At the Supreme Court Sitting as the High Court of Justice

HCJ 7040/15
HCJ 7076/15
HCJ 7077/15
HCJ 7079/15
HCJ 7081/15
HCJ 7082/15
HCJ 7084/15
HCJ 7085/15
HCJ 7087/15
HCJ 7092/15
HCJ 7180/15

Before:	**Honorable President M. Naor** **Honorable Justice H. Melcer** **Honorable Justice N. Sohlberg**
The Petitioner in HCJ 7040/15:	**Fadel Mustafa Fadel Hamed**
The Petitioners in HCJ 7076/15:	**1. Haj Hamed Abdallah** **2. Husni Mshaqi** **3. Ahmed Tzuwan** **4. Roshdiyeh Bashir** **5. Miryam Ganem** **6. Jamil Ziat** **7. The cooperative Housing Company of Government Employees** **8. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 7077/15:	**1. Zeinab Manir Askhaq An'am** **2. Ali Mani Askhaq An'am** **3. HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
The Petitioners in HCJ 7079/15:	**1. Lutafi Rizziq** **2. Rana Rizziq** **3. Daena Lutafi Rizziq** **4. Zeid Lutafi Rizziq**

5. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7081/15:

1. **Hadija Ahmed Hassan Amar**
2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7082/15:

1. **Afaf Ahmed Razeq**
2. **Ashraf Fathi Razeq**
3. **Talal Lutafi Razeq**
4. **Nasser Omar Razeq**
5. **Ahmed Omar Razeq**
6. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7084/15:

1. **Hamed Sariya Abed Almagid Mustafa**
2. **Noaman Salah Gam'a Hamed**
3. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7085/15:

1. **Mohamed Haj Hamed**
2. **Hiam Haj Hamed**
3. **Yosara Haj Hamed**
4. **Abed al Rahman Hamed**
5. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7087/15:

1. **Wal'a Kusa**
2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7092/15:

1. **Wal'a Alam Kusa**
2. **Mahmud Zahir Kusa**
3. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**

The Petitioners in HCJ 7180/15: **Lina 'Abd al Jani**

v.

The Respondents in HCJ 7040/15, in HCJ 7076/15 and in HCJ 7084/15:	**1. The Military Commander of the West Bank Area** **2. Legal Advisor for the Judea and Samaria Area**
The Respondents in HCJ 7077/15:	**1. Commander of IDF Forces in the West Bank** **2. Legal Advisor for the Judea and Samaria Area** **3. Fadel Albasheh**
The Respondent in HCJ 7079/15, in HCJ 7081/15, in HCJ 7082/15, in HCJ 7085/15, in HCJ 7087/15, in HCJ 7092/15, and in HCJ 7180/15:	**Commander of IDF Forces in the West Bank**
Applicants requesting to join as Respondents in HCJ 7081/15:	**1. Almagor - Terror Victims Association** **2. Dvora Gonen** **3. Eliezer Rosenfeld**

Objection to the issue of *Order Nisi*

Session Date:	**16 Heshvan 5776 (October 29, 2015)**
Representing the Petitioners in HCJ 7040/15	**Adv. Mufid Haj**
Representing the Petitioners in HCJ 7076/15	**Adv. Gabi Lasky**
Representing the Petitioners in HCJ 7077/15 and in HCJ 7084/15	**Adv. Michal Pomeranz**
Representing the Petitioners in HCJ 7079/15 in HCJ 7085/15 in HCJ 7087/15	**Adv. Labib Habib**

and the petitioner in HCJ 7180/15

Representing the Petitioners in HCJ 7081/15 and in HCJ 7082/15	**Adv. Andre Rosenthal**
Representing the Petitioners in HCJ 7092/15	**Adv. Lea Tsemel**
Representing the state in HCJ 7040/15 in HCJ 7077/15 in HCJ 7084/15 in HCJ 7180/15	**Adv. Avinoam Segal-Elad**
Representing the respondents In HCJ 7076/15 in HCJ 7079/15 in HCJ 7082/15 in HCJ 7085/15 in HCJ 7087/15 and in HCJ 7092/15	**Adv. Yuval Roitman; Adv. Yonatan Zion Mozes**
Applicants requesting to join as Respondents in HCJ 7081/15:	**Representing themselves**

Judgment

President M. Naor:

Before us is a host of petitions which were filed against seizure and demolition orders which were issued against the homes of Palestinians from the Judea and Samaria Area, who are accused or suspected of having committed murderous attacks in the last few months.

Background

1. In the last two years the security situation within Israel as well as in the Judea and Samaria Area has deteriorated which is expressed in a constant increase of terror activity against the residents and citizens of Israel, including fatal attacks which lead to the death and injury of dozens of people (see also: HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area** , paragraph 2 of my judgment (July 1, 2014) (hereinafter: **'Awawdeh**); HCJ 5290/14 Qawasmeh v. Military Commander of the West Bank Area , paragraphs 1-3 of the judgment of Justice Y. Danziger (August 11, 2014)(hereinafter: **Qawasmeh**)). Over the last few weeks another significant increase occurred in terror activity. According to data presented by the respondents in their responses, as of New Year's Eve and until October 25, 2015, about 778 attacks were

registered in which eleven individuals were killed and in addition about one hundred individuals were wounded. Regretfully, this wave of terror continues to hit nowadays too, and attacks and attempted attacks are carried out throughout Israel and the Judea and Samaria Area on a daily basis.

2. In the framework of the overall escalation, three severe shooting attacks were carried out in recent months in which Israeli citizens were killed in cold blood. The details of these attacks, which are situated in the center of the petitions before us, are as follows: on June 19, 2015, the late Danny Gonen was shot to death from a short range in a fatal attack near the Ein Bovine spring. Danny's friend, Netanel Hada, was injured. According to the respondents, the perpetrator who carried out the attack is Mohamed Husni Hassan Abu Shahin (hereinafter: **Abu Shahin**), who admitted to have executed said attack in his police interrogation. According to the respondents, Abu Shahin's admission is well supported by findings from the scene in which the attack took place including reference to concealed details. In addition, Abu Shahin admitted to have carried out a host of additional attacks, including thirteen attempts to intentionally cause death. Based on the above, an indictment was filed against Abu Shahin on August 17, 2015, which consists of twenty four charges including causing the death of the late Danny Gonen and wounding Netanel Hadad.

3. On June 29, 2015 another fatal shooting attack was carried out in which the late Malachi Rosenfeld was killed and three additional individuals were wounded. According to the respondents, the perpetrators which carried out the attack were Hamas members from the Judea and Samaria Area named Ma'ed Salah Jam'a Hamed (hereinafter: **Ma'ed**) and Abdallah Munir Salah Ischak (hereinafter: **Abdallah**). As indicated by Abdallah's interrogation – during which he admitted to have executed the above actions and also incriminated Ma'ed – he and Ma'ed were members of a Hamas cell which planned to carry out shooting attacks against Israeli citizens. In this context the two tried to carry out, on June 27, 2015, a shooting attack against Israeli cars, which fortunately enough ended up without casualties or damage to property. Two days later Ma'ed and Abdallah met for the purpose of executing yet another shooting attack. The two drove towards the Ma'ir village and while they were on their way they noticed an Israeli car in which the victims were driving. When the Israeli car stopped near the perpetrators' car, Ma'ed opened the window of the car and shot at the passengers using his Carl Gustav gun. As a result of the shooting the late Malachi Rosenfeld was killed and three additional individuals were wounded. To substantiate Ma'ed's and Abdallah's liability for the above actions, the respondents attached to their response Abdallah's police admissions and the indictment which was filed against him.

4. On October 1, 2015, perpetrators carried out another cruel shooting attack in the Beit Furik junction area. In the attack the late Naama and Eitam Henkin were killed in front of their four young children who were with them in the car and consequently lost their mother and father. According to the respondents, the murder was committed by three Hamas members: Karim Lutafi Fathi Razeq (hereinafter: **Razeq**); Samir Zahir Ibrahim Kusa (hereinafter: **Kusa**); and Yihya Mohammed Naif Abdallah Haj Hamed (hereinafter: **Hamed**). In their response the respondents noted that the three admitted that they carried out the attack but refrained from attaching the admissions themselves. Following discussions in the hearing before us, the admissions (parts of which had been blackened) were submitted to the court and at the same time to the petitioners. In the admissions which complement each other, the three specified, among other things, their part in the killing and their motives for the execution thereof.

The seizure and demolition orders being the subject matter of the petitions

5. In view of the great severity of the three attacks described above, and due to the need to deter potential perpetrators from the execution of similar actions, the Military Commander of IDF Forces in the Judea and Samaria Area (hereinafter: the **military commander**) decided to exercise his authority pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations**) and to seize and demolish the homes in which the perpetrators lived, namely, **six different structures** in the Judea and Samaria Area.

The eleven petitions before us were filed against the decision of the military commander to demolish the above six structures. Before we describe the petitions, we shall firstly describe the overall picture with respect to the structures designated for demolition:

(a) **The home of Ma'ed, suspect of having committed the murder of the late Malaachi Rosenfeld** (HCJ 7084/15): a one-story structure built on a terrace, located in the Silwad village north of Ramallah.

(b) **The home of Addallah, accused of the murder of the late Malaachi Rosenfeld** (HCJ 7040/15; HCJ 7077/15; HCJ 7180/15): apartment No. 23 located on the top floor of an eight-story building, located in the Silwad village north of Ramallah.

(c) **The home of Hamed**, **suspect of having committed the murder of the late Henkin spouses** (HCJ 7076/15; HCJ 7085/15): the two middle floors in a four story building, located in the Iskan Rujib area in the city of Nablus**.**

(d) **The home of Razeq suspect of having committed the murder of the late Henkin spouses** (HCJ 7079/15; HCJ 7082/15): an apartment on the second (middle) floor in a three story building, located in the Arek a-Tich neighborhood in the city of Nablus.

(e) **The home of Kusa, suspect of having committed the murder of the late Henkin spouses** (HCJ 7087/15; HCJ 7092/15): an apartment on the ground floor in a building consisting of two built-up floors and another floor which is currently in advance construction stages, located in the Dahiya neighborhood in the city of Nablus.

(f) **The home of Abu Shahin, accused of the murder of the late Danny Gonen** (HCJ 7081/15): an apartment on the top floor of a three story building, located in the Qalandia refugee camp.

We shall now describe the petitions which were filed in connection with these six structures. It should be clarified we refer to the petitions not according to the order by which they were filed with the court, but rather according to the order we decided to discuss the different issues which they arise.

Respondent's decision with respect to the petitioners in HCJ 7084/15 (concerning the demolition order against the home of Ma'ed)

6. Ma'ed as aforesaid is suspected of having committed the murder of the late Malachi Rosenfeld. The respondents allege that he lived in a one-story house built on a terrace, in the Silwad village north of Ramallah. In this house – which is registered under the name of the father of the family who passed away – live the mother and brother of the suspect Ma'ed. On October 15, 2015, the military commander notified the family members of the suspect of his intention to seize and demolish the entire structure and that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. The family members submitted an objection, which was denied on October 19, 2015. On that very same day the military commander signed a seizure and

demolition order against the home of Ma'ed. Three days later Ma'ed's family members filed a petition with this court (HCJ 7084/15). HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger joined them in their petition (hereinafter: **HaMoked**).

Respondent's decision with respect to the petitioners in HCJ 7040/15, HCJ 7077/15 and HCJ 7180/15 (concerning the demolition order against the home of Addallah)

7. Abdallah, who is accused of having committed the murder of the late Malaachi Rosenfeld, lived in apartment No. 23 on the top floor of an eight story building, also located in the Silwad village. The apartment is rented by the mother of the accused. The brother and sister of the accused also live in the apartment. On October 15, 2015, the military commander notified the family members of his intention to seize and demolish the above apartment and that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. Neither the owner of the building nor its other inhabitants were given notice by the military commander of his intention to seize and demolish Abdallah's apartment. Nevertheless, along the objection which was submitted by the family members of the accused, objections were also submitted on behalf of the other inhabitants of the building and on behalf of the owner of the building, Mr. Fadel Mustafa Fadel Hamed, who rents to Abdallah's mother the apartment designated for demolition (hereinafter: the **building owner**). After the three objections were denied and a seizure and demolition order was signed, each one of the objecting parties filed petitions against the order (HCJ 7040/15 – the petition of the building owner; HCJ 7077/15 – the petition of the family members of the accused and HaMoked; and HCJ 7180/15 – the petition of the inhabitants of the building and HaMoked).

Respondent's decision concerning the petitioners in HCJ 7076/15 and in HCJ 7085/15 (in connection with the demolition order against Hamed's home)

8. Hamed, as aforesaid, is suspected of having committed the shooting attack in which the late Henkin spouses were killed. Hamed's home is located in the Iskan Rujib area in the city of Nablus, in a four story building. The respondents argue that Hamed lived in the two middle floors of the building. They allege that Hamed lived with his parents in the apartment on the first floor (above the ground floor) and that Hamed intended to use the second floor, which is in its final construction stages, as his residence in the future. In any event, it was argued that lately Hamed lived alternately in this apartment as well. On October 15, 2015, the military commander notified the family members of his intention to seize and demolish **the first floor and the second floor** and that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. It should be noted that the Arabic version of the notice erroneously stated that the intention of the military commander was to seize and demolish the **ground** floor of the building. The family members of the suspect submitted an objection and so did the inhabitant of the ground floor of the building, the suspect's brother, and inhabitants of buildings adjacent thereto. In the decisions made by him in the objections, the military commander apologized for the error which occurred in the Arabic version of the notice and clarified that as stated in the Hebrew version of the notice – the intention was to demolish the first and seconds floors of the building. Thereafter the family's objection was denied. The objection of the neighbor and of the inhabitants of the adjacent buildings was denied as well. Following the denial of the objections and after the military commander signed the seizure and demolition order, the objecting parties filed, together with HaMoked, petitions with this court (HCJ 7076/15 – the petition of the inhabitant living on the ground floor and of the inhabitants of the buildings adjacent to the apartment designated for demolition; and HCJ 7085/15 – the petition of the family members including the suspect's mother who is also the owner of the building).

Respondent's decision concerning the petitioners in HCJ 7079/15 and in HCJ 7082/15 (in connection with the demolition order against Razeq's home)

9. Razeq, as aforesaid, is also suspected of participation in the attack in which the late Henkin spouses were killed. The apartment in which Razeq lived is located in Arek a-Tich neighborhood in the city of Nablus. The apartment is located on the second (middle) floor of a three story building. Razeq's parents and siblings also live in the apartment. On October 15, 2015, the military commander notified the family members of his intention to seize and demolish the second floor in the building and that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. The family members, as well additional inhabitants in the building submitted two objections – which were denied. Immediately thereafter the military commander signed a seizure and demolition order. Consequently, the objecting parties together with HaMoked filed two petitions with this court (HCJ 7079/15 – the petition of the family members; and HCJ 7082/15 – the petition of additional inhabitants in the building).

Respondent's decision concerning the petitioners in HCJ 7087/15 and in HCJ 7092/15 (in connection with the demolition order against Kusa's home)

10. Kusa, as aforesaid, is the third suspect in the execution of the attack in which the late Henkin spouses were killed. The apartment in which Kusa lived is located in Dahia neighborhood in the city of Nablus. The apartment is located on the **ground floor** of a building which consists of two completed floors and another floor in advanced construction stages. On October 15, 2015, the military commander notified the family members of the suspect of his intention to seize and demolish the **ground floor** in the building and that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. The family members submitted an objection, and so did additional inhabitants of the building. After the objections were denied and following the signature, by the military commander, of the seizure and demolition order, the objecting parties, together with HaMoked, filed petitions with this court (HCJ 7087/15 – the petition of the suspect's wife who lives with their three children in the apartment designated for demolition; and HCJ 7092/15 – the petition of the other inhabitants of the building).

Respondent's decision concerning the petitioner in HCJ 7081/15 (in connection with the demolition order against Abu Shahin's home)

11. Abu Shahin who is accused in the murder of the late Danny Gonen, lived with his family members in an apartment located on the top floor of a three story building in the Qaladia refugee camp. On October 15, 2015, the military commander notified the family members living with the accused and their relatives, the Amar family, of his intention to seize and demolish the third floor of the building. Said notice also stated that they were entitled to submit an objection in that regard in writing until Saturday, October 17, 2015. An objection submitted by the grandmother of the accused, Mrs. Hadija Amar, who lives on the first floor of the building, was denied on October 19, 2015. On the same day the military commander signed a seizure and demolition order against the home of Abu Shahin. Three days later Mrs. Amar together with HaNoked filed a petition against the order (HCJ 7081/15). To complete the picture it should be noted that according to the respondents, the apartment designated for demolition is owned by the **uncle of the accused**, Ibrahim Abdallah Amar. However, Mrs. Amar claimed that she was the owner of the entire building including the apartment of the accused on the top floor.

The main arguments of the parties

General arguments common to all petitions

12. Several common arguments were raised by all of the petitions at hand. Firstly, the petitioners argue that the demolition of houses of Palestinian residents in the Judea and Samaria Area – to which the belligerent occupation laws apply – constitutes a breach of international humanitarian law and human rights laws. They argue that house demolition is contrary to the prohibition against property demolition unless the exercise of this measure is required for military purposes (Article 53 of the Geneva Convention relative to the Protection of Civilian Persons in Times of War, 1 *Book of Treaties*, 453 (opened for signature in 1949) (hereinafter: the **Fourth Geneva Convention**); Regulation 46 of the Fourth Hague Convention respecting the Laws and Customs of War on Land, including the Regulations concerning the Laws and Customs of War on Land (190) (hereinafter: the **Hague Regulations**), constitutes prohibited collective punishment (Article 33 of the Fourth Geneva Convention; Regulation 50 of the Hague Regulations) and runs contrary to the obligation to secure the child's best interest (Article 38 of the Convention on the Rights of the Child, 31 *Book of Treaties*, 221(opened for signature in 1989)). Against this backdrop and based on the opinion of international public law experts from the Israel academy, it was argued that extensive house demolition may amount to a war crime according to international criminal law and the Rome Statute of the international criminal court (1988). The petitioners are aware of the institutional difficulty involved in the reconsideration of the lawfulness of the house demolition policy which was approved by this court over a long period of time. However, they argue that given the severe ramifications of the house demolition policy its reconsideration in the framework of the petitions before us is justified.

The petitioners argued further that despite the fact that the justification for the demolition of houses of perpetrators according to the judgments of this court stemmed from its deterring rather than punitive purpose, there was no evidence that house demolition indeed served the purpose of deterring potential perpetrators. In that regard the petitioners reminded that in 2005 the Minister of Defese accepted the recommendations of the reconsideration committee headed by Major General Udi Shani (hereinafter: the **Shani committee**) according to which house demolition should be stopped in view of the existing doubt concerning their effectiveness. The petitioners argue that respondents' failure to present empirical data or other evidence in support of the allegation that house demolition deterred and prevented potential perpetrators from the execution of attacks was in appropriate, particularly in view and *albeit* the comments of Justices **E. Rubinstein** and **E. Hayut** in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014)(hereinafter: HaMoked case) according to which the respondents should conduct "a follow-up and a study on this issue" and present "before this court as may be required in the future, and to the extent possible, data pointing at the effectiveness of the house demolition measure for deterrence purposes, to such an extent which justifies the damage caused to those who are neither suspects nor accused" (*Ibid*., paragraph 27 of the judgment of Justice **E. Rubinstein**). Another common argument is the discrimination argument. According to the petitioners Regulation 119 is used in a manner which discriminates between Jews and Arabs. While the homes of Arabs who committed terror attacks were demolished, the homes of Jews who committed similar actions remain intact. Finally, it was argued that the period allocated to the petitioners for the purpose of filing objections against the intention to demolish the structures and the period allocated to them for the purpose of filing petitions with this court against the orders which were issued were unreasonably short. Some of the petitioners even pointed at the fact that the forty eight hours which were allocated for the submission of the objections consisted of rest days. In addition, some petitioners raised arguments regarding additional flaws in the hearing procedure, and first and foremost respondents' refusal to transfer for petitioners' review materials upon which their decision was based such as the incriminating evidentiary material

against the suspects and the engineering opinions according to which the demolitions would be carried out.

13. The respondents argued in response that the general arguments should be dismissed. In response to petitioners' arguments which are based on international law, the respondents argued that the court has held on several occasions, and recently in HaMoked case that the demolition of perpetrators' homes was a legitimate action which reconciled with international law as well as with the local law. According to the respondents, the petitioners did not point at any reason which justified the reconsideration of these issues. The respondents argued further that in the current security situation the exercise of the authority pursuant to Regulation 119 of the Defence Regulations is necessary for the purpose of deterring additional potential perpetrators. According to them, the effectiveness of the house demolition policy was discussed in a host of judgments (such as in the judgment given in **HaMoked case** where a general petition which was directed against the use of the measure of demolition against perpetrators' homes was denied; a petition for further hearing in this judgment was denied today (HCJFH 360/15 HaMoked: Center for the Defence of the Individual v. Minister of Defense (November 12, 2015)(hereinafter: **HCJFH HaMoked**)). Indeed, the respondents agree that several years ago the Shani committee recommended to reduce the use of house demolition and to even cease using it. However, with the intensification of the wave of terror the need arose to exercise said authority in Jerusalem (as of 2008) and in the Judea and Samaria Area (as of 2014), The respondents argue that the renewed use of the demolition measure derives from the circumstances of time and place, and that in view of the changing show of terror the military commander is obligated to act accordingly, while changing the measures employed by him. The respondents added that the policy was applied proportionately and that the factors that were weighed in the framework of the balancing which was conducted by them included the severity of the actions; the residence connection between the perpetrator and the house; the size of the house; the impact of the exercise of the measure on other people; engineering considerations; etc. It was also argued that according to the judgments of this court, the discrimination argument should be dismissed. Finally it was argued that petitioners' arguments concerning the hearing procedures had no merit.

Specific Arguments

14. The petitions also raised a host of specific arguments which I will broadly discuss later on, in connection with each order that was issued against the houses being the subject matter of the petitions at hand. However, it should already be noted that the vast majority of the specific arguments pertains to deficiencies in the factual infrastructure upon which the respondents based their decision; doubts concerning the rational connection between the measure of house demolition and the purpose of deterrence in certain cases; delay in the exercise of the authority; possible damage to adjacent apartments and buildings and to whether the respondents should compensate for such damage. The respondents on their part argued that these arguments should also be denied, all as specified below.

The proceedings before us

15. In all of the above petitions requests for interim orders were submitted and accepted. According to the decisions in the requests for interim orders, the respondents are prohibited from seizing and demolishing the six buildings until judgment in said petitions is given.

16. On October 27, 2015 Almagor, Terror Victims Association in Israel, together with the mother of the late Danny Gonen and the father of the late Malachi Rosenfeld requested to join the petitions as respondents. We allowed them to submit a written position and to argue before us verbally in the hearing which was held in the petitions. They requested

to bring the voice of the bereaved families, on the deep pain of which there is no need to elaborate, and convey their support in the demolition of perpetrators' houses which, according to them, may prevent additional terror victims.

17. On October 29, 2015, a hearing was held before us. The petitions raise common questions and some of them concern the same buildings. We have therefore decided to consider them jointly. However, each one of the petitions has individual aspects which should be considered separately.

18. In the beginning of the hearing we asked the legal counsels of the respondents whether the petitions could be regarded as if *order nisi* was issued therein. Respondents' initial response was in the negative. However, after the hearing they filed a notice in which they have expressed their consent to the above. In addition, with the consent of petitioners' legal counsels, we reviewed *ex parte* privileged material concerning the deterring effect of the house demolition policy. According to our directions, a copy of the privileged material was thereafter transferred to the court, which would be kept in the court's safe as part of the exhibits which were submitted in the petitions before us. On November 9, 2015, a request was filed on behalf of the petitioners for the consideration of the possibility to transfer the privileged material, or at least parts thereof, for petitioners' review. The request was also raised in the hearing before us (see: hearing protocol dated October 29, 2015, page 32). We were unable to accept said request.

19. Finally, following clarifications which were requested on certain issues, the respondents filed on November 2, 2015 a complementary notice on their behalf (hereinafter: the **complementary notice**). In the framework of the complementary notice the respondents argued that in each one of the cases being the subject matter of the petitions the different alternatives for the realization of the orders were considered (full demolition, demolition of internal walls and ceiling or sealing). According to the, the conclusion of said consideration was that all six buildings should be demolished "given the entire circumstances of the matter, including, engineering, functional and operational reasons, as well as considerations of deterrence." The respondents also clarified that if as a result of **negligent** planning or execution of the demolition of the houses designated for demolition damage was caused to adjacent buildings, the state would agree, *ex gratia*, to repair the building or compensate its owner, subject to an assessment on its behalf and a host of additional conditions as follows: the flaw in the demolition of the building did not stem from disruptions of order; the owners of the building did not receive any compensation, indemnification or any other payment for the damage from the Palestinian Authority or any other body; The injured party is not a national of an enemy state or an activist or member of a terror organization, or anyone on their behalf (according to section 5B of the Civil Wrongs (State Liability) Law, 5712-1952 (hereinafter: the **Civil Wrongs Law**).

20. The respondents also specified at our request the realization dates of previous demolition orders which were approved since 2013 by this court. In this context it became evident that some orders were realized shortly after the judgment which approved the order was given, while others were realized only several months later. One order has not yet been realized for operational reasons. In addition, the respondents attached to the complementary notice the following documents: admissions of the suspects in the murder of the late Henkin spouses; admissions of two additional individuals involved in the attack in which the late Malachi Rosenfeld was killed; and a summary of a mapping of the house of the suspect Hamed.

21. The petitioners on their part submitted replies to the complementary notice. In their replies the petitioners argued, inter alia, that respondents' notice indicated that the alternatives for full demolition were not willingly considered. The petitioners argued

further that the conditions specified by the respondents for compensating the inhabitants of adjacent buildings were not reasonable.

Discussion and Decision

22. The petitions before us concern the use of Regulation 11 of the Defence Regulations, which authorizes the military commander to issue orders for the demolition of houses of those who are suspected or accused of hostile activity against the state of Israel. The Regulation stipulates as follows:

> 119. (1) A Military Commander may by order direct the forfeiture to the Government of Israel of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land. Where any house, structure or land has been forfeited by order of a Military Commander as above, the Minister of Defense may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall revert to the persons who would have been entitled to same if the order of forfeiture had not been made and all liens on the house, structure or land shall be revalidated for the benefit of the persons who would have been entitled thereto if the order of forfeiture had not been made.
>
> […]

23. The scope of Regulation 119 of the Defence Regulations, as drafted, is very broad. However, in its judgments this court clarified that the military commander must make prudent and limited use of said authority, according to principles of reasonableness and proportionality (see, for instance: '**Awawdwh**, paragraphs 16-17 of my judgment; HCJ 5696/09 **Mughrabi v. GOC Home Front Command**, paragraph 12 of the judgment of my colleague Justice H. Melcer (February 15, 2012 (hereinafter: **Mughrabi**); HCJ 5667/91 **Jabarin v. Military Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(1) 858, 860 (1992)). The above ruling was reinforced following the enactment of the Basic Law: Human Dignity and Liberty, in light of which the Regulation should be interpreted (see (see: FHHCJ 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 488 (1996)(hereinafter: **Sharif**); HCJ 8084/02 **Abbasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003)). Therefore, according to the rules which were established by case law, the person with the authority is vested must ascertain that the demolition is carried out for a proper purpose and that it satisfies the proportionality tests. Namely, the measure taken must rationally cause the attainment of the objective; the measure taken must violate protected human rights – the right to property and human dignity – to the least extent possible for the attainment of the objective; and finally, the measure taken must maintain a proper relation *vis-a-vis* its underlying objective (see: **Sharif,** pages 60-61; HCJ 9353/08 **Abu Dheim v. GOC**

Home Front Command, paragraph 5 of my judgment (January 5, 2009) and the references there (hereinafter: **Abu Dheim**)).

24. As held by case law, the purpose of the Regulation is to deter and not to punish. This purpose was recognized as proper purpose (for criticism on this approach see, for instance: David Krechmer "HCJ Criticism on sealing and demolition of houses in the Territories" **Klinghofer Book on Public Law 305, 314, 319-327 (1993);** Amichai Cohen and Tal Mimran "Cost without Benefit in House Demolition Policy: following HCJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area", **case law news flashes 31 5, 11-21 (2014)**). House demolition is indeed a severe and difficult measure – mainly due to the fact that it impinges on the family members of the perpetrator who on certain occasions did not assist him and were not aware of his plans. And indeed, "[…] the injury inflicted on a family member – who committed no sin – and who lost the roof over his head, contrary to fundamental principles, is burdensome". (**HaMoked** case, paragraph 3 *[sic]* of the judgment of my colleague Justice **N. Sohlberg**). However, given the deterring force embedded in the use of the Regulation, sometimes there is no alternative but to use it (see, for instance: HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289' 294 (2003)). It was therefore held by this court that when the acts attributed to a suspect are particularly severe, it may possibly justify the use of the extraordinary sanction of the demolition of his house based on considerations of deterrence (see: HCJ 8066/14 Abu **Jamal v. GOC Home Front Command**, paragraph 9 of the judgment of Justice E. Rubinstein (December 31, 2014)(hereinafter: **Abu Jamal**); HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003) (hereinafter: **Sharbati**). The above definition applies to all cases being the subject matter of the orders at hand, which concern cruel attacks in which Israeli citizens were killed in cold blood. All of the above, against the backdrop of the severe security situation in which, to our regret, attacks and attempted attacks against Israeli citizens and residents are carried out on a daily basis.

The authority of the military commander – compliance of the house demolition policy with international law

25. As aforesaid, the petitioners argued that respondents' policy violated international humanitarian law and human rights laws. These arguments – which pertain to the source of the authority vested in the military commander to issue orders for the seizure and demolition of houses of protected residents – have been recently raised before this court in **Hamoked** case. In that case the court did not find reason to deviate from prevailing case law on this issue (for further discussion see: *ibid*., paragraphs 21-24 of the judgment of Justice **E. Rubinstein**, and paragraph 3 of the judgment of Justice **E. Hayut**). As mentioned above, today my decision which denies a request for a further hearing in said case was given (the above **HCJFH HaMoked**). In said decision I noted that the procedure of further hearing was designated for the consideration of explicit and detailed decisions of the court rather than for the consideration of issues which were not thoroughly discussed by the court. Therefore, I denied applicants' main argument according to which a further hearing should be held in the judgment particularly due to the court's refusal to revisit issues which were determined by case law concerning the authority of the military commander to issue orders for the seizure and demolition of perpetrators' houses.
26. Considering the judgment of this court in **HaMoked** case, I did not find reason to revisit these issues, based, *inter alia*, on the fact that the Regulation was used both within the territory of Israel as well as in the Judea and Samaria Area. On this issue it seems appropriate to reiterate the words of Justice **E. Rubinstein** in HaMoked case according to which: "it seems – with all due respect – that the authority exists, and the main question concerns reasonableness and discretion." (*Ibid*., paragraph 20). Legal scrutiny over the

exercise of the authority under Regulation 119 of the Defence Regulations should therefore focus on the level of discretion, which will be now discussed below.

The effectiveness of the house demolition policy

27. Over the years petitioners have often raised the argument according to which there was no evidence that house demolition can deter others from carrying out acts of terror. As aforesaid, a similar argument was also raised in the petitions at hand. This court has held more than once that the degree of the effectiveness of the house demolition policy should be evaluated by the security agencies and that anyway the conduct of a scientific study which would prove how many attacks were prevented as a result of house demolition activity was problematic (see, inter alia: HCJ 7473/02 **Bahar v. Military Commander of IDF Forces in the West Bank**, IsrSC 56(6) 488, 490 (2002); HCJ 3363/03 **Beker v. Military Commander of IDF Forces in the West Bank** (November 3, 2003); HCJ 8262/03 **Abu Salim v. Military Commander of IDF Forces in the West Bank**, IsrSC 57(6) 569' 574-575 (2003) (hereinafter: **Abu Salim**); HCJ 2/97 **Abu Hillawa v. GOC Home Front Command** (August 11, 1997 (hereinafter: **Abu Hillawa**)

Nevertheless, in view of the fact that as aforesaid, house demolition is an extreme act – which often violates fundamental right of individuals who were not involved in terror – the court emphasized in the past that the security agencies should examine from time to time the correctness and efficiency of their above evaluation (see: HCJ 8575/03 **Azadin v. Military Commander of IDF Forces in the West Bank**, IsrSC 58(1) 210, 213 (2003)). Recently, in the context of the judgment in **HaMoked** case, which is relied on by the respondents, it was held that although at that time there was no reason to intervene in the policy of the military commander on the issue of seizure and demolition orders against homes of perpetrators who committed severe attacks, he should know that a duty was imposed on him to re-examine the effectiveness of said policy. And it was so held in that case by Justice **E. Rubinstein**:

> I am of the opinion that the principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined. We accept the fact that it is hard to be measured, and the court mentioned it more than once (HCJ 2006/97 Janimat v. GOC Central Command, IsrSC 51(2) 651, 655 (1997); 'Awawdeh, paragraph 24; Qawasmeh, paragraph 25). However, as aforesaid, in my opinion, the use of a tool the ramifications of which on a person's property are so grave, justifies a constant examination of the question whether it bears the expected fruit; This is so especially in view of the fact that even IDF agencies raised arguments in that regard, and see for instance the presentation of Maj.Gen. Shani, which, on the one hand, stated that there was a consensus among the intelligence agencies of its effectiveness, while on the other, proclaimed, under the caption "Main Conclusions" that "the demolition tool within the context of the deterring element is 'worn out'" (slide No. 20). Therefore, I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor

> accused [...] In my opinion, the requested effort adequately fulfills the fundamental provisions of the Basic Law: Human Dignity and Liberty, the importance of which in the Israeli democratic regime may not be overstated. We do not establish hard and fast rules concerning the nature of the research and the required data; This issue will be clarified, to the extent necessary, in due course. For the time being, naturally, in each and every demolition or specific sealing the engineering issue should be thoroughly examined to ensure that the objective is properly achieved within its limits with no deviation. (*Ibid*., paragraph 27).

Justice **E. Hayut** joined his above comment in said case:

> And finally, I wish to note that I attach great importance to the comment of my colleague, Justice Rubinstein concerning the need to conduct in the future from time to time and to the extent possible follow-up and research concerning the house demolition measure and the effectiveness thereof […] The last wave of terror which commenced with the abduction and murder of the three youths God bless their souls and continued in frequent killings and massacres of innocent civilians, passers-by and worshipers in a synagogue, also marked an extreme change of circumstances, characterized by terrorists from East Jerusalem, which required a renewed used of this means. However, these extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests. The poet Yehuda Amichai in his poem "The place in which we are Right" praised doubts, which also those who are right should always have [quote] (*Ibid.*, paragraph 6)(and see also, recently, the minority opinion of Justice U. Vogelman in HCJ 5839/15 **Sidr v. Military Commander of IDF Forces in the West Bank** (October 15, 2015)(hereinafter: **Sidr**)).

28. Against the above backdrop and given the fact that since judgment was given in HaMoked case several months passed. We asked the respondents in the hearing whether any examination was conducted with respect to this issue. In response to our question, the respondents emphasized that they had in their possession privileged material which supported their allegations concerning the effectiveness deriving from the demolition of perpetrators' homes (for a similar argument which was raised by the state in the past see, for instance: **Abu Salim**, page 574). With the consent of petitioners' legal counsels we have reviewed the above mentioned privileged material, *ex parte*. It should be emphasized that the material which was presented to us was not a "study", but rather accumulated data. Said data indicate that in more than a few cases potential perpetrators refrained from carrying out attacks as a result of their concern of the ramifications on the houses in which they and their families lived.

29. After I have reviewed the privileged material I am of the opinion that considering the fact that until recently the quantity of house demolitions was relatively limited, one may sufficiently conclude from the material which was presented to us that at this time there is no reason to intervene in the decision of the military commander and the political level (which was presented with said material), according to which house demolition indeed constitutes a factor which deters potential perpetrators who are concerned of any impingement which may be inflicted on their families. As noted by Justice U. Vogelman in **Sidr** "[…] in fact, if the demolition of some assailant's house deters some other

assailant from harming human life, then we may say that the chosen means has achieved perhaps the greatest conceivable benefit (*Ibid*., paragraph 3). Accordingly, the material presented to us satisfied me that the concern that the houses of perpetrators would be demolished deters potential perpetrators. Therefore, despite the doubts which have been recently expressed in judgments and writings as to the deterring force of house demolition, I did not find reason to veer from case law which held that as a general rule there was no justification to intervene in the decision of the competent authorities to use this measure. However, I shall already say now that after I have reviewed the material on which the respondents based their decisions, I cannot say that the demolition of a house owned by an "**unrelated**" third party, who is neither a family member of the perpetrator nor has any knowledge of his intentions, creates deterrence. The privileged material does not lay foundation for the determination that impingement of this kind also creates deterrence. I shall return to this issue and will discuss it more broadly below.

30. The petitioners also argued that the policy of the military commander discriminates between Jews and Arabs. This argument should be denied. As is known, the burden to prove a discrimination argument lies on the shoulders of the party who raises it. As held, it is not easy to satisfy this burden (see: **HaMoked** case, paragraph 25 of the judgment of Justice **E. Rubinstein**; see also: HCJ 9396/96 **Zakin v. Mayor of Beer Sheva**, IsrSC 53(3) 289 (1999)). In the petitions at hand the discrimination argument was raised only generally, without any serious infrastructure to support it. Hence, the petitioners failed to present an adequate factual infrastructure to support their argument and therefore it does not justify an intervention on our part (see and compare also: HCJ 124/09 **Dwayat v. Minister of Defense**, paragraph 6 of Justice **E.E. Levy** (March 18, 2009); **Sharbati**, page 815; **Qawasmeh**, paragraph 30 of the judgment of Justice **Y. Danziger**).

The hearings

31. The petitioners argued further as specified above that the schedule which was allocated for the hearings in their matter was unreasonable. Some of the petitioners also complained that they were not provided with all the materials underlying respondents' decision, for their review, such as the incriminating evidentiary material against the suspects and the engineering plans for the demolition of the houses.

32. A fundamental rule is that an administrative authority shall not exercise its power in a manner which may harm a person, before he was given proper opportunity to present his arguments and be heard by it. Said requirement derives from the concept that an administrative authority must act fairly (see: Yitzhak Zamir **The Administrative Authority** Volume B 1148 (second edition, 2011) (hereinafter: **Zamir**)). The hearing rule and its underlying reasons are also relevant for the exercise of the authority according to Regulation 119 of the Defence Regulations. Accordingly, it was held by this court in the past, by the President **M. Shamgar** that as a general rule the exercise of said authority should be delayed so as to enable those who may be injured by it to present their arguments:

> It would be appropriate that an order issued under Regulation 119 should include a notice to the effect that the person to whom the order is directed may select a lawyer and address the Military Commander before the order is realized, within a fixed time period set forth therein, and that, if he so desires, he will be given additional time after that, also fixed, to apply to this Court before the order is realized. (HCJ 358/88 **Association for Civil Rights in Israel v. GOC Central Command**, IsrSC 43(2) 529, 541 (1989) (hereinafter: the **ACRI** case)).

Only in extraordinary circumstances, in which as a result of military and operational reasons demolition must be carried out forthwith, there is no room to delay it until after the right to be heard was exercised:

> The Respondents do not dispute that there are circumstances - and until now these were apparently the majority of instances - in which, even in their opinion, there is no reason not to permit the making of objections (within a fixed time) before the person who issues the order, and also to allow the possibility of postponing its implementation for an additional fixed time (48 hours were mentioned), during which it will be possible to present a petition to this Court requesting the exercise of judicial review over the administrative decision. It is unnecessary to add that it is possible that an interlocutory order will be given, as a result of the application to the Court, and additional time will pass until the actual decision will be given.
>
> However, it is argued that there are situations the circumstances of which require an immediate action, and in which it is not possible to delay the implementation of the action until the said periods have passed […].
>
> According to our legal conceptions, **it is, therefore, important that the interested party be able to present his objections before the Commander prior to the demolition, to apprise him of facts and considerations of which perhaps he was unaware** [**...**].
>
> Indeed, there are military-operational circumstances, in which the conditions of time and place or the nature of the circumstances are inconsistent with judicial review; […].
>
> In my opinion, ways should be found to uphold the right to be heard before the execution of a decision which is not among the types of situations [in which demolition must be carried out forthwith – M.N.] (*Ibid.*, pages 540-541)(Emphasis added – M.N.).

In the case at hand, as part of the hearing, notices were sent as aforesaid to the family members who reside in the structures designated for demolition, which included the cause based on which it was contemplated to take the measure of seizure and demolition against their home. The notice also clarified that they were entitled to turn to the military commander and submit an objection. **All** notices of the contemplated demolitions were sent out on Thursday, October 15, 2015. In addition, the notices were drafted in a similar manner (*mutatis mutandis*), and the schedules which were provided for the submission of objections – were identical. For demonstration purposes I will bring as an example one of the notices which were sent, as drafted (the subject matter of HCJ 7079/15 and HCJ 7082/15):

> The commander of IDF Forces in the Judea and Samaria Area, by virtue of his authority as the military commander of the Judea and Samaria Area according to Regulation 119 of the Defence (Emergency) Regulations, 1945 and all other authorities vested in him pursuant to any law and security legislation, hereby gives notice of his intention to seize and demolish the apartment on the middle floor in a three story building in Nablus […] in which lives the perpetrator Karim Lutafi Fatchi Razeq […].

> This measure is taken due to the fact that the above referenced , acted for the execution of a terror attack on October 1, 2015, during which he shot to death the late Henkin spouses […].
>
> If you wish to present your arguments or objections against this intention, you should specify them in writing […] **until October 17, 2015, at 12:00** […].
>
> Any factual or legal argument raised by you must be substantiated by documents or other evidence which should be attached to your letter to the military commander (emphasis added – M.N.).

In my opinion, in the case at hand, the time schedule which was established is problematic. In **all** cases before us the time which was given to the petitioners to submit an objection was very short: from Thursday, October 15, 2015 until Saturday, October 17, 2015, and included rest days. Was it coincidental? It is acceptable to me that in most cases demolition orders which were issued against the homes of perpetrators must be executed expeditiously to achieve deterrence. Therefore, the establishment of short time tables is justified. However, despite the urgency, it is important to ensure that the time tables are reasonable and fair considering the entire circumstances of the matter (see and compare: the **ACRI case**, pages 540-541; see also: **Zamir,** page 1177). This conclusion derives from the basic principle according to which the competent authority cannot satisfy itself by summoning the relevant party and hearing his argument, but it is rather obligated to conduct a **fair** hearing which will be conducted in a manner that will provide the person who may be injured from the decision a proper opportunity to present his arguments.

33. I am of the opinion that considering the nature of the exercised authority and it occasional infringement of fundamental rights of innocent people, a period of one work day and sometimes even less than that for the purpose of filing an objection is insufficient. Moreover. The haste in which the proceedings were conducted caused additional problems such as an error in the Arabic version of the order which was issued against the house in which Hamed lived. Although the error in the order was technical in nature and was even revised later on in the decision which was given in the objections, the haste in the conduct of proceedings of this kind could have entailed severe errors which are sometimes irreversible (for an error which occurred recently in the identification of the house which was designated for demolition, see: HCJ 7219/15 Abu Jamal v. GOC Home Front Comand (November 3, 2015)). Nevertheless, since the petitioners were given an opportunity to present their arguments before us and an opportunity to complement their arguments after the hearing, I do not think that miscarriage of justice was caused in the case at hand as a result of the tight schedule (see and compare: **Abu Salim**, page 573). Therefore, the schedules do not justify, in my opinion, the extreme relief of revocation of the orders. With respect to the future, the respondents should establish for themselves reasonable procedures regarding the relevant dates, including the period for the submission of an objection.

34. Some of the petitioners argued further, as aforesaid, that the respondents should have transferred for petitioners' review the incriminating evidentiary material pertaining to the suspects and the engineering opinion. As noted above, the right to be heard given to the individual must be fair and proper. Therefore, as a general rule, the authorities should transfer to the interested parties the content of the documents underlying their decision (on the issue of the general obligations of the authority in connection with the duty to conduct a hearing before making a decision, see: **Zamir**, page 1173, Daphna Barak-Erez

Administrative Law, Volume A 499 (2010)). However, circumstance may arise in which it will not be possible due to reasons associated with state security or other reasons (see: *ibid.*, pages 506-507). Against the above backdrop, the respondents did the right thing when they have eventually provided to the petitioners and to the court the open parts of the admissions of the three suspects in the killing of the lae Henkin spouses and the admissions of additional involved parties in the killing of the late Malachi Rosenfeld. In view of the fact that the petitioners were given the opportunity to respond to the content of said evidence, there is no room for our intervention in that respect. Nevertheless it should be noted that as a general rule, it would be appropriate to include in the notice of the intention to seize and demolish a specification, be it even a minimal one, of the evidentiary material against the suspect who lives in the house designated for demolition (see and compare: **ACRI** case, page 541).

35. In my opinion there is also no reason to intervene in respondents' refusal to provide the engineering opinions for petitioners' review. In the cases at hand in which it was argued that damage may be caused to buildings adjacent to the building designated for demolition, the respondents described in the framework of their decisions in the objections and in their responses to the petitions the manner by which each demolition would be carried out and clarified that the execution of the demolitions themselves would be monitored by an engineer. The above indicates that the petitioners were presented with a comprehensive picture of the contemplated demolitions, and their arguments that the demolition plans remained vague and unclear should not be accepted. In addition, the petitioners who wanted to do so submitted engineering opinions on their behalf. The respondents should examine said opinions to the extent they have not yet done so, with an open mind and heart. Perhaps in the future, in cases in which, *prima facie*, an engineering problem ostensibly arises (such as a case in which the apartment designated for demolition is located on the middle floor of the building or a case in which the apartment designated for demolition is located in a dilapidated multi-story building) it would be appropriate to describe the intended demolition method already in the framework of the notice of the intention to seize and demolish. However, under the entire circumstances of the cases at hand, the fact that the respondents did not transfer the engineering opinions to the petitioners, does not constitute cause for the court's intervention in respondents' decision.

And from the general issues – to the specific questions which arose in the petitions.

Discussion and Decision – Specific Arguments

Decision in the petition concerning the demolition order issued against Ma'ed's home (HCJ 7084/15)

36. This petition concerns a seizure and demolition order which was issued against the home of Ma'ed, who is suspected, together with Abdallah, in the killing of the late Malachi Rosenfeld. The family members of the suspect, who live in the single-story house which is designated for demolition petitioned against the order, as aforesaid. The petition specifically argued that the respondents had no basis for the exercise of their authority according to Regulation 119 of the Defence Regulations. The petitioners argue that Ma'ed was not arrested by the Israeli authorities and was not interrogated by them, but was rather held by the Palestinian Authority. Naturally, no indictment was filed against him in Israel. Under these circumstances, the petitioners argued that Ma'ed's involvement in the act

attributed to him was not proved. Alternatively, it was argued that Ma'ed did not reside in the house designated for demolition. As described in the petition, between 2006-2010, Ma'ed lived in the United States and after his return he married and moved to live with his wife elsewhere. In the last year and-a-half, after his divorce and until his arrest, Ma'ed used to come to the house being the subject matter of the order between two to three times per week, but most nights he slept in his work place. Therefore, the petitioners requested that we directed the respondents to refrain from the execution of the seizure and demolition of the building being the subject matter of the order.

37. The respondents, in their response, argued that Ma'ed's involvement in the incident was well established based on administrative evidence, including Abdallah's admission and the indictment which was filed against him. The respondents also noted that they had in their possession privileged material which also established Ma'ed's guilt. According to the respondents, the above material provides sufficient evidentiary infrastructure for the exercise of the authority according to Regulation 119 of the Defence Regulations. As recalled, at a later stage the respondents attached to the complementary notice admissions of additional persons who were involved in the shooting implicating him in the execution thereof. The respondents argued further that the facts pointed at by the petitioners, according to which the suspect slept in the apartment designated for demolition about half of the week and did not own another apartment, established the required residence connection for the demolition of the apartment.

38. The specific questions in which a decision should be made in this petition are factual questions. I will discuss them in an orderly manner. According to the provisions of Regulation 119 of the Defence Regulations, the authority there-under may be exercised against a certain building if the competent authority was satisfied that an inhabitant thereof committed an offense of the type specified in the Regulation. In this context it was held that administrative evidence attesting to the fact that a perpetrator lived in the apartment designated for demolition was sufficient for this purpose (see: **'Awawdeh**, paragraph 25 of my judgment; **Sharbati,** page 815). Indeed, "The military commander does not need a convicting judgment of a judicial instance and he himself is not a court of law. As far as he is concerned the question is whether a reasonable person would have regarded the material in his possession as having sufficient evidentiary value" (HCJ 361/82 **Hamari v. Military Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 442 (1982); see also: HCJ 802/89 **Nasman v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 43(4) 461, 464 (1989); HCJ 897/86 **Jaber v. GOC Central Command**, IsrSC 41(2) 522, 524-525 (1987) (hereinafter: **Jaber**); **Mughrabi**, paragraph 14 of the judgment of my colleague Justice H. Melcer; HCJ 7823/14 **Ghabis v. GOC Home Front Command**, paragraphs 10-12 of the judgment of Justice E. Rubinstein (December 31, 2014)).

39. In the case at hand the respondents had in their possession detailed admissions of Ma'ed's accomplice, Abdallah, which described Ma'ed's central role in the execution of the attack. In addition, they had in their possession admissions of additional persons who wereinvolved in the planning and execution of the shooting attack; the admission of Amjad Hamed who admitted to have purchased for Ma'ed the weapon with which the attack was carried out and added that Ma'ed told him about his involvement in the incident and the admission of Faid Hamed who took part in the preparations of the perpetrators cell for the attack and also gave details about Ma'ed's involvement in the attack. The petitioners, on the other hand, did not present to us **any argument** which referred to the allegations of Ma'ed's accomplice, Abdallah, or to the allegations of the additional collaborators. Under these circumstances, the material presented to us is sufficient to establish administrative evidentiary infrastructure for the exercise of the authority (see and compare: **Jaber**, pages 524-525 and the references there). In view of the above said, I am of the opinion that no weight should be given to the fact that Ma'ed is held by the Palestinian Authority and has not yet been interrogated in Israel (see and compare: HCJ

2418/97 **Abu Phara v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 51(1) 226 (1997)).

40. In addition, I did not find any merit in the argument that Ma'ed did not reside in the apartment designated for demolition. For the purpose of exercising the authority by virtue of Regulation 119 of the Defence Regulations, it is necessary to show that the perpetrator was a "resident" or "inhabitant" in the house designated for demolition (see: HCJ 6026/94 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338, 343-344 (1994) (hereinafter: **Nazal**); HCJ 893/04 **Faraj v. Commander of IDF Forces in the West Bank**, IsrSC 58(4) 1, 6-7 (2004)(hereinafter: **Faraj**)). According to case law, a person's absence from his housing unit does not necessarily sever the required residence connection. It depends on the nature of the absence and the specific circumstances of the case (see: **Nazal**, pages 343-344). It was so held, for instance, that a perpetrator's residence in a boarding school as a student did not sever his connection to his parents' home (HCJ454/86 **Tamimi v. Military Commander of the West Bank Area** (October 6, 1986)). This was also the case in another matter in which the perpetrator used to frequently come to his home to change clothes and take food (HCJ 1245/91 **Fukha v. Military Commander of the West Bank** (December 31, 1991); and see also cases in which it was held that a perpetrator's absence from his home due to the fact that he was fleeing from the security forces did not sever the residence connection; **Nazal**; **Faraj**). On the other hand, in a certain case this court intervened in the decision of the military commander to demolish the home of the perpetrator's uncle, as it was found that said perpetrator resided on a permanent basis in his father's house (HCJ 299/90 **Nimer v. Military Commander of the West Bank Area,** IsrSC 45(3) 625, 628 (1991)). In our case there is no dispute that the suspect used to stay in his family home which is designated for demolition on a partial basis during the week, and in any event we were not presented with convincing evidence attesting to the fact that he had another permanent place of residence (see and compare: HCJ 350/86 **Alzek v. Military Commander of the West Bank** (December 31, 1986); **Jaber**, page 525). Hence, there is no room for our intervention in this issue either.

Decision in the petitions concerning the demolition order issued against Abdallah's home (HCJ 7040/15, HCJ 7077/15, HCJ 7180/15)

41. The order issued against the home of Abdallah, Ma'ed's accomplice, pertains as aforesaid to an apartment located on the top floor of an eight story building in Silwad. As recalled, three separate petitions were filed against this order. The **first** petition (HCJ 7077/15) was filed by the brother and sister of the accused who live in the apartment which is designated for demolition. In this petition it was specifically argued that the apartment designated for demolition was rented from a **third party**, who **was not** related to the family and was not aware of the intentions of the accused. In the hearing before us petitioners' counsel added that according to the lease agreement, it was a short term lease which could be renewed (or terminated) on an annual basis. In view of the above, the petitioners argued that the demolition of the apartment could not deter perpetrators from carrying out acts of terror and it should therefore be revoked. In addition, it was argued that the exercise of the authority about four months after the execution of the attack being the subject matter of the order was inappropriate and that the respondents should take into consideration the damage which may be caused to adjacent buildings.

42. The **second** petition (HCJ 7040/15) was filed as aforesaid by the owners of the building who rented out to Abdallah's mother the apartment designated for demolition. As alleged in said petition, the demolition of the apartment in the building owned by the petitioner, a third party who had no family or other relation with the perpetrator or his family, severely injured his property, amounted to collective punishment and would cause damage to other innocent inhabitants.

43. The **third** petition (HCJ 7180/15) was filed as aforesaid by inhabitants and lessees in the building in which the apartment designated for demolition is located. In the petition, the petitioners complained that they were not given the opportunity to review the engineering opinion based on which the demolition would be carried out or in the evidentiary material against the accused, and argued that the respondents should at least undertake to compensate them should their apartments be damaged as a result of the demolition.

44. In their responses to these three petitions the respondents have initially argued that the demolition order could be realized despite the fact the Abdallah's apartment was a rented apartment. The respondents argued that according to case law the proprietary status of the perpetrator as either an owner or lessee did not prevent the exercise of the authority. The respondents argued further, from the proportionality aspect, that they considered the fact that the apartment was not owned by the accused or his family but were of the opinion that nevertheless it was necessary to deter potential perpetrators from carrying out additional attacks. With respect to the demolition method it was explained that it would be carried out from within the apartment by drilling in some of the apartment's pillars and the exterior walls and by drill explosive charges. According to the respondents the anticipated result was that some of the interior partitions in the apartment would be destroyed and that the south-eastern part of the apartment would collapse. The respondents emphasized that throughout the demolition an engineer would be present on the scene and would supervise the manner of its execution, and that no damage is expected to be inflicted on adjacent apartments or buildings as a result thereof. With respect to the undertaking to compensate in advance the neighbors for incidental damage, the respondents referred to **Sidr**, where it was held that the neighbors may possibly demand compensation, depending on the relevant circumstances. In the complementary notice the respondents clarified that subject to certain conditions which were specified above, they agreed, *ex gratia*, to repair damages which would be caused to adjacent buildings or compensate therefore. As to the passage of time from the execution of the attack until the order issue date, the respondents argued that the exercise of the authority under Regulation 119 of the Defence Regulations was determined based on data of time and place and that discretion in that regard vested in the competent authorities.

45. After I reviewed the arguments of the parties, I came to the conclusion that in the matter of the order which was issued against the apartment in which Abdallah lived, the order should be made ***absolute*** in the petition of the owner of the building (HCJ 7040/15), in view of the weak connection in this case between the perpetrator and his family members and the apartment designated for demolition and due to the lack of foundation for the conclusion that under such circumstances the demolition of the apartment can deter potential perpetrators. As specified above, according to Regulation 119 of the defence Regulations as drafted, it is sufficient that the perpetrator is a "resident" or "inhabitant" of the apartment designated for demolition. Consequently, it was held by case law that the authority established by Regulation 119 of the Defence Regulations may be exercised whenever a "residence connection" exists between the perpetrator and the house. It was therefore held, *inter alia*, that the Regulation, as drafted, enabled to issue an order for the demolition of a house in which the perpetrator lived as a lessee (see: HCJ 542/89 **Aljamal v. Commander of IDF Forces in Judea and Samaria** (July 31, 1989)(hereinafter: **Aljamal**); see also: HCJ 1056/89 **Alshiekh v. Minister of Defense** (hereinafter: **Alsheikh**); HCJ 869/90 **Lafruch v. Commander of Judea and Samaria Area-Beit El** (May 3, 1990)(hereinafter: **Lafruch**); HCJ 3567/90 **Sbar v. Minister of Defense** (December 31, 1990)(hereinafter: **Sbar**); HCJ 3740/90 **Mansur v. Commander of IDF Forces in Judea and Samaria** (January 8, 1991)(**Abu Hillawa**).

46. Therefore, the authority exists in this case as well. However, as is known, judicial scrutiny over respondents' decision is not limited to the authority level. The discretion in the

exercise of the authority should also be examined in view of the circumstances of the case and considering the proportionality tests. According to these tests, a rational connection should exist, *inter alia*, between the objective and the measure taken. As specified above, this court held in a host of judgments that the purpose of the demolition of perpetrators' houses was not to punish their families, but rather to deter potential perpetrators who may refrain from carrying out terror attacks should they know that in so doing they put at risk their place of residence as well as that of their family members. However, I have serious doubts as to whether under the circumstances of the case at hand, the demolition of Abdallah's apartment may deter terror attacks. I shall specify. As is recalled, the respondents presented to us privileged material which generally supports the deterrence argument. However, there is no indication in the privileged material that the demolition of a house owned by an unrelated third party – **who has no family or another relation with the perpetrator and his family** and when the economic loss to the perpetrator and his family is almost non-existent – assists to deter potential perpetrators (and compare to the circumstances of **'Awawdeh**, which are different from the case at hand, as that case concerned a perpetrator who rented an apartment from **his brother**), as opposed to the eviction of the family members of the perpetrator from the apartment. The judge has nothing other than what his eyes can see. The recent judgment of this court in **HaMoked** case required, as noted, that the effectiveness of the deterrence be examined. The material presented to us does not point at effectiveness in a case such as the case at hand. Therefore, the case at hand is **different** from other cases which were discussed by this court in its judgments.

47. This issue is interconnected with and forms part of the specific circumstances of the case: the mother of the accused, Abdallah, rented the apartment according to an agreement which is renewed on an annual basis and which should be terminated, according to its provisions, by next September, The agreement was submitted in the Arabic language and we had it translated. According to the agreement the family members made a one year advance payment for the apartment, and nothing more than that. Under these circumstances, most of the damage caused as a result of the demolition would be suffered by the lessor rather than by the accused and his family members. Therefore, ostensibly, the assumption that the demolition in this case would deter potential perpetrators is problematic. In addition, I have serious doubts as to whether one can assume – without substantiating it on this material or another – that an unrelated lessor can affect the decisions of a perpetrator. Either way, the respondents did not argue that the demolition of the home of a third party may motivate lessors to take measures which would dissuade their inhabitants from carrying out terror attacks.

48. Therefore, in the case at hand the respondents did not show that a rational connection existed between the deterring purpose and the demolition of the apartment being the subject matter of the petition. In addition, according to the proportionality tests one must ascertain that a proper relation exists between the benefit arising from the measure taken and the injury (the proportionality test in its "narrow sense"). In this context, one should balance between "[…] the severity of the act of terror and the scope of the sanction, between the anticipated injury to the perpetrator's family and the need to deter future potential perpetrators; between the fundamental right of every person to his property and the right and duty of the authority to safeguard and maintain security and public order" (HCJ 6299/97 **Yasin v. Military Commander in the Judea and Samaria Area**, paragraph 13 of the judgment of President A. Barak (December 4, 1997); see also: Yoram Dinstein **The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses** 29 Isr. Y.B. Hum Rts. 285, 297 (1999), all of the above while weighing the residence connection of the perpetrator to the house and the effect that the exercise of the authority has on other people. In view of these parameters, in all past cases which concerned the demolition of an apartment which was rented out by a third party, the competent authorities took the sanction of sealing off rather than demolition. And it should be emphasized that said sealing off was **reversible**, which over

time could be revoked according to the last part of Regulation 119(1), which enables remission (see particularly in **Aljamal**; **Alshiekh**; **Lafruch**; **Sbar**; **Mansur**; **Abu Hillawa**; compare to the measure of sealing off with concrete which was used in other cases (which did not concern rentals): HCJFH 11043/03 **Sharbati v. GOC Home Front Command** (January 18, 2004)). In the case at hand, beyond the fact that there is no rational connection between the demolition of the apartment and the deterring purpose, the required deterrence may be achieved by removing the family members from the apartment and having it sealed off for a limited period of time. And indeed, in the case at hand, the owner of the building proposed, at his own initiative, to evict the family of the accused from the apartment and even agreed to have it sealed off for a certain period of time (see: petitioner's reply in HCJ 7040/15 dated November 5, 2015). The respondents, on their part, objected to petitioner's proposal. According to them, alternatives for the demolition were examined, but they were found to be impracticable. The respondents refer to this issue in a general manner without providing an explanation as to why in a case in which the main damage would be suffered by a third party who is not related in any manner to the perpetrator, whose connection to the apartment is weak, it is justified to take the extreme measure of demolition.

49. Therefore, if my opinion is heard, we shall direct of the revocation of the demolition order which was issued against the home of Abdallah, while obligating the petitioner in HCJ 7040/15 to uphold his proposal to evict the family of the accused from the apartment until November 17, 2015 at 12:00. The respondents argued, as aforesaid, that sealing was not possible and therefore the eviction of the family from the apartment would suffice. It should be emphasized that I do not intend to hold that in each case in which the perpetrator lived in a rented apartment it would not be possible to take against him the measure of demolition. My conclusion is limited to the specific circumstances of the case at hand in which such measure, in view of the entire circumstances described above, cannot be regarded as a proportionate measure.

50. As to the argument of delay which was raised by the family members of the accused in their petition (HCJ 7077/15). Recently, this court held in **Sidr** that as a general rule, the determination of the dates on which the perpetrators' houses would be demolished, should be made by the competent authorities at their discretion (see and compare also: HCJ 4747/15 **Abu Jamal v. GOC Home Front Command** (July 7, 205)). However, the decision on this issue is also subjected to the recognized standards of reasonableness and proportionality (**Sidr**, paragraph 7 of the judgment of the Deputy President **E. Rubinstein**). Implemented to the case at hand, the seizure and demolition order being the subject matter of the petition was issued – as drafted – "since the inhabitant of the apartment, Abdallah Munir Salah Askhaq […] killed the late Malachi Rosenfeld and wounded three others on June 29, 2015." However, the precise date for the execution of the order is derived from the circumstances of tme and place, namely, the escalation in the number of attacks lately (see: respondents' decision in petitioners' objection dated October 19, 2015 (P/F)). Based on the above it may be determined that the decision to demolish was made as a direct response to the execution of the attack by Abdallah, considering the severe security situation and the need to deter. In my opinion there is nothing wrong in that (but compare: minority opinion of Justice **U. Vogelman** in **Sidr**; minority opinion of Justice **D. Dorner** in HCJ 1730/96 **Salem v. Commander of IDF** Forces, IsrSC 50(1) 353, 364 (1996) (hereinafter: **Salem**)). Indeed, as a general rule, it would be appropriate to issue the notice of the intention seize and demolish a structure shortly after the attack (see: **Sidr**, paragraph 7 of the judgment of the Deputy President **E. Rubinstein**). However, given the entire circumstances of the matter, including the fact that the indictment against Abdallah was filed on August 17, 2015 (R/1), there is no room to accept the delay argument in this case (and see also: **Sidr** (in which the notice of the intention seize and demolish was delivered about seven months after the occurrence of the attack); **Salem** (in which about four months passed); **Alsheikh** (in which about five

months passed); HCJ 228/89 **Aljamal v. Minister of Defense**, IsrSC 43(2) 66 (1989)(in which more than a year passed between the date of the attack and the date on which the order was issued). It should be noted that in HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area**, an order nisi was recently issued in a petition which concerned a demolition order which was issued about eleven months after the date of the attack (Deputy President **E. Rubinstein** and Justices **Z. Silbertal** and **M. mazuz,** decision dated October 29, 2015)).

The family members of the accused also raised in their petition an argument concerning the damage which may be caused to adjacent apartments. As I found that intervention in respondents' decision in this case in the above described manner was justified there is no longer any significance to this argument. The same applies to the petition of the neighbors (HCJ 7180/15) which also focused on the damage which may be caused to buildings adjacent to the apartment designated for demolition. It should be emphasized that these petitions, in and of themselves – should be denied. However, the acceptance of the petition of the owner of the building (HCJ 7040/15) has practical ramifications on these petitions as well.

Decision in the petitions concerning the demolition order issued against Hamed's home (HCJ 7076/15, HCJ 7085/15)

51. In the matter of Hamed who, as recalled, is a suspect in the killing of the late Henkin spouses, a seizure and demolition order was issued for the two middle floors in a four story building in the Askan Rujib area in the city of Nablus. As recalled, two petitions were filed against the order. The **first** petition (HCJ 7085/15) was filed by the family members of the suspect who live on one of the floors designated for demolition. In the framework of said petition, the petitioners argued that the suspicions against the three – Kusa, Razeq and Hamed – have not yet been proven. According to them, for as long as their interrogation has not ended and an indictment was not filed or judgment given against either one of the three by a court of law, an order for the demolition of their homes is not justified. The petitioners also argued that Hamed was renting the second floor from his mother, petitioner 2, and the demolition should be avoided for this reason as well. Alternatively, the petitioners argued that respondents' intention to demolish two apartments located on two separate floors, while the suspect did not live on the floor on which the petitioners live, renders the decision disproportionate. Alternatively to the alternative the petitioners requested that we direct the respondents to refrain from demolition by way of detonation of the house.

52. The **second** petition (HCJ 7076/15) was filed by the suspect's brother who lives with his family on the ground floor of the building being the subject matter of the order and by owners of properties adjacent to the building. The petition argued, based on an engineering opinion which was attached thereto that the contemplated demolition would cause structural damages to adjacent buildings. Finally, the petitioners complained of the flaw in the Arabic version of the order which stated that the respondents intended to demolish the ground floor, while the Hebrew version of the order referred to the first and second floors of the building.

53. The respondents argued in their response that they had information which indicated of Hamed's involvement in the execution of the attack being the subject matter of the order. Thereafter, having been requested to do so, the respondents attached to the complementary notice the admissions of the suspects in the killing of the late Henkin spouses, including the admission of the suspect Hamed. To substantiate the residence connection of the suspect to the two floors in the building, the respondents attached to the complementary notice a document entitled "summary of mapping of the house of the perpetrator Yihya Haj Hamed in Askan Rujib, Nablus, October 6, 2015" (RS/6,

hereinafter: the **mapping summary**). According to this document, the suspect's family lives on the first floor whereas the second floor belongs to the suspect himself and is in its final construction stages. The respondents argue that under these circumstances the demolition of the two floors of the building is justified. As to the safety issue and the method by which the building would be demolished, the respondents noted that the demolition plan was prepared by professionals who were certified engineers, in an attempt to avoid, as much as possible, damage to adjacent buildings or parts of the building which were not designated for demolition. As to the demolition method, the respondents clarified that controlled hot destruction devices would be used, namely, small explosive devices, for the purpose of creating a shock which would render the floors unusable. The respondents added and emphasized that during the demolition an engineer who would be present would monitor all of its stages, and in any event it was not expected to cause structural damage. The respondents did not refer in their response to petitioners' argument in HCJ 7076/15 according to which the respondents should undertake to compensate the petitioners for incidental damages which would be inflicted on their apartments as a result of the demolition. However, in their complementary notice the respondents noted as aforesaid that if as a result of a negligent planning or execution of the demolition of the structure, buildings adjacent thereto were damaged, the state would agree, *ex gratia*, to repair the building or compensate its owner subject to conditions which were specified in the notice.

54. In their replies to the complementary notice the petitioners complained, *inter alia*, of the fact that the mapping summary was not made available to them for their review before the objection submission date. The petitioners also pointed at substantial differences between the description of the facts in respondents' response and the description of the facts in the mapping summary: thus, for instance, while in respondents' response it was noted that the suspect occasionally used to sleep in his new apartment (on the second floor), in the mapping summary this fact was not mentioned. In view of the above, the petitioners argued that no weight should be given to this document, and that in any event it could not be regarded as reliable and convincing evidence. It was also argued that "[…] the fact that the suspect used to occasionally stay in the apartment of his family and parents underneath him is only natural and understandable and does not negate the fact that he lived in his apartment located above […]". Therefore, the petitioners requested that we direct the respondents to at least avoid the demolition of the first floor, on which the family of the suspect lived.

55. Having considered petitioners' arguments of this part and respondents' arguments on the other, I am of the opinion that there is no room for our intervention in respondents' decision to seize and demolish the two floors on which Hamed lived. I shall firstly discuss the factual infrastructure. The respondents had in their possession detailed admissions of the three suspects in the killing of the late Henkin spouses, which complement each other. According to the standards established by case law which I have discussed earlier, these admissions constitute sufficient evidentiary infrastructure. The petitioners did not explicitly disputed that either, despite the fact that they were given an opportunity, as aforesaid, to raise arguments on this issue. Therefore, there is evidentiary basis for the exercise of respondents' authority in the case at hand. As to petitioners' argument that Hamed lived only on the second floor of the building, I am of the opinion that the mapping performed by the respondents, which is based on a close examination of the scene and interrogation of the family members by the Israel Security Agency (ISA) coordinator, is sufficient to establish Hamed's connection to the floors (see and compare: **Mughrabi**, paragraphs 17-19 of the judgment of my colleague Justice **H. Melcer**). Therefore, there is no room for our intervention in this issue either.

As aforesaid, the petitioners also complained of the manner by which the seizure and demolition order was issued and emphasized the error which occurred in Arabic version of the order. As previously noted, an error indeed occurred in the Arabic version of the

order. This flaw stems from the haste in which the orders were issued. It should be emphasized once again that the respondents must ascertain that a fair hearing is conducted and that all involved parties are granted appropriate opportunity to present their arguments. However, since said error was revised and the order was amended, it is not a flaw which justifies a revocation of the seizure and demolition order.

In the case at hand I am of the opinion that the lease argument should not be accepted either. **Contrary** to HCJ 7040/15 – in which, in my opinion, the demolition order should be revoked on the grounds that the lessor there was an "unrelated" third party – in the case at hand the apartment was rented from a family member, namely, the suspect's mother. Deterrence wise, there is no material difference between a case in which the perpetrator lives with his family members in a property owned by them and a case in which the perpetrator rents a property from a family member. In both cases the economic damage to the perpetrator's family is significant. Hence, a potential perpetrator who is aware of the possibility that his apartment or the apartment of **his family members** will be demolished, may be deterred from carrying out acts of terror.

56. And from here – to the **compensation argument**. As aforesaid, throughout the years this court limited the scope of Regulation 119 of the Defence Regulations and held that it was incumbent on the competent authorities to exercise reasonable discretion in the use thereof. As is recalled, we held that based on the material before us and to date house demolition can create deterrence. However, demolition must still be proportionate. In this context, there are different considerations which the competent authorities must take into account before they decide to exercise their authority. Among other things, one must examine whether it is possible to demolish the housing unit of the perpetrator without causing damage to the other parts of the building or to neighboring buildings, but "if it becomes evident that it is not possible, one should consider whether the sealing off of the relevant unit could suffice" (**Salem**, page 360). Hence, among the considerations which should be taken into account with respect to the demolition of a specific property, is the damage which may be caused to adjacent buildings, the reason being that an incidental harm caused to innocent people affects the proportionality of the demolition. As held in **Alamarin**:

> It is inconceivable that the military commander shall decide to destroy a complete multi-storey house, which contains many apartments belonging to different families, merely for the reason that a person suspected of a terrorist act lives in a room in one of the apartments, and if nonetheless he should want to do so, this court could have its say and intervene in the matter. (HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 699 (1992)).

Against these principles the respondents must uphold their undertakings to ensure that the demolition is professionally supervised and to examine the onion on behalf of the petitioners with an open mind and heart. In the case at hand it was also clarified by the respondents that an authorized engineer would monitor the demolition and that structural damage to adjacent buildings was not expected. Respondents' above undertakings are appropriate and they should be strictly upheld. However, respondents' obligation to act proportionately is not exhausted thereby. When the demolition may cause damage to innocent third parties who are not family members of the perpetrator and were not aware of his intentions, I will suggest to my colleagues to hold that it would be appropriate to condition the demolition on repairing incidental damages or compensating therefore, even if they were caused without negligence on respondents' part. I shall explain.

57. In the context of the proportionality tests we must be convinced that an appropriate relation exists between the proper objective of the measure taken and the violation of rights caused as a result of the use thereof (the proportionality test in its "narrow sense"). It is a moral test, which is based on balancing between conflicting interests and values. I have described above the severe injury sometimes caused by the house demolition measure to individuals who did nothing wrong. This injury is intensified when it is inflicted on innocent third parties, who are not related to the perpetrator and whose only sin is that they live near his place of residence. In my opinion, given the need to balance between the attained benefit and the damage arising there-from, it would appropriate to condition the demolition on repair or compensation for the damage caused as a result thereof to innocent third parties. In the absence of this condition, we cannot say that the demolition is proportionate. In the past the state did undertake to repair incidental damages or compensate therefore. Accordingly, for instance, the state undertook to repair damage caused to floors adjacent to the floor which was designated for demolition – if any (HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 653 (1997)). In other cases the state undertook that if despite efforts to prevent damage to adjacent buildings during demolition, damage is nevertheless caused – compensation would be paid to those who were injured there-from (see: **Salem**, page 363` HCJ 6932/94 **Abu Alrub v. Military Commander for the Judea and Samaria Area** (February 19, 1995); see also: HCJ 8124/04 **Al Ja'abari v. Military Commander of IDF Forces in the West Bank** (October 12, 2004) (undertaking of the state to avoid demolition if damage is caused to an adjacent floor); also see and compare: HCJ 4112/90 **Association for Civil Rights in Israel v. GOC Southern Command**, IsrSC 44(4) 626' 631 (1990) (undertaking of the state to compensate owners of properties which were destroyed as a result of military needs)). In fact, in the case at hand the respondents do not decisively object to repair or give compensation for incidental damages, but they make several conditions theretofore, which were objected to by the petitioners in their responses to the complementary notice. According to the respondents, they should repair or compensate for damages caused as a result of demolition only where the planning or execution were **negligent,** and subject to an assessment on their behalf and a host of additional conditions: the flaw in the demolition of the structure did not derive from disruptions; the owners of the structure did not receive compensation, indemnification or any other payment for the damage from the Palestinian Authority or any other body; the injured party is not a national of an enemy state or an activist or member of a terror organization, or anyone on their behalf (according to section 5B of the Civil Wrongs Law).

58. I am of the opinion that as a general rule there is no room to condition, in advance, respondents' obligation to compensate third parties who are not family members of the perpetrator, on negligent planning or execution or on other conditions. The default should be reversed – compensation shall be paid or damages shall be repaired (on the need to compensate innocent people even wan the act was lawful, see and compare: HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel**, IsrSC 57(6) 285, 573 (2003) (hereinafter: **Public Committee against Torture**); HCJ 2056/04 **Beit Sourik Village Council v. Government of Israel**, IsrSC 58(5) 807, 831 (2004) (hereinafter: **Beit Sourik**); on the obligation to compensate for violation of a constitutional right in general, see: CA 7703/10 **Yeshua v. State of Israel – Sela Administration,** paragraphs 20-34 of my judgment (June 18, 2014)). I do not exclude extraordinary circumstances in which the respondents will not be required to pay compensation. However, as aforesaid, I do not think that the extraordinary cases in which the respondents will not be obligated to do so should be determined in advance. I am not oblivious of the recent holding of this court in **Qawasmeh**, according to which the obligation to pay compensation is hypothetical for as long as no damage was in fact caused:

> I did not find that there was any room to discuss petitioners' request that the respondent would undertake to compensate the injured

> parties should the demolition cause damage to adjacent properties. This is a hypothetical argument which should be heard, if at all, only in the event such damages are caused as aforesaid, and by the competent instances. I am hopeful that this issue remains solely hypothetical (Ibid., paragraph 11 *[sic]* of the judgment of Justice **Y. Danziger**).

Indeed, it is only obvious that if no incidental damage is caused as a result of the demolition the obligation to compensate an innocent party does not arise. However, I am of the opinion that it is important to already make it clear at this point – and I do not think that it contradicts the Qawasmeh judgment - that the rule should be compensation or repair, when only in extraordinary cases deviation would be justified. Eventually, minimizing the damage caused to civilians who are not related to the perpetrator as a result of the demolition, either by way of compensation for the damage which was caused to their property or in any other manner such as repair of the damage which was caused, is crucial for the satisfaction of the proportionality requirement. As aforesaid, the above applies also to cases in which the respondents acted lawfully and within the scope of their authority (see and compare: **Public Committee against Torture**, page 573). Similarly, when the military commander confiscates land for military purposes he is also required to pay compensation (on this issue see, for instance: **Beit Sourik**, page 831; HCJ 24/91 **Timru v. Commander of IDF Forces in the Gaza Strip**, IsrSC 45(2) 325' 335 (1991); see also: Eyal Zamir "State lands in Judea and Samaria – Legal Review" **Studies of The Jerusalem Institute for Israel Studies** No. 12 12 (1985)). It is crucial seven times over if the respondents were negligent in the planning or execution of the demolition. In any event it is clear that when the owners of adjacent properties have a cause of action in torts against the state for negligence, the door to file a torts suit is open for them (see: **Sidr**, paragraph I of the judgment of the Deputy President **E. Rubinstein**; **Qawasmeh**, paragraph 11 of the judgment of Justice **Y. Danziger**; also see and compare, as to the damage caused to belongings in the property being the subject matter of the demolition: HCJ 5139/91 **Za'akik v. Commander of IDF Forces in the West Bank**, IsrSC 46(4) 260, 263-264 (1992); HCJ 3301/91 **Bardawiyeh v. Commander of IDF Forces in the West Bank Area** (December 31, 1991)).

59. Therefore, if my opinion is heard, we shall not intervene in the decision to demolish but we shall hold that if damage is caused the respondents will be obligated to either repair it or compensate the injured parties who are not family members of the perpetrator, subject to their right to turn to the competent court and apply for a declaratory judgment according to which said obligation does not apply due to the circumstances of the case.

Decision in the petitions concerning the demolition order issued against Razeq's home (HCJ 7079/15, HCJ 7182/15)

60. In the matter of Razeq, the accomplice of Hamed and Kusa, an order was issued against the apartment in which he lived with his family members. As recalled, the apartment is located on the second floor of a three story building. As aforesaid, two petitions were filed against this order. The **first** petition (HCJ 7079/15) was filed by Razeq's family members whereas the **second** petition (HCJ 7082/15) was filed by neighbors and inhabitants of buildings adjacent to the apartment designated for demolition. Similar to Hamed's matter, in these petitions it was also argued that the suspicions against the three involved persons including Razeq **have not yet been proven** and that the respondents should have transferred to the petitioners the evidentiary material underlying the order being the subject matter of the petition. This argument should be denied. Similar to Hamed, in Razeq's case the respondents also had in their possession a detailed admission which constitutes sufficient evidentiary basis for the exercise of the authority.

61. In addition, another argument was raised which relied on an opinion on petitioners' behalf, according to which the demolition of Razeq's apartment may cause structural damage to apartments in the building and to adjacent buildings. The respondents, on their part,

insisted on the demolition method and explained that it would be carried out by drill explosive charges which will be activated in the apartment, in the walls located on the south and west front and by blasting explosive charges which would be activated in the northern front. All of the above, to avoid damage to the other apartments in the building and in buildings adjacent thereto. The respondents added and declared that the expectation was that the above described demolition method would enable to demolish only the exterior walls (other than the protected fronts) and the internal partitions of the apartment without causing structural damage to the adjacent buildings and to the other floors of the building. As noted above with respect to the other petitions, we recorded the above undertakings of the respondents which are appropriate. Therefore, the above petitions should be denied.

Decision in the petitions concerning the demolition order issued against Kusa's home (HCJ 7087/15, HCJ 7192/15)

62. In the matter of Kusa, the accomplice of Hamed and Razeq, as recalled a seizure and demolition order was issued against the apartment in which he lived with his family members. The apartment is located on the ground floor of a three story building. Two petitions were also filed against the above order. The **first** petition (HCJ 7087/15) was filed by Kusa's wife who lives in the apartment designated for demolition. Similar to the petitions of the other suspects in the killing of the late Henkin spouses, it was also argued in this petition that the suspicions against the three, including Kusa, were not founded. Like my decisions in the matter of Hamed and Razeq, the argument concerning the evidentiary infrastructure should also be denied in Kusa's matter, in view of the fact that the respondents had in their possession a detailed admission of Kusa, which constitutes sufficient evidentiary basis for the exercise of the authority.

The **second** petition (HCJ 7092/15) was filed by the suspect's sister in law who lives on the **second** floor and the suspect's brother who lives on the **third** floor. In this petition the petitioners argued that they had a vested right to know how the respondents intended to carry out the demolition and whether damage was expected to be caused to their apartments. It was further argued that the military commander was not authorized to exercise the demolition sanction in Area A. Therefore, the petitioners requested, *inter alia*, that we order the respondents to undertake to refrain from causing any direct injury or damage to petitioners' residence.

63. Petitioners' arguments should be denied. At the outset it should be emphasized that an obligation cannot be imposed on the respondents to refrain in advance from causing any injury to the building, as this would in fact result in the prevention of the demolition. I have also found no merit in petitioners' arguments concerning the authority of the military commander in Area A. According to the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (hereinafter: the **Interim Agreement**). The powers in matters of internal safety and public order in Area A were indeed transferred from Israel to the Palestinian Council. However, at the same time it was explicitly stipulated in said agreement tat Israel would continue to be responsible for the defense against external threat and for the overall security of Israelis in the Judea and Samaria Area and Gaza, and for this purpose "will have all the powers to take the steps necessary to meet this responsibility" (Article XII(1) of the Interim Agreement). This means that Israel may continue to act in Area A if it is necessary for the defense of the overall security. Therefore, respondents' authority to use Regulation 119 of the Defense Regulations in the Area reconciles with the provisions of the Interim Agreement (see: **Qawasmeh**, paragraph 28 of the judgment of Justice **Y. Danziger**; see also: Yoel Zinger "The Israeli-Palestinian Interim Agreement on self government arrangements in the West Bank and the Gaza Strip – Some Legal Aspects" **Mishpatim** 27 605, 622 (1996)).

64. Moreover: after the signature of the Interim Agreement the military commander issued a special order for the implementation of the agreement – Proclamation Regarding Implementation of the Interim Agreement (Judea and Samaria)(No. 7), 5756-1995 (hereinafter: the **Proclamation**). This court held that the Proclamation rather than the Interim Agreement was the prevailing law in the Area nad that the provisions of the Interim Agreement applied only id adopted by the Proclamation:

> […] The Proclamation is the law. It determines who has the authority and what the authority consists of with respect to a certain issue in this area or another. The Proclamation rather than the Interim Agreement. The Interim Agreement is the historical source of the Proclamation but it is not the authorizing source of the Proclamation. Therefore, even if there are differences between the provisions of the Proclamation and the provisions of the Interim Agreement, and even if the contradict each other, the provisions of the Proclamation prevail. The provisions of the Interim Agreement form part of the law which applies to Judea and Samaria only if they were adopted and to the extent they were adopted by the Proclamation" (HCJ 2717/96 **Waffa v. Minister of Defence**, IsrSC 50(2) 848, 853 (1996).

The Proclamation stipulates, *inter alia*, that the law which applied to the Area on the date on which it entered into effect will continue to apply unless it was revoked, changed or conditioned according to its terms (see: paragraph 7 of the Proclamation; HCJ 7607/05 **Abdallah (Husein) v. Commander of IDF Forces in the West Bank**, paragraph 7 of the judgment of President **A. Barak** (February 14, 2005)). Regulation 119 was not revoked and therefore remained in force also after the Proclamation entered into effect. The Proclamation also stipulates that the determination of the military commander that certain powers and responsibilities continue to be held by him is "decisive" (paragraph 6 of the Proclamation). The provisions of the Proclamation therefore indicate that the military commander is authorized to act in Area A, and particularly when it is required for the purpose of safeguarding the security, as is the case in our matter. In view of all of the above, this petition - should also be denied.

Decision in the petitions concerning the demolition order issued against Abu Shahin's home (HCJ 7081/15)

65. As recalled this petition concerns a demolition order which was issued against the home of Abu Shahin, who is accused in the murder of the late Danny Gonen. The apartment is located on the top floor of a three story building. The petitioner, a family member of the accused who claims to have ownership over the apartment designated for demolition, raised several specific arguments: firstly the petitioner argued, based on an engineering opinion on her behalf that the demolition may cause damage to adjacent apartments in the building. Therefore, the petitioner requested that we directed the respondents to refrain from the contemplated demolition. In addition the petitioner raised the argument of administrative delay, in view of the fact that the authority was exercised only four months after the date on which the attack being the subject matter of the order had been carried out. Finally, the petitioner reminded that the accused and his family had only the status of lessees in the apartment designated for demolition.

66. In response the respondents argued that in view of the fact that the acts of terror have not stopped, the need to deter others remained in force as was the situation when the attack being the subject matter of the order occurred. The respondents argue that the decision to use Regulation 119 of the Defence Regulations is made according to the circumstances of time and place and therefore there is no room for intervention in the current order. With respect to the argument that the accused and his family are the lessees of the apartment

designated for demolition, the respondents reiterated their position according to which it did not constitute a barrier which prevented the demolition. As to the issue of safety and the demolition method, the respondents noted that due to the location of the apartment within the building, it was decided that the controlled hot destruction would be used to carry out the demolition and that the demolition process would be monitored by an engineer who will be present on scene. In the complementary notice the respondents added as aforesaid that alternatives were examined and were found to be unsuitable.

67. After I have reviewed the arguments of the parties, I am of the opinion that there is no room for intervention in this case either. The petitioners argued as aforesaid that the issue of seizure and demolition order was delayed. In our case, the seizure and demolition order being the subject matter of the current petition was issued – as drafted - "since the inhabitant of the house Mohammad Abu Shahin […] killed the late Danny Gonen in cold blood by gun shots and wounded another person […]". However, the exact timing for the execution of the order derives from the circumstances of time and place, namely, the increasing number of attacks recently (see: respondents' decision in petitioner's objection dated October 19, 2015 (P/4)). Therefore, like my above decision regarding the date on which the order in Abdallah's case was issued, in the case at hand the decision to seize and demolish was also made as a direct response to the attack, taking into consideration the severe security situation and the need to deter others. As I have noted earlier, as a general rule it would be appropriate to issue the notice of the intention to seize and demolish a house shortly after the attack (see: **Sidr**, paragraph G of the judgment of the Deputy President **E. Rubinstein**). However, given the entire circumstances of the matter, including the fact that the indictment against Abu Shahin was also filed on August 17, 2015, the delay argument should not be accepted in the case at hand. In my opinion the lease argument should not be accepted either. This case is similar in its circumstances to the case of HCJ 7085/15 before us, which concerns an apartment that was rented from a family member. In this case, as is recalled, the apartment was rented by the accused from a family member (be it the grandmother of the accused as alleged by the petitioners or his uncle as alleged by the respondents. As I have noted above, in such case there is no room for our intervention.

68. As to the issue of safety and the demolition method of the structure. As recalled, the order being the subject matter of the petition refers only to the top floor of a three story building. In the framework of the decision in petitioner's objection, the respondents clarified that the demolition plan was established by certified engineers "following a precise mapping of the apartment, taking into consideration its engineering characteristics and location" all of the above "in consideration of the need to avoid, as much as possible, damage to neighboring buildings or parts of the structure which are not designated for demolition, namely, the lower floors of the building." In addition, the respondents declared that the demolition would be carried out under the supervision of an engineer who will ascertain that all measures are taken to prevent incidental damage. As noted above, respondents' above undertakings are appropriate and should be strictly upheld. Under these circumstances I am of the opinion that there is no room to hold that the contemplated demolition is not proportionate.

Conclusion

69. If my opinion is heard, the petitions before us should be denied, other than the petition of the owner of the eight story building in the village of Silwad (HCJ 7040/15). This petition is accepted provided that the petitioner evicts the family members of the accused from the apartment until October 17, 2015 at 12:00. In addition to the above, the respondents should act according to the principles established in the judgment regarding the manner by which hearings should be conducted and their fairness and regarding the repair of

damages which may be caused to third parties as a result of the demolition and the payment of compensation therefore.

70. Under the circumstance of the matter, no order for costs shall be issued.

The President

Justice N. Sohlberg

I agree with the judgment of my colleague, President M. Naor, its principles and details. Parenthetically I shall make three comments: on the effectiveness of the house demolition policy, on the argument of discrimination between Palestinians and Jews, and on the applicability of international law.

1. (a) **On the effectiveness of the house demolition policy**: As is known, the opinion of this court concerning the exercise of the authority under Regulation 119 is that it is premised on a deterring purpose – rather on a punitive purpose. Consequently it must be assumed that the exercise of the Regulation does indeed deter potential perpetrators, and accordingly saves human life. However, naturally, deterrence may not be easily quantified, if at all. In the past this court was of the opinion that this issue could not be precisely substantiated and therefore the state was not required to lay this factual infrastructure for the exercise of the authority. It was held by Justice e. Goldberg in HCJ 2006/97

> **A scientific study which can prove how many attacks were prevented, and how many lives were saved as a result of the deterring actions of house sealing and demolition was not conducted and cannot be conducted. However, as far as I am concerned it is sufficient that the assumption that a certain deterrence exists cannot be rebutted so as to prevent me from intervening in the discretion of the military commander**.

In this spirit it was held in a number of judgments that the state could not be expected to prove in a scientific-empiric manner the effectiveness of house demolition as a deterring measure – as the petitioners require – and that it was sufficient that the professional position of the relevant security agencies was that it had a deterring effect so as to prevent this court from intervening in its discretion (**Abu Dheim**, paragraph 11; '**Awawdeh,** paragraph 24; **Qawasmeh** paragraph 25).

(b) Recently doubts were raised again by this court as well as by legal scholars, as to the correctness of this approach. According to one argument in view of the act that it is an extreme sanction which severely violates human rights of individuals who, in fact, were not involved in acts of terror, it may be exercised only when it is based on solid factual infrastructure, according to the regular requirements of administrative law. In view of the fact that the burden of proof in this matter lies on the authority and in view of the fact that it is unable to satisfy it, it must totally refrain from the exercise of the authority (see: Amichai Cohen and Tal Mimran "Cost without Benefit in House Demolition Policy: following HCJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area", **case law news flashes 31 5, 14 (2014)**).

(c) This argument is unacceptable. The authority must frequently make hard decisions even when there is uncertainty as to their entire ramifications. In many instances these things cannot be scientifically proved and they depend on the intelligence and professional discretion of the competent authorities. If you deprive them of this authority you – in fact – sterilize the ability of state authorities to cope with new challenges (compare Yoav Dotan "Two concepts of reasonableness" Shamgar Book – Essays Part A 417, 461 (2003)). This is the case in general terms and this also the case when unfortunately, fundamental rights on the one hand are balanced against human life on the other.

Relevant to this case are the words of my colleague, Justice **H. Melcer** on the **principle of preventive care** – "the purpose of which is to cope with the difficulty which arises from the gap between the data available at a certain time and the great and uncertain potential damage which may be caused as a result of a certain activity, unless appropriate preventive measures are taken with respect thereto. This principle enables the authority (legislative or executive) to take measures the purpose of which is to prevent the catastrophe, when there is a significant threat of an extensive and irreversible damage, even when its probability is low and even when there is no proven scientific certainty that damage will indeed occur" (HCJ 466/07 **MK Zehava Gal-on Meretz-Yahad v. Attorney General**, paragraphs 34-42 (January 11, 2012)). The above said is applicable to the issue at hand.

(d) Under the circumstances of the case at hand I join the opinion of my colleague the President that the summary of privileged information which was presented to us – the work product of experienced professionals who are knowledgeable of the prevalent currents in the society from which the perpetrators come and go – satisfactorily indicates that a concern that damage may be caused to the homes of the families of perpetrators deters potential perpetrators.

(e) questions on the effectiveness of demolition as a deterring measure were also raised by this court (see **Sidr**, paragraph 3 of the judgment of Justice U. Vogelman and opposing comments of Justice **I. Amit**; **HaMoked** case, paragraph 6 of the opinion of Justice Hayut and paragraphs 5-14 of my opinion). Said judgments pointed, based on a review of a study on this issue, how difficult it was to measure the effectiveness of deterrence. However, when a measure is concerned which extremely violates the most basic proprietary rights – a person's home – this court emphasized the need to make a study, gather information and process data regarding demolition of perpetrators' homes and the ramifications thereof ("**another 'careful step'**" as stated by my colleague the President in paragraph 6 of her decision given today in **HCJFH HaMoked,** based on the words of the **Deputy President E. Rubinstein** and Justice E. Hayut in **HaMoked** case). Nevertheless, we must point at the real and sincere difficulty of the professional agencies to base their professional position on empiric foundations. A review of the scarce academic writings on this issue (which I have discussed in length in **HaMoked** case) indicates that such analysis may yield real operational conclusions only when conducted from a long term perspective, using tools from the empiric-statistical field of research. The academic research of terror from different disciplines points at the difficulty involved in the gathering of data which either support or refute deterrence as well as at the difficulty to isolate the effect of a specific element – such as house demolition – from the array of elements used in the fight against terror. Needless to point out that the above does not derogate from the obligation of the state to gather data and analyze them to the best of its good ability, and to even revisit its policy on this issue in light of these data; but it cannot be expected that a comprehensive academic study be conducted as demanded by the petitioners. And certainly one cannot expect that a factual infrastructure be established based only on the limited number of demolitions which were carried out during the short period of time which passed from the date on which judgment was given **HaMoked** case.

(f) However, as the question of the factual infrastructure was raised before us we shall remind that a review of the academic research directly engaged in this issue shows that the position which regards house demolition as a deterring measure is indeed substantiated. In **HaMoked** case I mentioned the study of Efraim Benmelech, Esteban F. Klor and Claude Berrebi, Counter-Suicide-Terrorism: Evidence from House Demolitions, which was published after said judgment was given on an official academic platform (**77 J. of Politics 27-43 (2105)).** Said study focuses on the effect of house demolition on suicide attacks during the second intifada. The research points at a clear statistical effect of reduction in the number of attempts to commit suicide attacks in the geographical area in which the demolition was carried out for a short period of about a month until the deterring effect dissipates. It seems that no empiric-statistical study was executed which was not based on mere assumptions and hypotheses but rather on analysis of data, the conclusions of which run contrary to this up-to-date study (and for further details see my comments in **HaMoked** case, paragraphs 5-14; and the comments of Justice **Hayut** there, paragraph 5). And even if the deterring effect of house demolition is limited in terms of time and place, it suffices that by virtue of the demolition we save one life to make it worthwhile, despite the suffering caused thereby to the perpetrator's family.

Moreover: deterrence is not only meant to affect the perpetrator's state of mind but also to dissuade the potential perpetrator from carrying out his evil plan by the intervention of his family members: "**In the traditional Palestinian society the family takes a central role in the life of the suicide bomber and makes a significant contribution to the formulation of his personality and to the extent of his willingness to sacrifice his life in the name of his religion or for his people**" (Immanuel Gross, "The Fight of Democracy against the Terror of Suicide Bombers – Is the Free World Equiped with the Moral and Legal Tools for this Fight?" (**Dalia Dorner Book, 219, 246 (2009)).** Gross demonstrates and points out there that the family support and its public manifestation serves the terror organizations – **"in broadening the circle of those who support the organization amid the Palestinian population and thus, in the increase of its ability to recruit additional suicide bombers in the future.**" Deterrence helps to neutralize the family as an element which encourages terror, and to motivate the family unit to act for its reduction. The concern that its home be demolished is meant to encourage the family of the potential perpetrator to realize its influence in the right direction, dissuade it from giving him the support of his close circle and in so doing, veer him from joining or realizing terror. Not without reason had we accepted in this judgment the petition in HCJ 7040/15 to prevent the demolition of an apartment owned by an unrelated party, a landlord who had no family or other relation neither with the accused of murder in one of the attacks nor with his family members who lived in the apartment, other than a lessor-lessee connection according to an agreement with the mother of the family, as opposed to all other petitions which we have decided to deny, in which a family connection was evident. Deterrence helps, so we are convinced, even to a small extent. This small extent, in our time and place, may be a decisive factor; for good or for worse.

2. <u>On the argument of discrimination between Palestinian and Jews</u>: This argument should be denied as stated by my colleague the President in paragraph 30 of her judgment. The reason that Regulation 119 is not used against Jews stems from the fact that in the Jewish sector there is no need to apply the same environmental deterrence which house demolition is meant to achieve. The Jewish community, in general, is deterred and stands and is not incited. Indeed we cannot deny: there are acts of assault by Jews against Arabs. Surely, it is incumbent on the enforcement authorities and on the courts to exhaust also in these cases the penal law to the maximum extent. Tragically we have witnessed the horrible murder of Mohammad Abu Khdeir, not to mention the shocking murder of the Dawabsheh family, the details of which are not yet fully known. But there are more differences than similarities on different levels, and mainly, for the purpose of this case –

the attitude of the community: unrelenting and decisive condemnation from wall to wall in the Jewish sector, which is not the case on the other side.

3. (a) On the applicability of international law: It should be remembered and reminded that international law in its traditional sense deals with inter-state war relations. The struggle of the state of Israel as well as of other countries in the western world with phenomena of terror – raises legal and moral questions to which it is hard to find a solution in the classic conventions of international law (and see Hili Mudrik-Even Chen, **Terror and Internation Humanitarian Law** 16 (2010)). As noted by Justice **Hayut** in **HaMoked** case, in paragraph 2 of her opinion:

> **In this area of struggle against terror, international law and domestic Israeli law alike, have not yet caught up with reality and have not yet established a comprehensive and detailed codex of rules concerning the legal measures that a state can take, being obligated, as aforesaid, to protect itself and its citizens. Needless to point out that this area desperately needs to be regulated in view of the fact that the known rules according to which the nations of the world act befit, to a large extent, the old and known model of war between armies, whereas the new and horrifying reality which was created in Israel and around the globe by terror organizations and individuals who commit terror attacks, disregards territorial borders and draws no distinction between times of war and times of peace any time is the right time to saw destruction, violence and fear, in most cases without discrimination between soldiers and civilians. Terror, in fact, does not respect any one of the rules of the game which were established by the old world with respect to the laws of war, and this reality imposes upon the jurists and not only on the security forces, the obligation to re-consider the situation for the purpose of revising and updating these rules and adapting them to the new reality**.

Indeed, when acts of terror do not distinguish between a soldier and a civilian and between times of war and times of peace; when everyone, in the battlefront and in the home front, is a target; when any weapon whetted against you shall succeed, when regretfully, perpetrators beat their plowshares into swords and their pruning hooks into spears (compare: **Isaiah** 54, 17; 2, 4) - the expectation that the state continues to adhere to the dichotomous distinctions created by international law may tie its hands in the war against terror, and put at risk the security of its citizens (and see **Mudrik-Even Chen**, page 109 onwards).

(b) The current circumstances have a direct bearing on the way by which international law should be interpreted. We cannot interpret the international conventions which the state of Israel assumed upon itself separate from the specific aspect of the war against terror in which we are unfortunately involved, and without taking into consideration its unique moral dilemmas on the one hand, and the security needs which arise there-from, on the other. This issue was also discussed in HaMoked case, where the Deputy President **E. Rubinstein** wrote (in paragraph 22 of his opinion) as follows:

> The Geneva Convention of 1949 and the Hague Regulations of 1907 before them, were designed and signed in a different period than the one we live in. The terror which world nations are faced with, and the State of Israel is no different in that regard, presents them with uneasy challenges, since terror organizations do not abide by the

> provisions of this convention or another… the humanitarian provisions of the Fourth Hague Convention which Israel assumed upon itself even if not legally adopted… should be interpreted in a manner which would reflect their spirit and realize their underlying objectives, but will also enable the State of Israel, at the same time, to secure the safety of its residents in the most basic manner.

I can only join these words and hope that the experts and scholars of international law will continue to develop the unique legal aspects of a state of war between a sovereign state and terror organizations, and arrange this area by finding an appropriate balance between humanitarian protection of human rights, on the one hand, and maintaining the ability of states to effectively fight terror organizations, on the other.

Justice

Justice H. Melcer:

1. I join my consent to the comprehensive, reasoned and precise (factually and legally) judgment of my colleague, President **M. Naor**. I am also in agreement with the seething comments of my colleague, Justyice N. Sohlberg.

   I allow myself however to add a few comments to clarify my position.

2. The issue of seizure and demolition of property by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter also: the **Regulation**) is within the authority and discretion of the **military commander**. On these issues he consults with the Israel Security Agency (ISA) – and is subordinated under the internal constitutional law – to the authority of the political level according to the provisions of the Basic Law: The Military. Hence, the responsibility for the use or failure to use the Regulation is entirely in the hands of said authorities and their criticism by this court is merely legal.

3. The above Regulation 119 in its current version was promulgated (in its English version) and made part of the law of our land and of the law applicable to the Judea and Samaria Area during the regime of the British mandate by virtue of article 6 of the **Palestine (Defence) Order in Council, 1937**, and remained in force until this day. For a review of sources of the Regulation and its history see: Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 Yale Journal of International Law 1, 8-9, 15-18, (1994) (hereinafter: **Simon**).

   Apparently, during the British mandate the Regulation (and what preceded it) was relatively broadly used, when the need to do so arose in times of attacks and acts of terror (see: Simon, *ibid*., *ibid*., and also: Brigadier General Uri Shoham, *The Principle of Legality and the Israeli Military Government In the Territories*, 152 Military Law Review (Summer 1996) 253, 259-260; today our colleague, Justice **U. Shoham**).

   Following the establishment of the state and until 1979 seizure and demolition orders, to the extent issued, pursuant to the Regulation – were not reviewed by this court. The change – in the sense of judicial criticism over the orders – commenced in 1979 in HCJ 434/79 **Sahweil v. Commander of Judea and Samaria Area**, IsrSC 34(1), 464 (1979), and contributed to the understanding of the international community of the need to use this measure in extraordinary cases. However, over the years doubts arose as to the effectiveness of the deterrence in the above measure and the criticism

against house demolition in response to acts of terror increased both in Israel and in the world (reference to some of the articles which were published on this issue were specified in the opinion of my colleague the President and of my colleague Justice **N. Sohlberg** and see also: Simon).

4. Over the years, *inter alia* following the developments described in the last part of paragraph 3 above – administrative law was applied to this field and the Israel Defence Forces (IDF) also initiated an examination of the issue through the **Major General Shani Committee**. Following said examination the use of Regulation 119 was in fact stopped for several years, and the possibility to resort to it was left in force for very exceptional cases and situations, which regretfully take place at this time.

   At the same time this court decided, taking into consideration the developments which took place in our public law and in international law (which has not yet referred specifically to the issue – in situations such as those we are faced with) – to limit the possible use of Regulation 119 on three main levels:

   (a) Application of the rules of administrative law to the procedure as aforesaid.

   (b) Limitation of the causes for house seizure and demolition to – the residence of the perpetrator who carried out the act of terror and of his family members (therefore, inter alia, we accepted the petition of the landlord who other than renting out the apartment to the perpetrator and his family without having been aware of the perpetrator's intentions – was not involved in any other way in the attack).

   Furthermore. My colleague, Justice **E. Hayut** emphasized in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) that according to her if the family members of the perpetrator whose house is designated for demolition can convince by sufficient administrative evidence that before the attack they tried to dissuade the perpetrator from carrying it out, then, it would be appropriate to give this detail very significant weight, which may, in adequate cases, revoke a decision to demolish the home of said family members. This approach is acceptable to me.

   (c) Adding the remedy of compensation to uninvolved, innocent parties who were harmed, to the extent damage is inflicted on them as a result of the demolition and under the conditions specified in the judgment of my colleague the President.

5. In view of the last part of paragraph 4(b) above, in the hearing I asked once again the counsels of the petitioners, the family members, whether they tried to dissuade the perpetrator before he carried out the attack. Their answer was that they were not aware of his plans and therefore could not dissuade him. I have therefore continued and asked whether in retrospect the family members condemned such acts (which may contribute to deterrence), however, this question remained unanswered and even in their later responses in writing – they did not make any reference to this issue, which raises questions.

6. Petitioners' counsels argued in the hearing, *inter alia*, that their clients were not given an appropriate opportunity to be heard in the context of the rules of administrative law which apply here, as specified in paragraph 4(a) above, since on the one hand the respondents delayed the issue of the orders being the subject matter of the petition which were issued many months after the date of attack (so that deterrence is not relevant, even according to the respondents) and on the other hand gave them only 48 hours (which included Friday and Saturday) to submit their response in writing to the

military commander. Moreover. They argued that the entire deterrence argument was hanging by a thread in view of the fact that judgments which were given in the past and denied petitions against house demolitions – were not realized for several months.

We have therefore requested the state attorney's office to submit to us the details of the petitions which were denied in this context, the subject matter theref, the date on which judgment was given and the date on which demolition was carried out (if at all). The following is the table which was submitted:

Petition No.	**Subject matter of the petition**	**Judgment Date**	**Demolition Execution Date**
4597/14	Demolition of the house of the perpetrator who, on April 15, 2014, killed the late Commander Baruch Mizrahi.	July 1, 2014	July 2, 2014
5290/14	Demolition of the house of the perpetrator who took part on June 12, 2014, in the abduction and killing of the three youths the late Gil-ad Shaer, Eyal Ifrah and Naftali Frenkel.	August 11, 2014	August 18, 2014

5295/14	Demolition of the house of the perpetrator who took part on June 12, 2014, in the abduction and killing of the three youths the late Gil-ad Shaer, Eyal Ifrah and Naftali Frenkel.	August 11, 2014	August 18, 2014
5300/14	Demolition of the house of the perpetrator who took part on June 12, 2014, in the abduction and killing of the three youths the late Gil-ad Shaer, Eyal Ifrah and Naftali Frenkel.	August 11, 2014	August 18, 2014
7823/14	Demolition of the house of the perpetrator who, on August 4, 2014, killed the late Avraham Wallace with a bulldozer.	December 31, 2014	October 6, 2015
8024/14	Demolition of the house of the perpetrator who, on October 22, 2014 committed the shooting attack in which Yehuda Glick was severely wounded.	June 15, 2015	October 6, 2015
8025/14	Demolition of the house of the perpetrator which is located within the refugee camp Qalandia who, on November 5, 2014, committed a ramming attack at the light rail station Shimon Hazadik and killed the late Chief Inspector Jada'an Assad and Shalom Ba'adani.	December 31, 2014	Has not yet been realized for operational reasons
8066/14	Demolition of the house of the perpetrator who on November 18, 2014, committed a shooting and stabbing attack in the Har Nof synagogue in which the late Avraham Goldberg, Moshe Taberski, Kalman Levin, Aryeh Kopinski, Master Sergeant Zidan Seif and Haim Rotman were killed.	December 31, 2014	October 6, 2015

A review of the table shows that indeed, sometimes, for political and security considerations including operational evaluations – delays occurred in the realization of the demolition orders that petitions which were filed in connection therewith were denied and one order has not yet been realized. Furthermore – delays occurred even in the issue of the orders being the subject matter of the petitions. Therefore, indeed, the time limit of 48 hours for the hearing (which included Friday and Saturday) was not in order and as a result of the urgency errors occurred in the drafting of the orders as specified in the judgment of my colleague the President. Moreover, in a case which was recently adjudicated in HCJ 7219/15 **Abu Jamal v. GOC Home Front Command** (November 3, 2015) an error occurred in the identification of the house designated for demolition, and were it not for the judicial scrutiny proceeding before this court – an irreversible act would have occurred in that case.

This flaw of an exaggerated limitation of the hearing schedule – was indeed rectified under the circumstances since petitioners' counsels have eventually succeeded to submit their objections and were also broadly heard by us. However, in the future –

the directions of my colleague the President in this regard should be strictly adhered to, as drafted in her judgment.

7. As to the discrimination arguments concerning the use of Regulation 119 with respect to Jews as compared to Palestinians, it should be noted that other than raising the argument – no data were presented before us to substantiate such discrimination. However, I find it necessary to point out that if, God forbid, we reach a situation which will require such deterrence also towards families of Jewish perpetrators or of Israeli residents members of minority groups – as a general rule, similar law should also apply to them.

8. Finally, I wish to remind the moving and heart-rending things which were said in the hearing by the mother of the late **Danny Gonen**, Mrs. **Dvora Gonen** may she live long, and by the father of the late **Malachi Rosenfeld**, Mr. **Eliezer Rosenfeld**, may he live long. Beyond the description of their loved ones who were killed, their lives abruptly severed at a young age, and the demonstration of the unbearable loss suffered by their families and the people of Israel – they wanted to support the orders which were issued by the **military commander** not for reasons of revenge, but rather based on considerations of deterrence – so that others would not be harmed like their children and themselves.

   In this context I would like to express the hope, along sincere condolences sent from here to them and to all other victims' families, that their above wish - comes true and that innocent people will no longer be harmed and that we shall once again live in a period in which no deterrence shall be required

Justice

Decided as specified in the judgment of the President **M. Naor**.

Given today, 30 Heshvan 5776 (November 12, 2015).

The President | Justice | Justice