*

228. *Id.*

229. *Ajuri* 56(6) PD at ¶ 24; *see also* H CJ 2722/92 *Alamarin v. IDF Commander*, 46(3) PD 693, ¶ 7 (1992) (Cheshin, J., concurring) (“So we are taught in the Book of Deuteronomy and we learn also in the second Book of Kings that this is the law of Moses: in the reign of Joash, king of Judah, his servants Jozachar the son of Shimeath and Jehozabad the son of Shomer rose up against him and killed him . . . ‘And it came to pass when the kingdom was firmly in his control that he slew his servants who killed the king his father, but he did not put the sons of the killers to death’ . . . This is the spirit and this is what we should do.”).

230. *Ajuri* 56(6) PD at ¶ 24 (internal citations omitted).

231. *Alamarin*, 46(3) PD at ¶ 6.

232. Harpaz, *supra* note 20, at 419 (citing H CJ 698/85 *Dejalas v. Military Commander of Judea and Samaria Region*, 40(2) PD 42 (1986)).



pressure of the military authorities, it relinquished that requirement: lack of such [responsibility or] knowledge was found not to preclude the imposition of the demolition order.”<sup>233</sup> Early on, Israel “carried out ‘neighborhood punishment,’ under the broad language of [Regulation] 119, demolishing homes in areas proximate to a location where attacks had occurred.”<sup>234</sup> As the practice evolved, it became “limited to instances in which an attack was launched from a specific house or cases in which an ‘inhabitant’ of the house was suspected of involvement in an offense.”<sup>235</sup> In 1992, the High Court ruled in *Khizran v. IDF Commander* that “the military commander’s authority to demolish a person’s home pursuant to Regulation 119 . . . applies to the entire building, regardless of the innocence of the other occupants.”<sup>236</sup> In a minority opinion, Justice Cheshin—a staunch opponent to punitive demolitions—asserted that demolishing entire family homes in the absence of guilt constitutes collective punishment.<sup>237</sup> He emphasized in *Alamarin* that “if we agree that a residential unit belonging to one person should be destroyed, it is not proper to destroy residential units belonging to others as well.”<sup>238</sup> To that end, it is wholly against the principle of individual responsibility to displace numerous innocent people for a crime they did not commit or know about, even if the alleged offender was properly charged and convicted beforehand.

In seeming acknowledgment of Justice Cheshin’s stance, the High Court limited the scope of Regulation 119 in 1993.<sup>239</sup> In *Turkman v. Minister of Security*, it stopped the punitive demolition of a ten-person household on grounds of disproportionality, ordering a partial seal instead.<sup>240</sup> Unfortunately, Israel’s punitive demolition practice continued in force thereafter, ramping up during the second Intifada “as a means of ‘deterrence’ in its fight against suicide attacks.”<sup>241</sup> However, the practice continued to

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233. *Id.* (internal citations omitted).

234. *OPT: The Legality of House Demolitions*, *supra* note 18 (citing ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES: 1967-1982, 97 (1985)).

235. *Id.* (citing DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 146 (2002)).

236. *The Punitive Demolition of Homes*, HAMOKED, <https://hamoked.org/timeline.php?uuid=383e1180-6ad4-11eb-a98c-021656ed9372> (last visited Nov. 12, 2022).

237. *Id.* (acknowledging that if family members knew about the crime or undertook to turn a blind eye, they would assume individual responsibility, such that demolition would not be collective punishment).

238. See H CJ 2722/92 *Alamarin v. IDF Commander*, 46(3) PD 693, ¶ 4 (1992) (Cheshin, J., concurring).

239. *The Punitive Demolition of Homes*, *supra* note 236 (referencing H CJ 5510/92 *Turkman v. Minister of Defense* 48(1) PD 217 (1993)).

240. *Id.*

241. *Id.*

face scrutiny inside and outside the High Court.<sup>242</sup> In 2015, Justice Vogelmann wrote a minority opinion in *Sidr v. Commander of IDF Forces* contending that “between the benefit and the harm to human rights which result from implementing the Regulation’s content . . . in the absence of involvement by members of the household, the drastic harm to the rights of the uninvolved pushes the scales and enhances the considerations against such action.”<sup>243</sup> Also in 2015, Justice Mazuz’s *Abu Jamal v. GOC Home Front Command* opinion reflected on the character of Israel as a Jewish democratic state, concluding, “these principles inevitably lead to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power.”<sup>244</sup> In 2020, the High Court stopped the punitive demolition of a three-story home in *Abu Baher v. Military Commander*, admitting the demolition would “‘primarily harm . . . the wife and children,’ who are innocent beyond doubt.”<sup>245</sup> Although a promising turn, Court President Esther Hayut insisted that no new precedent was set in *Abu Baher* and that punitive demolitions are still a valid practice.<sup>246</sup> Nonetheless, criticisms persist. In 2022, after yet another family’s petition was denied in *Alrafai v. Military Commander*, Justice Kabub said, “[w]e must remember that this is not the petition of a perpetrator petitioning against the proportionality of the harm inflicted on him,” it is the petition of “the family members, some of whom are minors, some of whom are ill, and all of whom are innocent.”<sup>247</sup>

In its defense, Israel generally denies that punitive housing demolitions constitute collective punishment. In 1986, the High Court claimed housing demolitions are “similar to a prison sentence imposed on the head of the family—a father of minors whose imprisonment would leave them without

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242. See H CJ 2006/97 Janimat v. GOC Central Command, 51(2) PD 651, 655 (1997) (Cheshin, J., dissenting) (“If we demolish the perpetrator’s apartment we shall simultaneously destroy the home of this woman and her children. We will thereby punish this woman and her children even though they have done no wrong. We do not do such things here.”).

243. H CJ 5839/15 Sidr v. Commander of IDF Forces, ¶ 6 (2015) (Vogelman, J., dissenting), <https://hamoked.org/document.php?dID=Documents2799>.

244. H CJ 8150/15 Abu Jamal v. GOC Home Front Command, ¶ 13 (2015) (Mazuz, J., dissenting), [https://hamoked.org/files/2015/1160003\\_eng.pdf](https://hamoked.org/files/2015/1160003_eng.pdf).

245. *High Court of Justice Cancelled a Punitive Demolition Order for the Home of a Family of Nine*, *supra* note 178 (citing H CJ 4853/20 Abu Baher v. Military Commander, ¶ 5 (2020) (Mazuz, J., dissenting), [https://hamoked.org/files/2020/1664391\\_eng.pdf](https://hamoked.org/files/2020/1664391_eng.pdf)).

246. “No New Precedent was Set”: the HCJ Rejected the State’s Request for a Further Hearing on the Judgment Cancelling a Punitive Demolition Order, HAMOKED (Oct. 11, 2020), <https://hamoked.org/document.php?dID=Updates2198>.

247. H CJ 4088/22 Alrafai v. Military Commander of the West Bank Area, ¶ 3 (2022) (Kabub, J., dissenting), [https://hamoked.org/files/2022/1665800\\_eng.pdf](https://hamoked.org/files/2022/1665800_eng.pdf).

a supporter”—and acceptable on similar grounds.<sup>248</sup> That comparison was unconvincing. “The immediate aim of a prison sentence is to negate the offender’s freedom. The suffering of family members is an unavoidable result of the sanction but not its purpose. In contrast, the immediate aim of a house demolition is to make family members suffer.”<sup>249</sup> Nevertheless, in 1990, the High Court asserted that Regulation 119 “is not an authority to execute a collective punishment; its activation is not designed to punish the appellant family members.”<sup>250</sup> In 2014, the High Court again declared “the purpose of Regulation 119 is deterrence[,] which may also be directed at those close to the offender, but that it does not amount to collective punishment.”<sup>251</sup> Elevating Israel’s deterrence narrative, High Court President Hayut declared in 2020 that “use of this measure is allowed so long as its benefit ‘exceeds the damage it causes.’”<sup>252</sup> In 2022, the High Court in *Alrafai* affirmed that “the use of Regulation 119 is not aimed at punishing the innocent, but rather at saving human life by deterring potential perpetrators and their family members” and that “the awareness of the tenants of the building designated for demolition of the perpetrator’s intentions is not a necessary condition for exercising the demolition order.”<sup>253</sup> It concluded that “the considerations of deterrence and the severity of the attack . . . prevail over the harm caused to [the] family.”<sup>254</sup>

However, in *Alrafai*, the High Court candidly admitted that “it is difficult to evaluate the effectiveness of the policy of the demolition of perpetrators’ homes.”<sup>255</sup> It declined to comment further, stating, “[t]he solution to this dispute, to a large extent, is not found in our subjective position, but rather in the data, facts and opinions of the professional bodies.”<sup>256</sup> But the data, facts, and opinions of professional bodies oppose punitive housing demolitions. Familial relation and shared proximity with alleged offenders are not crimes, and the efficacy of Israel’s deterrence rationale has been refuted time and again, such that it exists as merely a

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248. Mordechai Kremnitzer & Tatjana Hörnle, *Human Dignity and the Principle of Culpability*, 44 *ISR. L. REV.* 115, 130 (2011) (citing *Dejalas*, 40(2) PD at ¶ 44).

249. *Id.*

250. Kremnitzer & Saba-Habesch, *supra* note 148, at 220 n.13 (citing H CJ 798/89 Shukri v. Minister of Defense (1990) (unpublished)).

251. *Punitive House Demolitions*, *supra* note 174, at 2.

252. *No New Precedent was Set*, *supra* note 246.

253. H CJ 4088/22 *Alrafai v. Military Commander of the West Bank Area*, ¶¶ 11, 14 (2022) (Kabub, J., dissenting), [https://hamoked.org/files/2022/1665800\\_eng.pdf](https://hamoked.org/files/2022/1665800_eng.pdf).

254. *Id.* at ¶ 15 (citing H CJ 6420/10 *Al-Atzafra v. Military Commander*, ¶ 13 (2019) (unpublished)).

255. *Id.* at ¶ 13.

256. *Id.*

conjectural end.<sup>257</sup> To that point, human beings are not collateral to conjectural ends, especially at the expense of due process and jurisprudential harmony.

#### IV. CONCLUSION

Israel's punitive housing demolition practice has rendered hundreds of innocent Palestinian families in the West Bank homeless and destitute. As demolition cases surge following COVID-19, it is increasingly important to understand the origin, scope, and implications of Israel's demolition power. The power derives from Emergency Regulation 119, a British Mandate-era instrument adopted in 1945 and preserved by Palestine's subsequent occupying powers. Today, Regulation 119 is sustained by and parasitic to Israel's perpetual state of emergency. It affords broad discretion to the Israeli military and is met with considerable deference from the Israeli High Court of Justice. In response to criticism, Israel weakly asserts that punitive demolitions are merely administrative sanctions—not punitive measures—and that they are a necessary deterrent mechanism against Palestinian activists and related security breaches. However, housing demolitions are characteristically punitive, their deterrent value is demonstrably superficial, and they fall outside the bounds of military necessity.

Moreover, punitive housing demolitions create tension with due process norms elsewhere affirmed in Israeli jurisprudence. As pre-conviction punishment, punitive demolitions violate Israel's respect for fair trial rights and the presumption of innocence. As collective punishment, punitive demolitions defy Israel's esteem for individual responsibility. Given Israel's desire for legal consistency and normative harmony, it is incumbent on the High Court to resolve the boiling jurisprudential hypocrisy inherent in its treatment of punitive demolition orders. To that end, Israel's punitive demolition power under Regulation 119 ought to be significantly curtailed, if not wholly annulled. Human life and livelihood are not a means to an end—innocent Palestinian families deserve protection, respect, and fair treatment before the law and under Israel's normative umbrella.

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257. See *supra* notes 165–171 and accompanying text (explaining the scholarly and sociopolitical refutation of Israel's deterrence rationale).