At the Supreme Court **HCJ 1125/16**
Sitting as the High Court of Justice

In the matter of:
1. **_____ Mer'i, ID No. _____**
2. **_____ Mer'i, ID No. _____**
3. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**
   Represented by counsel, Adv. Gabi Laski and/or Adv. Limor Wolf Goldstein and/or Adv. Neri Ramati and/or Adv.e Talia Ramati
   18 Ben Avigdor Street, P.O.Box 57092 Tel Aviv 6157002
   Tel: 03-6243215; Fax: 03-6244387
   Cellular: 054-4418988; e-mail: laskylaw@yahoo.com

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

Urgent Petition for *Order Nisi* and Interim Order

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 powers pursuant to Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**) including the seizure, demolition or damaging in any other manner of the family home of Petitioners 1-2. **Attached is the seizure and demolition order dated February 7, 2016, 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 information regarding the plans for executing the seizure and demolition order (the Order) and an expert opinion prior to execution thereof, and why an extension should not be granted to enable the Petitioners to have the plan reviewed by an engineer on their behalf;

b. Why they should not present a study with factual data regarding the alleged effectiveness of house demolitions as a deterring measure before the 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' plan to demolish the apartment where Petitioners 1 and 2 live, though there is no dispute that their son, whose alleged actions are the cause for issuance of the Order which is the subject of the petition herein, does not live there.

The apartment in question is the residence of five persons, including a 14-year-old minor. In view of the scope and magnitude of the demolition which Respondent 1 intends to carry out, and toward which has already taken preliminary steps, there is concern that as a result of the demolition substantial and irreparable damage would be caused to other parts of the building, to the point where it is rendered uninhabitable.

In view of the above the Honorable Court is hereby requested to urgently issue an interim order directing the respondents or anyone acting or their behalf to refrain from causing any damage to Petitioners' home, and to *inter alia* direct that the seizure and demolition order be stayed until proceedings in the petition at hand are concluded, given the fact that **the Respondents agreed to stay the execution of the Order only until today, February 10, 2016, at 12:00 PM**.

This request is made as an urgent request due to Respondents' unreasonable conduct, whereby they rejected Petitioners' objection based on insufficient facts and refuse to provide the Petitioners with essential material for the petition whilst the time the Respondent gave the Petitioners to act makes it impossible to obtain the required material in another way.

The wrongful conduct is exacerbated by the fact that what is at stake is the exercise of a power that has far reaching ramifications, while there is no dispute that the Petitioners had no connection to the acts due to which the Order was issued, and that their son does not live on the premises and denies the charges against him.

This conduct is patently unreasonable, defies the principles of good governance and forces the Petitioners to act urgently and quickly. The conduct of the Respondents may nullify the Petitioners' right to properly object to and challenge the demolition of their home.

Under the circumstances of the matter, the balance of convenience clearly favors the Petitioners. Hence, should the demolition order be executed, the Petitioners shall suffer severe damage that may render them homeless. 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. In fact, this would serve the broad 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 Court 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 an entire apartment on the second floor of a two-story building in Karwat Bani Hasan, in the Salfit district (hereinafter: the **apartment** and the **building** respectively).

2. The building is registered under the name of Petitioner 1. Petitioners 1 and 2 (hereinafter: the **Petitioners**) are the parents of Mr. _____ **Mer'i, ID. _____** (hereinafter: **Mer'i**), who stands accused of having taken part in the execution of a lethal stabbing terror attack, in which Aharaon Benett and Nehemya Lavie were killed and Naama Bennett and her infant were injured.

3. As detailed below, the attack was perpetrated by a different person, _____ Halabi, who was killed during the incident. In addition, on February 2, 2016, **Mer'i** pleaded not guilty to the charges laid against him and made arguments regarding wrongful conduct with respect to his statements on the matter.

4. Petitioner 3, HaMoked: Center for the Defence of the Individual, is a not-for-profit association which promotes human rights in the Occupied Palestinian Territories (OPT).

5. In a nut shell, the Petitioners will argue that the decision to seize and demolish the apartment is wrongful, for the following reasons:

    a. The Petitioners have no connection to the acts attributed to Mer'i, and there is no dispute that he was not the person who carried out the attack in question. In any event, there is no justification for harming the Petitioners and the rest of the family by way of seizing and demolishing their homes;

    b. The demolition of the apartment exceeds the powers vested in the military commander under Regulation 119, and, at the very least, relies on insufficient factual grounds, given that Mer'i did not live in the apartment and cannot be said to have ties thereto to the required degree. Mer'i has lived in the Abu Dis University dormitories for the past three years;

    c. The decision to demolish the apartments is disproportionate in view of the heavy penalty expected to be imposed on Mer'i should he be convicted of the charges against him in the pending legal proceeding, which constitutes a sufficient deterrent. This is all the more the case given that Mer'i has substantial arguments that have yet to be considered regarding the admissibility of his statements and the alleged part he took in the attack. Note that the indictment largely rests on these statements alone;

    d. House demolitions are a wrongful act that violates the fundamental rights of innocent people and defies international humanitarian law;

    e. The demolition of the apartment is disproportionate given the extensive harm it would cause to innocents, including family members living in it, including a minor girl;

    f. The demolition of the apartment is disproportionate given the expected damage to other parts of the building;

    g. There is real doubt whether the demolition of the apartment would, in fact, generate deterrence against further such attacks.

The main relevant facts:

6. The building which is the subject of the petition is a two-story building. The ground floor houses storerooms and a chicken coop, which are not suitable for human habitation. The apartment is located

on the second floor. It has three bedrooms, and is home to five persons: One room serves as the bedroom of Petitioners 1 and 2 who are 62 and 57 years old respectively, the second bedroom is shared by their 14-year-old and 23-year-old daughters and the third bedroom belongs to their 20-year-old son.

7. Mer'i, 21, is a student at Abu Dis University, who has moved out of his parents' home for his academic studies and has lived permanently in an apartment in the university dormitory for some three years. He has no ties to the Petitioners' home. He has no room there, or any possessions, and arrives for visits only on rare occasions, during holidays.

8. The family is of meager means. Neither parent works, and income is extremely low. The Petitioners and their family members have no alternative housing and the structure they own is the only dwelling available to them. As stated, the storeroom and chicken coop floor is no suitable for human habitation.

9. On December 7, 2015, soldiers arrived at the structure and surveyed it. Therefore, on December 10, 2015, counsel for the Petitioners sent Respondent 1 notice regarding representation of the family and asked to be notified in writing, sufficiently in advance, should measures against the home are considered.

   Attached is the notice of representation dated December 10, 2015, marked as Exhibit 2.

10. On January 20, 2016, military forces arrived at the Petitioners' home and delivered a notice on behalf of the Respondent with respect to the plan to seize and demolish the apartment where Mer'i was alleged to have lived. All the family was given was the notice in Arabic and the attached map, without the Hebrew notice and the indictment against Mer'i which forms an inseparable part of the notice. According to the notice, an objection could be filed until January 24, 2016 at 9:00 PM.

    Attached is Respondent 1's notice dated January 20, 2016, enclosures included, marked as Exhibit 3.

11. Despite the notice of representation sent to the Respondent, as noted, his notice and its enclosures were not provided to the undersigned as required, but rather produced on January 21, 2016, this too, after many written and verbal communications to the Respondent. The Respondent inexplicably denied counsel for the Petitioners' arguments regarding the flaws in the production, yet, at the same time, extended the deadline for submission of the objection to January 25, 2016 at 9:00 AM.

12. On the set deadline, Petitioners submitted an urgent objection against Respondent's plan to issue a seizure and demolition order, arguing that the decision to use Regulation 119 and to demolish the apartment was wrongful and flawed, given all the above detailed considerations, primarily the fact that Mer'i did not live in the apartment and the fact that the evidence regarding his involvement in the attack is insufficient. Petitioners' counsel also requested to be provided with all information on which the Respondent bases his conclusion regarding Mer'i's residence in the family home, all investigative materials relating to him and an engineering report and/or details regarding the demolition plan, **in order to give the Petitioners the opportunity to exhaust their right to argue their case before a final decision is made.**

    Attached is petitioners' objection dated January 25, 2016, marked as Exhibit 4.

13. On February 7, 2016, a notice signed by Maj. Sandra Beit-On Opinkaro, Head of Infrastructure and Seam Zone Division in the office of Respondent 2, along with a seizure and demolition order for the apartment was received. The notice stated that information received from the family members and "additional information received", indicated that Mer'i used to come to the house on weekends and holidays, and that he was seen in his home village about twice a month. Maj. Opinkaro argued that there was no room for doubt with respect to Mer'i's involvement in the attack, but refused to deliver even a single document from his investigation file, referring the undersigned to Mer'i's defense attorney in the

criminal case. The notice also stated that the apartment is designated for manual demolition, and therefore, according to the Respondent, no damage to the remaining parts of the building was expected.

Attached is the notice of Major Beit-On Opinkaro concerning the rejection of the objection, marked as <u>Exhibit 5</u>.

14. It is noted that contrary to their declarations in other cases, in the case at hand, the Respondents did not say that the entire demolition process would be monitored by a military engineer who will ensure that the demolition is carried out in compliance wtih professional guidelines. The notice stated that the Order would not be executed before February 10, 2016 at 12:00 PM, that is, only 72 hours after the Order was issued.

15. Under these circumstances, given the unreasonable and disproportionate decision regarding the demolition of their home, its fateful ramifications and the damage expected to be caused to them and their family members, the Petitioners were left with no recourse but to turn to this Honorable Court with this petition.

16. We further note, that due to the deficiencies in the Respondents' conduct, and their refusal to provide the undersigned with the requested material, the Petitioners insist on receiving the requested documents and reserve the right to supplement their arguments after receiving them.

<u>The Legal Argument</u>

17. The petitioners will argue that the decision to issue the seizure and demolition order should be revoked in view of the flaws in the hearing process, exceeding authority and reliance on erroneous facts given Mer'i's lack of ties to the apartment. In addition, given the particular circumstances of the case, it is not possible to attribute to Mer'i responsibility for the attack at the level of certainty required for using Regulation 119. In addition, the decision is extremely unreasonable and disproportionate given the violation of the fundamental rights of innocent, protected persons, and its breach of international law, as more voices in this Honorable Court have recently stated, as well as the overarching principle of the best interest of a child.

<u>The flaws in the procedure</u>

<u>Violation of the right to be heard and petitioners' right to due process:</u>

18. 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. As a corollary, the rule is that a person who may be harmed by a decision of the administrative authority has the right to present his arguments and be heard. On this issue see Y. Zamir, **Administrative Power**, page 793 (hereinafter: **Zamir**) 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 the fairness required in human relations, which has been present since ancient times.

19. It is further noted that an integral part of a proper hearing process imposes on the Respondents the obligation to provide the Petitioners with all the documents and information on which their decision is based. Thus, for instance Honorable President (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 review 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 review" 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 through use of a power lawfully vested in it, must be revealed and open to the other party'.

See also HCJ 7805/00 **Aloni v. Jerusalem Municipality Comptroller**, IsrSC 57(4) 577, 600 where Honorable Justice A. Procaccia held as follows:

> Without the right of review 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.

Additionally, Zmair, in his aforementioned book, p. 819, stressed:

> Presenting arguments to the administrative authority self-evidently includes presenting evidence… without a possibility to add or refute facts, the hearing may be empty.

20. Despite the Petitioners' weighty arguments, the Respondent's decision was delivered summarily, without proper consideration of all the relevant facts, in a manner that raises suspicion that the hearing is merely a vacuous formality.

21. Moreover, the Respondents offhandedly denied Petitioners' request to be provided with all the materials that form the basis of the decision to issue the seizure and demolition order, so that they may fully argue in the matter, that is, the apartment survey report and any other information pertaining to Mer'i's residential ties to the premises, all of Mer'i's investigation materials and an engineering report.

22. The impingement on the right to a hearing as a result of the Respondents' refusal to provide the requested information, and the fact that the Petitioners are kept in the dark, particularly when the family has information that could refute the Respondents' unsubstantiated, contested, information, 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.

23. Nor can the importance of the engineering report and the demolition plan for the fulfilment of Respondents' obligation to conduct a hearing and uphold Petitioners' right to due process 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 of their home, as is Petitioners' counsel's and the Honorable Court's ability to examine the proportionality of Respondents' actions

24. While the ruling made in **Hamad** stated that as a rule, there is no room for intervention in the Respondent's decision not to provide the engineering report, in HCJ 5839/15 **Sidr v. Military Commander of IDF Forces in the West Bank** (see paragraph C of the judgment; hereinafter: **Sidr**), the Respondents enclosed the requested report **on their own initiative,** and therefore, there is no justification for not doing so in the matter of the Petitioners herein, as required by the rules of good governance.

25. In the circumstances, the denial of the Petitioners' right to a hearing and to present their case constitutes a serious, substantive flaw which goes to the root of the administrative process, and this reason alone is justification for the revocation of the Order.

Exceeding authority and relying on lacking facts:

26. Due to the serious violation of fundamental rights and the irreversible damage to the family members, who have done nothing wrong, it has been ruled that the powers vested by Regulation 119 shall be exercised only for the purpose of deterrence, and subject to a proper administrative procedure, including careful factual substantiation, advance warning, a fair chance to plead one's case and more (see HCJ 9353/08 **Hisham Abu Dheim v. GOC Homefront Command**, published in Nevo, January 5, 2009).

27. It is a fundamental rule that Regulation 119 may be employed only against persons who are "inhabitants" of the building in question and who themselves committed or attempted to commit an offense that could justify use of this draconian regulation. In the case herein, notice of the seizure and demolition targets a person who is not an inhabitant of the building, and, as explained below, has not been proven to have committed or attempted to commit an offense to the standard required.

28. As stated, Mer'i is a student at the University of Abu Dis. He left his parents' home to pursue his studies, and has permanently lived in an apartment in the university dormitories **for some three years**. The authorities are aware of where Mer'i lives, as clearly indicated in the indictment enclosed with Respondent's notice of the plan to seize and demolish the apartment. The indictment includes the following statement:

> 38. The Defendant got on a bus in Nablus Gate and returned to his apartment at the student dormitory in Abu Dis.
>
> …
>
> 50. The Defendant returned to his apartment at the student dormitory in Abu Dis

29. It is further noted that Mer'i was apprehended during a nightly operation, at his student dormitory apartment, rather than the Petitioners' home. No argument has been made that he used the family home in any way, directly or indirectly, in the commission of the offense, or that he was absent from the house in order to hide from security forces.

30. It is further noted that Mer'i has no room or possessions in Petitioners' home, and he visited the house as a guest, on rare occasions. The Respondents' decision itself notes that Mer'i was **seen in the village** "about twice a month", based on unnamed sources whose nature cannot be examined, and in any event, such statements do not indicate permanent residency in the family home.

31. Given the above, in the circumstances of the case, and particularly given the time that has elapsed since Mer'i left the family home, and the duty to take extra care when using Regulation 119, it must be ruled that Mer'i's center-of-life is in Abu Dis, and his tie of residency is to the student dormitory there. While these facts may not sit well with the Respondents, their eagerness to use Regulation 119 cannot create ties of residency out of thin air and Mer'i must not be artificially tied to the parents' home.

32. We note that the Respondent could have taken steps against Abu Dis University, but chose not to do so. It appears that this is the result of the fact that the issue at hand is similar to long-term residency in a rental, and the circumstances under which Honorable President Naor recently held in **Hamad**, that use of Regulation 119 does not serve the alleged deterrent purpose, and that the act was disproportionate. The conduct of the Respondents, who instead of fulfilling their duty to act in good faith and in fairness, exceeded their powers and seek to take such an extreme measure against protected persons who have no means, and have no connection to the acts attributed to Mer'i, cannot be condoned.

33. In the circumstances, the proceeding does not meet the threshold requirements stipulated in Regulation 119, such that there is no legal basis or legitimate purpose for the employment thereof, and this serious flaw is sufficient to have the decision revoked.

Mer'i's responsibility for the attack cannot be established according to the standard required, and it has yet to be proven

34. Given the magnitude of the harm caused by use of Regulation 119, it is inappropriate to use it with respect to persons who are still undergoing legal proceedings. This is all the more so in the circumstances at hand, given the fact that the Respondent's decision is almost entirely based on Mri'i's admissions, which he now denies, and has made arguments at trial that these statements are inadmissible as they were extracted from him in a manner that severely violated his rights, including inappropriate mental and physical pressure.

35. The Respondent may make decisions based on administrative evidence, but these too, must meet the test of reasonableness and given their appropriate weight given the subject matter, the facts and the circumstances. The weight required of evidence, in order for it to serve as the basis for a decision, largely reflects the essence of the right or interests that are expected to be impinged by the decision and the scale of the violation of the fundamental right (**Zamir**, p. 755). The statements made by Honorable Justice T. Or in HCJ 3379/03 **Aviva Mustaki** et 372 al. **v. State Attorney's Office** (IsrSC 58(3) 865, emphasizing the direct link between the impingement on the right to plead one's case and the lack of reasonableness in the Respondent's decision are relevant to the matter at hand:

> The fact that the administrative authority has evidence that corroborates its conclusion is insufficient. If it violates existing rights, including property rights, the evidence must be clear, unequivocal and persuasive in order to constitute the basis of a decision. The more significant the right that may be impinged, the more powerful and convincing the evidence must be. The strength of the evidence may be compromised or weakened when the person who is to be adversely affected by the decision is not given a chance to challenge and refute it. In such a case, the authority must be aware of the fact that the classified evidence was not fully reviewed or critiqued by the persons who stand to be harmed by it, and give this fact consideration.

36. Also on this issue, see, HCJ 297/82 **Berger v. Minister of Interior**, IsrSC 37(3) 29, 48-49, where the court noted the importance of holding a pertinent, fair and systemic review that addresses the overall

aspects and relevant arguments, including explanations and information that is different from those in the possession of the authority. The scholar, Zamir, expanding on this, determined that the authority has a **positive obligation** to make all the relevant considerations and that "**ignoring a relevant consideration is a flaw that may render the decision unacceptable**" (Zamir, p. 742, see also HCJ 2013/91 **Ramla Municipality v. Minister of Interior**, IsrSC 46(1) 271, 279).

37. The result of the attack perpetrated on October 3, 2015 is terrible. However, the attack was perpetrated by another man, Muhanad Halabi (hereinafter: Halabi), who was killed during the attack, several hours after he and Meri'i went their separate ways.

38. According to the indictment served against Mer'i, he and Halabi had not known each other previously. It was Halabi who initiated contact with Mer'i and persisted in it. There is no allegation that contact was made for the purpose of committing the attack, but rather, that the sole purpose of coming to Jerusalem, as presented to Mer'i, was to pray at al-Aqsa Mosque. It is also clearly apparent that neither was armed either with cold weapons or firearms when they arrived in the area, and that they had come into contact with police personnel several times with no unusual incident.

39. Based on the indictment and Mer'i's statements to the police (which are the only investigative document counsel for the Petitioners was able to receive at short notice from the defense attorney in the criminal trial), it appears that alleging that Mer'i was involved in the attack, let alone as a main perpetrator, is a fear reaching step which raises difficulties in both the criminal and administrative sense.

40. Mer'i was arrested on October 5, 2015 and went through a harsh interrogation for about a month, during which he was denied counsel for more than three weeks, and was subjected to investigative tricks, such as use of planted cell mates who extracted information from him. The factual section of the indictment, which is selectively based on one of three statements Mer'i gave on the subject, raises serious questions which must be resolved, such as the contradiction between him pleading to Muhanad not to slap a police officer so as not to risk arrest, but, allegedly to perpetrate an attack that would result in his death, the alleged planning of the attack near a bustling bus station, putting up a picture of the two of them on Facebook, which anyone with common sense would know would result in his arrest, mentioning his private thoughts Mer'i etc.

41. This, in addition to the significant time lapse between the time the two allegedly discussed the act and the time it took place, when Muhanad's original motives, what he did during this time and how much influence he had on Mer'i remain unclear, particularly considering that it was Muhanad who started the conversation about how humiliated he had felt and mentioned Surat al-Baqra on his own initiative. Other questions are raised due to the absence of objective evidence of the actions Mer'i took toward the attack or his contribution to it, when the knife he sketched was not the same as the one used in the attack, and he himself did not positively identify the picture of the knife presented to him during his interrogation.

42. We stress that Mer'i was interrogated once more after giving the statement on which the indictment is based – on October 28, 2015. It was during this interrogation that allegations of planning and instigating a terrorist attack. In this statement, Mer'i repeated some of his previous account, but at no stage did he say that he was the one who put the idea of committing an attack in Muhanad's head. Mer'i even expressed remorse for his actions and insisted they were done unintentionally and that he did not commit any act of terrorism against Israel. He also said that committing such an attack was unlike him and that he had no desire to commit such an attack.

43. All this is an inseparable part of the administrative evidence the Respondents have. The Respondents cannot burn the candle at both ends, and prefer one version over another coherent version without explanation, while ignoring substantial arguments that raise material doubt as to Mer'i's degree of involvement in and responsibility for the outcome of the incident.

44. To this, one must add Mer'i's denial of the indictment and the fact that he has made significant arguments regarding the admissibility of his statements, which cannot be dismissed as baseless and on which the court has yet to rule. Respondents' contention that the arguments raised in the criminal proceeding do not impact the evidence in the administrative proceedings must be wholly rejected – given that these contentious statements are the administrative evidence.

45. Even if Mer'i's inadmissibility claims are rejected, his statements still indicate that at best, there is evidence that he transported Muhanad to Jerusalem without reason to suspect the object of the latter's arrival in the city, and that he may have purchased a knife for him that may or may not have been used to perpetrate the attack. Without detracting from the grievous nature of these acts, which Mer'i regretted and for which he is expected to receive a serious penalty if convicted, they cannot sustain a charge of murder, and clearly cannot justify the Respondent's decision with respect to Petitioners' home.

46. Thus, in the circumstances of this legally and factually contested case, it is not possible, at this time, to determine with the required level of certainty, that there is clear, unequivocal, convincing evidence that Mer'i did, in fact, commit the offenses attributed to him. Therefore, there is no basis for using Regulation 119, certainly not with respect to the family members who are uninvolved, protected persons. This is a clear case in which the administrative power should not be used prior to a criminal conviction.

The decision is not proportionate

47. According to the jurisprudence of this Honorable Court, in view of the severe violation of fundamental rights, use of the military commander's powers under Regulation 119 should be limited, subject to the exercise of reasonable discretion and the proportionality tests. The following was held by the Court in HCJ 4597/14 **'Awawdeh v. 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 powers there-under and act proportionately. …This ruling was reinforced by the enactment of 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 property and the right to human dignity. Therefore, as held, the power must be exercised proportionately.

48. In HCJ 769/02 **The Public Committee against Torture in Israel v. Government of Israel** (reported in Nevo, December 14, 2006, hereinafter: **PCATI**), the Court emphasized that the premise for the examination of the proportionality of the decision is 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.)

49. 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 currently seen in violence against Arab Israeli citizens and nationalistic crimes

50. In the case at hand there is no rational connection between the measure and the alleged objective, namely, deterring potential terrorists and safeguarding the security of the area. Considering the crucial violation of the Petitioners' rights and the circumstances of the specific case, as described above, strong proof of the effectiveness of such a severe measure is required.

51. However, not only that there is no evidence that house demolitions indeed serve the declared objective of this action, but rather, security authorities themselves have previously reached the conclusion that the policy of demolishing the family homes of perpetrators did not prove to be an effective deterring policy. In view thereof, in 2005, the Minister of Defense accepted the recommendations of the Shani Committee and decided to stop using the powers granted by Regulation 119, after it was found that the measure did not prove to be effective and that the damage caused by the demolitions outweighed their benefit.

52. Doubts regarding the efficacy of the house demolition policy was raised in a recent personal letter posted on the internet by Mr. Shlomo Gazit, a former major general, former head of the military's intelligence department and recipient of the Ben Gurion prize for 2002. During his long tenure in the military, Mr. Gazit served, among other functions, as the head of the political-security coordination committee in the OPT and as the head of military governance and regional security in the General Staff, and now serves as a senior researcher in the Yaffe Center for Strategic Studies at Tel Aviv University, and a visiting fellow at the Center for International Affairs, the Woodrow Wilson Center in Washington and at the United States Institute of Peace in Washington. In an article entitled "Demolition of Terrorists' Homes – Deterrent?", Mr. Gazit raised serious doubts regarding the efficacy of the measure. After listing some serious factors that would undermine the alleged deterrence, he concluded with the following incisive statement:

> We looked into it about forty years ago, and decided that, as far as we're concerned, the damage caused by house demolitions outweighs the benefit, and we decided to avoid using this punitive measure as much as possible.
>
> What has changed since?
>
> **Attached is the article by Mr. Gazit, marked as Exhibit 6**

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

> …State agencies should periodically examine the tool and the gains brought about by the use thereof, including the research and follow-up on the issue, and present this court in the future, if so required, and to the extent possible, with data pointing 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 Honorable Justice Hayut.

54. Despite the information presented *ex parte* in **Hamad**, such research should have continued immediately, rather than pressing on with a house demolition policy that is not predicated on a proper factual evaluation of its outcomes, and the publication of the findings. Thus, so long as the Respondents do not provide a current opinion on the efficacy of house demolitions, they fail to meet the test of rational connection.

55. In addition, a thorough examination must be conducted in order to uncover whether the measure that has been selected is the most appropriate and least injurious measure, particularly given that even according to the Respondents, this is a demolition of an entire apartment that houses innocents. It is not incumbent upon the Petitioners to offer alternatives, certainly not when they oppose the very 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 a relevant room, which is expected to cause less damage than the proposed measure (see for instance HCJ 2722/92 **al-'Amarin v. Military Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693).

56. Additionally, considering the immense and irreversible damage expected to be inflicted upon the Petitioners and their family members, that such a cruel measure "may" fulfil the purpose of deterring against further acts of violence is insufficient. The damage is certain and severe, and therefore strong proof of the efficacy of such a harsh measure is required. In the matter herein, the damage is doubly serious, given that the family member has not lived in the apartment for several years and has a different, permanent residence elsewhere (even if the Respondents contend he visits the apartment on rare occasions). This is an unlawful expansion of the use of Regulation 119 beyond authority and possible acceptability. Therefore, the Respondent's decision does not meet the proportionality test in the narrow sense.

57. The blatant disproportionality of the Respondent's decision is exacerbated by the fact that Mer'i is expected, if convicted, to receive a heavy penalty which, in itself, would serve as a significant deterrent for potential attackers. Use of the additional measure of demolishing the family's apartment, an injurious, irreversible measure which has fateful implications for their lives, highlights the fact that it constitutes vindictive punishment and excessive reaction causing harm to innocent people, which cannot be considered proportionate under the circumstances of the matter. Not without reason did Honorable Justice Vogelman note in **Sidr**:

> The exercise of powers granted by Regulation 119 where it has not been sufficiently proven that the family members of the suspect were involved in the hostile activity – is not proportionate.

58. Honorable Justice Mazuz has recently elaborated on this point, albeit in a dissenting opinion, in HCJ 8150/15 **Abu Jamal et al. v. GOC Homefront Command** (published in Nevo, December 22, 2015).

> I am of the opinion that the powers granted by 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 incident and the deterring purpose underlying use of the power. It is not superfluous to note that the biblical principle according to which "a man shall be put to death for his own sin" seems to constitute the ideological basis of the prohibition against collective punishment in international law.
>
> (Emphases in original, G.L.)

Honorable Justice Mazuz concludes with an unequivocal statement:

> In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of a right, exceeding authority, unreasonableness or disproportionality (compare: the words of Justice Cheshin in Nazaal cited above; the words of Justice Vogelman in Sidr above, and also D. Kretzmer "HCJ criticism of the demolition and sealing-off of houses in the territories" Klinghofer Book on Public Law (I. Zamir editor, 5753), 305, 353-355).

59. Moreover. Harming innocent people and collective punishment also entail negative consequences of increased hostility and hatred and the entrenchment 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 extensive, 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, rather than fear or hesitation. Thus, the indiscriminate destruction planned by the Respondents may contribute to a sense in both those who are close to the suspect, and those farther removed from him, that they have nothing to lose either way and may as well attack Israel's security interests and encourage additional injurious actions. It seems that this measure is not meant to deter but rather to appease public opinion in Israel which calls for revenge.

House demolitions run contrary to Israel's obligations under international law

60. House demolitions are also prohibited under international humanitarian law and the laws of occupation included therein. The Respondent acts *in lieu* of the sovereign in the occupied territories and he is vested

with ample powers the main purpose of which is to see to the needs of the protected civilian population and protect the safety of his forces. International law is the normative basis for the exercise of his powers (HCJ 7015/02 **Ajuri v. The Military Commander of IDF Forces in the West Bank**, IsrSC 56(6) 352, 364).

61. The seizure and demolition of the apartments, with their severe ramifications for the Petitioners, are contrary to the laws of occupation which prohibit the use of collective punishment and the destruction of private property. Hence, Articles 33 and 53 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (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.

62. In addition, see Articles 46 and 50 of the Regulations concerning the Laws and Customs of War on Land (Hague, 1907), which prohibit the confiscation of private property or the imposition of collective punishment as a result of the acts of individual persons. This prohibition constitutes customary international law and therefore obligates the State of Israel.

63. House demolition is also incongruent with international human rights law, which obligates the Respondent and is used as a standard by which his actions are examined. See **PCATI**; HCJ 9132/07 **al-Bassiuni v. Prime Minister** (reported in Nevo, January 30, 2008); HCJ 7957/04 **Mar'aba v. Prime Minister of Israel** (reported in Nevo, September 15, 2005)).

64. House demolitions also run 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 in Article 26 of the Covenant) and constitutes cruel, inhuman and degrading punishment (Article 7 of the Covenant).

65. The UN Human Rights Committee, the body responsible for the interpretation of the Covenant and overseeing its implementation by states parties, stated in a decision from 2003 that house demolitions were 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 demolitions were 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).

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

67. On this issue, the petitioners join all arguments which were raised in the expert opinion submitted with the petition in (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual et al., v. Minister**

of Defense, (December 31, 2014, reported in Nevo), authored by Prof. Yuval Shany, Prof. Mordechai Kremnitzr, Prof. Orna Ben-Naftali and Prof. Guy Harpaz, and may be reviewed at: www.hamoked.org.il/files/2014/1159001.pdf

68. As stipulated in the opinion, the house demolition policy may, under certain circumstances, amount to a crime under 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 extensive destruction and appropriation as required in the Article, however, at the same time it is clarified, in page 2, that:

> A 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 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 demolitions were approved by a national court will not prevent such an investigation.

69. The opinion goes on 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 directly refer 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.

70. Therefore, the opinion does not rule out the possibility that the house demolition policy, in its current scope, satisfies the basic factual requirements of a war crime, based on international criminal law. The opinion continues to note that the fact that the violations remain unaddressed at the national level increases the chance of intervention by the international court.

71. The petitioners are not oblivious to the institutional difficulties posed by a re-examination of a policy which was approved by the Honorable Court over a long period of time and a great many judgments. However, in view of the grave ramifications of the policy and the weight of the arguments, supported

by the above experts opinion, 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 demolitions, as expressed in the incisive statements made by Honorable Justice Mazuz in **'Aliwa**:

> The arguments which were raised are weighty and, in my opinion, worthy of thorough examination. While it is true that the general-basic arguments made herein and similar arguments have already been raised in the past, in my opinion they have not been thoroughly and comprehensively discussed as required, at any rate, not recently or fully. This is particularly so in view of the many difficulties use of Regulation 119 raises…

See also the opinion of Honorable Justice Dafna Barak-Erez in HCJ 8567/15 **Halabi v. IDF Commander in the West Bank** (December 28, 2015, reported in Nevo) where the following was established:

> As aforesaid, it stands to reason that in view of the complex questions evoked by the use of the measure of house demolitions, even following a murderous terror attack which was carried out by one of its inhabitants – from the aspect of international law as well as from the aspect of Israeli constitutional law – this court will continue to examine the compatibility of case law to the changing circumstances and the lessons learnt from the cases in which demolition orders were executed as aforesaid.

72. These statements are bolstered by the court's comments with respect to the need to present clear data regarding the alleged efficacy of house demolitions as deterrent and regarding the disproportionality inherent in the demolition of the homes of persons who were not involved in hostile activity, and particularly in the matter of the petitioners.

73. 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 cross cutting ramifications of the house demolition policy, as they arise in the context of the specific case, taking into consideration the diverse difficulties inherent in this policy, and not only as a matter of theory.

<u>The demolition of petitioners' home is contrary to the principle of the child's best interest</u>

74. The principle of the child's best interest as a primary principle need not be discussed at length. The supremacy of this consideration has been repeatedly recognized in Israeli jurisprudence and it has been clarified more than once that this principle may trump 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.

75. As described in the factual part, a 14-year-old minor lives in the Petitioners' home, and the demolition of the structure and its ramifications will cause her a great deal of suffering and seriously hurt her dignity. What sin has this child committed to deserve to see her home destroyed as she becomes homeless? This injury 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 **PCATI** and the references therein.

76. 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) obligates the respondent to take measures to ensure protection and care of the children who live in petitioners' homes. In his actions, the respondent sins twice

77. The Respondents did not find it necessary to refer to these considerations, 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

78. In the case at hand, there is no basis or proper purpose for the use of Regulation 119. Respondents' conduct indicates that the above demolition order was issued offhandedly, based on a hasty decision, in substantial violation of the Petitioners' right to plead their case and of their due process rights. The harm cause to the Petitioners and their family members is exacerbated by Mer'i's lack of ties to the apartment and given the substantial difficulties establishing the arguments regarding his involvement in and responsibility for an attack perpetrated by another man.

79. 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 severe trauma to the family leaving it destitute. 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 completely dependent on others. In the matter at hand

the injury constitutes increased injury of an already vulnerable populations such as children, women and the elderly.

80. This demolition constitutes intentional harm to innocents 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 **Ghneimat v. GOC Central Command**, IsrSC 51(2) 651, 654) and is therefore entirely prohibited.

81. Therefore, given each of the serious flaws in Respondents' decision, the Honorable Court is requested to issue an order nisi and an interim order as requested in the beginning of the petition, and, after hearing the arguments of the parties and make the *order nisi* absolute.

82. 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 supplement their arguments to the extent necessary.

[Signed]

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Gabi Lasky, Advocate
Counsel to the petitioners