Andre Rosenthal - Advocate

November 23, 2014

To
GOC Home Front Command
Via Facsimile: 08-978349, Telephone: 08-9783777

Dear Sir,

Re: **Appeal: The State's Intention to Demolish the House on the Ground Floor in which lived G. Abu Jamal**

1. I represent the Abu Jamal family on behalf HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger and on behalf of Addameer – Prisoner Support and Human Rights Association. Attached is a copy of the power of attorney.

2. The use of Regulation 119 of the Defence (Emergency) Regulations, 1945 is an act of revenge. It is a political response to a situation which exists for dozens of years – from the days which preceded the establishment of the state of Israel. The use of Regulation 119 injures innocent people whose guilt has not been proven, while the sole and exclusive connection between the terrorist and the Abu Jamal family is kinship. You have no proof that any family member knew of the terrorist's intentions and failed to act in order to prevent the execution of the terror attack. Punishment without trial for an act which was not carried out by the punished person – is legally inappropriate. As held by the Supreme Court in HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, page 706 opposite the letter A:

> 'And it came to pass when the kingdom was firmly in his control that he slew his servants who killed the king his father, but he did not put the sons of the killers to death, in accordance with what is written in the book of the law of Moses that God commanded him as follows: fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers, but a man shall die (read: be put to death) for his own sin.' (II Kings 14, 5-6).

3. **A.** The argument that we are not concerned with "punishment" is a denial on the part of the state. There is no doubt that the family members of the terrorist will be punished should the intention to demolish the house on the ground floor be carried out.

B. Regulation 119 originally appears, in page 50 under the title: Part XII – Miscellaneous Penal Provisions.

C. The state cannot punish a terrorist who died. Instead, his family members are punished, under the argument that it is required for deterrence purposes. The perpetrator, who died, cannot be deterred.

4. "There is no dispute that the exercise of the authority under Regulation 119 violates human rights. It violates the right to property and the right to human dignity." HCJ 4597/14 **'Awawdeh et al. v. West Bank Military Commander**, section 17 of the Judgment.

There is no way to find out whether the terrorist, a husband and father of three children, even considered the possibility that his home would be demolished as a result of his actions, before he committed the terror attack. It may be reasonably assumed that he took into consideration the fact that he would not return to his home after the terror attack. Namely, he was aware of the fact that the state demolishes terrorists' homes, also in Jerusalem. See: HCJ 9353/08 **Abu Dheim v. GOC Home Front Command,** of which he was certainly aware as an inhabitant of the village in which the Abu Dheim family home was sealed. The decisive status of the "deterring" effect has never been supported by any proof in dozens (if not hundreds) of cases in which this issue was discussed. One should not forget that we are concerned with a very old measure. Said measure, the use of Regulation 119 by the British which commenced in 1937, did not prove itself and eventually the British left Palestine, perhaps, also, due to the exercise of Regulation 119 against the local population.

5. The sad fact is that notwithstanding the existence of a very old house demolition policy, terrorists are not deterred from the execution of terror attacks. The unsubstantiated argument that the deterring effect may, possibly, deter a potential terrorist, the reason which was used by the Supreme Court to deny the petition which was filed in HCJ 6288/03 **Sa'ada et al. v. GOC Home Front Command**, did not prove itself in the case at hand.

   It is an assumption of the security forces, which by their nature promote the use of aggressive measures to achieve their objectives.

6. The fact that the Commander-in-Chief of the Israel Defence Forces, currently the Minister of Defence, adopted the recommendations of the committee which was established following the comments of the Supreme Court Justices in hearings which preceded the change of the house demolition policy in HCJ 7733/04 **Mahmud 'Ali Nasser and HaMoked: Center for the Defence of the Individual v. Commander of IDF Forces in the West Bank**, is explained by the increase in the number of terror attacks. However, in the past when Regulation 119 was broadly used by the state, there were also sharp increases in terror attacks. The recommendations of the committee were partially published in the past in the media and were referred to by a former judge of the Tel Aviv District Court, who was also, *inter alia*, the president of the Ramallah Military Court of Appeals and the Military Advocate General.

> "Needless to point out - as was also determined by the committee - that in no event it has been proved that house demolition resulted in the cessation of terror attacks, or in any significant reduction thereof, and maybe even the opposite is true. Hence, the deterring effect did not prove itself in this case."

"Beyond Security Considerations", Amnon Strashnov, "*Haartez*", February 21, 2005.

Among other things, the committee found that the use of Regulation 119 increases hatred, deepens the lines of the conflict and promotes the commitment of additional revenge attacks.

The only reason that Regulation 119 is being used once again is the helplessness of the state of Israel in view of the proliferation of terror attacks in Jerusalem and the need to take a public, demonstrative, well photographed action, highly mentioned on the media, to be seen by the nation and the international community. Revenge.

7. **A.** The exercise of the authority granted in Regulation 119, does not refer to the provisions of the Basic Law: Human Dignity and Liberty. In CrimFH **Ganimat v. State of Israel** as quoted in HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4), 485 the court held as follows:

> The enactment of the basic laws concerning human rights brought with it a substantial change in the legal field in Israel. Each legal plant is affected by said change. It is the only way to achieve harmony and uniformity in Israeli law. Law is a system of connected vessels. A change in one of these vessels affects all other vessels. It is impossible to differentiate between old law and new law as far as the interpretive effects of the basic laws are concerned. Indeed, any administrative discretion granted under the old law should be exercised in the spirit of the basic laws; any judicial discretion granted under the old law, should be exercised in the spirit of the basic laws; and generally, any statutory norm should be interpreted in accordance with the basic law and be inspired by it.

B. In view of the above judgment we argue that Regulation 119 has no proper purpose. Its purpose is only one: revenge, and at the same time, penalizing the family members. In the case at hand, the exercise of Regulation 119 is based on extraneous considerations, political considerations. We are concerned with a collective punishment against innocent family members.

C. The exercise of Regulation 119 does not reconcile with the values of the state of Israel as a Jewish and democratic state: "Fathers shall not be put to death because of their sons", namely, my father is not responsible for my actions, for as long as I follow the law of Moses.

D. In HCJ 7015/02 **Ajuri v. Commander of IDF Forces**, the Supreme Court held that deterring others is not a proper cause, when assigned residence was concerned. In that matter the court held as follows:

> 27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military commander may not, therefore, adopt a measure of assigned residence merely as a deterrent to others.

As far as Regulation 119 is concerned, deterring others is not a proper purpose as well.

The Supreme Court held that the purpose of deterring others could not justify the assignment of the residence of a family member of a terrorist who aided him in the execution of the terror attack. Similarly, it cannot be argued that deterring others may be considered a proper purpose when Regulation 119 is concerned.

8. **A**. The manner by which the authority is exercised in this case, the demolition of the apartment of the terrorist, which is located on the second floor of a two story house, and in so doing, destroying the home of his wife and three children,

does not enable the Minister of Defence to exercise, in the future, the power vested in him under Regulation 119. Namely:

> Where any house, structure or land has been forfeited by order of a Military Commander as above, the Minister of Defence may at any time by order remit the forfeiture in whole or in part …

9. It is clear that this provision which was enacted during the British Mandate has no place among the statutes of a Jewish and democratic state. The use of Regulation 119 injures innocent people. Kinship is their only "sin".

10. Reference is made to the minority opinion in HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, page 705 and onwards:

> Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one construction during the Mandate period and another construction after the State was founded, for the values of the State of Israel — a Jewish, free and democratic State — are utterly different from the fundamental values that the mandatory power imposed in Israel. Our fundamental values — even in our times — are the fundamental values of a State that is governed by law, is democratic and cherishes freedom and justice, and it is these values that provide the spirit in constructing this and other legislation. See for example, by way of comparison: HCJ 680/88 *Schnitzer v. Chief Military Censor, IsrSC 42(4) 625, 617et seq.* (*per* Justice Barak). This has been so since the founding of the State, and certainly after the enactment of the Basic Law: Human Dignity and Liberty, which is based on the values of the State of Israel as a Jewish and democratic State. These values are general human values, and they include the value that 'One may not harm a person's property' (s. 3 of the law) and 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive' (s. 8 of the law).

11. The use of Regulation 119 as a camouflage of "deterrence" is a fiction, a complete denial of the reality in the State of Israel.

The main reason for the exercise of Regulation 119 is revenge and blind faith that a cruel show of force against a specific sector within the State of Israel would cause it to cave in. The exercise of Regulation 119 disregards all acceptable legal norms in the "enlightened world", since the Jewish state, a "light unto the nations" has its own set of values.

12. The status of universal values under international law, collective punishment, causing injury to private property, penalizing the other due to the inability of the state to punish the dead perpetrator, makes acceptable international norms a fraud.

A. The status of customary international law in the domestic Israeli legal system was recognized by case law as a source for the determination that the use of torture against suspects is prohibited. As held by the Supreme Court in HCJ 5100/94

Public Committee Against Torture in Israel v. **The State of Israel**, IsrSC 53(4) 817, 836:

> Human dignity also includes the dignity of the suspect being interrogated. *(Compare* HCJ 355/59 *Catlan v. Prison Security Services*, at 298 *and* C.A. 4463/94 *Golan v. Prison Security Services*. This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." *See* M. Evans & R. Morgan, Preventing Torture 61 (1998); N.S. Rodley, The Treatment of Prisoners under International Law 63 (1987). These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice.

B. The Supreme Court held again in FH 7048/97 **Anonymous v. Minister of Defence**, IsrSC 54(1) 721 that the rules of customary international law should be taken into consideration, when it was so held in pp. 742-43:

> 20. Secondly, holding people as "hostages" – and this term also includes the holding of people as "bargaining chips" – is prohibited under international law (see Article 1 of the International Convention against the Taking of Hostages, 1979); Article 34 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (the Fourth Geneva Convention)). Indeed, I am willing to assume – without making a decision on this issue – that such a prohibition does not exist in customary international law. I am also willing to assume – without making a decision on this issue – that the consensual prohibition on the taking of hostages does not bind the state of Israel in the domestic law of the state in the absence of its application by state statute. Anyway, we must fairly assume that the purpose of the law is, *inter alia*, to realize the provisions of international law rather than to contradict them (see CrimApp 6182/98 **Sheinbein v. The Attorney General).** There is a "presumption of compatibility" between public international law and domestic law (see: HCJ 279/51 **Amsterdam v. Minister of Finance**, page 966; CrimApp 336/61 **Eichman v. The Attorney General**; CA 522/70 **Alkotov v. Shahin**, and also A. Barak, **Interpretation of the Law**, Vol. B, Interpretation of Legislation, page 576). The application of said presumption to the circumstances of the case at hand reinforces the inclination to examine the objective purpose of the law.

C. In HCJ 794/98 **Obeid v. Minister of Defence,** IsrSC 58(5) 774, wherein the Supreme Court held that the petitioner had the right to be visited by the ICRC, it was ruled, in page 769, as follows:

> The State of Israel is a state of law; the State of Israel is a democracy that respects human rights, and which gives serious attention to humanitarian considerations. We take such considerations into account because compassion and humaneness constitute an integral part of our nature as a Jewish and democratic state; we take such considerations into account, because we cherish the dignity of every person, even if he is our enemy (compare: HCJ 320/80 **Qawasmeh v. Minister of Defence**, page 132). We are aware of the fact that this approach, ostensibly, gives an "advantage" to terror organizations which pay no heed to

humaneness. But this is a temporary "advantage". Our moral approach, the humaneness of our position, the rule of law that guides us –constitute an important component of our security and our strength. At the end of the day, this is our advantage." Relevant to this case are words which were said in another matter:

> We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties (HCJ 5100/94 **Public Committee against Torture in Israel v. The Government of Israel**, page 845).

D. In HCJ 4112/99 **Adalah - The Legal Center for Arab Minority Rights in Israel v. the Municipality of Tel Aviv Jaffa**, IsrSC 56(5) 393, the Supreme Court held that the municipal signs of Tel Aviv Jaffa were unlawful and that each new sign should be drawn in both Hebrew and Arabic. As to existing signs, the respondent was given a period of two years to revise them. And it was so held, in page 414, in reference to international law:

> 17. Language receives special importance when the language of a minority group is concerned. Indeed, language embodies culture and heritage. It expresses social pluralism (see: D.F. Marshall, R.D. Gonzalez "Why We Should Be Concerned About Language Rights: Rights as Human Rights from an Ecological Perspective"). Hence the approach that the minority has the right to linguistic freedom (see: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (No. 47/135, December 18, 1992, Art. 1(1); Framework Convention for the Protection of National Minorities (Council of Europe, No. 157, February 1, 1995, Art. 14); (European Charter for Regional or Minority Languages (1992); see also in detail: M. Tabory "Language Rights as Human Rights).

E. In EDA 11280/02 Central Elections Committee for the Sixteenth Knesset v. MK Tibi, IsrSC 57(4) 1, the Supreme Court quoted international judgments and referred to international conventions as a basis for its judgment. And it was so held in page 22 onwards:

> 17. Language receives special importance when the language of a minority group is concerned. Indeed, language embodies culture and heritage. It expresses social pluralism (see: D.F. Marshall, R.D. Gonzalez "Why We Should Be Concerned About Language Rights: Rights as Human Rights from an Ecological Perspective"). Hence the approach that the minority has the right to linguistic freedom (see: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (No. 47/135, December 18, 1992, Art. 1(1); Framework Convention for the Protection of National Minorities (Council of Europe, No. 157,

February 1, 1995, Art. 14); (European Charter for Regional or Minority Languages (1992); see also in detail: M. Tabory "Language Rights as Human Rights).

F. In HCJ 4363/00 **Upper Poria Board v. Minister of Education**, IsrSC 56(4) 203 referred to international conventions as a basis for its judgment, and it was so held in page 213:

> Among the basic means which are required for a person's welfare is a person's right to education. This right was entrenched in the Universal Declaration of Human Rights of the UN of 1948, which states in Article 26 that Everyone has the right to education and provides that education shall be free and compulsory, at least in the elementary and fundamental stages, that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit, and that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, religious and ethnic groups. Following this declaration, different additional conventions were signed which entrenched the right of every person to education: The International Convention on Economic, Social and Cultural Rights of 1966 (Article 13); The European Convention for the protection of Human Rights and Fundamental Freedoms of 1952 (Article 2 of Protocol No. 1) and Articles 28 and 29 of the Convention on the Rights of the Child of 1990. Cultural rights, including the right to education, were recognized by customary and consensual international law as a category of human rights (Y. Dinstein "Cultural Rights").

13. In view of all of the above, the appeal should be accepted and Regulation 119 should no longer be used.

Sincerely,

Andre Rosenthal, Advocate