At the Supreme Court
Sitting as the High Court of Justice

HCJ 5772/12

In the matter of:

1. _____ Jarusha, ID.
2. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger

all represented by counsel, Adv. Michael Sfard and/or Emily Schaefer Shlomy Zachary and/or Avisar Lev, and/or Carmel Pomerantz, and/or Adar Grayevsky
of 45 Yehuda HaLevy St.
Tel Aviv - Yafo 65157
Tel: 03-4206947/8/9, Fax: 03-4206950

The Petitioners

v.

1. Military Advocate General, Brigadier General Dani Efroni
2. Chief Military Prosecutor, Colonel Jena Modzgavrishvili
3. Major O.
4. Staff Sergeant T.

Represented by State Attorney Counsel,
Ministry of Justice, Salah a-Din St., Jerusalem

The Respondents

Petition for *Order Nisi*

This is a petition for an *Order Nisi*, wherein the Honorable Court is requested to instruct Respondents 1-2 to appear and show cause, if they so please, why they should not indict Respondents 3-4 for their part in the killing of _____ Jarusha (Military Police Investigation Unit file 517/03) and why they should not charge them with the following offenses:

1. Causing death or attempt to cause death;

2. Alternatively, exceeding authority amounting to causing danger to life or health (Section 72 of the Military Justice Law, 5715-1955).

A. Introduction

1. This petition concerns the killing of _____ Jarusha (hereinafter: the Deceased), who was shot to death by soldiers as he was parking his car in the yard of his sister's home in Tulkarm. He was 40 years of age.

2. **This petition concerns an assassination order issued and executed against the Deceased as a result of a suspicion that he was providing armed Palestinians with information about the location of soldiers – a suspicion founded entirely on speculation and inference**.

3. The Deceased, it is not disputed, did not pose a danger to human life **at the time he was shot**, and the decision to kill him was made in advance and executed when the opportunity to do so presented itself rather than "under fire". Respondent 2 herself does not dispute the fact that this constitutes a breach of the open-fire regulations.

4. Therefore, this petition concerns the important question of what level of risk a citizen must pose before lethal force is used against him and what level of certainty that the risk indeed exists is required.

5. The military prosecution closed the investigation file and rejected the appeal against this decision claiming that the Deceased removed himself from the circle of "protected persons", and that Respondents 3 and 4 come under the necessity defense, combined with an argument regarding an honest misinterpretation of the situation.

6. The Petitioners believe that at the time the Deceased was shot, he met the definition of "protected person" who may not be harmed. Neither the actual circumstances, nor the circumstances as they appeared to Respondents 3-4 justified the use of lethal force against the Deceased and thus they cannot avail themselves of the necessity defense.

7. **The Petitioners believe that accepting the position of Respondent 2 contravenes the basic tenets of the law concerning use of force and the law of war, and as such, severely injures the rule of law. If this position, which was adopted by the military prosecution, prevails, it will constitute a license to kill civilians simply due to suspected involvement in hostilities even at a time when they pose no actual risk to human life**.

B. The Parties

8. Petitioner 1 is the brother of the Deceased, _____ Jarusha and one of his heirs.

9. Petitioner 2 is a human rights organization that takes action to increase enforcement of humanitarian law in the Occupied Palestinian Territories (hereinafter: OPT) and assists Palestinian residents of the OPT whose rights had been violated by Israel.

10. Respondent 1 heads the military prosecution and is entrusted with enforcing law and discipline within the IDF. As part of his position and functions, he is responsible, *inter alia*, for the military investigative and prosecutorial apparatuses and for disciplinary law inside the military. He is in charge of Respondent 2. He supervises her activities and she is his subordinate.

11. Respondent 2 heads the competent authority, according to law and military orders, to make decisions regarding indictment and, alternatively, regarding the closing of an investigation file without taking any legal or disciplinary measures.

12. Respondent 4 [*sic.*] commanded the November 2000 company at the time of the incident.

13. Petitioner 5 [*sic.*] is one of the two snipers who shot at the Deceased's car.

C. The Facts

I. The incident

14. In the morning of October 31, 2001, the Deceased and his son arrived for a family visit in the home of the Deceased's sister. The sister's home is located on the east side of Tulkarm, some 200 meters from a military post located, at the time, in the al-Safa building. An hour later, the family started toward the Deceased's home in his car, but the car was blocked off by an armored personnel carrier and a tank. The family turned back. The Deceased parked the car on the side of the road, and everyone went back inside the sister's home. A few minutes later, the family heard the armored personnel carrier approaching the house. The Deceased, who feared his car would be harmed, came out of the house in order to park the car in the yard. When he got inside the car, a burst of shots was heard. The Deceased sustained injuries as a result of the shots, but was able to get inside the house and call for help. A Red Crescent ambulance arrived at the scene and ultimately evacuated Jarusha to the hospital in Tulkarm. Jarusha died from his injuries in hospital a few hours later.

15. The investigation of the incident was opened after a considerable delay of **some 18 months** from the time the incident took place. The testimonies of the Deceased's relatives were collected two years after the incident and the testimonies of the soldiers and commanders **three years** after the incident. The decision of the military prosecution not to bring charges was made **seven years** after the incident, this too, only after a High Court of Justice petition was submitted (HCJ 5314/08 **Jarusha v. Military Advocate General**, (not yet reported, rendered October 12, 2008)).

    A copy of the petition in HCJ 5314/08 is attached hereto and marked **Exhibit 1**.

16. On September 2, 2008, the operations department of the military prosecution informed Petitioner 2 that the investigation file had been closed without legal measures against any military official. The notice indicated that according to the findings made in the investigation, there were reasonable grounds to believe that the Deceased was injured from shots fired by IDF snipers at the car he was driving. The shots were not necessarily meant to kill him, but rather to stop him. The shots were fired in light of the commanders' understanding that the Deceased had been repeatedly involved in directing Palestinian gunfire toward soldiers, putting soldiers' lives at risk.

    A copy of prosecution's notice regarding the closing of the file which is the subject of this petition is attached hereto and marked **Exhibit 2**.

17. The prosecution's main argument, summarized in paragraph 17 of its notice regarding the file closure, was that the law of war permitted shooting for the purpose of arresting the Deceased even at the cost of a possible injury. According to the prosecution, the Deceased's actions which it described as "directing gunfire at soldiers, on a great number of occasions, in a systematic, ongoing and intensive manner", had removed himself from the circle of "protected persons". He was not entitled to protection from harm inflicted by the soldiers as he was defined as a "civilian taking a direct part in hostilities", as opposed to a "protected person" who is not involved in hostilities'.

18. In its notice, the prosecution admitted that it would have been impossible to preauthorize the shooting as it was authorized and that the soldiers' conduct was a departure from the open-fire regulations. Despite this, the prosecution decided that considering the overall circumstances, the file would be closed without taking any legal steps against any of the soldiers involved in the incident. The decision to close the file stated as follows:

> Despite the fact that it is possible that the shooting, as it occurred, could not have been authorized, and in any case, it is clear that the open-fire regulations should have been followed, in considering whether or not to press charges, it has been found that weight should be given to the overall circumstances and the law.

19. As described below, Respondent 2 considered and rejected an appeal against the decision of the MAG. This is the background and basis for the petition at bar.

II. The demand for an investigation and the delay in investigating

20. On March 25, 2002, the family of the Deceased contacted the Military Legal Advisor for the West Bank, represented by Petitioner 2, demanding an investigation of the incident. A copy of the letter was provided to the GOC Central Command.

A copy of the letter of Petitioner 2 dated March 25, 2002 is attached hereto and marked **Exhibit 3**.

21. On March 26, 2002, the legal advisor replied that the Petitioners must contact the Central Command Military Attorney directly. On March 30, 2002, the Petitioners contacted the Central Command Military Attorney, Lieutenant Colonel Roi Ginot directly. On that day, the attorney replied that the complaint was under review. The Petitioners do not know when the formal investigation that followed the initial review began. They therefore take this date to be the date on which the investigation of the incident began.

A copy of the response of the Central Command Military Attorney dated April 30 2002 is attached hereto and marked **Exhibit 4**.

22. From this point on, and for more than three years, the Petitioners contacted the Military Police Investigation Unit (MPIU) on various occasions, in writing and by phone. The response was that the complaint was being investigated.

23. On October 27, 2005, Petitioner 2 learned that the investigation had been concluded and the file transferred to the Northern Command Attorney for a decision regarding whether or not to indict.

24. From this point on, and for more than two and-a-half years, the file was passed between the various offices of the MAG, without a decision on whether or not to indict.

25. Following the great delay, Petitioner 2 filed a petition demanding that the MAG and the MAG's office to make an immediate decision whether or not to indict the suspects in the death of the Deceased (HCJ 5314/08 **Jarusha v. Military Advocate General**, Exhibit 1 herein).

26. In its preliminary response to the petition, the MAG notified the court that on August 28 2008 a decision was made to close the file. Subsequently, on October 12, 2008, the Honorable Court held that the petition had become moot and hence dismissed it.

27. Seven years after the incident that caused the Deceased's death, only a petition to the High Court of Justice moved the MAG to finally make a decision not to indict the individuals suspected of killing him.

III. The investigation

The investigation material revealed the following:

28. The information that was in the possession of the military force prior to the attack on the Deceased consisted of about a week of occasional observations in which he was seen from "afar" arriving at a certain private residence on a number of occasions and staying outside it while talking on his cellular phone. This information was compounded by the circumstantial "evidence" that a few minutes later, Palestinians opened fire toward the soldiers' outpost in the a-Safa building. This set of circumstances was sufficient to create a certainty among the soldiers that the Deceased was directing gunfire at them, and was in fact involved in hostilities. Thus, the sniper, Staff Sergeant Igor, in his testimony (January 13 2005):

> This Palestinian directed sniper fire at our force for about a week before his death… Every time there was accurate sniper fire at us, he was standing there, talking on the cell phone and directing it. I know that he directed the force [*sic*] because a coincidence might have happened once or twice, not for a whole week.

And sniper Staff Sergeant Tom:

> The company soldiers told me that they had identified an individual who arrived every day in a blue Audi, parked about 450 meters away from the building, watched it while talking on the phone and appeared to be giving a report about us. As soon as the conversation was over, this person left the scene and immediately after that, heavy gunfire was aimed at the windows where soldiers were positioned. In the week and-a-half that I spent in the building, I also saw that man. This process repeated itself and I had no doubt that there was a direct connection between this person and the shooting and that he was actually ranging.

29. In the second testimony given by the company commander, Ofir, on September 26 2005, which is a more extreme version of the occurrences than the one contained in his first testimony (more on this will follow), the company commander notes that he came to the understanding that the Deceased was putting the troops at risk and must be neutralized after "a few incidents, which, as I recall, continued for more than a week, maybe close to two weeks" (all emphases in the petition were added unless otherwise stated).

30. Despite the deep conviction displayed in the testimonies of the snipers and the company commander, it should be noted that not one of the testimonies contains the exact number of incidents that indicated the Deceased supplied information about the force, or an estimation thereof. The MAG's notice regarding the rejection of the appeal stated that "the investigative material indicates that more than five incidents of shooting in the vicinity of the post were recorded, and shots were fired at the post as well". Note that this finding by the MAG contradicts the soldiers' testimonies that the posts were subjected to recurring gunfire attacks (e.g. testimony of Company Commander Ofir of September 26, 2005).

31. During the entire time that preceded the incident, the soldiers were unaware that the residence was the home of the Deceased's sister and that he often came to her house for family visits, sometimes in the company of his 13-year-old son (testimony of the sister ____ Zaghal, dated September 7, 2003). The Deceased was unarmed, had no sighting equipment whatsoever, did not hide from the soldiers and the content of the conversations he had on his cellular phone, as well as his conversation partner, remain unknown to this day.

32. The evidence provides no indication that the suspicion that the Deceased was directing gunfire toward the soldiers was investigated any further than the circumstantial impressions drawn by the soldiers manning the al-Safa building at the time, or that the issue was investigated in any way beyond the company and regiment commanders.

33. The investigative material further indicates that no retroactive action was taken to verify the suspicion that the Deceased was involved in unlawful activities. On the contrary, the sniper, Staff Sergeant Igor, estimated that the Deceased's car was not searched after the shooting (testimony dated January 13, 2005). Furthermore, Regiment Commander Roni testified that there was no inquiry into the incident (testimony dated November 28, 2004). A significant inquiry into the circumstances of the incident began only two years after the fact, when the MPIU investigation was opened, and this too, at the Petitioners' behest rather than as a result of any official initiative.

34. It should be noted that shortly after the incident, the regiment retroactively received information from the ISA that the Deceased had been the Hamas treasurer in Tulkarm. It is stressed that the soldiers were not aware of this information at the time of the incident and in any event, it does not "legitimize" their grievous conduct, nor make it permissible. See the statements contained in paragraph 6 in the Appeal Decision, Exhibit 6[*sic*] below.

35. Based on these circumstances, Company Commander Ofir approached Regiment Commander Roni about a week before the incident and pressed him for clearance to "neutralize" the Deceased, a "**kill approval**". The regiment commander granted his request a week later. Company Commander Ofir said in his November 30, 2004 testimony:

> I asked Roni for a kill approval. We talked about it a few times and after a few times that he didn't approve it, I got the approval.

36. The company commander's testimony indicates that the force he commanded ambushed the Deceased the day before the incident, but he did not show up. Ofir made flow charts of possible incidents and responses and noted that he was troubled by the presence of other individuals, or children, in the Deceased's car:

> At that point I realized we couldn't kill him, so I decided to stop the vehicle, to intercept it.

37. The soldiers then waited until the Deceased left the house, alone. In the meantime, Ofir ordered a tank and an armored personnel vehicle to advance toward the sister's home. Shortly thereafter, the Deceased left the house and entered the car unaccompanied. Ofir then gave the order to shoot him.

> I realized that I was going to miss this terrorist.. I estimate I gave the open-fire order the minute he got into the car and he only just moved the car.

38. The snipers, Staff Sergeant Igor and Staff Sergeant Tom, testified that they received an order to shoot the Deceased with the aim of hitting him, and in fact, killing him. Staff Sergeant Igor shot

at the Deceased using a 0.5 Barrett rifle, a weapon designed to kill. He said the following in his January 13, 2005 testimony:

> Q: You received an express order to shoot on target?
>
> A: Yes. There was an order to shoot him… but I can't remember exactly what was said in the order. I can't remember who gave the order.

39. In his testimony of September 25, 2005, Igor added:

> Q: Was the shooting meant to kill or hit?
>
> A: My shots can't be meant to wound/hit. I use a weapon that can only kill.

40. Staff Sergeant Tom shot at the Deceased using an M-24 sniper rifle. He initially invoked his right to remain silent, but later testified that the day before the incident, the company commander, Ofir, told him that the regiment commander had had a situation evaulation about the Deceased (testimony given September 28, 2009). The next time he [the Deceased] was identified, Tom was to quickly arrive at a shooting post overlooking the location where the Deceased was seen, which was prepared in advance. [This post] "meant, among other things, a cocked, calibrated and ready-for-shooting sniper weapon." Staff Sergeant Tom added that after the Deceased came out of the house and got into the car, Ofir ordered Tom to shoot him:

> The company commander called me and the other sniper [Igor], ordered us to shoot and told us not to let him get away. I shot at the front of the vehicle.

41. Thus, these were not warning shots fired in the air or the car tires in order to stop the Deceased, but rather at the front of the car, the driver's seat, meant to hit him with a weapon that, according to sniper Igor's testimony - "can only kill".

42. The commander of Regiment 202, Colonel Roni Numa, was also interrogated, particularly with respect to pre-authorizing the Deceased's killing. The investigative material shows that Colonel Roni was not physically present at the scene of the incident, but had received constant updates during its occurrence from Company Commander Ofir and had pre-approved the shooting. Unlike the testimonies given by Ofir and the snipers, who were on scene, Colonel Numa initially testified (on November 28, 2004) that a decision was made to carry out an "interception and stop operation with respect to the vehicle ", in order to examine the Deceased's connection to the gunfire directed at the soldiers. He explained that the directive was to block access and carry out a suspect-apprehension protocol against the vehicle. Colonel Roni added that the Deceased "did not respond to calls to halt " and therefore a suspect-apprehension protocol was carried out and shots were fired at the tires, though Colonel Roni further noted that he did not recall a pursuit.

43. After the testimonies of Company Commander Ofir and the sniper, Staff Sergeant Igor, which indicated that the regiment commander had given a "kill approval" and that the shooting was carried out using sniper rifles with the intent of hitting the target were presented to him, Numa stated in his January 16, 2005 testimony as follows:

> The communication described by Ofir did take place. He really did ask to intercept the car a few times and I approved only after some time… We talked about it on the night before, which is why I did approve shooting at this vehicle.

And then:

> Q: Ofir said in his testimony that he asked you for a kill approval. Is this true?
>
> A: [omitted] [I didn't give] a kill approval. I approved shooting at [the tires] to stop him. He might have asked and I approved.

44. In his third testimony, dated September 12, 2005, Regiment Commander Roni describes a pursuit of the Deceased's car and insists that a suspect-apprehension protocol was employed, including firing shots at the car tires. It should be noted that there is no mention of either shooting during pursuit or use of a suspect-apprehension protocol in either his first or second testimonies. As recalled, the regiment commander was not present at the scene of the incident and his sole source of information is the telephone updates provided by the company commander, Ofir, who, as stated, did not claim in his testimonies that a suspect-apprehension protocol was used.

45. Moreover, when the regiment commander, Roni, was asked to provide specifics about his current account of the incident, his answers remained vague and indefinite. So, for example, he noted that the Deceased tried to flee to "various places" and that he was signaled to stop in "various ways". The regiment commander did not explain exactly where the car, which was blocked by the armored personnel carrier, tried to flee and how he was able to flee while surrounded by armored vehicles located only a few dozen meters away from him. The regiment commander's account is inconsistent with the account given by the other soldiers with respect to what transpired, as well as with the account he gave previously. Another contradiction in his account can be found where in his third interrogation, Colonel Roni says that the Deceased was hurt by shots fired from the armored personnel carrier, whereas there is no indication thereof in the testimonies given by the soldiers who were at the scene. Company Commander Ofir and the sniper, Igor, made it expressly clear that the Deceased was hit by sniper fire and that there was no machine gun fire, or fire shot from the tank. These contradictions and the frequent changes in the accounts given by Colonel Roni severely undermine his credability.

46. Similarly, the second testimony given by the company commander, Ofir, also shows signs of an attempt to do some "damage control". In his testimony dated September 26, 2005, he exaggerates the risk the Deceased's actions posed to the soldiers. This testimony reveals that the Deceased had carried out his activities for more than a week, "maybe close to two weeks", and that he was an "arch-gunman and arch-observationist who placed gunmen in position". These details were not mentioned in Ofir's first testimony.

47. In addition, in this testimony, Company Commander Ofir says, for the first time, that he tried to **block** the Deceased, who chose to try to flee and that the open-fire order was given only then:

> … In one of his lines of progression, Muhammad got into his car and began to flee. At this point, the armored personnel carrier began advancing to block his way. When Muhammad saw he was blocked, he turned to the right. I interpreted his escape as failure to carry out the mission and that I had to neutralize the shootings. I gave the open-fire order to the two snipers who sat with me in the command post.

48. In contrast, in his first testimony, Ofir noted that he waited until the Deceased was alone and gave the open-fire order **as soon as** he entered his vehicle, without any attempt on the part of the force to block his path or any attempt to flee on the Deceased's part.

49. When Major Ofir was asked whether he tried to stop Jarusha or employ a suspect-apprehension procedure, the former admitted that he did not ask the Deceased to stop and that the fact that the armored personnel carrier was blocking the road was the "signal" for him to stop:

> I didn't use words to ask him to stop. Blocking the road by the armored personnel carrier was certainly a signal for Jarushi [*sic*] to stop. This was the practice in other actions as well...
>
> (Testimony given September 26, 2005)

50. The chain of events that emerges from the investigative material indicates that the armored personnel carrier blocked the road earlier, when the family was still inside the car and on their way to the Deceased's home. After the car was blocked, the Deceased parked the car near the house and the entire family got out of the car and went inside the house. A few minutes later, the Deceased left the house and got into the car, alone.

51. Ultimately, Ofir confirms that the plan to shoot the Deceased was made in advance and that the shots were intended to harm him, without a suspect-apprehension protocol, without warning shots in the air or at the tires:

> I recommended my request [*sic*]to neutralize him, including by killing him, to the regiment commander after I came to the realization that [the Deceased's] presence put our forces at risk. a few incidents, which, as I recall, continued for more than a week, maybe close to two weeks, I got the regiment commander's approval, not during this specific incident.

And elsewhere in the testimony:

> I took action to neutralize him according to directives and a prior agreement with the regiment commander, Roni, so I didn't request authorization for every single stage…
>
> Q: Where did you direct the snipers to shoot and what do you mean when you say you told them to fire at the car?
>
> A: I told them to shoot at the car. I hadn't planned for the possibility of escape by car. My objective was to stop the vehicle, or Jarushi [*sic*], even at the risk of harming Jarushi himself. I just didn't say where to shoot.

It is recalled that the snipers testified that in response to Company Commander Ofir's open-fire order, they shot at the front of the car, and at the Deceased, using lethal weapons.

52. An empty attempt to claim that the soldiers used a suspect-apprehension protocol against the Deceased can also be found in the second testimony of Staff Sergeant Igor (dated September 15, 2005). He stated that warning shots might have been fired at the Deceased and that "it could be" that the armored vehicles tried to stop him. However, his first testimony does not contain a claim that the suspect-apprehension protocol was employed. This claim was made only at a later stage, after he was presented with testimonies given by other individuals. In any event, it is inconsistent with his own previous account, according to which he received an express open-fire order intended to hit the Deceased **as soon as** he entered the vehicle, at which point he shot at him using a weapon "that can only kill".

53. In conclusion, the MPIU investigation indicates that the soldiers' suspicions regarding the Deceased's involvement in directing gunfire at them before he was targeted remained abstract and unsubstantiated. The investigation reveals that the soldiers did not bother to employ a suspect-apprehension protocol prior to shooting at the Deceased's car. The testimonies given by the company commander, Ofir, and the sniper indicate that they acted in light of the fact that a "kill approval" had been given in advance and the snipers' weapon was "cocked, calibrated and ready to kill". The soldiers ambushed the Deceased, and when the opportunity presented itself - the Deceased got into the car without anyone else - the soldiers immediately aimed lethal gunfire at the car, in fact, at the front of the car. The evidence lead to the conclusion that the shots fired at the Deceased were intended to kill him rather than stop him.

A copy of the investigative material from the MPIU investigation, as provided to Petitioner 2, is attached hereto and marked **Exhibit 5**.

IV. The appeal and its rejection

54. On September 16, 2009, Petitioner 2 filed an **appeal** against the decision to close the file without charges on behalf of Petitioner 1. The appeal was addressed to Respondent 1.

The Letter of Appeal is attached hereto and marked **Exhibit 6**. This exhibit forms an inherent part of the petition and the facts detailed therein are an inherent part of this petition.

55. The main argument in the aforesaid appeal was that the investigative material indicated that the suspicions that the Deceased supplied information about the soldiers remained abstract and circumstantial, based on thin information which could be interpreted in a number of ways. This information was never actually verified, either in real time or in retrospect. The shooting at the Deceased was approved and carried out in an arbitrary manner, with a "trigger happy" approach. Absent any real evidence of the Deceased's involvement in hostilities, we argue that it must be held that the soldiers deliberately harmed a "protected person", a civilian, and in so doing committed a grievous criminal act and clearly breached international humanitarian law.

56. The Letter of Appeal stated that in light of the findings of the investigation, the MAG's decision to close the file for lack of evidence appeared to have been erroneous and extremely unreasonable. Respondent 1 was requested to instruct that charges be brought against the soldiers involved in the incident, and at least, against the regiment commander, Colonel Roni, the company commander, Major Ofir and the snipers.

57. It was only **two years and four months** after the Letter of Appeal was sent that Petitioner 2 received the letter of Respondent 2, the chief military prosecutor, rejecting the appeal. It is noted that the date that appears on the letter that was received on January 24, 2012 is January 23, 2011, a year earlier.

A copy of the prosecutor's response to the appeal dated January 24, 2012 is attached hereto and marked **Exhibit 7**.

58. The response given by Respondent 2 to the appeal was based on two defenses. In her introduction, Respondent 2 recalled that, as is commonly known, a civilian who directly takes part in hostilities removes himself from the circle of protected persons and becomes a legitimate target for attack, for such time as he takes part as stated. She then stated that:

> An analysis of the forces' actions indicates that they came to an understanding that the individual at whom the gunfire was aimed had removes himself from the circle of protected persons as illustrated below.

Respondent 2 subsequently determined that in the circumstances, the soldiers come under the necessity defense and that alternatively, even if it were argued that they erred in assessing the situation, they could avail themselves of the defense of error of fact. Finally, Respondent 2 again noted that the investigative material presented further difficulties: The issue of the circumstantial connection and the clarity of the directives that had been given, which also affected the possibility of pressing charges against any of the individuals involved.

59. In conclusion, the appeal was rejected long after it was submitted and without reference to the central legal issue, which is how the soldiers could come under the necessity defense when the risk they were under was not immediate and the force that was used, was, on the face of it, lethal and therefore disproportionate. We shall address these and other issues in the Legal Argument section below.

60. Hence this petition.

D. The Legal Argument

I. The argument in brief

61. The legal argument is divided into two parts:

1. In the first part, we examine whether the Deceased indeed lost the protection afforded to a civilian, in view of the exception provided for in Article 51(3) of Protocol I to the Fourth Geneva Convention.

2. In the second part, we examine whether Respondents 3-4 meet the terms of the necessity defense stipulated in Section 34K of the Penal Law 5737-1977, or those of the error of fact defense stipulated in Section 34R of the Penal Law.

62. The following are our arguments in brief:

1. In view of the evidence in the file, Respondents 3-4 are not exempt from the prohibition on harming civilians, expressed in the exception contained in Article 51(3) of the First Protocol, nor do they meet the terms of the criminal defenses of necessity or error of fact. In the first part, we examine whether Respondents 3-4 meet the terms of the necessity defense stipulated in Section 34K of the Penal Law 5737-1977, or of the defense that arises from the combination of this section with section 34R of the Penal Law, which concerns misinterpretation of a situation.

2. Since the Respondents do not meet the terms of these defenses, it is argued that the evidence disfavors the Respondents and supports pressing charges for the offense of causing death or, alternatively, for the offense of exceeding authority amounting to causing danger to life or health, under Section 72 of the Military Justice Law, 5715-1955.

3. As such, the decision to close the file without pressing charges against the individuals involved and the decision to reject the appeal are extremely unreasonable.

II. Was Jarusha a legitimate target for attack?

63. The main argument in the MAG's notice regarding closure of the file was that the laws of war permit the shooting, the purpose of which was to arrest the Deceased, even at the cost of possible injury. According to the MAG, the Deceased had removed himself from the population of "protected persons" through his actions, which were described as " directing gunfire at soldiers, on a great number of occasions, in a systematic, ongoing and intensive manner." He was not

entitled to protection against harm on the part of the soldiers as he was defined as "a civilian who was directly taking part in hostilities," as opposed to a "protected civilian", who was not involved in hostilities. This argument also appears in the introduction to the MAG's notice regarding the closure of the file.

64. The international law norms that address armed conflict stipulate that a civilian who takes a direct part in hostilities may lose the protection normally afforded to "protected persons" and become a legitimate target for attack. This principle is expressed in Article 51(3) of the First Protocol to the Fourth Geneva Convention which sets forth:

> Civilians shall enjoy the protection afforded by this section unless and for such time as they take a direct part in hostilities.

65. This principle constitutes customary international law and it is binding on all states, including Israel and its army (see, M. Henckaerts, "Study on Customary International Humanitarian Law", 87 **International Law Review of the Red Cross**, 175, 198, rule 6; HCJ 769/02 **Public Committee Against Torture in Israel v. Government of Israel**, paragraph 30 of the judgment (2006) – hereinafter "**the targeted killings case**").

66. In the official interpretative guide of the Red Cross, the scholar Pictet says the following with respect to the provisions contained in Article 51(3) of the First Protocol:

> Thus "direct" participation means acts of war which by their nature or purpose are likely to cause harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. **Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked.** However, there is nothing to prevent the authorities, capturing him in the act or arresting him at a later stage, from taking repressive or punitive security measures with regard to him in accordance with the provisions of Article 45 ("Protection of persons who have taken part in hostilities") or on the basis of the provision of the Fourth Conveniton.
>
> **Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949** (International Committee of the Red Cross, Geneva 1987, P. 619).

67. In fact, Article 51(3) stipulates that the protection and immunity afforded to civilians cannot be used by a civilian when he is putting the lives of others at risk, and therefore, in this limited time range, he loses this protection.

68. Suppose that the Deceased did provide combatants with information about the IDF post in the al-Safa building, as the soldiers believed, and that he therefore, "took direct part in hostilities." Still, the Deceased was not shot and killed while he was doing so, but rather, when he left his sister's home in his car. The Petitioners' position is that in this state of affairs, the Deceased ceased to be a legitimate target, particularly considering the fact that it was possible to arrest him and charge him for his alleged participation in hostilities. The scholar Dormann also addresses this:

> For such time as they directly participate in hostilities they are lawful targets of an attack. When they do not directly participate in hostilities they are protected as civilians and may not be directly targeted. It must be stressed

> that the fact that civilians have at some time taken direct part in hostilities does not make them lose their immunity from direct attacks once and for all.
>
> Knut Dormann, "The Legal Situation of Unlawful/Unprivileged Combats", 85 **IRRC** 45, 70 (2003), pp. 72-73.

69. As is known, the meaning of the phrase "and for such time" appearing in the Article and what it covers are a matter of dispute in international literature. The Petitioners are aware of the finding of this Court in the aforementioned targeted killings case, which interpreted the time requirement in the provision more broadly than the original literal meaning of the expression. However, it is argued that even in light of this broad interpretation, the MAG's position that the Deceased was a legitimate target cannot stand.

70. It is so because this position, held by the MAG, ignores the accepted interpretation of the duty to refrain from harming civilians. Israeli law and international literature have long since held that this exception must be interpreted narrowly and literally, in order to preserve the sharp distinction between civilians and combatants and avoid harming innocent civilians:

> Since §51(3) is an exception to the duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances.
>
> Remarks of Justice Beinisch (as was her title then) in the aforesaid **targeted killings case**).

71. According to the accepted approach with respect to narrow interpretation, Israeli law has introduced strict criteria for applying the exception that allows targeting civilians who take direct part in hostilities and denying them protection. We shall examine the criteria relevant to the matter herein.

72. First, **verified and well substantiated information** with respect to the identity and actions of the civilian who is alleged to be taking part in hostilities is required. In case of doubt, **a thorough inquiry**, must be made before an attack is executed. In the aforesaid **targeted killings case**, the Honorable Court quotes the scholar Cassese as follows:

> [I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded (p. 421)

73. What then, is the level of proof required in order to determine that a civilian is in fact directly participating in hostilities? Some believe that the level of proof required from the attacking military must be compelling **beyond any reasonable doubt**. So, for example, Scheideman claims in her paper that just as the guilt of a suspect in a criminal trial must be proven beyond reasonable doubt, this standard must also apply to a person suspected of terrorism before force is used against him:

> The first stage of decision making would be best served by a standard requiring proof beyond reasonable doubt of the suspects' involvement in the preparation of an act constituting a breach of the peace. In effect, policy-makers will consider direct and indirect evidence to arrive at a determination of the suspects' guilt or innocence, in this instance, of the crime of terrorism. Just as a defendant in a criminal trial virtually anywhere in the world must be proven guilty beyond a reasonable doubt, it is imperative for policymakers to apply the same standard to alleged terrorists before the use of force is ever contemplated. In this situation, much more than an individual's fate is at stake; policy makers must contend with the possibility of extensive loss of life and destruction of property; accusations of abuse of power and of human rights, as well as charges of indifference to international law. Ultimately, policy-makers must be able to convincingly establish that the decision to use force in response to terrorist activity is unequivocally supported by the evidence.
>
> (Sara N. Scheideman, "Note: Standards of Proof in the Forcible response to Terrorism", 50 **Syracuse L. Rev.** (2000) 249, 22-283).

74. Even those who dispute that proof beyond reasonable doubt is required, do believe that a high level of certainty is necessary and that the onus placed on the assailing army is **heavy** (paragraph 40 in the targeted killings case). Immanuel Gross establishes as follows in his essay:

> One must be convinced with a high level of certainty that the terrorist poses a real danger.
>
> Emmanuel Gross, “Democracy’s Struggle against Terrorism”, **Legal and Moral Aspects** 76, (5764), p. 606).

75. The evidence indicates that the information in the possession of the soldiers before the Deceased was attacked amounted to a week of occasional observations in which he was seen from "afar" arriving at a certain private residence on a number of occasions and staying outside it while talking on his cellular phone. These tidbits of information were compounded by the circumstantial "evidence" that a few minutes later, Palestinians opened fire toward the soldier's outpost in the a-Safa building.

76. Despite the deep conviction displayed in the testimonies of the snipers and the company commander, it should be noted that not one of the testimonies contains the exact number of incidents that indicated the Deceased supplied information about the force, or an estimation thereof. The MAG's notice regarding the rejection of the appeal stated that "the investigative material indicates that more than five incidents of shooting in the vicinity of the post were recorded, and shots were fired at the post as well". Note: In the period described, about five shooting incidents in the vicinity of the post were recorded and in only some of them was the gunfire directed at the post. It is difficult to see how such a small number of shooting incidents at the post leads to such a clear conclusion regarding the Deceased’s actions – a conclusion that meant the death penalty.

77. It should be noted that this finding by the MAG contradicts the soldiers' testimonies that the posts were subjected to recurring gunfire attacks (e.g. testimony of Company Commander Ofir of September 26, 2005). If indeed the attacks on the post were so numerous, it follows that even if the soldiers saw the Deceased talking on the phone before they came under fire, they came under

fire on other occasions too, when the Deceased was not present in the area. The causal connection between the Deceased's conduct and the shots fired at the soldiers appears to be weak.

78. In any event, the combination of circumstances the soldiers point to after the fact does not amount to verified and well substantiated information, and are in fact, much less. After a week of sporadic observations, the soldiers had no doubt. The evidence shows no indication that the information that the Deceased was directing gunfire at the soldiers was examined beyond the circumstantial impression of the soldiers manning the al-Safaa building at the time. In addition, there is no indication that the suspicion was checked in any way at a level higher than the company and regiment commanders, or that there was an attempt to verify this information with field and intelligence officials within the army or outside it. The conclusion that arises from the investigative material is clear: the suspicion that the Deceased was providing information about the soldiers' movements in the post remained vague and circumstantial, based on meager information that no one attempted to verify. Therefore, the army entirely failed to meet the onus placed on it when claiming that the Deceased had removed himself from the circle of protected persons.

79. **Another significant rule that must be applied to the provision contained in Article 51(3) is that even when a civilian directly participates in hostilities, he may not be harmed if a less harmful measure can be used against him.** This necessarily follows from the principle of proportionality which is a major principle in the laws of war and in Israeli constitutional law. Arrest, investigation and trial are always preferable as "trial is preferable to use of force" (paragraph 40 of the judgment in the targeted killings case). The Honorable Court also stressed that this requirement is even more stringent in conditions of belligerent occupation. When the army controls the area where the action is carried out – arrest, investigation and trial are sometimes practicable options (ibid).

80. The suspect-apprehension procedure is an incremental combat measure which includes, *inter alia*, calling the suspect to halt, calling the suspect to identify himself, threatening to fire shots, demonstratively cocking the weapon, firing a warning shot in the air, firing at the suspect's feet or the tires of his car. The protocol is part of the IDF's official open-fire regulations which prefer arrest over physical harm. Diligent adherence to this protocol is required as part of the principle of proportionality and out of concern not to fatally harm innocents.

81. The investigative material clearly shows that the soldiers never bothered to execute the suspect-apprehension protocol before firing at the Deceased's car. No warning shots were fired in the air, nor were shots fired at the car's tires in order to stop the Deceased. The testimonies of the company commander, Ofir, and the snipers reveal that the "kill approval" was given ahead of time and the sniper rifle was cocked, calibrated and ready to kill. The MAG's conclusion that the shots were meant to "stop the car the Deceased was driving, not necessarily kill him," are not supported by the evidence. The contrary is true. The soldier's conduct was inconsistent with the principle of proportionality, to say the least.

82. Moreover, in the circumstances of the incident which is the subject of this petition, the need to use proportionate action is clearer considering the insufficient information the regiment soldiers had – a circumstantial, unsubstantiated and unverified suspicion that the Deceased was a civilian involved in hostilities. Even if the Deceased was ostensibly a legitimate target for attack, proportionality required the soldiers to avoid such targeting as it was possible to arrest him and clarify the suspicion, and, if necessary, try him for any illegal actions if such were revealed.

83. As an aside, we call attention to the fact that another rule, which applies after a civilian suspected of taking direct part in hostilities is targeted, is that **a thorough examination as to the accuracy**

of the identification of the target of attack and the circumstances under which he was attacked must be held (retroactively). Such examination must be independent and objective (paragraph 40 of the targeted killings case).

84. However, with respect to this incident, there was no retroactive examination to verify the suspicion that the Deceased was involved in unlawful activities. On the contrary, the sniper, Staff Sergeant Igor estimated that the Deceased's car was not searched after his death (testimony dated January 13, 2005). Moreover, the regiment commander, Roni, testified that there was no inquiry into the incident (testimony dated November 28, 2004). A significant clarification of the circumstances of the incident began only **two years** after the fact, when the MPIU investigation was launched, and this too, at the behest of the Deceased's family rather than as an initiative of any official.

85. Thus, it is abundantly clear that the stringent conditions required for removing the legal protection afforded to the lives of civilians did not materialize in this case: even if the soldiers believed that the Deceased guided Palestinian snipers to them, the information they had was incomplete. It was never checked or verified and never went beyond the company and regiment (even after the fact, there was no attempt to verify the suspicion regarding illegal activity on the part of the Deceased). The soldiers on the ground had resolved to neutralize the Deceased come what may, even by killing him. The shots were fired at the Deceased without any attempt to arrest him. The shooting was disproportionate. Paraphrasing the remarks of President (as was her title then) Beinisch in the aforesaid targeted killings case, indeed, the attack on the Deceased was not carried out in accordance with the above listed restrictions, nor within the scope of the law of international armed conflict under customary humanitarian law, as interpreted by the Honorable Court. Therefore, the attack on the Deceased did not constitute a legitimate measure to save lives, but rather, an arbitrary taking of a life.

III. The necessity clause

86. As the conditions for applying the exception contained in Article 51(3) of the First Protocol did not exist, it is necessary to examine whether in the circumstances of the incident, the necessity defense applies to the soldiers, as claimed by Respondent 2 in her notice regarding the rejection of the appeal the petitioners had filed against the closure of the investigation file which is the subject of this petition.

87. The necessity clause contained in Section 34K of the Penal Law 5737-1977 sets forth as follows:

> No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another person's life, freedom, bodily welfare or property from a real danger of severe injury, due to the conditions prevalent when the act was committed, there being no alternative but to commit the act.

88. Five elements are required for a necessity defense to stand, as defined in statute and interpreted in case law and literature. The first, is the element of immediacy; the second is the existence of threat to a value the law views as worthy of saving; the third element is that the danger to the value be real; the fourth element reflects the absence of a condition – the danger must result from a given situation, i.e., the question of who creates the danger and how is immaterial; the final element posited by the section is proportionality.

89. There is no dispute that the actions of the soldiers were meant to prevent harm to life and this is a paramount value which merits saving. We now turn to a review of the remaining elements of the exception.

The necessity clause – the element of proportionality

90. Proportionality is a central requirement for the materialization of the necessity exception. This may be deduced, *inter alia*, from the sharp language contained in the section with respect to this requirement, using a number of variations: "immediately necessary", "real danger", "when the act was committed". The scholar Dr. B. Sangero determines in his book that "immediacy is, most likely, the most obvious characteristic of an emergency situation", and its presence is necessary in order to justify the various constraint exceptions, including the necessity defense (B. Sangero, **Self-Defense in Criminal Law** (2000), p. 187).

91. With respect to the importance of proportionality for the justification of the exception, the remarks of Honorable Justice Jacob Kedmi in his book **On Criminal Law** are relevant:

> The phrase "immediately required" – expresses a central condition for the exception. Only if an "immediate" reaction is required in order to save one of the four values enumerated in the provision, is there justification to apply the exception.
>
> Jacob Kedmi, **On Criminal Law – Part I** (2012), p. 653. Emphases in original.

92. It is noted that the dispute among researches on whether the immediacy requirement refers to the danger (i.e., the danger is immediate) or the act (i.e., that the act taken in order to prevent the danger is immediately required), is less relevant to the matter at bar. This is so as it is clear that the farther the danger, in terms of time, the weaker the immediacy requirement with respect to the act taken in order to prevent it. We provide more detail on this below.

93. Was the saving act indeed **immediately** required in the incident which is the subject of the investigation file? The investigative material indicates that the Deceased was unarmed at the time he was shot. He left his sister's home (where family and children were present at the time), in his car, in a direction opposite from where the forces were stationed. IDF forces were stationed in armored posts or vehicles and did not hesitate to approach the house and the Deceased's car up to a distance of a few dozen meters. Even if the Deceased intended to flee, as the soldiers claimed only in their later testimonies, it is clear that in the given state of affairs, the Deceased posed no threat to the soldiers' lives.

94. The Honorable Court addressed the scope of the necessity defense in a similar context in its judgment in the petition against the interrogation methods used by the ISA (**the torture case**). In the judgment, which found a number of physical interrogation methods to be unlawful, Supreme Court President (as was his title then) Aharon Barak held:

> The reasoning underlying our position is anchored in the nature of the "necessity defense." The defense deals with cases involving an individual **reacting** to a given set of facts. It is an **improvised** reaction to an unpredictable event.
>
> (HCJ 5100/94 **Public Committee Against Torture in Israel v. State of Israel,** Israel Law Reports**, paragraph 36.)**

95. Hence the necessity defense arises only following an unexpected eventuality which pushes a person into a corner and forces him to respond ad-hoc. In this special time of need, there is a willingness to allow a person to react and make decisions that should normally be made by law and justice (B. Sangero, *ibid*.) As we see, the circumstances of the incident which is the subject of the investigation were different, and one might say, the opposite of the chaotic situation envisioned by the necessity defense. The Deceased was killed in a planned ambush, while the soldiers were instructed to harm him in advance, regardless of his conduct during the incident itself.

96. In this context, Dr. Kedmi determines the following:

> Had there been a "pause" allowing to make other arrangements for the saving act – which is the opposite of the immediacy requirement – the foundation on which the justification for the use of the exception is based will be lost.
>
> (Kedmi, *ibid.*, p. 652)

The investigative material indicates that Company Commander Ofir had been asking Regiment Commander Roni for a "kill approval" for an entire week. This long pause that allowed the forces to make other arrangements for neutralizing the danger allegedly posed by the Deceased constitutes, as Dr. Kedmi puts it, the opposite of the immediacy requirement, obliterating the basis for the justification for applying the exception.

97. Case law has established that a situation of "preventative defense" may come under the terms of the proportionality element. However, since in such circumstances the person who is on the defense is not clearly taking action to repel an attack that is directed at him, a number of burdensome requirements were put in place for proving that the terms of the exception to criminal liability had been met (see on this issue, the minority opinion of Honorable Justice Joubran in CrimA 6392/07 **State of Israel v. Shmuel Yehezkel** (published in Nevo, delivered April 30, 2004, paragraph 33); So, the action must be taken at a time after which no reasonable measure to prevent the danger is possible (CrimA 20/04 **Kleiner v. State of Israel**, IsrSC 58(6) 80, 90 (2004), and the opinion of Honorable Justice Joubran above). Additionally, since the timing of the defensive act constitutes a criterion for determining how necessary it was, the longer before the danger advances the act is taken, the harder it would be for the individual claiming the exception for his criminal liability to demonstrate that he had no other means of repelling the danger (Honorable Justice Joubran in CrimA 6392/07 above, which also cites the above-quoted book by Sangero, p. 190). We will address additional burdens as we review the element of real danger.

The necessity clause – the element of real danger

98. The discussion of "preventative defense" leads us directly to an examination of the presence of the third element of the necessity defense, according to which, the protected value must be in **real** danger of coming to harm.

99. The real harm requirement appears as one of the foundations of self-defense, which is anchored in Section 34J of the Penal Law. Referring to this element in the self-defense exception, case law has determined that the probability that the danger against which one is defending oneself would materialize must not be vague or distant, but the danger must be real and present;

> In this context, it is required that the probability that the danger would materialize is not vague, otherwise, the reaction of the person under attack may stray away from the parameters of conduct the law is prepared to accept and into the realm of prohibited conduct.
>
> (CrimA 20/04 **Kleiner v. State of Israel**, above, p. 90; see also CrimA 4191/05 **Altgauz v. State of Israel** (published in Nevo, delivered October 25, 2006, paragraph 13).

100. This is, therefore, the burden of proof in the classic circumstances in which the necessity clause applies, namely, in circumstances in which an act is immediately necessary in order to repel real harm to a protected value. However, recognizing a situation of "preventative defense" as giving rise to the exception entails an increased burden of proof with respect to the degree of certainty that the danger would indeed materialize. The Honorable Court has thus ruled in its discussion of the necessity exception with respect to the "ticking bomb" issue:

> Likewise, we are prepared to accept … that the phrase "immediate need" in the statute refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or even in a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing it. .. In other words, there exists a concrete level of imminent danger of the explosion's occurrence.
>
> (The torture case, above, paragraph 34, see more in the opinion of Honorable Justice Joubran in CrimA 6392/07 above)

101. As stated above, the suspicion that the Deceased was directing Palestinian gunfire toward the forces remained, at the moment of truth, vague and circumstantial only. As such, Respondents 1 and 2 failed to meet even the light burden of proof required to establish the element of real harm and certainly failed to meet the high standard the Honorable Court stipulated - certainty that the danger would materialize. As such, the element of real harm is not present.

102. In addition to this – the previous requirement addressed herein, the immediacy requirement also failed to materialize. If immediacy relates to the danger, there is no allegation that at the time the Deceased was shot, the soldiers were exposed to a danger that was removed by killing the Deceased. If we were to interpret the requirement as relating to the action, then, and in accordance with the above quoted judgment in the torture case, seeing as the danger was distant, it should have been imminent and highly certain. The vague danger posed by the Deceased's directing of gunfire certainly cannot be said to be such.

The necessity exception – the element of proportionality

103. The immediacy requirement, which appears in the final clause of section 34K of the Penal Law, has already been discussed as part of the examination of whether the criteria for the exception contained in Article 51(3) of the First Protocol were present. As stated therein, the soldiers' testimonies clearly indicated that they did not follow the open-fire regulations and did not employ a suspect apprehension protocol. Respondent 2 also admitted to this when she stated in her notification of September 2, 2008 that "… it is difficult to reconcile the shots that were fired with the what the regulations permit with respect to handling such an incident".

104. The open-fire regulations include the immediacy and reasonableness requirements and they, alone, empower IDF soldiers to use force (see CrimA 6392/07 above, pp. 17-18). Instead of following the open-fire regulations, the testimonies indicate a premeditated move to kill the Deceased, with the shots fired toward the front of the vehicle using a weapon that can only kill.

105. As such, Respondents 3-4 may not enjoy the criminal liability exception (*ibid*). Moreover, as previously argued, considering the purely circumstantial suspicions the regiment soldiers had that the Deceased was a civilian who was involved in hostilities, the need for a proportionate action was all the more powerful, but unfortunately such action was not taken.

106. In other words, the soldiers had an alternative which did not involve the targeted killing of the Deceased, but rather a more moderate and gradual use of force, following the classic open-fire regulations (for instance) – in order to confront the danger they believed they faced. It follows that they did not take a less injurious measure in order to achieve the legitimate goal of removing the danger they believed was present. As such, the proportionality requirement was not met.

107. Based on the facts and the legal analysis above, it is clear that the elements of the necessity clause fail to materialize.

The necessity clause – the reasonableness requirement

108. Along with the elements stipulated in Section 34K for the application of the necessity exception, Amendment 39 to the Penal Law, introduced a number of exceptions to the application of the exception, including an unreasonable act. It is our view that the Respondents fail to meet the requirements of the necessity defense based solely on the provisions contained in section 34K. We shall herein argue that the actions taken by Respondents 3-4 also fail to meet the requirement of reasonableness.

109. Section 34P of the Penal Law sets forth as follows:

> The provisions of sections 34J, 34K and 34L shall not apply if – under the circumstances – the act was not a reasonable one for prevention of the injury.

110. In CrimA 4785/90 **Jabarin v. State of Israel**, Honorable Justice (at the time) Dorner addressed the provisions of this section with respect to the application of the self-defense clause:

> An act that exceeds the degree required for protecting life does not meet the requirement of reasonableness as it loses the defensive nature that exempts it from criminal liability and becomes an assault, the purpose of which is to punish the assailant…

And subsequently:

> In essence, reasonableness is determined according to an objective test. Even a person who subjectively believed that he was defending himself and, in his fear, continued the attack on the person who sought to take his life after the danger had passed and killed him, bears responsibility for the assailant's death. However, clearly, the reasonableness of the conduct is determined based on the concrete circumstances of each and every case, in the scope of which the pressure and duress on the victim of the assault is taken under advisement.

(CrimA 4785/90 **Jabarin v. State of Israel**, IsrSC 49(5) 221, 228).

111. As stated above, the flagrant deviation from the military open-fire regulations, *per se*, constitutes a clear indication that the soldiers involved in the incident acted unreasonably. From the perspective of objective reasonableness, the shooting exceeded the measure required for defending the protected value – safeguarding the soldiers' lives and this was explained in detail in the section examining the proportionality requirement. Even if the Deceased attempted to flee, he did not pose a threat to the soldiers' lives. In any event, his killing was premeditated irrespective of his conduct during the incident.

112. Our conclusion is, therefore, that the actions taken by Respondents 3-4 in no way come under the necessity defense provided for in the Penal Law.

Imaginary necessity defense – misinterpretation of situation

113. Another reason provided for Respondent 2's decision to reject the appeal was that the individuals involved in the shooting came under the necessity defense, or, alternatively, even if it was argued that the situation they imagined was erroneous, they came under the error of fact defense. The defense claimed by the prosecutor is an "imaginary necessity defense", which arises from a combination of sections 34J and 34R of the Penal Law. According to this defense, the soldiers acted based on a misconstrued belief that the elements of the necessity defense were present and must, therefore, be held criminally liable only to the extent that they would have been held criminally liable if the actual situation had been as they imagined it to be.

114. Section 34R of the Penal Law stipulates as follows:

> (a) If a person commits an act, while imagining a situation that does not exist, then he shall bear criminal responsibility only to the extent that he would have had to bear it, had the situation really been as he imagined it.
>
> (b) Subsection (a) shall also apply to an offense of negligence on condition that the mistake was reasonable, and to an offense of enhanced liability subject to the provisions of section 22(b).

115. Contrary to past practice, under section 34R a mistake no longer need be reasonable in order to provide an exemption from criminal liability in *Mens Rea* offenses. It is sufficient that the defendant made an honest mistake with respect to the presence of the conditions required for the application of the defense. However, the courts have ruled that the test for whether or not a mistake is honest is how reasonable it is:

> Even if Section 34R(a) of Amendment No. 39, which concerns the defense of misinterpretation of situation, did not require the mistake to be honest and reasonable (as phrased in Section 17 of the former Penal Law), the Court may still consider the reasonableness of the account in order to test its reliability. In other words, the reasonableness of the mistake is indeed not an element in the application of the defense (in addition to honesty), but it can be used as a benchmark, based on logic and common sense, for testing the honesty of the defendant's account.
>
> CrimA 4260/93 **Iman bint Mujahed Hajj Yihia v. State of Israel**, 51 (4) 869, 874, see also **Altgauz**, paragraph 16 of the judgment).

116. In the case at hand, even if the soldiers erred in thinking that the Deceased was directing sniper fire and even if they erred in thinking (as stated in the MAG's notice regarding the rejection of the appeal) that "the Deceased deliberately fled the scene and that his failure to stop would leave him as a source of real danger to the soldiers when he once again helped direct snipers", **still, there is no error with respect to the presence of the elements of proportionality and immediacy in the necessity clause.** The soldiers, who were in armored vehicles and positions, did not fear for their lives at that moment. In the above review of "preventative defense", we explained why the argument of future danger cannot be accepted within the scope of the element of proportionality in this case. One of the reasons for this is that the farther off in the future the danger a person poses, the more difficult it is to argue that harming him is immediately required. With respect to the element of proportionality, it is indeed very difficult to imagine that any of the soldiers thought it was impossible to use a less injurious measure and that the only option was to shoot at the front of the vehicle using a weapon that can only kill.

117. It shall be further noted in this context that the open-fire regulations were designed to minimize honest mistakes with respect to the identity and actions of the individuals the IDF comes across. Had the soldiers followed these regulations, we would not need to address their mistakes today.

118. In conclusion, rejecting the argument regarding a mistake destroys the basis for the necessity argument, and even if the allegation regarding honest misinterpretation of the situation is accepted, it does not support the presence of the immediacy and proportionality requirements of the necessity defense.

E. Conclusions

119. Having ruled out the Respondents' arguments for the exception contained in Article 51(3) of the First Protocol of the Fourth Geneva Convention and the necessity defense (imaginary or real), the evidentiary test disfavors Respondents 3-4 and supports serving indictments for the offenses of causing death, or an attempt to cause death, or, at the least, the offense of exceeding authority amounting to endangering life or health under Section 72 of the Military Justice Law.

120. The MAG's finding that the Respondents come under the exception and the defense is a dangerous moral judgment and has broad and profound ramifications for use-of-force practices among soldiers and other security forces operating in civilian territory and toward civilians.

121. Closing the file without pressing charges against Respondents 3-4 allows individuals suspected of causing death to escape the wrath of the law and sends a message to those carrying a weapon in the context of their military actions that they have immunity even when their criminal behavior causes the death of protected persons.

In light of all the above, the Honorable Court is requested to issue an *Order Nisi* as sought in the beginning of this petition, and after receiving the response of the Respondents and holding a hearing – render it absolute.

The Honorable Court is also moved to order the Respondents to pay for Petitioner's costs and legal fees with VAT and interest as stipulated in law.

Michael Sfard, Adv. Adar Grayevsky, Adv.

Counsel for the Petitioners