HCJ No. 1730/96
HCJ No. 1731/96
HCJ No. 1740/96
HCJ No. 1821/96
HCJ No. 1824/96
HCJ No. 1825/96
HCJ No. 1828/96

_____ Sabih

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1730/96

1. _____ Azzam
2. _____ Saker

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1731/96

_____ Sharif

Versus

Major General Shmuel Arad, Commander of the Home Front Command HCJ 1740/96

_____ Sidar

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1821/96

1. **_____ Sarahana**
2. **HaMoked: Center for the Defence of the Individual**

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1824/96

1. _____ Dodin
2. _____ Dodin
3. _____ Dodin
4. _____ Dodin
5. _____ Dodin
6. _____ Dodin
7. HaMoked: Center for the Defence of the Individual

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1825/96

_____ Abu Vardah

Versus

Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region HCJ 1828/96

At the Supreme Court Sitting as a High Court of Justice [19 March, 1996]
Before the Justices G. Bach, M Cheshin, D. Dorner

L. Zemel - for the Petitioners in HCJ 1828, 1740, 1731, 1730/96;
A. Bolis - for the Petitioner in HCJ 1821/96;
B. Huri - for the Petitioner in HCJ 1825, 1824/96;
Y. Gnessin, Senior Deputy A. to the State Attorney, **Y. Shefer**, Senior Deputy A. to the State Attorney - for the Respondent.

Judgment

Justice G. Bach: 1. We have before us seven petitions which we heard together and which all address the decisions of the Commander of the IDF Forces in the West Bank (the "**Respondent**") pertaining to the confiscation and demolition of structures in which terrorists, who caused horrific terrorist acts in Israel, resided. Four such terrorists performed the assassination acts by blowing themselves up, as suicide bombers, mostly inside buses, through an explosive mechanism that was prepared in advance and thus caused the murder of many dozens of peaceful civilians, men, women and children, and the injury of hundreds of additional people (the aforesaid refers to terrorists whose actions are contemplated in the petitions in HCJ 1730/96, HCJ 1731/96, HCJ 1824/96 and HCJ 1828/96). The three additional terrorists (whose actions are contemplated in the petitions in HCJ 1740/96, HCJ 1821/96 and HCJ 1825/96) assisted in the transfer of the explosive devices to the hands of the terrorists who actually performed the suicidal terrorist attacks and guided and activated terrorists in the performance of the suicide acts and other murderous terrorist attacks. All of the aforesaid terrorists operated on behalf of terrorist organizations that are known as "Hamas" or the "Islamic Jihad".

2. The Respondent's decisions were issued in the beginning of March of this year, pursuant to the execution of a series of extremely deadly suicidal terrorist attacks on buses in Jerusalem and Tel Aviv, and at soldiers' transportation stations in Ashkelon. Such decisions were made by the Respondent by virtue of his authority according to Regulation 119 (1) of the Defense (Emergency) Regulations, 1945 (the "**Regulations**").

The Respondent initially ordered to seal the structures to which his decisions related in order to allow the families who may be harmed by such orders to submit their contestations and to approach this court, if necessary, but made it clear to the concerned parties that he intends to exercise his authority also by way of causing the demolition of such structures. Since the Petitioners' contestations were rejected, they approached this court with the petitions at bar that are intended to cause the revocation or mitigation of the contemplated demolition orders.

3. In their arguments, the petitioners' learned attorneys repeated, *inter alia*, claims which were already raised more than once in the past and whose purpose was to demonstrate that the demolition orders which were issued by the Respondent are invalid, since the meaning thereof is collective punishment, which contradicts the basic concepts of justice and the rules of the international law. This court determined in a line of judgments that the purpose of the contemplated orders is not the punishment of the families of the terrorists who perform the terrorist attacks, but rather the deterrence of potential criminals, at least some of whom may be deterred from executing their scheme if they are aware that in performing their actions they are risking not only their lives, but also their relatives' place of residence.

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This consideration may also influence terrorists who intend to sacrifice their lives by way of performing suicidal terrorist attacks (see HCJ 6026/94 *Nazal et al. v. The Commander of the IDF Forces in the Judea and Samaria Region* (the "***Nazal* Affair**" [1]**)**.

4. The authority which is vested in the hands of the Respondent according to Regulation 119(1) of the Regulations is extremely broad and in order to illustrate the same, the language of the regulation should be quoted one more time. The regulation in its part that is relevant to our case, states the following:

"A MILITARY COMMANDER MAY BY ORDER DIRECT THE FORFEITURE TO THE GOVERNMENT OF PALESTINE (namely: the Israeli government – G. B.)… 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 OFFENSE AGAINST REGULATIONS INVOLVING VIOLENCE OR INTIMIDATION OR ANY MILITARY COURT OFFENSE; AND WHEN ANY HOUSE, STRUCTURE OR LAND IS FORFEITED AS AFORESAID, THE MILITARY COMMANDER MAY DESTROY THE HOUSE OR THE STRUCTURE OR ANYTHING IN OR ON THE HOUSE, THE STRUCTURE OR THE LAND".

The purposeful wording of the regulation allows for the execution, on the widest scale, of acts of demolition of buildings that do not accord with basic precepts of justice in a modern state. Therefore, we have determined, in a number of judgments that the regulation should be restricted in its application. Nonetheless, we must be aware that in so doing, we are not interpreting the regulation but merely imposing restrictions on the mode of application and execution thereof, whilst exercising the rules of proportionality and the sense of proportion. See on this matter Z. Segal, "*The Cause of Disproportionality in the Administrative Law*", *Hapraklit* 39 (5750-51): 507. I expressed this opinion of mine in my judgment in HCJ 2722/92 *Alamarin v. The Commander of the IDF Forces in the Gaza Strip* (the "***Alamarin* Affair**" [2]), on p. 699:

> "…I would like to point out that the above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court is not able or bound to intervene in the decision of the military authority whenever the latter intends to exercise its authority in a way and a manner that are unthinkable. Thus, for example, it is inconceivable that the military commander should decide to destroy a complete, multi-storey house, which contains many apartments belonging to different families, merely for the reason that a person suspected of a terrorist act lives in a room in one of the apartments, and if nonetheless he should want to do this, this court would have its say and intervene in the matter.

5. In that judgment in the *Alamarin* Affair [2] I also listed a number of considerations, which would be appropriate for the military commander who has the authority according to Regulation 119 (1), to take into account before he decides with regard to the use of such authority, and in particular pertaining to the scope of the use of such authority (see there on p. 699-700).

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I emphasized there and I am emphasizing again that no rigid and exhaustive criteria can be set forth on this matter, and each case must be weighed according to the special circumstances thereof as a whole. I will only repeat here the essence of such guidelines:

a. The severity of the acts that are attributed to such suspect who resided in that structure and the existence of verified proof of the performance thereof by that suspect, should be taken into account.

b. The extent of involvement of the remaining residents of the house, in most cases the family members of the terrorist, in his terrorist activity, may be taken into account. Lack of evidence pertaining to awareness and involvement on the part of the relatives does not in itself prevent the exercise of the authority, but such factor may influence as aforesaid the scope of the Respondent's order.

c. A relevant consideration is whether the residence of the suspect terrorist can be deemed as a residential unit that is separate from the remaining parts of the structure.

d. It should be investigated whether the suspect's residential unit can be demolished without harming the remaining parts of the structure or neighboring structures; if it turns out that the same is not possible, then making-do with sealing the relevant unit should be considered.

e. The Respondent must take into account the number of persons who may be harmed by the demolition of the structure and who are, in themselves, assumedly innocent of any crime and were also not aware of the suspect's acts.

It arises from the material which was brought before us with regard to the petitions at bar that the aforesaid principles were indeed taken into account by the Respondent. Hence the efforts that were used in each one of the cases, to find out whether separate residential units can be isolated in the structure where also the terrorist resided, and to take out such separate units from the scope of the demolition order. Attention was also given to the extent of awareness of the terrorist's actions from the part of the other residents of the house.

Naturally, the greatest emphasis was placed on the severity of the acts which were performed by the suspects and the consequences thereof which are indeed very extreme in these cases.

6. In some of the petitions, the petitioners' attorneys did not deny that there is convincing evidence that the suspect concerned is indeed the person who lived in the structure that is contemplated in the demolition order. However, in some of the petitions it was argued that such fact was not proven properly and that there exists doubt on this issue.

We examined the petitioners' arguments in each one of such cases but we found no basis therefor. With regard to each one of the suicide terrorists it was proven with the required level of certainty that there is no reasonable doubt pertaining to the identity of the terrorist. The Respondent relied on evidence such as the identity between the suspect's fingerprints which were filed in files of investigations which were conducted against him in the past and the fingerprint which was discovered on the terrorist's body at the site of the explosion; positive results of a genetic comparison which was made between the blood of the suicide terrorist and his mother's blood;

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The fact that the family of the person residing in the aforesaid structure built a mourners' hut after the event; The fact that such person residing in the structure disappeared in proximity to such terrorist attack and has not been discovered since; and incriminating statements that were made by other terrorists who cooperated with such suspect terrorist. The same applies to the suspects to whom activation and guidance of suicide terrorists and assistance to other terrorists is attributed. Also with regard to such suspects there is sufficient circumstantial and direct evidence pertaining both to the performance of the acts of terrorism by them and with regard to their connection with the structures which are contemplated in the orders at bar.

To summarize this point: in each one of such petitions we rest assured that the evidence material in the hands of the Respondent justified his certain conclusion that indeed the suspect is the disappearing person who was responsible for the deadly

terrorist acts, and that he resided in the structure regarding which the Respondent intends to execute the demolition order.

7. We also found no flaw in the Respondent's conclusion that the demolition orders were issued solely against that residential unit where the suspect resided. In not one of the petitions was it proven to us that the demolition order is directed also against residential units that are separate from the apartment where the suspect resided. All of the cases concern a family's apartment where the suspect terrorist lived together with both or one of his parents and with his unmarried brothers and sisters. When one of the suspect's siblings lived in a separate unit, with his own family unit, such sibling's structure was taken out of the demolition order.

8. The petitioners' alternative proposal, that the Respondent will make-do with demolishing the terrorist's private room only in the residential apartment that is shared with the other family members or with the sealing thereof, appears particularly unconvincing when suicidal terrorist attacks are concerned. It appears that with regard to a terrorist who intends to blow himself up and commit suicide, the fear that afterwards the military will be able to seal only his private room or even demolish the same, will not be able to serve as a deterring factor of any kind. In such a situation, the Respondent's order would have lost any meaning.

9. In these petitions there was in fact only one point which caused me to have doubts, and which also led my honorable colleague, Justice Dorner, to issue a dissenting opinion with regard to two of the petitions (namely in HCJ 1730/96 and HCJ 1731/96). The aforesaid problem, which may arise to a certain extent also in the case of HCJ 1821/96, focused on the point which I will present as follows. We will briefly describe the facts that are relevant to the three aforesaid cases:

a) HCJ 1730/96 contemplates the terrorist _____ Jabarin who, on 21 August 1995, executed a suicide terrorist attack on bus route number 26 in Jerusalem. In this terrorist attack, 4 people were killed and 103 were injured.

A petition was filed by the family immediately thereafter but the same was dismissed without prejudice when it became clear that the Respondent had not yet formulated a standpoint pertaining to such suicide terrorist's place of residence. On 19 December 1995, a message was relayed to the family, on behalf of the Respondent, with regard to the intention to issue a demolition order, and on 22 December 1995, a contestation was submitted regarding this decision. Since then the family heard nothing further until they found out about the Respondent's decision from 3 March 1996 to demolish the house.

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b) HCJ 1731/96 addresses the terrorist attack which was performed by a terrorist by the name of _____ Azzam on 24 July 1995. The terrorist attack occurred in Tel Aviv on bus route number 20 and 6 residents were killed and 31 more were injured thereby.

On 19 December 1995, the Respondent decided to confiscate the structure in which the aforesaid terrorist lived and to partially demolish the same. Pursuant to the submitting of the contestation the Respondent decided to meanwhile freeze the

execution of the order. On March 3 1996, pursuant to the series of the recent terrorist attacks, the Respondent ordered the immediate execution of the demolition order with regard to which he decided at that time.

c) The petitioner in HCJ 1821/96, _____ Sidar, is a member of the military arm of the Hamas organization. He was responsible, *inter alia*, for the terrorist attack in Nahalat Shiva, that was performed on 9 October 1994, and which caused the death of 7 people and the injury of 13 more, and he was responsible for the suicidal terrorist attack in the International Convention Center in Jerusalem on 25 December 1994, in which 13 people were injured. In addition, he planned a great number of additional terrorist attacks, mainly in the Jerusalem area.

However, details and evidence on the activity of this terrorist were obtained only in 1995. The petitioner was arrested on 12 May 1995, near the Erez Crossing, when he returned to Israel from the Gaza Strip. His investigation lasted several months and the full picture in connection with the dimensions of his activity crystallized only at the end of the year.

An indictment against the petitioner was filed in January 1996.

His family was informed of the decision to demolish the house where the petitioner lived with his family on 4 March 1996, also after the performance of the series of terrorist attacks which occurred lately.

10. The argument that was raised regarding the three aforesaid petitions is, succinctly, as follows:

Contrary to orders which were issued with regard to the terrorist attacks that occurred recently, these are terrorist attacks which occurred a considerably long time ago, namely, more than six or seven months ago (and in the case of the subject of HCJ 1821/96, even prior thereto). Once the Respondent decided not to execute demolition orders against the structures in which the terrorists who are contemplated in such petitions resided, namely, once he decided, according to the Respondent's statements, to "freeze" the execution thereof, then it would be unjust to now "unfreeze" such orders and execute the same, when it was not argued that the families concerned had any connection with the recently performed terrorist attacks which, everyone agrees, they and they alone led the Respondent to now make the decision pertaining to the performance of the demolition of such houses.

The Respondent's attorneys relied in their answer, *inter alia*, on the judgment in HCJ 5667/91 *Jabarin v. The Commander of the IDF Forces in the Judea and Samaria Region* [3] where it was determined by Justice Barak (as was his title then) that "the lapse of time in itself does not omit the security reasons that are at the basis of the respondent's decision and does not point to another flaw which occurred in his decision" (there, on p. 860). This judgment is relevant, but does not constitute a full answer to the claim in the aforesaid petitions. That case deliberated an ordinary administrative delay in order to allow the respondent to consider the issue, whereas in our cases the petitioners' claim is not based just on the lapse of time but mainly on the reason which eventually caused the "unfreezing of the freezing" of the decision pertaining to the demolition of the houses.

11. This is, as aforesaid, an argument that is worthy of consideration, however, ultimately I reached the conclusion that the same should not be accepted. One should not forget that in neither one of the three aforesaid cases did the Respondent decide that there is no room to exercise his authority according to Regulation 119 of the Regulations, or decided to cancel demolition orders which were issued by him vis-à-vis such terrorists earlier. On the contrary, with regard to the petitions in HCJ 1730/96 and HCJ 1731/96, the Respondent decided at the end of December 1995 explicitly that he intends to order the demolition of the structures and he only suspended his final decision in the matter, or "froze" the same, pursuant to contestations which were filed by the families. With regard to the petitioner in HCJ 1821/96, a decision pertaining to the demolition of his place of residence had not yet been made after an indictment was filed against him in January 1996, and the decision with regard thereto was adopted only now.

Is the Respondent's mode of conduct in these cases flawed and does it justify our intervention? It appears to me that the answer to this question must be negative. In the course of the hearing we posed to the attorneys of such petitioners the following question:

> "Will the acceptance of your argument not lead to that in the future the commander will tend to execute demolition orders immediately, whenever there are reasonable grounds for doing so? What is the flaw in that the Respondent delays the performance of the decision in order to consider the matter further, perhaps he will realize that maybe there is no need to institute this painful sanction?".

I received no convincing answer to this question. We must not forget that this concerns the activation of a sanction, as a deterring measure, which necessarily harms people with regard to whom it was not proven that they, personally, committed a crime, and no one is rejoicing upon the use of this measure. Therefore I emphasized in the *Alamarin* Affair [2], on p. 699, that "…certainly no one will be sad if an improvement in the security of the State and the normalization of safety in the region will induce the legislator one day to regard this measure as redundant".

If so, what is the harm in that the Respondent, despite his fundamental decision that his authority according to Regulation 119 (1) should be exercised, postpones the execution in order to see whether a calming of the security situation would allow him, maybe in the future, to respond positively to the families' contestation and waive the exercise of such a drastic sanction. Only that then the horrific terrorist attacks occurred, one after another, causing mass injury and murder, performed by suicide bombers from the same terrorist organizations to which the suspects who are contemplated in the petitions at bar belonged also, and who were motivated by that same fanatic motivation. If the Respondent decided that in view of the situation which was thus created there is no more room to suspend the decision pertaining to the demolition of such structures, this should not be deemed as arbitrariness or extreme unreasonableness or an action according to foreign motives justifying the cancellation of the orders. It shall just be noted that of course also on this subject the proportionality factor should be taken into account. If for example this was a matter of the postponement of the performance of orders which were issued many years ago,

possibly a different conclusion would be required. However, in the cases before us, when we are dealing with a relatively short suspension, of approximately two months, of the execution of the decisions, there is no room for our interference.

12. Finally we will further mention the alternative request of some of the petitioners that it will be made possible for them to demolish their structures by themselves in order to prevent the causing of unnecessary damage to neighboring structures upon the demolition by the security forces.

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On behalf of the Respondent there was no consent to this proposal. It was argued by his learned attorneys that failure to perform the demolition by the security persons will derogate from the deterring effect of this sanction. Clearly any and all efforts will be used to prevent unnecessary damage and if the same will nevertheless occur, damages shall be paid to those prejudiced thereby.

Without taking a firm stance pertaining to the justification of the Respondent's assessment, I reached the conclusion that there is no room for our intervention in the Respondent's stance with regard to the manner of performance of the orders which were issued by him.

Based on all of the aforesaid it appears to me that the petitions at bar should be denied and the interim orders which were issued in the context thereof should be cancelled.

Justice D. Dorner: 1. I agree to the denial of the petitions in HCJ 1740/96, HCJ 1821/96, HCJ 1824/96, HCJ 1825/96 and HCJ 1828/96. However, I cannot agree to the denial of the petitions in HCJ 1730/96 and HCJ 1731/96, and if my opinion would be accepted, we would accept such petitions and forbid the Respondent to demolish the petitioners' houses.

2. Indeed, the purpose of the demolition authority according to Regulation 119 of the Regulations is deterrence and we have no grounds to deny the Respondent's argument that the demolition of the houses of suicide terrorists may deter future terrorists. However, this court ruled in a long line of judgments that the discretion in exercising the demolition authority is not absolute. So for example it was determined that in exercising the authority "one should consider, on the one hand, the prohibited conduct for the deterrence of which the use of Regulation 119 is intended. On the other hand, one should consider the suffering which will be incurred by those against whom the deterring measure will be exercised…" (HCJ 5510/92 *Turkeman v. The Minister of Defense et al.* [4], on p. 219-220). See also, for example: the *Alamarin* Affair [2]; HCJ 5667/91 [3]). It is also inconceivable that this court would have authorized the demolition of entire towns pursuant to the acts of individuals, despite the fact that such a measure is ostensibly anchored in the language of Regulation 119, and it cannot be said that the same is lacking a deterring value. It is permitted to demolish the house of the terrorist and his family only.

One of the requirements, which have not been disputed until now, for the exercise of the authority, is the existence of a causal relation between the terrorist attack and the demolition: Although the demolition of a house is not a punitive measure in the full sense of the word but a deterring measure, the same should not be instituted except as

a direct response to a terrorist attack which was performed by the terrorist who carried out the attack who resided in the house.

3. In the case at bar, the Respondent "froze" the demolition decision and turned it into a *quasi* "conditional" sanction. The "condition", so it turns out, was the performance of additional terrorist attacks, by terrorists who lived in other towns and belonged to other families. Pursuant to the performance of such further terrorist attacks, the Respondent seeks to demolish the petitioners' houses. In my opinion he is not entitled to do so, since the demolition authority should not be exercised pursuant to terrorist attacks which are not those which were performed by the terrorist who lived in the house.

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For such reasons, in my opinion, the petitions in HCJ 1730/96 and HCJ 1731/96 should be accepted. As aforesaid, I agree with the denial of the remaining petitions.

Justice M. Cheshin: I agree with the verdict which was written by my colleague, Justice Bach, and in the dispute which erupted between my colleague and my colleague, Justice Dorner, I agree with him.

2. In an opinion which I wrote in HCJ 4772 5359/91 *Hizran et al. v. The Commander of the IDF Forces in the Judea and Samaria Region* [5], on p. 155-161, in the *Alamarin* Affair [2], on p. 701-706 and in the *Nazal* Affair [1], on p. 351-352, I firmly routed myself in a fundamental principle of law, from which – so I said – I would not move neither right nor left. And such fundament al principle, we all know it since childhood: each man shall bear his own transgression and each person shall be put to death for his own sin. According to the prophet, as stated in the Bible:

> "The soul who sins is the one who will die. The son shall not share the guilt of the father, nor will the father share the guilt of the son. The righteousness of the righteous man shall be credited to him and the wickedness of the wicked will be charged against him" (Ezekiel, 18, 20 [a]).

I went on to state that "unlike case law which was set forth elsewhere…the fundamental principle which we are deliberating goes down to the roots of the authority and does not focus only on the authority's discretion and the issue of the compatibility ('proportionality', 'relativity') between an act of injustice and an authority's sanction" (the *Nazal* Affair [1], on p. 352). This was my opinion in such cases which I addressed. This is my opinion also today. Hence, I express doubts with regard to the statements of my colleague, Justice Bach, insofar as he constructs his ruling on the issue of compatibility and proportionality alone (as stated in paragraphs 4 and 5 of his opinion). However, these matters can be deemed as incidental statements only since as far as I am concerned, in the matters before us, the required conditions for authority and alongside them the proportionality and compatibility conditions also were fulfilled in the cases before us. For this reason, and it alone, I deemed myself permitted – also obligated – to join the ruling which my colleague issued.

3. So too on such two issues regarding which disputes erupted between my colleagues. The freezing of the demolition orders when they were frozen and the unfreezing thereof when they were unfrozen, both the freezing and the unfreezing were, in my opinion, lawful and within the boundaries of reasonableness. I would have ruled otherwise had I believed that the military commander waived- explicitly or implicitly – the issuance of demolition orders, namely: had we found out that after first terrorist attacks the military commander waived the issuance of the demolition orders, and that the recent terrorist attacks led him to change his mind with regard to the waivers that he made. Had it been so, I would have then said that the decision on unfreezing demolition orders which were frozen – or a decision on issuing demolition orders - is an unlawful decision, a decision which does not support itself on proper discretion, a decision which is tantamount to a decision made whilst deviating from authority. However, the commander did not waive - explicitly or implicitly – neither the unfreezing of the demolition orders, nor the issuance of demolition orders. Knowing all of the above, we further know that he acted lawfully and within the boundaries of authority.

If I entirely understood the opinion of my colleague, Justice Dorner, she believes that the unfreezing of the demolition orders would have been lawful, had subsequent terrorist attacks – terrorist attacks which led to the unfreezing – been performed by terrorists who resided in the town where the first terrorists resided or by such terrorists who belonged to the family of the first terrorists, whereas my opinion is that partners, for purposes of a murder scheme, of a terrorist – if only after-death partners – are deemed as the terrorist himself, and all of these are terrorists who are members of one "family".

The reason for this is that such suicide murderers tied their fate to the fate of their partners in the murder-scheme and thus, in a way, became mutually responsible for one another. And if we shall remember that the demolition of houses was intended for the deterrence of the individual and the group, we will easily see that the purpose of deterrence will be excessively achieved by way of freezing and unfreezing as the Respondent does. One way or another, I did not know from where to take the authority to intervene in the military commander's discretion pertaining to the timing of the demolition, if the same will take place immediately after the act of terrorism or if the same will take place after time shall have lapsed.

We will further remind, so as not to forget, that the demolition of the house is performed only because of a murderous terrorist attack that was performed by the one who lived therein and not pursuant to the act of another. The demolition of the house was a direct response to the act of terrorism although not an immediate response.

4. So much so – on the issue of the orders that were issued in our case, that in my opinion the same were issued with authority and neither affliction nor aberration occurred therein. Despite all that, so I said to myself, let us examine matters from some distance and find our path. I shall speak up and be at peace.

5. The issue of the demolition of houses according to the Regulations does not occupy the courts in day-to-day life. It is not an issue that routinely arises before the courts and the courts were not designated by their essence to deal therewith. Indeed, there is

no conceptual impediment to apply to the discretion of the military commander – who has the authority to issue demolition orders according to Regulation 119 of the Regulations - the rules of judicial review, which the court is experienced in: deviation from authority, arbitrariness, discrimination, reasonability, foreign motive, prejudice to fundamental rights, "proportionality". The military commander is supposed to consider whether or not he will issue demolition orders - and such discretion – as any discretion – is *ipso facto* established in the network of norms that covers all other acts of discretion. This has been our practice in the past – this is our practice now and thus shall be our practice in the future.

However, all of the aforesaid cannot dull a sensation – and it is a pungent sensation – that we are dealing with an issue which does not belong to us. Indeed, we will not conceal the entire truth, that our resort to regular administrative case law and to the application thereof to unusual decisions such as a decision on the demolition of houses in Judea and Samaria, is more than a little artificial and confusing the issue. Furthermore: our dealing with the review of demolition orders is accompanied by a strong sense of alienation. And it is not because it is not within our power and authority to intervene in the military commander's decision. We have more than once intervened in the military commander's decision, overturned decisions that he made and ordered him to act one way and not another.

The sense of alienation derives from that the act of demolishing houses according to the Regulations, by its very nature and character, is an act of war. And acts of war are not acts which the courts address in day-to-day life. _____ Nazal murdered twenty three people and injured dozens more when he blew up an explosive device in the heart of the bus. The "act of the murderer", thus I said with regard thereto, "was in its essence – although not in the context thereof and not by its formal definition – an act of war, and an act which is essentially an act of war, one answers with an act which is also essentially an act of war, and in the ways of war" (*Nazal* Affair [1], on p. 351). And this is where the great difficulty arises, that we find it hard to apply to acts of war, standards to which we resort from day-to-day law:

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> "and I as a judge did not accustom myself to deal with war and I know not the ways of the warriors. And behold I am being ordered to apply day-to-day law and legal standards to an act which is essentially an act of war. How will I do that?" (*Nazal* Affair [1], *ibid.*).

And if there was doubt in anyone's heart that we are indeed in the midst of a war (also if not according to the formal definition thereof) the government with its decision of 3 March 1996, reminded us as follows:

> "The government determines that Israel is in the midst of a comprehensive war against the Hamas Organization and the other terrorist organizations and it demands of the Palestinian Authority, all of the Arab states and all of the partners to the peace process to participate in this war with all the means that are available to them and to firmly act against terrorism".

War and the rule of law, acts of war and courts.

6. Two prongs have joined together and led us to where we are now. The first prong is in the Regulations themselves which apply in the Judea and Samaria regions since the time of the Mandate. The Defense Regulations, as their name and content attest, were essentially intended to serve as a tool of war and in the act of the war. Such Regulations were promulgated in 1945, and in the hands of the one having the mandate they were supposed to serve – and indeed served - as a tool of war in the underground organizations. War is not fought in the courts and therefore the one having the mandate set forth – in Regulation 30 of the Regulations – that decisions of military courts according to the Regulations shall not come before the court and shall not be examined in the courts. Regulation 30, as we know, is no longer valid. Currently, the military court system according to the Defense Regulations is integrated in the military tribunal system (see article 440A forth of the Military Jurisdiction Law. 5715-1955). However, also the cancellation of Regulation 30 did not alter the nature of the authorities according to the Regulations, which are authorities which accompany war.

7. However, chief to us now is the second prong, and the beginning thereof is in the Six Day War, after we seized control of parts of the land of Israel which were not in our hands since the establishment of the State. The Attorney General at such time, Meir Shamgar, instructed his attorneys that where a resident of Judea and Samaria, the Golan or the Gaza Strip will challenge a government act that was performed in the "territories", in the court, the State shall not raise a lack-of-authority argument. This has been the case from then until now, and the courts - namely, the High Court of Justice – addressed petitions which were filed by residents of the territories against the State and military authorities due to acts and omissions which were performed and omitted in the territories. See for example M. Negbi, *Chains of Justice – the HCJ Vis-à-Vis the Israeli Government in the Territories* (Kana, 5742) 9 forth. Further compare, M. Shamgar, *"Legal Concepts and Problems of the Israeli Military Government – The Initial Stage" Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* (Jerusalem, Ed. by M. Shamgar, 1982) 13 FF.

The developments which occurred since 1967 justified this policy of applying the jurisdiction of the High Court of Justice to the territories, since such a policy would infuse principles of the rule of law into the acts of a military government.

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And with all of the benefits which this policy brought pursuant thereto – and there were many benefits – we cannot turn a blind eye to the phenomenon that when applying principles of law to acts of war of the military authorities – including the demolition of houses – the courts found themselves dealing with an issue which is foreign to them, an issue whose gist is far from them, not the issue for which the legal principles were created and made. We did not say – nor will we say – that we should entirely refrain from dealing with such acts of war. However, at the same time, we cannot cover our eyes from seeing what we are dealing with, and what is unusual about this occupation of ours.

8. In the 1950s, the retaliation policy was practiced. In response to damage to Israel's security and the murder of Jews by infiltrators and terrorists, military units crossed the border and struck targets that were designated to them. In these retaliation acts also civilians who were across the border were injured (see "*Acts of Retaliation*" Z. Shif,

E. Haber, *Israel Security Lexicon* (Zmora, Bitan, Modan, 5736) 430). Did it cross the mind – does it cross the mind that a Jordanian (Palestinian) citizen would have filed a petition against a retaliation act which may have been intended to demolish his house? The clear answer to such a frenetic petition would have been, "act of state", namely, an act which does not fall within the realms of the courts, an act to which the courts do not apply legal norms, an act which lies, ostensibly, outside the law. This concerned the relationship between states and when states speak the language of war to one another, the individual has neither rights nor standing.

The civilian population suffers greatly at times of war, however, this suffering, wherever it is, gives the individual neither rights nor standing against the enemy. The acts are not judicable as they "belong" to a field which is not under the court's authority.

9. We did not mean to say that the acts of demolition of houses in regions which are controlled by Israel are identical to acts of war against an enemy state. The differences between these acts and those acts are far too obvious for us to be able to ignore. However, the acts are similar in that both are acts of state, acts of war. And when we say acts of state and acts of war we refer to acts which are designated – from beginning to end, in their entirety – for the existence of security for all and for the protection of the individual's life. Security and life in their simple meaning. Who shall deny that the statement that life and protection thereof – the existence of life, in the simple meaning thereof – is superior to other rights? That property rights must bow to the right to life? And if the military commander believes that demolishing a terrorist's house could – if only by a minute chance – deter someone who may also become a murderer-terrorist like his comrade in the Hamas organization (or the Islamic Jihad), how will the courts tell him what to do and what not to do? In war like in a war: what business does a court have to order a military commander what to do and what not to do? Indeed, the court shall not order a battalion's commander that he ought to send a certain company to the right and not to the left of the hill. Similarly, although to a smaller extent, I would find it hard to understand how the court could order a military commander not to demolish the house of a murderer-terrorist – to deter others – just because the court may think differently than the commander.

10. In the past we supervised the acts of a military commander when he ordered to demolish houses of terrorists, we supervised his acts and tempered them by the forge of judicial review. That is what we are doing now. That is what we will continue to do in the future.

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However, the following is also true, such review and supervision are not tantamount to review and supervision which we apply to the ordinary administrative authorities. The different material dictates, in itself, different methods of intervention. Indeed, an act of state and an act of war do not change their character also if the same are subject to the court's supervision, and the nature of the acts, naturally, makes an imprint on the modes of intervention. Difficulties which we struggle with in reviewing the actions of the military commander are great and they are tougher than difficulties which we encounter in the review and supervision of the ordinary administrative authorities, and such difficulties very much limit the court's ability to infuse the rule of law into the acts of the military commander. Indeed, we shall not grow weak in our

efforts to strengthen the rule of the law. We undertook an oath to dispense justice, to be servants of the law and we shall be loyal to our oath and to ourselves. Also when the trumpets of war sound the rule of the law shall make its voice heard, however, let us admit a truth: in such places its sound is like that of the piccolo, clear and pure but drowned out in the bustle. All of this we have long since known and yet, I preceded to say to myself: I shall speak up and be at peace.

It was decided unanimously to deny the petitions in HCJ 1740/96, HCJ 1821/96, HCJ 1824/96, HCJ 1825/96 and HCJ 1828/96; and it was decided by a majority of the court, against the dissenting opinion of Justice D. Dorner, to deny the petitions in HCJ 1730/96 and HCJ 1731/96. All of the interim orders that were issued in the context of the petitions at bar are cancelled.

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