
The Struggle Against Terrorism Versus Human Rights
——The Appropriate Balance

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A person may ask are the Petitioners entitled to have humanitarian considerations weighed in their case? The petitioners are members of terrorist organizations far removed from humanitarianism and whose purpose is to injure innocent persons. Are the Petitioners worthy of having humanitarian considerations weighed in their case, when at the same time organizations to which the Petitioners belong hold Israeli soldiers and civilians giving no weight whatsoever to humanitarian considerations and refusing to give any information about our people who are being held by them? To these questions our answer is as follows: the State of Israel is a state that abides by the rule of law, the State of Israel is a democracy respecting human rights and giving great weight to humanitarian considerations. We weigh these considerations

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165
because the dignity of every person is dear to us, even if that person is one of our enemies... we are aware that this approach, prima facie, grants an "advantage" to terrorist organizations which are far removed from humanitarianism. But this is a transitory "advantage". Our moral approach, the humanity in our position, the rule of law which guides us—all these are an important components of our security and strength. Ultimately, it is our own advantage.¹

The State of Israel is currently facing a war the like of which few states have known in the past. It is an armed and bloody terrorist struggle, unrestrained and lacking mercy, constrained by none of the moral or legal norms of a civilized society. It is a terrorism of suicide bombers motivated by a "holy war," killing themselves in the midst of the civilian population, a non-combatant population, a helpless population made up children, women and the elderly.

The 11th of September 2001 will always be remembered as a brutal example of what terrorism can do to innocent people. On that date, in a blood-chilling, well-orchestrated and thoroughly planned attack, a terrorist group took control of four passenger planes, crashing three into the Twin Towers of the World Trade Center in New York and the Pentagon in Washington and the fourth into a field in Pennsylvania.

It seems to me that there are few examples in modern history of terrorism conducted by suicide bombers. The Japanese kamikazes operating during World War II are perhaps the best known example. However, there the acts of suicide were committed by soldiers facing the soldiers of their enemy.² In contrast, Islamic terrorism, which Israel currently faces, is the terrorism of religious fundamentalism, of youths on a "mission from God."³ The goal of this terrorism is to kill unbelievers, whether Christians or Jews. Jews must be killed for being Jewish, whereas in the context of the Middle East, they must be destroyed on the grounds that Israel has no right to exist. That is, all Palestinian lands must be handed over to the Palestinians.⁴

² See, e.g., AMOS HAREL, THE SUICIDE TERRORISTS: AGED 17-28, BACHELORS SOME STUDENTS, Ha'aretz 24.8.01, 1A (Hebrew).
³ "The primary reason for the acts of suicide is described as the desire for religious and nationalist sacrifice... the promise of 72 virgins in Paradise in not folklore, it provides real encouragement, motivating the suicide terrorist." Id. at 4A.
⁴ For background material on this, see G. BECHOR, PLO LEXICON (Ministry of Defense
Israel is a Jewish and democratic state;\(^5\) it is perhaps the only democratic state in a region of regimes which are monarchical, theocratic or despotic. As part of its ancient culture, on the one hand, and its western culture, on the other hand, Israel is committed to moral and legal norms that are compatible with its values and regime. Israel is a law-abiding country that is governed by the rule of law in the most formal sense:\(^6\)

The rule of law in this sense has a dual meaning: the legality of the regime and the imposition of the law. This is a formal principle, as we are not interested in the content of the law but with the need to impose it, irrespective of its content. The rule of law in this sense is not connected with the nature of the regime but with the principle of public order.\(^7\)

Israel is also governed by the rule of law in the substantive sense. Israel belongs to the family of nations that preserve the substantive, principled character of their laws.\(^8\) Both aspects of the rule of law are important,

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\(^5\) The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations... See Israeli Declaration of Independence. See also Section 1A of Basic Law: Human Dignity and Liberty.

\(^6\) In this sense, the rule of law is the opposite of anarchy and to [the principle] 'whoever is more violent conquers'; and it means that the legal order, which is predetermined, dictates mandatory prohibitions and permissions. In this sense, the rule of law is a technique of social organization, which in the light of human experience is inescapable. In this sense the rule of law makes a number of demands: (a) that the law will be applied; (b) that it will be obeyed by the public authorities; (c) that human rights will be decided according to the law and exclusively in accordance with the law.

\(^7\) See H.C. 428/86, Barzilai v. Israel, 50(3) P.D. 505, 621 (Hebrew).

\(^8\) What, therefore, is the nature of the rule of law in this sense? As we are dealing with a principle, which is in part supra-legal, it is natural that its boundaries will be disputed. Dicey's definition of the rule of law was compatible with the England of the end of the last century; however, it is highly doubtful whether the definition is suited to the needs of other societies
particularly in times of emergency, in which a democratic country threatened at home and abroad, is required to uphold its values while defending itself appropriately. This balance between the preservation of human rights and the ability of a democratic country to defend itself efficiently, is a difficult issue with which very few states have had experience that may equal that of Israel.

The correct balance between the maintenance of the rule of law in both its senses, formal and substantive, and the ability of a democratic state to defend itself, ultimately reflects the moral integrity of the state. It also shows its ability to cope with times of emergency when the state is required to show its military and moral strength.

This military and moral strength is reflected in a variety of social fields of activity, such as in relation to prohibitions and permissions in connection with the interrogation of terrorist suspects,\(^9\) taking hostages as bargaining counts for the purpose of recovering soldiers captured by terrorist organizations,\(^10\) and deciding the legitimacy of striking at terrorists and their commanders as part of a theory of self-defense.\(^11\) In this context of the infringement of human rights by military bodies, the question of the appropriate standard of evidence also arises.\(^12\)

In this article I will examine an additional issue within the context of the balance between human rights and the right of a democracy to defend itself efficiently against acts of terror, namely, the exercise of administrative measures by the security authorities against terrorists and the civilian population. I am referring here to measures that Israel has taken over many years, such as the demolition of the homes of terrorists as a response to the


commission of acts of terror by them. Newer measures currently applied in
reaction to the armed Palestinian uprising that commenced in October 2000,
include the imposition of closures or barricades of population centers in which
terrorist have concealed themselves. One question that arises out of the
discussion of these issues is whether it is lawful to impose curfews on a
civilian population in an attempt to prevent terrorists from undertaking some
act or in order to enable their capture. Another question concerns the
lawfulness of the imposition of personal restrictions on the movement of
suspected terrorists.

In the first section, the article will consider the definition of terrorist
conduct and the problems entailed in the definition of the legal status of
terrorists. The second section will examine the legality of using the sanction
of demolishing homes as a response to acts of terror. The third section will
examine the legality of imposing closures or barricades, and the fourth section
will examine the legality of curfews. The fifth section will deal with
declarations that a particular place is a closed military area and the final
chapter will summarize and set out the conclusions of our investigations.

I. WHAT IS TERRORIST CONDUCT AND WHO IS A TERRORIST?

The problem of terrorism is complex and difficult. It is not certain that one
agreed definition may be found of conduct which may be termed "terror", and
the perpetrators of which may be termed "terrorists."

A. What is Terrorism and Who is a Terrorist?

Like the term "torture", the term "terrorism" is difficult to classify or assign
a clear meaning or definition. This term was invented at the time of the French
Revolution when the government established the Reign of Terror, with the
object of executing political opponents, seizing their property and imposing
terror on the rest of the population until it would yield to the regime. Nonetheless, the majority of the definitions possess a common basis.
Terrorism is the use of violence and the imposition of fear in order to achieve
a purpose, generally the collapse of an existing regime or revolt against it. In
order to achieve this purpose, members of a group organize in a structure
which enables the leader to exercise strict supervision over his subordinates. An
additional aspect is whether the activities of this group have the moral

\[\text{See David B. Kopel & Joseph Olson, Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation, 21 Okla. City U. L. Rev. 247, 251 (1996).}\]
support of the state. If in the past terrorism was localized and targeted its victims, today the problem is world-wide. Today, terrorist organizations exchange intelligence, fighting tactics, weapons and the like. Moreover, the support of states such as Iran, Libya and Iraq, in the supply of funds, weapons, intelligence and training facilities, also facilitates the activities of the organizations. Now the terrorist organizations organize swiftly, without engaging in any ordered activity. Terrorism draws its strength from both political and religious sources. Further, a new medium has been opened for terrorist activity, terrorism via the Internet that is carried out, *inter alia*, by causing the temporary collapse of web-sites and by the infiltration of viruses into essential computers occasionally with major economic damage resulting. Thus, today, this new form of terrorism must also be taken into account, when attempting to define the term.

The term terrorism is defined in part 14(1) of the English Prevention of Terrorism (Temporary Provisions) Act of 1984 (PTA of 1984) and in part 20 of the English Prevention of Terrorism (Temporary Provisions) Act of 1989 which replaced it: "... terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." Use of the term "violence" hints at unlawful behaviour, and more precisely to the commission of offenses that includes a threat to the safety of an individual. The term "political ends" hints at and emphasizes the fact that terrorist violence is a tool for the furtherance of other objectives underlying it. However, there are a number of problems with this definition. First, the definition still embraces a number of offenses, which according to one's ordinary understanding should not be described as terrorist acts. Thus, persons who demonstrate against state policy and in the course thereof are involved in a brawl, may be deemed to be terrorists under this definition. An additional problem ensues from the definition of a terrorist in part 31 of the Northern Ireland (Emergency Provisions) Act of 1978. In the judgment of

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15 See id. at 1020-21, 1031-32.
18 Id.
19 See id.
20 See id.
21 See id. "[T]errorist . . . a person who is or has been concerned in the commission or
DEMOCRACY'S STRUGGLE

the Irish Appeals Court in *McKee v. Chief Constable of Northern Ireland*, it was held that it is necessary to prove active and not passive participation in order for an accused to be deemed a "terrorist." Thus, members of a terrorist organization, or supporters thereof, will not be regarded as terrorists so long as they remain passive. This interpretation was not adopted in the Prevention of Terrorism (Temporary Provisions) Act of 1989, in Britain, as may be seen from the Act itself. Schedule 1 of the Act lists two organizations, the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA), as terrorist organizations. In addition, it provides that all those who belong to or support these organizations are terrorists. The Secretary of State may add additional organizations to this list or remove organizations from the list.

The characteristics of terrorist organizations and their structure are signified by a traditional, efficient terrorist organization based on a number of key figures located at the heart of the organization. A larger terrorist organization generally comprises a number of cells, each of which is responsible for a discrete field and each of which reports directly to the cell above it. Terrorist organizations comprise men and women without distinction and without discrimination. Generally in their twenties, these people often come from a middle class background and are often enlisted in university campuses. In the organization itself, a person’s background is immaterial. Each member is trained to perform his own functions.

The definition of terrorism as a violent act may be problematic. Thus, an accidental killing or the maintenance of public order by the police or army, acts which most people would not regard as being terrorist, may fall within the definition of violence that is in the nature of a terrorist act. However, as already noted, these will not be defined as terrorist activities. The distinction may lie in the statutory purpose behind the requirement that violence exist. In other words, violence that is exercised in order to maintain public order, for a legal purpose, will not be deemed a violent act that is in the nature of attempted commission of any act of terrorism or in directing, organising or training persons for the purpose of terrorism . . . ."

See Walker, *supra* note 17, at 5.


Id.; see id. § 1.


See id.
terrorism. Likewise, a person demonstrating against government policy will not be declared to be a terrorist, notwithstanding that he may fall within the various definitions of a terrorist. Generally, there will be agreement as to what is terrorism and what is not a terrorist activity. However, this agreement does not rely on the formal interpretation of this term. An additional problem in relation to the classification of terrorism is that terrorism is approached in the same way as every other criminal act. The moment a person is caught and convicted he is regarded as a criminal convict for every purpose. No special distinction is made between a terrorist act and other criminal acts. It is also difficult to distinguish between terrorist offenses and criminal offenses that entail violence or the threat of violence. If we fail to distinguish between or to preserve the clear dichotomy between an “ordinary” criminal offense and a “terrorist” offense, the problem of sliding down the “slippery slope” may arise. Accordingly, the distinction must be preserved. A further illustration of the lack of a clear dichotomy in this context may be seen in the United States. Thus, in a number of federal statutes, terrorist activities have been defined, for example, as a threat to place a bomb. The definition in the statutory proposals include all the violent crimes, except for sex crimes, assault with a dangerous weapon, assault causing grievous bodily harm, or offences of kidnapping, manslaughter, creating a risk of grievous bodily harm, injury accompanied by the destruction of property, causing invalidity, and the like. An additional attempt to define and delineate what will be regarded as terrorism, may be found in the following somewhat extreme example, based on the characteristics of the perpetrators of terrorism and their motives:

Terrorism is the crassest antithesis to democracy. It is the attempt to subjugate and pervert the will of the people and its elected leadership by a minute bunch of reckless people resorting to terrifying threats and unbridled violence. They say they kill for the cause. What is that cause? Liberty from oppression? Freedom from want? Justice for a people? If

30 Wilson Finnie, Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation, 1990 L.J. SCOT. U. JUD. REV. 1, 2-3 (1990). The Prevention of Terrorism Ordinance of 1948, includes terrorist criminal acts, notwithstanding that the purpose of the Ordinance is to assist in the fight against terrorism and it is not intended to be a criminal statute. Inter alia, it provides for criminal offences relating to activity within a terrorist organization, membership of a terrorist organization, and the like. Id.


32 See Kopel, supra note 13, at 323.
that would be their cause, how could they plot the extermin-
ation of another people, terrorize their own kinsmen and stuff
their war chests with oil money from Saudi Arabia, to finance
the assault against the regimes of these countries? Their
cause is killing. Their vocation is violence.33

There are three matters which are essential to a liberal democratic regime. The
first is that there be a responsible government; second that the state be subject
to the rule of law; and third that legitimate political opposition to the regime
is not prohibited.34 Accordingly, not all opposition to the existing regime will
be defined as terrorist activity, and caution should be exercised not to include
permissible opposition within the prohibition. In contrast, it should be recalled
that democracy is preserved *inter alia* by preserving security, and not only by
preserving rights and freedoms.

Often the difficulty in drawing the distinction ensues from the difference
between terrorist activities and those carried out by a person who regards
himself as a “freedom fighter” operating against a foreign regime. Here, the
distinction between such a person and a terrorist is important for the purpose
of determining his status as a prisoner of war under the Third Geneva
Convention and the supplementary protocols.

**B. The Status of the Terrorist Under International Law**

To be a civilian who does not belong to the combatant forces and who is
not a combatant, is one thing; to be a civilian who fights against an entity that
he regards as his enemy, is quite another. International law, too, distinguishes
between those participating in an armed conflict and those who do not. The
various Geneva Conventions also distinguish between those taking an active
part in the fighting itself, and those who undertake a passive role. Generally,
soldiers fall within this definition. However, members of other armed militias
are also contemplated. Civilians are protected in situations where a struggle is
underway.35 In such cases, the states participating in the fighting must refrain

35 Convention (III) Relative to the Treatment of Prisoners of War, date, 1949, art. 4, cite; Protocol to the Geneva Convention, date, 1979, art. 43, cite.
from any possible harm or suffering to the civilian population. These Conventions also grant protection to combatants captured by the enemy during the course of the fighting. Such captured soldiers are regarded as prisoners of war. The state holding them as prisoners of war is obliged to ensure that their rights as prisoners of war are properly maintained. The various Geneva Conventions do not refer to the legal status of civilians who do not fall within the term of combatants yet take an active part in the fighting. This phenomenon has not been the subject of any provision in the Geneva Conventions.

The attempts by Palestinian terrorists over many years to be regarded as freedom fighters and therefore to be entitled to the status of prisoners of war, have been consistently rejected by the courts in Israel. Notwithstanding that the idea of regarding “freedom fighters” as combatants for every purpose was not adopted or agreed to in the Geneva Conventions of 1949, when these were formulated, appreciation of the need for such recognition grew. Thus, in 1977 the issue was added to Protocol 1 of the original Geneva Conventions. The international community expanded the protection of the Geneva Conventions so as to apply them also to combatants who are not members of the official armed forces.

37 Id.
38 See Convention (III) Relative to the Treatment of Prisoners of War, Geneva 1949, art. 12.
39 See id. at art. 13.
40 See BeTselem Reports available at www.btselem.org (last visited on Jan. 12, 2000). BeTselem, one of the human rights organizations that examines the violations of human rights in Israel, has expressed the view that the situation cannot arise whereby persons will be recognized as combatants under the Geneva Conventions but will not be entitled to the conditions of prisoners of war. I agree with this statement, but assert that terrorists do not meet certain requirements set out in the provision, and therefore they do not fall within the meaning of the term “combatants” who are entitled to the rights of prisoners of war.
41 See H.C. 2967/00, Batya Arad v. Israel Knesset 54(2) P.D. 188 (Hebrew).
42 For a review of the debate prior to the adoption of the Protocol, see JUDITH GAIL GARDAM, NON-COMBATANTS IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100-06 (1993); see also KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 165 (1984); HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENT (1988); Waldemar A. Solf, A Response to Douglas J. Feith’s Law in the Service of Terror—The Strange Case of the Additional Protocol, 20 AKRON L. REV. 261 (1986).

1. The armed forces of a party to a conflict consist of all organized armed
As noted, the Geneva Conventions were amended so as to embrace a new class of combatants otherwise not recognized as combatants under the classic structure of wars in Europe. The Geneva Conventions granted these "combatants" the rights of prisoners of war, on condition that they conducted themselves in accordance with the rules applicable to combatants in international law.

Those organizations, at best, may be deemed to be para-military groups in accordance with Article 43.3 of Protocol 1 of the Geneva Convention. In such a case if one party is interested in including non-military combatants within its armed forces, it must notify the other party of the same, a notification which to date has not been made by the Palestinian Authority or by any neighboring state engaged in armed conflict with Israel. Moreover, those organizations initiate their attacks from the heart of the civilian population, contrary to the provisions of Article 44.3 of Protocol 1. The purpose of this provision is to protect the civilian population and to discourage combatants to make manipulative use of the civilian population as a cover. The desire of the drafters of Protocol 1 to find a just balance between the expansion of the term "combatants" to include "freedom fighters," and to distinguish combatants from civilians was not simple to fulfill. The final formulation of the Protocol clearly shows that the protection of the interests of the civilian population were preferred over full protection of the rights of the freedom fighters. The requirement that those freedom fighters refrain from mingling with the civilian population, that they wear uniforms or other distinct identification and carry their weapons openly, were drafted specifically in order to ensure that the other parties to the conflict would know against whom they were fighting. This would avoid harm occurring to civilians who were not combatants. The exception to these requirements in the provision is not applicable to Israel's situation under discussion here.
Israel, the United States and Britain have all refused to sign Protocol I of 1977 to the Geneva Conventions. This Protocol expanded the definition of combatants who are entitled to the rights that the Convention also grants to organizations located themselves inside civilian villages, in defiance of the agreements between Israel and Lebanon and contrary to this Article.

48 See Red Cross available at www.icrc.org (last visited Sept. 1, 2001) (listing the states which have signed the Geneva Conventions and ancillary Protocols).

49 See The Geneva Convention of 1949, August 12, 1949, part III, art. 4, 6 U.S.T. 3516 [hereinafter Geneva Conv. of '49]. A combatant is defined in Article 4 of the Geneva Convention of 1949 as follows:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed
freedom fighters.\textsuperscript{50}

Israel and the United States objected to signing the Protocol and accepting it as binding, \textit{inter alia}, on the grounds that the Article under discussion would enable terrorist organizations to be recognized as combatants, and thereby allow them to be granted the rights of prisoners of war. In their view it was not desirable to grant terrorists rights such as the right not to be tried for their actions.\textsuperscript{51} Professor Frits Kalshoven, who participated in the 1985 panel on the question \textit{Should the Law of War Apply to Terrorists}?\textsuperscript{52} asserted that terrorist forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

\textit{Id.}\textsuperscript{50}

Fourth Geneva Conv., art. 43, stating:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, \textit{inter alia}, shall enforce compliance with the rules of international law applicable in armed conflict . . . .

Article 44 of the Geneva Convention of 1977, provides:

1. Any combatant, as defined in Art. 43, who falls into the power of an adverse Party shall be a prisoner of war . . .

\textit{Id.} at art. 44.

\textsuperscript{51} Cristopher C. Burris, \textit{Re-Examining the Prisoner of War Status of PLO Fedayeen}, 22 N.C. J. INT’L L. & COM. REG. 943, 976 (1997); see also Gregory M. Travallo, \textit{Terrorism, International Law, and the Use of Military Force}, 18 WIS. INT’L J. 145, 176, 190-91 (2000) (discussing three options of self-defense against terrorist attacks in international law. One of the approaches is to recognize the terrorist attacks as an armed struggle. Thus, all the soldiers captured by the terrorist organizations will be deemed to be prisoners of war having rights. On the other hand, the terrorists will also be deemed to be prisoners of war, and will have immunity against being tried for their acts).

organizations and terrorists are not entitled to the status of combatants:

\[\ldots\text{In these circumstances, a simple statement that the law of armed conflict is applicable to terrorists seems of little practical utility. Who would be bound by such an instrument, and to what effect? Would, for instance, the authorities acquire any additional legal powers that they do not already possess under their constitutional provisions? Would they become bound to respect any special rights of terrorists not ensuing from existing human rights instruments? Again, are we to assume that terrorists must respect the law of armed conflict—with its express prohibition on acts of terror? Or that they would become entitled to a special status upon capture—a status that governments rejected even for an internal armed conflict? All these questions are purely rhetorical. In other words, my answer to the question of whether the laws of war should be made applicable to the activities of terrorists in situations where they are at present inapplicable is: No.}\]

The definition of the term "civilians" or "civilian population" appears in Article 50 of Protocol I of 1977 to the Geneva Convention:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

*Prima facie*, as this Article is formulated in the negative, one may think that if certain persons do not fall within the category of combatants, they must be civilians. However, in my opinion, it would not be right to interpret the Article in this way as the drafters of the Convention did not intend to grant

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53 Id. at 118.
54 Fourth Geneva Conv., *supra* note 43, art. 51.
terrorists the status of civilians. In addition, the defenses granted to civilians are broader than the defenses granted to combatants. Thus, for example, it is forbidden to attack civilian populations.

It follows that if it is not proper to regard terrorists as combatants, and thereby grant the terrorists the protection due to combatants, a fortiori it is improper to regard terrorists as civilians who are not combatants, and grant them even more extensive rights and protections.55

No clear definition exists as to what is embraced by terrorism. There is a feeling that as soon as one encounters an act of terror, one may identify it as such, however, no definitive expression of the term is possible which will also be accepted by all. A large number of attempts have been made to define the term. Thus, section 20 of the English Prevention of Terrorism (Temporary Provisions) Act of 1989, defines the term “terrorism” in the following way: “Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear.”56

It would seem that the majority of definitions of the term “terrorism” contain the element of actual physical violence or threat of such violence.57 There is no doubt that the activities carried out in Israel at present are violent activities carried out by terrorist organizations. As we have seen that these terrorists are not entitled to the broad protection given to civilians under international law, and at the same time are not combatants, it is now necessary to turn to an examination of the legal and justifiable means of fighting the abhorrent phenomenon of terrorism.

II. DEMOLITION OF HOMES

In the fight being waged against terror, a question often arises regarding the measures that a democratic state may legitimately apply in order to effectively protect its citizens and yet continue to maintain human rights, including those of the terrorist himself.58

The difficult dilemma brings to the forefront the clash between “the vital need to preserve the very existence of the state and the lives of its citizens, and the preservation of its character as a country governed by law which maintains

55 See generally Emanuel Gross, supra note 9 for a more extensive discussion.
One of the measures was established back in the period in which the British governed Palestine by virtue of their Mandate. At that time they enacted the Emergency Defense (Temporary Provisions) Regulations of 1945. Upon the establishment of the State of Israel in 1948, Israeli law adopted these Regulations. During the British Mandate, the Defense Regulations applied to all the territories of "Palestine", i.e., they also applied to the West Bank and Gaza Strip. Following the departure of the British and the seizure of these territories by the Jordanians and Egyptians, the Defense Regulations continued to remain in effect and became part of the local law. Thus, in 1967, when the I.D.F. captured these areas, the Regulations were already part of local law. The military commander decided in accordance with the rules of international law and as part of the effective control of the area, to leave all local law in place to the extent that they did not pose an obstacle to security needs.

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61 See, e.g., H.C. 2977/91, Salam v. Commander, 46(5) P.D. 467 (Hebrew).
62 See H.C. 660/88, el-Ussra v. Commander, 43(3) P.D. 673, 677 (Hebrew).
In this context it would be proper to recall Rule 43 of the Hague Rules of 1907, which as is known reflects customary international law which applies in Israel even without Israeli legislation. This Rule provides as follows: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

Id. The phrase "public order and safety" for the purpose of this Rule was interpreted in the case law. Thus, in H.C. 202/81, *Tabib v. Minister of Defence*, 36(2) P.D. 622, 629 (Hebrew), Justice Shiloh stated:

What does ensuring public order and safety mean? The necessary answer is: 'the exercise of proper government with all its agencies, as applied in modern times in a civilized country, including security, health, education, welfare, and, *inter alia*, quality of life and transport,' H.C. 660/88, The Assoc. "Inesh el-Ussra" v. Commander of I.D.F. Forces, 43(3) P.D. 673, 677 (Hebrew).

Id.

63 Justice Shamgar summarized this matter in H.C. 69/81, *Ita v. Commander*, 37(2) P.D. 197, 206 (Hebrew):

Legislation of the Israeli government: the Proclamation Regarding Government and Law (Judea and Samaria) (No. 2), which commenced on 7.6.67 and which establishes the guiding legal principles according to which the Israeli military government will act, sets out three main provisions which are relevant for our purposes:

1. The law which was in force in the region on the eve of the entry of the I.D.F., on 7.6.67, will continue to remain in force, to the extent that this does
Regulation 119(1) of the Defense Regulations provides as follows:

A military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land form in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown detonated, exploded or otherwise discharged or 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 to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land.64

There is no doubt that "the powers of the military commander under Regulation 119 is broader than broad, and in the words of counsel for the Petitioners, the commander has the power to order the destruction of a complete road or neighborhood."65

What is the purpose of this Regulation? It seems that the legislature intended to enable the military commander to respond in an effective and suitable manner to every act that impairs the security of the population or

not contradict the said Proclamation or any order which may be issued by the Commander of the I.D.F. forces in the region, and with the changes which ensue from the establishment of military government in the region (Para. 2 of the Proclamation).

2. Every power of government, legislation or administration regarding the region or regarding the residents thereof are given to the Commander of I.D.F. forces in the region and shall be exercised by him or by a person appointed by him for that purpose or acting on his behalf (Para. 3(a) of the Proclamation).

3. Taxes, levies, fees and payments of whatsoever type which are payable to central government institutions and which have not been paid by 6.6.67, must be paid, as of the establishment of the I.D.F. regime, to the aforesaid Commander of I.D.F. forces (Para. 5 of the Proclamation).

Id.64 Defense (Emergency) Regulations 1945, Palestine Gazette (No. 1442), Reg. 119, para. 2, at 1089 (Supp. II Sept. 27, 1945) [hereinafter Defense Emergency Regulations].
65 See H.C. 4772/91, Hizran v. Commander, per Cheshin, 46(2) P.D. 150, 154 (Hebrew).
threatens public order. The military commander has broad power to order the confiscation of land and thereafter the demolition of the structure or structures of which the terrorist made use in the commission of the offense. Moreover, the military commander may make these orders even if the act of terror was not committed from the relevant land. It is sufficient that the land served as the home of the terrorist.

It is possible to see and understand the seizure of the structure or even its destruction, if indeed it was used for the purpose of carrying out the act of terror. But is it possible to understand or justify the connection between a structure that served as the residence of a terrorist and the demolition of the house simply because he lived there? Moreover, often the terrorist does not live alone but rather with the rest of his family, wife, children, parents or siblings. Is the demolition of the home in response to the acts of the terrorist a form of collective punishment, which is prohibited according to basic principles of morality and justice?

In practice, there are two aspects to the examination of the validity of this Regulation. The first aspect concerns domestic law, where the examination must concentrate on whether the Regulation is lawful and whether today, in the light of Basic Law: Human Dignity and Liberty, it is perhaps also unconstitutional. Should the answer be that there is no legal or constitutional defect in this Regulation it would still be appropriate to examine the manner in which the military commanders exercise it. In other words the Regulation must be tested according to administrative law, and in this context one must examine the reasonableness of the exercise of discretion of the military commander when implementing his powers under this Regulation.

With regard to questions concerning the legality of the Regulation, it has already been noted that the Regulation was adopted into domestic law by virtue of being part of the prevailing law during the period of the Mandate. Notwithstanding that in general these Regulations have been sharply criticized by human rights organizations, the latter have not succeeding in repealing them. The late Minister of Justice Shmuel Tamir did, however, manage to

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66 In fact, the confiscation of property which has been used to further an offense, is a well-known power in criminal law. See, e.g., Section 39 of the Criminal Procedure (Arrest and Search) [New Version] Ordinance of 1969. The Laws of Israel [new version] 12, 1969 p. 284.

67 Cf., H.C. 798/89, Mahmud Hassin Mahmud Shukriv v. Minister of Defence, per Barak TK-El 90(1) 75 (Hebrew). "The power given to the military commander under Regulation 119 is not the power of collective punishment. Its exercise is not intended to punish the family members of the Petitioner. The power is administrative and its exercise is intended to deter and thereby preserve public order."

68 Basic Law: Human Dignity and Liberty, 1992 (Isr.).

69 See H.C. 2977/91, Salam v. Commander of 46(5) P.D. 467.

70 For a comprehensive survey of this matter, see Rubinstein, supra note 6, at 281-83.
divest the power to deport a person of much of its significance, at least in relation to the territory of the State of Israel. He also succeeded in replacing the provisions relating to administrative arrest with a new law that is more liberal and provides a better balance between human rights and security needs. At the same time, Basic Law: Human Dignity and Liberty that raises human rights, including a man’s right to property, to a constitutional status, does not invalidate these Regulations, both because the provisions of Section 10 of the Law entrench the old law and because Regulation 119 would meet the test of the limitation clause found in section 8 of the Basic Law. The Regulation cannot be said to be inconsistent with the values of the State of Israel as a Jewish and democratic State since a democratic state must also equip its military commanders with efficient tools for fighting terrorism. It cannot be said that such a purpose of fighting terrorism is an improper purpose. The only element that must be ensured is “proportionality,” i.e. that the power be exercised in a manner proportional to the gravity of the situation to which it applies.

71 Emergency Powers (Detention) Law—1979, Sefer Chukkim 930, at 76. See also Gross, supra note 10.

72 Section 3 of the Basic Law states: “There shall be no violation of the property of a person.”

73 Section 10 of the Basic Law states: “This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.”

74 Section 8 of the Basic Law states: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.”

75 See generally Alamarin v. Commander, H.C. 2722/92, 46(3) P.D. 693, 702 (Hebrew) (per Justice Cheshin).

The military commander has power, according to the language of the Regulation, to order wide-spread destruction such as the demolition of a five-storey house in the example we mentioned—and indeed much more than this, as I mentioned in the Hizran and Abu Muhsin case—albeit it seems that no one would consider exercising power in this manner. Moreover, I agree with my brother that ‘according to the spirit of the provisions’ of the Regulation, it would not be appropriate to restrict its interpretation. That is, if he is referring to ‘the spirit of the provisions’ at the time of the introduction of the Regulation, in 1945, and the spirit which the Court consisting of English ‘Mandatory’ judges breathed into the Regulation. However, ‘the spirit of the provisions’ of the Regulation disappeared as if it had never been, upon the establishment of the State in 1948. The provisions of the law which had their birth during the Mandate Period—including the Defence Regulations—had one interpretation during the Mandate Period and another interpretation following the establishment of the State. Indeed, the values of the State of Israel—a Jewish, free and democratic State—are completely different from the basic values of the Mandate holder governing Palestine. Our fundamental values—in contemporary times—are the fundamental values of a Democratic
The requirement of proportionality has been applied in the case law of the Supreme Court in a number of senses. Thus, for example, the Court has instructed the military commander to conform the exercise of his power to the severity of the case and the gravity of the circumstances. Consideration must be given not only to the gravity of the acts of which the terrorist is suspected, but also to the degree of participation of the rest of the household in advancing these acts. Also taken into account is the degree of influence which the demolition of the home will have on the other inhabitants thereof.\footnote{76}

State of law aspiring to freedom and justice, and these principles are what imbue life into the interpretation of these and other legal provisions.

\textit{Id.}

\textit{Cf.,} H.C. 680/88, Schnizer v. Chief Military Censor, 42(4) P.D. 617, 625 (Hebrew) \textit{(per Justice Barak).}

Thus it was since the establishment of the State, and certainly after Basic Law: Human Dignity and Liberty, which bases itself upon the values of the State of Israel as a Jewish and Democratic State. These values are universal human values, and among them is the principle that ‘its values should not violate the property of a person’ (section 3 of the Law) and that ‘there shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.’ (section 8 of the Law). H.C. 2722/92 Muhammed Alamrin v. Commander of I.D.F. Forces, 46(3) P.D. 693, 702 (Hebrew).

\footnote{76}{See H.C. 6026/94, Nazal v. Commander, 48(5) P.D. 338, 342 (Hebrew): [O]ur case law has also imposed many limitations on the circumstances in which the military commander is entitled to exercise his power, which the Regulation has defined in a broad and all-embracing manner. As we see from time to time, the security authorities are also aware of their duty to limit the use of this measure to serious cases only. Not to act save after a thorough examination of all the circumstances (including identification of the terrorist who actually committed the terrorist act, and his place of residence). And to limit to the minimum necessary the injury to people living in the residence—who are not core family members of the terrorist. (See the majority opinion in the Alamrin case, H.C. 2722/92, supra note 75 \textit{(per Justice Bach); and the judgment of Justice Barak in H.C. 5510/92, Turkeman v. The Minister of Defence (unpublished)) (Hebrew). Actually, \textit{(de facto and not de jure)} the power of the military commanders to act within the framework of the Regulation has been undermined. \textit{Cf.} H.C. 4772/91, Hizran, it should be pointed out that Justice Cheshin has also presented a contrary approach in relation to the existence of the power in its limited practical format. Under his approach (which he initially explained in H.C. 4772/91, Hizran v. Commander of I.D.F. Forces, 46(2) P.D. 150, 155, 158(3) (Hebrew), ff, and more recently in the Alamrin case, H.C. 2722/92 supra note 75, at 701ff), the power of the military commander to damage the home of a terrorist is contingent upon not damaging the homes of persons other than the terrorist. Indeed, Justice Cheshin also saw no reason to dispute that \textit{[for]} a young son living in the home of his parents—and who roams and wanders the length and breadth of the flat as if it was his—all the flat is ‘his’. The entire}
According to the test of proportionality, which is one of the cornerstones in the examination of the reasonableness of the decision of the military commander according to administrative law, where it is possible to achieve a deterrent effect by something less than demolishing the entire house this must be done. Likewise, where it is possible to achieve the deterrence by sealing the house this must suffice.\(^7\) At the most, one may expect today a liberal interpretation in the spirit of the Basic Law but we should not forget that the State of Israel is still being forced to defend itself, as it has in the past. Together with human rights one must consider the interests of security. In this context, the courts will continue to derive interpretive strength from the balancing formula in section 8 of Basic Law; Human Dignity and Liberty.\(^8\)

The second domestic test is an examination of the manner in which the military commander exercised his discretion under the principles of administrative law. The test is therefore the reasonableness of the decision. It must, however, be remembered that in assessing the legality of the decision, the Supreme Court, sitting as the High Court of Justice, is not a forum before which the decisions of military commanders may be appealed. The relevant flat can be expected to be demolished by reason of the acts of that son. At the same time, Justice Chesin referred to the power of demolition in the hands of the military commander being dependent on the immunity from damage accorded to sections of the building used for the residence of others (even if those others belong to the same household) provided that in practice the terrorist did not use those sections for his own residence as well.

But in both cases, in which he stated his position as aforesaid, Justice Cheshin remained in the minority. The binding rule is that in exercising the said sanction great caution is needed and reasonable proportionality. These are not matters of authority but matters of discretion (see the Turkeman case, H.C. 5510/92, supra). All the judges of this Court are anxious to ensure these standards. Against the background of this anxiety in relation to the severity of the injury to outsiders, who played no part in the acts of the terrorist, and who also could not know of his involvement in terrorist activity, we have not hesitated, in every suitable case, to express our position in the course of the trial. Often our comments have caused the security authorities to agree (without waiting for a judicial determination) to moderate the injury to the residence of others who are located within the area of the structure proposed to be demolished. Against the background of this approach all the statements in the case law regarding the punitive nature of the sanction should be understood, statements in which counsel for the Petitioners hoped to find support for their view that reference was, so to speak, to a punitive power \emph{per se}.


\(^{78}\) See Basic Law: Human Dignity and Liberty (Isr.).
question is not what the Court would have decided in the military commander's place but rather whether another reasonable military commander would have adopted a decision that was similar to the one actually adopted. Only a severe deviation from the scope of reasonableness will justify judicial intervention.\textsuperscript{79}

Nonetheless, the validity of this authority is liable to be challenged for being overly broad, arbitrary, and for causing harm to innocent people unconnected with the terrorist act, in other words, for its authorization of collective punishment. Advocates of this claim will argue that had the terrorist used his own house for the furtherance of the terrorist attack, \textit{i.e.} a hiding place from which he fired at a passing car, or threw a grenade at passers thereby justifying authorization for seizure of the house as both logical and just. The seizure could be justified as a preventative measure ensuring that the terrorist could not use the place again. Conceivably, it could further be argued that following the seizure, were the terrorist to remain alive and be indicted, it would be the Court's role to decide whether the place should be forfeited to the state. However, as we observed above, the military commander's authority is broader, extending not only to the seizure of land, but also to the authority to demolish the building connected thereto. The answer to these arguments would be that one cannot wait for the Court ruling, given that the issue is one of an "administrative-military" response for deterrent purposes. Waiting for the trial's outcome is liable to thwart the attainment of that goal.

In fact, the courts in Israel have ruled that the authority is an administrative one, intended as a tool with which the commander can respond to terrorist acts, hence not only by preventative measures, but also with measures directed at deterrence.\textsuperscript{80} The Israeli Supreme Court has repeatedly stressed the deterrent element accompanying the military commander's authority: "In our rulings we have repeatedly emphasized that the issue is one of a deterrent sanction only, directed against those who could have, had they so chosen, prevented the asset from being used for illegitimate purposes, and that this sanction also serves as a deterrent for the public at large."\textsuperscript{81}

On the one hand, the difficulty with this deterrent approach is that it confers a governmental authority, such as the military commander, with power that in a democratic regime, \textit{prima facie}, characteristically belongs to the judiciary.

\textsuperscript{79} For example, if the decision was not proportional, or was motivated by irrelevant considerations, or does not strike a correct balance between all of the relevant considerations—it will be deemed unreasonable and therefore subject to judicial intervention.

\textsuperscript{80} "It must be remembered that Regulation 119 is an exceptional punitary action, the main aim of which is to deter the commission of similar acts." H.C. 434/79, Sachwill v. Area Commander, 34(1) P.D. 464 (Hebrew).

\textsuperscript{81} H.C. 2977/91, Salam v. Commander, 46(5) P.D. 467, 471 (Hebrew).
In other words, one of the basic human rights is not to be punished without due process. On the other hand, the possible response is that even a democratic state, finding itself in a state of war with terrorist organizations in territories over which it exercises military control, must equip its commanders with effective tools to provide an immediate response to terrorist acts. The measures in this context are not limited to sophisticated weaponry, but also extend to legal tools that can provide for the immediate deterrence of potential terrorists.

Illustrating this is the case of Machmud Chasin Machmud Shukri, which came before the Supreme Court. In this case the Petitioner's brother confessed to the murder of a Jewish worker, purely because he was Jewish; he also confessed to having attempted to cause the Tel-Aviv-Jerusalem bus to fall into an abyss, again purely to take revenge against Jews. The military commander issued an order for the demolition of petitioner's brother's house. The Court responded to this stating:

The military commander's authority under Regulation 119 is not authority for imposing collective punishment. Its exercise

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85 Id. Petitioner presented his position in the following manner:
[T]he principle question confronting us is this: whether Respondent 2's decision was defective in a manner justifying our intervention. More precisely, the question is whether our intervention is justified on the basis of the unreasonableness of Respondent 2's decision. Attorney for the Petitioner claims that the unreasonability derives from the fact that Respondent 2's decision will lead to the destruction of the entire building, and as a result, not only will the apartment of the Petitioner-accused be destroyed, but also that of Petitioner—mother, given that all three of them live in the same building. Attorney for the Petitioner further claims that the reality of the past few months has shown that demolition of houses is not efficient, to the extent that it has not led to the suppressing of the uprising in the area, and it can therefore be concluded that the decision to demolish was unreasonable. He further claims that the decision of Respondent 2 constitutes a punishment of the entire family, in contravention of international law and constitutes the double punishment of the Petitioner's brother, which is also prohibited. In his opinion, in these circumstances, no use can be made of Regulation 119. Alternatively, he requests that the apartment of the Petitioner's brother, not be demolished, but only sealed and in doing so the other parts of the building will remain intact, for the residence of the family.
is not intended to punish members of the Petitioner’s family. The authority is administrative and its exercise is intended to deter and in doing so, maintain public order. Respondent 2 claims that this is an efficient deterrent method and we were not presented with any data that negated the reasonability of that assumption. Moreover, the fact that disruptions of the public order in the area continue despite the use of Regulation 119 does not mean that resort thereto is not effective. We have no reason not to accept Respondent 2’s claim that were it not for the use of Regulation 119, the disruptions of public order would be more numerous and more severe. All we can do is examine whether the method of demolishing a structure is reasonable in the special circumstances of the case. In assessing the reasonability of the use of Regulation 119 consideration must be given to the gravity of the actions ascribed to the inhabitants of the building and their consequences, against the background of the scope of the phenomenon and the need to adopt deterrent methods. On the other hand, the severity of the deterrent method and its affect on the inhabitants of the building and adjacent premises must also be considered. Consideration must also be given to the contributory degree of assistance provided by the building’s inhabitants to the actions disturbing the public peace and the measures they actually adopted to prevent the prohibited activities that violated the public peace. The reasonability of a decision under Regulation 119 is the outcome of the balancing and weighing up of these considerations (see generally H.C. 361/82 Chomri v. Commander of Judea and Samaria Area, 36(3) P.D. 439; H.C. 572/82, Mutzlach v. Minister of Defence, 36 (4) P.D. 610)). Bearing these criteria in mind, it seems to me that there is no basis for our intervention. The acts for which the Petitioner’s brother was convicted are exceptionally heinous. The Petitioner’s brother was convicted of murdering one person and attempting to murder 50 others. The accused cold bloodedly planned his actions, motivated by nationalist feelings of vengeance. Under these circumstances we do not think that it was unreasonable to adopt the particularly harsh deterrent measure of demolishing a building. We are aware that the demolition of the building also damages the living quarters of the Petitioner and his mother. Admittedly, this is not the purpose of the demolition, but it is its result. This harsh result is intended to deter
potential perpetrators of such acts who must understand that by their own actions, not only do they endanger public peace and security and the lives of innocent people, but also the welfare of their own relatives.\footnote{See H.C. 798/89, Chasim v. Minister of Defense (unpublished) (Hebrew).}

Another case exemplifying the necessity of the measures of the seizure, confiscation, demolition or sealing off, of houses belonging to those involved in terror, is the petition of \textit{Ali Chamdan Mutzlach}.\footnote{See H.C. 572/82, Mutzlach v. Minister of Defence, 36 (4) P.D. 610 (Hebrew).} The two sons of the Petitioner were terrorist organization members involved in the placement of explosives in different places in central Israel. All of the explosives blew up some causing the loss of life. Both sons lived in separate houses apart from their father. At the first stage, the military commander intended to forfeit the houses of the sons. The father petitioned the Court to instruct the military commander to refrain from the demolition of the houses. The Court responded:

In this matter we accept the comments of this Court in H.C. 361/82 and in H.C. 434/79, according to which the said Regulation will only be used after carefully weighing the circumstances and in special circumstances, and in all cases, sealing up of the building will be considered as an alternative to its demolition. However, it is for the military commander to decide which measures shall be taken in consequence of any act of terror; it is he who is empowered therefore in the Regulations. In making his decision he must be guided by the degree of severity of the act. An assessment of the acts of the two of them, as described above, does not indicate that legally the competent authority made any mistake which could justify the judicial or substantive intervention of this Court. The two of them caused the loss of life, and under these circumstances the military commander was entitled to consider the tremendous gravity of their actions and the necessary conclusions to be drawn there from in order to achieve the deterrent effect, as noted by this Court in H.C. 434/79, cited above.\footnote{\textit{Id.} at 613.}

For many years, the Supreme Court has seen no defect in this power being conferred upon the military commander. In fact, the Supreme Court has
The assumption is that persons involved in terrorist activity will be deterred if they know that their house will be forfeited, sealed up, or perhaps even demolished, causing tragedies for their own families too. At the least, even if these measures do not deter active terrorists, they may deter potential terrorists, who may reconsider their intentions given the heavy price that their families may have to pay. Since Israel is currently undergoing a wave of terrorism, the like of which it has not seen in the past given the acts of suicide terrorists exploding themselves among thronging civilian crowds, it has been claimed that the demolition of their houses will not deter these people who are already prepared to die.

The Supreme Court responded to this claim a number of years ago. Its comments are all the more valid today, as we witness the proliferation of terrorist attacks of suicide bombers and members of extremist terrorist organizations:

In its responding affidavit, the Respondent explained that in deciding upon the necessity of adopting measures under Regulation 119(1), one of the customary considerations was the death of the attacker. Until that time, the general policy was to avoid adopting these measures when the terrorist—attacker had been killed. . . . the death of the terrorist who had committed the murderous attack was taken into account, together with all of the other factors . . . . However, his conclusion . . . was that in this case there was no escaping the adoption of measures under Regulation 119, despite the terrorist's death. There were two deciding factors. The first and principle one was that this is a case of a terrorist belonging to an extremist Islamic terrorist organization; its members 'regard death in the course of a terrorist act against Israeli targets as a positive result, which ensures their place as holy martyrs in the world to come.' The second consideration was gravity of the terrorist act; against the background of the wave of severe attacks over the last few months orchestrated by the extremist terrorist organizations and in view of the public declarations of these organizations that they intend to continue to perpetrate murderous terrorist attacks in the future too. Under these circumstances the Respondent saw an urgent need to deter potential candidates for suicide bombings. Security authorities consider that there will be a deterrent element in the message heard by a potential terrorist, that his
death in the course of the terrorist act will result in severe consequences for his family with whom he lives. . . . As we know, both the scope and the reasonableness of measures adopted by competent authorities for the maintenance of security can only be measured against the background of changing circumstances. H.C. 270/88, L.S.M v. Commander of I.D.F. in Judea and Samaria, 42(3) P.D. 260, 263, per Shamgar J.; H.C. 723/89, Abu Daka v. Commander of I.D.F in Gaza Strip (unpublished). We all are aware and sense the extreme increase of late in the readiness of terrorist organizations to commit murderous attacks against all Israelis, soldiers and citizens alike, with the perpetrators undertaking to execute the attack by becoming suicide bombers. This is an entirely new dimension of crazy fanaticism. Given the necessity of dealing with this phenomenon, the competent authorities are entitled, *inter alia*, to adopt the measures of seizure, and demolition of the home of the suicide bomber. . . . The reason that justified the policy in the past was the assumption that with the death of the terrorist during the act, the deterrent element was exhausted with respect to potential terrorists. On the other hand, adoption of such a policy in cases of suicide terrorists will at the very least leave a vacuum in respect of the deterrent measures open to the military commander. Furthermore, it may even preclude any chance that those living together with the terrorist, and who are aware of his intention to do a suicide bombing, will attempt to prevent him.89

One of the important balances that the Court struck between the military interest in prompt deterrence and the inhabitants' right to protect their property, was the Supreme Court ruling that a person who saw himself as being harmed by the military commander's decision was entitled to petition the Supreme Court in order to contest the legality of the decision, and until that time, the property could not be harmed.90 In fact, the Court preferred the right

90 In H.C. 358/88, Civil Rights Ass'n v. C.O. Cent. Command, 43(2) P.D. 529, 536 (Hebrew), President Shamgar ruled on a petition filed against the military commander's intention to demolish the house of a person suspected of the commission of a terrorist act: "when applying the principles of public international law, the military commander acts in accordance with rules that derive from the fundamental precepts of administrative law as practiced in Israel." Further on President Shamgar rules that the sanction imposed when the military commander's
to a hearing, a basic right, over the interest of the immediate and efficient execution of the commander's order.91

The second aspect to be examined is international law. While in the past Israel has contended that the territories it entered in June 1967 did not belong to any state,92 it has not in fact been disputed that these territories are subject to humanitarian law. Meir Shamgar, who then served as the Attorney General and later on as the President of the Supreme Court, stated in an article he authored that Israel rejected the applicability of the Geneva Convention in these territories, his central claim being that their application was contingent on territories having previously been in the sovereignty of another state.93 Nonetheless, he continued, as a matter of practice, Israel applied the humanitarian principles of the Geneva Convention relating to the protection of civilians.94 We will now examine whether Israel's exercise of Regulation 119 exercises his authority under Defence Regulation 119 is a harsh one, since "the demolition of a structure is unanimously regarded as a harsh, severe punitive measure, and the deterrent potential embodied therein does not detract from its character as stated. Id. One of its central features is that it is irreversible, in other words, it cannot be rectified after the act. Id. It is therefore important that those affected thereby can voice all of their objections before the military commander, prior to the demolition, in order to appraise him of facts and considerations of which he may not have been aware. Id. at 540. From this he concludes that: "except if dictated otherwise by operational military needs, an order under Regulation 119 should contain a notification informing its recipient that he is entitled to choose an advocate and, within a fixed specified period of time, appear before the military commander prior to the execution of the order. Id. Furthermore, if they so choose, they will be given an extra, but fixed extension in order to come before the Court, prior to the order being executed. Id. at 541. Prof. Rubinstein adds that: "the legitimate balance between the military need to act in a prompt, effective manner, and the realization of the right of being heard will find its expression in the right reserved for the state to request an urgent hearing of the petition." Id. Rubinstein further quotes from the judgment: "[I]n urgent cases, sealing can be done on the spot, prior to the appeal or hearing of the petition—as opposed to demolition which as stated, is irreversible. (footnote omitted) In the case of sealing on the spot too, a notification will be given to those affected, informing them that their right to object or file a petition, remains intact." Rubinstein, supra note 6, at 115-16.

91 See id. at 116.
92 Even though they were actually controlled by Jordan and Egypt until the entry of the I.D.F. in 1967, with the exception of two states (England and Pakistan) Jordanian sovereignty over the West Bank territory was never recognized. See also H. RUBINSTEIN TSE ISRAEL: CONSTITUTIONAL LAW 83 (1991) (Hebrew).

Phillip J. Gendell & Paul G. Stark, Note, Israel: Conqueror, Liberator or Occupier Within the Context of International Law, 7 SW. U. L. REV. 206, 223 (1975), "It is clear that despite her annexation and claim of sovereignty over the West Bank, Jordan was not vested with the legal title to this area prior to 1967."

94 See Shamgar, supra note 93, at 266.
is in contravention of international law.

The claims that Regulation 119 contradicts international law can be summed up as follows:

1. Regulation 119 violates the prohibition on collective punishment.
2. Regulation 119 violates the prohibition on violating the right of property.
3. Regulation 119 violates the provision of the international law, that private property cannot be seized.
4. Regulation 119 violates the right to due process.

Before our examination of the correctness of each one of these claims, we should initially examine whether Israel acted justly in retaining the validity of the Regulation upon receiving control of the occupied territories.

It is a well known principle of international law that a state conquering territory from another state, is supposed to ensure the maintenance of public order and security:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country.\(^95\)

This principle, based on Article 43 of the Hague Convention, was the basis of the provision in Article 64 of the Fourth Geneva Convention, which stipulates that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.\(^96\)

In principle, international law expects that a state that becomes the effective ruler over occupied territories, should do all that is within its power to ensure

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\(^96\) See Geneva Conv. of ‘49, supra note 49, art. 64.
the security of the population and the maintenance of public order. The assumption is that these goals are attainable by preservation of the domestic law that which the civilians of that state, or the occupied area, are accustomed.\footnote{See Reicin, supra note 77, at 521.}

We saw above, that the expectation is that the criminal law that was previously valid will remain in force. This should not be understood as meaning that what was will always continue to be. The reservation regarding the preservation of the domestic law is that it does not contradict the nature of the military occupation and the interests of the army.\footnote{See id. at 522. “According to Article 64, the penal laws existing prior to the occupation shall remain in force except where they constitute: (1) a security threat, or (2) an obstacle to the application of the present Convention.” Referring to article 43 of the Hague Regulations, Professor Dinstein observes that: “. . . the occupant may abolish, suspend or amend existing laws—or enact new ones—only in exceptional circumstances when the continuation of the pre-existing legal position is absolutely prevented. Nevertheless, it is generally recognized that the adverb ‘absolutely’ is not as absolute as it sounds, and, in fact, if of small consequences. The proper and accepted construction is that absolute prevention means necessity . . . . The legitimate interests of the occupant are reflected primarily, in laws prohibiting acts of sabotage, possession of arms, hostile organization, contacts with the enemy, and the like.” Yoram Dinstein, The International Law of Belligerent Occupation and Human Rights, 8 ISR. Y.B. HUM. RTS 104, 112 (1978).}

This being the case, how can one justify the military commander’s power to seize the house of a terrorist and perhaps even order its demolition? Clearly, when the terrorist used that house in order to further his terrorist act the military interest in seizing that house becomes understandable, at least as a preventative measure and even as a deterrent military response.

Even assuming that Israel does in fact comply with the spirit of the Fourth Geneva Convention there is no absolute prohibition in the Convention on harming civilian property for reasons of military necessity. This is the language of Article 53 of the Convention, which states:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons or to the state, or to other public authorities, or to social or cooperative organizations, is prohibited except where such destruction is rendered absolutely necessary by military operations.\footnote{1 Kitvei Amana (Israel Treaty Series) (No.30) 581; see also Dinstein supra note 98, at 128.}
In other words, even though there is a prohibition in principle against harming private property, nonetheless, if there is an absolute military necessity, such an act is valid. Can the destruction of a terrorist’s house be considered as coming within the definition of necessary military operation? The issue has been disputed. There are those who claim that such a measure is an extreme one, totally unrelated to military necessity, but is in fact a punitive act in the guise of military need.\(^{100}\)

On the other hand, Israel maintains that this is a necessary military activity, at least in those cases where it is clear that the family members knew about the terrorist activities and refrained from reporting this to the authorities.\(^{101}\)

Detractors of this Israeli policy argue that in view of the application of the international law and its purpose, Article 53 was intended, from the beginning, to apply humanitarian law to conquered territory. Broad powers of this nature being granted to the military commander contradicts the humanitarian goal of international law and should therefore be declared invalid and null.\(^{102}\)

To this one can add an additional four reasons for its invalidation:\(^{103}\)

1. Demolition of houses violates the prohibition on collective punishment.
2. Demolition of houses violates the prohibition on harming private property.
3. Demolition of houses violates the provision on expropriating private property.
4. Demolition of houses violates the right to due process.

We shall now proceed to examine these claims one by one.

\(^{100}\) See Simon, supra note 83, at 10. “Notwithstanding the Military Government’s genuine interest in enhancing deterrence, I suggest that exhibition of might is the primary force driving the home demolition practice.” \textit{Id}.

\(^{101}\) See, \textit{e.g.}, H.C. 798/89, Nachmud Chasm, v. Minister of Defense (unpublished) (Hebrew) “In assessing the reasonableness of the use of Regulation 119 consideration must be given to the gravity of the actions imputed to the residents of the building and their consequences, against the background of the scope of the phenomenon and the need to adopt deterrent methods. On the other hand, the severity of the deterrent method and its affect on the residents of the adjacent building must also be considered. Consideration must also be given to the degree of assistance provided by residents of the building towards the actions disturbing the public peace and the measures adopted by the residents to prevent the prohibited activities that violate the public peace.”

\(^{102}\) See, \textit{e.g.}, Simon, supra note 83, at 60-65.

A. Demolition of Houses Violates the Prohibition on Collective Punishment

Does the demolition of houses in accordance with Regulation 119 contravene the prohibition on collective punishment?

Clearly, the normative basis for the prohibition on collective punishment is found in the legal systems of all enlightened states. The ancient source for this is found in the Bible “Fathers shall not be put to death for children, neither shall children be put to death for fathers: every man shall be put to death for his own sin.” This principle became entrenched as part of the concept of humanitarian law in at least two places. The first is Article 50 of the Hague Convention, which states that “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”

Secondly and in a similar vein, Article 33 of the Fourth Geneva Convention states “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism is prohibited.”

Is the demolition of a terrorist’s house, assuming others also used the same house, an act of collective punishment? The answer largely depends upon the understanding of the term “collective punishment.” If the intention is punishment inflicted on a person for the act of another, in the nature of vicarious responsibility, then a problem exists.

Whether a person will be considered an accomplice to the act of another person is dependent upon the understanding of the concept of criminal accomplices. In the case of a positive act the answer is less problematic, for a volitional act done with the intention of helping a terrorist further his

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104 See, e.g., H.C. 4772/91, Hizran v. Commander, 46(2) P.D. 150, 157 (Hebrew) (stating that “[t]he starting point for our purposes is the basic principle, which also guides the Respondent, by which there is not to be any imposition of collective punishment or collective sanction.”).

105 Deuteronomy 24:16.

106 Scott, supra note 95, at 124; see also James W. Garner, Community Fines and Collective Responsibility, 11 AM. J. INT’L L. 511, 528-31 (1917).

107 See Scott, supra note 95, at 124.

108 See Dinstein, supra note 98, at 141.

The article does not make it clear when the population can be held jointly responsible for individual acts, nor does it answer the question whether vicarious individual responsibility of one person for the acts of another (usually his relative) is admissible. Article 33 of the Convention solves this dual problem by banning collective penalties generally as well as all punishment of a person for an offence which he has not personally committed.

Id.
purpose, would certainly make that person an accomplice. If that actor was also a partner in the house of the terrorist then the demolition of that house could not be considered as collective punishment. The problem, however, arises in the case of a family member who is aware that a family member is about to commit an offence against state security. In such a case, the Israeli Penal Law would prevent the family member's indictment for the "covering up (an) offence." Even so, it would seem that the majority view in the Israeli Supreme Court regarding the interpretation of Regulation 119 ignores the stipulation of penal law. An illustration of this is the debate between Justice Cheshin and the justices who formed the majority in the Chizran case. Despite this, it must be stressed that the degree of involvement of the other user of the house must be taken into account and constitutes one of the important factors to be considered by the military commander exercising his discretion in respect of the demolition or entire or partial sealing of a house.

However, the real test regarding the aforementioned question is not limited only to the language of Regulation 119 and whether it really allows collective punishment. Rather, it is a practical test with restrictions imposed by the Israeli Courts on the military commanders, by forbidding any harm to the innocent whenever this is physically possible. In this sense, I tend to think that the use generally made by military commanders of their powers under the said Regulation, in view of the Supreme Court's supervision, does not contravene

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109 Section 95 of the Penal Law, 1977, Sefer Chukkim 322, at 226 states: "(a) A person who, knowing that a particular person is planning to commit or has committed an offence under this chapter punishable by imprisonment for fifteen years or a heavier penalty, does not take reasonable action to prevent its commission, completion or consequences as the case may be, is liable to imprisonment for seven years . . . . (c) The provisions of this section shall not apply to a spouse, parent, descendant, brother or sister of a person who . . . planned to commit or committed an offence as aforesaid."

110 See Justice Cheshin, H.C. 4772/91, Hizran v. Commander, 46(2) P.D. 150, 154 (Hebrew).

111 See, e.g., Justice Bach, H.C. 2722/92, Alamaria v. Commander, 46(3) P.D. 693, 697 (Hebrew).

Even so, I wish to note that this does not mean that the wielders of the authority, the military commanders, are not duty bound in each particular case to exercise their discretion reasonably and with a sense of proportion. Nor does it mean that this Court is not permitted and obligated to intervene in decisions of the military authorities whenever the latter intends to exercise its authority in an intolerable manner. Thus, for example, it is unlikely that a military commander would decide to demolish an entire, multi-floor building containing many apartments, all belonging to different families, purely for the reason that a person suspected of a terrorist act lives in one of the apartments. If, notwithstanding the aforesaid, he should decide to do so this Court could have its say and intervene.

Id.
international law’s prohibition on collective punishment.¹¹²

B. Demolition of Houses Violates the Prohibition on Harming Private Property

The prohibition on harming private property derives from the basic human right to property, which is one of the more rights in any civilized country. It is a right that cannot be abrogated purely by reason of a state of war, unless such a violation can be explained as having been necessitated by such a state of war. This prohibition is entrenched in at least three provisions of international law: Articles 46 and 23(g) of the Hague Convention and Article 53 of the Fourth Geneva Convention.¹¹³

Article 23(g) of the Hague Convention makes it prohibited “To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”¹¹⁴

Article 46 adds “Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”¹¹⁵

Finally, Article 53 of the Geneva Convention states “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons or to the state, or to other public authorities, or to social or cooperative organizations, is prohibited except where such destruction is rendered absolutely necessary by military operations.”

Therefore, it is forbidden to harm private property, except in those exceptional cases where such harm can be explained by military necessity.¹¹⁶

¹¹² Cf., Simon, supra note 83, at 60-65.
¹¹⁴ See VON GLAHN, supra note 113, at 227.
¹¹⁵ See ADAM ROBERTS & RICHARD GUELFF EDS., DOCUMENTS ON THE LAWS OF WAR (3d ed. 2000).
¹¹⁶ See H.C. 24/91 Rachman v. Commander, 45(2) P.D. 325, 332 (Hebrew). In this case, Justice Shamgar cites the explanatory notes of the Red Cross:

Section 53 has been explained inter alia in the compilation of the official interpretation of the aforementioned Fourth Convention, published by the International Committee of the Red Cross, and edited under the supervision of S.Pictet Jean, one of the heads of that committee (Geneva, 1958), as explained there:

The prohibition of destruction of property situated in occupied territory is subject to an important reservation: it does not apply in cases ‘where such destruction is rendered absolutely necessary by military operations.’ The occupying forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative
Is the destruction of houses on the basis of Regulation 119 consistent with such a need? It has been argued that the demolition of a terrorist's house as a punitive act cannot be considered as a military need within the meaning of Article 53 of the Fourth Geneva Convention, this is a fortiori the case if the house does not belong exclusively to the terrorist.¹

In my opinion, where a military commander exercises his authority under Regulation 119, it can be explained as a military necessity if indeed he exercised his discretion correctly, i.e. he examined all of the relevant circumstances, inter alia, the severity of the terrorist's acts, the contributory responsibility of the other users, and the degree of damage that the demolition or sealing of the house will cause to its inhabitants and other similar considerations. Thus, in H.C. 2722/92 Muhammad Alamaria v. Comm. of I.D.F. (46(3) P.D. 693, 698) the Court ruled:

This is an issue that does not admit of comprehensive, exhaustive criteria and every case will be weighed in accordance with its particular exigencies. However, generally speaking, I would include amongst the relevant factors to be considered by the military commander in his decision, the following considerations:

The severity of the acts imputed to one or a few of those living in the said building, and the existence of verified proof of their involvement. The importance of this consideration as a function of the severity of the decision permitted for the commander, was repeatedly stressed in rulings of this Court in the past (see e.g. H.C. 4644/90, where it was said:

'it would be appropriate for the Respondent to assess each case on its merits, having consideration for the severity of the acts and the consequences').

To what extent can it be inferred that the other residents, or military requirements so demand. Furthermore, it will be for the occupying power to judge the importance of such military requirements. It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless, for unscrupulous recourse to the clause concerning military necessity would allow the occupant power to circumvent the prohibition set forth in the convention. The occupying power must therefore try to interpret the clause in a reasonable manner: Whenever it is felt essential to resort to destruction, the occupant authorities must try to keep a sense of proportion in comparing the military advantage to be gained with the damage done.

some of them, were aware of the activities of the suspect/s or whether they had reason to suspect the execution of such activities. It will be mentioned again, for purposes of clarification, that lack of knowledge as stated, or lack of certainty in this respect do not, as such, prevent the adoption of the sanction. However, the factual situation in the matter may affect the scope of the commander's decision.

Is there a practical possibility of separating the living quarters of the suspect from the other sections of the building? Does it in fact already constitute a separate unit?

Can the residential unit of the suspect be destroyed without damaging the other parts of the building or adjacent buildings. If it is not possible, was the possibility of sealing the relevant unit considered.

What is the severity of the resultant damage planned to the building for those people regarding whom there is no proof of direct or indirect involvement in the terrorist activity? How many such people are there and what is the degree of their connection to the suspect resident.118

International law therefore, dictates full protection for the private property of the residents, but recognizes exceptions when the damage is essential for furthering military interests. Preventing terrorists from returning to use their property, as well as deterring potential terrorists from using their property as a means for establishing a reign of terror, is definitely a military necessity required to protect the army or citizens from being harmed.119

As noted, Article 53 of the Fourth Geneva Conv. permits, in special cases, the seizure of private property on the basis of military necessity. Opponents of Israeli actions involving the demolition of houses, point out the danger involved in granting discretionary powers to the military commander, who will tend to see a "military necessity" in situations where no such necessity

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118 See H.C. 2722/92, Alamaria v. Commander, 46(3) P.D. 693, 698 (Hebrew).


It is a tenet of counter guerilla action that the base from which the guerilla operates must be destroyed, because only if he has a base can he operate . . . All inhabitants are, of course, removed before the houses are destroyed. The Israeli action is, therefore, justifiable under Article 53.

Id.
exists.¹²⁰ The scholar Simon emphasizes that the term “military necessity” appearing in Article 53, refers to acts of warfare, as opposed to punishment or deterrence, and only when there are actual battles between the sides.¹²¹

I am prepared to accept that military necessity should be understood as referring to times of battle or armed activity, in the sense that systematic terrorist acts constituting part of a strategy or armed struggle, answer such a definition.¹²² I am not prepared to accept the restrictive interpretation under which only seizure intended to further an act of war will justify the seizure of a house. In my opinion, demolition of a house to prevent its use again as terrorist base, and even as part of a punitive conception that serves the war’s purposes, i.e. the eradication or limitation of terror, must be included within the meaning of “military necessity.”

I concur with the interpretation of Reicin, in this context, when he said:

. . . destruction of homes may deter those persons actually contemplating terrorist acts as well as those who might otherwise harbor terrorists or encourage such acts. The act of destroying houses serve as a dramatic warning to those contemplating similar actions. Even individuals who may be willing to undertake suicide missions and would not be deterred by most other types of punishment, might reconsider in light of the visual reality of destruction as well as the awareness that financial disaster could befall their families or landlords. Moreover, the destruction, may cause family members to make concerted efforts to discourage their children or siblings from committing acts of violence; landlords may also interfere by evicting those suspected of

¹²⁰ See Simon, supra note 83, at 68 (citing Commentary on 4 Geneva Convention Relative to the Protection of Civilian Person in Time of War, 302 (Jean Pictet, ed. 1958)). “It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless, for unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention.” Id.

¹²¹ See Simon, supra note 83, at 69. “Thus, military necessity cannot reasonably be argued except during a phase of ongoing combat or the initial stages of belligerent occupation.”

¹²² It is interesting to note the misgivings of the Supreme Court judges regarding the definition of activities of military commanders based on the 1945 Defence Regulations, which by their nature are tools of war. This question is especially connected to the question of the justiciability and scope of judicial review of war acts of military commanders. While in the final analysis the judges concluded that these acts are not to be deemed as acts of war from a formalistic perspective, in essence, they are acts of war and as such, the Court must be particularly cautious in the exercise of judicial review. See H.C. 1730/96, Adal Salam Arvu Sabich v. General Ilan Biran, 50(1) P.D. 353 (Hebrew). See also Opinion of President Barak in F.H.C. 2161/96, Sharif v. C.O. Homefront Command, 50(4) P.D. 485 (Hebrew).
terrorist involvement.\textsuperscript{123}

On the face of it, critics of the application of Regulation 119 in too broad a manner, with insufficient consideration for individual rights, are correct to the extent that it permits damaging property purely by virtue of the terrorist having lived in a certain house. In other words, in the view of these critics, one cannot accept the interpretation given to the regulation in Israeli rulings, as if it permits the destruction of a house just because it was the terrorist's house. The justification for this drastic measure, both in terms of the domestic law, the law of the territories, and in terms of international law must give consideration to the fact that the house itself was used by the terrorist for his terrorist act. It is not sufficient that the house merely served the terrorist as a place in which he slept. Conceivably, providing the terrorist a hiding place or place to sleep on the part of the residents, knowing that he was on his way to commit a terrorist act, would place such behavior in the category of using property for furtherance of terror. The situation would be different, however, if the other members of the household had no inkling as to the terrorist's actions.

The critics look for a functional, substantive connection between the act of terror and the requested property to be seized. Such a connection must be expressed in the misuse of the property, as a tool in the terrorist's hands. Even if the connection is only indirect, \textit{i.e.}, providing the terrorist with board on his way to the commission of an act of terror, this would be sufficient. Thus, the critics do not agree with the broad interpretation that has been given to Regulation 119 by the majority of the judges on the Israeli Supreme Court.\textsuperscript{124}

\textsuperscript{123} See Reicin, \textit{supra} note 77, at 547.

\textsuperscript{124} See, \textit{e.g.}, H.C. 299/90, \textit{per} Justice T. Or, Ahmad Machmud Nimer v. I.D.F Area Commander, 45(3) 625, 628, (Hebrew).

In the attempt to determine the residential connection of Raad to the said residence and whether for purposes of the Regulations he is to be regarded as an 'inhabitant' of the house, the specific circumstances of every particular case must be considered, including the nature of his being absent from his father's house (see H.C. 361/82, \textit{supra}, at 442a) ... according to Regulation 119(1) in the parts relevant for our purposes: "A military commander may by order direct the forfeiture to the government ... of any house ... the inhabitants of which he is satisfied have committed ... any offence against these regulations involving intimidation or any military court offence ..." Having reached the conclusion that Raad cannot be regarded as an 'inhabitant' of the Petitioner's apartment, it follows therefore that the Respondent was not authorized to use Regulation 119(1) with respect to the Petitioner's house.

It also bears mention that when the order was issued by the Respondent, it is entirely possible that the information before him indicated that Raad was
The critics are prepared to accept the comment of Justice Dorner that "one of the requirements for the exercise of the authority, which to date has not been disputed, is the existence of a causal connection between the act of violence and the demolition." But critics still do not concur with her conclusion that "even if the demolition of the house is not a punitive measure in the full sense of the word, but rather a deterrent measure, it should only be adopted as a direct response to a terrorist act committed by a terrorist who lived in the house."

This criticism would seem to be correct, but only on the face of it. It appears to me that a deeper understanding of the rationale and justification for damaging the terrorist's house, must be found. That is, understanding that showing such damage of this nature may lead others to reconsider whether or not to undertake terrorist activities. The reason for this justification is the awareness of potential terrorists that in doing so they are not only endangering themselves, but also the domicile of their families. This is a just punitive measure, if indeed it proves to be a deterrent. This, in fact, is the accepted view.

The *Chasan Nazal* case concerned a suicide-bomber. After short consideration, the military commander finally decided to demolish the bomber's house. His wife and daughter appealed the decision, their central claim being that since the terrorist himself had committed suicide, there was no longer any one to punish and to demolish his house would be to punish the remaining members of the family who were not accessories to the act. The military commander's response, endorsed by the Court, was as follows:

In its responding affidavit, the Respondent explained that in deciding upon the necessity of adopting measures under Regulation 119(1), one of the customary considerations was the death of the attacker. Until that time, the general policy of the defense establishment was to avoid adopting these measures when the terrorist—attacker had been killed. In this case too, the death of the terrorist who had committed the murderous attack was taken into account, together with all of the other factors forming the basis of the decision. However, his conclusion (shared by all of the security authorities) was that in this case there was no escaping the adoption of
measures under Regulation 119, despite the terrorist’s death. There were two deciding factors. The first and principle one was that this is a case of a terrorist belonging to an extremist Islamic terrorist organization; its members ‘regard death in the course of a terrorist act against Israeli targets as a positive result, which ensures their place as holy martyrs in the world to come.’ The second consideration was gravity of the terrorist act; against the background of the wave of severe attacks over the last few months orchestrated by the extremist terrorist organizations and in view of the public declarations of these organizations that they intend to continue to perpetrate murderous terrorist attacks in the future too. Under these circumstances the Respondent saw an urgent need to deter potential candidates for suicide bombings. Security authorities consider that there will be a deterrent element in the message heard by a potential terrorist that his death in the course of the terrorist act will result in severe consequences for his family with whom he lives. On the other hand, if it is clear that the death of the suicide terrorist will constitute a sufficient condition for leaving his house intact, he is liable to make every effort to choose to go through with the suicide attack. Thus instead of being deterred from the perpetration of murderous acts, the suicide terrorist will be encouraged to do them. I see no reason for disputing this approach. As we know, both the scope and the reasonableness of measures adopted by competent authorities for the maintenance of security can only be measured against the background of changing circumstances. H.C. 270/88, L.S.M v. Commander, 42(3) P.D. 260, 263 Hebrew), per Shamgar J.; H.C. 723/89, Daka v. Commander (unpublished) (Hebrew). We all are aware and sense the extreme increase of late in the readiness of terrorist organizations to commit murderous attacks against all Israelis, soldiers and citizens alike, with the perpetrators undertaking to execute the attack by becoming suicide bombers. This is an entirely new dimension of crazy fanaticism. Given the necessity of dealing with this phenomenon, the competent authorities are entitled, inter alia, to adopt the measures of seizure, and demolition of the home of the suicide bomber. Prima facie, the Respondent is justified in regarding the policy by which the security forces refrained from harming the house of the terrorist who was killed during the act, as being inapplicable to suicide
that justified the policy in the past was the assumption that with the death of the terrorist during the act, the deterrent element was exhausted with respect to potential terrorists. On the other hand, adoption of such a policy in cases of suicide terrorists will at the very least leave a vacuum in respect of the deterrent measures open to the military commander. Furthermore, it may even preclude any chance that those living together with the terrorist, and who are aware of his intention to do a suicide bombing, will attempt to prevent him.\footnote{128}

These comments by the court are no less correct today, carrying the same force as they did more than a decade ago given the fact that we are currently witnessing a wave of insane terror of suicide-terrorists, the extent of which we never knew in the past. The difference today is that some of those terrorists live in the areas belonging to the Palestinian Authority, no longer under direct Israeli control. Thus, it would seem that the terrorists feel more confident in setting out for their suicide missions knowing that no harm will come to their families.\footnote{129}

The cases of terrorists setting out for suicide missions from territories still under Israeli control will now be viewed with greater understanding if the military commander decides to exercise his power and gives orders to seize a house, whether to demolish or seal it up. There can be no doubt that with all the severity attaching thereto, this seizure is a measure that can deter others from setting out for a suicide mission, making them reconsider their steps. In my opinion, there is nothing inhumane in demolishing a terrorist’s house as a deterrent measure, if such an act can potentially prevent the murder and suffering of citizens who committed no crime and did no wrong to the terrorist.


\footnote{129} Obviously, the Palestinian Authority will not be a source of assistance in the execution of these orders. For its own part Israel could have reached these houses and damaged them, but this would have prevented the inhabitants from petitioning the High Court in order to prevent the action. Under the current conditions, this eventuality is impossible, and one cannot assume that the military commanders would exercise their authority against the inhabitants of Territory A (the territory under Palestinian control).
B. Does Regulation 119 Contravene the Prohibition on Expropriating Private Property?

Regulation 119 actually contains two powers, the power to seize and expropriate private property and the power to demolish the property.\(^{130}\)

We have already dealt with the second element of damage to private property by its destruction, or its sealing up. We shall now proceed to discuss the question of whether the less severe power of seizing and expropriating property contravenes the prohibition established by the international law in this respect:

Article 46 of the Hague Convention prohibits damage to private property.\(^{131}\) It states "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."\(^{132}\)

The occupying state is permitted to expropriate property under special circumstances, for the maintenance of its army,\(^{133}\) but it seems to me that this is not the context of our discussion. The prohibition in article 46 against damaging private property must be read together with the qualifications laid down in article 43 of the Hague Convention and article 53 of the Fourth Geneva Convention.\(^{134}\) Accordingly, it can be said that military necessity dictates and justifies the seizure of private property. In terms of military interests, what could be more important than the seizure of a house that was used for the purpose of terrorist activity to deter others from violating the security of the area? It would seem to me that together with the prohibition against damaging private property, there are certain exceptions to the civilian property rights, which are dictated by military needs, whether for the maintenance of the army or in order to prevent harm to the army and to peaceful citizens.\(^{135}\)

\(^{130}\) See Defense Emergency Regulations, supra note 64, at Regulation 119.

\(^{131}\) See Hague Convention of 1907, art. 46.

\(^{132}\) Id.

\(^{133}\) See, e.g., Fourth Geneva Conv., supra note 43, arts. 52, 53(2). See also Hague Conv., supra note 95, art. 43.

\(^{134}\) See Fourth Geneva Conv., supra note 43, art. 53 (stating "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.").

\(^{135}\) In those cases in which private property was seized in order to facilitate an urgent military need, for example the seizure and destruction of a house in order to broaden the access road to ensure the security of travellers, the military must pay compensation for the damage to property. See, e.g., H.C. 4112/90, Assoc. for Civil Rights v. O.C. Southern Command, 44(4) P.D. 626
C. Does Regulation 119 Contravene the Right to Due Process?

Due process is a basic right and a precursor for any governmental violation of human rights, for example, a property right. It is generally ascribed to the judicial process, but, in reality, is applicable to all administrative procedures by reason of which there may be an infringement of human rights. International law also requires the maintenance of appropriate protection of human rights by the occupying state. Thus, under article 71 of the Fourth Geneva Convention, a person against whom an indictment is brought is entitled to all of the rights specified therein. There is no doubt that this is the Israeli practice with respect to all those against whom indictments are filed. However, our concern here is not with judicial proceedings. What bothers critics is that Israeli application of Regulation 119 as a punitive measure is not expedited by way of judicial procedure, but rather by way of an administrative body that is not bound by all of the rules of a Court.

Regarding the claim that Regulation 119 conflicts with the concept of due process by allowing a person to be punished by a body other than the Court, my response is that authority for violation of basic rights does not vest exclusively in the Courts. There are other governmental bodies that are statutorily authorized to impose sanctions under certain circumstances. Thus, for example, a local authority is permitted to issue an order for demolition against a resident who built without a license. There can be no doubt that the demolition of a house is a violation of a person's property rights. Does the fact that the local authority was empowered to do so conflict with the idea of due process? The answer is in the negative. Governmental bodies can also be authorized to violate a person's basic rights, provided that there is an explicit statutory authorization, the authorization was for an appropriate purpose and not in excess of what is required. However, even if the authorization complies with the requirements of constitutionality, a person nonetheless has the right to have the body exercise its authority in accordance with due process. It is within this framework that we expect the existence of minimal guarantees to ensure that the governmental violation of rights is not arbitrary, or motivated by irrelevant and illegitimate considerations. In order to ensure

(Hebrew).

136 See, e.g., U.S. CONST. amend. V, XIV (Fifth Amendment states “nor be deprived of life, liberty, or property, without due process of law”; Fourteenth Amendment states “nor shall any state deprived any person of life, liberty, or property without the due process of law . . .”).

137 See, e.g., Simon, supra note 83, at 72-73.

138 Regarding the Administrative Demolition Order, see section 328 of the Planning and Building Law of 1965.

139 See Basic Law: Human Dignity and Liberty, supra note 74, § 8.
these guarantees, Israeli courts have forced military commanders to comply with appropriate standards. Thus, prior to directing the execution of a seizure or demolition order, commanders are obligated to allow those affected thereby to make their objections to the decision. Furthermore, if the commander dismisses their objections, the Supreme Court has directed that these people be allowed to petition the Supreme Court, in order to contest the legality of the commander’s decision. There are no other precedents for a person in occupied territory having recourse to the Supreme Court of the Occupying State against that state’s military commander. While the Supreme Court sitting as the High Court of Justice does not function as an instant appeal from the decision of the military commander, the Supreme Court only examines the legality the decision under a broad scope of judicial review that is still extremely restrictive. The reason for this was given by Justice Barak: “Extensive powers are concentrated in the hands of a Military Government, and for the sake of the rule of law we should apply judicial review according to the normal standards.”

It is evident, therefore, that the Supreme Court was not satisfied with the retention of the affected person’s right to “be heard.” The Court added an element that is definitely not required by international law, and is unprecedented.

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140 “This unprecedented phenomenon of allowing the civilian population access to the occupying power’s national courts and subjecting the Military Government’s conduct to domestic judicial review has added a unique element to this occupation.” Simon, supra note 83, at 22; see also EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 119 (1993) (Hebrew).

141 Justice Barak observed “the judgments of the Supreme Court stated more than once that the security considerations of the army, both inside Israel, as well as in Judea, Samaria and Gaza are subject to judicial review, and that this judicial review is not limited to questions of jurisdiction or the presence of security considerations in the case at hand. It extends to the whole gamut of grounds for review, including the question of the reasonableness of the security consideration,” Rassler v. Minister of Defence, 42(2) P.D. 785, 810 (Hebrew).


143 See H.C. 4112/90, Assoc. for Civil Rights v. O.C. Southern Command, 44(4) P.D. at 631. Deputy President Prof. Elon wrote:

[B]ut since the right to be heard is a basic right in the Israeli legal system, it is both appropriate and correct that it be implemented in any case where an Israeli authority functions, even if the law in that place, whether domestic or public international, do not require such application. The silence of domestic and international public law on this matter is not a negative arrangement.

Id. See also H.C. 358/88, H.C. 69/81, 493 Itta v. Commander 37(2) P.D. 197 (Hebrew)

The rules of Israeli law have indeed not been applied to the area, but any Israel official in the field carries with his functions, the duty to behave in accordance with additional criteria, which are necessitated by the fact of the
mented in that it grants a person the right to contest the military commander's decision in the highest judicial instance of the state, the High Court of Justice. Furthermore, as we observed, the Supreme Court did not hesitate to subject the military commanders to compliance with the reasonability standards of other administrative bodies. The military commander must take all the relevant factors into consideration. For example, the severity of the terrorist's acts compared with the expected damage to other family members if the house is demolished; the degree of knowledge of the other family members or the landlord, with respect to the terrorist's intentions; the degree of influence that the seizure and demolition of the house will have upon other potential terrorists all must be considered.\footnote{In view of the limitations and the judicial supervision of the decisions of the military commander, I find it difficult to accept the criticism that regards the exercise of Regulation 119 as being in contravention of the concept of due process.}

In view of the limitations and the judicial supervision of the decisions of the military commander, I find it difficult to accept the criticism that regards the exercise of Regulation 119 as being in contravention of the concept of due process.\footnote{Id. See also H.C. 2722/92, Alamarim v. Commander, 46(3) P.D. at 699.}

An official does not as a rule discharge his duty if he only complies with what is mandated by the norms of international law; as an Israeli authority more is required of him, meaning that even in the area under military government he should conduct himself in accordance with the rules of proper administrative procedure, and the right of being heard is one of the basic concepts in the Israeli legal system.\footnote{\textit{Id.} See, e.g., H.C. 1730/96, Sabich v. Biran, 50(1) P.D. at 357 (Justice Bach holding).}

One must consider the gravity of the acts imputed to the suspect that lived in the same building, and the existence of verified evidence of their execution by that suspect:

1. One may consider the degree of involvement of the other inhabitants of the house, usually members of the terrorist's family, in the terrorist activity of the latter. The absence of proof regarding the involvement of the relatives does not as such prevent the exercise of the authority, but is an element which may as said, affect the scope of the Respondent's order.
2. A relevant consideration is whether the residence of the suspected terrorist, constitutes a separate residential unit from the rest of the structure.
3. It must be clarified whether it is possible to destroy the suspect's residential unit, without harming the other parts of the building, or adjacent buildings. If it emerges that this is not possible, then consideration should be given to whether sealing up the relevant unit is sufficient.
4. The Respondent must consider the number of people who are likely to be harmed by the destruction of the building, and of whom it may be assumed that they are totally innocent of any crime, not were they aware of the actions of the suspect.

\textit{Id.} See also H.C. 2722/92, Alamarim v. Commander, 46(3) P.D. at 699.

\footnote{See the critique of Simon, \textit{supra} note 83, at 72-75.}
Even so, I am perturbed regarding one matter, concerning the degree of evidence and proof for the military commander. The accepted interpretation in this regard is that Regulation 119 does not require more than compliance with the standard evidentiary tests for administrative law, with respect to the involvement of members of the household in terrorist activity.\footnote{See H.C. 361/82, Hamri v. Commander, 36(3) P.D. 439, 442 (Hebrew).}

In my opinion, in this case a heavier burden of proof should be required. In terms of its nature and scope the burden should be between the civil and criminal burden of proof, which for our purposes means "clear and convincing" proof.\footnote{See Gross, supra note 12, at 239.} This burden is characterized by the fact that it is not satisfied with the reasonableness of the evidence, but requires something more. The evidence submitted must clearly and unequivocally indicate that the person concerned was connected to the act of terror being examined.

This chapter should be concluded with the citation of Justice Cheshin's comments in which he shares with us his misgivings regarding whether it is even proper for the Court to interfere with these kinds of decisions by military commanders. Justice Cheshin likens these decisions to acts of war that are not subject to judicial review:

In the fifties there was a policy of acts of revenge. In response to violations of Israel's security and the murder of Jews by infiltrators and terrorists, Israeli army units would cross the border and wait for designated targets. These revenge actions also involved harming citizens on the other side of the border. Was it even imagined, could it be imagined, that a Jordanian citizen (Palestinian) could file a petition against a revenge action that may have been intended to destroy his house? The clear response to such a ridiculous petition would be 'Act of State.' In other words, an act that does not come within the jurisdiction of the Courts, an action to which the Courts do not apply the norms of the law, or an act which is, as it were, outside the boundaries of the Law. The act concerned the relations between states and when states speak to each other in the language of war, the individual has neither rights nor status. Civilian populations suffer greatly during wartime, but the suffering as such does not vest the individual with either a right or status with respect to the enemy.\footnote{See Eitan Haber & Zeer Sheff, Revenge Actions, in LEXICON OF ISRAELI DEFENSE 430}
The acts are not justiciable, given that they 'belong' to a realm that is not within the Court's authority.

We have not said that the demolitions of houses in areas under Israeli control are identical to acts of war against an enemy state. The differences between the acts are too obvious to be ignored. Nonetheless, the acts are similar because they are both acts of state that are acts of war. When we say "acts of state" and "acts of war" our intention is to acts the entire essence and purpose of which is the maintenance of general security and safeguarding individual lives. Their concern is security and life, in simplest sense. Who can deny the assertion that life and its preservation, in the simple sense, are elevated above all other rights; that property rights retreat in the face of the right to life? Let us assume that the military commander deems that the destruction of the house of a terrorist may perchance, however slight that chance may be, deter another person from becoming a terrorist-murderer like the Hamas, or the Islamic Jihad. How can the Court possibly tell the commander what to do and what not to do? In war, one should act as in war. The Court has no business telling the commander what to do and what not to do. Clearly, the Court would not direct the commander of a battalion to send a particular platoon on the right side of the hill and not the left side. In the same vein, though on a lower level, I am unable to understand how the Court can tell a military commander not to destroy the house of a terrorist-murderer, for deterring purposes because the Court may take a different view. We have supervised the actions of the military commanders in the past, when he intends to destroy the houses of terrorists. We reviewed his acts and purified them in the blast furnace of judicial review. We do this now and we shall continue to do so in the future. But the truth is that this review and supervision is not the same review and supervision that we apply to the other administrative authorities.

The different material naturally dictates different modes of intervention. Acts of state and acts of war do not change their character even when subject to judicial review. The nature of the acts also quite naturally leave their stamp on the modes of intervention. The difficulties we encounter in reviewing the actions of the military commander are greater in number and graver in substance than the difficulties that we encounter in the judicial review and supervision over general administrative authorities. These difficulties severely limit the ability of the Court to inject the rule of law into the acts of the military commander. Even so, we will not be weakened in our efforts to contribute to the rule of law. We obligated ourselves in the oath to do justice and righteousness, to be the servants of the Law and we will be faithful to our

oath and to ourselves. Even when the trumpets of war blow, the rule of the law sounds its voice. But we must confront the truth. At those times, its voice is like the sound of the piccolo, refined and pure, but swallowed up in the tumult. These are all things that we have known for ages; and yet I said to myself, "I will speak and feel better for it."

III. IMPOSITION OF CURFEWS

We will now proceed to examine the restrictions on the freedom of movement and the individual’s personal autonomy when such restrictions are the result of military needs connected to the war against terror. In this context, the harshest restriction is the curfew, which, as we shall presently see, is the absolute restriction of freedom of movement keeping people in their houses for whatever period of time as determined by the military commander. On the other hand, the encirclement or the blockade are less serious in terms of the restrictions on the freedom of movement for in these situations people are unable to go out of a particular area, or even receive permits to leave or enter the same area.

Regulation 124 of the Defense Regulations provides that:

A military commander may by order require every person within any area specified in the order, to remain within doors between such hours as may be specified in the order, and in such case, if any person is or remains out of doors within that area between such hours without a permit in writing, issued by or on behalf of the military commander or some person duly authorized by the military commander to issue such permits, he shall be guilty of an offence against the Regulations.

What is the nature of this authority? It is intended to enable military commanders to discharge the duties legally imposed upon them. In areas subject to military control, the intention is to allow the enforcement of personal and public security of the military forces and civilians. The problem with this authority is that it interferes with other rights of the civilians upon whom the curfew is imposed. It restricts the freedom of movement or restricts the ability of civilians to conduct their lives as they choose. Can these severe

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150 Defense Emergency Regulations, supra note 64, at Regulation 124.
restrictions of human rights be justified both in terms of domestic law and in terms of international law?

In terms of the domestic law, the Defense Regulations are, as stated, part of the domestic law applicable in the West Bank and Gaza, as well as part of the domestic law of the State of Israel. This is legislation that has given rise to serious criticism from both jurists and public figures. Israel, however, is currently in control of foreign territories and responsible for their security, as well as the security of the military forces and that of Israeli citizens within those areas. There can be no doubt in the current situation that these Regulations are justified in terms of their purpose and the tools they provide military commanders for the discharging of their duties.

It is also true that even if domestic law permits and recognizes these Regulations, they must be implemented in a manner that has consideration for the human rights of those upon whom it is applied. The period of the British Mandate in Eretz Yisrael is not identical to the current period of Israeli sovereignty, which waves its banner of democracy and human rights. These were the comments of Justice Cheshin with respect to the manner of interpretation of these Regulations:

Legislative acts conceived and promulgated during the Mandate Period, including the Defense Regulations, have one interpretation during the Mandate Period and another interpretation thereafter, subsequent to the establishment of the State. For clearly, the values of the State of Israel as a Jewish, free and democratic state are entirely different from the basic values which the Mandate imposed upon the country. Our basic values—which in our days are the basic values of a law abiding state striving for freedom and justice, are the breath of life in the interpretation of the laws. This was the situation since the establishment of the State, and it is certainly the situation after the enactment of Basic Law: Human Dignity and Liberty, which is based upon the values of the State of Israel as a Jewish and Democratic State. These values are universal human values, including the value of "there shall be no violation of the property of a person" (Section 3 of the Law) and "there shall be no violation of rights under this Basic law except by a Law befitting the
Even though the Regulation does not restrict the military commander’s discretion and allows him to decide when to impose a curfew, it is clear that his discretion is not unlimited and must comply with the criteria established by constitutional and administrative law for the exercise of governmental authority. Thus, for example, the military commander must be convinced that the imposition of the curfew is essential for the promotion of one of the goals with which he is charged, i.e. the security of the area or public order. However, it is not sufficient that he regard the curfew as necessary for that goal. He must also be convinced that there is no other less harsh alternative way of achieving that goal. In other words, the commander must comply with the reasonability requirement [one of whose features is reasonableness].

The curfew is intended to assist the security forces in the restoration of order when the order was disturbed due to illegal demonstrations, serious riots, and other such behaviour. In order to allow the restoration of peace and quiet, a brief curfew is understandable. The same is true in the case of a terrorist act when the commander knows that the terrorist/s have taken refuge, hiding in one of the houses. Imposing a curfew would be an understandable measure to facilitate the location and capture of the terrorist/s.

A possible claim against curfews as measures is that it harms entirely innocent people unconnected to the disturbances or the terrorist act. In other words, the claim is that the curfew is a way of punishing innocent people. Prima facie, the result of the curfew is harm caused to innocent people who have no connection with the acts or conduct by reason of which the curfew was imposed. But, in fact, this is the inevitable consequence of the adoption of general measures that do not permit exceptions for innocent people.

Even so, it must be clear that the curfew must not be imposed as a punishment for conduct that disturbs public order or security of the area. The authority was not intended for punishment such as this and if the military commander acts in that fashion, his acts will be invalidated.
The curfew is an accepted legal tool and has also been used within Israel. On the eve of the Sinai Campaign in 1957, it was feared that some of the Israeli-Arabs would attempt to help the Jordanians in the approaching war. It was, therefore, decided to impose a night curfew to prevent them crossing the border. The case discussed in *Assoc. for Civil Rights v. O.C. Southern Command*. H.C. 4112/90 illustrated the use of the curfew as an essential measure for ensuring the security and peace in the area. There had been a series of violent disturbances at the entrance to the refugee camp Borge' in Gaza. The inhabitants went into the main streets close to the outer precincts of the camp and attacked passing cars with stones and Molotov Cocktails. The warnings to the civilians were to no avail, nor were the preventative measures such as the sealing up of alleys from where the rioters dashed out. A reserve soldier drove his car in the area and was stoned by the rioters. He and his car were then set on fire. Following that case, the military commander decided that there was no option but to broaden the local road and to that end he had to seize and demolish a number of houses bordering on the street, while compensating their owners. In order to allow the street broadening, a curfew was imposed on the residents of the camp. The residents appealed to the High Court, which examined the reasonability of the decision and affirmed that under the circumstances of the case, the action was justified.

The curfew is a drastic measure that severely violates human rights. The curfew must be the last measure, when there is no less severe alternative

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the decision to impose any particular restriction at a given time in a given place.

156 H.C. 4112/90, Assoc. for Civil Rights v. O.C. Southern Command, 44(4) P.D. 626 (Hebrew).
157 Id.
158 Id.
159 See H.C. 4112/90, Assoc. for Civil Rights v. O.C. Southern Command, 44(4) P.D. 626 at 630.

[T]he Respondent declared a general curfew in the area, which was seething with unrest and tension. The curfew was required in order to perform the actions necessary for broadening the road, in order to allow I.D.F. operations, and due to the fear of danger to the lives of the local residents. The declaration of a curfew was also necessary due to the spreading of rumors by hostile elements regarding acts of revenge perpetrated against the background of the murder of the soldier Pomerantz—the rumors were totally without foundation. In his comments to us, the Respondent himself dwelt upon the tremendous difficulties involved in maintaining a prolonged general curfew and even in the Bor'dz camp itself. . . . and it was also for this reason that he saw the need for acting immediately and to implement all of the measures specified in the Respondent's order without delay.

*Id.*
measure available and it must be proportional. It is forbidden to impose it for an extended period, and the military commander must reassess its necessity from time to time.\textsuperscript{160}

Furthermore, if the curfew continues for more than a few hours, the military commander must occasionally lift it for a short time to allow people to leave their homes for the sake of replenishing urgent food supplies needed at home. The military commander must also ensure the ongoing functioning of medical services and treatment for sick people, as well as access for medical personnel with freedom of movement, even during a curfew.\textsuperscript{161}

As with any other military powers that the commander has, the curfew, too, is subject to judicial review of the Supreme Court, sitting as the High Court of Justice.\textsuperscript{162} The problem is that this mode of supervision is not always efficient because if the curfew is only of short duration, practically speaking, there is

\textsuperscript{160} See H.C. 1113/90, Shaav v. Commander, 44(4) P.D. 590 (Hebrew) (stating that “[t]he Respondent must make periodic assessments regarding the need for the imposition of the said orders, in cognizance of the difficulties they cause to the population, the aim being to ascertain if and when it is possible to forego this measure, or at least be more lenient in its implementation.”).

\textsuperscript{161} See H.C. 477/91, Israeli-Palestinian Doctors Society v. Minister of Defense, 45(2) P.D. 832, 836 (Hebrew). In this case, a curfew had been imposed upon certain places in the area of Judea, Samaria and the Gaza Strip in the wake of the Gulf War. It was claimed that soldiers had prevented a girl getting to hospital and she died as a result. The Court instructed the Military Attorney General to examine the case, and also instructed the military commanders regarding the provisions to be established at the time of the curfew in order to ensure the receiving of proper medical treatment.

In terms of the general arrangements, it would seem to us that the subject of the movement of doctors and patients during the curfew should find expression in a general and comprehensive directive, to be worded in Hebrew and Arabic, and which should be issued by the civil administration responsible for coordination with the heads of the hospital services and with the government and private hospitals in these areas. As an appendix to the directive there should be examples of the certificates to be granted to the medical personnel and vehicles, and primarily which contains a complete specification of the paths of action available to the sick person or his family who find themselves in the difficult situation of requiring medical assistance during the curfew (the need for a doctor’s assistance or driving to a hospital). The aforesaid procedure will serve as a detailed standing order for soldiers at blockades and roadblocks and will be an authorized, written guideline for the local leaders and the local residents. The advance clarification of these paths of action which are available should a medical need arise during a curfew, will prevent numerous misunderstandings, reduce the difficulties deriving from ignorance on the part of the doctor, the patient or the particular official in the administration, and will lessen the danger of mishaps.

no time for the resident under curfew to petition the High Court.\textsuperscript{163} It would be more efficient to establish a speedier forum of review, for example an appeal to a military Court that supervises the actions of the commanders.\textsuperscript{164}

As stated above, the curfew constitutes a particularly grave restriction of individual liberty because it denies the resident any possibility of movement outside of his or her home. However, it is precisely the nature of the curfew that also constitutes its rationale. Keeping people in their homes facilitates the army’s efforts to restore the public order where it was disrupted, and allows easier access to the homes of the residents in order to locate those suspected of being involved in terrorist activities or in possession of forbidden weapons.

Even though the curfew resembles the confiscation and demolition of homes as a means of enforcing the military rule, the difference between the measures is clear. For example, Regulation 119 allows the military commander to seize the house of a person who was involved in terrorist actions, and to demolish it too, as a punitive and deterrent measure. Regulation 124, on the other hand, prohibits the use of the curfew as a punitive response reserving it for preventative measures only.\textsuperscript{165}

We will now proceed to examine the legality of Regulation 124 in terms of international law.

Even though international law does not explicitly relate to the subject, certain conclusions can be drawn from the prohibitions stipulated in Article 50 of the Fourth Geneva Convention and Article 33 of the Hague Convention, regarding collective punishments. Accordingly, curfews cannot be imposed as a collective punishment.\textsuperscript{166} As we saw above, this position is also stressed in Israeli case law.\textsuperscript{167} On the other hand, Article 78 of the Fourth Geneva Convention, empowers the military commander to detain a person in a particular place for military reasons.\textsuperscript{168} This Article has been viewed by some as a possible framework for entrenching the power to impose a curfew.\textsuperscript{169}

\textsuperscript{163} See, e.g., H.C. 1358/91, Arshid v. Minister of Police, 45(2) P.D. 747 (Hebrew) (stressing the need to allow the residents during a curfew to come before the Court and state their objections regarding the legality of the curfew).

\textsuperscript{164} See Reicin, supra note 77, at 545.

\textsuperscript{165} See Defense Emergency Regulations, supra note 64, at Regulations 109 and 124.

\textsuperscript{166} See Reicin, supra note 77, at 543.

\textsuperscript{167} See text adjacent to note 163 supra.


\textsuperscript{169} Fourth Geneva Conv., supra note 43 at art. 149:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made
The language of Regulation 124 does not qualify, or limit the grounds for curfew, ergo it could *prima facie* be imposed as a punitive measure for terrorist activity in a manner similar to the demolition of houses under Regulation 119. However, the Courts were careful to interpret this Regulation in a restricted sense that would make it compatible with the requirements of international law and Israeli constitutional law.\(^{170}\)

In summary, it can be said that despite the serious nature of the curfew and its harsh implications for individual freedom there is no escaping its existence and imposition on occasion. This, of course, is provided that it be done in a manner compatible with its goals and in compliance with the restrictions imposed upon it in the domestic law, and to a lesser extent, by international law.

We will now proceed to examine a related topic, the power to impose a blockade or an encirclement of certain place.

**IV. IMPOSITION OF A BLOCKADE OR ENCIRCLEMENT**

This authority of the military commander derives from a number of possible sources. For example, Regulations 122 and 126 authorize the commander to limit movement in the areas or in certain streets.\(^{171}\) Regulation 125 allows the declaration of a certain area as a closed area, the entry and exit there from being by permit alone.\(^{172}\)

Another normative source is the security legislation in the territories. This is legislation promulgated by a military commander, by virtue of his authorization under international law as the controlling force over the area. It was in this context that the Supreme Court noted:

> A military government is entitled to prohibit or restrict the entrance into an area under its control (H.C. 500/72 *Miriam Chalil Salam Abu Al-tin v. Minister of Defense et al.*, 27(1) P.D 481). The Military Governor of Judea and Samaria

\[\text{according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.}\]

\(^{170}\) *See* Reicin, *supra* note 77, at 544-45.

\(^{171}\) *See* Defense Emergency Regulations, *supra* note 64, at Regulations 122 and 126.

\(^{172}\) *See infra Part V.*
exercised this authority and decreed that Judea and Samaria are "closed areas", entry into which is prohibited (Order Regarding Closed Areas (Judea and Samaria Areas) (No.34), 1967). 

In fact, the Regulations allow restriction upon the freedom of movement in a graded and geographical manner beginning with restriction of entry or exit to all areas of the West Bank and the Gaza Strip, with the exception of those people with special permits. In such a case, the accepted term is a "closure," which is imposed upon these territories in order to prevent the transit of persons into the area of the State of Israel. These closures are usually imposed when intelligence warnings are received regarding impending entry of terrorists into Israel in order to commit terrorist acts. The restriction of passage between the territories and Israel is not just a restriction of movement for the residents of these areas, but more importantly, it means preventing many of them from earning a living from their work done in Israel. In reality, this is one of the most serious problems facing the State of Israel. Many of the residents of the territories must work outside those areas in order to make a living. At the same time, the moment that terrorist acts are done in Israel by Palestinians there is no option but to prevent entry into Israel, thereby reducing the danger of continued entry into Israel of hostile elements. Should this general closure, which is definitely a serious blow to many people who certainly are not connected to terror, be regarded as a form of collective punishment? The answer is in the negative because imposing the closure is not punishment, but rather exclusively to prevent continued acts of terrorism by blocking the terrorists' passage into Israel. The accompanying result indeed harms others but there is no avoiding this. Furthermore, even if an inhabitant of the territories previously had a work permit allowing him to enter Israel, none of the residents have any reason to suppose that the permit is inviolable. The permit is issued subject to military necessities. Thus, for example, in 1995 there was a severe terrorist act in Beth Lid where soldiers waiting for a bus were killed. The military commanders decided to impose a closure on the territories, and prevent entry into Israel. Subsequently, work permits in Israel were restricted to a certain category of persons who were defined as being low risk. 

Justice Matza explained the justification of the military commander's decision not to grant continued validity for the Petitioners' entry permits into Israel:


None of the Petitioners have an inherent right to enter Israel in order to work there. The Respondent has discretion to decide whether to permit their entry into Israel, be it for work or any other purpose. His discretion is exercised in accordance with fixed criteria, but the issue of the permit is always subject to the absence of any security-related reason that necessitates preventing entry. The existence of a security-related reason with respect to a person who is a resident of the area within the borders of the Palestinian Authority, is learnt, by virtue of the circumstances, from intelligence information. The Security Service examines and assesses the veracity of the information. The explanations that were given to us in response to our questions in the framework of the Court session *in camera* have satisfied us that the professional elements discharged all of their duties prior to reaching their conclusion. Under these circumstances, we see no reason to question the justification for the Respondent's refusal to return the Petitioners' magnetic cards that were confiscated from them.\(^7\)

It must be remembered that the imposition of a general closure, in the sense that residents of the territories are not permitted to enter Israel, is reminiscent of the authority given to the Minister of the Interior to refuse the allow certain categories of persons to enter Israel. This is in the event of there being a fear that they are liable to harm the public peace or public order.\(^7\) The authority given to the Minister of the Interior is intended to ensure that those seeking to enter Israel do not endanger its peace or security.\(^7\)

\(^{175}\) *Id.*

\(^{176}\) *See* H.C. 209/73, Oda (Lafi) v. Minister of the Interior, 28(1) P.D. 13, 17 (Hebrew).

\(^{177}\) *See* H.C. 482/71, Klark v. Minister of the Interior, 27(1) P.D. 113, 117 (Hebrew) (Justice Berenzon stated that:

as stated above, the matter is one for the absolute discretion of the Minister of the Interior and for as long as he does not give reasons for his differing practices in respect of foreigners visiting the county, his various decisions cannot be the subject of judicial review, except if it be proved that he acted out of corruption, fraud, lack of good faith and the like, which are likely to invalidate any administrative decision. . . . Amongst the factors that can lead to the invalidation of a governmental action we also include decisions given arbitrarily, or as a result of irrelevant considerations.

*Id.* Also see J. Landau's comments that are equally applicable for our purposes relating to the discretion exercised by the Minister:

In order to safeguard essential State interests, the Minister of the Interior is granted absolute discretion, to allow an individual or group of people, to be
The Minister of the Interior is entitled, for humanitarian reasons, to permit the entry of people into Israel and provide them with temporary residence permits. The same entitlement applies to the military commander. Given the economic difficulties of the Palestinian residents, when circumstances permit and the danger of terrorists coming into Israel decreases, authorities can sometimes permit a specific number of the residents to come to work in Israel.

Since the outbreak of the uprising in October 2000, and as part of the Palestinian Authority's armed struggle against Israel, many Israelis living in the West Bank and Gaza Strip have been injured. By these terrorist acts, the Palestinians almost certainly wished to show their opposition to the establishment of Jewish settlements in these areas. However, the shooting attacks are directed indiscriminately against civilian residents, women, children and the elderly. As such these are severe crimes both in accordance with domestic law and international law. Israel is committed to the security of all of its citizens, including those living in these parts of the country, in Judea, Samaria and the Gaza Strip. Since the killers exit the borders of the Palestinian Authority and later escape back into them there is no option but to impose a closure on the cities to which they escaped. Given the fact that the Palestinian Authority has absolutely refused to arrest such terrorists or extradite them to Israel, from a security perspective, there is no choice but to adopt all the measures necessary to prevent these and other terrorists from leaving their cities in order to attempt to undertake additional attacks.

In view of the above, the military commanders are forced to impose closures or encirclements on those Palestinian cities. Clearly, this reality also harms many good people who are unconnected with the terrorists, hence the widespread criticism of Israel amongst the human rights organizations. The Court assesses the imposition of the closure in accordance with the same

permanent residents, while refusing others, in as much as his discretion can reflect humanitarian considerations for one group and state interest considerations for another. Even so, even this absolute discretion has restrictions.

Id.  

See infra note 180.  

See id.  


See B'Tselem, Criticism of the Mass Deportation of December 1992, criticism of "BeTzelem" appears in their site http://www.btselem.org/ (last visited on September 10, 2001). See also Petition of the Israeli Citizens Rights Association, dated 4.4.01 against the I.D.F. Commander in the West Bank, relating to the closure imposed on the Twaana village in the Hebron Area(H.C. 2811/2001), as appearing in the Association's site http://www.acri.org.il (last visit Sept. 10, 2001).
criteria that it established in the past for assessing the military commander's discretion:

This is the response to the petition to the extent that it relates on a general level to the imposition of a curfew 'from time to time' or to the imposition of other forms of restriction on 'freedom of movement, occupation and work' of the local population. In all cases of the imposition of such restrictions, the competent authority must assess the degree of security needs for exercising the power given to it as compared to the harm caused to the local population, it must avoid imposition of restrictions as punitive measures and must refrain from the adoption of harsh measures which cause more harm than is required under the circumstances. This is a criterion for assessing a decision for imposing any particular restriction at any particular time or place. The general answer is therefore that the law permits the military commander of the territories to impose a curfew and additional restrictions, as established by law, and to the extent necessitated by security considerations in every case.183

As stated, above, the claims against the military commanders in cases of imposing a curfew on a particular village is that these measures constitute collective punishment, as well as causing the starvation of the residents and endangering their health.

In other words, the criticism against the imposition of closure attempts demonstrate that they result in the entire population being deprived of food and medicine, and that by this, the military commanders actually intend to punish the population for having terrorists dwell amongst them.184

183 See Srozberg v. Minister of Defense (unpublished), per Zamm J.
184 See H.C. 9242/00, The Doctor's Association for Human Rights v. Minister of Defence (unpublished) (Hebrew). The Court rejected Petitioners' claim, since the Petitioners had not substantiated it with evidence. This matter was recently presented to the Supreme Court in the following manner, by the Doctors for Human Rights Association:

The Petitioner requests other relief, necessitated primarily by the establishment of roadblocks by the army in the territories of Judea, Samaria and the Gaza Strip. These roadblocks were established and have already existed for a few months, due to the difficult security conditions in these areas, as part of the military effort to prevent attacks, which have taken a heavy toll in human life in the territories themselves and in the area of Israel.

The Petitioner claims that these roadblocks, which create a closure or encirclement, cause suffering to the civilian population of the Judea, Samaria
None of the petitions filed to date in the Supreme Court have succeeded in proving that the encirclements or closures are intended to harm the population in general. Quite the opposite is true. The State’s response is invariably that the army takes measures to ensure the entry of sufficient quantities of food and medicine for the needs of the populace. Furthermore, the Court has instructed the army to establish clear guidelines for ensuring the provision of emergency medical assistance.

It is important to stress that the measures adopted by the military commanders are the product of pressures imposed upon them by terrorists leaving the residential areas in Judea and Samaria for the purpose of committing terrorist attacks, after which they return to these places. There is no other way of ensuring that they do not leave these areas again, at least until the intelligence sources have attained the information necessary for their capture.

Given the situation since the outbreak of the armed uprising in the territories, the declared banner that only terror will force Israel to retreat from the territories, and given the scope of this terrorist activity, it is clear that the State of Israel is currently in a state of war or armed conflict with the Palestinian Authority. An understanding of the situation as being a state of war is important, given that in a state of war different rules apply. Justice Cheshin related to this, albeit in the context of destroying houses, but his comments are equally germane to our discussion:

[B]ut none of the above can dull the sense, a very sharp sense at that, which the matters are quite out of our depth. It cannot be denied that we are dealing with regular administrative laws and as such, their application to exceptional decisions such as the demolition of houses in Judea and Samaria is somewhat artificial, an attempt to merge disciplines that are essentially inassimilable. Furthermore, in reviewing demolition orders, we have a sense of being in a foreign environment and this is not due to our lack of power or authority to interfere with the

and Gaza territories. In particular, affecting the Petitioner specifically, they prevent the regular supply of food and medicines and medical services to the population. The Petitioner therefore requests that the Court instruct the Minister of Defence and the military commanders to remove the roadblocks (in the words of the Petitioner, 'the walls of soil surrounding the villages').

Id.

185 Id.
186 Id.
decision of the military commander. More than once we have interfered with the decision of a military commander; we have reversed decisions that were made, and we have instructed them to act in a particular manner, as opposed to a different manner. The feeling of not belonging derives essentially from the fact that the demolition of houses is an act performed in accordance with the Defense Regulations, which by their very nature and substance are acts of war. Acts of war are not the kind of acts that the courts are required to deal with in regular day to day life.

Tzalach Nazal murdered twenty-three people and injured dozens of others when he exploded a bomb inside a bus.188 ‘The murderer’s act’, was essentially, even if not in the formal sense of the definition, an act of war. When it comes to acts that are essentially acts of war, the response is via actions that are also essentially acts of war. This being the case, we are confronted with a formidable task, for we have difficulty in applying the norms of every day law to acts of war, “and I as judge have not trained myself to deal with war and know not the ways of fighters.

However, I am being requested to apply the everyday law and legal standards on an act that is essentially an act of war. How can I do that?”189 And if anyone had any doubt that we are in a state of war (even if not in the formal sense), then the Government’s decision, dated 3 March 1996, reminded us:

The Government determines that Israel is currently in a state of overall war against the Hamas organization and other terrorist groups, and it demands of the Palestinian Authority, of all the Arab states and of all the partners to the peace process, that they participate in this war, with all the measures at their disposal, and to act with tenacity against the terror.190

We will now examine international law.

The concept of encirclement or imposing a siege is in fact an ancient one. The intention is to surround the besieged city with the aim of wearing out the fighters of the city until they surrender.191 Clearly, this is no longer the

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190 Government’s decision, 3 March 1996.
intention when imposing a siege and Israel does not do it in order to “defeat” the residents. There is nothing in the international law that prohibits such an action when it is intended to block the way for terrorists in realizing their aims. This is a manifest act of self-defense that is permitted under international law.\footnote{For a comprehensive view of this term, see GINSS, DEC., supra note 11.}

The conceivable prohibition in this context is the prohibition against collective punishment. In other words, the tool of encirclement cannot be used if the intention is to punish the innocent for the past acts of terrorists. This prohibition is stipulated in Article 50 of the Hague Convention: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”\footnote{Hague Convention, art. 50.}

Similarly, Article 33 of the Fourth Geneva Convention states: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism is prohibited.”\footnote{Fourth Geneva Convention, supra note 43, at art. 33.}

In the cases of closure or encirclement orders that came to court, the State of Israel emphasized that the measures were not being adopted with the intention of punishing the civilian population for the acts of individuals, but rather as an act of defense or preventative measures.\footnote{See, e.g., H.C. 7277/94, Anon v. Military Governor (unpublished).} However, the conventions do impose upon the Occupying Power the duty of ensuring the welfare of the civilians under all circumstances. Thus, Article 55 of the Fourth Geneva Convention obliges the Occupying Power to ensure the full provision of food and medicine.\footnote{See Geneva Conv., of 49, supra note 49, at art. 55. “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular bring in the necessary foodstuffs, medical stores, and other articles if the resources of the occupied territories are inadequate.”} Legally speaking, however, in view of its agreements with the Palestinian Authority, it is highly unclear whether Israel has liability under this Article. There are areas for which the Palestinian Authority bears full responsibility and even so, Israel ensures the ongoing provision of food and medicines to areas around which it was forced to place a closure or encirclement.

There is one convention which raises a number of questions in the present context of closures or encirclements; namely, the International Covenant on Economic, Social and Cultural Rights.\footnote{International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966,} This Convention guarantees all men
context of closures or encirclements; namely, the International Covenant on Economic, Social and Cultural Rights. This Convention guarantees all men the right to earn a living in dignity in accordance with his own decisions. Does Israel violate this right? I have serious doubts regarding any interpretation that ignores the security situation in the occupied territories. In my view these rights are to be respected, but subject to those conventions that regulate the administration of occupied territory. Therefore, the result is that if there is a manifest military need, it takes precedence over other interests, or at least the needs should be balanced in order to minimize the violation of human rights as much as possible, including economic rights.

In summary, it can be said that the measures of closure or encirclement are adopted by the military commanders as part of the measures at their disposal in order to protect the civilian population in both the territories and in Israel from repeated attacks of terrorists who flee for refuge in those places. Because of its harshness and its effect on the civilian population, closure is a last ditch measure. Due to its severity, and like the curfew, it must be measured and for short periods of time, and subject to regular, periodical assessment of the necessity for it.

V. DECLARING A PLACE TO BE A CLOSED MILITARY AREA

In the previous sections we examined the restriction of freedom of movement as a result of the imposition of a curfew, closure or encirclement. We shall now proceed to examine another restriction of movement, differing in character from its predecessors.

Regulation 125 empowers the military commander to declare a certain place or location as being a closed military area. The meaning of such a declaration is that for the duration of its validity both the entrance and exit from the area require a special permit. The Regulation states the following:

A military commander may by order declare any area or place to be a closed area for the purpose of these Regulations. Any person who during any period in which any such order is in force, in relation to any area of place, enters or leaves that

198 Id. art. I (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).
199 See Defense Emergency Regulations, supra note 64, at Regulation 125.
area or place without a permit in writing issued by, or on behalf of the military commander shall be guilty of an offence against these Regulations.200

When the I.D.F entered the territories of the West Bank in 1967 it declared it to be a closed area, both in accordance with the Defense Regulations that were valid at that time, and also in accordance with a special directive issued by the I.D.F. 201 The meaning of this declaration was that both entry and exit from the West Bank territories required a special permit from the military commander.

Consequently, a result of the declaration was that people who had left the area prior to the Six-Day War could not return without receiving a special permit from the military commander.202 Similarly, those who had left temporarily required permits that were not always granted to retard.203

Even though the Regulation does not specify the conditions for exercising the power it is clear that it is subject to the rules of proper administration, as are all other powers of the military commander. The discretion of the military commander must be reasonable. It must take into account the human rights of all those affected. The exercise of the power must be for a proper purpose of an appropriate degree, and, obviously, must be in good faith and be the product of relevant considerations only.204

200 Id.
201 See H.C. 629/82, Mustapha v. Military Commander, 37(1) P.D. 158, 161 (Hebrew) (Justice Chalima stated:
Entry into the Judea and Samaria Areas is contingent upon receiving a special license, given the special status of these territories as occupied territory and given the military legislation that converted the entire area into a closed area (Order Regarding Closed Territories (Judea and Samaria Area) No.34, 1967). When territory that was controlled by one state, by reason of war passes into the control of army of another state and within that territory the army establishes a military government, then the latter is permitted to forbid or restrict the entry of people into the territory in its possession, to the extent dictated by the needs and interests for which it is responsible.

With respect to the Area of Judea and Samaria this authority receives explicit expression and is regulated in Order No.34, mentioned above.

The aforesaid authority regarding the regulating of entry into the area and exit therefrom, also includes the authority to regulate movement of temporary residents, as well as movement for the purpose of relocation.

Id.
202 See H.C. 629/82, Mustapha v. Military Commander, 37(1) PD. 158.
Like the power of the Minister of the Interior to supervise those requesting to enter Israel, this Regulation is intended to supervise the entry of people into the West Bank area as well as the Gaza Strip. However, more pointedly, this Regulation allows the military commander to restrict the entry into a certain place or along a specific geographical contour. The military commander's reasons for closing an area must always be military reasons, otherwise, the Supreme Court is liable to rule that he exercised his discretion based on irrelevant considerations making the action void. However, military reasons may be interpreted in a variety of ways according to the circumstances of the case. Recently, there has been serious discussion in Israel over the question of whether to order the declaration of particular areas adjacent to the entire length of what is referred to as the "central margin" as closed areas. The

\[205\] See H.C. 802/79, Abdallah v. Commander, 34(4) P.D. at 3 (where Barak J. used this parallel in rejecting the claim that the examination of the military commander's discretion was not justiciable in ruling):

Is the discretion of the military commander non-justiciable? Clearly one cannot deem it non-justiciable because of the absence of legal criterion for its assessment. I see no difference between the discretion of the commander before us and that of the Minister of the Interior in accordance with the Entry into Israel Law—1952. Both of the authorities deal with highly similar material; just as the discretion of the Minister of the Interior is subject to judicial review according to legal criteria, so too should the same law apply with respect to the discretion of the commander. What remains to be examined therefore is the claim regarding security considerations and political considerations. The non-justiciability grounded for these reasons cannot be defined exactly and in advance and it is dependent upon the degree of self-restraint displayed by the judiciary. In my opinion, with respect to justiciability, there is no difference between the commander's discretion when deciding upon the unification of families and the commander's discretion regarding the seizure of land; just as the latter is justiciable (see H.C. 606/78, Saliman Tofik Oyev et al. v. Minister of Defence; Gamal Arsam Matoua v. Minister of Defence et al., 33(2) P.D. 113 (Hebrew); H.C. 390/79, Azat Machmad Mustapha Duikat et al. v. Government of Israel et al., 34(1) P.D. 1 (Hebrew)), so too is the case before us. The fact that the former case dealt with the right of property and the case before concerns the Petitioner's right to have their request for family unification dealt with on the basis of appropriate considerations, is not relevant to the question of justiciability. It is true that determination of criteria for unification and their actual implementation is a sensitive issue, connected to state security and its foreign relations, and it is also quite clear that we do not purport to replace the commander's discretion, with our own. Even so, if the commander acted illegally, it is proper that we intervene.

\[Id.\]
"central margin" is the breadth of the land margin between the two sides of the Green Line.\footnote{The Green Line was the old border between Israel and its neighbors prior to the Six Day War in 1967.}

This possibility needs to be examined due to the fact that there is no other fence or means of separation between the old Israeli border and the West Bank. Consequently, the army has difficulty in preventing the entry of terrorists into Israeli territory. If Israel indeed declares a central margin, the intention will be to use a legal tool to enable supervision of all those entering and leaving this closed military area. However, given that the area will encompass a large number of tracts of lands serving both Israelis and Palestinians, the military commander will have to issue special certificates allowing them to continue to work their lands. The continued presence of considerable numbers of people in the closed areas will not only make it difficult for the landowners themselves, but will also impair the army’s ability to effectively monitor human traffic within these areas.

From an international perspective, there is nothing in the international law that prevents the declaration of a particular area as a closed military area, under army supervision, assuming that the declaration is based on military necessities. It is clear that a declaration of this nature is liable to restrict the freedom of movement of the residents. However, having consideration for the fact that it is an area under military control, and the correct balance between military needs and the rights of all the citizens to lead their lives in a normal manner, this power does not violate any right whatsoever of the residents.

VI. CONCLUSION

In this article we attempted to examine a number of the legal tools available to the military commander at a time when the democracy is engaged in struggle with terrorist organizations. Israel finds itself in this struggle at a time when almost every single day acts of terror and killing are committed against its citizens both in Israel and in the territories of the West Bank and the Gaza Strip, primarily by shooting attacks and suicide bombings.

Unfortunately, during the writing of this article, we were witness to the terrible tragedy of the terrorist attacks on the Twin Towers in New York and the Pentagon in Washington. These were perhaps a reminder to the free world that terror does not recognize borders and is not limited to the area of the State of Israel. This article focused upon the Israeli attempt to deal with terror, but it may also be a source for thought and inspiration if and when the United States and its allies find themselves forced to enter the territory of another
state. In that situation they will be required to give their commanders authorities for effectively dealing with terror while maintaining basic values of human rights.

The Mandate Period Defense Regulations remain valid in the territory of the State of Israel, the West Bank and the Gaza Strip. They authorize the military commanders to adopt a number of measures, most of them preventative, in order to reduce as much as possible, harm to peaceful citizens by acts of terrorism. While it is true that exercising these authorities also harms the local residents, the majority of whom are not involved in acts of terror, the harm caused to them is unavoidable and inevitably accompanies the primary purpose of preventing terrorist attacks.

Given that these measures affect the residents finding themselves under military rule, our examination was not only of domestic law but also international law. On both levels we found nothing defective in the utilization of these legal tools, provided that they could be justified under the circumstances against the background of manifest military needs.

Furthermore, we observed that unlike other states that were in similar situations, the State of Israel allows the residents of the territories direct access to the Supreme Court, sitting as the High Court of Justice, in order to supervise the actions of military commanders. The Supreme Court does in fact closely and effectively supervise the military commanders' exercise of their authority, even though the supervision relates to an area which does not easily admit of judicial supervision and intervention. The issue is one of actions in response to a war or hostilities, and the tools at the Court's disposal are not always sufficiently sophisticated.

Despite this difficulty, the Court made the commander's work more difficult, and promoted human rights for residents. Consequently, as a rule, the military commanders were unable to exercise their authorities under Regulation 119 by immediately destroying the terrorist's place of residence, but were rather obliged to wait for the inhabitants to exercise their right to come before the Courts.

These are drastic measures that violate the human rights of the local inhabitants. However, these rights must be balanced against the right to life of the citizens of the State of Israel who are subject to ongoing frequent terrorist attacks by people who leave those territories and later on take refuge again therein.
It is appropriate to mention the words of the Committee.\footnote{207}

Liberal democracies face a unique challenge in maintaining the security of the state. Put very simply, that challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process. Authoritarian and totalitarian states do not have to face this challenge. In such countries there is no need to ensure that security agencies, whose techniques inevitably involve a great deal of secrecy, be accountable to an elected legislature. Nor is there a requirement in such states that all of their security measures be authorized or provided for by law and that none of their officials be above the law. Only liberal democratic states are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society.

Summing up, a democratic state such as Israel, being forced to fight terrorist and guerilla organizations, must have the tools necessary for survival and existence. Even given the democratic nature of the State, not all ends justify the means, but we cannot waive those democratic means, legal and legitimate, that we already have.

We will conclude with a comment of the Supreme Court that provides the basis for the entire article.\footnote{208}

In a democratic society that loves freedom and security, there is no escape from balancing liberty and dignity, and security. Human rights cannot become a shovel for negating the security of the public and the state. There must be a balance, albeit a difficult and sensitive one, between the individual’s dignity and freedom and the state security and public security.

\footnote{208} F.Cr H. 7048/97, Anon. v. Minister of Defence, 54 (1) P.D. 721, 743 (Hebrew).