At the Supreme Court Sitting as the High Court of Justice

HCJ 8091/14

Before:	**Honorable President E. Rubinstein** **Honorable Justice E. Hayut** **Honorable Justice N. Sohlberg**
The Petitioners:	**1. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** **2. Bimkom – Planners for Planning Rights** **3. B'Tselem – The Israeli Information Center for Human Rights** **4. The Public Committee Against Torture in Israel** **5. Yesh Din – Volunteers for Human Rights** **6. Adalah – The legal Center for Arab Minority Rights in Israel** **7. Physicians for Human Rights** **8. Rabbis for Human Rights**
	v.
The Respondent:	**1. Minister of Defense** **2. IDF Commander in the West Bank** 1.
Petition for *Order Nisi*	
Session date:	11 Kislev 5775 (December 3, 2014)
Representing the Petitioners:	Adv. Michael Sfard; Adv. Noa Amrami; Adv. Roni Peli
Representing the Respondent:	Adv. Aner Helman

Judgment

Justice E. Rubinstein

1. This petition concerns respondents' authority to use regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119** or the **Regulation**), in a manner which enables to seize, demolish and seal the houses of individuals suspected of involvement in hostile activities against the State of Israel (originally the Regulation was enacted by the British Mandatory regime). The petitioners request that a declarative order be issued according to which the use of Regulation 119 in this manner and for the above purposes is unlawful, in that it breaches international law and Israeli administrative and constitutional law.

2. **The arguments of the parties**

This petition focuses on Regulation 119 (as currently drafted) which provides as follows:

> "A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence;
>
> and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land. Where any house, structure or land has been forfeited by order of a Military Commander as above, the Minister of Defense may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall be revested in the persons who would have been entitled to same if the order of forfeiture had not been made and all liens on the house, structure or land shall be revalidated for the benefit of the persons who would have been entitled thereto if the order of forfeiture had not been made."

3. The petitioners are eight human rights organizations, working to bolster human rights protection in Israel and in the territories under its control. They do not dispute the fact that the main arguments raised by them in this petition concerning the use of Regulation 119 as aforesaid have already been raised and denied by this court in the past. However, they argue that the decisions of this court on this issue were made many years ago, within the framework of two judgments only and with a laconic reasoning – HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464 (hereinafter: **Sahweil**), and HCJ 897/86 **Ramzi Hana Jaber v. GOC Central Command et al.**, IsrSC 51(2), 522 (hereinafter: **Jaber**) – and that the underlying normative justification upon which these judgments were based at the time should be revisited. It was further argued on this issue, that since these issues were last reviewed, international law has developed greatly, including the establishment of various international tribunals for war crimes around the world, and therefore the

various issues should be reconsidered. It should be noted that the vast majority of petitioners' arguments concern the State's authority to use Regulation 119 in the territories under its control, rather than within the boundaries of the State of Israel.

4. To the crux of the matter, it was mainly argued, that Regulation 119 was subject to the provisions of international law, and the prohibition against house demolition which amounted to collective punishment, and therefore house demolition should not be allowed under the Regulation. Petitioners' arguments are supported by the opinion of legal experts: Prof. Yuval Shany, Prof. Mordechai Kremnitzer, Prof. Orna Ben-Naftali and Prof. Guy Harpaz.

5. With respect to the normative hierarchy it was argued, that contrary to the judgments of this court in **Sahweil** and **Jaber**, Regulation 119 was subject to the norms and prohibitions established by international law; particularly when the Regulation was used in the territories under Israel's control, in view of the fact that in these areas there was no basis for the argument that domestic law, including Regulation 119, was preferable to international law; Regulation 119 – it was so argued – was a foreign law "inherited" by Israel from the previous regime, and therefore the rationales whereby domestic law was respected even when it clashed with international law, did not apply. It was further argued on this issue, that according to the interpretive presumption of compatibility, which was adopted by our legal system, Regulation 119 should be interpreted, to the maximum extent possible, in accordance with the rules of international law, in a manner which would not allow house demolition there-under, as it was currently used.

6. With respect to the provisions of international law it was argued that there was a broad consensus among scholars that house demolition ran contrary to the prohibition of international customary law against collective punishment, the prohibition against destruction of protected property unless absolutely necessary for a military operation and the prohibition against disproportionate use of force, and was therefore unlawful; particularly when we were concerned with the laws of occupation which applied, according to the argument, to the territories; This was the case, even if the declared purpose of the respondents in our case was only to deter; The test – it was argued – was not the underlying intention but rather the result, namely, the destruction of the homes of innocent individuals for the actions of others who were related to them. The prohibition against collective punishment was initially entrenched in Article 50 of the Hague Regulations concerning the Laws and Customs of War on Land 1907, and is currently enshrined in Article 33 of the Fourth Geneva Convention, which states as follows:

> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited" (The Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, Treaty Series 1, page 559).

In addition, the petitioners refer to the commentary of the International Committee of the Red Cross (ICRC) of 1987 on Protocol I of 1977 to the Fourth Geneva Convention which provides as follows:

> "The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise" (Commentary on Additional Protocol I of 1977 to the Geneva Convention of 1949, p. 874, paragraph 3055 (1987), available at: http://www.icrc.org/ihl/COM/470-750096?OpenDocument)

7. In addition it was argued that the Regulation also violated fundamental principles of Jewish law. In this context, the petitioners refer to the story of the destruction of the city of Sodom in the book of Genesis, in which Abraham tells the Lord: "*Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right*?" (Genesis 18:25); and to the story of Korah, in which Moses and Aharon argue before God:"*will you be angry with the entire assembly when only one man sins*?" (Numbers 16:22) and Rashi explains: "God said you have spoken well. I know and declare who sinned and who did not sin."

8. It was further argued that the prohibition on house demolition applied also by virtue of the prohibition on arbitrary destruction of property which was anchored, *inter alia*, in Article 53 of the Fourth Geneva Convention, and which was considered - as it was so argued - part of customary international law:

> "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."

In view of the fact that house demolition did not constitute an act that was "absolutely necessary for military operations" it was argued that for said reason also, Regulation 119 should not be interpreted as permitting the destruction of houses.

9. The petitioners also refer to the position of international criminal law on this issue. It was argued that despite the fact that Israel has not ratified the constitution of the International Criminal Court of 1998 (the "Rome Statute"), the war crimes defined therein constituted grave and significant violations of the customary norms of international humanitarian law, and as such were binding on Israel. Thus, for instance, Article 8(2)(a)(iv) of the Rome Statute, prohibits extensive destruction of property not justified by military necessity; Accordingly, it was held by the International Criminal Tribunal for the former Yugoslavia – ICTY – that destruction of property was allowed only when "such destruction is made absolutely necessary by military operations" **The Prosecutor v. Blaskic**, IT-95-14-T, paragraph 157 (2000); which is not the case in our matter, in which the demolition is intended, at the utmost, to deter.

10. It was further argued that the use of Regulation 119 for house demolition violated the proportionality principle in International law and Israeli law, in view of the fact that the harm caused to innocent civilians by the destruction of their homes was massive, while, in contrast, the advantage of house demolition, ostensible deterrence, was not achieved. In this context, the petitioners refer to a presentation prepared by a committee headed by Maj.Gen. Ehud Shani, which convened in 2004-2005 and examined the house demolition issue; The presentation stated that house demolition "intensifies the Palestinian refugee trauma (slide No. 14), strengthened the claim of "illegitimacy" (slide No. 27) and hence the conclusion - "The act is no longer legitimate and is on the line of legitimacy!!!" (slide No. 28).

11. It was also parenthetically argued that Regulation 119 was used in a discriminatory manner: only against the Arab population, and never against suspected, accused or convicted Jewish citizens alleged to have committed similar or identical offenses. It was further argued on this issue that the argument made in the past by the security agencies, according to which there was no need for

deterrence in the Jewish sector but only in the Arab sector, had no factual basis and should be rejected.

12. In contrast, the State argues that the petition should be summarily rejected. Firstly, it was argued that the petition was theoretic and academic, and was not based on a set of concrete circumstances and that for this reason alone it should be denied. Secondly, it was argued, that the arguments which were raised by the petitioners have already been raised and rejected by this court in the past, and that the petitioners in the case at hand were a party to some of these petitions, and that there was no room to revisit the issue. The State also noted, that the authority to issue house demolition orders under Regulation 119 was realized only in isolated and particularly severe instances in the last decade, and recently, in view of the tide of terror washing over Jerusalem, the GOC Home Front Command issued six demolition orders for structures in which terrorists, residents of East Jerusalem, lived; one order was exercised whereas the other five are still pending before this court in separate petitions which were filed: HCJ 8066/14 and HCJ 8070/14 – the murderous terror attack in the Har-Nof synagogue, in which four individuals were murdered and others were wounded; HCJ 8025/14 – a ramming attack near Rabbi Moshe Zaks Street in Jerusalem in which two individuals were murdered and others were wounded; HCJ 7823/14 – another ramming attack near Rabbi Moshe Zaks Street in Jerusalem in which one individual was murdered and others were wounded; HCJ 8024/14 – the stabbing of an individual near the Menachem Begin Heritage Center in Jerusalem, who was severely injured.

13. To the crux of the matter it was argued, that we were not concerned with collective punishment and injury of innocent individuals, in view of the fact that in many cases in which petitions against the use of Regulation 119 for house demolition purposes were rejected, the court held that the petitioners were not innocent, and were aware, to this or other extent, of the terrorist's activity. It was also noted, that in any event primary legislation trumped general principles of international law, and therefore there was no need to examine Regulation 119 subject to the provisions of customary international law. It was further stated, that many petitions which pertained to Regulation 119 – including all the specific petitions which were currently pending before this court – concerned the exercise of the Regulation against residents of the State of Israel, and therefore the arguments concerning the applicability of the laws of occupation to the territories were not relevant.

The hearing before us

14. In the hearing before us petitioner's counsel emphasized their argument, according to which even if the underlying purpose of house demolition was deterrence, it did not lessen the disproportionate injury inflicted on innocent individuals as a result of the demolition. It was also argued, as aforesaid, that even if this measure had a deterring effect – an argument which has not been proved as alleged by the State – international law prohibited the use of collective punishment for deterring purposes, and therefore the use of Regulation 119 for this purpose was improper *ab initio*. It was also stated, that contrary to the State's response, the issues at hand have not yet been thoroughly reviewed by this court, and that it was therefore necessary to have this issue discussed at this time, by an expanded panel.

15. The State's counsel stated in response that only a few months ago this court rejected a similar petition which requested to revisit issues concerning international law, on the grounds that there was no room to reconsider arguments which have already been raised and rejected in the past. With respect to the collective punishment argument, it was argued that in view of the fact the house designated for demolition was the house in which the specific terrorist lived, we were not concerned with collective punishment, but rather with deterrence only. To the crux of the matter it was argued that in the clash between international law and explicit Israeli law, the Israeli law trumped, and therefore the authority

vested with the military commander under Regulation 119 trumped customary international law on that issue. In response to the discrimination argument the State's representative noted that the purpose was to deter, and in view of the fact that deterrence was not required in the Jewish sector, we were not concerned with discrimination but rather with relevant distinction.

Decision

16. It cannot be denied that this petition raises, by its nature, difficult questions; As I noted in the courtroom, it may be easier to take petitioners' side than to take respondents' side, and nobody can deny that moral dilemmas arise in certain occasions. When I sit down to write this judgment I feel like the Talmudic judge of our sages of blessed memory, Amora Rav, who says when he goes out to adjudicate (Bavli, *Sanhedrin* 7, 2) "Wishing to be killed he goes" (in the sense of paying the price should he make a mistake); And it was further said: a judge should always feel as if a sword is laid between his thighs, and hell is open beneath him…" (Bavli *Yevomos* 109, 2), and it holds with us the judges too, what witnesses are warned not to say (Mishna *Sanhedrin* 4, 2) "And perhaps you say , what has this trouble to do with us…" and as Rashi says in Sanhedrin 37, 2, in his commentary to to these words "to involve ourselves in this trouble, even for the truth"; but we have the same duty that said witness has "if he does not say he shall bear the punishment for his sin" (Leviticus, 5,1) and Rashi commented "Upon you is the duty and you shall bear the consequences of your sin if you do not say what you have seen." The same applies to the judge, who must decide and has no choice. And relevant to this issue are the words of Justice Turkel (HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)) (hereinafter: **Sa'ada**): "The idea that the terrorists' family members… are to bear his sin, is morally burdensome… But the prospect that a house's demolition or sealing shall prevent future bloodshed compel us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the house's tenants. There is no other way."

    The difficulty is reinforced by the fact that the petition is supported by an expert opinion, despite the fact that the law does not require an opinion, whereas the State's position is mostly based on threshold arguments. However, it should already be noted that we decided not to reconsider issues which have already been resolved by this court, even if the grounds therefore do not satisfy the petitioners, in view of the fact that similar arguments were raised and rejected only a few months ago in HCJ 4597/14 '**Awawdeh v. West Bank Military Commander** (July 1, 2014 (hereinafter '**Awawdeh**) and in HCJ 5290/14 **Qawasmeh v. West Bank Military Commander** (August 11, 2014)(hereinafter: **Qawasmeh**). We shall discuss things shortly, and will firstly say, that the use of Regulation 119 should be limited, and indeed it was not used for a number of years, also following the recommendations of the above mentioned Shani committee, but it was argued before us that in view of recent circumstances – of cruel and repeated killing of innocent individuals – the use of the Regulation is required, which argument will be discussed by us. Furthermore: We must consider the issue within the broader picture of war against terror, of Israel and of the entire world. This war which "hath cast down many wounded; yea, a mighty host are all her slain" (Proverbs 7:26) causes not only Israel alone to take steps which it would have preferred not to have taken in the first place.

17. Firstly – to the judicial history of Regulation 119 in this court throughout the ages: as was held, the purpose of Regulation 119 was to deter rather than to punish; its objective was to give the military commander tools with which effective deterrence may be created, an objective the importance of which cannot be easily disputed (see HCJ 698/85 **Duglas v. Military Commander in the Judea**

and Samaria Area, IsrSC 40(2) 42, 44 (1986) (hereinafter: **Duglas**); HCJ 4772/91 **Hizran et al., v. Commander of IDF Forces**, IsrSC 46(2) 150 (1992); and see the minority opinion of Justice (as then titled) Cheshin; HCJ **Abassi v. GOC Home Fron Command**, IsrSC 57(2) 55, 60 (2003) (hereinafter: **Abassi**); **Sa'ada** , page 292; '**Awawdeh**, paragraph 19; **Qawasmeh,** paragraph 23). With respect to the question of whether the destruction of a specific structure can create effective deterrence, it was held the this court did not enter the shoes of the security forces, which are vested with the discretion to determine when the measure is effective and should be used to achieve deterrence (HCJ 2006/97 **Ghanimat v. GOC Central Command**, IsrSC 51(2) 651, 653-654 (1997); HCJ 9353/08 **Hisham Abu Dheim v. GOC Home Front Command**, paragraph 5 (2009) (hereinafter: **Hisham**); '**Awawdeh**, paragraph 20; **Qawasmeh**, paragraph 25). The State's response in the specific petitions was supported by an affidavit of the GOC Home Front Command, Maj.Gen. E. Eizenberg. It should be remembered, as problematic as this issue may be, that demolitions were approved only recently as aforesaid, in the cases of '**Awawdeh** and **Qawasmeh.**

18. Moreover, the damage caused to the property of the inhabitants of the house to the extent they were not involved in the offense for which the decision to demolish it was made, cannot be in dispute; It was later on held, that although the Basic Law: Human Dignity and Liberty did not affect the validity of the Regulations since they were "law (*din*) in force prior to the commencement of the Basic Law" (section 10 of the Basic Law), they should be interpreted according to the provisions of the law and the authority granted there-under should be exercised in a proportionate manner (HCJ 5510/92 **Turkman v. Minister of Defence**, IsrSC 48(1) 217; **Abassi**, page 59; **Sa'ada**, pages 291-292; **Hisham**, paragraph 5; '**Awawdeh**, paragraph 17; **Qawasmeh**, paragraph 22). I would like to emphasize this point further, and will return to it later.

In line with this approach, the following criteria, among others, were established to define the scope of the authority of the military commander while exercising the authority vested in him under Regulation 119 to issue an order for the demolition of the home of an individual suspected of terror activities:

> "the severity of the acts that are attributed to the suspect; the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and the scope of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition (**Qawasmeh**, paragraph 22 of the judgment of Justice Danziger; see also: HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, (1992) (hereinafter: **Alamarin**); **Salem v. Maj.Gen Ilan Biran, Commander of IDF Forces**, IsrSC 50(1) 353, 359 (hereinafter: **Salem**); **Hisham**, paragraph 5).

Indeed, according to case law, this is an open list and the parameters should be examined as a whole; Namely, the fact that a decision was made to demolish the entire house rather than to seal a room or demolish a certain part of the house, does not necessarily indicate that the measure which was chosen was not proportionate and justifies the interference of this court in the discretion which is vested, , as aforesaid, in the security forces (**Abassi**, pages 60-61; **Qawasmeh**, paragraph 26); To the same extent, it is not necessary to show that the inhabitants of the house knew of the suspect's terrorist activity (**Alamarin**, paragraph 9; **Salem**, page 359; **Hisham** paragraph 7). As aforesaid, proportionality is examined, first and foremost, *vis-à-vis* the severity of the action attributed to the

suspect, from which derives the required scope of deterrence, and I will emphasize again the above specified criteria and the meticulous discretion which should be exercised.

19. It should be further noted, that although this petition is mostly directly against the exercise of Regulation 119 in the territories, it was held by this court that the Regulation applied to the residents of the territories as well as to the residents of the State of Israel (**Hisham**, paragraph 5; **Abassi**, page 60).

And now, we shall refer to petitioners' arguments.

20. I will start by saying, that a distinction should be drawn between the authority to use Regulation 119 and the discretion which should be exercised while using it, namely, reasonableness. As will be specified below, it seems – with all due respect – that the authority exists, and the main question concerns reasonableness and discretion. A review of the comprehensive discussion held by the Shani committee last decade, the main principles of which may be viewed in the presentation which was submitted, indicates – and the committee included a senior jurist, head of the international law department of the IDF – that the use of said measure is lawful both according to international law and domestic law. With respect to reasonableness, it was found that "there is a consensus among the intelligence agencies concerning the connection between demolition of terrorists' homes and deterrence. In view of the sensitivity, the Central Command conducts a balanced and orderly procedure for the demolition of terrorists' homes… but deterrence should be weighed only *as part* of the entire considerations" (taken from the committee's presentation, emphasis appears in the original). Nevertheless, it was also stated, that according to international and domestic public tests, this action was no longer legitimate and was on the line of legitimacy. Now, after a few years during which the Regulation was not used in Jerusalem (2008-2009) and a longer period in the Judea and Samaria Area (2005-2014) – see paragraph 23 of the judgment of the Deputy President in **'Awawdeh** – the use of the Regulation was renewed following frequent and horrendous incidents of deliberate injury of innocent individuals in Jerusalem, murders and attempted murders, as specified above.

21. With respect to the authority, the arguments themselves are not new but they were all put together, and some of which have already been raised in the past, as indicated by the State's legal counsel, by the same petitioners themselves or some of them. Shortly we shall remind, that in the "pure" legal sense a distinction should be drawn between the territory of the State of Israel including Jerusalem, and the Judea and Samaria Area, a distinction which was not made in the petition. Within the State of Israel Regulation 119 is, as aforesaid law (*Din*) - primary legislation – the validity of which is maintained by the provisions of section 10 of the Basic Law: Human Dignity and Liberty. Parenthetically, it should be noted, that the Defence (Emergency) Regulations, 1945 – which were enacted by the British Mandatory regime, a regime which was fought against by the Jewish community (Yishuv) at the time – are not the pride and joy of an Israeli jurist and it has already been suggested to replace them in the past, which did not materialize, maybe due to the chronic security situation and its difficulties; However, this is not the place to discuss it. To the crux of the matter, it is clear that the applicability of the Regulation and the authority to use it within the State of Israel is undisputable. However, our substantive judicial approach, as opposed to the formal analysis, does not draw a distinction between the use of the Regulation within the State of Israel and the Judea and Samaria Area and the reasonableness of such use, and it has already been said that when authority is exercised by Israeli officials in the Judea and Samaria Area, it should be regarded as premised on the same fundamental principles of Israeli law; and in the words of Justice – as then titled – Barak: "Every Israeli soldier carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law" HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun Al-Tha'auniya Al-Mahduda Al-Mauliya v. Commander of IDF Forces in the**

Judea and Samaria Area, IsrSC 37(4) 785, 810 (1983); and see also HCJ 591/88 **Taha v. Minister of Defence**, IsrSC 45(2) 45, 52 (1991)).

22. With respect to the applicability of international law, as far as the Judea and Samaria Area is concerned, it has been held by this court in a host of judgments that the provisions of Regulation 119 reconciled with the law which applied to the territories (**Sahweil**, paragraph 4; **Jaber**, pages 525-526; HCJ 358/88 **Association for Civil Rights in Israel v. GOC Central Command**, IsrSC 43(2) 529, 532-533 (1989)). The authority vested in the military commander under Regulation 119, which was passed on to him as a "legacy" from the regime which controlled the Area before Israel took control thereof, is eventually part of the array of measures available to him to fulfill his main position as provided in Article 43 of the Hague Regulations: to "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." Thereafter, as noted by the scholar Dinstein "The choice of means deemed necessary to contend with the problems of control and security is left to the Occupying Power" (Yoram Dinstein The International Law of Belligerent Occupation 93 (2009); It should be noted, that the scholar criticizes many of the cases which involve house demolition and sealing (pages 156, 159 for instance). See also: Article 27 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, at 207 (Geneva, by J.S. Pictet, 1958). And as noted by Stone on this matter "[i]t would thus be very strange indeed to hold that the occupant was forbidden to maintain the existing law when this was necessary for his security" (Julius Stone, *No Peace, No War in the Middle East*, 15 (1969).

23. It should be added, that the Geneva Convention of 1949 and the Hague Regulations of 1907 before them, were designed and signed in a different period than the one we live in. The terror which world nations are faced with, and the State of Israel is no different in that regard, presents them with uneasy challenges, since terror organizations do not abide by the provisions of this convention or another (see for instance: Hans Peter Gasser "Acts of terror, 'terrorism' and international humanitarian law", *International Review of the Red Cross*, No. 847 547 (2002); Glenn M. Sulmasy "The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War" 19 *Notre Dame* J.L. Ethics & Pub. Pol'y 309, 3011 (2005); The Battle of the 21st Century – Democracy Fights Terror (Iyun Forum, Dan Meridor Chairman, Chaim Pass Editor, The Israel Democracy Institute, 5767-2006). The issue before us must be reviewed within the context of the war against terror, which was referred to by the Pope not long ago as "piecemeal World War Three" (September 2014). It seems that the incidents described in the above specific petitions speak for themselves. Hence, the humanitarian provisions of the Fourth Geneva Convention which Israel assumed upon itself even if not legally adopted (H. Adler "Laws of Occupation" *International Law* 590-591 (2010, R. Sibel Editor); Meir Shamgar "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage" *Military Government in the Territories Administered by 1967-1980 – (The Legal Aspects, Volume I 32 (1982))*, should be interpreted in a manner which would reflect their spirit and realize their underlying objectives, but will also enable the State of Israel, at the same time, to secure the safety of its residents in the most basic manner. As I had the opportunity to say in the past:

> "The relation between human rights issues and security challenges and needs is about to stay on the agenda of the Israeli society and Israeli courts for a long time … hence, the inherent tension between security and human rights issues will continue. The court will seek the balance between security and rights, so that security's name is not carried in vain but security is not abandoned either" (E. Rubinstein "On the Basic Law: Human Dignity and Liberty and the Security Forces" Iyunei Mishpat 21 (5758) 21, 22; See also E. Rubinstein "On Security and Human Rights in the Days of

War against Terror" *Law and Military* 16 765, 766-771 (5762-5763); HCJ 1265/11 **Public Committee against Torture in Israel v, Attorney General**, paragraphs 17-19 (2012).

24. Accordingly, we cannot accept petitioners' argument that any demolition whatsoever, small or large and regardless of its specific circumstances, necessarily amounts to collective punishment which is prohibited under Article 33 of the Fourth Geneva Convention (see on this issue – E. Gross **Democracy's Struggle against Terrorism – Legal and Moral Aspects** 224 (5764-2004)(hereinafter: **Gross**)). I will not bring examples of brutal use by "civilized countries" of collective rather than individual house demolitions from the past, far and near; For examples see: Dan Simon "The Demolition of Homes in the Israeli Occupied Territories" 19 Y.J.I.L. 1, 8 (1994). The same applies to the prohibition on house demolition which appears as aforesaid in Article 53 of the Fourth Geneva Convention; The prohibition is qualified, namely, if the action is required for military purposes, it is not prohibited under the Article. As noted by Gross in this context "military needs should be understood at the time in which fighting or armed activity takes place. In this sense, systematic terror activities which constitute part of a strategy or armed struggle fall within said definition… the demolition of a house for the purpose of preventing it from being used once again for terror purposes… should be considered as a 'military need'" (Gross, 227-228). The question is, as aforesaid, a question of proportionality, and it has already been clarified here that the above authority of the military commander should not be used in a disproportionate manner, which would amount to collective punishment, prohibited under international law (**Duglas**, page 44; **Qawasmeh**, paragraph 23; and see also '**Awawdeh**, paragraph 16 and the references there).

25. In addition, as was held by this court "The rule of belligerent occupation… impose conditions on the use of this authority [to maintain order and public life – E.R.]. This authority must be properly balanced against the rights, needs, and interests of the local population" (HCJ 2056/04 **Beit Sourik Vilage Council v. Government of Israel**, IsrSC 58(5) 807, 833, president Barak (2004) (hereinafter: **Beit Sourik**); and see also HCJ 10356/02 **Hess v. Commander of IDF Forces in the West Bank**, IsrSC 58(3) 443, 455-456 (2004) (hereinafter: **Hess**); HCJ 7957/04 **Mar'aba v. The Prime Minister of Israel**, IsrSC 60(2) 477, 506-507 (2005) (hereinafter: **Mar'aba**); and Y. Dinstein "Legistlative Authority in the Occupied Territories" Iyunei Mishpat B 505, 509 (5732-5733)). In addition, as mentioned above, the authority of the GOC Home Front Command and of the Military Commander in the Judea and Samaria Area – and as far as reasonableness is concerned, as opposed to the formal authority, all efforts should be made that there will be no difference between Israel and the Judea and Samaria Area even if the military commander in the Judea and Samaria Area is subject to a different set of laws – should be interpreted according to the principle of reasonableness, which applies pursuant to international and Israeli law, and according to the above specified criteria (**Beit Sourik**, page 840-841; **Hess**, page 460-461). As is known, one of the subtests of proportionality is that the measure taken by the administrative authority, rationally leads to the realization of the objective of the legislation or action (the "rational means test"); another subtest provides that if the injury caused to the rights of the individual as a result of the measure taken by the administrative body is not of proper proportion to the gain brought about by that measure, the measure is inappropriate (the "test of proportionality in the narrow sense") (HCJ 5016/96 **Horev v. Minister of Transport,** IsrSC 51(4) 1, 53-54 (1997); **Mar'aba**, page 507; A. Barak "**General Constitutional Balancing and Proportionality: the Theoretical Aspect**" *Studies of the Legal Philosophy of Aharon Barak* 39, 41-42 (5769)). And in our case, house demolition under Regulation 119 will satisfy the proportionality test, if, as a general rule, it is indeed effective and realizes the purpose of deterrence, and moreover – if the injury caused as a result of the demolition of the houses does not disproportionately violate the right of the injured individuals to their property, relative to the effectiveness of the deterrence. As mentioned above, proportionality also relates, in our opinion, to the question of whether the measure is exercised collectively – such as, God forbid, the demolition of the houses of an entire

neighborhood, an inconceivable action in the context of Regulation 119 – as opposed to the demolition of the house of a proven terrorist, and the injury, which should not be taken lightly, is caused to the property of the house's inhabitants and neither to the property of others nor to human life. This is the rule, as aforesaid, whether the authority is exercised within the boundaries of the State of Israel or in the territories.

26. With respect to the argument of the discriminatory enforcement, Justice Danziger held in **Qawasmeh**, that "the burden to present adequate factual infrastructure which can refute the presumption of administrative validity, lies on the party who argues that discriminating or "selective" enforcement is applied. Even if the arguing party surmounted this hurdle, the authority can still show that the seemingly selective enforcement is, in fact, based on pertinent considerations. And as pointed out by Justice I. Zamir in HCJ 6396/96 **Zakin v. The Mayor of Beer Sheva**, IsrSC 53(3) 289 (1999), "the burden to prove selective enforcement is particularly weighty." (*ibid*, paragraph 30; and see also M. Tamir **Selective Enforcement** 397-399 (5768)). The above applies to the case word for word, and since the petitioners failed to meet this burden, their argument concerning discriminatory enforcement should not be accepted.

27. The petitioners resorted to Jewish law as specified above. Indeed, in Ghanimat Justice Cheshin quoted (in pages 654-655) the words of the prophet Ezekiel (18:20), "*The soul that sins it should die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son. The righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him*." In addition, he also quoted the principle (Kings II, 14:6), "*The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin."* The petitioners also mention the story of the City of Sinners (Deuteronomy 13:15-16), which concerns the destruction of a city due to idol-worship, and the narrow interpretation given to it by our sages of blessed memory (Sanhedrin, 1;111 and 71:113). **However, we shall remind and emphasize; The case at hand, in substantial opposition to the quotes brought by the petitioners and which are brought by us above, does not concern a massacre, and it should be explicitly stated that had a massacre been involved the action would have been patently unlawful. Our case concerns the demolition or sealing of a house, which indeed causes a financial damage to its inhabitants, but may not be compared, by any means, to the above Biblical examples, or to actions taken by different countries in our world.** Indeed, the question before us is difficult, but is far from the intensity spoken of by the Bible and the prophets. For recent dilemmas see also Shaul Yisraeli "*Retaliation actions in Theory*" in *Cross Roads of the Torah and the State 3* (1991), 253, in the chapter "Injury of innocent people while exterminating murderous gangs" (page 271); see also Yitzhak Engelrad "*Law and Ethics in Jewish Tradition"*, Laws of Israel 28, (5771), 1; for the severe doubts see especially pages 54, 60. In pages (58, 59) the author cites the words of Rabbi Shlomo Zalman Pines (Russia – Switzerland the 20th Century; see about him in the book of Rabbi Yechiel Yaakov Weinberg *Lifrakim* (5763-2003), page 551, and especially page 559 onwards), *Ethics of the Bible and the Talmud* (5337-1977), 191 and as follows: "But sometimes the decision between the measures is in man's hands and depends on the decision of his mind and conscience, and the moral person who ponders his ways stands on a cross roads, roads of measures, and hesitates, and searches, and inquires, and deliberates what is the right way for him to choose, and there are considerations pro and con, and the decision is difficult and full of doubts. On this man it was said (*Moed Katan* 5, 71) in Psalms 'And he who puts his way will find it with God's help' do not read [and there is a way] but rather [he who puts his way], namely: He who puts his options one against the other and compares them and evaluates them in his mind and in the depth of his conscience, God will be with him to make sure that that his ways are right and he will not veer from the right way." Rabbi Weinberg stresses from the teachings of Rabbi Pines the sacredness of life – "Human life is sacred – this is a great principle in Judaism. Its value exceeds all other elements" (page 561). How very relevant are these sayings to the case at hand, too, together with the words of

Rabbi Aharon Lichtenstein ("War Ethics of Abraham our Father" web site *Har Etzion Yeshiva*, Lech Lecha), because "We must continue to follow the way outlined by Abraham our Father – to be sensitive to morality and justice also during war and struggle which are just and true in and of their own".

28. Having said all that, and facing the future, as broad as the discretion of the military commander may be, as discussed by us above, I am of the opinion that the principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined. We accept the fact that it is hard to be measured, and the court mentioned it more than once (HCJ 2006/97 **Ghanimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997); '**Awawdeh**, paragraph 24; **Qawasmeh**, paragraph 25). However, as aforesaid, in my opinion, the use of a tool the ramifications of which on a person's property are so grave, justifies a constant examination of the question whether it bears the expected fruit; This is so especially in view of the fact that even IDF agencies raised arguments in that regard, and see for instance the presentation of Maj.Gen. Shani, which, on the one hand, stated that there was a consensus among the intelligence agencies of its effectiveness, while on the other, proclaimed, under the caption "Main Conclusions" that "the demolition tool within the context of the deterring element is 'worn out'" (slide No. 20). Therefore, I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused (see on this issue also: Y. Arbel "House Demolition – A Legitimate Measure in the Fight Against Terror or Collective Punishment?" in A. Gil, Y. Tuval a, E. Levy, under the guidance of M. Kremnitzer and Y. Shani **Exceptional Measures to Fight Terror – Administrative Detention, House Demolition, Expulsion and Residency Allocation** 189 (5771); A. Cohen and T. Mimran "**Cost without Benefit in House Demolition Policy – following HCJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area**" case law news flashes 31 5, 21-24 (September 2014), and on the other hand see the sources collected by my colleague Justice Sohlberg in his opinion, some of which derive from situations encountered by other countries in the terroristic chaos which washes over the world. In my opinion, the requested effort adequately fulfills the fundamental provisions of the Basic Law: Human Dignity and Liberty, the importance of which in the Israeli democratic regime may not be overstated. We do not establish hard and fast rules concerning the nature of the research and the required data; This issue will be clarified, to the extent necessary, in due course. For the time being, naturally, in each and every demolition or specific sealing the engineering issue should be thoroughly examined to ensure that the objective is properly achieved within its limits with no deviation.

29. Subject to the aforesaid in paragraph 28 above, we cannot accept the petition.

Justice

Justice N. Sohlberg

1. I agree with the judgment of my colleague, Justice E. Rubinstein – little that holds much. Parenthetically I shall add a few comments.

2. The petitioners strongly object to Regulation 119. Indeed, the power vested in the military commander there-under is tremendous – to seize and demolish. It is a draconian power. The petitioners criticized it as such, and the scathing criticism which was attracted under said circumstances is understandable and reasonable. The criticism is reinforced by presenting the extreme sanction as punitive, which amounts to collective punishment. Indeed, the injury inflicted on a family member – who committed no sin – and who lost the roof over his head, contrary to fundamental principles, is burdensome.

3. The situation is severe and grave enough, as described by my colleague, Justice E. Rubinstein, but the manner by which it was presented in the petition, aggravates it disproportionately. I will explain. The Regulation as drafted does not reflect the actual situation, as it actually takes place. Firstly, in a host of judgments this court outlined criteria for the implementation of the Regulation, limited and narrowed the scope of its use; Secondly, in fact, currently the military commander exercises the authority in a moderate, balanced and responsible manner The petitioners indeed argue that "**House demolitions under Regulation 119 have been part of the Israeli occupation since its inception**" (paragraph 220 of the petition) and as counted by them "**This power has left hundreds of families and thousands of people homeless, all for the actions of an individual**." (paragraph 221 of the petition). However, according to the respondents, in the last decade, since 2005 the military commander exercised his said power only a few times: in 2008-2009 following a wave of terror in the Capital, the power was exercised against residential homes in East Jerusalem twice. A third incident in which Regulation 119 was used back then, has not been eventually realized. In the summer of 2014 the power under Regulation 119 was exercised against four structures (the house of the murderer of the late Police Commander Baruch Mizrahi, and the houses in which lived the three members of the cell who abducted and murdered the three youths Gil-Ad Shaer, Naftali Frenkel and Eyal Yifrach, God bless their souls). The significant escalation in the security situation required it. Currently pending are five orders which were issued against structures in which lived residents of East Jerusalem who committed very serious terror attacks, within the framework of the last tide of terror; an additional order was implemented. Hence, we are concerned with small numbers and not with a "collective punishment" as will be further clarified below, although, of course, each house is a world of its own and so is the suffering of its inhabitants.

4. The focus therefore is neither on the formal wording of Regulation 119, nor on its broad language and data from the far-away past, but rather on the narrow interpretation of the Regulation and its actual implementation in sporadic cases, during a severe tide of terror. It should also be reminded and remembered, and clarified to all those who may be at a loss: we are not concerned with **punishment** but rather with **deterrence**. Indeed, the classification of the demolition of a family's home as "punishment" or "deterrence", does not change the end-result as far as the family is concerned. The end-result is the suffering which arises from the loss of one's home. However, we were convinced that once the criteria established by law and case law are met, it is an inevitable necessity. The mere injury caused to the family members of the terrorist does not render the demolition of the house illegal, not even according to the rules of international law, as shown by my colleague. Indeed, when criminal punishment is concerned, unlike deterrence under Regulation 119, the focus is on the offender, rather than on his family members; but as I have noted in the above mentioned **Qawasmeh** – "**also in criminal proceedings the purpose of which is punitive – as distinct from the deterring purpose herein – innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members."** The language of the Regulation explicitly points at the deterring purpose underlying the seizure and demolition or sealing of a residential home, which necessarily involves impingement of innocent people. Otherwise, how

shall deterrence of suicide bombings and the like be achieved? The sour fruits of the murderous terror compel us to promote deterrence in this manner of horrible acts such as those which were described in the specific petitions: namely, even at the cost of injuring the family members of the terrorists. And it should be noted: the injury with which we are concerned is injury to property, not a physical one. A demolition of a house is on the scales, while on the other tip of the scales, saving of life is weighed.

5. The petitioners deny the effectiveness of the use of Regulation 119 for deterrence purposes. However, this argument has been repeatedly rejected by case law: "…**A study that can show conclusively just how many terrorist attacks have been prevented and how many lives have been saved as a result of house sealings and demolitions has never been conducted and never could be conducted. However, as far as I am concerned it is sufficient that the effectiveness of this deterrent measure has not been disproved in order to stop me from interfering with the discretion of the military commander.**" (the words of Justice Goldberg in HCJ 2006/97 **Ghanimat v, GOC Central Command** (March 30, 1997); see also HCJ 6288/03 **Sa'ada v. GOC Home Front Command** (November 27, 2003)).

6. Researchers who examined this issue recently, described the methodical difficulties in the measurement of the effectiveness of the deterring steps taken against terror. Wilner notes (based on Stein Lebow, Richard Ned and Janice Gross Stein, **Deterrence: The Elusive Dependent Variable**, 42(3) World Politics 336 (1990)) that successful deterrence actions leave very little "behavioral traces" if any. It is difficult to prove that the deterring measure taken had any effect on an occurrence which did not take place (Alex S. Wilner, Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism, 34(1) Journal of Strategic Studies 2 (2011)). Nevertheless, the existing empirical studies, specific indications from past experience together with new studies in the areas of the psychology of terror and theory of deterrence, cumulatively support, in a satisfactory manner, the deterring potential embedded in house demolition.

7. Benmelech, Berrebi and Klor examined, empirically, whether demolition of houses was effective tactics in the struggle against terror. Data regarding house demolition were compared with data of suicide attacks during the second intifada. It was found, that the demolition of the houses of martyrs and others involved in terror attacks, resulted in an immediate and significant decrease in the number of suicide attacks which were committed by perpetrators who lived in the area in which the demolition was carried out. However, it was found, that the measure had only a short-term deterring effect, of not more than a month, which was confined to the geographical area in which the demolition was executed. The researchers assume that in addition to house demolition the security forces implement additional measures within the framework of their struggle against terror, which may cause the deterrence to dissipate. Their conclusion is decisive:

> The results indicate that, when targeted correctly, counterterrorism measures such as house demolitions provide the desired deterrent effect…" (Efraim Benmelech, Claude Berrebiand Esteban Klor, Counter-Suicide-Terrorism: Evidence From House Demolitions, NBER Working Paper Series available at: http://www.nber.org/papers/w16493 (2010)).

8. Support to the empirical findings is found in data from the scene regarding the atmosphere or efforts made by relatives to convince a family member to refrain from involvement in terror activity which may put their homes at risk (for instance: see Doron Almog, **Cumulative Deterrence and the War on Terrorism**, 34(4) Parameters 5 (2004/5)). Said specific information indicates that deterrence permeates the consciousness of the target population. We heard things to that effect from respondents' counsel during the hearing in the petition, in response to my question.

9. Recent understandings in the area of theory of deterrence against terror should also be paid attention to. Rascoff points at a multi-layered approach for deterrence against terror – consisting of two aspects – synchronized layering and cumulative deterrence. In his words:

> "… there is the possibility of synchronic layering, in which various instruments of power operating in concert may "exceed an adversary's threshold for deterrence." …Synchronic layering argues for measuring deterrence's effectiveness in the context of a complex system… Second, diachronic layering (sometimes referred to as "cumulative deterrence" argues that the overall benefit conferred by a sustained deterrence posture may exceed the sum of interventions taken over time." (Rascoff, Samuel J., **Counterterrorism and New Deterrence**, 89 N.Y.U.L. Rev. 830, 840 (2014)).

Hence, an attempt to isolate and measure the effectiveness of the deterrence by a single step – house demolition – in and of itself, may lead to a wrong conclusion. The possibility may not be overruled that cumulatively, taken in coordination with additional steps, the demolition of the houses of terrorists will have a certain contribution, sometimes even a decisive one, to the conduct of terrorists, even though in and of itself it may not suffice.

10. Studies in the psychology of terror analyze in depth statements of terrorists alongside the conduct of terror organizations. It was found that terror organizations, including those who are characterized by religious extremism, respond to rational, utilitarian thinking. Thus, they may be deterred by steps which would affect the cost-benefit considerations of the terror attack. The centrality of the family in the eyes of those involved in terror, is clearly indicated by these studies, and supports the deterring value embedded in the demolition of a terrorist's house. As stated by Wilner:

> "… post 9/11 deterrence skepticism is misplaced. While it is true that deterring terrorism will be more difficult to do than deterring the Soviet Union, **targeting what terrorists value, desire and believe will influence the type and ferocity of the violence they organize**." (ibid, page 31 (emphasis was added), See also pages 7, 13-14. On the "rational" behavior of terrorists see: Jocelyn J. Belanger, Keren Sharvit, Julie Caouette and Michelle Dugas, *The Psychology of Martyrdom: Making the Ultimate Sacrifice in the Name of a Cause,* 58(7) The Journal of Conflict Resolution 494, 496 (2014)).

11. In more detail, Perry and Hasisi prove, that despite statements made for propaganda purposes, wishing to portray suicide actions as deriving from altruistic motivations, these actions are mostly the result of a "rational" choice, which is based, on the one hand, on the expected cost, and on the other, on the expectation to be rewarded (personally, religiously and socially). Terror organizations put an emphasis on promises pertaining to the expected improvement of the condition of the terrorist's family members after his suicide:

> "… The martyr's family's status upgrade… both socially and monetarily. … Financial reward can be given to the family by **rebuilding their homes… or in direct sums of money… .. at least 60… martyrs whose families, in exchange for the martyr's death, were given new homes adorned with the martyr's picture and name…** The recruiting terror

> groups embellish this incentive, reassuring the suicide bombers that "their families will be better taken care of in their absence".
>
> …**It is often this familial assistance alone that drives the suicide bomber to commit an attack**…" (Simon Perry and Badi Hasisi, Rational Choice and the Jihadist Suicide Bomber, 27 Terrorism and Political Violence, 53, 55, 61, 65-66 (2015)).

12. Suicide bombers emphasized in the video tapes in which they separate from this world the rewards which their families would receive, as a kind of compensation for their death, and even described how the thought of the benefit which would be conferred upon their families accompanied them until almost the actual committing of the attack (ibid). Putting a special emphasis on the terrorist's family home, the terror organizations themselves mark the "soft spot" in which deterrence may be effective.

13. All of the above indicate, that the demolition of terrorists' houses will add to the cost-benefit calculation conducted by a potential terrorist the knowledge that his family members will pay the price for his actions. Justice S. Netanyahu referred to this aspect of the deterrence in HCJ 4772/91 **Hizran et al., v. IDF Commander in the Judea and Samaria Area**, IsrSC 46(2) 150, 155, by saying: "… I do not disregard the fact that the demolition of the structures in their entirety would injure not only the petitioners themselves but their family members as well. However, this is the result of the need to deter the public, for them to see and know, that in their atrocious actions they injure not only the individual, put public safety at risk and subject themselves to heavy punishments, but also cause suffering to their family members…".

14. However, deterrence is not only intended to directly influence the terrorist's way of thinking, but also to cause him to change his ways by the interference of his family members. The family's ability to influence the terrorist is well known in the literature (Emanuel Gross, "*The Struggle of Democracy against the Terror of Suicide-Bombers – Is the Free World Equipped with the Moral and Legal Tools for this Struggle*? (The **Dalia Dorner Book**, 219, 246 (2009)): "**In the traditional Palestinian society, the family plays a central role in the life of the suicide bomber and significantly contributes to the development of his personality and his willingness to sacrifice his life in the name of his religion or for his people…**" Gross demonstrates and notes that the support of the family, and its display in public, serves the interests of the terror organizations – "by widening the circle of the individuals who support the organization from the Palestinian population, and in so doing, to increase its abilities to recruit additional suicide bombers in the future" (see also: Emily Camins, *War Against Terrorism: Fighting the Military Battle, Losing the Psychological War*, 15 Current Issues Crim. Just. 95, 101 (2003-2004). The family as a factor which enhances terror should be neutralized. The family should be encouraged to limit terror. The fear from having its house demolished, is intended to encourage the family of the potential terrorist to exert its influence in the right direction, to deprive him from the inner support circle, and cause him to leave terror or neglect the realization thereof. Hence, deterrence has an influence, even if to a small extent, which, under the circumstances of time and place, may be decisive; for good or for evil.

15. And as to the **discrimination** argument which was raised by the petitioners, discrimination between Palestinians and Jews in the use of Regulation 119. The argument has no basis. The reason that Regulation 119 was not used against Jews is that there is no need for the same deterrence in the Jewish sector. It cannot be denied: there certainly are attacks of Jews against Arabs. Criminal law and proper punishment must certainly be exhausted. To our dismay we have even reached the horrifying murder of Muhammad Abu Khdeir. However, the difference exceeds all similarities. The gap is huge – in the quality of the attacks, their quantity, and mainly, for the purpose of the case at

hand, the attitude of the environment: strong and decisive wall-to-wall condemnation in the Jewish sector, which is not the case on the opposite side, and there is nothing to add.

16. The petitioners dedicated in their petition a chapter to the issue – "**The prohibition of collective punishment in Jewish law**"; and they did well. The issue before us is a moral issue, an issue of values, difficult and seething, and it should be discussed in light of the values of the State of Israel as a Jewish and democratic state. The petitioners started with a quote from the words of Abraham, who stood firm and forcefully argued with God against the destruction of the Sodom and Gommorah – collectively – with "**all the inhabitants of the cities, and that which grew upon the ground**" (Genesis 19:25):

> Then Abraham approached him and said: "Will you sweep away the righteous with the wicked?... Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right?" (*Ibid*, 18, 23-25)

Abraham started his negotiation with "the Judge of all the earth" with fifty righteous people and ended with ten righteous people. If such a number is found, God promised Abraham not to destroy the city: "**For the sake of ten, I will not destroy it**." (*Ibid*., 18:32). For less than ten Abraham did not plead. He probably thought that this was the border line – ten (minyan) righteous people – not less; A question of **proportionality** (see the commentaries of *Rashi* and *Or HaChaim* (verses 32-33)).

17. However, a distinction should be drawn between said collective punishment in which the city of Sodom was overthrown, and its financial results. As recalled, Lot was saved from said punishment, but "**Left with hands on his head and from his property he saved nothing**" (Yerushalmi, Sanhedrin 10:8).

18. The petitioners also referred to the story of Korah: "**O God, the God of the spirits of all flesh, shall one man sin, and wilt thou be wroth with all the congregation**?" (Numbers, 16:22) etc. In this context the words of Justice M. Cheshin regarding the basic principle of Jewish law according to which: "**every man shall be put to death for his own sin**", which were also referred to by the petitioners, should be reiterated:

> "On many occasions I have pointed out the difficulties inherent in exercising the powers granted by Regulation 119… I rooted myself in a basic legal principle, and from it I will not be swayed. It is a basic principle which all our people recognize and reiterate: every man must pay for his own crimes. In the words of the prophet: The soul that sins it should die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son. The righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him."(Ezekiel 18:20). One should punish only cautiously and one should strike the sinner himself alone. This is the Jewish way as prescribed by the Law of Moses: "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." (Kings II, 14:6)". (HCJ 2006/97 **Ghanimat v. GOC Central Command**, IsrSC 51(2) 651, 654-655 (1997); see also HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, IsrSC 46(3) 693 (1992)).

19. These are basic principles, law of nature, both Jewish and democratic value. This principle of natural justice was well explained by Rabbi Shimshon Raphael Hirsch:

> "**Our writings do not intend to prevent the legal atrocity that any court will punish sons for the sins of their fathers… since it is inconceivable that any judicial authority will do so. But they come to teach us, that also politically and socially a person should not be punished for the sin of his relative**" (**Rabbi Shimshon Raphael Hirsch on the Torah**, Deutonomy 24:16).

20. Throughout the ages our sages of blessed memory interpreted said principle persistently and consistently, that in practice, a person who did not sin should not be punished (see the study of Rabbi Meir Batist, "Collective Punishment", *Techumin* 12, 229, 23-231 (5751) (hereinafter: **Batist**); Aviad HaCohen, "Shall one man sin, and wilt thou be wroth with all the congregation?", *Gilyonot Parashat Hashavua* (Ministry of Justice) (Parashat VaYishlach, 5761) (hereinafter: **HaCohen**)).

21. Nevertheless, the voice of ethics and justice, it seems that the rule "every man shall be put to death for his own sin" is neither the most important rule, nor is it an isolated rule, unlike petitioners' position which argue that it is the one and only and most important rule. As aforesaid, a distinction should be drawn between collective physical punishment and proprietary impingement. The position of Jewish law is not one-dimensional, but it rather takes into consideration additional rights and principles, important as well, by way of balancing and completion.

22. Punishing the family members of a person who sinned, is rare, but can be found in Jewish law, in different contexts. Thus, for instance, Rabbi Platoi Gaon ruled that a child could be removed from school as a sanction against his father, to enforce the father to abide by an order of the Rabbinical court, and to protect the principle of the rule of law and law enforcement (*Hageonim Answers*, Shaarei Tzedek, 4, 5:14; Yuval Sinai, "Implementation of Jewish law by the Courts in Israel", 444 (2009));

    Rabbi Kook justified the imposition of collective sanctions on a community which decided to grant one of its leaders a public position although he has desecrated Yom Kippur, for the prevention of desecration of God in public (*Da'at Cohen*, 193; Batist, 234-235);

    With respect to a person who refused to divorce his wife it was decided by the sages to impose sanctions on his family members as well, in order to release the wife from the status of *'Agunah*'. Said sanctions were classified both as a punishment imposed on an "accomplice" and as **deterring** measure. The underlying premise of said permit was that the husband did not act in a void, but was rather assisted by his close family which gave him mental, moral, financial and practical support. Such support, after an order directing the reluctant husband to divorce his wife has already been issued, amounts to aiding and abetting in the commission of an offense, and justifies the imposition of sanctions on the family members as well. It is however clear, that sanctions of this sort require a clear proof that such assistance and support was given by the family members, and in any event, the sanctions should be proportionate (Aviad HaCohen, "If you will – she is not '*Agunah'*: The Imposition of Sanctions on a Husband who Refuses to Divorce his Wife and on his Family Members", *Gilyonot Parashat Hashavua* (Ministry of Justice) Parashat Nitzavim-VaYelech, 5769)).

23. This way of thought is an inevitable product of a correct understanding of the reality, since a person cannot be disconnected from his environment and family. The responsibility of the environment and family – to a certain extent – for a person's actions is mentioned many times and in different contexts

in the sources of Jewish law. Accordingly, for instance, *Hamidrash* interpreted the justification for the punishment of the family of a man *"who gives any of his offspring to Molech"* (Leviticus 20:1): *"Then I will set my face against that man, and against his family, and will cut him off, and all that go a whoring after him" (Ibid*, 5):

> "Said Rabbi Shimon: What was the sin of the family? But to teach you that there is no family which has an oppressor that is not all oppressors; which has a robber, that is not all robbers – because they cover up for him" (**Torat Cohanim**, *Ibid*)

24. It should be noted that in this matter punishment is given by the celestial court rather than by the terrestrial court (HaCohen, Batist 234-235). Nevertheless, Hanaziv from Volozin explains, that the close relations between a person and his family may cause empathy, firstly, conceptually and later on, practically, and therefore, taking a proactive approach, deterrence should and must be taken for prevention purposes:

> "They did not find it in their hearts to do this evil. Therefore they try to save that person, who did evil first, and slowly they as well as others will also do evil. And if they have disregarded [his actions], his family members will be punished with him." (*Ha'amek Davar*, Leviticus 20)

25. An important statement concerning the responsibility of the family and of the community is found in the *Talmud*:

> "**A person who could prevent [the sins] of the people who live in his house and failed to prevent them – is caught for the people who live in his house; the people who live in his town – is caught for the people who live in his town; the people of the entire world – is caught for the people of the entire world**" (Bavli, Shabat 54, 72)

So we see, the sinner is not alone. His family and friends cannot exonerate themselves. And it was so ruled by HaRambam: "*A person who sees that another person sinned or took the wrong path is obligated to reform his ways and warn him that he had sinned in his evil ways… and a person who can prevent them and fails to do so, is caught for said sins because he could stop them*" (Hilchot Deot 6, 7)

26. Another issue which pertains to the responsibility of the community to the deeds of the offender is the issue which concerns the house leprosy. According to the Torah, when leprosy contaminates the walls of the house and cannot be eradicated, the entire house should be destroyed, even if consequently, all inhabitants of the house are injured, including the neighbor, whose wall is also destroyed. Said neighbor will also have to re-build his house which was damaged:

> "Hence it was said, the evil person suffers and his neighbor suffers, they both must work and bring the stones" (Mishnah, Negaim 12,6)

This may be regarded as a technical matter, in view of the fact that a wall cannot be broken only from one side. However, the sages explained this matter as a justification for the collective punishment of the offender and his neighbors, which maintain close and mutual relationships (see Bavli, Suka 56' 2; Batist 236; Michal Tikochinski, "The evil person and his neighbor" www.bmj.org.il/article/984; Yehuda Shaviv, "On the Separation of the House Leprosy from other Leprosies" Megadim 15 (2003)).

27. It should be noted: surely one should not conclude from the above examples that punishing the community for the actions of the offender must be consistently supported. On the contrary, the rule still stands in full force and effect: "**The soul that sins it should die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son. The righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him**."(Ezekiel 18:20). However, there are exceptions to the rule, situations in which a punitive-deterring response is required, which causes damage to the environment, to uproot evil: "Near the thorn suffers the cabbage" (Bavli, Baba Kama 92,1). Rashi explains: "**A thorn which grows with a cabbage, when uprooted sometimes the cabbage is uprooted with it, and suffers for it – which means to say that the neighbors of the sinner are punished with him**."

28. It should be reiterated and emphasized once again that a monetary damage cannot be compared to a collective physical punishment. HaRambam ruled (Rules (Halachot) of Kings and Wars5, 3) that a king who "breaks through to make a way, should not be prevented from doing so". All the more so when prevention of danger is concerned, and particularly serial murderous terror.

29. Regretfully, we do not live peacefully and safely. Peace is an ideal but the time has not yet come. The IDF, the Police and other security forces must cope with evil, murderous terror, which does not sanctify life but rather worships death. We have come to the point that in their horrific actions the terrorists are willing to die as "martyrs" provided they take Jews with them to hell. A time of war is unlike a time of peace as far as the applicable law is concerned (Batist, 237-238; Yaron Unger "Don't Fear Abraham – on the ethics of war in Israel" *Gilyonot Parashat Hashavua* (Ministry of Justice) Parashat Lech Lecha, 5766) (hereinafter: **Unger**). This is not the place to discuss the injury of civilians in a complex fighting such as this (see discussion and references in the articles of Rabbi Shaul Yisraeli "Retaliation Acts in view of the Halacha" *Cross Roads of Torah and State* 3, 267-273 (1991); Rabbi Chaim David Halevi, "Kill your enemies and smite them" in public life" *Techumin* 1, 343 (5740); Avraham Yisrael Sharir, "Military Ethics according to the Halacha" *Techumin* 25 426, 431-434 (5765); Unger, 2-3). On this issue we should warn ourselves from drawing hasty conclusions according to the Halacha, *inter alia*, due to "thousands years of exile from land-country-state" (Guttel, 18-19) and "dilution of Halacha sources" as a result thereof (*ibid*), and due to the gap between the reality according to the sources and the current reality, and the danger embedded in syllogism infected by anachronism. (Aviad HaCohen, "Law and Ethics in Times of War" Parshiyot and Mishpatim – Jewish Law in Parashat Hashavua, 457-462 (5771)(hereinafter: **Parshiyot and Mishpatim**)). Moreover: the rules of war between the nations (in terms of what is permitted and prohibited) also underwent important changes. These rules of international law were recognized by Jewish law by virtue of the rule "The law of the state is the Law" (Guttel, 38-40 and the references there; Unger, 4).

30. As aforementioned, with all the required due care and safety precautions, it is clear that special laws were designated for time of danger and war, under which damage to the environment cannot be absolutely prevented. However, time of war presents moral challenges. The tools used by the warriors in the battle field, and are necessary for their success in their missions, are tools of killing and destruction, which under normal conditions run contrary to the values of ethics and human rights. Not without reason had the Torah warned the warriors in the battle field:"And you shall keep away from every evil thing", (Deuteronomy, 23, 13). For war time special commandments are designed in order to struggle with moral and spiritual crises: "The Torah did not speak but against the evil inclination" (Rashi's commentary of the Torah, Deuteronomy, 21:11); Abraham Sherman, "Halacha Principles in War Ethics", *Techumin*, 9, 231, 231- 232 (5748-1988) (hereinafter: **Sherman**); Aviad Hachohen, "Since the Almighty is beloved and gracious, so be thou beloved and gracious!" On cruelty and mercy in the world of Israel Tradition", *'A Stain of light cloud : Soldiers, Military and Society in the Intifada*,

325-347, Yoel Elizur, Editor, 5772-2012). One of these commandments, which is relevant to the issue at hand – the prohibition imposed on the destruction of trees around a city:

> "When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them: for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field *is* man's *life*) to employ *them* in the siege: Only the trees which thou knowest that they *be* not trees for food, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued" (Deuteronomy 20:19-20)

31. This prohibition on collective pointless destruction, that was meant to hurt the enemy for no military gain, was applied to all things of value and not only to trees. This is a moral lesson of "do not destroy" during war, establishing a limit and setting rules for self-restraint, also when permission was granted to destroy (Moshe Drori, "If you besiege a city …do not destroy its tree – prohibition against destruction, *Gilyonot Parashat Hashavua* (Ministry of Justice) (Parashat Shoftim, 5767- 2007); Sherman 233-234). Jewish law allows to destroy valuable property during war, only when the purpose of this action is clearly known, and even then – the destruction should be made in a proportionate and most limited manner (Sherman, 235 and the references there). This kind of destruction, during war, for a useful purpose only, in a proportionate manner, also teaches us a thing or two about the demolition and sealing at hand: time of war is not meant to cast away human dispositions and not to lose moral nature (Parshiyot U-Mishpatim, *Ibid*, 457).

32. We can continue to endlessly discuss the difficult and painful issue at hand, in Jewish law and generally, but this is not the place to do it. The main principle which should guide us is: "The one who rules should be cautioned not to punish the sons for the sins of the father" (Innovations of the Ran, Sanhedrin 27, 2). At the same time, we must acknowledge the existence of exceptions – rare, extraordinary, but sometimes inevitable in view of the circumstances. These may come into play when great danger is posed, when the environment bears certain responsibility, even passive, or covers-up a crime, or when the rule of law is being down-trodden, to deter, to distance innocent people from the company of offenders, for the social and educational value of punishment, etc. In the specific petitions which were denied, we were indeed convinced that the commander did not punish the family members for the sins of the terrorist, but acted in difficult times to deter, for people to see and beware, to save lives. This is the duty of the commander – an inevitable necessity, even for the price paid by the family members of the terrorist – to protect life.

33. On the one hand, we must remember and preserve ethics, human rights and the measure of mercy also in time of war or quasi war: "**The Almighty is called merciful, you should also be merciful**" (Sifri, Akev, 49); On the other hand, we must also remember and keep in mind the following: "**Whoever is merciful to the cruel, eventually becomes cruel to the merciful**" (Yalkut Shimoni, Shmuel I, 121). We were commanded to deliberate and decide between these two poles. We had to weigh the demolition of the house of a terrorist, and the injury caused to his family, on the one hand, against the saving of lives – on the other. This is what my colleague Justice **E. Rubinstein** did and the grounds of his decision are clear and convincing; I agree with his opinion.

Justice

Justice E. Hayut

1. I join the conclusion of my colleague Justice E. Rubinstein according to which the petition at hand should be denied. The main reason which lead me to this conclusion is the fact that the general

issues which were raised by the petitioners in this petition were discussed and resolved by this court only recently in specific petitions. The first one – on July 1, 2014 concerning the demolition of the house of the person who was accused of having murdered the late Police Commander Baruch Mizrahi (HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area** (July 1, 2014)(hereinafter: '**Awawdeh**) and the others - on August 11, 2014 concerning the demolition of the houses of the terrorists who abducted and murdered the youths Gil-Ad Shaer, Eyal Yifrach and Naftali Frenkel God bless their souls and of another person who was involved in said actions (HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area** (August 11, 2014)) (hereinafter: **Qawasmeh**). Indeed, this court is not bound by the judgments rendered by it, as stipulated in section 20(b) of the Basic Law: The Judiciary: "A rule laid down by the Supreme Court shall bind any court other than the Supreme Court." However, relevant to this matter are the words of Justice Silberg in FH 23/60 **Balan v. The Executors of the Will of the Late Reimond Litvinski**, IsSC 15(1) 71, 75 (1961), who referred to the previous version of the provision in section 33(b) of the Courts Law, 5717- 1957, and stated as follows:

> This provision does not turn the pages on which the previous judgments of the Supreme Court were written into *'blank pages*'… The Israeli legislator did not want to completely release the Supreme Court from the burden of the precedent as a result of which each one of its Justices – will act as it pleases… This is not the path that we must take! Should we take this path, over time this judicial institution, will turn from a 'Court of Law' into a 'house of Justices' the number of opinions of which will equal the number of its members.

We should indeed always remember these important things. In the case at hand, the petitioners raise once again in their petition general issues concerning house demolition which have already been discussed and resolved in the **'Awawdeh** and **Qawasmeh** cases, and they in fact request to revoke said judgments. I cannot agree to do that without turning this court of law into a "house of Justices", especially in view of the fact that the above judgments were given by five Justices of this court only a few months ago. However, it should be honestly said that the issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy.

2. Israel has been struggling for years with the expansion of terror and its horrifying episodes which are directed against innocent civilians. In recent years states around the globe have also started to be exposed to terror which takes a global nature and this reality compels the law, on the local as well as on the international level, to cope with complex issues concerning the legitimate measures that a state can take in its struggle against terror, being obligated to protect itself and its citizens. Complex questions of this sort were presented more than once before the Israeli Supreme Court over the years and it would be sufficient to remind in this context the main issues on which judgments were given: the issue of the use of interrogation measures which included the exertion of physical pressure on interrogees (HCJ 5100/94 **Public Committee against Torture in Israel v. Government of Israel**, IsrSC 53(4) 817 (1999)); the issue of administrative detention of individuals for the purpose of using them as "bargaining chips" during negotiations (HCJ 7048/97 **A v. Minister of Defence**, IsrSC 54(1) 721 (2000)); the issue of orders assigning places of residence (HCJ 7015/02 **Ajuri v. IDF Commander in the West Bank** (September 3, 2002)); and the issue of the "targeted killing" policy (HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel** (December 14, 2006)). In addition, this court was also requested to judicially review statutes which were enacted in order to fight terror (CrimApp 6659/06 **A v. State of Israel**, IsrSC 62(4) 329 (2008); HCJ 7052/03 **Adalah - The legal Center for Arab Minority Rights in Israel v. Ministry of the Interior**, IsrSC 61(2) 202 (2006); HCJ 466/07 **MK Zehava Gal-On Meretz-Yachad v. Attorney General**

(January 11, 2012)). However, it seems that in this area of struggle against terror, international law and domestic Israeli law alike, have not yet caught up with reality and have not yet established a comprehensive and detailed codex of rules concerning the legal measures that a state can take, being obligated, as aforesaid, to protect itself and its citizens. Needless to point out that this area desperately needs to be regulated in view of the fact that the known rules according to which the nations of the world act befit, to a large extent, the old and known model of war between armies, whereas the new and horrifying reality which was created in Israel and around the globe by terror organizations and individuals who commit terror attacks, disregards territorial borders and draws no distinction between times of war and times of peace any time is the right time to sow destruction, violence and fear, in most cases without discrimination between soldiers and civilians. Terror, in fact, does not respect any one of the rules of the game which were established by the old world with respect to the laws of war, and this reality imposes upon the jurists and not only on the security forces, the obligation to re-consider the situation for the purpose of revising and updating these rules and adapting them to the new reality. Currently, in the absence of such updated codex of laws, Israeli law must cope, on a case by case basis, with issues pertaining to the struggle against terror, constantly striving to maintain the delicate balance between security needs and human rights and the values of the state of Israel as a Jewish and Democratic state.

3. Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) currently constitutes, according to case law, part of the positive Israeli law, and its validity is maintained by virtue of the validity of laws provision in section 10 of the Basic Law: Human Dignity and Liberty, even if it does not reconcile with the provisions of the Basic Law. However, as this court has stated more than once in its judgments, and as was also noted by my colleague E. Rubinstein, in our interpretation of the power vested in the authority by virtue of the Regulations, we must take inspiration from the Basic Law. This interpretive inspiration means that the manner by which the power granted to the authority under Regulation 119 is exercised, must be examined and reviewed by us according to the provisions of the limitation clause, and that we must ascertain that it is exercised for a proper cause and satisfies the proportionality tests (HCJFH 2161/96 **Sharif v. GOC Home Front Command**, ISRsc 50(4) 485, 488 (1996); '**Awawdeh** paragraphs 16-18; **Qawasmeh**, paragraph 22).

4. The respondents emphasized in their arguments that the underlying purpose of the terrorists' house demolition policy was not to impose a collective punishment but rather to deter and that said measure was exercised in a limited manner, taking into consideration the engineering ramifications arising there-from and after less injurious measures, such as sealing in the appropriate cases, were examined. This position concerning the purpose of said measure was adopted by this court in a host of judgments. Thus, President A. Barak noted in **Sharif** while having denied an application for a further hearing of a petition concerning a partial demolition of a structure in which lived a person who transferred to a suicide bomber an explosive device which exploded in a bus in Jerusalem as follows: "The purpose which the respondent sought to achieve is proper… there is nothing new about it in view of the many judgments of this court. The purpose is not to punish but rather to deter." (Ibid, page 488; and also see: '**Awawdeh,** paragraph 19). In their article "**Cost without Benefit in the House Demolition Policy: Following HCJ 9110/19 *[sic]* Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area**", Hamishpat on the web, case law news flashes 31 5, 11-21 (September 2014), its authors, the scholars Amichai Cohen and Tal Mimran stated that the deterrence consideration as a proper cause was controversial and supported their argument on this issue in the judgment of Justice Arbel in HCJ 7146/12 **Serg Adam v. The Knesset** (September 16, 2013) in which she noted that the deterrence of immigrants and refugees was a proper social interest. However, the legislation which was examined in that case did not entertain the required sensitivity for human rights which could enable it to satisfy the proper cause test, in view of the fact that it did not regard the individual as a purpose but rather as a means, which constitutes another

violation of his human dignity. This approach raises a certain analytic difficulty – given the premise according to which deterrence – in that case of immigrants and refugees and in our case of terrorists and their supporters – serves an important and proper social interest. This being the premise, criticism is actually directed against the measures taken and the proportionality tests which they must satisfy, rather than against the purpose which is proper, in and of itself, unless we are willing to categorically determine that deterrence – any deterrence – is not a proper cause, a proposition which I find hard to accept, certainly not when the protection of state security and the deterrence of potential terrorists from committing terror attacks are concerned.

Petitioners' counsel argues that even if the position according to which the underlying objective of house demolition is to deter, the outcome is punitive and collective and is therefore improper (on this issue see also: Yogev Tuval "House Demolition – a legitimate measure in the struggle against terror or collective punishment" in **Exceptional measures in the Struggle against Terror** 189 (The Israel Democracy Institute, 2010)). It seems to me that it is difficult to classify the demolition of a terrorist's home as collective punishment in the acceptable sense, even if as a result of the demolition of his house, his family members who live with him in the same house are also injured, given the determination according to which one of the considerations which the military commander should take into account in connection with house demolitions is the scope of involvement of the other inhabitants of the house in the hostile activity of the terrorist (see: '**Awawdeh**, paragraph 18 of the judgment of the Deputy President, M. Naor; **Qawasmeh**, paragraph 22 of the judgment of Justice Y. Danziger). The Deputy President however, noted further in this context that "the absence of evidence concerning awareness or involvement of the family members does not prevent, in and of itself, the exercise of the power, but this factor may influence the scope of respondent's order, as aforesaid." In my opinion, said consideration, although it is not the only consideration, should carry a significant weight in making the decision concerning the demolition of the structure and its scope, and it seems that it was emphasized more than once in the past by this court that said consideration should be given such weight (see for instance: **Sharif;** HCJ 6026/94 **Nazal v. IDF Commander in the Judea and Samaria Area**, IsrSC 48(5) 339, 349-350 (1994); '**Awawdeh**, paragraph 28 of the judgment of the Deputy President M. Naor). I will add and say, without exhausting the possibilities concerning this consideration, that in my opinion, if indeed the family members whose home is about to be demolished can convince by sufficient administrative evidence that before the terror attack they tried to prevent the terrorist from carrying it out, then said factor should be given very significant weight, which may, in adequate cases, nullify the decision to demolish the house of said family members.

5. An additional argument which was broadly discussed by the petitioners in their arguments concerns the effectiveness of house demolition as a measure which deters terrorists. The petitioners argued that this measure was not effective and supported their said argument by an expert opinion which referred to various articles including the article of Prof. Ariel Merari (Ariel Merari, *Israel Facing Terrorism*, 11 Israel Affairs (2005) (hereinafter: **Merari**) and to the article of Benmelech, Klor and Berrebi (Efraim Benmelech, Esteban F. Klor and Claude Berrebi, *Counter-Suicide-Terrorism: Evidence from House Demolitions*, 16493 NBER Working Paper (2010)), which was referred to by my colleague, Justice N. Sohlberg in his opinion. According to the petitioners, said articles refute the rational of deterrence, but a thorough review thereof shows that said researchers did not reach such a decisive conclusion. Thus, for instance, the empiric study of Benmelech, Esteban Klor and Berrebi points at a positive correlation between house demolitions and a decline in the number of suicide attacks which were reviewed by them, although they added a caveat to their conclusion, noting that the correlation was found in the period which followed the demolition and shortly thereafter and emphasized that house demolition may result in an increase of other types of terror which were not included in their research (*Ibid.*, page 16). Prof. Merari also referred to the effectiveness of house demolitions as a deterring factor and summarized his comments on this issue by saying:

> In general, collective anti-terrorism measures are likely to have two opposing effects on the population from which the insurgents emerge: on the one hand, they breed fear and, on the other hand, hatred to the government. The actual behavior of the affected public, as a result of the infliction of collective punishment, depends on whether fear is stronger than anger, or vice versa. Persons who are willing to kill themselves in order to kill others are, obviously, very hard to deter by the threat of punishment to themselves, but they may still care about the well- being of their families. (Merari, page 230).

Said conclusion is far from decisively refuting the rational of deterrence. It presents two opposing effects of demolition and states that the deterring power of the demolition depends, to a large extent, on the question of whether fear overcomes hate in any given case. The last sentence of the above quoted paragraph also emphasizes that it is hard to deter a suicide bomber but such a terrorist may still take into consideration the wellbeing of his family, and this statement at least insinuates that it may be the only way by which he may be deterred. The scholar Cheryl V. Reicin is also of the opinion that house demolition may deter people who consider the possibility of committing a terror attack as well as people who consider the possibility of supporting the terrorists and offer them hospitality. In addition, according to Reicin, house demolition may cause family members to make efforts to prevent their children or brothers from committing terror attacks, home owners may interfere and vacate individuals suspected of terrorism from their homes and eventually, the community which is exposed to this sanction may interfere and inform the security forces of individuals suspected of involvement in terrorism (Cheryl Reicin, Preventive Detention, Curfews, Demolition of Houses and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories, 8 Cardozo Law Review 515, 547 (1987)). Said conclusions are also far from refuting the rational of deterrence. In this context it is important to emphasize that for the purpose of satisfying the first subtest of the proportionality tests, the rational connection test, it is not required to show that the "means which was chosen will realize the objective in its entirety, and partial realization which is neither marginal nor negligible will suffice to satisfy the rational connection test" (HCJ 1213/10 **Nir v. The Chairman of the Knesset**, paragraph 23 of the judgment of President D. Beinisch (February 23, 2012), and in other words, it is sufficient to be able to point at a potential for the realization of said objective which cannot be refuted (HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 8 of the judgment of Justice (as then titled) M. Naor (December 17, 2008) and the references there) (hereinafter: **Abu Dheim**).

6. And finally, I wish to note that I attach great importance to the comment of my colleague, Justice Rubinstein concerning the need to conduct in the future from time to time and to the extent possible follow-up and research concerning the house demolition measure and the effectiveness thereof (paragraph 28 of his opinion). In this context it is needless to point out that also in the past this issue was examined by the Shani committee which was mentioned by my colleague, which engaged in "rethinking the issue of house demolition" and reached at that time (2005) the conclusion, which was adopted by the security agencies, that the demolition of terrorists' homes for deterrence purposes as a method in the Judea and Samaria Area should be stopped and should be **used only in extreme cases** (slide 30 of the Shani committee presentation, Exhibit 1 to the petition). The terror attack in Merkaz Harav Yeshiva in the center of Jerusalem constituted, according to security agencies, an extreme case, and the use of the demolition measure was renewed in connection therewith, after a recess of a few years. A petition which was filed with this court in that matter – was denied (**Abu Dheim**). The last wave of terror which commenced with the abduction and murder of the three youths God bless their souls and continued in frequent killings and massacres of innocent civilians, passers-by and worshipers in a synagogue, also marked an extreme change of circumstances, characterized by terrorists from East Jerusalem, which required a renewed used of this means. However, these

extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests. In praise of doubts, which must always nag even the heart of the just, the poet Yehuda Amichai spoke in his poem "The Place Where We Are Right":

> But doubts and loves
> Dig up the world
> Like a mole, a plow.
> And a whisper will be heard in the place
> Where the ruined
> House once stood.

For these reasons I join the conclusion of my colleague, **Justice E. Rubinstein**, according to which the petition should be denied.

Justice

Decided as specified in the judgment of Justice E. Rubinstein.

Given today, 9 Tevet 5775 (December 31, 2014)

Justice Justice Justice