Disclaimer: The following is a non-binding translation of the original Hebrew document. It is provided by **HaMoked: Center for the Defence of the Individual** for information purposes only. The original Hebrew prevails in any case of discrepancy. While every effort has been made to ensure its accuracy, **HaMoked** is not liable for the proper and complete translation nor does it accept any liability for the use of, reliance on, or for any errors or misunderstandings that may derive from the English translation. **For queries about the translation please contact** site@hamoked.org.il

HCJ 1336/16

At the Supreme Court
Sitting as the High Court of Justice

In the matter of:

1. **____ Atrash, ID No. _____**
2. **____ Atrash, ID No. _____**
3. **____ Atrash, ID No. _____**
4. **____ Atrash, ID No. _____**
5. **____ Atrash, ID No. _____**
6. **____ Atrash, ID No. _____**
7. **HaMoked: Center for the Defence of the Individual**

Represented by counsel, Adv. Lea Tsemel and/or I. Halak and/or Adv. Hava Matras-Irron and/or Adv. Sigi Ben Ari and/or Adv. D. Shenhar and/or Adv. Noa Diamond and/or Adv. Benjamin Agsteribbe and/or Adv. Bilal Sbihat

on behalf of HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger 2 Abu Obeida St., Jerusalem,

Tel: 02-6273373; Fax: 02-6289327

The Petitioners

v.

GOC Home Front Command Maj. Gen. Yoel Striek
Represented by the State Attorney's Office
Ministry of Justice Jerusalem

The Respondent

Petition

The Honorable Court is hereby respectfully asked to summon the Respondent to appear and show cause, why he should not refrain from the seizure and sealing of the part of a home located in the neighborhood of Sur Bahir in East Jerusalem, where Petitioners 1-6 live, and where, **____ Atrash, ID No. _____** lived prior to his arrest. The Honorable Court is requested to issue an injunction preventing the Respondent from so doing.

As an Interim Remedy

The honorable court is requested to order the respondent or anyone on his behalf:

To refrain from causing any damage to the apartment that is the subject of the petition herein pending exhaustion of all remedies in this petition. The rushed deadline given to the Petitioners to file their petition and receive the interim remedy was February 17, 2016.

Petitioners' request to extend the deadline for filing the petition by a few days was denied. Therefore, the petition is filed without fully addressing the evidence, which was disclosed to the Petitioners only recently. The Petitioners reserve the right to address investigative materials after studying same.

The grounds for the petition are as follows:

1. **The demolition and sealing order**: The subject of this petition is another seizure and demolition order issued on February 11, 2016, by Maj. Gen. Yoel Striek, GOC Home Front Command, which states as follows:

> This order is issued due to the fact that the resident of the house, **____ Atrash, ID No. _____** committed, together with others, an act of terrorism, wherein they threw stones at Jewish cars traveling on the 'Asher Winer' route in Jerusalem, in a manner resulting in the death of Alexander Levlovich, after one of the rocks penetrated his car, caused him to veer out of his lane and crash into a pole.
>
> No structure may be built on the lot which is the subject of this Order.

The order further states that the commander decided, by virtue of the authority vested in him as the IDF GOC Home Front Command:

> And according to Regulation 119 of the Defense (Emergency) Regulations 1945, and by virtue of the powers vested in me pursuant to any law and security legislation, and due to the fact that exigent military needs so require, I hereby order that seizure of the plot on which the apartment described below is located, and the partial seizure of the house describe below in the plan annexed to this Order

Exhibit "A"

2. The offense of which **____ Atrash** stands accused was allegedly perpetrated on September 13, 2015. Soldiers first surveyed the house on October 21, 2015. The above Order was drafted 3.5 months later, on

February 4, 2106, ostensibly after the Petitioners were given a rushed deadline to object to the plan to harm their home. The residents of the home received a separate notice in Arabic stating that there was a plan to harm the house and that the plan could be challenged.

The objection was filed on February 10, 2012 [sic]

Exhibit "B"

The objection listed all residents of the two-apartment building. It was noted that the house is old, mostly constructed prior to 1948, with parts constructed prior to 1967. It was expressly noted that the cousin of Petitioner 1 lives in an adjacent structure, whereas Petitioners 1-6 live in a two-bedroom apartment and that ____ **Atrash** lived with his father in one bedroom. An engineering report on the sealing method was **requested**. It was argued that collective harm could not be tolerated. The children living in the apartment are young, born in 1999, 2001, 2005 and 2008.

3. **One day only after the objection was sent**, that is, on February 11, 2016, at 2:57 PM, the Respondent replied to the objection, enclosing a **Seizure and Sealing Order** signed that very day, "Exhibit A."

   This indicates that the Respondent did not have enough time to **read, study, consider and make an informed decision**, following the objection, and that notice of the right to file an objection was sent as a mere formality.

4. In this response to the objection, drafted and signed by Maj. Friante, the Respondent reviewed some points raised in the objection, and ignored other, inconvenient, ones.

   The basis and background for the decision: It was argued that the plan was made as part of counter-terrorism policy. It was argued that the overall administrative evidence in the Respondent's possession indicate that the incident was an act of terrorism perpetrated for the purpose of harming innocent civilians for nationalistic reasons. The response also mentions that the indictment indicates that the act was perpetrated in response and solidarity with events on Temple Mount. The objection refers to the indictment served against the accused and others.

   The objection notes that the offense attributed to the accused was "manslaughter" and that the Jerusalem District Attorney was involved in making the decision, believing ____ **Atrash**'s conviction probable.

   It was further stated that the Respondent believed the measure was required in order to deter additional potential terrorists from carrying out such attacks.

   For deterrence only. The response also stated that the purpose is to let terrorist attackers know that their actions will have repercussions not just for them and their victims, but also for their relatives. The response contended that the efficacy of this sanction has recently been examined.

   The argument that the case has not been ruled by the court – the Respondent replies that use of the sanction **does not hinge on the results of the criminal proceeding**.

   The argument that this is prohibited collective punishment – the Petitioners were told that the order to harm the house does not constitute collective punishment, and is rather "**ancillary to the deterrent objective behind use of the power**".

   The argument regarding harm to the family – the Respondent finds that in the balance between the family's rights and the need to deter **terrorists** from carrying out **terror attacks** that result in death, the latter prevails.

The argument regarding discrimination in the use of the measure of harming homes - the Respondent argues that since use of the Regulation is not punitive, the fact that Jews commit terrorist attacks (such as the abduction and murder of the youth Abu Khdeir) is insufficient to "**justify, on its own, use of the Regulation against Jews**", and that this did not constitute selective enforcement.

The argument regarding confining the plan to harming the room occupied by ____ Atrash, himself – it was argued that the scale is determined according to the severity of each and every case.

Response to objection dated 11 February 2016 is attached, "Exhibit C"

The Legal Argument

5. Respondent's order for the seizure and sealing of the apartment in which the suspect lived is based on Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**). The Petitioners will argue that Regulation 119, in and of itself, runs contrary to the norms by which the military commander is bound, and he should not use it. In addition, his decision is contrary to and deviates from the rules established by this Honorable Court and, therefore, should be revoked.

6. This Regulation refers to specific offenses adjudicated in military courts, or other offenses, which do not include **rock throwing**.

7. Regulation 119, dating back to the British Mandate, runs contrary to two main provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which still constitutes the basis for the laws of occupation under international law. It runs contrary to Article 33 which **prohibits the use of collective punishment** and **reprisals** against protected persons and their property, and Article 53 of the Convention which prohibits the **destruction of houses** and property of protected persons by the occupying power.

8. Such collective punishment also contradicts Article 50 of the regulations annexed to the Convention respecting the Laws and Customs of War on Land (1907) (the Hague Regulations) which prohibits the imposition of collective punishment and Article 43 of the Hague Regulations which prohibits impingement on and destruction of property.

9. The Respondent is bound by and is obligated to act according to the rules of international human rights law, and particularly according to the UN Covenants on Civil and Political Rights, and on Social and Economic Rights. A ruling to that effect was also made by the International Court of Justice in its opinion regarding the separation wall. These norms also guided the Honorable Court in the examination of the acts of the military commander (HCJ **al-Basyuni v. Prime Minister** TakSC 2008(1); HCJ 7957/04 **Mar'aba v. Prime Minister of Israel** TakSC 2005(3) 3333 paragraph 24; HCJ 3239/02 **Marab v. Military Commander of IDF Forces** TakSC 2003(1) 937; HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. Military Commander of IDF Forces in the West Bank**, IsrSC 57(1) 385).

10. The use of Regulation 119 is also contrary to Article 17 of the International Covenant on Civil and Political Rights which enshrines a person's right to be free of arbitrary or unlawful interference with his home, Article 12 which protects a person's right to freely choose his residence, Article 26 which protects the right to equality before the law, and Article 7 which protects the right not to be subjected to cruel, inhuman or degrading treatment of punishment. The UN Human Rights Committee which monitors the implementation of the covenants by the various members of the UN, also stated in its opinion of 2003 that the use of the Regulation ran contrary to the covenant.

11. The Regulation is also contrary to various Articles of the Covenant on Social and Economic Rights, such as Article 11 (which protects the right to proper housing and living conditions), Article 10 (which protects the family unit), Articles 12-13 and Article 17 of the Universal Declaration on Human Rights. There is also a concern that the use of Regulation 119 of the Defense Regulations may even amount to a war crime according to the definitions contained in Article 8(2)(IV) of the Rome Statute of the International Criminal Court.

Prohibition on collective punishment and violation of fundamental rights

12. The neighborhood in question is a neighborhood of East Jerusalem, annexed to Jerusalem contrary to international agreement, and its inhabitants are residents, not citizens. Collective punishment is prohibited both against protected persons and against residents, and is certainly prohibited against residents who were annexed to the country against their will, have no full civil rights and are not permitted to vote in parliamentary elections.

13. The prohibition on collective punishment is expressed in customary international law, such as Article 50 of the Hague Regulations, which states that no general penalty shall be inflicted upon the population on for the acts of individuals for which the public cannot be regarded as responsible. Article 33 of the Fourth Geneva Convention categorically stipulates that a protected person will not be punished for an act which he has not committed. Collective punishment and the like, and any act of terror or harassment – is prohibited. Reprisals against protected persons and their property – are prohibited.

14. This approach is also expressed in the jurisprudence of the Honorable Court:

> My colleague Justice Cheshin has already stressed in connection to Regulation 119 of the Defense (Emergency) Regulations 1945, that the basic rule is "Each shall pay for his own transgressions, and each shall die for his sins… There is no punishment without warning, and only the sinner shall be struck" (HCJ 2006/97 **Ghneimat v. GOC Central Command – Uzi Dayan**, IsrSC 51(2) 651 p. 654).

On this issue, see Prof. Mordechai Kremnitzer's article dated February 24, 2009, on behalf of the Israel Democracy Institute "The Legitimacy of Demolishing Terrorists' Homes – Legal commentary following the judgment in the matter of Hisham Abu Dheim v. GOC Home Front Command".

Punishment prior to conviction

15. Even if all humanitarian arguments are rejected, the Honorable Court could not approve the harm to the apartment without being persuaded beyond doubt that the allegations against the Petitioners' son are credible and substantiated, and that the incident in which he was involved was an "act of terrorism", motivated by national fanaticism that cannot be eradicated other than by cruel, unlawful punishment.

Adjudication on the actual case has not even begun, and peripheral punishment is already taking place. We note at this point, that ____ Atrash himself vehemently denies that he threw rocks at moving vehicles. According to his statements, he arrived at the scene in order to take photographs, and then observe, but after he heard voices speaking Arabic, coming from Arab cars that had been hit, **he left the scene and returned home. He heard about the accident from a large distance, inside the village, and thought it was an Arab driver who had been hurt**.

According to his statements, in brief, rocks were thrown, but he was not involved in throwing them, and most of the rocks did not hit cars.

There was no discrimination between cars driven by Jews and cars driven by Arabs. **On the contrary, according to the evidence, Atrash was convinced the car that was hit was driven by an Arab woman.**

16. The thin skull: One of the defenses presented by those accused along with ____ Atrash in the case is that the victim was very ill and there is no certainty that the rock throwing caused him to lose control of the car. The prosecution was asked to produce the deceased's medical files.

17. Earlier rock throwing: Some of the evidence in the file points to rock throwing farther down the road, which took place before the rocks thrown by some of the defendants. This matter is being reviewed and will be determined by the court adjudicating the criminal case.

18. Stone throwing: Is, in fact, a common occurrence, and over the years, tens of thousands of rocks have been thrown, the vast majority of which caused no damage. Therefore, rock throwers, or those located in their vicinity, cannot be alleged to have had lethal intentions, or to have formed intent to cause death, or an expectation of such a result. Lack of criminal intent of the sort that might justify collective harm, must be considered.

19. Rock throwing in protest: is carried out by both Jews and Arabs. Of the harm known throughout the history of the conflict in the area and in the country, only a few cases of harm resulting in death are known. There are cases of rock throwing by settlers on an Arab family, which was severely harmed as a result. The perpetrators were tried and convicted, but were not sentenced to collective punishment. Even in other rare cases that resulted in casualties, there was no collective punishment.

20. Meaning of **manslaughter** charge against the defendant and the other defendants: the fact that the District Attorney's Office, mentioned in the response to the objection as involved in the decision to target the defendant's apartment, did not contend that the deceased's death was premeditated, but was an act of recklessness or negligence only.

Should further deterrence be approved after the Minister of Interior ordered residency revocation?

21. The Honorable Court must seriously consider a new issue, which is: **Is deterrence by way of harming ____ Atrash's residence still required after the Minister of Interior has decided to revoke his and the other defendants' residency as a result of the allegations against them?**

    The fact that every authority wielding control over the lives of East Jerusalem residents quickly exercised its power to target housing and deny status, in order to take revenge against and harm a young man who has yet to be convicted does not necessarily stem from considerations of deterrence, but appears more to be motivated by considerations of appeasement. Appeasement of public opinion, a show of force, inflicting pain for its own sake. It is very doubtful that the case involves deterrence. Is there any greater deterrence than the immediate killing of a terrorism suspect? If such deterrence – which has long since become the final outcome of every incident described as a terrorist attack – is not sufficiently discouraging – perhaps "deterrence" should be abandoned as the automatic reaction, and other solutions for "lone terrorist attacks" should be sought.

22. In the case at hand, the features of a "lone terrorist attack" are not even present. Getting together to throw rocks in response to events at al-Aqsa, as noted in the indictment, is a known, longstanding type of action, and was considered and publically discussed as the expected response to what appears to be a disruption of the status quo at the site.

23. The Honorable Court is nearly the ultimate defense against various deterrent measures. Alongside the genuine, great sorrow over the death of the deceased in the incident, we must caution **against the slippery**

slope of vindictive, cruel measures taken against ever growing circles of people connected to the perpetrator, beginning in harm to homes, continuing with the personal harm of <u>status revocation</u> and continuing with harm to relatives, with no end in sight.

<u>The family and the results of the harm to the apartment</u>

24. This petition is filed by six petitioners, members of the same family: The parents, and four siblings who are minors, all of whom have always lived in the small apartment and have no other place to live.

<u>The demolition method – Sealing</u>

25. No specifics on the proposed method of sealing have been received, precluding Petitioners' counsel from producing an expert opinion on the matter.

26. The method seems to be necessary given the irreversible damage caused to other apartments during demolitions by explosion, which was alleged to be controlled, but failed to prove itself. While this method does, at least, provide for upholding the final segment of Regulation 119, i.e. the possible future remission of the Order by the Respondent, <u>the possible remission and the revestment must be defined at this point, and the sanction must be time limited from the outset.</u>

27. Any act taken by the Respondent pursuant to the Emergency Regulations, due to its nature and objective, necessitates a guarantee that it can be remitted.

    What does this mean? Any act of demolition carried out under the first clause in Regulation 119 of the Defense (Emergency) Regulations 1945 must ensure the possibility of fulfilling the final clause of the same section. The Mandatory Regulation 119 of the Defense (Emergency) Regulations 1945 did not just allow confiscation and demolition, as repeatedly cited in the responses of the Respondents, **it also allowed for <u>remission and revestment</u>.**

    Further in the Regulation, remission is addressed:

> …[A]nd when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land.
> **Where any house, structure or land has been forfeited by order of a Military Commander as above, the Minister of Defense (the High Commissioner) may at any time by order remit the forfeiture in whole or in part and thereupon, to the extent of such remission, the ownership of the house, structure or land and all interests or easements in or over the house, structure or land, shall be revested in the persons who would have been entitled to same if the order of forfeiture had not been made and all liens on the house, structure or land shall be revalidated for the benefit of the persons who would have been entitled thereto if the order of forfeiture had not been made.**

    The military commander, the same military commander vested with the power to seize and demolish <u>is also vested with the power to remit the seizure and demolition!</u> The method of demolition must ensure a real, feasible possibility of remission.

28. Should the Order be upheld, it must be ruled a **sealing order**, considering the proposed method of execution, and, as stated in the Order itself as phrased, **the seizure order** relates only to **the seizure of the apartment on the second floor**, and nothing else. Therefore, the prohibition on construction on the second floor noted in the Order ("Exhibit A") must be time limited.

Harm to heritage and conservation

29. According to an engineering expert opinion delivered by Expert Structural Engineer Muhammad Kimri with respect to the sealing of the openings of four homes in the neighborhoods of Sur Bahir and Umm Tuba, the sealing harms the architectural, landscape and cultural heritage of the area. Existing conservation and enforcement policy in Jerusalem requires a license for sealing openings, as such sealing alters the appearance and nature of the building. Such an action requires a building permit. Brutishly entering a rural neighborhood in order to fulfil a wrongful objective in order to strike fear into the hearts of onlookers harms not only the occupants of the house itself, but the entire neighborhood, as houses are dispersed over a small radius:

> Applying the aforesaid measure to the four buildings (at a radius of 400 m^2) means a substantive change in the nature and identity of the existing fabric of life at the neighborhood level, in complete disregard to the guidelines on the conservation of building nature and heritage, and a mark that is inconsistent with the neighborhood's nature and identity.

Expert opinion attached "Exhibit D"

The effectiveness of the sanction and its reasonableness

30. It is well known that the Respondent **ceased** using the sanction of collective punishment by way of house demolition following an opinion which was issued by a military committee, the Shani committee, that examined the history of demolitions and concluded that said sanction did not have any real benefit and could even possibly have an adverse effect of broadening terror activity.

    It has already been held in a general petition against house demolition, HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. Minister of Defense**, by the Honorable Justice Rubinstein, in paragraph 27 of his judgment as follows:

> I am of the opinion that the principle of proportionality cannot be reconciled with the presumption that choosing the drastic option of the demolition, or sealing, of houses always achieves the desired objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined… in my opinion, the use of a tool the ramifications of which on a person's property are so grave, justifies a constant examination of the question whether it bears the expected fruit; This is so especially in view of the fact that even IDF officials have raised arguments in that regard, and see for instance the presentation of Maj. Gen. Shani, which, on the one hand, stated that there was a consensus among intelligence agencies with regards to its effectiveness, while on the other, proclaimed, under the caption "Main Conclusions" that "the demolition tool within the context of the deterring element is 'worn out'" (slide No.

> 20). Therefore, I am of the opinion that 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.

We have not received any data indicating that such an examination has indeed been conducted recently and that there is justification for the renewed use of this inappropriate sanction.

In the same judgment, paragraph 6 of the judgment of Justice Hayut:

> 6. And finally, I wish to note that I attach great importance to the comment of my colleague, Justice Rubinstein concerning the need to conduct, to the extent possible, periodic follow-up and research concerning the house demolition measure and the effectiveness thereof in the future (paragraph 28 of his opinion). In this context it is needless to point out that this issue was examined by the Shani committee in the past, as mentioned by my colleague, which engaged in "rethinking the issue of house demolition" and, at the time, (2005) reached the conclusion, later adopted by the security agencies, that the demolition of terrorists' homes for deterrence purposes as a method in the Judea and Samaria Area should be stopped and should be used only in extreme cases (slide 30 of the Shani committee presentation, Exhibit 1 to the petition).

The Honorable Justice was of the opinion that the terror attack in Merkaz Harav Yeshiva, the abduction and murder of the three youths, and the murder of the worshipers in the synagogue were such extreme cases. Nevertheless, she held:

> However, these extreme cases should not make us forget the need, as my colleague pointed out, to periodically re-examine and question the constitutional validity of the house demolition measure according to the limitation clause tests… Hail to doubt, which must always tug at the righteous as well…"

31. It is precisely the rapidly changing circumstances in the state of national security, as well as the new factors thrown into the arena of the conflict that require renewed professional thinking. The facts considered by the Shani committee are not the facts on the ground today. The political map of the Arab world at that time, is not the same today, the political balance of power in Israel when the Shani committee operated is not the same as it is today, following the last elections; the status of religion and religious extremism on both sides at that time, are not the same as their current status and influence; nor is the attitude of the outside world to Israel's acts in the past similar to the current boycotts and boycott threats.

Before house demolitions are reintroduced into routine use as they had been in the past, without success, the military should present an updated **professional** evaluation, which has not been conducted for many years, concerning the benefit or the damage arising from use of this sanction.

The Respondent, who is trying to support his decisions with different quotes from judgments on this issue should respect the proposal made by Honorable Justice Rubinstein in the above general petition:

> I am of the opinion that 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.

These statements were made before individuals, mostly young persons, put their lives in danger, and set out to commit attacks in the Occupied Territories and in Israel, with the almost certain knowledge that they would be killed and that their relatives would be harmed. **It seems that the measures intended to deter were reversed, and have become a source of motivation for these young people.** Given the lack of efficacy of this measure, political solutions must be sought.

The time has come.

Discrimination in the enforcement of punishment and deterrence

32. The objection already stated that in addition to the scathing criticism against the lack of justification and immorality of the above sanction, it is impossible to ignore the fact that the no-less shocking murder of an abducted Palestinian youth, Mohammed Abu Khdeir, was committed recently and three Israeli citizens are currently standing trial for said act, after they admitted and re-enacted it. They were captured alive and most of them are residents of settlements.

    Today, it is known, that at least one settler involved in the torching of the Dawabshe family home in Duma has been exposed and is standing trial for murder.

    His home, as the homes of Abu Khdeir's murderers, has not been harmed.

    CrimC 828608/08 at the Central District Court, is the case of Israeli defendant **Daniel Ben Avram Ben Yohanan, who threw a rock at a Palestinian car near the entrance to Yizhar.** The rock hit a pregnant woman who was in the car, and her two infant daughters. She suffered a brain injury, and had to deliver her baby in a cesarean section, and undergo brain surgery herself. One of her infant daughters was injured in the skull and eye, sustaining a fracture and injuries to the limbs. She was hospitalized in the hospital's intensive care unit. Her two-and-a-half-year old sister was also injured. It goes without saying that the penalty was minimal, and the option of targeting his house in the settlement never came up.

    The fact that Israeli citizens have been spared this vindictive, wrongful sanction is laudable. However, if this cruel measure was never employed against Israeli citizens (some of whom live in the settlement of Adam in Area C, where, it appears, there is no impediment to Israel's using said sanction against its own citizens), it certainly should not be used against residents of East Jerusalem, such as the petitioners, who are protected by international law, and whose status is precarious.

The question whether the discrimination itself does not provide motivation and impetus to carry out further attacks should not be left open for review.

Attached is an affidavit to support the above facts.

In view of all of the above, the Honorable Court is hereby requested to issue an interim order, an *order nisi* and an order absolute as requested, and order the Respondent to pay the costs of this petition including legal fees.

[Signed]

L. Tsemel, Advocate
HaMoked Center for the Defence of the Individual
Counsel for the petitioners

February 16, 2016