At the Supreme Court Sitting as the High Court of Justice

HCJ 6826/20

Before:	**Honorable Justice N. Sohlberg** **Honorable Justice M. Mazuz** **Honorable Justice Y. Willner**
The Petitioners:	1. _____ **Dweikat** 2. _____ **Dweikat** 3. _____ **Dweikat** 4. _____ **Dweikat** 5. _____ **Dweikat** 6. _____ **Dweikat** 7. _____ **Dweikat** 8. **HaMoked - Center for the Defence of the Individual**
	v.
The Respondents:	1. **Commander of IDF Forces in the Judea and Samaria Area** 2. **Minister of Defense**
	Petitions for *Order Nisi*
Session date:	24 Tishrei 5780 (October 12, 2020)
Representing the Petitioners:	Adv. Nadia Daqqa; Adv. Daniel Shenhar
Representing the Respondents :	Adv. Roi Shweika

Judgment

Justice N. Sohlberg:

1. Petition to revoke a confiscation and demolition order for a residential home in Rujeib village, in the Judea and Samaria Area, near Nablus, the residential home of a perpetrator who had committed a murderous stabbing attack.

2. According to the indictment filed against the perpetrator, the horrible deed occurred as follows: at noon time, on August 26, 2020, while working in a construction site in Petach Tikva, ____ ____ took a large knife with 14 cm blade from the kitchen, put it in the pocket of his pants, and went out to the street for the purpose of killing an Israeli citizen or soldier, Jewish, - "**for Palestine, the Palestinian people, al- Aqsa Mosque and Allah**" and "**to make a contribution to the Palestinian people**". ____ wondered around in Sgula Industrial Area for about an hour looking for a suitable victim, until he noticed

the late ___ ___ ___ of blessed memory, a person with a Hasidic appearance, who was just walking down the street. ____ pulled out the knife from the pocket of his pants, and stabbed ___ ___ once, twice and three times deep in the chest. In two of the stabbings the knife penetrated the right lung, the diaphragm and the liver; in the third stabbing it penetrated the left lung. ___ ___ called for help and fell down to the ground bleeding heavily. A passer-by who had noticed the occurrence, threw an article at ____ to prevent him from carrying on with his actions. ____ had then let go of ___ ___, who was bleeding heavily and in critical condition. He put the bloody knife in the pocket of his pants and started walking away from the scene, planning to stab additional Jews in a similar manner. Shortly thereafter police forces located ____ and arrested him. ___ ___ was rushed to the hospital, unconscious. Regretfully, the attempts to resuscitate him were unsuccessful; his death was pronounced at 14:05.

3. Following the recommendation of the Israel Security Agency (ISA) with the consent of the Attorney General, the Commander of IDF Forces in the Judea and Samaria Area decided to exercise the authority vested in him by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations**), against the residential home in which ____ had lived. On September 10, 2020 notice was given to the family of the intention to confiscate and demolish ____ 's residential home. Petitioner 1, ____ 's wife, filed an appeal against the intention to confiscate and demolish ____ 's residential home. The appeal had been denied and a confiscation and demolition order was given to the family.

4. Simultaneously with the petition the petitioners applied for an interim order preventing the realization of the confiscation and demolition order until a decision is made in the petition; on October 1, 2020 Justice N. Hendel issued an interim order preventing the respondents from realizing the confiscation and demolition order unless and until resolved otherwise. Hence the petition before us.

Petitioners' Main Arguments

5. Petitioner 1, as aforesaid, is ____ 's wife; petitioners 2-6, their daughters live in the residential home; the first daughter has come of age and her sisters are minors; petitioner 7 is ____ 's father and is the owner of the land on which the house is located; petitioner 8 is a not-for-profit association engaged in the protection of human rights.

6. The petition consists of several arguments against the decision of the military commander, some of which were defined as basic arguments and are directed against the lawfulness of Regulation 119 since, according to the petitioners, it is contrary to norms obligating the military commander according to international law, it constitutes collective punishment and fails to satisfy the constitutional proportionality tests. The petitioners argued further that the house demolition policy and use of Regulation 119 should be examined by an expanded panel, and reference was made to request for further hearing which had been filed in a different proceeding.

7. On the specific level it was argued, inter alia, that the house was used by the wife and daughters as their residential home and that the proportionality principle required considering a less severe way of action, and refraining from demolition, particularly in

view of the fact that there was no proof of the family's involvement in ____ 's deeds or that the family had any awareness of his intentions or supported him in any way; the house was also used by petitioner 1 as a kindergarten and the second floor, the construction of which has not yet been completed, was designed to serve this purpose, such that the demolition would also determinately affect her freedom of occupation and the family's livelihood. It was also argued that ____ was suffering from schizophrenia and depression and that it was not inevitable that it would be eventually determined that he was not responsible for his actions.

Respondents' Main Arguments

8. The respondents are of the opinion that the petition should be denied. With respect to the arguments concerning the mere lawfulness of Regulation 119 and the exercise of the authority by virtue thereof, the respondents argue that they were discussed and rejected by this court numerous times, including recently, and therefore they should not be revisited. As to the exercise of the authority in connection with the matter at hand, the proportionality tests are satisfied, according to the considerations outlined in the judgments of this court.

9. The respondents noted that there was no dispute that it was a murderous, intentional attack, the purpose of which was to injure innocent Israeli citizens, which was unfortunately successful. Deterrence against such actions is extremely important and therefore it is justified to currently act pursuant to the authority granted by virtue of Regulation 119, in the way and scope determined by the military commander.

10. As to the argument that the family members were neither involved nor aware of ____ 's actions, the respondents noted that although it was a relevant factor, it has been held more than once that it was not a decisive factor, and therefore, its mere existence did not prevent the exercise of the authority; as to the argument concerning the violation of the freedom of occupation, the respondents argue that since the purpose of the demolition is to deter, and since it was established that ____ had full residential connection to the residential home in its entirety, the military commander was vested with the authority to demolish the entire building, including parts which were arguably used for additional purposes. Under the circumstances of the case the respondents are of the opinion that the result is proportionate; with respect to the argument that ____ is suffering from mental problems and that the degree of his responsibility for his actions was unclear, it was argued that the evidence presented by the petitioners did not substantiate said argument. The medical record was drafted only after the attack, despite the fact that it stated that ____ had been suffering from medical mental problems as of 2017, and therefore it should not be attributed much weight. It was also argued that according to current psychiatric evaluation and ____ 's interrogations there is no indication of psychotic state, ____ himself says that he does not suffer from any mental problem, he understands the legal proceeding and is competent to stand trial.

The Hearing

11. In the hearing which was held before us as if an order nisi had been issued, the parties' representatives have briefly repeated their written arguments and answered our questions. Petitioners' representative argued that the exercise of Regulation 119 was

disproportionate, that severe harm would be caused to the innocent family members in the absence of roof over their heads and in the absence of livelihood, and she also raised arguments concerning ____ 's mental condition; respondent's representative argued, to the contrary, that the decision was correct, proper, proportionate, required for deterring purposes and satisfied the criteria outlined by judicial precedence.

12. At our request, we were presented, for our sole review, with a professional opinion of the Israel Security Agency (ISA) according to which the advantage in demolishing perpetrators' homes far outweighs the concern that it would lead to the execution of additional attacks.

Deliberation and Decision

13. Having read the petition and the written response thereto, having heard the oral arguments of the parties' representatives in the hearing, and having reviewed the annexes of the pleadings and all other documents which were presented to us, I came to the conclusion that the petition should be denied.

14. The petition raises several questions concerning the implementation of the authority entrenched in Regulation 119 of the Defense Regulations, on the general level as well as on the specific level. I have noted more than once with respect to the general issues relating to the implementation of Regulation 119, that they have been thoroughly discussed by this court on several occasions, and that there was no need to revisit them: "**It is not necessary to discuss all over again the general issue regarding the mere authority to issue confiscation and demolition orders according to this Regulation" (HCJ 8150/15 Abu Jamal v. GOC Home Front Command (December 22, 2015) paragraph 6 of the judgment of my colleague, Justice I. Amit). As noted by the military commander in his response, petitioners' arguments on the general level have been recently discussed in depth by this court in a number of judgments, and were rejected. This applies to the question of whether house demolition policy reconciles with international law; I also discussed this issue in the above HCJ 8091/14 (paras. 5-14). An updated opinion of the Israel Security Agency (ISA) has been recently submitted which indicates that "the measure of house demolition does essentially have a real deterring effect upon potential perpetrators who avoid such terror activities due to the concern of demolition" […]. As is known, a request to hold a further hearing in the judgment which was given in the above HCJ 8091/14 was denied in a decision given by the President M. Naor in HCJFH 360/15 dated November 12, 2015. […] In view of the above, there is no justification to revisit arguments on the general level in the context of this judgment, and they should be denied, with reference being made to the above authorities**." (HCJ 1014/16 **Skafi v. Commander of IDF Forces in Judea and Samaria**, paragraph 11 (February 28, 2016)(hereinafter: **Skafi**)).

15. Recently it was held by president **E. Hayut** in a request for further hearing as follows: "**In HCJ 8091/14 HaMoked Center for the Defence of the Individual v. Minister of Defense (December 31, 2014)(hereinafter: HaMoked) the court discussed the general, in principle, question of the authority to use Regulation 119 for the purpose of demolishing perpetrators' homes, and it was held that "a distinction should be**

drawn between the authority to use Regulation 119 and the discretion which should be exercised while using it… the authority exists, and the main question concerns reasonableness and discretion" (paragraph 20 of Justice (as then tiled) E. Rubinstein). Throughout the years which passed since the rule in this issue had been established, disputes arose between the Justices of this court regarding the lawfulness of the use of the Regulation and statements were made to the effect that "the implications of the use of Regulation 119 are severe and disturbing". However, all requests for further hearing in the question of the authority to use Regulation 119 were denied it being held that for the time being there was no need to hold a further hearing in the issue. For the reasons specified below I am of the opinion that at this time there is also no reason to veer from this position (HCJFH 5924/20 **Military Commander for the Judea and Samaria Area v. Abu Baher**, paragraph 5 (October 8, 2020) (hereinafter: **HCJFH 5924/20**)).

16. Hence, case law remained in force and should not be revisited each time a-new. However, in view of the general arguments in the petition concerning the use of Regulation 119, inter alia, due to voices which have been recently heard again, I shall return to fundamental principles, to the judgments of this court on the general level throughout the years, before examining petitioners' arguments on the specific level.

17. It should be initially pointed out that the citations brought by the petitioners from judicial precedence in their attempt to substantiate the argument of erosion of current case law, do not justify re-examination of the current rule which has been applied for dozens of years. Petitioners' argument that it is an old rule which should be revisited in view of the changing-times, has been repeatedly answered by the repeated examination and ratification of the rule throughout the years, including in recent years, paying great attention to the human and legal difficulties embedded in the exercise of the authority pursuant to Regulation 119, and by reasoned rejections of requests for further hearing.

18. Petitioners' main argument concerning the mere exercise of the authority is that the great importance of the issue justifies its re-examination that it was pointed out in different judgments that the issue raised questions which have not yet received satisfactory answers by judicial precedence and that things should be thoroughly examined and discussed by an expanded panel. However, the above does not sufficiently indicate that the current case law has been eroded.

19. Accordingly, the petitioners refer, for instance, to the words of my colleague Justice M. Mazuz in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015) (hereinafter: **'Aliwa**) who noted with respect to the general issue that "**The arguments which were raised are weighty and, in my opinion, worthy of thorough examination. While it is true that the general-basic arguments made herein and similar arguments have already been raised in the past, in my opinion they have not been thoroughly and comprehensively discussed as required, at any rate, not recently or fully.**" Nevertheless my colleague satisfied himself by briefly presenting different questions which according to him were not sufficiently addressed – neither in respondents' response nor in judicial precedence – and noted that "**In view of my colleagues' position that this petition should be dismissed, I see no reason to discuss here in detail said general and basic questions concerning the validity of**

Regulation 119 and the manner in which it is employed, and I shall only make some brief comments in that regard". The same applies to later judgments referred to by the petitioners, for instance the words of my colleague in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (hereinafter: **Abu Jamal**); the words of Justice **U. Vogelman** in HCJ 1630/16 **Zakariya v. Commander of IDF Forces** (March 23, 2016) (hereiafter: **Zakariya**), in HCJ 628/18 **Kamil v. Commander of IDF Forces in the West Bank** (February 28, 2018) and in HCJ 752/20 **Atawaneh v. Military Commander of the Judea and Samaria Area** (May 25, 2020); the words of Justice (as then titled) **S. Joubran** in HCJ 1938/16 **Abu Alrub v. Commander of IDF Forces in the West Bank** (March 24, 2016) and the words of Justice **G. Karra** in HCJ 4853/20 **Abu Baher v. Military Commander in the West Bank** (August 10, 2020) (hereinafter: **Abu Baher**). In all of the above references which were presented by the petitioners it had been indeed said that there were questions which had not yet been adequately addressed, but these remained open questions, short comments, mainly question marks; rather than exclamation points. The mere fact that they have been raised does not establish cause for reconsidering the issue which was seriously discussed by this court on several occasions – in the past as well as recently; from a constitutional aspect, from an administrative aspect and from the aspect of international law. I have already written in Zakariya (paragraph 25) that **"having read the opinion of my colleague, Justice M. Mazuz, regarding a host of questions which "have not yet been addressed in a sufficient and up-to-date manner by this court in its judgments" (paragraph 3) it should be noted that I respect his opinion but find it hard to accept his tone which disregards a thorough and weighty discussion of the difficult questions raised by the issue at bar in a host of recent judgments**". Indeed, as was held by the then president, M. Naor in HCJFH 2624/16 **Masudi v. Commander of IDF Forces in the West Bank** (March 31, 2016) (hereinafter: **Masudi**) "a review of the judgment being the subject matter of the request for further hearing indicates that it does not contain a detailed and in-depth discussion of the legal issues associated with the use of Regulation 119, and thus, it does not contain an express and detailed ruling […] **Indeed, two out of the three justices of the panel commented that in their opinion a further review of the issue by an expanded panel was required. However, these comments, in and of themselves, do not establish cause for further hearing**." Case law then is valid, existing and stands in full force and effect.

Regulation 119 – Preliminary Review

20. Regulation 119 of the Defense Regulations authorizes the military commander to confiscate houses of suspects or accused of hostile activity against the state of Israel and empowers him to thereafter issue an order for their demolition. It states as follows:

> The Military Commander may by order direct the confiscation to the Government of Palestine 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 […] any offence against these Regulations involving violence or intimidation or any Military Court offence ; and when any house, structure or land is confiscated as

> aforesaid, the Military Commander may destroy the house or the structure or anything located in or on the house, structure or the land. Where any house, structure or land has been forfeited by order of a Military Commander as above said, 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 re-vest in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order or forfeiture had not been made […]".

21. The language of the Regulation indicates that it may apply to numerous and diverse cases and that it vests with the military commander broad authority to confiscate and demolish whenever "**an offense was committed against these Regulations**." However, in the judgments of this court it has been clarified that the military commander should make cautious, proportionate and limited use of his above authority (see, for instance: HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area** (August 11, 2014) (hereinafter: **Qawasmeh**); HCJ 4597/14 **Awawdeh v. Military Commander of the West Bank Area (**July 1, 2014) (hereinafter: **Awawdeh**); HCJ 5696/09 **Mougrabi v. GOC Home Front Command** (February 15, 2012) (hereinafter: **Mougrabi**); HCJ 5667/91 **Jabarin v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(1) 858, 860 (1992)). While exercising the authority vested in him by virtue of Regulation 119, the military commander should act in a manner reflecting, to the maximum extent possible, the spirit of the Basic Law: Human Dignity and Liberty (**Awawdeh; Mougrabi**; HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003)). Therefore, according to the rules established by judicial precedence, the military commander must ascertain that the confiscation and demolition actions are taken for a proper purpose and satisfy the proportionality tests. Namely, he must ascertain that the action taken may achieve the requested purpose; and that the proper relation is maintained between harm caused by it and its underlying purpose (**Sharif**, pages 60-61; HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 5 of the judgment of Justice (as then titled) **M. Naor** (January 5, 2009) and the references there (hereinafter: **Abu Dheim**)).

22. Accordingly, criteria were established which limit and restrict the discretion of the military commander while exercising the powers according to Regulation 119. As held in **Qawasmeh**, the military commander should take into consideration, inter alia, "**the severity of the acts attributed to the suspect; the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and the scope of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition**" (see also: HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip** (1992) (hereinafter: **Alamarin**); HCJ 1730/96 **Salem v. GOC Ilan Biran, Commander of IDF Forces**, IsrSC 50(1) 353, 359 (1996)

(hereinafter: **Salem**); **Abu Dheim**, paragraph 5). It should be emphasized that it is not an all-encompassing list and the existence or absence of any of its components does not affect the discretion of the military commander; things should be examined as a whole. Hence, the decision to demolish an entire building, in lieu of sealing a single room or demolishing a certain part of a building, does not automatically mean that the measure which was selected is disproportionate and justifies the court's intervention; there is no obligation to show in each case that the persons residing in the house were aware of the criminal deeds of any of its residents, or even encouraged them (**Alamarin**, paragraph 9; **Salem**, page 359; **Abu Dheim**, paragraph 7). Therefore, the decision shall satisfy the proportionality test after it is examined according to the entire circumstances and considerations, primarily the severity of the deeds committed, with such entirety looking forward toward **deterrence**; to which extent and magnitude **deterrence** is required to prevent a deed of this sort from recurring.

23. We have reiterated over and over again in our judgments that the purpose of the Regulation – is to deter; not to punish. In certain situations there is no alternative but to use the authority according to the Regulation to save human life; literally (HCJ 698/85 **Dajalas v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 40(2) 42, 44 (1986); HCJ 4772/91 **Hizran et al., v. Commander of IDF Forces**, IsrSC 46(2) 150 (1992)). Said deterring purpose was recognized as appropriate, although said approach has also been criticized (see, for instance: David Kretzmer "**HCJ Criticism of House Demolition and Sealing in the Areas**" Klinghoffer Book on Public Law 305, 314, 319-327 (1993); Amichai Cohen and Tal Mimran "**Cost without Benefit of House Demolition Policy; Following HCJ 4597/14 Awawdeh v. Military Commander of the West Bank Area**" Law on-line, Insights into Recent Judgments 31, 5, 11-21 (2014)). The main difficulty in exercising the authority according to the Regulation lies in the harm inflicted on the perpetrator's family members; it is not inevitable that they have not assisted him and were not at all aware of his evil intentions. In this context I said: "**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**." (HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense**, paragraph 3 (December 31, 2014) (hereinafter: **HaMoked for the Defence of the Individual**). However, "**deterrence considerations sometimes oblige deterring potential perpetrators who must understand that their actions may also harm the well-being of their family members, even when there is no evidence that the family members were aware of the perpetrator's deeds**." (**Abu Dheim**, paragraph 7 of the judgment of Justice (as then titled) **M. Naor**) and the references there); as aforesaid, the purpose of the action is **- deterrence**, to save lives. At the same time it was held that the question of awareness or involvement of the perpetrator's family members may affect the scope of the demolition order (**Awawdeh**, paragraph 18).

24. It was further held that the court does not have the adequate tools to examine whether the demolition of a specific building would indeed result in effective deterrence. The court does not enter the shoes of the military commander (and those surrounding him) having the discretion, tools and authority to determine when proper benefit shall arise from the measure which shall be used and the purpose of deterrence shall be achieved (HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 653-654 (1997)

(hereinafter: **Janimat**); **Abu Dheim**, paragraph 5; **Awawdeh**, paragraph 20; **Qwasmeh**, paragraph 25). We, as Justices, have nothing but the professional opinion of security bodies whereby the deterring measures do indeed achieve their purpose, even if in a limited way, as "**saving one soul**" (Mishna, Sanhedrin 4, 5). As a general rule, and absent evidence to the contrary, the court assumes that the factual infrastructure presented to him by the state an supported by the affidavits of the relevant bodies, is accurate and reliable (see: Daphna Barak-Erez, **Procedural Administrative Law**, 446-447 (20917); Itzhak Zamir, **The Administrative Authority**, Volume C, 1656 (2014); HCJ 6905/18 **Naji v. Military Commander of the West Bank Area**, paragraph 14 of the judgment of my colleague Justice **Y. Willner** (December 2, 2018)(hereinafter: **Naji**)).

The authority to apply the Regulation

25. The petitioners argue that the 'house demolition' policy is applied without authority and contrary to international law. This argument was discussed and determined by this court in a host of judgments which were given throughout the years where it was held that the authority is valid and in force.

26. Firstly, legal distinction exists between the territory of the state of Israel (including east Jerusalem), and the area of Judea and Samaria; in both territories the military commander is vested with the authority to apply Regulation 11 of the Defense Regulations.

Within the territory of the state of Israel – Regulation 119 constitutes primary legislation the validity of which is maintained by Section 10 of the Basic Law: Human Dignity and Liberty, since the defense regulations constitute part of the law which existed prior to the entering into effect of the Basic Law (HCJ 6026/94 **Nazal v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 48(5) 338, 351 (1994) (hereinafter: **Nazal**)). Hence, the question of authority does not arise when the Regulation is applied within the territory of the state of Israel.

Within the area of Judea and Samaria – it has been repeatedly held in a host of judgments that Regulation 119 is an integral part of the body of laws which apply in the west bank (HCJ 434/79 **Shewil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464 (1979); HCJ 22/81 **Hamed v. Commander of the Judea and Samaria Area**, IsrSC 35(3) 223 (1981); HCJ 274/82 **Hamamra v. Minister of Defense**, IsrSC 36(2) 755 (1982); HCJ 897/86 **Jaber v. GOC Central Command,** IsrSC 41(2) 522 (1987); **HaMoked Center for the Defence of the Individual**, paragraphs 21-24 of the judgment of Justice (as then titled) **E. Rubinstein**)). Accordingly, the authority vested in the military commander under Regulation 119 "**which was passed on to him as a 'legacy' from the regime which controlled the Area before Israel took control thereof, is eventually part of the array of measures available to him to fulfill his main duty as provided in Article 43 of the Hague Regulations: to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country**.'" (**HaMoked Center for the Defence of the Individual**, paragraph 21). Hence, the military commander is also vested with the authority to act according to Regulation 119 in the territories of the west bank by virtue of the local law which applies in the area and according to international law.

Deterrence rather than Collective Punishment

27. The petitioners argue further that the above policy violates international humanitarian law and human rights laws because it constitutes prohibited collective punishment. This argument has also been examined by judicial precedence – and was rejected.

28. The Geneva Conventions which were established and signed in 1949, as well as the Hague Regulations which had been formulated and established many years earlier, in 1907, came into being in a period totally different from the period in which we currently live. An 'ordinary' war is totally different from a war against guerilla organizations. Unlike countries at war which honor, more or less, the rules of international law, terror organizations do not subject themselves to the different conventions, do not take into consideration any humanitarian considerations and use the measures available to them – tools of war and destruction – against an innocent civilian population. This complex reality, poses before a country that wishes to protect its existence difficult challenges, but they cannot be unsolvable. Hence, according to judicial precedence, the conventions are still binding, but in difficult times, and in view of the significant changes that we have experienced since their inception, the humanitarian provisions of the Fourth Geneva Convention (the applicability of which was not recognized on the legal level by the state of Israel, although the state has assumed its provisions) 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"** (**HaMoked Center for the Defence of the Individual**, paragraph 22). Therefore, we cannot interpret the international conventions that the state of Israel assumed upon itself without regard to the specific aspect of war against terror which we unfortunately experience on a daily basis; we wish to live and we shall not die on the altar of the Geneva Convention. It is well known that the state of Israel deals with evil-seeking terrorists that have not been envisioned by the draftsmen who have conceived and formulated the provisions of the conventions.

29. Relevant are the words of Justice (as then titled) E. Hayut in **HaMoked Center for the Defence of the Individual**: "Israel has been struggling for years with the expansion of terror and its horrifying episodes which are directed against innocent civilians. In recent years states around the globe have also started to be exposed to terror which takes a global nature and this reality compels the law, on the local as well as on the international level, to cope with complex issues concerning the legitimate measures that a state can take in its struggle against terror, being obligated to protect itself and its citizens [...] 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 and any time is the right time to sow destruction, violence and fear, in most cases without discrimination between soldiers and civilians. Terror, in fact, does not respect even 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. Currently, in the absence of such updated codex of laws, Israeli law must cope, on a case by case basis, with issues pertaining to the struggle against terror, constantly striving to maintain the delicate balance between security needs and human rights and the values of the state of Israel as a Jewish and democratic state" (paragraph 2).

30. In these circumstances, taking into consideration the global changes and the different spirit in which the conventions are being currently examined (which as aforesaid were drafted in a patently different reality), petitioners' argument that any act of demolition – regardless of its scope and surrounding circumstances – amounts to collective punishment and as such should be prohibited according to international law by virtue of Article 33 of the Fourth Geneva Convention, cannot be accepted. As aforesaid, in certain circumstances democracies need to protect themselves, including by severe and harsh measures, to secure their existence and to protect the safety and life of their citizens. "**Your life precedes the life of your friend**" (Bavli, Baba Metsia, 62, 1). Needless to point out that it does not mean that there are no rules; and that the end justifies all means. For this purpose the proportionality tests were established, to weigh and balance the different considerations and aspects.

31. It should be reminded that the prohibition against house demolition according to Article 53 of the Fourth Geneva Convention is not absolute, and is subject to the exception of necessary military operations, and in the case at hand – to create deterrence which shall prevent the infliction of future harm to the bodies and lives of innocent persons (**HaMoked Center for the Defence of the Individual**, paragraph 23, and the references there). Accordingly, as mentioned above, judicial precedence has developed an 'open' list of considerations, that should be taken into account by the military commander prior to exercising his authority, including: **the severity of the acts attributed to the suspect and the evidence against him;** the connection between the perpetrator and the house designated for demolition; the degree of harm inflicted on the residents of the house should it be demolished; the scope of involvement of the residents of the house in the perpetrator's deeds; the ability to take less injurious measures against the building designated for demolition and its surrounding buildings (see for instance, **Abu Dheim**, paragraph 5; **Awawdeh**, paragraph 17; **Qawasmeh**, paragraph 22; **Naji**, paragraph 27). Hence, the exercise of the authority according to the Regulation in cases in which it is necessary and required to protect security, while exercising discretion according to the criteria established by judicial precedence, is permitted – as pointed out by the Deputy President E. Rubinstein in HCJ 2828/16 **Abu Zeid v. Commander of Military Forces in the West Bank** (July 7, 2016) (hereinafter: **Abu Zeid**): "**The legal and moral justification is embedded in the deterring component of demolition, which as of now has been sufficiently proven to us. Like all other countries in the world wishing to exist, Israel cannot sit still against those wishing to destroy us. Hence, since the security bodies found, after a long and meticulous examination that a certain measure – which does not cause harm to human life but only to property, without taking it lightly – has a deterring effect and can save human lives, I am of the opinion that despite the difficulty involved therein, we cannot determine that said**

measure is prohibited *per se*; the key is to constantly examine the deterring effect, the proportionate use of the Regulation by the respondent in the most extreme cases and to consider in the appropriate cases the use of alternative measures which may achieve the purpose of deterrence. Things were considered in the case at hand but no alternative was found. In view of all of the above, there is no room for our intervention".

32. Even if in my above words I have not exhausted the discussion of the matter, according to our jurisprudence, we must rely on past-precedents, new and old and as stated by the then President **M. Naor** "**This Court has repeatedly ruled, in numerous judgments in the past, that there is no conflict between the powers to demolish homes under Regulation 119 of the Defense Regulations and the provisions of international law**" (HCJFH 360/15 **HaMoked Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense** (November 12, 2015)(hereinafter: **HCJFH 360/15**); and see my words in HCJ 7040/15 **Hamed v. Military Commander in the West Bank Area**, paragraph 3 (November 12, 2015) (hereinafter: **Hamed**)). The authority therefore exists and according to judicial precedence it neither constitutes collective punishment nor violation of international law.

Achieving deterrence by using Regulation 119

33. The petitioners adamantly refute the argument that the exercise of Regulation 119 promotes deterrence and argue that demolition of perpetrators' homes increases hatred; the damage caused by the demolition policy, according to them, exceeds its ostensible benefit. However, this argument has also been discussed by judicial precedent and was rejected: "**A scientific study showing how many attacks were prevented and how many lives were saved as a result of deterring actions of house demolition and sealing has not been and could not have been conducted. However, as far as I am concerned it suffices that the effectiveness of this deterring measure has not been disproved in order to stop me from interfering with discretion of the military commander**" (the words of Justice **E. Goldberg** in **Janimat**; see also HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003) (hereinafter: **Sa'ada**)). In addition, I shall reiterate some of the befitting things said by Justice **E. Mazza** in **Nazal**, in pages 348-349: "**The question whether the demolition of a perpetrator's home can deter potential perpetrators has been raised before this court many times, and <u>as a general rule the professional opinion of the security bodies with respect to this matter has never been contested. Even when a contradicting opinion has been presented to it, the court was of the opinion that in the dispute between an expert and between an expert who is also in charge of maintaining security, the opinion of the latter should naturally be given more weight</u>. However, in the vast majority of cases the argument was decided without having to prefer one expert opinion over the other; as stated by Justice Goldberg in one of the cases: <u>'We are not of the opinion that numerical data can decide the fate of these petitions. Because even if there is a position that said measures are not at all effective, it is contradicted by respondent's position that these measures are highly effective and that had he not taken them the situation in the area would have been much worse. We are therefore concerned with two contradicting positions and different assessments of the circumstances that cannot be resolved by legal**

instances.' The above also applies to the case at hand, and even more forcefully due to the horrible novelty embedded in the deeds of fanatic suicide bombers, which we have been recently witnessing. Namely, even if we assume that in adequate circumstances the court may interfere with the assessment of the military commander as to the effectiveness of this measure or another, preferring the opinion of an expert to the contrary, the circumstance of the dispute in the case at hand do not justify such interference. Whatever the personal impression of a justice may be based on his understanding and life experience, he cannot determine, in a positive way, that refraining from demolishing the homes of suicide bombers shall not encourage potential perpetrators to overcome their last hesitations as to whether they should take part in such attacks. And as far as I am concerned it suffices that we are dealing with the unknown, while on the other hand there is a chance (even if a slight one) that taking said measure would save human lives, to prevent us from interfering with the assessment and decision of the respondent" (emphases added – N.S.)

34. I have broadly discussed the issue of deterrence in **HaMoked: Center for the Defence of the Individual**, where I have pointed at the methodological difficulty in examining the effect of deterring measures since "**successful deterrence actions leave very little, if any 'behavioral traces'. It is difficult to prove that the deterring measure taken had any effect on an occurrence which did not take place" (Alex S. Wilner, Deterring the Undeterrable: Coercion, Denial, and Delegitimization in Counterterrorism, 34(1) Journal of Strategic Studies 2 (2011));** However, I have noted further that "**Nevertheless, the existing empirical studies, specific indications from past experience together with new studies in the areas of the psychology of terror and theory of deterrence, cumulatively support, in a satisfactory manner, the deterring potential embedded in house demolition**" (paragraph 6). I have discussed there the study of Benmelech, Berrebi and Klor, who have empirically examined whether house demolition is an effective tactic in the struggle against terrorism. I noted that after data regarding demolition of perpetrators' homes were compared with data regarding suicide attacks during the second intifada, the researchers found that **"the demolition of the houses of suicide bombers and others involved in terror attacks, resulted in an immediate and significant decrease in the number of suicide attacks which were committed by perpetrators who lived in the area in which the demolition was carried out**". The following, as stated there, was the researchers' decisive conclusion: **"The results indicate that, when targeted correctly, counterterrorism measures such as house demolitions provide the desired deterrent effect…" (Efraim Benmelech, Claude Berrebi and Esteban Klor, Counter-Suicide Terrorism: Evidence From House Demolitions, NBER Working Paper Series available at: http://www.nber.org/papers/w16493 (2010)).** (paragraph 7).

35. With respect to indications from past experience I noted that support to the empirical findings is found in data from the scene regarding the atmosphere or efforts made by relatives to convince a family member to refrain from involvement in terror activity which may put their homes at risk (for instance: see Doron Almog, Cumulative Deterrence and the War on Terrorism, 34(4) Parameters 5 (2004/5)). Said specific data indicate that deterrence permeates the consciousness of the target population. I have also said that recent understandings in the area of theory of deterrence against terror should

be considered. Rascoff points at a multi-layered approach for deterrence against terror – consisting of two aspects – synchronized layering and cumulative deterrence. In his words: "… there is the possibility of synchronic layering, in which various instruments of power operating in concert may "exceed an adversary's threshold for deterrence." …Synchronic layering argues for measuring deterrence's effectiveness in the context of a complex system… Second, diachronic layering (sometimes referred to as "cumulative deterrence" argues that the overall benefit conferred by a sustained deterrence posture may exceed the sum of interventions taken over time." (Rascoff, Samuel J., Counterterrorism and New Deterrence, 89 N.Y.U.L. Rev. 830, 840 (2014)). Hence, an attempt to isolate and measure the effectiveness of the deterrence by a single step – house demolition – in and of itself, may lead to a wrong conclusion. The possibility may not be overruled that cumulatively, taken in coordination with additional steps, the demolition of the houses of terrorists will have a certain contribution, sometimes even a decisive one, to the conduct of terrorists, even though in and of itself it may not suffice" (paragraphs 8-9). **I have also reviewed studies in psychology which analyzed in depth statements of perpetrators alongside the conduct of terror organizations. It was found that terror organizations, including those who are characterized by religious extremism, respond to rational, utilitarian thinking. Thus, they may be deterred by steps which would affect the cost-benefit considerations of the terror attack**: "The centrality of the family in the eyes of those involved in terror, is clearly indicated by these studies, and supports the deterring value embedded in the demolition of a terrorist's house. As stated by Wilner: '… post 9/11 deterrence skepticism is misplaced. While it is true that deterring terrorism will be more difficult to do than deterring the Soviet Union, targeting what terrorists value, desire and believe will influence the type and ferocity of the violence they organiz' (ibid, page 31 (emphasis was added), See also pages 7, 13-14. On the "rational" behavior of terrorists see: Jocelyn J. Belanger, Keren Sharvit, Julie Caouette and Michelle Dugas, The Psychology of Martyrdom: Making the Ultimate Sacrifice in the Name of a Cause, 58(7) The Journal of Conflict Resolution 494, 496 (2014)). 11. In more detail, Perry and Hasisi prove, that despite statements made for propaganda purposes, wishing to portray suicide actions as deriving from altruistic motivations, these actions are mostly the result of a "rational" choice, which is based, on the one hand, on the expected cost, and on the other, on the expectation to be rewarded (personally, religiously and socially). Terror organizations put an emphasis on promises pertaining to the expected improvement of the condition of the terrorist's family members after his suicide: "… The martyr's family's status upgrade… both socially and monetarily. … Financial reward can be given to the family by rebuilding their homes… or in direct sums of money… .. at least 60… martyrs whose families, in exchange for the martyr's death, were given new homes adorned with the martyr's picture and name… The recruiting terror groups embellish this incentive, reassuring the suicide bombers that 'their families will be better taken care of in their absence'. …It is often this familial assistance alone that drives the suicide bomber to commit an attack…" (Simon Perry and Badi Hasisi, Rational Choice and the Jihadist Suicide Bomber, 27 Terrorism and Political Violence, 53, 55, 61, 65-66 (2015)). Suicide bombers emphasized in their video goodbyes in which they part from this world the rewards which their families would receive, as a kind of compensation for their death, and even described how the thought of the benefit which would be conferred upon their families accompanied them until almost the actual committing of the attack (ibid). Putting a special emphasis on the

terrorist's family home, the terror organizations themselves mark the "soft spot" in which deterrence may be effective". (paragraphs 10-12).

36. It emerges from all of the above, as was stated in **HaMoked Center for the Defence of the Individual**, that demolition of perpetrators' homes would add to the cost-benefit calculation made by a potential perpetrator the knowledge that his relatives would pay a price for his deeds. Said aspect of deterrence was discussed by Justice S. Netanyahu in HCJ 4772/91 **Hizran et al., v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 46(2) 150, 155, who stated as follows: **"… I do not disregard the fact that demolition of structures in their entirety would harm not only the petitioners themselves but their family members as well. But this is the consequence of the need to deter the public, for all to see and know that in their evil deeds they do not only harm an individual, put public safety at risk and subject themselves to heavy penalty, but also bring trouble on their household members…"**. However, the deterrence is not only intended to affect the perpetrator's way of thinking, but also to dissuade him from his deeds by the intervention of his family members. The family's ability to influence the terrorist is well known in the literature (Emanuel Gross, "**The Struggle of Democracy against the Terror of Suicide-Bombers – Is the Free World Equipped with the Moral and Legal Tools for this Struggle?** (The Dalia Dorner Book, 219, 246 (2009)): **"In the traditional Palestinian society, the family plays a central role in the life of the suicide bomber and significantly contributes to the development of his personality and his willingness to sacrifice his life in the name of his religion or for his people…"** Gross demonstrates and notes that the support of the family, and its display in public, serves the interests of the terror organizations – **"by widening the circle of the individuals who support the organization from the Palestinian population, and in so doing, to increase its abilities to recruit additional suicide bombers in the future**" (see also: Emily Camins, War Against Terrorism: Fighting the Military Battle, Losing the Psychological War, 15 Current Issues Crim. Just. 95, 101 (2003-2004). The family as a factor which enhances terror should be neutralized (as stated in paragraph 14 of **HaMoked Center for the Defence of the Individual**). The family should be encouraged to limit terror. The fear of having its house demolished is intended to encourage the family of the potential perpetrator to exert its influence in the right direction, to deprive him of the inner support circle, and cause him to leave terror or neglect the realization thereof. Hence, deterrence has an influence, even if to a small extent, which, under the circumstances of time and place, may be decisive; for good or for evil.

37. **Hence, given all of the above: considering the existing empirical studies pointing at potential deterrence (even if limited); the cumulative indications based on past experience; and studied in the psychology of terror and theory of deterrence, which support the ability to deter including in cases in which terror organizations having an extreme-religious inclinations are concerned; it can be established that demolition of perpetrators' homes does indeed have a deterring potential. If this is not enough, we have been presented for our (sole) review an updated professional opinion of the ISA decisively indicating that house demolition contributes to deterrence.** "The opinion that the practice of house demolition has a detrimental rather than beneficial effect on deterrence is obviously legitimate, but I, as Justice, have only what my eyes see and examine: not atmosphere but rather a professional opinion of the

Israel Security Agency" (HCJ 799/17 Kunbar v. GOC Home Front Command, paragraph 5 of my opinion (February 23, 2017)). As noted by my colleague, Justice U. Vogelman in HCJ 5839/15 Sidr v. Commander of IDF Forces in the West Bank (October 15, 2015) (hereinafter: Sidr) "In fact, if the demolition of a certain perpetrator's house deters an unknown perpetrator from harming human life, then we shall say that the chosen measure has achieved the greatest of all conceivable benefits". I was therefore convinced that it is indeed true, that the desired deterrence may be achieved by using Regulation 119, at least to a certain extent; the benefit arising therefrom is considerably higher than the possible alleged damage, which should be placed on the spectrum between speculation and assumption.

38. Indeed, more than once the authority must make hard decisions and sometimes there is ambiguity regarding the entire ramifications arising therefrom. In some cases things cannot be scientifically proved, and the authority must rely on the good judgment and professional discretion of the competent bodies. Depriving the authority of said power actually undermines 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)). The above applies in general, and particularly when due to the complex reality basic rights on the one hand and human life on the other are at stake (and see my words in **Hamed**, paragraph 1 (c)).

The argument regarding harming innocent persons

39. The petitioners – ____'s family members – argue that they were unaware of the evil intentions and deeds of which he was accused and that they are being punished although they have done nothing wrong and committed no offense. Their distress is obvious and their outcry is heard. However, this argument should be rejected. The purpose of demolition – is not to punish but rather to deter; it has already been repeatedly held by this court that "**the authority of the commander extends also to those parts of an apartment or house that are owned or used by the members of the family of the suspect or by others, with regard to whom it has not been proved that they took part in the criminal activity of the suspect or that they encouraged it or even that they were aware of it"** (**Alamarin**, page 698; and see also: **Salem**, page 359; **Abu Dheim**, paragraph 7).

40. When a deterring rather than a penalizing measure is concerned, the justification for the demolition should not be examined while giving main weight to the degree of the family members' guilt or the scope of support, encouragement and assistance provided by them to the perpetrator, in advance or in retrospect (compare: **'Aliwa**). Giving excessive weight to the issue of guilt alone, may lead to an erroneous conclusion that the demolition is ostensibly carried out for penalizing purposes and for the purpose of adequately punishing the perpetrator for his deeds, externalizing the punishment to the persons surrounding him, which is not the case; demolition is carried out solely for the purpose of causing a potential perpetrator to consider said cost which would be borne by his family members while weighing cost-benefit considerations, profit and loss, prior to committing an act of terror; and for causing his family members to take this consideration into account, such that if they become aware of his evil intentions prior to their commitment, they should dissuade him from his actions and may even hand him over to

the security forces. Needless to point out that deterrence is also required in cases in which the potential perpetrator consciously chooses not to share his murderous intentions with his family, in order to distance them from the fate of demolition; if the potential perpetrator realizes that said compartmentalization does not prevent demolition, it may dissuade him from his evil deeds (and see, for instance, the words of the scholars **Simon Perry and Badi Hasisi** in their essay **Rational Choice and the Jihadist Suicide Bomber, 27 Terrorism and Political Violence, 53, 55, 61, 65-66 (2015)** parts of which I have cited above).

41. House demolition of innocent persons – is troubling, the decision – is hard, but it is an unfortunate necessity as stated by the Deputy President, Justice E. Rubinstein, in HCJ 967/16 Harub v. Commander of Military Forces in the West Bank, paragraph 11 (February 14, 2016): "If the life of one person, the future victim, is saved, and also – indeed – the life of the terrorist who is deterred, following the deterrence achieved by the demolition (see Mesilat Yesharim, Rabbi Moshe Haim Luzato, Italy-Holland-Eretz Yisrael the 18th Century, end of chapter 19), and all the more so, if more than one is saved, since terrorists are prepared to injure many people including the elderly and young infants – then the price of the unfortunate demolition, which is an act against property rather than against a person, will not be unjustified. We are concerned with human lives, not less, and the sanctity of life should have top priority on the moral-ethical level". And as held by Justice Y. Turkel in Sa'ada (page 294): "The idea that the perpetrator's family members, who as far as is known have neither helped him nor were aware of his actions, are to bear his sin, is morally burdensome. This burden stems from an ancient principle in Jewish heritage whereby 'Fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers; a person shall be put to death for his own wrongdoing'. (Deuteronomy (24, 16 [A]); and compare the words of Justice M. Cheshin in HCJ 2722/92 Alamarin v. Commander of IDF Forces in the Gaza Strip [10], page 705-706). Our scholars of blessed memory have also reprimanded King David for having violated said principle by refusing to spare the seven sons of Saul (Shmuel B, 21, 1-14 [B]) and tried to reconcile the difficulty (Yabamot, 79, 1 [C]). However, the prospect that a demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the inhabitants of the house. There is no other way."

[The petitioners dedicated a chapter in their petition to the issue of the prohibition against collective punishment in Jewish Law. My colleague, Justice M. Mazuz, has also noted that "apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law" (Abu Jamal, paragraph 13). I have discussed this important issue in detail in HaMoked Center for the Defence of the Individual (paragraphs 16-30). Since I have discussed things in length hereinabove, I shall satisfy myself by making reference thereto).

42. Indeed, the military commander should take into account among the considerations that should be weighed by him prior to exercising the authority vested in him according to Regulation 119, the scope of involvement of the family members in the perpetrator's deeds (HCJ 1633/16 A. v. Military Commander in the West Bank Area (May 31, 2016);

Hamed, paragraph 1(7) of my opinion; paragraph 5 of the opinion of my colleague Justice (as then titled) H. Melcer), but based on this consideration alone demolition cannot be revoked, where it was held that the exercise of the authority has a deterring effect, for the purpose of preventing the next bloodshed. As was held by the President E. Hayut, a few days ago, in her decision in HCJFH 5924/20: "The rule in the matter at hand was and remains that the awareness and involvement of the family members in the perpetrator's deeds – although carrying weight in the gamut of considerations that the commander should weigh prior to exercising the authority vested in him by virtue of Regulation 119 – is absolutely not a consideration which tips the scale".

43. The above also applies to cases involving minor family members who are expected to be harmed by the demolition, in spite of the principle of the child's best interest which may indicate a certain increase in the level of the harm. In these cases too, it cannot be determined, based on said datum alone, that the military commander has exceeded the discretion vested in him. Naturally, since we are concerned with residential buildings, minors shall often be living there; and yet, the need to deter stands (**Qawasmeh**, paragraphs 21 and 26; **Abu Zeid**, paragraph 7). In the words of the then President **A. Barak**: "**We are aware of the fact that the demolition of the building shall leave petitioner 1 and her children without a roof over their heads, but this is not the purpose of the demolition order. It is not a punitive measure. Its purpose, rather, is to deter. Its consequences to the family members are harsh. The respondent is of the opinion that this measure is essential to prevent further attacks on innocent people. He maintains that pressure exerted on the families may deter the perpetrators. There is no absolute certainty that this measure is indeed effective. But considering the very few measures left to the state to defend itself against these 'human bombs' we should not belittle this measure too**" (**Janimat**, pages 653-654). Therefore, this argument should also be denied.

Interim Summary

44. According to all of the above, the sum of the principled arguments of the petitioners have been discussed and decided by judicial precedence throughout the years, including recently. The court has consistently held that the authority to use Regulation 119 and apply it within the territory of the state of Israel and in the territories of Judea and Samaria exists; that it does not constitute violation of international law; that it is used for deterrence rather than for punishment; that the effectiveness of the tool has been sufficiently substantiated; and that in the proper cases and adequate circumstances, demolition may be carried out despite the fact that the perpetrator's family members also reside in the building designated for demolition, even if it was found that the latter did not encourage him to commit his deeds and were not aware of his intentions. It is for good reason that as the rule has been repeatedly ratified over the years, requests for further hearing have been accordingly denied (see for instance: **HCJFH 360/15**; HCJFH 8988/15 **Abu Jamal v. GOC Home Front Command** (December 29, 2015); HCJFH 1773/16 **Skafi v. Military Commander for the West Bank Area** (March 2, 2016); HCJFH 2916/16 **Dwayat v. GOC Home Front Command** (April 10, 2016); HCJFH 4657/16 **D'ais v. Military Commander in the West Bank Area** (June 9, 2016); HCJFH 9324/17 **Abu Alrub v. Commander of IDF Forces in the West Bank** (November 29, 2017); HCJFH 416/19 **Jabarin v. Military Commander for the West Bank Area**

(January 17, 2019); **HCJFH 5924/20**). We should reiterate again in this context the words of Justice **M. Zilberg** in FH 23/60 **Blan v. the Executors of the Will of the Deceased Litwinsky**, IsrSC 15(1), 71, 75 (1961): "**The Israeli legislator did not want to totally relieve the Supreme Court from the burden of the precedent – and to consequently enable each one of its justices – to act as he pleases […] we must not conduct ourselves in this manner! Lest over time this judicial institution shall become in lieu of a 'court of law' into a 'court of justices', the number of whose opinions equals the number of its members**". Indeed, according to Section 20(b) of the Basic Law: The Judiciary, the Supreme Court is not bound by its precedents. Nevertheless, veering from precedents is not done as a matter of routine, but after deliberation, very carefully and after the passage of a long period of time from the date of the previous rule, for reasons of stability, certainty, consistency and continuity. As noted by Justice **A. Barak** (as then titled) in LCA 1278/92 **Bouskila v. Zemach**, IsrSC 46(5) 159, 172 (1992): "**Veering from precedent shocks and harms the legal system. The public and the authorities relied on the existing law, and built their plans around it. Veering from precedent violates the principle of reliance and the need to maintain certainty and security. Existing and known law is to be preferred over the uncertainty involved in changes made therein for improvement […] Veering from precedent harms consistency which is based on justice, fairness and equality. It harms the continuity of the system and the need to integrate the present with the past in view of the future. The Justice does not integrate into the texture of the existing law but rather breaks the fence and acts as he pleases […] proper and effective operation of "judicial services" justifies the binding force of the precedent without veering therefrom. Judicial work shall not be possible and efforts of generations shall be lost if each judicial decision would be re-examined each time a-new. But beyond that, on many occasions the 'deviation' from previous rule should be made by way of legislation while judicial deviation shall be regarded as violation of the principle of separation of powers. Too many deviations shall eventually affect public trust and respect for the judiciary.**"

I shall now proceed to examine petitioners' specific arguments.

The Issuance of the order

45. The petitioners argue that the proceeding by which the confiscation and demolition order had been issued was flawed. It was argued, inter alia, that the notice regarding the intention of the military commander to confiscate and demolish the house did not state that it was made for deterrence purposes (although the military commander used to include such statement in notices given by him in the past (sample of such notice was attached to the petition)); that the petitioners were not given enough time to file an appeal; that not all documents pertaining to ____ 's interrogation were attached to the response to the appeal, and that it was not clarified how the demolition would be carried out, and no engineering opinion was provided.

46. Indeed, the military commander would have been better off had he stated in his notice the reason for using said measure and things should be done in the future as they were done in the past, but it does not invalidate the lawfulness of the order. The purpose of exercising the authority according to Regulation 119 is well known by all, and the above

applies even more forcefully presently, after a petition was filed, a response was submitted and a hearing was held.

47. As to the period of time given to file an appeal, I am of the opinion that the military commander gave the petitioners sufficient time for filing the appeal and for filing the petition and he has also accepted petitioners' request for extension prior to their appeal.

48. The argument that all relevant materials have not been provided to the petitioners should not be accepted as well. As noted above, an indictment had been filed against ____ prior to the notice of the intention to demolish the residential home, and it may be assumed that simultaneously with the filing of the indictment, all of the investigation material has been transferred to ____ and his counsels. With respect to the method of demolition – indeed, here too the petitioners should have been advised of the manner by which the demolition shall be carried out, and generally, in the absence of any preclusion, an engineering opinion should have been provided to them. However, it should be remembered that the intention in the case at hand is not to demolish a specific part of an apartment or a specific apartment in a residential building, in which case providing information regarding the contemplated demolition method is of great importance (due to the understandable concern of the owners of adjacent apartments that their property would also be damaged), but rather to demolish a residential building in its entirety. In any event, in view of the fact that the engineering opinion was attached to respondents' response, the need to continue discussing this issue no longer exists.

The proportionality of the order

49. The petitioners argue that the authority was exercised disproportionately since the harm which shall be caused to household members, for whose involvement in the deeds of the father of the family there is no evidence, is very severe. According to the petitioners, there is no justification to demolish their home only due to ____ 's deeds, and there is certainly no reason for taking such a drastic and draconian step aimed at demolishing the entire home. The demolition shall also cut-off the family's livelihood since petitioner 1 operates a kindergarten in her home. Beyond that, the petitioners argue that the very exercise of the authority is erroneous and flawed in view of ____ 's mental condition.

50. As specified above, the military commander is vested with the authority to issue confiscation and demolition orders for perpetrators' homes by virtue of Regulation 119, but he must exercise his above authority proportionately. Among other things the military commander is required to consider the severity of the deeds attributed to the perpetrator; the strength of the evidentiary infrastructure which exists against him; and the degree of involvement of the household members in the deeds committed by him. In addition, he should examine whether other measures are available, which may facilitate the realization of the deterring purpose of Regulation 119, while causing the innocent minimum harm.

51. As I have noted above, with all the difficulty involved therein, the exercise of Regulation 119 often results in the infliction of harm on the innocent – those living together with the perpetrator in his home – otherwise the entire purpose of deterrence which is aimed at dissuading potential perpetrators from committing acts of terror by considering the cost

which shall be paid by their family members for their evil acts, even if the latter are not aware of their intentions - would have been undermined. In addition, it is aimed at motivating family members to prevent potential perpetrators from committing their evil intentions, if and when they become aware in advance of their murderous plans.

52. Exercising the authority – is hard, and the judicial decision – is burdensome; but it is our duty. There is no dispute that the residential building is the home of ____, who had resided therein with his family members for many years, as stated by petitioner 1 in her interrogation: "**____ is the home owner, he built the house about 23 years ago and has been living there ever since. He is the one who started building the second floor to expand the house for the future use of the household members […] only the immediate family lives in the building**". The severity of the act committed by ____ is widely known, an evil, devastating act, the murder of an innocent man who was walking down the street, just because he was Jewish, and the above, in ____'s words – "**for Palestine, the Palestinian people, al-Aqsa Mosque and Allah**" and "**to make a contribution to the Palestinian people**". He spoke and acted. He had stabbed ___ ___ with a knife three deep wounds which caused his death, left him bleeding, and intended to continue stabbing and killing additional Jewish Israelis (as stated in the indictment). Such horror requires effective deterrence which shall assist to prevent acts of this sort from recurring, since regretfully, there are additional potential perpetrators such as ____.

53. According to the above discussed case law, the deterring purpose of Regulation 119 may also justify the exercise thereof in cases in which the other family members, living with the perpetrator in the house, are not involved in his actions (see: **Alamarin**, page 698; **Salem**, page 359; **Janimat**, page 653-654; **Abu Dheim**, paragraph 7; **Abu Baher**, paragraph 17 of the opinion of my colleague Justice **Y. Willner**), and even when the family members include minors who are expected to be harmed by the demolition (see: **Qawasmeh**, paragraphs 21 and 26; **Abu Zeid**, paragraph 7). As aforesaid, recently it was held by Justice **E. Hayut** in **HCJFH 5924/20** that: "**The rule in the matter at hand was and remains that the awareness and involvement of the family members in the perpetrator's deeds – although carrying weight in the gamut of considerations that the commander should weigh prior to exercising the authority vested in him by virtue of Regulation 119 – is absolutely not a consideration which tips the scale**".

54. Against the backdrop of the above said, on both the factual and legal levels, the decision of the military commander to demolish the building satisfies the proportionality requirements established by law. As aforesaid, there is a rational connection between the purpose – deterrence, and the means – demolition; the scope of the harm was established, in the opinion of the military commander, in the necessary degree to obtain deterrence (the demolition does not exceed the limits of the perpetrator's home, and it solely affects his immediate family); the demolition of the house shall cause damage to property but it is expected to help prevent harm to the life and limb of innocent people.

55. The argument that the demolition shall violate petitioner 1's freedom of occupation does not change said result. ____ had built the residential building about 23 years ago, acted therein throughout the years as its owner, and has even started expanding it, building on top of it an additional floor for the family's use. ____'s connection to the house is therefore strong and clear. In these circumstances, the additional uses of the house cannot

prevent its demolition. The main harm caused to the family members is the mere demolition of the house; the harm caused to their livelihood is secondary. Since it was found that the main harm satisfies the proportionality tests, the secondary harm, ancillary thereto, also satisfies them. In addition, petitioner 1's freedom of occupation was not directly affected, but rather the manner by which she can realize her occupation. If until now petitioner 1 could operate the kindergarten in her home, from now on she shall be obligated to do it elsewhere (petitioner 7 lives about 30 meters away from ____ 's house (paragraph 20 of the petition) and the married daughter of ____ and petitioner 1 lives in another house in the same village).

56. Petitioners' argument concerning ____ 's mental-medical precondition should also be denied. For the purpose of using the authority according to Regulation 119, it is sufficient to have acceptable administrative evidence, substantiating the perpetrator's guilt (see: HCJ 1336/16 **Atrash v. GOC Home Front Command** (April 3, 2016)): "**The rule is that administrative evidence can sufficiently justify the exercise of the authority according to Regulation 119 of the Defence Regulations, and there is no need to wait for an indictment to be filed or for a conviction**" (**Qawasmeh**, paragraph 27; see also **Awawdeh**, paragraph 25).

57. The indictment which was filed against ____, in which he was accused of having committed murder under aggravated circumstances and more, attests to significant evidentiary infrastructure, substantiating reasonable grounds for his conviction in having committed the appalling murder. Prior to the filing of the indictment, the argument concerning the existence of mental-medical precondition was considered – considered and rejected – after it was found that it had no merit. The petitioners rely on a medical record written on September 6, 2020, after the attack, only one day before the indictment was filed, claiming that ____ has been suffering from a mental-medical precondition as of 2017. In addition, after the hearing the respondents submitted interrogations of two of ____ 's siblings. According to the siblings, ____ has been suffering from mental problems for a number of years. One of them has even argued that ____ had been treated about a year earlier by a psychiatrist in Jordan. Notwithstanding the above, not even one 'real time' medical record was presented to us, proving the truthfulness of the argument. Teaching us, ostensibly, that it is not true. The Prozac prescription and the photographs of the medication bottles attached by the petitioners also fail to support their arguments. There is a great distance between a Prozac prescription and the conclusion that ____ acted in a psychotic condition, stemming from a mental illness. The respondents, on their part, attached to their response an initial psychiatric opinion prepared with respect to ____ on August 30, 2020, at the Shalvata mental health center, whereby – "**No formal evidence was found indicating a psychotic condition or major affective disorder… the above understands that he is in the midst of legal proceedings, that he would be punished if found guilty and that he is represented by an attorney who is obliged to defend him. In view of the above the impression is that he understands the legal proceeding and is capable of standing trial**". During ____ 's interrogations no evidence of active psychotic condition or major affective disorder was found. ____ stated in his interrogations that he was a healthy person, that he was not mentally ill and that he did not require mental treatment.

58. At the end of the hearing we heard with pain the words of the widow of the late ___ ___ ___ of blessed memory. I wish that she knows no more sorrow. It should be emphasized. Our judgment, as aforesaid, is not aimed at punishing the perpetrator ____, but rather to deter potential perpetrators like him from committing their evil intentions. In conclusion, we found no reason to interfere with the decision of the military commander. I shall therefore propose to my colleagues to deny the petition.

Justice

Justice Y. Willner

I join the comprehensive opinion of my colleague, Justice **N. Sohlberg**.

It cannot be denied that the harm caused by Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) to the property and home of innocent family members, due to the murderous acts of the perpetrator who is their family member – is harsh. But the harm caused to the lives of innocent terror victims – men, women and children – is harsher. Regretfully, the state of Israel has had to struggle throughout its existence with recurring waves of terror. Hundreds and thousands have fallen victim, having done nothing wrong, only due to the fact that they were Israeli citizens. In this complex and harsh reality, the state has the right, and even the obligation, to protect the safety and security of its citizens, inter alia, by creating firm and clear deterrence against additional acts of terror and murders by exercising Regulation 119 in a proportionate manner. Said regulation is therefore one of the clearest manifestations of the principle of self-defending democracy, thus constituting "an integral part of the democratic system, which at times must protect its continued existence" (see: HCJ 6905/18 **Naji v. Military Commander for the West Bank Area**, paragraph 22 (December 2, 2018)).

With respect to the case at hand, it should be added and noted that a review of the privileged opinion which was presented to us for our review shows that the use of Regulation 119 does indeed clearly contribute to the deterrence of potential perpetrators. In view of all of the above, the use of said Regulation, being an unfortunate necessity, satisfies the proportionality tests. It is certainly so in view of the harsh circumstances of the case at hand, in which ___ ___ ___ of blessed memory was murdered in cold blood, leaving behind a widow and orphans.

We send our condolences to the deceased's family and all those who loved him.

I join, as aforesaid, the opinion of my colleague, Justice **N. Sohlberg**.

Justice

Justice M. Mazuz:

1. I do not share the position of my colleagues and their conclusion.

2. As I have noted in the past, the implementation of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) raises a host of principled questions relating to the validity of Regulation 119. These questions relate to aspects of public international law – mainly whether the Regulation is contrary to a succession of provisions of international humanitarian law, primarily the prohibition against collective punishment entrenched in Article 50 of the Regulations annexed to the Hague Conventions respecting the Laws and Customs of War on Land, 1907, and in Article 33 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, as well as the prohibition against confiscation and destruction of property of the protected population entrenched in Article 23(g) of the Hague Regulations and Article 53 of the Geneva Convention - and to aspects of Israeli constitutional and administrative law, with respect of which a comprehensive and up-to-date discussion has not yet been held in my opinion. In addition, Regulation 119 also raises difficult questions regarding the limits of the discretion while exercising the authority (see: HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015); HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015), hereinafter: **Abu Jamal**; HCJ 6745/15 **Abu Hashiya v. Military Commander for the West Bank Area** (December 1, 2015, hereinafter: **Abu Hashiya**; HCJ 1630/16 **Zakariya v. Commander of IDF Forces** (March 23, 2016), hereinafter: **Zakariya**; HCJ 1125/16 **Mar'i v. Commander of IDF Forces in the West Bank** (March 31, 2016), hereinafter: **Mar'i**; HCJ 8161/17 **Aljamal v. Commander of IDF Forces in Judea and Samaria** (November 7, 2017), hereinafter: **Aljamal**; HCJ 8786/17 **Alrub v. Commander of IDF Forces** (November 26, 2017), hereinafter: **Alrub**; HCJ 974/19 **Dhadha v. Military Commander for the West Bank Area** (March 4, 2019), hereinafter: **Dhadha;** and recently: in HCJ 4853/20 **Abu Baher v. Military Commander for the West Bank Area** (August 10, 2020), hereinafter: **Abu Baher**).

3. Indeed, on the question of the **validity** of Regulation 119 the court has taken until now a consistent position whereby the Regulation is in force, alongside comments of some of the Justices, including the undersigned, regarding the need to re-visit this issue in view of changes which have taken places in international law and in Israeli constitutional and administrative law throughout the years affecting the above issue (see the judgments specified in paragraph 2 above, and the judgments mentioned in paragraph 19 of the opinion of my colleague Justice N. Sohlberg).

4. On the other hand, with respect to the issue of the **discretion and criteria** which should be applied while exercising the authority, it is apparently difficult to point at a clear or consistent rule.

   Indeed, everybody agrees, as a starting point, that the authority vested in the military commander by virtue of Regulation 119, should be exercised by him with great restraint, carefully, reasonably and proportionately. Since the court began discussing the exercise of the authority according to Regulation 119, it has repeatedly and consistently emphasized that the exercise of the authority according to Regulation 119 requires taking a very careful and limited approach, particularly after the basic laws had been enacted, since the exercise of said authority involves severe violation of a host of fundamental rights, including harm to property and violation of human dignity and a succession of

rights deriving from human dignity (see for instance: HCJ 361/82 **Hamri v. Commander of the Judea and Samaria Area**, IsrSC 36(3) 439, 443 (1982); HCJ FH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 489 (1996); HCJ 8084/02 **Abasi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/14 **Awawdeh v. Military Commander of the West Bank Area, paragraph 17 (**July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014); HCJ 7040/15 **Hamed v. Military Commander of the West Bank Judea and Samaria Area**, paragraph 23 (November 12, 2015); **Abu Hashiya**, paragraph 12 of the opinion of the Deputy President and paragraph 5 of my opinion; **Abu Jamal**, paragraph 8 of my opinion; **Mar'i**, paragraph 8 of the President's opinion; and HCJ 6905/18 **Naji v. The Military Commander**, paragraph 27 (December 2, 2018)).

However, despite the same starting point as aforesaid, in fact, different approaches and views have been expressed by the court in its judgments over the years with respect to the criteria pursuant to which the reasonableness and proportionality of the exercise of the authority according to Regulation 119 should be examined, and with respect to the balancing of the considerations and values involved in the implementation of said authority, and on this issue I disagree with the main principles underlying the holding of my colleague, Justice Sohlberg in the case at hand.

5. The main issue in the case at hand concerns the question of harm caused to innocent persons, when the perpetrator is killed or captured and stands trial, and the sanction of house confiscation and demolition is actually exercised against his family members, while no involvement, knowledge or support, in advance or in retrospect, in the perpetrator's deeds is attributed to them. This issue raises the argument of "collective punishment", contrary to the rules of international law, as well as the great difficulty, from the aspect of Israeli constitutional and administrative law, of harming innocent family members.

With respect to this issue there is indeed no dispute that while exercising the authority according to Regulation 119, the harm caused to innocent family members should be taken into consideration, and that balancing should be made between the deterring purpose underlying the exercise of the authority and the harm caused as a result thereof to family members who were not involved in the perpetrator's deeds (see recently HCJ FH 5924/20 **Military Commander for the Judea and Samaria Area v. Abu Suhila** (October 8, 2020). However, with respect to the relative weight which shall be given to these considerations, and hence, to the result of the balancing, there was and still remains a sharp dispute between the Justices of this court and the judgments mentioned there. I have expressed my own view on this issue on many occasions in the past (in **Abu Jamal**, paragraphs 7-14; in **Zakariya,** paragraph 4; in **Mar'i** paragraphs 10 and 14; in **Aljamal**, paragraphs 5-6; in **Alrub,** paragraphs 9-11; in **Dhadha**, paragraphs 8-9; and recently in **Abu Baher**, paragraphs 4-7). I have accordingly noted, *inter alia*, in **Abu Jamal** as follows:

> "7. The conscious and deliberate infliction of harm on innocent people, and even more so, a severe violation of their constitutional rights, only for other potential perpetrators "to see and beware", is

inconceivable conduct in any other context. The consideration of **deterring others** is indeed recognized as one of the punitive principles in criminal law but it is applied only against a **convicted perpetrator** rather than against an innocent third party (section 40G of the Penal Law, 5737-1977). This difficulty ("collective punishment") underlies, inter alia, the question of the lawfulness and constitutionality of the mere use of Regulation 119…

9. … the issue of causing harm to innocent people has been discussed more than once in the judgments of the court in the context of the exercise of Regulation 119. The court has frequently reiterated that the harm caused to innocent family members should be taken into consideration and that the purpose for which the power is exercised should be balanced against the harm caused to the family members (HCJ 987/89 **Kahawaji v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 44(2) 227 (1990); HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 46(3) 693 (1992), hereinafter: **Alamarin**; HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014), hereinafter **HaMoked**). It was held that weight should be given to the fact that this concerned a "severe violation of the fundamental rights of the uninvolved inhabitants of said houses" on the grounds that "the demolition or sealing of a house in which lives a person who has not sinned is contrary to the right to own property, the right to dignity and even the right to housing which is derived there-from". It was also noted that such violation "cannot be reconciled with concepts of justice and basic moral principles, including the principle according to which "The son shall not bear the guilt of the father, nor will the father bear the guilt of the son." (**Qawasmeh,** paragraph 21). In certain cases it was emphasized that only in "special cases" the sanction of demolition could be justified due to the harm caused to the uninvolved inhabitants of the house (HCJ 361/82 **Hamri v. Commander of Judea and Samaria Area**, IsrSC 36(3) 439 (1982), hereinafter: **Hamri**; HCJ 5510/92 **Turkman v. Minister of Defense**, IsrSC 48(1) 217 (1993), IsrSC 48(1) 217 (1993)…

13. I am of the opinion that the exercise of the power according to Regulation 119 should be examined in view of the fundamental principles which derive from the mere fact that the state of Israel is a **Jewish state** ("a man shall be put to death for his own sin") and a **democratic state** (compare: HCJ 73/53 "**Kol Ha'am" v. Minister of the Interior**, IsrSC 7, 871 (1953)), and in view of **the principles of our constitutional law**, mainly from the aspects of **proportionality**, as well as in view of universal values. I am of the opinion that all these principles **inevitably lead** to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. Needless to point out that apparently

> the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law.
>
> In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of right, act in excess of authority, unreasonableness or disproportionality…" (all emphases appear in the original).

And see also the words of Justice M. Cheshin in HCJ 6026/94 **Nazal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48 (5) 338, 351-352 (1994), and HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997); the words of Justice U. Vogelman in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraphs 5-6 (October 15, 2015); and the words of Justice G. Karra in **Abu Baher**.

6. The petitioners before us are the perpetrator's wife and five daughters, four of whom are minor, all living in the house against which the confiscation and demolition order was issued. The respondents do not attribute to the wife and her daughters any involvement in the evil deeds of the father of the family – neither by assisting him, nor by being aware of his intention to take action or by supporting his actions in retrospect. There is no doubt that the act attributed to the perpetrator is a severe and horrendous crime. However, we are not concerned with the perpetrator himself, who was captured and stands trial for murder under aggravated circumstances, and is expected to serve long incarceration sentences if convicted. Hence, the demolition of the house shall primarily harm the perpetrator's wife and daughters who continue to reside therein, leaving them homeless. Under these circumstances I am of the opinion, as aforesaid, that sanction directed at harming the innocent, cannot stand.

7. In conclusion a few short comments concerning the purpose of deterrence.

Firstly, as I have already noted in the past, the determination that sanction according to Regulation 119 constitutes a deterring rather than a punitive measure, is not free from doubt (see **Aliwa**, paragraph 8 of my judgment).

Secondly, indeed the purpose of the sanction according to Regulation 119 is to deter, but the question whether the implementation of the sanction can achieve said purpose is not free from doubt. Many respected members of the security establishment have doubted, throughout the years, the deterrence created by Regulation 119. It should be reminded that a professional committee headed by Major General E. Shani, which had been appointed at the time by the Chief of the General Staff to examine this issue, recommended in a report submitted by it in January 2005, to stop the demolition policy, having concluded that its effectiveness as a deterring measure had not been proved, excluding in a relatively small number of cases, and that the harm caused by the demolitions exceeded their benefit in view of the hatred and hostility that this severe measure causes among Palestinians. Said recommendation was adopted by the military's Chief of General Staff and the Minister of Defense, and a decision was made to freeze the use of Regulation 119. This freeze was upheld for almost a decade, excluding a few exceptions.

Even the professional opinion of the security bodies presented to us regarding the deterring effect of said measure points out that alongside cases indicating that the exercise of the house demolition authority creates deterrence, in certain cases it was found that it did not affect perpetrators and there are also cases in which it constituted an incentive to carry out an attack out of feelings of revenge.

Thirdly, and in my eyes most importantly, even if the sanction according to Regulation 119 can deter potential perpetrators, I do not think that it can justify harming the innocent. As I have already noted above, "Consciously and deliberately inflicting harm on the innocent, let alone severely violating their constitutional rights, only as 'a lesson for other potential perpetrators to see', is inconceivable in any other context". Hence, it is one of the situations in which the end does not justify the means (see also my comment in Abu Jamal regarding the anti-deterring aspect when innocent persons are involved – Ibid., paragraph 17).

Justice

It was accordingly decided by a majority opinion as specified in the judgment of Justice **Noam Sohlberg** against the dissenting opinion of Justice **M. Mazuz**.

Given today, 7 Heshvan 5781 (October 25, 2020).

Justice Justice Justice