The Supreme Court sitting as the High Court of Justice

HCJ 7195/08

Before:	The honorable Justice A. Procaccia The honorable Justice A. Rubinstein The honorable Justice H. Melcer
Petitioners:	1. Ashraf Abu Rahme 2. B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories 3. The Association for Civil Rights in Israel 4. The Public Committee Against Torture in Israel 5. Yesh Din – Volunteers for Human Rights
	v.
Respondents:	1. Brigadier General Avichai Mandelblit, military advocate general 2. Colonel Liron Leibman, chief military prosecutor 3. Lieutenant Colonel Omri Burberg 4. Staff Sergeant L.
	Petition to grant an order nisi
On behalf of the Petitioners:	Limor Yehuda, attorney at law; Dan Yakir, attorney at law

On behalf of Respondents 1 and 2:	Shai Nitzan, attorney at law
On behalf of Respondent 3:	Shlomo Tzipori, attorney at law; Ehud Ben Eliezer, attorney at law
On behalf of Respondent 4:	Ilan Katz, attorney at law; Gali Steiner, attorney at law

Judgment

Justice A. Procaccia:

1. An indictment was brought against Respondent 3, Lt. Col. Burberg (hereinafter – the Battalion Commander) and Respondent 4, Staff Sergeant L (hereinafter – the Soldier), charging them with the offense of unbecoming conduct, in contravention of Section 130 of the Military Justice Law, 5715-1955 (hereinafter – the Military Justice Law). Petitioner 1, Ashraf Abu Rahme (hereinafter – the Petitioner) and four public human rights organizations – B'Tselem, The Association for Civil Rights in Israel, The Public Committee Against Torture in Israel, and Yesh Din, Volunteers for Human Rights – filed this petition, in which the requested remedy is amendment of the indictment brought against the Battalion Commander and the Soldier in such manner that the counts of the indictment will reflect, in the words of the petition, "the criminal offenses that were allegedly committed by Respondents 3 and 4 in view of the event in which Respondent 4 (the Soldier) shot the Petitioner – who was in custody, bound and blindfolded – from extremely close range, while Respondent 3 (the Battalion Commander) was holding him."

2. The core of the claim made by the Petitioners is that the circumstances of the event, which will be set forth below, indicate

particularly egregious conduct on the part of the Battalion Commander and the Soldier, which requires that they be charged with far more serious offenses than that of unbecoming conduct, for which they were indicted. According to the Petitioners, the decision of the military prosecution to charge the Battalion Commander and the Soldier with the minor offense of unbecoming conduct indicates a laxity with which the law is enforced in the military ranks, and sends an improper message of tolerating grave harm to the basic values of society and of the Army, which require that a person's dignity and physical safety be protected, particularly when he is in custody and in a situation in which he is unable to defend himself. Against the backdrop of the circumstances of the incident, the decision of the Military Advocate General (hereinafter – the MAG) and the Chief Military Prosecutor (hereinafter – the CMP) (Respondents 1 and 2) to limit the indictment to a minor charge, dealing with the minor offense of unbecoming conduct, is extremely unreasonable and justifies judicial intervention.

The background and the facts

3. Below are the circumstances of the event, as described in the indictment:

On the date relevant to the charge, the Battalion Commander served as an officer with the rank of lieutenant colonel, the commander of Battalion 71, while the Soldier served in the Army as a staff sergeant under the command of the Battalion Commander. The event occurred on July 7, 2008 at the entrance to the village Na'alin, in the following circumstances: During a violent demonstration in Na'alin, the Petitioner

was detained by border guards due to his active involvement in disturbances of the peace, and brought to the intersection at the entrance to Na'alin, handcuffed and blindfolded. At that stage, the Battalion Commander, who was present and who knew the Petitioner from previous demonstrations and disturbances, turned to him and said, "Well, now will you stop demonstrating against the IDF forces?," or words to that effect. The Petitioner's response to the Battalion Commander, in Arabic, implied that he did not understand Hebrew. After this exchange between the Battalion Commander and the Petitioner, the Battalion Commander told the Soldier, who served under his command and who was standing in close proximity: "What do you say? Should we go aside and shoot him with [a] rubber [bullet]?," or words to that effect. These words were spoken by the Battalion Commander with the intention of frightening the Petitioner into thinking that a rubber bullet was about to be shot at him, and out of the belief, from his previous acquaintance with the Petitioner, that the latter understood Hebrew. In response to this question by the Battalion Commander, the Soldier replied: "I have no problem shooting him with [a] rubber [bullet]," or words to that effect. Then the Battalion Commander lifted the Petitioner from where he had been sitting and, with the Petitioner still handcuffed and blindfolded, led him to the military jeep that stood nearby. When the Battalion Commander with the Petitioner passed by the Soldier, the Battalion Commander said to the Soldier: "Load a bullet," or words to that effect. The Soldier replied: "I already have a bullet in the barrel," or words to that effect.

After this exchange, the Soldier followed the Battalion Commander and stood beside the jeep, alongside the Battalion Commander and the Petitioner. While the Battalion Commander was holding the Petitioner by his arm and talking to a border guard who stood nearby, the Soldier aimed his weapon at the Petitioner's shoe and shot him with a rubber bullet from close range. Immediately after the shot, the Battalion Commander pushed the Soldier, shouted at him, and rebuked him for shooting at a bound man. The Soldier replied that he understood that he had received an order from the Battalion Commander to do so. As a result of the shooting, the Petitioner sustained a superficial wound to his left big toe. The Petitioner was examined at the scene by a military doctor and did not require additional treatment.

On account of these actions, an indictment was brought against the Battalion Commander and the Soldier, charging them with the offense of unbecoming conduct, in contravention of Section 130 of the Military Justice Law. The punishment for this offense is one year's imprisonment.

4. Before the indictment was brought, a disciplinary procedure was held in the matter of the Battalion Commander and the Soldier. Soon after the start of the investigation, the MAG recommended that the authorized commanding officer immediately suspend the Battalion Commander and the Soldier. Later on, and after a hearing, the division commander relieved the Soldier of his duties, effective immediately. On August 6, 2008, the chief of staff held a disciplinary procedure in the matter of the Battalion Commander. The Battalion Commander took responsibility for his part in the incident, and requested to be relieved of his duties as a Battalion Commander. The Chief of Staff informed the Battalion Commander that he viewed the incident as a serious lapse on the

Battalion Commander's part, both morally and in his role as a commanding officer. The Chief of Staff also announced that he had decided to relieve the Battalion Commander of his duties immediately. As a result, the Battalion Commander left his position, and was instead appointed head of the armored division at the Tze'elim Ground Training Center, on August 12, 2008. The essence of this position concerns the training of soldiers and officers.

5. The Petitioners complained to the MAG about the imbalance in the command sanctions that had been implemented vis-à-vis the Battalion Commander, and about the discrepancy between the indictment that was brought against the Soldier and the Battalion Commander and the seriousness of the offenses that were committed in the incident. They petitioned for a change in the indictment by way of charging the Battalion Commander and the Soldier with offenses more serious than unbecoming conduct. The MAG denied their application, and hence the petition.

The essence of the petition

6. The Petitioners claim that the incident entailed the shooting of a bound and helpless detainee, and ostensibly establishes the elements of the offense of aggravated abuse of a detainee, in contravention of Section 65 of the Military Justice Law, the punishment for which is between three and seven years' imprisonment. In the circumstances of the incident, the Battalion Commander and the Soldier should have been brought to trial for this offense. According to the Petitioners, even assuming that the Battalion Commander did not intend that the Soldier obey the command to shoot, but only wanted to frighten the detainee with threats of being shot, believing that he understood Hebrew, the episode involves an act of

abuse nonetheless, or, at the very least, the offense of unauthorized conduct leading to the endangerment of life or body, or the offense of unlawful use of a weapon, or offenses in connection with detainment, in contravention of Sections 72, 85 and 115 of the Military Justice Law, the punishment for which is three years' imprisonment. According to the Petitioners, the acts of the Battalion Commander and the Soldier in intentionally shooting a bound and helpless detainee at short range are so severe as to require that they be charged with offenses that are compatible with the gravity of the acts. The Petitioners assert that prosecuting the Soldier and the Battalion Commander for the offense of unbecoming conduct is not compatible with the circumstances of the incident. This offense is among the lighter offenses in the Military Justice Law, and the social value that it protects is maintaining the image of the IDF. Its character is that of an ethical violation, and conviction thereof does not entail any criminal record. Therefore, the Petitioners claim that this case, which is characterized by the cruel conduct of a commander and soldier in their military activities, which involved intimidating and humiliating a bound detainee, cannot lead merely to prosecution for a minor offense of a disciplinary nature, which is conspicuous in its moderation. The gap between the position of the offense on the scale of severity of offenses and the factual circumstances of the incident is extreme, and cannot be bridged.

7. The Petitioners further claim that international law treats abusive acts of the type under deliberation here with extreme gravity, and requires the state to prosecute and punish the violators while addressing the grave nature of the actions. International law ensures the rights of protected citizens to protection of their bodies and their dignity and to protection against violence perpetrated against them, and imposes a

positive obligation on the state to actively enforce the rules of combat (e.g., The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949).

8. The Petitioners emphasize in their argument that the prosecution of the accused for an offense compatible with the nature of his acts is not limited to the narrow interest of bringing about the punishment of the accused. The need for a correlation between the nature of the deeds and the offense chosen as a count in the indictment is intended to fulfill the purpose of transmitting an immediate message, within the ranks of the Army and outside it, regarding condemnation of particularly egregious acts by Army personnel in the course of performing their duties. Trying the Battalion Commander and the Soldier for the offense of unbecoming conduct foils the communication of this message.

9. The Petitioners' primary claim is that the MAG's decision to try the Battalion Commander and the Soldier for unbecoming conduct is extremely unreasonable and should therefore be voided. With regard to the Soldier, according to the facts of the indictment, he shot a bound detainee pursuant to what appears to have been a blatantly illegal order, which every soldier, as such, should have refused to obey; the weight of the leniency ascribed to the minor wounds sustained by the Petitioner due to the shot fired at him is not proportional, particularly in view of the fact that the shot was fired from extremely close range. With regard to the Battalion Commander, even if his factual version of the event – whereby he did not intend to give the Soldier an order to shoot the detainee, but only intended to frighten the detainee by creating the impression that he was going to be shot – is taken as correct, the charge in the existing form

cannot stand, in view of the seriousness of the conduct carried out vis-à-vis a person who was bound and in the Army's custody.

10. It was also claimed that the disciplinary procedure conducted with regard to the Battalion Commander should not be accorded much weight. In the framework of the disciplinary procedure, it was not ruled that the Battalion Commander's military service would come to an end, nor was he disqualified from serving in command positions in the future. He remained in military service, and was transferred to training duties on a military base. The disciplinary procedure, too, does not emphasize the seriousness of the acts. Moreover, even if severe disciplinary measures had been taken vis-à-vis the Battalion Commander, they might have been taken into account as factors relevant to his sentencing at trial, but not as far as the offenses with which he and the Soldier are to be charged.

11. As a matter of law, the Petitioners argue that, although the judicial review of decisions made by the head of the prosecution in the matter of indictments is generally narrow, when such a decision involves considerations of public interest, as distinguished from evidentiary aspects, judicial intervention is less sparing. This is true not only with regard to the decision to prosecute, but also as far as the essence of the charges included in the indictment. The decision of the MAG to charge the Battalion Commander and the Soldier with extremely moderate charges is a severe blow to the sense of justice and to the military authorities' responsibility to protect human rights as such, including those of enemy combatants in military custody. According to the Petitioners, this decision thus calls for judicial intervention.

Order nisi

12. In the wake of the petition, an *order nisi* was issued, ordering the Respondents to explain why the indictment against the Battalion Commander and the Soldier should not be amended, so that the counts of the indictment reflect the criminal offenses allegedly committed by them. An interim order was issued, postponing the criminal proceeding in the special military court until otherwise decided.

Response of the Military Advocate General and the Chief Military Prosecutor

13. The response affidavit on behalf of the MAG and the CMP contained the following main arguments:

The main line of the pleadings in the response is that under the circumstances, prosecuting the Battalion Commander and the Soldier for the offense of unbecoming conduct is reasonable, and there should be no intervention therein. Moreover, in accordance with case law, this case does not fall within the realm of those rare cases in which the Supreme Court will intervene in the decisions of the head of the prosecution in connection with choosing the count to be included in the indictment brought against a particular defendant.

In what follows, we will address in detail the response of the MAG and the CMP:

The factual issues

14. With regard to the factual level, the affidavit submitted by the MAG and the CMP makes the following claims:

The MAG was sent a video clip documenting the incident, which was filmed from a building adjacent to the scene of the incident. Following the incident and the receipt of the recording by the MAG, a vigorous and thorough investigation was conducted. As part of the investigation, the activities of the battalion headed by the Battalion Commander in the Na'alin sector prior to the incident were described. The operational activity was difficult due to violent disturbances by the local residents, which included stone-throwing, road-blocking, and various other belligerent actions. The Petitioner was detained by IDF soldiers because of his participation in the disturbances, and was recognized as one of the main protesters, who habitually participated in protests conducted against construction of the fence in Bil'in.

The Battalion Commander's version

15. According to the response, the Battalion Commander's version in the investigation was as follows: He arrived at the place where the Petitioner was being held and addressed him in Hebrew, saying: "Well, now will you stop demonstrating against the IDF forces?" The Petitioner responded in Arabic that he did not understand Hebrew. At that stage, the Battalion Commander decided to intimidate the Petitioner in order to make him speak to the Battalion Commander in Hebrew, because he knew from previous encounters that the Petitioner spoke Hebrew. He turned to the Soldier who stood nearby and told him that they would try

to frighten the Petitioner by pumping the weapon held by the Soldier, so that the Petitioner would think that he was about to be shot with a rubber bullet. After a conversation with the Soldier, the Battalion Commander says, he stood the Petitioner on his feet and called out to the Soldier to "pump it." This slang expression denotes the cocking of a weapon without actually firing it. Suddenly, a shot rang out, and the Petitioner screamed. Immediately thereafter, according to the Battalion Commander, he ran toward the soldier and yelled at him: "What are you doing? Why did you shoot? Who told to shoot? What? Are you retarded?" The Soldier replied: "I thought you told me to shoot," to which the Battalion Commander answered: "I told you to shoot at a bound and handcuffed person? I told you only to pump your weapon." The Soldier responded that his weapon had been loaded with rubber ammunition and that he had understood that the Battalion Commander had ordered him to shoot. After this exchange, the Battalion Commander treated the Petitioner, ordered that he be untied and that his blindfold be removed, and called an Army doctor to the scene. Since the Petitioner did not require medical treatment, he was released and left the scene under his own power.

The Soldier's version

16. The Soldier provided a description that differed from that of the Battalion Commander regarding the chain of events: When the Petitioner was sitting bound, with a blindfold over his eyes, the Battalion Commander turned to him and said: "What do you say? Should we

shoot him with [a] rubber [bullet]?" The Soldier replied: "Yes, I have no problem shooting him with [a] rubber [bullet]." At that stage, the Soldier stated, he thought that the Battalion Commander did not intend to shoot, and that he was joking with him in order to intimidate the Petitioner. After a discussion between the two, the Battalion Commander stood the Petitioner on his feet and began to lead him toward the jeep and, while walking, the Battalion Commander told the Soldier: "Let's go aside and load a bullet" or "Load a bullet." The Soldier claimed that the Battalion Commander did not tell him to "pump" the weapon, as the Battalion Commander said in his version. The Soldier understood at that stage that the Battalion Commander was serious in his intention about shooting and he told him: "I already have a bullet in the barrel." And then the Soldier decided to shoot at the sole of the Petitioner's shoe, because he understood from the body language of the Battalion Commander, who had distanced the Petitioner from his body while holding him by the arm, that he expected the Soldier to shoot, and that he had, in fact, received an order to shoot. Consequently, he shot.

17. When he was first questioned, the Soldier said that the Battalion Commander told him right before the shooting, "Come on, shoot already, shoot already." Later on he retracted that statement, but insisted that he understood the seriousness of the Battalion Commander's intentions when he told him to "Load a bullet" by the fact that he led the detainee toward the jeep and from the body language of the Battalion Commander and the manner in which he held the Petitioner. The Soldier confirmed that after the shooting, the Battalion Commander ran to him and shouted

at him, demanding to know why he had shot a bound person. The Soldier replied that he had acted according to an order that he had received from the Battalion Commander. The Soldier repeated that he had understood that he was acting according to an order that he had received from the Battalion Commander.

The Petitioner's version

18. Upon questioning, the Petitioner testified that he does not understand Hebrew and that from the exchange between the Battalion Commander and the Soldier he understood only the word "rubber."

The factual basis according to the indictment

19. With regard to the beginning of the incident, the prosecution adopted the Soldier's version of the chain of events. With regard to its conclusion, the prosecution accepted the position of the Battalion Commander, whereby he was not aware of the fact that the Soldier would shoot at the Petitioner and did not intend for this to happen. This position is supported by the testimony of border guards who were in the area at that time. Following the investigation, the factual version appearing in the indictment was adopted, which is a version based mainly on the version of the Soldier, and adopts the version of the Battalion Commander as far as his intention to intimidate the Petitioner, and his definite lack of intention to actually shoot. The prosecution emphasizes that all the evidence, including the Soldier's version, indicates that the Battalion Commander did not intend to shoot and was not aware of the possibility that such shooting might occur. According to the prosecution, a

misunderstanding arose between the Battalion Commander and the Soldier, which formed the basis for the incident. The Battalion Commander's words to the Soldier were intended to intimidate the detainee, but he did not intend to shoot him. The Soldier, on his part, understood the words and behavior of the Battalion Commander, erroneously, as an order to shoot, and therefore carried out what his commander had ostensibly ordered him to do. This, in essence, is how the prosecution views the facts in this affair.

The legal and disciplinary measures that were taken following the incident

20. Immediately upon submission to the MAG of the video clip that documented the incident, a CID investigation was launched to look into the circumstances of the incident. The Soldier was relieved of his duties immediately. The Chief of Staff informed the Battalion Commander that, in view of his part in the incident and his responsibility for its occurrences, he had decided to transfer him from his duties as Battalion Commander. He noted that he did not rule out the possibility that the Battalion Commander would be reinstated to his position in the future, after he completed, in several years, the position to which he had been transferred, and the issue would be examined after completion of the legal proceeding in the matter, and taking its results into account. According to the response, the proceeding described involves a dismissal of the Battalion Commander from a military position and his transfer to another position. The Battalion Commander was removed from the core of the IDF chain of command and from the professional promotion track on which he had been, even though the possibility that he would return in the future to the primary command was not ruled out, subject to

considerations to be weighed at the relevant time, including the results of the legal proceeding. In the Respondents' view, the disciplinary sanction that was imposed with regard to the Battalion Commander is extremely significant in a hierarchical military system, and the attendant message, both vis-à-vis the individual and as far as its public significance, may even outweigh that of the criminal proceeding. The Battalion Commander was an outstanding military man throughout his many years of service, and from his standpoint and the standpoint of the military system, the disciplinary sanction was a severe blow of serious significance. This factor was weighed with regard to the criminal proceeding, and constituted an important consideration in the leniency of the criminal charge brought against the Battalion Commander.

21. According to the response, the MAG decided that the conduct of the Battalion Commander and the Soldier in the Na'alin incident requires that they be tried on criminal charges before a military court, and that a disciplinary trial would be insufficient. The MAG stated that conducting a trial for the offense of unbecoming conduct in the disciplinary trial track is entirely different from conducting a trial for the same charge in the criminal judicial track. In this instance, the criminal track was chosen, in order to emphasize the seriousness of the incident, and this befits the public interest in prosecution.

22. In the response, the MAG explained his considerations in choosing the indictment count, explaining that the set of facts underlying the incident is consistent with a series of alternative offenses that lie within the authority of the military court. The choice of the proper indictment count in a given case reflects a broad spectrum of considerations, among them evidentiary aspects, the probability of

conviction, the circumstances of the offense, the significance of the disciplinary measures taken against the accused before the criminal proceeding, and the gamut of pertinent public interests.

23. In the decision of the military prosecution with regard to the indictment count, special consideration was given to the disciplinary action taken against the Soldier and the Battalion Commander. This consideration is rooted in the position and status of the disciplinary procedure of removal from duty in the military setting, from the standpoint of the individual and from that of the system. Taking into consideration disciplinary measures against military personnel for the purpose of criminal proceedings is prevalent and acceptable.

24. According to the response, in choosing the indictment count, the MAG made the following assumptions: (a) The Battalion Commander wanted to frighten the Petitioner, without intending to shoot at him, but did not make his true intentions clear to the Soldier; (b) the wrongdoing on the part of the Soldier, who fired the shot even though an order to do so, had it been given, would have been blatantly illegal; (c) consideration was also given to the fact that the Soldier did not mean to hurt the body of the detainee and, as far as the results of the incident, they involved only a superficial physical wound. In light of these circumstances, it was decided not to be harsher with the Soldier than with the Battalion Commander, even though he was the one who actually fired the shot.

25. According to the response, the MAG considered trying the Battalion Commander and the Soldier for the offenses of abuse (Section 65 of the Military Justice Law), unauthorized conduct leading to the endangerment of life or body (Section 72 of the Military Justice Law), or

unlawful use of a weapon (Section 85 of the Military Justice Law) – and he did not rule out in advance the possibility of charging both the Battalion Commander and the Soldier with each one of these offenses. The decision to choose a count of unbecoming conduct was made mainly in view of the disciplinary measures that had been taken vis-à-vis the Battalion Commander and the Soldier. According to the MAG:

> I found that this offense was the most appropriate, among the offenses mentioned above (including the offense of abuse), to the circumstances of the incident in Na'alin, giving proper consideration to the disciplinary measures, and I found that trying the Battalion Commander and the Soldier for this offense before a military court most suitably fulfills the various interests of law enforcement in this case (the response of the MAG, paragraph 73).

26. The MAG further claims in his response that the offense of unbecoming conduct, with which the Battalion Commander and the Soldier were charged, is not merely an "ethical violation." It is a serious criminal offense that involves a substantial deviation from the standard of behavior expected of an IDF officer, and it is punishable by up to one year's imprisonment. This offense, when adjudicated in a military setting, is designed to safeguard the moral soundness of the army. It involves an offense of "immoral or unethical behavior at a serious level, which is also accompanied by a lapse concerning the defendant's role as a commander" (paragraph 99 of the response affidavit). The level of severity in a charge for the offense of unbecoming conduct as the only offense in the indictment exceeds the level of severity that exists when it accompanies another criminal offense, and that is certainly the case when the offense is adjudicated in a military court and not in a disciplinary hearing. This case involved a failure on the part of the Battalion Commander in the moral-ethical sphere and in his role as a commander, and a moral-ethical lapse

on the part of the Soldier; the offense in question is appropriate, given the nature of their actions. The MAG added that the military advocacy is now acting to rectify the existing situation, whereby conviction on a charge of unbecoming conduct before a military court does not involve a criminal record.

27. Finally, the MAG argues that the decision in the matter of the count of the indictment of the Battalion Commander and the Soldier does not provide cause for judicial intervention on the part of the High Court of Justice, according to the tradition of restraint and circumspection in the judicial review implemented, as a rule, in matters pertaining to decisions made by the prosecution. With regard to choosing the indictment count with which an accused is to be charged in a specific set of circumstances, the extent of intervention must be particularly limited and reserved. Under the circumstances of this matter, no cause exists to justify intervention in the decision of the head of the prosecution regarding the indictment count with which the parties involved should be charged.

The Battalion Commander's arguments

28. Generally, the Battalion Commander's arguments reiterate those of the MAG. The Battalion Commander emphasizes that at no stage did he request that the detainee be shot; he did not give a command for such a shot to be fired; he did not anticipate the possibility that such a shot might be fired; and never imagined that the Soldier did not understand his intention, which was limited to frightening the detainee. The shot fired by the Soldier stemmed from the Soldier's misunderstanding of the Battalion Commander's words and true intentions. The Battalion Commander did not cover up the events of the incident, but rather immediately thereafter

assembled the company commanders and staff officers, described the occurrence to them and gave orders accordingly. He took full responsibility for the incident and for its results. In the Battalion Commander's investigation into the event, which was transferred to his superiors, the Battalion Commander wrote in conclusion:

> A grave and unnecessary incident. It is clear to me that the incident is problematic and dangerous. My intention was one thing and what actually occurred was something else… I never imagined that it might be understood that my intention was for the soldier to actually shoot the detainee. I have not done that in the past and I will not do so in the future… the soldier is not responsible for the fact that he did not understand my intention. The mistake was mine alone…

29. Later on, the Battalion Commander's arguments outline his outstanding performance in military service, his special contribution to the service, and the powerful effect of cutting off the process of his promotion in the Army due to the event that is the subject of the petition. The Battalion Commander disagrees with the MAG's position whereby there was a moral lapse in his attempt to intimidate a bound and blindfolded man. In his view, it was a ploy aimed at conducting a dialogue between the Battalion Commander and the detainee. The Battalion Commander argues that this was not a moral lapse, since at no stage did he expect the detainee to be in any danger. The disciplinary measure that was taken vis-à-vis the Battalion Commander was of particular significance. Consideration must also be given to the extraordinary attack on the Battalion Commander by the media and the public, which seriously harmed him and his family. Under the circumstances, the Battalion Commander argues that it would be proper to limit the proceedings against him to a disciplinary trial, in view of the general circumstances surrounding the incident – the challenge of

handling rioting and of keeping the peace, and given the ploy that he utilized, which was not intended to endanger the physical well-being of the Petitioner. In the circumstances described, there is also no fault to be found with the fact that the criminal proceeding will not result in a criminal record, the significance of which is that the Battalion Commander will not be tainted by a criminal record in the future, thus preventing various ramifications vis-à-vis the Battalion Commander in the realm of freedom of occupation and movement, the effect of which, in any case, is outside the sphere of the military.

30. In a supplementary brief, the Battalion Commander added an affidavit by the Chief Officer of the Armored Corps, Brigadier-General Yehezkel, who noted, *inter alia*, that the disciplinary and legal measures that had been taken against the Battalion Commander were perceived in the army as extremely severe. A similar approach was taken by General of the Northern Command, Gadi Eizenkot, in an affidavit, which emphasized the balanced nature of the various measures that were taken in the matter of the Battalion Commander. Commander of the Ground Forces, Major General Avi Mizrachi, concurred with the spirit of these affiants' remarks.

31. Counsel for the Battalion Commander further claimed that among the considerations that should be taken into account regarding the petition, it should be noted that under Section 380 of the Military Justice Law, the military court is authorized to cancel the hearing before it and to order that an accused be prosecuted pursuant to a new indictment, if it finds that the accused was charged with a lighter offense than that with which he should have been charged. The fact that the court holds this authority means that great restraint should be employed in the judicial

review exercised by this Court over the count contained in the original indictment.

The Soldier's arguments

32. In his arguments, the Soldier supports the decision of the MAG, and emphasizes his being an outstanding soldier and the need to take this consideration into account as far as the measures to be taken against him. He claims that the event in question was an isolated incident, which does not characterize his general level of service. He was released from the army in the wake of the incident and is taking his first steps in civilian life. In these circumstances, there is special significance to the lack of a criminal record following the criminal proceeding that is to be held in his matter.

Decision

33. The following two questions require decision in this matter:

(a) Did the military prosecution err in deciding to prosecute the Battalion Commander and the Soldier in a military court on a charge of unbecoming conduct, in contravention of Section 130 of the Military Justice Law, and to refrain from charging them with more serious offenses, such as the offense of abuse, the offense of unauthorized conduct leading to the endangerment of life or body, or the offense of unlawful use of a weapon under the Military Justice Law?

(b) Assuming there was, indeed, an error in choosing the appropriate charge, given the facts of the indictment, does this error

provide cause for judicial intervention, on the part of this Court, in the decision taken by the head of the military prosecution?

34. I will begin by saying that, in my opinion, given the circumstances of the case, an error did, indeed, occur in the selection of the appropriate charge in the indictment brought against the Battalion Commander and the Soldier. Moreover, in view of the special nature of the incident, and considering the rules of the judicial review that apply to such matters, judicial intervention by this Court is called for in order to rectify the matter.

Correlation required between the core of the actions and the indictment counts

35. A fundamental principle regarding the preparation of an indictment is that the prosecution must take care that the description of the facts in the indictment includes the core of the actions ascribed to the accused, with no substantive change from the manner in which they actually occurred, as they emerge from the prima facie evidentiary basis formed by the evidence. With regard to choosing the indictment count, the prosecution must ensure that there is a direct correlation between the description of the facts in the indictment and the nature and type of the offenses with which the defendant is accused. The purpose of the indictment is to define the facts and to clarify the offenses included in the indictment so that they reflect, in the most appropriate manner, the core of the defendant's actions as they emerge from the prima facie evidence against him, and to correctly describe, in appropriate indictment counts, the normative nature of the acts. These rules apply both to a situation in

which an indictment is drawn up for the purpose of conducting a trial in which evidence is to be heard and to a trial that is to be conducted according to a plea bargain (HCJ 5699/07 Anonymous v. Attorney General, paragraph 9 of the judgment of President Beinisch (26.2.08) (hereinafter – Katzav); Criminal Appeal 1820/98 Angel v. State of Israel, PD 52(5) 97, 106 (1998) (hereinafter – Angel)).

Indeed,

> The court should convict a defendant in accordance with his deeds, and not in accordance with an artificial and fictitious set of facts. That said, as a rule, it is proper that the offenses ascribed to the defendant should be tailored to the facts described in the indictment. We cannot ignore the fact that, ultimately, the defendant's legal responsibility is determined according to the offenses for which he is convicted (Angel, at p. 106 (emphasis added)).

36. A significant gap between the description of the facts in the indictment and the indictment count that was chosen, which was designed to reflect the criminal norm that was violated in respect of those facts, can amount to a fundamental defect in the indictment. This defect involves the choice of the criminal norm that is supposed to reflect the essence of the offense that was committed in connection with a given set of facts, and the extent of their severity. The criminal norm places the factual events in the appropriate normative slot, and the punishment established alongside that norm defines in advance the degree of severity that the law ascribes to the criminal act. The prosecution's choice of a certain count from among possible alternative offenses reflects the way the prosecution perceives the nature of the act that is the subject of the count, and its

relative severity in the hierarchy of degrees of severity defined by the legislator within the overall fabric of the criminal law. A fundamental rule in preparing an indictment is that from among possible alternative offenses, the prosecution must choose the normative-penal option most appropriate to the nature of the criminal event, as it is described in the factual portion of the indictment. Thus, a factual description of an incident that is particularly severe, accompanied by an indictment count that expresses a moderate, minor criminal norm, may indicate a lack of correlation between the facts and the indictment count, which could amount to a fundamental defect in the indictment. Where there is an alternative criminal norm that is more appropriate to the facts, and which more closely conforms to the essence of the alleged violation, it should be chosen. The lack of such a substantive correlation between the set of facts and the type of offense with which the defendant is charged may, in certain extreme circumstances, justify remedial judicial intervention.

37. Behavior characterized by extreme severity as far as its harm to socially-acceptable moral criteria must be assigned to a suitable penal norm, which stands in proportion to the severity of the act. In general, in matching the penal norm to the factual basis, the personal circumstances of the defendant should not be accorded decisive significance; nor should other considerations that may be relevant to the sentencing phase. The weight of the public interest in rooting out grievous behavior that undermines the foundations of society requires that a substantive correlation be maintained between the gravity of the acts in question and the counts in the indictment, while leaving considerations of punishment, deterrence, retribution and various factors that may point toward leniency for the sentencing phase (Criminal Appeal 234/77 Yadlin v. State of

Israel, PD 32(1) 31, 38 (1977); HCJ 6009/94 Shafran v. CMP, PD 48(5) 573, 589 (1994), minority opinion of Justice Matza).

38. In this case, there is a fundamental lack of correlation between the "details of the offense," which form the factual basis of the incident, as described in the indictment, and the indictment count that ascribes unbecoming conduct to the Battalion Commander and the Soldier as their only offense. This lack of correlation is reflected, in essence, by the extreme severity that accompanies the circumstances of the incident, on the one hand, versus the lightness and moderation of the offense that was chosen for the purpose of enforcing the criminal norm on those involved, in light of the facts of the incident detailed in the indictment.

39. The severity of the incident described in the indictment in the case of the Battalion Commander and the Soldier emerges primarily from the following circumstances:

40. The Battalion Commander is a senior IDF officer with the rank of lieutenant colonel, who is experienced in the military and who has seen a great deal of operational action in the IDF. In his military duties, and mainly in his duties as Battalion Commander, he served as an exemplar to his soldiers-subordinates. As rightly noted in the response of the MAG, the role of a battalion commander is one of the most important military-operational command duties in the IDF. Battalion commanders, in their operational duties, do not serve only as the spearhead for conducting operational missions along with their soldiers. They constitute, no less than that, leadership figures who serve, in the eyes of their soldiers, as educational examples of the fulfillment of the values of the "purity of arms" and the norms of battle, which characterize the Israeli army and

Israeli society. A soldier who fights alongside his commander draws from him not only direction, guidance, and orders about how to fight; he is also supposed to absorb from his commander a sense of restraint, forbearance and inhibition in using force vis-à-vis the civilian population of the enemy, and vis-à-vis the captive, the detainee, the interrogee and anyone held in army custody. The basic rights of enemy combatants held in custody – protection of life and limb and of their human dignity – have been recognized by the Israeli legal system for generations (HCJ 428/86 Barzilay v. Government of Israel, PD 40(3) 505 (1986); HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel, PD 53(4) 817 (1999) (hereinafter – Public Committee)). Conducting interrogations, implementing administrative detention, bringing criminal charges, and other measures taken by state systems against Palestinian detainees are ever subject to constitutional principles, which dictate the boundaries of permissible deprivation of freedom and the nature and character of the means that may be employed, in terms of suitable purposes and proportional means, which should not exceed those that are necessary. These values are meant to be translated by the army and its commanders into the language of daily operations and to be reflected, in practice, in the military's activity, in times of calm and in times of war. These values are assimilated into the ethical military education that has been imparted to commanders and soldiers in the IDF since the establishment of the state. This is the mark of the Israeli Army. This ethical education must find expression in IDF operations at all levels. Among the commanders' missions is the obligation to supervise the fulfillment of these values at all levels of military operations and in all military ranks, from private to senior commander.

41. Harming a detained, bound and helpless person has always been deemed a heinous and cruel offense requiring suitable punishment. In the words of President Shamgar in HCJ 253/88 Sajadiya v. Minister of Defense, PD 42(3) 801, 823 (1988):

> If an unacceptable and prohibited practice occurred as is alleged, it represents harm not only the prisoner, and humiliates not only him, but also the person who treats him violently or degradingly;
>
> Harming a bound and helpless person is a shameful and cruel act, and it requires a response that is appropriate to the act's gravity.

42. This approach, which completely rejects the harming of a bound and helpless person, conforms to the general approach of Israeli law regarding the duty to defend the basic rights of people held in custody, even when they are suspected of heinous acts and of endangering lives. Thus, the rights of interrogees are protected, and the power that may be used against them by disproportional means of interrogation is limited (Public Committee, at p. 836). Interrogations must never be conducted by means of torture or through cruel and humiliating treatment of the detainee; and the preservation of human dignity is a guideline that controls interrogations of any kind. The prohibition on acts of physical or mental violence is absolute: "Indeed, violence against the body or mind of the interrogee does not constitute a reasonable means of interrogation. The use of violence in an interrogation may impose criminal and disciplinary liability upon the interrogator" (Public Committee, at p. 836, judgment of

President Barak). This is certainly the case where mental violence is employed against the detainee with no connection to the needs of the interrogation. In HCJ 3278/02 Center for Defense of the Individual v. Commander of IDF Forces in the West Bank, PD 57(1) 358 (2002) (hereinafter – Center for Defense of the Individual), the Court insisted on the obligation to ensure humane detention conditions for residents of the territories, which preserve their dignity as human beings, in stating:

> Even those suspected of the worst acts of terrorism are entitled to incarceration at a minimally humane level, ensuring basic human needs. We ourselves would not be humane if we did not ensure a humane standard for detainees in our custody. This is the duty of the area commander under international law, and it is his duty under the fundamentals of our administrative law. It is the duty of the Israeli government, pursuant to its human, Jewish and democratic essence (Center for Defense of the Individual, at p. 398, judgment of President Barak).
>
> [Compare also HCJ 5591/02 Yassin v. Commander of Kitziot Military Camp, PD 57(1) 403, 411 (2002); HCJ 4668/01 MK Sarid v. Prime Minister, PD 56(2) 265, 282 (2001).]

43. The military court, throughout its extensive case law, has given expression to the supreme obligation of the IDF to carefully maintain limits upon the force held by IDF soldiers. This was well described in the case of Appeal/146/03 CMP v. Roi Rozner (21.8.03), where the court stated (paragraph 12 of the judgment):

> According to our moral and legal outlook, where power is granted to a person in authority, a normative system must be

> created to limit his power, so that he does not abuse it. This rule holds true for every type of society, with all its mechanisms and functions that create relationships of dependence and authority. It is even more necessary in a military society, which has, by the very definition of its functions, violent and aggressive characteristics. Therefore, the use of force by IDF soldiers must be restricted in place, in time, and in measure; it must be context dependent; solely in the proper measure and context, for the purpose of fulfilling the specific tasks required of them in given circumstances. The restrictions that apply to the use of military force pertain to the actions of every male and female soldier, who affect those surrounding them. This is the case for the proper relationship between commander and subordinate, and between soldier and fellow soldier; for relationships between a soldier and a citizen of his own nation, or a resident of his country, or a foreigner residing therein; for the proper relationship between a soldier and his enemy – a soldier of another army, or a citizen of a nation fighting against him, or any person from an enemy nation. In all of these contexts, IDF soldiers are required to exhibit restraint and to exercise the power vested in their hands only in the proper measure. This is the personal, moral, legal, professional and ethical duty of every soldier in the Israel Defense Forces, and it is also the institutional duty of the IDF as a fighting organization. Hence: carefully maintaining conduct that internalizes human dignity – the human dignity of every person, whether friend or foe – is required of every soldier. It is required first and foremost by the very fact that he is a human being, in that it safeguards the humanity within him, but it also gives him professional and moral advantages as a soldier and as a commander, vis-à-vis his colleagues and subordinates, and also vis-à-vis his enemies.

44. The military court emphasized in its case law that the duty of applying the moral and ethical restrictions upon the exercise of military power is, first and foremost, the duty of the commanders, who are obligated to implement these restrictions by virtue of their leadership, and as moral exemplars for their soldiers (Appeal/62/03 CMP v. Ilin

(27.5.03), paragraph E.1 of the judgment) (hereinafter – Ilin)). The court pointed to the obligation to safeguard the dignity, body and health of prisoners in the custody of the Army. It emphasized the distinction between the use of force required to implement a military mission and the abuse of force against the civilian population; it insisted on the value of the purity of arms, which requires a soldier to act with restraint when exercising military force vis-à-vis people who are not combatants or vis-à-vis prisoners, and noted the soldier's obligation to do everything in his power to avoid any harm to their lives, bodies, dignity and property (Ilin, paragraph E.2 of the judgment; Appeal/27/02 CMP v. Sergeant Chazan, paragraph 6 of the judgment (27.2.02)).

45. According to the facts described in the indictment, the Battalion Commander's encounter with the Petitioner, who had been involved in disturbances of the peace, began when the Petitioner was already in military custody, and was sitting on the ground, handcuffed and blindfolded. There was an exchange between the two, as a result of which the Battalion Commander wanted to frighten the Petitioner in order to motivate him to speak Hebrew, because he believed from his previous acquaintance with the Petitioner that the latter spoke and understood the language. It is not clear why it was important to the Battalion Commander to force the Petitioner to speak Hebrew. In any case, the act of intimidation on the part of the Battalion Commander (who assumed that the Petitioner understood Hebrew) was expressed in the Battalion Commander's words to the Soldier who stood nearby: What do you say? Should we go aside and shoot him with [a] rubber [bullet]?" To which the Soldier replied: "I have no problem

shooting him with [a] rubber [bullet]." Immediately thereafter, the Battalion Commander stood the Petitioner – who, as stated, was sitting handcuffed and blindfolded – on his feet and led him in the direction of a nearby military jeep. When he passed by the Soldier, he said to the latter: "Load a bullet," and the Soldier replied: "I already have a bullet in the barrel." While the Battalion Commander was holding the Petitioner by the arm, and speaking with a border guard nearby, the Soldier aimed his weapon at the Petitioner's foot and shot him with a rubber bullet from close range, a shot that caused a superficial wound to the Petitioner's foot. Immediately after the shooting, the Battalion Commander scolded the Soldier for shooting a bound person. The Soldier replied that he had understood that he had received an order to fire from the Battalion Commander.

46. To my mind, this factual description – which is detailed in the indictment and learned from various testimonies of those involved and those who were present at the scene of the incident – leaves more than a few unanswered questions, which will presumably be examined in the trial itself, when the relevant individuals present their versions of the events. Did the Battalion Commander, in his clear statements to the Soldier regarding shooting in the direction of the detainee, have in mind only acts of intimidation vis-à-vis the latter, or did he intend an actual shooting, as his statements implied? And if he intended an actual shooting, is it possible that he meant the shot to be fired not in direction of the Petitioner's body, but perhaps in the air, as a means of intimidation? And when it became clear to him that the Soldier had shot in the direction of the detainee's foot, he reacted severely and rebuked the Soldier for shooting at a bound person. And if, indeed, the Battalion

Commander's did not intend for an actual shooting to occur, but rather meant to verbally alarm the Petitioner, how can his unreserved statements as to genuine shooting be reconciled with the possibility available to him to signal to the Soldier that he did not really mean what he said in those statements (nothing would have been easier, with the Petitioner bound and blindfolded and unable to see such a signal)? And on what basis could the Battalion Commander have assumed that, given his unrestrained statements about shooting the detainee, the Soldier would "read his mind" and understand that when the Battalion Commander told him to "load a bullet" he did not actually intend him to shoot, but rather just to "pump" the weapon? And how is it that the Battalion Commander did not feel that he must clearly explain his real intention to the Soldier (without the Petitioner hearing and understanding it) in order to prevent a possible misunderstanding or mishap?

47. The gap between the unrestrained statements made by the Battalion Commander, the way they were naturally accepted and understood at face value by the Soldier, and the Battalion Commander's description of his actual intentions, is significant. This is particularly the case since, under the circumstances, the Battalion Commander could easily have made his intention clear to the Soldier by means of signs, hints and signals that could readily have transmitted the message that he wanted to convey to the Soldier without them being comprehended by the detainee, whose eyes were covered. Presumably, the trial court will address these questions.

48. However, we shall set these questions aside and focus on the facts as they appear in the indictment. Their essence, as far as the Battalion Commander, is that he wanted to make the Petitioner "admit"

that he understands and speaks Hebrew. Why, is not clear. To that end, he "staged" an act of intimidation, in which the Petitioner, as someone who was supposed to understand Hebrew, was supposed to hear the Battalion Commander and the Soldier planning to shoot him with a rubber bullet from extremely close range. For that purpose, the Battalion Commander raised the Petitioner to his feet, led him next to the jeep and, while he was standing, held his arm in order to ostensibly enable the Soldier to shoot at him. In the course of this, he told the Soldier: "load a bullet," and the Soldier replied: "I already have a bullet in the barrel."

49. As regards the Battalion Commander, staging such a scene of intimidation vis-à-vis a detained person who is handcuffed and blindfolded indicates an extreme deviation from the moral norms that obligate every IDF soldier and, all the more so, a senior commander in the army. The significance of this behavior – in terms of the *mens rea* of the Battalion Commander – is that in order to bring the Petitioner to cooperate with the Army authorities, he was to be put in a position of fearing for his life, thinking that he was about to become a victim of a shooting by an IDF soldier who was standing right next to him and who intended to shoot him at extremely close range. And, indeed, in the blink of an eye, a shot was fired at the Petitioner and wounded him in the foot.

50. The actions of the Battalion Commander, according to his own version, are not compatible with established norms of behavior for a soldier and commander in the IDF. They signify the infliction of real harm against the rights of a detained person in the custody of the army. The Battalion Commander's behavior indicates severe persecution of a bound and blindfolded detainee, in an attempt to put him in fear for his life or in fear of serious injury from a shot that was about to be fired at

him from close range, without having any possibility of defending himself. This conduct constitutes contempt for, and humiliation of, a person in a state of absolute helplessness. It represents a twisted abuse by the powerful against the weak who cannot defend himself. It transmits an extremely negative moral message to the soldiers-subordinates, who look up to their commander as an exemplar, who is supposed to guide and enlighten their way not only in their military activities but also in their moral conduct. It constitutes a serious moral lapse by the Battalion Commander as a person and as a military man, even assuming that he did not intend to inflict any physical harm whatsoever on the Petitioner.

51. And with regard to the Soldier, from the basis of facts set forth in the indictment, it appears that he misunderstood the precise intention of the Battalion Commander, and for good reason. When the Battalion Commander turned to him and said: "Should we go aside and shoot him with [a] rubber [bullet]?" and afterwards said further: "load a bullet," and in the course of this exchange stood the detainee on his feet and led him toward the jeep, and held the detainee standing, it was only natural that the Soldier understood these statements as an order from his commander, and he even answered: "I already have a bullet in the barrel." Throughout all stages of the incident, the Soldier did not receive from the Battalion Commander any signal by movement, look, or other hint, that his intention was merely to utter words of intimidation, as opposed to an actual command to be carried out. However, even if the Soldier innocently perceived the Battalion Commander's statements as orders that he was supposed to fulfill, it would seem that he was obligated to refrain from carrying them out, since they amounted to a blatantly unlawful command, involving the shooting of a detained, bound and

blindfolded person from close range. When he carried out what he assumed to be this order from his commander, he would seem to have turned his back upon the basic obligation of every IDF soldier, wherever he may be – to respect the human rights of a person in custody, and to refrain from exploiting military force and authority in a cruel manner that seriously harms the detainee and ignores his basic right to life and limb. In this behavior, the Soldier would seem to have violated the basic values of respecting human rights, held by Israeli society and deeply ingrained in the tradition of IDF activities.

Alternative indictment counts

52. The incident, as described in the factual portion of the indictment, can be assigned to a number of alternative criminal norms. Among these norms, the military prosecution chose to charge the Battalion Commander and the Soldier with the most moderate and the lightest alternative, in terms of the moral content of the offense, in terms of the punishment that accompanies it, and in terms of the future ramifications of the conviction, should the criminal proceeding end in a conviction. The prosecution also saw fit not to distinguish between the Battalion Commander and the Soldier as far as the offense chosen for the indictment.

53. In his response, the MAG explained (paragraph 70 of the response affidavit) that he had considered the possibility of prosecuting the Battalion Commander and the Soldier for the offense of abuse (Section 65 of the Military Justice Law), or for the offense of unauthorized conduct leading to the endangerment of life or body (Section 72 of the Military Justice Law), or for the offense of unlawful

use of a weapon (Section 85 of the Military Justice Law). In his opinion, those involved could have been prosecuted on criminal charges for each of the said offenses, albeit, with regard to some of them, only the inchoate offense appears applicable. It should be noted that all of the aforementioned offenses carry a far harsher punishment than that for the offense of unbecoming conduct, with which the Battalion Commander and the Soldier were charged.

54. Is the offense of unbecoming conduct appropriate to the circumstances of the incident, as described in the indictment?

The offense of unbecoming conduct

55. Section 130 of the Military Justice Law defines the offense of unbecoming conduct as follows:

> A solider of the rank of sergeant or higher, who behaved in a manner unbecoming to his rank or position in the Army, is liable to one year's imprisonment.

The offense of unbecoming conduct is adjudicated under the Military Justice Law at both the disciplinary level and the criminal level (Section 136 of the Military Justice Law).

56. The offense of unbecoming conduct is located at the intersection between disciplinary law and criminal law. While, according to its wording, it constitutes an open fabric with flexible boundaries, which can encompass various types of behavior, it is most conspicuously characterized as a behavioral-institutional lapse that is unbecoming to a person in view of his senior rank in the IDF. The provision speaks of

conduct unbecoming to a person with a senior rank of sergeant or higher, thereby singling out only the holders of higher ranks according to their position in the military hierarchy. Ostensibly, the focus of the offense is the improper conduct of a commander as such, in performing his duties, and possibly even beyond.

57. The offense of unbecoming conduct emphasizes not the act that violates a substantive criminal norm, but rather the failure stemming from the act, concerning commander-subordinate relations, in the relationship between the person holding the senior IDF rank and his subordinates. The disciplinary facet of this offense continues to accompany it even when it is dealt with on the criminal level, as distinguished from the disciplinary level, and in a criminal proceeding it is also intended, primarily, to protect the status and the professional and moral image of the IDF (Appeal/70/06 CMP v. Major Ali Arida (7.11.06); Appeal/162/98 CMP v. Corporal Segal (8.9.98); Appeal/180/01 CMP v. Ofer Caspi (5.9.02)).

58. The military court discussed the nature of the offense of unbecoming conduct in Appeal/123/02 Yishai v. the Military Prosecutor (17.3.04) (hereinafter – Yishai). It characterized the offense as applying solely to commanders, and as rooted in the commander's duty to serve as an example for his subordinates (Yishai, paragraph 27). The legislative purpose of this provision was understood as the prohibition on conduct that is injurious to the "commander's mission" as an example for his soldiers. When a commander's conduct undermines his authority and harms the system's faith in the level of his command, it

constitutes unbecoming conduct (Appeal/227/86 First Sergeant Kahat v. CMP). The main purpose of the norm anchored in the offense of unbecoming conduct is to preserve a "level of proper conduct" in the fulfillment of duties. The approach of the military courts to its application is markedly similar to that attendant to the offense of unbecoming conduct in public service. In the matter of Appeal/256/96 Major Bivas v. CMP (28.8.97) it was stated:

> It appears, therefore, that when we come to interpret Section 130 of the Military Justice Law, we should look to the Supreme Court precedents that relate to the disciplinary offense of unbecoming conduct. However, as explained above, in view of the principles of the Basic Law: Human Dignity and Liberty, when we come to apply the aforementioned criteria, we will apply them more narrowly.

59. As stated, the offense of unbecoming conduct is adjudicated both in army disciplinary proceedings and in criminal proceedings and, certainly, when it is adjudicated in a criminal proceeding, its content takes on even greater gravity. Nevertheless, a person sentenced thereunder may receive a maximum sentence of only one year, which makes this offense one of the lighter ones among those listed in the military criminal code.

60. At present, a criminal conviction for the offense of unbecoming conduct in contravention of the Military Justice Law is not recorded in the criminal records and conviction thereof does not entail any future ramifications (Regulation 1 (2)A of the Crime Register and Rehabilitation of Offenders Regulations (Record Details that

Will Not Be Recorded or for Which No Information May Be Provided and Offenses that Will Not End the Periods of Limitation or Dismissal), 5744-1984). The offenses in the Military Justice Law that do not entail a criminal record are mainly offenses in the realm of internal military discipline, such as release from custody, disobeying a command, dereliction of duty and fraudulent recruiting. They include the offense of unbecoming conduct. The protected value behind these offenses is mainly military-disciplinary. Eyal Toledano noted this in his article, "The Criminal Record in the IDF" (Mishpat Vetzava 15, 17, 55 (5761)), in stating:

> What all these offenses have in common is the fact that they involve crimes that attest to a violation of the norms that are unique to the military system and, therefore, we should not infer from them that their perpetrator poses a danger to society. Absent the need to protect society from their perpetrators, the record of these offenses remains solely in the military framework and does not carry over to the criminal register.

61. Unlike these offenses, which are characterized by a dominant disciplinary element, the offenses of abuse, unlawful use of a weapon and unauthorized conduct leading to the endangerment of life or body do entail a criminal record, since the interests they protect pertain to values that are of importance to the general public in Israel, and go beyond the interest of maintaining discipline and the level of command in the IDF. It should be noted that the MAG's response indicates that there is now a legislative initiative to remove the offense of unbecoming conduct from the realm of offenses that do not entail a criminal record, but that initiative is not applicable to this case.

62. The offense of unbecoming conduct is not unique to the military system. It is also recognized in the disciplinary system of the public service, and in various occupations and professions of special natures. In those contexts as well, the main content that accompanies the offense focuses on a norm that prohibits conduct that harms the professional level of the entity involved, and the public's trust in its actions. There may be various degrees of severity regarding this offense, which is fairly flexible in nature. However, it is essentially designed to prevent conduct that is institutionally injurious and which undermines the status of the worker or the professional, as well as the service, in the eyes of the public. The moral-ethical lapse in the behavior itself is not the focal point of the offense, but rather the impact of the violation and its implications for institutional damage due to that lapse. The moral-ethical lapse inherent in the illicit conduct often constitutes the object of a separate criminal proceeding, which focuses on these aspects.

63. In our case, the value that is protected by the offense of unbecoming conduct under the Military Justice Law is safeguarding the level and status of the IDF command system, and punishing a commander who commits an act or omission that is unbecoming to a person with command status in the IDF. The legislator revealed his opinion that the offense of unbecoming conduct is among the more moderate of the Military Justice Law on the scale of severity, by the fact that he ascribed to it a moderate maximum sentence and decreed that it carry no record in the criminal register. He refrained from doing so with regard to other offenses that may constitute alternative charges in this case.

64. The facts of the indictment ostensibly reflect a severely injurious act toward a bound and blindfolded person in the custody of IDF soldiers,

who made threats and employed psychological abuse against him by acting as if they were about to use firearms against him; and a shot was indeed fired at him. These acts were performed together by a senior commander and his subordinate. They included an unreserved instruction by a senior commander to a soldier under his command to use live fire against a bound prisoner, which was taken at face value by the soldier, who then carried it out. This instruction was blatantly unlawful; it never should have been spoken; and certainly it never should have been carried out.

Is the charge for the offense of unbecoming conduct suitable to the circumstances of this case?

The MAG's considerations in charging the accused with the offense of unbecoming conduct

65. In his affidavit, the MAG explained his considerations in charging the Battalion Commander and the Soldier with the offense of unbecoming conduct, in the circumstances of this case. In the gamut of considerations, he took into account the intentions and motivations of the Battalion Commander, who did not actually intend for a shot to be fired; the misunderstanding between the Battalion Commander and the Soldier, which was the basis for the shooting incident; the fact that even the Battalion Commander's original intention – to intimidate the Petitioner – was not realized, as it later turned out that the Petitioner did not understand the exchange between the Battalion Commander and the Soldier, which was conducted in Hebrew. He also took into account the minor severity of the physical injury that the Petitioner incurred as a result of the shooting. In view of this failure in normative terms and in the

execution of command responsibilities, which led to a prohibited shooting by the Soldier, the military prosecution chose to indict the Battalion Commander and the Soldier in criminal, as opposed to disciplinary, procedure – a course of action that lends added severity to the proceedings. The MAG explained that the offense of unbecoming conduct was chosen since, in his view, no basis of cruelty and malice were found in the subjective motivations and intentions of the Battalion Commander, which are required for the offense of abuse. The Battalion Commander's goal was only to frighten the Petitioner and not to harm him, so charging him with the offense of abuse would be inappropriate. In his opinion, the offense of unbecoming conduct encompasses all facets of the incident and not just one of its aspects, a limitation that characterizes alternative offenses. And finally, a major consideration among those taken into account by the MAG was the disciplinary action taken against the Battalion Commander and the Soldier, to which great weight was ascribed. According to the MAG's position, the judicial track and the disciplinary track in the Army are two separate channels, each of which promotes enforcement of the norms in the IDF, but there is a reciprocal connection between them. Disciplinary measures taken against a military man may affect the nature of the measures to be taken in the judicial track. This interrelation is inescapable, in order to fulfill, coherently, the interests embodied in the Army's system of normative enforcement. The disciplinary measures taken vis-à-vis both men involved were quite harsh, and convey a clear message to soldiers in general regarding the impropriety and gravity of the act.

The essence of the discretion held by the head of the military prosecution in bringing charges

66. The MAG is the head of the military prosecution and oversees its activities. In this capacity, he oversees enforcement of justice in the military. He is in charge of the military prosecution and exercises his authority while taking into account the public's interests, and the Army's interests in particular. The exercise of the MAG's powers in the framework of the Army's interests is a normative matter, centered around moral decisions regarding the benefits and the damage that will accrue to the military from one decision or another (HCJ 2702/97 Anonymous v. Minister of Defense, PD 53(4) 97, 107 (1999), judgment of President Barak). The military advocate general, as any other government officer, must act with fairness, integrity and good faith; he must act with reasonableness and proportionality; he must take the relevant considerations into account, and only those considerations, and he must refrain from any prohibited discrimination; and he must exhibit independence in his decision, as the person responsible for the rule of law in the army.

67. The Military Advocate General and the Attorney General each stand at the head of the prosecution system under his purview, one at the head of the military prosecution and the other at the head of the general prosecution. The similarity between the nature of the Attorney General's function and that of the military advocate general, as those who head respective prosecution systems, has been discussed by this Court more than once (HCJ 4723/96 Atiya v. Attorney General, PD 51(3) 714, 726 (1997) (hereinafter – Atiya); HCJ 425/89 Tzofan v. Military Advocate General, PD 43(4) 718, 725-742 (1989) (hereinafter – Tzofan); HCJ 372/88 Fuchs v. MAG, PD 42(3) 154, 155 (1988)

(hereinafter – Fuchs); HCJ 6009/94 Shafran v. C.MP, PD 48(5) 573, 583-586 (1994)). This similarity in the nature of the office leads to similarity between the scope of the judicial review exercised by this Court with regard to the decisions of the MAG, as head of the military prosecution, and that which is undertaken with regard to the decisions of the Attorney General, as the head of the general prosecution (HCJ 4869/01 Anonymous v. MAG, PD 56(3) 944, 957 (2002); HCJ 5960/98 Shalpoversky v. Minister of Defense, PD 55(1) 552, 573 (1999); HCJ 10682/06 Atrash v. MAG, paragraph 5 of the judgment (18.6.07)).

68. Like the Attorney General, the MAG controls the military prosecution system on the basis of extremely broad discretion, which covers the entire scope of the criminal proceeding, beginning with the decision on whether to open a criminal proceeding, and, thereafter, applying to every additional stage of it. The authority of the MAG, like that of the Attorney General, entails very broad discretion; however, this discretion is not absolute (HCJ 4550/94 Isha v. Attorney General, PD 49(5) 859, 871 (1995) (hereinafter – Isha); HCJ 935/89 Ganor v. Attorney General, PD 44(2) 485, 507-508 (1990) (hereinafter – Ganor)). The discretion of the Military Advocate General in conducting the criminal proceeding is, indeed, very broad, like that of the Attorney General, but it is subject to the obligation to maintain and promote the goals and the values that the criminal system endeavors to achieve. His discretion must also stand the test of the general principles of administrative law. The head of the prosecution must base his decisions on fairness and good faith; he must act with integrity and fairness and

solely on the basis of germane considerations. His decisions must stand the test of equality (Tzofan, at p. 735). His discretion must also stand the test of reasonableness. In this context, reasonableness means –

> weighing the full range of considerations that are relevant to the matter, and only those, and ascribing the proper weight to each of those considerations. The reasonableness of the decision is measured according to the internal-proportional weight given to the main factors that shape the decision (Ganor, at pp. 513-514, judgment of Justice Barak).

69. The requirement of reasonableness obliges the Military Advocate General to balance the various interests called into play by the legislative norm. The balance chosen is reasonable where proper weight is given to the various relevant factors that operate within the realm of the legislative norm that the authority is asked to apply (HCJ 14/86 Leor v. Counsel for Control of Films and Plays, PD 41(1) 421 (1987), judgment of Justice Barak; Katzav, paragraph 10 of my judgment).

70. Sometimes the goals toward which government action is taken can be promoted in various alternative ways, each one of which falls within the range of reasonableness. An action will be deemed to fall beyond the range of reasonableness where the relative weight that it ascribes to a relevant factor or to relevant factors departs from the goals which the action was intended to promote (Ganor, at p. 514).

The reasonableness of the decision to prosecute those involved for the offense of unbecoming conduct

71. In this case, the decision to prosecute the Battalion Commander and the Soldier in a criminal trial on a charge of unbecoming conduct lies beyond the range of administrative reasonableness. The discretion that was applied took relevant considerations into account, but the relative weight ascribed to certain considerations among these deviated from that which should have been ascribed to them, in the following senses:

72. The circumstances of the incident, as described in the indictment, reflect, first and foremost, a profound moral-ethical lapse, from the standpoint of both the Battalion Commander and the Soldier. This lapse is what stands at the focal point of the incident, and it should serve as the central axis around which the choice of the criminal norm to be applied should revolve, so as to reflect the nature and the seriousness of the act in question. Concomitantly, the acts of the Battalion Commander also point to a failure on his part – of a disciplinary-institutional nature – in his role as a commander. However, this aspect of the incident is not at its center but, rather, merely accompanies it. The severe blow to the basic moral norm at the foundation of the values that guide the Army's actions is what lies at the core of the normative violation that occurred in this incident, and this feature of the case must take center stage as far as choosing the offense relevant to the charge.

73. Indeed, the seriousness of the incident in normative-moral terms is extreme and aberrant. The nature of the conduct of a senior commander in the IDF and a soldier under his command vis-à-vis a detainee in custody of the Army, whose hands were bound and whose eyes were blindfolded, should constitute the decisive factor in choosing the criminal norm to define the criminality of the act. The core of the protection of human rights that is part of the Army's activities regarding the enemy

finds expression, *inter alia*, in the Army's contact with the civilian population on the opposing side, and in its treatment of those held in custody from among the enemy, who are under the complete control of the military forces. The obligation to act in a humane and fair manner vis-à-vis every person in Army custody, even if he is an enemy, is a pivotal and fundamental value in the IDF's system of ideological education. The need to instill awareness with regard to restrictions on the use of force in the hands of the Army, and regarding the obligation to use it with restraint and forbearance, solely for essential purposes, is the basic value in the ideological foundation that characterizes the Army's operations. The obligation to refrain from using physical force or psychological violence against an unprotected detainee, even if he belongs to the enemy, is part of the social-ideological ethos upon which the tradition of IDF values was built.

74. The MAG described this well in his supplementary brief in this proceeding:

> IDF soldiers are in possession of means whose destructive potential is great, and sometimes lethal. The ideal of "purity of arms," which is one of the values of the "IDF Spirit" and the basic moral code of the entire IDF, is designed to restrain the use of these means and forces, and to limit it to those cases in which it is necessary and justified. Cases in which IDF soldiers make prohibited use of the force and authority at their disposal are, first and foremost, contrary to the IDF's code of values, and to the basic norms of military conduct. Additionally, they may amount to criminal or disciplinary offenses (supplementary brief on behalf of the MAG and the CMP, paragraph 17).

75. The MAG emphasizes in his response that the ideological education in the IDF is perceived, first and foremost, as the duty of the

commanders. The commander is not only a figure of authority, but also an exemplar of personal conduct, who instills values and behavioral norms in his subordinates. He does so, first and foremost, by setting an example in his personal conduct.

The MAG continues by stating:

> These principles are all the more true with regard to field commanders. The encounter between commanders and fighters often takes place in scenarios in which human lives literally hang in the balance (supplementary brief on behalf of the MAG and the CMP, paragraph 18) (emphasis added)).

This state of affairs obligates the commander to conduct himself impeccably; and the higher the commander's rank in the military hierarchy, the higher the standard of conduct required of him. The MAG notes:

> The IDF's philosophy of command entails an educational-ideological duty incumbent upon commanders to clearly and resolutely deal with anyone whose behavior deviates from the standard of conduct expected of a soldier or commander of his status (supplementary brief on behalf of the MAG and the CMP, paragraph 19).

76. However, this worthy outlook, which the head of the military prosecution described so well, did not bring about the selection of an indictment count that properly reflects the seriousness of the actions described in the indictment. In the MAG's considerations, proper weight was not ascribed to the cruelty and the element of abuse that characterized the Battalion Commander's actions in the very attempt to terrorize a bound and blindfolded person, by means of credible threats that he was about to be shot at close range, with no ability to defend

himself. On the other hand, excessive consideration was given to the Battalion Commander's intentions, according to the latter's version, whereby he did not intend to harm the Petitioner, even though these intentions found no external expression, whereby it could have been understood that the Battalion Commander did not mean for his instructions to be carried out. The facts ostensibly indicate that the Battalion Commander "turned a blind eye" to the possibility that his words, which were voiced more than once before the Soldier, would be taken and carried out at face value. The matter of the Soldier in this proceeding has been pushed aside to a certain extent; however, presumably, one of the questions to be clarified, among others, will be – Did the conduct of the Battalion Commander, as a senior commander, and his unreserved orders to the Soldier, set in motion the uncontrolled reaction of the latter, who was under the Battalion Commander's authority, and does the Battalion Commander not bear significant moral responsibility for the lapse on the part of the Soldier who fired the shot, who executed what appeared to be an order from his superior, without considering, in the moment, the significance of his actions? And finally regarding the MAG's considerations, excessive weight was accorded the disciplinary measures taken against the Battalion Commander and the Soldier in the matter of choosing the criminal norm appropriate to the alleged factual circumstances of the incident.

77. We must not underestimate the important value of the disciplinary measures that were taken by the Army in the case of the Battalion Commander and the Soldier in this incident. However, there are clear differences in the goals and purposes of the proceedings in the disciplinary track and the goals of law enforcement in the criminal track. On this point, there is a similar relationship between the disciplinary track

and the criminal track in the Army, and the disciplinary track and the criminal track in the public-civilian sphere.

78. The criminal system in the Army is designed to enforce the norms of criminal law by means of prosecution, judgment and, in the case of conviction, also proportional punishment. The enforcement of criminal law is meant to achieve the goals of criminal law. Criminal enforcement relates to the application of ideological norms that pertain to the general public in Israel, which transcend the specific institutional system to which the accused belongs. It goes to protecting the common values of society and the state, which unify, and are shared by, all members of the public in Israel. In contrast to the criminal track, the disciplinary track faces inward, inside the military system, to provide a response to its institutional needs, while maintaining efficient, proper and moral professional operations. The disciplinary track deals with all aspects of the institutional and systemic dimension of the Army's needs. The measures taken within this framework are not punitive but, rather, are of a purely institutional nature.

79. In this case, decisive consideration was given to the measures taken against the Battalion Commander and the Soldier in the disciplinary track in choosing the criminal count with which they were charged. The disciplinary measures that were taken constituted an important factor in the MAG's decision to be lenient with them at the criminal level. The fact that the accused were relieved of their military duties was perceived as a pivotal factor in choosing a more moderate offense, bordering on a disciplinary offense, as the count included in the indictment.

80. Even if the disciplinary measures that were taken may have certain implications with regard to the criminal track in the matter of the Battalion Commander and the Soldier, where a moral-ethical lapse that departs conspicuously from the institutional-disciplinary context is concerned, the disciplinary measures cannot be accorded decisive consideration in choosing the indictment count that is appropriate to a criminal proceeding (compare Tzofan (judgment of Justice Beisky); Isha (judgment of Justice Heshin)).

81. The deviation from the realm of reasonableness in ascribing the offense of unbecoming conduct to the Battalion Commander and the Soldier, as the only offense in the circumstances of the incident in this case, is fundamental and extreme. This is not a case of a marginal gap between a serious indictment count and an indictment count that is slightly less serious, but, rather, a broad chasm between the possible charge of an offense that reflects the real severity of the act and a charge that is perceived by the legislator as the lightest of the offenses in the military criminal code, which does not even entail a criminal record. This is a profound divergence between a norm that reflects a substantive violation of the duty to respect the rights of a detainee held in military custody and the moral-ethical lapse accompanying that violation, and an indictment count that represents an institutional lapse by a commander, as such, in which the violation of moral-ethical standards is perceived as merely ancillary. Therefore, the military prosecution's decision in this case betrays a significant discrepancy as far as the perception of the criminal norm appropriate to the circumstances of the incident. The choice of the offense of unbecoming conduct therefore deviates fundamentally, in my opinion, from the range of reasonableness, for it reflects considerations accorded a relative weight that deviated from the

proper balance, and which did not achieve, in this case, the main objective underlying the enforcement of the criminal law in the ranks of the Army (compare Tzofan, at p. 735).

The scope of judicial intervention in the MAG's decisions in matters related to prosecution

82. As with judicial intervention in the Attorney General's decisions regarding prosecution, so too for the MAG's decisions within the realm of his authority in the ranks of the Army – the extent of judicial intervention is narrow, and is reserved for extreme circumstances in which a decision betrays a substantive error that goes to the root of the matter, or where a fundamental distortion emerges, which must be rectified.

83. The following was ruled in Isha:

> These are the keys that will open the gates to the High Court of Justice, and will lead to its intervention in the decisions of the prosecution authorities – the Attorney General or the military prosecutor – to refrain from commencing criminal proceedings… a decision that was not made with integrity or that was not made in good faith; a decision that was made for unworthy and impure motives; a decision that is clearly contrary to the public interest; a decision that was made with extreme or fundamental unreasonableness (in the broad sense); a decision that is blatantly unreasonable; a decision that expresses a fundamental distortion; or a decision that betrays an error that goes to the root of the matter. A few gates lead to the same hall, and each of the keys (which overlap in part) will open one of the gates. However, only he who holds one of these keys is entitled to the intervention of the High Court of Justice (Isha, at p. 871).

The rule regarding intervention is summarized in the words of President Shamgar:

> This Court will intervene in the decision-making of the military prosecution solely in extreme circumstances, where it is clear and evident that an error has occurred which goes to the root of the matter, or where another fundamental distortion is discovered that requires rectification (Fuchs, at p. 155).
>
> [See also Tzofan, at p. 728; HCJ 741/05 Samir al Hametz v. CMP (14.12.06); HCJ 6009/94 Shafran v. CMP, PD 48(5) 573 (1994), paragraph 11 of the judgment of Justice Or).]

84. The discretion of the head of the prosecution with regard to the criminal proceedings is, indeed, very broad, at all its stages, including the stage that involves choosing the indictment count that is appropriate for the facts and circumstances of the offense; however, his discretion is not absolute. In the realm of prosecution, with its multiple ramifications, there may be some variation as far as the scope of judicial intervention in different aspects of the criminal proceeding. For example, the scope of intervention in the evidentiary aspect of prosecution is particularly narrow. This aspect lies within the special knowledge of the prosecution, which does not come into the court's possession; hence, the scope of intervention in this area is by necessity extremely minimal. This is not the case regarding the moral-ideological aspect of prosecution, which pertains to the public interests entailed therein; this aspect of prosecution includes the choice of an indictment count to normatively define the set of facts described in the indictment. This process of selection incorporates considerations of the public interest. I addressed this facet of

the scope of judicial intervention in the prosecutor's decisions, as far as they are entwined with public interests, in Katzav:

> The discretion of the Attorney General in the aspect dealing with "the public interest" in prosecution entails a normative assessment of various social values. Notwithstanding the broad discretion held by the Attorney General in such matters, this aspect of his decision is more open to judicial review, as it deals with the evaluation and weighting of the normative values that are relevant to a given case (Katzav, paragraph 23 of my judgment).

In the case before us, a question arises regarding the public interest in matching the proper criminal norm to the factual circumstances described in the indictment.

85. No one disputes that the actions described in the indictment constitute, at the very least, unbecoming conduct on the part of the Battalion Commander and the Soldier alike. However, at the same time, they may also constitute offences contrary to other norms of military criminal law. The MAG, in his fairness, confirmed that, as far as the elements of the offenses, it would have been possible to prosecute those involved for more serious crimes, including crimes for which punishment is three years' imprisonment or more. For example, the offense of abuse in criminal law and in the Military Justice Law emphasizes, among its fundamental elements, those of humiliation, degradation and intimidation of the victim, when he is in a position of inferiority in relation to a person of authority (Criminal Appeal 5598/99 Anonymous v. State of Israel, PD 54(5) 1, 7-8 (2000); Appeal/63/06 Sergeant Haimovitz v. CMP (19.6.07) (hereinafter – Haimovitz); Criminal Appeals 6274/98

Anonymous v. State of Israel, PD 55(2) 293, 302-303 (2000)). (For the necessity to eschew disciplinary proceedings and to pursue criminal proceedings where an act of abuse is suspected, see Haimovitz, paragraph 12 of the judgment; for the proposition that psychological abuse can constitute the required elements of the offense, see Criminal Appeal 1752/00 State of Israel v. Nakash, PD 54(2) 72, 78-79 (2000)). It would seem that the circumstances of the case before us are consistent with the definition of the offense of abuse according to the final clause of Section 65 of the Military Justice Law.

86. The offense of threats, defined in Section 192 of the Penal Law, 5737-1977 (hereinafter – the Penal Law) and which carries a sentence of three years' imprisonment, should also be considered. The offense of threats is an act that is committed in any manner in order to intimidate or taunt a person to the effect that his person, liberty, property, reputation or livelihood, or those of another person, will be harmed. This usually entails the expectation that the threatened person will behave in a certain manner, which the person making the threat wishes to achieve (Leave for Criminal Appeal 2038/04 Lam v. State of Israel (4.1.06) (hereinafter – Lam); Criminal Appeal 103/88 Lichtman v. State of Israel, PD 43(3) 373 (1989)). For a conviction, there is no need to prove that the objective of the threat was achieved, or that intimidation or taunting were indeed achieved. "The act of the threat itself is sufficient, if it was committed with the intent to intimidate or to taunt, in order to constitute the offense of threats"

(Lam, paragraph 7 of the judgment of President Beinisch). These examples do not exhaust the existing avenues for situating the incident that is the subject of this proceeding within the framework of one of multiple possible punitive alternatives, either under the Military Justice Law or under the Penal Law.

87. The decision regarding the selection of the criminal norm that is most appropriate to the incident in question, among the various possible options, is a matter that relates to the collection of public interests that underlie criminal proceedings as such. This decision rests upon a process of normative, moral valuation, which lends itself somewhat more readily – relatively speaking – to judicial review.

88. The decision to charge the Battalion Commander and the Soldier with the offense of unbecoming conduct must be nullified, and, instead, they should be charged with an offense that appropriately reflects the seriousness of their actions. This case emphasizes the importance of the contribution made by the Army judicial authorities toward law enforcement in Israel, in rooting out occurrences of aberrant behavior among IDF soldiers and commanders vis-à-vis local residents, who are in a position of inferiority and helplessness, and in establishing norms that embody respect for their basic rights to life, limb and dignity. The Army's justice system, which is in charge of instilling norms of proper behavior in the IDF, must transmit a firm message of consistent and resolute protection of these values, which are fundamental to society and to the Army, and of uncompromising enforcement, at all levels – educational, disciplinary and punitive – of basic principles that are shared by Israeli society and the Israeli Army, and which confer upon them their ethical and humane nature (Detention Appeal/29/03 CMP v. Sergeant

Zamir (8.7.03); and compare Criminal Appeal 5136/08 State of Israel v. Yanai Lalza (31.3.09)).

89. We cannot ignore the fact that the military system is an entity that is subject to a special set of rules, which befit a hierarchical entity that bears the ultimate responsibility for the security of the state, and that is subject to special constraints resulting from the security needs which dictate the nature of its activities and its mode of operation. These special circumstances led to the creation of rules of conduct unique to the Army, which were designed to regulate the unique aspects of its activities. Precisely because of the special status of the military system, extra care is required in enforcing moral-ethical norms in its activities and among its soldiers, particularly in all matters related to the meticulous safeguarding of the rules of restraint and circumspection in the use of force and military authority. In these areas, we must take special care, with serious and light offenses alike, and we must give clear preference to the need to enforce the moral norms of the law even over the institutional interests of the Army and over individual personal considerations pertaining to soldiers who have strayed from the path of acceptable behavior. The level of enforcement in matters pertaining to the prohibited use of military power vis-à-vis local residents who are members of the opposing side, or vis-à-vis interogees, captives and those in military custody, should be as rigorous as it possibly can be, in order to instill the appropriate moral messages not only in the individual sinner, but also in all soldiers throughout the military.

90. The protection of the rule of law and the defense of individual liberties are characteristics of the democratic conception that underlies the Israeli system of government. It is also an important component of

Israel's approach to security (Public Committee, at p. 845). The insistence upon respect for human rights and the safeguarding of human dignity, even vis-à-vis enemy individuals, are inherent in the nature of the state as a democratic, Jewish state. These values must also find their expression in the enforcement of criminal law upon those whose conduct has violated these principles. Law enforcement in this vein is also an important component in Israel's outlook on security, and in the capabilities and standards of the IDF. "The strength of the IDF depends on its spirit no less than on its physical power and on the sophistication of its weapons" (HCJ 585/01 Kelachman v. Chief of Staff, PD 58(1) 694, 719 (2003)). The spirit and moral character of the Army depend, *inter alia*, on maintaining the purity of arms and defending the dignity of the individual, whoever he may be.

91. In this case, the moral gap between the nature of the act described in the indictment and the manner in which it was evaluated in the indictment – as amounting merely to an offense of unbecoming conduct – is so profound that it cannot stand.

92. Ultimately, my conclusion is that the decision of the military prosecution to try the Battalion Commander and the Soldier for the criminal charge of unbecoming conduct must be nullified due to extreme unreasonableness. I propose that an *order absolute* be issued ruling the decision void, as stated, and returning the matter to the Military Advocate General for him to reconsider, pursuant to this judgment, the offenses with which the Battalion Commander and the Soldier should be charged in the indictment, each according to his position and circumstances, so that the offenses ascribed to each of them properly reflect the nature of the facts and the character of the acts described in the indictment.

The order prohibiting publication of the Soldier's name is to be rescinded.

Justice

Justice E. Rubinstein

Background

A. I will not deny that I had many reservations in this case. It raises difficult questions. The court does not easily intervene in decisions of the military prosecution, as with the general prosecution, at their highest echelons. I will already state here that I have decided to concur with the position of my colleague, that the order should be made final, subject to the comments that will be stated below. I did not come to this decision easily. I did not ignore the gamut of considerations weighed by the military Judge Advocate General in his detailed affidavit and in his supplementary position. Nor did I ignore the complexity of the long and exhausting mission imposed on the IDF in its fight against Palestinian terrorism, including the coping of Respondent 3 personally, and also the service of Respondent 4. I kept in mind – notwithstanding the fact that basically, this involves considerations for punishment and not considerations for prosecution – the many years and the significance of the contributions made by Respondent 3 to the IDF and to the State, which, as noted by the deputy state attorney at the hearing on September 28, 2008, "Without people like this we would not be sitting here." But, ultimately, the reasonableness of the decision made by the military advocate general was examined in a moral crucible of the highest level – the values of the State of Israel as a Jewish and democratic state, and the spirit of the IDF and the enforcement perspective must be broader.

About the infrastructure

B. The factual infrastructure that we face, as far as I am concerned, is the one determined by the military Judge Advocate General, on the basis of which the chief military prosecutor brought the indictment. I see no reason to disagree with that professionally and practically, even after viewing and studying the documentary film. In contrast to my colleague, I myself do not believe that we must examine the questions that she raised in paragraph 46 with regard to the charges, since we are not the trial court, and even my colleague ultimately focused on the facts of the indictments. The problematic components in this infrastructure of the indictment are the statement made by Respondent 3 to Respondent 4, "What do you say? Should we go aside and shoot him with a rubber [bullet]?" with the intention of frightening Petitioner 1, who was handcuffed and blindfolded; and the statement made by Respondent 3 to Respondent 4, "load a bullet," and, of course, the shot fired by Respondent 4 at the shoe of Petitioner 1. I am also making the assumption, which is embodied in the indictment, that there was a misunderstanding – because Respondent 3 pushed Respondent 4 after the act and rebuked him for shooting at a bound person, and Respondent 4 replied that he understood that he had received an order to do so. Before us, therefore, are the statements made by Respondent 3 which were meant to frighten the Petitioner, and surely a person who is blindfolded and handcuffed, if he had understood those words, his heart could have sunk, and he would have been in fear for his life (Talmud Bavli states in Arachin 15 B, by Rabbi Hama the son of Rabbi Hanina, on words in the Bible, "Death and life in the hands of the tongue" (Proverbs 18:2): "Now, does a tongue have a hand? This tells you that just as a hand can kill, so too a tongue can kill."). Luckily, however, Petitioner 1 did not understand anything other than the word "rubber," as he testified. That, therefore, is the factual infrastructure that we are examining against the

offense of unbecoming conduct, under Section 130 of the Military Justice Law, 5715-1955 (hereinafter – the Military Justice Law).

C. I concur that the use of this offense in this case exhibits conspicuous unreasonableness. It seems to me that we are dealing with a case in which a gap has opened between the military-governmental perception in the inner circle, as expressed in the indictment and the position presented to us, and the need to contend, according to the values of the State of Israel, with phenomena of this type – in the normative circle that examines things in an external and comprehensive manner. This is so, notwithstanding the fact that we are not talking about a matter that reached the level of severity of the Tzofan case (HCJ 425/89 Tzofan v. Military Advocate General, PD 43 (4) 718)), which involved the severe beating of bound and blindfolded detainees. While the IDF viewed the incident that is the subject of this case with justified gravity, and expressed it twice – first, in transferring Respondent 3 from command of his battalion, a position on whose significance there is no need to elaborate, to a position in the training system, whose importance should not be diminished as well – but this constituted a type of demotion and being "moved aside"; second, in being tried on criminal charges at the level of unbecoming conduct. With regard to Respondent 4, even though he was the one who fired the shot, it was decided not to deal with him more severely than with Respondent 3. In the opinion of the IDF, the combination of the two is the appropriate balance, and this was also acceptable to the attorney general. I do not take this lightly. However, we must observe these things with a broader view that sees the incident within the moral values of the State of Israel, as stated. And in this view and circumstances, unbecoming conduct cannot be the appropriate

offense, and insofar as only that was used in the indictment, this entails egregious unreasonableness.

The offense of unbecoming conduct – is unbecoming in this case

D. Why is the offense of unbecoming conduct an offense that is unbecoming to this case? The answer is that it minimizes it. My colleague rightly identified this offense as fundamentally – and even more so when it currently does not even entail a criminal record before the law is amended – an offense which, clearly, does not suit the facts that are involved. I assume, as stated, that Respondent 3 did not intend to shoot, but rather to intimidate – but an offense that includes the intimidation of a handcuffed and blindfolded person, even if he is an enemy or rival, by means of a weapon in general, cannot be "only" unbecoming conduct. Indeed, the police utilizes ploys during its investigations and some of them have been legally sanctioned, and counsel for the state wished to view the conduct of the Respondent 3 as a "ploy" that was intended to lead Petitioner 1 to a dialogue, on the assumption that he knew Hebrew. However, when dealing with a handcuffed and blindfolded person as was Petitioner 1 during the relevant moments, and I wish to emphasize those components, these things cannot be viewed as a "ploy."

The offense of unbecoming conduct – a world close to the realm of discipline

E. The analogy required in deliberating the offense of unbecoming conduct is an analogy to the world of disciplinary infractions, among

which this incident cannot stand. I wish to note, in addition to the words of my colleague in the section she devoted to this offense in her opinion, that, clearly, for its part, and from the annals of the offense and its placement in the law, the legislator of the Military Justice Law basically viewed this offense as an offense proximate to the disciplinary laws (it is, incidentally, one of the offenses which, under Section 136 of the Law, can be brought from the outset for a disciplinary hearing).

F. Indeed, the legislative history of Section 130 reveals that originally – in the Military Justice Law as first passed in 5715 – it was worded as "A solider of the rank of sergeant or of a higher rank who behaved in a manner unbecoming to his rank or position in the Army shall be sentenced to – demotion in rank, and notwithstanding the provisions of this law, no punishment of detention may be imposed in its place." Clearly this wording was close to a disciplinary infraction; it was – and remains – proximate to Sections 128 and 129, which also deal with conduct – disorderly (128) or dishonorable (129). In a fundamental amendment to the law (Amendment No. 3, 5724-1964), the section was amended to its present wording, i.e., instead of the previous sanction, a punishment of "one year's imprisonment" was specified. In the explanation (to this section and to a similar amendment to Section 129), it was stated (Bills 5723, 84, 102) that because it was not possible to punish these offenses with imprisonment and "that it is also not possible to replace the charge in court with a close and lighter charge – a breach of discipline in contravention of Section 132 of the main law – since the maximum punishment for a breach of discipline is one year's imprisonment, and the court may not replace a charge with a more serious charge, in order to give the courts flexibility in imposing a sentence and

the possibility of matching it to the offender" – a maximum sentence of one year was proposed. This will enable, *inter alia*, "the replacement of the indictment count in the appropriate case with a lighter offense, breach of discipline."

G. We can see that the amendment to the law obviously indicates the proximity of the section to the disciplinary realm. The draft law memorandum for the Military Justice Law (Amendment) (Qualification of Conviction Consequences), 5768-2008, indeed changes the existing situation whereby offenses such as unbecoming conduct are not given to a criminal record, and determines that sometimes even conviction of this offense will justify a criminal record; but no criminal record to date for this offense indicates its basic nature, which is close to the disciplinary laws.

H. summing up, with regard to the offense of unbecoming conduct, when we are dealing with acts relating, even if only for the purpose of intimidation, to a handcuffed and blindfolded person, even if this case does not approach that of *In re* Tzofan, the words of Justice Bejski hold true, ibid. (p. 735):

> Precisely in a military framework, and also in hard times, the IDF knew how to maintain the purity of arms and meticulously fulfilled the duties imposed on the State of Israel under *jus gentium*; and safeguarding the well-being of the local population in the territories and enforcing law and order therein are the basic system of the rule of law and the public interest.

And this is the case

> "Even if the IDF is facing a difficult mission due to the uprising in the territories…"

I. As this is the case in the matter before us, we are not in a field that is close to the disciplinary, and prosecution under Section 130 in these circumstances appears, ostensibly, to be eminently unreasonable, even if I have no doubt that the decision of the military Judge Advocate General was made in good faith and with discretion. My colleague spoke (paragraph 77 of her opinion) of "criteria that are compatible with the values of the State of Israel as a Jewish and democratic state." I will hereinafter discuss the moral aspects and the Jewish aspects of the IDF, which I think should be added to the words of my colleague and thus to complement them.

On pure-mindedness

J. Before I do so, I wish to remind that those in the government are required to exercise both discretion and pure-mindedness. In my opinion, pure-mindedness must be given weight in decisions regarding which, in situations such as the one that was adjudicated in HCJ 5562/07 Shusheim v. Minister of Internal Security (unpublished), it is possible – and advisable – as a rule to consider giving substantive expression to the moral significance of contemptuous words that harbor violence, with uncouth encouragement to use physical force, of a senior officer (there - a police officer). And we have already mentioned the words of the Sages in relation to the passage "Death and life in the hands of the tongue" – the tongue that means to intimidate can, unfortunately, cause more than intimidation, and the tongue is compared to an arrow,

whose sender knows where it has come from but not where it will go (see Jeremiah 9:7).

The spirit of the IDF

K. The document "The Spirit of the IDF," the IDF's code of ethics, contains two levels of values – basic values and other values. Among the basic values of the IDF, the document lists human dignity, stating: "The IDF and its soldiers are obligated to safeguard human dignity. Every person has worth, which is not contingent upon origin, religion, nationality, gender, status and position." Among the values is a personal example: "The soldier shall act as required of him and shall fulfill that which he requires of others, out of recognition of his ability and his responsibility within the Army and outside it, to serve as a worthy example." Also listed among the values is the purity of arms, about which it has been stated, *inter alia*, that "the soldier shall use his weapon and his force only to perform the mission, only to the extent required therefore, and he shall maintain his humanity even in combat. The soldier shall not use his weapon and his force to harm noncombatants and captives, and he shall do everything in his power to avoid harm to their life, limb, dignity and property." I fear that these circumstances, on the surface and with all the regret it entails, are not compatible with the spirit of the IDF – at the level of human dignity, the personal example and the use of arms. To the appropriate words of my colleague, Justice Melcer, I will add my voice to remind of the approach of Nathan Alterman, which is properly described in the new essay by M. Finkelstein " 'The Seventh Column' and 'Purity of Arms' – Nathan Alterman on Security, Morals and Law," (**Mishpat Vetzava** 20 (A)); see also my essay "Security and Law – Trends" and my

book "NETIVEI MEMSHAL U-MISHPAT (Paths of Government and Law)" (5763-2003), 263, 271-272 (hereinafter - NETIVEI MEMSHAL U-MISHPAT). Things written long since by Alterman still hold true.

David Ben-Gurion on IDF commanders as exemplars

L. The first Prime Minister and Minister of Defense, David Ben-Gurion, in many of his writings and speeches during his many years in office, which were collected in the book, YICHUD VE YIE'UD (Uniqueness and Destiny of Israel) (edited by G. Rivlin, 5731-1971) spoke from the outset, time after time, about the example that the IDF commanders and soldiers must set. We will provide some of his words without exhausting the subject. About the commanders he said, in his farewell address to the IDF (1963) which is exhibited in many security installations in Israel, "Every mother should know that she is entrusting the destiny of her son to commanders who are worthy of it." In his words in the Eretz Israel Labour Party, at the height of the War of Independence (12 Sivan 5718 – June 19, 1948) Ben-Gurion noted that "The Army's main weapon is its moral power" (p. 32); at the end of a platoon commanders' course (2 Heshvan 5709 – November 4, 1948), he spoke about the multitude of our enemies surrounding us and said "How have we therefore stood until now and how will we stand in the future? It is only by our qualitative advantage, by our moral and intellectual advantage" (p. 43) (emphasis added –E.R.). At the graduation of a class of young officers on 16 Iyyar 5709 – May 15, 1949, Ben-Gurion spoke about the responsibility imposed on a commander, due to which he must "equip himself with all the moral and mental attributes and with all the knowledge and abilities required to perform this supreme mission, on

which depends the fate of the state's security, the fate of the nation's liberty and physical existence. Only a person of highly virtuous attributes will succeed in this task…" (p. 60-61).

M. In presenting the Defense Service Law in the Knesset, Ben-Gurion noted that a commander in the IDF must "be an exemplar and an educational figure. A commander cannot suffice with technical and professional knowledge and with administrative and combat abilities…" A commander will only succeed in this if "by his moral being and image that inspires trust… he instills at each of his soldiers the hidden sources of dedication and valour" (p. 70). At the conclusion of the first cycle of the military high school academy, in Tammuz 5715 (July 11, 1955), Ben-Gurion said that a commander must be "first and foremost an exemplary person, who educates his subordinates not by orders and discipline – although an army cannot exist without those – but rather by the example of his life " (p. 216). Ben-Gurion wished the cadets to be "people of example and inspiration" (ibid.). Words in this spirit were also reiterated by Ben-Gurion in later years (see ibid., pp. 304 , 306, 344, etc.). We can see a consistent line that continues throughout David Ben-Gurion's term of service as prime minister and minister of defense – continuously transmitting the message of morality, the commander as exemplar, the quality and success as dependent thereon. I have written at length about these things because, in my opinion, they form the moral foundation for the spirit of the IDF, and they must be a guiding principle for the commander and the soldier, today, just as then. See also, for treatment from different angles by David Ben-Gurion and Rabbi Shlomo Goren, chief rabbi of the IDF, A. Edrei, "War, Halakhah, and Redemption: The Military and Warfare in the Halakhic Thought of Rabbi Shlomo Goren," **Katedra** 125 (5768), 119-148 (Hebrew); see also Rabbi S. Goren,

"Combat Morality in light of the Halakhah" in MESHIV MILCHAMA A (5747),p. C, which emphasizes: "There is no doubt that human life is the highest value in the Torah of Israel and in Halakhah, and according to the ethics of the prophets, this entails not only the lives of Jews, but also the lives of any person created in the image of God"; and hence we also infer human dignity.

On Kevod ha-Adam (human dignity) and kevod ha-Briyyot (respect for all creation) in Jewish law

N. We are dealing with human dignity, a constitutional foundation in Israel, in the Basic Law: Human Dignity and Liberty, and the level of values of the State of Israel as a Jewish and democratic state, which encompasses Jewish law (see, *inter alia*, AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (5763); 452-453; THE JUDGE IN A DEMOCRATIC SOCIETY (2004), 290). In Jewish law, human dignity is called *Kevod ha-briyyot* [respect for all creation]. The offenses involved here – vis-à-vis a handcuffed and blindfolded person – ostensibly serve both to infringe *kevod ha-briyyot*, and the dignity of the non-Jewish person who is our neighbor, even if he is hurting us, and to desecrate the name of God. The following words elaborate somewhat – and it is still just a very small amount – on this subject, in the overall ideological framework in which this case is situated.

O. In Jewish law, human dignity - *Kevod ha-Adam*- is perceived as the reflection of God in whose image man was created, and as the basis for the obligations between man and his fellow man (see RABBI J. B. SOLOVEITCHIK, THE LONELY MAN OF FAITH, 15; my article "On the

Basic Law: Human Dignity and Liberty, and the Defense Establishment" **Iyunei Mishpat** 21 (5758-1997) and my book NETIVEI MEMSHAL U-MISHPAT, 225, 226)). The following comes from Rabbi Eliyahu Bakshi Doron (the Rishon Lezion and the Chief Rabbi of Israel):

> The greatness of man and his amicability as the chosen among the creatures so he was defined in the image of God lies mainly in his aptitudes, his liberty and his free choice, and any harm to a person, and not just physical harm to his body…is a violation of the foundation of the faith…hence, human dignity is more important than the other commandments in the religion, because a violation thereof constitutes a violation of the foundation of the faith and of the Creator who esteemed man with his image (emphasis in the original – E.R.) (in the anthology KEVOD HA-ADAM BA'ASHER HU ADAM, edited by Aluf Hareven, 5761-2001, 9).

And in a similar spirit, by Rabbi Yerucham Levovitz (the moral supervisor in the Mir Yeshiva in Poland between the two World Wars), "All of our studies are the laws of respecting human dignity, and this includes the laws of theft and plunder, which are also included in, and dependent on, disrespecting a person…respecting human image" (DA'AT CHOCHMA U-MUSAR *(*Knowledge of Wisdom and Morals), 5732, 63 (Hebrew); for a comprehensive review, see N. RAKOVER, GADOL KEVOD HA-BRIYYOT – HUMAN DIGNITY AS A SUPREME VALUE (5759-1998)).

P. The importance of human dignity is reflected in the well-known Talmudic rule, "So great is human dignity that it supersedes a negative ("thou shall not") commandment of the Torah" (Bavli, Berachot 19 B; see TALMUDIC ENCYCLOPEDIA, entry on "Human Dignity"). In other

words, the importance of human dignity and the need to refrain from harming and humiliating others justifies even crossing boundaries of halachic prohibition in certain cases. *Kevod ha-Briyyot* [respect for all creation], is just that – respect for all creatures, and the Rambam (Maimonides) had already written, "Let not *kevod ha-Briyyot* be taken lightly by us, as it supersedes a negative commandment in the Torah, and all the more so the dignity of the sons of Abraham, Isaac and Jacob, who possess the true law (HILCHOT SANHEDRIN 24, 10). And, so, too, RABBI MOSHE CHAIM LUZZATTO (Italy – Holland – Israel, 18th century) in the book on morals MESILAT YESHARIM (Path of the Righteous) (chapter 22), which emphasizes "showing respect to every person," as explained by Rabbi Dr. Aharon Lichtenstein "The Rambam opens with the general kevod ha-Briyyot [respect for all creation] and only afterwards does he relate to the sons of Abraham, Isaac and Jacob. In any case, you must say that '*briyyot'* (creatures) also means the sons of Noah ("Kevod Ha-Briyyot" edited by Aviad Hacohen in **Machanayim** 5 (5753) 8, introduction in **Daf Letarbut Toranit** (edited by Dr. A. Strikovsky) 236, 5759, 4, 5). So, too, said Deputy President Elon: " 'Kevod ha-Briyyot' means respecting all creatures, all those created in the image of God" (Human Dignity and Liberty, President's House. Jerusalem 5755, also printed in the **Daf Letarbut Toranit**, ibid, 3); we are therefore obligated to [respect] the dignity of every person, Jews and non-Jews, including the dignity of anyone with an adverse position, even an enemy.

On desecrating the name of God

Q. In my opinion, conduct of this type is, ostensibly, even liable to be desecration of the name of God, when an important person, in this case a senior officer, harms – either by words or by more than that – another

person, in this case a handcuffed and blindfolded detainee. God's name is desecrated when a person – particularly an important person – acts in an unworthy manner in public, even, in cases that do not involve an offense from a legal standpoint (for a review see the TALMUDIC ENCYCLOPEDIA, entry on "Desecrating the Name of God"). This is true with regard to Jews and with regard to non-Jews. RABBI MOSHE CHAIM LUZZATTO wrote IN MESILAT YESHARIM, chapter 11:

> The spheres of desecrating the name of God are also many and great, because a person must do much to safeguard the dignity of the Creator and in everything he does he must look and observe well that nothing will emerge that might be a desecration of heaven, God forbid…and the matter that every person according to his level and according to how he is perceived in the eyes of his generation, must take care not to do anything unfair to a person like himself, because the greater his importance and wisdom, so should he amplify his caution…

This was also stated by RABBI DZ. Y.Y. WEINBERG (Russia – Germany – Switzerland, 20th century) LEPRAKIM (edited by Rabbi Dr. A.A. Weingort, Rabbi A. Wexelstein, and Rabbi S.Y, Weingort, 5766) 507 "There is a measure and a measure: and a measure for the people and a measure for the leader…" And in the context before us, as summarized by Rabbi Avraham Yisrael Sharir: "Aberrant and cruel actions by us vis-à-vis our enemy, even if their objective is prevent harm to ourselves, is liable to lead to desecrating the name of God, because desecrating the name of God is not examined as the permissible or the prohibited in the mirror of pure halacha, but rather by the question of whether the action conforms to, or does not conform to, what is expected in the nations' view of us, in the moral norms that they ascribe to us in this action" ("Military Ethics According to Halacha" TECHUMIN 25 (5765) 415; see

also Y. Warhaftig, "Selling Weapons to Non-Jewish Nations," TECHUMIN 12 (5751), 240, 242). The issues in this case also turn on the dignity of the state that the IDF commanders and soldiers represent.

R. We have brought all these in the realm of the values of the State of Israel, and more than we have brought are found in the writings – and the ethos embodied therein is like a pillar of fire before the Israeli military camp, in order to fulfill "Let your camp be holy" (Deuteronomy 23: 15). However, these things do not call for avoidance of combat, as necessary and indefatigably, in the name of these values, in defense of the state and the security of its residents, or in the name of this misplaced refinement; absolutely not. But they do mean norms of conduct toward the enemy as well, which are immersed in these values.

Section 380 of the Military Justice Law

S. Let us return to our assessment: perhaps this is the place to recall that in the continued hearing on December 16, 2008, Section 380 of the Military Justice Law was pointed out to us, which enables the military court – if it finds that there is reason to charge the accused, *inter alia*, with an offense for which the punishment is more severe than the offense in the indictment – to cancel the hearing so that the accused will be brought to trial under a new indictment. Attorney Nitzan argued for the state that it might be advisable to move in that direction and leave matters to the military court, and enable the petitioners to argue there as a creative solution. I believe, with all due respect to creativity, that if we were to go in that direction, we would only be "rolling the ball into another court" and delaying the end, and there is no reason to do that.

Conclusion

T. With deliberate intention we are not operatively deciding with regard to the offense that the Judge Advocate General will utilize in the indictment and which is not the offense of unbecoming conduct. This issue arose in the hearings, the options were discussed during the handling of the case and they are on the desk of the Judge Advocate General. Obviously, the Judge Advocate General must consider according to his authority, including the question of whether the matter entails different offenses with regard to Respondent 3 and Respondent 4, and also if, within the bounds of the offenses, there might be variations between the "full" offense and the attempted offense, provocation and so forth (as noted by attorney Nitzan with regard to some of the offenses).

U. The Judge Advocate General and his learned counsel repeatedly emphasized the command measures that had been taken against Respondent 3 by transferring him from his post. As stated, we must not at all belittle this measure, nor the affidavits of the senior officers – two major generals and a brigadier general – who expressed their opinion about it. This may constitute part of the considerations when the court comes to adjudicate the Petitioner's case on the merits, and it is, of course, a legitimate consideration, but this is not the time and this is not the place. The main problem, which we pointed out, i.e., the discrepancy between the offense and the circumstances, cannot be connected to the command measures, even if, as human beings, we understand the conscious link that is liable to be created. Everything in its time and in its place.

V. Long ago (in my aforementioned article "On the Basic Law: Human Dignity and Liberty, and the Defense Establishment") I had the opportunity to write (p. 22, NETIVEI MEMSHAL U-MISHPAT p. 226).

> The relation between questions on issues of human rights and the security challenge and the security need will remain for a long time on the agenda of Israeli society and the Israeli courts… The inherent tension between security and the human rights issues will, therefore, continue, and will find its main legal expression in the interpretation of the Basic Law: Human Dignity and Liberty; discussion will continue on the questions of when the rights recede before the security and what is the balance between safeguarding existence and safeguarding humanity – wording that sharpens the dilemma completely. We will continue to have reservations about the question of what the space should be between the imperative "be most careful" in the collective sense, and between "in the image of God did he create man" and "great is kavod ha-Briyyot, which defers the negative command ('thou shall not') in the Torah." The court will seek the balance between security and rights, so that the word security will not be spoken in vain, but neither will it be abandoned.

And further on, ibid, p. 60 (NETIVEI MEMSHAL U-MISHPAT pp. 261-262):

> Every part in the defense establishment, in its broadest sense, should educate its people on the subject of rights, so that a person in the GSS or the relevant commander in the police or the IDF and other parts in the system who are liable to violate rights, will be aware of that from the start of their duties. Rights are like plants – we cannot assume and trust that they will grow by themselves, after we sow or plant them and that they will endure without watering and cultivation. And the cultivation is implemented by means of a constant educational effort in the training system of the authorities, enforcement in their internal disciplinary jurisdiction and, of course, by the criminal enforcement

> required in cases of lapses. The Basic Law: Human Dignity and Liberty established and focused what had been preserved and promoted by the Supreme Court for years and turned into a written book, into a formula that must be viewed at all times; all the security authorities deal with rights and their attention to the rights must also be a continuous state of mind, the essence of which is 'love they neighbor as thyself' "What is hateful to you, do not do onto others" (Tana Hillel, Bavli Shabbat, 31 A)
>
> But no less obligatory is an additional educational effort, namely, preserving the ethos of security as a value, albeit in a dynamic and variable format. There is nothing easier than throwing out the baby with the bathwater. In order to maintain the security that the State of Israel is still struggling to create, in order to encourage those who have been placed in charge of it to carry out their mission, in order to ensure that inductees into compulsory military service or into the police or into the GSS will know that they are called to a mission that is, indeed, compulsory or mandatory, and so that rules and frameworks will not be broken in the absence of an alternative – it is necessary to internalize those values in the Israeli education system, one of which is security. If you will, after all, these are the values of Zionism that are contained in the Declaration of Independence…

In my opinion, this is also true now.

W. Indeed, upon conclusion I would like to note that our sages, through the Amora Reish Lakish said (Bavli Sota, 3 A), "A person does not commit an offense unless he is possessed by folly." Our mission in this case is to classify an aspect in the functioning of military law, in the realm of criminal law and its purposes as part of the public law, and its ramifications for the ideological norms that pertain to the general public beyond the IDF. However, I would add that whatever the results may be in terms of the indictment and the proceeding itself, and even if, ultimately, it entails an offense that leads to a criminal record – we shall

not forget or erase, even in the operative sense, the rights and the contribution of Respondent 3, the difficult missions that he faced and his immediate request to be relieved of his duties after the incident; that is the rule for Respondent 4, in his place and for his rank. Given these, I concur with my colleague.

Justice

Justice H. Melcer

1. I concur with the comprehensive judgment of the head of the panel, Justice A. Procaccia, and also with the comments of my colleague, Justice Rubenstein, with regard to the legacy of David Ben-Gurion and the manner of analyzing the sources that he brought from Jewish law in connection with human dignity and kavod habriyot.

2. Given the importance of this matter, I consider it appropriate to explain here – in brief – the reasons for my position and to add several emphases of my own, in addition to referring to the relevant comparative law and the moral-cultural foundations underlying these matters. However, before we get to the crux of the matter, I wish to commence with a comment. We must remember and remind (*inter alia*, those petitioners for whom promoting civil rights and human rights is of the uppermost importance), that this judgment deals solely with the question of the reasonableness of the decision made by the prosecution authorities in the IDF, and not with the guilt or innocence of Respondents 3 and 4. The words of Justice E.E. Levy, at the start of his judgment in HCJ 5699/07 Anonymous (A.) v. Attorney General (26.2.2008) (hereinafter – Katzav Case), hold true for this case:

> The petitions before us require us to be extremely cautious. They touch upon the question of prosecuting a person, who is deemed innocent in the matter until he is brought before a judicial instance and, in any case, before it is decided. We are enjoined to be extremely meticulous about the things that we state, lest we trespass across the border that we should not cross, and with concern that our words will be heard as though a judgment had been rendered on questions of guilt

> or innocence. We are sitting as the High Court of Justice and we may not deviate to the left or to the right from this role.

This legal truth should guide us also in this judgment, and everything stated below is subject to this principle. Now we will specify, one by one.

3. The factual basis underlying the petition before us is that which is stated in the indictment. And this is what was written:

> On or about July 5 …after a violent demonstration in Kfar Na'alin in which Mr. Ashraf Ibrahim Abu-Rahme (hereinafter – "Ashraf") was detained as a result of involvement in disturbances of the peace and brought to the intersection at the entrance to Kfar Na'alin, where he was seated on the ground while handcuffed and blindfolded, Defendant 1 (the battalion commander, Respondent 3 here – my addition – H.M.), who was at the scene and recognized Ashraf from many demonstrations and disturbances of the peace in which Ashraf had participated in the past, turned to him and said: "Well, now will you stop demonstrating against the IDF forces?" or words of similar import. Ashraf responded to the Battalion Commander in Arabic, which implied that he did not understand Hebrew.
>
> Therefore, after this exchange between Ashraf and Defendant 1, Defendant 1 said to Defendant 2 (the staff sergeant, Respondent 4 here – my addition – H.M.), the direct subordinate of Defendant 1, who was serving at that time as loader for the commander of battalion 71 and was standing nearby, "What do you say? Should we go aside and shoot him with a rubber [bullet]?" or words of similar import, with the intention of Defendant 1 – who believed from his previous acquaintance with Ashraf that Ashraf understood the Hebrew language – of frightening Ashraf by the fact that Defendant 1 would cause Ashraf to think that he was about to be shot with a rubber bullet.

> In response to the above question by Defendant 1, Defendant 2 responded "I have no problem shooting him with a rubber [bullet]" or words of similar import.
>
> Then Defendant 1 lifted the Petitioner from the place in which he had been sitting, still handcuffed and blindfolded, and led him to the military jeep that was standing nearby. When Defendant 1 with the Petitioner passed by the Defendant 2, Defendant 1, said to Defendant 2: "Load a bullet," or words of similar import. Defendant 2 replied: "I already have a bullet in the barrel," or words of similar import.
>
> Following said exchange of words, Defendant 2 followed Defendant 1 and stood beside the jeep, next to which stood Defendant 1 and Ashraf, and while Defendant 1 was holding Ashraf by his arm and talking to a border guard who was standing nearby, Defendant 2 aimed his weapon at Ashraf's shoe and shot him with a rubber bullet from close range.
>
> Immediately after the shot, Defendant 1 pushed Defendant 2, shouted at him, and rebuked him for shooting at a bound man. Defendant 2 replied that he understood that he had received an order from him to do so.
>
> As a result of the aforementioned, Ashraf sustained a superficial wound to his left big toe. Ashraf was examined at the scene by a military doctor and did not require additional treatment.

4. The above charge came about as a result of a CID investigation which was opened about two weeks after the incident, immediately after publication of a video clip that was broadcast over the electronic media, which was filmed by Ms. Salem Jamal Hussein Amira, a 17-year-old girl who is a resident of Kfar Na'alin, who was watching the incident and filmed in from the window of her home. Prior to the publication, the battalion commander reported the incident through command channels however, the operational investigation did not lead to the opening of

proceedings, since the material was not submitted to the military advocate general or to his representative, in accordance with the option set forth in Section 539 A of the Military Justice Law, 5715-1955 (hereinafter – the Military Justice Law), and it is advisable, with regard to the future, that procedures be established in this connection. However, when the pictures came to light, the picture changed, since "The camera is an instrument that teaches people how to see without a camera." (Dorothea Lange, as quoted in the Los Angeles Times of August 13, 1978). The same thing happened in the United States, in the Abu Ghraib case, to which we will refer later on. Here we have proof that "a picture is worth a thousand words." While the picture "captured the moment" (see: The Pulitzer Price Photographs: Capture the Moment (Newseum, 2007)), we agree that "The camera's eye does not lie, but it cannot show the life within" (W.H. AUDEN, SIX COMMISSIONED TEXTS, No. 1 (1962); comment: some of the above quotes are taken from EITAN BEN-NUN, TREASURY OF QUOTATIONS (entry: "Photography") 650-652 (Magnes Press, 2009)). In view of the above, the question is whether the offense under which Respondents 3 and 4 (the battalion commander and the staff sergeant, respectively) were charged – unbecoming conduct as defined in Section 130 of the Military Justice Law – is appropriate to the totality of the events and circumstances (regarding the need to include in the indictment details of the offenses and the sections of the law that establish them – see Section 304 (A) of the Military Justice Law and the examples in the addendum to the Military Justice Law).

5. It seems to me that the decision to prosecute Respondents 3 and 4 under the indictment count of unbecoming conduct, as reflecting the offense ostensibly revealed by the aforementioned facts and from the

pictures that emerge from the video clip, suffers from substantive unreasonableness, which requires the intervention of this court. I will clarify and explain below.

6. Underlying the legal analysis of the incident before us is the judgment HCJ 935/89 Ganor v. Attorney General, PD 44(2) 485 (1990) (hereinafter – Ganor Case), in which it was ruled that even though the discretion of the attorney general – in his capacity to order a prosecution – is extremely broad, it is not absolute (see: the Ganor Case, 508). It was further ruled there that the scope of intervention by the High Court of Justice in these decisions should be narrow, within the realm of administrative law, but cases of extreme unreasonableness in decisions will justify intervention by the High Court of Justice (see: *ibid*. 523). In the judgment in the Katzav Case, all the justices in the panel reiterated the above general holding, while emphasizing that the realm of judicial review as to prosecution is, indeed, narrow in the aspect of public consideration ("lack of interest to the public," in accordance with Section 62 of the Criminal Procedure [Consolidated Version] Law, 5742-1982, and in everything connected to the evidentiary aspect – the realm of judicial review is even narrower (see: the Katzav Case, paragraph 24 of the judgment of Justice A. Procaccia). However, in the circumstances of the case before us, in which the petition is based on a description of the facts in the indictment (and for the required parallel to this case, between the military advocate general and the attorney general) – the legal question turns on

the "correlation" between the offenses ascribed to the defendants and the appropriate normative environment, and the possible judicial review by this court in said context. As explained, in a matter of this type, a realm of this court's intervention exists, even if it is very narrow, since it involves a quintessentially legal question, not a factual or evidentiary question (as an aside, I would add that, in my opinion, in appropriate, special and rare cases, it is possible to review prosecution on the grounds that there was no reason to do so, or that the prosecution was substantively unreasonable, since the totality requires a charge for a lesser offense, while the prosecution ascribed offenses that were too serious to the accused (e.g., in order to overcome a possible claim of statute of limitation)).

7. This brings us back to the original question – is the indictment count with which Respondents 3 and 4 here were charged –Section 130 of the Military Justice Law: unbecoming conduct – "suitable," since this offense ostensibly embodies a certain criminal aspect of the ethical conduct required of IDF commanders, and it does not lead to a criminal record. In this connection, I concur with the analysis of my colleague, Justice A. Procaccia, whereby the aforementioned Section 130 of the Military Justice Law embodies elements of both criminal law and disciplinary law. The voice of this indictment count, as it was once stated in military case law, is "a quiet voice" on the criminal scale. I, therefore, concur with her conclusion whereby, ostensibly, prosecuting Respondents 3 and 4 for violation of the aforementioned offense is not sufficient in the alleged circumstances and, therefore, it entails substantive unreasonableness in the legal sense of the expression (for the meaning of Section 130 of the Military Justice Law, see also: the symposium with the president of the Supreme Court (Ret.) Meir Shamgar, **Mishpat Vetzava**

16 457, 460 (5763); see also Appeal/123/02 Yishai v. Military Prosecutor (17.03.04); Appeal/153/03 Sagie v. CMP (5.8.04) (hereinafter – Sagie Case); NORMS AND ETHICS IN MILITARY LAW – THE VALUES OF THE SPIRIT OF THE IDF, COMMAND AND LEADERSHIP – SELECTED JUDGMENTS 6, 95-126 (Edited by Brigadier General Yishai Beer , 2007)).

At this point it should be emphasized that perhaps even from the standpoint of Respondents 3 and 4 – their prosecution for violation of that section in the Military Justice Law, which has dominant ethical elements (of conduct unbecoming the rank of the commander or his status in the Army), is ultimately liable to be an obstacle. The reason is that it is possible that after the judgment in the military trial becomes absolute, someone could claim that, considering the essence of the charge, the Respondents cannot make the argument that "I have already been acquitted – I have already been convicted" in international criminal law, and I will add no more on this issue, even though this issue leads us to a short discussion of comparative law.

8. It is worth noting that the totality of the issue for our examination in this petition is not unique to Israel, and military prosecution authorities in other countries have been compelled to contend with the question of how to act – from legal and disciplinary standpoints – with commanders and with soldiers who have harmed or abused detainees, prisoners, or captives, particularly in situations of low intensity warfare, or in the battle against terrorism (it should be noted, however, that the well-known cases around the world are far more serious than the case before us). The incident that elicited worldwide attention in recent

years – also following initial exposure by the media – was the affair of prisoner abuse in the Abu Ghraib prison (hereinafter – Abu Ghraib) in Iraq, committed by American soldiers who served as jailers in said prison. At this point it should be noted that the conduct that was ascribed to the military jailers there was many magnitudes more grave and more serious than the case before us and, notwithstanding the fact that the incidents are dissimilar, we can learn from them about the conduct of the prosecution authorities in the United States military in cases of prohibited conduct alleged against soldiers and commanders.

Among the jailers who took part in the abuse of prisoners at the Abu Ghraib prison in Iraq, a number of soldiers (and not officers) were tried in an American military court on various charges: conspiring to abuse detainees in contravention of Chapter 892, Section 81 of the U.C.M.J. (the Uniform Code of Military Justice); criminal dereliction of duty in contravention of Section 92 of said law; cruelty and abuse of detainees, in contravention of Section 93 of said law; assault in contravention of Section 128 of the American Uniform Code of Military Justice; indecent acts in contravention of section 134 of said law and making false statements, in contravention of Section 107 of the U.C.M.J. (see: James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts Martial and that Failure of the Military Justice System*, 27 WHITTIER L. REV. 684 (2005-2006) (hereinafter – Smith, A Few Good Scapegoats). Among the soldiers who were tried there, 12 were convicted of all or part of the charges ascribed to them, most of them in plea bargains, and, as a result, they were sentenced to significant periods of imprisonment, demotion in ranks and bad conduct discharge. However, the American military authority did not open legal proceedings against

the officers who were involved in the Abu Ghraib affair and took only disciplinary measures against them, such as demotion in rank, reprimand and transfer from command duties to non-command duties (hence the IDF prosecution authorities here, and even in the Sagie Case for example, went beyond what was implemented in the United States, and this fact should be noted). The way in which the US military prosecution authorities handled this matter was sharply criticized by American and other jurists. See:

Smith, A Few Good Scapegoats; Jason Sengheiser, *Command Responsibility for Omissions and Detainee Abuse in the 'War on Terror,'* 30 T. JEFFERSON L. REV. 693 (2008); Victor Hansen, *What's Good for the Goose is Good for the Gander: Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own,* 42 GONZ. L. REV. 335, 344 (2006-2007); Roberta Arnold, *The Abu Ghraib Misdeeds – Will There Be Justice in the Name of the Geneva Conventions?* 2 J. INT'L CRIM. JUST 999 (2004).

9. The European Court of Human Rights was also required to deal with a similar issue as part of a case involving the conduct of the Turkish army during its invasion of Cyprus. It ruled that the violation of Section 3 of The European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning humiliating treatment of detainees, should be measured in accordance with the circumstances, including the following:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this

> minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and, in some cases, the sex, age and state of health of the victim.
> See: OCALAN V. TURKEY (2003) 37 EHRR 10, para.219

Taking these tests into consideration – Turkey was found to be exempt from responsibility regarding the detainment of citizens, handcuffing detainees, covering their eyes, etc. This is the place to note that during the last decade, the relationship between the responsibility of countries and personal responsibility in these contexts has been examined in international criminal law – see up-to-date research on the subject, published in: BEATRICE I. BONAFÈ, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES (2009).

10. The ostensible gravity of this occurrence, in comparison to the events that led to the claims against Turkey in the European Court of Human Rights, originates in the attempt to impose fear and dread on Petitioner 1 (in order to discern whether he understood Hebrew) and, in the attempt to "stage" a shooting (which apparently occurred, as claimed, due to a misunderstanding), it moved from the phase of "staging" to the phase of implementation, and also caused the injury to Petitioner 1.

A similar occurrence was adjudicated in US military law and is mentioned in the article by *John Sifton, United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutional Gaps*, 43 HARV. J. ON LEGIS. 487 (2006):

> "In a case from April 2003, a Marine shown to have mock-executed four Iraqi juveniles (by making them kneel next to a ditch and firing his weapon to simulate an execution) was found guilty of cruelty and maltreatment and sentenced to

> thirty days hard labor without confinement and a fine of $6336. See United States Marine Corps, *USMC Alleged Detainee Abuse Cases Since Sep 11 01, at 2 (2004)…*
> (*Ibid*., at page 493, footnote 48).

It should be noted that in his article, John Sifton (even though in general, he exhibits a categorical approach) presents possible prosecution arguments, as well as possible defense arguments in incidents of the type discussed here and anyone who is interested – can learn.

11. Let us return to our case – the state of affairs that ostensibly occurred in the incident before us also teaches us about the depth of the biblical commandment "You shall not insult the deaf, or place a stumbling block before the blind…" (Leviticus 19:14), and we will not elaborate. However, the aforementioned biblical source brings us to the "IDF spirit," as it has formed over the years, *inter alia*, in the wake of aberrant incidents and the reactions of people of morals and culture. Instructive research on this subject was recently published by the former MAG, Major General (Res.) Menachem Finkelstein (today a central district court judge), entitled "'The Seventh Column' and 'Purity of Arms' – Natan Alterman on Security, Morals and Law," **Mishpat Vetzava**, 20, 1 (A) June 2009 (hereinafter – Finkelstein). Finkelstein writes of Alterman: "…With all his admiration for the IDF and its commanders and soldiers – the poet believes with all his heart that preserving the moral level of the IDF was vital and that the end does not justify all the means. Anywhere that Alterman believed that IDF soldiers or commanders behaved improperly…he reacted severely in his weekly column. Military soundness and moral soundness were as one in the eyes of Alterman. Compare, e.g., to the judgment of the Supreme Court, HCJ

1284/99 Anonymous v. Chief of Staff, PD 53(2) 62, 69 (1999): "The soundness and strength of the IDF are drawn from two sources: one, its moral soundness including its underlying norms, values and behavioral patterns; and the other, its military soundness, which relies, *inter alia*, on the human and professional resource." See also HCJ 320/80 Qawasmi v. Minister of Defense, PD 35(3) 113, 132 (1980): "The moral weapon is no less important than any other weapon, and perhaps exceeds it – and you have no more effective moral weapon than the rule of law" (*ibid*., at p. 2, footnote 2).

Indeed, from the start, Alterman's admonishing columns provided guidance to the IDF. His famous column "About That" (THE SEVENTH COLUMN, Vol. A, 149 (November 19, 1948)), which reacted strongly to a crime committed by IDF soldiers, was distributed to all IDF personnel – at the order of Prime Minister and Minister of Defense David Ben-Gurion (see: Finkelstein, 142-143).

12. Finkelstein adds that Brigadier General (Res.) Zvi Inbar, the former MAG, stated in the film Altermania that the aforementioned column "About That" affected him, when he was required, in the 1970s, to make decisions regarding prosecuting soldiers who violated the value of "purity of arms" (*ibid*., at p. 5, footnote 81). Even my colleague, Justice Rubinstein, when he served as the attorney general, referred to one of the columns ("Both New and Old" – THE SEVENTH COLUMN, Vol. A, 295 (August 7, 1953)) in his article on "Security and Human Rights in Time of War and Terrorism" (**Mishpat Vetzava** 16, 765, 785-786 (5763). See: Finkelstein p. 64, footnote 64.

Therefore, the moral-critical power in Alterman's work was internalized by the IDF and both the commanders and the quasi-judicial decision-makers inside and outside the Army considered themselves committed to his way. This approach must be preserved.

13. Before closing, I would also like to refer briefly to the issue of the gag order in the case before us. I agree with the decision regarding removal of the gag order here for two main reasons:

First, the name of Respondent 4 was disclosed in any case – erroneously – in the indictment brought by Respondents 1 and 2 in which his full name was inadvertently included.

Second, this affair came to light, as stated above, upon publication of the pictures in the media, in which Respondent 4 was also visible, so the benefit of a gag order here, is naturally, very limited.

However, I would like to note that I do not rule out the possibility, in the future, of a gag order on identifying details of IDF soldiers who are accused of similar offenses – for various reasons, but this is not the place to review and analyze them.

14. After all the above, it would be fitting to end with two quotations from Alterman's poetry:

"The law's the ABC. An axiom. It cannot be that crimes committed would not wake the law."

NATAN ALTERMAN, TCHUM HAMESHULASH (1956) THE SEVENTH COLUMN (Vol. B) 355 (1981)

"So it seems… But the judge at his desk, in his gown,
When he took up his work – which to statehood is critical –
And his laws and his orders in books leather-bound,
And instructed each witness in terms almost mystical,
Turned ideas and dimensions around, upside down,
And the world then became
Metaphysical…"

Natan Alterman, LACHASH SOD (following the words of the military prosecutor: I have instructions from the chief of staff to the witness, not to answer this question. The witness, and not the court, is the one to determine what a military secret is), THE SEVENTH COLUMN (Vol. A) 289 (5737).

15. What emerges from this collection therefore indicates that the order nisi should be changed to absolute and there is no need to say more.

Judge

It is therefore decided as stated in the judgment of Justice Procaccia.

Given this day, 9 Tamuz 5769 (July 1, 2009).

Justice Justice Justice

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