At the Supreme Court **HCJ 8066/14**
Sitting as the High Court of Justice

In the matter of:

1. **M_____ Abu Jamal, ID No. _____**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA**
3. **Addameer – Prisoner Support and Human Rights Association**

all represented by counsel, Adv. Andre Rosenthal - License No. 11864 and/or Adv. Muhammad Mahmud – License No. 38848
of 15 Salah a-Din Street, P.O.Box 19405,
Jerusalem, 91194
Tel: 6280458; Fax: 6221148

The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office

The Respondent

Petition for *Order Nisi* and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not retract his decision to use Regulation 119 of the Defence (Emergency) Regulations, 1945 against the home of petitioner 1, as specified below.

As an **interim relief**, the honorable court is requested to grant an order directing the respondent or anyone on his behalf, to refrain from taking any action against the home of petitioner 1 until the termination of the proceedings in this petition.

A copy of the petition is transferred, along with its filing with the honorable court, to the State Attorney's Office.

The grounds for the petition are as follows:

1. **A.** Petitioner 1 (hereinafter: the **petitioner**) is the brother of _____Abu Jamal who committed, on November 18, 2014, a terror attack in a synagogue in the Har-Nof neighborhood, Jerusalem, in which people were killed and injured, including himself.

   B. The path chosen by petitioner's brother runs contrary to all values and principles in which the petitioner and his family believe and according to which the family members were raised. The petitioner and his family members object to any violent and terrorist activity and to any injury of innocent civilians. Had the petitioner or any of the residents of the house known of the terrorist's intentions, they would have done anything in their power to stop him.

   C. The terrorist's apartment is located on the second floor, where he lived with his wife and children. His brother ____, lives in the apartment located below his apartment, which consists of a room, bathroom and kitchen. Next to him, on the ground floor, is the parents; apartment which consists of three rooms, a kitchen and a bathroom. Petitioner's affidavit is attached and marked **P1**.

   D. On November 20, 2014 notice was given to the petitioner according to which the respondent intends to demolish the house in which the terrorist lived. A 48 hour warning was given, until Saturday, November 22, 2014, at 13:18, to submit an appeal against the execution of the demolition.

   E. On November 21, 2014 petitioners' counsel turned to the respondent and requested a 24 hour extension for the submission of the appeal, namely, until November 23, 2014 at 12:00. The respondent accepted the application but demanded that the appeal would be submitted not later than 10:00.

   F. The appeal was denied and on November 24, 2014, the respondent notified of his intention to demolish parts of the structure in which the terrorist lived, including bathroom, shower, kitchen, part of a corridor and three rooms. The scheme indicates that the respondent intends to detonate these parts, as a result of which damage will certainly be caused to the other parts of the house.

   The petitioners argue that respondent's statement that no damage would be caused to the other parts of the structure is nothing more than a guess. A copy of the appeal and the response are attached and marked **P2** and **P3**. A copy of the demolition order is attached and marked **P4**. A copy of a scheme of part of the structure is attached and marked **P5**.

Petitioners' Arguments

2. **A.** Respondent's only argument which according to him, and according to this honorable court, justifies the exercise of this draconian regulation is "the need to find proper solution for state security and the safety of its citizens and residents."

   B. There is no doubt that proper solution must be found for the current situation and the question before this honorable court is whether the measure which was chosen meets domestic and international legal standards. The petitioners argue that clearly, the measure of house demolition of the family home of a terrorist – in the absence of any evidence, not even an administrative evidence, that any of the residents of the house was involved in the execution of the terror attack – does not meet these standards in any manner whatsoever.

3. The petitioners argue that the domestic Israeli discourse concerning the lawfulness of Regulation 119 in fact constructs a legal structure which justifies the means and its consequences.

4. **A.** The respondent argues that the proper cause which justifies the exercise of Regulation 119 is the deterrence of future terrorists and thus, the prevention of future terror attacks. It is argued that the terrorist who is about to commit an attack would think twice whether he should proceed with his intention, if he knows that as a result of the attack, after his death, the house of his family would be demolished. This argument has no factual basis whatsoever.

   B. The petitioners argue that there is no way to determine whether or not said assumption has merits.

   C. The petitioners argue that the measure taken by the respondent was imposed on him by the Prime Minister who has publicly announced that the houses should be demolished. On November 18, 2014, the following statement was published by the spokesman of the Prime Minister:

   > "Prime Minister Benjamin Netanyahu convened a security consultation at the Prime Minister's office in Jerusalem…
   >
   > In the meeting the Prime Minister directed to destroy the houses of terrorists who committed the terror attack today and to promote the demolition of the houses of the terrorists who have committed the recent terror attacks…"

   A copy of the publication is attached and marked **P6**.

   D. The petitioners argue that it is an inappropriate measure in view of the fact that the use thereof is based on extraneous considerations, guided by the political echelon, as specified in Exhibit P4 above. The international reaction to this directive expresses the contempt of the democratic world against this inappropriate measure. Everybody agrees that this measure penalizes the residents of the house with no fault on their part, despite the fact that their guilt has not been proven and despite the fact no causal connection has been substantiated, other than kinship. See for instance:

   http://www.un.org/apps/news/story.asp?NewsID=49437#.VHTeB4uUeSo

   http://www.theatlantic.com/international/archive/2014/11/can-israel-deter-attackers-by-demolishing-their-homes/382945/

   http://www.nytimes.com/2014/11/20/world/middleeast/israel-demolishes-family-home-of-palestinian-driver-who-killed-2-pedestrians.html?_r=0

   E. The case before us concerns a terrorist, resident of the Jabel Mukaber village. There is no doubt that he was aware, as a resident of the village, that the State demolishes the family homes of terrorists, including residents of East Jerusalem, since even before the current wave of demolitions and the Prime Minister's directive, the house of the Abu Dheim family, located in Jabel Mukaber village, was almost completely sealed. See: HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**. Namely, the measure had no deterring effect over the perpetrator and his cousin in that case.

5. On December 13, 2014 *[sic]*, a hearing was held in HCJ 7733/04 **Mahmmud 'Ali Nasser et al. v. Commander of IDF Forces in the West Bank** which concerned the use of Regulation 119 against the homes of the residents of the Occupied Palestinian Territories (OPT). The court posed critical questions to the representative of the State Attorney's Office regarding the use of such a draconian regulation and presented before him the same criticism and doubts which were raised

by the petitioners – in that file like in all previous files on the same issue. The hearing was postponed by 90 days; a military committee was established which reached the conclusion "that in no event it was proved that the demolition of houses would stop terror or reduce it in any significant manner" as stated by Judge (retired) Amnon Strashnov, formerly the Military Advocate General and president of the Ramallah military court ("Beyond Security Considerations", *Ha'aretz*, February 21, 2005).

The committee determined, *inter alia*, that the use of Regulation 119 increases hatred, deepens the lines of the conflict and encourages the execution of yet another revenge attack.

> "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.

According to the scheme attached to the demolition order, Exhibit P5, the respondent intends to detonate an entire floor. The petitioner is concerned of the damage that would be caused to the other parts of the house should the demolition be carried out.

6. This honorable court has determined more than once that in fact the purpose of the regulation is not punitive. The distinction between the declared purpose by the respondent – deterrence, and the result – demolition, is an artificial distinction. The purpose of the regulation is punitive. The fact that said distinction is artificial is supported by the location of Regulation 119 in the collection of the regulations. The Regulation, which was promulgated by British legislator who chose his words carefully, appears under the caption "Part XII – Miscellaneous Penal Provisions", page 50. There is no doubt that it concerns punishment, collective punishment, of innocent people.

   The petitioners argue that penalizing the family is inappropriate by any standard. There is no evidence which ties the family with the act other than kinship.

   A. Despite the extensive use which was made by Regulation 119 from 1937 by the British, when the kingdom was the sovereign of the area, and by the respondent and the commanders of the OPT, it cannot be said that terror stopped, neither in Palestine before Great Britain left it, nor after the State of Israel was established, either within its territory or in territories under its control.

   B. The petitioners argue that reality and history show that house demolition does not stop terror – and respondent's argument that the deterrence of future potential perpetrators is a proper purpose, is deceptive.

   C. House demolition has a clear purpose which is to satisfy the will to revenge, as indicated by the Prime Minister's directive, Exhibit P6.

7. A. The petitioners argue that the authority granted by the Regulation should be construed according to the spirit of the provisions of the Basic Law: Human Dignity and Liberty. Reference is made to the words of the Honorable President Barak (*emeritus*) in CrimFH 2316/95 **Ganimat v. State of Israel** as cited in HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4), 485:

   > 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. The petitioners argue that respondent's decision does not comply with the spirit of the Basic Law, and injures, beyond need, people whose only sin is kinship.

8. The petitioners argue that the use of Regulation 119 cannot be reconciled with the values of the State of Israel as Jewish and democratic state:

> '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) as cited by the Honorable Justice Cheshin in HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, page 706 opposite the letter A.

The petitioner and his family are not responsible for the acts of their family member, the terrorist.

9. In HCJ 7015/02 **Ajuri v. Commander of IDF Forces**, it was held, inter alia, 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

This Honorable Court has already rejected the purpose of "general deterrence" when the assignment of the residence of relatives of the terrorist was concerned. This Honorable Court is requested to determine that in this case either, the purpose of general deterrence is unacceptable.

10. Alternatively, the petitioners argue that the manner, by which the authority is exercised, is not proportionate. In determining that he wishes to destroy – other than the terrorist's room – the bathroom, shower and kitchen and two additional rooms which are used by the other family members which consists of ten persons – the respondent does not act according to the test of proportionality.

11. According to the language of Regulation 119 –

> 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 …

Once the respondent, GOC Home Front Command, decides to seize and demolish parts of the house, he prevents the Minister of Defence from considering the exercise of said authority, forgiveness, which is vested with him by law. The petitioners argue that an action may not be taken where it is clear, from the outset, that it will prevent the Minister from exercising his authority in the future.

12. The petitioners argue 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 whose guilt has not been proven; and with respect of whom it has not even been argued that they were guilty of anything. Things should be clearly said: we are concerned with an act the main purpose of which is revenge. Voices from the street and the establishment call for it, and therefore the Prime Minister succumbs to the cries for revenge, Exhibit P6. These are extraneous considerations.

13. 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).

14. One cannot disregard the fact that such acts derive from despair and helplessness in view of the severe and hopeless situation of the permanent residents of East Jerusalem, which may even cause a person to lose his sanity.

15. The use of Regulation 119 under the guise of "deterrence" is a fiction, a complete denial of the reality in the State of Israel. The respondent has a 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 "developed world", since the Jewish state, a "light unto the nations" has its own set of values.

16. The Supreme Court's failure to intervene with respondent's actions while exercising his authority under Regulation 119, makes acceptable international norms a fraud. The status of universal values under international law which are contemptuous of collective punishment, causing injury to private property, penalizing the other due to the inability of the state to punish the dead perpetrator – constitute part of said norms – which are acceptable in the developed world, but not in the State of Israel – which considers itself "light unto the nations".

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").

17. The petitioners argue that neither the respondent nor the state has any "answer" or practical solution for the phenomenon of suicide bombers or perpetrators of other terror attacks, as is the case in petition at hand. For as long as the State of Israel refuses to talk with its enemies and mostly prefers the use of force, and there is no end to this endless conflict, actions such as the one which was committed by petitioner's family member, will continue to take place. The use of the Regulation is intended to appease public opinion and show that actual steps were taken by the security forces. We argue that this is an extraneous and inappropriate consideration.

Conclusion

Reference is made to the words of the Supreme Court in HCJ this matter in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, TakSC 2003(4), 404, 406:

> Despite the judicial rationales, the idea that the terrorists' family members, that as far known did not help him nor were aware of his actions are to bear his sin, is morally burdensome. This burden is rooted in the Israel tradition's ancient principle according to which "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin." (*Deuteronomy*, 24, 16; and compare to Justice M. Cheshin judgment in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, *Piskei Din* 46(3) 93, 705-706). Our Sages of Blessed Memory also protested against King David for violating that principle by not sparing the seven sons of Saul (*Samuel II*, 21, 1-14) and worked hard to settle the difficulty **(**Yevomos, 79, 1).

The Honorable Justice Turkel states further:

> But the prospect that a house's demolition or sealing shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the house's tenants. There is no other way."

With respect to the last part of the above quote, we wish to point out that force has been used against Palestinians for so many years. We are of the opinion that the fact that the deeds of some residents of the state are repulsive and even more than that, should not dictate respondent's actions.

The honorable court is requested to intervene and restrain the respondent who acts as a representative of a Jewish and democratic state, and encourage the continuation of the change which lead to the abandonment of the use of Regulation 119 following the hearing in HCJ 7733/04 mentioned above.

18. Therefore, the honorable court is requested to grant the requested orders and make them absolute.

Jerusalem, November 25, 2014.

_____	_____
Andre Rosenthal, Adv.	Muhammad Mahmud, Adv.
Counsel to the petitioners	Counsel to the petitioners