HCJ 7015/02

1. **Kipah Mahmad Ahmed Ajuri**
2. **Abed Alnasser Mustafa Ahmed Asida**
3. **Centre for the Defence of the Individual**

v.

1. **IDF Commander in West Bank**
2. **IDF Commander in Gaza Strip**
3. **Bridget Kessler**

HCJ 7019/02

1. **Amtassar Muhammed Ahmed Ajuri**
2. **Centre for the Defence of the Individual**
3. **Association for Civil Rights in Israel**

v.

1. **IDF Commander in Judaea and Samaria**
2. **IDF Commander in Gaza Strip**
3. **Bridget Kessler**

The Supreme Court sitting as the High Court of Justice

[3 September 2002]

Before President A. Barak, Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, T. Strasberg-Cohen, D. Dorner, Y. Türkel, D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The IDF Commander in Judaea and Samaria made orders requiring three residents of Judaea and Samaria to live, for the next two years, in the Gaza Strip. The orders were approved by the Appeals Board. The three residents of Judaea and Samaria petitioned the High Court of Justice against the orders.

The petitioners argued that the orders were contrary to international law. In particular the petitioners argued that Judaea and Samaria should be regarded as a different belligerent occupation from the one in the Gaza Strip, and therefore the orders amounted to a deportation from one territory to another, which is forbidden under international law (art. 49 of the Fourth Geneva Convention).

The respondents, in reply, argued that the orders complied with international law. The respondents argued that the belligerent occupation of Judaea, Samaria and the Gaza Strip should be considered as one territory, and therefore the orders amounted merely to assigned residence, which is permitted under international law (art. 78 of the Fourth Geneva Convention).

A further question that arose was whether the IDF commander could consider the factor of deterring others when making an order of assigned residence against any person.

Held: Article 78 of the Fourth Geneva Convention empowers an occupying power to assign the place of residence of an individual for imperative reasons of security. Assigned residence is a harsh measure only to be used in extreme cases. However, the current security situation in which hundreds of civilians have been killed by suicide bombers justifies the use of the measure in appropriate cases.

Judaea and Samaria and the Gaza Strip are effectively one territory subject to one belligerent occupation by one occupying power, and they are regarded as one entity by all concerned, as can be seen, *inter alia*, from the Israeli-Palestinian interim agreements. Consequently, ordering a resident of Judaea and Samaria to live in the Gaza Strip amounts to assigned residence permitted under art. 78 of the Fourth Geneva Convention, and not to a deportation forbidden under art. 49 of the Fourth Geneva Convention.

An order of assigned residence can be made against a person only if there is a reasonable possibility that the person himself presents a real danger to the security of the area. If he does not, considerations of deterring others are insufficient for making an order of assigned residence. But if such a danger does exist, the IDF commander is authorized to make an order of assigned residence, and he may consider the deterrent factor in deciding whether actually to make the order or not.

The Appeals Board found that the petitioner in HCJ 7019/02 had sewn explosive belts. The Appeals Board found that the first petitioner in HCJ 7015/02 had acted as a lookout for a terrorist group when they moved explosive charges. In both these cases, the Supreme Court held that the deeds of the petitioners justified assigned residence, and it upheld the orders. However, with regard to the second petitioner in HCJ 7015/02, the Appeals Board found only that he had given his brother, a wanted terrorist, food and clothes, and had driven him in his car and lent him his car, without knowing for what purpose his brother needed to be driven or to borrow his car. The Supreme Court held that the activities of the second petitioner were insufficient to

justify the measure of assigned residence, and it set aside the order of assigned residence against him.

HCJ 7019/02 — petition denied.

HCJ 7015/02 — petition of the first petitioner denied; petition of the second petitioner granted.

Legislation cited:

Defence (Emergency) Regulations, 1945, r. 119.

Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, ss. 84(a), 84A, 86, 86(b)(1), 86(e), 86(f).

Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002.

Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002.

International conventions cited:

Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, arts. 49, 78.

Fourth Hague Convention respecting the Laws and Customs of War on Land, 1907.

Israeli Supreme Court cases cited:

[1] HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank* IsrSC 56(3) 3.

[2] HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank* IsrSC 56(3) 28.

[3] HCJ 3451/02 *Almadani v. Minister of Defence* IsrSC 56(3) 30.

[4] HCJ 393/82 *Almashulia v. IDF Commander in Judaea and Samaria* IsrSC 37(4) 785.

[5] HCJ 102/82 *Zemel v. Minister of Defence* IsrSC 37(3) 365.

[6] HCJ 574/82 *El Nawar v. Minister of Defence* (unreported).

[7] HCJ 615/85 *Abu Satiha v. IDF Commander* (unreported).

[8] HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank* IsrSC 42(2) 4.

[9] HCJ 7709/95 *Sitrin v. IDF Commander in Judaea and Samaria* (not reported).

[10] HCJ 1361/91 *Mesalem v. IDF Commander in Gaza Strip* IsrSC 45(3) 444.

[11] HCJ 554/81 *Beransa v. Central Commander* IsrSC 36(4) 247.

[12] HCJ 814/88 *Nasralla v. IDF Commander in West Bank* IsrSC 43(2) 265.

[13] HCJ 2006/97 *Janimat v. Central Commander* IsrSC 51(2) 651.

[14] CrimApp 4920/02 *Federman v. State of Israel* (unreported).

[15] CrimFH 7048/97 *A v. Minister of Defence* IsrSC 54(1) 721.

[16] HCJ 159/94 *Shahin v. IDF Commander in Gaza Strip* IsrSC 39(1) 309.

[17] HCJ 8259/96 *Association for Protection of Jewish Civil Rights v. IDF Commander in Judaea and Samaria* (unreported).

[18] HCJ 253/88 *Sejadia v. Minister of Defence* IsrSC 43(3) 801.

[19] HCJ 5667/91 *Jabrin v. IDF Commander in Judaea and Samaria* IsrSC 46(1) 858.

[20] HCJ 5510/92 *Turkeman v. Minister of Defence* IsrSC 42(1) 217.

[21] HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* IsrSC 50(1) 353.

[22] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* IsrSC 49(5) 1.

[23] HCJ 3643/97 *Stamka v. Minister of Interior* IsrSC 53(2) 730.

[24] HCJ 4644/00 *Jaffora Tavori v. Second Television and Radio Authority* IsrSC 54(4) 178.

[25] HCJ 4915/00 *Communications and Productions Co. Network (1988) v. Government of Israel* IsrSC 54(5) 451.

[26] HCJ 1030/99 *Oron v. Knesset Speaker* (not yet reported).

[27] HCJ 3114/02 *Barake v. Minister of Defence* IsrSC 56(3) 11.

[28] HCJ 680/88 *Schnitzer v. Chief Military Censor* IsrSC 42(4) 617; IsrSJ 9 77.

[29] HCJ 619/78 *'Altaliya' Weekly v. Minister of Defence* IsrSC 33(3) 505.

[30] HCJ 4541/94 *Miller v. Minister of Defence* IsrSC 49(4) 94.

[31] HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* IsrSC 44(1) 536.

[32] HCJ 24/91 *Rahman v. IDF Commander in Gaza Strip* IsrSC 45(2) 325.

[33] HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* (unreported).

[34] HCJ 168/91 *Morcos v. Minister of Defence* IsrSC 45(1) 467.

[35] HCJ 2161/96 *Sharif v. Home Guard Commander* IsrSC 50(4) 485.

[36] HCJ 390/79 *Dawikat v. Government of Israel* IsrSC 34(1) 1.

English cases cited:

[37] *Liversidge v. Anderson* [1941] 3 All ER 338.

Jewish Law sources cited:

[38] Deuteronomy 24, 16.

For the petitioners in HCJ 7015/02 — L. Zemel, Y. Wolfson.
For the petitioners in HCJ 7019/02 — D. Yakir, M. Hazan.
For respondents 1-2 in both petitions — A. Helman, S. Nitzan

JUDGMENT

President A. Barak

The military commander of the Israel Defence Forces in Judaea and Samaria made an 'order assigning place of residence'. According to the provisions of the order, the petitioners, who are residents of Judaea and Samaria, were required to live for the next two years in the Gaza Strip. Was the military commander authorized to make the order assigning place of residence? Did the commander exercise his discretion lawfully? These are the main questions that arise in the petitions before us.

Background

1. Since the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. This is not police activity. It is an armed struggle. Within this framework, approximately 14,000 attacks have been made against the life, person and property of innocent Israeli citizens and residents, the elderly, children, men and women. More than six hundred citizens and residents of the State of Israel have been killed. More than 4,500 have been wounded, some most seriously. The Palestinians have also experienced death and injury. Many of them have been killed and wounded since September 2000. Moreover, in one month alone — March 2002 — 120 Israelis were killed in attacks and hundreds were wounded. Since March 2002, as of the time of writing this judgment, 318 Israelis have been killed and more than 1,500 have been wounded. Bereavement and pain overwhelm us.

2. Israel's fight is complex. The Palestinians use, *inter alia*, guided human bombs. These suicide bombers reach every place where Israelis are to be found (within the boundaries of the State of Israel and in the Jewish villages in Judaea and Samaria and the Gaza Strip). They sew destruction and spill blood in the cities and towns. Indeed, the forces fighting against Israel are terrorists; they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the

territories, including in holy sites; they are supported by part of the civilian population, and by their families and relatives. The State of Israel faces a new and difficult reality, as it fights for its security and the security of its citizens. This reality has found its way to this court on several occasions (see HCJ 2936/02 *Doctors for Human Rights v. IDF Commander in West Bank* [1]; HCJ 2117/02 *Doctors for Human Rights v. IDF Commander in West Bank* [2]; HCJ 3451/02 *Almadani v. Minister of Defence* [3], at p. 36).

3. In its struggle against terrorism, Israel has undertaken — by virtue of its right of self-defence — special military operations (Operation 'Protective Wall' which began in March 2002 and Operation 'Determined Path' which began in June 2002 and has not yet ended). The purpose of the operations was to destroy the Palestinian terrorism infrastructure and to prevent further terrorist attacks. In these operations, IDF forces entered many areas that were in the past under its control by virtue of belligerent occupation and which were transferred pursuant to agreements to the (full or partial) control of the Palestinian Authority. The army imposed curfews and closures on various areas. Weapons and explosives were rounded up. Suspects were arrested. Within the framework of these operations, many reserve forces were mobilized; heavy weapons, including tanks, armoured personnel carriers, assault helicopters and aeroplanes, were used.

4. The special military operations did not provide an adequate response to the immediate need to stop the grave terrorist acts. The Ministerial Committee for National Security sought to adopt several other measures that were intended to prevent further terrorist acts from being perpetrated, and to deter potential attackers from carrying out their acts. The opinion of the Attorney-General was sought; in his opinion of 19 July 2002, the Attorney-General determined the legal parameters for the actions of the security forces. Consequently, the Ministerial Committee for National Security met on 31 July 2002 and decided to adopt additional measures, in accordance with the criteria laid down by the Attorney-General.

5. One of the measures upon which the Ministerial Committee for National Security decided — all of which within the framework of the Attorney-General's opinion — was assigning the place of residence of family members of suicide bombers or the perpetrators of serious attacks and those sending them from Judaea and Samaria to the Gaza Strip, provided that these family members were themselves involved in the terrorist activity. This measure was adopted because, according to the evaluation of the professionals involved (the army, the General Security Service, the Institute

for Intelligence and Special Tasks (the *Mossad*), and the police), these additional measures might make a significant contribution to the struggle against the wave of terror, resulting in the saving of human life. This contribution is two-fold: *first*, it can prevent a family member involved in terrorist activity from perpetrating his scheme (the preventative effect); *second*, it may deter other terrorists — who are instructed to act as human bombs or to carry out other terror attacks — from perpetrating their schemes (the deterrent effect).

The Amending Order assigning place of residence

6. In order to give effect to the new policy, on 1 August 2002 the military commander of the IDF forces in Judaea and Samaria amended the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970 (hereafter — the Original Order). This Order determined provisions, *inter alia*, with regard to special supervision (s. 86). These allow instructions to be given that a person should be placed under special supervision. According to the provisions of the Original Order, no authority should be exercised thereunder unless the military commander is of the opinion 'that it is imperative for decisive security reasons' (s. 84(a)). An order of special supervision may be appealed before the Appeals Board (s. 86(e)). The Appeals Board is appointed by the local commander. The chairman of the Appeals Board is a judge who is a jurist. The Board's role is to consider the order made under this section and to make recommendations to the military commander. If a person appeals an order and the order is upheld, the Appeals Board will consider his case at least once every six months whether that person submitted a further appeal or not (s. 86(f)). The application of the Original Order was limited to Judaea and Samaria. The amendment that was made extended its application to the Gaza Strip as well (the Security Provisions (Judaea and Samaria) (Amendment no. 84) Order (no. 510), 5762-2002 (hereafter — the Amending Order)). The provisions of the Amending Order (s. 86(b)(1) after the amendment) provide:

> **‘Special supervision and assigning a place of residence’**
>
> a. A military commander may direct in an order that a person shall be subject to special supervision.
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> b. A person subject to special supervision under this section shall be subject to all or some of the following restrictions, as the military commander shall direct:
>
> (1) He shall be required to live within the bounds of a certain place in Judaea and Samaria or in the Gaza Strip, as specified by the military commander in the order.’

In the introduction to the Amending Order it is stated that is was made ‘in view of the extraordinary security conditions currently prevailing in Judaea and Samaria, and because reasons of security in Judaea and Samaria and public security so require, and because of the need to contend with acts of terror and their perpetrators’. It was also stated in the introduction that the order was made ‘after I obtained the consent of the IDF military commander in the Gaza Strip’. Indeed, in conjunction with the Amending Order, the IDF commander in the Gaza Strip issued the Security Provisions (Gaza Strip) (Amendment no. 87) Order (no. 1155), 5762-2002. Section 86(g) of this order provided that:

> ‘Someone with regard to whom an order has been made by the military commander in Judaea and Samaria under section 86(b)(1) of the Security Provisions (Judaea and Samaria) Order (no. 378), 5730-1970, within the framework of which it was provided that he will be required to live in a specific place in the Gaza Strip, shall not be entitled to leave that place as long as the order is in force, unless the military commander in Judaea and Samaria or the military commander in the Gaza Strip so allow.’

Under the Amending Order, orders were made assigning the place of residence of the three petitioners before us. Let us now turn to these orders and the circumstances in which they were made.

The proceedings before the military commander and the Appeals Board

7. On 1 August 2002, the IDF commander in Judaea and Samaria (hereafter — the Respondent) signed orders assigning the place of residence of each of the petitioners. These orders state that they were made under the Amending Order and after obtaining the consent of the IDF commander in the Gaza Strip. They also state that they were made because the Respondent

is of the opinion that 'they are essential for decisive security reasons, and because of the need to contend with acts of terror and their perpetrators'. These orders require each of the petitioners to live in the Gaza Strip. The orders state that they will remain valid for a period of two years. The orders further state that they may be appealed to the Appeals Board. Underlying each of the orders are facts — which we will consider below — according to which each of the petitioners was involved in assisting terrorist activity that resulted in human casualties. In the opinion of the Respondent, assigning the place of residence of the petitioners to the Gaza Strip will avert any danger from them and deter others from committing serious acts of terror. The petitioners appealed the orders before the Appeals Board. A separate hearing was held with regard to the case of each of the petitioners, before two Appeals Boards. Each of the Boards held several days of hearings. The Boards decided on 12 August 2002 to recommend to the Respondent that he approve the validity of the orders. The Respondent studied the decision of the Boards and decided on the same day that the orders would remain valid. On 13 August 2002, the petitions before us were submitted against the Respondent's decision.

The proceedings before us

8. When the petitions were submitted before us, a show-cause order was issued on the same day in both petitions. An interim order was also issued, which prevented the forcible assignment of the place of residence of the petitioners to the Gaza Strip until further decision. When the State's response was received, a hearing was held on 19 August 2002 before a panel of three justices. The panel decided to hear the two petitions together. It also decided to grant the petitioners' application to submit two opinions by international law experts on the subject of the petitions, one by Prof. Schabas and the other by Ms Doswald-Beck and Dr Seiderman. Finally it decided to expand the panel. The panel was indeed expanded in accordance with that decision, and on 26 August 2002 a hearing was held at which arguments were heard from the parties.

9. Counsel for the petitioners argued before us that the Amending Order, the individual orders issued thereunder and the decisions of the Appeals Boards should be set aside, for several reasons. *First*, there were defects in the proceedings that took place before the Respondent and the Appeals Board (in HCJ 7015/02). *Second*, there was an inadequate factual basis for the decisions of the respondents and there was no justification for the harsh measure ordered against them — especially when its purpose was merely

deterrence. *Third*, the Amending Order was made without authority, because the Respondent was not competent to make an order concerning the Gaza Strip. Finally — and this argument was the focus of the hearing before us — the Amending Order is void because it is contrary to international law. Counsel for the Respondent argued before us that the petitions should be denied. According to him, the Amending Order, and the individual orders made thereunder, are proper and they and the proceeding in which they were made are untainted by any defect. The respondent was competent to make the Amending Order, and the individual orders are lawful, since they are intended to prevent the petitioners from realizing the danger that they present, and they contain a deterrent to others. The orders are proportionate. They are lawfully based on the factual basis that was presented to the commander and the Appeals Boards. According to counsel for the Respondent, the Amending Order and the orders made thereunder conform to international law, since they fall within the scope of article 78 of the Fourth Geneva Convention of 1949 (Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1949; hereafter — the Fourth Geneva Convention).

10. Before the hearing began, Mrs Bridget Kessler made an application to be joined as a respondent to the petitions. We granted the application. Mrs Bridget Kessler is the mother of Gila Sara Kessler, of blessed memory, who was murdered in the terrorist attack on 19 June 2002 at the French Hill crossroads in Jerusalem. The attack was perpetrated by a suicide bomber who blew himself up near a bus stop. The explosion killed seven Jews including Mrs Kessler's nineteen-year-old daughter, who merely wanted to go home from work. Mrs Kessler spoke before us quietly and evocatively. She regarded herself as the representative of all those who were harmed by the terrorist attacks that have befallen us. She emphasized the moral aspect in assigning the residence of the petitioners to the Gaza Strip, and supported the position of counsel for the Respondent. Another applicant asked to be joined as a respondent, but he did not trouble to come on the date fixed, and his application was denied without any consideration of it on the merits.

11. In the course of their arguments, counsel for the petitioners applied to submit before us affidavits of the petitioners. These affidavits were unsigned. The purpose of submitting them was to declare their position with regard to their personal circumstances. We dismissed this application both because of the procedural defects in the affidavits and also because they contained nothing that added anything to the actual arguments of the petitioners. At the end of the arguments of counsel for the Respondent, he asked us to hear

General Ashkenazi, the Deputy Chief-of-Staff, with regard to the security background that was the basis for the Respondent's decision. We denied this application. Our position is that the security position was presented in full before the Appeals Boards that gave expression to it, and there was no reason for an extension of this framework.

12. As we have seen, the arguments before us concern various aspects of the decision of the Respondent and the Appeals Board. We should state at the outset that we found no basis to the arguments about procedural defects in the decision of the Respondent or in the decisions of the Appeals Boards. We do not think that in the proceedings that took place before the Boards (mainly in the case of the petitioners in HCJ 7015/02) there were defects that justify setting aside the proceeding or its conclusions. The same is true of the arguments regarding prejudice on the part of the Board; not being given a full opportunity to be heard; *prima facie* ignoring factual and legal arguments and the Board hearing the Respondent's witnesses; this is also the case with regard to not hearing certain witnesses or cross-examining them and allowing the Respondent to submit material. We have studied these arguments, the decisions of the Board and the material before us. We are satisfied — for the reasons stated in the State's reply — that the proceeding that took place was duly held and it does not justify our intervention in this framework, and that the defects that occurred — according to the petitioners — do not justify in themselves setting aside the decisions that were made, either by the Boards or by the commander. Indeed, the main matters on which the parties concentrated their arguments — and on which we too will focus — concern the following three questions: *first*, was the military commander competent, under the provisions of international law, to make the Amending Order? This question concerns the authority of a military commander under international law to make arrangements with regard to assigning a place of residence. *Second*, if the answer to the first question is yes, what are the conditions required by international law for assigning a place of residence? This question concerns the scope of the military commander's discretion under international law in so far as assigning a place of residence is concerned. *Third*, do the conditions required by international law for making the orders to assign a place of residence exist in the case of the petitioners before us? This question concerns the consideration of the specific case of the petitioners before us in accordance with the laws that govern their case. Let us now turn to consider these questions in their proper order.

The authority of the military commander to assign a place of residence

13. Is the military commander of a territory under belligerent occupation competent to determine that a resident of the territory shall be removed from his place of residence and assigned to another place of residence in that territory? It was argued before us that the military commander does not have that authority, if only for the reason that this is a forcible transfer and deportation that are prohibited under international law (article 49 of the Fourth Geneva Convention). Our premise is that in order to answer the question of the military commander's authority, it is insufficient to determine merely that the Amending Order (or any other order of the commander of the territory) gives the military commander the authority to assign the place of residence of a resident of the territory. The reason for this is that the authority of the military commander to enact the Amending Order derives from the laws of belligerent occupation. They are the source of his authority, and his power will be determined accordingly. I discussed this in one case, where I said:

> 'From a legal viewpoint the source for the authority and the power of the military commander in a territory subject to belligerent occupation is in the rules of public international law relating to belligerent occupation (*occupatio bellica*), and which constitute a part of the laws of war' (HCJ 393/82 *Almashulia v. IDF Commander in Judaea and Samaria* [4], at p. 793).

In this respect, I would like to make the following two remarks: *first*, all the parties before us assumed that in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply (see, in this regard, HCJ 102/82 *Zemel v. Minister of Defence* [5], at p. 373; HCJ 574/82 *El Nawar v. Minister of Defence* [6]; HCJ 615/85 *Abu Satiha v. IDF Commander* [7]); *second*, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law; hereafter — the Fourth Hague Convention). With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention — which in his opinion does not reflect customary law — does not apply to Judaea and Samaria. Notwithstanding, Mr Nitzan told us — in accordance with the long-established practice of the Government of Israel (see M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 *Isr. Y. H.*

R. 1971, 262) — that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that for the purpose of the petitions before us we are assuming that humanitarian international law — as reflected in the Fourth Geneva Convention (including article 78) and certainly the Fourth Hague Convention — applies in our case. We should add that alongside the rules of international law that apply in our case, the fundamental principles of Israeli administrative law, such as the rules of natural justice, also apply. Indeed, every Israeli soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue. Therefore the question remains: is the military commander competent under the rules of belligerent occupation to determine provisions regarding the forcible assigned residence of a person from his place of residence to another place in the territory under his control?

14. The fundamental premise is that the displacement of a person from his place of residence and his forcible assignment to another place seriously harms his dignity, his liberty and his property. A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships (see M. Stavropoulou, 'The Right not to be Displaced', 9 *Am. U. J. Int'l L. & Pol'y*, 1994, at pp. 689, 717). Several basic human rights are harmed as a result of an involuntary displacement of a person from his home and his residence being assigned to another place, even if this assigned residence does not involve him crossing an international border (see F. M. Deng, *Internally Displaced Persons: Compilation and Analysis of Legal Norms*, 1998, 14). These human rights derive in part from the internal law of the various countries, and are in part enshrined in the norms of international law.

15. The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. Therefore they may be restricted in order to uphold similar rights of other members of society. They may be restricted in order to further proper social goals which will in turn further human rights themselves. Indeed, human rights and the restriction thereof derive from a common source, which concerns the right of a person in a democracy.

16. The extent of the restriction on human rights as a result of the forcible assignment of a person's residence from one place to another varies in accordance with the reasons that underlie the assigned residence. Assigned residence caused by combat activities (whether because of an international dispute or because of a civil war) cannot be compared to assigned residence caused by a disaster (whether natural or of human origin) (see R. Cohen and F. M. Deng, *Masses in Flight: the Global Crisis of Internal Displacement*, 1998). In the case before us, we are concerned with the assigned residence of a person from his place of residence to another place in the same territory for security reasons in an area subject to belligerent occupation. The extent of the permitted restriction on human rights is determined, therefore, by the humanitarian laws contained in the laws concerning armed conflict (see D. Fleck ed., *The Handbook of Humanitarian Law in Armed Conflict*, 1995). These laws are mainly enshrined in the Fourth Hague Convention and the Fourth Geneva Convention. We will now turn to these laws.

17. We were referred to various provisions in the Fourth Hague Convention (mainly article 43) and in the Fourth Geneva Convention (mainly articles 49 and 78). In our opinion, the case before us is governed entirely by the provisions of article 78 of the Fourth Geneva Convention:

> 'Article 78
>
> If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.
>
> Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.'

This provision concerns assigned residence. It constitutes a special provision of law (*lex specialis*) to which we must refer and on the basis of

which we must determine the legal problems before us. Whatever is prohibited thereunder is forbidden even if a general provision may *prima facie* be interpreted as allowing it, and what is permitted thereunder is allowed even if a general provision may *prima facie* be interpreted as prohibiting it (see J. Stone, *No Place, No Law in the Middle East* 1969, at p. 17). Indeed, a study of the Amending Order itself and the individual orders made thereunder shows that the maker of the Order took account of the provisions of article 78 of the Convention, and acted accordingly when he made the Amending Order and the individual orders. The Respondent did not seek, therefore, to make a forcible transfer or to deport any of the residents of the territory. The Respondent acted within the framework of 'assigned residence' (according to the provisions of article 78 of the Fourth Geneva Convention). Therefore we did not see any reason to examine the scope of application of article 49 of the Fourth Geneva Convention, which prohibits a forcible transfer or a deportation. In any event, we see no need to consider the criticism that the petitioners raised with regard to the ruling of this court, as reflected in several decisions, the main one being HCJ 785/87 *Abed El-Apu v. IDF Commander in West Bank* [8], with regard to the interpretation of article 49 of the Fourth Geneva Convention. We can leave this matter to be decided at a later date.

18. Article 78 of the Fourth Geneva Convention does not deal with a forcible transfer or deportation. It provides a comprehensive and full arrangement with regard to all aspects of assigned residence and internment of protected persons. This provision integrates with several other provisions in the Fourth Geneva Convention (arts. 41, 42 and 43) that also discuss internment and assigned residence. When the place of residence of a protected person is assigned from one place to another under the provisions of art. 78 of the Fourth Geneva Convention, it is a lawful act of the military commander, and it does not constitute a violation of human rights protected by humanitarian international law. Indeed, art. 78 of the Fourth Geneva Convention constitutes both a source for the protection of the right of a person whose residence is being assigned and also a source for the possibility of restricting this right. This can be seen, *inter alia*, in the provisions of art. 78 of the Fourth Geneva Convention that determines that the measures stipulated therein are the measures that the occupying power (i.e., the military commander) may 'at most' carry out.

The conditions for exercising the authority of the military commander with regard to assigned residence

19. Article 78 of the Fourth Geneva Convention stipulates several (objective and subjective) conditions with which the military commander must comply, if he wishes to assign the place of residence of a person who is protected by the Convention. We do not need, for the purposes of the petitions before us, to consider all of these conditions. Thus, for example, art. 78 of the Fourth Geneva Convention stipulates an objective condition that a regular procedure for exercising the authority must be prescribed; this procedure shall include a right of appeal; decisions regarding assigned residence shall be subject to periodic review, if possible every six months. These provisions were upheld in the case before us, and they are not the subject of our consideration. We should add that under the provisions of art. 78 of the Fourth Geneva Convention, someone whose place of residence was assigned 'shall enjoy the full benefit of article 39 of the present convention'. We have been informed by counsel for the Respondent, in the course of oral argument, that if in the circumstances of the case before us the Respondent is subject to duties imposed under the provisions of art. 39 of the Convention, he will fulfil these duties. Two main arguments were raised before us with regard to the conditions stipulated in art. 78 of the Fourth Geneva Convention. Let us consider these. The *first* argument raised before us is that art. 78 of the Fourth Geneva Convention refers to assigned residence within the territory subject to belligerent occupation. This article does not apply when the assigned residence is in a place outside the territory. The petitioners argue that assigning their residence from Judaea and Samaria to the Gaza Strip is removing them from the territory. Consequently, the precondition for the application of art. 78 of the Fourth Geneva Convention does not apply. The petitioners further argue that in such circumstances the provisions of art. 49 of the Fourth Geneva Convention apply, according to which the deportation of the petitioners is prohibited. The *second* argument raised before us concerns the factors that the military commander may take into account in exercising his authority under the provisions of art. 78. According to this argument, the military commander may take into account considerations that concern the danger posed by the resident and the prevention of that danger by assigning his place of residence (preventative factors). The military commander may not take into account considerations of deterring others (deterrent factors). Let us consider each of these arguments.

Assigned residence within the territory subject to belligerent occupation

20. It is accepted by all concerned that art. 78 of the Fourth Geneva Convention allows assigned residence, provided that the new place of residence is in the territory subject to belligerent occupation that contains the place of residence from which the person was removed. The provisions of art. 78 of the Fourth Geneva Convention do not apply, therefore, to the transfer of protected persons outside the territory held under belligerent occupation. This is discussed by J. S. Pictet in his commentary to the provisions of art. 78 of the Fourth Geneva Convention:

> '… the protected persons concerned… can therefore only be interned, or placed in assigned residence, within the frontiers of the occupied country itself' (J. S. Pictet, *Commentary: Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, at p. 368).

It was argued before us that the Gaza Strip — to which the military commander of Judaea and Samaria wishes to assign the place of residence of the petitioners — is situated outside the territory.

21. This argument is interesting. According to it, Judaea and Samaria were conquered from Jordan that annexed them — contrary to international law — to the Hashemite Kingdom, and ruled them until the Six Day War. By contrast, the Gaza Strip was conquered from Egypt, which held it until the Six Day War without annexing the territory to Egypt. We therefore have two separate areas subject to separate belligerent occupations by two different military commanders in such a way that neither can make an order with regard to the other territory. According to this argument, these two military commanders act admittedly on behalf of one occupying power, but this does not make them into one territory.

22. This argument must be rejected. The two areas are part of mandatory Palestine. They are subject to a belligerent occupation by the State of Israel. From a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit, and the legislation of the military commander in them is identical in content. Thus, for example, our attention was drawn by counsel for the Respondent to the provisions of clause 11 of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, which says:

> 'The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which shall be preserved during the interim agreement.'

This provision is repeated also in clause 31(8) of the agreement, according to which the 'safe passage' mechanisms between the area of Judaea and Samaria and the area of the Gaza Strip were determined. Similarly, although this agreement is not decisive on the issue under discussion, it does indicate that the two areas are considered as one territory held by the State of Israel under belligerent occupation. Moreover, counsel for the Respondent pointed out to us that 'not only does the State of Israel administer the two areas in a coordinated fashion, but the Palestinian side also regards the two areas as one entity, and the leadership of these two areas is a combined one'. Indeed, the purpose underlying the provisions of art. 78 of the Fourth Geneva Convention and which restricts the validity of assigned residence to one territory lies in the societal, linguistic, cultural, social and political unity of the territory, out of a desire to restrict the harm caused by assigning residence to a foreign place. In view of this purpose, the area of Judaea and Samaria and the area of the Gaza Strip should not be regarded as territories foreign to one another, but they should be regarded as one territory. In this territory there are two military commanders who act on behalf of a single occupying power. Consequently, one military commander is competent to assign the place of residence of a protected person outside his area, and the other military commander is competent to agree to receive that protected person into the area under his jurisdiction. The result is, therefore, that the provisions of art. 78 of the Fourth Geneva Convention does apply in our case. Therefore there is no reason to consider the provisions of art. 49 of that Convention.

The considerations of the area commander

23. The main question that arose in this case — and to which most of the arguments were devoted — concerns the scope of the discretion that may be exercised by the occupying power under the provisions of art. 78 of the Fourth Geneva Convention. This discretion must be considered on two levels: *one* level — which we shall consider immediately — concerns the factual considerations that the military commander should take into account in exercising his authority under the provisions of art. 78 of the Fourth Geneva Convention. The *other* level — which we shall consider later — concerns the applicability of the considerations that the military commander must take into account to the circumstances of the cases of each of the petitioners before us.

24. With regard to the first level, it is accepted by all the parties before us — and this is also our opinion — that an essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others. Likewise, one may not assign the place of residence of a person who is not innocent and did carry out acts that harmed security, when in the circumstances of the case he no longer presents any danger. Therefore, if someone carried out terrorist acts, and assigning his residence will reduce the danger that he presents, it is possible to assign his place of residence. One may not assign the place of residence of an innocent family member who did not collaborate with anyone, or of a family member who is not innocent but does not present a danger to the area. This is the case even if assigning the place of residence of a family member may deter other terrorists from carrying out acts of terror. This conclusion is required by the outlook of the Fourth Geneva Convention that regards the measures of internment and assigned residence as the most severe and serious measures that an occupying power may adopt against protected residents (see Pictet, *ibid.*, at p. 257). Therefore these measures may be adopted only in extreme and exceptional cases. Pictet rightly says that:

> 'In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately… their exceptional character must be preserved' (*ibid.*, at pp. 367, 368).

He adds that it is permitted to adopt a measure of assigned residence only towards persons whom the occupying power 'considers dangerous to its security' (*ibid.*, at p. 368). This approach — which derives from the provisions of the Convention — was adopted by this court in the past. We have held repeatedly that the measures of administrative internment — which

is the measure considered by art. 78 of the Fourth Geneva Convention together with assigned residence — may be adopted only in the case of a 'danger presented by the acts of the petitioner to the security of the area' (HCJ 7709/95 *Sitrin v. IDF Commander in Judaea and Samaria* [9]; see also HCJ 1361/91 *Mesalem v. IDF Commander in Gaza Strip* [10] at p. 456; HCJ 554/81 *Beransa v. Central Commander* [11] at p. 250). In one case Justice Bach said:

> 'The respondent may not use this sanction of making deportation orders merely for the purpose of deterring others. Such an order is legitimate only if the person making the order is convinced that the person designated for deportation constitutes a danger to the security of the area, and that this measure seems to him essential for the purpose of neutralizing this danger' (HCJ 814/88 *Nasralla v. IDF Commander in West Bank* [12], at p. 271).

This conclusion is implied also by the construction of the Amending Order itself, from which it can be seen that one may only adopt a measure of assigned residence on account of a danger presented by the person himself. But beyond all this, this conclusion is required by our Jewish and democratic values. From our Jewish heritage we have learned that 'Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing' (Deuteronomy 24, 16 [38]). 'Each person shall be liable for his own crime and each person shall be put to death for his own wrongdoing' (*per* Justice M. Cheshin in HCJ 2006/97 *Janimat v. Central Commander* [13], at p. 654); 'each person shall be arrested for his own wrongdoing — and not for the wrongdoing of others' (*per* Justice Y. Türkel in CrimApp 4920/02 *Federman v. State of Israel* [14]). The character of the State of Israel as a democratic, freedom-seeking and liberty-seeking State implies that one may not assign the place of residence of a person unless that person himself, by his own deeds, constitutes a danger to the security of the State (cf. CrimFH 7048/97 *A v. Minister of Defence* [15], at p. 741). It should be noted that the purpose of assigned residence is not penal. Its purpose is prevention. It is not designed to punish the person whose place of residence is assigned. It is designed to prevent him from continuing to constitute a security danger. This was discussed by President Shamgar, who said:

> 'The authority is preventative, i.e., it is prospective and may not be exercised unless it is necessary to prevent an anticipated danger… The authority may not be exercised… unless the evidence brought before the military commander indicates a danger that is anticipated from the petitioner in the future, unless the measures designed to restrict his activity and prevent a substantial part of the harm anticipated from him are adopted' (*Beransa v. Central Commander* [11], at p. 249; see also *Abu Satiha v. IDF Commander* [7]).

Of course, we are aware that assigning the residence of a person who constitutes a danger to the security of the State is likely to harm his family members who are innocent of any crime. That is not the purpose of assigned residence, although it may be its consequence. This is inevitable, if we wish to maintain the effectiveness of this measure (cf. *Janimat v. Central Commander* [13], at p. 653).

25. What is the level of danger that justifies assigning a person's place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that — even if inadmissible in a court of law — shows clearly and convincingly that if the measure of assigned residence is not adopted, there is a reasonable possibility that he will present a real danger of harm to the security of the territory (see Pictet, at p. 258, and the examples given by him, and also HCJ 159/94 *Shahin v. IDF Commander in Gaza Strip* [16]; *Sitrin v. IDF Commander in Judaea and Samaria* [9]; HCJ 8259/96 *Association for Protection of Jewish Civil Rights v. IDF Commander in Judaea and Samaria* [17]; HCJ 253/88 *Sejadia v. Minister of Defence* [18], at p. 821). Moreover, just as with any other measure, the measure of assigned residence must be exercised proportionately. 'There must be an objective relationship — a proper relativity or proportionality — between the forbidden act of the individual and the measures adopted by the Government' (HCJ 5667/91 *Jabrin v. IDF Commander in Judaea and Samaria* [19], at p. 860; see also HCJ 5510/92 *Turkeman v. Minister of Defence* [20], at p. 219). An appropriate relationship must exist between the purpose of preventing danger from the person whose place of residence is being assigned and the danger that he would present if this measure were not exercised against him (see HCJ 1730/96 *Sabiah v. IDF Commander in Judaea and Samaria* [21], 364); the measure adopted must be the one that causes less harm; and it is usually necessary that the measure of

assigned residence is proportionate to the benefit deriving from it in ensuring the security of the territory (cf. HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [22]; HCJ 3643/97 *Stamka v. Minister of Interior* [23]; HCJ 4644/00 *Jaffora Tavori v. Second Television and Radio Authority* [24]; HCJ 4915/00 *Communications and Productions Co. Network (1988) v. Government of Israel* IsrSC 54(5) 451 [25]; HCJ 1030/99 *Oron v. Knesset Speaker* (not yet reported) [26]).

26. Within the framework of proportionality we should consider two further matters that were discussed by President Shamgar in a case that concerned the administrative internment of residents from Judaea and Samaria, where he said:

> 'The internment is designed to prevent and frustrate a security danger that arises from the acts that the internee may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger)' (*Sejadia v. Minister of Defence* [18], at p. 821).

These remarks are also relevant to the issue of assigned residence. Therefore each case must be examined to see whether filing a criminal indictment will not prevent the danger that the assigned residence is designed to prevent. Moreover, the measure of assigned residence — as discussed in art. 78 of the Fourth Geneva Convention — is generally a less serious measure than the measure of internment. This matter must be considered in each case on its merits, in the spirit of Pictet's remarks that:

> 'Internment is the more severe… as it generally implies an obligation to live in a camp with other internees. It must not be forgotten, however, that the terms "assigned residence" and "internment" may be differently interpreted in the law of different countries. As a general rule, assigned residence is a less serious measure than internment' (*ibid*., at p. 256).

27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military

commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others. Notwithstanding, when assigning a place of residence is justified because a person is dangerous, and the question is merely whether to exercise this authority, there is no defect in the military commander taking into account considerations of deterring others. Thus, for example, this consideration may be taken into account in choosing between internment and assigned residence. This approach strikes a proper balance between the essential condition that the person himself presents a danger — which assigned residence is designed to prevent — and the essential need to protect the security of the territory. It is entirely consistent with the approach of the Fourth Geneva Convention, which regards assigned residence as a legitimate mechanism for protecting the security of the territory. It is required by the harsh reality in which the State of Israel and the territory are situated, in that they are exposed to an inhuman phenomenon of 'human bombs' that is engulfing the area.

28. Before we conclude the examination in principle as to the conditions prescribed by art. 78 of the Fourth Geneva Convention, we ought to point out once again that the occupying power may make use of the measure of assigned residence if it 'considers it necessary, for imperative reasons of security'. A similar test appears in the Amending Order — which, without doubt, sought to comply with the requirements of the Fourth Geneva Convention and the Fourth Hague Convention — according to which the military commander may adopt the measure of assigned residence 'if he is of the opinion that it is essential for decisive security reasons' (s. 84A of the Amending Order). These provisions give the military commander broad discretion. He must decide whether decisive security reasons — or imperative reasons of security — justify assigned residence. In discussing this, Pictet said:

> 'It did not seem possible to define the expression "security of the State" in a more concrete fashion. It is thus left very largely to Governments to decide the measure of activity prejudicial to the internal or external security of the State which justifies internment or assigned residence' (*ibid.*, at p. 257).

Note that the considerations that the military commander may take into account are not merely 'military' reasons (see, for example, arts. 5, 16, 18, 53, 55, 83 and 143 of the Fourth Geneva Convention). Article 78 of the Fourth Geneva Convention extends the kind of reasons to 'reasons of security' (see, for example, arts. 9, 42, 62, 63, 64 and 74 of the Fourth

Geneva Convention). Indeed, the Fourth Geneva Convention clearly distinguishes between 'imperative reasons of security' and 'imperative military reasons'. The concept of reasons of security is broader than the concept of military reasons.

29. The discretion of the military commander to order assigned residence is broad. But it is not absolute discretion. The military commander must exercise his discretion within the framework of the conditions that we have established in this judgment and as prescribed in art. 78 of the Fourth Geneva Convention and the Amending Order. The military commander may not, for example, order assigned residence for an innocent person who is not involved in any activity that harms the security of the State and who does not present any danger, even if the military commander is of the opinion that this is essential for decisive reasons of security. He also may not do so for a person involved in activity that harms the security of the State, if that person no longer presents any danger that assigned residence is designed to prevent. Indeed, the military commander who wishes to make use of the provisions of art. 78 of the Fourth Geneva Convention must act within the framework of the parameters set out in that article. These parameters create a 'zone' of situations — a kind of 'zone of reasonableness' — within which the military commander may act. He may not deviate from them.

30. The Supreme Court, when sitting as the High Court of Justice, exercises judicial review over the legality of the discretion exercised by the military commander. In doing so, the premise guiding this court is that the military commander and those carrying out his orders are public officials carrying out a public office according to law (*Almashulia v. IDF Commander in Judaea and Samaria* [4], at p. 809). In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted (cf. HCJ 3114/02 *Barake v. Minister of Defence* [27], at p. 16). Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld (see HCJ 680/88 *Schnitzer v. Chief Military Censor* IsrSC 42(4) 617 [28], at p. 640). This was well expressed by Justice Shamgar in one case that considered the extent of judicial review of the considerations of the military commander in Judaea and Samaria:

> 'The respondents' exercising of their powers will be examined according to criteria applied by this court when it exercises

> judicial review of an act or omission of any other branch of the executive, but this of course while taking into account the duties of the respondents as required by the nature of their function' (HCJ 619/78 *'Altaliya' Weekly v. Minister of Defence* [29], at p. 512).

Admittedly, 'security of the State' is not a 'magic word' that prevents judicial review (see the remarks of Justice Strasberg-Cohen in HCJ 4541/94 *Miller v. Minister of Defence* [30], at p. 124). Nonetheless, 'an act of State and an act of war do not change their nature even if they are subject to judicial review, and the character of the acts, in the nature of things sets its seal on the means of intervention' (*per* Justice M. Cheshin in *Sabiah v. IDF Commander in Judaea and Samaria* [21], at p. 369). Therefore we will not be deterred from exercising review of the decisions of the military commander under art. 78 of the Fourth Geneva Convention and the Amending Order merely because of the important security aspects on which the commander's decision is based. Notwithstanding, we will not replace the discretion of the military commander with our discretion. We will consider the legality of the military commander's discretion and whether his decisions fall into the 'zone of reasonableness' determined by the relevant legal norms that apply to the case. This was discussed — in the context of exercising r. 119 of the Defence (Emergency) Regulations, 1945, in the Gaza Strip — by President Shamgar, who said:

> 'But it should be understood that the court does not put itself in the shoes of the military authority making the decision… in order to replace the discretion of the commander with the discretion of the court. It considers the question whether, in view of all the facts, the use of the said measure lies within the scope of the measures that may be regarded, in the circumstances of the case, as reasonable, taking into account the acts of those involved in the activity that harms the security of the area whose case is being considered by the court' (HCJ 1005/89 *Agga v. IDF Commander in Gaza Strip* [31], at p. 539).

Thus, for example, we are not prepared to intervene in the decision of the Respondent that assigned residence constitutes an important mechanism for ensuring security in the territory. In this matter the petitioners argued before us that this measure is ineffective. This argument was considered in detail by the Appeals Boards, and they rejected it. Before us the Respondent presented the general picture in its entirety, and he gave examples of cases in which

serious terrorist activity was prevented by taking account of considerations such as that of assigned residence. In such circumstances, we will not replace the discretion of the Respondent with our own discretion (see HCJ 24/91 *Rahman v. IDF Commander in Gaza Strip* [32], at p. 335; *Janimat v. Central Commander* [13], at p. 655). Against this background, we will now turn to consider the specific cases that are before us. The Respondent assigned the place of residence of the three petitioners before us. Let us therefore consider the case of each petitioner.

From the general to the specific

Amtassar Muhammed Ahmed Ajuri (HCJ 7019/02)

31. Amtassar Muhammed Ahmed Ajuri (an unmarried woman aged 34) is the sister of the terrorist Ahmed Ali Ajuri. Much terrorist activity is attributed to the brother, Ahmed Ali Ajuri, including sending suicide bombers with explosive belts, and responsibility, *inter alia*, for the terrorist attack at the Central Bus Station in Tel-Aviv in which five people were killed and many others were injured. The Appeals Board (chaired by Col. Gordon), in its decision of 12 August 2002, held — on the basis of privileged material presented to it and on the basis of testimonies of members of the General Security Service — that the petitioner directly and substantially aided the unlawful activity of her brother, which was intended to harm innocent citizens. The Board determined that there was more than a basis for the conclusion that the petitioner knew about the forbidden activity of her brother — including his being wanted by the Israeli security forces — and that she knew that her brother was wounded when he was engaged in preparing explosives, and *prima facie* she also knew that her brother was armed and had hidden in the family apartment an assault rifle. It was also held that the petitioner aided her brother by sewing an explosive belt. The Board pointed out that, on the basis of privileged evidence, which it found 'reliable and up-to-date', it transpired that the petitioner indeed aided her brother in his unlawful activity. It held that this was a case of 'direct and material aid in the preparation of an explosive belt, and the grave significance and implications of this aid were without doubt clear and known [to the petitioner]'. Admittedly, the petitioner testified before the Board that she was not involved in anything and did not aid her brother, but the Board rejected this testimony as unreliable. It pointed out that 'we found her disingenuous and evasive story totally unreasonable throughout her testimony before us, and it was clear that she wished to distance herself in any way possible from the activity of her brother… her disingenuous story left us with a clear

impression of someone who has something to hide and this impression combines with the clear and unambiguous information that arises from the privileged material about her involvement in preparing an explosive belt.' For these reasons, the appeal of the petitioner to the Appeals Board was denied. It should also be pointed out that in the Respondent's reply in the proceeding before us — which was supported by an affidavit — it was stated that 'the petitioner aided her brother in the terrorist activity and, *inter alia*, sewed for his purposes explosive belts' — explosive belts, and not merely one explosive belt.

32. It seems to us that in the case of the petitioner, the decision of the Respondent is properly based on the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. Very grave behaviour is attributed to the petitioner, and the danger deriving therefrom to the security of the State is very real. Thus, for example, the petitioner prepared more than one explosive belt. It was argued before us that the petitioner did not know about her brother's activity. This story was rejected by the Appeals Board, and we will not intervene in this finding of the Appeals Board. The behaviour of the petitioner is very grave. It creates a significant danger to the security of the area, and it goes well beyond the minimum level required by the provisions of art. 78 of the Fourth Geneva Convention and the Amending Order. Indeed, assigning the place of residence of the petitioner is a rational measure — within the framework of the required proportionality — to reduce the danger she presents in the future. We asked counsel for the State why the petitioner is not indicted in a criminal trial. The answer was that there is no admissible evidence against her that can be presented in a criminal trial, for the evidence against her is privileged and cannot be presented in a criminal trial. We regard this as a satisfactory answer. Admittedly, the petitioner is subject to administrative internment (which will end in October 2002). However the possibility of extending this is being considered. It seems to us that the choice between administrative internment and assigned residence, in the special case before us, is for the Respondent to make, and if he decided to terminate the administrative internment and determine instead assigned residence, there is no basis for our intervention in his decision. This is the case even if his decision was dictated, *inter alia*, by considerations of a general deterrent, which the Respondent was entitled to take into account.

Kipah Mahmad Ahmed Ajuri (the first petitioner in HCJ 7015/02)

33. Kipah Mahmad Ahmed Ajuri (hereafter — the first petitioner) (aged 38) is married and is the father of three children. He is the brother of the petitioner. His brother is, as stated, the terrorist Ahmed Ali Ajuri, to whom very grave terrorist activity is attributed (as we have seen). The petitioner before us admitted in his police interrogation (on 23 July 2002) that he knew that his brother Ali Ajuri was wanted by the Israeli security forces 'about matters of explosions' and was even injured in the course of preparing an explosive charge. The first petitioner said in his interrogation that his brother stopped visiting his home because he was wanted, and also that he carried a pistol and had in his possession two assault rifles. Later on during his interrogation (on 31 July 2002) he admitted that he knew that his brother was a member of a military group that was involved 'in matters of explosions'. He also said that he saw his brother hide a weapon in the family home under the floor, and that he had a key to the apartment in which the group stayed and prepared the explosive charges. He even took from that apartment a mattress and on that occasion he saw two bags of explosives and from one of these electric wires were protruding. On another occasion, the first petitioner said in his police interrogation that he acted as look-out when his brother and members of his group moved two explosive charges from the apartment to a car that was in their possession. On another occasion — so the first petitioner told his interrogators — he saw his brother and another person in a room in the apartment, when they were making a video recording of a person who was about to commit a suicide bombing, and on the table in front of him was a Koran. The first petitioner said in his interrogation that he brought food for his brother's group.

34. In his testimony before the Appeals Board, the first petitioner confirmed that he knew that his brother was wanted and that he knew his friends. He testified that he did indeed have a key to his brother's apartment and he removed from it a mattress, although he did not know that the apartment was a hide-out. He confirmed in his testimony that he went to the apartment and saw two bags there. He confirmed that he saw his brother make a video recording of someone when a Koran was on the table, and that on another occasion he saw his brother finish hiding an assault rifle in the floor of the house. The first petitioner confirmed in his testimony that he saw his brother and his friends remove from the residential house two bags and that he was told that they contained explosives, although he said that he was not asked to be a look-out or warn those present.

35. The Appeals Board examined the statements of the first petitioner and also the evidence presented to it and the testimony that it heard. It held in its decision (on 12 August 2002) that the first petitioner was indeed involved in the activity of his brother Ali Ajuri. The Appeals Board held, as findings of fact for the purpose of its decision, that the first petitioner did indeed act as stated in his statements during the interrogation, and not merely as he said in his testimony. In this respect, the Board pointed out the fact that the first petitioner was aware of his brother's deeds, his brother's possession of the weapon and hiding it. The Board also held that the first petitioner knew of the hide-out apartment, had a key to it and removed a mattress from it. The Board held that the first petitioner knew about the explosive charges in the apartment and did indeed act as a look-out when the charges were moved. The Board further pointed to the occasion when the first petitioner brought food to the members of the group, after he saw them make a video recording of a youth who was about to perpetrate a suicide bombing. The Board said that 'the gravity of the deeds and the extensive terrorist activity of [the first petitioner's] brother is very grave. The involvement of [the first petitioner] with his brother is also grave, and it is particularly grave in view of the fact that [the petitioner] does not claim that his wanted brother forced him to help him, from which it follows that he had the option not to help the brother and collaborate with him.'

36. We think that also in the case of the first petitioner there was no defect in the decision of the Respondent. The first petitioner helped his brother, and he is deeply involved in the grave terrorist activity of that brother, as the Appeals Board determined, and we will not intervene in its findings. Particularly serious in our opinion is the behaviour of the first petitioner who acted as a look-out who was supposed to warn his brother when he was involved at that time in moving explosive charges from the apartment where he was staying — and from which the first petitioner took a mattress in order to help his brother — to a car which they used. By this behaviour the first petitioner became deeply involved in the grave terrorist activity of his brother and there is a reasonable possibility that he presents a real danger to the security of the area. Here too we asked counsel for the Respondent why the first petitioner is not indicted in a criminal trial, and we were told by him that this possibility is not practical. The measure of assigning the place of residence of the first petitioner is indeed a proportionate measure to prevent the danger he presents, since the acts of this petitioner go far beyond the minimum level required under the provisions of art. 78 of the Fourth Geneva Convention. Since this is so, the respondent was entitled to take into account

the considerations of a general deterrent, and so to prefer the assigned residence of this petitioner over his administrative internment. There is no basis for our intervention in this decision of the Respondent.

Abed Alnasser Mustafa Ahmed Asida (the second petitioner in HCJ 7015/02)

37. Abed Alnasser Mustafa Ahmed Asida (hereafter — the second petitioner) (aged 35) is married and a father of five children. He is the brother of the terrorist Nasser A-Din Asida. His brother is wanted by the security forces for extensive terrorist activity including, *inter alia*, responsibility for the murder of two Israelis in the town of Yitzhar in 1998 and also responsibility for two terrorist attacks at the entrance to the town of Immanuel, in which 19 Israelis were killed and many dozens were injured. The second petitioner was interrogated by the police. He admitted in his interrogation (on 28 July 2002) that he knew that his brother was wanted by the Israeli security forces for carrying out the attack on Yitzhar. The second petitioner said that he gave his brother food and clean clothes when he came to his home, but he did not allow him to sleep in the house. He even said that he gave his private car on several occasions to his brother, although he did not know for what purpose or use his brother wanted the car. He further said that he stopped giving his brother the car because he was afraid that the Israeli security forces would assassinate his brother inside his car. On another occasion, he drove his wanted brother to Shechem (Nablus), although on this occasion too the second petitioner did not know the purpose of the trip. The second petitioner also said that he saw his brother carrying an assault rifle. On another occasion he helped another wanted person, his brother-in-law, by giving him clean clothes, food and drink when he visited him in his home, and even lent him his car and drove him to Shechem several times. While the second petitioner claimed that he did not know for what purpose the car was used and what was the purpose of the trips to Shechem, the second petitioner told the police that he drove his brother to the hospital when he was injured in the course of preparing an explosive charge and he lent his car — on another occasion — in order to take another person who was also injured while handling an explosive charge; at the same time, the second petitioner claimed in his interrogation that he did not know the exact circumstances of the injury to either of those injured.

38. In his evidence before the Appeals Board, the second petitioner confirmed that he knew that his brother was wanted. He testified that he did indeed drive his brother but he did not give him the car. He testified that he

saw his brother with a weapon and that he wanted to give him food during the brief visits to him, but he did not have time. The Appeals Board, in its decision (on 12 August 2002), held that the second petitioner did indeed know of the deeds of his brother and that he possessed a weapon and that he was in close contact with him, including on the occasions when he gave him — at his home — clean clothes and food. The Board held that the second petitioner did not only drive his wanted brother in his car but also lent the car to his brother and to another wanted person. The Board pointed out that 'we are not dealing with minor offences', but it added that 'the contact between the [second petitioner] and his brother and his material help to him… are significantly less grave than those of [the first petitioner]'. The Board added, against this background, that 'we direct the attention of the area commander to the fact that his personal acts are less grave than those of [the first petitioner], for the purpose of the proportionality of the period'.

39. We are of the opinion that there was no basis for assigning the place of residence of the second petitioner. Admittedly, this petitioner was aware of the grave terrorist activity of his brother. But this is insufficient for assigning his place of residence. The active deeds that he carried out, in helping his brother, fall below the level of danger required under the provisions of art. 78 of the Fourth Geneva Convention and the provisions of the Amending Order. His behaviour does not contain such a degree of involvement that creates a real danger to the security of the area, thereby allowing his place of residence to be assigned. This petitioner claimed — and the Appeals Board did not reject this — that he did not know what use his brother made of the car that the second petitioner made available to him, and that he did not know, when he drove his brother, what was the brother's purpose. It should be noted that we think that the behaviour of the second petitioner — even though it derived from close family ties — was improper. It is precisely that help that family members give to terrorists that allows them to escape from the security forces and perpetrate their schemes. Nonetheless, the mechanism of assigned residence is a harsh measure that should be used only in special cases in which real danger to security of the area is foreseen if this measure is not adopted (cf. HCJ 2630/90 *Sarachra v. IDF Commander in Judaea and Samaria* [33]). We do not think that the case of the second petitioner falls into this category. It seems to us that the danger presented to the security of the area by the actions of the second petitioner does not reach the level required for adopting the measure of assigned residence. It appears that the Appeals Board was also aware of this, when it considered the possibility of reducing the period of the assigned residence. In our opinion, the case of the second

petitioner does not fall within the 'zone of reasonableness' prescribed by art. 78 of the Fourth Geneva Convention and the Amending Order, and there is no possibility of assigning the residence of this petitioner. Admittedly, we are prepared to accept that assigning the place of residence of the second petitioner may deter others. Nonetheless, this consideration — which may be taken into account when the case goes beyond the level for adopting the mechanism of assigned residence — cannot be used when the conditions for exercising art. 78 of the Fourth Geneva Convention and the Amending Order do not exist.

Conclusion

40. Before we conclude, we would like to make two closing remarks. *First*, we have interpreted to the best of our ability the provisions of art. 78 of the Fourth Geneva Convention. According to all the accepted interpretive approaches, we have sought to give them a meaning that can contend with the new reality that the State of Israel is facing. We doubt whether the drafters of the provisions of art. 78 of the Fourth Geneva Convention anticipated protected persons who collaborated with terrorists and 'living bombs'. This new reality requires a dynamic interpretive approach to the provisions of art. 78 of the Fourth Geneva Convention, so that it can deal with the new reality.

41. *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 Judaea 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. This was well-expressed by Lord Atkin in *Liversidge v. Anderson* [37], at p. 361, when he said:

> 'In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which… we are now fighting, that the judges… stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.'

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* [34], 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* [3], 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' (*Sabiah v. IDF Commander in Judaea and Samaria* [21], 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* IsrSC [35], at p. 491, citing the remarks of then-Vice-President Justice Landau in HCJ 390/79 *Dawikat v. Government of Israel* [36], at p. 4).

The result is that we are denying the petition in HCJ 7019/02, and the petition in HCJ 7015/02, in so far as it concerns the first petitioner. We are making the show-cause order absolute with regard to the second petitioner in HCJ 7015/02.

Vice-President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice M. Cheshin

I agree.

Justice T. Strasberg-Cohen

I agree.

Justice D. Dorner

I agree.

Justice Y. Türkel

I agree.

Justice D. Beinisch

I agree.

3 September 2002.

HCJ 7019/02 — petition denied.

HCJ 7015/02 — petition of the first petitioner denied; petition of the second petitioner granted.