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And by fax: 02-5305741
No. of Pages: 16

January 25, 2016

- U R G E N T! -

Dear Sir,

Re: The Housing Unit of _____ Mari's Family – Urgent Objection

On behalf of my clients _____ Mar'i. ID _____; _____ Mar'i, ID _____; and HaMoked: Center for the Defence of the Individual an objection is hereby submitted against your intention to forfeit and demolish the housing unit which serves as the residence of my clients as follows:

1. On January 20, 2016, in the early hours of the morning, military forces arrived to the housing unit of my clients and delivered your notice regarding the intention to forfeit and demolish the housing unit which ostensibly served as the residence of _____ Mar'i, ID _____, in Qarawat Bani Hassan, by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**). According to the notice said measure was taken in view of the fact that the person whose name appeared in the notice took part in the execution of a murderous stabbing attack on October 3, 2015, in which two persons were killed and two other were wounded.
2. The only thing which was given to the family was the Arabic version of the notice and a map which was attached thereto without the Hebrew version and the indictment which constitutes an integral part thereof. Despite the fact that a representation notice had been sent to your bureau on December 10, 2015, the notice and its attachments were not sent to the undersigned as required, and the missing documents were provided only on January 21, 2016, only following numerous requests which were made by telephone and e-mail to your bureau and the office of the legal advisor for the Judea and Samaria Area.

3. Hence this objection, to which is also attached a power of attorney on behalf of Mr. _____ Mar'i who at the time the representation notice was sent was abroad in a bid to perform the Umrah ritual.
4. My clients will argue that the intention to forfeit and demolish the housing unit is inappropriate for the following reasons:
 - a. My clients and their family have no connection to the actions attributed to Mr. _____ Mar'i, who indisputably did not carry out the above referenced attack. In any event there is no justification to harm my clients and the family members by having their home forfeited and demolished;
 - b. The intention to demolish the housing unit exceeds the power of military commander according to Regulation 119 and is at least based on flawed factual infrastructure in view of the fact that Mr. _____ Mar'i did not reside in the housing unit designated for demolition, but has rather been living for about three years at least in the dormitories of the Abu Dis University;
 - c. House demolition is a prohibited action which violates fundamental rights of innocent people and runs contrary to international humanitarian law;
 - d. The demolition of the housing unit is disproportionate in view of the extensive harm inflicted by it on innocent people including the family members who reside therein including a minor youth, and neighbors;
 - e. The demolition of the housing unit is disproportionate in view of the damage which is expected to be caused to other parts of the building`
 - f. The demolition of the housing unit is disproportionate in view of the heavy punishment which is expected to be imposed on Mr. _____ Mar'i to the extent convicted of what is attributed to him following a legal proceeding which has not yet terminated and which constitutes a sufficient deterring measure. The above is all the more so applicable in view of the fact that to the best knowledge of the undersigned, Mr. Abd al-Aziz Mar'i has weighty claims against the admissibility of his statement and his alleged part in the attack, with respect of which a decision has not yet been made;
 - g. There is a real doubt as to whether the demolition of the housing unit will indeed deter against the execution of additional attacks.
5. In view of all of the above we request that you revoke the above decision and refrain from taking any measures whatsoever against the housing unit of the family.

The main relevant facts

6. The housing unit is located in a two story building. Storerooms and a hen house are located on the ground floor. The second floor consists of one housing unit being the subject matter of the forfeiture notice, in which five individuals live: my client who is about 62 years old, my client who is about 57 years old, their daughters who are 14 and 23 years old, and another son who is 20 years old.

7. It is a poor family, in which both parents are unemployed and which hardly makes ends meet. My clients and their family members have no alternative housing arrangement and the building in their ownership is the only dwelling available to the family, while the floor on which the storerooms and hen house are located is neither suitable nor appropriate for residential purposes. It is clear that the demolition of the housing unit may leave the family without a roof over its head.

Exceeding authority and reliance on flawed factual infrastructure

8. Due to the severe violation of fundamental rights and due to the irreversible damage that will be inflicted on the family members who have done nothing wrong, it was held that the power established in Regulation 119 will be exercised solely for deterrence purposes and subject to a proper administrative proceeding taking meticulous measures to ensure, *inter alia*, that a factual basis was established, a warning and a fair opportunity to be heard were given, etc. (see HCJ 9353/08 **Hisham Abu Dheim v. GOC Central Command** (reported in Nevo, January 5, 2009)).
9. A fundamental principle is that Regulation 119 may be used only against a building the inhabitant of which himself committed or tried to commit an offense which justifies the use of such a draconian regulation. In the case at hand the forfeiture and demolition notice was aimed against an individual who does not reside in the building and as will be clarified below, with respect of whom it has not been adequately proved that he committed or tried to commit an offense.
10. Hence, Mr. _____ Mar'i, is a 21 years old student in Abu Dis University, who left his parents' home to study and who has been living on a permanent basis in the university's dormitories for about three years at least. He has no connection to his parents' home. He has no room or belongings in their home and arrives for visits seldom on holidays.
11. The place of residence of Mr. Abd al-Aziz Mar'i is known to the authorities as the indictment which was attached to your notice explicitly indicates, which states, *inter alia*, as follows:

38. The defendant boarded a bus at the Damascus Gate and returned to his apartment in the students' dormitories in Abu Dis.

...

50. The defendant returned to his apartment in the students' dormitories in Abu Dis, turned on the TV...

12. It should also be noted that Mr. _____ Mar'i was arrested in a pre-planned night raid in his apartment in the university's dormitories and not in his parents' home and no argument was made that the family home was used by him in any way, directly or indirectly, to commit the offense.
13. Despite the fact that any decision of the administrative authority regarding the exercise or failure to exercise its power must be based on proper factual infrastructure, no factual infrastructure was attached to your notice which shows that Mr. ____Mar'i did in fact live in the family home.

14. Under these circumstances the proceeding fails to meet the threshold conditions established in Regulation 119 itself and therefore there is no lawful basis or legitimate purpose for using it, and this serious flaw alone suffices for having your notice revoked.
15. For the avoidance of doubt I request that before a decision is made the undersigned will be provided with the mapping report of the housing unit and any other information which pertains to your arguments about the residence of Mr. Abd al-Aziz Mar'i in the family's housing unit, including a paraphrase of the material which cannot be disclosed in a bid to properly conduct the hearing obligation and to enable my clients to present their entire arguments on this matter.

The involvement of Mr. _____ in the attack is doubtful:

16. The results of the attack which occurred on October 2, 2015, in HaGuy Street, Jerusalem, are very severe and unfortunate. However, said attack was carried out by another person who was killed in the course of the attack, _____ Halabi, several hours after he parted from Mr. _____ Mar'i.
17. According to the indictment itself, the two did not know each other beforehand and the sole purpose of their arrival to Jerusalem was to pray in the Al Aqsa Mosque, while no argument was made that the contact was created for the purpose of carrying out an attack. It is further indicated that the two were not carrying any arms, neither firearms nor cold arms, and that they came across policemen several times and that nothing unusual happened.
18. *Prima facie* it seems that attributing involvement in the attack to Mr. _____ Mar'i, all the more so as a principal perpetrator, is a far reaching step which raises substantial difficulties, both on the criminal as well as on the administrative level.
19. The indictment is mostly based on Mr. _____ Mar'i's statement which was taken over the course of a harsh and long interrogation without an ability to meet with counsel. The factual part of the indictment raises some substantial questions which should be clarified, such as the gap between _____'s insistent pleading of Muhannad not to slap a policemen so as to avoid the risk of being arrested but ostensibly to carry out an attack in which he would die; the planning of the attack ostensibly near a bus stop in a crowded place; uploading the picture of both of them to facebook in a manner which would obviously lead to his arrest; description of _____'s passing thoughts etc. The above is also coupled with the significant time gap between the time on which the two have ostensibly discussed the action and the time on which it occurred, while it is not at all clear what were the original motives of _____ Halabi, what was he doing at that time and to what extent did Abd al-Aziz influenced him; the lack of objective evidence regarding _____ Mar'i's doings; and the fact that the two had a single one-time meeting and there is no argument to the effect that the purpose of their meeting from the beginning was to carry out a terror attack. It should also be emphasized that to the best knowledge in the upcoming hearing of his case Mr. Mar'i intends to deny the allegations made against him in the indictment and to raise substantial arguments in a bid to strike the statement.
20. Therefore, under the circumstances of this matter in which the disputes are both factual and legal, it cannot be determined at this point, at the required level of certainty that there is clear, unequivocal and convincing evidence to the fact that Mr. Abd al-Aziz Mar'i has indeed committed the offenses attributed to him. Hence, there is no basis for the use of Regulation 119, certainly not against family members who are protected and uninvolved

residents, and it is a clear case in which administrative powers should not be exercised prior to criminal conviction.

21. In addition it should be emphasized that also in this regard my clients' right to present their arguments was severely violated in view of the fact that the only thing which was provided was the indictment which was filed against Mr. _____ Mar'i despite the fact that in other proceedings which pertained to Regulation 119 statements of suspects were provided even before an indictment was filed. In view of above I request that the entire investigation material in Mr. Mar'i's matter be transferred to me before a decision is made including a paraphrase of the material which cannot be disclosed so as to enable us to complete our arguments on this issue.

Damage to the other parts of the building and to adjacent buildings

22. According to your notice you intend to demolish the housing unit located on the second floor of a building which is situated at the heart of a congested residential area and surrounded by buildings from all sides. Upsettingly, an opinion on your behalf and/or a detailed account of the planned demolition methods was not attached to the notice. Similarly, no information was given about the precautions which you intend to take to ensure that no damage whatsoever is caused to the other parts of the building and why full demolition is required *in lieu* of a less offensive and more secure measure.
23. Past experience shows that such damages are neither theoretical or negligible, even when the demolition is carried out manually and against non-structural elements only. In this context it should be reminded that in HCJ 4597/1 '**Awawdeh v. Military Commander of the West Bank Area**' (reported in Nevo, July 1, 2014; hereinafter: '**Awawdeh**) you undertook to execute the demolition order only once you were satisfied 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, which was also entrenched in the judgment, the demolition of the apartment in said case caused damage to neighboring apartments.
24. Thereafter, in a hearing which was held on October 14, 2015 in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (reported in the Judicial Authority Website, October 15, 2015; hereinafter: **Sidr**) the Justices of the Supreme Court made some scathing remarks regarding the inadequacy embedded in the infliction of such damages and in the words of the Honorable Justice Vogelman: "**what happened should not have happened...**". It should be noted that in said hearing the Supreme Court also discussed the possibility according to which the state would be obligated to compensate neighbors whose apartments were damaged as a result of the demolition and said obligation has even been recently entrenched in the judgment of the President of the Supreme Court in HCJ 7040/15 Hamed v. The Military Commander of the West Bank Area (reported in the Judicial Authority Website, November 12, 2015; hereinafter: **Hamed**) who held in paragraph 58 that: "**There is no room to restrict, in advance, respondents' obligation to compensate third parties...**"

The prohibition against house demolition

25. 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, leaving the family in a state of displacement, without shelter which causes the family to become totally dependent on

others. In the case at hand we are concerned with an enhanced impingement of populations which are already vulnerable to begin with of children, women and the elderly.

26. Demolition causes an intentional harm to innocent people and runs contrary to a superior fundamental principle 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 H CJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 654), and is therefore totally prohibited.
27. Moreover. Needless to discuss at length about the fact that house demolition impinges on protected human rights. 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 the decision in that matter, 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).
28. House demolition also runs contrary to international humanitarian law which prohibits collective punishment and on the impingement and destruction of private property (Articles 33 and 53 of the Fourth Geneva Convention, Article 46 of the Hague Regulations).
29. Other than the obligation to strictly adhere to the rules of good governance, the exercise of power in this case must also satisfy the tests of proportionality, after the person in which the power is vested has meticulously examined and properly balanced all relevant interests (see H CJ 1730/96 **Salem v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 50(1) 353, 359; The opinion of the Honorable Justice Mazuz in H CJ 7220/15 '**Aliwah v. Commander of IDF Forces in the West Bank** (reported in the Judicial Authority Website, December 1, 2015)). As will be argued below, the decision to demolish the housing unit of my clients cannot be regarded as either reasonable or proportionate under the circumstances of the matter.

Causing harm to innocent people

30. As described in the factual part, the housing unit of my clients also serves as the residence of three of their children who live with them, including one minor. Under the circumstances of this case the decision to demolish the housing unit cannot be considered either reasonable or proportionate. It causes great suffering to innocent persons, and critically injures the human dignity and most fundamental rights of my clients and their family members.
31. In addition, the injury inflicted on the family members runs contrary to the rights of the minor daughter and of other minors who may be injured as a result of the demolition, 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.

The decision is disproportionate

32. According to the judgments of the Supreme Court, in view of the severe violation of human rights, the exercise of the power vested in the military commander according to Regulation 119 must be limited, subject to the exercise of reasonable discretion and to the proportionality tests. And it was so held by the Supreme Court in the above mentioned '**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.

33. In the above mentioned HCJ 769/02 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 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. Being aware of the rights of the innocent civilians, 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, G.L.).

34. In the case at hand no rational connection exists between the measure and the alleged purpose, namely, deterrence of potential perpetrators and maintaining the security of the area. Considering the critical violation of the rights of my clients and their family members; the absence of proper factual infrastructure according to which the family home actually served as the residence of Mr. Abd al-Aziz Mar'i; and the situation in which my clients and the family members had no knowledge whatsoever of his ostensible intentions or actions and the indictment with respect of which raises considerable difficulty – a high level of proof is required regarding the efficiency of such a severe measure.
35. However, not only that no proof exists to the effect that house demolition indeed serves the declared purpose of the measure, particularly under the circumstances of the case at hand, but the security agencies themselves have already concluded in the past that the demolition policy of the homes of the families of the perpetrators did not prove to be a deterring policy. In view of the above, in 2005 the Minister of Defense adopted the recommendations of the Shani committee, and decided to discontinue the use the power according to Regulation 119 in view of the fact that the measure was not proved effective and it was found that the harm caused by the demolitions exceeded their benefit.
36. An additional doubt concerning the effectiveness of the use of Regulation 119 also arose in the context of a personal letter recently published on the internet by Mr. Shlomo Gazit, a retired major-general who headed Israel's military intelligence service and received the Ben-Gurion award for 2012. During his long military service he served, *inter alia*, as the Coordinator of Government Activities in the Territories, and as the head of IDF regional military and security rule department in the army general staff headquarters. Currently he serves as a senior researcher at the Jaffe Center for Strategic Studies at the Tel Aviv University, and as a research fellow at the Center for International Affairs at the Harvard University, the Woodrow Wilson Center in Washington, and at the United States Institute of Peace in Washington. In an article entitled "**Demolition of perpetrators' homes – Does it deter?**" Mr. Gazit seriously questions the effectiveness of house demolition, and, after having specified weighty factors which could undermine the alleged deterrence, he concluded with the following piercing words:

About forty years ago we examined the issue and decided that the damage in house demolition exceeded the gain arising there from as far as we were concerned, and decided to refrain to the maximum extent possible from said punitive measure.

What has changed since then?

Mr. Gazit's article is attached and marked as Exhibit A.

37. It should be reminded that in the judgment in HCJ 8091/14 **Hamoked: Center for the Defence of the Individual v. Minister of Defense** (reported in Nevo, December 31, 2014), it was determined by the majority of the Justices on the panel that in future cases of house demolitions, the military would be required to present data and studies concerning the alleged effectiveness of house demolitions as a means of deterrence. Deputy President Rubinstein stated as follows:

...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...

Also see paragraph 6 of the judgment of the Honorable Justice Hayut.

38. Notwithstanding the data presented *ex parte* in **Hamed**, it was appropriate to have immediately conducted the aforementioned study rather than continue to apply the policy of demolition and sealing of houses which is not based on a proper factual study intended to examine its consequences. Hence, you are requested to refrain from carrying out the demolition of the home of my clients' family or that of any other building before a study is conducted the results of which are openly presented.
39. Given the enormous and irreversible damage already caused to my clients and their family members, it does not suffice that this measure "may" achieve the purpose of deterrence against the execution of additional violent actions. The damage certain and severe, and a significantly higher level of certainty is required to justify it.
40. In this specific case, the demolition of the family's home may not be viewed as a proportional measure, also in view of the fact that if convicted, Mr. Abd al-Aziz Mar'i is expected to be severely sentenced which in and of itself constitutes significant deterrence for potential assailants. The use of an additional measure, namely, the demolition of the housing unit of the family members, a measure which does not satisfy the obligation to take the least injurious means as it is irreversible and may have far-reaching consequences on additional apartments in the neighborhood, emphasizes more vigorously the fact that it constitutes a vindictive punishment and an excessive reaction which harms the innocent and also fails to meet the proportionality test in its narrow sense. Only recently, Justice Fogelman, for good reason, noted in his judgment in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (reported on the Judicial Authority Website on October 15, 2015; hereinafter: **Sidr**) that:

The exercise of power pursuant to Regulation 119 when there was no sufficient evidence that the suspect's relatives were involved in hostile activities - is disproportionate.

41. The Honorable Justice Mazuz, in a minority opinion, elaborated on this issue in HCJ 8150/15 **Abu Jamal et al. v. GOC Home Front Command** (reported on the Judicial Authority Website, December 22, 2015):

I am of the opinion that the power according to Regulation 119 should be exercised in view of the fundamental principles which derive from the mere fact that the state of Israel is a Jewish state ("a man shall be put to death for his own sin") and a democratic state (compare: HCJ 73/53 "Kol Ha'am" v. Minister of the Interior, IsrSC 7, 871 (1953)), and in view of the principles of our constitutional law, mainly from the aspects of proportionality, as well as in view of universal values. I am of the opinion that all these principles inevitably lead to the conclusion that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. It is needless to point out that apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law... (Emphasis added, G.L.)

42. Furthermore, harm caused to innocent individuals and collective punishment also have negative results of increased hostility and hatred, and establishment of the feeling that Israel does not attach any value to the safety and well-being of residents of the Occupied Palestinian Territories, even if they are innocent and are not involved in any hostile activity. This broad and indiscriminate impingement, contrary to a targeted impingement inflicted on those who are guilty and deserve to be punished, may generate feelings of despair and willingness to sacrifice oneself, rather than fear and apprehension. Hence, the indiscriminate demolition planned by you may contribute to the feeling of the suspect's close and more remote environment that, in any case, they have nothing to lose and thus cause harm to Israel's security interests and foster additional attacks. It appears that this measure is not intended for deterrence but rather to placate public opinion in Israel which demands revenge.

Conclusion:

43. In the case at hand there is no foundation or legitimate purpose for the implementation of Regulation 119. Firstly, Mr. ____ Mar'i has not been living in the family's home for a number of years and no evidence to the contrary was presented. Secondly, the allegations regarding the involvement and establishment of Mr. ____ Mar'i's liability for an attack which was executed by another person are in dispute. Thirdly, the demolition of the housing unit will leave an entire family homeless and may cause irreversible damage to the entire building as well as to adjacent buildings.
44. Furthermore, house demolition is a cruel and irreversible measure which runs contrary to Israeli administrative and constitutional law as well as to international law, the effectiveness of which is doubtful. In the circumstances of the matter, the use of such an offensive measure may not be viewed as proportionate, particularly in view of the fact that there is no dispute that my clients and their family members are not involved in any manner whatsoever in the acts attributed to Mr. ____ Mar'i.
45. You are therefore requested to retract your intention to forfeit and demolish the housing unit located on the second floor of the building. To the extent you do not intend to accept the objection you are requested to provide the undersigned, before making a final decision, the requested material in its entirety, namely, the information regarding the residence of Mr. ____ Mar'i in the family home, the investigation material in his matter and the engineering report and/or details regarding the demolition plan.

46. For as long as the proceedings regarding the forfeiture and demolition of the housing unit are pending, no action should be taken that will in any way damage the apartment. Furthermore, should it be decided to deny this objection, my clients intend to file an urgent petition with the Supreme Court. For this purpose, we request a reasonable period of time during which no action will be taken which will cause damage to the building. It must also be emphasized that the above stated does not exhaust my clients' arguments concerning the matter at hand and they reserve the right to supplement their arguments if and to the extent needed.

Sincerely,

[Signature]

Gaby Lasky, Adv.