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**At the Supreme Court**  
**Sitting as the High Court of Justice**

**HCJ 7076/15**

In the matter of:

1. \_\_\_\_\_ **Haj Hamed, ID No. \_\_\_\_\_**
2. \_\_\_\_\_ **Mashaqi, ID No. \_\_\_\_\_**
3. \_\_\_\_\_ **Tzuwan, ID No. \_\_\_\_\_**
4. \_\_\_\_\_ **Bashir, ID No. \_\_\_\_\_**
5. \_\_\_\_\_ **Ganem, ID No. \_\_\_\_\_**
6. \_\_\_\_\_ **Ziat, ID No. \_\_\_\_\_**
7. **The cooperative Housing Company of Government Employees, Registration No. 355**
8. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

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**The Petitioners**

v.

1. **Military Commander of IDF Forces in the West Bank**
2. **Legal Advisor for the Judea and Samaria Area**

Represented by the State Attorney's Office  
29 Salah a-Din Street, Jerusalem  
Tel: 02-6466590; Fax: 02-6467011

**The Respondents**

**Petition for Order Nisi**

A petition for an *order nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause, why they should not refrain from exercising the authority according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) including the seizure, demolition or infliction of injury in any other manner on two floors in the building in which lives petitioner 1, which is located near the homes of petitioners 2-7.

Attached is a seizure and demolition order dated October 19, 2015, which was received by petitioners' counsel on October 20, 2015, and marked **Exhibit 1**.

In addition, the honorable court is hereby requested to issue an *order nisi* ordering the respondents to appear and show cause:

- a. Why they should not provide the petitioners with detailed plans and opinion regarding the execution of the seizure and demolition order prior to the execution thereof, and why an extension should not be granted to enable the petitioners to examine the plan on their behalf;
- b. Why they should not declare that if during the execution of the seizure and demolition order being the subject matter of this petition damages are caused to the homes of the petitioners, they would undertake to compensate them for such damages;
- c. Why they should not present a study with factual data regarding the alleged effectiveness of house demolition as a deterring measure before the seizure and demolition order is executed and as a condition for the execution thereof.

### **Urgent Request for an Interim Order and an Interim Injunction**

This petition concerns respondents' intention to demolish the first and second floors of a building on the ground floor in which lives petitioner 1 together with his family. The family consists of five members including three minors. The building is located in a congested area, and buildings owned by petitioners 2-7, in which about 65 individuals live, including at least 20 children, are located in a very short distance there-from. In view of the scope and magnitude of the demolition which respondent 1 intends to carry out, and has already taken preliminary steps in that regard, there is a concern that as a result of the demolition substantial and irreparable damage would be caused to the homes of petitioners 1-7.

In view of the above the honorable court is hereby requested to urgently issue an interim order directing the respondents or anyone on their behalf to refrain from causing any damage to petitioners' homes, and to *inter alia* direct that the seizure and demolition order be stayed until the proceedings in the petition at hand are concluded, given the fact that **respondent 1 agreed to stay the execution of the seizure and demolition order only until October 22, 2015, at 09:00.**

This request is made as an urgent request due to respondents' unreasonable conduct, whose notice regarding the seizure and demolition order was received by petitioners' counsel only on October 20, 2015, in the morning hours, and in view of the fact that in the evening hours of the same day the respondents rejected the request of petitioners' counsel according to which the counting of the 48 hours for the execution of the order would commence only after the entire material underlying the seizure and demolition order shall have been delivered. Said decision was made despite the fact that respondent 1's notice dated October 15, 2015, regarding his intention to seize and demolish part of the building was substantially flawed and consequently it was not at all clear until October 20, 2015, which part of the building was designated for demolition.

Consequently, the respondents left the petitioners with only one working day for the purpose of applying to court, despite the fact that this case concerns an exercise of authority with far reaching ramifications, while there is no dispute that the petitioners are not connected with the acts as a result of which the seizure and demolition order was issued. Respondents' conduct therefore directly and disproportionately violates petitioners' right to apply to court, which is a fundamental right in our legal system, by presenting an unreasonable and impossible schedule which forces the petitioners to act urgently and hastily.

Respondents' above conduct raises a real concern that this course of action is taken by them for the purpose of neutralizing petitioners' ability to protest against and object to the damages which are about to be caused to their homes, or for other extraneous considerations.

Under the circumstances of the matter the balance of convenience clearly favors the petitioners. Hence, should the demolition order be executed there is a substantial concern that a severe damage will be caused to the petitioners who may even become homeless, without a roof over their heads. On the other hand, no substantial damage will be caused to public interest should the execution of the order be stayed for a short period of time until the petition is considered, and the above will even serve the wide public interest of having constitutional rights protected.

In view of all of the above, the honorable court is hereby requested to issue an interim order staying the execution of the seizure and demolition order until the petition is resolved on its merits. In addition, in view of the urgency of the matter, the honorable is requested to issue an interim injunction until a decision in the request for an interim order is made.

**The grounds for the petition are as follows:**

**Preface:**

1. This petition concerns the intention of respondent 1 to demolish by explosives the first and second floors (above the ground floor) of a four story building, located in Rujeib, Nablus, waypoint \_\_\_\_\_ (hereinafter: the **building**) – an act which may cause substantial and irreversible damages to the homes and property of petitioners 1-7.
2. The building is registered under the name of Mrs. \_\_\_\_\_ Haj Hamed, the mother of petitioner 1 and of Mr. \_\_\_\_\_ Haj Hamed, ID No. \_\_\_\_\_, who about ten days ago was arrested on the suspicion that in a shooting attack which took place on October 1, 2015, he caused the death of the late Henkin spouses.
3. Petitioner 1 (hereinafter: the **petitioner**), a 34-year-old driving instructor, who is the only breadwinner in his family, lives on the ground floor of the building together with his family which consists of five members, three of whom are minors aged eleven, ten and a two year old toddler.
4. The building is located at the heart of a congested housing complex and is surrounded by additional buildings owned by petitioners 2-7. The housing complex is managed by petitioner 7, "The cooperative Housing Company of Government Employees" (hereinafter: the **housing company**), and the buildings in the area are registered with it as plots, as follows:
  - a. The building being the subject matter of the seizure and demolition order consisting of the apartment of petitioner's family, is registered as **plot 609**;
  - b. **Plot 606** is owned by petitioner 2. The building consists of four occupied floors inhabited by more than twenty one individuals, including, at least, five children. The father of the family is about 69 years old and suffers from several illnesses and underwent in the past an open heart surgery. His wife is also an elderly woman who suffers from several illnesses;
  - c. **Plot 607** is owned by petitioner 3, who is 41 years old and is the heir of his mother, the late Mrs. \_\_\_\_\_ Badaran. This building consists of three occupied floors, inhabited by more than twelve individuals including eight children and a woman who suffers from cancer;
  - d. **Plot 608** is owned by petitioner 4. This building consists of two occupied floors inhabited by eleven individuals. The building is owned by a 71-year-old elderly and sick woman whose husband has recently passed away, and two of the tenants of the building suffer from blood pressure problems and diabetes;

- e. **Plot 612** is owned by petitioner 5. This building consists of three occupied floors inhabited by twelve individuals including three children. The building is owned by a 73-year-old elderly woman who suffers from asthma and chronic diabetes, and whose husband, also an elderly man, suffers from blood pressure problems;
- f. **Plot 613** is owned by petitioner 6, who is 46 years old. This building consists of one occupied floor inhabited by six individuals including four children.
- g. **Plot 615** serves as the office of the housing company, which provides services to more than 1,500 people who live in the complex. This building consists of one occupied floor.

It should also be noted that the buildings in this area were erected in the beginning of the seventies. Other than these buildings the complex consists of about forty additional buildings located not more than 20-30 meters away from the building being the subject matter of the petition, inhabited by more than 300 people, and which are also expected to be injured by any act of demolition.

**Attached is an aerial photograph which was attached to the notice of the intention to issue a seizure and demolition order with markings of the above buildings, and a detailed explanation letter on behalf of the housing company, marked as Exhibits 2 and 3, respectively.**

- 5. Petitioner 8, HaMoked: Center for the Defence of the Individual, is a not-for-profit association which promotes human rights in the Occupied Palestinian Territories (OPT).
- 6. In a nut shell, the petitioners will argue that the decision to seize and demolish two floors in the building including the apartments thereat (hereinafter: the **apartments**) is inappropriate, for the following reasons:
  - a. The demolition will injure all petitioners, despite the fact that they are not connected with the acts attributed to Mr. Haj Hamed;
  - b. House demolition is a prohibited act which violates fundamental rights of innocent people, and is contrary to international humanitarian law;
  - c. The demolition of the apartments will cause wide injury to innocent people, including children;
  - d. The decision to demolish the apartments is disproportionate in view of the injury which is expected to be inflicted on the building and apartments surrounding the building;
  - e. The decision to demolish the apartments is disproportionate in view of the injury inflicted by it on the family members who reside therein, as well as in view of the heavy penalty which is expected to be imposed on Mr. Yihya Haj Hamed should he be convicted following a legal proceeding which constitutes a sufficient deterring measure, while it has not even been proved that the latter lived in any of the apartments.

### **The main relevant facts:**

- 7. On October 15, 2015, respondent 1 gave notice of his intention to seize and demolish a part of a building due to the acts attributed to Mr. Yihya Haj Hamed and his alleged residence in that part. It should be noted that while the Arabic version of the notice stated that the notice pertained to the ground floor of the building, in which only the petitioner and his family live, the Hebrew version of the notice provided that the notice pertained to the first and second floors thereof. Therefore, on that date it was totally unclear which part of the building was designated for demolition. According to the notice, an objection to the decision could be submitted until October 17, 2015, Saturday, at 12:00.

**Attached is respondent 1's notice dated October 15, 2015, marked as Exhibit 4.**

8. On October 17, 2015, respondents' counsel submitted an urgent objection against respondent 1's intention to issue a seizure and demolition order, which argued that the decision to use Regulation 119 and to demolish the apartments in the building was inappropriate and flawed since it was unclear and based on erroneous factual basis; that it constituted a prohibited action contrary to the basic principles of Israeli law and international humanitarian law; that it would severely injure innocent people, including children, babies and neighbors; and that it could not be regarded as proportionate under the circumstances of the matter. In the framework of the objection petitioners' counsel requested that all necessary clarifications concerning the planned demolition including the demolition method, as well as the interrogation material in the matter of Mr. \_\_\_\_ Haj Hamed, be transferred to her possession. An additional objection was submitted by the legal counsel of Mrs. \_\_\_\_ Haj Yihya.

**Attached is petitioners' objection dated October 17, 2015, marked as Exhibit 5.**

9. On October 19, 2015, after regular work hours, respondent 2's notice was sent to the offices of petitioners' counsel, which rejected the objection. The notice was signed by Major Sandra Beit-On Ofinkero, head of infrastructure and seam zone division on behalf of respondent 2, and included a seizure and demolition order for the first and second floors of the building (above the ground floor). In the decision, which was received by petitioners' counsel on October 20, 2015, in the morning, the respondent retracted the argument that Mr. Yihya Haj Hamed lived in petitioner's apartment and that it was designated for demolition, and clarified that a mistake in that regard occurred in the notice dated October 15, 2015. It was also stated that based on a professional opinion which was prepared, the demolition method which was chosen enabled to avoid, to the maximum extent possible, damage to parts of the building which were not designated for demolition, namely, the ground floor in which the petitioner lives, and the top floor. It was also argued that an engineering plan was prepared which took into account the need to limit damage to neighboring buildings, and that the demolition would be monitored from beginning to end by a military engineer, who would ensure that it was carried out according to the professional opinion. It was further stated that the enforcement of the order would not commence before the elapse of 48 hours from its delivery.

**Attached is the notice of Major Beit-On Ofinkero concerning the rejection of the objection, which was received on October 20, 2015, marked as Exhibit 6.**

10. On October 20, 2015, at noon time, petitioners' counsel sent an urgent letter to Major Beit-On Ofinkero in which she pointed out that the notice failed to include a description of the method which was chosen for the execution of the demolition as well as the manner chosen to ensure that unexpected damage would be avoided, to the maximum extent possible. In addition, petitioners' counsel reiterated her request that all documents underlying the seizure and demolition order relevant for the exhaustion of petitioners' right to be heard, including the plan and/or opinion concerning the demolition method and its ramifications, the interrogation material in the matter of Mr. Yihya Haj Hamed and any other relevant document, be transferred to her.

**Attached is the letter of petitioners' counsel dated October 20, 2015, to Major Beit-On Ofinkero, marked as Exhibit 7.**

11. On October 20, 2015, in the evening hours, petitioners' counsel received a response letter from Major Beit-On Ofinkero, in which the latter notified that respondent 1 rejected the request for the receipt of the engineering plan regarding the execution method of the planned demolition. At the same time it was notified that "**the execution method which was examined (and verbally it was clarified that it should have been "chosen", G.L.) is by controlled hot destruction which would destroy non**

**structural walls in the apartment in a controlled manner."** It was further notified that respondent1 decided to "extend" the stay of the execution of the demolition order until October 22, 2015, at 09:00, regardless of the fact that only at that time 48 hours shall have passed from the delivery of the order.

**Attached is the response letter of Major Beit-On Ofinkero dated October 20, 2015, to petitioners' counsel, marked as Exhibit 8.**

12. To complete the picture it should be noted that petitioners' counsel has in her possession an engineering opinion of Mr. Jabarin Thaysir, a civil engineer, License No. 36465, a Technion graduate from 1986 and a registered contractor, License No. 14390 since 1992. The opinion was prepared following a visit in the building in the framework of which the engineer was requested to evaluate the damage which would be caused should the apartment located on the second floor of the building (above the ground floor) be demolished.
13. The opinion indicates that the building consists of 680 square meters, and was constructed by a conventional method with a continued static scheme, and the outside walls of the building have a stone covering. All apartments in the building are completed and occupied other than the third floor above the ground floor. Mr. Jabarin summarized his opinion by stating that:

**Should the apartment of \_\_\_\_\_ be demolished, which is located on the third floor and has apartments above it and underneath it (the second floor above the ground floor, G.L.):**

1. **The upper apartment on the fourth floor will collapse during demolition.**
2. **The parents' floor underneath the apartment designated for demolition, will suffer heavy structural damage and may even collapse as a result of its exposure to unplanned loads such as detonation and/or the fall of large pieces of concrete.**
3. **The lower apartment of \_\_\_\_\_ will also suffer structural damage as a chain reaction resulting from the collapse of the apartments above it.**

**Attached is the opinion of Mr. Jabarin which was given on October 18, 2015, marked as Exhibit 9.**

14. It should be emphasized that in view of the lack of clarity and flaws in respondent's notice and as a result of the shortage of time, the opinion was given, at this stage, only with respect to the second floor above the ground floor. Hence, the anticipated damages caused as a result of the planned demolition of two floors are naturally much more severe.
15. Under these circumstances, in view of the crucial ramifications of the demolition and the damages which are expected to be caused to the homes and property of the petitioners, particularly in view of the fact that the respondents notified of an intention to use explosives, the petitioners had no alternative but to apply to this honorable court and file this petition.

## **The Legal Argument**

16. The petitioners will argue that the decision to issue the seizure and demolition order should be revoked in view of the fact that it is based on a fundamentally flawed procedure, including the breach of petitioners' right to be heard and their right to due process which cannot be rectified. In addition,

the decision to destroy floors of the building and the apartments located therein is unreasonable and extremely disproportionate in view of the fact that it breaches fundamental rights of protected innocent residents, and runs contrary to international and Israeli law as well as to the superior principle of the child's best interest.

### **The flaws in the procedure**

#### **The flaws in respondent 1's notice concerning his intention to seize and demolish the apartments:**

17. Due to the severe violation of fundamental rights and due to the irreversible damage caused to family members and other unrelated residents, who did not sin, it was held that seizure and demolition of a home for deterring purposes according to Regulation 119 would be carried out only subject to a proper administrative procedure, including a strict factual substantiation, warning and a fair opportunity to be heard, and so forth and so on (see HCJ 9353/08 **Hisham Abu Dheim v. GOC Home Front Command** (reported in Nevo January 5, 2009)). Said conduct conforms with the obligation of each and every administrative authority to base its decisions on a proper factual infrastructure, and to conduct a pertinent, fair and methodological examination whenever it intends to exercise its authority.
18. An inappropriate and unexplained substantial gap was found between the Hebrew and Arabic versions of the notice to demolish (Exhibit 4) concerning the number of floors which respondent 1 intends to demolish as well as to their location in the building. Hence, while the Hebrew notice stated that the intention was to demolish the first and second floors of the building (without clarifying whether the ground floor and the floor above it are referred to, or whether reference is made to the two floors located above the ground floor), the Arabic notice stated that the intention was to demolish the ground floor, in which petitioner's family lives.
19. Therefore, an inconceivable situation was created in which the petitioner was notified in his mother tongue that respondent 1 intended to demolish his home, while in fact this was not true. Respondent's notice stated further that the decision was made in view of the fact that Mr. Yihya Haj Hamed lived in the apartment of petitioner 1, information which was fundamentally erroneous, and to witness, the respondent has indeed retracted his above allegation later on.

#### **Violation of the right to be heard and petitioners' right to due process:**

20. The right to be heard does not require sophisticated arguments and an array of citations from case law to establish its status, since it constitutes an integral part of the rules of natural justice which demand that no harm be inflicted upon a person by an administrative authority unless he has been previously granted a proper opportunity to present his arguments before it. On the other hand, the rule which grants a person who may be prejudiced by a decision of the administrative authority the right to present his arguments and be heard. On this issue see Y. Zamir, **The Administrative Authority**, page 793 and also HCJ 1661/05 **Gaza Coast Local Council et al., v. Israel Knesset et al.**, TakSC 2005(2), 2595, 420:

**It is obviously agreed that the right of the individual to present his arguments before the authority before a decision which might harm him is made – is a superior right, a right rooted in fairness which is required in human relations, which is exercised by us from ancient times.**

21. Notwithstanding these basic principles, respondent 1's notice of his intention to seize and demolish parts of the building was delivered on Thursday, October 15, 2015 and stipulated that an objection to the decision could be submitted only until Saturday, October 17, 2015, at 12:00. The tight and almost impossible schedule allocated by the respondent for the submission of the objection caused

the procedure to become a mere formality and has substantially prejudiced petitioners' ability to present their arguments and gather their evidence, especially in view of the grave situation in which respondent's notice contained erroneous and contradicting information.

22. In addition, the notice was not delivered to the tenants or owners of the buildings surrounding the building in which the demolition is about to take place, including petitioners 2-7, despite the fact that a violation of rights entrenched in international law as well as in Israeli law is concerned, and that past experience shows that a demolition may have weighty ramifications which may affect them as well.

The failure to transfer the documents underlying the decision and the engineering opinion

23. An integral part of a proper hearing process imposes on the respondents the obligation to transfer to the petitioners the entire documents underlying their decision. Accordingly, for instance the Honorable Justice (emeritus) A. Barak held in LCA 291/99 **D.N.D. Stone Supplies Jerusalem v. VAT Director**, IsrSC 58(4) 221, 232:

**The right of the individual to inspect documents held by the administrative authority and upon which it relied in making its decision in his matter constitutes part of the basic principles of a democratic regime. It is the "the private right of inspection" which is mainly derived from the right to present arguments and be heard and the obligation of the administration to act in a transparent manner (see Zamir in his above book, pages 875-886). Indeed, 'the rule which arises from case law is that documents which were received by a public authority while using an authority lawfully vested in it, must be revealed and open to the other party'.**

See also HCJ 7805/00 **Aloni v. The comptroller of Jerusalem Municipality**, IsrSC 57(4) 577, 600 where it was held by the Honorable Justice A. Procaccia as follows:

**Without the right of inspection the right to be heard will never be complete. And without the right to be heard – the decision of the administrative authority may be incomplete and flawed.**

24. However, in the case at hand, the respondents offhandedly denied the request of petitioners' counsel that all materials associated with the decision to carry out the demolition be transferred to her, including material concerning the demolition method and its ramifications, and the interrogation material in the matter of Mr. Yihya Haj Hamed, who has not yet been charged. Petitioners' counsel reiterated her above request following the issue of the seizure and demolition order, after it was clarified by respondent 2 that he had in his possession a demolition plan and an engineering opinion for the execution of the demolition.
25. The importance of the engineering opinion and demolition plan for the purpose of fulfilling respondents' obligation to conduct a hearing and to enable the petitioners to exercise their right to due process cannot be overstated. Without these documents and in the absence of specific information concerning the demolition plan, the petitioners are denied, without any justification or cause, the opportunity to present a specific opinion on their behalf, which would be able to properly examine the specific risks posed by the demolition to petitioners' homes and property, as well as the ability of petitioners' counsel and the honorable court to examine the proportionality of respondents' actions.



26. The applicability of the above is intensified in view of respondents' notice that they intend to carry out the demolition by **explosives** ("hot destruction"), contrary to other cases in which it was decided to carry out the demolition by "manual, electrical and mechanical demolition, without detonation", as was stated, for instance, in the hearing in HCJ 5839/15 **Sidr v. Military Commander of IDF Forces in the West Bank** (see paragraph C of the judgment; hereinafter: **Sidr**).
27. On this issue it should be noted that following the judgment in HCJ 5290/14 **Qawasmeh v. The Military Commander of the West Bank Area** (reported in Nevo, August 11, 2014; hereinafter: **Qawasmeh**) in which the court discussed the presumption of validity enjoyed by the authority, in their response to the petition in **Sidr** the respondents attached the requested opinion at **their own initiative**, and therefore there is no justification that they should refrain from doing so before a petition is filed and even before a decision to issue a demolition order is made, as is required by the rules of good governance and natural justice.
28. Furthermore, the presumption of administrative validity has been completely refuted, and at least in a manner which clearly indicates that the respondent should be obligated to transfer to the petitioners the opinion and enable them to respond to it, as it became evident that respondents' undertaking to take measures to reduce the damage which could have been caused to neighboring apartments as a result of the demolition which was discussed in HCJ 8066/14 **Abu Jamal v. GOC Home Front Command** (reported in Nevo, December 31, 2014)(hereinafter: **Abu Jamal**) did not actually materialize. In that case, as a result of the demolition, infrastructures and property in the neighboring apartment were severely damaged to the extent that it became dangerous and non-habitable. Therefore, an abstract undertaking of the respondents that in the execution of the demolition appropriate measures would be taken to minimize the damage and that the demolition would be carried out under the supervision of an engineer on scene, would not suffice, and the petitioners should be given the opportunity to examine the professional opinion and to respond to it.
- Attached are photographs of the Abu Jamal home which show the damage that was caused to the neighboring apartment in that case, marked as Exhibit 10.**
29. Hence, respondents' conduct was substantially and fundamentally flawed, in brazen contrast to the duty of fairness and good faith imposed on them. As a result of these circumstances the petitioners were left in the dark and in an actually unclear situation and their right to present their arguments and their right to due process were violated. Each one of the above flaws alone, and certainly the accumulation of such consecutive flaws, suffices for the revocation of respondent's decision to issue a seizure and demolition order. The respondents should at least be obligated to transfer for petitioners' inspection, all materials requested by them and to enable them to complement their arguments on the above issues before a final decision regarding the enforcement of the demolition order is made.

The decision is not proportionate

30. According to the Supreme Court's judgments, in view of the severe violation of fundamental rights, the exercise of the authority of the military commander under Regulation 119 should be limited, subject to the exercise of reasonable discretion and the proportionality tests. It was so held by the Supreme Court in HCJ 4597/14 '**Awawdeh v. The Military Commander of the Wet Bank Area** (reported in Nevo, July 1, 2014, hereinafter: '**Awawdeh**)
- ... 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.**

31. In HCJ 769/02 The Public Committee against Torture in Israel v. Government of Israel (reported in Nevo, December 14, 2006), the Supreme 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 distinction between unlawful combatants and civilians must be maintained. In the case at, this is the meaning of the "targeting" in "targeted killing". This is the meaning of the proportionality requirement which my colleague President Barak discusses broadly.**

**With respect to the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of the innocent civilians who do not break the law. The State of Israel has a duty to honor the lives of the civilians of the other side. It must protect the lives of its own citizens, while honoring the lives of the civilians who are not subject to its effective control. With the rights of the innocent civilians before our eyes, it becomes easier for us to recognize the importance of the restrictions imposed upon the management 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, G.L.)

32. Indeed, in a regime which respects fundamental rights and protects human dignity, Regulation 119 is not used unless all hope was lost. To witness, Regulation 119 is not used in Israel against the families of Jewish security prisoners, despite the escalation we currently are witnesses of in violence against Arab Israeli citizens and nationalistic crimes. Parenthetically it should be noted that there is a real concern that the different implementation of the Regulation in similar cases amounts to discrimination.
33. In the case at hand there is no rational connection between the measure and the alleged objective, namely, deterring potential perpetrators and safeguarding the security of the area. Considering the crucial violation of the rights of petitioner 1's family and children, as well as the rights of the neighbors, petitioners 2-7, a high level of proof is required as to the effectiveness of such a severe measure. However, not only that there is no evidence that house demolition indeed serves the declared objective of this action, but rather, the security authorities themselves have already reached the conclusion in the past that the policy of demolition of homes of families of perpetrators, did not prove to be an effective deterring policy. In view of the above, in 2005, the Minister of Defense accepted the recommendations of the Shani Committee and decided to stop the use of the authority according to Regulation 119, since deterrence was not proved to be effective and the damage caused by the demolitions was greater than their benefit.

34. It should be reminded that in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (reported in Nevo, December 31, 2014), in which circumstances similar to those of the case at hand were discussed, it was held by a majority vote of the justices of the panel that in future cases of house demolition the military would be required to present data pointing at the alleged effectiveness of house demolition as a deterring measure. And it was stated by the Honorable Deputy President Rubinstein:

**... 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...**

And see also paragraph 6 of the judgment of the Honorable Justice Hayut.

35. In view of the above, the respondents should conduct such study immediately and refrain from exercising the house demolition policy which is not based on a proper factual examination of its consequences.
36. Considering the huge and irreversible damage which will be caused to the petitioners and their family members, it is not sufficient that such a cruel measure "may" realize deterring purposes against the execution of additional acts of violence. The damage is certain and severe, and therefore benefit in a significant higher level of certainty is required to justify it.
37. Therefore, for as long as the respondents do not provide an updated opinion concerning the effectiveness of house demolition, they do not satisfy the rational connection test. This applies even more forcefully when it is highly likely that the measure at hand may destroy the home of the petitioners who are innocent people.
38. Moreover. In view of the fact that we are concerned with an offensive and irreversible measure which will have far reaching ramifications on the homes of additional neighbors who are expected to be substantially harmed from this action, one should thoroughly examine whether the measure chosen is the most appropriate and least injurious measure, and whether alternatives may suffice, such as the sealing of the house rather than the demolition thereof, particularly in view of the fact that the destruction which may be caused would damage innocent people.
39. In the case at hand, despite the request of petitioners' counsel to receive from the respondents the engineering opinion based on which the decision to demolish was made, and particularly the specific method by which the demolition in this case would be carried out, the respondents refused based on the argument that according to the decision of the honorable court, they were not obligated to transfer such an opinion. How, then, may less injurious alternatives be examined when the measure chosen cannot be thoroughly examined?
40. The petitioners will argue that according to the opinion attached as Exhibit 9 to this petition, the measure which was chosen is, in fact, the most injurious measure. Due to respondents' refusal to provide them with the engineering opinion on which they relied, the petitioners have no alternative but to request the honorable court to accept petitioners' opinion, or at least, to direct the respondents to transfer the opposing opinion without which, all their arguments are meaningless.
41. As noted above, although respondents' engineering opinion has not been transferred to the petitioners, their response stated that the measure which was chosen was "hot destruction". This leads to the

conclusion that demolition by explosives is concerned, a method which everyone agrees is less precise than the method chosen in similar cases such as **Sidr** where it was decided that the demolition would be carried out manually, electrically and mechanically, without any structural damage and without detonation.

42. And it should be reminded, as noted in paragraph 28 above that in past cases in which the respondents argued that demolition by explosives would not cause damage to nearby apartments and that the neighbors had no reason to worry, the same neighbors found themselves on the next day without walls and without furniture. Therefore the mere statement of the respondents that no damage would be caused, despite the fact that execution by "hot destruction" was chosen, which was also the method chosen in the case of the Abu Jamal family, not only fails to reduce the existing concern, but is rather intensified by their arrogance.
43. It is not incumbent upon the petitioners to offer alternatives, certainly not when they oppose the mere act of demolition. However, the respondents have an obligation to thoroughly and carefully examine alternative measures as has been done in the past and according to the decisions of the court on this issue, such as the sealing of rooms or manual demolition, the expected damage of which is lesser than that of the proposed measure (see for instance H CJ 2722/92 **Alamarin v. Military Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693).
44. Finally, considering the timing which was chosen, the administrative flaws in respondents' conduct, and the manner by which the hasty decisions were made before the interrogation of Yihya Haj Hamed has ended, not to mention the fact that an indictment has not yet been filed against him, the suspicion arises that the purpose of the demolition is not to deter, as argued by the respondents, who obviously did not prove such connection, but is rather used as vindictive punishment and excessive reaction causing harm to innocent people, which cannot be considered proportionate under the circumstances of the matter. Not without reason had the Honorable Justice Vogelmann noted only a few days ago in his judgment in H CJ 5839/15 **Sidr v. The Military Commander of IDF Forces in the West Bank** (reported in the Judicial Authority Website, October 15, 2015) that:

**The exercise of the authority according to Regulation 119 where it has not been sufficiently proved that the family members of the suspect were involved in the hostile activity – is not proportionate.**

45. Moreover. Harming innocent people and collective punishment also entail negative consequences of increased hostility and hatred and the introduction of the sense that Israel does not value the safety and wellbeing of OPT residents even if they are innocent and are not involved in any hostile activity. Such broad and indiscriminate injury, contrary to targeted injury inflicted on those who are culpable and deserve to be punished, may instill feelings of despair and willingness to make sacrifices, without any fear or hesitation. Thus, the indiscriminate destruction planned by the respondents may contribute to the sense of the close and more remote environment of the suspect that in any event have nothing to lose and may just harm the security interests of Israel and encourage additional injurious actions. It seems that this measure is not meant to deter but rather to please public opinion in Israel which calls for revenge.

#### House demolition runs contrary to Israel's obligations under international law

46. House demolition is also prohibited under international humanitarian law and the rules of occupation constituting part thereof. The respondent acts *in lieu* of the sovereign in the occupied territories and he is vested with ample authorities the main purpose of which is to take care of the protected civilian population and protect the safety of his forces. International law is the normative basis for the exercise

of his authorities (HCJ 7015/02 **Ajuri v. The Military Commander of IDF Forces in the West Bank**, IsrSC 56(6) 352, 364).

47. Seizure and demolition of apartments, with their severe ramifications on the petitioners, are contrary to the rules 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 (hereinafter: the **Fourth Geneva Convention**) provide 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.
48. In addition, see regulations 46 and 50 of the regulations attached to the Fourth Geneva Convention respecting the Laws and Customs of War on Land (Hague, 1907), prohibiting the seizure of private property or the imposition of collective punishment as a result of the acts of individual persons. This prohibition constitutes part of international customary law and therefore obligates the state of Israel.
49. House demolition is also prohibited by international human rights law, which obligates the respondent and is used as a standard by which his actions are examined. See HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel**, (reported in Nevo, December 14, 2006), HCJ 9132/07 **Al-bassiuni 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)).
50. House demolition also runs contrary to the provisions of the Covenant on Civil and Political Rights (1966, ratified in 1991), since it violates a person's right to freely choose his place of residence established in Article 12 of the Covenant; a person's right not to be subjected to arbitrary or unlawful interference with his home (Article 17 of the Covenant); and the right to equality before the law (established in Article 26 of the Covenant) and constitutes cruel, inhuman and degrading punishment (Article 7 of the Covenant).
51. The Human Rights Committee of the United Nations, which is responsible for the interpretation of the covenant and oversees the manner by which it is implemented by the states members, stated in a decision of 2003 that house demolition was prohibited by Articles 33 and 53 of the Fourth Geneva Convention (see Commission on Human Rights Resolution 2003/6, paragraph 15), and a report from 2003 stipulated that house demolition was prohibited by the Covenant on Civilian 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, paragraph 16).
52. House demolition also contradicts the Covenant on Economic and Social Rights (1966, ratified in 1991) which enshrines in Article 11 thereof the right to housing and proper living conditions and in Article 10 thereof the special protection of the family unit.
53. On this issue, the petitioners join all arguments which were raised in the request for further hearing (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual et al., v. Minister of Defense**, hereinafter: the **request for further hearing**) in which the honorable court was requested to hold a further hearing in the judgment which was given on December 31, 2014, in HCJ 8091/14

(hereinafter: **HCJ HaMoked**) and also refer to the expert opinion of international law scholars which was attached to the petition and which was written by Prof. Yuval Shany, Prof. Mordechai Kremnitzer, Prof. Orna Ben-Naftali and Prof. Guy Harpaz.

The expert opinion may be reviewed at: [www.hamoked.org.il/files/2014/1159001.pdf](http://www.hamoked.org.il/files/2014/1159001.pdf)

54. As stipulated in the opinion, house demolition policy may, under certain circumstances, amount to a crime according to the international criminal law and the Rome Statute of the International Criminal Court. The opinion makes reference to Article 8(2) of the Rome Statute which provides that certain serious violations of the Fourth Geneva Convention, including, inter alia, Article 53 which was mentioned above, may be regarded as a war crime. Thereafter, Article 8(2)(a)(iv) of the Rome Statute establishes as a criminal offense: "unlawfully extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". The opinion explains that apparently, individual house demolition will not be regarded as an extensive destruction and appropriation as required in the Article, however, at the same time it is clarified, in page 2, that:

**Policy which throughout the years caused the demolition of hundreds and even thousands of houses without justification of military necessity may cross the required threshold as required for the formulation of the offensive breach in Article 8(2)(a)(iv) .**

And thereafter:

**The mere existence of the possibility that the entire policy will be examined in terms of war crimes demonstrates the extent to which said policy deviates from lawful international standards. Indeed, one should not rule out the possibility that an investigation be initiated to examine whether criminal liability may be imposed on a specific person for the extensive destruction and appropriation of property as a result of the house demolition policy. In such an event, the fact that house demolition was approved by a national court will not prevent such an investigation.**

55. The opinion continues to state that respondents' policy may be regarded as a war crime based on the mere fact that it constitutes collective punishment. Although the Rome Statute does not refer directly to collective punishment as a war crime, it may be regarded as "inhuman treatment", again according to Article 8(2)(a)(iv). In this context it should be pointed out once again, as the opinion emphasizes in page 28, that:

**There is broad consensus among scholars that the different prohibitions against collective punishment according to humanitarian law are absolute, without regard to the specific circumstances of the matter, and that these prohibitions are not subjected to the exception of "military necessity" or any other exception.**

56. Therefore, the opinion does not rule out the possibility that the house demolition policy, in its current scope, satisfies the basic factual requirements of war crime, based on international criminal law. The opinion continues to note that the fact that the violations are not treated on the national level increases the chance of interference by the international court authorities. Hence, despite the fact that this honorable court has repeatedly approved the lawfulness of respondent's policy in dozens of judgments throughout this period, it was done without a substantial consideration of these weighty arguments. Accordingly, recent judgments given by the honorable court (HCJ 4597/14 '**Awawdeh v. Military**

**Commander of the West Bank Area** (reported in Nevo, July 1, 2014; hereinafter: '**Awawdeh**'); the above **Qawasmeh** and **Sidr**) have also neglected to consider these arguments in a substantial manner.

57. The petitioners are not oblivious of the institutional difficulty embedded in the re-examination of a policy which was approved by the honorable court over a long period of time and by ample authority. However, in view of the grave ramifications of the policy and the weightiness of the arguments, supported by the above experts opinion, which have not yet been conclusively determined in the context of the request for further hearing, it would not be appropriate for the honorable court to continue to refrain from discussing them. The importance of the above is intensified in view of comments recently made by the court concerning the need to present clear data regarding the alleged effectiveness of house demolition as a deterring measure as well as concerning the disproportionality associated with house demolition which is directed against those who were not involved in the hostile activity.
58. And it should be further noted and clarified that the benefit of conducting the general discussion on the house demolition policy in a specific context is clear. For the vast majority of the petitioners, these are their only homes and therefore the decision of the honorable court has a crucial significance for them which directly affects their economic survival and future. This fact enables the parties and the court to conduct an in depth discussion and to examine the across-the-board ramifications of the house demolition policy, as they arise in the context of the specific case, taking into consideration the diverse difficulties embedded in this policy, and not only as a matter of theory.

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

59. The principle of the child's best interest as a primary principle should not be discussed at length. The supremacy of this consideration has been recognized many times in Israeli jurisprudence and it has been clarified more than once that this principle may defeat 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, this consideration is joined by additional considerations... but all these are secondary considerations, and they will all bow to the consideration of the child's best interest**". And see also CA 549/75 **A v. Attorney General**, IsrSC 30(1) 459, 465: "**There is no legal matter which concerns minors, in which the minors' best interest is not the primary and main consideration.**" Above anything else, it is a basic human consideration.
60. As described in the factual part, three minors in the ages of between two through eleven only live in the family home of the petitioner. In addition, about twenty additional children live in the homes of petitioners 2-6, which are located near petitioner's home. The offices of the housing company which is responsible for the management of the entire housing complex and the proper functioning of which is essential for the wellbeing of many children in the Area, are also located in close proximity to petitioner's home. Hence, the demolition of the apartments and its ramifications on the petitioners will cause great suffering to innocent people and will crucially violate their human dignity. How did the children of petitioners' families sinned to deserve to see their homes damaged and probably destroyed, to the extent that they may become homeless? The harm caused to the children of petitioners' families is contrary to the rights of the children and Israel's undertakings according to the Convention on the Rights of the Child, and particularly according to 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 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 conventions to the OPT see HCJ 769/02 **Public Committee against Torture in Israel v. Government of Israel**, (reported in Nevo, December 14, 2006), and the references there.

61. It should be emphasized that Article 38(d) of the Convention imposes a positive obligation on the respondents: in addition to the prohibition to break the rules of international humanitarian law established in Article 38(a), Article 38(d) obligated the respondent to take measures to ensure protection and care of the children who live in petitioners' homes. In his doings, the respondent sins twice.
62. The demolition of the apartments in a manner which will cause damage and will even deprive the petitioners from making proper use of their homes will make these children more vulnerable, since they will become homeless and totally dependent on the mercy of others.
63. The respondents did not find it necessary to refer to these considerations of the child's best interest, despite the arguments raised on this issue by petitioners' counsel in the objection and despite the obligation imposed on each and every arm of the authority while making decisions which affect the condition of children. Respondent 1's decision is inappropriate for this reason as well and should therefore be revoked.

### Conclusion

64. According to the respondents there is no intention to destroy the apartments of the petitioners in the petition at hand. The respondents do not dispute petitioners' innocence nor do they dispute the fact that they were not involved in any way or manner whatsoever in the actions attributed to Yihya Haj Hamed against whose apartment and against the apartment of his mother the demolition order was issued. However, as specified above and as past experience clearly shows, despite their declared intention – intention does not go hand in hand with reality. Moreover. The respondents do not even deign to support their declaration by an engineering opinion specifying the measures which they intend to use for the purpose of carrying out the demolition and how it would be carried out without causing additional damage to the adjacent buildings.
65. Respondents' conduct indicates that the above demolition order was issued offhandedly, based on a hasty decision. The order consists of substantial errors which dramatically affect the lives of the petitioners and their fundamental rights. Respondents' conduct shows a brazen disrespect for the petitioners and constitutes a severe breach of both law and case law established on this issue.
66. In addition, it should also be noted that the demolition of a family home in and of itself constitutes a cruel and inhuman action, which causes a severe trauma to the family leaving it homeless. It severely



violates the right to own property and the right to have a home. It leaves the family in a state of displacement, without a roof over its head and totally dependent on others.

67. This demolition constitutes an intentional impingement on the innocent and is contrary to a basic and primary moral and legal principle according to which "**The fathers shall not be put to death for the children nor the children be put to death for the fathers, but every man shall 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) and is therefore totally prohibited.
68. Therefore, the honorable court is requested to issue an order nisi and an interim order as requested in the beginning of the petition, after hearing the arguments of the parties and make the *order nisi* absolute.
69. Due to the urgency of the petition and the short time which the petitioners had available to them for its submission, the above does not exhaust their arguments on the subject matter of this petition. The petitioners insist on receiving all requested material and reserve the right to complement their arguments and the opinion on their behalf to the extent necessary.

October 22, 2015

(Signed)

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