At the Supreme Court **HCJ 8025/14**
Sitting as the High Court of Justice Scheduled for December 1, 2014

1. **_____ 'Akari, ID No. _____**
2. **_____ 'Akari, ID No. _____Petitioner**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
4. **Addameer – Prisoner and Human Rights Association**

all represented by counsel, Adv. Labib Habib et al.
of New Beith Hannina
POB 21225, Jerusalem 97300
Tel//fax: 02-6263212; Cell: 0524404477

The Petitioners

v.

GOC Home Front Command

represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Tel: 02-6466008; Fax: 02-6467011

The Respondent

Response on behalf of the Respondent

In accordance with the decision of Honorable Justice Hayut dated November 26, 2014, the Respondent hereby respectfully submits his response to the petition as follows:

1. The petition herein concerns Petitioners' request that the Respondent refrain from: "seizing and demolishing the apartment located on the third floor of a three-story building in Shu'fat Refugee Camp in Jerusalem, or otherwise harming it".

2. The Respondent will argue that the petition must be dismissed in the absence of cause for the Honorable Court's intervention. The decision regarding the seizure and demolition of the apartment located on the third floor in the Shu'fat neighborhood in East Jerusalem was made by the Respondent in accordance with the power vested in him under Regulation 119 of the Defense

(Emergency Regulations) 1945 (hereinafter: **Regulation 119**). The decision was made after the husband of Petitioner 1 and brother of Petitioner 1, Ibrahim Muhammad Daud 'Akari ID No. _____ (hereinafter: **the terrorist**), perpetrated a murderous terrorist attack at the light rail station on Shimon HaTzadik Street on November 5, 2014, killing a border police officer and a 17-year-old boy and injuring 14 others to varying degrees (hereinafter: **the terror attack**).

3. The Respondent argues that given the recent escalation which peaked with terrorist attacks in the heart of Jerusalem, use of the powers granted under Regulation 119 against the structure in which the terrorist resided is essential for deterring other potential terrorists from carrying out additional attacks.

4. As detailed below, most of the arguments raised by the Petitioners are not new. They have been reviewed and rejected in many judgments issued by the Honorable Court in the past.

   We add that only recently, the Honorable Court issued judgments in HCJ 4597/14 **Awawdeh v. Judea and Samaria Area Military Commander** (published on the website of the Judicial Authority, July 1, 2014, hereinafter: **Awawdeh**) and HCJ 5290/14 **Qawasmeh v. Military Commander** (published on the website of the Judicial Authority, issued August 11, 2014, hereinafter: **Qawasmeh**), wherein the Honorable Court repeated the rulings made with respect to the use of powers granted under Regulation 119, and dismissed the petitions.

   In the circumstances, the Respondent will argue that there is no cause or justification to address these arguments once more in the framework of this petition.

5. Given the series of terror attacks perpetrated in recent months shortly before and after the terror attack which is the subject of this petition, and since deterring potential terrorists is of the utmost importance, in particular potential terrorists among residents of East Jerusalem, especially those who intend to act on their "own initiative" rather than as part of an organized terrorism, network and since in our view, use of the powers granted under Regulation 119 is indeed necessary for deterring future potential terrorists, the Respondent asks the Court to rule on this petition as soon as possible.

The main relevant facts

6. Petitioner 1 is the terrorist's wife. Petitioner 2 is his brother.

7. The terrorist had a permanent residency permit in Israel. He lived in the apartment that is the subject of the demolition order on which the petition focuses in the Shu'fat neighborhood of East Jerusalem.

8. The terrorist had been involved in transferring Hamas funds on behalf of his brother, Musa 'Akari, released in the Shailt deal (more on this will follow) from abroad into the Judea and Samaria Area. He was also involved in Hamas activities.

Description of the terror attack

9. On November 5, 2014, the terrorist drove a pick-up truck near the light rail station on Shimon HaTzadik Street in Jerusalem. When he was near the light rail station, the terrorist veered off the road and into the light rail track, where pedestrians were standing, waiting for the train to arrive.

10. The terrorist sped, ramming into pedestrians at the station and then continuing with accelerated speed with the intention of running over more pedestrians

11. Continuing to speed, the terrorist deliberately drove the truck onto the sidewalk and ran over a cyclist who was cycling there. The truck hit the cyclist and killed him.

12. Later, the terrorist continued his erratic driving, crashing into other cars, until he stopped the truck the intersection between Haim Bar Lev St. and Mosheh Sachs St.

13. After the truck stopped, the terrorist was seen exiting it, carrying an iron bar. The terrorist attacked a police cruiser with the bar, breaking its windows. He then appeared to be searching for more victims, but a police force that arrived at the scene neutralized him.

14. This is a dry description of a heinous act that led to the death of two innocent people, a border police commander and a 17-year-old youth and the injury of 14 others.

    A video documenting the various stages of the attack is attached hereto and marked **R/1**.

The terrorist's relatives

15. The terrorist's brother, ____ 'Akari, was released and deported to Turkey in the Shalit deal. He had been convicted of membership in a cell that planned and executed the kidnapping of Police Officer Nissim Toledano, as well as an additional shooting attack in Talmei Elazar in which two police officers were attacked.

16. Another of the terrorist's brothers, _____, Petitioner 2 in the petition herein, praised the attack in an interview on the Shihab website and called the hundreds of listeners to follow in his footsteps. The video clip is available at https://www.facebook.com/videa.php?v=894893003886454&swt=vb.179609608748134&type2=&theater.

    We note that _____ has a Facebook page which shows his shahid brother's face as the background photo.

17. Security officials further state that confidential information in their possession indicates that following the terror attack, people were heard saying that the terrorist's family intended to forge a lease showing that the terrorist was a lessee in the house of his brother Musa (who, recall, lives in Turkey and was released in the Shalit deal).

18. Moreover, Petitioner 2, ____ 'Akari, has said in his interrogation that Khaled Mash'al called to congratulate him after the attack and expressed his wish that his brother would go to heaven, for which ____ thanked him.

The facts leading up to submission of the petition

19. Given the severity of the terror attack and the critical need to deter potential terrorists from perpetrating terror attacks inside the State of Israel, the GOC Home Front Command has decided, at the recommendation of the Israel Security Agency (ISA), with government-level approval and the approval of the Attorney General, to exercise his power under Regulation 119 with respect to the apartment in which the terrorist lived.

20. On November 20, the Petitioners were informed of the Respondent's intent to seize and demolish the apartment located on the third floor of a structure in the Shu'fat neighborhood in East Jerusalem, where the terrorist lived. The notice stated that the terrorist's family may submit an objection against said intent to the Respondent before he makes a final decision in the matter.

    The notice dated November 20, 2014 was attached to the petition and marked **P/1**.

21. On November 22, 2014, the Petitioners submitted an objection against the intent to use the powers granted under Regulation 119 with respect to the house.

    The objection dated November 22, 2014 was attached to the petition and marked **P/2**.

22. On November 24, the acting Home Front Command legal advisor responded to Petitioners' counsel in a detailed letter that the GOC Home Front Command had decided to reject the objection.

    The response dated November 24, 2014, was attached to the petition and marked **P/3**.

23. At the time the response to Petitioners' objection was provided, the Respondent signed a Seizure and Demolition Order for the residential unit in which the terrorist lived with his family (hereinafter: **the Order**), pursuant to his powers under Regulation 119. The Order stated the grounds for its issuance

    > This Order is issued as the occupant of the apartment, Ibrahim Muhammad Daud 'Akari (ID No. _____) perpetrated a terrorist attack when driving his vehicle onto the light rail platform on Shimon HaTzadik station, where passengers were waiting, and ran them over, continuing to attack passersby with an iron bar after his vehicle came to a stop. A border police officer and a 17-year-old youth were killed in the attack and 14 others were injured to varying degrees.

    A photocopy of the order dated November 23, 2014 was attached to the petition and marked **P/4**.

24. On November 26, 2014, the petition herein, which is directed against the Order issued by the Respondent was filed. Shortly after the submission of the petition, on the same day, Honorable Justice Hayut issued an interim order precluding the Respondent or anyone acting on his behalf from seizing, sealing or demolishing the apartment which is the subject of the petition.

The terrorist's family home

25. The apartment in which the terrorist resided is located in a three-story building in the Shu'fat neighborhood of East Jerusalem. It was home to the terrorist's nuclear family. The apartment in which the terrorist lived occupied the entire third (top) floor of the building.

21. [*sic*] As stated in para. 17 of the response to the objection given by the Respondent on November 24, 2014, "use of the power granted in Regulation 119 of the Defense (Emergency) Regulations 1945 refers to the apartment where the terrorist lived with his nuclear family. At the time of the demolition, measures will be taken to minimize the chances of significant damage being caused to apartments located near the terrorist's apartment." (emphases added, the undersigned).

The legal argument

The Respondent will argue that the petition must be dismissed. In two judgments, **Awawdeh** and **Qawasmeh**, given just a few months ago, the Court confirmed the long standing case law, whereby the demolition of terrorists' homes, is, in certain circumstances, a lawful, reasonable and proportionate measure based on the Military Commander's assessment that the measure acts as a deterrent (see, HCJ 124/09 **Dwayat v. Minister of Defense** (published on the website of the Judicial Authority, March 18, 2009, hereinafter: **Dwayat**); HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (published on the website of the Judicial Authority, May 1, 2009, hereinafter: **Abu Dheim**); HCJ 5696/09 **Mughrabi v. GOC Home Front Command, Maj. Gen. Yair Golan** (published on the website of the Judicial Authority, February 15, 2009, hereinafter: **Mughrabi**).

The arguments raised in this petition are merely a repetition of arguments made - and repeatedly dismissed - by the Honorable Court in the past. Respondent's position is detailed below.

The normative framework

Use of the power to seize and demolish - general

26. The power to order the seizure, sealing or demolition of a structure under Regulation 119 of the Defense Regulations is granted to the military commander, as part of local law.

Regulation 119 of the Defense Regulations, in the binding English language version, stipulates as follows:

> A MILITARY COMMANDER MAY BY ORDER DIRECT THE FOREFEITURE TO THE GOVERNMENT OF ANY HOUSE, STRUCTURE OR LAND SITUATED IN ANY AREA, TOWN, VILLAGE, QUARTER OR STREET THE INHABITANTS OR SOME OF THE INHABITANTS OF WHICH HE IS SATISFIED HAVE COMMITTED… ANY OFFENCE AGAINST THESE REGULATIONS INVOLVING VIOLENCE OR INTIDMIDATION OR ANY MIITARY COURT OFFENCE"…

[Hebrew translation follows]

27. As stated, Regulation 119 empowers the Respondent to seize, demolish or seal the entire structure in which the terrorist lives with his family. At the same time, according to the jurisprudence of the Honorable Court, when the Respondent decides to exercise his power under Regulation 119, he must exercise said power reasonably and proportionately, taking into consideration the overall circumstances outlined in case law.

According to case law, the purpose of exercising the power granted under regulation 119 is solely to deter and not to punish. Hence, the power granted under Regulation 119 is not exercised as a punishment for terror attacks perpetrated in the past, but is rather exercised only if the military commander reaches the conclusion, that use of the power is required to deter terrorists from carrying out additional terror attacks in the future – and for this purpose only.

The underlying premise is that a terrorist who knows that his family members may be harmed if he carries out his plan – may consequently refrain from carrying out his

planned terror attack. The deterrence is also directed at the family members of the terrorist, who may be aware of his plans, and is intended to cause them to take action to prevent the terror attack in view of the concern that their home would be damaged should they fail to do so.

28. According to case law, the harm inflicted on additional people who live in the house of the terrorist which has been made the object of the power granted under Regulation 119, does not constitute collective punishment, but is rather an impingement that is ancillary to the deterring purpose of using said power.

In HCJ 798/89 **Shukri v. Minister of Defence,** TakSC 90(1) 75 (1990) the following was held:

> The power vested in the military commander under Regulation 119 is not a power to use collective punishment. Use thereof is not designed to penalize members of the Petitioner's family. This power is administrative and its use is designed to deter, thereby upholding public order……
>
> We are aware of the fact that the demolition of the building damages the dwelling of the petitioner and his mother. True, this is not the purpose of the demolition, but it is its outcome. This bitter outcome is designed to deter potential perpetrators of terror attacks, who must understand that through their actions they themselves cause harm not only to public order and safety, and not only to the lives of innocent people, but also to the wellbeing of their own loved-ones.

And see also the words of the Honorable Justice (as then titled) Mazza, in the majority opinion in a judgment given by an extended panel of five justices in HCJ 6026/94 **Nazal v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 48(5) 338 (1994) (hereinafter: **Nazal**), as follows:

> We should therefore reiterate what has been said more than once: the purpose of using the measures subjected to the power of the Military Commander under Regulation 119 (1), relevant to the issue herein, is to deter potential terrorists from the execution of murderous acts, as an essential measure to maintain security… the exercise of said sanction indeed has a severe punitive implication, which injures not only the terrorist but also others, mainly his family members who live with him, but it is neither its purpose nor designation.

29. The security forces, in general, and the Respondent, in particular, are aware of the severe implications of the exercise of the sanctions under regulation 119, and particularly when an irreversible measure is taken, such as demolition. The military commander is directed to exercise his authority to order house demolitions only in such severe cases in which "ordinary" punitive and deterring measures, by their nature, cannot sufficiently and properly deter terrorists who harm body and soul.

30. Using the sanction of house demolitions is a **direct outcome of circumstances of time and place**. Just as terrorism takes on a new shape from time to time, so the Respondent is obligated to act accordingly and to the extent required, and alter the measures taken to counter the danger and annihilate it in the course of Israel's fight against the hostile and murderous terror activity.

In this regard, it has long since been held by this Honorable Court , authored by Honorable President Shamgar in HCJ 358/88 **The Association for Civil Rights in Israel v. GOC Central Command**, IsrSC 43(2) 529, 539 (1989), as follows:

> The prevention of acts of violence is a condition for maintaining public order and safety. There is no security without law enforcement, and law enforcement will not be successful and will not be effective if it does not also have a deterrent effect. The scope of the measures taken to enforce the law is, in any event, related to the gravity of the offense, to the frequency with which it is committed and the nature of the acts involved therein. If, for example, the murder of people who have contacts with the army becomes widespread, or, if attacks intended to burn people or property in order to instill terror and fear proliferate, the law must be enforced more rigorously and more frequently. The aforesaid is applicable anywhere, and areas under military control are no exception in this regard; on the contrary, maintaining order and safety and the enforcement thereof in practice are, according to public international law, among the central tasks of the military regime.

31. In view of the fact that the power granted under Regulation 119 is exercised in response to terrorism, it is not surprising that the scope of its use over the years was directly related to the scope and severity of the terror attacks. Thus, during the years in which there was a decline in terror attacks, the power granted under the Regulation was exercised more rarely, whereas in periods during which terror attacks became a "daily routine", security forces were compelled to respond by using the Regulation more frequently, in order to deter and cut off terrorism at the root to prevent the harm from spreading even further.

32. This is the place to note once again that taking measures according to Regulation 119, is based, first and foremost, on a number of balances. A balance between the severity of the act of terrorism and the scope of the sanction; a balance between the expected injury which would be inflicted on the family of the terrorist and the need to deter potential future perpetrators; a balance between every person’s basic right to his property and the right and duty of the government to maintain public order and safety, and protect the wellbeing and security of the citizens and residents of Israel.

33. Thus, within the framework of this balancing task, weight is given to the gravity of the acts, the circumstances of time and place; the terrorist’s residential ties to the house; the size of the house; the effect of the measure on other people; engineering concerns and other such considerations. Only after the weighing, examination and balancing of the entire array of considerations which are relevant to the circumstances of the matter, shall the military commander decide whether to use the measure of demolishing or sealing a structure, and to what extent (see, for instance, the judgment in **Nazal**).

34. Some nine years ago, when terrorism abated, a think tank headed by Major General Udi Shani issued a report entitled "Rethinking House Demolitions", in which it recommended bringing the systematic use of Regulation 119 down to a complete stop, while retaining the option to use this measure in extreme cases. A presentation to that effect was made in a meeting held by the IDF Chief of Staff in February 2005. Upon the conclusion of said meeting, the Chief of Staff decided to suspend, at that time, the use of the power granted under Regulation 119. However, it should be emphasized, that the Chief of Staff also determined that this decision could be revisited in extreme cases (as recommended by the think tank). The Minister of Defense adopted the Chief of Staff’s

policy. In the same context it was also determined that should there be an extreme change of circumstances, the decision would be reconsidered.

And indeed, following a substantial increase in the involvement of East Jerusalem residents in terror activity in 2008-2009, the GOC Home Front Command issued three orders by virtue of the power vested in him under Regulation 119. The orders were directed against the houses of the terrorist who carried out the attack at Merkaz Harav Yeshiva and the terrorists who perpetrated two vehicular attacks in Jerusalem. Three petitions submitted to the Honorable Court against these decisions – **Abu Dheim, Dwayat, Mughrabi** – were denied.

After that wave of terrorism subsided, several years went by without recourse to this measure.

From the general to the particular – security necessity

35. According to the professional assessment of security officials and the information collected by them, over the last two years the Jerusalem and Judea and Samaria sectors have shown a trend toward deteriorating security. This is evidenced in the increase in the overall number of terror attacks (including the number of severe attacks), the number of unorganized terror attacks and the number of casualties in these attacks.

36. This trend is well reflected in the terrorism figures collected **from the beginning of 2013 to mid-November 2014**. Thus, in 2013, 1,414 terror attacks were recorded in the Area, while more than 1,650 terror attacks have been recorded in 2014 to date. Of the attacks carried out in 2014, 1,595 were unorganized (including 1,387 incidents of Molotov cocktails thrown at cars and people, and 187 improvised pipe bombs). This period also saw a spike in the number of Israelis killed in terror attacks originating in the Area and in Jerusalem. **From 2013 up to the present time, 22 people have been killed in terror attacks, compared to zero casualties in 2012**.

37. Furthermore, from the beginning of 2014 - **and especially during the last few months - there has been a sharp increase in the number of severe terror attacks in which Israeli citizens were killed or firearms were used, as well as attempts to carry out severe terror attacks.**

We emphasize that this refers to a sequence of **dozens of incidents** which evince a serious escalation, such as the following cases:

a. **March 2014**: A wanted Hamas terrorist from the Jenin refugee camp, who was directed by Hamas headquarters in the Gaza Strip to advance a series of terror attacks, including shooting attacks against Israeli targets in the Area, was thwarted. The terrorist was killed in a military operation, during a gun battle with IDF forces in Jenin.

b. **April 2014**: Shooting attack at an Israeli vehicle at the Tarqumya checkpoint, killing Police Commander Baruch Mizrahi on Passover eve and injuring two others.

c. **April 2014**: Six activists of a military group from the Jenin and Bethlehem areas were apprehended, thwarting the its plan, directed by an "international Jihad" activist in the Gaza Strip, to perpetrate a shooting attack against IDF forces in the Jenin area.

d. **May 2014:** Suicide bomber's plan to detonate an explosive belt composed of improvised bombs carried on his person, at the Tapuach junction, frustrated. The members of the cell from Nablus, which were behind the attempted terror attack, were arrested by IDF forces shortly thereafter.

e. **May 2014:** Shooting attack in the Ramat Shlomo neighborhood in Jerusalem, in which a Palestinian terrorist shot at a group of Israeli citizens. The event ended without injuries.

f. **June 2014**: Shooting attack carried out by a Palestinian terrorist using small-arms, against an IDF position in Bitunya. The military force shot at the terrorist who fled the scene. The event ended without injuries

g. **June 2014**: Shooting attack using small-arms carried out from a passing Palestinian vehicle, at an IDF position near the tunnels road/Bethlehem bypass. The event ended without injuries and the attacking vehicle fled the scene.

h. **June 2014**: June 12, 2014 - kidnapping and murder of three youths who were on their way home from their schools in the Gush Etzion area. This terror attack was planned and executed by a Hamas cell.

i. **July 2014:** Terrorist attack using small-arms, shots fired at an Israeli civilian at Rehelim intersection in the Judea and Samaria Area. Civilian was moderately injured.

j. **July 2014**: IDF soldier lightly injured in a terrorist attack using small-arms in Samaria.

k. **July 2014**: Hamas attempt to perpetrate terrorist attack using booby trapped vehicle thwarted. Vehicle seized at a military checkpoint in the Judea and Samaria Area.

l. **August 2014**: Vehicular attack using an excavator in Jerusalem. Once civilian killed, others injured.

m. **August 2014**: Small- arms shooting attack in Jerusalem. IDF soldier severely wounded.

n. **October 2014**: Vehicular attack on light rail in Jerusalem. Baby girl and tourist killed. Other civilians injured

o. **October 2014**: Terror attack in which terrorist Mu'taz Hijazi made an attempt on Yehuda Glick's life, critically injuring him.

p. **October 2014**: Vehicular attack in Jerusalem, the subject of the petition at bar, again on light rail. Two Israeli civilians murdered, others injured.

q. **November 2014**: Vehicular attack at transportation station in al-'Arrub area, moderately wounding three IDF soldiers.

r. **November 2014**: Combined vehicular and knifing attack in Gush Etzion. Israeli civilian murdered, others wounded.

s. **November 2014**: Knifing attack at Hagana railway station in Tel Aviv. IDF soldier murdered.

t. **November 2014**: Combined shooting and knifing attack at a synagogue in Har Nof in Jerusalem. Five Israelis were murdered in the synagogue massacre and several others were wounded.

38. We further note that since the beginning of 2014, about 137 intended and attempted terror attacks in a variety of severe methods (kidnapping, bombs and shooting) in different sectors in the Area were thwarted.

39. The terror activity is mostly lead by local and "decentralized" groups, and by “lone terrorists”, with the latter coming to the fore as of late.

40. The Respondent believes that **these figures indicate a substantial shift in circumstances and an escalation in the scope, force and level of murderous terrorism which require measures to deter potential terrorists from perpetrating attacks in general, and attacks of the type that have proliferated recently in particular**.

41. It is important to note that some of the figures detailed above with respect to the state of security in the Judea and Samaria Area were provided to the Court just a few months ago in **‘Awawdeh**, leading the Honorable Court to rule (para. 24 in **‘Awawdeh**):

> We opened by describing the extreme circumstances currently prevailing in the Judea and Samaria area, circumstances which led to the conclusion adopted at the ministerial level, that a change of policy was required. I am of the opinion that the data presented, all as specified above, constitutes a change of circumstances. There is no room to intervene in the decision of the Respondent, who has concluded that at this time, actual deterrence was required, and that the demolition of the terrorist's house would result in such deterrence. As held in our jurisprudence: "the court is not inclined to intervene with the security agencies' evaluation concerning the effectiveness of using the measure of demolishing or sealing houses as a means to deter others" (Abu Dheim, para. 11). Furthermore, as ruled on more than one occasion, it is impossible to conduct scientific research which would prove how many terror attacks were prevented and how many human lives were saved as a result of taking the measure of house demolitions (see, for instance: HCJ 2006/97 Janimat v. GOC Central Command, IsrSC 51(2) 651, 655 (1997)). The conclusions arising from the severity of the recent events in Judea and Samaria are clearly a matter for the respondent to attend to. Petitioners' argument, that Respondent's decision was tainted by extraneous considerations as a result of the kidnapping of the three teens, and did not derive from considerations of deterrence, is hereby dismissed. The kidnapping of the teens constitutes part of the escalation in terror activity in the Judea and Samaria area, which underlies Respondent's conclusion that a change of circumstances has occurred justifying the intensification of the deterrence, by the demolition of 'Awwad's home. [emphases added, the undersigned]

We wish to argue, *a fortiori*, that given the recent surge of murderous terror attacks in Jerusalem and its vicinity, there is real need for deterrant measures in order to deter potential perpetrators from carrying out attack in general, and attacks of the types perpetrated in the recent wave of terrorism in particular.

42. The Respondent argues that **due to the wave of terror attacks in Jerusalem in recent months, some of which were perpetrated by residents of East Jerusalem, deterring terrorists who are residents of Jerusalem from carrying out attacks inside the country is critical. The need is all the greater given that some of these terror attacks were perpetrated by “lone terrorists”, i.e., terrorists who are not affiliated with an organized terrorism network, terrorists who are willing to die in the execution of the attack. Such attacks are inherently difficult to stop in advance. It follows that early deterrence of other terrorists of this type in Jerusalem is all the more critical**.

43. Given the aforesaid, the professional assessment of security officials, which is shared by the Prime Minister and the Chief of Staff, is that maximum deterrence against further terror attacks is currently critically important, particularly given the difficulty to thwart attacks of the type perpetrated in recent months by "lone terrorists". The Respondent believes that use of the power granted under Regulation 119 against the terrorist's home, as against the homes of other potential terrorists in East Jerusalem, and in the Area, is the order of the day.

The Respondent further argues that the decision to use the power granted by Regulation 119 against the terrorist's home in this case was reached noting, *inter alia*, the severity of the terror attack; the fact that it was perpetrated by a resident of East Jerusalem who ran over innocent pedestrians in the heart of the city. The Respondent believes that it is utterly crucial to deter further such attacks to the extent possible.

44. The Honorable Court addressed the issue of using the power granted by Regulation 119 at a time when terrorism is on the rise, when there is a stronger need to deter other terrorists in order to curb the rising tide of terrorism. We refer to the remarks made by Honorable Justice (as then titled) Naor in **Abu Dheim**, **the terrorist who perpetrated the murderous attack in Merkaz Harav Yeshiva**.

> Thus, the possibility that the policy would once again change was present even at the time the various petitions were dismissed without prejudice. Furthermore, the Respondent claims that prima facie it is clear that the case in the matter at hand is severely extreme, such that, according to the policy set forth by the Chief of Staff in early 2005, as per the recommendation of the think tank, it would be possible to consider use of the power granted under Regulation 119 with respect thereto. Therefore, claims the Respondent, this is sufficient for rejecting the Petitioners' claim regarding the change of policy. Nevertheless, the respondent clarifies that he intends to activate the power vested in him under Regulation 119 also with respect to houses in which other terrorists from East Jerusalem resided, and that in view of the change of circumstances since the policy change was made in 2005, there is no impediment to changing the policy once more and enabling use of the aforesaid Regulation. The respondent claims that the general principal is that policy can be changed when the circumstances change (see for example: AAA 1386/04 National Council for Planning and Building v. Neot Rosh Ha'ayin Association, Registered Association (not yet published, 20 May 2008). The respondent specifies that according to data produced by the Israel Security Agency, there has been a surge of terrorism in which East Jerusalem residents are involved, since 2007. This surge intensified in 2008. Unlike previously, a principal characteristic of the current wave of terrorism, aside from its extent, has been that residents of East Jerusalem perpetrate the terror attack themselves rather than aiding terrorists from the Area, as had been the case in the past. Security forces have gathered information on the intentions of residents of East Jerusalem to carry out additional terror attacks, and have also managed to thwart several additional terror attacks planned by residents of East Jerusalem. The Respondent attached to his response a review by the Israel Security Agency regarding the involvement of East Jerusalem in terrorism. This review was updated to 22 September 2008. The review indicates that in 2008, 104 residents of East Jerusalem were arrested due to involvement in terror attacks, while during the entire period lasting from 2001 to 2007, 374 people were arrested. It is, therefore, a steep increase in the number of terrorists from East Jerusalem. This review mentions prominent terror attacks in 2008 including the vehicular terror attack in Tzahal Square in which 18 Israeli civilians were injured; the tractor terror attack

on Mapu Street in which an Israeli civilian was severely wounded and 22 were lightly wounded; a shooting terror attack in the Old City in which one police officer was killed and another was wounded; a tractor terror attack on Jaffa Street in which three Israelis were killed and 42 wounded; a stabbing terror attack near Nablus Gate in the Old City, in which an Israeli civilian was wounded; a terror attack near Shu'fat Refugee Camp in which a border police officer was killed and a police officer was severely wounded, and of course - the terror attack in Merkaz HaRav Yeshiva that was perpetrated by the Petitioner's son. The Israel Security Agency also indicates in its review that intensified deterrent measures are required in order to deal with the new threat, including demolishing of terrorists' houses, intensifying sanctions against terrorists' families, increasing Israeli security presence in East Jerusalem, exhausting legal remedies vis-à-vis individuals who commit the criminal offense of arms trading, and charging anyone who intends to carry out a terror attack. The Respondent notified in his response that he intended to use Regulation 119 (subject to a hearing) in two other cases of tractor terror attacks.

Our position is that there is no room to intervene in the Respondent's change of policy. The new-old policy relies on the aforesaid opinion of the Israel Security Agency, and it is shared by the Chief of Staff and the Minister of Defense. Indeed an authority may change a policy and it may surely do so when the circumstances change. With respect to terrorists who are residents of East Jerusalem the Respondent demonstrated with concrete data, the highlights of which we mentioned above, that there is indeed a change of circumstances. As was ruled in the past by this Court, the Court is not inclined to intervene in the security forces' evaluation of the effectiveness of demolishing or sealing houses as a factor that deters others. The same was true when, a few years ago, there was a change of policy following the recommendations of the think tank headed by Major General Shani. As mentioned above, as ruled on more than one occasion, it is impossible to conduct scientific research that would prove how many terror attacks were prevented and how many human lives were saved as a result of using the measure of house demolitions. On this issue, nothing has changed. Indeed, reality has changed and so has the severity of the events. The conclusions to be drawn from that are clearly for security forces to evaluate.

These remarks are relevant word-for-word to the matter at hand.

45. Given the aforesaid, the Respondent believes there is no cause to intervene in his decision to make use of the powers granted under Regulation 119 with respect to the terrorist's house. In addition to the general critical need to deter other potential terrorists who are plotting to harm innocent civilians, there is also a concrete, essential need, to deter additional terrorists who enjoy full freedom of movement inside Israel from deliberately harming innocent civilians by exploiting their access to public places.

The decision falls within the purview of the Respondent by the powers vested in him by law, and complies with the case law produced by this Honorable Court in that it is made for a proper purpose, i.e., deterring other potential terrorists from committing additional terror attacks inside the country and executed in a proportionate and reasonable manner.

The remaining arguments made by the Petitioners

46. We shall now address the remaining arguments made in the petition

The argument regarding collective punishment

47. The petitioners argue that those harmed by the demolition are family members who had no part in the terror attack.

48. According to case law, family members' awareness or assistance with respect to the terrorist's intention to carry out the attack that prompted use of the powers granted under Regulation 119 is not required to effectuate said power.

We note that arguments similar to this argument brought by Petitioners have been raised and rejected by this Honorable Court many times. On this issue, see, for instance, the judgment in HCJ 2418/97 **Abu Phara v. IDF Commander in the Judea and Samaria Area**, IsrSC 51(1) 226 (1997), as follows:

> Indeed, it is true that there is no evidence which ties the petitioner and the family members of the terrorist with the acts attributed to him, but as was held more than once, the demolition of a structure is designed to deter rather than to punish and its purpose is "to deter potential perpetrators of terror attacks, who must understand that through their actions they themselves cause harm not only to public safety and order, and not only to the lives of innocent people, but also to the wellbeing of their own loved-ones.

And see also the remarks in made in the judgment in HCJ 6996/02 **Zu'rub v. Commander of IDF Forces in the Gaza Strip**, IsrSC 56(6) 407 (2002), as follows:

> Furthermore, we are of the opinion that in view of the fact that the Respondent took into consideration the engineering structure of the house and the fact that all of the inhabitants of the house were living together, but nevertheless concluded that in view of the circumstances of time and place, decisive importance should be given to considerations of deterrence, the Respondent did not exceed the legitimate limits of his discretion, even if there is no evidence that the other inhabitants of the house were aware of the actions of the son.

And see also on this issue the judgment of Honorable Justice (as then titled) Naor in HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (reported in the Judicial Authority Website, January 5, 2009), as follows:

> 6. The argument which also arose in the petition before us, that it is neither appropriate nor moral that the terrorists' family members, who did not help him and were not aware of his plans, shall bear his sin, was discussed in our jurisprudence. This argument was raised in the past and rejected. Justice Turkel wrote in this matter in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)) (the **Sa'ada** Case):
>
> > "Despite the judicial rationales, the idea that the terrorist's family members, that to the best of knowledge, did not help him and were not aware of his actions are to bear his sin, is morally burdensome. This burden is rooted in the Jewish tradition's ancient principle according to which "Parents are not to be put to death for their children, nor children

> put to death for their parents; each will die for their own sin" (Deuteronomy 24:16; and compare to Justice M. Cheshin's judgment in HCJ 2722/92 **al-'Amarin v. IDF Commander in the Gaza Strip**, IsrSC 46(3) 693, 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). But the prospect that the demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may fall victims to terrorists' horrifying actions, more than it is appropriate to spare the house's tenants. There is no other way."

7. Similarly, it was argued before us that the terrorist's family members were not related to the terror attack and that the father even opposed such acts. For this matter it is sufficient to refer to the ruling in HCJ 2418/97 0 Abu Pharah v. IDF Commander in Judea and Samaria Area, IsrSC 51(1) 226 (1997) and to HCJ 6996/02 **Zu'rub v. IDF Commander in the Gaza Strip**, [IsrSC] 56(6) 407 (2002) in which it was ruled that deterrence considerations sometimes oblige the deterrence of potential perpetrators who must understand that their actions might also harm the well-being of their loved ones, even when there is no evidence that the family members were aware of the terrorist's actions.

See also recently, para. 22 in **Awawdeh**

> The court's position regarding this issue may be summarized with the words of Justice Turkel in **Sa'ada**, which were quoted time and again:
>
> > the idea that the terrorist's family members, that to the best of knowledge, did not help him and were not aware of his actions are to bear his sin, is morally burdensome […] But the prospect that the demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may fall victims to terrorists' horrifying actions, more than it is appropriate to spare the house's tenants. There is no other way (**Sa'ada,** page 294. See also **Abu Dheim**, paragraphs 6-7 of my judgment).

49. In addition to the aforesaid we refer to the statements regarding the terrorist's relatives above.

Regarding the argument that the terrorist did not own the structure but was a lessee therein

50. The Petitioners claim that the house in which the terrorist resided belongs to his brother and that he leased his apartment from him.

> As emerges from para. 14 of the response to the objection, the Respondent has taken the claim that the terrorist did not own into consideration. In this context, it is noted, that the terrorist's proprietary status as owner or lessee does not detract from the Military Commander's power under Regulation 119. According to the common interpretation of the powers granted under Regulation 119, "residency ties" to the effect that a terrorist resided in a building are sufficient to activate the power to seize and demolish said building. On this issue, see paragraph 6 of the opinion of Honorable Justice Mazza (as was his title then) in **Nazal,** as follows:

> On the issue of the Respondent's power pursuant to Regulation 119(1), we must be satisfied that the terrorist was a "resident" or an "inhabitant" of the home which is the subject of the seizure and demolition order.

We note that according to consistent case law, the fact that the terrorist was a lessee in the building slated for demolition rather than its owner, does not preclude use of the power with respect to the building. The rationale for this was made clear as early as in HCJ 542/89 **al-Jamal v. IDF Commander in Judea and Samaria** (reported in Nevo, July 31, 1989), as follows:

> Learned counsel argued that the power granted in Regulation 119 could not be used as the Petitioner leased the apartment to the second Respondent and that in any case, the ties between him and the person who carried out the offenses against national security are distant enough to negate the material justification for employing said Regulation 119. There is no dispute that, as phrased, the Regulation may be used. In other words, given the Regulation's provisions, the fact that the person who committed the offenses is merely a lessee does not preclude use of the power. The argument addresses the material justification for using said legal provision.
> We have considered the arguments made by learned counsel for the Petitioner. Our conclusion is that Regulation 119 is used as a deterrent punitive tool and, should it come to pass that sanctions could be avoided if terrorists rent apartments, the deterrent effect expected from use of said provision will be lost.

See also the remarks made by Honorable President Barak in paragraph 10 of his opinion in HCJ 2/97 **Abu Halaweh v. GOC Home Front Command** (reported in ARS, August 11, 1997), as follows:

> The argument regarding the distinction between owners and terrorists who are merely lessees must also be rejected. Indeed, since Regulation 119 is used for the purpose of deterrence, there is no room for distinguishing between a terrorist who owns the building and one who rents it (see HCJ 3560/90 a-Sabber v. Minister of Defense (unreported)). This is particularly so considering the home of Petitioner 4 above was sealed rather than demolished.

See also: HCJ 1056/89 **Saradih v. Minister of Defense** (reported in Nevo, March 27, 1990); HCJ 2630/90 **Karakreh v. IDF Commander in the Judea and Samaria Area** (Reported in Nevo, February 12, 1991).

The argument that Regulation 119 cannot be used inside Jerusalem

51. Petitioners argue that Regulation 119, a warlike measure, must not be used inside Jerusalem's sovereign territory.

52. As detailed above, terrorism has struck at this city, perpetrated, among others, by residents and citizens of the country. This harsh reality requires exceptional measures.

53. With respect to authority – Regulation 119 of the Defense Regulations applies to the entire territory of the State of Israel and many rulings issued by this Honorable Court dismissed petitions regarding use of the powers granted in Regulation 119 in East Jerusalem (see, e.g., **Abu Dheim**, **Dwayat**, **Mughrabi**)

In this regard, we refer to the remarks of Honorable Supreme Court President Barak in FHHCJ 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4), 485 (1996), as follows:

> Indeed, the house slated for demolition is located in Israel rather than the Area. However, the power to demolish homes located in Israel is also located in the Defense (Emergency) Regulations (see, HCJ 261/89 **Temes v. Minister of Defense**, IsrSC 43(2) 559 (sealing of an apartment in the Old City of Jerusalem); HCJ 387/89 **Ra'id Rajabi v. IDF Commander in the Judea and Samaria Area** IsrSC 53(3) 177 (sealing of an apartment in the Old City). I have not found that use of this power is discriminatory.
>
> > Counsel for the Petitioner notes that Justice Cheshin believes use of Regulation 119 of the Defense (Emergency) Regulations is sanctioned by the existence of a state of war. She claims he refers to the West Bank rather than Jerusalem, and if the same holds true for Israel and the West Bank, then there is a novelty that requires additional review.
>
> On this issue, counsel for the Petitioners refers to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War which prohibits the destruction of real property "except where such destruction is rendered absolutely necessary by military operations". Counsel argues that this is not the case herein. This argument has no merit. Justice Cheshin did not rule that there was a state of war in the formal sense, nor did he base his judgment on the laws of war. This is clearly evinced in his judgment in HCJ 1740/06 and his dissenting opinion in **Nazal**. In Nazal, Justice Cheshin wrote:
>
> > The Justice's task is a difficult one. It is harder still when dealing with a horrifying, murderous terrorist attack such as the one before us. The murderer's deed is in substance, even if not formally, an act of war, and one responds to an act whose substance is an act of war, with an act that is also an act of war by nature, and as one would in war.
>
> In HCJ 1740/96, after citing this dictum, Justice Cheshin adds that he is not referring to war "as formally defined". He reiterates that "we are not suggesting that house demolitions in the areas under Israel's control are identical to acts of war carried out against an enemy state". Indeed, Justice Cheshin's judgments in the case at bar is founded on substance, not form. His judgment is based on "actions designed from start to finish in every way to maintain public safety and safeguard the lives of individuals – life and security, in their simplest sense". Indeed, Justice Cheshin concurred with Justices Bach and Dorner, and in doing so, did not establish a new rule worthy of further review, but, as he phrased it: "We have long since been aware of all this, and yet, I said to myself, I shall speak and unburden myself".

The argument regarding the manner of the demolition

54. As detailed, the Respondent does not intend to demolish the entire building, but to demolish the residential unit on the third floor only, where the terrorist resided. At the time of the demolition, the Respondent will take every precaution to minimize the chance of harm to apartments near the terrorist's apartment.

55. As to Petitioners' request to receive the opinion of an engineer with respect to the manner in which the apartment is to be demolished, a similar request was dismissed in Qawasmeh, when the Court did not see fit to intervene in the manner in which the demolition was to take place. So was ruled in para. 31 in Qawasmeh:

> As for Petitioners' arguments in HCJ 5292/14 concerning the possible effect of the demolition on adjacent apartments, we made a note of the statement made by Respondent's counsel whereby he would refrain from actions that might cause damage to adjacent properties. If they so wish, the Petitioners in the three petitions can submit to the respondent engineering opinions on their behalf on this issue, and the Respondent will examine these opinions with an open heart and mind before he executes the orders that are the subject of the petition.
>
> However, I found no merit in the alternative request of the petitioners in HCJ 5295/14 that we order the Respondent to provide them with an engineering opinion concerning the demolition, and I am satisfied that the Respondent will carry out his decisions, while properly considering the engineering characteristics of Petitioners' apartment. I also found no merit in Petitioners' arguments in HCJ 5300/14 concerning the manner in which the demolition will be carried out, a matter regarding which the Respondent has particularly broad discretion. In addition, I did not find that there was room to discuss Petitioners' request that the respondent undertake to compensate the injured parties should the demolition cause damage to adjacent properties. This is a hypothetical argument which should be heard, if at all, only in the event that such damage is caused as aforesaid, and by the competent instances. I am hopeful that this issue remains solely hypothetical.
> [emphasis added, the undersigned]

The argument regarding discrimination vis-à-vis Jewish terrorists

56. Petitioners also claim that the house should not be sealed or demolished since the powers granted under Regulation 119 are not used against Jewish terrorists.

57. The Honorable Court has addressed similar arguments in the past, and dismissed them. We refer to the recent remarks of Justice Danziger in **Qawasmeh**, referring to this very argument, and rejecting it.

> Indeed, it cannot be denied that acts of incitement and violence against Arabs have proliferated in Jewish society. It is regretful and one should act forcefully against such occurrences. However, the comparison is not in place, in view of the fact that the house demolition measure is not taken in the Area in cases of incitement and violence, but only in extreme cases of murder. I am not oblivious of the horrifying murder of the youth Muhammad Abu Khdeir, a case which rocked the foundations of our country and was condemned across the board. However, this is an extremely exceptional case. Therefore, I am of the opinion that there is no room for the artificial symmetry argued by the petitioners in support of their argument concerning discriminatory enforcement.
>
> Moreover, I do not think that Petitioners' arguments regarding discrimination are acceptable. The burden to present adequate factual infrastructure which can refute the presumption of good governance, rests on the shoulders of the party arguing that discriminating or "selective" enforcement is at play. Even if the arguing party

surmounts this hurdle, the authority can still show that the seemingly selective enforcement is, in fact, based on pertinent considerations. And as pointed out by Justice I. Zamir in HCJ 6396/96 **Zakin v. The Mayor of Beer Sheva**, IsrSC 53(3) 289 (1999), the burden to prove selective enforcement is particularly onerous. Justice Zamir states as follows:

> Indeed, an administrative authority seeking to enforce the law enjoys, like any administrative authority, the presumption of legality. The burden to refute this presumption rests on the shoulders of the party that raises the argument of selective enforcement against the decision of the authority, and therefore requests that the decision be revoked. It stands to reason that only in rare cases said presumption will be refuted and selective enforcement substantiated. Firstly, it stands to reason that an administrative authority which has the power to enforce the law, usually exercises the power based on pertinent considerations in view of the underlying purpose of the law. Secondly, even when there is concern that selective enforcement was applied, it is usually difficult to prove that the administrative authority exercised its power to enforce the law based on an extraneous consideration or for the attainment of an inappropriate purpose. However, in the rare case in which selective enforcement is proved, it should have legal ramifications [*ibid*, page 307].

In the case at hand, the Respondent made a decision which is located squarely within his discretion. Petitioners' arguments cannot point, at this time, at discrimination or extraneous considerations which underlie Respondent's decision. In view of the fact that Regulation 119 has a deterring rather than a punitive purpose, the mere execution of hideous terror acts by Jewish citizens, such as the abduction and murder of the youth Muhammad Abu Khdeir, cannot justify, in and of itself, the application of the Regulation against Jewish citizens, and there is nothing in Respondent's decision alone, not to exercise the Regulation against the suspects in this murder, which can point to the existence of selective enforcement.

See also, opinion of Honorable Justice Levi in HCJ 10467/03 **Sharabati v. GOC Home Front Command** (published on the website of the Judicial Authority, December 15, 2003) and the judgment in **Nazal** (para. 10 therein).

As stated, the incident which is the subject of this petition is one in a series of serious terror attacks, some of which have been perpetrated by residents of East Jerusalem (see para. 34 above). It is therefore essential to deter further potential terrorists within this population. This is not the case with respect to the terror act in which the youth Muhammad Abu Khdeir was killed, which is a rare exception.

Conclusion

58. Given all the aforesaid, the Respondent argues that there is no cause for the Honorable Court to intervene in the Respondent’s decision to issue the Order which is the subject of this petition and that the petition must be rejected.

59. As stated in the opening, the Respondent asks the Court to rule on this petition as soon as possible, considering the numerous terror attacks perpetrated in recent months and the paramount importance of deterring further potential terrorists.

60. The facts specified in this response are supported by the affidavit of Maj. Gen. Eyal Eisenberg, IDF GOC Home Front Command.

Jerusalem, November 30, 2014

[signed]	[signed]
Yochi Genessin, Adv. Senior Department Manager (Administrative Affairs) State Attorney's Office	Avinoam Segal-Elad, Adv. Senior Deputy State Attorney's Office