At the Supreme Court **HCJ 1777/16**
Sitting as the High Court of Justice

In the matter of:

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

Represented by counsel, Adv. L. Tsemel and/or Adv. A. Khaleq 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
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 Yoel Strick
Represented by the State Attorney's Office
Ministry of Justice Jerusalem

The Respondent

Petition

A petition is hereby filed which is directed at the respondent ordering him to appear and show cause, why he should not refrain from the forfeiture and sealing of the apartment located on the second floor in a building in **Sur Bahir, Jerusalem** which serves as the residence of petitioners 1-6 and which served as the residence of _____ **Tawil, ID** _____ prior to his arrest, and direct him by an absolute order to refrain from doing so.

Petitioner No. 6 is **HaMoked: Center for the Defence of the Individual** founded by Dr. Lotte Salzberger which engages in the protection of human rights.

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 being the subject matter of the petition until all remedies in this petition shall have been exhausted. The actual short date which was given to the petitioners for the purpose of filing their petition and receiving an interim remedy was until March 2, 2016, and the petitioners reserve the right to relate further to the investigation materials once they have the chance to review them.

The grounds for the petition are as follows:

1. On October 21, 2015, soldiers arrived and measured the apartment being the subject matter of this petition.

2. **The forfeiture and sealing order**: The subject matter of this petition is a forfeiture and sealing order (despite the fact that it is captioned as a forfeiture and demolition order) which was issued on February 25, 2016, by Major General Yoel Strick, the GOC Home Front Command, which stated as follows:

> This order is issued due to the fact that the resident of the apartment, _____ **Tawil ID** _____, committed on September 13, 2015, together with others an attack in which they acted jointly to throw stones at Jewish vehicles which were passing on the 'Asher Weiner' route in Jerusalem, in a manner which killed Alexander Levlovitch after one of the stones penetrated his car and caused it to veer from its path and hit a post."
>
> No structure shall be erected on the plot being the subject matter of this order.

The order stated further that the commander decided, by virtue of the power vested in him as the GOC Home Front Command,

> And according to Regulation 119 of the Defence (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 the land on which the apartment described below is located be forfeited and that the apartment described below and which is described in the scheme attached as an Exhibit to this order be sealed.

Attached as Exhibit "A"

3. On February 10, 2016, an objection was submitted on behalf of the petitioners. In the objection details were given regarding all inhabitants of the apartment; it was explicitly noted that the father of _____ Tawil passed away about two years ago in Dekel prison and that _____ Tawil lived in a separate part in one of the rooms which consisted of a living room. An engineering opinion was requested regarding the manner by which the sealing would be carried out; it was argued that collective punishment was inappropriate; the children who reside in the apartment, other than

_____ are young some of whom are school pupils and others are university students. It was also noted that it was a rented apartment in an old building.

Attached is the objection, Exhibit "B"

4. On February 25, 2016, a response to the objection was sent, which was drafted and signed by Major Pariente. In the response the respondent reviewed several issues which were raised in the objection and ignored others with which he did not feel comfortable.

The background and basis for the decision: it was argued that the intent was established in the context of the fight against terror. It was argued that the entire administrative evidence in respondent's possession indicated that it was a terror attack which was executed in a bid to harm innocent civilians for nationalistic motives. Reference was also made to the indictment which stated that the action was carried out as a response to Temple Mount events. The response also mentions the indictment which was filed against the defendant and others.

It was stated that the offense which was attributed to the defendants was the offense of "manslaughter" and that the Jerusalem District Attorney who was involved in making the decision was of the opinion that the state stood a reasonable chance of securing the conviction of **Muhamad Abu Kaf**.

It was also noted that the respondent was of the opinion that it was necessary to take said measure to deter additional potential perpetrators from the execution of similar attacks.

For deterrence only. It was also stated that the perpetrators should know that their actions would affect not only the victims and the perpetrators themselves, but their family members as well. It was alleged that the effectiveness of said sanction has been recently examined.

In response to the argument that the case has not yet been decided by a court of law: respondent's reply was that the exercise of the sanction **was not conditioned on the results of the criminal proceeding.**

In response to the argument that it was prohibited collective punishment: the petitioners were advised that an order to take measures against a house was not a collective punishment "**but rather an injury ancillary to the deterring purpose of the exercise of the authority**".

In response to the argument that family members were harmed: the respondent found that in the balancing between the rights of the family members and the need to deter perpetrators from the execution of attacks which lead to the loss of human life, the latter prevailed.

In response to the argument of discrimination in the application of the measure of house demolition: the respondent argues that in view of the fact that the regulation is not exercised for punitive purposes, the fact that Jews carried out terror attacks (such as the abduction and murder of the youth Abu Khdeir) "**did not justify in and of itself the use of the regulation against Jews**" and that it was not selective enforcement.

With respect to the sealing method it was noted that the openings would be sealed and that no structural damage would be caused.

In response to the rental argument it was stated that no document was attached which attested to the rental on behalf of the municipality of Jerusalem and that for this reason alone the rental argument could be denied. However, the respondent cannot hide behind a formal argument. He was told that the house was not owned by the youth's father. The apartment was originally owned by petitioner's uncle. After the uncle passed away petitioner's father assumed responsibility over the house. After her father passed away the petitioner is only one of many heirs. The others are petitioner's siblings.

Reply dated February 25, 2016, to the objection is attached as 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 Defence (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 that he should not use it. In addition, his decision is contrary to and deviates from the rules established by this honorable court and therefore it should be revoked.

6. The above Regulation refers to specific military court offenses or offenses involving firearms or other offenses that **stone throwing is not one of them**.

7. Regulation 119 from the era of the British Mandate runs contrary to two main provisions of the Fourth Geneva Covenant relative to the Protection of Civilian Persons in Time of War, which constitutes to date 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 said covenant which prohibits the **destruction of houses** and property of protected persons by the occupying power.

8. Such collective punishment is also contrary to regulation 50 of the regulations annexed to the Convention respecting the Laws and Customs of War on Land (Hague Convention 1907) which prohibits the imposition of collective penalties and regulation 43 of the Hague convention which prohibits impingement and destruction of property.

9. The respondent is bound to and obligated to act according to the international legal rules of human rights, 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 **Albassione v. Prime Minister** TakSC 2008(1); HCJ 7957/04 **Mar'aba v. Prime Minister of Israel** TakSC 2005(3) 3333 paragraph 24; HCJ3239/02 **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 not to be subjected to arbitrary or unlawful interference with his home, to Article 12 which protects a person's right to freely choose his residence, to Article 26 which protects the right to equality before the law, and to Article 7 which protects the right not to be subjected to cruel, inhuman or degrading treatment or punishment. The UN human rights committee which examined the implementation of the covenants by the states

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 different 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 Defence Regulations may even amount to war crime according to the definitions of Article 8(2)(IV) of the Rome Statute on the Establishment of an International Criminal Court.

Prohibition against collective punishment and violation of fundamental rights

12. This case concerns an East Jerusalem neighborhood which was annexed to Israel contrary to international consent and its inhabitants are "residents" rather than citizens. Collective punishment against residents and protected persons is prohibited, and it clearly should not be used against residents who were annexed to the state against their will, who do not have full civil rights and who do not have the right to vote to the Knesset.

13. The prohibition against collective punishment is expressed in international customary law, such as Regulation 50 of the Hague convention, which states that no general penalty shall be inflicted upon the population on account of acts of individuals for which the public cannot be held 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 judgments of the honorable court:

> My colleague Justice Cheshin has already stressed in connection with Regulation 119 of the Defence (Emergency) Regulations 1945, that the basic rule is "The soul that sins it shall die… one should not be punished unless he was warned and one should strike the sinner himself alone. (HCJ 2006/97 **Janimat v. GOC Central Command** – Uzi Dayan IsrSC 51(2) 651 page 654)

On this issue see Prof. Mordechai Kremnitzer, article dated February 24, 2009, Israel Democracy Institute "The legitimacy of the demolition of terrorists' homes – judicial commentary following the judgment in the matter of Hisham Abu Dheim v. GOC Home Front Command."

Punishment before conviction

15. Even if all humanitarian reasons are denied, the honorable court will not be able to approve the injurious measure taken against the apartment unless it was convinced beyond reasonable doubt that the suspicions which were raised against petitioners' son were indeed substantiated and credible, and that the incident in which he was involved was indeed a "terror attack" which stemmed from fanatic nationalistic motives that could not be eradicated other than by cruel and unlawful punishment.

The hearing of the case on its merits has not yet begun and peripheral punishment is already imposed. No argument was made to the effect that the son _____ Tawil was the one who threw the injuring stone. On the contrary, in the beginning of his statements (the admissibility of which has not yet been substantiated) he says that he threw several stones in the beginning

but stopped throwing them, and the person who admitted to stone throwing – including possibly the injuring stone, if any such stone had indeed caused the injury – was another defendant.

_____ Tawil is a minor. He was born in October 1998, which means that he was a minor at the time of the incident.

No distinction was drawn between cars which were driven by Jews and cars which were driven by Arabs. **On the contrary, according to the evidentiary material some stone throwers were convinced that a car driven by an Arab woman was hit**.

16. The Eggshell Skull doctrine: the defense argument of the defendants including _____ **Tawil** is, *inter alia*, that the victim was very sick, that there is no certainty that the stone throwing caused him to lose control over his car and the prosecution was requested to provide the deceased's medical records.

17. Previous stone throwing: some of the evidentiary material in the file pertains to stone throwing up the road which preceded the throwing by some of the defendants. This issue is also being examined and will be determined by the court which will hear the criminal case.

18. Stone throwing: is indeed a wide-spread phenomenon and throughout the years dozens of thousands of stones were thrown, the vast majority of which caused no damage. Therefore, one cannot attribute to a stone thrower or to anyone in his close vicinity a fatal intent or the establishment of intent to cause death or expectation for the occurrence of such a result. The absence of criminal intent which may justify collective injury should be taken into consideration.

19. Stone throwing as a protest is carried out by both Jews and Arabs. Among the damages known in the history of the dispute in the area and in Israel few cases of injury which ended up in death are known. Cases are known in which settlers threw stones at an Arab family who were consequently severely injured. The settlers were indicted and convicted but no collective punishment was imposed. In other rare cases in which human lives were lost no collective punishment was imposed.

20. The significance of the fact that the offense attributed to the defendant and others is **manslaughter**: full weight must be given to the fact that the attorney's office – which is mentioned in the response to the objection as being involved in the decision to take measures against defendant's apartment - did not argue that the deceased's death was premeditated but was the result of recklessness or negligence only.

    The significance of the fact that he is a minor and that no attempt was made to revoke his residency. The Ministry of Interior revoked the residency of those it regarded as major defendants. In view of the fact that the minor played a marginal and immaterial role no attempt was made to revoke his residency.

The method of demolition-sealing

21. No specific details were received regarding the proposed sealing method. Therefore petitioners' counsel was unable to provide a professional opinion which would examine it.

22. It seems that this method is required in view of the irreversible damages which were caused to other apartments as a result of demolitions and detonations which were allegedly controlled but did not prove themselves as such. It is true that this method enables, at least, the fulfillment of the **last part**

of Regulation 119, namely, it enables the respondent to retract the order in the future. <u>However, the remission and retraction should already be defined at this time and the sanction should be time limited from the outset</u>.

23. It must be ascertained that any act taken by the respondent by virtue of the Defence Emergency Regulations, in view of its nature and purpose, is reversible.

What does this mean? Each and every demolition according to the first part of Regulation 119 of the Defence (Emergency) Regulations 1945 must ensure that the last part of said Regulation may be fulfilled. The mandatory Regulation 119 of the Defence Regulations did not only enable forfeiture and demolition, as repeatedly quoted by the respondent. **It enabled <u>remission and reinstatement</u>**.

The Regulation in pertinent part provides for remission:

> And when any house, structure or land is forfeited as aforesaid, the Military Commander may forfeit the house or the structure or anything in the house, structure, land or on them**. 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 revest in the persons who would have been entitled to the same if the order of forfeiture had not been made and all charges on the house, structure or land shall revive for the benefit of the persons who would have been entitled thereto if the order or forfeiture had not been made**.

The military commander, the same military commander who is empowered to forfeit and demolish <u>is also empowered to remit the forfeiture and demolition</u>! The demolition method must ensure that a real and viable remission will be possible.

24. And if the order is approved it must be determined that it is a **sealing order** according to its proposed method. And as stated in the order itself, as drafted, the **forfeiture order** refers only to **the forfeiture of the residential unit on the second floor** and nothing beyond that. Therefore that part of the order (Exhibit "A") which states that construction on the second floor is prohibited, <u>must be time limited</u>.

<u>Damage to preservation and heritage values</u>

25. According to an engineering opinion which was provided by an expert civil engineer Muhammad Kimari and which pertains to the sealing of the openings of four apartments in the neighborhoods of Sur Bahir and Um Touba, the required sealing impinges on the architectural heritage, the landscape and cultural character of the area. The current enforcement and preservation policy in Jerusalem <u>requires that sealing of openings will also be subject to licensing in view of the fact that it changes the appearance of the building and its character. Such an action requires a building permit</u>. A forcible entry into a rural neighborhood for the realization of an inappropriate objective for "all to see and beware" harms not only the inhabitants of the house but also the nature of the neighborhood as a whole, since the houses are all located within a short radius:

Taking said measure against the four buildings (in a radius of about 400 meters) will materially change the nature and character of the current structure, on a neighborhood level, with complete disregard of the established guidelines for the protection and preservation of sites and heritage, leaving an impression which does not befit the nature and character of the neighborhood.

The opinion is attached as Exhibit "D"

The effectiveness of the sanction and its reasonableness

26. It is very well known that the respondent **ceased** to exercise the sanction of peripheral punishment through 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 by the Honorable Justice Rubinstein, in paragraph 27 of his judgment as follows:

> I am of the opinion that the principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for 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 agencies 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 the intelligence agencies of 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 examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused"

We have not received any data according to which 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 in the future from time to time and to the extent possible follow-up and research concerning the house demolition measure and the effectiveness thereof (paragraph 28 of his opinion). In this context it is needless to point out that

> also in the past this issue was examined by the Shani committee which was mentioned by my colleague, which engaged in "rethinking the issue of house demolition" and reached at that time (2005) the conclusion, which was 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 extreme situations indeed occurred in the terror attack in Merkaz Harav Yeshiva, in the abduction of the three youths and their murder, and in the murder of the worshipers in the synagogue. Nevertheless she held:

> However, these extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests… in the praise of doubts, which also those who are right should always have…"

27. Precisely the rapidly changing circumstances in the security condition of the state, as well as the new data which were thrown into the arena of the conflict, require renewed professional thinking. The data which were presented to the Shani committee are not the same as the current data in the arena; the political map of the Arab world which existed at that time is not the same as it is currently mapped; the political balance of power in Israel when the Shani committee operated is not the same as the current political balance following the last elections; the status of religion and mutual religious extremism at that time are not similar to their current status and influence in the arena; neither is the attitude of the external world to the acts of Israel in the past similar to the current boycott threats and bans.

Before house demolition is once again used as a matter of routine as it was used in the past with no 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 the exercise of this sanction.

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

> I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused**.**

The above was said before individuals, mostly young, risked their lives and went off to execute attacks in the Occupied Palestinian Territories and in Israel, knowing with an almost absolute certainty that they would be killed and their relatives would be harmed. **It seems that the measures which were meant to deter achieve the opposite results and just motivate these young people**. As these measures proved to be ineffective, political solutions should be sought.

This is the time.

Discrimination in the enforcement of punishment and deterrence

28. It has already been stated in the objection that in addition to the scathing criticism against the lack of justification and immorality embedded in the above sanction, one cannot ignore the fact that a not less shocking murder of an abducted Palestinian youth, Mohammed Abu Khdeir, was committed a while ago and three Israeli citizens currently stand trial for said deed, after they admitted and re-enacted it. They were caught alive and most of them are residents of settlements.

It is already known at this time that at least one resident of the settlements was caught and stands trial for the arson and murder of the Dawabsheh family in Duma village.

His home, like the homes of the murderers of Abu Khdeir was not injured.

The fact that this vindictive and inappropriate sanction was not imposed on Israeli citizens is satisfying. However, if such a cruel step is not taken against Israeli citizens (some of whom live in the Adam settlement and others in Area C in which there is ostensibly no preclusion for exercising the sanction by Israel against its own citizens), it most certainly should not be taken against East Jerusalem residents, such as the petitioners, who are protected by international law and weak status.

The question of whether the above discrimination as such motivates and propels additional attacks should not be left under advisement.

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 to make the order absolute as requested, and obligate 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 to the petitioners

March 2, 2016