At the Supreme Court **HCJ 2828/16**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Abu Zid, ID No. _____**
2. **_____ Abu a-Rob, ID No. _____**
3. **HaMoked: Center for the Defence of the Individual**

Represented by counsel, Adv. Gabi Laski and/or Adv. Michael Sfard, and/or Adv. Limor Wolf Goldstein and/or Adv. Neri Ramati and/or Advocate 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 Injunction

This is a petition for an Order Nisi which is directed at the Respondents and ordering them to appear and show cause why they should not refrain from using the power granted by Regulation 119 of the Defence (Emergency) Regulations 1945 (hereinafter: Regulation 119 or the Regulation), including the forfeiture and demolition of the family home of Petitioner 1 or any other harm thereto.
The forfeiture and demolition order dated March 31, 2016 is attached hereto and marked Appendix 1.

The Honorable Court is also hereby requested to issue an Order Nisi ordering the Respondents to appear and show cause:

A. Why a declarative remedy to the effect that **use of Regulation 119 of the Defense (Emergency) Regulations 1945, by way of forfeiture and demolition or sealing of the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens is unlawful**, in that it breaches international humanitarian law, international human rights law and Israeli administrative and constitutional law, should be denied.

B. Why the Petitioners should not be provided with details regarding the plans for the execution of the forfeiture and demolition order (hereinafter: the Order) and a report, prior to execution, as well as time to have the plans reviewed by an engineer designated by the Petitioners;

C. Why the Respondents should not provide research with factual data regarding the alleged effectiveness of house demolitions as a deterrent measure before ordering the execution of the demolition and as a condition thereto.

Urgent Motion for Interim Injunction and Temporary Injunction

This petition concerns Respondents' intent to demolish the apartment where the family of Petitioner 1 (hereinafter: the Petitioner) resides. The apartment in question is the home of the Petitioner, his wife, and eight of their children, two of whom are minors. Given the demolition planned by Respondent 1 (hereinafter: the Respondent), there is real concern that substantive, irreparable damage would be caused to other parts of the structure, to the point of rendering it uninhabitable. This would also damage another apartment in the same building and the businesses operating therein, including a metal shop belonging to Respondent 2, which serves as a sole source of income for him and his family.

In light of the above, the Honorable Court is hereby moved to urgently issue an Interim Injunction ordering the Respondents, or anyone acting on their behalf, to refrain from causing any damage to Petitioner's home and the building, including an order to stay execution of the forfeiture and demolition order pending completion of proceedings in the petition herein. We make this motion given that **Respondents have issued notice that execution of the Order would be stayed only until today, April 5, 2016, at 5:00 PM.**

The issue at stake involves use of far-reaching powers, where there is no dispute that the Petitioners have no connection to the actions due to which the Order was issued. In the circumstanced of the matter, the balance of convenience clearly leans toward the Petitioners. Thus, if the demolition order is executed, the Petitioners and their families would suffer grave harm. While the family members of Petitioner 1 may become homeless, the family of Petitioner 2 may lose its source of income. On the other hand, no substantive damage would be caused to public interest due to a stay of execution for a short while, for purposes of settling the petition. In fact, this may serve the greater public interest of protecting constitutional rights.

In light of all the above, the Honorable Court is moved to issue an Interim Injunction staying execution of the forfeiture and demolition order until the petition is decided. Additionally, due to the urgency of the matter, the Court is moved to issue a Temporary Injunction pending a decision on the Motion for Interim Injunction.

Motion for Extended Panel

The Honorable Court is requested to use its power pursuant to Section 26 of the Courts Law [Consolidated Version], 5744-1984, and rule that the petition shall be heard by an extended panel of justices.

The issue of principle for which an extended panel is requested is whether use of Regulation 119 contradicts international law and Israeli constitutional and administrative law.

As detailed below, recently, seven of the justices of the Honorable Court have expressed their opinion that use of Regulation 119 raises serious difficulties. Some have added that they believe case law should be re-examined by an extended panel. Some of the justices have even noted that to their understanding, the question whether use of Regulation 119 is legal has not been thoroughly addressed in the many judgments that related to it.

Given these statements, and the fact that in many cases, there was a dissenting opinion that touched on the relevant issues, the Petitioners believe that the time has come for deliberation on the issues of legal principle that emerge from the current policy, by an extended panel of justices of this Honorable Court, all as detailed below.

1. The core issue in this petition is the legality of using **Regulation 119 of the Defense (Emergency) Regulations 1945, by way of forfeiture and demolition or sealing of the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens** and particularly the relation between the power given in the Regulation and the prohibition on collective punishment, set in both human rights law and Israeli law. Without addressing these questions, no decision can be reached in the Petitioners' petition.

2. There has been a change in this Honorable Court recently. The voices of justices expressing reservations on the case law followed thus far, with respect to the powers given by the Regulation have grown louder, and some have gone so far as saying that if their opinion is heeded, the issues of principle will be addressed by an extended panel.

3. On March 3, 2016, the Court delivered its judgment in HCJ 1630/16 **Masudi v. Commander of IDF Forces in the West Bank** (hereinafter: **Masudi**). The Petitioners will cite the findings made by Honorable Justice U. Vogelman, and the references he makes to remarks by other justices regarding the need to revisit the issues involved in use of powers pursuant to 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**.

And Honorable Justice Mazuz found in para. 5:

> In view of my above positions I am unable to join the position of my colleagues who denied the petition. **However, I obviously join my colleague Justice Vogelman in his call for having the issues associated with the use of Regulation 119 revisited by an expanded panel** (paragraph 3 of his opinion).

4. On the next day, the Honorable Court delivered its judgment in HCJ 1938/16 **Abu a-Rob v. Commander of IDF Forces in the West Bank**, wherein Honorable Justice Joubran referred to the legality of using 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.

And Honorable Justice Barak-Erez, in para. 3:

> In view of the fact that the position of the Court on this issue has only been recently re-visited I consider it to be binding upon me at this time. However, as I have already noted, **it would be appropriate that "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"** (Ibid., paragraph 2 of my opinion). In fact, my colleague, the Deputy President also holds the same opinion.

5. A week later, the Honorable Court delivered its judgment in HCJ 1125/16 **Mar'i v. Military Commander of IDF Forces in the West Bank** (March 31, 2016) (hereinafter: **Mar'i**), wherein a petition for the revocation of a forfeiture and demolition order issued by the Respondent was accepted by the majority opinion of Honorable Justice Mazuz and Honorable Justice Baron, against the dissenting opinion of President Naor. Honorable Justice Mazuz noted in his preliminary comment:

> [I]n their written submissions and in the oral arguments made by their counsel before us, alongside specific arguments, Petitioners herein made arguments on issues of principle impugning the legality of the seizure and demolition order issued against their home. These arguments were presented in brief and rejected by my colleague, the President, mostly on the argument that these and other arguments have been considered and rejected on more than one occasion in the jurisprudence of this Court, including in recent judgments (paras. 7-9), **my view differs from the President's view on a number of general-principled issues related to use of Regulation 119**, but I do not wish to address this herein. I have presented my position and reservations on this issue on several occasions recently, and I see no need to repeat or elaborate on them in the case at hand.

And Honorable Justice Baron held in para. 1 of her opinion:

> However, as terrorism intensifies, **just then, our duty as a society to examine the propriety of the methods we use to fight terrorism, also intensifies**. Inasmuch as the measure of seizing, sealing or

> demolishing homes (hereinafter in brief: house demolitions) of allegedly innocent people, it appears that there is no dispute that the questions are exacting…
>
> As noted by my colleague, President M. Naor, the premise for the deliberation herein is that the military commander is competent to order the seizing, sealing or demolition of the home of a person accused or suspected of hostile activity against the State of Israel, pursuant to Regulation 119 of the Defence (Emergency) Regulations 1945. The Court has long since followed this case law, and, so long as it remains unchanged, it must clearly be followed, particularly given that a recent request for a further hearing of the matter has been rejected (see further hearing in HaMoked and the references therein; see also HCJFH 2624/16 **Masudi v. IDF Commander in the West Bank** (March 31, 2016)). **However, it is noted that the view that this case law should be revisited by an extended panel of HCJ justices has been voiced in a slew of judgments, some very recent**.

6. Just earlier this week, on April 3, 2016, the Honorable Court unanimously accepted three more petitions heard by Honorable Justice Hayut, Honorable Justice Vogelman and Honorable Justice Zylbertal in HCJ 1136/16 **Firas Mustafa Atrash et al. v. IDF Commander in the West Bank**, HCJ 1337/16 **Salah Muhammad 'Alayan Abu Kaf et al. v. IDF Commander in the West Bank**, and HCJ 1777/16 **Hanan Tawil et al. v. IDF Commander in the West Bank**. Honorable Justice Hayut determined in para. 8:

> Indeed, a number of justices of this court expressed doubts about the use of Regulation 119 for the issue of forfeiture and demolition or sealing orders, and in the public petition I have also stated that "taking the path of case law in this matter is not easy" (Ibid., paragraph 1 of my opinion). But, like myself the vast majority of the other justices who expressed doubts were also of the opinion that they were bound by the recently established rule which approved the use of Regulation 119 for as long as it has not been changed. And as was rightfully emphasized, such change should be made by an expanded panel rather than by a panel of three.

And Honorable Justice Vogelman held in para. 1:

> Recent case law responded to the general arguments against the exercise of said authority (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014)), and although my opinion was and continues to be that it should be revisited by an expanded panel – my position, as recently reiterated, is that since this is the rule, and since this court has recently affirmed it by different panels, there is no alternative but to make decisions within its limits for as long as it has not been changed.

7. In these petitions, prior to the judgment, a motion was filed to extend the panel and schedule dates for submission of supplementary arguments by parties on the issues of principle surrounding the

legality of using Regulation 119. The motion was denied on March 29, 2016, given that the hearing of these petition had concluded.

8. In addition, with respect to the judgment given in **Masudi**, a motion for a further hearing was filed, and denied by Honorable President Naor, who determined that: "This is not the appropriate case for deciding whether to reopen the issues of principle surrounding powers to use Regulation 119 before an extended panel of this Court.

9. In **Mar'i**, Honorable President Naor noted in the conclusion of her opinion, "this is a court of justice, not a court of justices". At present, seven of the 15 justices of the High Court of Justice have stood up and explicitly voiced reservations on the continued application of case law regarding use of Regulation 119. Justices Vogelman, Mazuz and Joubran have written in their opinions, detailed above, that they object to house demolitions and requested a further hearing on the issues of principle. Justices Zylbertal and Barak-Erez have upheld use of the Regulations, while expressing reservations and noting that there is room to revisit the Court's stance on this issue. Justice Baron has also accepted a petition on the subject while noting that the legality of the measure should be examined. Even Justice Hayut joined the call saying, "taking the path of case law in this matter is not easy".

10. These are no longer just a few voices, but nearly half of the justices of the Court. Thus, not only has the time come to revisit the principled legal questions concerning the legality of using Regulation 119 before an extended panel of justices of the Honorable Court, but such a discussion is a matter of necessity.

11. Note that in HCJFH 360/15 **HaMoked v. Minister of Defense**, this Honorable Court rejected a motion for a further hearing before an extended panel of a public petition against house demolitions, HCJ 8091/14, referring to the fact that in that petition, there was no specific applicant and noting that: "Without setting things in stone, it appears that this petition, at the time at which it was filed, was not the optimal vehicle for the Applicants' arguments…"

12. Unlike the petition therein, the petition herein is filed on behalf of named petitioners. The legal issues, as detailed below, strike at the core of the principled argument on the illegality of use of Regulation 119. All this, together with the current developments in case law and the increase in the number of justices voicing their discomfort with use of Regulation 119 and calling for reconsideration of the issue before an extended panel, requires revisiting case law as part of the petition herein, and having it heard before an extended panel.

13. We further note that two more motions for further hearings in petitions that are relevant to the matter at hand have been dismissed on the basis of the argument that there had been no extensive deliberation of the related legal argument in the petitions themselves. In HCJFH 2624/16 **Masudi v. IDF Commander in the West Bank**, Honorable President Naor dismissed the motion for further hearing, partly based on the assertion that:

> Moreover, a review of the judgment which is the subject of the motion for further hearing reveals that there had been no thorough, detailed deliberation of the legal questions related to use of Regulation 119, and, in any event, there no explicit rule was given therein (see and compare: HCJFH 360/15 **HaMoked v. Minister of Defense** (published in Nevo, para. 4 (November 12, 2015)). Indeed, two of the three justices on the panel remarked that there was room to

> review the issue before an extended panel, however, these remarks do not, in and of themselves, constitute cause for a further hearing.

14. In addition, in HCJFH 360/15 **HaMoked v. Minister of Defense**, the motion for further hearing was rejected on the following grounds:

> Having reviewed the material enclosed with Applicants' motion and the literature cited therein, I have reached the conclusion that the motion must be denied. In its judgment which is the subject of the motion herein, the Court found no reason to reconsider decisions made in previous judgments on house demolitions. In so doing, the Court took note of the fact that this policy was approved just a short time earlier in two judgments (**'Awawdeh** and **Qawasmeh**). The main argument put forward by the Applicants is that there is room for a further hearing given that their main arguments were not considered in depth in the judgment. However, a further hearing is not the appropriate venue for presenting such arguments. This particular proceeding is designed for discussing express, detailed rulings by the Court rather than questions the Court did not address. (see and compare: CFH 8184/13 **Dabah v. State of Israel**, paragraph 22 (May 8, 2014); CFH 1075/14 **Keren Hayesod United Israel** Appeal v. Jewish National Fund via Israel Land Administration, paragraph 15 (July 15, 2014); CFH 4439/10 **Haran v. Hekdesh Gavrielovitch (Deceased) Foundation**, paragraph 9 (September 15, 2010) and many others). A further hearing is not meant for reconsidering matters that were not considered in the judgment.

15. It follows that the questions of principle raised in the petition herein cannot be properly revisited other than by an extended panel that would hear the petition.

16. In light of all the above, the Honorable Court is hereby requested to grant the motion and rule that the petition would be heard before an extended panel.

The grounds for the petition:

Introduction:

1. This petition concerns the Respondent's plan to demolish an entire three-room apartment located on the second floor of a two-story building in the village of Qabatiya, Salfit District (hereinafter: "the apartment" and "the building" respectively).

2. Petitioner 1 is Mr. _____ Abu Zid, who lives with his wife and eight of their children, including two minors, in the apartment the Respondent is planning to demolish. The Petitioner is the father of Bilal Abu Zid, ID No. _____ (hereinafter: Bilal), who stands accused of taking part in a stabbing and shooting attack on February 3, 2016, in which Border Police Officer Hadar Cohen was killed and another officer was injured.

   According to the indictment served against Bilal Abu Zid, the attack in question was perpetrated by three other individuals, _____ a-Rob, _____ Zakarneh and _____ Kamil. Subsequently, three demolition orders were issued for the homes of the families of the three individuals. The petitions

filed against these orders, HCJ 1938/16 **Abu a-Rob v. Commander of IDF Forces in the West Bank**, HCJ 1999/16 **Nassar v. Military Commander of the West Bank** and HCJ 2002/16 **Kamil v. IDF Commander in the West Bank** were heard together and dismissed in a judgment handed down on March 24, 2016.

3. Petitioner 2 is Mr. _____ a-Rob, who operates a shop the produces aluminum doors and windows. He now works in the shop along with his two children, aged 13 and 15. This business is the family's only source of income.

4. Petitioner 3 is HaMoked: Center for the Defence of the Individual, an association working to promote human rights in the OPT.

5. In a nutshell, the Petitioners will argue that the decision to forfeit and demolish the residential apartment is wrongful for the following reasons:

   a. House demolition is a prohibited act that violates the fundamental rights of innocent people, contradicts international humanitarian law, international human rights law and Israeli administrative and constitutional law;

   b. The Petitioners have no connection to the acts attributed to Bilal, and there is no dispute that he did not commit the attack in question. In any event, there is no justification for harming the Petitioners, their relatives and the remaining inhabitants of the building through forfeiture and demolition of the apartment;

   c. The demolition of the apartment is disproportionate given the severe harm it would cause to innocents, including relatives living in an adjacent apartment, and shopkeepers who rent the bottom floor of the building;

   d. The demolition of the apartment is disproportionate given the harm that may be caused to other parts of the building;

   e. The demolition of the apartment is disproportionate given the heavy penalty expected to be imposed on Bilal if convicted of the charges against him following the pending legal proceeding – a penalty that constitutes a sufficient means of deterrence.

   f. There is real doubt whether the demolition of the apartment will, in fact, produce deterrence against the commission of further attacks.

The main relevant facts:

6. The apartment is located in a two-story building that was owned in its entirety by the late Mr. Adib Abu Zid. Ownership of the building is currently split between the Petitioner and his ten siblings. Some of the building is used by the family as a residence and some is rented to shopkeepers.

7. The top floor has two residential units. The Petitioner lives in the apartment slated for demolition along with his wife and eight of their children, including two minors, around 14 and 17 years old. Petitioner's brother, _____ Abu Zid lives in the adjacent apartment, along with his wife and 75-year-old mother, _____ Abu Zid

8. Three businesses operate out of the ground floor. One is a shop producing aluminum doors and windows, operated by Petitioner 2 for some 18 years. Petitioner 2 currently works in the shop with his two children, aged 13 and 15, and the business is the family's sole source of income. Therefore,

the demolition is liable to have an extremely deleterious effect on the family's income. The other two businesses are a hair salon and a grocery store, which also provide an important source of income that may be seriously damaged as a result of the demolition. The ground floor also has a storeroom which is used by _____ Abu Zid.

9. There is another building adjoining the building in question. This building has a shared wall with the apartment slated for demolition. This adjacent building has four apartments, used by four families, which may also be damaged if the demolition is executed.

10. On Friday, March 25, 2003, military forces arrived at the Petitioner's family home and delivered notice of the plan to forfeit and demolish the apartment where Bilal had lived (hereinafter: "the notice") pursuant to Regulation 119. According to the notice, the measure was selected since Bilal had taken part in the execution of the stabbing and shooting attack on February 3, 2006, in which Hadar Cohen was killed and another officer was injured.

Respondents' notice dated March 25, 2016, with enclosures, is attached hereto and marked as <u>Appendix 2</u>.

11. At the specified time, Petitioners, via the undersigned, filed an urgent objection to Respondent's plan to issue a forfeiture and demolition order, wherein they argued that the decision to use Regulation 119 to demolish the apartment is wrongful and flawed, given all the considerations detailed above. The undersigned also asked to be provided with all the material that forms the basis for the decision, including the investigative material in Bilal's case, an engineering report and/or the specifics of the demolition plan, before the decision is made. The undersigned also asked for time to have an engineering report prepared for the Petitioners, so that they may make full use of the right to present their case before a final decision is made.

Petitioners' objection dated March 26, 2016, is attached hereto and marked as <u>Appendix 3</u>.

12. Two days later, on March 31, 2016, the letter of Captain Yoav Rotem, Seam Zone and Infrastructure Advisory Officer at the office of Respondent 2, along with an order for the forfeiture and demolition of the apartment was received. The letter enclosed the charge sheet served to the Shomron Military Court against Bilal, and several police statements made by Bilal and by another person, who, according to Bilal's charge sheet, drove the perpetrators to Israel. The letter also noted that the apartment would be demolished using mechanical engineering equipment, a method which, according to the Respondent, is not expected to harm "uninvolved or third parties". The letter also noted that the order would not be executed before April 5, 2016 at 5:00 PM.

The letter of Cap. Rotem regarding rejection of objection, including enclosures, is attached hereto and marked as <u>Appendix 4</u>.

13. On April 4, 2016, counsel for the Petitioners received an engineering report from Mr. Nasser Abu Leil. According to the report, the building which is the subject of the petition and the adjacent building share a cantilever. The report indicates that using heavy equipment in demolitions is risky for shared buildings in general, and more so in cases such as these, where there is a shared cantilever. The clear conclusion that emerges from the report is that there is no doubt that demolishing the Petitioners' apartment using heavy equipment would cause serious damage to the stores on the ground floor, damage additional apartments – including in the adjacent building – and may even cause damage to building infrastructure. Therefore, and as can be seen in the photos

attached to the report, Respondents' contention that the demolition, as planned, would not harm persons who are "uninvolved", is baseless.

The engineering report is attached hereto and marked as Appendix 5.

14. In these circumstances, given the unreasonable and disproportionate decision regarding the demolition of the apartment, its fateful implications and the damage expected to be meted on them and their family members, the Petitioners ha not recourse but to seek the intervention of this Honorable Court in this petition.

The legal argument:

15. As part of the arguments on issues of principle, the Petitioners will argue that use of Regulation 119 is unlawful in that it contradicts international humanitarian law, international human rights law and Israeli administrative and constitutional law

16. As part of the arguments specific to the case, the Petitioners will argue that the order issued against the Petitioner's apartment must be revoked, given the flaws therein and since the decision to demolish the home is unreasonable and disproportionate in the circumstances of the matter. This, given the fact that the Petitioners took no part in the actions that led to issuance of the order and the severe impingement on their fundamental rights and on the fundamental rights of other innocent people.

Arguments on issues of principle:

A. Introduction

17. The practice of demolishing the homes of individuals who perpetrated attacks against Israelis, based on Regulation 119 of the Defence (Emergency) Regulations (hereinafter: Regulation 119) has been in place for five decades. In the past, use of this extreme sanction, as detailed below, such that at times, use of the tool was widespread, and at other times reduced, to the point of a full moratorium.

18. At present, as we are unfortunately in the grip of another rising tide of violence and attacks in Jerusalem and the West Bank, use of Regulation 119 has once again become a central tool used by the Respondent. In the time that has passed since the summer of 2014, when the Court was again presented with petitions against demolition orders, for the first time in several years, dozens of additional demolition orders have been issued. The Court last explicitly addressed the issues of principle related to the legality of using Regulation 119 in view of international law and Israeli constitutional and administrative law on November 12, 2015, in the decision dismissing the motion for further hearing (HCJFH 360/15 **HaMoked v. Minister of Defense** (November 12, 2015)).

19. In the relatively short time that has passed since then, the Court has heard scores of other petitions, wherein it addressed forfeiture and demolition orders, focusing its review only on the concrete issues and the specific circumstances of the case at hand, without revisiting general legal issues. As detailed below, the vast majority of the justices of the Court considered themselves bound to applicable case law, on the argument that this case law had been put in place only recently and therefore, should not be departed from, as well as concerning regarding turning the "court of justice" into a "court of justices". There are more petitions currently pending, awaiting the decision of the Court.

20. The direct result of increased use of the practice of demolishing assailants' homes on the one hand, and the reserved approach of following existing law chosen by the justices of the Honorable Court on the other, has been scores of homes belonging to the families of assailants being sealed, demolished and forfeited, despite the fact that no involvement or connection on the part of the family living in the home to the act of terrorism had been proven.

21. After dozens of petitions in which the Court was repeatedly asked to uphold demolition orders issued against innocent family members, have led to calls by the justices of this Honorable Court to revisit the weighty legal issues involved in using the power granted by Regulation 119.

22. Add to that the fact that the jurisprudence of this Honorable Court raised many difficulties to begin with, and completely contradicted the position of most experts, both in Israel and abroad, who believe that Regulation 119 contravenes a litany of provisions in international humanitarian law and international human rights law, primarily the prohibition on collective punishment, entrenched in Art. 33 of the Fourth Geneva Convention elative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the Fourth Geneva Convention), and the prohibition on destroying or confiscating the property of protected persons stipulated in Art. 53 of the Fourth Geneva Convention, as detailed below.

23. Given the overall circumstances, it appears that the time has come to revisit the legality of using Regulation 119, despite the relatively short time that has passed since this issue of principle was last brought before this Court.

24. Below we provide a review of the developments that have taken place over the years with respect to use of he power stipulated in Regulation 119 in aid of sealing, demolishing and forfeiting the homes of persons involved in terrorist activity, and the jurisprudence of the Honorable Court on the issue, as well as a detailed legal argument, as initially presented in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014), together with updates on the developments that have occurred after this petition was filed.

B. Regulation 119

25. The Defense (Emergency) Regulations 1945 (hereinafter: the Defense Regulations, or the Regulations) were enacted by the officer administering the Government on behalf of the British High Commissioner, pursuant to Article 6 of the Palestine (Defence) Order in Council, 1937. The Regulations granted the Mandatory regime far reaching, if not draconian, powers, which included, *inter alia*, extensive search-and-arrest powers; strict monitoring over the publication of books and newspapers coupled with broad authority to prevent publication entirely; allowing administrative detention without trial for unlimited duration; the establishment of a system of military courts with powers to try citizens without right of appeal; closure of areas; deportation; curfew and house demolitions.

26. The military commander allegedly draws his power to seal or demolish homes as a punitive and deterring measure from Regulation 119(1) of the Defense Regulations. Israel has anchored its policy of demolishing the homes of suspected terrorists in this regulation since the 1970s.

27. The language of Regulation 119(1), as befits a regulation enacted by the British Mandate for the colonies it ruled, is the language of the occupier. It is the language of those who dominate a population devoid of rights, oppressed and ruled by force that knows few restrictions and little restraint. Unlike criminal penalties set forth in criminal law, Regulation 119 requires neither

evidence nor a conviction. The sanction need not necessarily be used against the individuals suspected of breaching security themselves, but may be used against their neighbors, or residents of their community.

28. Regulation 119 was enacted four years before the signing of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949) (hereinafter: Fourth Geneva Convention), which entrenched the principles of the international laws of occupation, including the sanctified, absolute prohibition on collective punishment and the express prohibition on damaging the property of protected persons. These prohibitions were sealed even earlier, in the Hague Regulations. We shall return to these prohibitions and to the fact that Regulation 119 is a clear breach thereof.

29. We first present Regulation 119(1) in its original language (emphases added):

> **A Military Commander may by order direct the forfeiture to the Government of Israel** of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, **or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact of the commission of, any offence against the Regulations involving violence or intimidation or any Military Court offence;** and 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 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.

30. On June 7, 1967, with the occupation of the West Bank and the Gaza Strip, the military commander promulgated Proclamation Regarding Regulation of Administration and Law (Proclamation No. 2). Section 2 of the proclamation sets forth: "The law that existed in the Region on June 7, 1967 shall remain in effect, to the extent that it contains no contradiction with this proclamation or any proclamation or order issued by me, and with the revisions ensuing from the establishment of the rule of the Israel Defense Force in the Area".

31. As such, the military commander preserved what he perceived to be the existing legal situation in these territories prior to the Israeli occupation. This preservation included the application of the Defense Regulations, including the above cited Regulation 119. The Honorable Court has been presented with numerous challenges against the application of the Defense Regulations pursuant to the proclamation, and has rejected them. In one of these challenges, the petitioners argued that the British authorities had repealed the Defense Regulations. It was argued that upon termination of the

British Mandate, on April 29, 1948, the United Kingdom passed the Palestine Act 1948, revoking all British legislation within the Mandate. Another challenge contended that the Defense Regulations were revoked in the 1952 Jordanian Constitution. As noted above, the Supreme Court dismissed these challenges and ruled that the regulations applied to the West Bank and the Gaza Strip (see, Kretzmer, **The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories** (CUNY Press, 2002), pp. 121-124; see also, HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464.

32. Thus, according to the jurisprudence of this Honorable Court, from the positivist point of view, Regulation 119(1) constitutes part of the law of the West Bank, and we do not intend to revisit this issue in the petition herein. We are concerned with the substantive question of whether Regulation 119 has not been repealed due to binding principles and prohibitions of a higher normative order. However, before we turn to this question, we shall provide a historical review of the use of Regulation 119.

Use of Regulation 119 until 2004

33. Israel has pursued a policy of house demolitions under Regulation 119(1) in the West Bank (and, prior to disengagement, also in the Gaza Strip), since 1967. The policy is implemented as a punitive/deterrent measure against the Palestinian population (we shall refer to the issue of distinguishing between punishment and deterrence below). Its official purpose is to harm the relatives of Palestinians who have committed or are suspected of involvement in terrorist attacks against Israeli civilians and soldiers in order to deter Palestinians from committing such attacks in the future. The main victims of these house demolitions are the relatives of the individuals the state seeks to punish, including women, children and elderly individuals who are left without a roof over their heads, though they are not responsible for the actions of their family members, nor are they suspected by Israel of committing any offense.

34. The frequency with which Israel has used this measure has changed over the years. In the absence of official figures on house demolitions, these figures are collected by Israeli human rights organizations. The figures referred to below have been collected by HaMoked: Center for the Defence of the Individual, (Petitioner 3 herein), and B'Tselem and published periodically. For full figures and information on how they were collected see:

- Punitive house demolitions, HaMoked: Center for the Defence of the Individual website, http://www.hamoked.org//timeline.aspx?pageID=timelinehousedemolitions
- Through No Fault of Their Own: Israel's Punitive House Demolitions in the al-Aqsa Intifada, November 2004, B'Tselem, November 2004: http://www.btselem.org/publications/summaries/200411_punitive_house_demolitions
- House Demolition and Sealing as a form of Punishment in the West Bank and Gaza Strip, B'Tselem, http://www.btselem.org/sites/default/files2/update_november_1990.pdf

35. According to documentation by Israeli human rights organizations, from the beginning of the occupation until the outbreak of the first intifada in 1987, the military fully demolished or sealed at **more than 1,300 homes**, more than half in retaliation for actions that did not result in deaths.

36. Despite the massive use of the regulation in the early years of the occupation, as described above, the HCJ was not asked to address the legality of punitive house demolitions pursuant to Regulation 119 until 1979. In HCJ **434/79 Sahweil v. Commander of the Judea and Samaria Area**, IsrSC

34(1) 464 (hereinafter: **Sahweil**), the Honorable Court heard the petition of a mother whose son had been convicted of aiding and abetting terrorists and possession of explosives. In addition to the five-year prison sentence imposed on the son, the military commander also decided to seal his room in his mother's house, noting that the decision had not been made lightly and that it was the necessary minimum for deterrence only.

37. The HCJ approved the sealing and found that it was indeed a **punitive** act meant for **deterrence** (emphasis added):

> It must be recalled that the aforesaid Regulation 119 concerns unusual punitive measures whose main purpose is to discourage similar acts and in cases such as these, there is no fault with the fact that the competent authority uses its powers against one person and not others because it is of the opinion that in the circumstances of the matter, using this type of deterring punishment in one case is sufficient for achieving the sought goal.

38. Also important for the matter at hand is the fact that in the same judgment, the Court rejected the argument that the power vested under the Regulation contradicts prohibitions set forth in the Fourth Geneva Convention because the Regulation was part of "local law" preceding the occupation.

> We need not address the question of whether or not the Respondent must comply with the provisions of the Geneva Convention, as, even if this is indeed the case, there is no contradiction between the provisions of the Convention on which Ms. Tsemel relied and the use the Respondent has made of the power vested in him under the statutory provisions that were in effect at the time the Judea and Samaria Area was under the control of the Jordanian Kingdom and said statute remains in effect in the Judea and Samaria Area today.

39. This legal justification against the claim of a breach of the Fourth Geneva Convention was repeated in subsequent years. Thus, for example, in 1986 Supreme Court President Shamgar explained the argument in detail:

> … However, and with due respect for the expert opinion, we are not faced here with the question of interpreting Article 53 of the Fourth Geneva Convention: Regulation 119 forms part of the law that was in effect in the Judea and Samaria Area prior to the establishment of IDF rule therein (HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(464, 465), 1h; HCJ 22/81 **Hamed v. Commander of the Judea and Samaria Area**, IsrSC 35 (223, 224) 3e; HCJ 274/82 **Hamamreh v. Ministry of Defense**, IsrSC 36 (2, 756). In keeping with the rules of international public law, as expressed in Proclamation No. 2 issued by the IDF Commander in the Area, domestic law remained in effect under caveats that do not affect the matter at hand (see Article 43 of the Hague Regulations of 1907 and Article 64 of the Fourth Geneva Convention). It follows that powers granted pursuant to the aforesaid Regulation 119 constitute domestic law in force in the Judea and Samaria Area, which was not repealed during the previous regime or during military rule and we

> have not been presented with legal arguments for considering it null and void at this time.

HCJ 897/86 **Ramzi Hana Jaber v. OC Central Command et al.**, IsrSC 51(2), 522.

40. Therefore, this is in effect the legal response that this Honorable Court has repeatedly quoted from 1979 until today in dozens of rulings in reference to the argument that the power granted by the Regulation contradicts the laws of occupation. That is, that domestic law remains in effect even if it contradicts the norms of international law.

41. The subject was brought before the Honorable Court for a second time some three years after the ruling in **Sahweil**, which stressed that this was an exceptional punitive measure and that it was therefore applied in this case only against the defendant who had been convicted of the worst offense out of all the defendants in the case. In the second case, HCJ 361/82 **Hamri v. IDF Commander of the Judea and Samaria Area**, IsrSC 36(3), 439, Honorable Justice Barak (his title at the time) extended the military commander's power to demolish the homes of those accused of murder to cases in which the suspects had not yet been convicted. The Court ruled that prima facie evidence was sufficient (evidence of sufficient probative value):

> … In my view this material, which is available to the military commander, clearly provides him with a sufficient evidentiary infrastructure for formulating a decision on the use of powers vested in him under Regulation 119. As is known, the military commander does not require a conviction by a court of law, and he himself is not a judicial instance. As far as he is concerned, the question is whether a reasonable person would judge the material before him as having sufficient probative value…

42. It is true that Justice Barak pointed out in his ruling that one should not treat the use of a punitive house demolition lightly:

> It is well known that the measure contained in the provision of Regulation 119 is a strong and severe measure and that it should be used only following through investigation and consideration and only in special circumstances (HCJ 434/79 [3]). All this and more; Regulation 119 itself contains measures of varying degrees of severity, beginning with mere confiscation, on to confiscation with partial sealing and ending with the demolition of the structure. It is only natural that the severity of the measure used by the military commander correlate to the severity of the act committed by the occupant and that demolition would be used rarely, as its severe impact is threefold: first, it may deny the occupants of the home a dwelling; second, it may preclude restoration of the situation and third, it may, sometimes, harm neighboring residents.

But in practice, in this ruling, the Court adopted a broad interpretation of the Regulation. Counsel for the petitioners argued that the wording of the regulation did not permit the demolition of the home of a family where only one of its members was involved in the perpetration of a crime. This argument rested on the presence of the word "some", which denotes a number of perpetrators exceeding one. The Court rejected the argument, stating that "there is no literal or substantive basis

for interpreting the expression 'some of the inhabitants' as referring to inhabitants whose number must necessarily be more than one" and regarded the argument as baseless. Another argument that was rejected was that the accused did not even live in the house but in a school in a neighboring village. The Court said of this, "The fact that during the school year they reside outside their parents' home does not preclude them from living in their parents' home and being inhabitants thereof during vacation periods, when they live with their parents…"

43. From 1987 until 1992, during the First Intifada, Israel substantially increased its use of punitive house demolitions. According to the documentation of Israeli human rights organizations, between 1988 and 1992, Israel fully demolished 431 homes and partially demolished 59. Furthermore, Israel completely sealed 271 houses and partially sealed 100 more. The use of the house demolition policy has presented the Court with many a dilemma. In rejecting these petitions, the Court expanded even further the interpretation of the Regulation and the power of the military commander to put it to use.

44. In HCJ 542/89 **al-Jamal v. Military Commander of the Judea and Samaria Area**, TakSC 89(2), 163, for example, a panel headed by then-President Shamgar allowed the army to seal a house occupied by the father of a man who had committed a security offense, even though the latter was a tenant in the house, so that the deterrent effect of Regulation 119 would not be lost.

45. In HCJ 4772/91, **Hizran et al v. Military Commander of the Judea and Samaria Area**, IsrSC 46 (2), 150, the Honorable Court approved the demolition of an entire building where a man who had committed a security offense lived, rather than just the unit he occupied. The Court stressed, in the words of Justice Netanyahu, that the power to use Regulation 119 (1) was broad and given entirely to the discretion of the military commander, according to the deterrence he wished to achieve, despite the unbearable harm caused to those who had not done anything wrong.

> I do not ignore the fact that the demolition of the structures in their entirety will not harm the Petitioners alone, but also their family members. However, this is the consequence of the need to deter the masses, to show them that in their actions, not only do they harm individuals, put public safety at risk and mete severe punishment upon themselves, but they also bring hardship to members of their household.

(**Hizran**., p. 155).

46. The panel in that case also gave a dissenting opinion. Justice Mishael Cheshin accepted the petitioner's argument that only the perpetrator's unit should be demolished rather than the entire building, otherwise, the demolition would constitute wrongful collective punishment. This marked the beginning of a series of dissenting opinions by Justice Cheshin, who opposed using the powers contained in Regulation 119 as it was collective punishment against those who did no wrong.

47. Justice Bach responded to the dire statements in Cheshin's dissenting opinion in his ruling in al-'Amrin (HCJ 2722/92 **al-'Amrin v. Military Commander of the Gaza Strip,** IsrLR 1 [1992-4]. It was there that the Honorable Court first drew up a list of considerations that the military commander must take into account when deciding whether to make use of the Regulation to demolish a house so that his decision will be "objective" and not "clearly tainted by manifest unreasonableness" (according to the wording in that decision**, al-'Amrin**., p. 7). According to this list, the military must examine the extent of the injury to those who did not take part in the action

the family member is suspected of perpetrating and the degree of their involvement. The following are the considerations Justice Bach listed:

> a. What is the seriousness of the acts attributed to one or more of those living in the building concerned, with regard to whom there is definite evidence that they committed them? The importance of this factor as a basis for the severity of the decision that the commander may make has been emphasized in the past more than once in the decisions of this court…
>
> b. To what extent can it be concluded that the other residents, or some of them, were aware of the activity of the suspect or the suspects, or that they had reason to suspect the commission of this activity? It should be stated once more, to make matters clear, that such ignorance or uncertainty on this issue do not in themselves prevent the sanction being imposed, but the factual position in this regard may influence the scope of the commander's decision.
>
> c. Can the residential unit of the suspect be separated in practice from the other parts of the building? Does it, in fact, already constitute a separate unit?
>
> d. Is it possible to destroy the residential unit of the suspect without harming the other parts of the building or adjoining buildings? If it is not possible, perhaps the possibility that sealing the relevant unit is sufficient should be considered.
>
> e. What is the severity of the result arising from the planned destruction of the building for persons who have not been shown to have had any direct or indirect involvement in the terrorist activity. What is the number of such persons and how closely are they related to the resident who is the suspect?

(**al-'Amrin**, pp. 7-8)

Justice Bach also wrote, perhaps troubled by the fact that all the petitions filed against the use of the power granted by Regulation 119 were rejected, that despite the broad interpretation of the Regulation, there was still room for judicial review.

> It would appear that there is no basis in the said regulation, either in the literal text or in the spirit of what is stated there, for a construction that imposes such a far-reaching duty of restriction on the military commander. The contrary is true: the construction that make the authority broader has been adopted and applied by the various panels of this court with a significant number of similar petitions that have been brought before us in recent years (as Justice Cheshin also states in his aforesaid opinion).

> Nonetheless, I would like to point out that the above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court is not able or bound to intervene in the decision of the military authority, whenever the latter intends to exercise its authority in a way and manner that are unthinkable...

(**al-'Amrin**, pp. 7-8)

48. Justice Bach's assertions did not convince Justice Cheshin. Again, in a dissenting opinion and in harmony with the previous judgment he gave on the matter, Justice Cheshin demonstrated the absurdity of interpreting the Regulation in the spirit of the legislator, when the legislator was the British Mandate and those on whom the sanction was imposed were members of the Jewish community. Now, wrote the justice, the laws and regulations are subject to the Basic Laws, so that even if the spirit of the regulation in practice allows for collective punishment to achieve deterrence, the contemporary legal situation does not. As he put it so beautifully:

> I agree that in the language of the regulation — in its literal text, in the words of my colleague — there is no basis for the restrictive construction, the construction which is acceptable to me. Indeed, the military commander has the authority, according to the text of the regulation, to order a widescale destruction… But I believe that no-one would even think of exercising authority in that way. I also agree with my colleague that 'in the spirit of what is stated there', in the regulation, there is no basis for limiting its construction, if by this he means the 'spirit' when the regulation was enacted in 1945, and the spirit which a court made up of English judges during the British Mandate would have read into the regulation. But that 'spirit' of the regulation vanished and became as if it had never existed, when there arose a greater spirit, in 1948, when the State was founded. Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one construction during the Mandate period and another construction after the State was founded, for the values of the State of Israel — a Jewish, free and democratic State — are utterly different from the fundamental values that the mandatory power imposed in Israel. Our fundamental values — even in our times — are the fundamental values of a State that is governed by law, is democratic and cherishes freedom and justice, and it is these values that provide the spirit in constructing this and other legislation… This has been so since the founding of the State, and certainly after the enactment of the Basic Law: Human Dignity and Liberty, which is based on the values of the State of Israel as a Jewish and democratic State. These values are general human values, and they include the value that 'One may not harm a person's property' (s. 3 of the law) and 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive' (s. 8 of the law).

(**al-'Amrin**, pp. 14-15).

49. Between 1993 and 1997, the use of punitive house demolitions was reduced. According to documentation by Israeli human rights organizations, during this five-year period, Israel fully demolished 26 houses, and partially demolished 18 more. It was during this time, that the Declaration of Principles (the Oslo Accord) was signed by Israel and the PLO. It was a time when Israel's citizens suffered an onslaught of brutal suicide attacks that caused a large number of casualties. It was then that the Court, for the first time, permitted the demolition of the house of a suicide bomber, even though he was not the one punished by the act. The Court ruled that the aim in resorting to the Regulations was deterrence. Therefore, there was no prohibition against demolishing his home. Furthermore, the Court ruled that were the death of the terrorist to prohibit the demolition of his family's house, it would in effect serve as an incentive for others to perpetrate suicide attacks. (See HCJ 6026/94 **Nazzal v. Military Commander in Judea and Samaria Area,** IsrSC 48(5), 338).

50. In this judgment, too, Justice Cheshin reiterated his solitary position, and in a dissenting opinion cried in protest, "…but the fundamental principle remains as it has. It will budge neither right nor left: each person will carry his own transgression and each person will be put to death for his own sin…" (**Nazzal**, p.352).

51. As stated, the years following the signing of the Declaration of Principles between Israel and the PLO were difficult years. Nevertheless, the military commander refrained from frequent use of his alleged power to demolish houses.

52. However, after a series of suicide attacks, the military commander sought to use this power once more, this time not just against the homes of people who perpetrated the most recent attacks, but also those of people who had been involved in attacks the previous year (and in some cases even earlier), and the demolition of their homes had been considered and suspended. In what appears to have been a retaliatory act, it was decided to demolish the houses of these "veteran" terrorists. In the judgment in a petition filed by HaMoked against the above decision (HCJ 1730/96 **Sabih et al. v Major General Ilan Biran, Commander of the IDF Forces in the Judea and Samaria Region et al.** (IsrSC 50(1), 353), Justice Dorner was of the opinion that the houses of "veteran" terrorists should not be demolished since they would not have been demolished because of the actions of their inhabitants, which is the requirement for implementing that authority, but because of actions perpetrated by other people at another time. (i.e. the "new" terrorists).

53. Honorable Justice Cheshin, who, had he maintained his opinion against the use of Regulation 119, would have formed a majority with Honorable Justice Dorner, sided with the position allowing use of the Regulation in this instance. In his opinion, he wrote the words that have been etched ever since in the annals of the Honorable Court - for the good, according to some and for the bad according to others. His message, as we understand it, was that at war, there was no genuine place for judicial review:

> À la guerre comme à la guerre: what business does a court have to order a military commander what to do and what not to do? […] Indeed, we shall not grow weak in our efforts to strengthen the rule of law. We took an oath to dispense justice, to be servants of the law and we shall remain loyal to our oath and to ourselves. Even when trumpets of war sound, the rule of law shall make its voice heard;

> however, let us admit a truth: in such places its sound is the sound a piccolo, clear and pure, but inaudible in the commotion.

(**Sabih**., pp. 368-369).

54. From early 1998 until October 2001 the use of punitive house demolitions under Regulation 119 was halted de facto, governmental powers over Palestinian major cities and over most of the Palestinian population were transferred to the Palestinian Authority and the Israeli military refrained, in general, from entering these areas.

55. Since October 2001, the military has resumed and intensified the house demolition policy. This was the case during the Second Intifada and until late October 2004. During these difficult years, Israel demolished 628 houses according to the figures collected by Israeli human rights organizations. As a result of the destruction, 3,983 people were left homeless. At the end of July 2002, the Security-Political Cabinet approved an official resolution to renew the punitive house demolition policy. In practice, many houses had been demolished months earlier. According to B'Tselem, of the 628 houses the IDF demolished under Regulation 119, 295 houses with 1,286 occupants were located near the houses occupied by individuals suspected of attacking Israelis. In other words, only about half the houses destroyed by the Israeli military as a punitive measure were inhabited by the nuclear families of those suspected of involvement in terrorist attacks.

56. Until 2001, aside from exceptional circumstances, the military commander took care to issue a written demolition order declaring his intent prior to the demolition itself. The orders were presented to the residents of the houses slated for demolition and they were given 48 hours to appeal to the military commander. In case the appeal was rejected, the residents could petition the High Court of Justice against the demolition. During the Second Intifada, prior warnings were given to such residents in less than three percent of the demolition operations. The decisive majority of punitive house demolitions conducted during that period were carried out at night without any prior warning. The residents were given a few minutes to remove their belongings from the house before they were buried under the rubble.

57. In a long list of petitions filed by HaMoked on behalf of dozens of families of suspected assailants of Israelis, the Court approved the military commander's practice of denying these families' right to a hearing prior to the demolition if there was substantial concern that holding a hearing would endanger the lives of soldiers or undermine the success of the operation. The High Court decision gave the military the power to grant or withhold the right to a hearing even in an action that was a punitive measure against a civilian target rather than a military operation conducted in response to an attack against it or against civilians. (See e.g.: HCJ 6696/02 **'Amer et al. v. Commander of IDF Forces in the West Bank**, IsrSC 56(6) 110.

58. The Shani Committee: In late 2004 and early 2005, a committee headed by Maj.Gen. Ehud Shani examined the efficacy of house demolitions as a tool in the struggle against terrorism. The committee recommended freezing the use of this measure and then-military Chief of Staff Lt. Gen. Moshe Yaalon, accepted the committee's conclusion, adding that the military reserved the right to depart from its new policy in "extreme circumstances." A presentation of the committee's conclusions, which was provided to HaMoked, stated that "although house demolitions are one of the elements in the (limited) toolbox which the IDF possesses for the war against terrorism," the negative results of this policy such as strengthening the national identity of the Palestinian collective, and the fact that house demolitions are viewed as collective punishment which violates the principle of human dignity and respect for private property and contradicts liberal principles,

intensifies the Palestinian refugee trauma, strengthens the claim that "the occupation corrupts" and creates a chasm which cannot be bridged. The presentation ends with an unequivocal statement: "The IDF, in a Jewish and democratic state, cannot walk the line of legality, let alone the line of legitimacy!!!" [sic].

The presentation is attached hereto and marked **Appendix 6**.

59. In accordance with the recommendation of the Shani Committee, which as mentioned above, was followed between the years 2004 and 2008, the State refrained from exercising the power to demolish houses.

60. The State informed the Court of a change in this policy in March 2005 in an updating notice given in HCJ 7733/04 **Nasser et al v. IDF Commander in the West Bank** (reported in Nevo, June 20, 2005). The military commander said in his statement that the decision not to make use of Regulation 119 applied to the home of the petitioner in this case. Therefore, despite the request made by HaMoked to discuss the questions of principle surrounding the legality of Regulation 119, the petition was dismissed. The judgment also stated that the questions of principle raised by Regulation 119 should be discussed in another, principled petition that was pending at the time. However, that petition was dismissed on the same grounds:

> We have concluded that, in light of the statement of the respondents with regard to the intention to cease the demolition of houses, there is no room, at this time, to hear the petition on its merits. A decision on the claims made by the petitioners on matters of principle is not necessary at the present time. Indeed, in light of the new situation in the field as declared by the respondents, the petition has become academic, and moot.

HCJ 4969/04 **Adalah - The Legal Center for Arab Minority Rights in Israel v. IDF OC Southern Command** (reported in Nevo, July 13, 2005).

Thus, the Court rejected the principled petition but left an opening to reconsider the matter should the state's policy change again.

61. This review demonstrates that in fact, though the Court considered the question of house demolitions dozens of times, it **never** addressed the **essence** of the argument that the house demolition policy and Regulation 119 contravened international law applicable to the military's operation in the area. The High Court did not see any need to consider this argument on the grounds that it had addressed it in its judgment in the first petition on the matter (**Sahweil**, 1979), a judgment which has since been repeatedly quoted – to the effect that since the Defense (Emergency) Regulations constituted "domestic law" that preceded the occupation, they were applicable even though they contradicted international law.

62. This review demonstrates that in fact, though the Court considered the question of house demolitions dozens of times, it **never** addressed the **essence** of the argument that the house demolition policy and Regulation 119 contravened international law applicable to the military's operation in the area. The High Court did not see any need to consider this argument on the grounds that it had addressed it in its judgment in the first petition on the matter (**Sahweil**, 1979), a judgment which has since been repeatedly quoted – to the effect that since the Defense

(Emergency) Regulations constituted "domestic law" that preceded the occupation, they were applicable even though they contradicted international law. [*sic*]

63. It also demonstrates that the Court has never directly considered the question of whether the power vested by Regulation 119 should be regarded as "collective punishment", as understood in international law, and whether it is not a violation of the prohibition against damaging the property of protected persons when not required for military operations.

Renewed use of Regulation 119

64. In November 2008, HaMoked filed a petition on behalf of the father of the man who perpetrated the terrorist attack at the Mercaz Harav Yeshiva against the decision to seal his house. This marked the first time since 2005 that a decision was made to activate the powers included in Regulation 119 and to seize and seal the house that was the subject of the petition. According to the judgment, the decision to resume use of the power was made only after the attorney general had provided an opinion that there was no legal impediment to exercising the power if, in the opinion of the competent official, such action was absolutely required for security reasons and subject to the rules of proportionality and the observance of proper procedure. The Court accepted the attorney general's position and added that when this power is used against residents of Israel (in other words, residents of East Jerusalem), the power emanating from the Regulations must be interpreted in the spirit of Basic Law: Human Dignity and Liberty.

65. With regard to the Shani Committee findings, the Court ruled that a change in policy had been within the realm of possibility even when the decision was made to stop making use of Regulation 119 of the Defense (Emergency) Regulations. This was certainly true in extreme circumstances. "Our position is that there is no room to intervene in the respondent's change of policy. […] Indeed an authority can change a policy and surely it may change it when the circumstances change". (See HCJ 9353/08 **Abu Dheim et al. v. GOC Home Front Command** (reported in Nevo, May 1, 2009).

66. In the spring of 2009, the military commander decided on another demolition. In this instance it was the house of a man who deliberately struck a victim with his vehicle in Jerusalem. The Court approved this demolition also as an exception to the policy adopted in the wake of the Shani Committee (HCJ 124/09 **Dawyat v. Minister of Defense et al.** (reported in Nevo, March 18, 2009). In April of 2014, the power was exercised for the third time since the policy freeze was announced, now to demolish the house of the suspect in the killing of Police Commander Baruch Mizrahi. This demolition, too, was approved by the Court (see HCJ 4597/14 **'Awawdeh et al. v. West Bank Military Commander** (reported in Nevo, July 1, 2014). The Court also rejected the request made by the petitioners, relatives of the murder suspect, to wait until his trial concludes and to refrain from demolishing before a court ruling on whether he was in fact responsible for the killing.

67. The summer of 2014 was a violent one. It began with the abduction and murder of Gilad Shaar, Naftali Frankel and Eyal Yifrach, and ended with the war in Gaza. Between the two, we also witnessed the murder of the youth Muhammad Abu Khdeir by Jewish citizens. In the petition filed against the demolition of the homes of the three suspects in the abduction and murder of the three youths at the Gush Etzion junction, the petitioners argued, inter alia, that the house demolition policy was used in a wrongfully discriminatory manner. The argument was made as no demolition order had been issued for the home of the men who killed Muhammad Abu Khdeir, though at least one of them was a resident of Area (see HCJ 5290/14 **Sa'di 'Al 'Afu Qawasmeh v. Military Commander of the West Bank** (reported in Nevo, August 11, 2014).

68. In all these cases, the Court no longer deliberated over the argument that resorting to Regulation 119 was prohibited pursuant to the prohibition against collective punishment or the prohibition against damaging the property of protected persons prescribed in international law.

69. At the beginning of July of this year, after the abduction and murder of Gilad Shaar, Naftali Frankel and Eyal Yifrach, daily newspaper Haaretz published a front-page news item which reported that the Security-Political Cabinet had decided to renew and expand the house demolition policy in the West Bank. According to the report, the cabinet instructed the IDF to carry out staff work to locate dozens of houses of Hamas terrorists and commanders and to provide the cabinet with recommended demolition targets. A similar report was published in the Washington Post on July 22, 2014.

70. In wake of these reports, Petitioner 3 made inquiries to the Respondent several times in order to find out whether indeed there was a plan to renew the demolition policy. As part of this correspondence, a letter from Michal Hod, Assistant Attorney General, dated August 19, 2014, stated that the powers granted under Regulation 119 are used with great care, and currently only in extreme cases. The letter also stated that any additional cases would be examined according to their particular circumstances.

The letter dated August 19, 2014 is attached hereto and marked **Appendix 7**.

71. In a later response, dated November 9, 2014, Adv. Gal Cohen, Senior Legal Department Director for Judea and Samaria at the Office of the Legal Advisor to the Security Establishment, listed the judgments (listed above) upholding the current policy on the use of the powers granted to the military commander under Regulation 119 with respect to house demolitions.
The letter implies that the Respondents intended to continue the house demolition policy

The letter dated November 9, 2014 is attached hereto and marked **Appendix 8**.

72. In light thereof, on November 27, 2014, a general petition against use of Regulation 119 by way of forfeiting and demolishing or sealing the homes of persons suspected, accused or convicted of involvement in hostile actions against the State of Israel and its citizens, arguing that such use was unlawful in that it contravened international humanitarian law, international human rights law and Israeli constitutional and administrative law (HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (reported in Nevo, December 31, 2014) (hereinafter: the general petition).

73. At the same time, from August to November 2014, Jerusalem was came under yet another wave of terrorism. Five more petitions were filed against demolition orders issued for the homes of assailants in Jerusalem, as detailed below.

74. On December 31, 2014, the general petition was dismissed by a panel of three justices. The panel ruled there was no room to revisit the legal questions raised in the petition, on the grounds that the **'Awawdeh** and **Qawasmeh** judgments delivered in the preceding year had addressed them (see remarks of Honorable Justice Rubinstein in the last paragraph on page 8 of the judgment, and the remarks of Honorable Justice Hayut pp. 33-34). On that day, the same panel dismissed two petitions filed by the families of the men who carried out the stabbing attack at the Har Nof neighborhood. In the short judgment, the justices ruled that the normative framework with regards to the Respondent's use of Regulation 119 power was reviewed in the judgment given in the general petition, which, as stated, was delivered on the same day. In light thereof, the justices did

not find it necessary to address the matter again HCJ 8066/14 **Abu Jamal et al. v. GOC Home Front Command**, (December 31, 2014)0

75. On December 31, 2014, the Court also rejected a petition against the demolition order issued for the home of the Ja'abis family, whose member, the State alleged, committed an attack using a bulldozer, in which one man was killed (see, HCJ 7823/14 **Ja'abis v. GOC Home Front Command** (December 31, 2014). Another petition dismissed that day challenged the demolition order issued for the family of Ibrahim 'Akari who also carried out an attack using a vehicle. In this judgment too, the justices noted that the issue of the use made of the power granted by Regulation 119 had been reviewed in the general petition and, therefore, need not be addressed again. The same panel heard another petition jointly with this case. The second petition was directed against the demolition of the home of the parents of M'utaz Hijazi, who shot Yehuda Glick. In that petition, an order nisi was issued because the attack did not result in a death (see HCJ 8024/14 **Hijazi v. GOC Home Front** (June 15, 2015).

76. As stated, the Honorable Court did not discuss the argument that Regulation 119 could not be used as it is contrary to international law and to Israeli administrative and constitutional law in any of the additional five petitions, due to the dismissal of the general petition.

The current wave of attacks

77. In the summer of 2015, another waves of attacks plagued Jerusalem and the West Bank. It has been called the "loner intifada" or the "knife intifada". Reacting to the many attacks, as one event quickly followed another, the Respondent renewed use of Regulation 119 on a mass scale. This trend has been in effect for more than six months.

78. On October 15, 2015, the Honorable Court rejected two petitions against the demolition order issued for the home of Maher al-Hashlamun, who had murdered Dalia Lamcus at the Alon Shvut junction on November 10, 2014. The judgment includes the dissenting opinion of Justice Vogleman who believed that an order nisi should have been issued as a result of the great delay on the part of the Respondent, which notified the family of the intent to forfeit and demolish their home many months after the attack took place (see, HCJ 5839/15 **Sidr v. IDF Commander of the West Bank** (October 15, paras. 7-8 of the judgment). In his dissenting opinion, Honorable Justice Vogelman expressed, for the first time, reservations regarding case law and noted that use of powers granted by Regulation 119 against family members who have not been proven to be involved in the hostile action, was disproportionate. Honorable Justice Vogelman added:

> Demolition of the home is therefore within authority, but the fault lies rather in the realm of discretion: in this situation the action is not proportional. All of this is in a nutshell, since it is not the precedent put out by this Court. Still, I would suggest that we re-evaluate the judicial precedent so as to lay all the cards on the table regarding issues in internal and international law, since as long as this precedent stands I bow my head before the opinion of this house.
> (**Sidr**, opinion of Honorable Justice Vogelman, para. 6)

The petition was dismissed due to the position taken by the majority of the panel that there was no room to revisit issues of principle regarding house demolitions that had been determined in a number of judgments.

79. On November 12, 2015, Honorable President Naor rejected a motion for a further hearing in the general petition (HCJFH 360/15 **HaMoked v. Minister of Defense** (November 12, 2015)). Honorable President Naor noted that the position of the Petitioners was that a further hearing was required since their main arguments were not reviewed in depth in the judgment. The general petition was denied after the Court found no room to revisit case law on house demolitions, as it had been upheld a short while earlier in two judgments (**'Awawdeh** and **Qawasmeh**). The Honorable President held that arguments of that sort were not appropriate for a further hearing, as such a proceeding is intended for further hearing of express rules set down by the Court, rather than questions the Court did not see fit to revisit and review (general petition, para. 4 of the decision of the President.

80. At that time, a judgment was given with respect to eleven petitions filed against demolition orders issued for six different homes (HCJ 7040/15 **Fadel Hamed v. IDF Commander in the West Bank** (November 12, 2015). The homes in question were the homes of the person who perpetrated the shooting attack against Dani Gonen near the Ein Bubin spring; the homes of the members of the cell that perpetrated the lethal shooting attack in which Malachi Rosenfeld was killed, and the perpetrators of the shooting attack at Beit Furiq intersection in which Na'ama and Eitam Henkin were killed. The Court accepted the petition of the homeowner of the home in which one of the perpetrators, 'Abdallah Ishaq, lived with his family, holding that demolishing a home that belongs to a foreign third party who has no family or other relation to the perpetrator and his family causes little to no financial damage to the perpetrator and his family, and therefore, cannot deter potential perpetrators (**Hamed**, para. 46 of the judgment of President Naor). With respect to the arguments raised against the military commander's power and the adherence of the policy to international law, President Naor repeated the position she expressed in her decision to dismiss the motion for further hearing, referred to above, and ruled that there was no room to revisit these questions and that judicial review of use of powers granted by Regulation 119 must focus on discretion (**Hamed**, paras. 25-26).

81. On December 1, 2015, this Honorable Court dismissed, in a majority opinion, the petition filed by relatives of Rajeb 'Aliwa against the demolition order issued for their home, on the accusation that 'Aliwa had taken part in the cell that planned and executed the shooting attack in which the Henkins were killed (see: **HCJ 7220/15 'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015)). The majority justices saw no room to revisit the general issues related to the legality of Regulation 119, since the matter had been reviewed and ruled upon in several previous judgments, primarily the general petition and the motion for further hearing therein, which was also dismissed (para. 7 of the judgment). This judgment includes the first dissenting opinion maintaining that use of Regulation 119 raises serious legal questions which were not explored as thoroughly and comprehensively as necessary. Honorable Justice Mazuz ruled that although the Court had recently rejected the attempts for a renewed, comprehensive review of the topic (the general petition and the motion for further hearing) on the argument that the matter had been reviewed and decided in a number of judgments:

> However, a careful examination indicates that deliberation of these issues in previous judgments was not exhaustive. Furthermore, these were mainly judgments handed down in the 1980s and early 1990s, prior to the constitutional era in Israeli law, and in the time that has elapsed, considerable changes have also occurred in the norms of

international law pertaining to this issue.
(**'Aliwa**, para. 4 of the judgment of Honorable Justice Mazuz).

82. Another judgment issued on December 1, 2015, accepted the petition filed against the demolition of the home of Nur a-Din Abu Hashiyeh, who stabbed and killed a soldier - Almog Shiloni. The petition was accepted by the majority opinions of Justices Mazuz and Zylbertal, due to the great delay on the part of the Respondent, given that 11 months had passed from the time of the attack until the Regulation 119 was used. Since the argument regarding laches was accepted, the judgment contained no reference to the general arguments (see: HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank**, December 1, 2015)).

83. On December 22, 2015, a majority opinion of this Honorable Court dismissed petitions against two demolition orders. One was directed against the home of Baha Alian, who, together with another man, perpetrated a shooting and stabbing attack on a bus in the Jerusalem neighborhood of Armon Hanatziv. The other order was directed against the home of 'Alaa Abu Jamal, a Bezeq employee who used a company vehicle to run over one man, and then got out of the vehicle, carrying a knife, and stabbed two more people (**HCJ 8150/15 Abu Jamal v. GOC Home Front Command** (December 22, 2015)). The majority opinion was that the Court need not explore the general issue regarding the power granted by Regulation 119 every time it considers a case that relates to the Regulations. The reason was that these arguments were made and considered in a number of judgments, some of which were recent (p. 4 of the judgment). Honorable Justice Mazuz, once more in a dissenting opinion, repeated his principled position as extensively detailed in **'Aliwa** (HCJ 7220/15), while reiterating that the conclusion that Regulation 119 cannot be used against uninvolved relatives was unavoidable: "a sanction which directs itself to harm innocent people, cannot be upheld…" (**Abu Jamal**, para. 13 opinion of Justice Mazuz). Honorable Justice Zylbertal, who ruled in favor of dismissing the petitions, referred to Honorable Justice Mazuz' principled opinion as follows:

> Justice Mazuz brings forth weighty reasons which are based on fundamental constitutional principles as well as on basic principles 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.
> (**Abu Jamal**, para. 2 opinion of Justice Zylbertal).

84. Shortly after this, this Honorable Court unanimously dismissed other petitions filed against the demolition of the home of Muhanad Halabi who had stabbed Rabbi Nehemia Lavi and Aharon Bennett in the old city of Jerusalem (HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015)). Deputy President Rubinstein repeated the ruling that the issue of the military commander's power under Regulation 119 has been ruled in a long list of judgments, and therefore need not be revisited (**Halabi**, para. 5 of the opinion of Justice Rubinstein). Honorable Justice Barak-Erez noted that house demolitions do raise complex questions both in terms of international law and Israeli constitutional law, adding:

> It stands to reason that in view of the complex questions evoked by the use of the measure of house demolition, 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. 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 (compare with the position of Justice Vogelman in **Sidr** and the position of Justice Zylbertal in **Abu Jamal**)) – without derogating from the repugnance, condemnation and deep sorrow which arise as a result of the killings which lead to the hearing in this case and in other similar cases, and from the justified desire to deter in a bid to prevent similar additional doings. 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.
> (**Halabi**, para. 2 of the opinion of Justice Bark-Erez).

85. On February 14, 2016, this Honorable Court again unanimously dismissed petitions against two demolition orders. The first order was issued against the home of Muhammad Harub who has been charged with perpetrating a shooting attack from a moving vehicle and running over pedestrians in the Gush junction. The other order concerned the home of Ra'id Khalil, charged with perpetrating a stabbing attack at the Panorama building in south Tel Aviv (HCJ 967/16 **Harub v. Commander of IDF Forces in the West Bank** (February 14, 2016)). The Honorable Court again declined to address the general arguments challenging the legality of Regulation 119 that had been raised and rejected in a number of judgments issued recently (**Harub**, para. G of the judgment).

86. On February 28, 2016, the Honorable Court dismissed a petition against the demolition of the home of Ibrahim Skafi, who had veered his car in the direction of border police officers in the Halhul junction, seriously wounding a border police officer, Benjamin Yakubovich, who succumbed to his wounds several days later. (HCJ 1014/16 **Skafi v. Military Commander of the Judea and Samaria Area** (February 28, 2016)). Once again it was ruled that there was no justification to revisit general arguments and these must be rejected (p. 5 of the judgment). The judgment focused on the petitioners' argument that there was not sufficient evidence that the attack was an act of terrorism rather than a traffic accident. The arguments were accepted, against the dissenting opinion of Justice Zylbertal, who did not think the evidence collection process had been reasonable and had failed to produce evidence that could either confirm or deny the conclusion that this was a deliberate attack, hence, the Respondent did not have sufficient evidence to employ his Regulation 119 powers.

87. On March 23, 2016, by majority opinion (against the dissenting opinion of Justice Mazuz), the Honorable Court rejected a petition against a demolition order issued for the apartment where Ihab Masudi had lived. Masudi stabbed and wounded Gennady Kaufman near the Tomb of the Patriarchs. Kaufamn succumbed to his wounds three weeks later (HCJ 1630/16 **Masudi v. Commander of IDF Forces in the West Bank** (March 23, 2016). The Honorable Court repeated its ruling that the principled arguments against case law on house demolitions had been rejected in a number of judgments, some quite recent, and there was no change in circumstances that necessitated a departure from case law (paras. 15-20 of the opinion of Justice Sohlberg). Honorable Court Vogelman repeated his position, noted in **Sidr** above, that use of Regulation 119 against

uninvolved family members is not proportionate, but, as long as case law remains, it must be followed. Honorable Justice Vogelman added that since the **Sidr** judgment was handed down, more justices have commented about the difficulties raised by use of Regulation 119 for the purpose of house demolitions (**Masudi**, para. 3 of the opinion of Justice Vogelman):

> 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. However, for as long as case law stands, which is the situation at this time, I see no alternative in this case but to hold that there is no cause for our intervention according to the rule in its current form.
> (para. 3 of the opinion).

88. One day after the **Masudi** petition was dismissed, another judgment was issued, dismissing, by majority opinion, three petitions against demolition orders issued for the homes of three men from Qabatiya who perpetrated a stabbing and shooting attack near Damascus Gate in Jerusalem, in which Border Police Officer Hadar Cohen was killed (HCJ 1938/16 **Abu a-Rob v. Commander of IDF Forces in the West Bank** (March 24, 2016). Honorable Court Barak-Erez noted in her opinion that:

> [I]n several judgments which were recently given on this issue a number of my colleagues noted, and so did I in HCJ 8567/15 **Halabi v. Commander** of IDF Forces in the West Bank (December 28, 2015), that the practice of the demolition of a perpetrator's house as a deterring measure was not at all simple and evoked serious questions. Said position veers from the limits of current case law and offers an "external" perspective in relation thereto. In view of the fact that the position of the Court on this issue has only been recently re-visited I consider it to be binding upon me at this time. However, as I have already noted, it would be appropriate that "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" (Ibid., paragraph 2 of my opinion).
> (para. 3 of the opinion of Justice Barak-Erez).

In a dissenting opinion, Honorable Justice Joubran joined the reservations made in various judgments with respect to use of the Regulation 119 powers, though he too, did not see fit to depart from case law established by many different panels (see, para. 2 of the opinion of Justice Joubran). With respect to how the powers were employed, Justice Joubran ruled that it must be used in keeping with the principle of proportionality and stated that in that case, he was not convinced the principle was upheld as he was not convinced that the material presented by the Respondents sufficiently proved that the demolition orders would create real, effective deterrence (para. 4 of the opinion). Justice Joubran added:

> 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.
> (para. 6 of the opinion).

89. Several days after these judgments were handed down. President Naor rejected a motion for a further hearing in the **Masudi** case (HCJFH 2624/16 **Masudi v. IDF Commander in the West Bank** (March 31, 2016)). The motion was rejected partly because of its timing, shortly before the expiration of the interim order that stayed the house demolition and since it did not include substantive arguments or listed the legal questions (**Masudi motion**, paras. 7-8 of the decision). Additionally, despite the position of Honorable Justice Vogelman in the **Masudi** judgment, that a review of the case law must be carried out by an extended panel, the Honorable President cited that another reason for the rejection of the motion was that the judgment lacked a thorough, deep, discussion of the legal issues related to use of Regulation 119, and hence lacks a clear, explicit rule (para. 8 of the decision). As recalled, a similar argument led to the rejection of the motion for further hearing in the general petition, as explained in detail above. However, Honorable President Naor did note that in so saying she did not "express an opinion on whether in another case the Court may consider holding a further hearing on any question which may pertain to the use of Regulation 119," (para. 9 of the decision).

90. Later that day, another judgment was issued, accepting a petition against the demolition of the home of 'Abd al-'Aziz Mar'i. Mar'i was alleged to have been involved in an attack in the Old City, wherein Muhanad Halabi murdered Rabbi Nehemia Lavi and Aharon Bennett (see, HCJ 1125/26 **Mar'i v. Military Commander in the West Bank** (March 31, 2016)). The focus of the discussion in this case was whether the assailant had a sufficient residency tie to the apartment slated for demolition, given that he was a student who rented a room in the university student residence. The majority opinion was that the petition should be accepted given the weakened tie of residency between the assailant and the family home, and given the complete lack of involvement, and even knowledge, by the family living in the house, of the actions attributed to the son (see, **Mar'i**, para. 25 of the opinion of Justice Mazuz, and para. 9 of the opinion of Justice Baron). Honorable Justice Baron also noted that the premise for the discussion was that the military commander does have the power to order the demolition, sealing and forfeiture of the homes of terrorists, as this was the case law in effect, and so long as it has not changed, it must be followed (**Mar'i**, para. 2 and 7 of the opinion of Justice Baron). Justice Baron commented that case law has set forth several considerations for examining the proportionality of using Regulation 119 in a specific case, primarily the gravity of the actions attributed to the assailant. Justice Baron also added:

> My view is different. As a rule, using the power to demolish homes based on the severity of the acts attributed to the terrorist alone, without giving any weight to the degree of involvement by family members in said acts, I believe, fails to meet the test of proportionality in the narrow sense in circumstances where the deterring power of demolitions is, at the least, not unequivocal.
> (**Mar'i**, para. 6 of the opinion of Justice Baron).

91. Just a few days later, and this Honorable Court once more accepted three of four petitions concerning forfeiture and sealing orders issued for apartments where four young men whose

indictments allege they threw rocks at cars, allegedly resulting in the death of Alexander Levlovitch (HCJ 1336/16 **Atrash v. GOC Home Front Command** (April 3, 2016). The majority opinion referred to the principled arguments impugning the lawfulness of Regulation 119, given the reservations just recently expressed by several justices with respect to case law. Honorable Justice Hayut noted in this context that:

> [L]ike myself the vast majority of the other justices who expressed doubts were also of the opinion that they were bound by the recently established rule which approved the use of Regulation 119 for as long as it has not been changed. And as was rightfully emphasized, such change should be made by an expanded panel rather than by a panel of three (see Zakariyeh, paragraph 3 of the opinion of my colleague Justice U. Vogelman; paragraph 5 of the opinion of Justice M. Mazuz, Ibid.; and paragraph 6 of the opinion of Justice b in Abu a-Rob; As to the great difficulty which this issue raises see also the words of the President in HCJFH 360/15, in paragraph 6; see also HCJFH 2624/16 Zakariyeh v. Commander of IDF Forces in the West Bank (March 31, 2016) where the possibility to expand the panel on this issue in the appropriate petition was not ruled out).

The majority opinion favored accepting the petitions filed by three of the assailants, due to the relatively small part they played in the incident and that they were alleged to have had a role in the offense of manslaughter mostly because of their presence on the scene, while there was no dispute that only the fourth assailant is alleged to have thrown the lethal stone (para. 14 of the opinion of Justice Hayut). Honorable Justice Vogelman, in a dissenting opinion, believed an order nisi should have been issued in the fourth assailant's case as well, given his position that using Regulation 119 against uninvolved relatives in circumstances in which the assailant is not alleged to have had "intent to kill", was disproportionate and constituted a departure from case law (para. 6 of the opinion of Justice Vogelman).

Conclusion

92. To conclude this section, we note that in the time that has elapsed since July 2014, when the policy of demolishing assailants' homes was reinstated, 26 homes have been sealed or demolished with the approval of this Honorable Court. To this one must add pending petitions which have not yet been ruled by the Honorable Court regarding eight more homes.

The frequent use the Respondent makes of Regulation 119 repeatedly presents the Court with the need to review the lawfulness of the orders. The case law reviewed above clearly indicates that use of Regulation 119 is troubling and raises much difficulty, particularly due to the commitment by many of the justices of this court to "follow the path" marked in case law, so long as it has not been revisited. A significant number of justices of this Honorable Court have expressed their reservations with regard to case law and noted there was a need for an expanded panel to revisit the issue. These views have been expressed despite the fact that a general petition on this issue was rejected, and that less than six months have passed since a motion for a further hearing on the matter was rejected (HCJFH 360/15, above). As stated, currently, the call to revisit the issues of principle stemming from use of Regulation 119 no longer comes solely from the Petitioners. It has been made by justices of this Court who are asked to hear petitions on this issue time and time again, with their hands tied. It is time for a review by an expanded panel. As Honorable President Zmora ruled in

CA 376/46 **Rosenbaum v. Rosenbaum** (April 3, 1949): "Long known truth – better the truth" (**Rosenbaum**, p. 254, para. A).

The argument in brief and the opinion of the experts in international law

93. The Petitioners argue as follows:

1. That the power allegedly granted by Regulation 119 to Respondent 2 violates three customary principles of international law:

   I. The principle prohibiting collective punishment;

   II. The principle prohibiting the destruction of protected persons' property when not necessitated by military operations;

   III. The principle prohibiting disproportionate use of force;

2. That Regulation 119 is a norm of domestic law and as such, subject to the above norms and prohibitions of international law, and certainly subject to the prohibitions stipulated in the branch of humanitarian law that addresses occupation (belligerent occupation), from which the military commander draws his powers.

3. That the Respondents' policy regarding use of Regulation 119 may amount to a war crime under international criminal law.

4. That the use of Regulation 119 violates the principles of Israeli law that prohibits collective punishment;

5. That the use of Regulation 119 is effectuated in a discriminatory manner, only against suspected, accused or convicted Palestinians, and never against suspected, accused or convicted Jewish citizens alleged to have committed similar, or identical offenses.

94. Given the pivotal role of the argument regarding the superiority of local law over international law in the Court's decisions regarding use of Regulation 119, as described above, we begin our legal argument by clarifying the relationship between a norm of the international laws of occupation and the norm of domestic law.

95. We shall then present our arguments whereby the policy which is the subject of this petition constitutes a violation of the prohibition against collective punishment, the prohibition against the destruction of the property of protected persons, and the prohibition against the disproportionate use of force.

96. In view of all these, we will request that the Court accept the petition and declare that use of Regulation 119 for the purpose of demolishing or sealing the homes of individuals suspected, accused or convicted of hostile terrorist activity against Israel and Israelis, is unlawful and constitutes a violation of international and Israeli law.

97. Attached to this petition is an expert opinion by a roster of professors of law specializing in the relevant legal branches. It seems to us that their stature and level of expertise are such that there is no need to present them to the Court, which is well acquainted with them. Still, we present them herein:

1. Prof. Yuval Shany – Hebrew University Faculty of Law Dean, member of the UN Human Rights Committee;

2. Prof. Mordechai Kremnitzer – Criminal law and criminal international law expert, Vice President of Research at the Israel Democracy Institute and Professor Emeritus at the Law Faculty at the Hebrew University of Jerusalem. Prof. Kremintzer is a member of the Public Council of B'Tselem, Petitioner 3 herein.

3. Prof. Orna Ben-Naftali – Expert on international law, Emil Zola Chair of Human Rights at the Haim Striks School of Law. Prof. Ben-Naftali is a member of the Public Council of Yesh Din, Petitioner 5 herein.

4. Prof. Guy Harpaz – Expert on European and international law, Hebrew University Faculty of Law;

In their opinion, the experts, who form the elite in research and publishing in the relevant fields, provide their detailed position in support of this petition, and clarify that the house demolition policy is unlawful, and may attract responsibility as a war crime:

a. The house demolition policy constitutes a grave breach of international humanitarian law, the international laws of occupation and international human rights law;

b. The jurisprudence of this Honorable Court that ostensibly upheld use of Regulation 119 is incongruent with fundamental principles set down by this Honorable Court in rulings addressing the tension between security considerations and human rights under international law, most notably, the principle of individual responsibility and individual threat;

c. The house demolition policy may, in certain circumstances, constitute a war crime, and, in certain conditions, invoke the jurisdiction of the International Criminal Court.

The expert opinion is attached hereto and marked **Appendix 9**.

98. Also listed below are critical essays by additional academics, lecturers in human rights law in Israel, who all share the Petitioners' argument that the policy of demolishing the homes of terrorists and suspected terrorists fails to comply with international law.

The relationship between a norm of the international laws of occupation and domestic law

99. As previously stated, beginning with the first judgment on the question of the legality of using Regulation 119, HCJ 434/97 in the matter of **Sahweil**, the Court rejected the arguments that the practice violated prohibitions stipulated in international law on the grounds that the Regulation had been in force prior the occupation, and therefore could not be superseded by the laws of occupation. Dozens of court decisions following **Sahweil** repeated this argument and in the recent rulings on this issue, including the most recent of them (HCJ 4597/14 in the matter of **'Awawdeh**), the incongruence between the Regulation and the prohibitions stipulated in the Geneva Conventions and the Hague Regulations of 1907 (hereinafter: the Hague Regulations), were never again discussed.

100. **In our opinion, this is a legal error**.

101. The position the Honorable Court took regarding the relationship between domestic law and a norm of international law in Sahweil and in subsequent judgments that cited and expanded on Sahweil can be divided into three sub-arguments:

1. That the two norms carry **equal weight** from the outset and therefore, since in Proclamation No. 2, the military commander elected to leave in force the laws that were in existence when the IDF entered the area, the international law norm does not supersede the domestic norm;

2. The argument that even if the two norms did not start out equal, Article 43 of the Hague Regulations, which calls for respecting the laws in force in the country, renders the domestic law norm equal, and even preferential to other norms established in the Hague and Geneva conventions;

3. That even if the international ranks higher on the normative scale, one should follow the principle that **in the case of a clash between domestic law and a norm of international law, the local court will prefer the domestic norm.**

102. In our opinion, none of the above possibilities is correct. The following are our reasons.

International law ranks higher than domestic law on the normative scale from the outset

103. It would be difficult to dispute that the norms established in international humanitarian law in general and the laws of occupation in particular rank higher on the normative scale than domestic law from the point of view of international law. This is a basic precept in international law which regards itself as taking precedence over domestic law when domestic law cannot justify a breach of an international obligation.

> It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal law.

(Malcolm Shaw, INTERNATIONAL LAW 102 (4th edition, Cambridge University Press).

104. This principle gained expression in Article 27 of the 1969 Vienna Convention on the Law of Treaties, which stipulates the customary rule that:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

105. The International Court of Justice, the U.N.'s highest judicial organ, determined that a fundamental principle of international law is that:

> … the fundamental principle of international law, that international law prevails over domestic law.

(Applicability of the Obligation to Arbitrate Case, ICJ Reports, 1988, p. 12, 34; ILR pp. 225, 252).

106. These words speak for themselves. In the sphere of international law, no state may excuse a violation of one of its customary or treaty obligations on the grounds that its internal laws require or permit it to violate said obligation.

107. Any other position would transform international law from a legal field into a meaningless text, for if states were free to choose whether or not to perform their international obligations, then these would not be obligations at all in the legal meaning of the term.

108. When it comes to the laws of occupation, the situation is even clearer. The entire concept of regulating a situation of occupation in international law is to create a form of constitutional regime for the occupation that will formalize the rights and obligations of civilians under occupation and the powers and obligations of the occupier. An approach that allows the occupying power to choose not to fulfil its obligations or uphold the rights of the occupied as stipulated in the laws of occupation, by giving preference to domestic laws that violate these rights and obligations, is an approach that makes this important legal field entirely moot. The matter is clear.

109. This concludes the discussion of international law.

<u>Article 43 of the Hague Regulations does not raise the normative status of domestic law above that of the laws of occupation.</u>

110. In the decisions of the Court, one can find the approach which states that the local law of the occupied territory which was in effect before the occupation is preferential to the other provisions of the laws of occupation.

> In keeping with the rules of international public law, as expressed in the Proclamation Regarding Regulation of Administration and Law (Judea and Samaria (Proclamation No. 2) 5721-1967, issued by the IDF Commander in the Area, domestic law remained in effect under caveats that do not affect the matter at hand (see Article 43 of the Hague Regulations of 1907 and Article 64 of the Fourth Geneva Convention). It follows that powers granted pursuant to the aforesaid Regulation 119 constitute domestic law in force in the Judea and Samaria Area, which was not repealed during the previous regime or during military rule and we have not been presented with legal arguments for considering it null and void at this time.
>
> HCJ 897/86 Ramzi Hana Jaber v. OC Central Command et al., IsrSC 51(2), 522 (published in Nevo (May 6, 1987).

111. We recall that Article 43 of the Hague Regulations stipulates as follows (emphasis added):

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

112. It is true that domestic law was afforded **protection** under Article 43 in that the article imposes on the occupying power an obligation to **respect it**. The idea behind the obligation to respect domestic law is to prevent the occupier from changing it according to its wishes. This is predicated on the concept of the occupation as a **temporary trusteeship** wherein the occupier is precluded from making long term changes which are the purview of the sovereign (See: Orna Ben-Naftali & Yuval Shany, **International Law between War and Peace**, (Ramot 2006) ((Hebrew) pp. 179-180).

113. But does this mean that domestic law prevails when it obliges the occupying power to breach a contradicting provision in the laws of occupation?

114. In our opinion and in the opinion of the scholars who have addressed this question – the answer is clearly no. Such domestic law is without doubt a law that comes under the exclusion set out in the Article's final clause, a domestic law which the occupying power is "absolutely prevented" from respecting.

115. See, for example, the official commentary of the International Committee of the Red Cross (ICRC) which states as follows with regard to the obligation to respect the law in force in an occupied territory (in the context of the commentary on Article 64 of the Fourth Geneva Convention, which applies the principle established in Article 43 of the Hague Regulations to the penal law):

> […] when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.

COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS TN TIMES OF WAR 335-336 (Jean Pictet ed. 1958).

116. Moreover: In the case before us, local legislation does not oblige the occupying power or the occupying forces to demolish or seal them, but rather grants discretionary authority to do so. In this state of affairs, it cannot be said that failure to use this power constitutes a breach of the duty to respect domestic law:

> It is important to note that this outcome [a violation of the rights of protected persons by resorting to domestic law permitting same] does not emanate from Article 43 of the Hague Regulations, as even if domestic laws allow the legal sovereign to apply sanctions against its own citizens, it does not require the occupier to exercise these powers.

(Orna Ben-Naftali & Yuval Shany, International Law between War and Peace, (Ramot2006) ((Hebrew)p. 180 (emphasis in the original)).

117. In our view, any other interpretation undermines the **object and purpose** of Article 43 of the Hague Regulations (according to the Vienna Convention on the Law of Treaties, object and purpose is the primary tool in interpreting international conventions). The object of the laws of occupation and humanitarian law in general is to protect civilians from the harm caused by armed conflict. In occupied territory specifically, the object of the laws of belligerent occupation is to protect the rights of civilians from the foreign occupier while guaranteeing the occupier's and the occupying power's security interests. Thus, an assertion that the occupier may impinge on the rights afforded to protected persons by the laws of occupation by exercising draconian powers granted in domestic law – strikes at the object and purpose of these international laws, at their very raison d'être.

118. Therefore, this argument, that the obligation to respect "the law in force" imposed by Article 43 of the Hague Regulations legitimizes use of Regulation 119 even if the Regulation itself violates prohibitions set forth in the laws of occupation, must also be rejected.

The rule that domestic courts should give precedence to domestic law over international law does not apply to situations of occupation.

119. We now turn to examining the argument that the principle requiring respect for the rules of international law corresponds with the principle that local courts must give precedence to a local norm that is explicitly and directly incongruent with the norm of international law.

120. 115. We recall that 35 years ago, in **Sahweil**, the Court accepted the State's position that even if there is a contradiction between a norm of international law and Regulation 119, local court (in other words, the High Court of Justice), will not prohibit use of the local norm:

> We need not address the question of whether or not the Respondent must comply with the provisions of the Geneva Convention, as, even if this is indeed the case, there is no contradiction between the provisions of the Convention on which Ms. Tzemel relied and the use the Respondent has made of the power vested in him under the statutory provisions that were in effect at the time the Judea and Samaria Area was under the control of the Jordanian Kingdom and said statute remains in effect in the Judea and Samaria Area today.

121. This rule is based on the notion that domestic law takes precedence over international law from the point of view of the local court.

The rationale of giving precedence to domestic law does not apply here because the law is not domestic but rather foreign and there is no separation of powers.

122. The sources of this rule are to be found in the respect local courts gives to the local legislator and the constitutional principle of separation of powers. Both of these create the gap between the approach of international law to clashes between domestic law and the international norms, and the approach of the local court to this clash.

123. However, in the case at hand, domestic law is not the outcome of an act by the local legislator but rather by that of a foreign legislator. **Domestic law (in this case of Regulation 119) is, in essence, a foreign law**. In fact, it is a foreign law twice over – once because it is the law of the occupied territory and not of the Israeli legislature (the Knesset) and a second time because it is also not the legislative act of the government that preceded the occupation **but rather the legislative act of the Mandatory government which preceded the government which preceded the occupation**.

124. Therefore, the rationale whereby the local legal system respects the local legislature, which is the basis for the precedence given to domestic law when it clashes with international law, does not apply to a clash that occurs in the context of occupation.

125. Furthermore, in a regime of occupation, the principle of separation of powers is nullified. As is known, the military commander is vested with the powers of all three branches of government. He is the legislature, the judiciary and, of course, the executive. In this state of affairs, it cannot be said that judicial intervention in the act of the legislator of the occupied territory violates the principle of separation of powers – which is non-existent in a regime of occupation to begin with. Thus, this rationale for giving precedence to domestic law does not apply in the case at hand as well.

126. Furthermore, the IDF forces in the West Bank draw their powers directly from the laws of belligerent occupation in international humanitarian law (this matter is a constant theme in the

rulings of the Court regarding West Bank affairs. See, for example, HCJ 393/82 **Jam'iat Iscan Al-Ma'almoun v. Commander of the IDF Forces in the Area of Judea and Samaria**, IsrSC 37(4) 785, Paragraph 10 of the opinion of Justice Barak; HCJ 7957/04 **Mara'abe et al. v. The Prime Minister of Israel et al.**, TakSC 2005 (3) 3333, p. 3340). Therefore, in the special case of a clash between the domestic law of an occupied territory and the laws of occupation – the occupying power is subject only to domestic law that has passed through the filter of the laws of occupation which grant him his powers in the first place.

127. The approach of the Petitioners as detailed above, which is deeply embedded in the customary norms of international law, are consonant with the opinion of renowned Israeli scholar, Prof. Yoram Dinstein, whose commentary leaves no doubt whatsoever that domestic law cannot grant the occupying force powers that are incongruent with of the laws of occupation (emphasis added). Dinstein interprets Article 64 [of the Fourth Geneva Convention], which is directly linked to Article 43 of the Hague Regulations and also stipulates an obligation to respect domestic law. Because of the importance of his remarks, and because he concludes with specific reference to an example which is the subject of this petition, we wish to present them in full:

> The second Paragraph of Article 64 is couched in language of entitlement ("may"), rather than obligation, when conferring on the Occupying Power the authority to alter the preexisting legislation. However, like all other Contracting Parties of the Geneva Convention, the Occupying Power has unconditionally undertaken (in Article 1) "to respect and to ensure respect" for the Convention "in all circumstances". **The implementation of the Geneva Convention is not contingent on compatibility with domestic legislation. On the contrary, Contracting Parties have to enact any enabling domestic legislation required to give effect to the Geneva Convention**... If this is true of the Occupying Power's own legislation, it should a fortiori be true of the domestic laws in force in the occupied territory. **The Geneva Convention must prevail over any conflicting local legislation in the occupied territory. That means that the laws in force in the occupied territory must be adapted where necessary to the Geneva Convention** (and, indeed, to any other binding instrument of international humanitarian law).
>
> The distinction between what the Occupying Power may or must do in this field has significant practical repercussions when the Occupying Power is pleased with, and more than willing to strictly apply, some legislation — in force in the occupied territory at the commencement of the occupation — which is inconsistent with international humanitarian law. The leading illustration has been the Israeli reliance on Emergency Regulations, in force in the West Bank and the Gaza Strip on the eve of the occupation (and dating back to the British Mandate), permitting the authorities to destroy private property as a punitive measure, and not merely "where such destruction is rendered absolutely necessary by military operations" (as required by Article 53 of the Geneva Convention, based on Article 23(g) of the Hague Regulations)… **in the opinion of the present**

> **writer, the Occupying Power was bound to repeal or suspend these Regulations and certainly it could not legitimately rely on them**.
> (Emphases added)

Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, Program on Humanitarian Policy and Conflict Research, Harvard University, occasional paper series (Fall 2004).

128. **An approach whereby domestic law can grant the occupying force powers prohibited by an explicit norm of the laws of occupation, is comparable to an approach whereby the secondary legislator may empower an executive authority to take measures that are prohibited in the primary legislation pursuant to which the secondary legislation is enacted**.

Regulation 119 does not give rise to an "explicit contradiction"

129. The Petitioners will argue that in any case, the rule giving precedence to domestic law over international law in case of conflict between them does not apply in the case before us because there is no **explicit** contradiction. Since jurisprudence has developed a presumption in favor of compatibility between laws (more on this below), contradiction between domestic law and a customary international norm is insufficient, and an **explicit** contradiction is required for a finding that domestic law that breaches an international norm prevails.

130. In the well-known matter of CA 4289/98 (Tel-Aviv/Jaffa District) **Shulamit Shalom v. Attorney General**, IsrDC 58(3) 1 (Bassiouni), the Tel Aviv District Court ruled that for domestic legislation to override a rule of customary international law, the Court must expressly rule as such. Thus, for example, the fact that domestic law is silent on a matter is not sufficient for a finding that there is a contradiction.

131. As this is so, the Petitioners will argue that, in fact, there is no contradiction between the **discretionary power** granted by Regulation 119 and the international law norm prohibiting house demolitions in the circumstances under which they are done according to Israel's policy, since domestic law does not **explicitly** oblige Israel to demolish the houses.

The interpretive presumption of compatibility calls for an interpretation that rejects use of Regulation 119

132. As stated above, the power granted by Regulation 119 to the executive branch is a discretionary power rather than a norm of obligatory law. In this case, the *interpretive presumption* of compatibility must be applied, and will significantly impact said administrative discretion.

133. According to the presumption of compatibility, the Court "will interpret a local statute, if its contents do not demand otherwise, in accordance with the rules of public international law" (the remarks of Justice Landau in HCJ 302/72 **Hilo et al. v. the Government of Israel et al.** IsrSC 27(2) 169, 177. The presumption also states that "a local statutory provision, which is open to equivocal construction and whose content does not demand another construction, must be construed in accordance with the rules of public international law (CA 336/61 **Eichmann v. Attorney General**, IsrSC 16 (3) 2033, 2040). For the presumption of compatibility in the laws of other countries see also:

Oppenheim, INTERNATIONAL LAW (9th edition) (Volume I), §20

134. The presumption is clearly even more significant when the "local" law being interpreted is not an Israeli Knesset law but rather the law of a foreign legislator.

135. Therefore, the position of the Petitioners is that the *interpretive presumption* of compatibility necessitates an interpretation of Regulation 119 that is compatible with the prohibitions international law imposes on the destruction of property belonging to protected persons when such is not required for military operations and on collective punishment.

I. Use of Regulation 119 constitutes prohibited collective punishment

What is collective punishment and what does it have to do with deterrence

136. Jurisprudence on the subject of this petition often mentions the State's position that house demolitions under Regulation 119 are not a matter of "punishment" but of "deterrence".

137. But the argument that this is an act of "deterrence" and therefore not "punitive" assumes that the difference between the two lies in the **motivation of the party applying the sanction**, that is, the mental element of the decision to demolish.

138. However, this is not the test, certainly not when the deterrent effect is pursued by deliberately harming innocents. From the dawn of history armies have used barbaric means to harm innocents because of the actions of a few in order to "teach a lesson" (or in the Respondents' words: "to deter") and to frighten future plotters of "terrorist activity" into abandoning their plans.

139. The prohibition against collective punishment was not meant to prevent bad intentions but bad results. The rationale is to avoid causing harm to people for the actions of others. **Therefore, prohibited collective punishment includes any action aimed at extracting a significant price from the civilian population for the actions of individuals.** The commentary of the ICRC on the Geneva Conventions clearly states that punishment is not just a criminal sanction, as we have already quoted above. Because of the importance of this matter, we present it here again:

> The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.

COMMENTARY ON ADDITIONAL PROTOCOL I OF 1977 TO THE GENEVA CONVENTIONS OF 1949, p. 874, para. 3055 (Jean Pictet ed. 1987).

140. Even those who use the term "punishment" narrowly in the context of collective punishment, view house demolitions as a punitive act because they believe the definition of collective punishment includes actions that **deny the population a right that is protected in conventions governing the laws of war**. The right to shelter and the right to property are clearly protected by international humanitarian law.

141. For more on the ruling, which is often repeated in jurisprudence, that the Regulation 119 sanction is a measure of deterrence, rather than punishment, see the comments made by Honorable Justice Mazuz in **HCJ 7220/15 'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015), paragraph 8.

142. In light of the above, from the point of view of the occupants of the demolished houses who were not involved in the act attributed to their family member, which was the reason for issuing the

military order under Regulation 119 – the demolition is an act of punishment in the meaning of the term in the context of the prohibition on collective punishment, as specified below.

The prohibition on collective punishment in international law

143. The prohibition on collective punishment has existed in international law from early on. In fact, the imposition of collective punishment was recognized as a war crime immediately after World War I in the context of the report of the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* established by the Paris Conference in 1919.

On this matter see:

J.M. Henckaerts & L. Doswald-Beck, CUSTOMARY INTERNATIONAL LAW 374-375 (Cambridge, 2005).

144. Today, the prohibition against collective punishment is considered a customary prohibition of humanitarian international law enshrined in Article 33(1) of the Fourth Geneva Convention, which states:

> 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.

145. The prohibition on collective punishment had already been enshrined in Article 50 of the Hague Regulations concerning the Laws and Customs of War on Land 1907, which states:

> No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

146. According to the official commentary of the ICRC on the Fourth Geneva Convention, the prohibition on collective punishment does not refer only to penalties ordered by a court in criminal proceedings, but to punishments of any other kind imposed on an individual or group for acts they did not commit. On this matter see:

COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 225 (Jean Pictet ed. 1958).

147. It is further explained that the purpose of Article 33(1) is to limit the interpretation of the final clause of Article 50 of the Hague Regulations ("for which acts they cannot be regarded as jointly and severally responsible"), the wording of which, one might argue, does not preclude the possibility that the population could bear some responsibility for an individual (Pictet, 1958: 225).

148. The prohibition is also anchored in Article 75 of the first protocol of the Fourth Geneva Convention and the explanatory notes for this article strongly emphasize that it is to be interpreted in the *broadest possible way*:

> The concept of collective punishment must be understood in the broadest sense: it covers not only legal sentences but sanctions and harassment of any sort, administrative, by police action or otherwise.

COMMENTARY ON ADDITIONAL PROTOCOL I OF 1977 TO THE GENEVA CONVENTIONS OF 1949, p. 874, para. 3055 (Jean Pictet ed. 1987) 143.

149. Thus, the prohibition on collective punishment is a basic foundation of international humanitarian law, and specifically – the laws of occupation. **It suffers no exceptions** and it covers every type of sanction imposed on innocents in response to the actions of individuals, other than as a preventative action with respect to same individuals (such as declaring a closed military zone or restricting on movement during a search for terrorists).

The prohibition on collective punishment in human rights law

150. As is known, Israel, in its operations in the West Bank, is also bound by the norms established in international human rights law including the norms established in the International Covenant on Civil and Political Rights, 1966 (ICCPR). The applicability of international human rights law to Israel's regime in the West Bank was confirmed in the International Court of Justice advisory opinion on the separation wall (see: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, 9 July 2004, 43 I.L.M. 1009) and also the judgments of this Honorable Court (see, for example, HCJ 7957/04 **Mara'abe et al. v. The Prime Minister of Israel et al.**, TakSC 2005 (3) 3333, para. 24; HCJ 3239/02 **Marab v. IDF Commander in the West Bank**, TakSC 2003(1) 937; HCJ 9132/07 **al-Bassiuni vs. Prime Minister**, TakSC 2008(1) 1213.

151. The ICRC has determined that despite the fact that there is no explicit prohibition on collective punishment in human rights law as there is in international humanitarian law as detailed above, the imposition of collective punishment could be a breach of specific rights anchored in the ICCPR, including the right to personal freedom and personal security, and the right to due process. See:

J.M. Henckaerts & L. Doswald-Beck, CUSTOMARY INTERNATIONAL LAW, 374-375 (Cambridge, 2005)

152. As is known, Article 4 of the ICCPR allows suspending of the provisions of the Covenant in emergency situations and determines:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

153. The use of Regulation 119 of the Defense (Emergency) Regulations could ostensibly be justified on the basis of the "state of emergency" exemption. However, in its interpretation of Article 4 (General Comment 29), the UN Human Rights Committee determined regarding this matter that the allowances the Convention makes for a state of emergency can never be used to justify a breach of humanitarian law such as, **for example, the imposition of collective punishment** in a departure from basic principle of due process. See:

Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21Rev.1/Add.11 (2001)

154. It is not surprising, therefore, that the prohibition against collective punishment emanates also from international human rights law. The prohibition is so substantial that these laws prohibit collective punishment even during a state of emergency, a time when the exercise of some of the rights enshrined in human rights law may be suspended.

II. Application: The implementation of Regulation 119 constitutes prohibited collective punishment

155. As stated in the section in which we examined what "punishment" is in the context of the prohibition against collective punishment: punishment is not just criminal penalty, but any sanction, any impingement on a vested right, imposed on people for the actions of others. Therefore, house demolitions under Regulation 119 clearly constitute punishment since they harm a web of rights (property, housing, dignity, etc.).

156. It is also clear that, given the fact that this "punishment" is not confined to those responsible for the terrorist act because of which the house was chosen, it is collective punishment, in other words, punishment that harms not only the person responsible but also those close to him – household members, neighbors, relatives.

157. The conclusion that the use of Regulation 119 constitutes collective punishment is shared by many scholars who have examined and written about this policy. See for example:

Dan Simon, The Demolition of Homes in the Israeli Occupied Territories, 19 YALE J. INT'L L. 1, 53-65 (1949);

David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (2002), p. 147-153;

Martin B. Carroll, The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of its Legality in International Law, 11 MICH. J. INT'L. L. 1195, 1213-1217 (1990)

Shane Darcy, Punitive House Demolitions, the Prohibition of Collective Punishment and the Supreme Court of Israel, 21 PENN. ST. INT'L L. REV. 477 505-507 (2003);

Brian Farrell, Israeli Demolition of Palestinian Houses as a Punitive Measure: Applications of International Law to Regulation 119, 28 BROOK. J. INT'L L. 871, 930 (2003)

Ralph Ruebner, Democracy, Judicial Review and the Rule of Law in the Age of Terrorism; The Experience of Israel – A Comparative Perspective, 31 GA. J. INT'L & COMP. L. 493, 507 (2003);

Yoram Dinstein, The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses, 29 ISR. Y.B. HUM. RTS. 285, 296 (1999).

III. Use of Regulation 119 constitutes a violation of the prohibition on the demolition of houses belonging to protected persons

The principle forbidding the demolition of private property belonging to the protected population in an occupied territory

158. The prohibition against unnecessary destruction in time of war is a customary principle in international law and anchored in Article 23(g) of the Hague Regulations whereby:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden [t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

The prohibition on the destruction of private property belonging to protected persons in an occupied territory is anchored in Article 53 of the Fourth Geneva Convention which stipulates:

> 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.

159. Like the prohibition against collective punishment, the prohibition on arbitrary destruction of property as a form of deterrence or punishment is an established customary principle in international law. Thus, for example, as early as 1947, a judgment issued by the French Military Tribunal in Dijon that the destruction of houses (by fire in this case), even though carried out in response to an insurgency, constituted a breach of Article 23 of the Hague Regulations and was therefore a crime under French criminal law (See: *Trial of Franz Holstein and twenty-three others*, Permanent Military Tribunal at Dijon, case no. 46, February 3rd, 1947).

160. As stated in the final clause of Article 53, the prohibition against the destruction of property applies unless there are "rendered absolutely necessary by military operations". The term "military operations" has been interpreted by the ICRC as "the movements, maneuvers and actions of any sort taken by the armed forces with a view to combat" [see: COMMENTARY ON ADDITIONAL PROTOCOL I OF 1977 TO THE GENEVA CONVENTIONS OF 1949, p. 67, para. 152 (Jean Pictet ed. 1987).

161. In other words – the exception regarding military necessity is an **operational** exception concerning necessary demolition during military operations.

162. Accordingly, the official ICRC commentary on Article 53 states that the occupying power must interpret the exception "rendered absolutely necessary by military operations" in a reasonable manner, observing proportionality and weighing the military advantage against the damage that will be caused, so that the occupying power does not make unscrupulous use of its power which would empty the article of all meaning. (See: COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTON OF CIVILIAN PERSONS IN TIMES OF WAR 302 (Jean Pictet ed. 1958).

163. Therefore, there is a connection between the prohibition on destruction of property by the occupying power which is not absolutely necessary for military operations, as stipulated in Article 53 and the prohibition on reprisals against property stipulated in Article 33(1), (See Pictet, 1958, p. 301.) That is, it can be said that destruction of property that does not constitute an act that is absolutely necessary for military operations (thus breaching Article 53.), and that is carried out as a sanction against a person or a group for acts that they, themselves, did not commit, will be considered collective punishment in violation of Article 33(1)

164. Furthermore, there is broad consensus among scholars that the interpretation of the exclusionary clause in Article 53 of the Fourth Geneva Convention (which allegedly justifies the use of

Regulation 119 of the Defense Regulations) – is extremely restricted and does not include the demolition of houses for deterrence or punishment but only when necessary for a military operation.

On this matter, see inter alia:

Yoram Dinstein, The International Law of Belligerent Occupation and Human Rights, 8 ISR. Y.B. HUM. RTS. 104, 128 (1978);

David Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, 147 (2002);

Dan Simon, The Demolition of Homes in the Israeli Occupied Territories, 19 YALE J. INT'L L. 1, 68 (1994)

165. The policy of punitive house demolitions also infringes upon the right to due process, anchored in Articles 71-73 of the Fourth Geneva Convention. Furthermore, Article 147 of the Fourth Geneva Convention states that "extensive destruction and appropriation of property, not justified by military necessity" constitutes a grave breach of the provisions of the Convention as we will explain below.

166. Thus, the prohibition against damaging the private property of protected persons is a customary principle of international humanitarian law. The exception is restricted and focuses on situations in which the demolition is a necessary part of a military operation and carried out during such. A violation of the prohibition constitutes a grave breach of the Fourth Geneva Convention and therefore has important legal consequences that are considered below.

IV. The principle prohibiting the destruction of property belonging to protected persons in human rights law

167. The policy of punitive house demolitions primarily violates the right to housing anchored in many conventions including: Article 25(1) of the Universal Declaration of Human Rights (1948); Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); Article 17 of the International Covenant on Civil and Political Rights (1966); Article 5(5)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965); and Articles 16 and 27 of the Convention on the Rights of the Child (1989).

168. The destruction of private property can also be considered a violation of the prohibition against cruel, inhuman or degrading treatment as stated in Article 7 of the ICCPR as well as Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which allows no derogation under any circumstances.

169. The UN Committee against Torture addressed Israel's punitive house demolition policy and found that in certain instances the policy indeed reached the point of cruel, inhuman and degrading treatment and punishment, thus violating Article 16 of the Convention, (which Israel ratified in 1991). The Committee called on Israel to stop sealing and demolishing houses.[1] The committee reiterated this call in 2009.[2]

[1] *Conclusions and Recommendations of the Committee against Torture*, Israel, U.N. Doc. CAT/C/XXVII/Concl.5 (2001) ,paras. 6(j), 7(g).
[2] *Concluding Observations on Fourth Periodic Report Submitted by Israel*, CAT/C/ISR/CO/4, 23 of June 2009, para. 33.

> While recognizing the authority of the State party to demolish structures that may be considered legitimate military targets according to international humanitarian law, the Committee regrets the resumption by the State party of its policy of purely "punitive" house demolitions in East Jerusalem and the Gaza Strip despite its decision of 2005 to cease this practice. The State party should desist from its policies of house demolitions where they violate article 16 of the Convention.

170. In fact, the policy of punitive house demolitions for which Israel has become the standard bearer was denounced by the UN Human Rights Committee back in 1998.[3] The committee later demanded Israel desist from this policy as it constituted a violation of its ICCPR obligations.[4]4 These are the findings of the committee (emphasis added):

> While fully acknowledging the threat posed by terrorist activities in the Occupied Territories, the Committee deplores what it considers to be the partly punitive nature of the demolition of property and homes in the Occupied Territories. In the Committee's opinion, the demolition of property and houses of families, some of whose members were or are suspected of involvement in terrorist activities or suicide bombings, contravenes the obligation of the State party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art. 17), freedom to choose one's residence (art. 12), equality of all persons before the law and equal protection of the law (art. 26), and not to be subject to torture or cruel and inhuman treatment (art 7). The State party should cease forthwith the above practice.

171. In 2010 as well, the committee reiterated its concern that Israel was using unlawful punitive methods without considering less injurious deterrence measures:[5]

> The Committee is concerned that, despite its previous recommendation…the State party continues its practice of demolishing property and homes of families whose members were or are suspected of involvement in terrorist activities, without considering other less intrusive measures…

172. **The UN Human Rights Committee has just recently reiterated its position, when it expressed concern over the return to the Israeli house demolition policy seen since July 2014. The Committee repeated its call for Israel to desist immediately from the punitive house demolition policy, which is a breach of its international obligations**.[6]

---

[3] *Human Rights Committee, Concluding Observations of the Human Rights Committee*: Israel, UN Doc. CCPR/C/79/Add.93 (18 August 1998), para. 24.
[4] *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR (21 August 2003), para. 16.
[5] *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/C/ISR/CO/3 (29 July 2010), para. 17.
[6] *Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of Israel*, (adopted on 28 October 2014, advance unedited version- not yet published), para. 9

173. The UN Special Rapporteur on Adequate Housing also determined that the punitive house demolition policy constituted a grave breach of the right to an adequate standard of living and adequate housing enshrined in Article 11(1) of the ICESCR.[7] The UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories further found that Israel's house demolition policy constituted collective punishment (according to Article 33 of the Fourth Geneva Convention), since in most cases it was not necessary for military reasons (as required by Article 53 of the Convention,) and as a result, constituted a grave breach per Article 147 of the Convention.[8]

174. The principle that prohibits the destruction of private property was also addressed by the European Court for Human Rights which determined that the burning of occupied houses which were used for Kurdish underground activities by the Turkish security forces constituted, under the circumstances, cruel, inhuman and degrading treatment, thus violating Article 3 of the European Convention on Human Rights. The Court ruled that because of the circumstances of the incident, including the fact that the security forces did not give the occupants sufficient warning before destroying the house or any alternative or remedy to safeguard their personal safety, **the breach remained whether security forces perpetrated the act as a punitive or a deterrent measure**.[9]

175. Thus, demolishing the homes of suspected terrorists, with its consequences for the suspect's relatives, constitutes a blatant breach of a number of rights enshrined in international human rights law, including the right to housing and the right to be free of inhuman or degrading treatment or punishment.

International criminal law: the policy of demolishing the houses of protected persons as a war crime

176. The constitution of the International Criminal Court of 1998 (hereinafter: the "**Rome Statute**") includes the most current and comprehensive codification of all customary prohibitions violation of which is considered a war crime (See on this issue: Orna Ben-Naftali & Yuval Shany, **International Law between War and Peace**, (Ramot2006) ((Hebrew), p. 263 on). While Israel has yet to ratify the Rome Statute; the war crimes defined therein constitute grave and significant breaches of the customary norms of international humanitarian law, and as such are binding on Israel.

The war crime of extensive destruction of protected property

177. Article 8 of the Rome Statute codifies war crimes that constitute grave breaches per Article 147 of the Fourth Geneva Convention (Article 8(2)(a)), as well as other serious violations of the laws applicable to international armed conflict (Article 8(2)(b)).

178. The destruction of civilian property is a war crime under Article 8(2)(a)(iv) of the Rome Statute, which defines the crime as follows:

> Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

[7] Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr. Miloon Kothari, E/CN.4/2003/5/Add.1, 12 June 2002.
[8] Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, E/CN.4/2002/32, para. 31.
[9] *Selçuk and Asker v. Turkey*, ECHR judgment of 24 April 1998, p. 19; see additional judgment on this issue: *Akdivar v. Turkey* 23 Eur. Ct. H.R. 143, 189-90 (1997).

179. We hereby detail the components of this article, referring to the official commentary of the ICRC on the Rome Statute wherein Article 8(2)(a)(iv) is composed of seven elements:

a. Destruction of property;

b. The destruction is not justified by military necessity (of course, "military necessity" applies only to legal acts executed in accordance with the laws of war when the possibility of executing them is explicitly present. Military necessity cannot justify operations that are unlawful per se);

c. The destruction is extensive and perpetrated wantonly;

d. The property is protected under the Fourth Geneva Convention;

e. The perpetrator of the destruction is aware of the factual circumstances that established the protected status of the property under the Geneva Convention;

f. The destruction takes place as part of an international armed conflict (which includes occupation according to the Rome Statute);

g. The perpetrator was aware of the factual circumstances that establish the existence of an armed conflict

See: K. Dormann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY 81-86 (CAMBRIDGE, 2003).

180. This offense, as previously stated, is part of the group of grave breaches of the laws of war listed in Article 147 of the Fourth Geneva Convention. It has, however, been determined to be a violation of other rules of humanitarian law and has therefore been defined as a war crime pursuant to these rules as well (Article 154 of the Geneva Convention stipulates that the Convention is supplementary to the Hague Regulations, rather than subtractive. Therefore a violation of the Hague Regulations is also a violation of international humanitarian law.) Thus, the offense enshrines the prohibition against the destruction of property by the occupying power in occupied territory stipulated in Articles 53 of the Fourth Geneva Convention and 42-56 and 23(g) of the Hague Regulations discussed above.

181. The International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), addressed the question of the lawfulness of destroying property in occupied territory and was compelled to study the "military necessity" exclusion. True to the principle that the exclusion applies only to operational activities, in *Blaskic*, the ICTY determined the occupying power may not destroy movable or immovable property unless absolutely necessary for a military operation: An occupying Power is prohibited from destroying movable and immovable property except where such destruction is made <u>absolutely necessary by military operations</u>.

> An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations

See: ICTY Judgment, *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 157 190.

182. It was further established that:

> To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.

See: Blaskic, para. 157 and also in COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN [PERSONS IN TIMES OF WAR 601 (Jean Pictet ed. 1958).

183. In another case, the ICTY ruled that where occupied territory is concerned, only the following conditions need be met for destruction of property to be considered a war crime: The property is protected under Article 53 of the Fourth Geneva Convention; the destruction is extensive and not justified by military need.

See ICTY Judgment, The Prosecutor v. Dario Kordiac and Mario Cerkez, IT-95-IT-95-14/2, para. 335-341.

184. With regards to the mental element required for a violation of Article 8(2)(a)(iv), it was found that mens rea is satisfied when the accused acted with intent to destroy the property or with reckless disregard to the fact that the property might be destroyed (Kordiac, p.341).

185. In this context, we must examine the policy of using Regulation 119 as it has been discussed in depth in this petition.

a. Israel's house demolition policy causes destruction of property that is undoubtedly protected as civilian property.

b. Israel is obviously aware of the fact that this is protected property in an occupied territory.

c. The destruction is extensive. It is not confined to a few individual houses, but rather the result of a systematic, official policy carried out deliberately and for punitive purposes, a policy that has seen the demolition of hundreds of homes belonging to people who committed no crime, while the authorities were aware that they had committed no crime.

d. Furthermore, house demolitions are not justified and cannot be justified under any circumstances by "military necessity", as the concept is currently defined in customary law as an **operational requirement** as we have discussed at length above.

<u>The war crime of collective punishment</u>

186. In addition to war crimes that constitute grave breaches of the Geneva Convention, the Rome Statute established in Article 8(2)(b) a list of other serious violations of the laws applicable to international armed conflict, which also constitute war crimes.

187. As discussed in detail above, the prohibition on collective punishment anchored in Article 50 of The Hague Regulations and Article 33(1) of the Geneva Convention is a long-standing customary prohibition which allows for no exceptions. Collective punishment also constitutes a war crime under the constitution of the International Criminal Tribunal for Rwanda (Article 4(b)):

> Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II The International Tribunal for Rwanda

> shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> …
>
> b. Collective punishments
>
> …

Statute of the International Tribunal for Rwanda, Security Council Resolution 955, U.N. Doc. S/Res/955 (1994).

188. An identical version of the above article defining collective punishment as a war crime was included in Article 3(b) of the Statute of the Special Court for Sierra Leone (See: Statute of the Special Court for Sierra Leone, Security Council Resolution 1315, U.N. Doc. S/Res/1315 (2000)).

189. In addition, the official ICRC commentary on the Fourth Geneva Convention emphasizes that even though in Article 147 does not list collective punishment as a grave breach, it may be considered as such.

See: COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR (Jean Pictet ed. 1958).

190. In view of the above, there is a real danger that the policy of using the power granted by Regulation 119 constitutes the war crime of extensive destruction unjustified by military necessity and there is also a real danger that this policy constitutes the war crime of collective punishment. Over one of these – the war crime of extensive destruction to protected property – the International Criminal Court has material jurisdiction.

The Palestinian Authority accession to the Rome Statute

191. On December 31, 2014, the Palestinian Authority acceded to the Rome Statue, by making a declaration under Section 3(12) of the Rome Statute. In its accession declaration, the Palestinian government established June 13, 2014 as the date of commencement of jurisdiction. In other words, jurisdiction shall apply with respect to suspected offenses committed from that day forward by Palestinian nationals or by any person within the Palestinian territories. The accession of the Palestinian Authority to the Rome Statute fulfills one of the main conditions for making Israelis subject to international criminal jurisdiction.

V. The use of Regulation 119 violates the principle of proportionality in international and Israeli law

The principal of proportionality in international and Israeli law

192. Below we argue that the use of Regulation 119 – which constitutes use of force by the occupying power as part of an international armed conflict – comes under the laws governing use of force, including the principle of proportionality. Furthermore, the principle of proportionality has a parallel in Israeli law (See; HCJ 7957/04 **Mara'abe et al. v. The Prime Minister of Israel et al.**,

TakSC 2005 (3) 3333, p. 3340) (2005) 3333 (3) – the matter of the separation fence in the Alfei Menashe enclave).

193. Alongside the principle of distinction between combatants and non-combatants, which is a fundamental principle in the international laws war, the principle of proportionality also stands as a central general principle of these laws.

194. The principle of proportionality prohibits attacks on legitimate targets (combatants and military objects), if the attack is expected to result in loss of civilian life, civilian injuries and/or other civilian damage exceeding the military advantage expected from the attack.

195. This principle, though more complex than the principle of distinction, sends a very important message and puts significant restraint on the methods of warfare and the types of weapons that are permissible when force is used. The military commander must do more than distinguish between legitimate and illegitimate targets. He must take into account the harm that might be caused to civilians and civilian objects by the use of force against legitimate targets – this is the significance of the principle, and it too is accepted today in customary international law (See: J.M. Henckaerts & L. Doswald-Beck CUSTOMARY INTERNATIONAL LAW 46 (Cambridge, 2005)).

196. We will not quote from all the military handbooks, all of which address the principle of proportionality. However, we will present, verbatim, Article 51(5)(B) of the First Protocol of the Geneva Convention, which is widely considered by scholars who study the subject as the article that summarizes the issue and precisely defines the principle, by way of defining indiscriminate attacks (**which are prohibited attacks**):

> 5. Among others, the following types of attacks are to be considered as indiscriminate:
>
> …
>
> b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(See also Article 51(4) which prohibits "indiscriminate" attacks).

197. See also the language of the right to self-defense established in Article 51 of the UN Charter, which also prohibits disproportionate responses.

198. This Honorable Court, in its extensive jurisprudence in matters of war, has also addressed this principle and has determined that not only is it a principle of international law and specifically of the laws of occupation, but also a principle of Israeli law (See: HCJ 2056/04 **Beit Sourik Village Council et al. v. The Government of Israel et al.**, TakSC paras. 36 and on; HCJ 7957/04 **Mara'abe et al. v. The Prime Minister of Israel et al.**, TakSC 2005 (3) 3333, p. 3340) (2005) 3333 (3); HCJ 769/02 **The Public Committee against Torture in Israel et al. v. The Government of Israel et al.** TakSC 2006(4), 3958, para. 45).

199. In the jurisprudence of this Honorable Court, to determine whether a governmental act is proportionate, a three-phase test is applied: Is there a rational connection between the means chosen and the objective? Has the least injurious means been chosen from the spectrum of means that can

be employed to achieve the objective? Is the harm caused to the protected interest greater than the benefit to the interest being sought in "absolute values" (see the **Beit Sourik**, para. 41).

Use of Regulation 119 to demolish the homes of suspected terrorists is inherently disproportionate

200. The Petitioners will argue that the use of Regulation 119 to demolish suspects' homes is disproportionate.

201. The harm caused to innocent civilians is, obviously, massive. There is no need to elaborate on what a home means to a person. A home is not just the physical place where a person lives. It contains his memories, expresses his personality and gives him security and protection.

202. In contrast, not only is there no proven military advantage to the house demolition policy but, as stated in the factual section of this petition, **a military commission determined that the policy does not create the hoped-for deterrence**.

203. Under these circumstances, it is clear that the principle of proportionality is not achieved and, in fact, the policy fails to meet a single one of the principle's tests: there is no rational connection between the means and the end and there is no proportionality in the narrow sense.

204. In light of all the above, the Petitioners will argue that the house demolition policy pursuant to Regulation 119 violates the principle of proportionality in the use of force as established in the laws of international conflict and in Israeli administrative law.

VI. Use of Regulation 119 discriminates between Palestinians and Jews

205. The Petitioners also argue that the practice by which Regulation 119 is used is discriminatory in that it is exclusively reserved for cases concerning Palestinians rather than Jews.

206. Alas, there are terrorism, violence and terrible murders in our area, directed and perpetrated by individuals and organizations of all nationalities. However, Regulation 119 has never been used as a deterrent/punitive sanction against Jews.

207. We do not, Heaven forbid, seek to have the practice extended to apply to Jews as well. Our position of principle against this policy is blind to the national identity of its victims. But we do believe that the systemic, and in fact, openly admitted, discrimination with which the policy is applied, also gives rise to unlawfulness that demands its revocation.

208. There is no need to elaborate on the cause of discrimination in our administrative and constitutional law. A discriminatory practice is an unacceptable practice, and in the case at hand, there is no dispute that this grave practice is aimed only at "deterring" Palestinians.

209. The argument that has been made, for instance, in the Respondents' response to a similar argument made in HCJ 5290/14 **Qawasmeh et al. v. Military Commander et al.** (reported in Nevo, August 11, 2014), that the onus of proving that a distinction is based on immaterial considerations lies with the person claiming selective enforcement (para. 30 of the judgment) is, with due respect – problematic.

210. This is not an issue of selective enforcement, as the matter at hand does not concern a practice of enforcement, but rather the imposition of a deterring sanction. On this issue, once a gap that is, on the face of it, discriminatory, is proven, the onus is, in fact, on the authority to show that this is not so.

211. It has been argued that there is no need for "deterrence" in the Jewish sector. See, on this issue, Honorable Justice Sohlberg's statement that the Jewish public is, in general, deterred, remains so, and is not subjected to incitement, and his comments about the difference in the communities' attitudes: "unrelenting and decisive condemnation from wall to wall in the Jewish sector, which is not the case on the other side" (HCJ 7040/15 **Fadel Hamed v. IDF Commander in the West Bank** (November 12, 2015), para 2 of the opinion of Justice Sohlberg).

212. With due respect, this claim must be substantially supported, which has not been the case. In any event, we recall and clarify that our argument does not seek to have the unlawful practice of demolishing and/or sealing homes applied to the Jewish sector as well. Our argument is that its discriminatory implementation creates an additional, independent unlawfulness that also demands its revocation.

Specific arguments:

Impingement of the right to a hearing and the right to due process:

213. The status of the right to a hearing needs no sophisticated arguments or a myriad citations from case law. It is part and parcel to the principles of natural justice which necessitates that an administrative authority refrain from harming a person unless it has given said person a proper chance to make his or her case. The rule that any person who may be harmed as a result of the decision of an administrative authority has a right to be heard is a corollary. On this, see: Yitzhak Zamir, **The Administrative Authority**, p. 793 (5756) (hereinafter: **Zamir**)), and HCJ 1661/05 **Gaza Coast Regional Council et al. v. Knesset of Israel et al.**, TakSC 2005(2), 2595, para. 420:

> We shall agree, of course, that a person's right to present his arguments to the authority before a decision that may harm him is made, is an exalted right, a right that derives from the fairness required in human relations, and has been with us from days gone by.

214. It is further emphasized that as an inherent part of the hearing procedure, the Respondents are obligated to provide the Petitioners with all documents and information on which their decision is based. So, for example, President (emeritus) Barak, ruled in LCA 291/99 **D.N.D Jerusalem Stone Supplies v. VAT Director**, IsrDC 58(4) 221, 232:

> The individual's right to view documents held by an administrative authority that were used by it to make a decision in his matter is one of the basic tenets of democracy. This is the "individual right to review", which derives mainly from the right to argue one's case and the administration's obligation to practice transparency (see, **Zamir**, pp. 875-886). Indeed, "the rule that emerges from case law is that documents received by a public authority through use of a power bestowed upon it by law, must be open and available to the relevant party.

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

> Without the right to access documents, the right to be heard will never be complete, and without the right to be heard, the decision of the administrative may not be complete, and afflicted by a flaw.

So too, **Zamir**, in p. 819, argued: "**Arguing before the administrative authority self-evidently includes presenting evidence… Without the ability to add or disprove facts, the hearing may be futile".**

215. Despite the Petitioners' serious arguments, the Respondent's decision was issued summarily, without a proper review of all relevant considerations, in a manner that suggests the hearing is a mere formality, devoid of any real content.

216. Moreover, the Respondents did not grant the Petitioners' request to receive all materials on which the plan to issue a forfeiture and demolition order is based, in a manner that allows them to make their full arguments on the issue, **before a decision is issued**, without any pertinent explanation.

217. With respect to the evidence of Bilal's involvement in the actions attributed to him, as stated, the only materials that were provided were the indictment and several police statements, though there was no impediment to providing the full investigation file to the Petitioners, thus allowing them to exhaust the right to argue appropriately and as required by law.

218. Nor is it possible to overstate the importance of the engineering report and the execution plan to the fulfilment of the Respondents' obligation to hold a hearing, and the Petitioners' right to due process. Without these documents, and without concrete information about the demolition plan and its ramifications, the Petitioners are unjustly and without cause denied the ability to present a their own expert opinion that properly addresses the specific risks stemming from the demolition of their home and allows Petitioners' counsel and the Honorable Court to assess the proportionality of the Respondents' actions.

219. While in **Hamed**, the Court did rule that any decision made by the Respondent not to provide the engineering should generally not be interfered with, in HCJ HCJ 5839/15 **Sidr v. IDF Commander of the West Bank** (October 15, 2015, published in Nevo (hereinafter: **Sidr**)), the Respondents enclosed the requested report **on their own initiative**, such that there is no justification not to do so in the case at hand, as required by the rules of good governance.

220. In the circumstances, denying the right to argue and the right to a hearing constitutes a serious, substantive flaw that strikes at the root of the administrative proceeding, and this reason alone suffices to justify the revocation of the order.

Bilal's responsibility has not been sufficiently proven:

221. Given the enormity of the harm caused by use of Regulation 119, it should not be used against the family of a person who is subject to pending criminal proceedings. The Respondent may make decisions based on administrative evidence, but these must meet the test of reasonableness and he must give them reasonable weight, given the issue, the content and the circumstances. The weight evidence must have in order to form the basis of a decision largely reflects the essence of the right or interest that is expected to be harmed as a result of the decision and the extent of the impingement on a fundamental right (**Zamir**, p. 755). On this issue, the remarks of Honorable Justice Theodore Or in HCJ 3379/03 **Aviva Mustaky et 372 al. v. State Attorney's Office**, IsrSC 58(3) 865, which emphasize the direct correlation between compromising the right to argue and lack of reasonableness in the Respondent's decision:

> It is not enough for the administrative authority to have evidence whose content confirms its conclusions. If they harm existing rights, including property rights, they must be clear, unequivocal and

> convincing in order to form the basis for a decision. The more important the right that may be harmed, the stronger the evidence is required to be. The strength of the evidence may be compromised or weakened if the victim of the decision is not given the opportunity to face the evidence and refute it. This is, for example, the case of confidential evidence that is not disclosed to persons who may be harmed by the decision. In such a case, the authority must be aware of the fact that the confidential evidentiary material was not fully reviewed or addressed by those who stand to be harmed by it, and give this fact weight.

222. See also on this matter, HCJ 297/82 **Berger v. Minister of Interior**, IsrSC 37(3) 29, 48-49, where the Court addressed the importance of a pertinent, fair and methodical examination that addresses all aspects and relevant claims, including explanations and figures that form an alternative to those in the possession of the authority. The scholar Zamir, expanded on this issue, holding that the authority has a **positive obligation** to take all the relevant considerations into account and that "**ignoring a relevant consideration is a flaw that could invalidate the decision**". (**Zamir**, p. 742; see also HCJ 2013/91 **Ramla Municipality v. Minister of Interior**, IsrSC 46(1) 271, 279).

223. The result of the attack perpetrated on October 3, 2015 is terrible and regrettable. However, based on the indictment served against Bilal, and the police statements provided, the attack was perpetrated by three others, not by Bilal who was never present at the scene. Therefore, attributing responsibility to Bilal as a main perpetrator is a far-reaching step that raises real difficulties both on the criminal and the administrative levels.

224. Moreover, since the Petitioners were not given all the material concerning Bilal, including the investigative material and the transcripts of hearings held in his matter, they are unable to make a full argument with respect to sufficient proof of Bilal's responsibility. The Petitioners insist on their request to receive all the material and request to supplement their arguments on this issue upon receipt thereof. Without the aforesaid material, the Petitioners argue that the selective transfer of documents by the Respondents cannot be considered as meeting the burden, such that at this stage, it is not possible to assert with the required level of certainty that there is clear, unequivocal and convincing evidence that Bilal had indeed committed the offenses attributed to him. It follows that there is no basis for employing Regulation 119, certainly not with respect to relatives who are uninvolved, protected residents. This is a clear case in which the administrative authority should not be used prior to a criminal conviction.

Disproportionate decision

225. In accordance with the jurisprudence of this Honorable Court, and given the serious violation of fundamental rights, Regulation 119 must be applied in a restricted fashion, subject to reasonable discretion and the tests of proportionality. The following was held in HCJ 4597/14 **'Awawdeh et al. v. West Bank Military Commander** (reported in Nevo, July 1, 2014) (hereinafter: **'Awawdeh**):

> [I]n its interpretation of the [Regulation 119], this Court limited the implementation and application thereof and held that the military commander must exercise reasonable discretion while using his authority thereunder and act proportionately […] This ruling was

> reinforced by the enactment of the Basic Law: Human Dignity and Liberty. This Court held that although the 'validity of law' clause applied to the regulation, it should be interpreted in the spirit of the Basic Laws […] There is no dispute that the exercise of the authority granted by Regulation 119 violates human rights. It violates the right to own property and the right to human dignity. Therefore, as held, the exercise of the authority must be proportionate.

226. In HCJ 769/02 **The Public Committee against Torture in Israel v. The Government of Israel** (December 14, 2006, reported in Nevo) (hereinafter: **PCATI**), the Court stressed that the premise for examining proportionality is the rights of innocent civilians:

> However, even under the difficult conditions of combating terrorism, the distinction between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeted" in "targeted killing". That is the meaning of the proportionality requirement which my colleague, President Barak, addressed at length.
>
> Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians. 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. When the rights of the civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of hostilities.
>
> That duty is also part of the additional normative system which applies to armed conflict: it is part of the moral code of the state and the fundamental principle of protecting human dignity. (p. 61, emphases added, G.L.)

227. Indeed, in a regime that respects human rights and protects human dignity, Regulation 119 is not used. If, however, this draconian measure is in use, it must only be employed as a last resort.

228. In our matter, there is no rational connection between the means and the alleged purpose, i.e. deterring potential terrorists and maintaining the security of the area. Given the fatal impingement of the constitutional rights of the Petitioners, their relatives and other persons living in the same building and an adjacent one, and given the particular circumstances of the case, as described above, a high level of proof of the efficacy of such a serious measure is required.

229. And yet, not only is there no evidence that house demolitions actually serve the stated purpose of the act, but, as stated above, security agencies had themselves reached the conclusion that the policy of demolishing the homes of terrorists' relatives has not proven itself as a deterrent, and that the harm caused by the demolitions outweighs their benefit.

230. We recall that in the judgment handed down in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014, reported in Nevo), which concerned circumstances similar to the ones in the case at hand, a majority of the justices on the panel ruled

that in future cases of house demolitions, the military will be required to present figures on the alleged efficacy of house demolitions as a deterrent. As stated by Honorable Vice President, E. Rubinstein:

> 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.

See also para. 6 of the opinion of Justice Hayut.

231. Despite the data presented *ex parte* in **Hamed**, such research should have been conducted immediately, rather than pressing on with a house demolition policy that is not based on an appropriate factual assessment of its outcomes and publication thereof. Therefore, so long as the Respondents fail to provide a current expert opinion on the efficacy of house demolitions, they fail to meet the test of rational connection.

232. It is also necessary to examine thoroughly whether the means chosen is the most appropriate and least injurious, particularly in view of the fact that even according to the Respondents, the measure involves demolishing an entire apartment which is home to innocents. It is not the Petitioners' role to suggest alternatives, certainly not when they object to the entire demolition. However, the Respondents do have a duty to consider alternative measures, as they have before, and in accordance to the rulings made by the Court in the matter, such as sealing a relevant room, an action that is expected to be less injurious than the suggested measure (see, e.g. HCJ 2722/92 **al-'Amrin v. Military Commander of the Gaza Strip,** IsrLR 1 [1992-4]).

233. Given what is stated in the engineer's report, it is clear that the execution of the order as planned is unreasonable and disproportionate also given the immense, irreparable damage expected to be caused to the Petitioners, their families, other renters in the building and in the adjacent building. In these circumstances, the fact that the measure "might" achieve the purpose of deterrence against further acts of violence is insufficient. The harm is certain and serious and a high level of proof of the efficacy of such a serious measure is required. Thus, the Respondent's decision fails to meet the test of proportionality in the narrow sense.

234. The blatant disproportionality of the Respondent's decision is exacerbated by the fact that Bilal, if convicted, will likely receive a serious penalty which may itself constitute sufficient deterrence for other potential terrorists. In this context, attention must be given to the fact that the attack that is the subject of the petition has already led to three, issued and approved, forfeiture and demolition orders against the three men who allegedly perpetrated the actual attack. It is, therefore, possible to say that there has already been a serious, massive response to the attack, such that admitting this petition would not result in a situation wherein there is no retaliation for the attack. In the circumstances, it is clear that demolishing a fourth home for the same incident, the home of a person who, as stated, was never present during the incident, would be patently disproportionate and unreasonable and would amount to an act of vindictive penalization and an exaggerated reaction while harming innocents, which cannot be considered proportionate. It was not for naught that Honorable Justice Vogelman noted in **Sidr** that:

> Employing the authority under Regulation 119 when no sufficient proof has been provided that the family of the suspect were involved in hostile activity – is disproportionate.

235. On this point, Honorable Justice Mazuz has recently elaborated, albeit in a dissenting opinion, in **HCJ 8150/15 Abu Jamal v. GOC Home Front Command** (December 22, 2015, reported in Nevo):

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

Honorable Justice Mazuz concludes with the unequivocal statement that:

> In my opinion, a sanction which directs itself to harm innocent people, cannot be upheld, whether we define the flaw as a violation of right, act in excess of 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).

236. As stated, in addition to this, harming innocents and collective punishment also carry the negative result of increasing hostility and hatred, and instilling a sense that Israel ascribes no value to the safety and well being of residents of the OPT, even if they are innocent and take no part in hostile activity. Such large scale, indiscriminate harm, unlike harm targeting those who are guilty and worthy of punishment, may instill feelings of despair and readiness for martyrdom, rather than fear. As such, the indiscriminate destruction planned by the Respondents may, in fact, contribute to a sense, among the suspect's immediate and more remote circles, that they have nothing to lose and may actually encourage harm to Israel's security interests and further attacks. It appears that this measure is not intended for deterrence but rather to appease public opinion in Israel which demands revenge.

237. On this issue, the statements made by Honorable Justice Baron in **Mar'i** are relevant:

> My view is that the doubts regarding the deterring power house demolitions produce not only a duty for constant self-examination on the part of security officials, but also serve as a significant consideration for the Court when examining the proportionality of the use the military commander makes of this measure. This is particularly the case given the provisions of Basic Law: Human Dignity and Liberty and the limitations clause therein…
>
> …As a rule, using the power to demolish homes based on the severity of the acts attributed to the terrorist alone, without giving any weight to the degree of involvement by family members in said acts, I believe, fails to meet the test of proportionality in the narrow sense in circumstances where the deterring power of demolitions is, at the least, not unequivocal…
>
> Naturally, in situations like the current one, when we constantly hear news of terrible violent acts perpetrated for nationalistic reasons and out of pure hatred, the public wants revenge and punishment. These are human emotions, brought on by the impossible predicament we are in. However, these emotions cannot be assuaged by house demolitions, which, as stated, are meant to deter the next terrorist attack, not serve as punishment.

Demolishing the Petitioners' home is contrary to the principle of the child's best interest

238. There is no need to elaborate on the child's best interest as a paramount interest. Its supremacy was repeatedly recognized in Israeli law, and it has been repeatedly clarified that this principle might trump other interests. For instance, in CFH 7015/94 **Attorney General v. A.**, IsrSC 50(1) 48, 119: "The best interest of the child is a paramount consideration, the decisive consideration. Indeed, other considerations will be present alongside it… but all of these are secondary considerations, and all will bow to the consideration of the child's best interest". See also CA 549/75 **A. v. Attorney General**, IsrSC 30(1) 459, 465: "There is no judicial matter that concerns minors wherein the best interest of these minors is not the primary and main consideration". More than anything, this is a basic human consideration.

239. As noted in the section describing the facts, two minors live in the Petitioners' home. The demolition of this home and its impact would cause them great suffering and severely undermine their dignity. What crime have these minors committed that they must see their home demolished, as they become homeless? Other minors, including the children of Petitioner 2, are also expected to suffer harm should the structure be damaged. This injury to minors runs contrary to Israel's obligation under the Convention on the Rights of the Child, particularly Article 2(2):

> 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:

1. 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
…
4. 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 issue of the application on international human rights conventions in the OPT see **PCATI** and the authorities cited therein.

240. It is stressed that Article 38(4) of the Convention imposes a positive obligation on the Respondents: in addition to the prohibition on breaching international humanitarian law, imposed in Article 38(1), Article 38(4) requires taking measures toward ensuring children are protected in such situations. In this, the Respondents' transgression is twofold.

241. The Respondents have not seen fit to address these considerations, despite the arguments raised by the Petitioners in the objection and the duty incumbent upon every arm of the authority when making decisions that affect children. For this reason too, the Respondent's decision is unacceptable and must be revoked.

Conclusion

242. House demolitions under Regulation 119 have been part of the Israeli occupation since its inception. This is an extreme, draconian power that has attracted scathing criticism from legal experts, intellectuals, public figures, researches, academics and international institutions.

243. This power has left hundreds of families and thousands of people homeless, all for the actions of an individual, and it is an affront to the most basic sense of justice.

244. The time has come, particularly in light of the calls made by justices of this Honorable Court, to revisit the issue of the legality of this policy.

245. Aside from the moral reasons for outlawing use of the power to forfeit and demolish homes under Regulation 119 in general, the specific circumstances of the case herein are enough to justify the revocation of the order which is the subject of the petition, given the substantive flaws therein, the extreme unreasonableness and disproportionality of the order and the severe impingement on the rights of the Petitioners, their families and other innocent residents.

246. In light of all the above, we ask the Honorable Court to issue an order nisi as requested at the beginning of this petition, and upon receiving the response of the Respondents and holding a hearing, to render the order absolute.

247. Given the urgency of the petition and the short time available to the Petitioners, the aforesaid does not conclude their arguments on the matter and they insist on receiving all requested materials and reserve the right to supplement their arguments as needed.

Gabi Laski, Adv. Counsel for the Petitioners	Michael Sfard, Adv. Counsel for the Petitioners	Limor Goldstein, Adv. Counsel for the Petitioners