The Supreme Court sitting as a High Court of Justice

HCJ 8091/14

The Petitioners:	1.	HaMoked: Center for the Defense of the Individual
	2.	Bimkom – Planners for Planning Rights
	3.	B'Tselem – The Israeli Information Center for Human Rights
	4.	The Public Committee against Torture in Israel
	5.	Yesh Din – Volunteers for Human Rights Organization
	6.	Adalah – The Legal Center for Arab Minority Rights
	7.	Physicians for Human Rights
	8.	Shomrei Mishpat – Rabbis for Human Rights

v.

The Respondents:	1.	Minister of Defense
	2.	Commander of Military Forces in the West Bank

Petition for an order nisi

Hearing Date: 11 Kislev 5775 (December 3, 2014)

For the Petitioners: Adv. Michael Sfard; Adv. Noa Amrami; Adv. Roni Pelli

For the Respondents: Adv. Aner Hellman

Before: Justice E. Rubinstein, Justice E. Hayut, and Justice N. Sohlberg

Judgment

Justice E. Rubinstein:

1. This Petition concerns the Respondents' power to employ Regulation 119 of the Defense (Emergency) Regulations, 1945 (Regulation 119, or the Regulation) in a manner that permits the confiscation, demolition and sealing of the houses of persons suspected of involvement in hostile activity against the State of Israel (the Regulation was originally promulgated during the British Mandate). The Petitioners ask that this Court issue a declaratory order whereby the exercise of Regulation 119 in this manner and for such purposes is unlawful since, in their opinion, it is repugnant to international law and to Israeli constitutional and administrative law.

The Parties' Arguments

2. As aforesaid, this Petition focuses upon Regulation 119 (in its current language) which reads as follows:

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

3. The Petitioners are eight organizations that act for the protection of human rights in Israel and in the Administered Territories. They do not dispute that the central arguments raised in this Petition regarding the lawfulness of the exercise of the said Regulation 119 have been raised and rejected in this Court in the past. However, they argue that this Court's rulings in this regard were issued many years ago, in the context of only two judgments and with laconic reasoning – HCJ 434/79 *Sahwil v. Commander of the Judea and Samaria Region*, IsrSC 34 464 (hereinafter: the *Sahwil* case) and HCJ 897/86 *Ramzi Hanna Jaber v. GOC Central Command et al.* IsrSC 41(2) 522 (hereinafter: the *Jaber* case) – and it is time to revisit the normative justification which, at the time, grounded those judgments. It was further argued that since the time these issues were addressed, there have been significant developments in international law, including the establishment of the various war-crime tribunals throughout the world, and it is therefore necessary to revisit the various issues. Note that the vast majority of the Petitioners' arguments concern the State's authority to employ Regulation 119 in the Administered Territories, and not within the borders of the State of Israel.

4. On the merits, it was primarily argued that Regulation 119 is subject to the provisions of international law, which prohibit the demolition of houses as constituting collective punishment and therefore, as aforesaid, the demolition of houses should not be permitted by virtue of the Regulation. The Petitioners' arguments are supported by opinions of legal experts: Prof. Yuval Shani, Prof. Mordechai Kremnitzer, Prof. Orna Ben Naftali and Prof. Guy Harpaz.

5. With respect to the normative hierarchy, it was argued that, contrary to this Court's ruling in the *Sahwil* case and in the *Jaber* case, Regulation 119 is subject to the norms and prohibitions of international law. This is particularly so when it pertains to the application of the Regulation in the Administered Territories, inasmuch as the argument that domestic law, including Regulation 119, prevails over international law, is not applicable. It is argued that Regulation 119 constitutes foreign law that Israel "inherited" from the previous regime, and therefore the rationales for respecting domestic law, even when it conflicts with international law, do not apply. It was further argued in this context that in accordance with the presumption of compatibility, which was adopted by our legal system as well, Regulation 119 ought to be interpreted, insofar as possible, in accordance with the provisions of international law, i.e., such that the demolition of houses by virtue thereof is impermissible as currently carried out.

6. Regarding the provisions of international law, it was argued that there is a consensus in legal academia that the demolition of houses contravenes the customary international prohibition on collective punishment, both with respect to the prohibition on demolition of the property of a protected person without an operational need, and with regard to disproportionate use of force, and is therefore unlawful. This is especially so when the subject matter is the law of occupation which applies, so it is claimed, to the Administered Territories, even if the declared purpose of the Respondents in our case is solely deterrence. Thus – as argued – the question is not the underlying intention, but the result, i.e. the demolition of houses of innocent persons due to the activity of others who are related to them. The prohibition on collective punishment was initially established in Article 50 of the Annex to the Hague Convention: Regulations Respecting the Laws and Customs of War on Land, and is currently established in Article 33 of the Fourth Geneva Convention, which states as follows:

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited [Geneva Convention Relative to the Protection of Civilians During War, 1949 KITVEI AMANA 1, p. 559].

In addition, the Petitioners refer to the Red Cross Commentary of 1987 on Protocol I of 1977 to the Fourth Geneva Convention, which determines the following:

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

7. In addition, it was argued that the Regulation also violates basic principles of Jewish law. In this context, the Petitioners refer to the affair of the destruction of the

city of Sodom in the book of Genesis, in which Abraham says to God: "Far be it from You to do a thing such as this, to put to death the righteous with the wicked so that the righteous should be like the wicked. Far be it from You! Will the Judge of the entire earth not perform justice?" (Genesis 18:25); and to the affair of Korach, in which Moses and Aaron claim before God: "If one man sins, shall You be angry with the whole congregation?" (Numbers 16:22). Rashi comments there: "The Holy One, Blessed Be He said: You have spoken well. I know and will make known who sinned and who did not sin".

8. It was further argued that the demolition of houses is also forbidden by virtue of the prohibition on arbitrary destruction of property, which is established, *inter alia*, in Article 53 of the Fourth Geneva Convention, and which – it is argued – is deemed part of customary international law:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Because the demolition of the houses cannot be said to amount to "military operations [where] such destruction is rendered absolutely necessary", it was argued that Regulation 119 should not be interpreted as permitting such demolitions.

9. The Petitioners also refer to the position of international criminal law on the issue. It is argued that although Israel has not ratified the Rome Statute of the International Criminal Court of 1998 (the "Rome Statute"), the war crimes defined therein amount to severe violations of humanitarian international law, and therefore, the provisions therein are binding on Israel. So for example, Article 8(2)(a)(4) of the Rome Statute prohibits extensive destruction of property not justified by military necessity, and accordingly, the International Criminal Tribunal for the former Yugoslavia – ICTY – ruled that such destruction is only permitted when "such destruction is made absolutely necessary by military operations" (*The Prosecutor v. Blaskic*, IT-95-14-T, par. 157 (2000)), which is not the case here, where the purpose of the destruction is, at most, deterrence.

10. It was further argued that the exercise of Regulation 119 for the purpose of the demolition of houses violates the principle of proportionality in international law and Israeli law. This is the case since the harm caused to innocent civilians by the demolition of their houses is tremendous, while the benefit from the demolition of the houses – ostensibly deterrence – is not achieved. In this context, the Petitioners refer to a presentation assembled by a committee headed by Major General Ehud Shani, which examined the issue of house demolitions in the years 2004-2005. The presentation stated that the demolition of houses "intensifies the historic homelessness trauma" (Slide No. 14), and leads to "illegitimacy; absurdly" (Slide No. 27), and hence the conclusion – "the act is no longer legitimate and is borderline legal!!!" (Slide No. 28).

11. Peripherally, it was argued that Regulation 119 is exercised in a discriminatory manner. This is the case since the Regulation has been exercised only against the Arab

population, although Jewish terrorists have been caught in the past who were suspected, indicted or convicted of crimes no less severe that those of the Arabs. It was further claimed in this regard that the argument previously made by the security forces that deterrence is not necessary among the Jewish population but only among the Arab population, lacks factual foundation and should be rejected.

12. Conversely, the State claims that the Petition ought to be summarily dismissed. First, it is argued that it is a theoretical, academic petition that is not based on a concrete case, which is sufficient for dismissal. Second, it is argued that all of the claims that are made by the Petitioners were raised and rejected in the past in this Court, the Petitioners in this case were even a party to some of these petitions, and there is no reason to reexamine the issue. The State further noted that the power to demolish houses by virtue of Regulation 119 was exercised only in isolated and particularly severe cases in the last decade, and recently, in view of the wave of terrorism in Jerusalem, the Commander of the Home Front Command issued six demolition orders for buildings in which terrorists who are residents of East Jerusalem lived. One order was carried out, while the case of five others is still pending before this Court in the context of separate petitions that were filed: HCJ 8066/14 and HCJ 8070/14 – the murderous terrorist attack at the synagogue in Har Nof, in which four persons were murdered and others injured; HCJ 8025/14 – a hit-and-run terrorist attack close to Rabbi Moshe Sachs Street in Jerusalem, in which two persons were murdered and others injured; HCJ 7823/14 – another hit-and-run terrorist attack close to Rabbi Moshe Sachs Street in Jerusalem, in which one person was murdered and others injured; HCJ 8024/14 – the stabbing of a person close to the Menachem Begin Heritage Center in Jerusalem, critically wounding him.

13. On the merits, it was argued that this does not constitute collective punishment and harm to innocent persons. This is so because in many cases of denial of petitions concerning the exercise of Regulation 119 for the purpose of demolishing houses, the Court ruled that the petitioners had not acted in good faith, and were to a certain extent aware of the terrorist's activity. It was further noted that, in any event, primary legislation prevails over general principles of international law, and therefore, it is not necessary to examine Regulation 119 under the provisions of customary international law. It was also noted that many petitions which pertain to Regulation 119 – including all of the individual petitions that are currently pending before this Court – contemplate the exercise of the Regulation vis-à-vis residents of the State of Israel, and therefore the claims pertaining to the applicability of the law of occupation in the Territories are irrelevant.

The Hearing before the Court

14. In the hearing before us, counsel for the Petitioners emphasized their argument that even if the purpose underlying the demolition of the houses is deterrence, this does not mitigate the disproportionate harm to innocent persons as a result of the demolition. It was further argued, as aforesaid, that even if deterrence is achieved – which was not proven as argued by the State – international law prohibits collective punishment as a means of deterrence, and therefore the exercise of Regulation 119 for

the aforesaid purpose is wrongful *ab initio*. It was further claimed that in contradiction to the claims in the State's response, the issues at bar have not yet been thoroughly deliberated by this Court, and therefore it is proper that the issue be deliberated now, and before an expanded panel.

15. Counsel for the State responded that it was only several months ago that this Court denied a similar petition which sought to revisit issues of international law, on the grounds that there was no reason to revisit arguments that were previously raised and rejected. As for the collective punishment argument, it was claimed that because the subject matter is that of demolishing the house in which the specific terrorist lived, we are not concerned with collective punishment, but only deterrence. On the merits, it was argued that in a conflict between international law and explicit Israeli law, Israeli law prevails, and therefore the power conferred on the military commander by virtue of Regulation 119 prevails over the customary international law on that issue. As for the discrimination argument, counsel for the State answered that, as aforesaid, we are dealing with deterrence, which is not necessary among the Jewish population, and therefore this is not discrimination but rather a relevant distinction.

Decision

16. Undeniably, this Petition, by its nature, raises difficult questions. As I noted in the courtroom, it may be easier and more convenient to take the side of the Petitioners over that of the Respondents, and there are certain instances which unquestionably raise a moral dilemma. As I sit to write this judgement, I am like that Talmudic judge mentioned in Jewish law sources, the amora Rav, who said, as he set out to court (Babylonian Talmud, Sanhedrin 7b) "He goes out to perish at his own will" (meaning that should he err, he will be liable for the transgression); and it was further stated that "a judge must always see himself as if a sword rests between his thighs and hell is gaping beneath him"… (Babylonian Talmud, Yevamot 109b), and we judges are also subject to the warning to witnesses (Mishna, Sanhedrin 4:2) "and perhaps you will say, what have we to do with this trouble…", which Rashi (Sanhedrin 37b) explains to mean "to become involved in this trouble, even for sake of the truth". However, like the witness, we are under the obligation that: "he who fails to say it, shall bear his iniquity" (Leviticus 5:1), as interpreted by Rashi to mean: "you bear the duty and the liability for the transgression should you fail to speak of what you have witnessed". This is also the task of the judge, who has no choice but to render judgment. In a similar case, (HCJ 6288/03 *Sa'ada v. GOC Home Front Command*, IsrSC 58(2) 289, 294 (2003) (hereinafter: the *Sa'ada* case), Justice Turkel stated that "the idea that the terrorist's family members are to bear his transgression is morally burdensome... But the prospect that demolishing or sealing the house will prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be the victims of terrorist horror, more than it is appropriate to spare the house's tenants. There is no avoiding this".

The problem is exacerbated by the fact that the Petition is supported by expert opinions, although the law does not require an expert opinion, while the position of the State mainly relies on threshold arguments. However, we shall note from the outset that we do not deem it necessary to reopen questions that were decided by this Court, even if the reasons provided did not satisfy the Petitioners, since similar claims were raised and dismissed but a few months ago in HCJ 4597/15 *Awawdeh v. Military Commander of the West Bank Area* (July 1, 2014) (hereinafter: the *Awawdeh* case);

and in HCJ 5290/14 *Qawasmeh v. Military Commander of the West Bank Area* (August 11, 2014) (hereinafter: the *Qawasmeh* case). We will address the matters concisely, and will first state that limited use should be made of Regulation 119, and indeed, it was not used for several years, also due to the recommendation of the aforesaid Shani Committee. However, it has been argued before us that the circumstances recently emerging – of merciless, repeated killings of innocent victims – require the utilization of the Regulation, and we shall address this matter. Furthermore, the issue should be viewed within the broad context of the war on terror of the State of Israel and the entire world. This war, "for many are the dead that it has felled, and numerous are all its victims (Proverbs 7:26), compels Israel and other nations to exercise measures that were never sought in the first place.

17. We will begin with a review of the judicial history of Regulation 119 in this Court. It has been held that the purpose of Regulation 119 is deterrence and not punishment; its goal is to provide the military commander with tools for effective deterrence, a purpose the importance of which is undisputable in itself (see HCJ 698/85 *Daghlas v. Military Commander of the Judea and Samaria Area*, IsrSC 40(2) 42, 44 (1986) (hereinafter: the *Daghlas* case), HCJ 4772/91 *Khizran et al. v. IDF Commander*, IsrSC 46(2) 150 (1992), and see the dissenting opinion of Justice Cheshin; HCJ 8084/02 *Abbasi et al. v. GOC Home Front Command*, IsrSC 57(2) 55,60 (2003) (hereinafter: the *Abbasi* case); the *Sa'ada* case, paragraph 19; the *Qawasmeh* case, paragraph 23). As to the question of whether the demolition of a specific building will create effective deterrence, it was held that this Court does not step into the shoes of the security forces, which are vested with the discretion to determine which measure is effective and should be used for the purpose of achieving deterrence (HCJ 2006/97 *Ghanimat v. OC Central Command*, IsrSC 51(2) 651, 653-654 (1997); HCJ 9353/08 *Hisham Abu Dheim et al. v. GOC Home Front Command*, paragraph 5 (2009) (hereinafter: the *Hisham* case); the *Awawdeh* case, paragraph 20; the *Qawasmeh* case, paragraph 25). The State's response in the individual petitions was supported by an affidavit of the Home Front Commander, Major-General A. Eisenberg. It is important to bear in mind, as problematic as this matter may be, that demolitions were only recently approved in the *Awawdeh* case, and the *Qawasmeh* case.

18. Moreover, the damage caused to the property of the inhabitants of the house, to the extent that they were not involved in the offence for which the demolition was prescribed, cannot be disputed. It was further held that although the Regulation's validity is not subject to the provisions of Basic Law: Human Dignity and Liberty since they are deemed "law that was in force prior to the taking of effect of the Basic Law" (section 10 of the Basic Law), they are to be construed according to the Basic Law, and the power thereunder is to be exercised proportionately (HCJ 5510/92 *Turkeman v. GOC Central Command*, IsrSC 48(1) 217; the *Abbasi* case, at p. 59; the *Sa'ada* case, at pp. 291-292; the *Hisham* case, paragraph 5; the *Awawdeh* case, paragraph 17; the *Qawasmeh* case, paragraph 22). I wish to stress this issue forcefully, and will return to the matter below.

As a consequence of this approach, the following criteria, *inter alia*, were prescribed, defining the boundaries of the authority of the military commander when seeking to exercise the power vested in him under Regulation 119, and ordering the demolition of the house of a suspect of terrorist acts:

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

Indeed, according to the case law this is an open list, and the parameters are to be considered as a whole. In other words, the choice to demolish the entire house, in lieu of sealing a room or demolishing a certain part of the house, does not necessarily indicate that the measure that was chosen is disproportionate and justifies the intervention of this Court in the discretion granted, as aforesaid, to the security forces (the *Abassi* case, pp. 60-61; the *Qawasmeh* case, paragraph 7). Similarly, it is not necessary to show that the inhabitants of the house were aware of the suspect's terrorist activity (the *Alamarin* case, paragraph 9; the *Salem* case, p. 359; the *Hisham* case, paragraph 7). As aforesaid, proportionality is examined, first and foremost, in relation to the severity of the act that is attributed to the suspect, from which the required degree of deterrence is derived, and I hereby stress and reiterate the aforesaid criteria, and the meticulous discretion required.

19. It should be further noted that although this Petition primarily challenges the exercise of Regulation 119 in the Administered Territories, this Court has ruled that the Regulation applies to the residents of the Territories as well as to the residents of the State of Israel (the *Hisham* case, paragraph 5; the Abassi case, p. 60).

And now to the Petitioners' arguments.

20. I will begin by noting that the question of the authority to use Regulation 119 and the discretion as to the manner of its application, i.e. reasonableness, are to be distinguished. As shall be presented below, we shall see – with all due respect – that the authority exists, and that the main question is that of reasonableness and discretion. Referring to the comprehensive discussion held by the Major General Shani Committee at the time, in the previous decade – a Committee that included a senior jurist, the head of the IDF International Law Department – the major points of which are included in the presentation that was submitted, it reveals that use of such a measure is legal under both international and domestic law. As to reasonableness, it was found that "there is a consensus among intelligence agencies about the relation between the demolition of terrorists' homes and deterrence. In view of the sensitivity, the Central Command conducts a balanced, orderly procedure with

respect to the demolition of homes of terrorists… however, deterrence is to be weighed only as a *part* of the considerations" (from the Committee's presentation, the emphasis appears in the original). It is noted, however, that according to international and domestic public tests, the act is no longer legitimate and is borderline legal. And yet, after a period of several years during which the Regulation was not used in Jerusalem (2008-2009), and for an even longer period in the Judea and Samaria Area (2005-2014) – see paragraph 23 of the opinion of the Deputy Chief Justice in the *Awawdeh* case – use of the Regulation has now been renewed due to the frequent and heinous events of intentional harm to innocent people in Jerusalem, murder and attempted murder, as specified above.

21. As to the authority, the arguments themselves are not new, but have rather been concentrated together, and as noted by the State, some of them were already raised in the past by some or all of Petitioners. In a nutshell, we would note that from a "purely" legal perspective, the territory of the State of Israel and Jerusalem should be distinguished from the Judea and Samaria Area, a distinction which was not made in the Petition. Within the State of Israel itself, Regulation 119 constitutes, as aforesaid, the law – primary legislation – the validity of which is preserved under Section 10 of Basic Law: Human Dignity and Liberty, which treats of the preservation of laws. I would parenthetically note that the Defense (Emergency) Regulations, 1945 – originally promulgated under the British Mandate, as aforesaid, which was the object of the struggle of the Jewish community at the time – are not favored by Israeli jurists, and the replacement thereof was contemplated in the past, albeit not implemented, perhaps due to the chronic security situation and its hardships. However, this is not the place to deliberate the matter. On the merits, it is clear that the validity of the Regulation and the authority to use it within the State of Israel cannot be challenged. Nevertheless, our substantive judicial approach, as distinct from the formal analysis, does not distinguish between the use of the Regulation in Israeli territory and in the Judea and Samaria Area and the reasonableness thereof, and it has already been stated that where officials of an Israeli authority exercise powers in the Judea and Samaria Area, it is to be regarded as based on the same fundamental principles of Israeli law -- in the words of (then) Justice Barak: "Every Israeli soldier carries with him, in his backpack, the rules of customary international public law concerning the laws of war and the fundamental principles of Israeli administrative law" (HCJ 393/82 *Jam'iat Iscan Al-Ma'almoun Al-Taounieh Al-Mahdudeh Al-Masauliyeh v. IDF Commander in the Judea and Samaria Area*, IsrSc 37(4), 785, 810 (1983); and see also HCJ 591/88 *Taha v. Minister of Defense***,** IsrSC 45(2) 45, 52 (1991)).

As for the application of international law, as far as the Judea and Samaria Area is concerned, and as the Petitioners have noted themselves, this Court has ruled in several cases that the provisions of Regulation 119 are compatible with the law that applies in the Administered Territories (the *Sahvil* case, paragraph 4; the *Jaber* case, pp. 525-526; HCJ 358/88 *Association for Civil Rights in Israel v. Central District Commander*, IsrSC 43(2) 529, 532-533 (1989) [http://versa.cardozo.yu.edu/opinions/association-civil-rights-v-central-district-commander]). The authority vested in the military commander by virtue of Regulation 119, which he "inherited" from the administration that governed the region prior to Israeli rule, constitutes, after all, one of the tools available to him for the purpose of accomplishing his main duty, as directed by Article 43 of the Hague

Regulations: "to take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Further, as stated by Prof. Dinstein, "The choice of means deemed necessary to contend with the problems of control and security is left to the Occupying Power" (Yoram Dinstein THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, 93 (2009). It should be noted, that the author criticizes the demolition and sealing of houses in a considerable number of cases (e.g., at pp. 156 and 159). See also: Article 27 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949; J.S. PICTET, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN. PERSONS IN TIME OF WAR, 207 (Geneva, 1958). And as stated by Stone in respect of such matters: "[i]t would thus be very strange indeed to hold that the occupant was forbidden to maintain the existing law when this was necessary for his security" (JULIUS STONE NO PEACE, NO WAR IN THE MIDDLE EAST, 15 (1969)).

22. In addition, the 1949 Geneva Conventions, and the preceding 1907 Hague Regulations, were designed and signed at a period that is different to our own. The terrorism with which the world must contend, the State of Israel being no exception, presents complicated challenges since the terrorist organizations do not abide by these or other conventions (see, for example, Hans-Peter Gasser, *Acts of Terror, "Terrorism" and International Humanitarian Law*, 847 INTERNATIONAL REVIEW OF THE RED CROSS, 547 (2002); Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers fighting; the Last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 311 (2005); *The Battle of the 21st Century – Democracy fighting Terror* (Forum Iyun, Dan Meridor, Chairman, Haim Fass (ed.), , The Israel Democracy Institute, 5767-2006). The matter at bar should be considered within the context of the war on terrorism, which was recently referred to by the Pope as a "Piecemeal World War III" (September 2014). It seems that the cases depicted in the aforesaid individual petitions speak for themselves. Thus, the humanitarian provisions of the Hague Convention (IV), which were assumed by Israel despite the fact that it did not recognize the application of the Convention from a legal perspective (H. Adler, *Laws of Occupation*, R. SABEL, (ed.), INTERNATIONAL LAW 590-591 (2010) (Hebrew); Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, M. SHAMGAR (ed.), MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980 – THE LEGAL ASPECTS, Volume I, 32 (1982) (Hebrew)), are to be construed in a manner that will preserve their spirit and realize their underlying purposes, while concurrently permitting the State of Israel to protect the security of its residents in the most basic sense of the word. As I have had occasion to state in the past:

> The relationship between human rights issues and the security needs and challenges will remain on the agendas of Israeli society and the Israeli courts for years to come… The inherent tension between security and human rights issues will, therefore, persist. The Court will seek a balance between security and rights such that security is neither falsely used nor abandoned (E. Rubinstein, *On Basic Law: Human Dignity and Liberty and the Security Establishment*, 21 IYUNEI MISHPAT 21, 22 (5758) (Hebrew); see also, E. Rubinstein *On Security and Human Rights at Times of*

Fighting Terrorism, 16 IDF MILITARY LAW REVIEW, 765, 766-771 (5762-5763) (Hebrew), and E. RUBINSTEIN, PATHS OF GOVERNANCE AND LAW, 15-40 (5763-2003) (Hebrew); HCJ 1265/11 *Public Committee Against Torture in Israel v. Attorney General*, paragraphs 17-19 (2012)).

23. Further, the Petitioners' claim that any demolition whatsoever, no matter the size and independent of the specific circumstances, necessarily constitutes collective punishment that is prohibited, as aforesaid, under Section 33 of the Fourth Geneva Convention, cannot be accepted (see on this matter – E. GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM - THE LEGAL AND MORAL ASPECTS, 224 (5764-2004) (Hebrew) (hereinafter: GROSS)). I will refrain from bringing examples of the brutal use of house demolition made by "civilized" nations, collectively and not individually, in the distant and near past; see examples in Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 Y.J.I.L 1, 8 (1994). This also holds true for the prohibition on house demolition appearing, as aforesaid, in Article 53 of the Fourth Geneva Convention. That prohibition carves out certain cases, namely, it is not precluded under the Article where the action is necessary on military grounds. As stated by GROSS in this regard, "military needs are to be understood at times of combat or armed activity. In that sense, systematic acts of terror that form part of a strategy or armed struggle meet such definition… demolition of a house to the end that it will not be used again for terror purposes… should be deemed a 'military need'" (GROSS, 227-228). The question is, as aforesaid, one of proportionality, and we already clarified that the disproportionate use of said authority by the military commander, which amounts to collective punishment that is prohibited under international law, is precluded (the *Daghlas* case, p. 44, paragraph 23, and see also see, the *Awawdeh* case, paragraph 16 and the references there).

24. Moreover, as this Court has held, "The law of belligerent occupation… imposes conditions on the use of this authority [to maintain order and public life – E.R.]. This authority must be properly balanced against the rights, needs, and interests of the local population" HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel*, IsrSC 58(5) 807, para. 34 at p. 833, *per* President Barak (2004) [http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.pdf] (the *Beit Sourik* case); and see also HCJ 10356/02 *Haas v. IDF Commander in the West Bank*, IsrSC 58(3) 443, 455-456 (2004) [http://versa.cardozo.yu.edu/opinions/hass-v-idf-commander-west-bank] (the *Haas* case); HCJ 7957/04 *Mara'abe v. Prime Minister of Israel*, IsrSC 60(2) 477, 506-507 (2005) [http://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel] (the *Mara'abe* case); and Y. Dinstein, *Legislative Authority in the Occupied Territories*," 2 IYUNEI MISHPAT 505, 507 (5732-5733) (Hebrew)). In addition, as stated above, the authority of the GOC Home Front Command and the military commander in the Judea and Samaria Area – and in the context of reasonableness, as distinct of the formal authority, every effort should be exerted so that there be no difference between Israel and the Judea and Samaria Area, even if the commander in the Judea and Samaria Area is bound by a different set of laws – should be interpreted according to the principle of proportionality, which applies by virtue of both international and Israeli law, and according to the criteria addressed above (the *Beit Sourik* case, pp. 840-841; the *Haas* case, pp. 460-461). As we know, one of the subtests in examining proportionality is that the means employed by the

governmental authority rationally leads to the realization of the purpose of the legislation or action (the "rational connection test"). An additional subtest provides that if the means selected by the government disproportionately infringes the individual right relative to the benefit derived therefrom, it is deemed invalid (the "proportionality test *stricto sensu*") (HCJ 5016/96 *Horev v. Minister of Transportation*, IsrSC 51(4) 1, 53-54 (1997) [http://versa.cardozo.yu.edu/opinions/horev-v-minister-transportation]; the *Mara'ab**e*** case, p. 507; A. Barak, *Principled Constitutional Balancing and Proportionality: The Theoretical Aspect*, STUDIES OF THE JURISPRUDENCE OF AHARON BARAK, 39, 41-42 (5769) (Hebrew)). In the case at bar, house demolition under Regulation 119 may meet the proportionality test if an examination reveals that, in general, it is indeed effective and fulfils the purpose of deterrence, and moreover, that the damage suffered due to the house demolition does not disproportionately violate the right of the injured parties to their property relative to the effectiveness of deterrence. As noted, proportionality refers, in our opinion, also to the question of whether the means was exercised collectively – such as, God forbid, the demolition of an entire neighborhood, which is inconceivable in the context of Regulation 119 – relative to the demolition of the home of a proven terrorist, where the injury, which must not be taken lightly, is caused to the property of the inhabitants of house, but not to the property of others nor to human life. This holds true, as aforesaid, whether the authority is exercised within the State of Israel or the Administered Territories.

25. As for the claim of discriminatory enforcement, Justice Danziger ruled in the *Qawasmeh* case that "the burden to present an adequate factual basis which can refute the presumption of administrative validity, lies with the party who argues that discriminatory or 'selective' enforcement is implemented. Even if the arguing party surmounted this hurdle, the authority can still show that the ostensibly selective enforcement is, in fact, based on pertinent considerations". Against this backdrop, and as noted by Justice I. Zamir in HCJ 6396/96 *Zakin v. Mayor of Beer Sheva*, IsrSC 53(3) 289 (1999), "the burden to prove selective enforcement is particularly heavy" (*ibid*, paragraph 30; and see also M. TAMIR, SELECTIVE ENFORCEMENT 397-399 (5767)). This holds true in the case at bar verbatim, and where the Petitioners have failed to meet that burden, their claim of discriminatory enforcement cannot be accepted.

26. The Petitioners referred to Jewish law, as presented above. Indeed, in the *Ghanimat* case, Justice Cheshin quoted (p. 654-655) the words of the prophet Ezekiel (18:20), "the soul that sins, it shall perish. The son shall not bear the inequity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him"; and further quoted the principle (II Kings 14:6) "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin". The Petitioners also refer to the story of the "Idolatrous City" (Deuteronomy 13:16-17), which contemplates the city's destruction due to the worship of other gods, and the narrow interpretation given by the Sages (Babylonian Talmud, Sanhedrin 111a and 113a). However, *we should bear in mind and stress: in substantial opposition to everything referenced by the Petitioners and by us herein, we are not concerned with killing, and we should make it absolutely clear that were killing being discussed, the act would be patently illegal. Our case involves the demolition or sealing of a house, which does indeed entail a*

financial loss for its residents, but cannot be compared to all of the aforesaid biblical examples, or to the actions taken by certain nations in our world. Thus, indeed, the question at bar is a difficult one, but it is far from the intensity discussed by the Torah and Prophets. (For related dilemmas, see also Rabbi Shaul Yisraeli, *Acts of Retribution in Halacha*, 3 CROSSROADS OF TORAH AND STATE, 253 (5751-1991), in the chapter entitled *Incidental Injury to Innocent People Incidental to Eradicating Gangs of Assassins*" (p. 271) (Hebrew); and further see Izhak Englard, *Law and Ethics in Jewish Tradition*, 28 DINEI YISRAEL 1 (5771); on the difficult dilemmas, see in particular pp. 54-60. The author quotes (at pp. 58-59) Rabbi Shlomo Zalman Pines (Russia-Switzerland, 20th century, regarding whom see: RABBI YECHIEL YAACOV WEINBERG, LIFRAKIM (5763-2003), at p. 551, and especially pp. 559*ff*), BIBLICAL AND TALMUDIC MORALITY 191 (5737) (Hebrew), as follows: "But sometimes the decision among virtues rests with a man, and depends on the judgment of his mind and conscience. A moral man who seeks his path stands at a crossroads of the paths of virtues. He hesitates, searches, explores and wonders which is the righteous path to be chosen? There are arguments supporting both sides, and the decision is difficult and fraught. Of such a man, a midrash (Baylonian Talmud, Mo'ed Katan 5a) expounds on the verse in Psalms [50:23] 'And to he who sets [*ve-sam*] a path I shall show the salvation of God' as follows: 'Read it not *ve-sam* ["sets"] but *ve-sham* ["appraises"], in other words: a person who appraises his paths and evaluates and assesses them in his mind and in the depths of his conscience, he shall be promised the salvation of God that his paths will be righteous and he will not stray from the path of virtue." Rabbi Wienberg stresses the sanctity of life present in the teachings of Rabbi Pines – "human life is sacred – this is a great principle of Judaism. The value of life is greater than all other elements" (p. 561). Such words are applicable in the case at bar, together with the statement of Rabbi Aharon Lichtenstein (*The War Ethics of Abraham*, Har Ezion Yeshiva website, Lech-Lecha), that "we must continue to walk on the same path outlined by Abraham – to be sensitive to morality and justice, also at times of war and combat that are just and true on their own merits".

27. And after all of the foregoing, and looking to the future, as extensive as the discretion of the military commander may be, as we have explained above, I believe that the principle of proportionality does not allow us to continue to assume forever that choosing the drastic option of house demolition, or even of house sealing, achieves the desired purpose of deterrence, unless all of the data that properly confirms that hypothesis is presented to us for our review. We accept the premise that it is hard to assess this matter, and this Court has frequently addressed this problem (HCJ 2006/97 *Ghanimat v. OC Central Command*, IsrSC 51(2) 651, 655 (1997); the *Awawdeh* case, paragraph 24; the *Qawasmeh* case, paragraph 25). However, as aforesaid, I believe that using means that have considerable consequences on a person's property justifies an ongoing review of the question of whether or not it bears fruit, especially in view of the fact that claims have been raised in this regard even among IDF officials, and see, for example, the presentation of the Major General Shani Committee, which, on the one hand, presents a consensus among intelligence agencies regarding the benefits thereof, and on the other hand states, under the title "Major Insights" that "within the context of deterrence, the measure of demolition is 'eroded'" (slide no. 20). Thus, I believe that State authorities must examine the measure and its utility from time to time, including conducting follow-up research on the matter, and insofar as possible, should, as may

be necessary in the future, present this Court with the data demonstrating the effectiveness of house demolition as a means of deterrence that justifies the infliction of damage to parties who are not suspected nor accused (in this regard see also: Y. Tuval, *House Demolition: A Legitimate Means for Fighting Terror or Collective Punishment?* in A. Gil, Y. Tuval and I. Levy (supervised by M. Kremnitzer and Y. Shani), EXCEPTIONAL MEASURES IN THE STRUGGLE AGAINST TERRORISM: ADMINISTRATIVE DETENTION, HOUSE DEMOLITIONS, DEPORTATION AND "ASSIGNED RESIDENCE" 189 (IDI, 5771) (Hebrew); A. Cohen and T. Mimran, *Cost without Benefit in House Demolition Policy – Following HCJ 4597/14 Muhamed Hassan Halil Awawdeh v. West Bank Military Commander*, 31 *Mivzakei He'arot Pesika* 5, 21-24 (website of the College of Management Academic Studies, September 2014) (Hebrew)), and conversely, see the sources collected by my colleague Justice Noam Sohlberg in his opinion, some of which refer to situations encountered by other nations faced with the terrorist chaos that has befallen the world. In my opinion, the requested effort would be appropriate in order to meet the basic requirements of Basic Law: Human Dignity and Liberty, the importance of which in the Israeli democratic system requires no elaboration. We are not setting hard-and-fast rules as to the nature of the research and the data required. That will be clarified, to the extent necessary, at the appropriate time. At present, of course, the engineering issue should be thoroughly examined in respect of each specific demolition or sealing, in order to ensure that the goal is achieved within its boundaries, and without deviation.

28. Subject to Paragraph 27, we cannot grant the Petition.

Justice Noam Sohlberg:

1. I concur in the judgement of my colleague Justice E. Rubinstein – little holding much. I shall add several incidental comments.

2. The Petitioners have challenged Regulation 119. Indeed, the power of the military commander thereunder is tremendous – to confiscate and demolish. We are concerned with draconian authority. The Petitioners attacked it as such, and against that backdrop, the harsh criticism is understandable and reasonable. The criticism further intensifies through the presentation of the extreme sanction as punitive, and as amounting to collective punishment. Indeed, the injury to a family member – who has not sinned nor transgressed – when he loses his home and shelter, contrary to first principles, is burdensome.

3. The state of affairs is sufficiently bleak and onerous as described by my colleague Justice E. Rubinstein, but the manner in which it was presented in the Petition is too extreme. I shall explain. The Regulation, as written, does not reflect the actual situation on the ground. First, in a number of judgements, this Court has outlined criteria for the implementation of the Regulation, and has restricted and reduced the scope of its application. Second, in practice, the military command currently exercises moderation, restraint and control in implementing the authority. The Petitioners claim that "*house demolitions under Regulation 119 have accompanied the Israeli occupation since its very beginning*" (Section 22 of the Petition), and according to them, "*the authority has caused hundreds of families and thousands of people to lose their homes, due to the deeds of the individual*" (section

221 of the Petition). However, according to the Respondents, in the last decade, since 2005, the military commander has exercised the contemplated authority only several times: in 2008-2009, following a wave of terror in Jerusalem, the authority was exercised twice against residential buildings in East Jerusalem. A third use of Regulation 119 at that time was ultimately not realized. In the summer of 2014, the authority under Regulation 119 was exercised against four buildings (the home of the assassin of Police Commander Baruch Mizrahi OBM, and the homes of the three cell-members who abducted and murdered the three teenagers Gil-Ad Shaar, Naftali Fraenkel and Eyal Yifrach OBM). A considerable deterioration in the security situation required this. Now we are discussing 5 orders against buildings inhabited by terrorists residing in East Jerusalem, who were the instigators of horrendous terror attacks in the context of the recent wave of terror. An additional order has been implemented. Thus, a small number of cases is concerned, and we are not dealing with "collective punishment" as shall be further elaborated below, although, of course, every home holds the story and strife of its dwellers.

4. Hence, the focus herein is not the formal envelope of Regulation 119, nor its broad language, or factual data from the distant past, but the narrow interpretation of the Regulation and its actual implementation in a small number of cases, in the course of a serious wave of terror. Furthermore, the following should be recalled and noted to disabuse those who may wonder or be confused: we are concerned with *deterrence*, and not *punishment*. The classification of the demolition of a family home as "punishment" or "deterrence" indeed makes no difference when it comes to the outcome suffered by the members of that family. The outcome is the anguish involved in losing one's home and shelter. However, we have been convinced that when the criteria set forth in law and case law are met, it is an inevitable necessity. The mere injury to the members of the terrorist's family does not render a house demolition illegal, even according to the rules of international law, as demonstrated by my colleague. Indeed, in criminal punishment, as distinct from deterrence under Regulation 119, the focus is on the person convicted of the crime, and not his family members. However, as I stated in the *Qawasmeh* case referenced above – "*even in criminal proceedings the purpose of which is punitive… innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both in terms of their physical needs and emotionally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members*". The language of the Regulation explicitly testifies to the deterrent purpose underlying the confiscation and demolition or sealing of a residential home. This inherently involves an injury to innocent parties. Otherwise, how can deterrence from suicide attacks and the like be achieved? These are the bitter fruit of murderous terrorism, and we are obligated to promote deterrence against horrendous acts of the kind described in the individual petitions, even at the cost of injuring the terrorists' families. *And note*, the matter involves property damage and not bodily injury. While house demolition is placed on one side of the scales, the other weighs the saving of lives.

5. The Petitioners deny the deterrent benefit of Regulation 119. However, such claim was repeatedly dismissed in case law: *"…A study that can conclusively show just how many terrorist attacks have been prevented and how many lives have been saved as a result of house sealing and demolitions has never been nor could be*

conducted. However, as far as I am concerned, it is sufficient that we cannot rule out the view that this measure has some deterrent effect to prevent me from intervening in the discretion of the Military Commander" (*per* Justice E, Goldberg in HCJ 2006/97 *Ghanimat v. OC Central Command*, (March 30, 1997); see also HCJ 6288/03 *Sa'ada v. GOC Home Front Command* (November 27, 2003)).

6. Researchers who have recently addressed the issue have described the methodological difficulties encountered in measuring the influence of deterrent steps against terror. Wilner notes (in reliance on Richard Ned Lebow and Janice Gross Stein, *Deterrence: The Elusive Dependent Variable*, 42(3) WORLD POLITICS 336 (1990)) that successes of deterrent acts leave few, if any, "behavioral tracks". It is hard to prove that the deterring party had influence on an event that did not occur (Alex S. Wilner, *Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism*, 34(1) JOURNAL OF STRATEGIC STUDIES 3 (2011)). Nevertheless, the existing empirical research, specific indications from past experience, together with new research in the field of the psychology of terrorism and the theory of deterrence, cumulatively and satisfactorily support the deterrent potential of the demolition of terrorists' homes.

7. Benmelech, Berrebi and Klor empirically examined whether house demolition is an effective tactic in counterterrorism. Data about house demolitions were crosschecked with data about suicide attacks during the Second Intifada. It was found that the demolition of houses of suicide bombers and of other parties involved in terrorist attacks led to an immediate and substantial decrease in the number of suicide attacks by terrorists residing in the area of the demolition. However, it was found that the deterrent effect was short lived, the influence fading within a month, and that it was limited to the geographic area of the demolition. The researchers' hypothesis is that, in addition to house demolition, the security forces implement additional counterterrorism measures, and it is possible that the latter may be responsible for the waning of the deterrence. Their conclusion is unambiguous:

> The results indicate that, when targeted correctly, **counterterrorism measures such as house demolitions provide the desired deterrent effect**… (Efraim Benmelech, Claude Berrebi and Esteban Klor, *Counter-Suicide-Terrorism: Evidence from House Demolitions*, NBER WORKING PAPER SERIES, available at: http://www.nber.org/papers/w16493 (2010)).

8. The empirical findings are supported by data obtained from people in the field regarding the states of mind, or efforts of relatives to implore family members to refrain from involvement in terrorism that will endanger their homes (see for example: Doron Almog, *Cumulative Deterrence and the War on Terrorism*, 34(4) PARAMETERS 5 (2004/5). Such pin-pointed data reveal that the deterrence permeates into the awareness of the target population. Similar statements were made by the Respondents' counsel during the Petition's hearing, in response to my question.

9. Current insights in the field of the terror-deterrence theory should also be considered. Rascoff proposes a multi-layered approach to counterterrorism (layering), from two perspectives – an interaction among various measures and the accumulation thereof. In his words:

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

It emerges from the foregoing, that, in the case at bar, an attempt to isolate and assess the deterrence achieved through a certain measure – house demolition – on its merits, could lead to an erroneous conclusion. It is possible that taken cumulatively, together with additional coordinated steps, house demolition will make that certain contribution that may sometimes be crucial to the manner by which terrorist organizations conduct themselves, even if on its own it is insufficient.

10. Research in the field of the psychology of terrorism thoroughly analyzes statements made by terrorists, alongside the mode of conduct undertaken by terrorist organizations. It was found, that terrorist organizations, including those characterized by religious extremism, respond to rational, utilitarian reasoning. Thus, they can be deterred through measures that influence the cost-benefit considerations of the terrorist action. The centrality of family in the eyes of those involved in terrorism clearly emerges from such studies, supporting the deterrent value inhering in the demolition of terrorists' homes. This is Wilner's take on the matter:

> … post- 9/11 deterrence skepticism is misplaced. While it is true that deterring terrorism will be more difficult to do than deterring the Soviet Union, **targeting what terrorists value, desire, and believe will influence the type and ferocity of the violence they organize** (*ibid*, at p. 31, emphasis added, and also see pp. 7, 13-14; For additional material on the "rational" conduct of terrorists see: Jocelyn J. Belanger, Keren Sharvit, Julie Caouette and Michelle Dugas, *The Psychology of Martyrdom: Making the Ultimate Sacrifice in the Name of a Cause*, 58(7) JOURNAL OF CONFLICT RESOLUTION 494, 496 (2014)).

11. Perry and Hasisi show in greater detail that despite propaganda-directed declarations, which seek to present suicide attacks as deriving from altruistic motivations, they are mainly the result of a "rational" choice. That choice is founded, on the one hand, on the expected costs, and on the other hand on the expectation of reward (personal, religious and social). The terrorist organizations put an emphasis on promises pertaining to the expected improvement in the situation of the terrorist's family members after his suicide:

> …The martyr's family's status upgrade…both socially and monetarily. …Financial reward can be given to the family by **rebuilding their homes**. …or in direct sums of

> money… **at least 60… martyrs… whose families, in exchange for the martyr's death, were given new homes adorned with the martyr's picture and name….** The recruiting terror groups embellish this incentive, reassuring the suicide bombers that "their families will be better taken care of in their absence". …**It is often this familial assistance alone that drives the suicide bomber to commit an attack**… (Simon Perry and Badi Hasisi, *Rational Choice Rewards and the Jihadist Suicide Bomber*, 27 TERRORISM AND POLITICAL VIOLENCE 53, 55, 61, 65-66 (2015)).

12. Suicide bombers have stressed, in their recorded farewells from this world, the benefits that their families will be awarded, as a certain compensation for their departure, and even described the extent to which the thought of the good that will come to their families was on their minds virtually up to the act itself (*ibid*). In putting special emphasis on the house of the terrorist's family, the terrorist organizations themselves mark the "soft underbelly" in which deterrence may be effective.

13. From the aforesaid it emerges that the demolition of terrorists' homes will add the knowledge that his relatives will pay the price for his actions to the cost-benefit calculation made by a potential terrorist. This aspect of deterrence was referred to by Justice S. Netanyahu in HCJ 4772/91 *Hizran et al. v. Commander of IDF Forces in the Judea and Samaria Area*, IsrSC 46(2) 150, 155, as follows: *"... I do not ignore the fact that the demolition of entire buildings will injure not only the Petitioners themselves but also their family members. But this is the result of the necessity to deter the many, such that they will see and know that their despicable acts not only harm individuals, risk public safety and inflict severe punishment upon themselves, but that they also cause grief to their families*…".

14. However, deterrence is not only intended to directly influence the state of mind of the terrorist, but also to dissuade him from his actions through the intervention of his family. Familial influence is a well-known factor in the literature (Emanuel Gross, *The Struggle of Democracy against Suicide Terrorism – Is the Free World Equipped with Moral and Legal Answers for this Struggle?* DALIA DORNER BOOK, 219, 246 (2009) (Hebrew)): "*In the traditional Palestinian society, family takes a central place in the life of the suicide bomber, making a decisive contribution to the shaping of his personality and the extent of his willingness to sacrifice his own life in the name of his religion or for his people*…". Gross provides examples and points out that family support, and its public displays, serve the terrorist organizations "*in widening the circle of the organization's supporters within Palestinian society, thus increasing its ability to recruit additional suicide bombers in the future*" (and see: Emily Camins, *War against Terrorism: Fighting the Military Battle, Losing the Psychological War*, 15 CURRENT ISSUES CRIM. JUST. 95, 101 (2003-2004)). The familial factor as a terrorism enhancer needs to be defused, and the family must be given incentives to act to minimize terrorism. Fear of the demolition of its home should encourage the family of the potential terrorist to influence him in the desired direction, and dissuade it from providing him a tight circle of support, thus discouraging him from joining or carrying out terrorist attacks.

Thus, deterrence contributes, even if to a small extent. Such a small extent, in the circumstances of time and place, may sometimes be the decisive factor, for better or worse.

15. The Petitioners' claim of discrimination between Palestinians and Jews in the implementation of Regulation 119 is unfounded. The reason that Regulation 119 has not been used against Jews stems from the fact that there is no need for such environmental deterrence within the Jewish sector. We do not deny that there are assaults initiated by Jews against Arabs. Indeed, criminal law should be enforced to its fullest extent, and appropriate punishment should be inflicted. Tragically, we have even reached the point of the heinous murder of Mohamed Abu Khdeir. But the differences exceed the similarities. The gap is huge in the nature and quantity of attacks, and primarily, for the purpose of the case at bar, in the manner by which it is treated by society: a firm, unambiguous, wall-to-wall denunciation by the Jewish sector, which is unmet by a similar stride on the other side, and there is no need to further elaborate on the matter.

16. The Plaintiffs have dedicated a chapter in their Petition to the subject of "*The Prohibition on Collective Punishment in Jewish Law*", and appropriately so. This is a difficult, fundamental matter of values and morality, and it should be discussed in light of the values of the State of Israel as a Jewish and democratic state. Initially, the Petitioners quoted the words of Abraham, who stood firmly before God and categorically argued against the collective obliteration of Sodom and Gomorrah, including "*all those living in the cities, and also the vegetation in the land*" (Genesis 19:25):

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

Abraham began his negotiation with "*the judge of all the earth*" with fifty righteous people, and ended with ten. If such number of men be found, God promised Abraham not to destroy the city: "*For the sake of ten, I will not destroy it*" (*ibid.* 18:32). Abraham did not ask for less than ten. He may have reasoned that this is the watershed – a *minyan* of righteous people – and not less; a matter of proportionality (see the interpretations of Rashi and Or Hachayim *ad loc*. (verses 32-33)).

17. However, this collective punishment embodied in the destruction of Sodom is to be viewed as distinct of its pecuniary outcomes. As recalled, Lot was spared such punishment, but "*left with his hands over his head and did not rescue any of his assets*" (Jerusalem Talmud, Sanhedrin 10, 8).

18. The Petitioners also referred to the story of Korach: "*O God, the God who gives breath to all living things, will you be angry with the entire assembly when only one man sins?*" (Numbers 16:22) etc. In this context it is appropriate that we repeat the words of Justice M. Cheshin, which were also referenced by the Petitioners, regarding the basic principle in Jewish Law, whereby "every man must pay for his own crimes":

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

19. These are fundamental maxims, the law of nature – a value that is both democratic and Jewish. Rabbi Samson Raphael Hirsch accurately interpreted this principle of natural justice as follows:

> Our scripture is not aimed at preventing the legal abomination whereby a court will punish sons for the crimes of their fathers… inasmuch as it is inconceivable that any legal authority would do so. Rather, Scripture teaches us that from a political and social perspective, a person is not to be punished for the sins of his relative (HIRSCH COMMENTARY ON THE TORAH, Deuteronomy 24:16).

20. Throughout the generations, the Sages have perceived this principle in a persistent, consistent manner, whereby in practice, a man who did not participate in the wrongdoing is not to be punished (see the survey by Rabbi Meir Batiste, *Collective Punishment*, 12 TEHUMIN 229, 230-231 (5751) (Hebrew) (hereinafter: Batiste); Aviad Hacohen, *Shall One Man Sin, and Will You be Wroth with all the Congregation? Gilyonot Parashat Hashavua* (Ministry of Justice) (*Parashat Vayishlach*, 5761) (Hebrew) (hereinafter: Hacohen)).

21. Nevertheless, the voice of ethics and justice notwithstanding, it seems that the rule prescribing that "every man must pay for his own crimes" is not the be-all and end-all, it does not stand alone, contrary to the approach of the Petitioners who assert its exclusive application. As aforesaid, collective corporal punishment is to be viewed as distinct from property damage. The approach of Jewish law is not one-dimensional, but rather considers additional rights and principles, which are important as well, by way of balancing and completion.

22. Imposing punishment on the family members of a person who did wrong is rare, but can be found in Jewish law in various contexts. Thus, for example, Rabbi Paltoi Gaon ruled that a child may be taken out of school as a sanction against his father, in order to compel the father to fulfill a Court order, and for the purpose of protecting the principle of the rule of law and its enforcement (*Teshuvot HaGeonim*, Shaarei Tzedek 4, 5, Title 14; YUVAL SINAI, IMPLEMENTATION OF JEWISH LAW IN ISRAELI COURTS, 444 (2009); Rabbi Abraham Issac Kook justified collective sanctions against a community that decided to appoint one of its members to public office despite the fact that he had desecrated Yom Kippur, in order to prevent public desecration (DAAT KOHEN, 193, Batiste, 234-235)). The Sages have allowed the imposition of sanctions on members of the family of a recalcitrant husband in order to release a woman who is denied a divorce. These sanctions were imposed on the grounds that they serve as punishment for "*aiding and abetting a transgression*", as well as being measures of *deterrence*. The underlying premise is that the recalcitrant husband does not act in a void, but rather receives the psychological, moral, financial and practical support of his close family. Such support, after an order has already been issued by the Rabbinical Court instructing the recalcitrant husband to divorce his wife, actually aides and abets the commission of an offence, thus justifying the imposition of sanctions against the family members, as well. It is obvious, however, that such sanctions require clear proof that assistance and support were provided by the family, and in any event must be enforced proportionately (Aviad Hacohen, *If You Will It, She shall not be an Agunah: Imposing Sanctions on a "Recalcitrant Husband" and his Family*, *Gilyonot Parashat Hashavua* (Ministry of Justice) (*Nitzavim-Vayelech*, 5769) (Hebrew)).

23. Such an approach is also dictated by a true view of reality, since a person cannot be viewed as detached from his environment and family. The responsibility of the environment and family for a person's actions – to a certain extent – is repeatedly mentioned in various contexts in Jewish law. Thus, for example, a midrashic interpretation of the justification for punishing the family of a person "*who sacrifices any of his children to Molech*" (Leviticus, 20:1): "*I myself will set my face against him and his family and will cut them off from their people together with all who follow him in prostituting themselves to Molech*" (*ibid.*, 5) states:

> Rabbi Shimon said: What has the family sinned? This serves to teach that when a family member is an illegal customs collector, all of its members are deemed illegal customs collectors; when a family member is a thief, all of its member are deemed thieves – since they cover for him (TORAT KOHANIM, *ibid.*).

24. It is should be noted, that regarding such matters, the power to punish is vested in the Heavenly Court and not an earthly court (Hacohen, Batiste, 234-235). Nevertheless, Rabbi Naftali Zvi Yehuda Berlin explains that the closeness of a person to his family may create an identification, which is initially conceptual, and later becomes practical as well, and thus, from a forward-looking perspective, deterrence is sometimes required for the sake of prevention:

> They could no longer find it in their hearts to commit this abomination. Thus, they try to save this man, who endangered himself at first, and slowly they and others will

> also reach this abomination. And if they were willfully blind therefor, his family will also perish" (HAAMEK DAVAR, Leviticus 20 (Hebrew)).

25. An additional expression of the responsibility of the family and community is brought in the Talmud:

> Anyone who is able to rebuke his household, but does not – he will be liable for his household; his townsmen – he will liable for his townsmen; the entire world – he will be liable for the entire world" (Babylonian Talmud, Shabbat 54b).

As we can see, the sinner does not stand alone. His friends and family cannot wash their hands clean of him. Maimonides ruled that: "*a person who sees that his friend has sinned or is following an improper path is required to correct his behavior and inform him that he is sinning by his evil deeds… and whoever is able to rebuke and fails to do so is considered responsible for such sins, for he had the opportunity to rebuke in regard to them*" (MISHNEH TORAH, *Hilchot De'ot* 6:7).

26. An additional matter related to the responsibility of the community for the deeds of an offender can be found in the discussion of the matter of "house leprosy". According to the Torah, when leprosy spreads in the walls of a house and is not cured, the entire house is to be demolished, even if all of the inhabitants will suffer, as well as the neighbors whose house wall is incidentally demolished. Such neighbor will also be forced to rebuild his damaged home:

> From here they said, woe to the evil person, woe to his neighbor. Both remove, both scrape and both bring the stones (Mishnah, Nega'im, 12:6).

This matter may be understood "technically", since one cannot tear down a wall from one side only. However, the Sages viewed the matter as justification for collective punishment of the culprit and his surroundings, which maintain a mutual and reciprocal relationship among them (see Babylonian Talmud, Sukkah 56b; Batiste 236; Michal Tikochinsky, *Woe to the Evil Person, Woe to his Neighbor* ,http://www.bmj.org.il/show_article/984 (Hebrew); Yehuda Shaviv, *House Leprosy as distinct of other Leprosies*, 15 MEGADIM (2003) (Hebrew)).

27. We should note that these examples should not be understood as consistently advocating punishment of the community for the misdeeds of one deviant member. On the contrary, the rule still holds: "*The soul that sins, it shall perish. The son shall not bear the iniquity of the father, neither the father bear the iniquity of the son, the righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him*" (Ezekiel 18:20). However, there are exceptions in which uprooting evil requires a punitive-deterrent response that also inflicts harm upon the surrounding environment: "*The cabbage is damaged with the thorn*" (Babylonian Talmud, Bava Kama 92a). Rashi explains *ad loc*: "*When a thorn grows near the cabbage, uprooting the thorn sometimes results in the cabbage being uprooted with it and sustaining harm due to it – in other words, the neighbors of an evil person suffer with him*".

28. We should reiterate that a pecuniary matter is not equivalent to collective corporal punishment. Maimonides ruled (MISHNEH TORAH, *Hilkhot Melachim Umilchamot* 5:3) that a king "*may break through to make a road and no one can take issue with him*". This is all the more applicable when rescue from danger is concerned, and *a fortiori* in the case of serial, murderous terrorism.

29. Unfortunately, we do not live in quietness and confidence. Peace is our heart's desire, but it has yet to come. The IDF, police and other security forces are compelled to confront heinous, murderous terrorism that does not sanctify life, but rather worships death. The atrocities of terrorists have radicalized to the extent that they are willing to die the "death of martyrs", as long as they drag Jews with them into the abyss. The law that applies in times of war is not the same as law that applies in times of peace (Batiste 237-238; Yaron Unger, *"Fear Not Abram" – On the Ethics of Warfare in Israel*, *Gilyonot Parashat Hashavua* (Ministry of Justice) (*Parashat Lech Lecha*, 5766) (Hebrew) (hereinafter: Unger)). This is not the proper venue to discuss the matter of injury to civilians in the course of such complex combat (see the discussion and references in the articles of Rabbi Shaul Yisraeli, *Acts of Retribution in Light of the Halacha*, 3 CROSSROADS OF TORAH AND STATE 267-273 (1991) (Hebrew); Rabbi Haim David HaLevi, *The Principle of "Kill or be Killed" in Public Life*, 1 TEHUMIN 1 343 (5740 (Hebrew); Abraham Israel Sharir, *Military Ethics according to the Halacha*, 21 TEHUMIN 426, 431-434 (5765) (Hebrew); Unger, 2-3)). In such a context, we must caution ourselves not to draw hasty conclusions from the Halacha, *inter alia* due to "*thousands of years of exile from land, country and state*" (Guttel 18-19), resulting in "*a dilution of Halacha sources*" (*ibid.*), and due to the difference between the reality emerging from the Talmudic sources and the present reality , as well as the inherent danger of drawing anachronistic analogies (Aviad Hacohen, *Law and Ethics at Times of War*, PARSHYIOT UMISHPATIM – JEWISH LAW IN THE WEEKLY TORAH PORTION**,** 457-462 (5771) (Hebrew) (hereinafter: PARSHYIOT UMISHPATIM). Moreover, there have also been important developments in regard to what is permitted and prohibited in wars among nations. Such rules of international law have been recognized in Jewish law, under the principle of "*the law of the land is the law*" (Guttel 38-40, and the reference there; Unger 4).

30. As aforesaid, with all due care and caution, it is clear that there are special laws intended for times of danger and war, and their application does not entirely preclude collateral damage. Nevertheless, times of war are a moral challenge. The weapons used by combat soldiers on the battle field, and which are necessary for the success of their missions, are tools of death and destruction that would normally be seen as contradicting moral values and human rights. It is not without reason that the Torah warned warriors participating in a battle as follows: "*you shall keep away from everything evil*" (Deuteronomy 23:10). Special commandments are intended for times of war, in order to contend with moral and spiritual crises: "*Scripture speaks only against the evil inclination*" (Rashi's commentary on Deuteronomy 21:11; Avraham Sherman, *Halachic Principles in War Ethics*, 9 TEHUMIN 231, 231-232 (5748) (Hebrew) (hereinafter: Sherman); Aviad Hacohen, *"As God is Compassionate and Gracious, You too are Compassionate and Gracious!": On Cruelty and Compassion in Jewish Tradition*, in YOEL ELIZUR (ED.),"THE BLOT OF A LIGHT CLOUD"? ISRAELI SOLDIERS, ARMY, AND SOCIETY IN THE INTIFADA, 325-347 (5772)

(Hebrew)). One such commandment relevant to the case at bar is the prohibition on cutting down trees around a city:

> When you besiege a city for many days to wage war against it to capture it, you shall not destroy its trees by wielding an ax against them, for you may eat from them, but you shall not cut them down. Is the tree of the field a man, to go into the siege before you? However, you may destroy and cut down a tree that you know is not a food tree, and you shall build bulwarks against the city that makes war with you, until its submission (Deuteronomy 20:19-20).

31. This prohibition on collective, wanton destruction designed to hurt the enemy for no military advantage was applied to anything of value and not only to trees. This is the moral lesson of "do not destroy" (*bal tashchit*) at times of war, which sets a boundary and prescribes rules for self-restraint, even when permission has been granted to the destroyer to inflict harm (Moshe Drori, *"When you besiege a city… you shall not destroy its trees" – the Prohibition of Do Not Destroy, Gilyonot Parashat Hashavua* (Ministry of Justice) (*Parashat Shoftim*, 5767) (Hebrew); Sherman 233-234). Jewish law permits the destruction of valuable property at times of war, provided that there is clear awareness of the purpose, and even then – one must act proportionately and carry out such acts to the least destructive extent (Sherman 235 and the references there). Such destruction, in the course of war, solely for an advantage, and performed in a proportionate manner, teaches us a thing or two about the matter of demolition and sealing contemplated in this case: even in war we must not lose sight of human values or our moral compass (PARSHIYOT UMISHPATIM, *ibid.*, 457).

32. This difficult and distressing topic could be discussed endlessly, in Jewish law and in general, but this is not the place to discuss it further. The crux of the matter is the basic guiding principle that of which we have been warned: "*A governor is cautioned not to punish the sons for the sin of the father*" (Novellae Ran, Sanhedrin 27b). At the same time, we must recognize the existence of exceptions – rare, irregular, but sometimes inevitable. These can be applied when the danger is great, when the community carries a certain responsibility, even if it is only passive, or when it covers up for a crime, or when the rule of law is trampled upon, to deter, to distance the innocent from a criminal environment, to promote the social and educational value underlying punishment, and more. In the individual petitions that were dismissed, we were indeed convinced that the governor did not seek to punish the family members for the sin of the terrorist, but to deter, at times of emergency, as a lesson for all to see, and for the purpose of saving lives. This is the governor's role – an inevitable necessity, even at the price paid by the terrorist's family – in order to protect the living.

33. On the one hand, we are to remember and preserve morality, human rights and a measure of compassion even in war and quasi-war: "*as God is compassionate, you too must be compassionate*" (Midrash Sifri, Eikev 49). On the other hand, we must also bear in mind that: "*He who is compassionate to the cruel will ultimately be cruel to the compassionate*" (Yalkut Shimoni, I Samuel 121). We must deliberate and decide between these extremes. While the demolition of the house of a terrorist

and the injury to his family is placed on one end of the scales -- the other weighs the saving of lives. This was done by my colleague Justice E. Rubinstein, and his reasoning is clear and convincing. I concur in his opinion.

Justice E. Hayut:

1. I concur with the conclusion reached by my colleague Justice E. Rubinstein whereby this Petition should be denied. The main reason leading me to this conclusion stems from the fact that the principle questions raised by the Petitioners were only recently heard and decided by this Court in the context of individual petitions. The first, on July 1, 2014, regarding the demolition of the home of the man accused of the assassination of Police Commander Baruch Mizrahi OBM (HCJ 4597/15 *Awawdeh v. Military Commander of the West Bank Area* (July 1, 2014) (the *Awawdeh* case); and the others on August 11, 2014, regarding the demolition of the homes of the abductors and murderers of the three teenagers Gil-Ad Shaar, Naftali Fraenkel and Eyal Yifrach OBM, and of an additional person who was involved (HCJ 5290/14 *Qawasmeh v. Military Commander of the West Bank Area* (August 11, 2014) (the *Qawasmeh* case). Indeed, this Court is not constrained by its own precedents, as prescribed by section 20(b) of Basic Law: The Judiciary, which establishes that: "Case law laid down by the Supreme Court shall bind any court other than the Supreme Court". However, the words of Justice Silberg in FH 23/60 *Balan v. Executors of the Litvinsky Will*, IsrSC 15(1) 71, 75, in reference to the previous version of that provision, in section 33(b) of the Courts Law, 5717-1957, are applicable in the case at bar, stressing as follows:

> This provision does not render the pages on which the previous judgments of the Supreme Court were written into a "tabula rasa"… The Israeli legislator did not wish to completely release the Supreme Court from the burden of the precedent such that each one of its Justices would act as he pleases… This is not the path that we must take! Should we take this path, over time this judicial institution will turn from a "House of Law" into a "House of Judges" in which the number of opinions will equal the number of its members.

This important statement should always be borne in mind. In the case at bar, the Petitioners again raise matters of principle concerning house demolition that have already been heard and resolved in the *Awawdeh* and *Qawasmeh* cases, such that they are actually seeking to overturn those judgments. I cannot agree to this without the risk of turning this court into a "House of Judges". This is particularly true given the fact that said judgments were issued by five of the Justices of this court only a few months ago. Nevertheless, it should be stated honestly that the issues raised in the Petition are difficult and vexing, and I do not deny that taking the path outlined by case law in this matter is not easy.

2. For years, Israel has contended with the spread of terror and its horrifying eruptions aimed even against innocent civilians. In recent years, the world has been exposed to global terrorism, and this reality compels the law, both locally and

internationally, to confront complicated questions as to the legitimate measures that a state may employ in its struggle against terrorism, as it fulfils its obligation to protect itself and its citizens. Such complicated questions have often confronted the Israeli Supreme Court over the years, and it would be sufficient to mention several notable judgments issued in that context: the use of interrogation measures that included the exertion of physical pressure (HCJ 5100/94 *Public Committee against Torture in Israel v. Government of Israel*, IsrSC 53(4) 817 (1999) [http://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel); administrative detention of individuals for the purpose of using them as "bargaining chips" in negotiations (HCJ 7048/97 *Does v. Minister of Defense*, IsrSC 54(1) 721 (2000) [http://versa.cardozo.yu.edu/opinions/does-v-ministry-defense]); "assigned residence" orders (HCJ 7015/02 *Ajuri v. IDF Commander in the West Bank* (September 3, 2002) [http://versa.cardozo.yu.edu/opinions/ajuri-v-idf-commander-west-bank); and the "targeted killing" policy (HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* (December 14, 2006) [http://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government]). In addition, this court also conducted judicial review of statutes that were enacted for counterterrorism purposes (CrimA. 6659/06 *A. v. State of Israel*, IsrSC 62(4) 329 (2008) [http://versa.cardozo.yu.edu/opinions/v-state-israel-1]; HCJ 7052/03 *Adalah - The Legal Center for Arab Minority Rights in Israel v. Ministry of the Interior*, IsrSC 61(2) 202 (2006) [http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior]; HCJ 466/07 *MK Zehava Gal-On Meretz-Yachad v. Attorney General* (January 11, 2012) [http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary]). However, it seems that in the area of counterterrorism, both international law and domestic Israeli law have yet to catch up with reality, and have yet to establish a comprehensive, detailed code of legal measures that a state may employ in fulfillment of its aforesaid obligation to protect itself and its citizens. Needless to say, this area desperately requires regulation. since the known law by which the nations of the world act is largely adapted to the traditional, familiar model of war between armies, whereas the new, horrific reality created by terrorist organizations and individuals who carry out terror attacks in Israel and around the world, disregards territorial borders and draws no distinction between times of war and times of peace. Thus, any time is the right time to spread destruction, violence and fear, usually without discriminating between soldiers and civilians. In fact, terrorism does not respect any of the rules of the game established by the old world in the laws of war, and this reality also requires that jurists, and not only the security forces, rethink the subject in order to update these laws and adapt them to the new reality. Currently, in the absence of such an updated legal code, Israeli law must cope, on a case by case basis, with questions related to counterterrorism, while constantly aspiring and striving to maintain the fragile balance between the needs of security and human rights and the values of the State of Israel as a Jewish and democratic state.

3. Under the case law, Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: Regulation 119) currently forms part of Israel's positive law, and its validity is maintained by virtue of the Preservation of Laws clause under section 10 of Basic Law: Human Dignity and Liberty, even if it is inconsistent with the provisions of the Basic Law. However, as this Court has often stated in its decisions, and as mentioned by my colleague Justice Rubinstein, in interpreting the power granted an authority under the Regulations, we must draw interpretive inspiration

from the Basic Law. This interpretive inspiration informs us that when examining and reviewing the exercise of power granted the authority under Regulation 119, the conditions of the Limitation Clause should guide us, and we must ensure that the act is undertaken for a proper purpose and that it satisfies the proportionality tests (HCJFH 2161/96 *Sharif v. GOC Home Front Command*, IsrSC 50(4) 485, 488 (1996); the *Awawdeh* case, paragraphs 16-18; the *Qawasmeh* case, paragraph 22).

4. In their arguments, the Respondents emphasized that the underlying purpose of the demolition policy of terrorists' homes is not collective punishment but rather deterrence, and that the said measure was exercised in a limited manner, while examining the engineering consequences involved, and while considering less injurious measures, such as sealing, in appropriate cases. This Court adopted its position as to the purpose of this measure in a number of judgments. In the *Sharif* case, denying a request for a further hearing concerning the partial demolition of a building that was the residence of a person who had provided a suicide bomber with an explosive device that was detonated on a bus in Jerusalem, President A. Barak stated as follows: "The purpose that guided the Respondent is a proper one… this is no innovation against the background of the extensive case law of this Court. The purpose is not punitive but rather deterrent" (*ibid*, p. 488; and also see: the *Awawdeh* case, paragraph 19). In their article *Cost without Benefit in the House Demolition Policy: Following HCJ 4597/14 Muhammad Hassan Khalil Awawdeh v. Military Commander of the West Bank*, 31 *Hamishpat BaReshet Mivzakei He'arot Psika* 5, 21-24 (website of the College of Management Academic Studies, September 2014) Amichai Cohen and Tal Mimran state that the consideration of deterrence as a proper purpose is controversial, and they supported this argument in reliance on the opinion of Justice Arbel in HCJ 7146/12 *Serge Adam v. The Knesset* (September 16, 2013) [http://versa.cardozo.yu.edu/opinions/adam-v-knesset-summary] in which she noted that the deterrence of immigrants and asylum seekers was a desired social interest, but that the legislation that was reviewed in that case did not display the required sensitivity for human rights required to meet the proper purpose test, since it fails to treat the individual as an objective rather than a means, which constitutes another violation of his dignity as a human being. I believe that their view raises a certain analytic difficulty, given the fact that the starting point was that deterrence – in that case, of immigrants and asylum seekers, and in our case, of terrorists and their supporters – serves an important, proper social interest. That being the premise, criticism should actually be directed against the measures exercised and the proportionality tests they must satisfy, rather than against the purpose, which is itself proper, unless we are willing to determine categorically that deterrence – any deterrence – is not a proper purpose, a proposition that I would find hard to accept, and certainly not when the protection of national security and the deterrence of potential terrorists from committing terror attacks are concerned.

The Petitioners' counsel argues that even if we accept the position that the underlying purpose of house demolition is deterrence, the outcome is collectively punitive, and therefore, wrongful (on this issue see also: Y. Tuval, *House Demolition: A Legitimate Means for Fighting Terror or Collective Punishment?* in EXCEPTIONAL MEASURES IS THE STRUGGLE AGAINST TERRORISM 189 (The Israel Democracy Institute, 2010) (Hebrew)). It seems to me that it is difficult to classify the demolition of a terrorist's home as collective punishment in the customary sense, even taking into account that his family members who live with him in that house are

also injured by the demolition of the house, since one of the considerations that must be weighed by the military commander in respect of house demolitions is the extent to which the other inhabitants of the house were involved in the terrorist activity of the perpetrator (see: the *Awawdeh* case, paragraph 18 of the opinion of Deputy President M. Naor; the *Qawasmeh* case, paragraph 22 of the judgment of Justice Y. Danziger). However, the Deputy President further noted in this context that "the absence of evidence concerning awareness or involvement on the part of the relatives does not prevent, in and of itself, the exercise of the power. Nevertheless, such a factor may influence the scope of the order issued by the Respondent, as aforesaid". In my opinion, that consideration, although it does not stand alone, should be afforded considerable weight when deciding on the demolition of a building and its scope. In the past, this court has emphasized this more than once as a concern that should be afforded such weight (see for example: the *Sharif* case; HCJ 6026/94 *Nazal v. IDF Commander in the Judea and Samaria Area*, IsrSC 48(5) 339, 349-350 (1994); the *Awawdeh* case, paragraph 28 of the opinion of Deputy President M. Naor). I would add, without exhausting the possibilities pertaining to this consideration, that I believe that if, indeed, the family members whose home is about to be demolished can convince, by means of sufficient administrative evidence, that prior to the terrorist attack they tried to dissuade the terrorist from carrying it out, that factor should be given very significant weight, which may, in suitable cases, rule out a decision to demolish the house of those family members.

5. An additional argument that was extensively discussed by the Petitioners pertains to the matter of the effectiveness of house demolition as a deterrent of terrorism. The Petitioners supported their arguments regarding the ineffectiveness of that measure with an expert opinion that referred to various articles, including the article of Prof. Ariel Merari (Ariel Merari, *Israel Facing Terrorism*, 11 ISRAEL AFFAIRS (2005) (hereinafter: Merari), and the article of Benmelech, Klor and Berrebi (Efraim Benmelech, Esteban F. Klor and Claude Berrebi, *Counter-Suicide-Terrorism: Evidence from House Demolitions*, 16493 NBER WORKING PAPER SERIES (2010)), which was referenced by my colleague Justice N. Sohlberg in his opinion. According to the Petitioners, these articles refute the rationale of deterrence, but a thorough review reveals that those researchers did not reach such an unequivocal conclusion. Thus, for instance, the empirical study of Benmelech, Esteban, Klor and Berrebi points to a positive correlation between house demolitions and a decline in the number of suicide attacks that they investigated, although they qualified their conclusion by noting that the correlation was found in the period that immediately followed the demolition, and emphasized that house demolition may result in an increase of other types of terrorism, which they did not investigate (*ibid*., page 16). Prof. Merari also referred to the effectiveness of house demolitions as a deterring factor, and summarized his comments on this issue by saying:

> In general, collective anti-terrorism measures are likely to have two opposing effects on the population from which the insurgents emerge: on the one hand, they breed fear and, on the other hand, hatred to the government. The actual behavior of the affected public, as a result of the infliction of collective punishment, depends on whether fear is stronger than anger, or vice versa. Persons who are willing to kill themselves in order to kill others are,

> obviously, very hard to deter by the threat of punishment to themselves, but they may still care about the well- being of their families (Merari, page 230).

This conclusion is far from a decisive rejection of the rationale of deterrence. It presents two opposing effects of demolition, and states that the deterring power of demolition largely depends on the question of whether fear overcomes hate in any given case. The last sentence of the quoted paragraph also emphasizes that it is hard to deter a suicide bomber, but it is possible that such a terrorist will still consider and take account of the wellbeing of his family, and this at least implies that it may be the only way by which he may be deterred. The scholar Cheryl V. Reicin also posits that house demolitions may deter people who consider committing terror attacks, as well as people who consider supporting the terrorists, and who offer them the hospitality of their homes. In addition, according to Reicin, house demolition may cause family members to make efforts to dissuade their children or brothers from committing terror attacks, home owners may interfere and vacate individuals suspected of terrorism from their homes, and eventually, the community that is exposed to this sanction may intervene, and inform the security forces about individuals suspected of involvement in terrorism (Cheryl Reicin, *Preventive Detention, Curfews, Demolition of Houses and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO LAW REVIEW 515, 547 (1987)). These conclusions are also far from disproving the rationale of deterrence. In this context, it is important to emphasize that in order to satisfy the first subtest of the proportionality tests, the rational connection test, it is not necessary to show that the "means that were chosen will fulfill the objective in its entirety, and partial fulfillment which is neither marginal nor negligible will suffice to satisfy the rational connection test" (HCJ 1213/10 *Nir v. Chairman of the Knesset***,** paragraph 23 of the opinion of President D. Beinisch (February 23, 2012). In other words, it is sufficient to be able to point to a potential of realizing the said purpose that cannot be ruled out (HCJ 9353/08 *Abu Dheim v. GOC Home Front Command*, paragraph 8 of the opinion of (then) Justice M. Naor (December 17, 2008) and the references there (hereinafter: the *Abu Dheim* case).

6. Finally, I wish to note that I see great importance in the comment made by my colleague Justice Rubinstein concerning the future need to conduct, from time to time and to the extent possible, follow-up and research concerning the house demolition measure and its effectiveness (paragraph 27 of his opinion). In this context, it is noteworthy that this issue was also examined in the past by the Shani Committee, mentioned by my colleague, which engaged in a process of "rethinking the issue of house demolition", and reached a conclusion that was adopted by the security community at the time (2005) whereby systematic demolition of terrorists' homes for deterrence purposes in the Judea and Samaria Area should be stopped and *should be reserved for extreme cases* (slide 30 of the Shani Committee presentation, Exhibit 1 of the Petition). According to the security agencies, the terrorist attack at the Merkaz Harav Yeshiva in the center of Jerusalem constituted an extreme case, and recourse was made to demolition in that matter after a pause of several years. A petition that was filed with this Court regarding that matter was denied (the *Abu Dheim* case). The recent wave of terror that began with the abduction and murder of the three teenagers, and continued with the frequent killings and massacres of innocent civilians, passers-by and congregation members at a synagogue, also

marked an extreme change, characterized by terrorists from East Jerusalem, required a renewed application of this measure. However, these extreme cases should not dissipate the need that was addressed by my colleague to re-examine from time to time, and raise doubts and questions concerning the constitutional validity of house demolition under the tests of the Limitation Clause. In his poem “The Place where We are Right", the poet Yehuda Amichai praises the doubts that should always trouble even the hearts of the righteous:

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

For these reasons, I concur in the conclusion of my colleague Justice E. Rubinstein, according to which the Petition should be denied.

Decided in accordance with the opinion of Justice E. Rubinstein.

Given this day, 9 Tevet, 5765 (December 31, 2014).