At the Supreme Court **HCJ 8567/15**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Halabi, ID No. _____**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger (RA)**

represented by counsel, Adv. Labib Habib et. al.,
New Beit Hanina, P.O.Box 21225, Jerusalem 97300
Tel/Fax: 02-6263212; Cellular: 052-4404477

The Petitioners

v.

Military Commander of IDF Forces in the West Bank

represented by the State Attorney's Office

The Respondent

Petition for *Order Nisi* and Interim Order

A petition for an *order nisi* is hereby filed which is directed at the respondent ordering him to appear and show cause:

a. Why he should not refrain from the seizure and demolition of the house in which live the petitioner and his family which is located in Surda, or damage it in any other way or manner whatsoever;

b. Alternatively, why the respondent should not choose a less injurious sanction such as the sealing-off of the relevant room.

c. In any event, and even if a decision is made to demolish or seal the house or any part thereof, why he should not revoke the seizure order.

d. In any event, and even if a decision is made to demolish the house, why he should not carry out the demolition moderately, in a manner which does not cause damage to neighboring structures.

e. Why he should not transfer in advance the demolition plan for petitioners' review and for its examination by an expert.

Petition for Interim Order

The honorable court is also requested to order the respondent, by an interim order, to refrain from the seizure and demolition of the above house or from causing it any other damage, until the proceedings in this petition are concluded.

The grounds for the petition are as follows:

Factual Background

1. On October 15, 2015, around 04:00 a.m. in the early hours of the morning, the respondent gave the petitioner a notice of intention to seize and demolish the house in which petitioner No. 1 lives with his family, according to the authority vested in him under Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Regulation**). The notice gave the petitioner an opportunity to submit an objection to the respondent until October 22, 2015, at 12:00.

   A copy of the notice (hereinafter: the **notice**) is attached and marked **P/1**.

   The notice stated that the deceased son of the petitioner, _____ Halabi, who lived at home, had carried out a stabbing attack and caused the death, by stabbing, of two, and wounded two others.

   The notice stated that an objection could be submitted until October 17, 2015, at 03:50 (indeed, 03:50 in the early hours of the morning!!!!).

2. A. On October 15, 2015, petitioners' counsel at that time, Advocate Lea Tsemel, requested an extension for the preparation of the objection from the respondent's legal advisor in Beit-El. Her request was denied on that day "in view of the security situation"! A copy of the request and the response are attached and marked **P/2** and **P/3**, respectively.

   B. On October 17, 2015, the objection was submitted, a copy of which is attached and marked **P/4**.

   C. On October 15, 2015, around 22:00, a letter was received from the respondent in which the petitioner was requested to provide a scheme of the house "until noon time tomorrow"!!! On October 20, 2015, petitioner's counsel sent a letter in which an extension was requested until October 21, 2015 for the preparation of the scheme. On October 21, 2015, the scheme was sent by petitioner's counsel to respondent's legal advisor.

   A copy of the above referenced letters is attached and marked **P/5**, **P/6** and **P/7** respectively.

   D. On December 6, 2015, about two months after the date on which the first notice of the intention to demolish the house was sent out, a letter was received around 17:00 which denied the objection, together with the seizure and demolition order being the subject matter of this petition which was attached thereto, and an opportunity to file a petition was given until December 8, 2015, at 17:00. Following an additional request, respondent's legal advisor agreed to extend the petition filing date until December 10, 2015, at 17:00. On December 9, 2015, an additional extension was given at the request of Advocate 'Alaa Mahjaneh who represents the owner of the house, Mr. Hassan Sharakeh, until December 13, 2015, at 17:00.

   A copy of the response letter to which the order was attached and of the two consent letters which approved the extension for the filing of the petition, are attached and marked **P/8, P/9** and **P/10** respectively.

The house being the subject matter of the order:

3. A. The house being the subject matter of the order is located in the Occupied Palestinian Territories (OPT), in the village of Surda, Ramallah region in the West Bank. It is a two story structure of 360 square meters, which consists, on the first floor, a living room, a den, a kitchen, dining room and two toilettes. The second floor consists of six bedrooms, a living room and three toilettes.

B. The house was acquired by the petitioner from Mr. Sharakeh, who is the registered owner of the house and representative of the Palestinian Workers Union, in the framework of which the house was acquired. It is a housing which is offered to member workers of the union, such as the petitioner, at reasonable prices.

C. The petitioner entered into an agreement for the acquisition of the house and used the money he saved from hard manual labor to pay for it. He paid only a portion of the consideration. At a certain point the petitioner stopped paying the balance of the consideration, about one third thereof. **Consequently, in 2012, a warning was sent to him by the owners, through a notary, regarding the intention to revoke the acquisition agreement, as specified in the documents which were attached to respondent's decision to deny the objection, P/8**. The above dispute between the petitioner and the owner has not been settled until this day and the petitioner has not yet completed the acquisition of the entire rights in the house. Therefore, the house has not yet been registered under his name in the land registration office.

D. With respect to petitioner's status in the house and the status of his rights, it is possible that under the circumstances and due to the shortage of time, this issue has not been fully clarified at the time the objection was submitted, and petitioner's counsel did not have in her possession all relevant documents. However, it is currently clear, also according to the documents obtained by the respondent from the "direct" examination conducted by him that the proprietary rights in the house have not yet been fully acquired by the petitioner, and full consideration has not yet been paid, and therefore, the ownership of the house and the registration thereof have not yet been transferred to petitioner's name. Therefore, a warning regarding the intention to revoke the acquisition agreement was issued on behalf of the seller-owner.

The Parties

4. Petitioner No. 1, born in 1964, a plumber, lives in the house together with his wife, born in 1974, a house wife, and their four children, the son _____, who is 21 years old, Zahraa an 18 years old student, _____ who is 14 years old and _____ who is 10 years old. The deceased son _____, was 19 years old and used to live and sleep in a separate room and bathroom adjacent thereto on the second floor.

5. Petitioner No. 2 is a registered not-for-profit association which has been engaged for many years in the defending human rights.

6. The respondent was authorized to act as the military commander for the West Bank area according to the Defence (Emergency) Regulations, 1945. As such, he is vested with the authority to issue seizure, sealing and demolition orders according to Regulation 119 of said Regulations.

The Legal Argument

Flawed hearing:

7. The hasty procedure by which the order was issued which lacks discretion and a real hearing, not even for the sake of appearance, and the concern that the respondent does not seek deterrence but

rather revenge in accordance with the '*Zeitgeist'*, all indicate that the hearing was conducted for the sake of appearance only whereas the final decision has already long been made.

8. In addition, the respondent did no enable to conduct a real hearing. He did not disclose to the petitioners the interrogation material which gives rise to the suspicion based on which the order was issued.

9. Said deficiency violates petitioners' right to be heard and prevents them from raising dense arguments against the order.

10. The hearing must be made according to the rules of natural justice and the duty of the authority to act fairly, which include the right of the injured party to be informed of the grounds for the impingement inflicted on him and his rights, of the facts argued against him and even of the evidence supporting such allegations:

> The special status of this right in employer-employee relationships was discussed more than once by the National Labor Court. Accordingly, in LabC 3-148 Shekem Ltd. – Grinberg [23] and in LabA 1027/01 Guterman – The Academic College of Emek Yezreel [24], the court stated, *inter alia*, that "**It is the fundamental right of the employee to know what are the allegations which are raised against him or in his matter and to accordingly respond to them, to present the opposing arguments from his point of view and to try to convince the authorized person to changed his mind in as much as it prejudices his rights**…" (page 455).
>
> **28. The hearing conducted by the authority must be fair and must enable the civilian to present his case. Sometimes the presentation of evidence is involved**.
>
> The presentation of arguments before the administrative authority includes, as a matter of fact, the presentation of evidence, in view of the fact that occasionally the authority relies on facts, which allegedly, do not provide a full or accurate picture. **Therefore, the hearing may focus on facts. Without the opportunity to add facts or to refute facts, the hearing may be futile**" (Zamir in his above mentioned book [25], page 819)."

HCJ 3379/03 **Moustaki v. State Attorney's Office**, IsrSC 58(3), 865, 891;
See also the book of Y. Zamir, **The Administrative Authority**, Volume B (5756), page 816.

11. Therefore, the honorable court is requested to obligate the respondent to disclose such interrogation material as requested in the beginning of the petition, and to enable the petitioners to complement their arguments.

<u>Regulation 119 is contrary to the norms by which the military commander is bound</u>

12. The military commander must act according to international humanitarian law and the rules of belligerent occupation which form an integral part thereof. The respondent is a trustee of the OPT and is not the sovereign thereof. All of his powers in the OPT derive from international law, which constitutes the sole normative basis for the exercise of his powers (HCJ 2150/07 **Abu Safiyeh v. Minister of Defense** (not reported, December 29, 2009)).

13. Regulation 119 runs contrary to two main provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: the **Fourth Geneva Convention**), which

forms the basis for the rules of occupation under international law. Article 33, which prohibits the imposition of collective penalties and reprisals against protected persons and their property and Article 53 of the convention which prohibits the destruction of homes and personal belongings by the occupying power. The Regulation also runs contrary to Article 50 of the regulations annexed to the Convention respecting the Laws and Customs of War on Land (Hague, 1907)(hereinafter: the **Hague Convention**), which prohibits the imposition of collective punishment and to Article 43 of said convention which prohibits the infliction of damage and destruction of property.

14. Secondly, the respondent must also act according to international human rights law, and first and foremost according to the UN covenants on civil and political rights and on social and economic rights. It was so held in the opinion of the International Court of Justice in connection with the separation wall. This honorable court has also examined the acts of the military commander according to these norms. (**Albasyuni v. The Prime Minister**, TakSC 2008(1) 1213; HCJ 7957/04 **Mar'aba v. The Prime Minister of Israel, TakSC 2005(3) 3333, paragraph 24; HCJ 3239/02 Marab v. Commander of IDF Forces,** TakSC 2003(1) 937; HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. Military Commander of IDF Forces in the West Bank**, IsrSC 57(1) 385).

15. Regulation 119 also runs contrary to Article 17 of the Covenant on Civil and Political Rights (a person's right not to be subjected to arbitrary or unlawful interference with his home), Article 12 (a person's right to freely choose his place of residence) Article 26 (the right to equality before the law) and Article 7 (the right not to be subjected to cruel, inhuman and degrading treatment or punishment). Statements to the same effect were made by the Human Rights Committee of the UN which is responsible for the examination of the manner by which the covenant is implemented by the states members, in its opinion of 2003 concerning Israel.

16. In addition, Regulation 119 runs contrary to certain provisions of the Covenant on Social and Economic Rights, primarily the provisions of Article 11 (the right to housing and proper living conditions) and Article 10 (special protection of the family unit); the Regulation runs contrary to Articles 12-13 and Article 17 of the Universal Declaration on Human Rights; and may even amount to a war crime as this term is defined in Article 8(2)(iv) of the Rome Statute for the establishment of the International Criminal Court (Extensive destruction and appropriation of property, not justified by military necessity).

<u>The order breaches the prohibition against collective punishment and violates fundamental rights</u>

17. The prohibition against collective punishment is a basic principle of law:

> That be far from Thee to do in this manner — to slay the righteous with the wicked; and that the righteous should be as the wicked, that be far from Thee! Shall not the Judge of all the earth do right?" (Genesis 18; 25).

18. The prohibition against collective punishment was expressed, as aforesaid, in international customary law. Article 50 of the Hague Convention states:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

19. Whereas Article 33 of the Fourth Geneva Convention stipulates categorically as follows:

> 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…
>
> Reprisals against protected persons and their property are prohibited.

20. And it was so held by this honorable court:

> My colleague Justice M. Cheshin has already discussed this issue in connection with Regulation 119 of the Defence (Emergency) Regulations, 1945. The basic principle is that "The person who sins will die... There is no punishment without a warning, and punishments are inflicted only upon the offender himself." (HCJ 2006/97 **Janimat v. GOC Home Front Command – Uzi Dayan**, IsrSC 51(2) 651, page 654).

21. It should be noted that even if, as argued by the respondent, the purpose of the demolition is to deter, it actually injures innocent people and therefore, in fact, constitutes a collective punishment.

22. House demolition violates the hard core of human dignity. A person's dignity is critically violated when he is deprived of his home and is left homeless without a roof over his head and with no shelter. The grave violation of dignity also stems from the fact that a person's home is not just a physical structure, but also a place with which a person has a strong emotional affiliation, a place where all his intangible property and memories are found.

Disproportionality

23. The principle of proportionality is a superior principle which the respondent must undoubtedly follow while exercising a draconian power which severely injures innocent people such as in the case at hand:

> The exercise of power according to Regulation 119 of the Defence Regulations must be the outcome of balances: between the severity of the act committed by the perpetrator and the severity of the sanction take; between the injury caused to the perpetrator's family and the gain achieved as a result of the deterrence of other potential perpetrators; between the right of family members of the perpetrator to have property and the safeguarding of public security. Said balancing, which forms part of the known constitutional proportionality tests, mandates that the deterring measure taken will rationally bring about the realization of the proper purpose; and that the measure chosen will also satisfy the third sub-test of the relevant "relativity", namely, that proper relation is found ("proportionality" in the narrow sense) between gain that arises from the act and the realization of its underlying purpose and the injury which may be inflicted as a result thereof on the constitutional right. (see: Aharon Barak Proportionality in Law 471 (2010); compare: MApp(Crim) 8823/07 **A v. State of Israel**, paragraph 26 of the judgment of my colleague, deputy president, Justice E. Rivlin. In this context the court must also be convinced that the same purpose may not be realized by a less drastic measure than house demolition or sealing (see: HCJ **Abu Dheim**; **Sharif**)(HCJ 5696/09 **Mughrabi v. GOC Home Front Command;** hereinafter: **Mughrabi**, paragraph 12 of the judgment).

24. In view of the above the petitioners will argue that the seizure and demolition of the house for deterring purpose does not satisfy the proportionality tests – neither the rational connection test

between the means and the purpose, and beyond need, nor the least injurious measure test and the harm *vis-à-vis* the gain test (proportionality in the narrow sense).

25. Neither proportionality nor discretion was exercised in this case, but rather the decision of the political level to destroy houses was carried out, this and nothing more. The respondent disregarded his obligation to examine from time to time the effectiveness of the sanction and the rational connection between the sanction and the anticipated result, and the heavy burden imposed on him to justify impingement of innocent people by proper evidence, and in so doing he disregarded the words of the Supreme Court which were adopted and clarified on October 15, 2015 by the Honorable Justice U. Vogelman in HCJ 5839/15 **Sidr et al., v. Military Commander of IDF Forces** (not reported yet):

> Firstly, this deterrence which the Regulation at hand hopes to establish. Deterring terrorists from taking part in atrocities – and though we are in crazed days of a murderous terror wave, this is true in "normal" times as well – has a large benefit. In effect, if the demolition of a certain terrorist's house deters an unknown terrorist from harming human life, then we may say that the chosen means has granted the greatest benefit imaginable. Except that there may be room to wonder whether this deterrence is in fact achieved through the implementation of the authority granted to the Respondents under Regulation 119. It would seem that the military authorities did so; even though they believed that there was a connection between the demolition of terrorists' houses and deterrence, they noted that as a system there exists a tension between deterrence and "the price of demolition"; they even concluded that "the tool of demolition in the framework of a deterrent element has been eroded'" (see slides 17, 20 and 22 of the presentation given by the Committee headed by Major-General Ehud Shani which examined this subject in 2004 and 2005, and which was attached as Addendum No. 1 to HaMoked petition). As a result the security authorities chose – a decision later amended – to cease house demolition activity for purposes of deterrence as a method in the area (while keeping it available in extreme cases) (see *ibid*., paragraph 6 of the opinion by Justice E. Hayut). This Court took this stand as well when it emphasized that even though it is impossible to prove "how many terror attacks were prevented, and how many lives were saved as a result of the deterring actions of sealing and demolishing houses" (HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997) (words of Justice Goldberg) (hereafter: **Janimat**)), still "it behooves the State authorities to examine the tool and its concomitant benefit from time to time […] [and] to provide […] statistics indicating the effectiveness of the method of house demolitions as a deterrent in such a manner as justifies the harm to those who are not suspects or defendants" (HaMoked petition, paragraph 27; and paragraph 6 of the opinion of Justice E. Hayut).

26. In addition, the proportionality in its narrow sense and the need to choose the least injurious sanction were not satisfied. The respondent should have considered to seal-off the room in which lived the son Muhannad which was like a separate unit with a separate bathroom, or any other alternative, and to refrain from the demolition of an entire house of an entire family, all under the frivolous argument that in so doing security is obtained for others.

27. In addition, the fact that house has not yet been transferred to petitioner's ownership also requires that the house should not be demolished. The ownership of the house is a relevant detail which the respondent should have considered and which should have prevented him from demolishing the

house. The respondent exempted himself from the obligation to consider this issue and tried by an obscure and indirect manner to argue that petitioner's argument on this issue was not credible.

28. Respondent's "examination" also indicated that the house, as aforesaid, has not yet been transferred to petitioner's ownership and that the agreed consideration has not yet been paid to the original owner and therefore, as mentioned above, a warning regarding the revocation of the acquisition agreement of the house was sent. The respondent should have taken this consideration into account and should have refrained from issuing an order for the demolition of the house.

The confiscation Order is not valid

29. Even if permission is granted to the respondent to demolish the house on the grounds of deterrence, it is still unclear why confiscation is required for deterrence purposes?

30. The petitioners will argue that even if one accepts respondent's position, which in and of itself is denied, according to which the family should suffer a painful blow "as a lesson for all to see" by a showcase detonation of its home, it is still unclear how confiscation contributes to said deterrence.

31. The petitioners will argue further that after the demolition is carried out there is no longer any need to confiscate and that it should be determined that the confiscation expires immediately upon the demolition of the structure.

32. The petitioners will argue that confiscation after the demolition of the structure results in a confiscation of privately owned land by the respondent, contrary to international customary law which prohibits confiscation, seizure and appropriation of property of protected civilians by the occupying power.

In the case at hand we are not concerned with a temporary seizure which has been limited by time in advance, but rather with an actual confiscation. However, even if a temporary seizure was concerned, it was also void and unlawful in view of the fact that there is no "military need", and certainly not an absolute one, which justifies such confiscation and renders it lawful under international law:

> It is worth noting that construction of the separation fence is unrelated to **expropriation or confiscation of land. The latter are prohibited by regulation 46 of The Hague Regulations** (see HCJ 606/78 Iyub v. The Minister of Defense, 33(2) P.D. 113, 122; hereinafter – The Iyub case). Construction of the fence does not involve transfer of ownership of the land upon which it is built. The construction of the fence is done by way of taking possession. Taking of possession is temporary. The seizure order stipulates its date of termination. Taking of possession is accompanied by payment of compensation for the damage caused. Such taking of possession – which is not related in any way to expropriation – is permissible according to the law of belligerent occupation (see regulations 43 and 52 of The Hague Regulations, and §53 of The Fourth Geneva Convention: … Pursuant to regulation 52 of The Hague Regulations, the taking of possession must be for "needs of the army of occupation". Pursuant to §53 of The Fourth Geneva Convention, the taking of possession must be rendered "absolutely necessary by military operation"

See: HCJ 7957/04 **Mara'abe et al., v. The Prime Minister of Israel et al**., (reported in Nevo).

33. The proportionality principle also requires that the confiscation be revoked. Even if one accepts the position according to which the demolition is necessary, which is totally denied, no explanation may

be given which can justify the need to confiscate. The petitioners will argue that the proportionality principle also requires that the confiscation be at least revoked.

The manner by which the impingement is realized

34. The petitioners will argue further that the obligation to act proportionality also applies to the manner by which the sanction is realized. In their objection, the petitioners requested clarifications as to the manner by which the respondent intended to demolish the house. No response was given to said request.

35. The petitioners will argue that should the remedy of the revocation of the order be denied, the state should be directed to refrain from detonating the house, and take a moderate approach in the execution of the sanction, should it be approved.

36. The petitioners wish to present in the hearing several recent cases in which houses were demolished by the respondent, and regardless of his undertaking that the demolitions would be carried out carefully and moderately under the supervision of an engineer, a spectacle of detonations took place which caused damage not only to the entire building in which the apartment was located but also caused substantial damage to adjacent buildings!

37. The petitioners will argue that these cases prove that respondent's declarations on this issue cannot be trusted, and that for this reason only he should not be allowed to carry out demolitions and turn entire neighborhoods into a war zone. These cases also prove that we are not concerned here with balanced deterrence and security considerations but rather with revenge and detonations in the midst of residential neighborhoods, and with intentional impingement inflicted on innocent people without any justification.

Discrimination

38. The family of Ami Popper who slaughtered innocent workers, did not rush to evacuate its house in view of the fact that said sanction did not hover over its head. Neither did the Goldstein family, which resides in the OPT, think that it had to look for alternate housing after a member of the family slaughtered dozens of worshipers. The house of those who burnt and murdered Mohammad Abu Khdeir is not at risk too. The families of those who burnt and murdered the Dawbsheh family will not rush to evacuate their homes by fear that they might be demolished.

39. The fact that the respondent uses this sanction exclusively against Palestinians, a sanction which is inappropriate in and of itself, adds to the sanction a flair of unlawfulness and immorality.

In Conclusion

40. The infliction of injury on innocent people, their property and lives is prohibited. This is the essence of the rule of law. The breach of said principle, and most certainly by state authorities, gives a very problematic and colored message. Precisely in these difficult times, a restraining message is required, and there is a need to go back to the basic, just and moral principle:

> **That be far from Thee to do in this manner — to slay the righteous with the wicked; and that the righteous should be as the wicked, that be far from Thee! Shall not the Judge of all the earth do right?**

(Genesis 18; 25).

41. And even if the language of Regulation 119 allows such an action, causing harm to innocent people as a lesson for all to see, the respondent must interpret the power and exercise it in this spirit. He must refrain from leaving a large family without a roof over its head and must find another way to achieve his goal.

And the above was so stated in the case law of this honorable court, by the Honorable Justice Cheshin:

> **This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the prophet: The soul that sins it shall die. The son shall not bear the iniquity of the father neither shall the father bear the iniquity of the son. The righteousness of the righteous shall be upon him and the wickedness of the wicked shall be upon him (Ezekiel 18:20). One should punish only cautiously and one should strike the sinner himself alone. This is the Jewish way as prescribed by the Law of Moses**:
>
> **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 II 14:6).**
>
> **… since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we have read Regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of the free and democratic Jewish state. These values guided us on the path of justice during our people's ancient times and our own times are no different: "They shall say no more, The fathers have eaten sour grapes, and the children's teeth are set on edge. But everyone shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge**"
>
> (HCJ 2006/07 **Abu Phara Janimat et al., v. GOC Central Command,** IsrSC 51(2) 651, 654-655; and see also the opinion of the Honorable Justice Cheshin in HCJ 4722/91 **Hizran et al., v. Military Commander of IDF Forces in the Judea and Samaria Area** (IsrSC 46(2) 150); in HCJ 4722/92 **Alamarin v. Military Commander of IDF Forces in the Gaza Strip** (IsrSC 46(3) 693) and in HCJ 6026/94 **Nazal et al., v. Military Commander of IDF Forces in the Judea and Samaria Area** (IsrSC 48(5) 338)).

42. Attached is an affidavit in support of the petition.

For all above reasons the honorable is requested to issue an *order nisi* and interim order as requested in the beginning of the petition, and after hearing respondent's response, to make them absolute.

(Signed)

_____

Labib Habib, Advocate

Labib Jassen Habib, Advocate
Lic. No. 28420