At the Supreme Court
Sitting as the High Court of Justice

In the matter of:

1. **Atrash and six others** — **The Petitioners in HCJ 1336/16**
2. **Abu Kaf and seven others** — **The Petitioners in HCJ 1337/16**
3. **Tawil and five others** — **The Petitioners in HCJ 1777/16**

Represented by counsel, Adv. L. Tsemel and/or
Adv. A. Khaleq and/or Adv. Michael Sfard
All on behalf of HaMoked: Center for the Defence
of the Individual, founded by Dr. Lotte Salzberger

v.

GOC Home Front Command
Represented by the State Attorney's Office
Ministry of Justice Jerusalem
Tel: 02-6466590; Fax: 02-6467011

The Respondent

Request for expansion of panel and for the scheduling of filing dates of complementary arguments on behalf of the parties on the general issue of the lawfulness of the use of Regulation 119

The petitioners hereby respectfully submit a request for expansion of the panel which hears the petitions and for the scheduling of filing dates of complementary arguments in writing and thereafter for an oral hearing in the general issue of the lawfulness of the use of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**). The general issue with respect of which the expansion of the panel and the filing of the complementary arguments are requested concerns the fact that the use of Regulation 119 runs contrary to international law and Israeli constitutional and administrative law.

As will be specified below, recently, six justices of this honorable court expressed their opinion that the use of Regulation 119 raised substantial difficulties and some of them even added that in their opinion the rule should be re-visited by an expanded panel. Some of the justices even pointed out that to their understanding the lawfulness of the use of Regulation 119 was not sufficiently clarified in the numerous judgments in which it was discussed.

In view of said statements and in view of the fact that there were minority opinions in many of these cases, the petitioners are of the opinion that the time has ripened to discuss the general legal questions which the current policy raises by an expanded panel of justices of the honorable court.

The grounds for the petition are as follows:

1. On March 9, 2016, a hearing was held in the petitions at bar. With respondent's consent the hearing was held as if an *order nisi* was issued. On March 16, 2016, the respondent filed an updating notice in response to requests for remission which were submitted to the Military Commander for the West Bank Area and to the Minister of Defense. The petitioners replied on March 21, 2016. A decision in the petitions has not yet been given.

2. On March 23, 2016, the judgment of this honorable was given in HCJ 1630/16 **Masudi v. Commander of IDF Forces in the West Bank**. The petitioners wish to refer to the statements of the Honorable Justice Volgeman and to the words of other Justices cited by him therein regarding the need to re-visit the issues associated with the exercise of the authority by virtue of Regulation 119:

> In **Sidr** (HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015) (hereinafter: **Sidr**)) I expressed my opinion the that "were it not the applicable case law, my own opinion would have brought me to the conclusion that the employment of the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect was involved in hostile activity – is not proportionate"…
>
> In addition, and despite my position that for as long as the rule has not been changed it should be followed, I added that I thought it would be advisable to revisit said rule in a bid to fully examine all issues which may arise under the local law as well as all issues which may arise under international law (paragraph 6 of my opinion). Ever since the **Sidr** judgment was given additional voices were heard regarding the use of Regulation 119 for house demolition purposes, in different versions and emphases (see for instance the opinion of Justice **M. Mazuz** in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015), and paragraph 13 of his opinion in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015) ("In my opinion, a sanction which is aimed at harming the innocents, cannot stand"). See also paragraph 2 of the opinion of Justice **Z. Zylbertal**, *Ibid*. ("The reasons of Justice **Mazuz** are weighty reasons which are based on fundamental constitutional principles as well as on basic reasons of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have joined the main principles of his positions"); see also paragraphs 1-2 of the opinion of Justice **D. Barak-Erez** in HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015) ("We have no alternative at this time but to respect the current judgments of this court, and to refrain from the practice of applying different law according

> to the panel of the Justices […] Indeed, ostensibly, there is merit to the argument that the use of power which concerns house demolition raises a difficulty from the aspect of the proportionality requirement […] However, according to the principles of conduct which are binding on this court as an institution and despite the difficulty associated therewith, I join the recommendation of my colleague, the Deputy President **E. Rubinstein** to dismiss the petition at bar"). See also the opinion of Justice **Z. Zylbertal**, *Ibid*. Prior to **Sidr**, see paragraph 1 of the opinion of Justice **E. Hayut** in **HaMoked** ("The issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy").
>
> The different opinions expressed in case law, particularly after **Sidr**, strengthen me in my position that the weighty questions associated with the exercise of the power by virtue of Regulation 119 should be re-visited. In my opinion, in view of the many judgments which followed the rule (by different panels), the rule should be re-visited by an expanded panel rather by a panel of three. (Emphasis added by the undersigned – M.S.)

3. A day later the judgment of this honorable court was given in HCJ 1938/16 **Abu Alrub v. Commander of IDF Forces in the West Bank** (March 24, 2016) in which the Honorable Justice Joubran also referred to the lawfulness of the use of Regulation 119:

> I must admit and cannot deny the fact that I am not comfortable with the use of the authority established in Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**), for the issue of forfeiture and demolition orders against the homes of perpetrators (hereinafter: the **authority**), while all other inhabitants of these houses were not involved in terror activity…
>
> The exercise of the authority raises difficulties under local law and international law, which in my opinion have not yet been thoroughly addressed by the court in its judgments, particularly in view of the increasing use of this authority, against the backdrop of the severe security situation and the rising wave of terror…
>
> Shortly after the above opinion was written, the judgment in HCJ 1630/16 **Zakariye v. Commander of IDF Forces** (March 23, 2016) was given and published. In paragraph 3 of his opinion Justice **U. Vogelman** called for a reconsideration of the questions associated with the exercise of the authority by virtue of Regulation 119 by an expanded panel. This call was joined in that case by Justice **M. Mazuz** (paragraph 5 of his opinion) and I also join it for the reasons specified in paragraph 2 above.

4. The above citations indicate that the lawfulness of the use of Regulation 119 is problematic and raises great difficulties. A significant number of justices of this honorable court expressed their reservations and pointed out that this issue should be re-visited by an expanded panel.

5. The Honorable Justices Mazuz, Vogelman and Joubran expressed their explicit opinion that the rule which enabled the use of Regulation 119 for the demolition or sealing of homes of perpetrators and their family members should be re-visited. The Honorable Justice Zylbertal stated that had the issue

been brought to him for the first time, he might have possibly joined the opinion of Justice Mazuz that the policy was not lawful. The Honorable Justice Barak-Erez and Hayut stated that they found it difficult to continue to follow the "path of case law".

6. This concerns almost half of the justices of this honorable court.

7. The petitioners are represented by counsels on behalf of HaMoked: Center for the Defence of the Individual, which was a party to all petitions in which the above cited judgments were given, including the petition in which the general arguments were raised [HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014)] and the request for a further hearing [HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense (November 12, 2015)].** (Adv. Michael Sfard was joined to the representation by Adv. Lea Tsemel and HaMoked: Center for the Defence of the Individual.

8. We are obviously aware of the fact that almost six months ago a request for a further hearing of this issue was denied (the above HCJFH 360/15). However, we are of the opinion that in view of the many judicial opinions referred to above which have accumulated since then, a critical mass was created which requires that the general issues be discussed by an expanded panel.

9. In view of the above, the honorable court is hereby requested to accept the request and expand the panel which hears the petitions, to schedule a date for the filing of written arguments on the general issues concerning the lawfulness of the use of Regulation 119, and thereafter to schedule an oral hearing before an expanded panel.

March 27, 2016

(Signed)
_____
Lea Tsemel, Advocate
Counsel to the petitioners

(Signed)
_____
Michael Sfard, Advocate
Counsel to the petitioners