At the Supreme Court in Jerusalem **HCJ 8084/02**
Sitting as the High Court of Justice

In the matter of:

1. _____ **Abbasi**
2. _____ **Abbasi**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (Reg. Assoc.)**

all represented by attorneys L. Habib and/or Lea Tsemel and/or Yossi Wolfson of HaMoked: Center for the Defence of the Individual
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The Petitioners

v.

GOC Home Front Command
represented by the State Attorney's Office

The Respondent

Petition for Order Nisi and Temporary Injunction

A petition is hereby filed for an Order Nisi, directed at the Respondent and ordering him to give cause why he will not refrain from confiscating and demolishing the apartment in which Petitioner 1 and his family reside, and which is located in the neighborhood of Silwan in Jerusalem, or from otherwise damaging the same.

The Petition for a Temporary Injunction

The Honorable Court is further moved to instruct the Respondent, in a Temporary Injunction, not to confiscate or demolish the said apartment, or otherwise damage the same, until the hearing of this petition is concluded.

The grounds for the petition are as follows:

Factual introduction

1. In the evening hours of 5 September 2002, the Respondent delivered notice of the intention of confiscating and demolishing the residential apartment in which

Petitioner 1 resides, in accordance with the authority vested in him in Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the Regulation). In the text of the notice, an opportunity was given to submit an objection to the Respondent by 8 September 2002, and 48 hours to approach the Honorable Court from the date of receipt of the decision in the objection.

A copy of the notice and of the drawing attached thereto (hereinafter: the notice) are attached hereto as *Exhibit A*.

2. On 9 September 2002, the Petitioner, via his attorney, filed the objection, a copy of which is attached to this petition as *Exhibit B* and constitutes an integral part hereof.

3. On 19 September 2002, the Respondent's decision to dismiss the objection was received, after having been faxed the previous night, accompanied by the Confiscation and Demolition Order.

Copies of the decision and of the order are attached hereto as *Exhibits C* and *D*, respectively.

The Parties:

4. Petitioner 1 is under arrest, married and the father of a 6-month old girl, and resides in a 3-room apartment.

5. Petitioner 2 is Petitioner 1's grandfather, and is the owner of the apartment in which Petitioner 1 and his family reside, and it was he who built it so that it may serve him in his old age.

6. Petitioner 3 is a registered association, which has engaged for many years in the protection of human rights.

7. The Respondent, GOC Home Front Command, has been authorized to act as the military commander for the Jerusalem region pursuant to the Defence (Emergency) Regulations, 1945. As such, he has the authority to issue confiscation, sealing and demolition orders pursuant to Regulation 119 of the said regulations.

The Legal Argumentation

Petitioner 1 has not yet been convicted

8. The Petitioners shall claim that the Respondent's decision to take these measures against the Petitioner's apartment is premature, since it was made even before his interrogation was completed.

At the time the notice was given and the objection filed, Petitioner 1 was undergoing investigation. This fact has compromised the ability of the Petitioner and his family to properly defend themselves. Only recently was an indictment filed against him.

9. a. This, however, is not enough, and the proceedings against Petitioner 1 have not ended. One cannot accept a situation in which a sanction of damaging a residential apartment is executed before the detainee's fate is decided in court.

b. The execution of the sanction at this stage, which, even if not aimed at punishing the family, it certainly stems from the suspect's culpability, constitutes an infringement of the basic principle of law, whereby a man is presumed innocent until proven guilty.

c. Damaging the apartment at this stage also infringes the principle of the separation of powers, and could send the message that the judicial proceeding against the detainee is a colorable proceeding only, and that his guilt was decided even before the Court made its decision.

What would the Respondent's answer be if, after the house is damaged, it turns out that the Court has acquitted the detainee of the charges against him, or of part thereof, which is a valid and feasible possibility in our legal system?

d. An administrative decision such as this can be left to a later stage, until the proceedings are concluded. For example, HCJ 2/97 and 11/97, *Halawe et al. v. GOC Home Front Command*, *Taqdin Elyon* 97 (3) 111, discussed damage to houses ***in Jerusalem*** only after the suspects had been convicted, as stated at the outset of the judgment:

> ***Following the conviction of the persons involved in the attacks*** (emphasis added, L.H.)**, GOC Home Front Command (Respondent 1) has issued, on 29 December 1996, orders for the confiscation and sealing of residential buildings in which the Petitioners reside**.

In our case, the damage is requested ***before the conviction***.

10. The Petitioners shall claim that only in cases in which bringing the offender to trial is impossible, or involves great difficulty, can this authority be used without the need for a juridical ruling. However, once it was decided to bring the suspects to a criminal

trial, this proceeding has to be exhausted, and no additional parallel proceedings should be taken against the suspects.

11. The tried and true way should be preferred, and the judgment awaited, in the absence of weighty circumstances which would require deviating from this principle.

12. Also the case law of the Honorable Court has determined that instituting administrative proceedings before a judicial decision is irregular and extraordinary in the general principles of law.

13. a. HCJ 518/78 *Daniel Avrahami v. The Minister of Transportation et al.*, *Piskei Din* 32 (3) 675, discussed the issue of an administrative agency's authority to revoke a driving license prior to conviction. The court reviewed the language of the regulation, and determined as follows:

> **The judgments on which Ms. Na'or relied do not support her arguments. Indeed, it was ruled not once, and recently in the said HCJ 338/77, in which a judgment was given by a majority opinion of three judges against two, that an administrative agency may exercise its punitive authority also without being preceded by a criminal conviction, *but all of the cases in which it was so ruled, concerned the provisions of statutes which did not say, as does Regulation 264, that the condition to the exercise of the authority was the presence of proof before the authority that the person had "committed an offense"*. Therefore, those judgments are irrelevant to the case before us. Conversely, the judgment issued in FH 13/58 (*The City of Tel Aviv Jaffa v. Joseph Lubin*, *Piskei Din* 13 118, 125; *Pesaqim Avoda* 38 6) (re *the City of Tel Aviv v. Lubin*) supports, to a certain extent, the interpretation argued by the Petitioner. Although it is true that that judgment cannot serve as a direct reference for the issue before us, because it concerned not the revocation of a license by the authority that granted it, but rather the infringement of a person's property by confiscating an asset of his, the reasoning given there for the majority's decision**

> **is equally applicable here. In that case it was ruled that an inspector may not confiscate pork without a judicial process, despite the fact that the authorizing article did not state that the existence of the process was a condition to the confiscation.** ***The majority opinion in FH 13/58, which was expressed mainly in the opinion of Justice Landau (as was his title then), was based on the fact that legitimizing a pre-offense administrative confiscation is irregular from the point of view of the general principles of law.***

b. FH 13/58, *The City of Tel Aviv Jaffa v. Joseph Lubin*, *Piskei Din* 13 118, 125 quoted above, discussed the issue of an administrative confiscation of property before a judicial decision is handed down. It was ruled that the administrative authority should not be exercised in the case of an *infringement of property* before a judicial decision is handed down, even though the authorizing article does not condition the confiscation upon the existence of a judicial process:

> ***And now just think how the interpretation which seeks to legitimize a pre-offense administrative confiscation is irregular from the point of view of general principles*****. This was explained already in the majority judgment in the first hearing, and all I need do is summarize the same: This interpretation allows property to be confiscated without a prior judicial examination, not by a court or by some other judicial instance, and certainly not by the local authority itself or by the inspector, because, as the President comments… the authorizing statute does not confer upon the local authority the power to investigate or compel people to answer its questions or the questions of its inspectors. And yet, this interpretation conditions the confiscation authority upon the existence of facts which are far from simple, from the points of view of both the possessor's mental state… and the attendant circumstances… and the determination of the nature of the merchandise as**

> **pork or as a pork food product (and the sausage will prove these evidentiary difficulties). To that one should add that the bylaw seeks to entrust the decision of all of the above to an inspector, without requiring him to have any training for this duty. Taking all of the above into account I, respectfully, concur with the President ... that "*this is a very rare case in legislation, and very difficult to accept from the jurisprudential point of view.*"**

See: p. 125;

14. ***Our case fulfills both conditions***, each of which justified, in the foregoing cases, postponing the agency's authority until the judicial decision is handed down: First, our case too concerns a critical infringement of property and of the property right, not only of the Petitioner but also of his family. Second, also the language of the Regulation and an internal comparison of its text, supports this outcome, and so it reads:

> **... or any house, structure or land ... whose inhabitants he knows ... *to have committed, or attempted to commit ... any offence pursuant to these regulations*, an offense involving violence or intimidation or an offense that is tried in a military court.**

15. There is no justification for deviating from the above principle, in light of the passage of time since the suspects' arrest; in light of the fact that the case concerns residents of Israel and houses inside Jerusalem; and the fact that the injury would be inflicted upon innocent family members.

The Defence (Emergency) Regulations, 1945

16. The said defence regulations, from which the Respondent draws his authority to issue the order, are anachronistic! Since the promulgation thereof, and over time, they have been replaced by more innovative, and less injurious, "civil" legislation.

17. Thus, for instance, the regulations dealing with administrative detention have been replaced by the Emergency Authorities (Detention) Law, 5739-1979. Also the regulations dealing with deportation have been revoked. In addition, the State no longer uses its clauses for prosecution.

18. As we can see, of all the issues included in the defence regulations, the majority of which have become a dead letter, only Regulation 119 remains, as a relic of the past, unused other than against Arabs. The Honorable Court is moved to declare that there is no room to make use of this regulation, particularly when exercised against residents of the State.

Injuring the innocent:

19. HCJ 2722/92 *Alamarin v. Commander of the IDF forces in the Gaza Strip*, *Piskei Din* 46 (3), 693, p. 700-701, listed the considerations which have to be weighed before Regulation 119 is exercised. It determined, *inter alia*:

> **b. To what extent can it be concluded that the other residents, or some of them, were aware of the activity of the suspect or the suspects, or that they had reason to suspect the commission of this activity? It should be stated once more, to make matters clear, that such ignorance or uncertainty on this issue do not in themselves prevent the sanction being imposed, but the factual position in this regard may influence the scope of the commander's decision.**
>
> **…**
>
> **e. What is the severity of the result arising from the planned destruction of the building for persons who have not been shown to have had any direct or indirect involvement in the terrorist activity? What is the number of such persons and how closely are they related to the resident who is the suspect?**

In our case, the family members had no connection with the suspect's activity, nor is any such connection alleged. On the contrary, the family condemns the acts attributed to the son and has distanced itself therefrom.

20. It should be noted that the foregoing judgment related to the exercise of the Regulation **in the territories**, as distinguished from the exercise thereof **inside the territory of the State**, and against the residents thereof. The Petitioners shall claim that the said consideration regarding the degree of the family's involvement, should be given conclusive weight in this case, as explained also below.

21. The order which is the subject matter of the petition constitutes, in fact, a direct and enhanced injury to the family members, and twice infringes their constitutional rights, which are fixed in the Basic Law: Human Dignity and Liberty. The order severely injures the property right of Petitioner 2, fixed in Article 3 of the Basic Law, whereby "there shall be no violation of the property of a person". This injury also amounts to an injury to the dignity of the Petitioner's family, since it denies their right to shelter and habitation, and violates the most important property of all, the roof over their heads, in which matter, Article 4 provides that "all persons are entitled to protection of their life, body and dignity".

22. The family members' status as residents of the State must carry substantial, and even decisive, weight in the exercise of the Respondent's authority, which requires adhering to a more stringent standard as compared with the residents of the territories, and in the territories, in which fighting is going on.

The position of the Minister of Defence

23. From the publications in the media we have learned that the Minister of Defence, before giving his final consent, ***objected to the issuance of the orders against the houses, since they are located inside the territory of Israel***. From the contents of the publication it may be inferred that the Minister would object to the sanction being exercised against citizens, as distinguished from residents.

    A copy of the news item from *Haaretz* newspaper of 9 September 2002 is attached hereto as *Exhibit E*.

24. The mere fact that the initial and instinctive position of the Minister of Defence was to object to damaging the houses, enhances the argument that exercising the Regulation in Jerusalem is a severe and irregular measure which cannot be accepted. The objection thereto was the immediate position, and the correct one in the Petitioners' view.

25. From the text of the item it may be inferred that the Minister of Defence's approval resulted from irrelevant considerations: The fact that the Petitioners are not **citizens of the State** cannot render their rights more vulnerable, at least according to the law and particularly the Basic Law: Human Dignity and Liberty, which makes no distinction between residents and citizens.

    On the contrary, it is, rather, the population which does not enjoy some of the rights to which citizens are entitled (such as voting to the Knesset), which becomes more

vulnerable, and is more needy of and entitled to the enhanced protection of the authorities.

The protection of the foreigner, in the Jewish sources, was a fundamental principle and a cornerstone in the moral conception, and was compared to a citizen:

> **When a stranger resides with you in your land, you shall not do him wrong. The stranger who resides with you shall be to you as the native among you, and you shall love him as yourself, for you were aliens in the land of Egypt** (Leviticus 19:33-34). [Translation: The New American Standard Bible]

Sanction of a belligerent nature – inside Jerusalem:

26. Already in the past, the Court has expressed its aversion to the mere dealing with the damaging of houses pursuant to the Defence Regulations, and the sense of alienation at dealing with an act of a belligerent nature. In HCJ 1730/96 *Sabih v. Major General Ilan Biran*, *Piskei Din* 50 (1) 353, p. 368-369, the following opinion was stated:

> **However, none of this can allay the sense – the strong sense – that we are not dealing with our own. Indeed, we do not deny that our citing of ordinary administrative precedents, and our application thereof to irregular decisions such as the decision to demolish houses in Judea and Samaria, embraces no little artificiality and the mixing of apples and oranges. Moreover: Our dealing in the review of demolition orders is accompanied by a strong sense of alienation. And this is not because it is beyond our power and authority to intervene in the Military Commander's decision. It was not on a single occasion that we intervened in the Military Commander's decision, reversed decisions he had made, and ordered him to act so and not otherwise. The sense of alienation is rooted in that the act of *demolishing houses pursuant to the Defence Regulations is, by its mere nature and character, an act of war*. And acts of war are not acts which are daily addressed by the courts.**

If the aforesaid is true with regard to the Court, it is most certainly true with regard to residents of the State, against whom such "act of war" is committed!

27. The Honorable Court has recently refused, in a series of judgments, to intervene in the military system's discretion regarding the exercise of this sanction and other acts, that are taken **in the territories as part of the belligerent acts performed there**, and the massive exercise of a variety of sanctions was enabled under the caption of the deterrence of the masses and the elimination of terror. The Court emphasized that the justification for exercising the sanction was the general state of warfare, and the need for deterrence:

> **The State of Israel is in the midst of a state of warfare. The army is taking a series of belligerent acts, the purpose of which is to restore security to the region and to the state. In the framework of such acts, and due to the deterring nature thereof, the army wishes to demolish houses which were occupied by terrorists who had taken life and shed blood.** ***We have neither been asked to, nor shall we take any stand on the necessity and effectiveness of the demolition acts. This is a matter for the army, and as such constitutes part of the overall warfare activity***.

See: HCJ 6696/02 *Amir et al. v. Commander of the IDF forces in the West Bank*; and see also: HCJ 2977/02 *Adalah et al. v. Commander of the IDF forces in the West Bank*, *Piskei Din* 56 (3) 6 regarding the demolition of houses in the Refugee Camp of Jenin; and see also HCJ 2936/02 *Physicians for Human Rights v. Commander of the IDF forces in the West Bank*, *Piskei Din* 56 (3) 3 regarding harming medical teams.

28. There is no claim that any belligerent activity is taking place in Jerusalem. Therefore, the mere execution of the sanction inside Jerusalem and against its residents is not obvious and requires a close scrutiny as to the degree of its necessity and legality.

The Respondent's latitude, also in times of war, has to be limited in cases of "internal" operations, inside the sovereign territory of the State, and against its own residents, and all the more so when the sanction will injure innocent people.

From the mere definition of the area as sovereign territory, arises the presumption that the sovereign is able to enforce order and achieve its goals using "civilian" means, and without resorting to acts of a belligerent nature.

29. Also in times of war, we said, and shall add, particularly in times of war: It is precisely in these difficult times that the distinction between inside and outside has to be clear and unequivocal; it is precisely nowadays, when the army demolishes and seals houses in the territories, that similar action inside Jerusalem should be avoided.

This self-restraint is called for from the mere sovereignty, and constitutes an important layer in the components thereof, whose weight actually increases in times of warfare.

30. This distinction is enhanced from the families' point of view: Blameless residents of the State expect to be treated reasonably by government. The requested sanction cannot be defined as such treatment, not only because its nature is loathsome, also to this Honorable Court, but also because its being part of the "means of warfare" that are available to the army in the territories. A means that is acceptable in a warring territory is not, and cannot, be acceptable in sovereign territory.

Deterrence and the means for achievement thereof

31. And what is the justification for taking similar steps ***inside Jerusalem***: The Respondent will certainly claim that the longed-for deterrence justifies it. It appears that this consideration should be summarily rejected: since the beginning of the Intifada, the Jerusalem population's share in the activity has been very limited, and negligible compared to the territories. This behavior has even been praised every so often by the Mayor of Jerusalem and by others.

The Respondent must demonstrate that weighty considerations do indeed exist and justify taking this step inside Jerusalem, as well as that importing acts of war against innocent residents into it, is essential.

32. The use of the "heavy artillery" of deterrence, without giving weight to the requisite distinctions and to the level of peace prevailing among the "target population", the residents of Jerusalem, could void this concept of any content. Also in these difficult times, a gradation of penalization and deterrence has to be maintained, while taking into consideration the level of placidity among the population in general.

The efficacy of the sanction

33. Taking this draconian measure of demolition of a house pursuant to Regulation 119 in the midst of a civilian population, the necessary consequence of which it to injure innocent people and commit environmental penalization, even if this is not its goal, could actually achieve the opposite results.

34. It is feared that in the heat of the events, and the roar of the cannons, the Respondent has acted according to the same considerations which guide the army in the acts of war in the territories, and has not reasonably considered the entirety of the circumstances. Therefore, even if the Honorable Court will not be willing to examine the efficacy of the sanction, it should at least check whether the Respondent has even

considered the singularity of the case, in which the sanction is activated against residents of the State, in a relatively calm environment, and whether he had given the appropriate weight to the aforesaid.

Preferring means that do not involve environmental penalization

35. The Petitioners shall reiterate that the penalties which the suspect is expected to face, if he is convicted, are sufficient for achieving the deterrence hoped for, and that there is no need for additional steps, certainly not such that inflict serious injury also on family members.

36. The examination of the proportionateness and of the necessity of steps that are taken against the suspects, cannot be made by examining each sanction alone, and the Respondent has to specify whether the State has any intention of exercising additional sanctions: Only by examining the whole picture, and weighing the totality of all the means of deterrence and penalization, can it be assessed whether proportionateness and reasonableness have been kept, and whether it is possible to avoid exercising draconian sanctions, which constitute collective and indiscriminate punishment.

The aforesaid is stated because of the fomenting voices that have recently been heard, calling for the denial of residency (an intention frequently echoed by the Minister of the Interior), and even for the imposition of the death penalty, as was published in the media.

Danger to nearby buildings

37. a. As stated in the affidavit attached hereto, most of the houses in the neighborhood have been built shakily, and without foundations. As may be inferred from the drawing attached ***to the notice***, the demolition would be performed by the use of 30 demolition blocks, with a total weight of 15 kgs, and 5 irruption/shock charges, each with 6 blocks!

b. One gains the strong impression that the demolition is intended as a spectacle of blasts! Such conduct in the midst of a high-density civilian population is improper, and could inflict damage on the entire area, over and above the wrongdoing that it involves!

c. Against this argument, the Respondent notes, in his decision dismissing the objection, that:

> **It should be noted that even prior to your objections, the GOC ordered a meticulous examination of the scope and manner of execution**

> **of the order, so as to avoid damaging nearby houses, and after receipt of your objections, the GOC even ordered the method of execution of the demolition modified, so as to ensure the aforesaid. The house will be demolished with a combination of demolition charges with a lesser weight than initially planned, and with bulldozers.**

The Petitioners shall claim that the aforesaid does not alleviate the fear: First, no engineer's opinion confirming the demolition in such method and ensuring that it will not damage the other houses was attached to the order. Second, the Respondent does not sufficiently specify the manner of execution of the order and the quantity of explosives that will be used.

38. The danger to neighboring buildings or to parts of the building that are not designated for demolition is, at least, a consideration which the Respondent has to weigh. In the *Sabih* affair, on p. 360, and see also HCJ 5510/92 *Turkeman v. GOC Central Command*, *Piskei Din* 48 (1) 217, the Court ruled, in the opinion of the Honorable Justice (as was his title then) Barak, that only the suspect's residential unit should be damaged, and since partial demolition of the building is not possible, the less drastic measure of sealing the building or, alternatively, the demolition thereof by the family, should suffice.

39. Alternatively, if the Honorable Court approves the demolition, with the said measures, then a responsible and independent opinion on the implications of the demolition should first be obtained.

In this regard, one should mention the case discussed in HCJ 6932/94 *Abu al-Rub v. The Military Commander for the Judea and Samaria Region*, *Taqdin-Elyon* 95 (1) 1292, in which the army undertook that the demolition operation would not damage the rest of the building, and the Court made do with that. Despite the aforesaid, the demolition caused severe damage to the other parts of the building, so much so that the Court charged the army with payment of damages.

Discrimination

40. The family of ___ Popper, who slaughtered innocent laborers, did not hasten to vacate its house, since no such sanction was hanging over its head. Nor did it ever occur to the Goldstein family, which is even a resident of the territories, that it would have to seek alternative accommodation after its son slaughtered dozens of worshippers (and in this case, the matter of his **tombstone** enjoyed a "surgical" and

restrained treatment). Also the organization that was recently exposed, wherein Jewish citizens had placed a bomb in a learning institution in Jerusalem, and conspired to commit other activities, required no particular response other than prosecution.

41. The authorities knew well how to preserve the "deterrence measures" available to them in the most severe cases, which cry for deterrence, for clear reasons: A state does not treat its residents as it does its enemies, even if the acts of the former are severe to the degree of treason, such as the organized sale of weapons and ammunition to terror organizations, by soldiers, of all people.

42. Against this argument, the Respondent states in his decision as follows:

> **The performance of the said steps does not constitute wrongful discrimination. Without belittling the severity of the acts mentioned in your objections, which deserve the gravest condemnation, the acts attributed to your client, who acted as part of a group of murderers, are far more severe from the point of view of their consequences, the scope of the group members' actions and the long duration in which they lasted, as appears from the indictment filed in their case.**

However, this argument, which is not free of inaccuracies, cannot justify or explain the gap between the frequency of the activation of the Respondent's authority against Arabs, and the zero activation thereof against Jews. In any event, the comparison of the severity of the offenses does not justify using the sanction of demolition, and less severe measures should suffice.

43. Over and above the aforesaid, this argument does not stand in the case of Israeli residents. It cannot be said that this phenomenon is common among the Palestinian residents of Jerusalem to an extent justifying a deviation from the standard of "response" used against other residents of the State. The level of penalization in the courts is sufficient to provide the deterrence.

44. And if the above arguments are insufficient to deny the Respondent the authority to activate Regulation 119 against residents of Jerusalem, they at least require a close scrutiny of his considerations.

Population in distress

45. The families, when coming before the Honorable Court, carry with them only their innocence, and therefore, also their rightfulness, as they understand it. However, they cannot be faithfully represented without presenting a small part of the reality of their lives. The neighborhoods in which the Respondent seeks to execute his deterrence arsenal of sealing and demolition are crying, rather, for construction and rescue: these are families living in neighborhoods of poverty and deprivation in the full sense of the word; unemployment-stricken neighborhoods, which suffer from dense construction, lack of planning and sub-standard living conditions, and today have lost more of their livelihood.

This obviously provides no justification for any act. However, one cannot ignore this reality when the Respondent seeks to further injure families that are suffering already. One cannot support the aforesaid without compromising the sense of justice!

Law under cannon fire

46. This Honorable Court has recently contemplated the issue of the deportation of residents of the territories to the Gaza strip (HCJ 7015/02 *Kifah Ajuri et al. v. Commander of the IDF forces in the West Bank et al.*). At the end of the judgment, the Honorable Court states the following, in the opinion of the Honorable Chief Justice A. Barak, which speaks for itself:

> ***Second,*** **the State of Israel is undergoing a difficult period. Terror is hurting its residents. Human life is trampled upon. Hundred have been killed. Thousands have been injured. The Arab population in Judea and Samaria and the Gaza Strip is also suffering unbearably… All of this is because of acts or murder, killing and destruction perpetrated by terrorists. Our heart goes out to Mrs. Kessler who lost her daughter in a depraved terrorist act and to all the other Israelis who have lost their beloved ones or have been themselves severely injured by terrorist attacks. The State is doing all that it can in order to protect its citizens and ensure the security of the region. These measures are limited. The restrictions are, first and foremost, military-operational ones. It is difficult to fight against persons who are prepared to turn themselves into living bombs. These restrictions are also normative. The State of Israel is a freedom-seeking democracy. It is a**

defensive democracy acting within the framework of its right to self-defence — a right recognized by the charter of the United Nations. The State seeks to act within the framework of the lawful possibilities available to it under the international law to which it is subject and in accordance with its internal law. As a result, not every effective measure is also a lawful measure. Indeed, the State of Israel is fighting a difficult war against terror. It is a war carried out within the law and with the tools that the law makes available. The well-known saying that 'In battle laws are silent' (inter arma silent leges — Cicero, pro Milone 11; see also W. Rehnquist, *All the Laws but One*, 1998, at p. 218), does not reflect the law as it is, nor as it should be...

Indeed, "… even when the cannons speak, the military commander must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values' **(HCJ 168/91 *Morcos v. Minister of Defence*, *Piskei Din* 45 (1) 467, at p. 470). "We have established here a law-abiding State, that realizes its national goals and the vision of generations, and does so *while recognizing and realizing human rights in general, and human dignity in particular*" (HCJ 3451/02 *Almadani v. Minister of Defence*, *Piskei Din* 56 (3) 30, at p. 35). This was well expressed by my colleague, Justice M. Cheshin, when he said:**

> **"We will not falter in our efforts on behalf of the rule of law. We committed ourselves by our oath to dispense justice, to be the servants of the law, and to be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law makes its voice heard" (*Sabih v. IDF Commander in Judea and Samaria*, *Piskei Din* 50 (1) 353, at p. 369).**

Indeed, the position of the State of Israel is a difficult one. Also our role as judges is not easy. We are doing all we can to balance properly between human rights and the security

of the area. In this balance, human rights cannot receive complete protection, as if there were no terror, *and State security cannot receive complete protection, as if there were no human rights. A delicate and sensitive balance is required. This is the price of democracy*. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so. I discussed this in one case, where I said:

> **"*The decision has been placed at our door, and we must rise to the challenge. It is our duty to protect the legality of executive acts even in difficult decisions. Even when the cannons speak and the Muses are silent, law exists and operates, determining what is permitted and what forbidden, what is lawful and what unlawful. And where there is law, there are also courts that determine what is permitted and what forbidden, what is lawful and what unlawful*. Part of the public will be happy with our decision; another part will oppose it. It is possible that neither the former nor the latter will read the reasoning. But we shall do our work. 'This is our duty and this is our obligation as judges'." (HCJ 2161/96 *Sharif v. Home Guard Commander*, *Piskei Din* 50 (4) 485, at p. 491, citing the remarks of then-Deputy-President Justice Landau in HCJ 390/79 *Dawikat v. Government of Israel*, *Piskei Din* 34 (1) 1, at p. 4).**
> [Translation: Supreme Court website]

And we shall add: It is for hours such as these, in particular, that the Court has been designed as a restraining and balancing factor.

When the cry of Sodom and Gomorrah rose to the Heavens, God was in no haste to eradicate them. "I will go down now, and see if they have done entirely according to its outcry, which has come to Me", He says (Genesis 18:21), and such statement has been construed by the Sages as attesting to the duty of conducing a factual inquiry and a hearing before the act (see the opinion of the Deputy President Elon, as was his title then, in the said HCJ 4112/90 on p. 638). And on the same matter, it was said:

> **Far be it from You to do such a thing, to slay the righteous with the wicked, so that the righteous and the wicked are treated alike. Far be it from You! Shall not the Judge of all the earth deal justly?** (Genesis 18:25)

47. And even if the language of Regulation 119 permits such an act to be committed, to injure the innocent as a lesson for all to see, we are bound, and the Respondent is bound, to interpret and exercise the authority in the foregoing spirit. He should be wary of leaving a large family without shelter, and should pursue peace and security by other means.

So it was stated in this Honorable Court's case law, by the Honorable Justice Cheshin:

> **Since the beginning of our being, we have all known and memorized the same basic principle: Everyone shall bear his own crime and be put to death for his own sin. In the words of the Prophet: "The person who sins will die. The son will not bear the punishment for the father's iniquity, nor will the father bear the punishment for the son's iniquity; the righteousness of the righteous will be upon himself, and the wickedness of the wicked will be upon himself" (Ezekiel 18:20). There is no punishment without a warning, and punishments are inflicted only upon the offender himself. This is the Law of Moses, and it is written in the book of the Law of Moses: "The fathers shall not be put to death for the sons, nor the sons be put to death for the fathers" (2 Kings 14:6).**
>
> **… Since the establishment of the State – and certainly so since the Basic Law: Human Dignity and Liberty – we read into the provisions of Regulation 119 of the Defence Regulations, read into it and embed in it, values which are our values, the values of a Jewish, free and democratic state. These values will lead us directly to the ancient times of our people, and our times are like those times: They shall say no more that the fathers have eaten sour grapes, and the children's teeth are set on edge. Each man who eats sour grapes, his teeth will be set on edge.**

(HCJ 2006/97 *Janimat et al. v. GOC Central Command*, *Piskei Din* 51 (2) 651, 654-655; and see also the opinion of the Honorable Justice Cheshin in HCJ 4722/91 *Hizran et al. v. Commander of the IDF forces in Judea and Samaria* (*Piskei Din* 46 (2) 150); in HCJ 2722/92 *Alamarin v. Commander of the IDF forces in the Gaza Strip* (*Piskei Din* 46 (3) 693) and in HCJ 6026/94 *Nazaal et al. v. Commander of the IDF forces in Judea and Samaria* (*Piskei Din* 48 (5) 338)).

Due to all of the foregoing grounds, the Honorable Court is moved to issue an Order Nisi and a Temporary Injunction as requested at the outset of the petition, and, after hearing the Respondent's answer, render them absolute.

Jerusalem, Today 22 September 2002,

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L. Habib, Att.

Counsel for the Petitioners