At the Supreme Court **HCJ___ /08**
Sitting as the High Court of Justice

In the matter of:

1. **Bassam Aramin**
2. **Salwa Aramin**
3. **"Yesh Din" – Volunteers for Human Rights (RA-580442622)**

Represented by counsel, Adv. Michael Sfard and/or Natalie Rosen and/or Shlomi Zecharia and/or Neta Patrik
49 Achad Haam Street, Tel Aviv 65206
Tel:03-6206947-8-9; Fax: 03-6206950

The Petitioners

v.

1. **Attorney General**
2. **Sergeant Shani Y., Israel Border Police combatant**
3. **First Sergeant Major V., Commander of Israel Border Police unit**

Represented by the State Attorney's Office, Ministry of Justice
Salah al-Din Street, Jerusalem

The Respondents

Petition for *Order Nisi*

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, should they wish to do so, why respondent No. 1 should not file an indictment against respondents 2 and 3 regarding their acts in connection with the killing of the ten year old girl, the late Abir Aramin (Jerusalem District Attorney's Office File No. 744/07, appeal 1/07) and why charges should not be pressed against them for having committed the following offenses:

1. Manslaughter (section 298 of the Penal Law, 5737-1977; hereinafter: the **Penal Law**);
2. Alternatively, Causing Death by Negligence (section 304 of the Penal Law);
3. Alternatively to the alternative, Endangering life while breaching the Open Fire Regulations (section 338(a)(5) of the Penal Law).

First Part: The Petition

A. Preface

1. This petition concerns the terrible death of a ten year old Palestinian girl from 'Anata village located in East Jerusalem, who left school with her friends during recess to buy candy in the near-by grocery, and was shot in the head.

2. This petition concerns the responsibility of a policeman of the Israel Border Police (IBP)(respondent No. 2) who according to the investigative material fired a rubber bullet which hit the girl and killed her, contrary to the Open Fire Regulations. The deadly shot which was fired in the midst of a crowded town and in an area which consists of three schools while the school children were on recess, was not preceded by warning shots in the air.

3. This petition concerns the superior responsibility of the commander of the policeman who shot the girl (respondent No. 3), who authorized the execution of the deadly shot, despite the fact that all other crowd control measures have not been exhausted and despite the fact that the policemen, according to **their own version**, were attacked by stones which were thrown at them from a long distance while they were sitting in an shielded Jeep, and therefore they were certainly not in a life threatening situation.

4. This petition concerns the decision of the Attorney General (respondent No. 1), not to press charges against respondents 2-3, a decision which is **mainly based on an obvious and clear error** according to which the possibility that the deceased was hit by a stone rather than by a rubber bullet was not ruled out. It is a grave and inconceivable error, in view of the fact that according to its underlying thesis the stone which ostensibly hit the deceased was thrown at the place in which the deceased was standing while the Jeep of the IBP policemen was leaving the village and the stone throwers were running after it. This possibility, as will be demonstrated in great detail below, could not have possibly occurred given the fact that more than an hour before the Jeep left the village the deceased had already been brought to Al-Makassed hospital, and it seems that the stone throwing, if any – was a response to the shot which was fired at the deceased.

5. This petition concerns the Attorney General's disregard of the facts which clearly prove that the shooting by respondent No. 2 as well as the shooting by respondent No. 3 – were made contrary to applicable Open Fire Regulations with disregard to the threat posed by them to the life of innocent passers-by, and particularly to small children who attend the near-by schools.

6. The truth should be said. The four policemen in the Jeep who came to a congested urban area on a lookout mission and at whom stones were allegedly thrown, conducted in the center of town, in a congested morning hour, an irresponsible shooting pursuit showing complete indifference to the fate of the citizens around them, as if they were taking part in a Hollywood film.

7. Therefore, this petition concerns our 'culture of impunity'. It concerns the question whether the killing of a ten year old girl who left school during recess to buy candy in a near-by grocery and was killed by an irresponsible and indifferent shooting of IBP policemen – would come to an end with no judicial response. Will her death pass as if nothing had happened.

B. The Parties

8. Petitioners 1 and 2 are the parents of the late Abir Aramin, a ten year old girl who in the morning of January 16, 2006, was allegedly hit by a rubber bullet which was fired at her by an IBP unit in her village, 'Anata. Two days later the deceased passed away as a result of her injuries.

9. Petitioner No. 2, the deceased's father, is one of the founders of the "Combatants for Peace" organization (2005). This organization which was jointly established by Israelis and Palestinians, ex combatants, promotes the awareness of both nations to the hopes and suffering of the other side, holds dialogues, acts for the promotion of education for reconciliation and non violent struggle amidst both Israeli and Palestinian societies, and for the exertion of political pressure on the two governments for the purpose of putting an end to the vicious cycle of violence and end to the occupation.

10. Petitioner No. 3 is an Israeli human rights organization engaged in diverse issues pertaining to human rights in the West Bank Area, and provides, among other things, legal assistance to those whose rights were violated. The organization is engaged in a material project within the framework of which it scrutinizes the law enforcement procedures over Israelis in the West Bank Area and in the context of which it published a report which was issued in October 2006 ("The pretence of the Law: Law Enforcement on Israeli Citizens in the West Bank").

C. Factual Background

I. The Incident and findings of the investigation

11. The incident being the subject matter of this petition occurred on January 16, 2007 in the 'Anata village located in East Jerusalem. That morning, on or about 09:15, the deceased, the late Abir Aramin (hereinafter: **Abir**), exited, together with her sister and two friends, the girls school in her village. They crossed the road and entered a candy store. After they bought some candy all four of them left the store and started walking down the street to their homes. They were walking towards the village exit with their backs turned to a roundabout located on the upper part of the street. An IBP Jeep which was in the village at that time, was driving nearby. Seconds after they left the candy store a noise was heard and Abir fell to the ground wounded in her head. A local youth took her into the courtyard of the girls' school, and from there she was taken by a private vehicle to 'Al Makassed' hospital accompanied by the school master and the nurse of the girls' school. A few minutes later a rubber bullet was found in the place in which Abir was wounded. Abir was transferred from 'Al Makassed' hospital to Hadassah Ein Kerem hospital in Jerusalem. Abir Aramin passed away two days later when she was only ten years old.

12. The facts described above are not in dispute.

13. The investigation of the incident commenced only two days and a half later, on January 18, 2007, and only after a letter to that effect was sent by petitioners' counsel, the undersigned, despite the fact that the security forces were aware of the incident which had already been reported of in the media on the date of incident.

    The letter of petitioners' counsel dated January 18, 2007, is attached hereto and marked as ***Exhibit A***.

14. On July 24, 2007, a decision was made to close the investigation file against the four suspects, namely, the four IBP combatants who manned the Jeep which was driving around the village

that day. The file was closed on the grounds of: lack of evidence. Petitioners' counsel was notified of the decision to close the file verbally.

15. The investigation file consists of the following findings:

- In the morning of the incident an IBP Jeep manned by four policemen entered the village for the purpose of observing the construction works of the separation fence in the Givat Zeev area from a post located near the boys' school. The unit commander – respondent No. 3 – sat near the driver in the front part of the Jeep, and policeman Y – respondent No. 2 – sat in the back together with another policeman.

- At a certain point, according to the version of the IBP policemen (hereinafter: the **policemen** and/or the **defendants**) stones were thrown at them by youths from the village. Throughout their interrogations all policemen reported of two centers from stones were thrown at them – the first one near the observation post behind the boys' school and the other the cemetery area (located near the girls school). **The center relevant to the case at hand is the second center, namely, the cemetery. The shots which were fired towards it came from the roundabout which is located some dozens of meters away from the place in which Abir was injured**. The first center is located on the upper part of the street, near the boys' school and is some hundreds of meters away from the place in which Abir was injured.

  For the convenience of the honorable court, attached are an aerial photograph and some photographs with markings of the centers of the incident. The aerial photograph and the photographs are marked as ***Exhibit B***.

- According to the policemen, in order to handle the stone throwing they drove around the village in a route which was described by them and fired rubber bullets at the two centers from which stones were thrown as described above and shots were fired by only two of them: **respondents 2 and 3, an IBP policeman and the commander of the unit (respectively)**.

- **As aforesaid, the policemen admitted that the crowd control measures which were used included the use of rubber bullets**.

- **A rubber bullet was found in the place in which Abir was injured** by one of the eyewitnesses. The bullet was transferred to the interrogators by the undersigned.

- **There is a version gap which was not bridged between the manner by which the incident was described by the civilian eyewitnesses, and the version of the policemen, mainly with respect to the location of the Jeep when Abir was injured.**

- **Nevertheless, the four policemen confirm that shots were fired at the cemetery from which stones were thrown. Respondents 2 and 3 who opened fire admit that the shots were fired when the Jeep was standing in the roundabout, with its rear end facing the cemetery.**

  Attached are drawings drawn by respondents 2-3 in their interrogations, which indicate that at the time of the relevant shooting the Jeep was located north of the roundabout (we shall elaborate on this point later on). These drawings are marked as ***Exhibit C***.

- The pathologic findings: Although there are differences in the importance attached to certain issues and in the determinations concerning the level of certainty of the conclusions,

both pathologic reports (one ordered by the Israel Police and prepared by Dr. Konstantin Zaitsev from the Pathologic Institute, and the other prepared by Dr. Chen Kugel who was requested by the family to be present in the autopsy) conclude that Abir's injury conforms with an injury caused by a rubber bullet but that it cannot be absolutely ruled out that Abir was hit by a stone of the same size and shape of a rubber bullet of a similar speed and weight. In view of the fact that there is evidence that stones were thrown in the area, as aforesaid, it could not be ruled out that Abir was hit by the stones which were thrown in the area.

- Despite the fact that the security forces were aware of the incident from the same day on which it occurred, criminal investigation was initiated only more than 48 (critical!) hours later and only after the undersigned filed a formal complaint in writing on petitioners' behalf. As a result of the belated initiation of the investigation the trails left by the Jeep which could prove his exact route in the village – disappeared as a result of the rains which fell during those days.

II. The appeal and its denial

16. On September 24, 2007, the undersigned submitted, on behalf of the petitioners, an **appeal** against the decision to close the file without having any indictments filed.

    Attached is the appeal marked as ***Exhibit D***. This Exhibit constitutes an integral part of the petition and the facts specified therein constitute an integral part of the petition.

17. The main argument which was raised in the appeal was that there was no likelihood, neither medium nor low, that Abir was hit by a stone and that the result of said conclusion was that Abir was hit by a shot which was fired from the gun of policeman Y (respondent No. 2).

18. Petitioners' position in the appeal submitted by them was based on a visit on scene and on photographs of the arena (the photographs are attached as exhibits to the appeal) all of which revealed a very important fact regarding the only place from which stones were thrown as was reported, and which is ostensibly located in a distance from which a stone that was thrown by hand could reach the place in which Abir was hit, namely, the cemetery, according to which there was no possibility – neither physical, nor technical or ballistic – that a stone which was thrown from the cemetery hit Abir in view of the fact that a three story building blocked the way between the cemetery from which the stones were thrown and the place in which Abir stood when she was injured.

19. **Once the possibility that Abir was hit by a stone was ruled out, the only remaining possibility which arises from the evidence is that Abir was hit by a rubber bullet**. Therefore, the undersigned argued in petitioners' name that the shots which were fired at the group of the girls caused the critical injuries and eventually the death of the late Abir Aramin. In view of these findings, the undersigned argued that the decision to close the file for lack of evidence was erroneous and extremely unreasonable.

20. In addition, the appeal argued that even if it was decided that there were not enough evidence for manslaughter charges, the policemen who opened fire and at least respondent 2, should have been indicted for having committed offenses related to putting human life at risk, in view of the fact that the manner by which the weapon was used, in a civilian environment in the vicinity of three schools(!) was contrary to the Open Fire Regulations mainly in view of the fact that it was not preceded by the use of crowd control and dispersal measures and warning

shots in the air (see paragraphs 107-109 of the appeal) and particularly in view of the fact that it was not argued by the policemen that their lives were at risk.

21. On February 4, 2008 the deputy state for criminal matters, Mr. Yehoshua Lamberger, denied the appeal. In the response to the appeal it was argued again that there was not enough evidence for the purpose of pressing charges against the defendants and that according to the existing material no sufficient infrastructure existed which indicated that Abir was hit by a rubber bullet which was fired at her by either one of the defendants.

    The response to the appeal is attached and marked as ***Exhibit E***.

22. The response to the appeal relied on two main points: firstly, the opinion of the treating physician from Hadassah regarding the source of the injury. Secondly, and in response to the argument which was raised in the appeal that it was not possible to throw a stone from the cemetery which would reach the point in which Abir was standing while she was hit – a possibility was raised that Abir was hit by a stone which was thrown while the Jeep was leaving the village (at which time it was driving in the street in which Abir was standing). The following is a detailed description of these two points (all emphases were added by us unless stated otherwise, M.S., N.R.).

    - The deputy attorney general relied on the opinion of Dr. Cohen from Hadassah hospital (who treated Abir when she was transferred from Makassed hospital) that Abir was not his by a bullet, while emphasizing that the undersigned did not refer in the appeal submitted by them to said testimony.

      And with respect to the place from which the stone that hit Abir was thrown, the response stated -

    - "Clearly, the position of the expert on your behalf according to which "it is more likely" that the injury was caused by a rubber bullet, is insufficient for the substantiation of adequate evidentiary infrastructure on the question of the object which injured the deceased at the high level of certainty which is required in a proceeding of this nature. **Hence, it is impossible to establish that a causal connection exists between the acts of the defendants over the course of the incident and the deceased's death**.

      … the findings of the pathologic opinion according to which there is a possibility that the deceased was hit by a stone, reconcile with defendants' version as specified below, that allegedly while they were leaving the village, down the street in which the deceased was standing, demonstrators who descended from the cemetery area and from the nearby junction and alley, "bombarded" them with stones. Obviously, this is not enough to substantiate a determination as to what happened. **However, said evidence raises substantial doubts as to the responsibility of the defendants to the deceased's death**.

      … during the re-enactments with the defendants, the latter pointed at the place in which they were standing at the time of the shooting towards the roundabout adjacent to the cemetery. The re-enactment indicated, *prima facie*, **that it was impossible to see from that location, the point in which the girl was hit according to eyewitnesses, who also participated in the re-enactment**. [emphasis appears in the original]. Hence, the likelihood that the deceased was hit by rubber bullets which were fired by the defendants is low.

Under the above circumstances, one cannot rule out that the deceased who, according to the material which exists in the file, was standing on the road which was taken by the defendants while they were leaving the village, was hit by a stone which was thrown by the demonstrators towards the Jeep while it was leaving the village down the road. This possibility reconciles with the findings of the pathologic opinion, including the expert on your behalf, as well as with defendants' allegation that they were not aware of the fact that girl was injured in real time.

Indeed, the material in the file consists of testimonies on your behalf according to which no stone throwing was observed. However, in the beginning of the opinion of the expert on your behalf it was stated that testimony was provided to him according to which the shooting at the deceased occurred **after a stone was thrown towards the Jeep which was driven by the defendants.** [emphasis appears in the original]. **It should be added that the description of the incident arising from these testimonies is completely different from the description provided by the defendants in other points as well.** Anyway, the testimonies of the school girls who were with the deceased while the incident took place, do not indicate that they saw that any rubber bullets were fired at them from defendants' Jeep… therefore, it seems that the testimonies which were brought on your behalf do not refute defendants' version, and anyway, they cannot, in and of themselves, establish a sufficient evidentiary infrastructure for the purpose of pressing criminal charges against the defendants.

There is *prima facie* evidentiary infrastructure that over the course of the incident being the subject matter of the appeal stones and bottles were thrown at the defendants from different locations, by dozens of people, and that previous measures for the dispersal of the violent disorders were not effective. Under these circumstances one cannot rule out defendants' version that they felt that their lives were at risk. It therefore seems that the shooting of rubber bullets which was made by them was lawful, and according to the Open Fire Regulations.

As to the ostensible contradictions which exist, as you claim, in defendants' testimonies it only natural that in incidents such as the one being the subject matter of the appeal, different versions exist on this detail or another. We did not find that the above, if any, under the circumstances of the matter, can feel the evidentiary gap which exists in the file."

III. After the appeal: the errors in its denial

23. As the undersigned understands it, the above response was based on at least **two clear factual errors**: the Abir was ostensibly on the street while the Jeep started moving towards the exit from the village and the inability to hit Abir by gun shots from the location of Jeep which in the roundabout up the street;

24. With respect to the first error, in the response to the appeal an explanation was proposed according to which Abir could have been hit from stone throwing which ostensibly occurred while the Jeep and the defendants were leaving the village, when they passed near the back gate of the girls school (a version which initially appeared in defendants' statements which were taken from them after the re-enactment). This possibility was apparently raised in view of the argument which was raised and proved in the appeal – that Abir could not have been possibly hit by stones which were thrown earlier (due to the existence of a three story building which separated Abir from the stone throwers). **However, the proposed explanation completely disregards the data which came up in the police investigation and presented in the appeal**

– according to which and according to the operations log, at 10:03 the defendants reported of stone throwing in the village and the column captioned "actions taken" (in the operations log) **provided that "the crowd was dispersed at 11:00". <u>This means that at the earliest, the defendants were still in the village at 11:00 whereas Abir Aramin was hit on or about 9:15 and according to the records of the "Al- Makassed" hospital she has already been admitted in hospital at 9:53! Therefore, it is impossible that Abir was hit by a stone which was thrown at the Jeep while it was leaving the village because at that time she was no longer there</u>**.

25. With respect to the second error, the response to the appeal stated that "In the re-enactments which were carried out with the defendants, the latter pointed at the place in which they were standing at the time of the shooting towards the roundabout adjacent to the cemetery. The re-enactment indicated, *prima facie*, that from that location **it was totally impossible to see the place in which the girl was hit as pointed by eyewitnesses who also took part in the re-enactment**" [emphasis appears in the original]. **<u>This argument is simply incorrect</u>. The place from which <u>according to the defendants</u> fire was opened "towards the cemetery" was in a straight line, free of any obstacles, from the place in which Abir was standing when she was hit. One point can be easily be seen from the other and shots can be easily fired from one point to the other.** Moreover: From the place according to defendants' admission, shots were fired by respondents 2-3, both the cemetery and the place in which Abir was hit may be seen. **<u>There is a very small angle between the line which connects the roundabout in which the Jeep was sanding and from which respondents 2-3 fired at the cemetery and the line which connects the roundabout to the place in which Abir was hit</u>**.

26. The above explanation is based on a perusal of defendants' testimonies, their drawings of the scene (in which the Jeep is located at the northern part of the roundabout) and on a visit of the scene by undersigned. In addition, it can be seen that defendants' drawings were erroneous (as they placed the cemetery off its real location, just in the opposite direction) which fact is supported by the aerial photograph which was attached to the appeal.

27. In view of the above, on February 11, 2008, **the undersigned turned once again** to Advocate Zusman, (acting) senior deputy A to the State Attorney, drew her attention to the errors and requested her urgent response.

    Attached is the letter of the undersigned to Advocate Zusman marked as ***<u>Exhibit F</u>***.

28. On February 12, 2008, the response of Advocate Zusman was received who **rejected the arguments of the undersigned** and reiterated her position that in the case at hand there was no sufficient evidence to press criminal charges against the defendants.

    Attached is the letter of Advocate Zusman, marked as ***<u>Exhibit G</u>***.

29. Among other things, Advocate Zusman wrote in her response [the emphases appear in the original unless otherwise noted] –

    > "… the evidentiary material consists of several testimonies to the fact that **the activity in the village took place between eight or eight thirty to ten o'clock in the morning** [emphasis added by the undersigned: M.S., N.R.]
    >
    > …

We are aware of the registration in the operations log to which reference was made by you. In that respect it should be noted that the operations log, by its nature, documents the **reporting** time of the incident.

It should be noted that even according to your approach, according to which the operations log reflects the time on which the events **occurred**, in view of the fact that according to your argument the deceased was injured **before** the occurrence of the events reported of in the operations log, the registration in the log cannot be relied on to reflect the time of the occurrence of the events reported of.

It should also be stated that the registration in the operations log constitutes part of the entire evidence pertaining to the hours during which the activity took place, as specified above. We did not find reason to reject defendants' version as it arises from their testimonies and the activity report, and to prefer the registrations entered in the operations log. In any event, these testimonies and the content of the activity report most certainly raise doubt that the activity in the village had indeed ended at the time specified in defendants' testimonies and in the activity report.

Therefore, it cannot be overruled… that the deceased stood on the road which was used by the defendants to leave the village and was hit by a stone which was thrown by the demonstrators at the Jeep while it was leaving the village [emphasis added by the undersigned: M.S., N.R.].

In addition to all of the above it should be reminded… that according to the pathological findings… the cause of deceased's death cannot be precisely ascertained. Hence, it cannot be determined that there is a causal connection between defendants' actions over the course of the incident and injury caused to the deceased.

As to your argument… we shall respond that the content of our letter is based on the photographed re-enactments which were carried out with the defendants, re-enactments, which as indicated by the appeal, are not in your possession.

… under these circumstances… the deputy to the State Attorney is of the opinion that there is no sufficient evidence to press criminal charges against the defendants."

30. **As will be further specified in detail below, the above response of Adv. Zusman left in place the factual error concerning the possibility that Abir was injured by stones which were thrown at the Jeep while it was leaving the village**. As to the argument of the undersigned concerning the location of the Jeep at the time of the shooting, Adv. Zusman stated in her response that the content of her response was based on re-enactments which were carried out by the border policemen on scene which were not in the possession of the undersigned. Therefore, the undersigned decided to turn and request the remaining investigation material which has not yet been transferred to them.

IV. The re-enactment and the proceedings until the filing of the petition

31. On February 13, 2008, the undersigned turned to the police commissioner and requested to receive the **summary of the investigation findings** and the investigation material pertaining to the interrogation conducted to the border policemen who were present in the incident,

pursuant to section 102(b)(5)(a) of the Police (disciplinary procedures, investigation of complaints against policemen and various directives) Law, 5766-2006.

32. Until the filing date of this petition no response to the request has been received nor have the findings of the investigation been transferred.

    The letter dated February 13, 2008, and the correspondence which followed it are attached and marked as ***Exhibit H***.

33. On March 11, 2008, the undersigned turned to Superintendent Yuval Shtal, assistant to the head of the investigation branch of the Judea and Samaria district, and requested to receive the **re-enactment tapes** in the investigation file being the subject matter of this petition.

34. On May 5, 2008, notice was received from Adv. Zusman according to which the tapes could be watched – but not duplicated – at the state attorney's office.

35. On May 21, 2008, the undersigned watched the tapes at the state attorney's office. The re-enactment was divided into three tapes (re-enactment dated January 23, 2007, re-enactment dated January 28, 2007 and a third re-enactment from an unknown date).

    The letter dated March 11, 2008, and the correspondence which followed it are attached and marked as ***Exhibit I***.

36. **Having reviewed the investigation material, the two responses to the appeal and having watched the re-enactment tapes, the undersigned have no doubt that the first decision to close the investigation file and the second decision to deny the appeal are extremely erroneous and unreasonable and are based on clear factual errors. The petitioners cannot accept these decisions and hence this petition**.

D. The arguments against the denial of the appeal

37. **The following, in a nutshell, are our arguments: in view of the undisputed fact that rubber bullets were shot towards the cemetery, the decisions to close the file and deny the appeal are extremely unreasonable for the following reasons**:

    - **The decision is based on a factual error according to which it is possible that Abir was hit by a stone which was thrown while the Jeep was leaving the village;**

    - **The decision gave no weight to the fact that in the place in which Abir was injured a rubber bullet was found;**

    - **The decision gave no weight to the versions of the civilian eye witnesses which contradict the version of the policemen;**

    - **The decision did not thoroughly examine the arguments concerning breach of the Open Fire Regulations with respect to the required hierarchy in the passage between shooting crowd control weapons, firing warning shots in the air and shooting rubber bullets and with respect to the threat to life requirement;**

    - **The decision disregarded the fact that in any event the Open Fire Regulations were breached since there is no dispute that no warning shots were fired in the air;**

- **The manner by which the re-enactment was carried out on scene is, to say the least, very problematic in view of the fact that the policemen were lead to understand by the interrogator where was the place which would "give them away". And indeed, their hesitant version in the beginning of the re-enactment regarding the exact location of the Jeep in the roundabout becomes more solid and certain as the re-enactment progresses, by the end of which the Jeep is safely placed only a few meters southwards but thus ostensibly – according to the respondent – the possibility that Abir was injured there-from was ruled out.**

E. The Legal Argument

38. The legal argument will be divided into two parts:

    1. The first part will discuss the authority of the High Court of Justice to examine an extremely unreasonable decision of respondent 1.

    2. The second part will specify the unreasonableness of respondent 1's decisions in the case being the subject matter of this petition.

I. HCJ's intervention in decisions of the Attorney General in criminal appeals

39. The issue of HCJ's intervention in decisions of the Attorney General, and particularly in his decisions on whether or not criminal charges should be pressed, was discussed in a host of judgments. The ruling arising from the judgments of the honorable court is that respondent 1 (hereinafter: the **respondent**) has broad discretion to decide whether or not to indict a person and that the scope of judicial scrutiny of this honorable court over respondent's said decisions is narrow. And it should be **emphasized**. Case law did not abolish the judicial scrutiny of the honorable court over the decisions of the respondent, which is still implemented, although its scope has been narrowed down and despite the fact that it is applied quite rarely.

40. When respondent's decision is based on the argument that the evidentiary material is insufficient the intervention of this honorable court in this consideration – which pertains to the sufficiency of the evidentiary material – would be rare, **but yet possible should the honorable court be of the opinion that respondent's decision is extremely unreasonable**, and see on this issue the words of the Honorable Justice Maza:

> Despite the fact that the scope of discretion granted to the Attorney General and to the other prosecution authorities to decide on the sufficiency of the evidence for the purpose of filing an indictment is wide and broad, their decisions on said issue – as has already be noted – are not immune from judicial criticism. Indeed, it seems that until now there has not been even a single case in which this court found it necessary to intervene in the decision of the Attorney General not to file an indictment due to lack of evidence, **but it has been frequently stated that cases may occur – although they would most certainly be rare – in which this court would also be inclined to intervene in a decision of the Attorney General which pertains to the sufficiency of the evidence, if it realizes that its decision to refrain from filing an indictment is patently unreasonable** (see

for instance: HCJ 223/88 **Sheftel v. The Attorney General**, IsrSC 43(4) 356, the words of Justice Bach in page 368, and HCJ 806/90 **Hanegbi v. The Attorney General**, IsrSC 44(4) 797, the words of Justice S. Levin, in page 799).

(HCJ 5675/04 **The Movement for Quality Government in Israel v. The Attorney General**, IsrSC 59(1) 199, 211-121 (emphases added by the undersigned: M.S., N.R.)

41. It is clear that not any error in weighing the evidence amounts to extreme unreasonableness, but rather only a **clear and substantial error** (HCJ 2534/97, 2535, 2541 **MK Yahav et al., v. State Attorney's Office et al.,** (Judgment dated June 15, 1997), IsrSC 51(3) 1, 24 (hereinafter: **Yahav**).

42. In fact, the above described rule does not deviate from the scope of intervention of this court in other decisions of other administrative authorities for unreasonableness. The clear and known rule is that the administrative act will be disqualified for unreasonableness only in cases in which the unreasonableness is severe and extreme (**Yahav** above, page 24; and see also HCJ 6781/96 **MK Olmert v. The Attorney General** (Judgment dated November 5, 1996), IsrSC 50(4) 793, 807; HCJ 935/89, 940, 943 **Ganor et al., v. The Attorney General et al.,** (Judgment dated May 10, 1990), IsrSC 44(2) 485, 528).

43. It is clear that the above rule regarding the scope of intervention derives from the principle that the court does not replace the discretion of the Attorney General with its own discretion, **however, if the administrative authority made a decision which exceeds the realm of reasonableness, the court must disqualify said decision by virtue of it being infected by unlawfulness** and in any event, even if the honorable court usually refrains from criticizing the reasonableness of a decision which pertains to the sufficiency of the evidence, it does not prevent the examination of the decision making process.

44. A known principle is that a governmental authority is obligated to exercise the governmental discretion vested in it fairly, honestly, **reasonably** and without discrimination (HCJ 6163/92 **Eizenberg v. The Minister of Housing and Construction** (Judgment dated March 23, 1993), IsrSC 47(2) 229, 259). Therefore, the lawfulness of the administrative action will be examined, *inter alia*, according to the objective standards of administrative reasonableness.

45. Clearly there is no one reasonable decision, but rather there exists a realm of reasonable decisions from which the administrative authority may choose at its discretion. Hence, reasonableness is a normative concept which requires locating the relevant considerations and balancing **between them** according to their weight (the above HCJ **Ganor**, page 513). **The reasonableness of a decision will be determined*, inter alia*, by examining the question of whether the public authority allocated appropriate weight to each one of the different relevant considerations** (see HCJ 341/81 **Moshav Beit Oved v. Inspector of Transportation** (Judgment dated August 9, 1982), IsrSC 36(3) 349, 354 (1982); the above HCJ **Eizenberg**, pages 272-273; HCJ **The Movement for Quality Government in Israel v. Government of Israel** (Judgment dated September 8, 1993)**,** IsrSC **47(5) 404, 420-421 (1993);** HCJ 4267/93 **Amitai – Citizens for Proper Government and Integrity v. Prime Minister** (Judgment dated September 8, 1993) IsrSC 47(5) 441, 464-465 (1993) (hereinafter: **Pinhasi**); HCJ 5082/05 **Attorney General v. A** (Judgment dated October 26, 2005) TakSC 2005(4) 387; HCJ 7542/05 **Gal Portman v. Meir Shitrit** (Judgment dated February 11, 2007), paragraphs 17-18 of the judgment of Justice Arbel).

46. **In the case at hand,** the petitioners will argue that respondent No. 1 reached an **extremely unreasonable result** in view of the fact that for the purpose of making his decision he relied

on factual assumptions which are *prima facie* erroneous and when he was made aware of his mistake he disregarded the facts which arise from the investigation file. He has completely disregarded the testimonies of the local-civilian eye witnesses and relied solely on the testimonies of the policemen, disregarded circumstantial evidence and finally, disregarded a clear breach of the Open Fire Regulations.

47. And it should be clarified: it is not a "grey area" within the realm of which a decision could be made that the evidence was insufficient for the purpose of pressing criminal charges, but rather an extreme deviation from the realm of reasonableness, a fundamental one, which therefore requires the intervention of this honorable court.

II. The extreme unreasonableness in the case at hand

48. We shall summarize the facts known until now and which are not in dispute: Respondents 2 and 3 fired rubber bullets in the roundabout area towards the cemetery; No warning shots in the air were fired beforehand; the pathological reports pointed at the possibility that Abir was hit by either a stone or a rubber bullet, while one of them explicitly states that the there is a higher likelihood that she was hit by a rubber bullet; according to the report of 'Al Makassed' hospital Abir was admitted to the hospital at 09:53; a rubber bullet was found where Abir was wounded.

49. The following are the factual errors and the errors in weighing all relevant considerations which occurred in respondent 1's decision. Each one of these errors separately and certainly the accumulation thereof, create a critical mass of flaw of extreme unreasonableness in the decision.

A. Factual error

50. As aforesaid, the examinations conducted by the undersigned and the photographs which were attached to the appeal have totally ruled out the version the probability of which underlined the decision to close the file without pressing criminal charges – namely – that Abir was hit by a stone which was thrown from the cemetery area. Said possibility was refuted due to the fact that a three story building blocks the way between the cemetery and the place in which she was standing when she was hit. Hence, the only possible logical conclusion was drawn. In view of the fact that the possibility that she was hit by a stone was ruled out the only possibility left is that she was hit by a rubber bullet.

51. The above conclusion is significantly reinforced in view of the fact that a rubber bullet was found where Abit was wounded.

52. In response to this issue which was raised in the appeal, the notice of its denial stated that the possibility (which was raised there for the first time) that Abir was hit by a stone – while the Jeep was leaving the village and was passing through the street in which Abir was standing followed by stone throwers – was valid. It should be **emphasized** that the above version of the policemen of stones which were thrown while they were leaving the village appeared for the first time in their statements which were taken after the re-enactment.

53. **However the above thesis runs contrary to the time schedules which were established by the police in its investigation**.

54. As aforesaid, according to the operations log at 10:03 the policemen reported of stone throwing in the village and the column (in the operations log) titled "actions taken" states that "the crowd was dispersed at 11:00". Therefore, the undersigned argued, that in view of the fact that according the report of 'Al Makassed' hospital Abir was admitted to the hospital at 09:53 (according to the version of the school nurse it was even earlier, at 09:40), the undersigned argued that while the Jeep was leaving the village – at which time according to respondent's argument Abir could have been injured – Abir has already been in the hospital for some time.

55. When the undersigned turned to Advocate Zusman and drew her attention to the above issue they were told that notwithstanding the registrations in the operations log, according to the other reports the activity in the village occurred "between eight – eight thirty to ten o'clock", and therefore she reiterated the position that Abir could have been injured by a stone which was thrown at the Jeep while it was leaving the village.

56. **Moreover. Even if we accept the policemen's version according to which their activity in the village took place until ten o'clock, and therefore ostensibly, according to the respondent, Abir could have been injured by a "barrage of stones" which was thrown according to the policemen's version while they were leaving the village, we know that Abir was not injured at ten o'clock or around ten o'clock but rather around 09:15. Immediately after she was injured Abir was taken into the girls school and from there by car to the Hizmeh checkpoint and from the checkpoint to 'Al Makassed' hospital which she has already reached – according to the hospital's report – at 09:53! Therefore, even if we accept the version according to which the Jeep left the village at ten o'clock – at that time Abir has already been at the hospital**!

57. **The above clearly indicates that stone throwing, if any, occurred after Abir has already been shot and evacuated from the village, and it is possible that the stone throwing occurred as a reaction to an injury caused to a ten years old girl who went to buy candy and was shot in the head.**

58. In view of all of the above, the theory according to which Abir could have been hit by a stone **does not** "reconcile" with defendants' version and its does not "raise a real doubt as to defendants' responsibility for the deceased's death" as stated by the respondent.

B. Failure to give evidentiary weight to the hour reported in the operations log

59. The petitioners do not accept the lightness by which the respondent deciphers and disregards the registrations made in the operations log. **However, in any event, even if one can (barely) accept the argument that there is a possibility that the entries in the operations log were made at a later hour than the hour at which they have actually occurred, one certainly cannot argue with the operations log when it explicitly states that "the crowd was dispersed at 11:00". In other words, 11:00 is not the hour on which the entry was made but rather the hour which was reported of and constitutes part of the content of the entry**.

C. Failure to give evidentiary weight to a significant circumstantial piece of evidence

60. The response to the appeal completely disregards – and hence no weight was given – to the important circumstantial evidence which indicates that at the place in which Abir was injured a rubber bullet was found.

61. This piece of evidence clearly proves that **contrary to defendants' version including respondents 2-3, which was accepted by respondent 1 – a rubber bullet had been indeed fired towards the place in which Abir was standing**. In the absence of testimony, version or

allegation that there was someone else other than respondents 2-3 who used any sort of warm weapon, let alone rubber bullets, the only possible conclusion is that the rubber bullet was fired from the weapon of respondent No. 2.

62. Therefore, in view of the above undisputed fact that a rubber bullet was found in the place in which Abir was injured, Advocate Zusman's statement in the letter which denies the appeal that "in any event, the likelihood that the deceased was injured by rubber bullets which were fired by the defendants is low" is unclear.

D. Failure to give weight to the versions of the civilian eye-witnesses

63. Hence, the testimony of the civilian eye-witnesses completely also contradicts the testimonies of the policemen with respect to the question of whether stones were thrown (according to their version no stones were thrown, or at least not in proximity to the location and around the time of the injury) and with respect to the location of the Jeep at the time of the shooting (all civilian witnesses with the exception of one claimed that the Jeep was facing the back gate of the girls school and was not standing near the roundabout).

64. This contradiction was solved by the respondent with the argument that "Indeed, the material in the file consists of testimonies on your behalf according to which the witnesses did not see stone throwing. However, the expert opinion on your behalf states in the opening part thereof, that testimony was given to him according to which shots were fired at the deceased after a stone was thrown at the Jeep which was driven by the defendants. It should also be added that the description of the incident which arises from these testimonies in completely different from the description given by the defendants in additional points as well."

65. **From the above it is unclear why the respondent decided to prefer defendants' version over the version of the civilians who witnessed the incident, and how did the respondent come to the conclusion that precisely the civilian eye-witnesses were the ones who were lying**.

66. Particularly strange is the astonishing argument that the pathologist on behalf of the family, Dr. Kugel, was given testimony according to which a stone was thrown at the Jeep prior to the shooting. It should be emphasized on this issue that the "testimony" which was given to Dr. Kugel (the pathologist!) came from a secondary source with respect of whom there is no information. Dr. Kugel wrote at the outset of his opinion as follows: "Mr. Ronen Shimoni from the "Btselem" organization transferred to me the testimony of Mahmud Radwan Abu Haniyeh according to which the deceased was walking on the road. A border police Jeep was driving slowly on the same road when a stone was thrown at it. Immediately thereafter a shooting sound was heard from the rear part of the Jeep from which a barrel of a weapon was sticking out. Thereafter the witness found the deceased lying unconscious on the road." It is not clear who Mr. Radwan Abu Haniyeh is since the police have not deigned to interview him (nor with Mr. Ronen Shimoni) and obtain his version. Beyond need it should be noted that the youth Sharif Abu Haniyeh who picked Abir up after she was wounded and took her to school particularly stated in his testimony that he did not see where stones were thrown from and whether stones were thrown, but according to him, on the main street, where Abir was injured, no stones were thrown.

67. According to the version of the civilians eye-witnesses the Jeep stood much closer to the place in which Abir was wounded (across the back gate of the girls school rather than in the roundabout area, as was claimed by the policemen). It should be noted that the acceptance of this version could have reinforced the assumption that Abir was hit by a rubber bullet since the

opinion of Dr. Zaitsev (the Abu Kabir pathologist) stated that "a mechanism of an injury caused by a rubber bullet from a short range shooting cannot be overruled".

68. The clear testimonies of all civilian witnesses, the coordination between whom is much more difficult than between four policemen who serve together and who were together in the same Jeep when the incident took place, disappeared without a trace with no explanation. These are all important incriminating testimonies because they prove the fact that Abir was hit by the shooting of the policeman, respondent No. 2, and because they refute respondents' version which appears to be false and as such supports the evidence of the prosecution.

E. Failure to examine the possibility of filing indictments for breach of the Open Fire Regulations and disregarding this severe conduct

69. Beyond the question of whether there is room to indict any of the policemen for any of the homicide offenses which exist in our penal law, it was argued in the appeal that there was room to consider the filing of indictments against respondents 2-3 who admitted to have fired rubber bullets in a civilian environment and when the schools were on recess, for offenses which concern posing risk to life and health due to a clear and severe breach of the Open Fire Regulations.

70. Hence, in his response to the appeal the respondent notified with respect to this issue that "there is ostensible factual infrastructure that over the course of the incident being the subject matter of the appeal stones and bottles were thrown towards the defendants from different points by dozens of people, and that former measures for dispersing the violent disorder were to no avail. Under these circumstances defendants' version that they felt that their lives were at risk cannot be ruled out. It therefore seems that the shooting of rubber bullets which was carried out by them was lawful and according to the Open Fire Regulations."

71. **In view of the fact that the incidents in the village took place over a certain period of time, in order to examine the reasonableness of respondent 1's response, it should be checked whether crowd control measures were utilized before rubber bullets were used – in the specific point in which rubber bullets were used and shortly before the shooting**. Indeed, crowd control measures which were utilized in the observatory area (which is distanced from the roundabout and cemetery area) cannot be regarded as complying with the requirement that crowd control measures be used as a preliminary measure to warning shots in the air and/or rubber bullets (according to sections E and F of the **Open Fire Regulations card to Judea and Samaria soldiers July 2006**) which were fired in the cemetery area. Accordingly, crowd control measures which were utilized many minutes before the rubber bullets were fired cannot be regarded as complying with the requirement for gradual passage between the different crowd control measures (namely, firstly crowd control measures: water jets, tear gas and stun grenades, then warning shots in the air and finally rubber).

72. With respect to the argument that "Under these circumstances defendants' version that they felt that their lives were at risk cannot be ruled out. It therefore seems that the shooting of rubber bullets which was carried out by them was lawful and according to the Open Fire Regulations" it should be **emphasized** that according to the policemen's version (as things arise from the re-enactment) the boys stood about eighty meters away from the shielded Jeep. **There is no way in the world to regard stones thrown from a distance of almost one hundred meters at a**

shielded Jeep as life threatening! It should also be emphasized that according to the testimony of the driver (in the re-enactment) when the Jeep came down from the cemetery area towards the roundabout the children ran away and therefore it is unclear why at this stage shots were fired. Any shots.

73. **Finally and in any event, it is clear beyond any doubt that in the case being the subject matter of this petition no warning shots were fired in the air before rubber bullets were used and therefore it is clear that there was at least a breach of the Open Fire Regulations in this context**.

74. **And we hereby remind the factual detail with respect of which there is no dispute, namely, that all of the above shooting occurred in the vicinity of three (3!) schools during recess. This fact should have required an even greater caution on behalf of the policemen**.

F. Blind adoption of the conclusion of the re-enactment and giving a decisive weight to said conclusion

75. Hence, respondents 2-3's statements indicate that when the Jeep arrived to the roundabout area near the cemetery stones were thrown at it. In response, while the front part of the Jeep was facing north, crowd control weapons were used (and according to some versions rubber bullets were also fired) by the force commander, respondent No. 3, towards the cemetery. Thereafter, the Jeep continued to drive towards the nearby cemetery, turned around and drove (southwards) towards the roundabout, where it stopped, with his rear end facing north-east. At this point respondent No. 2 fired (one or more) rubber bullet(s) towards the cemetery (north-east) from the Jeep. The petitioners have no doubt that said shot which was fired by respondent No. 2 was the one which hit Abir and caused her death.

76. **It should be clarified that whenever interrogated neither respondents 2-3 nor any of the other policemen who were present in the incident had been questioned of the precise location of the Jeep in the roundabout area when the above described shots were fired, however, the drawings which they were requested to draw demonstrate beyond any doubt that at the time of the shooting the Jeep was standing in the northern part of the roundabout. See: *Exhibit C***.

77. Watching the tape indicates that there is no dispute that shots were fired by respondents 2-3 near the roundabout adjacent to the cemetery. **The main question which should have been clarified in the re-enactment is where precisely the Jeep was standing when the shooting took place: in its northern part – from which there is a direct line with no obstacles to the spot in which Abir was hit, or in its more southern part, from which the spot in which she was hit cannot be seen**.

78. **Having watched the re-enactment tapes our conclusion is that the questions which were posed to the policemen by the interrogator were leading questions and it seems that more than once the interrogator "forced" out from the policemen the answers he wanted/hoped to hear while the policemen were not at all certain – at least not in the first stage – where the Jeep was precisely standing**.

79. It should also be noted that in significant parts which concern the location of the Jeep the tape is mute and therefore the conversation between the interrogator and the policemen cannot be heard.

80. For demonstration purposes:

- The interrogator, superintendent Yaron Shitrit (the **interrogator**) tells the Jeep to stop at a point located somewhat south of the roundabout, towards the small gate of the girls school (located on the main road, at a point from which the place in which Abir was hit cannot be seen) and asks the force commander: "Was the Jeep standing here?" The force commander answers: "Here. There. Not exactly in the middle. In this area." (And points at the northern part of the roundabout) (January 23, 2007, minute 18:18).

- The interrogators asks respondent No. 2 whether after the Jeep turned around he shot towards the cemetery or at "this" direction (the street in which Abir was standing). Respondent No. 2 points at at the cemetery.

- One of the policemen (respondent 2 or 3) asks the photographer where Abir was hit (does not receive an answer)(January 23, 2007, minute 22:00).

- Respondent No. 3 says that at that point the Jeep was standing at the northern part of the roundabout. At this stage a discussion is held with respect to the location of the Jeep in the junction which is not heard on tape. The interrogator then calls respondent No. 2 and asks him about the shooting and in response respondent No. 2 points at the southern part of the roundabout. Again there is no sound. (January 23, 2007, commencing from minute 26:15).

- At this point the interrogator directs the photographer who documents the re-enactment, **at the presence of the policemen** and tells him to photograph the place in which they were standing and then to turn around and photograph the wall behind them (the school's wall) while emphasizing/explaining to the photographer (at the presence of the policemen) that according to the policemen the shooting was executed from a higher point (namely, further to the south) and that the girl was behind the wall and therefore there was no field of vision. (January 23, 2007, minute 28:00).

- The interrogator requests the policemen to show him the exact place in which the Jeep was standing with its rear end facing the cemetery (at the time of the shooting) and the policemen (who until now were standing in the northern part of the roundabout) start marching towards its southern part. The interrogator asks: "Is it possible that you were standing here?" (still in the northern part) and they answer: "No". The interrogator escorts them to the southern point of the roundabout and states: "And you were standing here and fired towards the cemetery" (January 23, 2007, minute 29:19).

- The re-enactment conducted with the driver of the Jeep shows the Jeep standing on the hillside near the cemetery and then starts descending down driving backwards. According to the driver the children have meanwhile ran away and when they drove backwards they have no longer seen children (January 28, 2007, minute 5:30).

- At this point the interrogator requests the driver to show him the exact route taken by the Jeep on its way back to the roundabout. The driver continues driving backwards and turns towards the roundabout. The interrogator asks the driver where exactly they were standing in the roundabout and the driver answers: "In this area. I don't remember exactly where but in this area." The interrogator persists on knowing where they were exactly standing and from where the shooting has exactly taken place. The driver answers again that he does not exactly remember where the Jeep was standing but that the shots were fired backwards. The interrogator requests to start again. This time the Jeep arrives from the southern part of the roundabout and drives to the north and the interrogator tells the driver:"Try to remember where you were standing". After the Jeep passes the small gate of the girls' school (approximately parallel to the southern point of the roundabout) the driver tells the

interrogator "we stood here but in that direction" (namely, on the other lane, since they came from the opposite side). The interrogator requests the driver to pass to the other lane and show exactly where the Jeep was standing. He asks the driver whether he is certain that this was the spot in which they were standing. The driver answers: "More or less". The interrogator asks whether it was possible that they were standing in the northern part of the roundabout. The driver answers: "No way". The interrogator reiterates: "You say that in this roundabout there is no way that you were standing/" The driver replies: "We did not stand". Thereafter he leads him to the roundabout and asks if they stood there. The driver replies in the negative. The interrogator asks again: Is it possible that you stood here (north to the roundabout) and fired. The driver replies: No. The driver asks the interrogator where exactly the girl was injured and the interrogator shows him while asking the driver: "Did you shoot at this direction?" The policeman replies: No. (January 28, 2007, commencing from minute 7:00)

81. **Hence, it is apparent that the policemen were not decisive as to the location of the Jeep in the roundabout. However, as the re-enactment progresses it seems that they have understood the meaning of a southern version and the meaning of a northern version, namely, where Abir was standing and the meaning of their exact location in the roundabout. From the moment they understood, their version substantially looses weight and weight should be given to their written version and their drawings. And indeed, as the re-enactment progresses the policemen become more decisive and clearer as to the location of the Jeep at the time of the shooting, according to the comprehension which version was more convenient**.

82. And before we summarize this part, it should be noted with respect to the argument that no reference was made in the appeal to the opinion of Dr. Cohen, that it is the undersigned's understanding, that once an autopsy is executed it is clear that its weight and credibility are greater than the evaluation of the treating physician and therefore render the need to use the latter redundant. It is worth noting that even Dr. Chen said that "[he] was unable to know for sure what was the mechanism of the injury and all the assumptions reported [by him] were only assumptions based on [his] impression and experience".

83. **In conclusion, the respondent "deliberately" disregards decisive facts** (the time on which Abir was injured, the time on which she arrived to the hospital and the time on which the Jeep left the village); **he disregards circumstantial evidence** (the fact that rubber bullets were found where Abir was injured); **he does not take into consideration the pathological opinion** (according to which it is reasonable that the injury was caused by a rubber bullet) **with respect to the above circumstantial facts and evidence; he fails to give any weight to the version of the civilian eye-witnesses** (which refutes stone throwing at the place of the incident prior to and over the course of the incident and according to which the Jeep was standing near the back gate of the girls' school). **On the other hand he adopts with both hands the policemen's version: he easily skips over arguments concerning breach of the Open Fire Regulations** (despite the fact that these are severe arguments which pertain to breach of the regulations in the midst of a residential area and in the vicinity of three schools) **and even disregards the clear breach which is not in dispute of the failure to fire warning shots in the air prior to firing life threatening shots; gives the problematic re-enactment decisive weight in his decision regardless of the substantial flaws in its execution**.

84. **In view of all of the above said respondent's decision is patently unreasonable and cries for the intervention of the honorable court.**

85. **As stated in the appeal the petitioners are of the opinion that the conclusion which necessarily arises from the investigation material is that Abir was hit by respondent 2's shooting while the Jeep was standing in the roundabout area, and a legal analysis of the circumstances of the shooting necessarily leads to the conclusion that there is sufficient evidence to file indictments against respondents 2-3 for the offense of manslaughter or alternatively for causing death by negligence (with respondent No. 2 being responsible as the principal perpetrator and respondent No. 3 as an accomplice and/or solicitor by virtue of his superior responsibility and due to the open fire directives given by him), which we shall now discuss.**

Filing an indictment

86. The test established by law which obligates a prosecutor to file an indictment against a suspect is the "sufficient evidence to indict a person" test. The above rule has one exception only which is "lack of public interest in holding the trial".

87. The rule and the exception derive directly from the provisions of section 62 of the Criminal Procedure Law [Consolidated Version], 5742-1982:

> If the prosecutor to whom the investigation materials were sent sees that the evidence suffices to indict an individual, the prosecutor will press charges against him, unless the prosecutor is of the opinion that there is no public interest in holding the trial..."

88. The test established by case law for the existence of "sufficient evidence to indict a person" is the **reasonable prospects for conviction** test according to which when a prosecutor needs to decide whether there are reasonable prospects for conviction he must make a double examination of the raw evidentiary material and evaluate the prospects for conviction based thereon (the above **Yahav** case, pages 10-12).

89. And on this issue see the words of President (*emeritus*) Barak in CrimApp 8087/95 Zada v. State of Israel (judgment dated April 15, 1996), IsrSC 50(2) 133, 146:

> A *'prima facie*' evidence is by its nature a raw evidence. It has not yet gone through the melting pot of the criminal procedure. It is not possible to convict or acquit a person based on such evidence… *'prima facie'* evidence is therefore evidence which has an evidentiary potential which takes effect in the future, upon the termination of the judicial proceeding.

And thereafter, in pages 148-149 (where the following things were said in the context of ostensible evidence for detention till completion of proceedings, but they also suit our case):

> The court examines whether the entire investigative material gives rise to a convicting factual infrastructure by the end of the judicial proceeding… from all of the above the court creates a comprehensive picture regarding the evidentiary potential embedded in the investigative material, namely, whether there are reasonable prospects that such investigative material would give rise by the end of the judicial proceeding to evidence which would substantiate the defendant's guilt…

90. And indeed, *prima facie* evidence for this purpose means that also where the evidence in the file is not clear cut, reasonable prospects for conviction may nevertheless exist.

91. It has already been said that the petitioners are of the opinion that there is no doubt that the shooting which eventually caused the death of Abir was executed by respondent No. 2. The accumulation of his admission that he fired from the roundabout towards the cemetery (which is at a very small angle from where Abir was standing); the fact that a rubber bullet was found where Abir fell down; and the improbability that she was hit by a stone – create not less than reasonable prospects for conviction.

92. In addition, the evidentiary material ties respondent No. 3 to the manslaughter offense by virtue of **his superior responsibility for the incident and its consequences**, and also ties him to the breach of the Open Fire Regulations as a principal perpetrator.

93. The testimonies indicate that respondent No. 3 was the one who authorized the shooting which caused Abir's death (respondent No. 2's admission dated January 21, 2007, page 2, lines 34-38, page 4, lines 50-51), and over the course of the incident even opened fire himself contrary to the Open Fire Regulations.

94. Being the force commander respondent No. 3 should have acted very strictly and exercise control not only over his own conduct and actions but also over the actions of his subordinates, thus setting personal example.

95. As indicated by the investigative material, over the course of the incident rubber bullets were fired in a condensed civilian area, in the vicinity of three schools, during recess, in circumstances which were not life threatening and contrary to the Open Fire Regulations which applied to the scene, and therefore with disgraceful indifference to human life.

96. The above superior responsibility of respondent No. 3 should be converted into legal responsibility which will materialize in the form of criminal indictment (see on this issue: CrimC (Jerusalem) 0455/97 **State of Israel v. Odrenko Michael** (judgment dated April 27, 1998); CrimC (Jerusalem) 183/03 **State of Israel v. Sisay Noga** (judgment dated May 10, 2005) since at least part of the responsibility for the deviation from the Open Fire Regulations – if not the entire responsibility – is imposed on the shoulders of the person who gave the order to open fire, namely, respondent No. 3.

97. In the case at hand, the evidentiary test points against the respondents and supports the filing of indictments for manslaughter; alternatively for causing death by negligence and alternatively to the alternative, endangering human life.

98. Closing the file without filing indictments against respondents 2-3 enables the suspects in causing the death of a ten year old girl to escape the rigor of law and sends a message to those who carry arms in the framework of their military activity that they have immunity also when their criminal activity caused the death of innocent individuals who did not pose any risk to them.

In view of all of the above, the honorable court is requested to issue an *order nisi* as requested in the beginning of this petition, and after receiving respondents' response and an oral hearing – make it absolute.

In addition the honorable court is requested to obligate the respondents to pay petitioners' costs and attorneys' fees together with VAT and interest according to the law.

_____	_____
Michael Sfard, Advocate	Natalie Rosen, Advocate

Counsels to the petitioners

June 29, 2008