



HCI 316/03

1. Muhammad Bakri
2. Forum of Documentary Producers
- v.
1. Israel Film Council
2. Ministry of Science, Culture and Sport
3. Yitzhak Busidan (father of the late Amit Busidan)
4. Leah Berr (mother of the late Dror Berr)
5. Pninah Yaskov (widow of the late Avner Yaskov)
6. Eva Meislish (mother of the late Dani Shmuel Meisliash)
7. Solomon and Simcha Azuri (parents of the late Eyal Azuri)
8. David Zimmerman (father of the late Eyal Zimmerman)
9. Amnon Chava (father of the late Menashe Chava)
10. Rosaline and Salomon Ezra (parents of the late Gad Ezra)
11. Aryeh and Tziporah Weiss (parents of the late Shmuel Weiss)
12. Rina and Mark Rabinson (parents of the late Matanyah Rabinson)
13. Simcha and Pninah Melik (parents of the late Gedaliah Melik)

14. Gadi and Bernice Ya'akov (parents of the late Avihu Ya'akov)
15. Michal Arazi (mother of the late Tiran Arazi)
16. Shlomo Alshochat (father of the late Ronen Alshochat)
17. Mazal, Ami and Chagai Tal (parents and brother of the late Roey Tal)
18. Dr. David Tzangan
19. Zev Iluz
20. Barak Alfi
21. Baruch Bachar
22. Avraham Gal
23. Ron Teicher
24. Yisrael Kaspi
25. Rafi Lederman
26. Sagi Marak
27. Eli Proz
28. Guy Friedman
29. Aryeh Kadosh
30. Amichai Kadron
31. Avner Kinnal
32. Maron Shtteter

The Supreme Court Sitting as the High Court of Justice  
[November 11, 2003]  
*Before Justices D. Dorner, A. Procaccia, and A. Grunis*

Petition for an *Order Nisi*.

**Facts:** After IDF operations against the terror infrastructure in Jenin in April 2002 (“Operation Defensive Wall”), petitioner 1 filmed the responses of local Palestinians and edited them into the film “Jenin, Jenin.” After advance screenings, both domestically and abroad, and in anticipation of the film’s domestic commercial screening, petitioner requested the approval of the Israel Film Council. The Council denied its approval. Petitioners claim that this decision violates their constitutional rights and Israeli administrative law.

**Held:** The Court held that freedom of speech constitutes one of the fundamental principles of a democratic society. Even so, the freedom of speech is not an absolute right and, under certain conditions, it may be infringed. The Court decided that, under the circumstances, the decision of the Israel Film Council unlawfully infringed the constitutional rights of the petitioners.

**Basic Laws Cited:**

Basic Law: Human Dignity and Liberty

**Statutes Cited:**

Film Ordinance of 1927

**Israeli Supreme Court Cases Cited:**

- [1] HCJ 73/53, *Kol Ha'am v. Minister of the Interior*, IsrSC 7 871
- [2] FH 9/11, *Israel Electric v. Ha'aretz Publishing*, IsrSC 32(3) 337
- [3] HCJ 9723/01, *Levi v. Dep't of Foreign Worker Permits, Director of Industry and Services*, IsrSC 57(2) 87
- [4] HCJ 399/85 *Kahane v. The Board of the Broadcasting Authority*, IsrSC 41(3) 255
- [5] HCJ 6126/94 *Senesh v. Broadcasting Authority*, IsrSC 53(3) 817
- [6] HCJ 806/88 *Universal City Studios v. Israel Film and Theater Council*, IsrSC43(2) 22

- [7] HCJ 7144/01 *Gush Shalom v. The Broadcasting Authority*, IsrSC 56(2) 887
- [8] HCJ 2888/97 *Novick v. The Second Television and Radio Authority*, IsrSC 51(5) 193
- [9] CrimA 2831/95 *Alba v. The State of Israel*, IsrSC 50(5) 221
- [10] HCJ 2137/98 *Elias v. Chairman of the Board of the Broadcasting Authority* (unreported decision)
- [11] CA 214/89 *Avneri v. Shapira*, IsrSC 43(3) 840
- [12] HCJ 4804/94 *Station Film v. Israel Film Council*, IsrSC 50(5) 661
- [13] HCJ 14/86 *La'or v. Israel Film and Theater Council*, IsrSC 41(1) 421
- [14] F. HCJ 4466/94 *Nosyabe v. Minister of Finance*, IsrSC 49(4) 68
- [15] HCJ 7852/98 *Arutzie Zahav v. Minister of Communications*, IsrSC 53(5) 423
- [16] HCJ 4644/00 *Yaforah v. The Second Television and Radio Authority*, IsrSC 54(4) 178
- [17] HCJ 4541/94 *Miller v. Minister of Defense*, IsrSC 49(4) 94
- [18] HCJ 5016/96 *Horev v. Minister of Transportation*, IsrSC 51(4) 1
- [19] HCJ 1715/97 *Israel Investment Managers v. The Minister of Finance*, 51(4) 367
- [20] HCJ 1715/97 *Indoor v. The Mayor of Jerusalem*, IsrSC 57(2) 157
- [21] HCJ 606/93 *Kidum Yezumot v. The Broadcast Authority*, IsrSC 48(2) 1
- [22] HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Elections for the Sixteenth Knesset*, IsrSC 57(2) 62
- [23] HCJ 1/81 *Shiran v. The Broadcasting Authority*, IsrSC 35(3) 365
- [24] EA 2/84 *Neiman v. The Central Elections Committee for the Eleventh Knesset*, IsrSC 39(2) 225
- [25] CrimA 697/98 *Sorotzkin v. The State of Israel*, IsrSC 52(3) 289
- [26] HCJ 206/61 *Israeli Communist Party v. The Mayor of Jerusalem*, IsrSC 15 1723
- [27] HCJ 807/78 *Ein Gal v. The Israel Film and Theater Council*, IsrSC 33(1) 274

- [28] HCJ 146/59 *Cohen v. Minister of the Interior*, IsrSC 14 283
- [29] HCJ 381/66 *The Attorney-General v. The Israel Film and Theater Council*, IsrSC 20(4) 757
- [30] HCJ 7128/96 *Temple Mount Faithful v. The Government of Israel*, IsrSC51(2) 509
- [31] HCJ 953/89 *Indoor v. Mayor of Jerusalem*, IsrSC 45(4) 683
- [32] HCJ 351/72 *Keinan v. The Film and Theater Council*, IsrSC 26(2) 811

**Australian Cases Cited:**

- [33] *Tobin v. Jones* (2003) FCAFC 137
- [34] *Archbishop of Melbourne v. The Council of Trustees of the National Gallery of Victoria* (1997) 96 A CRIM R 575

**United States Cases Cited:**

- [35] *Abrams v. United States*, 250 U.S. 616 (1919)
- [36] *Whitney v. California*, 274 U.S. 357 (1927)
- [37] *Dennis v. United States*, 341 U.S. 494 (1951)
- [38] *Cohen v. California*, 403 U.S. 15 (1971)
- [39] *Stromberg v. California*, 283 U.S. 359 (1931)
- [40] *Terminiello v. Chicago*, 337 U.S. 1 (1949)
- [41] *Virginia v. Black*, 123 S.Ct. 1536 (2003)
- [42] *Collin v. Smith*, 578 F.2d 1197 (1978)
- [43] *Smith v. Collin*, 439 U.S. 916 (1978)
- [44] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)
- [45] *Street v. New York*, 394 U.S. 576 (1969)
- [46] *Schenk v. United States*, 249 U.S. 47 (1919)

**English Cases Cited:**

- [47] *Verrall v. Gt. Yarmouth B.C.* [1981] Q.B. 202 (C.A.)
- [48] *Derbyshire CC v. Times Newspapers Ltd* [1993] 1 All E.R. 1011 (H.L.)
- [49] *Hector v. A-G of Antigua and Barbuda* [1990] 2 All E.R. 103 (P.C.)
- [50] *R. v. Home Secretary, ex parte Brind* [1991] 1 A.C. 696

**Israeli Articles Cited:**

- [51] Mordechai Kremnitzer, *The Boundaries of Freedom of Expression*, *The Seventh Eye* 26-27 (January-February 1996).  
[52] D. Stattman, *Offense to Religious Feelings, in Multiculturalism in a Jewish and Democratic State: A Book in Memory of Ariel Rosen-Tzvi* 133 (1988)

**Foreign Books Cited**

- [53] M.B. Nimmer, *On Freedom of Speech* (1992)  
[54] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (1993)  
[55] M. Chesterman, *Freedom of Speech in Australian Law – A Delicate Plant* (2000)  
[56] A.M. Dershowitz, *Shouting Fire – Civil Liberties in a Turbulent Age* (2002)

**Miscellaneous**

- [57] 8(2) Halsbury, *The Laws of England* (4<sup>th</sup> ed., 1996)  
[58] P. Lahav, *Freedom of Expression During National Security Crises* (1973)

**Jewish Law Sources Cited:**

- [59] Maimonides, *Laws of Torah Study*, Ch. 1,2  
[60] Babylonian Talmud, Tractate Nedarim 81b  
[61] Babylonian Talmud, Tractate Eruvin 13b

For petitioner—Avigdor Feldman

For respondents 1 and 2—Dina Zilber

For respondents 3-17—Ilan Bombach; Yariv Ronen

Respondents 18, 24 and 25 argued *pro se*.

**JUDGMENT**

## **Justice D. Dorner**

*With intelligence shall man distinguish  
between the true and the false.*

Maimonides, Guide to the Perplexed,  
I:2 [59]

### *Facts, Proceedings and Arguments*

1. On Passover eve, March 27, 2002, there was a terror attack at the Park Hotel in Netanya. A terrorist entered the hotel dining room—filled with almost 250 women, men and children in the middle of the Passover feast—and detonated a bomb that he had strapped to his body. The dining room was destroyed. Nineteen guests were killed on the spot. Eleven died later. One hundred and sixty were injured.

Two days later, the Israeli Defense Forces (“IDF”) began “Operation Defensive Wall.” The operation was intended to uproot the terrorist infrastructure responsible for the unprecedented wave of terror attacks that had struck Israel. On April 3, 2002, IDF forces entered the Jenin refugee camp, which served as a central base for organizing terror attacks, and from which many suicide bombers had been sent to commit such attacks all over Israel.

After the civilian population was warned to evacuate, IDF forces engaged in intense house-to-house combat. This was one of the IDF’s most difficult battles in the area. Soldiers were fired on from every direction, booby traps were placed in their way, bombs were detonated around them. Armed Palestinians hid among civilians, a few thousand of which remained in the camp when the fighting began. These armed men fought from civilian homes and from civilian facilities. The IDF attempted to avoid injuring civilians. It did not make use of jets or artillery. Tanks and military helicopters, however, were utilized. After a force of reserve soldiers was

ambushed, leaving thirteen soldiers dead, it was decided that bulldozers would be used to destroy the houses used in the course of combat. During the battle, 23 IDF soldiers were killed and about 60 were wounded. According to IDF data, the Palestinians suffered 52 dead, half of whom were civilians. Serious damage was caused to property.

2. During the warfare and for several days following, journalists were forbidden from entering the camp. It was only possible to learn of what had occurred by seeing the battlefield itself, and from testimony of the people involved. This media blackout contributed to the conflict regarding the events.

The report of Human Rights Watch, for example, claimed that severe violations of human rights had occurred in the camp, including mass detentions, the denial of medical assistance to the wounded, and the destruction of civilian property. Nevertheless, the report repudiated the claim—which had spread among the local Palestinian population and around the world—that the IDF had slaughtered the residents of the camps and carried out systematic executions. Amnesty International and the Secretary General of the United Nations released findings similar to those of Human Rights Watch. In response, the IDF released a report that emphasized the restraint it had displayed and its efforts to prevent injury to civilians, despite the harm that these efforts may have caused to its soldiers. The report underscored that medical and humanitarian assistance was offered to the residents of the camp, even during the course of warfare itself. It also claimed that at least half of the Palestinian dead were fighters in terror organizations.

3. It is clear that the traumatic experiences of the Jenin refugee camp impressed themselves upon the minds of the IDF soldiers who fought there, their families, and upon the minds of the residents of the camp. The events attained mythic stature among Palestinians, and this influenced the way in which the events were subsequently portrayed. After armed combat came to an end, the struggle for public opinion began, both in Israel and abroad.

4. Petitioner 1, a resident of the village of Baana in the Galilee, entered the refugee camp, at the end of April 2002, accompanied by a film crew. He filmed the reactions of Palestinian residents to the events, and edited them into the film “Jenin Jenin.” From the outset, petitioner declared that he did not attempt to present the Israeli position or present a balanced portrayal of the events. His goal was to present the Palestinian story.

Advance screenings of the film were shown in Tel Aviv and Jerusalem, and the film was screened in foreign countries as well. In anticipation of its commercial screening in Israel, the film was submitted, as required by the Film Ordinance of 1927, for approval to the Israel Film Council. The Council, which was then subject to the Ministry of Science, Culture and Sport, held hearings concerning the film on November 18, 2002 and December 23, 2002.

The film left a difficult impression upon the Council members. One asserted that it was a “repulsive propaganda film,” “every second of which oozes venom.” *See* The Meeting Protocol, November 18, 2002, at 4. Council member Yechiel Guttman even stated that “the sins of the Gestapo in the concentration camps will seem as white as snow in light of the description of IDF activities in the movie.” *Id.* at 2.

A majority of Council members decided that the film should not be approved for screening. A minority of dissenting Council members suggested that the screening be permitted, but that it either be accompanied by slides presented by an IDF spokesman, or that it be permitted exclusively for viewers 18 and older. The Council, in a letter to the petitioner, listed the following reasons for its decision:

1. It is a distorted presentation of the events, under cover of documentary truth, which may mislead the public.
2. It is a propaganda film that presents a one-sided version of events, the position of a side that Israel is currently in

a state of war with. It is not appropriate that the Council should aid and approve this screening.

3. It is a film which severely offends the feelings of the public which may mistakenly think that IDF soldiers regularly and systematically commit war crimes, and this is completely at odds with the truth and the facts uncovered by investigations of the IDF and international bodies.
4. The presentation of the events borders on incitement, even to the point of delegitimizing the existence of the State of Israel.
5. The fundamental principles of a democracy—a democracy that does not wish to commit suicide—demands that we refrain from approving the screening of the film.

5. The petition before us is directed against the decision of the Council. An order interim was issued on January 10, 2003. In the petition, petitioners claim that the decision is unreasonable and that it unlawfully violates their freedom of expression. They also claimed that the Council cannot base its decisions upon political considerations or upon its belief that the film is based on untruths. As such, they assert, the Council did not have the authority to make the decision, and that it took inappropriate considerations into account. Petitioners further claim that the ordinance under which the Council acted is unconstitutional.

6. The State laid out its position in a lengthy and detailed response. It asserts that the film is false and callously distorts the truth. In its own words: “The one and only truth is otherwise.” This truth, in the opinion of the State, is clearly reflected by the description of the events in reports by the IDF, as well as by information presented by international and even Palestinian bodies.

The State is of the opinion that the film must be censored, due to the danger that it poses to the public order and the offense it causes to feelings of the public. The State claims that the film contains incitement: its content may move some viewers to engage in violent activity. Second, the State claims that the film will weaken Israel's international standing during this difficult time of war, and may even delegitimize the existence of the State. Third, the State claims that the film, being full of untruths, deceives the public and offends its feelings.

7. In the hearing which took place on March 20, 2003, the parties elaborated upon their claims. We decided to allow the families of the IDF soldiers who fell in battle, as well as a group of soldiers who participated in the fighting, to join as additional respondents to the petition. These parties had claimed that the State did not properly represent their positions. We listened to all their words, and thoroughly read all their written submissions. These additional respondents claimed that the film causes severe damage to the reputation of serving IDF soldiers as well as to the reputation of those that fell in battle. In heart-wrenching testimony, they described their feelings of frustration and pain, feelings that they endure because they are being attacked and slandered for actions that they did not commit.

8. A number of weeks after the State submitted its response, petitioners' counsel informed us of the existence of a film called "The Road to Jenin." The film, by the French director Pierre Rehov, was produced to challenge the content of petitioners' film. It contests specific segments of "Jenin Jenin," emphasizing the perspective of the IDF soldiers and the families of the fallen. Petitioners requested that an interim order be issued to prevent the broadcast of that film on the television program *Mabat Sheni*. We did not find reason to prevent the broadcast. We should note, however, that while many can view "The Road to Jenin" which, as stated, challenges the content of the film "Jenin Jenin," the public's ability to view the latter is significantly limited in light of the decision of the Israel Film Council.

We viewed both films, the film “Jenin Jenin” which was submitted by the State, and the film “The Road to Jenin,” which was submitted by the petitioners.

*The Normative Framework*

9. The Council’s decision to prohibit the screening of the film infringes the freedom of expression of its producer, and of others whose opinions the film gives voice to. As is well known, the freedom of expression is one of the fundamental principles of our democracy. Our judgments, long ago, recognized it as a “superior right,” even acknowledging that it serves as a basis for other rights. See the famous words of Justice Shimon Agranat in H CJ 73/53 *Kol Ha’am v. Minister of the Interior*, at 876-78 [1].

The meaning of freedom of expression is, first and foremost, that the government may not restrict the voicing and hearing of opinions in public, and it must prevent others from infringing the right. See FH 9/77 *Israel Electric v. Ha’aretz Publishing*, [2] at 343. In the words of my colleague, Justice Ayala Procaccia in H CJ 9723/01 *Levi v. Dep’t of Foreign Worker Permits, Director of Industry and Services*, [3] at 94, “[t]he freedom of expression is not only the freedom to express opinions, to write and to present, but also the right to see and to hear.”

Freedom of expression is not an absolute right. In certain cases, the law allows that it be infringed. We must distinguish between the very principle of freedom of expression—which extends to all forms of expression, and to all of the means which may be used for conveying expression—and between the degree of protection, which may only be partial. See, e.g., H CJ 399/85 *Kahane v. The Board of the Broadcasting Authority*, [4] at 283; H CJ 6126/94 *Senesh v. Broadcasting Authority*, [5] at 830-31; H CJ 806/88 *Universal City Studios v. Israel Film and Theater Council*, [6] at 34-35; H CJ 7144/01 *Gush Shalom v. The Broadcasting Authority*, [7] at 890-91.

The fact that expression may be offensive, rude, or grating cannot serve as a reason not to protect it. This was noted by Justice Mazza in HCJ 2888/97 *Novick v. The Second Television and Radio Authority*, [8] at 201:

Freedom of expression was not only intended to protect accepted and popular opinions, expressed under peaceful conditions, but also—and this is the central test of the freedom of expression—deviant, infuriating, and exasperating opinions, expressed after difficult events, in a callous and offensive fashion.

Also appropriate in this regard are the words of the English judge, Lord Denning.

Freedom of speech [is] amongst our most precious freedoms. Freedom of speech means freedom not only for the views of which you approve, but also freedom for the views you most heartily disapprove.

*Verrall v. Great Yarmouth Borough Council*, [1981] Q.B. 202, at 216 [47]. The mere fact that an expression is false does not constitute a cause for the removal of protection. This is in contrast to the manner it is expressed, such as being racist. The use of such a manner of expression—regardless of its content—violates a statutory prohibition and constitutes a cause for the restriction of that expression. See Crim. A. 2831/95 *Alba v. The State of Israel*, [9] at 320; Mordechai Kremnitzer, *The Boundaries of Freedom of Expression*, *The Seventh Eye* 26-27 (January-February 1996) [51].

Indeed, it has been established that “regarding the freedom of expression, we do not concern ourselves with the truth of the expression.” *Universal*, [6] at 33. To permit the restriction of false expression would allow the authorities the power to distinguish between the true and the false, to decide what is appropriate to be voiced and what is not, and the power to substitute its own decisions

for the decisions of the free market of ideas. “Freedom of expression also includes the freedom to present facts and interpret them, even if many are certain that the presentation is erroneous and the interpretation deceiving.” HCJ 2137/98 *Elias v. Chairman of the Board of the Broadcasting Authority* (unpublished decision) [10]. See also *Senesh*, [5] at 830; CA 214/89 *Avneri v. Shapira*, [11] at 857-58; HCJ 4804/94 *Station Film v. Israel Film Council*, [12] at 676; HCJ 14/86 *La’or v. Israel Film and Theater Council*, [13] at 433; *Kahane*, [4] at 281. As stated by Justice Oliver Wendell Holmes, of the United States Supreme Court:

But when men have realized that time has upset many fighting faiths, they may come to believe, even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out...

*Abrams v. United States*, 250 U.S. 616, 630 (1919) [35]. The words of Justice Louis Brandeis are also appropriate in this regard:

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

*Whitney v. California*, 274 U.S. 357, 377 (1927) [36].

Another reason for protecting the freedom of expression includes protecting the speaker's right to self-realization, and the need to preserve public order, especially by allowing for the release of the "social steam" by those who hold minority views. Imposing a prohibition against false expression may contribute to the accumulation of this "steam," which may lead to violent eruption. As stated by Justice William Douglas:

Free speech has occupied an exalted position because of the high service it has given our society, its protection is essential to the very existence of a democracy. The airing of ideas releases pressures which otherwise might become destructive. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain new adherence...

*Dennis v. United States*, 341 U.S. 494 (1950) [37].

10. The "limitations clause" in section 8 of the Basic Law: Human Rights and Dignity sets the legal standard for using administrative authority to infringe the freedom of expression. *See, e.g.,* F. HCJ 4466/94 *Nosyabe v. Minister of Finance*, [14] at 87; HCJ 7852/98 *Arutzei Zahav v. Minister of Communications*, [15] at 429; *Yaforah v. The Second Television and Radio Authority*, [16] at 182. This is the case whether freedom of expression is enshrined, fully or partially, in the right to human dignity established by the Basic Law—in which case section 8 is directly applicable—or whether freedom of expression is not enshrined in the right to human dignity—in which case the limitations clause will apply either by analogy or due to general administrative law. *See* HCJ 41/94 *Miller v. Minister of Defense*, [17] at 138; HCJ 5016/96 *Horev v. Minister of Transportation*, [18] at 43.

The limitations clause permits the violation of a right only where the authority to violate that right is granted by statute, if the violation

is consistent with the values of the State of Israel, and if the violation has an appropriate purpose and is not disproportionate. Proportionality is measured by three tests. The “suitability test” ensures that the measure which violates the right is suited to the purpose of the violation. The “minimal violation” test confirms that the measures taken are those which violate the right least. The “relativity test” ensures that the benefits of the violation bear a reasonable relation to its costs. These tests weigh the purpose of the violation against the injury done to the person whose rights are infringed.

In addition to the proportionality tests, the courts, even before the advent of the Basic Laws, had developed balancing equations. These equations were intended to analyze the probability that expression would harm the public interest. See HCJ 6226/01 *Indoor v. The Mayor of Jerusalem*, [20] at 164. As is well known, injury to the public must be nearly certain in order to justify infringing the freedom of expression. See *Kol Ha'am*, [1] at 888.

Nevertheless, these probability standards are not applicable where expression results in injury to feelings. In such cases, we must examine the “force” of the offense. See the words of Justice Eliezer Goldberg in *Universal*, [6] at 41, as well as my opinion in *Kidum*, at 14. We must determine whether the intensity of the injury is beyond that which is tolerated in a democratic society, which has a high “level of tolerance.” In the words of President Aharon Barak:

[O]nly severe offenses to feelings warrant curtailing the freedom of expression and creation. Thus, a democratic society must arrive at a “level of tolerance” for offending feelings. Only where the degree of offensiveness exceeds this “level of tolerance” can restrictions on the freedom of expression and creation be justified in a democratic society... The tolerance threshold is particularly high in the context of limitations on the freedom of speech and creation.

*Senesh*, [5] at 836-37, 839. *See also Kidum*, [21] at 16; *Yafora*, [16] at 183.

*Lawfulness of the Council's Decision*

11. After having found that the Council's decision infringes the petitioners' freedom of expression, we must examine whether this infringement meets the conditions of the limitations clause. The first condition is that a freedom may only be infringed "pursuant to statute, or pursuant to the explicit authorization of a statute." In the matter at hand, the decision was made pursuant to the grant of authority to the Council contained in section 4(1) of the Ordinance, which provides:

No projection film may be presented unless it has been approved for presentation and marked by the Council.

Petitioners, however, claim that the Ordinance itself is unconstitutional. As such, it cannot be considered a "statute" that can grant authority to infringe the freedom of expression. In light of my conclusion that the decision of the Council does not fulfill other requirements of the limitations clause—that it has no appropriate purpose and that it is not proportionate—we leave the claim of constitutionality open. We will also leave open the question of whether the decision is consistent with the values of the State of Israel as a Jewish and democratic state.

At the same time, it should be noted that the decision of the Council can harm the democratic process. Within the bounds of the democratic process, the way to choose between different paths is by allowing all political expression, and not by obstructing certain paths. My colleague, Justice Ayala Procaccia, has noted:

In a democracy, the freedom of speech...requires both the freedom to express ideas that shape public opinion, as well as the freedom to receive such ideas.

H CJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Elections for the Sixteenth Knesset*, [22] at 72. See also *Kol Ha'am*, [1] at 877, as well as the words of Justice Meir Shamgar in H CJ 1/81 *Shiran v. The Broadcasting Authority*, [23] at 377.

These ideas concerning pluralism with regard to ideas and worldviews are also supported by the Jewish values of the State of Israel. According to the Talmud, “[b]oth these and these are the words of God.” Babylonian Talmud, Tractate Eruvin, 13b [61]. See also the words of Vice-President Menachem Elon in EA 2/84 *Neiman v. Central Elections Committee for the Eleventh Knesset*, [24] at 294.

#### *Appropriate Purpose*

12. The decision of the Council has a clear purpose: exposing the truth. The central rationale in which it grounded the decision, and which was later adopted by the State as the basis for its position here, is that the film, which is allegedly deceitful and distorts the truth, will remain, if its screening is not prohibited, a disgrace for all of history. This can be seen from the protocols of the Council meetings, from the reasoning of the decision, and from the response of the State to the petition here. In its decision, the Council wished to protect the public by disallowing false expression and permitting, as the only available expression, what respondents believe to be the truth.

The Council, however, like every other government body, has no monopoly over the truth. It was not granted the authority to expose the truth by silencing expression that members of the Council consider to be lies. In general, revelation of the truth in a free and open society is a prerogative given to the public, which is exposed to a spectrum of opinions and expression, even false expression. As stated by Justice John Harlan of the United States Supreme Court:

The Constitutional right of free expression is powerful medicine in a society as diverse and populous as our. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as

to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

*Cohen v. California*, 403 U.S. 15, 26 (1971) [38].

When we are dealing with expression whose truth is disputed, the freedom of expression has special significance if that expression has important political implications. This is the case here, where the political intentions and factual claims of the film are virtually undistinguishable. As we have already noted, the petitioner did not even attempt to present a balanced picture of the events in the film. His goal was simply to express the Palestinian story. The Council does not have the authority to restrict expression that is principally ideological or political, simply because the government, part of the public, or even a majority of it, disagrees with the views expressed.

In Britain, where similar questions have arisen, the House of Lords has ruled that political expression can not be restricted unless such restrictions are necessary to protect against violence or obscene content. *See, e.g., Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All E.R. 1011 [48]. In *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 All E.R. 103, 106 [49], Lord Bridge stated that any attempt to limit criticism of governmental authorities “amounts to political censorship of the most insidious and objectionable kind.”

In addition, the Council’s composition and the framework of its proceedings are not suitable for deciding factual matters. A court of law, for example, has the authority to issue restraining orders in suits concerning libel, and in this context, often rules on factual findings in order to decide the conflict before it. The Council, in contrast, is not competent to rule whether the content of a documentary film is true or false. As such, it seems only logical that it does not have the

authority to make such decisions.

In its decision to expose the truth, the Council exceeded the limits of its authority and acted upon inappropriate considerations. As such, its infringement of the freedom of expression was not motivated by an appropriate purpose.

*Proportionality*

13. As stated, a proportionate decision is one that satisfies the “suitability,” “minimal violation” and “relativity” tests. In my opinion, the Council’s decision does not meet these tests.

14. The “suitability” test. The Council believed that prohibiting the screening of the film, and ensuring that the public is not exposed to it, would reduce the danger it posed to public order. In this regard, it is appropriate to note that it is doubtful whether infringing the freedom of expression is an effective means of promoting public security. Rather, it is possible that the public peace may actually be ensured by permitting free speech. The United States Supreme Court discussed the relationship between free expression and public order in *Whitney*, [36] at 375-76:

[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; ...the fitting remedy for evil counsels is good ones.

*See also Stromberg v. California*, 283 U.S 359, 369 (1931) [39].

Whatever the case, it is clear that the means chosen by the Council—prohibiting the commercial screening of the film in Israel—does not reduce the public’s accessibility to the expression, but rather achieves the opposite. The Council members knew that their decision would create public debate and that their decision would probably be brought before the examination of this Court, with all of the attendant consequences regarding the exposure of the film. Mr. Guttman, a member of the Council, stated: “I have no doubt...

that if we agree to take this decision, we will be back in the headlines again.” See The Meeting Protocol, November 18, 2002. Another Council member, Dr. Menachem Horowitz, added that “[t]he problem is that I believe that a prohibition will give the film much more publicity.” *Id.*, at 4. And, indeed, subsequent to the Council’s decision, both the film and its producer became the focus of public debates and a subject for news articles. After being censored, “Jenin, Jenin” was transformed into a symbol. Clearly, this was not the Council’s intention.

Moreover, the Council’s decision affects only the narrow area of commercial cinema in Israel. The Council does not have the authority to prohibit screenings in foreign countries or alternate means of viewing the film, such as television broadcasts, home cinemas, or the internet, where a person can purchase the film for \$30. It is reasonable to expect that these alternative means will be able satisfy commercial demand for the film, which may now increase due to the media commotion created by the decision.

It may even be possible that the prohibition itself will raise the suspicion that there is some truth to the film; otherwise, why would the Council feel the need to prevent its screening? The means chosen by the Council did not promote the goal that it was intended to achieve, and may even have achieved the opposite.

15. The “minimal violation” test. Prohibiting the screening of a film is not the only means available to the Council. Section 6(2) of the Ordinance provides:

The Council may allow the presentation of any film of part of a film...either under specified conditions or absent any conditions, and it may refrain from so allowing the presentation of the film.

As such, the Council could have made use of a less blunt instrument. It could have, for example, limited the film to viewers of a certain age, preceded the film with a warning, instructed that

certain segments be struck, or limited the hours for its viewing. Without expressing an opinion with regard to the lawfulness of these means or their suitability to the case before us, it is clear that they grant the Council a spectrum of possible actions. During its discussions, the possibility was raised of supplementing the film with commentary. From the protocol, however, it seems that the Council did not hold a serious discussion concerning such alternate means. The Council was mistaken in not doing so. An absolute prohibition against the screening of a film is the most drastic action which the Council is authorized to take. It must be a measure of last resort. Compare the words of Justice Aharon Barak in *Universal*, [6] at 35 and the words of Justice Eliahu Mazza in Crim. A. 697/98 *Sosotzkin v. The State of Israel*, [25] at 308.

16. The “relativity” test: The damage caused by the Council’s decision is greater than its benefit. The viewing public is not forced to view the film against its will. This is not a case of a captive audience. The viewers will reach the cinema of their own free choice, pay to view the film with their own money, and it is reasonable that they will even prepare themselves for it mentally. In comparison, this viewing public has more choice than viewers of “The Road to Jenin.” That film was televised on a public television station during primetime. Indeed, the extent of the forced exposure to expression is one of the factors—although it is not always a decisive factor—in determining whether expression can be restricted. *See Kidum*, [21] at 16. This was already noted by Prof. Nimmer:

The presence or absence of a captive audience is a relevant factor which should be taken into account in reaching a proper accommodation between given speech and anti speech interests. It is useful in drawing an appropriate definitional balance.

M.B. Nimmer, *On Freedom of Speech* 1-40 (1992) [53].

Second, there is no doubt that the film injures the feelings of many members of the public, including the feelings of the soldiers

who participated in the battle and their families, especially the parents, spouses and siblings of the fallen, including respondents 3-32. However, it should not be said that this injury, with all of its pain and anguish, is not within the bounds of that which is tolerated in our democratic society. An open, democratic society, which upholds the freedom of expression, certain in the feeling that this advances society and does not threaten it, is willing to bear offense, even substantial offense to the feelings of the public, in the name of the freedom of expression. The words of Justice Douglas are appropriate in this regard:

A function of free speech... is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech though not absolute... is nevertheless protected against censorship or punishment...

*Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) [40].

In protecting freedom of expression we ruled that, for example, posting notices that used especially sharp and severe language to condemn government policy should be allowed. *See* HCJ 206/61 *Israeli Communist Party v. The Mayor of Jerusalem* [26]. We ruled that the screening of a film that could, by its portrayal of the character of Jesus, offend Christian viewers, should be allowed. *See Universal* [6]. We held that the television broadcast of an allegedly biased documentary, which presented the events which preceded the assassination of the Prime Minister Yitzchak Rabin, should be allowed. *Novick*. We also decided that the hanging of notices, which used rude and insulting language to condemn the head of the opposition, MK Yossi Sarid, should be allowed. *Indoor* [20]. An especially high level of protection for the freedom of expression was established in *La'or* [13], despite the fact that the play at issue there,

“Ephraim Goes Back to the Army,” which compared the military government in the area to the Nazis, offended feelings in an extreme manner. In all those cases, the Court ruled that, despite clear injury to the sensitivities of the public, freedom of expression demanded that the offensive expression not be prohibited. Such is the case, in my opinion, in the matter at hand as well.

Respondents wish to rely on HCJ 807/78 *Ein Gal v. Israel Film and Theater Council* [27], where we approved the decision of the Israel Film and Theater Council to ban the screening of a documentary film. The film claimed that the Arabs of Israel were expelled from their land by the Jews. The Council prohibited the film, reasoning that it was false and prejudiced, disgraced the State of Israel, weakened its position in the world, and could incite to violence. Since this judgment was handed down in 1979, however, times have changed, and so has the law. In light of the development of the law since then, this ruling can no longer stand. In any case, I am of the opinion that Israeli society is now able to deal with such expressions.

The pain and anguish of the families, of the soldiers, of the relatives of the fallen, is understandable. Allowing the screening of the film does not ignore this pain, and is not intended to reduce the esteem for their sacrifices. Nor does this decision impress the film with our seal of approval. It would be fitting if the respondents would focus their energies, as they have in fact done, and with success, within the ambit of the freedom of expression.

There is no way to escape the conclusion that the decision not to allow the screening of the film unlawfully infringes the freedom of expression of the petitioners.

17. In his famous 1644 essay, “Aeropagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England,” the English philosopher, John Milton wrote, regarding the freedom of printed speech:

Let [the Truth] and Falsehood grapple; Who ever knew  
Truth put to the worse, in a free and open encounter?  
...For who knows not that Truth is strong, next to the  
Almighty? She needs no policies, nor stratagems, nor  
licensings to make her victorious... Give her but room,  
and do not bind her...

The film “Jenin, Jenin” should be permitted to be screened in theaters, and the viewing public should be allowed to judge it for themselves. The *order nisi* should be made absolute, the decision of the Council should be reversed, and the screening of the film should be allowed. Respondents 1 and 2 shall pay petitioners’ expenses, in the amount of 15,000 NIS.

#### **Justice A. Procaccia**

I concur with the opinion of my colleague, Justice Dorner. Due to the significance of the matter, I wish to add the following comments.

##### *The Council’s Reasons for Censoring the Film*

1. The decision of the Israel Film Council to prohibit the commercial screening of the film “Jenin, Jenin” is based upon three main reasons.

First, the Council asserted that the film distorted the events of the battle. This, under the cover of documentary truth, may deceive the public. Furthermore, the Council saw the film as a propaganda film made by a body with which the state is at war.

Second, the Council saw the manner in which the events are presented in the film as constituting incitement, to the point that the film delegitimizes the existence of the State of Israel.

Third, the Council believed that screening the film, in presenting IDF soldiers as responsible for war crimes, could seriously offend the feelings of the public. This belief took into consideration the

temporal proximity between the film and the events that it purported to portray.

2. In her opinion, my colleague, Justice Dorner, emphasizes the first of the Council's three reasons—the false presentation of the events of the battle at Jenin. I agree that issues of truth in expression, including artistic productions, cannot usually constitute a cause for the restriction of freedom of expression, as this freedom is a primary, constitutional right. The view that freedom of expression is a broad, fundamental right—to the extent that it applies to even false and distorted expression—has been established in our constitutional jurisprudence for quite some time. Falsehoods should not be confronted by suppression. Rather, freedom of expression should serve as a means to present the truth and to challenge such falsehoods in the free and open market of ideas. In the free flow of information, opinions, ideas and values, the truth will ultimately prevail over lies. Such confrontation characterizes free life in a democratic society. All of the means of communication—the print media, film, theater and all of the channels of national and international media—may take part in this confrontation. Some of these means were even utilized in this case, such as when a new film was made which presented the events from the perspective of the Israeli soldiers who fought in the battles. The ability to respond, by presenting all the data and facts, substantially mitigated the possible harmful effects which “Jenin, Jenin” could have had as a propaganda film, and assuaged worries that it would interfere with the public order.

The Council's second reason—that the presentation of the events borders on incitement and delegitimizes the existence of the State—should also be rejected. The film is intended for the general public in Israel. The fear that the film will incite the public, or part of the public, to deny the State's right to exist is far-fetched and has no basis in proven fact.

*Injury to the Feelings of the Public*

3. In my opinion, however, the Council's third reason—severe offense to the sensitivities of the public—requires special examination. It constitutes the crux of the matter, where the clashing values come into conflict. Can the suppression of a film, which portrays Israeli soldiers as systematically committing war crimes in Jenin, be justified? The film seriously offends the feelings of the public, a public which completely rejects the ideas of the film, sees it as in absolute conflict with the truth, and rebels against the attempt to undermine the images of Israel as a society founded upon moral values and respect for human life. In my opinion, the question is whether such substantial offense to the feelings of the public justifies prohibiting the screening of the film, or whether, the decision of the Council being unreasonable, there is a cause for our intervention.

4. In their response to the petition, respondents asserted that the IDF's activities in Jenin were forced upon the State of Israel as a response to the terror attacks that climaxed in March of 2002. During these attacks, hundreds of Israeli citizens were killed and thousands were wounded. The IDF was forced to enter centers of terrorist activity, including Jenin, in which a terrorist infrastructure of unprecedented extent had been operating. Fierce battles were fought in the camp, and these resulted in the deaths of 23 Israeli soldiers. Terrorists laid dozens of booby traps and explosive devices, and endangered the civilian population by exploiting women and children and abusing humanitarian concerns, such as ambulances, for terrorist causes.

5. According to the film, the IDF carried out a massacre in Jenin and attempted to cover it up by hiding the bodies. IDF soldiers, so it claims, intentionally harmed women, children, the elderly and the handicapped. The camp was shelled by aircraft and artillery, and this caused extensive injury to people and property. The director of the hospital, Dr. Abu Raali, claims that the hospital was shelled and that the IDF intentionally cut off the hospital's water and electricity. A 75 year old man tells, through bitter tears, of how he was removed from his bed in the middle of the night, shot in the hand and, after being unable to obey the commands of the soldiers, shot again in the

foot. The film shows Palestinian detainees tied up and lying on the ground, while an armed personnel carrier moves towards them. The film, through the juxtaposition of photographs, verbal segments, and interviews, creates the impression that tanks and armed personnel carriers ran over the detainees. One of those interviewed tells of a child, Monir Washichi, who was hit by a gunshot in the chest and died after soldiers prevented him from going to the hospital. The film also relates that a youth named Abu Jandal was bound by IDF soldiers and shot twice in the head. It also claims that IDF soldiers used children to rip holes through walls and destroy buildings, and that some children were later executed by the soldiers. The film claims that the IDF demolished buildings even as residents remained inside.

6. These allegations are harsh. They become even harsher when presented visually through the use of, as is claimed, deceptive pictures and interviews with people who seem to be telling their allegedly personal stories, either as witnesses to the events or as direct victims. Respondents, to counter the message presented by the film, assert that the IDF operations were characterized by an effort to reduce, as much as humanly possible, the harm caused to civilians and property. In adherence to this policy, certain military operations—such as the use of aircraft and artillery—that may have brought about the rapid conclusion of the mission while also reducing the danger to the soldiers, were not employed. There was, say the respondents, no massacre at Jenin. The claims presented by the Palestinian leadership have been refuted, proven to be groundless by international bodies. According to accurate data, 52 Palestinians were killed, most of whom participated in the battles against the IDF.

As per the claims regarding the hospital, terrorists barricaded themselves within it, endangering the safety of the patients. Despite this, IDF soldiers, pursuant to their orders, were careful not to enter the hospital or damage it, not to target it, and to allow its continued operation. They even supplied it with generators, water, electricity, and oxygen. The IDF made an effort to treat the wounded and the sick. Two hundred and fifty seven wounded were transferred to the

hospital in the city of Jenin; sixty were transferred to hospitals in Israel. The words of the elderly man in the film are absolutely groundless: the Israeli doctor who treated the man testified to this—not a single Palestinian was run over by a military vehicle, no one was wounded by Israeli armored personnel carriers. The boy described as Monir Washichi was, in fact, a 19-year-old Hamas fighter who was killed in battle. The claim that Abu Jandal was shot from short range by IDF soldiers is completely groundless. There is no basis to the claim that IDF soldiers used children and intentionally harmed them. In fact, the terrorists employed children to distribute explosives and conduct observations. Private houses were destroyed and property was damaged, but not to the extent alleged by Palestinians. The damage to the houses was necessary due to the fact that terrorists made use of the houses, shooting from them and endangering the local population and its property. Some of the houses were even rigged with explosives. Bulldozers were indeed used to destroy houses and to subdue the terrorists. This, however, was only done, in order to minimize the danger to innocent civilians, after allowing sufficient time for those inside to exit.

7. The film, as described above, is offensive to the feelings of many members of the Israeli public. The allegedly documentary presentation of the operations of the IDF—portraying them as war crimes—provokes difficult emotional reactions in three circles of the public. First, the inner circle of soldiers who participated in the operation, who closely experienced the horrors of battle, and the tragedy of losing their comrades in arms. Second, the circle of bereaved families who lost those dear to them in battle. Third, large parts of the public who relate to those events that are significant to the life of the State and society, who identify with the feelings of the Israeli side regarding the battle in Jenin, the portrayal of the IDF, and the loss of soldiers in combat.

All of these circles feel themselves committed to basic standards of humanity and respect for human life, even during war against the enemy. They are certain that the IDF adhered to fundamental—even more than fundamental—humanitarian standards. They are

convinced that the IDF made use of combat measures that reduced the chances of injury to civilians, even as this increased the chances of harm to soldiers and slowed down military progress. They think that these combat methods contributed to the loss of the lives of Israeli soldiers. In light of this, attributing war crimes to the IDF soldiers who fought in Jenin is an extraordinarily offensive act. The intensity of the offense is only increased by the fact that the pain of loss is still fresh. The offense is intensified by the reality that the country continues to confront terrorist attacks. The film is offensive to the individual soldier, who fought in combat and endangered his life, while remaining committed to humanitarian values. It is offensive to the entire army, which is guided by these values. It is painful for the grieving families. It is offensive to the Israeli public, which deeply identifies with the existence of the State, and is dedicated to the moral, humane values it represents.

8. What are the limits of the freedom of expression—in this case, the freedom of cinematic production—where such expression causes offense to the feelings of the public? Here, the offense is caused by the accusation that the army engaged in inhumane military activities, an accusation that points an accusing finger directly at the moral and ideological image of the Israeli public. Does such offense justify restricting expression? What are the limits of the freedom of expression when the offense is caused during times of national crisis, or during war? This is the question before us.

*The Authority of the Council*

9. The Council, pursuant to the Film Ordinance, may prohibit the screening of a film. Section 4(1) of the Ordinance provides that “[n]o projection film may be presented unless it has been approved for presentation and marked by the Council.” In other words, no film may be screened unless it receives a permit from the Council. The Ordinance does not establish standards for the Council’s discretion. Like any government authority, however, the Council is bound by limitations, which may be ascertained from the language and purposes of the legislation which established it. We have ruled that

the Council must act within the strict bounds of the goal for which it was established, as they may be ascertained from the Ordinance. Its principal purpose is to prevent the presentation of films which may disturb the public order. *Compare* HCJ 14/86 *La'or v. Israel Film and Theater Council*, [13] at 430. "Public order," in this regard, was broadly interpreted as including "disturbing the public order, whether this disturbance is the result of a criminal act, the result of an immoral act, or any other act which offends the feelings of the public and its safety." (emphasis added). *See also* HCJ 146/58 *Cohen v. Minister of the Interior* [28]; HCJ 381/66 *The Attorney-General v. Israel Film and Theater Council* [29]. In the words of Justice Zamir in HCJ 7128/96 *Temple Mount Faithful v. The Government of Israel*, [30] at 522:

The feelings of the public, including religious sensitivities, are an aspect of public order.

*See also* HCJ 399/85 *Kahane v. Board of the Broadcasting Authority*, [4] at 295; *La'or*, [13] at 430.

"Disturbing the public order" is a broad concept, which also takes account of offense to the sensitivities of the public. Thus, when the Council decides whether to permit or prohibit the screening of a film, it must place, on the one hand, the principle of freedom of expression, which reflects a fundamental right with constitutional weight and, on the other hand, other values which the Council is responsible for preserving, and which are included in the need to protect public safety and public order. Whether a film is true or not, or whether a film has artistic value, are not considerations which the Council must balance against the freedom of expression. On the other hand, fear of offending the feelings of the public by screening a highly offensive film may be an important consideration in balancing between the relevant values.

In exercising its discretion, the Council acts as an independent authority and, generally, this Court will not substitute its own discretion for that of the Council. Nevertheless, in making its

decision, the Council must act reasonably, while evaluating the relevant considerations and balancing between them appropriately. In so doing, the Council must adhere to standards established by law, as these standards have been interpreted by the courts. H CJ 953/89 *Indoor v. Mayor of Jerusalem*, [31] at 693; H CJ 4804/94 *Station Film v. Israel Film Council*, [12] at 685. The purpose of our judicial review is to examine whether the Council relied upon relevant considerations and whether its decision properly balanced the conflicting values.

In deciding that screening the film “Jenin, Jenin” would be highly offensive to the sensitivities of the public, and thus prohibiting its screening, did the Council act within its authority? Did it act reasonably, pursuant to the standards established by law and the decisions of the courts? This is the question at hand.

*Freedom of Expression v. Offense to the Sensitivities of the Public*

10. In exercising its discretion, the Council must balance between the value of freedom of expression and the conflicting value of preserving the public order. In this case, the latter value finds definite form in the need to protect the feelings of the public. The standards that bind the decisions of the Council are deeply rooted in our caselaw and should be applied, in their spirit, to the case at hand. The general principle is the freedom of expression. It is a fundamental value in the accepted view of human rights in Israel. It is derived from the democratic nature of the country, by the method of our elections, and from the right to vote and be voted for. It is a consequence of the freedom to voice ideas, opinions, and facts, whether true or distorted, and to see, hear and absorb them. It is derived from the right to criticize the government. This freedom applies to messages expressed through any means of artistic work, regardless of its nature, content, quality, or truth. Thus, “freedom of expression is the freedom of the artist to open and close her heart, spread her wings and liberate her thoughts.” *La’or*, [13] at 433 (Barak, J.). This includes the freedom to produce a work which bears a political message, whether it be true or false, as offensive as it may

be. HCJ 6126/94 *Senesh v. The Broadcasting Authority*, [5] at 676. In a democratic process, the way to deal with an offensive message is not by prohibiting it, but rather by wielding the freedom of expression to react to it and present the truth. In this way—in the undisturbed free flow of opinions and ideas—the truth, by challenging the false, shall find its place.

11. The freedom of expression is not absolute. It may conflict with values that must be protected in order to ensure the vitality of any society. The need to preserve public order, in the broad sense of the term, is one of society's fundamental values. If it is not protected, the foundation of the State and democracy may be damaged. When there is a conflict between the freedom of expression and the value of preserving public order, a decision must be made between these two values. The conflicting values must be balanced against each other. This balancing, according to our constitutional approach, takes into account the significance of each value in light of the circumstances. The importance of the freedom of expression must be evaluated in light of the expression at issue in the specific case. Similarly, there are various values included within the term "public order," and their weight may also vary. Thus, the conflicting values are balanced while attributing the proper weight to each of them, according to their nature and the context.

12. Protecting the sensitivities of the public is part of the concept of public safety and public order. HCJ 651/03 *Association for Civil Rights in Israel v. Chairman of the Central Elections Board for the Sixteenth Knesset*, [22] at 73; HCJ 5016/96 *Horev v. Minister of Transportation*, [18] at 34-35; D. Stattman, *Offense to Religious Feelings, in Multiculturalism in a Jewish and Democratic State: A Book in Memory of Ariel Rosen-Tzvi* 133 (1988) [52]. The value is important to both the individual and to society in general. Protecting sensitivities is as necessary as protecting persons or property. It protects one's spiritual property, one's cultural and moral values, against harm. It is intended to protect one from the desecration of all that is dear to him.

Protecting the sensitivities of the public is important, even if the offense causes no more than pain or anger. Even so, the force of an offense is not only connected to its content, but also to its timing. Offense during times of peace and calm is not similar to offense during times of war. The severity of the offense is affected by the social climate and by the circumstances of the time. The effect of an offense during national emergencies may even extend beyond causing pain or anger. It may cause irreparable damage to a society's morale. This may affect its ability to carry out tasks of existential importance. Under such circumstances, offense to the feelings of the public may have broader social ramifications, which may lead to a need to protect it more.

### *Balancing*

13. Freedom of expression means the freedom to express views, ideas, opinions, and facts, whatever their content. This freedom may offend the feelings of the public, and thus, disturb the public order. Both the freedom of expression and the need to protect the feelings of the public are fundamental values in our legal system. In order to balance the two, we must first take into account the type of expression at issue. Second, the offense to the sensitivities of the public should be evaluated on two levels. We must take into account both the severity of the offense and the probability of its occurrence. *Temple Mount Faithful*, [30] at 522. With regard to the severity of the offense, the freedom of expression will yield to the sensitivities of the public only where the offense is acute, serious, and severe. *La'or*, [13] at 435; H CJ 251/72 *Kinan v. Isreal Film and Theater Council* [32]. As to the probability of the offense, it must reach near certainty. H CJ 806/88 *Universal City Studios v. Israel Film and Theater Council* [6].

In light of the importance of the freedom of expression, it will be restricted only when we are faced with an offense whose intensity is beyond the level of tolerance which persons in a democratic society must accept. *Senesh*, [5] at 839. Such offenses include only those that “shake the very foundations of mutual tolerance,” that touch the

deepest foundations of our existence, that undermine such basic axioms that it may harm the nation, and where it is difficult or impossible to react against. The level of tolerance is not a fixed constant. This level may change from liberty to liberty and from value to value. *Temple Mount Faithful*, [30] at 521. Tolerance for the freedom of expression, as such, should stand at a high level. Only cases of exceptional offenses will justify such a restriction of freedom of expression. Otherwise, the freedom will be emptied of meaning.

In HCJ 2888/97 *Novick v. The Second Television and Radio Authority* [8], this Court, as per the opinion of Justice Mazza, employed an even stricter standard:

The content of the expression must be so severe, and the expected offense so incurable, that failing to prohibit it will raise a substantial and present danger to the public order.

*Id.*, at 202. Thus, in general, the freedom of expression will prevail over the value of protecting the feelings of the public. Only an incurable offense to sensitivities, which may lead to a substantial disturbance of the peace, will justify restrictions on expression.

14. A similar constitutional approach is accepted in western democracies. As a rule, the United States does not recognize offense to the feelings of the public as a cause for limiting the freedom of expression. As Justice Holmes stated in 1919:

The hallmark of the protection of free speech is to allow “free trade of ideas,” even ideas that the overwhelming majority of people might find distasteful or discomforting.

*Abrams v. United States*, 250 U.S. 616, 630 (1919) [35]. In *Collin v. Smith*, 578 F.2d 1197 (1978) [42], known as the Skokie case, the court did allow the prohibition of a neo-Nazi parade which had been planned to be held in a Chicago suburb in which a large number of

Holocaust survivors resided. In spite of the contempt that the court expressed for the goals and methods of the group, it held that the United States Constitution did not allow content-based restrictions of speech. Expression could only be restricted in cases of obscenity, “fighting words,” or “imminent danger of a grave substantive evil.” *Id.* at 1202. Offense to feelings did not constitute a cause to restrict expression unless it violated the right to privacy or intruded upon a “captive audience.” *Id.* at 1206. The court stated that:

[o]ur constitutional system protects minorities unpopular at a particular time or place from governmental harassment and intimidation that distinguishes life in this country from life under the Third Reich.

*Id.* at 1201. In *Collin*, the Supreme Court denied certiorari. *Smith v. Collin*, 439 U.S. 916 (1978) [43]. Compare also *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) [44]; *Street v. New York*, 394 U.S. 576 (1969) [45]. The Supreme Court of the United States maintained this position throughout the years, as expressed in the recent case of *Virginia v. Black*, 123 S. Ct. 1536 (2003) [41]. In that case, the Court held a Virginia state law that prohibited the burning of crosses to be overly broad and therefore unconstitutional. The Court stated that offense to the feelings of those exposed to the burning crosses was not cause to restrict expression, so long as it was not “inherently likely to provoke a violent reaction.” As Justice O’Connor wrote:

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, “the lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot’s hateful ideas with all my power, yet at the same time challenging any community’s attempt to suppress hateful ideas by force of law.

*Id.*, at 1551.

In England, the heavy weight of freedom of expression has been recognized, together with the understanding that there are public interests that may justify the restriction of speech. *See* 8(2) Halsbury's Laws of England 104 (1996) [57]; Feldman, Civil Liberties and Human Rights in England and Wales 560 (1993) [54].

In Australia, the freedom of expression is seen as a means of achieving social goals, such as advancing democratic discourse, rather than as an end in and of itself. Australian caselaw tends towards allowing restrictions on the freedom of expression where the offense concerns race, skin color, or ethnic origin. *Toben v. Jones*, (2003) 199 A.L.R. 1 [33]. Offense to religious feelings, grave as it may be, did not constitute a cause for restricting the freedom of expression. In *Archbishop of Melbourne v. The Council of Trustees of the National Gallery of Victoria*, (1997) 96 A. Crim. R. 575 [34], the court did not prohibit the presentation of a work of art that humiliated Jesus by presenting him while immersed in urine.

#### *Offense During Times of Emergency and National Crisis*

15. Times of war or national crisis grant greater weight to the public interest in preserving public order, when that value stands in conflict with the freedom of expression. In such situations, the value of protecting the sensitivities of the public also receives special weight. This may tilt the balance between the conflicting values, transforming the value of public order into the senior interest. However, even under such circumstances, any restriction on the freedom of expression must be proportionate. It may not exceed that which is necessary to ensure public order.

In this regard, we recall the words of Justice Agranat in H CJ 73/53 *Kol Ha'am*, [1] at 880:

During critical periods, when the country is in a state of war or other crisis, the matter should be decided in favor of

national security. Of course, this depends on the circumstances of each case.

Times of national crisis may lead to a genuine need to restrict the freedom of expression in order to protect the public order. Even in the United States, the cradle of individual liberties, freedom of expression was restricted when the state was involved in military activities and the expression could have harmed military discipline. In *Schenk v. United States*, 249 U.S. 47, 52 (1919) [46], the United States Supreme Court, as per the opinion of Justice Holmes, stated that:

When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

In such circumstances, the standard for restricting the freedom of expression is:

Clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

In *Abrams v. United States*, 250 U.S. 616 (1919) [35], Justice Holmes, this time as a minority, emphasized:

Only the emergency that makes it immediately dangerous to leave the correction of evil counsel to time warrants making any exception to the sweeping command “Congress shall make no law...abridging the freedom of speech.”

A decade later, Justice Brandeis strengthened these doctrines in *Whitney v. California*, 274 U.S. 357 (1927) [36]. For an analysis of the restriction of the freedom of expression during times of national crisis in the United States, see the doctoral dissertation of Professor

Pninah Lahav, Freedom of Expression During National Security Crises (1973) [58].

In England, courts have recognized the constitutionality of restricting radio and television broadcasts, when these related to the struggle between England and Northern Ireland. In *R v. Secretary of State for the Home Department, ex parte Brind*, 1 A.C. 696 (H.L. 1991) [50], the House of Lords approved the executive's authority to restrict the live broadcast of speeches by members of Northern Ireland organizations, due to the offense they caused to feelings of the viewers, especially after terror attacks. Publication of the content of the speeches was not prohibited. However, live broadcast of the speeches was prohibited, and the restriction was recognized as reasonable and proportionate.

As such, a national crisis or emergency, such as a difficult period of armed struggle, may change the evaluation of the relative importance of the freedom of expression vis a vis the value of protecting the sensitivities of the public. Every constitutional system will change these relative weights, each in its own way.

16. These are our standards for balancing the two values: the freedom of expression will usually be given senior status, even where this freedom is exploited to offend feelings, and even where the offense is substantial. Only in exceptional and extreme cases, where the offense is beyond the level of tolerance which should be borne in a democracy, and where the offense will substantially harm public safety and public order, will it be possible to limit the freedom of expression. States of national crisis or emergency may be included in those exceptional and extreme cases.

17. As stated, the Council must take into account the offense to the feelings of the public. It is a relevant consideration. *See Horev*, [18] at 5-34. The question is: what is the appropriate method of balancing this value against the freedom of expression, and what is the relative weight of each of these values, in light of the circumstances of the matter.

*From the General to the Specific*

18. The film “Jenin, Jenin” purports to be a film that documents the battle of Jenin from the Palestinian perspective. Even if the film is one-sided, and even if it is distorted and fraudulent, our point of departure is that its producers have the right to present it, a right that is derived from freedom of expression, a right that Israel sees as fundamental.

Against this right stands the offense which large parts of the Israeli public feel as a result of the film. We assume that the probability of such offense to the sensitivities of the public is not only a near certainty, but an absolute certainty. Even so, the question, as per our caselaw, is whether the offense is of such magnitude that the freedom of expression may be infringed.

I am of the opinion that, under the circumstances, even though the wound is grave, it is not of the severity required to restrict the freedom of speech. The injury is both broad as well as deep. *Compare Temple Mount Faithful*, [30] at 524-25. It is not limited to a single person or a small minority. It affects the IDF soldiers that fought in Jenin, it affects their comrades who serve in the regular and reserve forces, and it affects the grieving families of the soldiers who fell in battle. The feeling is shared by many in Israel. It is not a superficial injury, transient, and blowing over like the wind. The feeling, the reaction, is genuine and harsh. The offense is not vague, ambiguous in its direction. It relates to specific events, whose memory still scars the minds of those Israelis that took part in them. Even so, the offense does not shake the foundations of human tolerance to the extent that it threatens public order, and justifies restricting the freedom of expression. Despite the fact that the offense is related to Israel’s armed struggle against its enemies, this is not a time of emergency or national crisis that is severe enough to attribute decisive weight to the value of protecting against threats to the public order.

The Council should have considered the following issues:

19. Fraudulent and distorted representations of IDF military activities are not isolated occurrences. They have become part and parcel of the conflict between the two nations. Dealing with the deep offense caused by false representations has become almost routine. Since the near future does not seem to promise resolution of this conflict, it should be assumed that such fraudulent expressions will continue. Restricting the freedom to screen the film signifies a willingness to recognize the ability to impose broad restrictions in the future, while unreasonably limiting the freedom of speech, whether such speech be true or false, right or wrong. Such restrictions are inappropriate.

20. Our proximity to the events may aggravate the intensity of the offense. Between the battle in Jenin and the Council's decision to prohibit the film, almost seven months passed. The scars of the battle, however, and the pain of the fallen soldiers and of the military operations, have not faded with time. Even so, the interim period has strengthened the public's resilience in the face of the offense caused by the film. It can now meet the film head-on, even wield means to present its own views of the truth.

21. Despite the military operations that continue, and despite the unending terror, we do not find ourselves in a state of full-fledged war or national crisis that would require contending with immediate and serious issues of survival. The times, however stormy, reflect persistent security tensions and local military activities, processes which extend over a period of years. This reality does not justify infringement of the freedom of expression in order to protect the sensitivities of the public. These events demand a high level of tolerance from the public, even when its feelings are offended by expression, painful as that expression may be.

22. The offended public has its own means of expression to present its account of the truth and of the facts. In fact, the film that presented the Jenin battle from the Israeli perspective took this path. The Israeli side has means of expression at its disposal. It has sources of information; the witnesses and the soldiers who took part in the

battle can testify first-hand about the truth. The ability to employ such media, together with their actual use in the past, substantially reduces the offense caused by the film. It has been said before as well: the power of the Israeli public is not in the fact that it can restrict the expression of the other, but in the fact that it can convey the truth. *Senesh*, at 841.

23. It cannot be ignored that, aside from the medium of film, there are additional means of expression that can give voice to the issues raised by the conflict. These include the written word, newspapers, radio, and television. Prohibiting the screening of a film means singling out that specific means of expression while, at the same time, allowing other channels to remain free and open, even where they cause similar offense. “Jenin, Jenin” itself was only prohibited from being screened commercially, and the chance remains that, even with that prohibition, the public will be exposed to the film. As such, it is only natural to question the effectiveness of the Council's censorship, and these doubts only undermine the Council's decision, especially where that decision stands against the freedom of expression.

24. To summarize, although the film causes deep offense to much of the Israeli public, prohibiting its screening does not accord with our standards for balancing the conflicting values here. The Council's decision is unreasonable and cannot be upheld. The film should be allowed to be screened. It should be allowed to struggle for its place in the free flow of expression.

The offense to the sensitivities of the public, harsh as it may be, does not threaten the public order. The resilience of the Israeli public is great. It has endured challenges to its survival, stubbornly preserving the dignity of its moral values. It has the internal strength to stand before these accusations, distorted and false as they may be. It is capable of responding appropriately, through other means of expression. This is true even though the pain of the events, still fresh, intensifies both the affront and the need to protest against it. These form the core of democracy: the need and the capability to deal with

such challenges without restricting the freedom of expression, as well as the fundamental ideals of tolerance in a free society, even where such tolerance is not reciprocated.

*The Limitations Clause of the Basic Law*

25. The constitutional principle of the freedom of expression, and our methods of balancing this freedom against other, opposing values, were developed long before the legislation of any of our Basic Laws, including the Basic Law: Human Dignity and Liberty. Even so, we make use of the standards established by those Basic Laws in order to interpret any statutory grant of authority. This is regardless of whether the statute in question was legislated before or after the passage of the Basic Law, and regardless of whether we deal with rights and freedoms which the Basic Law refers to explicitly. “This connection between the constitutional limitations clause and the entirety of our public law, including human rights not explicitly covered by the Basic Law, is entirely natural.” *See Horev*, [18] at 41-43 (Barak, P.)

Examining the present question in light of the conditions set out in the limitations clause of section 8 of the Basic Law: Human Dignity and Liberty, we are led to the conclusion that we cannot let stand the Council’s decision to prohibit the film. The limitations clause sets out a framework for examining whether a specific public interest can justify restrictions on the freedom of expression. Within this framework, we must determine whether such a restriction would be appropriate in light of the values of the State of Israel as a Jewish and democratic state, whether the purpose of the restriction is proper, whether the restriction is proportionate, and whether it is narrowly tailored to achieve its goal. *See Senesh*, [5] at 835-36. As per the Jewish and democratic values of Israel, it may be said that we need consider not only the freedom of expression but also to the need to protect the sensitivities of the public. As such, restricting the freedom of expression is consistent with the Jewish and democratic values of the State, provided that the injury to sensitivities is extreme, and provided that it is nearly certain that such injury will occur. All this,

however, is insufficient. Such restrictions must have an appropriate purpose, they must be proportionate, and they must be narrowly tailored. Here, even if the purpose behind the restriction—preventing offense to sensitivities—is proper, the scope and severity of the restriction is extreme, while the scope and severity of the offense is not. As such, the restriction does not meet the standard of proportionality. In light of this, the prohibition against the film cannot stand before our judicial review, and we must intervene in the Council's decision.

26. I arrive at this conclusion after having examined one of the Council's rationales, the offense caused to the sensitivities of the public. But even if the collective weight of all of the Council's reasons would be placed on one side of our judicial scales, I would still come to the same conclusion. The power of these reasons, even collectively, in our present circumstances, is insufficient to parry the force of the freedom of expression.

27. In conclusion: the authority of the censor stands only weakly before the freedom of expression. Our fundamental assumption is that the false and the fraudulent should be confronted with the good and the true, and that it is the latter that will ultimately prevail, taking its place among the rainbow of beliefs, ideals, and faiths of the free world. As in the words of Alan Dershowitz in his book, *Shouting Fire* (2002), [56] at 187:

The problem is that our First Amendment prohibits persuasive governmental censorship. The solution is to answer bad speech with good speech, and to have the good speech prevail in the marketplace of ideas.

For these reasons, I concur with the opinion of Justice Dorner.

### **Justice Grunis**

I concur with the opinion of my colleague, Justice Dorner and with the additional reasons of my colleague, Justice Procaccia.