At the Supreme Court
Sitting as the High Court of Justice

HCJ 5844/15

In the matter of:

1. **_____ Alasalmon (ID No. _____)**
2. **_____ Alasalmon (Minor, ID No. _____)**
3. **_____ Alasalmon (Minor, ID No. _____)**
4. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger, RA 580-163-517**

Represented by counsel, Adv. Smadar Ben-Natan and/or Adv. Galit Lubetzky and/or Adv. Michal Pomeranz and/or Adv. Racheli Hefetz and/or Adv. Anu Dwulle Luski
10 Huberman Street, Tel Aviv
Tel: 03-5619666; Fax: 03-6868596

The Petitioners

v.

1. **Military Commander of the West Bank Area**
2. **Legal Advisor for the West Bank Area**

Represented by the State Attorney's Office

The Respondents

Petition for *Order Nisi* and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent 1 ordering him to appear and show cause, why he should not refrain from exercising the authority vested in him by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: Regulation 119) including the seizure, demolition or injury in any other way or manner to the residential apartment of petitioners 1-3, located on the third floor of a five story building in Hebron.

*A seizure and demolition order dated August 27, 2015, is attached and marked Exhibit **A***.

In addition **an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause why they should not present a study with factual data concerning the effectiveness of the measure of house demolition as a deterring measure before they order to carry out the demolition.**

Very Urgent Request for an Interim Order

The honorable court is hereby requested to urgently issue an interim order directing respondent 1 or anyone on his behalf to refrain from any irreversible injury to petitioners' home, and to order, among other things, to stay the execution of the demolition order until the conclusion of the proceedings in the petition at hand, in view of the fact that respondent 2 agreed to stay the execution of the seizure and demolition order only until August 30, 2015, at 20:00. This request is filed on a very urgent basis due to respondents' unreasonable conduct. The respondents notified the undersigned of their intention to issue a demolition order against petitioners' home only in the evening of August 26, 2015, and denied petitioners' request that the execution of the order be stayed for a week, and *in lieu* left the petitioners only one working day and a half for the purpose of filing a petition with the court, while ten months passed from the event which lead to respondents' decision to demolish petitioners' home, during which no action was taken by the respondents in this regard and no notice was given to petitioners' family n that matter, despite the fact that petitioners' counsel has already turned to the respondents on this matter on November 11, 2014.

It should already be emphasized that respondent's conduct in connection with the scheduling of the date for the execution of the order is severe and directly violates petitioners' right of access to legal instances, which is a fundamental right in our legal system, by establishing an unreasonable and impossible schedule which forces the petitioners to act quickly and urgently, while the demolition of petitioners' only home is concerned. The above is aggravated by the fact that the respondent started to take action towards the demolition of petitioners' home only ten days ago, while he had at his disposal ten whole months during which he did nothing in this regard and did not give any notice to the petitioners. Respondent's said conduct raises a real concern that the respondent took this course of action to neutralize petitioners' ability to object and appeal against the demolition of their home, or for other extraneous considerations since under these circumstances there is no apparent justification for the urgency of the matter.

In view of all of the above, the honorable court is requested to accept the request for an interim order. It is clear that no real damage to public interest will be caused as a result of the stay of the demolition order for an additional short period, whereas the balance of convenience favors the petitioners, in view of the irreversible damage which would be suffered by them should the court fail to accept their request.

The grounds for the petition are as follows:

Preface

1. Petitioner 1 (hereinafter: the **petitioner**) is the wife of _____ Alasalmon, holder of ID No. _____, who was convicted for his involvement in a terror attack on October 11, 2014 in Alon Shvut junction and serves to two cumulative life sentences. In addition he was ordered to pay the victims of the terror attack compensation in the sum of about four million ILS. Petitioner 2 (born 1n 2007) and petitioner 3 (born in 2009) are their minor children. They are 6 and 8 years old, respectively.

   *The sentence imposed on Mr. Alasalmon is attached and marked Exhibit **B***.

2. Petitioner 4, HaMoked: Center for the Defence of the Individual (HaMoked), is a not-for profit association which has taken upon itself to act for the promotion of human rights in the Occupied Palestinian Territories (OPT).

3. This petition concerns the fate of the family's residential apartment, with respect of which notice was given by the respondent on August 26, 2015, that he intends to seize and demolish it due to Mr. Alasalmon's deeds.

4. In short, the petitioners will argue that the decision to seize and demolish their home is an inappropriate decision which should be nullified, for the following reasons:

1. As a general rule, house demolition is a prohibited action, which impinges on fundamental rights of innocent people, contrary to the basic principles of our jurisprudence;

2. House demolition constitutes collective punishment contrary to international humanitarian law and to international human rights law;

3. The demolition of the family home is contrary to the principle of the child's best interest, and the international obligations of the state of Israel according to the Convention on the Rights of the Child;

4. The decision to demolish petitioners' home is not proportionate: firstly in view of the fact that no rational connection exists between the purpose of the demolition and the measure taken; secondly, in view of the heavy punishment which has already been imposed on Mr. Alasalmon which is a sufficient deterring measure; thirdly, in view of the passage of time; and fourthly, in view of the damage which will be caused to the neighboring apartments in the building.

The main facts

5. The residential apartment of petitioners 1-3 is located in a five story building. The first floor is a basement floor and the four additional floors are above the ground. Each floor consists of two adjacent apartments. The apartment of petitioners 1-3 is located on the third floor on the east side of the building. Seven families reside in the building in addition to petitioners' family.

6. Until November 10, 2014, Mr. Alasalmon and petitioners 1-3 lived in said apartment. On November 10, 2014, following the involvement of Mr. Alasalmon in a terror attack, IDF forces arrived to the family home, entered the apartment, interrogated the petitioner and took articles from the apartment. Said event caused petitioners 2-3 severe anxiety and since that day the family has been living in the family home of petitioner 1 due to the concern that IDF forces would return, and due to petitioner's desire to protect the children from any additional trauma. However, the petitioner lives in her family's home temporarily, and her residential apartment in Hebron is the only apartment in her ownership and the only possible way available for her and petitioners 2-3 to lead independent life, either by living in the apartment or by selling it and living in another apartment.

7. Following the event and in view of reports in the media regarding respondents' intention to issue orders for the demolition of "terrorists' homes", petitioners' counsel turned to the respondents on November 11, 2014, and requested that to the extent a demolition of petitioners' home be considered by virtue of Regulation 119, it would be done subject to proper administrative procedure, including the issue of notice regarding the intention to demolish, the grant of an opportunity for a fair hearing and appeal, and time to turn to court to the extent necessary (see HCJ 9353/08 **Hisham Abu Dheim v. GOC Home Front Command** (reported in Nevo, January 5, 2009)). On November 16, 2014, a representative of respondent 1 notified petitioners' counsel that the letter was received and that to the extent a decision is made in petitioners' matter notice would be given.

   *Undersigned's letter dated November 11, 2014 and respondent 1's letter dated November 16, 2014 are attached and marked Exhibit **C**.*

8. Only ten months after the event, on Wednesday, August 19, 2015, notice was received in the office of petitioners' counsel of the intention to seize and demolish the building in which Mr. Alasalmon lived, by virtue of Regulation 119, on the grounds that Mr. Alasalmon "acted for the execution of a terror attack on November 10, 2014." The notice stated that an appeal against the intention to demolish the building may be submitted until August 21, 2015. Consequently, the undersigned turned

to the respondents and requested an extension of one week for the submission of an appeal, but the respondents deigned to grant a three day extension only.

*Respondent's notice dated August 19, 2015, petitioners' request for extension and respondent's response are attached and marked Exhibit **D**.*

9. On August 24, 2015, petitioners' counsel submitted a very urgent appeal against respondent's intention, which argued that the decision to use Regulation 119 and demolish petitioners' home was inappropriate in view of the fact that it was a prohibited action contrary to basic principles of Israeli law and international humanitarian law, which would severely injure innocent people, including children and infants, and which could not be deemed reasonable under the circumstances. The appeal was submitted together with the opinion of the engineer Jabarin Taysit, License No. 36465, according to which the demolition or sealing of the apartment would cause the entire building to collapse, which was attached thereto. At the same time, an appeal was submitted on behalf of all other tenants of the building, who are represented by Advocate Andre Rosenthal.

*The appeal which was submitted on August 24, 2015, on behalf of the petitioners is attached and marked Exhibit **E**.*

10. On Wednesday, August 26, 2015 at 17:00 in the afternoon, respondent's notice (dated August 25, 2015) was received by petitioners' counsel which stated that the appeal was denied. The respondent reasoned his decision by stating that the demolition of petitioners' home reconciled with the provisions of Regulation 119 and its underlying rational of deterrence. In view of the opinion of the engineer, the respondent stated that the demolition would be carried out manually and towards non structural elements and that consequently no additional damages are expected to the surrounding environment and the structure. The notice stated further that the execution of the above order would not commence before Sunday, August 30, 2015, at 12:00 (respondent's notice was originally transferred without the demolition order and only following repeated requests of petitioners' counsel the order was transferred on August 27, 2015 at noontime. See Exhibit A above).

*Respondent's notice dated August 26, 2015, is attached and marked Exhibit **F**.*

11. About half an hour after respondent's notice was received petitioners' counsel sent an urgent request for a one week stay of the execution of the demolition order, until September 8, 2015, so as to provide the petitioners sufficient time to apply to the court. Petitioners' counsel wrote that the date set by the respondent for the execution of the order left the petitioners only one work day to plan their steps and apply to the court, in addition to the fact that the acts of Mr. Alasalmon which lead to the decision to demolish his home at this time were committed on November 10, 2014, about ten months earlier, and the respondent failed to take any action in that regard throughout that period. Therefore there was no justification for the allocation of such a short period to the petitioners for the purpose of filing a petition against the order, and no harm would be caused by granting the short extension as requested.

*The request submitted by petitioners' counsel for a stay of the execution of the order dated August 26, 2015 is attached and marked Exhibit **G**.*

12. On August 27, 2015, around noontime, the respondent sent his response to the above request which stated that the respondent decided to deny the request for a stay of the execution of the order. However, it was stated that the order would not be carried out before 20:00, Sunday August 30, 2015, and that "the military commander is of the opinion that it is a reasonable period which gives you sufficient time to consider your steps". Hence this petition.

*Respondent's response dated August 27, 2015, is attached and marked Exhibit **H**.*

The Legal Argument

The prohibition against house demolition

13. The demolition of a family home constitutes a cruel and inhuman measure which causes the family a severe trauma, leaving it without a roof over its head. It impinges on the right to own property and on the right to have a home. In the absence of a roof over its head the family is displaced and is completely dependent on others.

14. The demolition causes an intentional harm to innocent people and a brazen breach of the prohibition against collective punishment which is one of the fundamental principles of our legal and moral system: "**The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man be put to death for his own sin**" (Kings 14;5-6, and see also the words of the Honorable Justice Cheshin in HCJ 2006/97 **Janimat v. GOC Central Command,** IsrSC 51(2) 651, 654). It should be noted that even if according to the respondent the purpose of the demolition is to deter, then, in fact, it injures innocent people and actually constitutes collective punishment, while the attainment of the objective of deterrence is doubtful.

15. Moreover. House demolition impinges on the right to dignity, on the right to live in a dignified manner and on the right to own property. In view of the fact that house demolition harms innocent family members whose actions did not cause the demolition, and who have no ability to influence respondent's decision, the demolition also critically impinges on the autonomy of the will and on the ability of a person to make his own decisions and take responsibility for the consequences of his own actions (see and compare AP 10/94 **A v. Minister of Defense**, IsrSC 53(1) 97, 107).

House demolition is contrary to Israel's obligations according to international law

16. House demolition is also prohibited by international humanitarian law and the occupation laws included therein. The respondent is the alternate sovereign in the OPT and he is vested with broad authorities the main purpose of which is to provide for the needs of the civil population and protect the safety of its forces. International law is the normative basis underlying the exercise of his authorities (HCJ 7015/02 **Ajuri v. Commander of IDF Forces in the West Bank**, IsrSC 56(6) 352, 364).

17. The seizure and demolition of petitioners' home runs contrary to the laws of occupation which prohibit the use of collective punishment and the destruction of private property. Hence, Articles 33 and 53 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, (the **Fourth Geneva Convention**) state as follows:

> "33. 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."
>
> "53. 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".

Also see regulations 46 and 50 of the regulations attached to the Convention respecting the laws and Customs of War on Land (Hague 1907) which prohibit the seizure of private property or the imposition of collective punishment due to the deeds of single individuals. Said prohibition constitutes part of international customary law and therefore obligates the state of Israel.

18. House demolition is also prohibited by international human rights law which obligates the respondent and is the standard by which its acts are examined (HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel** (reported in Nevo, December 14, 2006); HCJ 9132/07 **Albasyuni v. The Prime Minister** (reported in Nevo, January 30, 2008); HCJ 7957/04 **Mar'aba v. The Prime Minister of Israel** (reported in Nevo, September 15, 2005)).

19. House demolition is also contrary to the provisions of the Covenant on Civil and Political Rights (1966, ratified in 1991), in view of the fact that it violates the right of the individual to freely choose his place of residence established in Article 12 of the covenant; the right of the individual not to be subjected to arbitrary or unlawful interference with his home (Article 17 of the covenant) the right to equality before the law (Article 26); and constitutes cruel, inhuman and degrading punishment (Article 7 of the covenant).

20. The Human Rights Committee of the United Nations which is responsible for the interpretation of the covenant and its implementation by the member states, also resolved in 2003 that house demolition was contrary to Articles 33 and 53 of the Geneva Convention (see Commission on Human Rights Resolution 2003/6, section 15), and stated in a report from 2003 that house demolition was contrary to the Covenant on Civil and Political Rights and that the state of Israel should cease said practice (see: Concluding observations of the Human Rights Committee, CCPR/CO/78/ISR, section 16).

21. House demolition is also contrary to the Covenant on Economic and Social Rights (1966, ratified in 1991), which enshrines in Article 11 thereof the right to adequate housing and living conditions, and in Article 10 the special protection of the family unit.

22. On this issue the petitioners join all arguments which were raised in the context of the request for a further hearing (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual et al., v. Minister of Defence**, hereinafter: the **request for a further hearing**) in the judgment of the Supreme Court sitting as the High Court of Justice which was given on December 31, 2014, in HCJ 8091/14 (hereinafter: **HaMoked's petition**), and also refer to the opinion of the experts on international law which was attached to the petition, which was drafted by – Prof. Yuval Shany, Prof. Mordechai Kremnitzer, Prof. Orna Ben-Naftali and Prof. Guy Harpaz, which is attached hereto for the convenience of the honorable court.

*The experts opinion is attached and marked Exhibit **I**.*

23. The opinion provides that the house demolition policy may, under certain circumstances, constitute a **war crime of** according to international criminal law and the Rome Statute (Rome Statute of the International Criminal Law). The opinion refers to Article 8(2) of the Rome Statute which states that certain severe violations of the Geneva Convention, including, *inter alia*, the above mentioned Article 53, may be regarded as a war crime. Article 8(2)(a)(iv) of the Rome Statute stipulates that: "unlawfully extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" shall be a criminal offense. The opinion explains that individual house demolition will probably not be regarded as an extensive destruction as is required by the above Article. However:

> A policy which over the years caused the demolition of hundreds and even thousands of homes with no justification of military necessity may pass the required threshold for the injurious breach as stipulated in Article 8(2)(a)(iv)." And thereafter "The mere possibility that the policy as a whole will be examined in terms of war crimes demonstrates the extent by which said policy veers from international legal standards. Indeed, one cannot rule out the possibility that an investigation will be initiated to inquire whether criminal responsibility may be imposed on a certain individual for the extensive destruction of property caused as a result of the house demolition policy. In this case, the fact a national court approved the house demolition policy will not prevent such an investigation" (page 2 of the opinion).

24. Thereafter the opinion discusses the possibility that respondents' policy may be regarded as a war crime being a collective punishment. Despite the fact that the Rome Statute does not directly define collective punishment as a war crime, it may be regarded as an "inhuman treatment", again under Article 8(2)(a)(iv). In this context it should be noted once again as the opinion emphasizes that "**there is almost a unanimous agreement between the scholars that the different prohibitions against collective punishment according to humanitarian law are absolute, without taking into consideration the specific circumstances of the case, and that such prohibitions are not subject to the exception of "military necessity" or any other exception**." (page 28 of the opinion).

25. Therefore, the opinion does not rule out the possibility that the house demolition policy, in its current scope, satisfies the requirements of the *actus reus* element of war crime according to criminal international law, and thereafter points out that the fact that the violations are not handled on the national level increases the risk of intervention by the international court.

26. As was broadly argued in the request for a further hearing, the general arguments which were raised in the petition being the subject matter of the request, and which are also raised in the petition at hand – according to which respondents' policy regarding the demolition of the homes of Palestinians who were involved in terror attacks totally contravenes international law – **have never been resolved on their merits by the honorable court**. Hence, although the honorable court has repeatedly approved the lawfulness of respondent's policy in dozens of judgments over the course of said period, it was done without a substantial discussion of said weighty arguments. The same applies to the recent judgments of this honorable court in HCJ 4597/14 '**Awawdeh v. The Military Commander of the West Bank Area** (dated July 1, 2014, hereinafter: '**Awawdeh**) and in HCJ 5290/14 Qawasmeh v. The Military Commander of the West Bank Area (dated August 11, 2014) in which said arguments were not substantially discussed.

    The petitioners are aware of the institutional difficulty embedded in a renewed examination of a policy which was approved by the honorable court over a long period of time and in many judgments, but in view the harsh ramifications of said policy and in view of the weighty arguments raised which are supported by the above mentioned experts opinion and which have not yet been finally resolved in the context of the request for a further hearing, it is improper for the honorable court to continue to avoid discussing them.

27. And it should be noted. The advantage in holding the general discussion regarding the house demolition policy in a specific context is obvious. As will be specified below, it is petitioners' only home and hence, the resolution of the honorable court has a critical significance for them and affects the economic survival and future of petitioners 2-3. This fact enables the parties and the court to

thoroughly and broadly examine the consequences of the home demolition policy, as they arise from the specific case, taking into consideration the different difficulties embedded in this policy, rather than in theory only.

The demolition of petitioners' home is in contrary to the principle of the child's best interest

28. There is no need to discuss at length the status of the principle of the child's best interest as a primary principle. The supremacy of said consideration has been recognized many times in Israeli jurisprudence, and it has been clarified more than once that said principles may override other interests. It was so held for instance in CFH 7015/94 **Attorney General v. A.,** IsrSC 50(1) 48, 119: "**The consideration of the child's best interest is a superior consideration, the decisive consideration. Indeed, other considerations are also taken into account in addition to this consideration… but they are all secondary considerations, and they will all bow to the consideration of the child's best interest.**" And also in CA 549/75 **A. v. Attorney General**, IsrSC 30(1) 459, 465: "**There is no legal matter concerning minors in which the minors' best interest is not the primary and main consideration**". Beyond anything else, it is a basic human consideration.

29. As is described in the factual part, the two children of the petitioner and Mr. Alasalmon, aged six and eight also lived n the family home. Moreover, seven additional families live in the building. Although the family does not reside in the apartment at the moment in view of the concern that IDF forces might return thereto and frighten the children, their stay with petitioner's family is only temporary, and this apartment is the sole apartment which they have. Hence, the demolition of the residential apartment will cause great suffering to innocent persons, and will critically injure their human dignity. How did petitioners 2 and 3, the children of the family, sin that they deserve to see their home demolished, and become homeless? The injury inflicted on the family's children is contrary to the rights of the children and the undertakings of the state of Israel according to the Convention on the Rights of the Child, and particularly those stipulated in Article 2(b):

> "b. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

And in Article 38 of the convention:

> "a. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
> …
> d. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

On the applicability of human rights treaties to the Occupied Palestinian Territories (OPT) see HCJ 769/02 **The Public Committee against Torture in Israel et al., v. Government of Israel** (reported in Nevo, December 14, 2006), and the authorities there.

30. And it should be noted. Sub Article 38(d) of the convention imposes a positive obligation on the respondent: in addition to the prohibition against the breach of the rules of humanitarian international law, established in sub-Article (a), sub-Article (d) obligates the respondent to take measures which will ensure the provision of protection and care to petitioners 2-3. In its conduct the respondent sins twice.

31. The demolition of the residential apartment of petitioners 2-3 will make them more vulnerable, in view of the fact that together with their mother, the petitioner, they will lose everything they have and will become totally dependent on the mercy of others.

32. The respondent did not find it appropriate to take these considerations, concerning the child's best interest, into account, despite the obligation imposed on every administrative arm in making decisions which affect the condition of children. Respondents' decision is inappropriate for this reason also and should therefore be revoked.

Respondents' decision is not proportionate

33. In its judgments this honorable court ruled that the use of Regulation 119 for deterrence purposes was legitimate when this measure was required for the purpose of preventing the infliction of additional injury on innocent people. However, the exercise of the authority must satisfy the proportionality tests, after the person vested with the authority meticulously examined and made a proper balancing between all relevant interests.

34. Case law defined the scope of respondent's discretion in the exercise of his authority to seize and demolish homes in the context of Regulation 119:

> The above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court may not and should not intervene in the decision of the military authority, whenever the latter intends to exercise its authority in a way and manner that are intolerable." (HCJ 2722/92 **Alamarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693, 699).

35. However, recently, in 'Awawdeh, this honorable court held that the implementation of the authority vested in the military commander according to Regulation 119 should be limited, subject to the exercise of reasonable discretion and the proportionality tests:

> "… in its interpretation of [Regulation 119], this court limited the implementation and application thereof and held that the military commander must exercise reasonable discretion while using his authority there-under and act proportionately... This ruling was reinforced by the enactment of the Basic Law: Human Dignity and Liberty. This court held that although the 'validity of law' clause applied to the regulation, it should be interpreted in the spirit of the Basic Laws […] There is no dispute that the exercise of the authority granted by Regulation 119 violates human rights. It violates the right to own property and the right to human dignity. Therefore, as held, the exercise of the authority must be proportionate.

36. Accordingly, the respondent must meticulously examine the circumstances of each and every case: the expected injury to the family, the connection of the suspect to the house, the severity of the actions, the size of the house and the ramifications of the sanctions on other people, whether those injured by the demolition have any connection to the suspect's actions, is it possible to isolate the residential unit of the suspect/convicted of the deeds, can less injurious measures be taken, etc. (see HCJ 1730/96 **Salem v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 50(1) 353, 359; HCJ 6299/97 **Yassin v. The Military Commander of the Judea and Samaria Area** (reported in Nevo, December 9, 1997)).

37. In HCJ 769/02 **The Public Committee against Torture in Israel et al., v. The Government of Israel** (reported in Nevo, December 14, 2006), this court emphasized that the examination of the proportionality of the decision is premised on the right of the innocent civilians:

> However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. This is, regarding the issue at hand, the meaning of the "targeting" in "targeted killing". This is the meaning of the proportionality requirement with which my colleague the President deals extensively.
> Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians who are not lawbreakers. **The State of Israel has a duty to respect the lives of the civilians of the other side**. It must protect the lives of its own citizens, while respecting the lives of the civilians who are not subject to its effective control. **When the rights of the innocent civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of the armed conflict.**
> This duty is also part of the additional normative system which applies to the armed conflict: it is part of the moral code of the state and the superior principle of protecting human dignity. (page 61, emphases added).

38. Indeed, in a regime which respects fundamental rights and protects human dignity, Regulation 119 is not implanted unless there is no other alternative. To witness, Regulation 119 is not exercised in Israel against the families of Jewish security inmates, despite the escalation in violent actions against Arab Israeli citizens and national hate crimes we are witnesses of. A substantial concern exists that the different implementation of the Regulation in similar cases amounts to discrimination. Accordingly, in HCJ 10467/03 **Adnan Yihya Sharbati v. GOC Home Front Command,** IsrSC 58(1) 810, 815 the Honorable Justice A.A. Levy noted that "**The phenomenon of Jewish terrorists as severe as it may be is the domain of the very few, while the vast majority of the Jewish population in Israel condemns it and is revolted by it**". and hence "the exercise of the authority under Regulation 119 is measured and balanced". Also in **Qawasmeh** the Honorable Justice Danziger noted that the house demolition measure is used "in especially severe case of murder" and that cases in which such acts are committed by Jews against Arabs are very rare. However, unfortunately, lately we are no longer concerned with a marginal phenomenon in the Jewish-Israeli society. In view of the accumulation of the cases, the query whether it is a discrimination or not, arises once again.

39. The petitioners will argue that in the case at hand respondent's acts exceed the established rules, and his decision to exercise the authority vested in him under Regulation 119 is a severe and harsh step, which is not required under the circumstances of the matter in view of the fact that the terrorist himself had been severely punished shortly after the occurrence of the event, that as a result of the exercise of his authority at least three innocent individuals will remain without a roof over their

heads, and injury may be inflicted on other neighbors as well. Even if in other cases this court approved house demolitions, each case must be examined on its merits and the discretion must be exercised based on the entire circumstances and cumulative facts. The examination of petitioners' matters indicates that the seizure and demolition of their home for deterrence purposes do not satisfy the proportionality tests.

There is no rational connection between the measure and the alleged purpose – the need to present empirical data

40. Considering the critical impingement on petitioners' rights, a very high level of proof is required as to the efficiency of such a severe and irreversible measure of house demolition. However, not only that there is no proof that house demolition indeed serves the declared purpose of the action, but the security agencies themselves have already concluded in the past that the policy of house demolition of terrorists' family homes did not prove to be a deterring policy.

41. A "think tank" headed by Major General Shani, appointed by the Commander in Chief of the Israel Defence Forces in 2004, examined, *inter alia*, the issue of house demolition for deterrence purposes. The insights, conclusions and recommendations of the team were presentation before a forum of the general staff in the beginning of 2005. The recommendation of the team was to stop using the measure of house demolitions for deterrence purposes, in view of the fact that effective deterrence had not been substantiated and that the harm caused by the demolitions exceeded their benefit. In 2005 the Minister of Defense adopted the recommendations of the Shani think tank and decided to stop the exercise of the authority under Regulation 119, in view of the fact that the deterrence was not effective and the harm caused by the demolitions exceeded their benefit.

    A copy of the computerized presentation of the main principles of the Shani report which was transferred to HaMoked is available in HaMoked's website at the following address: http://www.hamoked.org.il/items/110467.pdf

42. Indeed, common sense also teaches us that injury inflicted on innocent people and collective punishment also entail negative consequences of increased hostility and hate and gives the impression that Israel attaches no value to the safety and wellbeing of the residents of the OPT, even if they are innocent bystanders and are not involved in any hostile activity. Such impressions and feelings may increase the willingness of future terrorists and give rise to feelings of despair and willingness to make sacrifices, rather than fear and concern. Thus, the non-discriminating demolition contemplated by respondents may contribute to the feeling of the close and far circles surrounding the suspect that in any event they have nothing to lose and therefore injure the security interests of Israel and encourage additional injurious acts.

43. Neither in the case at hand nor in other recent petitions in which this issue was raised, did the respondents explain in which manner the demolition of the residential homes of individuals suspected and convicted of having committed terror attacks would achieve, in their opinion, the purpose of deterring others better than before, considering the recommendation and decision from 2005. The mere deterioration in the security situation cannot justify in and of itself the renewed exercise of the authority to seize and demolish. The importance of the effort to safeguard the security of the citizens of Israel is not questionable. However, it is not clear why the respondents are of the opinion that the employment of the measure of house demolition would succeed to cause deterrence while it has failed to achieve this purpose in the past.

44. In view of the doubts which were raised by professionals concerning the benefit of the measure of house demolition, in the absence of any factual infrastructure it is difficult to accept respondents' position according to which house demolition is an effective measure for achieving deterrence. As noted by Amichai Cohen and Tal Mimran in their article "Cost without Benefit in the house demolition policy: following HCJ 4597/14 Muhammad Hassan Khalil 'Awawdeh v. Military Commander of the West Bank Area" **case law news flashes** 31 5, 21-24:

> As a general rule, the reliance on cost-benefit considerations without any underlying data to support them poses a risk. If there are no data which substantiate the efficiency of a certain policy it is very difficult to rely on utilitarian arguments. The fact is that those who took a utilitarian approach with respect to house demolitions were unable to put "on the table" the data which justify their position. In the absence of such data, it seems that the general debate concerning the non-effective approach *vis-à-vis* the utilitarian approach loses ground in view of the fact that those who take the latter approach cannot substantiate their position."

45. And relevant to this matter are also the words of Prof. Kremnitzer which are cited in said article:

> One more thing should have been checked, and without this detail we do not have a real benefit balance, we have a bluff. I suggest checking how many people took the path of terror as a result of the fact that they were victims of such actions or witnessed such actions. Benefit is examined not only according to the test of how it affected a specific person who has maybe decided not to take action, but you also have to see what is the motivation that it implanted in other people, how terror is reinforced as a result of such activity, which is both unjust and inhuman.

See protocol number 342 of the meeting of the Constitutional, Law and Justice Committee on the issue of human rights and purity of arms while fighting terror, December 6, 2004.

46. And indeed, the above were adopted by the honorable court in the judgment of the Honorable Deputy President Rubinstein in HaMoked's petition, where it was held in connection with the matter at hand that:

> "…**State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused**…"

47. The Honorable Justice Hayut also joined said position and noted:

> **And finally, I wish to note that I attach great importance to the comment of my colleague, Justice Rubinstein concerning the need to conduct in the future from time to time and to the extent possible follow-up and research concerning the house demolition measure and the effectiveness thereof (paragraph 28 of his opinion). In this context**

> **it is needless to point out that also in the past this issue was examined by the Shani committee which was mentioned by my colleague, which engaged in "rethinking the issue of house demolition" and reached at that time (2005) the conclusion, which was adopted by the security agencies, that the demolition of terrorists' homes for deterrence purposes as a method in the Judea and Samaria Area should be stopped and should be used only in extreme cases. … However, these extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests**.

48. In view of the above and particularly in view of the fact that the house demolition policy has already been renewed about a year ago, the respondents should have conducted such an examination instantaneously and there was no room to continue to implement a house demolition policy which was not based on a proper empirical examination concerning its consequences, especially in view of the obvious fact that the wave of terror which has been recently experienced by the state of Israel broke despite respondents' renewed implementation of the house demolition policy over a year ago. It seems that the demolitions which were carried out over the last year failed to deter the current perpetrators and maybe the respondents only wish to satisfy the calls for revenge raised by the public.

49. Therefore, in the appeal, the petitioners demanded that the respondents refrain from carrying out the demolition of their home (or any other home) until such an examination is conducted as was held by the honorable court and its results are presented. In response, the respondents stated in paragraph 11 of their response to the appeal that "The position of the security agencies which is supported by comprehensive information, most of which is privileged, is that the exercise of the authority under Regulation 119 of the Regulations can establish effective deterrence against potential perpetrators in the Area. The deterioration in the security situation during the last two years… as well as the current evaluation concerning the effectiveness of the deterrence in the above cases, establish the required basis for the exercise of the authority embedded in Regulation 119 of the Regulations in the case at hand."

50. This response is not satisfactory and even raises doubts since how can data which should attest to the actual effectiveness of the deterrence be privileged. Do the respondents argue that the effect of house demolition should be kept in the dark?

51. Considering the immense and irreparable damage which will be caused to the petitioners, including the minor children of the family, it is not sufficient that such a cruel measure may deter potential perpetrators. The damage is certain and severe, and benefit in a very high level of certainty is required to justify it. In view of the words of the honorable court and in view of the fact that an evaluation of the "effectiveness of the measure of house demolition for deterring purposes" has not been carried out for many years, the demolition of petitioners' home with no actual data which can substantiate the benefit arising there-from cannot be deemed reasonable.

<u>There is no rational connection between measure and the alleged purpose – the passage of time</u>

52. The fact that there is no rational connection between the demolition of petitioners' home and the purpose of the alleged deterrence is even more conspicuous in the case at hand. As aforesaid, the respondents justify the house demolition policy by saying that as far as they are concerned it is an efficient deterring measure. However, this justification also depends on the promptness of

respondent's imposition of the sanction against the terrorist and his family (see page 9 of the article of Mimran and Cohen).

53. In the case at hand, the long period of time which passed between the date of the event and the imposition of the sanction weakens the ostensible causal connection between these two events. Therefore, also in view of the above the consideration of deterrence does not justify the demolition of petitioners' home.

54. Moreover. The passage of time also undermines the legitimacy of the purpose of deterrence since it seems that respondents' decision is not actually based on the deeds of Mr. Alasalmon himself but rather on deeds of others which were committed later on and which lead the respondents to believe that house demolitions should be carried out at this time.

55. Although it was held by the honorable court that deterrence is a legitimate objective in the context of house demolition, it is clear that a direct connection must exist between the acts of the person with respect of whom the injurious measure is exercised and the alleged objective of deterrence, and one cannot act based on general deterring purposes which are not directly related to said person. Relevant to this case are the words of the Honorable Justice Dorner in HCJ 1730/96 **Salem v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 50(1) 353 (1996):

> One of the requirements, which have not been disputed until now, for the exercise of the authority, is the existence of a causal relation between the terrorist attack and the demolition: Although the demolition of a house is not a punitive measure in the full sense of the word but a deterring measure, the same should not be instituted except as a direct response to a terrorist attack which was performed by the terrorist who carried out the attack who resided in the house. In the case at bar, the Respondent "froze" the demolition decision and turned it into a quasi "conditional" sanction. The "condition", so it turns out, was the performance of additional terrorist attacks, by terrorists who lived in other towns and belonged to other families. Pursuant to the performance of such further terrorist attacks, the Respondent seeks to demolish the petitioners' houses. In my opinion he is not entitled to do so, since the demolition authority should not be exercised pursuant to terrorist attacks which are not those which were performed by the terrorist who lived in the house.

56. Despite the fact that the opinion of the Honorable Justice Dorner in said judgment was a minority opinion, the Honorable Justice Bach who discussed the issue decided to deny the petition on these grounds only because in the matter of the petitioners in that case notices regarding the intention to demolish were given shortly after the events which lead to the decision to demolish and the demolition orders were stayed due to legal proceedings which were initiated by the families, and it was held that there was no flaw in respondent's decision to examine whether appellants' appeals should be accepted. The case at hand is different in that no notice whatsoever regarding the demolition has been given shortly after the terror attack, and the first notice was given only now, after the passage of more than ten months, in a manner which disconnects any significant connection between the acts of Mr. Alasalmon and the injurious measure of the demolition of his home.

57. Under these circumstances reference should also be made to the comments of the honorable court in other cases where it emphasized the difficulty and problems embedded in arrangements which impinge on human rights for a **general purpose of deterrence**. This issue was discussed by Mimran and Amichai in their article and relevant to this issue are the words of the Honorable Justice Arbel in paragraph 86of her judgment in HCJ 7146/12 **John Doe v. The Knesset** (reported in Nevo,

September 16, 2013) regarding the incarceration of asylum seekers for the purpose of deterring potential infiltrators:

> **The difficulty in the purpose of deterrence is clear. A person is placed in detention not because he personally presents any danger, but in order to deter others. The person is regarded not as a goal but rather as a means. This treatment undoubtedly constitutes a further injury to his human dignity. "Human dignity regards the human as a goal rather than as a means for securing the goals of others" (Barak, Constitutional Interpretation, 421). "Humans always stand as a purpose and a value by themselves. They should not be regarded as a mere means or as a negotiable commodity – however noble the goal" (Kav LaOved I, 399). I have also noted that "a person is not to be treated as a mere means for securing ancillary and external purposes, since this entails injury to his dignity," as illuminated in the teaching of the philosopher Immanuel Kant (Human Rights Division, para. 3 of my judgment**).

And see also HCJ 7015/02 **Ajuri v. Commander of IDF Forces in the West Bank,** IsrSC 56(6) 352, 374.

58. Case law emphasized that the difficulty embedded in the purpose of deterrence is aggravated whenever it is the sole purpose of the statutory provision, as noted by the Honorable President Naor in the judgment in HCJ 7385/13 **Eitan – Israeli Immigration Policy v. The Government of Israel** (reported in Nevo, September 22, 2014) "**General deterrence in and of itself is not a legitimate purpose**" (*Ibid.*, paragraph 2 of the judgment of the Honorable President Naor). The Honorable President Naor reiterated the above in a judgment which was just recently given in HCJ 8665/14 **Desta et al., v. The Knesset, Minister of Interior et al.** (reported in Nevo, August 11, 2015), paragraph 35 of her judgment and so did Justice Vogelman who wrote that:

> This time, in my opinion, an explicit decision is required on the question of whether this purpose satisfies the proper objective test. In my opinion, other than in exception circumstances to the contrary – and such circumstances do not exist – this purpose is not proper. […] in my opinion this purpose cannot stand on its own feet and as an independent stand-alone purpose – it is inappropriate." (paragraph 21 of the judgment of the Honorable Justice Vogelman).

59. The above are also relevant to the case at hand. The same rule which applies to punitive policy which was rejected by the honorable court on the grounds that it preferred general deterrence or policy considerations over the handling of the specific person whose matter was heard, applies to our case (even if the purpose is not punitive). A measure the purpose of which is general and the connection of which to the deeds of Mr. Alasalmon weakens with the passage of time, particularly when the consequences arising from said measure injure the petitioners who are innocent and have no connection to the offense – should not be allowed. See for instance the words of the Honorable Justice Danziger in LCrimA 3173/09 **Farajin v. State of Israel** (May 5, 2009):

> The imposition of deterring punishments by the court as part of the fight against the security threat should be done only according to established legal principles including the principle of individual punishment…"

60. Support to the approach according to which the principle of general deterrence should not be given preference can also be found in the fact that the consideration of "deterring others" was placed relatively low in the "hierarchy" after amendment 113 of the Penal Law entered into force (see CrimApp 1765/13 **Abdullah v. State of Israel**, paragraph 15 of the judgment of the Honorable Justice N. Sohlberg (July 3, 2014); Ami Kobo "Interpretation of Amendment No. 13 to the Penal Law concerning the structuring discretion in sentencing" *Hasanegor* 183, 5, 8 (2012)).

61. Even if the honorable court approved in the context of house demolition injury to innocent people, it was always done where there was a direct connection to the acts of the family members. Where this connection has been significantly weakened, the injury inflicted on the innocents is aggravated and certainly surpasses the standards established by law.

There is no adequate proportion between the benefit which arises from the demolition of petitioners' home and the damage which will be suffered by them

62. In this specific case the demolition of petitioners' home may not be regarded as a proportionate measure in view of the fact that two cumulative life sentences and compensation in the sum of about four million ILS to his victims have already been imposed on Maher Alasalmon in the context of the criminal proceeding (Exhibit B above)). Although it was held by the honorable court that the punishment imposed in the criminal proceeding in such contexts may not always constitute sufficient deterrence, and that the criminal proceeding does not prevent the use of Regulation 119, each case must be examined on its merits.

63. It is clear that in the case of Mr. Alasalmon, the heavy punishment imposed on him, which also includes a substantial economic component which is single and unique in Israeli criminal law, constitutes a significant measure for the purpose of deterring potential perpetrators. The employment of an additional measure, namely, the demolition of the family home, a measure which is injurious and irreversible, emphasizes with greater vigor the fact that it is a revengeful punishment and an excessive reaction which injures innocent people and which may not be deemed proportionate under the circumstances of the case at hand.

Danger to the other parts of the building and causing injury to the other tenants of the building

64. The opinion of the engineer (which was attached to the appeal, Exhibit E above), indicates that a demolition or sealing of petitioners' apartment may cause the entire building to collapse, and cause damage to the neighboring apartments. Respondent's response to the above was, as aforesaid, that the demolition will be carried out manually and towards non structural elements and that no additional damages are expected to the surrounding environment and to the structure. This answer is not clear enough and it is not clear how in fact the respondents intend to neutralize the damage to the neighboring apartments. As a result of the short period allocated by the respondents to the petitioners for the purpose of filing this petition, the petitioners were unable to obtain a complementary opinion on their behalf and the honorable court is requested to give them the opportunity to do so. In addition, as aforesaid, the other tenants filed a separate petition and wil raise their arguments therein.

65. In this context it should be reminded that recently, in '**Awawdeh**, the respondent undertook that the demolition order would be carried out only after he was convinced that no damage would be caused to other apartments in the building (see the words of the state's representative in page 4 of the protocol of the hearing dated June 30, 2014). However, despite the state's undertaking, the demolition of the apartment being the subject matter of the '**Awawdeh** case, caused damages to additional apartments in the building, as indicated by the opinion of the engineer Jabarin Taysir, who visited the site on July 19, 2014, and examined the condition of the building after the demolition:

"Damages to the apartment in which the plaintiff Muhammad lives [the terrorist's brother, S.B.P.]:

1. Deep and wide cracks were found in the ceiling and exterior walls. Most walls were cracked and/or demolished […]

2. The electric and plumbing systems including appliances were damaged.

3. Many cracks along the staircase […]

Damages to the ground floor (storage houses)

1. Many deep and wide cracks were found in the ceiling and walls […]

Conclusions

The apartment which was detonated is in a state of destruction and may collapse. The pillars were destroyed and the ceiling has deep and wide cracks. […] in this condition the apartment poses a serious safety danger both to the tenants of the building as well as to the building itself. The collapse of the apartment will create an overload on the adjacent apartment and the storage house floor underneath. Therefore the elements of the detonated apartment must be dismantled and cleared (ceiling, pillars, walls etc.) in a controlled manner.

*The relevant pages of the protocol of the hearing in HCJ 4597/14 dated June 30, 2014 and the opinion of the engineer concerning the 'Awawdeh family home dated July 21, 2014 are attached and marked Exhibit **J***.

Conclusion

66. Precisely in times of deterioration in the security condition which takes a heavy toll on Israeli nationals as well as on Palestinian nationals, there is an obligation to meticulously exercise sensible discretion and to protect to the maximum extent possible the safety and rights of uninvolved civilians. The alternative to stay uninvolved and unharmed, must remain a real alternative for the Palestinian population, while the respondents wish to abolish it. As stated by the president (as then titled) Barak in HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485, 491:

> **It is our duty to preserve the legality of government also in difficult decisions. Also when the canons roar and the muses are silent, the law exists and is active and determines what is allowed and what is prohibited, what is legal and what is not**.

Precisely times such as these are the greatest test of democracy. The Court was designed as a restraining and balancing factor precisely for times such as these.

67. And even if the language of Regulation 119 permits such an act to be committed, to injure the innocent as a lesson for all to see, we are bound, and the respondent is bound, to interpret and exercise the authority in the foregoing spirit, and he should be careful not to leave a family without shelter.

So it was stated by the Honorable Justice Cheshin in HCJ 2006/07 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 654-5:

> Since the beginning of our being, we have all known and memorized the same basic principle: Everyone shall bear his own crime and be put to death for his own sin. In the words of the Prophet: "The person who sins will die. The son will not bear the punishment for the father's iniquity, nor will the father bear the punishment for the son's iniquity; the righteousness of the righteous will be upon himself, and the wickedness of the wicked will be upon himself" (Ezekiel 18, 20). There is no punishment without a warning, and punishments are inflicted only upon the offender himself. This is the Law of Moses, and it is written in the book of the Law of Moses: "The fathers shall not be put to death for the sons, nor the sons be put to death for the fathers" (2 Kings 14, 6). … Since the establishment of the State – and certainly so since the Basic Law: Human Dignity and Liberty – we read into the provisions of Regulation 119 of the Defense Regulations, read into it and embed in it, values which are our values, the values of a Jewish, free and democratic state. These values will lead us directly to the ancient times of our people, and our times are like those times: In those days they will not say again, the fathers have eaten sour grapes, and the children's teeth are set on edge. Each man who eats sour grapes, his teeth will be set on edge.

68. Therefore, **the honorable court is requested to issue an *order nisi* and an interim order as requested in the beginning of the petition, and after respondents' response is received and a hearing is held to make them absolute**.

69. Due to the urgency of the matter and the inability to meet with the petitioners this petition is supported by the affidavit of Mrs. Jihan Kahil, who conversed with the petitioner by phone.

Today: August 30, 2015

_____

Michal Pomeranz, Advocate
Counsel to the petitioners