At the Supreme Court in Jerusalem **HCJFH 360/15**
Sitting as the High Court of Justice

1. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** - RA 580163517
2. **Bimkom – Planners for Planning Rights** – RA 580342087
3. **B'Tselem – The Israeli Information Center for Human Rights** – RA 580146256
4. **The Public Committee Against Torture in Israel** – RA 580168854
5. **Yesh Din – Volunteers for Human Rights –** RA 580442622
6. **Adalah – The legal Center for Arab Minority Rights in Israel** – RA 580312247
7. **Physicians for Human Rights** – RA 580142214
8. **Rabbis for Human Rights** – RA 580151967

represented by counsel, Adv. Michael Sfard and/or Shlomi Zachary and/or Emily Schaefer and/or Anu Deuel-Luski and/or Noa Amrami and/or Roni Peli, all of 45 Yehuda HaLevi St., Tel Aviv 65157 Tel: 03-6206947; Fax: 03-6206950

The Applicants

v.

1. Minister of Defense
2. IDF Commander in the West Bank

represented by counsels from the State Attorneys' Office
Ministry of Justice, Salah a-Din Street, Jerusalem

The Respondents

Request for Furrther Hearing

Pursuant to Section 30(b) of the Courts Law [Consolidated Version], 5744-1984

The Honorable Court is hereby requested to hold a further hearing in the judgment of the Supreme Court sitting as the High Court of Justice (the Honorable Justices Rubinstein, Hayut and Sohlberg) which was given on December 31, 2014, in HCJ 8091/14.

The issue with respect of which a further hearing is requested is the legality of the use of **Regulation 119 of the Defense (Emergency) Regulations 1945, by way of confiscating and demolishing or sealing the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens, and** mainly **the relation between the power granted under the Regulation and the prohibition on collective punishment and on damaging property of protected persons established by international humanitarian law, international human rights law and Israeli law.**

The judgment in HCJ 8091/14 being the subject matter of this Request for Further Hearing is attached and marked Exhibit 1.

He petition in HCJ 8091/14 (without exhibits) is attached and marked Exhibit 2.

The Expert Opinion which was submitted within the framework of HCJ 8091/14 is attached and marked Exhibit 3.

The grounds for the Request are as follows:

"This petition raises difficult questions" (the Honorable Justice Rubinstein, paragraph 16 of the judgment being the subject matter of this request).

"We are engaged with a draconian power" (the Honorable Justice Sohlberg, paragraph 2 of the judgment being the subject matter of this request).

"It should be honestly said that the issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of the case law in this matter is not easy." (the Honorable Justice Hayut, paragraph 1 of the judgment being the subject matter of this request).

A. The Policy and the Court's Ruling

1. The judgment being the subject matter of this request concerns a practice that has been followed by the State of Israel from the inception of the occupation of the West Bank (and, until the cessation of permanent military presence therein – also in the Gaza Strip). This is the practice of demolishing the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens, based on Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: the house demolition policy, Regulation 119 and the Defense Regulations, respectively).

2. This request concerns the judgment of this Honorable Court, which denied the petition of eight Israeli human rights organizations, which requested the court to thoroughly examine and resolve for the first time the legality of the house demolition policy and Regulation 119 in view of the explicit prohibitions established in different legal fields, and particularly in international customary law which applies to and has a binding effect in the Occupies Palestinian Territories (OPT).

3. It was argued in petitioners' petition being the subject matter of the request, that **despite the appearance of hundreds of judgments which discussed the practice of demolition or sealing of houses pursuant to Regulation 119, in fact, the main legal arguments which were raised against it throughout the years – that it constituted prohibited collective punishment (as defined by humanitarian international law and criminal international law) and a breach of the prohibition on damaging protected persons' property - have never been discussed and resolved.**

4. The Petitioners argue in their petition that, in fact, the arguments concerning the above two prohibitions were addressed only in two judgments which were given decades ago, by the end of the 1970's and in 1986, but the question of whether or not the Regulation breached said prohibitions was not resolved in said judgments either (HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464, 465 and HCJ 897/86 **Ramzi Hana Jaber v. OC Central Command et al.**, IsrSC 51(2), 522). In the above two judgments it was held, that whether or not the Regulation breached the above prohibitions, the Regulation being a local law, had superiority over them. Ever since these two first judgments were given – which are based, to our understanding, on a serious legal mistake, in view of the fact that the Defence Regulations are not "local law" and in any event they are not superior to explicit prohibitions established by the laws of belligerent occupation, which *ab initio* grant local law its force in an occupied territory – the arguments concerning the

prohibitions on collective punishment and on the damaging of property of protected persons were not discussed on their merits. It was argued, based on referrals to and analysis of many judgments, that the dozens of judgments which were given in the last thirty years, referred, in response to arguments concerning breach of the above prohibitions, to those two first judgments, or to judgments which quoted them. Hence, a situation was created in which, for 30 years, the main arguments according to which the Regulation contravened the explicit prohibitions on collective punishment and on damaging property of protective persons, entrenched in international law, were not, actually, discussed.

5. Petitioners' above described position was supported by a rare opinion of some of the most prominent Israeli experts on humanitarian international law and criminal international law, who are:

   a. Prof. Yuval Shany – Hebrew University Faculty of Law Dean, expert on international law and member of the UN Human Rights Committee;

   b. Prof. Mordechai Kremnitzer – Criminal law and criminal international law expert, Vice President of Research at the Israel Democracy Institute and Professor Emeritus at the Law Faculty at the Hebrew University of Jerusalem. Prof. Kremintzer is a member of the Public Council of B'Tselem, Applicant 3 herein.

   c. Prof. Orna Ben-Naftali – Expert on international law, Emil Zola Chair of Human Rights at the Haim Striks School of Law. Prof. Ben-Naftali is a member of the Public Council of Yesh Din, Applicant 5 herein.

   d. Prof. Guy Harpaz – Expert on European and international law, Hebrew University Faculty of Law.

6. In their opinion, the experts - who form the elite in research and publishing in the relevant fields - provide their detailed position in support of this petition being the subject matter of this request, and clarify that (1) the house demolition policy was unlawful, and may even attract responsibility as a war crime (2) the judgments given by this honorable court have never discussed the international law arguments.

7. In the judgment of this honorable court, being the subject matter of this request for a further hearing, the honorable panel decided not to enable the reconsideration of the lawfulness of Regulation 119, based on the argument that the issues raised by the petitioners were resolved in two judgments which were recently given, namely, HCJ 4597/14 **'Awawdeh v. West Bank Military Commander** (July 1, 2014)(hereinafter: **'Awawdeh**) and HCJ 5290/14 **al-Qawasmeh v. West Bank Military Commander** (August 11, 2014) (hereinafter: **Qawasmeh).**

8. In this request the following arguments will be made:

   a. That the issue discussed in the judgment being the subject matter of this request – the question of whether the use of Regulation 119 is lawful (and ethical) is a very **important** and **difficult** question which justifies a further hearing by an expanded panel. **In fact, it is inconceivable that such a difficult issue which pertains to such far reaching and draconian power, has never been discussed by an expanded panel of the honorable court has never been conducted;**

b. That the honorable court erred in its decision that the two judgments which were given last year **('Awawdeh** and **Qawasmeh)** included a decision on the argument of collective punishment and on the argument of destruction of property of protected persons. Therefore, and **in view of the fact that these issues have never been resolved, or at least have not been discussed for ages, this case concerns a <u>difficult</u> legal situation which pertains to a very <u>important</u> issue, in which a further hearing by an expanded panel should be held;**

c. That the failure of the honorable court throughout the years to decide on this issue puts the state of Israel and those acting on its behalf at a legal risk of violating the laws of war – **and for this reason also the issue should be classified as <u>important</u> and <u>difficult</u> to the extent which justifies a further hearing**;

d. That said legal risk, which is specifically pointed at by the experts on behalf of the Applicants, became extremely concrete on the date on which the judgment being the subject matter of this request was given, when a few hours after it was given, the "State of Palestine" joined the Rome Statute, and in so doing, gave the international criminal court jurisdiction to investigate and adjudicate severe violations of the laws of war in the West Bank. As argued in the petition and in the experts opinion, the house demolition policy according to Regulation 119 may be considered a war crime, which may be subject to the jurisdiction of the international criminal court. As noted by the experts, **the fact that the honorable court has refrained for many years from resolving the legal issues which were raised against the policy, or at least – its failure to hold a comprehensive discussion on these issues – increases the risk that in future indictments would be filed against Israelis in connection with this policy**. For this reason also, which constitutes a new circumstance which occurred after the judgment being the subject matter of this request was given – **the ruling being the subject matter of this request is important and difficult to the extent which justifies a further hearing by an expanded panel**.

B. An extremely important issue and an extremely difficult ruling

I. The ruling is difficult due to an ostensible violation of explicit prohibitions established by Humanitarian Law

9. It seems that there is no dispute that the ruling which upholds the exercise of the power to demolish the homes of persons suspected of terror is very difficult. The honorable Justices of the panel who heard the petition in our case, also defined it as such, and we have quoted in the beginning of this request their own words, which were written in the judgment being the subject matter of this request.

10. Although Israel has used and continues to use a wide variety of governmental practices in the territories it occupied during the Six Day War, and though its policies and the practices of its various agencies have been the subject of keen public and legal debate in Israel and abroad, **it is difficult to imagine a power that has been the butt of more scathing, incisive, broad and comprehensive criticism than the house demolition policy under Regulation 119. <u>In fact, we have not a single expert on international law who supports the argument that the house demolition policy is lawful, and most believe its implementation is a grave breach of international humanitarian law, and may, therefore, give rise to personal criminal liability as a war crime.</u>**

11. Indeed demolishing the homes of individuals suspected of involvement in terrorist attacks, with the harm caused to members of their household who pay the heavy toll of losing their home because of the actions (or suspected actions) of a relative, is perceived as a full, frontal and brutal violation of the moral and customary prohibition on collective punishment (hereinafter: the **collective punishment argument**). Moreover, demolishing the homes of those defined under international law as "protected persons", is also perceived as an independent violation of the prohibition on damaging the property of protected persons (hereinafter: the **protected persons property argument**). **These are the <u>fundamental arguments</u> for impugning the practice and the policy and they are made – as was specified in the petition (sections 166-193 of the petition, Exhibit 2) - in every paper, book and legal expert opinion penned on the subject.**

12. <u>Ethically</u> **-** it is hard to think of an ethical theory which does not reject the punishment of the sons for the sins of their fathers. The holly book is filled with verses which express this idea in many ways, and Torah stories which did comply with this principle were interpreted by our sages of blessed memory in a manner which reconciled them with the prohibition (see on this issue the section which was devoted by us in the petition to the prohibition on collective punishment in Jewish law, Exhibit 2, pag**es** 35-38)**.**

13. Legally - The consensus that the house demolition policy is unlawful is so broad, that in what is a rare occurrence, all of the top experts we know working in Israel in the relevant legal fields have written about the policy and analyzed it, and all determined that it is unlawful. We have referred in the petition attached hereto as Exhibit 2 to their essays and books of (*inter alia*) Prof. David Kretzmer and Prof. Yoram Dinstein (see: Exhibit 2 to the petition, paragraphs 122, 165, 172). In addition, and as aforesaid, the expert opinion of four experts, who have written about this policy academically and taught about it, was attached to the petition. Some of the assertions included in their detailed and extensive expert opinion are:

a. The house demolition policy constitutes a grave breach of international humanitarian law, the international laws of occupation and international human rights law;

b. The rulings of this Honorable Court that ostensibly upheld the use of Regulation 119 are incongruent with fundamental principles which this Honorable Court established in its rulings addressing the tension between security considerations and human rights under international law, most notably, the principle of individual responsibility and individual threat;

c. **The house demolition policy may, in certain circumstances, constitute a war crime, and, in certain conditions, the International Criminal Court has jurisdiction over it.**

This is indeed a clear and sharp message from those who together form the vanguard of the legal expert community in Israel.

14. The petition specifies in detail the fundamental arguments (pages 42-43 of the petition). A section was devoted to the issue of prohibition on collective punishment, established in international law from its inception and the interpretation which draws a distinction between *punishment and deterrence* was discussed, with references to different sources including the official interpretation of the Red Cross (ICRC). A section was devoted to the superiority of international law in an occupied territory over the local law (paragraphs 94-130 of the petition). A section was devoted to the analysis of the prohibition against damaging property of protected persons and to the scope of the exception "rendered absolutely necessary by military operations", with respect of which there is a consensus that it does not apply under the circumstances in which the policy, being the subject matter of this request, is exercised (paragraphs 167-172 of the petition). There are extensive writings, international rulings and interpretations on each one of the above issues, sometimes specifically in the context of the Israeli house demolition policy according to Regulation 119.

15. **In view of the fact that the honorable court did not refer to any of the above, we will not encumber this request with all relevant arguments and sources and will only attach the petition and make references thereto**.

16. **It should be briefly recalled, that the fundamental arguments are that the policy violates two customary prohibitions which are established and enshrined in the humanitarian law and which also underlie the definitions of two different war crimes under criminal international law**:

a. Prohibition on collective punishment: the old prohibition underwent codification and is currently enshrined in Article 50 of the Hague Regulations concerning the Laws and

Customs of War on Land 1907, and in Article 33(1) of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,1949,which state as follows:

> "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible" (*Article 50*);
>
> "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited (*Article 33(1)*).

The petition describes the current interpretation of the term "collective punishment" and explains why all scholars who examined and written about this issue (with no exception) share the conclusion that the house demolition policy constitutes collective punishment and violates the prohibition.

b. Prohibition on the destruction of property belonging to protected persons: This customary prohibition was also codified and is currently enshrined in a Article 23(7) of the Hague Regulations and Article 53 of the Geneva Convention (a prohibition the violation of which was directly defined as a war crime in the constitutions of the criminal courts which were established in the last decades, including the Rome Statute).

> "In addition to the prohibitions provided by special Conventions, it is especially forbidden [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" (*Article 23(7)*);
>
> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations" (*Article 53*);

The petition includes a description of the various elements of the prohibition according to humanitarian law and criminal international law, with references to judgments of international tribunals and writings on this issue. Here too there is absolute consensus among international law scholars: the policy being the subject matter of this request violates the prohibition.

17. Hence, the case before us concerns an extremely difficult and an extremely important issue. Which court does not find it difficult and what judge does not find it hard to sleep at night when he is requested to impose a sanction on someone who did no wrong, only because he is a relative or a neighbor of a person suspected or convicted of a crime? This clear difficulty has a legal interpretation which is reflected in the fundamental prohibitions specified above, which, regretfully, were neither discussed nor resolved – neither in the many judgments

which were given by this honorable court over the years nor in the judgment being the subject matter of this request.

18. **The clear importance of this issue, and the difficulties posed by the court's ruling which disregards such fundamental prohibitions of international humanitarian law – justify, in our opinion, a further hearing.**

19. Parenthetically, we would like to refer to the words of the Honorable Justice Sohlberg, who apparently agrees that this case concern collective punishment but who is of the opinion that in certain cases collective punishment is required. And it was so written by the Honorable Justice Sohlberg in the judgment being the subject matter of this request:

> "Nevertheless, the voice of ethics and justice, it seems that the rule "every man shall be put to death for his own sin" is neither the most important rule, nor is it an isolated rule, unlike petitioners' position which argue that it is the one and only and most important rule."

(page 27, paragraph 21, and see the examples brought thereafter by the Honorable Justice Sohlberg such as a rabbinical ruling according to which a child could be removed from school as a sanction against his father).

20. It is indeed an individual opinion and it may probably be classified as an *obiter dictum*, (in view of the fact that according to the judgment the collective punishment issue should not be considered at all), nevertheless, this is exactly the issue in which a further hearing is required.

21. In addition, the Applicants are of the opinion that the rule "each will die for their own sin" is an absolute rule which has no exceptions. In our opinion, this is a moral and certainly a legal commandment. What is the position of the Israeli law on this issue? What is the position of the Supreme Court? For this purpose a further hearing is required.

II. The failure to decide on the legal arguments intensifies the difficulty posed by the court's ruling

22. The Applicants will argue that the "difficulty" of the ruling, stipulated in section 30 of the Courts' Law [Consolidated Version], 5744-1984, as a cause for further hearing, may arise from the failure to decide on pivotal legal issues which stand at the heart of the ruling at hand. The Applicants will argue that in the case at hand – the court's ruling which pertains to a very controversial practice was given without coping with the fundamental legal arguments which were raised against it – is by definition a very difficult ruling, in which a further hearing is justified in view of the court's failure to consider the main arguments and decide on them.

23. The aforementioned fundamental arguments impugning the use of Regulation 119 – the argument concerning the breach of the prohibition on collective punishment and the breach of the prohibition on damaging property belonging to protected persons – and other arguments have been presented to the Court dozens, if not hundreds of times. They have been reviewed and rejected.

24. However, as we have explained above and described in detail in the petition, though the lawfulness of the practice and the attendant policy has seemingly been addressed by the Honorable Court in hundreds of individual petitions against orders issued pursuant to Regulation 119, **in fact, the Honorable Court has not considered the legal arguments <u>on their merits</u> ever since the 1980s', nor has it addressed the criticism directed at those early judgments, or confronted the volumes of writing on this issue - and the petitions were always dismissed citing the (scant) grounds provided in the early judgments on this issue from the 1970s and 1980s.**

25. Legal research into the history of rulings issued by the Honorable Court on this subject, as specified in the petition (paragraphs 45-76), demonstrates that despite the appearance of hundreds of judgments upholding the practice, the Honorable Court considered the collective punishment and protected persons' property arguments <u>on their merits</u> in two judgments only. The rest refer back to these first two judgments, or to judgments referring to them. Legal research proves that in practice, **<u>over the last thirty years</u>, the Court has not reconsidered the main legal arguments that the power vested under Regulation 119 is unlawful and constitutes a breach (and a grave one at that) of legal provisions of a higher normative order**. Since the mid-1980's, the Honorable Court's judgments in petitions against the use of Regulation 119 have focused on attendant issues (such as the proportionality of the demolition, the right to a hearing, the expansion of the policy to the homes of suicide bombers etc.), rather than the fundamental arguments against the practice – the collective punishment argument and the protected persons' property argument. On these – the Honorable Court repeatedly refers back to earlier judgments, which in turn refer to those first and old two judgments from the 1970s and the 1980s.

26. Moreover: Arguments alleging breach of customary international law were dismissed in those oft cited early judgments, based on the doctrine that holds domestic law preferable to international law when the two conflict. This position appears in the first judgment on the use of Regulation 119, HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464, 465 and blatantly so in the other central judgment, HCJ 897/86 **Ramzi Hana Jaber v. GOC Central Command et al.**, IsrSC 51(2), 522, where the following remark is made:

> "Regulation 119 forms part of the law that was in effect in the Judea and Samaria Area prior to the establishment of IDF rule therein (HCJ 434/79 **Nuzhat Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34 464, 465; HCJ 22/81 **Hamed v. Commander of the Judea and Samaria Area**, IsrSC 35, 223, 224; HCJ 274/82 **Hamamreh v. Ministry of Defense**, IsrSC 36 (2) 755, 756. In keeping with the rules of international public law, as expressed in Proclamation No. 2 issued by the IDF Commander in the Area, domestic law remained in effect under caveats that do not affect the matter at hand (see Article 43 of the Hague Regulations of 1907 and Article 64 of the Fourth Geneva Convention). It follows that powers granted pursuant to the aforesaid Regulation 119 constitute domestic law in force in the Judea and Samaria Area, which was not repealed during the previous regime or during military rule and we have not been presented with legal arguments for considering it null and void at this time."

27. The many judgments upholding orders to seal or demolish homes issued under Regulation 119 subsequent to these two judgments, did not revisit the fundamental arguments, and, as stated, referenced these judgments or judgments referring to them.

28. The judgment being the subject matter of the request at hand was given against this backdrop. The petitioners there (the Applicants here) requested the Court to consider once and for all the fundamental issues and decide on them. The petitioners requested the Court to consider the meaning of the prohibition on collective punishment (which may even constitute punishment or inhumane treatment as will be specified below), as it appears and cited above in clear customary provisions of humanitarian law upon which the definition of a war crime in criminal international law is based (Article 50 of the Regulations annexed to the Fourth Hague Convention, 1907, and Article 33(1) of the Fourth Geneva Convention 1949). The petitioners requested the honorable Court to examine the scope of the prohibition in view of the interpretation which appears in the writing of scholars and in rulings of international courts and tribunals and to hold whether or not the house demolition policy violated said prohibition in the mirror of international law. Similarly, the petitioners requested the Court to examine the argument that the house demolition policy also violated the prohibition on the destruction of property belonging to protected persons, as stipulated and cited above in Article 23(7) of the Hague Regulations and in Article 53 of the Geneva Convention (a prohibition which was directly defined as a war crime in the constitutions of the criminal courts which were established over the last decades, including the Rome Statute).

29. The ruling of the judgment being the subject matter of this request is that there is no room to decide on the fundamental arguments against the house demolition policy. The panel held, that there was no room to revisit these legal issues on the grounds that they were addressed in the **'Awawdeh** and **Qawasmeh** judgments which were given last year (see the comments of the Honorable Justice Rubinstein in the last paragraph of page 8 of the judgment, and the words of the Honorable Justice Hayut in pages 33-34).

30. However, a review of said last judgments, **'Awawdeh and Qawasmeh**, shows that the fundamental arguments regarding the violation of the prohibition on collective punishment and the violation of the prohibition on damaging the property of protected persons were not addressed there altogether. Moreover: the State Attorney's Office even argued that there was no need to address these issues, in view of the fact that, allegedly, these issues have already been resolved in the past (see: HCJ 5290/14 **Qawasmeh** paragraphs 14 and 21 and HCJ 4597/14 **'Awawdeh** commencing from paragraph 16).

31. **In fact, neither one of these judgments mentioned the prohibitions established in international law, and clearly no discussion was conducted in the question of whether they were violated as a result of the use of Regulation 119** (see the legal analysis in **'Awawdeh** paragraphs 15-22 and in **Qawasmeh** paragraphs 21-25). In these two judgments the Honorable Court reiterated its determination that Regulation 119 was used for deterring rather than punitive purposes, **and followed**

its own previous judgments which failed to examine the definition of a punitive sanction in connection with the prohibition on collective punishment – though there is ample writing on this issue.

32. The experts on behalf of the Applicants also noted that in these two judgments the Court failed to address the legal arguments concerning international law (page 33 of Exhibit 3):

> "The June 2014 verdict of 'Awawdeh and the August 2014 verdict of Qawasmeh are cases in point, the Court adjudicating the case solely on the grounds of Israeli law, ignoring the applicability of the laws of belligerent occupation and the obligations that this body of law imposes on Israel. The latter example is particularly illuminating in its deficient treatment of the laws of belligerent occupation. The Petitioners invoked the laws of belligerent occupation to substantiate their claim about the illegality of the Policy. Justice Danziger, leading the unanimous bench of three Justices, referred to the Petitioners' claim, but decided to ignore that body of law altogether."

33. **In other words: in the two judgments which were referred to by the Honorable Court in the judgment being the subject matter of the request, 'Awawdeh and Qawasmeh, the Court followed the exact same path taken by it over the last thirty years in dozens of petitions which impugned demolition or sealing orders according to Regulation 119: failure to decide on the fundamental legal issues, failure to address the argument that the policy violated the customary prohibitions which stand at the heart of the difficult issue at hand**.

III. In view of the above – causes which justify a further hearing

34. In view of the above, we are of the opinion that there are three causes which justify the holding of a further hearing by an expanded panel in the judgment being the subject matter of this request:

a. **A ruling which upholds punitive house demolition – an important and difficult ruling**: **in our opinion, and without addressing the mistake which we believe was made in the judgment that referred to 'Awawdeh and Qawasmeh as judgments in which the fundamental issues were resolved, in view of the difficult nature of the ruling, and its importance to the persons injured by it as well as to the State of Israel and Israeli society – it would be wrong to leave the issue without a thorough and comprehensive legal examination by a the highest legal instance**.

b. Failure to resolve the fundamental issues – creates a difficult ruling to an extent which justifies a further hearing: as aforesaid, the analysis of the judgments

given by the court in general and of the judgment being the subject matter of this case in particular, indicates that the Court failed to address the pivotal legal arguments which were raised against the policy, a fact which makes the ruling difficult to an extent which justifies a further hearing.

c. The broad legal consensus that the policy is not lawful: in addition, the Applicants are of the opinion that the full consensus among Israeli and foreign scholars and the extensive writing of expert jurists, all of whom scathingly criticize the judgments on this issue, require a reconsideration of the ruling of this Honorable Court. It is difficult to accept a situation in which the judiciary and the academic community take polar positions on such a pivotal and fundamental issue. This situation requires at least a renewed and general discussion of such a central issue, which has not been discussed on its merits for decades and has never been discussed in an exhaustive manner – a discussion that the Court refused to conduct in its judgment being the subject matter of this request.

C. Criminal International Law and the Palestininas' Signature of the Rome Statue

I. House demolition pursuant to the Regulation ostensibly constitutes a war crime

35. Another argument which was raised in the petition being the subject matter of this request, was that the current legal situation in Israel which upholds the use of Regulation 119, creates legal risks for those involved in the exercise of the authority, in view of the fact that ostensibly, it may impose criminal liability under criminal international law.

36. Firstly, it was argued, it was argued that the policy ostensibly constituted a **war crime of extensive destruction of property belonging to protected persons**. Said argument relied, *inter alia*, on Article 8 of the Rome Statute, which is a codification of war crimes constituting grave breaches under Article 147 of the Fourth Geneva Convention and which defines destruction of civilian property as a war crime under Article 8(2)(a)(4) which provides as follows:

> "Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly."

37. Regretfully, an in depth examination of house demolition policy, against the backdrop of the elements of the offense as they are defined in the above Article and as they were interpreted by the relevant international tribunals, indicates that it satisfies the elements of the offense:

a. Israel’s house demolition policy causes destruction of property that is undoubtedly protected as civilian property.

b. Israel is obviously aware of the fact that this is protected property in an occupied territory.

c. The destruction is extensive. It is not confined to a few individual houses, but rather the result of a systematic, official policy carried out deliberately and for punitive purposes, a policy that has seen the demolition of hundreds of homes belonging to people who committed no crime, while the authorities were aware that they had committed no crime.

d. Furthermore, house demolitions are not justified and cannot be justified under any circumstances by "military necessity", as the concept is currently defined in customary law as an **operational requirement,** and the respondents do not argue either that it is an act taken under circumstances of "military necessity" but rather a deterring measure with a future effect.

38. Secondly, it was argued that the policy satisfied the elements of the **war crime of collective punishment** as it constituted a grave breach of a prohibition entrenched in the Fourth Geneva Convention. Different international criminal tribunals (such as the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone) included in their constitutions a specific definition of the war crime of collective punishment.

39. Thirdly, it was argued that in view of the nature of the policy, its influence on third parties and the grave injury it causes them as a result of the actions of others, it may also constitute a **war crime of punishment and inhuman treatment**. This crime is defined in the constitutions of all international criminal courts and in the Rome Statute it appears in Article 8(2)(a)(iv). For a more detailed discussion of this argument, see the experts opinion, Exhibit 3, page 5-24 and 28.

40. **But the most important thing in this context, as far as this Honorable is concerned, is the argument, that the prolonged failure by the Court to seriously, thoroughly and comprehensively discuss the legal arguments concerning the lawfulness of the policy, increases the risk that Israelis involved in the exercise of the policy would be accused of the above war crimes**.

41. This argument stems from the Principle of Complementarily enshrined in the Rome Statute, which provides that preference should be given to a legal examination of the issues on the local level. Therefore, according to Article 17 of the Rome Statute, if the local legal authorities conduct a "genuine" investigation and if they prove that the State which has jurisdiction over it is "willing and able" to carry out such investigation according to the required standards, then, the international criminal court would not exercise its jurisdiction over the matter.

42. In this context the experts on behalf of the Applicants have clearly commented as follows (pages 6-35, Exhibit 3):

> "We are of the opinion that in light of the principle of complementarily, the light treatment of international law by the Israeli Supreme Court in house demolition cases and its erroneous treatment of the breaches of international law by the Policy, reduces that likelihood that should the lawfulness of Policy and the liability of persons involved therewith be referred to the International Criminal Court (investigation, prosecution

and even judiciary authorities), the latter will decline jurisdiction over the Policy."

43. **The fact that there is an actual risk that a certain Israeli policy would give rise to international criminal proceedings against those involved in the exercise thereof, most certainly turns the ruling which enabled such reality to occur, into an "important" and "difficult" ruling which justifies a further hearing thereof by the Supreme Court by an expanded panel**.

II. A new circumstance: The Palestinians' signature of the Rome Statute

44. The concern that the policy would give rise to international criminal proceedings as described above, is accompanied by a circumstance which took place a few hours after the judgment being the subject matter of this request, was given: the Palestinians' signature of the Rome Statute, which ostensibly vests the International Criminal Court and its institutions with jurisdiction over suspicions of breaches of the prohibitions stipulated therein, in the occupied territories.

45. The Palestinians joined the Rome Statute on the date on which the judgment being the subject matter of this request was given – December 31, 2014 – by a declaration pursuant to Article 12(3) of the Rome Statute. In the declaration, June 13, 2014 was stipulated by the Palestinian government as the ICC's jurisdiction effective date. Namely, jurisdiction will apply to crimes which were allegedly committed from that day onwards by suspects having a Palestinian citizenship or which were committed as of that date by any person in the occupied Palestinian territories.

For a complete version of the declaration see:

http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf

46. It is our understanding, that said new circumstance, which took place after the judgment being the subject matter of this request was given, has a weighty significance, which intensifies the "difficult" nature and "importance" of the ruling with respect of which a further hearing is requested.

47. With all required modesty we join the words of the experts on behalf of the Applicants in their opinion, according to which (page 38, Exhibit 3):

> "**We are of the opinion that the position taken by the court may increase the risk that some of those involved in the exercise of the policy would be prosecuted by the International Criminal Court, according to the Rome Statute. Further implementation of the policy may, under certain circumstances, which were specified in the opinion, expose certain Israeli citizens who are involved, in different stages and on different levels in its implementation and approval, to foreign criminal jurisdiction (national and/or international) and subject them to international criminal liability**."

48. One of the main conditions for the exposure of Israeli citizens to international criminal jurisdiction was met by the Palestininas' signature of the Rome Statute.

49. The Court is obligated to examine the legal issues and resolve them. Regretfully, to date, as well as in the judgment being the subject matter of the request, the Court failed to fulfill its obligation. Normally, such a situation justifies the holding of a further hearing, all the more so when such an omission creates a concrete international legal risk.

50. We would like to be very clear on this point: in this section we do not argue that the legal risk at which we pointed obligates the Court to decide in favor of the Applicants and stipulate that the policy is not lawful. All we argue is that the legal situation, under international law, and particularly international criminal law, requires that the Supreme Court discusses and fully resolves the above issues.

51. It is therefore an additional cause which justifies the holding of a further hearing by an expanded panel: the Court's failure to resolve the main legal issues under international law, given the fact that the Palestinians joined the Rome Statute, increases the risk that Israelis involved in the policy would be subject to criminal proceedings before the International Criminal Court. A ruling which increases the risk as described above is certainly an "important" ruling and moreover a "difficult" one.

D. Conclusion

52. House demolitions under Regulation 119 have been part of the Israeli occupation since its inception. This is an extreme, draconian power that has attracted scathing criticism from legal experts, intellectuals, public figures, researches, academics and international institutions.

53. This power has left hundreds of families and thousands of people homeless, all for the actions of an individual, and it is an affront to the most basic sense of justice.

54. After more than forty years in which this practice has been in used, and thirty years since the fundamental arguments against it were last heard (though not fully resolved) – it is time to revisit it. Such a hearing is required in view of the fact that the Court's obligation is to examine and resolve legal issues, in view of the fact that its failure to do so puts us at the risk of committing grave breaches of international law, and mostly, in view of the fact that the policy gives rise to moral and ethical dilemma of the first degree, which justify, at least, a comprehensive and thorough hearing.

55. The Honorable Court has a history of addressing the question of compatibility of controversial practices exercised by the State of Israel with the provisions of international law. This was the case when the Court decided on the lawfulness of extrajudicial assassinations (or as the Respondents refer to it: targeted killings) - HCJ 769/02 **The Public Committee Against Torture in Israel et al. v. Government of Israel et al.**, TakSC 2006(4) 3958; this was the case when the IDF used a "Neighbor Procedure", which allegedly breached the prohibition on the use of civilians as human shields – HCJ 3799/02 **Adalah – The Legal Center for Arab Minority Rights in Israel et al., v. GOC Central Command et al**., TakSC 2005(4) 49 (2005); this was the case with respect to the lawfulness of the use of "bargaining chips", an issue in which a further hearing was held – CFH 7048/97

A. v. Ministry of Defence, IsrSC 54 (1) 721 (2000); this was the case with respect to the tortures in ISA interrogations ("moderate physical pressure") - HCJ 5100/94 **The Public Committee Against Torture in Israel et al. v. Government of Israel et al.**, IsrSC 53(4) 817 (1999) and this was the case in many other cases.

56. In fact, the Honorable Court's willingness to resolve complex issues, involving local and international law, was always a central element of the court's reputation both in Israel and worldwide.

57. The Court should once again go deeply into the matter and resolve the fundamental legal issues which pertain to the lawfulness of Regulation 119. It is required due to the difficult nature of the ruling which upholds a very controversial and draconian sanction; it is required due to the importance of a policy which raises acute moral issues; it is required due to the fact that the Court's objective is to resolve judicial controversies and it is required due to the fact that failure to resolve these issues may prejudice the legal situation of those involved in the exercise of the policy.

58. According to the Applicants, the further hearing is required due to the fact that Israel exercises a bad policy, which violates fundamental principles of law and ethics, all without an examination and resolution of the arguments which were raised against it, on their merits.

In view of all of the above, the Honorable Court is hereby requested to accept the request and order to hold a further hearing in HCJ 8091/14 before an expanded panel of its Justices.

Date: _____

_____	_____	_____
Michael Sfard, Advocate	Noa Amrami, Advocate	Roni Peli, Advocate

Counsels to the petitioners