At the Supreme Court
Sitting as the High Court of Justice

HCJ 704/15
Scheduled for March 16, 2015

_____ Darbas et al.,

Represented by counsel, Adv. Andre Rosenthal
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Tel: 6280458, Fax: 6221148

The Petitioners

v.

GOC Home Front Command
Represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Telephone: 02-6466590; Fax: 02-6467011

The Respondent

Respondent's Response

1. According to the decision of the Honorable Justice Vogelman dated January 29, 2015, the respondent hereby respectfully submits his response to this petition. It should be noted that this response is submitted with the approval of the exceptions committee taking into consideration the sanctions taken by the Attorneys Union.

2. This petition concerns an order issued on November 30, 2014, by the respondent, the GOC Home front Command, by virtue of his authority pursuant to regulations 6, 108 and 109 of the Defence (Emergency) Regulations, 1945 (the "**order**" and the "**Defence Regulations**"). In the order the respondent ordered the petitioner not to enter, not to stay and not to be present in the municipal boundaries of the city of Jerusalem marked on a map which was attached to the order and constitutes an integral part thereof, unless he was permitted to do so by an order issued on behalf of the GOC Home Front Command or according to a summons issued in the framework of an interrogation or legal proceedings under applicable law.

   The order entered into force on November 30, 2014 and is valid until April 30, 2015 (the order mistakenly states that it is valid for a period of six months, but according to the dates prescribed on the order itself, the order is valid for a period of five months).

3. The respondent will argue that the petition should be dismissed *in limine* and on its merits – all as specified below.

The severe deterioration of the security situation in Jerusalem during the second half of 2014

4. In the beginning of July 2014, the youth Muhammad Abu Khdeir, from the Shufat neighborhood in East Jerusalem, was murdered by Jewish terrorists. The shocking murder caused the security situation in Jerusalem to severely deteriorate during the second half of 2014, which included, *inter alia*, massive disruptions of public order accompanied by stone throwing, fireworks and firebombs attacks against security forces and civilians, and other serious terror attacks of different types (ramming, shooting, stabbing and firebombs throwing). The deteriorating security situation reached its peak in the months of October – November, 2014, when a wave of extremely severe terror attacks hit Jerusalem, in which ten people were killed.

5. According to the data of the Israel Security Agency (ISA), in 2014, over **370** terror attacks were carried out in Jerusalem, the vast majority of which occurred during the second half of the year, as compared to about **120** terror attacks throughout 2013 ("terror attack" for this purpose is an incident of firebombs throwing, shooting, stabbing, ramming, etc., as well as an incident in which medium and severe injuries were caused to civilians).

   A simple calculation indicates that the number of terror attacks in Jerusalem in 2014 was **almost three times** greater than their number in 2013.

   In addition, whereas throughout 2013, no one was killed in Jerusalem in terror attacks, during the second half of 2014, **eleven** people were murdered in Jerusalem in terror attacks. The number of people who suffered medium and severe injuries as a result of terror attacks in Jerusalem also increased from **four** throughout 2013, to **thirty five** in 2014.

   Among others, during the second half of 2014, the following severe terror attacks were carried out:

   a. A ramming attack on August 4, 2914, near route 1 in Jerusalem, in which one person was murdered and others were injured. On the very same day a shooting attack was executed by a terrorist who was riding a motorcycle, near the Mount Scopus tunnel. In that terror attack an Israeli soldier was shot and seriously injured.

   b. A ramming attack on October 22, 2014, along the route of the light rail near the Ammunition Hill in which two people were murdered and others were injured.

   c. A shooting attack near the Begin Heritage Museum on October 29, 2014, in an attempt to murder Mr. Yehuda Glick, who was seriously injured in the terror attack.

   d. A ramming attack along the route of the light rail on November 5, 2014 in which three persons were murdered and others injured.

   e. A stabbing and shooting attack on November 18, 2014, in the Har Nof synagogue, in which five people were murdered and others injured.

f. A ramming and stabbing attack on March 6, 2015 (in Purim), along the route of the light rail, in which five people were injured.

All terror attacks specified above, in which eleven people were murdered and dozens injured, were executed by residents of the Jerusalem area.
It should be further noted that the above terror attacks were carried out against the backdrop of additional murderous terror attacks which were carried out, at the same time, in the Judea and Samaria area.

6. Moreover. 2013 was characterized by many order disruption incidents in Jerusalem. According to ISA data, an average of **about 207** order disruption incidents occurred between January and November 2013 ("order disruption" for this purpose includes "clash incidents" with the security forces as well as incidents in which stones and fireworks were thrown etc.).

   During the first half of 2014, a very significant decrease was marked in the number of order disruption incidents in Jerusalem, as compared to the number of order disruption incidents during 2013 (**about 50** order disruption incidents per month according to ISA data).

   Following the murder of the youth Muhammad Abu Khdeir, the order disruption incidents in Jerusalem resumed much more forcefully, and according to ISA data, between July and November 2014, **about 300** order disruption incidents occurred per month. In December 2014, additional 100 order disruption incidents took place.

7. Moreover. 2014 was also characterized by **nearly a fivefold** increase in the number of security incidents on Temple Mount: from **22** incidents in 2013 in its entirety to **106** incidents in 2014.

   The significant increase in the number of security incidents on Temple Mount resulted in a significant increase in the need to use police/border police forces on the mountain. The increase in the number of security incidents on Temple Mount has also significantly increased the number of times that Jewish visitors were not permitted access to Temple Mount.

8. All data specified above clearly indicate that during the second half of 2014, the scope, severity and level of murderous terror and popular terror incidents increased sharply, which required the taking of the necessary measures to secure public safety and security.

Coping with the security incidents in Jerusalem during the second half of 2014

9. In an attempt to stop the severe outbreak of violence which engulfed Jerusalem during the second half of 2014, state authorities used mainly the ordinary criminal enforcement measures: detention and interrogation of suspects by the police and security forces, as well as by pressing charges against offenders who took part in criminal activity based on national motives in the city.

   In addition, Israel Polices has significantly reinforced the scope of police and border police forces in the city, particularly in the East Jerusalem neighborhoods.

   According to the data transferred by the Israel Police to the State Attorney's Office, from July 2, 2014, until December 29, 2014, **1,439 detainees,** suspects of taking part in the order disruption incidents in Jerusalem, were detained by Israel Police – **938** adults and **501** minors.

   According to the data which were transferred, between July 2, 2014, and February 17, 2015, **449 indictments** were filed against persons who were involved in the riots in Jerusalem.

10. In addition, as will be specified below, in the framework of the efforts to restore peace and quiet to Jerusalem and along the exercise of enforcement powers on the criminal level, the Minister of Defense and the GOC Home Front Command exercised **prudently** – the administrative powers vested in them, in a limited number of specific cases in which it was found that the criminal enforcement measures did not give sufficient solution to the essential security need of restoring security and order to the capital of Israel.

11. Accordingly, in the second half of 2014, the Minister of Defense issued orders for the administrative detention of **five** East Jerusalem residents.

    In July 2014, an East Jerusalem resident was put under administrative detention for a period of six months. The Jerusalem District Court shortened the period of the administrative detention. An appeal filed by the state to the honorable court regarding the shortening of the administrative detention' period was accepted, and the administrative detention was fully approved (AAA **State of Israel v. A**., reported in the Judicial Authority Website, August 7, 2014 (the Honorable Justice Silbertal).

    In November-December 2014, four additional East Jerusalem residents were put under administrative detention for about five to six month periods. The Jerusalem District Court approved the four orders issued by the Minister of Defense. Appeals filed by the detainees were denied by the honorable court (AAA 8967/14 **A. v. State of Israel**, reported in the Judicial Authority Website, January 12, 2015 (the Honorable Justice Amit); AAA 265/15 **Jit v. State of Israel** (reported in the Judicial Authority Website, January 2,5 2015 (the Honorable Justice Silbertal); AAA 266/15 **al-Handi v. State of Israel** (reported in the Judicial Authority Website, January 25, 2015 (the Honorable Justice Silbertal); AAA 267/15 **Jit v. State of Israel** (reported in the Judicial Authority Website, January 25, 2015 (the Honorable Justice Silbertal)).

12. In addition, the GOC Home Front Command issued, on November 30, 2014 – by virtue of his authority according to regulations 6, 109 and 110 of the Defence Regulations – **five** orders prohibiting the presence of five East Jerusalem residents in the municipal area of Jerusalem for a period of five months (until April 30, 2015).

    The objections submitted by four of the removed persons, including the petitioner at hand, were rejected by the GOC Home Front Command, and therefore petitions were filed on their behalf with this honorable court. The four petitions are scheduled for a hearing on March 16, 2015, before a panel presided by the Honorable President Naor.

    The objection submitted by the fifth resident was partly accepted by the military commander – and the prohibition established by the order which was issued against said resident was limited. The prohibition imposed on the presence of said resident in the Jerusalem area for a period of five months remained in force – with the exception of residency in his home in the At-Tur neighborhood in East Jerusalem, to which he was permitted to arrive through a specific access road only.

13. In addition, during the second half of 2014, the GOC Home Front Command issued by virtue of his authority under regulation 119 of the Defence Regulations, six orders for the seizure and demolition or sealing of structures or parts of structures in which resided terrorists who committed extremely serious terror attacks. The purpose of said orders was to deter potential perpetrators from committing additional murderous terror attacks.

One of the six orders which were issued, and against which no appeal was filed with this honorable court, has already been executed. Petitions were filed with this honorable court against the five remaining orders. Four petitions were denied on December 31, 2014 (HCJ 7823/14, HCJ 8025/14, HCJ 8066/14 and HCJ 8070/14). In the fifth petition (HCJ 8024/14), an *order nisi* was issued on December 31, 2014, and the state has recently notified the honorable court, in a response affidavit, that a decision was made to only seal the room of the terrorist, *in lieu* of demolition.

14. It should be noted that in view of the special sensitivity of Temple Mount, in the framework of handling the security incidents which took place on the mountain in 2014, additional administrative powers were exercised, such as a prohibition imposed on certain rioters from entering Temple Mount, as well as declarations by the Minister of Defense of certain entities as un-authorized associations, by virtue of the authority of the Minister under regulation 84 of the Defence Regulations.

15. As is clearly indicated by the above specified data, the main and major manner by which the state handled the severe security incidents which hit Jerusalem during the second half of 2014, was by exercising the "ordinary" criminal enforcement powers.

    As specified above, the exercise of administrative powers for the purpose of handling the severe security situation experienced by Jerusalem during the second half of 2014, was made prudently, in isolated cases. The administrative powers were exercised only where the competent administrative agencies estimated that the "ordinary" criminal enforcement powers did not suffice and it was necessary – **for absolute security reasons** – to exercise a certain administrative power against a certain person or structure in which a terrorist lived.

16. We wish to update that since December 2014, following the intensive activity of the police and the security forces, the number of terror attacks and riots in Jerusalem has gradually and significantly decreased. However, the current tranquility is only relative, as attested by the additional ramming attack which occurred in Purim, Friday, March 6, 2015.

17. It should be further noted, that according to security agencies, the stabilization and strengthening of a relative calmness in Jerusalem, in the attainment of which extensive efforts are invested, dictates that the prohibition imposed on the return of the administrative detainees and removed persons to the Jerusalem, be currently continued.

The main facts concerning petitioner's specific case

18. The petitioner, borne in 1991, is a resident of the Al 'Isawiya neighborhood in East Jerusalem.

19. According to ISA information, the petitioner is an activist of the terror organization the Popular Front for the Liberation of Palestine in his neighborhood. Petitioner's prohibited activity is mainly carried out in the area of his village, Al 'Isawiya, and includes participation in and leading of popular terror attacks and riots in the area of his residency.

20. As is even indicated by the petition, in the past the petitioner was convicted and served imprisonment sentences for his prohibited security activity.

21. On November 30, 2014, the GOC Home Front Command issued an order, by virtue of his authority under regulations 6, 108 and 109 of the Defence Regulations, whereby the petitioner was ordered not to enter, not to stay and not to be present in the municipal boundaries of the city

of Jerusalem marked on a map which was attached to the order and constituted an integral part thereof, unless he was permitted to do so by an order issued on behalf of the GOC Home Front Command or according to a summons issued in the framework of an interrogation or legal proceedings under applicable law.

The order entered into effect on November 30, 2014 and is valid until April 30, 2015 (the order mistakenly states that it is valid for a period of six months, but according to the dates prescribed on the order itself, the order is valid for a period of five months).

A copy of the order dated November 30, 2014, was attached as **Exhibit P/1 to the petition**.

22. On December 9, 2014, the petitioner submitted to the respondent an objection against the order.

    A copy of the objection dated December 9, 2014, was attached as **Exhibit P/4 to the petition**.

23. An oral hearing in the objection on behalf of the military commander was scheduled for December 22, 2014, before Lieutenant Colonel Udi Sagi.

    On December 21, 2014, HaMoked filed a petition to this honorable court, HCJ 8706/14, in which it requested that an interpreter into the Arabic language would be present in the hearing. The petition was deleted on that very same day after it was notified that an interpreter into the Arabic language would be present in the hearing.

    A copy of the judgment in HCJ 8706/14 was attached as **Exhibit P/5 to the petition**.

24. On December 22, 2014, a hearing in petitioner's objection against the order was held before Lieutenant Colonel Sagi, and an opportunity to raise verbal arguments against the order was given.

25. On January 18, 2015, following arguments raised in the oral hearing of the objection which was held on December 22, 2014, the petitioner was interrogated by the Israel Police. The petitioner denied in his interrogation that he was a member of any terror organization.

    A copy of petitioner's police statement dated January 18, 2015, was attached as **Exhibit P/6 to the petition**.

26. On January 22, 2015, a reasoned response to petitioner's objection was delivered, which notified that the military commander decided to reject the objection.

    A copy of the notice dated January 22, 2015 concerning the rejection of petitioner's objection was attached as **Exhibit P/7 to the petition**.

27. To complete the picture, it should be emphasized that on March 9, 2015, in the afternoon, the petitioner was detained for having breached a lawful order, **as he took the law into his own hands** and stayed in the municipal area of the city of Jerusalem contrary to the order being the subject matter of this petition, while his arguments against the order are pending before the honorable court, and the hearing in the petition is scheduled for the beginning of next week.

    While this response is submitted, the petitioner is brought to the Jerusalem Magistrate Court for a hearing in the request for his detention.

As will be specified below, the respondent is of the opinion that the fact that the petitioner took the law into his own hands is sufficient for the dismissal of this petition *in limine*.

A copy of a report dated March 9, 2015, of petitioner's detention is attached and marked **RS/1**.
A copy of petitioner's police statement dated March 9, 2015, is attached and marked **RS/2**.

The Legal Argument

28. The respondent will argue that the petition should be dismissed

in limine since the court should not grant an equitable remedy to a petitioner who takes the law into his own hands.

And beyond need also **on its merits**, in the absence of any cause for intervention in respondent's decision.

Dismissal of the petition *in limine* for taking the law into one's own hands

29. As indicated above, the petitioner decided to take the law into his own hands and enter Jerusalem despite the fact that he was prohibited from doing so by order, while his arguments are pending before the honorable court – all of the above only one week before the hearing of his petition against the order.

30. The honorable court held more than once that a petitioner who takes the law into his own hands – his petition should be dismissed *in limine*. "The court will not open its doors for a person who takes the law into his own hands, pays no respect to the provisions of the law and wishes to impose on the authority established facts. The prohibition against taking the law into one's own hands constitutes part of a broader rule which requires that a litigant who turns to the court and applies for remedy, acts with clean hands (…). This rule is defined as a threshold condition when a petition is filed with the High Court of Justice or the Court for Administrative Affairs. Therefore, a petition of a litigant who does not act with clean hands may be dismissed *in limine* without having his arguments heard on their merits. [HCJ 3483/05 **D.B.S. Sattelite Services (1998) Ltd. v. Minister of Communication**, TakSC 2007(3) 3822 (2007)].

It was also so held in HCJ **Vaaknin v. Israel Land Administration** (reported in the Judicial Authority Website, given on November 27, 2007), where the words of the Honorable Justice (as then titled) Cheshin in HCJ 8898/04 **Jackson v. Military Commander in the West Bank Area**, TakSC 2004(4) 609 (2004), were cited with consent as follows:

> "This court held, in a host of judgments that a petitioner who takes the law into his own hands – should not be given the requested remedy and his petition should be dismissed *in limine*:
>
> > A rule from ancient times is that the High Court of Justice will not give remedy to those who take the law into their own hands. A person must decide in his heart if he requests remedy from the court or if he takes the law into his own hands. One cannot do both at the same time. Namely, the court will not give remedy to a person who turns to the court and at the same time takes the law into his own hands and wishes to impose established facts on the other party. This is a fundamental ruling in our

jurisprudence and its logic is self evident. The petitioners breached said ruling, and for this reason we see no justification to hear their petition (HCJ 8898/04 **Jackson v. Military Commander in the West Bank Area** (not reported, October 28, 2004))."

And see also, among many others: HCJ 1547/07 **Bar Kochva v. Israel Police**, TakSC 2007(3) 433 (2007); HCJ 7697/03 **Tanenberg v. State of Israel – Minister of Defense**, TakSC 2003(3) 2302 (2003); HCJ 6102/04 **Sheik 'Ali Mu'adi v. Minister of Interior**, TakSC 2005(3) 3926 (2005); HCJ 851/06 **Amona Cooperative Agricultural Association for Settlement v. Minister of Defense**, TakSC 2006(1) 1138 (2006).

Beyond need – the petition should be dismissed on its merits

The normative Infrastructure

31. The normative source for the authority of the GOC Home Front Command to issue orders prohibiting a person from staying in a certain are within state limits, is embedded in regulations 108-109 of the Defence Regulations, which were made part of Israeli law by virtue of section 11 of the Law and Administration Ordinance, 5708-1948 (hereinafter: the **Law and Administration Ordinance**).

32. Regulation 109 of the Defence Regulations provides, in its Hebrew version, as follows:

> "(1) A Military Commander may make, in relation to any person, an order for all or any of the following purposes, that is to say —
>
> (a) **for securing that, except in so far as he may be permitted by the order, or by such authority or person as may be specified in the order, that person shall not be in any such area in Israel as may be so specified**;
>
> (b) for requiring him to notify his movements, in such manner, at such times and to such authority or person as may be specified in the order;
>
> (c) prohibiting or restricting the possession or use by that person of any specified article;
>
> (d) imposing upon him such restrictions as may be specified in the order in respect of his employment or business, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or the propagation of opinions.
>
> (2) If any person against whom an order has been made as aforesaid contravenes the terms of such order, he shall be guilty of an offence against these Regulations" [Emphasis added – the undersigned].

Regulation 108 of the Defence Regulations provides, in its Hebrew version, the objectives for which such an order may be issued as follows:

> "An order shall not be made by the Minister of Defense or by a Military Commander under this Part in respect of any person unless the Minister

of Defense or the Military Commander, as the case may be, is of opinion that it is necessary or expedient to make the order for securing the public safety, the defense of Israel, the maintenance of public order or the suppression of mutiny, rebellion or riot."

33. The Defence Regulations were promulgated by the High Commissioner by virtue of the powers vested in him under Article 6 of the King's Order in Council (Defence), 1937, which provides, in section (1) of its English version, as follows:

> "The High Commissioner may make such regulations (in this Order referred to as "Defence Regulations") as appear to him in his unfettered discretion to be necessary or expedient for securing the public safety, the defense of Palestine, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community."

34. The Defence Regulations were made part of the laws of state of Israel by virtue of section 11 of the Law and Administration Ordinance, which provides that:

> "The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such changes which may arise from the establishment of the State and its authorities."

35. According to case law, the normative status of the Defence Regulations in the state of Israel is that of primary legislation, and this honorable court held many times that the Defence Regulations were in currently in force (see for instance: HCJ 680/88 **Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617 (1989); HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810 (2003)).

The ruling concerning the status and validity of of the Defence Regulation, in general, and of regulation 109 in particular, was summarized in HCJ 5211/04 **Vanunu v. GOC Home Front Command**, IsrSC 58(6) 644 (2004) (hereinafter**: Vanunu**), as follows:

> "6. The Defence (Emergency) Regulations, 1945 are primary Mandatory legislation, which upon the establishment of the State of Israel became - by virtue of section 11 of the Law and Administration Ordinance, 5708-1948 – part of Israeli law. Shortly after the establishment of the State it was argued before the Supreme Court that the Defence Regulations should be repealed (as required by the latter part of section 11 of the Ordinance), due to "the changes arising from the establishment of the State and its authorities". Rejecting this argument, the court ruled that the Defence Regulations remained in force and had been incorporated into Israeli law, and it was up to the legislature to change or repeal them (HCJ 5/48 **Lion v. Gubernik**, IsrSC 1 58). Over the years this ruling was reinforced many times; see, for instance, HCJ 680/88 **Schnitzer v. Chief Military Censor**, IsrSC 42(4) 617; and recently HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810). Petitioners' attorneys argued before us that the court's ruling according to which the Defence Regulations were part of Israeli law

was mistaken, and that in any case it was time to abandon it, as it ran contrary to the values of the State and human rights as embodied in the Basic Law: Human Dignity and Liberty.

…

7. I am not persuaded by the arguments of petitioners' attorneys, namely, that the orders issued against the petitioner constitute a sufficient cause to reconsider the justification of the rulings established in **Lion** and **Bialer**. Over the past five decades the court has time and again repeated these decisions, adopted them and invoked them, so that they have become well-established rulings. For the court to deviate from such entrenched rulings it must be persuaded that there are weighty reasons for doing so. In the absence of such reasons, the best the court can do is to refer the petitioners to the legislature; (compare:…). Petitioners' attorneys did not offer weighty arguments to justify a reconsideration of the **Lion** and **Bialer** rulings.

Furthermore: even if the court accepted petitioners' argument that the Defence (Emergency) Regulations and regulation 6 of the State of Emergency Regulations (Exit from the Country) were not primary legislation, this would not be sufficient to abrogate them. Even if it were true that despite their incorporation into primary legislation they remained secondary legislation, they constitute in any event "protected laws" which section 10 of Basic Law: Human Dignity and Liberty secures from abrogation…

However, even if we were not faced with the obstacles that bar us from intervening in the binding validity of the State of Emergency Regulations, I would not accept petitioners' argument that the regulations must be repealed because they are clearly unreasonable. True, the implementation of emergency legislations - the ones that concern the present case and others that do not - injures not only the rights of individuals against whom they are implemented, but also injures the values that Israel, as a Jewish and democratic state, is obliged by its basic legislation to respect. Unfortunately, the implementation - like the very existence - of the emergency legislation is sometimes imperative, due to the fact that the State of Israel is still subject to danger and threats from within and without; and if this necessity was not so widely established, the case of the present petitioner attests to it. This does not mean that in actually implementing the emergency legislation the authority is free to ignore the basic rights of the affected individuals. The rule is that while the Basic Law has not derogated from the force of the protected laws, it does influence their interpretation. The same rule applies to emergency legislation. This means that though the Court does not examine the status of the emergency legislation while considering the tests of the limitation clause set in section 8 of the Basic Law, the Court is obliged to examine the justification of the

> implementation of an emergency legislation provision, as in the present case. That is to say, in its examination the court should not focus on the reasonableness of the given provision in the emergency legislation, as such, but rather on the justification of its implementation in the specific case brought before it. The court must base its examination on two criteria: whether the application of the emergency provision to a particular individual in the given circumstances meets its general purpose; and whether the injury caused to the individual by its application satisfies the test of proportionality.

36. The question of whether or not it is justified to restrict the freedom of movement of the individual in a democratic state, by using administrative measures such as the measure established in regulation 109 of the Defence Regulations, was discussed by the honorable court in HCJ 6358/05 **Vanunu v. GOC Home Front Command**, TakSC 2006(1), 320 (2006), as follows:

> "Nevertheless, the right of the individual to freedom of movement and personal liberty is not absolute. Its implementation by law is relative, and it is subject to limitations where it should be balanced against essential and contradicting social interests and values. The most conspicuous of these values is the interest to protect state security. Public safety and security is a fundamental value for the existence of a human society. In its absence, society cannot survive, and the individual cannot materialize his life as such and have his basic rights upheld. Under certain circumstances complete freedom of movement may put public safety at risk. Therefore, the legislator granted the competent authority powers which enable it to limit the personal liberty and movement of an individual within the country as well as in the entry into and exit there-from, for the purpose of securing state security. Case law recognized the importance of the security value as a general public interest which may defeat, under certain circumstances, the right to freedom of movement. The acceptable legal concept is that in the conflict created between the right of the individual to fully materialize his personal liberty and a conflicting public interest, balancing should be made, in the framework of which the conflicting values are weighed and their relative weight is evaluated. The proper intersection point, the product of said balancing, will determine which value, among the conflicting values, prevails, and whether it is possible and proper, in the hierarchy of the relative strengths of the conflicting values, to uphold one value while abrogating the other, or uphold both values subject to the determination of the proper relations between them. In the conflict between freedom of movement and public security vertical balancing was made, which regards security as a prevailing value (HCJ 448/85 **Daher v. Minister of Interior**, IsrSC 40(2) 701; **Horev**, *ibid*, page 37). However, even when vertical balancing is made, the injury inflicted on the individual should be limited to the maximum extent possible, without jeopardizing the security purpose, and under certain circumstances certain risks may have to be assumed in that regard." (*Ibid*., paragraph 11 of the judgment).

37. Hence, the status of the Defence Regulations remained in full force throughout the years of the state, as well as after the enactment of the Basic Law: Human Dignity and Liberty, which affects the manner by which the Defence Regulations are interpreted and used. The honorable court

shortly commented on the above in its judgment in HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 27 (2) 55 (2003), as follows:

> "Respondent's actions are entrenched in regulation 119 of the Defence (Emergency) Regulations. These regulations are "… law (*din*) in force prior to the commencement of the Basic Law (section 10 of the Basic Law: Human Dignity and Liberty), and therefore, the Basic Law cannot infringe on their validity. The power to revoke or amend them is therefore vested with the legislator. Nevertheless, the interpretation of the regulations should be made against the backdrop of the basic laws. Therefore, the power vested in the respondent under regulation 119 should be exercised proportionately (See HCJFH 2161/96 **Sharif v. GOC Home Front Command**…)"

38. In conclusion of this issue, it should be noted that indeed, in several cases, the Knesset revoked certain provisions of the Defence Regulations. Thus, for instance, the Defence Regulations which limited the immigration (*Aliya*) of Jews to Israel were revoked (section 13(a) of the Law and Administration Ordinance); The regulation permitting judicial corporal punishment of whipping was abolished (section 2(b) of the Punishment of Whipping (Abolition) Law 5710 – 1950); and the regulation permitting the denial of the right to leave the country without a permit (section 3 of the Emergency Regulations (Foreign Travel) (Amendment) Law 5721-1961).

    Other Defence Regulations were abolished upon the enactment of new laws which regulate issues that were regulated in the past by the Defence Regulations – see for instance: section 27(c) of the Emergency Land Requisition Law of 5710-1949; Section 25(a)(3) of the Explosives Law, 5714-1954; and the Emergency (Detentions) Law, 5739-1979.

39. It should be further added that about a year and-a-half ago the Government submitted to the Knesset a bill for the amendment of the Defence Regulations (Emergency)(Revocation of Regulations), 5773-2013 (Government bill 5771 (782) page 992, July 2, 2013). The bill proposes to abolish certain Defence Regulations including regulations 108-109.

    It should be noted that the revocation of the Defence Regulations according to said bill is conditioned upon the enactment of the Fight against Terrorism Law. The proposed Fight against Terrorism Law is about to assemble under one roof the main legislative arrangements concerning the fight against terrorism. The proposed Fight against Terrorism Law is meant, *inter alia*, to replace some of the current arrangements which exist in various enactments, and promulgate, *in lieu* thereof, new arrangements which reconcile with the basic laws on human rights (see on this issue the explanations to the bill, pages 992-994). As to the alternative arrangement proposed for Defence Regulations 108-109, see section 120 of the proposed Fight against Terrorism Law, 5771-2011 (Government bill 5711 (611), page 1408, July 27, 2011)).

    Nevertheless, the Regulations pursuant to which the order was issued in petitioner's matter remained in force, and therefore, there is no preclusion which prevents the use thereof, in appropriate cases.

As to the argument that the Regulations were not incorporated into the law of our country due to the revocation of the King's Order in Council (Defence), 1939 *[sic]*

40. The petitioner argues in the petition that the Defence Regulations were not incorporated into Israeli law through the "channel" of section 11 of the Law and Administration Ordinance.

    The petitioner tries to base his argument on the ostensible revocation of the King's Order in Council (Defence), 1937, on May 12, 1948, pursuant to which the Regulations were promulgated,

by the Palestine (Revocation) Order in Council, 1948 (hereinafter: the **King's Order in Council (Revocation)**).

The petitioner does not deny that the King's Order in Council (Revocation) was not published in the official gazette, but refers in this matter to the fact that the High Commissioner approved on April 29, 1948, not to publish in the official gazette laws and different notices as a result of difficulties in the publication of the official gazette.

The petitioner also tries to base his argument that publication in connection with the Defence Regulations was not required, on **regulation 4** of the Defence Regulations which provides that the publication of "emergency certificates" issued pursuant to the Defence Regulations is not required.

The petitioner therefore argues that in view of the fact that the Defence Regulations were no longer in force on May 14, 1948, they were not incorporated into the law of the state of Israel according to section 11 of the Law and Administration Ordinance.

41. The respondent will argue that petitioner's argument according to which the Defence Regulations were not incorporated into the law of our country according to section 11 of the Law and Administration Ordinance – should be totally rejected.

42. Section 11A of the Law and Administration Ordinance, stipulates as follows:

> 11A. (a) An unpublished law has no effect and never had any effect.
>
> (b) "Unpublished law" in this section, means a law within the meaning of the Interpretation Ordinance, 1945, which has been purportedly enacted during the period between Kislev 16, 5708 (November 29, 1947) and Iyar 6, 5708 (May 15, 1948) and which was not published in the Palestine Gazette despite it being a law of a category, the publication of which in the Palestine Gazette was, immediately prior to that period, obligatory or customary."

On August 15, 1949, when the Minister of Justice, Pinchas Rozen, presented before the Knesset plenum, in the first reading, the Amendment to the Law and Administration Ordinance, 5708-1948, 5709-1949, he explained the need to enact section 11A of the Law and Administration Ordinance, as follows:

> "Honorable Knesset. The Knesset is hereby presented with a short bill for the Amendment to the Law and Administration Ordinance, 5708-1948, 5709-1949. I will read before the Knesset the draft of this short bill. And now a short explanation: section 11 of said Ordinance states that the law which existed on the 5th of Iyar, 5709 May 14, 1948 shall remain in force, insofar as it does not contradict this Ordinance or other laws which may be enacted by or on behalf of the Provisional Council of State. The legislator refers to a set of laws which existed at that time and which were known. Throughout the term of the British Mandate, the hard and fast rule was that any law must be published in the official gazette, and after it was published in the official gazette it became valid. It was clear to the draftsmen of the Law and Administration Ordinance that they referred to a known set of laws, good or bad, but known. And then, it

> turned out that in the short interim period between November 29, 1947 and May 14, 1948, the Mandate governmental authorities veered from the acceptable rule and started to draft documents, which purported to be laws, without having published them in the official gazette. It turned out that in May 1948, the Mandate authorities published in Jerusalem a leaflet which contained thirty six laws of this sort. In fact, only thirty four laws appeared, despite the fact that the in the table of contents of the leaflet thirty six laws were listed. Two laws did not appear in the leaflet. They were probably included in the first place, and the pages were later on torn off from the leaflet.
>
> Shortly after the termination of the Mandate, another leaflet was published in London which contained 42 such quasi-laws. Obviously, we neither know nor shall we ever know, whether other similar documents existed. It is interesting to note that the first thing which appears in the leaflet, is an order issued by the High Commissioner which validates 5 laws that were not published in the official gazette and stipulates that laws may also be enacted in the future without the need to publish them in the official gazette. In fact, said law, which ostensibly abolishes the need to publish laws in the official gazette, was not published as well. As aforesaid, the draftsmen of the Law and Administration Ordinance could not and should not have taken into account such quasi-laws, when they stipulated that the laws which existed upon the termination of the Mandate would remain in force. And although the court will probably not acknowledge the validity of such laws, there is nevertheless a concern that legal doubts may arise in connection therewith. A situation whereby, at any time in the future, a dispute may arise in court on this issue is intolerable, and it is unacceptable that we will always have to face the possibility of being surprised by a hidden law of which we have no knowledge, or that there will be room for a doubt as to its legal status. The purpose of the proposed amendment is to remove this doubt, and stipulate once and for all that any hidden law has no effect and never had any effect, whether or not there was an obligation to publish it in the official gazette, and even if there is room for the argument that there was no obligation but only a custom to publish. A citizen of the state has the right to know which laws exist in the state. One cannot require a citizen to be always concerned that nevertheless, some document may exist somewhere, with respect of which an argument may be made that it is legally valid. …"

A copy of the relevant page from the Knesset minutes dated August 15, 1949, is attached and marked **RS/3**.

43. As noted by the Minister of Justice Pinchas Rozen in his above words, it is known and clear that prior to November 29, 1947, there was an obligation to publish in the official gazette a notice of the revocation of primary legislation such as the King's Order in Council (Revocation).

44. It should be emphasized, for the removal of any doubt that even if section 11A of the Law and Administration Ordinance was not enacted, the "hidden laws" which were enacted between November 29, 1947 and May 14, 1948, would not have had any force whatsoever in view of the fact that they were not published in the official gazette as was customarily done prior to the termination of the British Mandate.

Needless to point out in this regard that it is a well known and established rule that the validity of an enactment is conditioned on its publication in public and a law which was not published in public may not be regarded as an obligating act of legislation.

45. Moreover. It is clear that regulation 4 of the Defence Regulations does not exonerate from the obligation to publish in the official gazette the revocation of the Kin's Order in Council (Defence), 1937, by virtue of which the Defence Regulations themselves were promulgated.

46. Hence, the King's Order in Council (Revocation) is a "hidden law", as this term is defined in section 11A(b) of the Law and Administration Ordinance, and therefore according to section 11A(a) of the Ordinance it "has no effect and never had any effect".

    Accordingly, the Defence Regulations were indeed in force on May 14, 1948, and were incorporated into the law of our country pursuant to section 11 of the Law and Administration Ordinance, according to the consistent judgments of the honorable court, commencing from the judgment in HCJ 5/48 **Lion v. Gubernik**, IsrSC 5 58 (1948) and the judgments which followed it.

As to the argument that the Defence Regulations establish a primary arrangement in secondary legislation and should therefore be revoked

47. In the complementary argument submitted by him, the petitioner argues that the Defence Regulations are secondary legislation which does not reconcile with the rule of law, in view of the fact that they establish a primary arrangement in secondary legislation, and therefore should be revoked according to case law.

48. Firstly, this argument should be rejected, for the simple reason that, as cited above, the court has already held in the **Vanunu** judgment that the Regulations were primary legislation, and rejected a similar argument that the Defence Regulations were secondary legislation.

49. Secondly, for the rejection of this additional argument we wish to refer also to the guiding judgment in HCJ 3267/97 **Rubinstein v. Minister of Defense**, IsrSC 52(5) 481 (1998). In the judgment in HCJ 3267/97 it was held that in the period which preceded the enactment of the Basic Law: Human Dignity and Liberty, the rule concerning "primary arrangements" had an interpretive status only, and secondary legislation which established primary arrangements could infringe on human rights, provided that the authorizing primary legislation contained an explicit authorization to that effect (see sections 28-30 to the judgment of the Honorable President Barak).

    Therefore, even if the Defence Regulations were secondary legislation, section 6 of the King's Order in Council (Defence), 1937, contained a very explicit authorization to promulgate defence regulations which severely violate fundamental rights, such as regulations 108-109 of the Defence Regulations.

    In addition, as has already been held in **Vanunu**, the Defence Regulations constitute "protected law" pursuant to section 10 of the Basic Law: Human Dignity and Liberty, and therefore the enactment of the Basic Law could not have nullified them.

As to the argument that the order does not satisfy the limitation clause in view of the fact that it is based on privileged information which is not disclosed to the petitioner

50. The petitioner argues that the order issued against him does not satisfy the limitation clause established in section 8 of the Basic Law: Human Dignity and Liberty, on the grounds that it is based on privileged information which was not disclosed to him, and therefore he was not given the opportunity to effectively respond to the allegations raised against him.

    The respondent will argue that this argument should be rejected.

The petitioner received an open paraphrase which specified the reasons for issue of the order against him, according to which "the above is an activist of the terror organization the Popular Front for the Liberation of Palestine. His activity is mainly carried out in the area of his village, Al 'Isawiya, and includes participation in and leading of popular terror attacks and riots in the area of his residency."

The respondent will argue that the open paraphrase specifies, to the extent possible for reasons of privileged information, the actions attributed to the petitioner due to which the order was issued. The respondent will argue that the paraphrase which was given to the petitioner is sufficient and proper under the circumstances (see a similar matter in HCJ 4348/10 **Ofan v. GOC Home Front Command** (reported in the Judicial Authority Website, June 29, 2010) paragraph 3 of the judgment; hereinafter: **Ofan**).

51. The petitioner argues further concerning the weakness of the privileged information in his matter.

The respondent will argue that the information accumulated in respondent's matter is reliable and cross-checked, and that the order was issued based on solid administrative evidence.

To the extent the court find it necessary, and subject to petitioner's consent, the respondent will present before the honorable court the privileged information in the possession of security agencies in petitioner's matter, *in camera* and *ex parte* only.

As to the arguments against the police interrogation

52. The petitioner argues that in the police interrogation he was presented with general questions only and was not questioned of any specific actions.

53. On this issue we respond that the petitioner could not have been interrogated of specific actions committed by him to avoid exposure of the sources of the information. In any event, we refer to petitioner's denial in his interrogation of being a member of any terror organization.

As to the arguments that the term of the order is not proportionate

54. The petitioner argues that the scope and duration of the order are not proportionate.

55. The respondent will argue that considering petitioner's position in the Popular Front terror organization and the severe actions committed by him during the second half of 2014, his removal by a substantial distance from his neighborhood and its vicinity was imperative. The respondent will argue that under the circumstances of the matter, nothing less than petitioner's removal from the entire area of Jerusalem was sufficient.

56. The respondent will argue that considering petitioner's deeds, due to which the order against him was issued, his removal from Jerusalem for a period of five months is utterly proportionate, and that an absolute security need exists in petitioner's removal from Jerusalem for the period stipulated in the order.

The respondent will continue to argue that considering petitioner's position in the Popular Front terror organization and the severe actions committed by him during the second half of 2014, which lead to the security need to remove him from the city – petitioner's return at this time to Jerusalem may pose a substantial risk to public safety and security.

As to the arguments against the grant of the right to be heard *ex post factum*

57. The petitioner argues against the fact that he was granted the right to raise his arguments only after the order entered into effect, and of the period of time which passed until a decision in his objection was made.

58. With respect to the grant of the right to be heard only after the order was issued, the respondent will argue that in view of the serious security situation which existed in Jerusalem by the end of November 2014, it was imperative for the immediate prevention of the severe risk posed by the petitioner, and the concern that the grant of the right to be heard in advance would enable the petitioner to escape the authorities (see and compare a similar case: **Ofan** above).

Conclusion

59. The respondent will argue that the petition should be dismissed *in limine* in view of the fact that the petitioner took the law into his own hands, and beyond need, also on its merits, in the absence of any cause for the intervention of the honorable court.

60. The facts specified in paragraphs 4-8 and 10-27 of this response are supported by the affidavit of "Arik", Head of the ISA Counter-Terrorism Branch in Jerusalem.

    The facts specified in paragraph 9 of this response are supported by the affidavit of Chief Superintendent Shlomo Dai, Head of the Jerusalem District Interrogation Branch, Israel Police.

Today, Adar 19, 5775

March 10, 2015

(signed)	(signed)
_____	_____
Aner Helman, Advocate	Avishai Krauss
Deputy Manager of HCJ Department	Chief Assistant to State Attorney
At the State Attorney's Office	