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At the Supreme Court
Sitting as the High Court of Justice

HCJ 5933/23

In the matter of:

1. **--------- Z______, ID No. ---------**
2. **---------, ID No. ---------**
3. **---------, ID No. ---------**
4. **--------- (minor), ID No. ---------**
5. **--------- (minor), ID No. ---------**
6. **--------- (minor), ID No. ---------**
7. **--------- Shauqi, ID No. ---------**
8. **---------Shauqi, ID No. ---------**

All residing in the Shu'fat refugee camp

9. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – RA 580163517**

Represented by counsel, Adv. Nadia Daqqa (Lic. No. 66713) and/or Daniel Shenhar (Lic. No. 41065) and/or Adv. Tehila Meir (Lic. No. 71836), and/or Aaron Miles Kurman (Lic. No. 78484) and/or Maisa Abu Saleh-Abu Akar (Lic. No. 52763) and/or Nadine Abu Arafe (Lic. No. 89020) and/or Alma Elimelech (Lic. No. 82867)

of HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger 4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **GOC Home Front Command**
2. **Minister of Defense**

Represented by the State Attorney's Office
Ministry of Justice, Jerusalem

The Respondents

Petition for Order *Nisi* and Interim Order

Urgent petition for order *nisi* is hereby filed which is directed at Respondents 1-2 ordering them to appear and show cause;

a. **Why they would not refrain from exercising** the power according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: "**Regulation 119**") or the "**Regulation**") including the power to forfeit, demolish or harm in any other way the home of Petitioners 1-8 located at the Shu'fat refugee camp, and other houses.

b. At least, **freeze** the exercise of the power according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: "**Regulation 119**" or the "**Regulation**") including the power to forfeit, demolish or harm in any other way the home of Petitioners 1-8 located at the Shu'fat refugee camp, and other houses, until the question concerning the lawfulness of the policy of house demolition and harming innocent people for deterrence purposes is clarified and resolved including all aspects thereof.

c. Why prior to implementing the order and demolishing the homes and destroying the lives of Petitioners 1-8, they would not present to them and to the public in the state of Israel reliable factual data unequivocally substantiating their allegation that the house demolition policy as a deterring measure realizes its purpose and is therefore necessary and proportionate. The above, in view of the critical and severe harm inflicted by the policy and the order issued by virtue thereof on the Petitioners. These are elementary data in the absence of which it is impossible to examine, let alone determine, whether the order issued against the homes of the Petitioners, and the policy by virtue of which the policy was issued, comply with the tests of proportionality and reasonableness. This is particularly required at this time, after Respondents' policy to continue to demolish houses over the past years did not prevent the number of attacks that we are currently witnessing from increasing, and it has even become clearer that in some cases it even served as a motive for the attack.

d. Why the Respondent would not cease its arbitrary conduct according to which it sets a very narrow time frame, preventing potential victims harmed by the exercise of Respondent's said authority from having sufficient time to get organized.

e. Present data concerning the damages caused to the buildings which are not designated for demolition following the demolitions carried out by the Respondent by virtue of Regulation 119, and to the extent that the execution of these orders are subject to supervision, the Petitioners will request to review the data accumulated by such supervision systems.

Urgent Motion for an Interim Order

The honorable court is hereby requested to urgently issue an interim order ordering the Respondents or anyone on their behalf to refrain from exercising the seizure and demolition order **which is scheduled for execution as of August 3, 2023** and/or from causing any irreversible harm to Petitioners' home and to *inter alia* order to stay the demolition order, until the termination of the proceedings in the petition at hand.

Since one cannot point at any actual damage that shall be caused to public interest as a result of staying the execution of order by another short period, while, on the other hand, the dismissal of the motion shall lead to a severe violation of Petitioners' rights, it is clear that the balance of convenience tips in favor of the Petitioners, due to the irreversible damage which shall be inflicted on them should the honorable court dismiss Petitioners' motion. Therefore, the honorable court is requested to accept the motion for an interim order.

In addition, the honorable court is requested to obligate the Respondents, prior to hearing the petition on its merits, to hand over all of the investigation materials underlying their decision.

This Petition is filed without the complete materials necessary to complete the arguments having been presented to Petitioners' counsel, and in particular the investigation materials underlying Respondent 1's decision to forfeit and demolish the apartment the subject of the demolition order. The petition is filed at this stage due to the urgent need to stay a wrongdoing from occurring. The Petitioners however reserve the right to supplement their arguments and add documents to the extent that additional details are discovered and to the extent necessary.

The grounds for the petition are as follows

1. This petition concerns two buildings connected to each other by the apartment the subject of the demolition order. One building consists of six stories while the other consists of four stories. Dozens of people reside in these buildings and Petitioners 1-6 reside in the apartment the subject of the demolition order. The apartment the subject of the demolition order is owned by Petitioners 7-8. The terms of the sale transaction between them and Petitioner 1 have not yet been completed and therefore the transfer of ownership in the apartment has not been completed. All of the above following the allegation that the son of Petitioners 1-2, the minor M. Z., committed a stabbing attack, at the age of 13, on February 13, 2023 in which a security guard shot at a border police officer, Asil Suaed (hereinafter: the **Police Officer**) and caused his death (hereinafter: the **Incident**).

2. **The decision of the military commander to issue a seizure and demolition order against the apartment which is located on the third floor of the building in which the Petitioners reside, including three minors, who were not involved in the incident, and did not have any ability to prevent it, is disproportionate and extremely unreasonable. The Petitioners came to this conclusion, while against the frequent use of Regulation 119 stands a weighty question concerning the effectiveness of Respondent's house demolition policy. Heavy concerns arise that said policy increases hatred and feeds the cycle of bloodshed since it has more than once served as a motive for carrying out similar attacks, as things apparently emerge from the facts of the case at hand**.

3. **Another aspect raised by this case undermining the argument concerning the effectiveness of the deterrence, which has not been sufficiently examined, concerns the fact that the Respondents have not considered the fact that the family member is a 13-year-old minor and that the details of the incident as they emerge from the investigation materials do not indicate that the stabbing caused the Police Officer's death. Hence, no reason relating to the effectiveness of the deterrence was presented given his young age and the fact that the Police Officer's death was not caused by him.**

4. **This case is yet another example of Respondents' extensive use of Regulation 119, without feeling the need to use this draconian regulation in a limited and prudent manner. At this time no attempt was even made to hide the "vengeful purpose" behind the exercise of the "authority", as an engineering opinion has been presented attesting to Respondents' intention to use hot detonation to demolish the apartment regardless of the building's characteristics and location, completely refraining from presenting alternative ways whose harm is substantially lower, exposing additional protected inhabitants – including innocent people – to severe harm to their property and homes, unlike other cases having similar characteristics to the case at hand**.

5. **The uniqueness of the case at hand is also clear to the Respondent who did not act immediately after the attack and only after a month and a half took the first step**

towards exercising it, taking measurements towards the demolition of the apartment the subject of the demolition, unlike other cases in the same period in which the houses were measured and in some cases the authority was exercised on the same day or a few days after the incident. The above delay shows that the Respondents understood that this is not a classic case in which the authority is exercised and that the mere compliance with the required conditions for exercising it was not unequivocal since it did not follow the same schedule according to which it acts in other similar cases. Notwithstanding the aforesaid, the Respondents decided to exercise the authority as broadly as possible even compared to other cases in the same period.

6. In fact, it is a drastic step which reinforces the argument that it is a **<u>punitive and vindictive act</u>**, foreign to house demolition considerations, as argued by the Respondents, undermining Respondents' argument that the exercise of Regulation 119 of the Defence (Emergency) Regulations, 1945 in the case at hand is based on deterrence purposes.

   It should be emphasized that the house demolition policy is contrary to a fundamental ethical principle according to which "**The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin**." (Deuteronomy, 24, 16), and in other words, the personal liability principle, underlying the law as a whole.

<u>The Factual Part</u>

<u>The Parties</u>

7. Petitioner 1 (hereinafter: the **Petitioner**) is the father of the minor M. Z.(hereinafter: **M.** and/or the **Minor**) who has allegedly committed the attack on February 13, 2023. Petitioner 1, born in 1978, is a renovation worker. Petitioner 1 lives together with Petitioners 2-6 in the third-floor apartment the subject of the demolition order, in the Shu'fat refugee camp.

8. Petitioner 2, born in 1984, is M.'s mother. She lives with Petitioner 1 and their children in the apartment the subject of the demolition order.

9. Petitioner 3, born in 2005 is M.'s brother and the son of Petitioners 1-2. He lives with them in the apartment the subject of the demolition order. Petitioner 3 works as a cleaning worker in Hadassah Ein Kerem hospital.

10. Petitioner 4, a minor born in 2007 is M.'s sister and the daughter of Petitioners 1-2. She lives with them in the apartment the subject of the demolition order. Petitioner 4 is an outstanding student at Al Khorizmi high school.

11. Petitioner 5, a minor born in 2012 is M.'s sister. She lives with her parents and siblings in the apartment the subject of the demolition order. Petitioner 5 is a student at Al Fakieh school.

12. Petitioner 6, a toddler born in 2020 is M.'s sister and the daughter of Petitioners 1-2. She lives with her parents and siblings in the apartment the subject of the demolition order.

13. Petitioner 7. Mrs. Shauqi (hereinafter: **Mrs. Shauqi**) is the registered owner of the apartment the subject of the demolition order. Petitioner 7, born in 1971, is married to a resident of East Jerusalem and lives with him and their three minor children in a rented apartment in the Shu'fat refugee camp.

14. Petitioner 8, (hereinafter: **Mr. Shauqi**) is the spouse of Mrs. Shauqi on whose name the apartment was purchased. Petitioner 8, born in 1957, has actually handled all matters relating to the sale of the apartment and acted as its owner until its sale.

15. Petitioner 9, HaMoked for the Defence of the Individual (hereinafter: **HaMoked**), is a non-profit registered association sitting in Jerusalem, working to promote the human rights of Palestinians in the occupied territories.

16. Respondent 1 (hereinafter: the **Respondent**) is responsible for issuing the seizure and demolition order against the home of Petitioners 1-5, by virtue of his authority according to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: "**Regulation 119**").

17. Respondent 2, the Minister of Defence, is in charge, according to the Basic Law: The Military, on behalf of the Government of Israel, of the Respondent and of establishing the systematic house demolition policy exercised by the Respondent and in the case at hand, in Petitioners' matter (hereinafter, together with the Respondent: the **Respondents**).

Exhaustion of Remedies

18. On March 29, 2023 HaMoked wrote to the Respondent and informed him that the Petitioner authorized HaMoked's attorneys to handle all matter relating to the exercise of their authority according to Regulation 119. Said letter was sent after on March 28, 2023, the military had visited the apartment the subject of the demolition order and had measured it.

    A copy of HaMoked's letter dated March 29, 2023 is attached and marked **P/1**.

19. On Friday afternoon, June 9, 2023, the Respondent gave notice of the intention to forfeit and demolish the apartment located on the third floor of the building in which the minor, M., had resided together with his other family members, according to Regulation 119 of the Defence Regulations. Said measure was allegedly taken since M. "had committed on February 13, 2023 a murderous terror attack for national reasons, as a result of which a Border Police Officer, sergeant major Asil Suaed, of blessed memory, was killed, and since said measure can deter potential perpetrators from committing terror attacks and help protecting the safety of the state's citizens and residents". (hereinafter: **Respondent's Notice**). Respondent's notice informed of the possibility to submit an objection by June 14, 2023, at 15:00.

A copy of Respondent's notice dated June 8, 2023 is attached and marked **P/2**.

20. At HaMoked's request, an extension for submitting an objection was granted until June 24, 2023 at 12:00. On June 24, 2023, HaMoked submitted to the Respondent an objection against his intention to forfeit and demolish the apartment in the building the subject of the demolition order, described the exceptional circumstances of the case and requested the Respondent to retract his intention to demolish and/or forfeit Petitioners' home due to the severe harm which is expected to be inflicted on their rights, without any fault on their part, should the Respondent decide to exercise Regulation 119. HaMoked emphasized the special circumstances of the case that each one, in and of itself, justifies the revocation of the order or at least, its substantial limitation. According to case law, the accumulation of the circumstances should lead to the revocation of the order, as the Respondents well know. Respondents' understanding that this is an exceptional case arises from the schedule applied by them in the case at hand, compared to other cases. In addition, HaMoked stressed that the Respondents should refrain from demolishing the apartment in a way that would cause damage to the building, since the opinion presented on behalf of the Respondents had unequivocally exposed the fact that revenge was underlying the contemplated demolition. HaMoked has emphasized primarily and based on the opinion presented on behalf of the Respondents that the demolition by means of hot detonation should be avoided, as noted by the Respondents, since said method would definitely cause damage to the entire 5-story building.

    A copy of the objection submitted to the Respondent on June 24, 2023 is attached and marked **P/3**.

21. On Thursday evening, July 13, 2023, a letter was received from Major Anan Sarhan, on behalf of the legal counsel of the Home Front Command, stating that the GOC Home Front Command decided to reject the objection submitted on June 24, 2023 and decided that the residential apartment on the second floor of the building connecting two buildings located on waypoint 3521495, 712942 N36, in Shu'fat refugee camp shall be forfeited and demolished. The seizure and demolition order the subject of the petition at hand was attached to the decision. In addition, an engineering opinion was attached describing a demolition method different from the one used so far for houses in Shu'fat refugee camp, even recently, namely, the hot detonation method. Time was granted until July 19, 2023 for the purpose of filing a petition.

    A copy of the Respondent's decision in the objection dated July 13, 2023 is attached and marked **P/4.**

    A copy of the seizure and demolition order dated July 13, 2023 is attached and marked **P/5.**

22. Upon receiving the order, Respondent's counsel was requested to grant an extension for the purpose of filing the petition. The request for the extension was approved and extension was granted until July 26, 2023. Subsequently and due to medical reasons relating to the undersigned, another extension was granted until August 3, 2023.

The home the subject of the seizure and demolition order and the residency connection

23. As aforesaid, the Petitioners reside in an apartment located on the second floor of a five story building as shown in drawing 1 of Respondents' opinion. The apartment connects two buildings. The east building is a five story building, four stories of which are above ground level, and the west building is a four story building, three stories of which are above ground level.

24. According to the photographs attached to the engineering opinion on behalf of the Petitioners, it can be seen that in the east building, the apartment is located on the third floor above ground level, while in the west building, the apartment is located on the second floor above ground level. The gap between the two levels amounts to half a meter.

25. The buildings were built in different periods by different people without any engineering supervision, which is a quite customary and common phenomenon in this specific area, namely, in the Shu'fat refugee camp. Hence, according to the engineering opinion on behalf of the Petitioners, there is room to assume that the buildings differ in their stability and that the two parts of the structure cannot be treated in the same manner. According to the Petitioners the construction of the structure commenced about 25 years ago.

26. The apartment at hand is owned by Petitioner 7 who purchased it together with her spouse. Mr. Shauqi, ID No. -------. The apartment had been purchased by them in 2018 and they resided therein for a short period of time. As a result of financial difficulties encountered by the Shuaqi family, after Mr. Shuaqi, the family's main provider, was injured in a work accident, they had to sell the house and move to a rented apartment.

27. On March 24, 2020 an agreement was entered into between Mrs. Shuaqi and Mr. Z. in which it was agreed that the apartment would be sold in consideration for NIS 290,000. According to the agreement the sum of NIS 100,000 was paid on the execution date and the balance was divided into monthly installments of NIS 3,000 each.

28. The above agreement governs the transfer of ownership rights and Mrs. Shuaqi's receipt of an irrevocable power of attorney. Accordingly, the full transfer of the rights in the property shall occur only after purchase price is fully paid. Given the fact that a considerable part of the purchase price has not yet been paid to the Shuaqis, the spouses still have a connection to the apartment since the Z.family does not have full rights therein.

29. Consequently, the Z. family has been living for about three years in the apartment the subject of the demolition order without having full ownership rights therein. The owners of the apartment, the Shuaqi spouses, are not their family members and are not related to them. The Shuaqi family has not yet received the entire consideration for the apartment and the spouses have therefore joined the petition. The Shuaqi spouses are concerned that they may lose their property without any fault on their part, while the payments for the above transaction constitute their main source of income in view of the difficult economic situation they have been dealing with over the last few years.

A copy of the purchase and sale agreement dated March 24, 2023 is attached and marked **P/6.**

30. The Residential apartment of the Z. family is a 160 square meter apartment in which Petitioners 1-6 reside as aforesaid, three of whom are minors.

31. The two buildings connected by the apartment the subject of the demolition order consist of nine additional residential apartments some of which share common walls with said apartment.

32. The structure is located in a busy area in Shu'fat refugee camp. The southern front of the apartment faces the main road, and as can be seen in the photographs attached to the engineering opinion on behalf of the Petitioners, many shops and business are located along this road drawing a great deal of traffic and people.

33. The northern part of the building faces a narrow 3 meter wide road across which a long line of additional buildings are located, which were also constructed in an uncontrolled manner, as is customary and common in Shu'fat refugee camp. In addition, the building on the east side is itself connected to the building next to it by an apartment, similar to the apartment the subject of the demolition order. Consequently, we are concerned with three buildings which are connected to each other and the apartment the subject of the demolition order is located in two buildings among the series of buildings described above.

34. Notwithstanding the aforesaid, the opinion on behalf of the Respondents presents only one demolition method [and fails to mention] the existence of other more moderate demolition methods, while the person who has drafted the opinion does not deny the possibility that damages shall be caused to the two buildings to which the apartment is connected, as well as to the nearby buildings.

35. Although such damages are expected to occur, which are even more substantial compared to previous opinions which were given in similar cases, the Respondent did not deign to explain why sealing or demolition of the internal walls could not suffice or, in general, manual demolition inflicting less damage on nearby apartments.

36. The fact that the Respondents refrain from examining alternative demolition methods as is customary and similarly done in previous cases in this specific area and in view of its unique characteristics, points only to one single thing: the desire to harm, to the maximum extent possible, the innocent persons living in these buildings, as an act of collective punishment aimed at harming them at any cost.

37. The above is also reinforced in the opinion itself which deviates from the professional engineering issues. In view of the fact that it is a mere vindictive act, the person who drafted the opinion refrains from describing alternative demolition methods and does not mention or refer to several critical details from an engineering perspective. On the other hand, the engineer does refer to the attacks which took place in Shu'fat refugee camp and describes the incident underlying the order the subject of the petition, although these

facts have nothing to do with his professional expertise and with the purpose of the engineering opinion.

38. The deviation by the engineer on behalf the Respondents from his professional interest blatantly reflects on his choice of the demolition method and even on the professionalism of his opinion, as we have seen in previous cases, in which his guarantees that no peripheral damage would occur did not materialize. In a significant number of these cases, the results of the demolitions overseen by him, as will be shown in detail below, were devastating and even forced the Respondents to pay compensation to the persons who were harmed by them. These things speak for themselves.

39. In the stage of the objection, the Petitioners have already raised claims about Respondents' puzzling insistence on choosing the "hot detonation" demolition method, while in recent cases some of the opinions which were prepared towards the demolition of similar apartments in buildings located in the Shu'fat refugee camp, did not suggest to use this demolition method, and in cases in which it was suggested, the Respondents have eventually retracted their intention to use it and instead of hot detonation used other measures causing relatively less harm to innocent neighbors.

40. Accordingly, for instance, in HCJ 144/22 **Abu Skhidem v. GOC Home Front Command** (January 11, 2022) (hereinafter: **Abu Skhidem**), the Respondents did not present demolition by way of "hot detonation" as an option. The building in that case had similar and even less complicated characteristics compared to the case at hand. The building in which the apartment was located was a four story building, also located in the Shu'fat refugee camp, which was demolished without damaging the outer shell of the building, with the understanding that damage to the outer shell could damage the entire building.

41. In a later case, in HCJ 8604/22 **Tamimi v. GOC Home Front Command** (reported in the Judicial Authority Website) (January 3, 2023) (hereinafter: **Tamimi**), the Respondents have first expressed their intention to demolish the apartment which was also located in a multi-story building, by way of "hot detonation". Subsequently, the Respondents retracted their intention and decided to demolish the apartment manually due to "operational considerations".

42. The opinions in the above cases were prepared by different engineers. In **Abu Skhidem** the opinion was prepared by the engineer Lieutenant Colonel Shaul Nevo, and in **Tamimi** by Major Y.P.

43. The Tamimi opinions present the gaps between the damages projected by the author of the opinions. In the opinion presenting the demolition by way of "hot detonation" the engineer did not commit to low probability damages, and simply stated that "damage is feasible" as a result of the activity, similar to the opinion presented in the case at hand. On the other hand, in the later opinion which referred to manual demolition, the engineer did commit to damages "at a **very** low level and probability to the point of no damage at all".

44. This comparison unequivocally demonstrates the gaps between the damages that will be caused, as projected by the professional official acting on behalf of the Respondents,

according to the demolition method chosen. In the event of "hot detonation" the projected damage is more significant, and in the case at hand he refrains from explaining why a less injurious method cannot be used. It should be added that according to the Respondents in said case, the demolition method was replaced with manual demolition due to operational considerations. Hence, the question also arises in the case at hand why these operational considerations do not lead to the same result?

45. The engineer on behalf of the Petitioners emphasized that the demolition of the building by "hot detonation" is undoubtedly expected to cause damage, to the two buildings connected by the apartment due to their dilapidated characteristics, and the unsupervised construction of the buildings, as well as to the neighboring buildings due to the congested surroundings of the buildings and for lack of regularized construction, which may clearly cause damage to the above buildings, and may even put their stability at risk in general and in the event of earthquakes in particular.

46. In view of the above, it seems that the opinion presented by the Respondents is insensitive to the damages which may be caused to third parties, and may even reveal their clear intention to harm the innocent, while they have the option of making the apartment unusable without putting at risk the entire structure and in any event the Respondents choose to use an injurious demolition method.

A copy of the opinion on behalf of the Petitioners is attached and marked **P/7**.

A copy of the opinion in **Abu Skhidem** is attached and marked **P/8**.

A copy of the opinion concerning demolition by way of "hot detonation" in **Tamimi** is attached and marked **P/9**.

A copy of the opinion concerning a manual demolition in **Tamimi** is attached and marked **P/10**.

The Legal Argument

47. Petitioners' legal argument is divided into two parts. The first part of the argument shall focus on the principled arguments.

48. In this part of the petition the Petitioners shall argue that the systematic house demolition policy applied by the Respondents by using Regulation 119 – is unlawful. It is contrary to basic principles of ethics and justice, it is contrary to international humanitarian law, it is contrary to human rights law and it is even contrary to Israeli law – both administrative and constitutional law. In this part of their argument the Petitioners shall argue further that the house demolition policy on the basis of Regulation 119 violates international penal law. Finally, the Petitioners shall argue that voices have often been heard from this honorable court supporting the need to re-visit this painful issue and to have it thoroughly examined by an expanded panel. Therefore, and in view of recent developments concerning the authority of the International Criminal Court, it seems that the time has come for an expanded panel to address the lawfulness of the use of Regulation 119.

49. In the individual part of the argument the Petitioners shall argue that the procedure conducted against them by the Respondent and the order issued upon its termination with respect to the family home, should be revoked due to the fact that it is an unreasonable and disproportionate decision and since the procedure is unlawful. Petitioners' position which shall be specified in detail below is that the procedure is clearly unlawful the sole purpose of which is to punish and take revenge. The procedure was conducted by the Respondent for appearance's sake only. The Respondent has clearly tried to deny the Petitioners the right to due process, disregarded their serious claims against him, and eventually made a decision which does not comply with the proportionality tests. We shall discuss things in an orderly manner.

Regulation 119

50. Respondent's ostensible and alleged authority to demolish homes of Palestinians in Israel and in the occupied territories, and the systematic policy of house demolition applied by the Respondent whenever an attack involving fatalities is committed, a policy in the framework of which the order in the case at hand was also issued, is rooted in Regulation 119, a 77-year legacy from the era of the British Mandate.

51. Although we are obviously concerned with a regulation originating from an era in which punishment and the infliction of severe and deliberate harm on innocent persons were legitimate tools in the hands of a foreign government which controlled a foreign population in territories under its control, and despite the numerous changes that our world in general and the legal world in particular underwent since then, the State of Israel continues, in 2023, to argue that it is a perfectly legitimate act. In addition, it should be noted that the legal basis for the continued use of this outdated regulation at the present time, originates from a judgment of this honorable court given over 40 years ago in HCJ 434/79 **Sahwil v. Commander of the Judea and Samaria Area** (reported in Nevo) (hereinafter: **Sahwil**). Several years later, in its judgment in HCJ 879/86 **Ramzi Hana Jaber v. GOC Central Command** (reported in Nevo), the honorable court clarified again that Regulation 119 constitutes part of the domestic law.

52. However, in its judgment in HCJ 879/86, the honorable court failed to take any heed of the fact that it is not an actual domestic law, but rather a law established by foreign authorities, whose control over a foreign population preceded Israel's control over a foreign population.

53. The house demolition policy which is applied in 2023 is therefore based on a 77-year-old regulation and a 40-year-old ruling, while in practice and on the substantive level, the lawfulness of the continued use of Regulation 119 has not been examined.

The purpose of house demolition has no validity

54. Although the Respondents keep noting throughout the years that the act of house demolition is taken only for deterrence purposes – an argument which according to the Petitioners cannot cure the unlawfulness of the act as shall be specified below – rather

than for the purpose of punishment or revenge, reality with all due respect, unfortunately points in the opposite direction.

55. The truth should be clearly stated. The Regulation itself attests to its real purpose. First, it appears under the heading "Miscellaneous Penal Provisions". Second, it also concerns the possibility of remission, and third, as aforesaid, the period in which it was promulgated also attests to its purpose. This draconian regulation was promulgated in an era in which collective punishment, taking revenge from innocent people and vindictive acts were common practice.

56. The fact that we are not concerned with a deterring act but rather with a procedure motivated by considerations of punishment and revenge and nothing more, is demonstrated by the proceeding conducted by the Respondent in the case of the Petitioners at hand which shall be described in detail in the individual part of the petition.

57. It shall be briefly stated that the patently unfair timeline which was given to the Petitioners in which to raise their arguments against the Respondent wishing to knowingly use innocent people by directly and intentionally causing damage to their physical home and erasing their memories and life experiences, the failure to respond to the severe arguments raised by the Petitioners before him, and the calls for "immediate" deterrence made by the political echelon and different sectors of the population in the media – all blatantly seek punishment and revenge.

58. However, even if we theoretically assume that we are concerned with an act whose ostensible purpose is innocent deterrence, it is still a fundamentally inappropriate policy which should be immediately stopped. We shall explain.

59. Behind the argument that house demolition is required for the purpose of deterrence hides a horrific, direct and deliberate reality of punishing the innocent, whatever the purpose of that act may be. A "deterring" house demolition means giving permission to knowingly and intentionally harm innocent people, in a fundamental and critical manner, demolishing their physical home and erasing their memories and life experiences accumulated between the walls of their home over the years. Moreover. It validates the right to use human beings as a tool to convey messages to potential third parties by seriously harming them.

60. Therefore, and even if the purpose for which a person is punished so brutally is ostensibly a deterring purpose, this purpose does not cure the illegality of the harm inflicted on them. It is a deliberate and direct punishment of persons who did nothing wrong, violating their dignity and causing damage to their property, using them in a cruel manner as a tool to convey messages. Hence, even according to the Respondents, arguing for an ostensible deterring purpose, without a deliberate punishment and use of human beings as a tool, deterrence may not be achieved.

61. Moreover. According to the Petitioners, and with all due respect, the deterring act of demolishing the home and destroying the lives of others, is not a by-product of the act of their family member, as stated by the honorable Justice Sohlberg in his judgment in HCJ

5290/14 **Qawasmeh v. Military Commander of the West Bank Area** (reported in Nevo):

> Indeed, injuring a family member – who committed no sin – in a manner which will cause him to remain without a roof over his head, contrary to fundamental principles, is troublesome. But this should be well remembered, that also in criminal proceeding the purpose of which is punitive – as distinct from the deterring purpose herein – innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivations arising from a person's incarceration, which are suffered by his family members.

62. Contrary to the punishment of criminal incarceration which necessarily negatively affects others, in the case at hand we are concerned with a cynical, deliberate and direct punishment of the innocent, which is not inevitable, and which validates the use of human beings as a tool in the hands the Respondents for the purpose of conveying ostensible messages to potential third parties. This punishment is disconnected from the act of their family member, and not only that the Respondents are not obligated to use it, but rather, according to the Petitioners they are absolutely prohibited from doing so.

63. It should be emphasized that contrary to Respondents' conduct in 2023, Regulation 119, which was promulgated 77 years ago, does not obligate them to harm others and use the innocent by demolishing their houses and destroying their lives; it only enables them to do it.

64. In other words: whatever the purpose of house demolition may be, it is a punitive, cruel and illegal act, validating the deliberate use of innocent people as an instrument, destroying their lives physically and mentally due to the deeds of others..

65. The fact that the criminal law in Israel recognizes the principle of personal responsibility and prohibits taking punitive measures against the innocent for the realization of deterring purposes – although it stands to reason that deterrence will help reduce crime rates - also shows that the use of Regulation 119 is unlawful and that punishing the innocent is prohibited, whatever the purpose of penalizing them may be.

66. Petitioners' argument that in essence we are concerned with a clear and extremely severe punitive measure, is reinforced by the clear words of the honorable Justice Mazuz in paragraph 8 of his judgment in HCJ 7220/15 '**Aliwa v. Commander of IDF Forces in the West Bank**:

> In addition, the determination, often repeated in case law, that the sanction according to Regulation 119 is a deterring measure rather than a punitive one, is not free of doubts. Firstly, Regulation 119 is located in Part XII of the Defence Regulations entitled "Miscellaneous Penal Provisions". Secondly, the fact that a sanction is a deterring measure does not, in and of itself, preclude it from being a punitive sanction at

the same time. A sanction is classified according to its nature and not necessarily according to its objective, and in any event, deterrence is one of the clear objectives of criminal punishment (Sections 40 and 40G of the Penal Code, 5737-1977) (reported in Nevo).

67. For all of these reasons, the Petitioners are of the opinion that the time has come to stop the use of house demolition and hold that the purpose it wishes to attain is not valid. It is a regulation from a different era, an era in which penalizing and using the innocent as an instrument was a legitimate tool in the hands of a foreign regime exercising control over a foreign population.

House demolition under international law

68. Once we have clarified that house demolition is a cruel punitive act against the innocent, regardless of the declared purpose underlying it, an act which is based on a 77-year-old regulation and on a 40-year-old ruling, we shall clarify why the continued use of Regulation 119 is contrary to the provisions of international law. However, before we proceed we shall point out again that in practice the lawfulness of house demolition according to international law has not been examined to this day.

69. The vast majority of the scholars, Israelis and foreigners, are of the opinion that Regulation 119 is contrary to a slew of provisions in international humanitarian law and international human rights law, primarily, the prohibition on collective punishment, entrenched in Article 50 of the regulations annexed to The Hague Convention respecting the Laws and Customs of War on Land, 1907 (hereinafter: the **Hague Regulations**) and in Article 33 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the **Geneva Convention**). The interpretation given to this prohibition by the Red Cross, international tribunals and Israeli and foreign scholars, in this context and in general, requires that the question of whether Regulation 119 complies with the above prohibition, and if so – under what conditions, should be thoroughly examined.

70. Another prohibition according to international humanitarian law raising queries and difficulties concerning the exercise of Regulation 119 is the prohibition on the seizure and destruction of property of protected persons: Article 23(g) of The Hague Regulations and Article 53 of the Geneva Convention.

71. Similar prohibitions also ostensibly derive from different provisions of international human rights law and international criminal law (from the judgment of the honorable Justice Mazuz in HCJ 7220/15 '**Aliwa v. Commander of IDF Forces in the West Bank**) (reported in Nevo). The Respondent is obligated to act according to international humanitarian law and the laws of occupation forming an integral part thereof. The Respondent is a trustee in the occupied territories and is not the sovereign thereof. All of his powers in the occupied territory are vested in him by virtue of international law, constituting the exclusive legal basis for exercising his powers (HCJ 2150/07 **Abu Safia v. Minister of Defense** (reported in Nevo).

The Hague Convention: Customary International Law preceding Regulation 119

72. The Judea and Samaria Area is held by the State of Israel under belligerent occupation. The state's long arm in this area is the military commander. He is not the sovereign of the area under belligerent occupation (see HCJ 2056/04 **Beit Surik v. Government of Israel** (June 30, 2004) (Nevo), page 832). His authority derives from public international law concerning belligerent occupation. The legal implication of this concept is twofold: first, the law, jurisdiction and administration of the state of Israel do not apply to this area. It was not "annexed" to Israel; second, the legal regime in this area is governed by public international law relating to belligerent occupation (see HCJ 1661/05 **Hof Aza Regional Council v. Knesset of Israel**, pages 514-516). In the center of this public international law stand the Regulations annexed to the Hague Convention. Customary international law is reflected in these Regulations. The law of belligerent occupation is also established in the Geneva Convention. The State of Israel acts according to the humanitarian parts of this convention. Notice to that effect was given by the government to this court in many petitions. In view of said notice given by the government of Israel, we do not see the need to re-examine the government's position (HCJ 7957/04 **Mara'abe v. The Prime Minister of Israel**) (reported in Nevo).

73. First and foremost the house demolition policy applied by virtue of Regulation 119 is contrary to the provisions of Article 50 of The Hague Regulations, prohibiting collective punishment and the provisions of Article 23 of the Convention, prohibiting property damage and destruction.

74. The Hague Regulations preceded the promulgation of Regulation 119 by dozens of years, and in addition, constitutes part of customary law (see on this matter, *inter alia*, CrimApp 336/61 **Adolf Eichman v. Attorney General** and HCJ 785/87 **Afo et al. v. Commander of IDF Forces in the Judea and Samaria Area**) (reported in Nevo).

75. In the above judgments the honorable court alluded to the interpretive rule according to which to the extent there is no contradiction between the provisions of international customary law and Israeli law, domestic law should be interpreted according to customary international law.

76. As aforesaid, Regulation 119 was promulgated in a different era and is a legislative provision which was repeatedly applied by a foreign regime to a population residing in the territory controlled by it. However, even if we disregard the above, Regulation 119 does not obligate the military commander to exercise the power established therein to harm the innocent.

77. In conclusion it should be noted that according to the Petitioners, the systematic policy of using the innocent as an instrument, punishing them by demolishing their homes and destroying their lives for the purpose of conveying messages to potential third parties, is not covered by Article 43 of The Hague Regulations. In the case at hand, since it is clear that the purpose of Regulation 119 is not to allow the population living under the rule of a foreign military regime to maintain its daily routine and live its life in an orderly manner, but is rather a tool used by one foreign regime after another against the local population which is not their population to take revenge on it when necessary, it is Petitioners' position that Regulation 119 cannot be covered by Article 43 of The Hague Convention.

The Fourth Geneva Convention

78. The systematic house demolition policy applied by Israel on the basis of Regulation 119 also stands in contrast to two central provisions of the Geneva Convention. As known, the Geneva Convention, alongside The Hague Regulations, constitutes the basis of international humanitarian law. More specifically, the use of the Regulation also stands in contrast to Article 33 prohibiting collective punishment and acts of retaliation against protected persons and their property, and to Article 53 of the Convention, prohibiting the occupying power from destroying buildings and property. This Convention, similar to The Hague Regulations, constitutes international customary law which obligates the Respondents to act accordingly, and the fact that it was preceded by Regulation 119 makes no difference and does not constitute grounds for validating a systematic policy of punishing the innocent.

79. Accordingly, Articles 146-147 of the Geneva Convention provide that the breach of Articles 33 and 53 of the Convention constitute a material breach thereof. As aforesaid, according to the Petitioners, Regulation 119 by virtue of which the systematic policy is applied is not a "domestic law" in the sense that the Respondents wish to attribute to it, but rather a provision which was adopted and which constituted, when promulgated 77 years ago, a legitimate tool in the toolbox of the foreign regime in its conduct vis-à-vis the local population controlled by it.

80. In view of the aforesaid, and as specified in the beginning of the petition at hand, the Petitioners are of the opinion that the continued implementation of the house demolition policy by virtue of Regulation 119, in its current format, in the framework of which the honorable court sweepingly refrains from addressing the principled issue pertaining to the lawfulness of the use of Regulation 119, is no longer possible, and that this issue should be thoroughly examined by an expanded panel of this honorable court.

Human rights law

81. Other than Respondents' obligation to act according to the provisions of international humanitarian law forming part of customary law, the Respondent is also obligated to act according to international human rights law. First and foremost, the UN Covenants on Civil and Political Rights and on Social and Economic Rights from 1966, covenants which were signed and ratified by the state. It was so determined in the opinion of the International Court of Justice in the matter of the separation fence. This honorable court has also examined the acts of the military commander according to these norms (HCJ 9132/07 **Abassiuni v. The Prime Minister**, TakSC 2005(3) 3333 paragraph 24; HCJ 3239/02 **Mara'ab v. Commander of IDF Forces**, TakSC 2003(1) 937; HCJ 3278/02 **HaMoked Center for the Defence of the Individual v. Commander of the Military Forces in the West Bank**, IsrSC 57(1) 385).

82. According to the Petitioners, Regulation 119 stands in contrast with the following Articles of the Covenant on Civil and Political Rights – and therefore also with the policy applied by virtue thereof: Article 7 (the right not to be subjected to cruel, inhuman or degrading treatment or punishment), Article 17 (a person's right not to be subjected to arbitrary or illegal interference with their home), Article 12 (a person's right to freely choose their place of residence) and Article 26 (the right of equality before the law). It should be noted

that was also so determined by UN Human Rights Committee in charge of examining the implementation of the Covenant by the different member states, in its 2003 opinion concerning Israel.

83. In addition, Regulation 119 stands in contrast to certain Articles of the Covenant on Economic, Social and Cultural Rights - and therefore also to the policy applied by virtue thereof – primarily Article 11 (the right to housing and proper living conditions) and Article 10 (special protection of the family unit); the Regulation also stands in contrast to Articles 12-13 and 17 of the Universal Declaration on Human Rights, 1948.

84. In short, Regulation 119 and the policy applied by the Respondents even in 2020 is in complete contrast with a series of covenants and binding provisions, some of which form part of the international customary law.

85. The continued implementation of the systematic policy under which innocent Palestinians are punished and exploited by the Respondents who demolish their homes and destroy their lives whenever a terror attack involving fatalities is committed, for deterrence purpose, therefore constitutes an ongoing breach of the provisions of international humanitarian law and of human rights law. It may even constitute a war crime according to the Rome Statute from 1998 on the Establishment of the International Criminal Court which is a codification of the severe breaches of the customary prohibitions and of the severe breaches listed in Article 147 of the Geneva Convention.

86. Accordingly, and in view of recent developments in the international arena, in the framework of which an application was submitted to the International Criminal Court to examine its jurisdiction to hear cases relating to Israel's policy and the acts taken by it in the territories, the Petitioners are of the opinion that it is necessary and even required to open the issue of the lawfulness of Regulation 119 and its use to justify the applied policy, for deliberation by an expanded panel of this honorable court.

Collective punishment is contrary to the basic rules of ethics and justice and is prohibited under Jewish Law

87. In addition to all of the above, and maybe first and foremost, collective punishment is contrary to the fundamental principles of ethics and justice, including Jewish values.

88. Therefore, and alongside the prohibition on collective punishment which is manifested as aforesaid in international customary law, it is contrary to Jewish values and ethics, as expressed by this honorable court in its judgments:

> This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets: "The Soul that sins, it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him" (Ezekiel 18:20). One should punish without warning and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses: "The father shall not be put to death for the children nor the children be put

to death for the fathers; but every man shall be put to death for his own sin" (II Kings, 14:6).

> …Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we have read Regulation 119 of the Defence Regulations, we have read it and vested it with our values, the values of the free and democratic Jewish state. These values will guide us to ancient times of our people; and our times are no different: "They shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." (HCJ 2006/97 **Ghanimat et al. v. GOC Home Front Command**, IsrSC 51(2) 651, 654-655).

89. The house demolition policy by virtue of Regulation 119 violates the essential core of human dignity. As aforesaid, we are not concerned only with the demolition of a person's home but rather, also with the erasure of entire parts of a person's memories and life experiences accumulated between the walls of their home. In the family home, human beings are born, human beings grow-up, human beings get married and even pass away. A policy which systematically uses people's lives by erasing these memories and life experiences alongside the demolition of the physical building, solely for the purpose of transferring a massage, the successful transfer of which has never been proven, is completely contrary to the most basic values of ethics and justice.

90. Respondent's authority to exercise the sanction of seizure, sealing or demolition of a house is vested in him by virtue of Regulation 119. The Petitioners shall argue that Regulation 119 is contrary to the norms applicable to the military commander and therefore he must not use it. If the military commander exercises the authority vested in him by virtue of the Regulation, he must act in the framework of the discretion and rulings of this honorable court and meet the proportionality tests. In the case at hand the Respondent acted contrary to all of the above and therefore his decision should be revoked.

<u>The principle of proportionality</u>

> One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation; second, it is a central standard in Israeli administrative law which applies to the area under belligerent occupation. We shall now briefly discuss each of these […] Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli Administrative Law (See **Z. Segal, The Cause of**

Disproportionality in Israeli Administrative Law; I. Zamir, The Administrative Law of Israel)(paragraphs 36 and 38 of the judgment in HCJ 2056/04 Beit Sourik Village Council et al. v. The Government of Israel) (reported in Nevo)

91. Even if this honorable court is of the opinion that the aforesaid does not sufficiently justify a determination that Regulation 119 and the policy exercised by virtue thereof are unlawful, then, in addition to the aforesaid, the Petitioners are of the opinion that Regulation 119 and the policy applied by virtue thereof do not comply with the principle of proportionality customary in international humanitarian law, nor do they comply with the principle of proportionality according to the requirements of Israeli administrative constitutional law. We shall explain.

92. According to the long-standing rulings of this honorable court, Regulation 119 remains valid even after the enactment of the basic laws. However, it has long been established that, notwithstanding the aforesaid, the authority granted in the Regulation should be interpreted in the spirit of the provisions of the Basic Law: Human Dignity and Liberty.

93. The authority according to Regulation 119 of the Defence Regulations should be exercised after balancing is made: between the severity of the act committed by the perpetrator and the severity of the sanction used; between the harm caused to the perpetrator's family and the benefit which shall arise as a result of deterring other potential perpetrators; between the right of the perpetrator's family members to property and protecting public safety. This balancing, forming part of the known constitutional proportionality tests requires that the deterring measure rationally realizes the proper purpose; that the measure violates the protected right to the least extent possible for the purpose of achieving the proper purpose; and that the chosen measure also meets the third sub-test of the relevant "proportionality", namely, that a proper relationship ("proportionality" in the narrow sense) is maintained between the benefit arising from the act and the realization of the purpose underlying it and the damage which may be caused as a result thereof to constitutional rights (see: Aharon Barak **Proportionality in the Law** 471 (2010); compare: MiscCrimApp 8823/07 **A v. the State of Israel**, in paragraph 26 of the judgment of the Deputy President, Justice A. Rivlin ([reported in Nevo], February 11, 2010)). In this context, one must also be convinced that the same purpose may not be realized by less drastic measures than house demolishing or sealing (HCJ 5696/09 **Moghrabi v. GOC Home Front Command**, paragraph 12 of the judgment) (reported in Nevo).

94. However, although it has long been held by this honorable court that the exercise of the authority in individual cases must meet the proportionality tests, the court has never examined the proportionality of the systematic house demolition policy applied by virtue of Regulation 119 itself.

95. The Petitioners shall show below that the policy itself is completely contrary to the principle of proportionality and fails to satisfy any of the three sub-tests which were established to examine the matter.

<u>The refusal to reconsider the lawfulness of the use of Regulation 119</u>

96. Despite the unease caused by the frequent use of Regulation 119, the principled arguments concerning the unlawfulness of house demolition are rejected time and again without any substantial discussion. Therefore, the Petitioners wish to reiterate these things and remind of them once again, with the hope and the belief that the petition at hand shall give the court an opportunity to thoroughly examine the difficulties evoked by the use of Regulation 119 by an expanded panel.

> … **the arguments which were raised** [against the lawfulness of the use of Regulation 119 – N.D.] **are weighty and, in my opinion, worthy of thorough examination. While it is true that the general-basic arguments made herein and similar arguments have already been raised in the past, in my opinion they have not been thoroughly and comprehensively discussed as required, at any rate, not recently or fully**. [emphasis was added; N.D.]

(the words of the Justice Mazuz in HCJ 7220/**15 'Aliwa v. Commander of IDF Forces in the West Bank** (dated December 1, 2025).

97. In recent years comments were made in several judgments about the use of Regulation 119 and Respondent's authority to demolish houses, in whole or in part, by virtue thereof. In HCJ 8150/15 **Daud Abu Jamal v. GOC Home Front Command** (hereinafter: **Abu Jamal**) it was held by the Honorable Justice Mazuz in paragraph 3 of his judgment as follows:

> I have presented my position on these issues – according to which the use of Regulation 119 raises a series of difficult legal questions, on the level of international law and on the level of Israeli constitutional law which in my view have not yet been given proper and sufficient attention by the judgements of this court - on several occasions over the last two years…

98. And it was also so held by the Honorable Justice Baron, although she has joined the opinion of the Honorable Justice Amit that the petition itself should be dismissed: "**It should however be noted that I join the voices calling to re-visit this ruling** (the authority by virtue of Regulation 119 – N.D.) **by an expanded panel of Justices**" (paragraph 1 of her judgment).

99. These comments were also joined by the Honorable Justice Vogelman in HCJ 1630/16 **Zakkariya v. Commander of IDF Forces** (given on March 23, 2016):

> 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** [emphasis was added; N.D.]
>
> See also similar things which were said in HCJ 628/18 **Kamil v. Commander of IDF Forces in the West Bank**, paragraph 13

> (February 28, 2028); see also HCJ 1490/20 **Shibli v. Military Commander of the West Bank Area**, paragraph 1 (March 30, 2020); HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank**, paragraphs 1-6 (October 15, 2015); HCJ 752/20 **'Attawneh v. Military Commander of the West Bank Area**, paragraph 22 (May 25, 2020).

100. As noted by the Honorable Justice Vogelman there, these positions were also expressed by other Justices:

> Ever since the Sidr judgment was given, additional voices have been 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 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").

101. In a judgment discussing this issue, the Honorable Justice Vogelman has reiterated his position in HCJ 628/18 **Kamil v. Commander of IDF Forces in the West Bank**, (February 28, 2018) and noted that:

> The above also apply to Petitioners' request that we re-visit – in the current proceeding – the principled issues evoked by the house demolition policy… I have expressed my opinion on the prevailing rule concerning house demolition by virtue of Regulation 119 of the Defense Regulation and the general difficulties associated therewith more than once (see for instance my opinion in HCJ 5839/15 Sidr v.

Commander of IDF Forces in the West Bank (October 15, 2015); in HCJ 1630/16 Zakariye v. Commander of IDF Forces (March 23, 2016); in HCJ 1336/16 Atrash v. GOC Home Front Command, paragraph 1 of my opinion (April 3, 2016); in HCJ 5141/16 Mahamara v. Commander of Military Forces in the West Bank (July 24, 2016); and in HCJ 5943/17 A. v. Commander of Military Forces in the West Bank (August 3, 2017)). As I have noted in these cases, **although I am of the opinion that said rule should be re-visited and all aspects thereof be fully discussed**, it is binding until it is changed, to the extent it is changed, by an expanded panel"

102. The Honorable Justice (retired) Joubran has also joined these comments in HCJ 1938/16 **Abu Alrub v. Commander of IDF Forces in the West Bank** (March 24, 2016, hereinafter: **Abu Alrub**), noting that:

> **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 seizure 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…**

103. Recently, the Honorable Justice Karra has also joined this position in HCJ 4853/20 **Abu Baker v. Military Commander in the West Bank** (August 10, 2020, hereinafter: **Abu Baker**):

> In HCJ 6905/18 **Naji v. Military Commander of the West Bank Area** (December 2, 2018) and in HCJ 8886/18 **Jabarin v. The Military Commander** (January 10, 2019) I have expressed my opinion that the exercise of the power of the military commander to demolish houses by virtue of Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: **Regulation 119** or the **Regulation**) raises difficulties in the realm of local law and international law which have not been thoroughly clarified and discussed in our judgments and that these questions should be revisited by an expanded panel of this court. I also noted that an increased use of Regulation 119 shall intensify the need to re-examine the rule.

104. In addition, recently, the Honorable Justice Mazuz referred to the change in the security circumstances in the hearing held on October 12, 2020 **Dweikat v. The Military Commander** (hereinafter: **Dweikat**) and to the substantial decline in the number of attacks presented by the Respondent in its responses to the petitions. The Honorable Justice Mazuz has even challenged Respondents' counsel on the analysis of the factual

reality and the segmentation of the data and noted that a rational connection should exist between the amount of security incidents and the intensity by which the Regulation is used. He stated further:

> "These data show that after the peak in 2014-2015, at which time there was a large increase, following which the policy of applying Regulation 119 was intensively renewed, after 2015 the number of attacks dropped to the level before 2014, a period in which this regulation has almost never been used other than in exceptional cases. (See protocol dated October 12, 2020, line 8, page 8, in Dweikat)

105. As aforesaid, recently criticism was heaped and questions were raised by some members of the different panels on the casual application of the house demolition policy, taking no consideration of the circumstances of the period, the changes in the security situation, the indications of the threat posed by other populations against which the Regulation is not used, and more.

106. These things raise question marks as to whether the continued use of Regulation 119 which became automatic is justified or not. In this context the words of the Honorable Justice (as then titled) E. Hayut in HCJ 8091/14 **HaMoked Center for the Defence of the Individual v. The Military Commander**, should be reminded:

> The terror attack in Merkaz Harav Yeshiva in the center of Jerusalem constituted, according to security agencies, an extreme case, and the use of the demolition measure was renewed in connection therewith, after a recess of a few years. A petition which was filed with this court in that matter – was denied (Abu Dheim). The last wave of terror which commenced with the abduction and murder of the three youths, God bless their souls, and continued in **frequent** killings and massacres of innocent civilians, passersby and worshipers in a synagogue, also marked an extreme change of circumstances, characterized by terrorists from East Jerusalem, which required a renewed used of this means. However, these extreme cases should not make us forget the need, as my colleague pointed out, to re-examine from time to time and raise doubts and questions concerning the constitutional validity of the house demolition measure according to the limitation clause tests. (The emphases were added, N.D).

107. Hence, it seems that there is no dispute that the lawfulness of the use of Regulation 119 is a complex issue which should be discussed by an expanded panel. It also seems that the only reason for the court's reluctance to examine the lawfulness of the use of Regulation 119 limiting the judicial scrutiny only to the manner by which the authority is exercised in an individual case, does not stem from the validity of the Regulation, its morality, or its compliance with the tests of proportionality and reasonableness. These matters, as specified above, have never been examined. The continued use of Regulation 119, notwithstanding the legal and moral difficulties raised by it, is made possible in 2023 solely due to a ruling which was given four decades ago. However, it is Petitioners' position that the changes taking place these days in the international arena, as well as the

fact that this case proves the ease with which the Respondents decide to use the Regulation and to expand the exercise of the authority vested by virtue of Regulation 119 to harm and use innocent persons from more distant circles, make it inevitable and even necessary to re-visit the lawfulness of the current policy and the use of Regulation 119. For all of these reasons, the Petitioners hereby request the honorable court to completely invalidate the use of Regulation 119 and the policy applied by virtue thereof, and alternatively to order that the use of Regulation 119 shall be stayed until this principled issue is thoroughly examined and resolved by an expanded panel.

<u>The manner by which the authority and the discretion are exercised</u>

108. The Petitioners are of the opinion that even if the honorable court decides in the case at hand that the Respondent is vested with the authority to exercise his authority according to Regulation 119 against Petitioners' home although they have done nothing wrong, then **judicial scrutiny of Respondent's decision does not end on the level of the authority. The honorable court is requested to examine the discretion in exercising the authority, in the light of the circumstances of the case, and in view of the proportionality tests**.

109. The Petitioners shall argue that in the case at hand the Respondent deviated from the court's rulings by ordering to take such a severe and devastating step neglecting to meticulously and carefully examine the circumstances of the case as required.

110. Due to this severe violation of fundamental rights and the irreversible damage inflicted on all of the family members, in its interpretation of Regulation 119 the Supreme Court has limited its implementation and use and held that it is incumbent on the military commander to exercise reasonable discretion while exercising his authority by virtue thereof and to act proportionately.

111. The Honorable Deputy President (retired) Rubinstein referred in the past to the manner by which the military commander exercises his authority in a case in which "the purpose of terror" was not the only thing which motivated the perpetrator, and stated as follows:

> It is not necessary to determine that terrorism was the perpetrator's sole or primary motivation in order to find that the military commander had the authority to use his power to order the demolition or sealing of a house pursuant to Regulation 119. However, **this may carry weight in terms of the military commander's discretion and assessment of the proportionate measure that fits the circumstances - for instance, sealing rather than demolishing, or partial rather than full demolition**, all according to the purpose of Regulation 119 [emphases added, N.D.].

(HCJ 6745/15 **Abu Hashiyeh et al. v. The Military Commander of the West Bank Area**)

112. It should be noted that despite the fact that house demolition is contrary to international humanitarian law and basic rights, this honorable court held that the use of Regulation 119 for deterring purposes is legitimate, when this measure is required to prevent innocent

persons from being harmed (HCJ 2418/97 **Abu Farah v. Commander of the Military Forces**, IsrSC 51(1) 226; HCJ 6996/02 **Za'arub v. Commander of the Military Forces in Gaza**, IsrSC 56(6) 407 and more).

113. However, case law has defined the framework of Respondent's discretion while exercising his authority to forfeit and demolish houses by virtue of Regulation 119.

> …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. (HCJ 2722/92 **Al'amarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693 (hereinafter: **Al'amarin**), page 669).

114. Accordingly, the Respondent must meticulously examine the circumstances of each and every case: **the harm expected to be caused to the family**; the perpetrator's connection to the house, the perpetrator's part in the attack, the severity of the attack, the size of the house and the effect of the sanctions on other people, **whether those adversely affected by the demolition have any connection to the perpetrator's deeds**, **is it possible not to cause damage to the entire house** and the like (see HCJ 6299/97 **Yassin v. The Military Commander**, reported in Nevo, and **Al'Amarin**).

115. Even if in other cases as argued by the Respondent in his response to the objection, this honorable court has approved house demolitions in circumstances partly similar to the case at hand, each case should be examined on its own merits and the discretion should be based on all of the facts and circumstances, in the aggregate. One should not examine, as the Respondent does, whether each circumstance in and of itself allows the exercise of the authority according to Regulation 119 or not, but rather whether all of the circumstances in the case at hand, in the aggregate, undermine the basis of the military commander's decision.

Extreme harm to an innocent family

116. As mentioned above, the use of the measure of house demolition should be examined according to the circumstances of each case, since this measure seriously violates basic rights of innocent people and constitutes collective punishment contrary to the commandment "A man shall be put to death for his own sin" (Deuteronomy 24:17).

117. The long-standing rulings of this honorable court emphasized the obligation to act prudently when exercising the authority by virtue of Regulation 119 and even limited it only to special circumstances. The demolition of a house in which innocent family members live solely on the basis of the act which is attributed to the family member, does not meet the proportionality test at all.

118. Contrary to the holding of the honorable court in HCJ 2770/22 **Hamarsheh v. The Military Commander** (reported in the Judicial Authority Website May 19, 2022)

according to which the harm inflicted on innocent family members is a by-product of a tool designed to deter, the Petitioners are of the opinion that this is not a by-product, but rather an intentional harm directed in its entirety against innocent people, used as a tool for deterrence purposes.

119. Only recently, and in response to the court's decision in **Hamarsheh**, it was written that: "The damage to the house as an "object" is caused here as a means to cause suffering to the family, which, as aforementioned, is a means to achieve the purpose of "deterrence". Hence, it is only one step in the chain intended to cause damage, and as such, it does not make the damage to the family a by-product." (See: David Enoch and Eliav Lieblich, "**On House Demolition and Intentional Harm to the Innocent: Following HCJ 2770/22 Hamarsheh et al. v. The Military Commander", Forum Iyunei Mishpat (Judicial Commentary) 46 (June 2, 2022).** In other words, anyone seeking to demolish a house intends to cause damage, making the harm inflicted on innocent family members an intentional harm for all intents and purposes. Therefore, it is an illegitimate act morally and is unlawful, both according to international law and Israeli law, prohibiting the infliction of intentional harm on the innocent, when this is the main purpose of the act - exploiting the intentional harm to deter others. In other words, using the innocent as a tool to achieve a purpose extraneous to them. Applicable to this matter are the words of the Honorable Justice H. Kabub in HCJ 4088/22 **Alrafai v. The Military C**ommander (reported on July 7, 2022) (hereinafter: **Alrafai**):

> I shall not deny that I am not at ease with the severe harm caused to the residential home and with the seizure of the property of the family members, some of whom are minors, some of whom are ill, and **all of whom are innocent**, due to the murderous deeds of their family member the perpetrator – as occurs in the case at hand. We must remember that this is not the petition of a perpetrator petitioning against the proportionality of the harm inflicted on him. The perpetrator stands trial, and if and when convicted of the offenses attributed to him, he will most likely spend the rest of his life behind bars, as is fitting given the extreme and murderous crime… However, the seizure and demolition order the subject of the case at hand harms the petitioners who are, as aforesaid, his family members… all of whom shall become, at once, homeless... Such harm should not be taken lightly since a home for a person "is not only a roof over their head but also a means for determining a person's physical and social position […] their private life and social relationships" (HCJ 7015/02 Ajuri v. Commander of IDF Forces in the West Bank, IsrSC 56(6) 352, 365 (2002)). (Emphases were added, N.D.).

120. Although the Respondents do not allege that any of the family members was involved in M.'s deed it seems that this consideration was not reflected in the result reached by the Respondents since they wish to demolish the entire apartment in the most devastating demolition method. The family members did nothing wrong, they were not involved in the incident and did not give refuge or support in retrospect and no evidence was presented showing that there had been early signs before the incident pointing at M.'s intentions to dissuade him from his intention to carry out the attack. Nevertheless, the

decision to exercise the authority was taken as aforesaid, to the most extreme: demolition of the entire apartment including the exposure of several buildings to damage, without any attempt to limit the unjustified harm, but rather on the contrary, to expand it in an unprecedented manner!

121. The Respondents do not even feel the need to create the appearance of an attempt to mitigate the damage not even in view of Petitioners' circumstances, alleging that it is required for deterring purposes.

122. Where innocent family members are concerned, it is required, according to case law, that the damage shall be limited to the specific part of the apartment with respect of which the perpetrator had a strong residential connection. However, the Respondents have apparently decided to expand the offensive policy and have also added to the circle of persons who are expected to be harmed the tenants of the buildings connected by the apartment the subject of the order, who are not related to the Petitioners, beyond the innocent members of the nuclear family. Not only that these sensitive details did not lead the Respondents to consider the possibility of refraining from exercising the authority or, at least, limiting it, but rather, conversely, the Respondents decided to expand it and cause damage to the entire structure, since the goal justifies the means and deterrence, whose effectiveness is doubtful, must be achieved at any moral cost, however difficult it may be.

123. Although the exercise of the authority could focus on the room in which M. used to sleep, the Respondents refrained from doing so and chose to demolish the entire apartment and even expose additional apartments to damage. The above unequivocally proves that the only consideration underlying the exercise of the authority is a pure punitive consideration, since the exercise of the authority and its scope was examined solely on the basis of the severity of the deed, separate and apart from the other criteria established over the years by this honorable court.

124. This concern increases in view of the fact that the Respondents failed to present to the Petitioners all of the relevant evidence for the purpose of submitting the objection and the petition at hand. The above is stated while the recent history of house demolition policy shows that the Respondent did not limit the use of Regulation 119 since the resumption of the house demolition policy, and whenever a Jew is killed in an attack, without any exception, a demolition order is issued.

125. This argument is intensified following the Abu Baker judgment in which it was held that the demolition order was not proportional and should therefore be revoked, maintaining Respondent's authority to issue a partial sealing order for the perpetrator's room.

126. The Respondents were of the opinion that said judgment deviated from case law in a manner justifying the submission of an application for a further hearing which was denied by the court which held that no deviation from case law was found (see HCJFH 5924/20 **The Military Commander v. Abu Baker**, reported in the Judicial Authority Website on October 8, 2020). The Respondent lost sight of the fact that according to case law he is obligated to strike a balance between the severity of the deed and the severity of the harm inflicted on innocent family members.

<u>The involvement of the family members according to case law</u>

127. As aforesaid, over the years, case law recognized Respondent's authority to use Regulation 119, but at the same time has emphasized that the military commander should not exercise his above authority disproportionately, in a manner amounting to collective punishment (see HCJ 698/95 **Dajales v. Commander of IDF Forces**, IsrSC 40(2) 42 (1986), page 44) and HCJ 4597/14 **'Awawdeh v. The Military Commander of the West Bank Area,** paragraph 16 (July 1, 2014)).

128. According to this approach, the honorable court has reiterated, more than once, the criteria delineating the authority of the military commander while exercising this draconian sanction:

> The severity of the acts that are attributed to the suspect; the number and characteristics of the persons who may be harmed as a result of the exercise of the authority; the strength of the evidence and the scope of involvement, if any, of the other inhabitants of the house. The military commander is also required to examine whether the authority may be exercised only against that part of the house in which the suspect lived; whether the demolition may be executed without jeopardizing adjacent buildings and whether it is sufficient to seal the house or parts thereof as a less injurious means as compared to demolition (HCJ 5290/14 **Qawasmeh v. The Military Commander of the West Bank Area**, paragraph 22 of the judgment of Justice Danziger (August 11, 2014) (emphases were added, N.D.)

129. In view of the above, it is apparent that the honorable court has long recognized that the number of the harmed family members, their characteristics and scope of their involvement are weighty considerations while deciding whether to exercise the authority by virtue of Regulation 119 and for the purpose of determining the scope of the authority. The Honorable President Hayut has also emphasized the importance of these considerations, mainly in response to the collective punishment argument, in HaMoked judgment:

> … one of the considerations which the military commander should take into account in connection with house demolitions is the scope of involvement of the other inhabitants of the house in the hostile activity of the terrorist (see: 'Awawdeh, paragraph 18 of the judgment of the Deputy President, M. Naor; Qawasmeh, paragraph 22 of the judgment of Justice Y. Danziger). The Deputy President however, noted further in this context that "the absence of evidence concerning awareness or involvement of the family members does not prevent, in and of itself, the exercise of the power, but this factor may influence the scope of respondent's order, as aforesaid." **In my opinion, said consideration, although it is not the only consideration, should carry a significant weight in making the decision concerning the demolition of the structure and its scope, and it seems that it was emphasized more than once in the past by this court that said consideration should**

be given such weight (**HaMoked**, paragraph 4 of the judgment of the President the Honorable Justice Hayut) (emphases were added, N.D.).

130. Even according to the approach that the ability to exercise the authority by virtue of Regulation 119 stands, the intentional and deliberate harm inflicted on innocent people raises weighty questions and requires, according to the fundamental principles of Israeli jurisprudence and the universal moral principles, that the exercise of the authority be invalidated, or at least, limited.

131. In a number of judgments given by this honorable court, the court has reiterated that the harm inflicted on the innocent family members must be taken into account, and that the purpose of exercising the authority should be balanced against the harm inflicted on the family members. For instance, in HCJ 5510/92 **Turkman v. Minister of Defense**, IsrSC 48(1) 217 (1993), the consideration concerning the innocence of the family members was translated into action. In said judgment, the court ordered to cancel the demolition order and to issue, *in lieu* thereof, a partial sealing order due to the harm inflicted on innocent family members.

132. The court has also addressed this issue in recent years in HCJ 8024/14 **Hijazi v. GOC Home Front Command** (June 5, 2015). In said case the GOC Home Front Command has replaced the demolition order to the house with a sealing order to the room in which the perpetrator had been residing following the court's comments and an order *nisi* which had been issued in the above proceeding on December 31, 2014, concerning the innocence of his family members.

133. Moreover. This honorable court has taken a consistent position and held more than once that the home of the nuclear family should not be demolished in its entirety, where there is no allegation of involvement or assistance on their part (HCJ 5359/91 **Hizran v. Commander of IDF Forces in the West Bank**, IsrSC 46(2) 150 (1992); P.D. Mo. (2) 150 (1992); HCJ 2722/92 **Al'amarin v. Commander of IDF Forces in the Gaza Strip**, IsrSC 46(3) 693 (hereinafter: **Al'amarin**); HCJ 6026/94 **Nazaal v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 48(5) 338 (1994) (hereinafter: **Nazaal**); HCJustice 2006/97 **Ghanimat v. GOC Central Command**, IsrSC 51(2)) 651 (1997) (hereinafte**r: Ghanimat**) Accordingly, for instance, it was so held by the Honorable Justice (retired) Cheshin in that regard:

> Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one meaning during the Mandate period and another meaning 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 — and 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 interpreting 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…

'In those days people shall no longer say: fathers ate unripe fruit and their sons' teeth shall be blunted, but a person shall die because of his own sin; any person who eats unripe fruit shall have his teeth blunted' (Jeremiah 31, 28-29 [8]).

No longer do fathers eat unripe fruit and their sons' teeth are blunted, and no longer do sons eat unripe fruit and their fathers' teeth are blunted, but a man shall be put to death for his own sin. (Alamarin, paragraphs 6-7).

134. And in **Nazaal**:

The basic principle will stand, without a hair's breadth deviation there-from; a man shall be put to death for his own sin… The basic principle with which we are concerned goes to the root of the power and does not pertain only to the discretion of the authority and to the issue of compatibility ('proportionality, 'relativity') between the evil deed and the sanction imposed by the authority.

I find it difficult to agree to the stipulation that the respondent is vested with the power to demolish the entire house being the subject matter of this case, despite that fact that the assassin did not own it and did not reside in the entire house. The assassin's room is designated for demolition, and the authority was entitled to destroy it had it wanted to. His room alone rather than the home of others".

135. And in **Ghanimat**:

If we destroy the perpetrator's apartment, we shall destroy at the same time – by the same strokes – the apartment of this woman and these children. We shall there-by punish this woman and these children although they have not sinned. This is not done here. Since the establishment of the State - certainly since the Basic Law: Human Dignity and Liberty – when we have read regulation 119 of the Defense Regulations, we have read it and vested it with our values, the values of a free, democratic Jewish state. These values directly lead us to the ancient times of our people, and be our times no different than former times: they shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. Every man who eats sour grapes, his teeth will be set on edge.

136. A similar position was also expressed by the Honorable Justice Vogelman in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015):

> …And these words primarily relate, as stated, to the innocent family members, about whom it was not claimed that they were in any way involved in the criminal action of the assailant, in cases where the military commander orders the demolition of the entire house (as opposed to its partial demolition or sealing).
>
> The result of balancing the scales one against the other – the benefit against the human rights violation attendant to the realization of the Regulation's aim – is that, at least in the absence of involvement by the household members, the drastic harm to the rights of the uninvolved tips the scales and outweighs the opposite considerations. The demolition of the home is therefore done with authority, but the flaw lies in the level of the discretion: in such a case, the action is disproportionate (paragraphs 5-6)).

137. In a later judgment, the Honorable Justice Mazuz has broadly discussed this issue in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015) (hereinafter: **Abu Jamal**) referring to Respondent's obligation to examine, while exercising the authority, the extent of the involvement, if any, of the family members residing in the house, and stating that this is a fundamental consideration when making the decision on whether and how the authority should be exercised. The following are his words:

> In my opinion, considering the severe violation of the rights of those who did not sin, the **inevitable** conclusion which arises is that in cases in which no evidence exists regarding connection and involvement of the family members in the criminal act, the order should not be directed against them, and accordingly one should consider to refrain from exercising the sanction or at least limit it to the perpetrator's part in the house alone (paragraph 14)(emphasis appears in the original).

138. Furthermore. The Honorable Justice Mazuz emphasized that this approach was consistent with the deterring purpose which according to the Petitioners in the case at hand, underlies the policy:

> In my opinion, the above approach precisely reconciles with considerations of deterrence. A deterring purpose assumes that a rational connection exists between the prohibited action and the sanction. Said purpose does not reconcile with the infliction of harm on innocent people. Directing the sanction only against family members who were involved in the terror activity, and on the other hand, leaving uninvolved family members unharmed, may create an incentive for the family members to act for the prevention of attacks when they become aware of such intention, in a bid to avoid the expected sanction. On the other hand, **taking the sanction against those who are not involved as well, does not create an incentive for the family members to act for the prevention of the terror activity in view of the fact that the sanction would be taken against them in any event, even if they act**

> **for the prevention thereof** (without success) (the emphases were added, N.D.).

139. Similarly, the Honorable Justice Baron referred in HCJ 1125/16 **Mar'i v. Commander of IDF Forces in the West Bank** (March 31, 2016) to the undesirable consequences embedded in the use of this sanction against innocent family members. It should be noted that in said case the honorable court ordered to cancel the demolition order and even denied the option to replace it with a sealing order:

> 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. Note, that the jurisprudence of this Court has **highlighted the importance to be attached to the family's knowledge of or involvement in the murderous plans of its offspring with respect to examining the proportionality of the decision to demolish the family's home** (paragraph 6) (the emphases were added, N.D.).

140. In conclusion, the involvement of the family members in the deed is a weighty issue while examining the proportionality of the decision. This honorable court in its judgments over the years has emphasized the importance of this issue while addressing the collective punishment argument.

141. In the judgment given on August 10, 2020 in **Abu Baker** it was held that due to the fact that the woman and her children, all minors, were not involved, the decision to demolish their residential home, and beyond, was not proportionate and therefore the demolition order should be revoked. The honorable court recognized the importance of the family members' involvement as a major factor in examining the exercise of the authority and the manner of its exercise, a consideration which is even consistent with the purpose of deterrence.

142. In the case at hand the harm inflicted on the family members is extremely severe. An entire family including, *inter alia*, three minors, residing in the house is expected to find itself out on the street, and other families, including dozens of minors, are also expected to be harmed by the act of the demolition which shall be carried out in front of their eyes, if and to extent this honorable court approves this order.

<u>The use of Regulation 119 against innocent family members for the deeds of their minor son</u>

> The argument that Regulation 119 should be used for an offense committed by a minor and that as a result of its use others like him shall be deterred, cannot stand in the circumstances of the case before us." (paragraph 5 of the opinion of the Honorable Justice (retired) Karra, HCJ 8886/18 **Jabarin v. The Military Commander** (January 10,

2019) (reported in the Judicial Authority Website)(hereinafter: **Jabarin**)

143. Leaving a family of two parents and their four children, three of whom are minors aged 16, 11 and 3, without a roof over their head, due to the alleged deeds of a minor who was 13 years old at that time, cannot be considered reasonable. The above, when the family is innocent, in the absence of any allegation that it was involved in the deeds of their minor son, or that it had any prior knowledge of his intention to carry out the deeds attributed to him.

144. As aforesaid, the defendant is a minor, who is currently 14 years old, a fact that the Respondent should take into account while considering whether and how to use Regulation 119.

145. A minor's involvement in a criminal offense is clearly examined in view of their young age and their ability to understand the seriousness of their actions, their consequences and obviously their awareness of all of the above. Even in the context of deterrence, the perpetrator's young age cannot be disregarded and the harm inflicted on their innocent family members as a result of his deeds must also be taken into consideration.

146. This basic principle is already found in the Mishnah: "The harm inflicted by the deaf, the foolish and the young is severe, those harming them are liable, but they who harmed others are exempt" (Bava Kama, Chapter 8, Mishna 4).

147. Israeli law adopted the approach which draws a distinction between the adjudication of minor defendants and the adjudication of adult defendants. This distinction is mainly based on the characteristics of minors as they relate to their mental state, the degree of their understanding and internalization of the severity of their actions, their moral views, and more. In CrimApp 1583/91 **State of Israel v. A**, IsrSC 46(5) 94, 99 (1992) it was held in this regard that:

> The law is willing to recognize the fact that the mental inhibitions and moral assessment of the value of human life in minors are different than those of adults and that "there is no malice like the malice of someone who has turned eighteen".

148. Consequently, it is clear that these characteristics must have an effect not only on the manner by which minors are punished but also on the alleged deterrence of minors and their family members.

149. Israeli case law recognized that minors' conduct is not affected by the same rationales affecting adults. It has been noted by the Supreme Court more than once that minors' conduct is irresponsible, reckless, immature, because it is greatly affected by social pressure and is characterized by the failure to exercise discretion and the difficulty to control impulses (see CrimApp 5048/09 **A v. State of Israel** (February 14, 2010)).

150. In CrimApp 49/09 **State of Israel v. A** (reported in Nevo, March 8, 2009) (hereinafter the "**A case"**) the Supreme Court explained the rationale underlying the legal theory whereby defendant's young age is a factor that should be taken into consideration:

> "… **minors' discretion is not fully formed and therefore they cannot distinguish good from bad. Second, minors are more easily susceptible to negative environmental influence and are less resistant to social pressure compared to adults. Therefore, their actions are not the result of an informed and balanced judgment**. Finally, the personality of minors has not yet been formed and therefore deviant behavior patterns have not yet been permanently established and ingrained in them. Hence, their temporary deviation can be treated and rehabilitated". (emphases were added, N.D.).

151. Also appropriate in this context are the words of the honorable court in CrimApp 5048/09 **A v. State of Israel** (February 14, 2010) which explained the different rationales distinguishing a minor defendant from an adult defendant underlying the legal theory whereby the fact that the defendant is a minor should be taken into consideration for sentencing purposes. It was so held:

> "The first reason is a type of **diminished responsibility**. Namely, a minor at a certain age (12 according to Section 34F of the Penal Law) **is indeed responsible for his/her actions but not to the fullest extent like an adult. This difference may result from physiological developments, lack of life experience or the fact that the minor is at a different point of development than the adult.** This state of affairs leads to the conclusion that adults should be treated more rigorously than minors... It should be noted that the first reason focuses on responsibility for the offense..." (emphasis added, N.D.)

152. Hence: the different treatment given to minors in the framework of the criminal procedure stems from the understanding that it is impossible to examine their actions with the same tools that are used to examine the actions of adults, who have discretion, life experience and the ability to withstand social pressures. There is no doubt that the same characteristics specified by the court as aforesaid, including their unformed sense of judgment, their inability to distinguish good from bad, **the strong environmental influences that minors are exposed to**, their inability to withstand social pressure, lack of life experience, and more, all affect the way in which the legal system deals with the actions of minors and the consequences thereof.

153. **Although we are concerned with the use of Regulation 119 in the context of deterrence, we cannot disregard the fact that its use depends on the carrying out of an offense, and that unless an offense had been committed this tool would not have been used. Hence the relevance of the distinction drawn by Israeli law between minors and adults**.

154. The above is reinforced by the words of the Honorable Justice (retired) Karra in his judgment in **Jabarin** who pointed out that after having reviewed the confidential material presented to the court *ex parte*, it became clear that the minor acted for a mix of different motives, "the minor age of the perpetrator in the circumstances of the case at hand, whose murderous act was motivated by a mix of different motives including the desire to die as a *Shahid*, and a strong desire to hurt his parents and harm them as a result of a dispute

between them - **excludes petitioners' case from Regulation 119**" (emphasis added, N.D.).

155. Similarly, in the case at hand, as it emerges from M.'s interrogation on February 13, 2023, one can clearly get the impression that his act was influenced by the strong environmental influences that he was exposed to. In response to the question why he had decided to commit the attack he said: "because the videos I saw on Facebook made me angry. I saw a video at 12:00 of soldiers who had attacked two brothers from the camp and hit them" (page 3, line 61). Later, in response to the question of his interrogator why he stabbed the soldier he said again: "because of the videos I saw on Facebook and once they searched our house and turned it upside down" (page 3, line 69). At the same time, it emerges from the open interrogation report of Petitioner 1 which was attached to the response to the objection on Respondent's behalf, that M. had a connection to the boy who had been killed by the military on January 25, 2023, about two weeks before the incident underlying the petition.

A copy of M.'s police statement dated February 13, 2023, is attached and marked **P/11**.

A copy of an open interrogation report of Petitioner 1 is attached and marked **P/12**.

156. In addition to the above said, it emerges from M.'s interrogation that M. did not plan the attack and that it was a spontaneous decision which was made by him when he had left his aunt's house and found a knife near the neighbors' house.

157. The unstable and irrational aspect of minors when committing an offense is evident from the above. These details were not reflected in the Respondent's decision.

158. The need to consider the unique characteristics of adolescent minors is of great importance. These minors are in a stage of life characterized by great emotional turmoil, they are moody, are prone to impulsive behavior and experience greater difficulty in controlling their emotions. Due to these characteristics it is difficult to control them and it is even difficult to predict their behavior.

159. It should be noted that due to time constraints, the Petitioners could not obtain an up-to-date professional opinion confirming the unique characteristics of adolescent minors, and in any event they will request to attach a letter received by HaMoked from Prof. Amiram Raviv, an educational and clinical psychologist, who studies this specific issue (hereinafter: **Prof. Raviv's letter**). Obviously, the facts stated in the letter are still true.

A copy of Prof. Raviv's letter is attached and marked **P/13**.

160. Exercising such a devastating and problematic authority, given the different and unique characteristics of minors and the diminished responsibility attributed to them by Israeli law, cannot be proper, in view of the difficult questions which arise and which have no clear-cut answer, if any, regarding the effectiveness of Regulation 119 in achieving the purpose of deterrence, and given the fact that the use thereof and similar offensive actions constituted a motive for M. to carry out the attack, in addition to the claim for diminished responsibility arising not only from the fact that he is a minor but also from the existence of another factor which led to the death of the Border Police Officer.

Effective deterrence in the context of minors

161. The above is reinforced when we are concerned with attacks which were committed by minors, where the question of the effectiveness of the deterrence is even more complex. The validity of the purpose of deterrence is questionable when minor perpetrators are concerned who, due to their unique characteristics, do not absorb the message of deterrence which does not affect them as it affects adults. The above is evidenced by the fact that the consequences of the use of the Regulation, as experienced by M., have apparently caused him to make the decision to commit the attack, as things emerge from the interrogation of his father.

162. It is difficult for minors to realistically assess the consequences of their conduct, and they tend to be drawn into risky and dangerous behaviors in the belief that even if others are harmed they will not be harmed (see Prof. Raviv's letter). **The above lead to the question of whether the effectiveness of deterrence as it relates to minors is examined separately due to the special aspects of the cases involving minors**?

163. The Respondent is required to present and formulate a factual infrastructure which shall unequivocally show that minors are indeed deterred by the sanction of house demolition. Since the Respondent has refrained from performing even the most basic examination in relation to minors, his decision cannot be considered reasonable or proportionate.

164. **In as much as the deterring effect is not effective as it relates to potential minor perpetrators, their exclusion from the Regulation should not adversely affect the deterrence of adult perpetrators, to the extent that effectiveness on the general level is proven**.

Parental responsibility and constructive knowledge

165. According to the interrogation materials in Petitioners' possession, it appears that M. made the decision when he was outside his family home and immediately after making it he left his aunt's house to carry out the attack, at which time his parents could not have prevented it in any way or know about it. In addition, it seems that the offensive actions of the soldiers towards the residents of the place in which he lives and to which he was exposed, including the consequences of the use of Regulation 119 therein, increased the minor's anger and led him to make the above decision.

166. According to the interrogation report of Petitioner 1, it explicitly emerges that the minor's whereabouts were not known to his parents who assumed that he was still with his aunt. Only later on, after the incident, they learnt of their son's involvement in the attack.

167. In the case at hand, we are not concerned with parents who could be encouraged to dissuade their son from acting, or to refrain from helping them, but rather **an active demand to supervise a minor family member, the elements and boundaries of which are unclear and are not known in advance**.

168. According to the Respondents, and under the argument of parental patronage, the family member is not required to be actually aware of the minor's actions or intentions, but rather,

the parents are required to be more involved in their children's lives in order to know and prevent what they do not know.

169. Clearly, it is a very problematic expansion of the limits of the court's intervention in parenting, an expansion whose nature is unclear and unknown from the moral aspect, in terms of the legitimate purposes of the law, and from a practical-applicative aspect, all of the above in the context of using the draconian sanction entrenched in Regulation 119. After all, eventually, M. was influenced by an environment unrelated to his parents, and it can even be said that he was influenced by factors related to the Respondents themselves. Hence the parental responsibility argument is an inappropriate argument which does not suit the circumstances of the case at hand.

170. On the other hand there are situations in which parental responsibility has already been entrenched in Israeli law in which the above balance is already currently maintained and therefore the Respondents can use these sections (or their equivalents in the military legislation), instead of using a far-reaching interpretation of Regulation 119.

171. In HCJ 591/88 **Taha v. The Minister of Defense**, the court discussed an order against parents of minors under the age of criminal responsibility - an age where on the one hand there is no criminal alternative that can be taken or used to deter and on the other hand there is more parental control; which is imposed only after there is already evidence of the minor's involvement in criminal activity. The order concretely imposes on certain parents a duty to take a positive action, an obligation to deposit a financial guarantee, and a legal procedure is required for its seizure. And note well. Considering the exceptional responsibility imposed by the order, the judgment emphasizes its "concreteness":

> "**The order is not applied collectively against groups of parents due to the acts of individual children, but individually against a parent who has violated the duty to supervise their child**. Therefore, the order is not contrary to the prohibition on collective punishment" (paragraph 12) (Emphases were added, N.D.)

172. However, over the years judgments may be found which disapprove of the expansion of parental responsibility for the actions of minors, responsibility which inevitably leads to a violation of the parents' human rights. See in that regard the judgment in AA 11930-07-18 **Ministry of Interior v. Khatib** (January 4, 2019, Nevo), in which it was held that a perpetrator's mother cannot be excluded from the family reunification procedure only due to the actions of her minor son.

173. Beyond the question of deterrence, the responsibility of family members is also examined in the context of proportionality - while the first concerns others and is forward looking, the second concerns the circumstances of the concrete matter.

174. Given M.'s age, and in view of the fact that parental control over a child of his age is not absolute, and in the absence of any evidence of actual knowledge by the family members of M.'s intentions, and the nature of the reasons which led him to carry out the attack, the requirement of constructive knowledge is not met, not even in the strictest sense, which includes mere suspicion.

175. As known, the term "knowledge" in an offense of constructive knowledge, due to its very nature, cannot be interpreted as including a mere suspicion, since requiring a person who only has suspicions that an offense is planned by another, to verify said suspicion, is far reaching, and considerations of legal policy deny it. It was held that "actual" knowledge is required, rather than knowledge relying on assumptions. What should be proven is that the defendant was aware of the facts from which the offense which was planned or committed can be legally concluded (see CrimApp 3417/99 **Margalit Har-Shefi v. State of Israel**).

176. As aforesaid, in the case at hand even the Respondents do not dispute the fact that the minor's parents were not aware of his intentions to carry out an attack. The minor has also made it clear in his interrogation that his parents had no knowledge and that he was not in contact with them when he had made the decision and carried it out instantaneously.

177. Attributing "constructive knowledge" denies this defense from families which did not know that their sons or daughters had carried out an attack and were therefore unable to extradite their children to the authorities. In these circumstances, a determination that the demolition of Petitioners' home or the homes of other families to which "constructive knowledge" is attributed, is proportionate, means that the family is unable to avoid the demolition of its home if one of the family members, particularly a minor family member, decides alone to carry out an attack. Such arbitrary conduct which punishes the innocent regardless of their actions is not in line with the deterring purpose intended to encourage families to take action against the intentions of family members to carry out attacks. If the family is punished regardless of its intentions and actions, it shall not be "encouraged" to prevent similar actions.

<u>Lack of causal connection between the stabbing and the death</u>

178. It emerges from numerous reports in the various media that the Border Police Officer who was killed in the attack died from shots fired by a security guard who should have secured him while he was checking the bus in which M. was traveling (see "He was fearless, and died from a security guard's gunshot. The story of the last person killed in operational activity," Yehoshua (Josh) Breiner, Haaretz (April 24, 2023)).

https://www.haaretz.co.il/news/education/2023-04-24/ty-article-magazine/.premium/00000187-af7c-d803 -ad8f-ff7dceff0000

179. Ironically, even the engineering opinion on behalf of the Respondents confirms that "the death of Border Police Officer, sergeant major Asil Suaed, of blessed memory, at the Shu'fat checkpoint [sic] was caused by an accidental shot fired at him by his fellow security guard." Although the Respondents do not explicitly say so in their response to the objection, it seems that they wish to exercise the authority following an accident in which the security forces were involved, or more precisely, the private security company "Sheleg Lavan". On this basis, the Respondents wish to transfer the responsibility to the shoulders of a 13-year-old boy, since but for the above accident Border Police Officer, Asil Suaed, would not have been killed. The security bodies are required to interrogate the incident and draw lessons to prevent the recurrence of similar incidents, but instead

they pass the burden on to a 13-year-old minor, and even to his innocent family members, as we have specified in detail above.

180. The details of the incident, as described in the indictment and in the partial interrogation materials obtained by the Petitioners, indicate that the injury inflicted by M. was not serious and that the Border Police Officer Asil managed to take control of him, but the security guard fired, apparently unnecessarily, accidentally causing Asil's death. In his interrogation dated February 15, 2023, a video documenting the incident was presented to M. It emerges from the interrogator's question in section 79, that Border Police Officer Asil took control of M. and even managed to keep him away from him after pushing him. It appears from M.'s answer that after he had been pushed the knife he was holding fell and he ceased to pose a threat. Hence, the question therefore is why did the Respondents fail to verify that the security guard's action was necessary and proper? It appears from the article attached above, that the deceased's family members have also raised questions and reservations on the matter

181. There is no dispute that Asil's death caused the Respondents to give notice of the intention to demolish. However, it seems, on the basis of the above publications and statements made by his family members, the interrogation materials which were thus far disclosed to the Petitioners and according to the "professional" engineering opinion, that the death was caused as a result of the accidental shooting of the security guard rather than by M.'s stabbing. As the above has clearly emerged, the Respondents should have attached all of the interrogation materials, including the deceased's autopsy report, the interrogation of the security guard, the video documenting the incident and additional related interrogation materials which could have shed light on the real circumstances which led to Asil's death.

182. Given the fact that there is evidence pointing at the absence of direct causal connection between M.'s acts and the death, the authority to issue the order in the case at hand is highly questionable also for this reason. It is Respondents' obligation to make sure that the evidence pointing at a causal connection between the stabbing and the death are unequivocal and clear, to avoid a situation in which the controversial authority is erroneously exercised against people who should not have been harmed at all by the cruel policy implemented by them.

183. Even if the Respondents insist on M.'s responsibility for the "chain of events" which led to the death of the Border Police Officer Asil, it should be remembered that his responsibility through this "chain of events" is a diminished responsibility to begin with due to his young age. It should be remembered that in these case and where the Respondents wish to pass on to a 13-year-old minor the responsibility for a person's death whose physiological cause of death is unrelated to his actions, the Respondents should present the efforts which had been made to ensure that the security guard's reaction was appropriate and befitting, since according to the above materials the shooting has apparently occurred after M. has already been neutralized by Asil. In other words, it seems that the shooting was redundant and was not necessary.

184. The aforesaid, in and of itself, justifies the revocation of the seizure and demolition order against the residential apartment of the Z. family, or at least the limitation of the order

according to his diminished responsibility arising from his young age and the real cause of death.

The demolition method

185. In the objection the Petitioners raised arguments concerning the demolition method as presented in the engineering opinion attached by the Respondent to the notice of his intention to demolish Petitioners' home.

186. In both the opinion and the response to the objection, the Respondents, contrary to has been done until recently, refrained from presenting different demolition methods and the damages expected to be caused by each one of the potential methods. The Respondents satisfied themselves by saying that the apartment shall be demolished by way of "hot detonation" and that damage is feasible. The expected damage from the demolition in this manner was not specified nor the severe consequences of this demolition method in a crowded civilian environment consisting of non-standard construction.

187. The engineer on Respondent's behalf did not deny the possibility that structural damage may be caused to the building and its surrounding area and did not warrant that the chances for the occurrence of such damage was low, as has been done in previous opinions.

188. With all due respect to the person who prepared the report and his nine years of engineering and operational experience in house demolition by controlled hot detonation in a complex urban environment, while noting that "damage is feasible as a result of the activity as such; acts are meticulously taken in the engineering mapping stage, the engineering planning, in choosing the means and outlining the execution (including on scene supervision and control by the undersigned) to ensure that the demolition shall have, to the maximum extent possible, targeted and controlled characteristics causing low degree and reasonable damage" a sentence appearing in each one of the opinions prepared by him. HaMoked's experience shows that there is no correlation between the guarantees made by the engineer on behalf of the Respondent and the reality.

189. As already stated above, the engineer who had prepared a similar opinion in Tamimi, was requested a later stage to prepare an opinion about the demolition of the same house by way of manual demolition. A review of the opinions attached as P/9 and P/10 shows that there is an alternative with milder consequences, and the engineer himself was already able to commit in the opinion to lesser damage at a lower probability, since it is common knowledge that demolition by detonation may be dangerous and severely harm the other parts of the structure, as past experience shows.

190. A slew of cases in which the measure of hot detonation was used, present a different reality. **According to data in HaMoked's possession referring to the period from 2014 (probably the same period in which the person preparing the opinion has accumulated his experience), out of 15 cases handled by HaMoked in which the measure of hot detonation was used for demolition purposes, where only part of the building was designated for demolition rather than the building in its entirety, in 11 cases severe damage was caused to the neighboring apartments surrounding the part designated for demolition, and some of which even became inhabitable**.

191. Accordingly, for instance, in HCJ 806/14 **Abu Jamal v. GOC Home Front Command** the court approved a demolition order of a ground-floor apartment. It has already become clear at the time of the demolition which was carried out by way of hot detonation that Respondents' undertaking had no merit, and it was found that damage was caused to seven additional apartments in the vicinity of the apartment, which were damaged to varying degrees. An application for compensation was submitted with respect of theses damages, and only in 2020, the sum of NIS 391,000 was transferred by the Respondents for the benefit of those who were damaged.

192. In addition, in HCJ 8161/17 **al Jamal v. The Military Commander** judgment was given which approved the demolition of an apartment located on the top floor of a three-story building by way of hot detonation. As a result of the demolition which was carried out by the Respondent the entire building became inhabitable. The other tenants of the building abandoned it, since the severe damages which were caused to it put at risk the lives of those who continued living there. An application for compensation has already been submitted as early as 2017, and only in 2021 as part of a settlement, compensation in the total amount of NIS 65,000 was received, while according to the assessment the damages amounted to NIS 93,000.

193. Similarly, in HCJ 7220/15 **'Aliwa v. The Military Commander** (reported in the Judicial Authority Website on December 1, 2015) the demolition of the third floor in a three-story building was approved. The demolition was performed by way of hot detonation. Consequently the tenants of the building had to abandon it since as a result of the severe damages which were caused to the building by the detonation it became dangerous to stay therein. In that case the damage was not limited to the building in which the apartment designated for demolition was located, and heavy damage was also caused to nearby buildings, attesting to the problematic nature of the use of this measure in a populated and dense residential area. As a result of the demolition, damage was caused to five apartments.

194. Also, a year ago, in HCJ 480/21 **Kabha v. The Military Commander** (reported in the Judicial Authority Website on February 3, 2021), the demolition of two floors in a three-story building by hot detonation was approved. As a result of the demolition, heavy damage was caused to the ground floor and living there became dangerous. The damage was assessed at NIS 233,000. All of the above contrary to the opinion of the engineer on behalf of the Respondent according to which no damage or damage at a low level was expected. To date, no compensation was paid to the injured parties. Eventually and only recently, the victims agreed to receive compensation in the amount of NIS 100,000, due to the prolongation of the proceedings. The amount has not yet been transferred to them.

195. In another case, the Respondent deviated from the demolition method of which notice was given by him in the framework of the petition in HCJ 5506/16 **Mahamara v. The Military Commander**, which caused heavy damage to the entire building. First, the Respondents gave notice of their intention to demolish two apartments on different floors of the building using "heavy mechanical equipment". The honorable court held in its judgment that only the top-floor apartment should be demolished. After the judgment was given the Respondents decided to demolish the top floor apartment by way of "hot

detonation". Hence, the considerations supporting the limitation of the demolition to the apartment to which the perpetrator had a residential connection became meaningless, since the Respondents decided to act on their own accord and change the demolition method which eventually caused substantial damage to the other parts of the building which were not designated for demolition. This case may be used as an example illustrating the damages which may be caused in the case at hand. Following the deviation from Respondents' undertaking, compensation was paid in the sum of NIS 128,000, plus an additional sum of NIS 5,000. This payment was only received in 2020.

196. In the various opinions which were submitted by the Respondent in proceedings of this type, the state has repeatedly pledged that the demolition would be carried out with the assurance that the existing structural system be protected, specifying the allegedly low chances for the infliction of damage. Nevertheless, we witness, time and again, cases in which Respondent's obligation is not upheld, and heavy damages are caused to third parties, whose exposure to damage has not been properly presented to the honorable court while approving the order.

197. Additional similar cases demonstrating the heavy damage caused by this demolition method, all of which were approved by the honorable court after the Respondent undertook to use a less harmful method, can be found for instance in HCJ 7081/15 **Abu 'Amar v. The Military Commander**. In said case the third floor of a three-story building was designated for demolition. As a result of the detonation the building became inhabitable and additional damages were caused to a neighboring building. Although the damages were assessed at NIS 850,000, in a settlement reached in CC 48291-10-17 **Abu Amar v. Ministry of Defense**, the parties agreed that the sum of NIS 350,000 shall be paid to the injured parties, which was received by them only in 2019.

198. Another case is the Rizak family case. In HCJ 7079/15 **Rizak v. The Military Commander** the court approved the order after the Respondent had committed to a demolition method and warranted that structural damages shall not be caused thereby. Following the demolition damage was caused to the other apartments in the building rendering it inhabitable. In addition, damages were caused to a nearby building.

199. In addition, following a demolition by way of hot detonation which was carried out in the framework of HCJ 87/23 **Jamjum V. The Military Commander**, heavy damages were caused to other apartments in the building and in the surrounding area. The demolition was carried out recently and therefore the damages have not yet been assessed. Also, following HCJ 7787/22 **'Abed v. The Military Commander**, substantial damages were caused. Currently damage assessment is conducted for the purpose of submitting an application for compensation. In the case of the Souf family whose house has recently been demolished following HCJ 1374/23 **Souf v. The Military Commander**, damages were caused to nearby buildings. A video of the detonation posted by IDF Spokesman demonstrates Respondents' great indifference in carrying out a demolition by way of detonation, causing a powerful explosion in a dense civilian environment with far reaching consequences, way beyond the boundaries approved by the honorable court. Attached is a link to the documented event as posted by IDF spokesman:

https://www.idf.il/%D7%9B%D7%AA%D7%91%D7%95%D7%AA-%D7%95%D7%A2%D7%93%D7%9B%D7%95%D7%A0%D7%99%D7%9D/2023/%D7%9E%D7%90%D7%99/%D7%A6%D7%94-%D7%9C-%D7%9E%D7%92%D7%91-%D7%9B%D7%95%D7%97%D7%95%D7%AA-%D7%9C%D7%95%D7%97%D7%9E%D7%99%D7%9D-%D7%94%D7%A8%D7%99%D7%A1%D7%94-%D7%91%D7%AA%D7%99-%D7%9E%D7%97%D7%91%D7%9C%D7%99%D7%9D-%D7%90%D7%A8%D7%99%D7%90%D7%9C-%D7%90%D7%96%D7%95%D7%A8-%D7%AA%D7%A2%D7%A9%D7%99%D7%99%D7%94-%D7%9B%D7%A4%D7%A8-%D7%A4%D7%95%D7%A0%D7%93%D7%A7/

200. On May 23, 2023, at night, a similar demolition was carried out following the court's decision in HCJ 3231/23 **Hawajeh v. GOC Central Command** (September 5, 2023) (reported in the Judicial Authority Website). A detonation may naturally cause damage to houses in the surrounding area due to its large destructive radius compared to other demolition methods, causing building fragments to fly in all directions and distances. In that case videos were posted documenting the military forces vacating people from nearby houses, old people, children and women, including people with disabilities, all of the above to carry out the desired detonation.

https://www.facebook.com/100091810627736/videos/637939851149867

201. One can learn from these data, which are only a small part of all the cases in which heavy damages were caused, of Respondent's conduct as it relates to the manner of execution of the demolition, **<u>in which the damages were so severe rendering entire buildings uninhabitable,</u>** the above beyond the collateral damage, including less drastic damage, causing many not to file suit, given the long periods of time and hassle required to receive amounts coming nowhere close to the amount of the actual damage. It should be noted that beyond the material damage, one must remember the mental damage experienced by the residents of the neighborhood – minors and adults alike – on the day of the demolition, when increased forces of armed and often masked soldiers drive them out of their homes, in the middle of the night, in order to carry out the demolition.

202. The aforesaid substantiates that considerations of revenge underlie this policy and its implementation. The ease with which the Respondents harm innocent residents and the cruelty with which these demolitions are carried out, are affirmed and approved time and again by the honorable court, after the Respondents strongly deny that heavy damages are caused to the houses as a result of their inappropriate conduct. Hence, the Petitioners have presented, even if only partially, the damage caused to the houses which had been demolished by hot detonation, and have also presented the compensation that the Respondents were required to pay, and in some cases have actually paid, despite their denial of the aforesaid.

203. The experience of the author of the opinion on behalf of the Respondents, amounting to nine years of experience in demolishing houses by way of hot detonation, is translated into the aforementioned damages, which occurred in the period parallel to the years of his

experience. The above data speak for themselves, and Respondents' expert himself proves it as shown in the comparison between the two opinions prepared by him in Tamimi.

204. With respect to the case at hand, any deviation from the engineering opinion presented by the Respondent, who *ab initio* does not bother to examine several alternatives and to present the least injurious alternative, may lead to "forcible transfer" of the tenants of the building and cause further damage to nearby buildings.

205. It seems that over the years, and although the court refrains from intervening in Respondent's discretion in choosing the demolition method, the time has come for the Respondent to present data and deal with the allegations that he deviates from his obligations in the context of the demolition damages caused beyond the parts designated for demolition.

206. **It is inconceivable that there is no way to monitor the manner by which the Respondent implements these draconian orders, and beyond the severe and controversial harm that these orders inflict on innocent people, in the manner in which the orders are executed, the Respondent expands the circle of victims and does not exercise caution while choosing the demolition method and while implementing it.** Until these issues are clarified, the Respondent must cease carrying out demolitions by way of hot detonation. Appropriate to this matter are the words of the Honorable Justice Kabub in HCJ 2036/23 **Faroukh v. The Military Commander** (April 10, 2023) (reported in the Judicial Authority Website):

> So long as the court is not satisfied that demolition by way of 'hot detonation' does not cause damage to the other apartments in the multi-story building which are adjacent to the apartment the subject of the order, and in view of the fact that the petitioners submitted to the court an opinion of an expert on their behalf describing the expected damages, in which they have also described and documented the results of previous 'hot detonations' that petitions with respect to the demolition orders underlying them were dismissed by this court – including from recent times in the demolition which was the subject matter of HCJ 87/23 **Jamjum v. The Military Commander of the Judea and Samaria Area** (February 5, 2023) (hereinafter: **Jamjum**) – demolition in this manner should not be permitted. To prevent this dispute from recurring in the form of two texts denying one another; It should be noted that the Military Commander and the petitioners are expected to submit an update notice together with visual documentation concerning the effect of the demolition the subject of the case at hand to the court's file, shortly after its execution (emphases appear in the original).

207. In view of the aforesaid, the honorable court is requested to revoke the demolition order or alternatively to order the Respondent to carry out the order in alternative, more proportionate ways such as limiting its scope or by way of sealing *in lieu* of demolition.

208. The honorable court is also requested to order the Respondent to present data concerning the damages caused to buildings as a result of the demolitions carried out by virtue of Regulation 119, and to the extent that the execution of these orders is monitored, the Petitioners wish to review the information accumulated by such monitoring systems.

The family does not have ownership rights

209. The Petitioners are of the opinion, as already stated above, that the exercise of Respondents' authority according to Regulation 119 against the property of the Shauqi spouses, does not realize the declared purpose of deterrence for which the Respondents have allegedly been granted the authority to issue seizure and demolition orders.

210. As stated in the beginning, the house in which the Z. family resides was purchased by them in a purchase & sale transaction entered into three years ago, while according to the agreement the ownership rights in the apartment shall transfer only after all payments due to the Shauqi spouses are made.

211. Not only that the perpetrator has no ownership rights in the apartment, but neither one of his family members has ownership rights therein, and there are no family ties between the two families.

212. In the above state of affairs, harming the residential apartment which is still owned by the Shauqi family and in which the Z. family resides, is unprecedented since to date harming a house owned by a third party who is not a family member of the perpetrator has not been approved. It should be noted that the examples referred to by the Respondents in response to the objection, cases were presented in which the demolition of a house was also approved when the house was not owned by the family.

213. In the vast majority of these cases which were referred to by the Respondents, the apartments were owned by a third party who was a first-degree relative of the persons who were residing in the house designated for demolition (see HCJ 3231/23 **Hawajeh v. GOC Central Command** (reported in Nevo) (May 9, 2023), HCJ 1629/16 **'Amar v. Commander of IDF Forces** (reported in Nevo) (April 20, 2016). In the single case in which the demolition of a house which was not owned by a family member was approved, the house was owned by the Palestinian Workers Union. In said case the court approved the demolition order on the grounds that the perpetrator's family had a long-term connection to the house (see HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (reported in Nevo) (December 28, 2015), which is not the case here.

The Proportionality tests

214. Due to the severe violation of fundamental rights and the irreversible harm which is caused it was held that the tool of house seizure and demolition for deterrence purposes according to Regulation 119 shall be used carefully and in a limited manner and that the exercise of the authority must comply with the tests of proportionality, after the holder of the authority has conducted a careful examination and a proper balancing between all interests at stake (see HCJ 1730/96 **Salem v. Commander of IDF forces in the Judea and Samaria Area**, IsrSC 50(1) 353, 359).

215. In HCJ 4597/14 **Awawdeh v. The Military Commander of the West Bank Area** (July 1, 2014), as well as in the decision on the application for a further hearing, it was held by this honorable court that the use of the military commander's authority according to Regulation 119 should be limited, subject to the exercise of reasonable discretion and the proportionality tests.

216. Accordingly, the Respondent must carefully examine the circumstances of each and every case: the expected harm to the family, whether the victims of the demolition have any connection to the suspect's deeds, the possibility that the demolition will lead to deterrence under the relevant circumstances, can less harmful measures be taken and the like (see **Salem** above; HCJ 6299/97 **Yassin v. Military Commander in the Judea and Samaria Area** (reported in Nevo, December 9, 1997)).

217. Proportionality and balancing are supreme-principles governing Respondent's discretion. This is the case in general and particularly while exercising this extraordinary authority inflicting harm on the innocent who did nothing wrong.

218. In view of the above the Petitioners shall argue that the seizure and demolition of an entire apartment in a building for the purpose of "deterrence" does not comply with the proportionality tests – it fails to comply with the test of rational connection between the means and the goal, and beyond need, it also fails to comply with the least injurious means test and with the test of the harm versus the benefit (proportionality in the narrow sense).

Absence of a rational connection between the means and the alleged goal

219. In the framework of the hearing in HCJ 7961/18 **Na'alwah v. Military Commander** (hereinafter: **Na'alwah**), which took place on November 19, 2018, part of the perpetrator's will was disclosed which stated: "… the perpetrator shall carry out the attack in view of the aggression against the Palestinian people, the demolition of houses and expropriation of property.." (Emphasis were added N.D.)(Protocol of the hearing in HCJ 7961/18 dated November 19, 2018, page 8, line 27).

220. Moreover. In her judgment in that case, the Honorable Justice Barak-Erez did not hide her astonishment at the fact that the house demolition policy, whose declared purpose is to deter, constituted in that case a motive for carrying out an attack. And these were her words:

> I find it troubling that the perpetrator's will in the case at hand alluded to the "house demolition" argument as one of the motives underlying his deadly decision, as opposed to a deterring factor.

221. The use of this tool for deterrence purposes requires a thorough examination. It is therefore incumbent on the Respondents to well examine, *inter alia*, the possibility that this tool, while used against innocent people, constitutes in and of itself a motive for attacks. The harm inflicted on the innocent in the case at hand, including three minors, is so severe and even irreversible and therefore obligates the Respondents to frequently examine the implications of house demolition. The case described above is an example of the opposite result arising from the use of this tool, an example weakening the argument of deterrence in a manner which can show that the cost exceeds the benefit.

222. In her judgment in **Na'alwah**, the Honorable Justice D. Barak-Erez states with respect to the classified opinion of the Israel Security Agency (ISA) concerning the alleged effectiveness of the use of demolition orders as a deterring measure, that even if the court was satisfied in that case with the content of the opinion, it did not exempt the security bodies from re-examining this issue time and again. She states further that it is incumbent on the security bodies to show that they keep conducting this examination.

223. The Respondents continue to apply this harsh and controversial policy regardless of the security situation: even after the significant decline that we have witnessed, they continued to use the Regulation, and now, when the number of terror attacks has increased, ostensibly showing that the policy had no effect at all, they continue to automatically use it.

224. The honorable court pointed at the difficulty of using this tool automatically whenever an attack occurs, which turned it from a tool reserved for extreme situations into a tool which is used frequently and routinely (see the judgment of the Honorable Justice (retired) Karra in the HCJ 4853/20 **Abu Baker v. The Military Commander** (August 10, 2020).

225. The above was also discussed in the hearing which took place on October 12, 2020 in HCJ 6826/20 **Dweikat v. The Military Commander**, in which the Honorable Justice (retired) Mazuz pointed at the significant decline in the number of attacks every year, as shown in Respondent's responses to the repeated petitions in the matter.

226. Notwithstanding the fact that over the last few years there was a significant decline in the "number of attacks" justifying, in Respondents' opinion, the use of Regulation 119, they have continued to use this draconian tool which constitutes collective punishment, in any event and regardless of the actual circumstances.

227. The term "number of terror attacks" was presented as a neutral term without distinguishing between minor incidents and serious incidents involving casualties. Consequently, during 2020 for instance, when the number of severe attacks was three, the Respondent chose to continue using the house demolition tool disregarding the general circumstances and without examining whether there is an "imperative" need to exercise the initially problematic authority.

228. Respondents' frequent use of punitive house demolition over the years, alleging that it is required for deterrence purposes, requires the examination of a few necessary questions: **has the continued use of Regulation 119 over the years, and in the absence of a <u>real</u> rational connection to the general circumstances, reduced the effectiveness of the tool which was initially questionable? Has the continued use of the tool including in relatively calm periods increased the feelings of hatred and anger among the Palestinian residents subjected to continuous occupation with no end in sight, causing a clear increase in the number of the serious attacks today? Aren't we led by all of the above to the inevitable conclusion that the tool of house demolition is ineffective and does not serve Respondents' declared purpose, but rather satisfies the desire for revenge, or in other words, is used for purposes of collective punishment**?

229. These questions require that the entire policy of penal house demolition be re-evaluated, especially these days when we experience a clear increase in the number of deadly attacks, showing that the policy has clearly failed to achieve its "deterring" purpose.

230. The apartment the subject of the demolition order is the home of three minors and their parents. Petitioner 1, his wife and children will find themselves out on the street. The Petitioners do not have another house. Demolishing the family's residential home, an offensive and irreversible measure with far-reaching implications on their lives, emphasizes more forcefully the fact that it is a vindictive punishment and an excessive and unjustified response, harming the innocent, which cannot be deemed proportionate under the circumstances of the matter. It was noted for good reason by the Honorable Justice Vogelman in **Sidr** that:

> **The exercise of the authority by virtue of Regulation 119 where it has not been proven by sufficient evidence that the suspect's family members were involved in the hostile activity – is disproportionate**.

231. The fact that no allegation was raised of the involvement of any of the tenants of the building in the incident, totally disconnects the rational connection (which is anyway doubtful) between the demolition of the house and the deterring effect that the Respondent wishes to achieve. Even if a rational connection did exist, then, in view of the very severe harm inflicted on the residential home of the tenants, the exercise of the authority by virtue of Regulation 119 is disproportionate and is inconsistent with the provisions of the Basic Law: Human Dignity and Liberty. The above is reinforced by the fact that the apartment is owned by Petitioners 7-8, since the purchase & sale transaction between them and the Z. family has not been completed, and since there are no family ties between the two families. The above reinforces the severance of the rational connection.

232. In this state of affairs, it is difficult to see how the seizure and demolition of a house whose tenants, who have never been allegedly involved in the alleged attack, can contribute to the alleged purpose – deterring potential perpetrators in similar future cases. The contrary is true. The exercise of the authority by virtue of Regulation 119 in the case at hand shall not only fail to achieve the purpose of deterrence but may undermine it. Considering the critical and severe violation of Petitioners' property rights, a high degree of proof is required concerning the effectiveness of such an offensive measure, when the authority according to Regulation 119 is exercised mainly against minors. Hence, the demolition of a house following an incident committed by a minor on the threshold of the age of criminal responsibility, cannot be considered as maintaining the rational connection between the means and the goal, since the responsibility of minors at these ages is diminished, since they do not act in a coherent and calculated manner and they react impulsively to environmental influences to which they are exposed.

233. The above is reinforced by the words of the Honorable Justice (retired) Karra in HCJ 144/22 **Abu Skhidem v. GOC Home Front Command** (January 19, 2022) referring to the "professional" privileged opinion presented by the Respondents whose purpose is to substantiate the allegation concerning the effectiveness of the deterrence:

> I do not share the position of the security bodies concerning the effectiveness of the deterrence that comes with demolishing homes of those who are not involved in the attack in any way or manner whatsoever. In fact, I am not at all convinced that the opinion which was presented on behalf of the security bodies shows that their conclusion in that regard is based on actual evidence. On this matter I share the position of my colleague, Justice A. Baron in HCJ 799/17 **Qunbar v. GOC Home Front Command**).

234. In that case the Honorable Justice (retired) Karra referred to the expertise of the authors of the opinion and explained that the fact that a person has extensive knowledge in "fighting terror" does not necessarily turn them into experts who can identify potential "collective deterrence" of a civilian population by the means of house demolition. Appropriate are his words in this regard:

> Expertise is not a negligible matter. Not every counter-terrorism expert is an expert in deterrence of a civilian population. Expertise requires proof and should be substantiated. An expert may testify only in the area of their expertise and only after their expertise in the area was properly proven. I am of the opinion, that the time has come to re-visit the professional validity, credibility and weight of the security opinions submitted to us in cases such as the case at hand.

235. The demolition of the entire apartment in these circumstances, and its demolition by way of hot detonation, is a measure which does not comply with the tests of reasonableness and proportionality. In view of all of the aforesaid, the Petitioners are of the opinion that the seizure and demolition of their home cannot realize the declared purpose of Regulation 119 – deterring potential perpetrators who may refrain from committing attacks if they know that in doing so they risk their homes and the homes of their family members.

236. In addition, it does not suffice that the measure which the Respondent wishes to use, ostensibly realizes, partially or marginally, the declared purpose underlying the exercise of the authority by virtue of Regulation 119. The Respondent must show that his act meets the high standard of the proportionality test, due to the extreme harm inflicted by the exercise of his authority in the case at hand. It was so held in HCJ 3648/97 **Israel Stamka v. Minister of Interior et al**.:

> We should bear in mind that in implementing the proportionality test, the measure of our strictness with the governmental agency will be commensurate with the importance of the infringed right, or the severity of its infringement.

The least injurious means test

237. Even if, nevertheless, the court deems it appropriate to justify the exercise of authority in the case at hand, it seems that the Respondent has refrained from examining the possibility of using a measure which violates fundamental rights to a lesser extent.

238. Despite all the considerations that exist in the case at hand, that each one of them, in and of itself, may justify the cancellation of the sweeping seizure and demolition order which was issued, due to the non-involvement of the family members, due to M.'s diminished responsibility in view of his young age and the existence of another factor which led to the death of the Border Police Officer, the critical violation of the right to exist in dignity of an entire family and of spouses who fell into a sensitive financial situation and still hold ownership rights in the apartment, the Respondent chose the harshest means available to him, namely, the seizure and demolition of the entire apartment. Even compared to recent more severe cases in comparison to the case at hand, in those cases the Respondents took measures that were significantly less harmful, although their circumstances raised fewer considerations justifying the limitation of the harm compared to the case at hand (see Tamimi).

239. In the framework of his response to the objection, the Respondent did not try to present, not even just for appearances, that any attempt was made to reduce the harm inflicted on the family that did nothing wrong, by issuing a more proportionate order that would be directed against the part in which M. lived, or by using demolition tools expected to cause less damage, and without any hesitation rejected all of the above arguments neglecting to conduct a serious examination as required in cases of this type.

240. In other words, recognizing the authority of the military commander by virtue of Regulation 119, among the options available to him commencing from the demolition of an entire house, going through complete or partial sealing and ending with avoiding demolition altogether for reasons of proportionality, precisely in this case the Respondent chose to resort to the harshest tool at his disposal.

<u>The third proportionality test – the "narrow" proportionality test</u>

241. As aforesaid, the position of the Petitioners is that even if the purpose of the demolition is to deter, in practice it harms and punishes the innocent. Even if the purpose is indeed to achieve deterrence, then bearing in mind the critical violation of Petitioners' rights, who could not have foreseen or prevented the deed attributed to their son, a high degree of proof is required to substantiate the effectiveness of such a severe and irreversible measure as house demolition.

242. And it should be emphasized, as detailed above, Petitioners' position is that the prohibition on the demolition of the houses of innocent people is absolute, and that Respondents' policy is illegal, according to both international law and Israeli law, regardless of the effectiveness of this policy or the ability to deter embedded therein. When a certain act is prohibited, the fact that it is effective does not invalidate the prohibition. Beyond need it should be noted that the effectiveness of the house demolition policy is a controversial issue debated by the Justices of the honorable court and by others.

243. The Petitioners are obviously not exposed to the intelligence material presented by the Respondents in this type of proceedings before the honorable court, and therefore they cannot dispute the determinations of some of the Justices of this honorable court, that they were presented with confidential information showing that the use of Regulation 119 "has a deterring effect towards potential perpetrators and attackers, causing their immediate

environment to prevent perpetrators from acting among them." However, and although it has already been held that "as a general rule, the question of the effectiveness of the deterrence embedded in the application of Regulation 119 is for the security bodies to decide..." as stated by the Honorable Deputy President (as then titled) E. Rubinstein in HCJ 5376/16 **Abu Khdeir v. Minister of Defense**, and that "the effectiveness of the policy of house demolition is for the security bodies to assess" as stated by the Honorable Justice Elron in HCJ 8786/17 **Abu Alrub v. Commander of IDF Forces in the West Bank**, the following questions are yet to be decided (1) whether the security officials examine all of the relevant considerations which are required for evaluating the deterrence resulting from the use of Regulation 119, including its negative effect; and (2) what is the required degree of certainty regarding their conclusions. These are legal questions in nature, which should be decided by the honorable court, and which according to the Petitioners, have not been sufficiently addressed in Respondents' decision.

244. The Petitioners will further argue that in view of the passage of time and the frequent use made of the Regulation based on data showing that its use is effective and constitutes a deterring factor, data which, as stated above, the Petitioners are not aware of and are not exposed to, the need arises to disclose at least parts of the information illustrating these allegations which eventually lead to such a critical violation of their rights without any fault on their part.

245. **The Petitioners are innocent and there is no allegation that they had any knowledge of the acts or intentions attributed to the detainee, or of the existence of any preliminary signs indicating that this incident or another may occur**.

246. Appropriate are the words of the Honorable Justice A. Baron in HCJ 1125/16 **Mar'i v. Commander of IDF Forces in the West Bank**:

> 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**. Note, that the jurisprudence of this Court has highlighted the importance to be attached to the family’s knowledge of or involvement in the murderous plans of its offspring with respect to examining the proportionality of the decision to demolish the family’s home (see remarks of Justice E. Hayut in HaMoked, para. 4; and the remarks of Justice U. Vogelman in Sidr (para. 6) and Zakariya (para. 2); and, recently, the remarks of Justice S. Joubran in Abu Alrub (para. 2)(emphasis added, N.D.)

247. Harming the Petitioners is severe punishment without any fault on their part. Such a draconian step is contrary to the deterring purpose that Regulation 119 wishes to achieve. **When the sanction is directed against the Petitioners, who had no involvement or prior knowledge of the incident, it does not promote the alleged purpose of deterrence in similar cases in the future**.

<u>Examining the negative consequences as part of the evaluation of the deterring effect of Regulation 119</u>

248. As was clarified in a slew of judgments given by this honorable court, the data presented by the Respondents in the privileged opinion concerning the effectiveness of the deterrence achieved by Regulation 119 pertain to the "positive results" of the exercise of the authority according to the Regulation, and not to the negative consequences embedded therein.

249. The assertion that house demolition, in the fragile security situation in which we live, may lead to deterrence and calming rather than to the opposite result of deterioration of the security situation, is not without doubts. Although as a general rule the honorable court does not intervene in questions of this type, there are extreme cases which justify intervention, or at least an increased demand that the Respondent substantiates the benefit of his decision, particularly if Respondent's current assessments do not include this component. It is well known that a decision in which the relevant considerations are not properly considered is unreasonable (HCJ 341/81 **Moshav Beit Oved v. Traffic Inspector**, IsrSC 36(3) 349, paragraph 9). This argument is reinforced by the things which were discussed in the hearing in **Na'alwah**.

250. However, not only is there no evidence that house demolition serves the declared purpose of the act, but rather, as we know, the security bodies themselves have already reached the conclusion in the past that the damage caused by house demolition outweighed the benefit deriving therefrom, and therefore the use of this measure was stopped (following the adoption of the recommendations of a committee headed by General Shani from 2005), and since then it seems that no empirical data have been collected showing a different picture.

251. The importance of the need to maintain the security of the citizens of Israel is not in doubt, but it is not clear why the Respondents are of the opinion that the use of this measure shall lead to deterrence although it has failed in the past, and why it shall not necessarily lead to escalation in the security situation.

252. Common sense in fact teaches us that harming the innocent and collective punishment also have negative consequences. They increase hostility and hatred, and instill the feeling that Israel does not attach any value to the safety and well-being of Palestinians, even if they are innocent and are not involved in any hostile activity, and even if they are minors. This feeling and recognition may instill feelings of despair, thus increasing the willingness of future perpetrators to act. Hence, the indiscriminate destruction planned by the Respondents may encourage further attacks.

253. Mr. Ami Ayalon, the former head of the ISA, has elaborated on this issue (the following is an excerpt of his words as published in "Ha'aretz" on August 9, 2016):

> **Many experts have already expressed their opinion that in the reality of terrorism today, when the attacks are carried out by individuals who are often motivated by personal distress, the likelihood that the policy whereby their family homes are demolished does indeed have a deterring effect, is quite low. Even**

> **if we assume that in the short term it may be effective in single cases, in the long term, currently measured in a few months, the anger, hatred, and humiliation, fueled by ideologies more radical than those of Hamas, will actually lead to escalation in terrorism. [...] In most cases, humiliation more often entrenches a desire for revenge than deterrence. [...] If this is the case, then the demolition of the homes of perpetrators' families is closer to a retaliatory action than a preventive action, and when it is directed against those who are not the perpetrators themselves, it is illegitimate, so long as it is not proven otherwise beyond a reasonable doubt**.

254. Some of the Supreme Court Justices hold the position that using a security measure can be justified if it saves the life of a single person. Well – this principle should guide the honorable court also in view of the negative consequences which may arise from using that same measure. Demolishing a house in an attempt to deter may precisely lead a person to commit an attack as an act of revenge and harm the lives of innocent people. It should be noted that the case at hand can also point at the negative impact of the policy, since it emerged from the father's interrogation that his son might have been affected by the death of his neighbor friend who was killed by the military forces which were present in the refugee camp when the Tamimi family home was demolished as mentioned above.

255. This argument is supported by other concrete examples such as the case of Ahmed Mughrabi (which was discussed in CrimC 42425-02-16 **State of Israel v. Ahmed Mughrabi**) and the case of 'Alaa Abu Jamal (who committed an attack a few days after the house of his relatives had been demolished (see HCJ 8150/15) demonstrating that the demolition of the homes of suspects of terrorism also leads to the opposite result, namely, it encourages acts of terror and creates a desire to revenge on the Palestinian side due to the severe harm caused to the homes of their families and their family members.

256. This is the place to remind that this honorable court was careful throughout its judgments on the exercise of Respondent's authority by virtue of Regulation 119, not to mix punitive considerations with considerations of deterrence.

257. In recent years pressures are exerted on the Respondent to implement the Regulation and expedite the house demolition procedures against the homes of individuals who had committed attacks. The direct implications of the above are also noticeable in the case at hand.

258. The above may indicate that Respondent's motives are more punitive and vindictive than deterring. This question arises whenever extraneous bodies try to influence the nature and manner by which the authority is exercised. Appropriate here are the words of the Honorable Justice Barak-Erez in **Na'alwah**:

> The State, and thereafter this court, have reiterated the clear distinction between refraining from using demolition orders for punitive purposes and using them for deterrence purposes. As aforesaid, this distinction also underlies the great caution taken by this court while examining petitions such as the petition at hand. Hence, when deterrence is the underlying factor the position of the bereaved family members –

> although important and significant on the emotional level and on the punitive level (when criminal proceedings take place) – is not granted special priority. In fact, their independent position contrary to the position of the security bodies may even cast a shadow of punitive purpose on the use of the demolition orders, contrary to the stated position of the security officials.

The degree of certainty concerning the effectiveness of deterrence

259. In view of the severe violation which is about to be inflicted on Petitioners' rights as a result of the demolition of their home, in the absence of an allegation that any of the tenants of the building had any knowledge about the incident, a high degree of proof is required concerning the effectiveness of such a harsh and irreversible measure as the demolition of Petitioners' house. The Petitioners will argue that the Respondents did not satisfy this high burden, and that in practice there is currently an ambiguity as to the degree of deterrence which is actually achieved.

260. This ambiguity concerning the benefit achieved by using Regulation 119 on the one hand, and the negative results of harming the innocent and collective punishment on the other, was also addressed by this honorable court. Accordingly, it was held by the Honorable Justice Baron in HCJ 1125/16 **Mar'i v. Commander of the Military Forces in the West Bank**, with respect to the customary justification for using the house demolition measure on the basis of the argument of deterrence (pages 33-34):

> … it must be recognized that the effectiveness of the deterrence produced by house demolitions is a **serious, troubling issue, which preoccupies the Court and will likely continue to preoccupy it in the foreseeable future**. The common justification for using house demolitions is based on the position that when a chance to prevent bloodshed hangs in the balance against the property of the attacker's family "Lives must be spared…". **<u>However, in practice, the issue of deterrence is not all that clear, and certainly not unequivocal</u>**. Though the deterrence rationale cannot be ruled out, **there is reasonable cause to believe that house demolitions only have a localized deterrent effect, specific to time and place, while, on the other hand, this measure is known to have the extremely deleterious effect of escalating the relations between the two sides, fueling hate and even acts of terror against Israel** (see, for instance the thorough review by Justice E. Hayut in HaMoked, paragraph 5 of her opinion) (emphases were added; N.D.).

261. The Honorable Justice Baron has also reiterated her position with respect to the data presented by the State *ex parte* concerning the deterring benefit of house demolition in her judgment in HCJ799/17 **Qunbar v. GOC Home Front Command** (dated February 23, 2017):

> In the hearing before us it was clarified by Respondent's counsel that the unequivocal assessment of the security bodies is that the deterring benefit embedded in house demolition far exceeds the damage which may arise from the use of this measure. However, a review of the opinion on behalf of the Respondent, on which this assessment

> allegedly relies, shows that no empiric basis or scientific answer can be found therein to the weighty question of the effectiveness of the deterrence embedded in house demolition. I personally do not think that the deterring picture arising from the opinion is so clear, certainly not decisive; and in any event it obviously raises compelling questions. It particularly applies to the cases in which house demolition acts in the opposite direction, encourages or incites hatred and acts of violence against Jews. I have already stressed that the doubts hovering over the deterring effect of house demolition do not only impose on the security bodies the obligation to continuously re-examine themselves as noted by my colleague – but also constitute a considerable consideration when this court examines the proportionality of Respondent's use of this measure (see: HCJ 1125/16 **Mar'i v. Commander of the Military Forces in the West Bank**, paragraph 5 of my opinion (March 31, 2015). (emphases were added; N.D.).

262. In **Abu Alrub** the Honorable Justice (retired) Joubran has also referred to the effectiveness of the deterrence and the evidence which are required to support this argument holding that (ibid., paragraph 4):

> …As is known, the issue of demolition and seizure orders became an acceptable reaction measure to murderous terror attacks, the purpose of which is to prevent future attacks. This purpose of protecting human lives is appropriate… **However, in my opinion, an abstract possibility to save lives does not suffice while confronted by an actual, real and tangible violation of the right to property and human dignity**. Naturally, **the deterrence which may be achieved by using the tool of seizure and demolition orders wears down with the passage of time and with the escalating use of said tool**…. **The orders may have an adverse effect since they may regretfully create situations in which the exercise of the authority will cause agitation which will result in increased motivation to carry out attacks**. I was not convinced that the material which was presented to us sufficiently establishes the conclusion that the use of seizure and demolition orders creates real and effective deterrence against the execution of attacks (emphases were added. N.D.).

263. The Honorable Justice Vogelman has also expressed his thoughts on this issue in **Sidr**:

> First a few words about the deterrence that the Regulation at hand wishes to achieve. Deterring attackers from taking part in atrocities – and we are in the midst of bad days of a murderous terror wave, but this applies to "normal" times as well – has a large benefit. In fact, if the demolition of the house of perpetrator A deters perpetrator B from harming human life, then we may say that the chosen measure achieved the highest benefit conceivable. **However, there may be room to wonder whether this deterrence is in fact achieved by exercising the authority vested with the Respondents by virtue of Regulation**

> **119**. It seems that the military authorities did so; even though they believed that there was a connection between the demolition of perpetrators' houses and deterrence, they noted that on the systemic level there is a tension between deterrence and "the price of demolition"; and have even concluded that "the tool of demolition in the framework of the deterring element has been "worn down" […] Subsequently the security bodies decided – a decision which was later retracted – to cease using house demolition for deterrence purposes as a method in the area (reserving it for extreme cases) (see *Ibid.*, paragraph 6 of the opinion of Justice E. Hayut)." (Emphases were added, N.D.).

264. In view of the doubts raised by professional bodies and by some of the Justices of this honorable court about the effectiveness of the house sealing and demolition measure, in the absence of open and orderly factual infrastructure, it is difficult to accept Respondents' position that it is an efficient deterring measure. As noted by Amichai Cohen and Tal Mimran in their article "Cost without Benefit in House Demolition Policy: Following HCJ 4597/14 Muhammad Hassan Halil 'Awawdeh v. Military Commander of the West Bank Area" **Law online, Comments on Recent Judicial Decisions**, 31, 5 (2014):

> In general, there is a danger in relying on cost-benefit considerations without substantiating data. In the absence of data substantiating the effectiveness of a particular policy, it is very difficult to rely on utilitarian arguments. The fact is that those who advocated the utilitarian approach in the context of house demolition failed to put "on the table" the data supporting their position. In the absence of these data, it seems that the principled debate regarding the non-consequential approach versus the utilitarian approach loses its importance, since the advocates of the latter approach cannot substantiate their position.

265. Appropriate in this regard are the words of Prof. Kremnitzer, quoted in the above article:

> One more thing should have been checked, and without this datum we do not have a real balance of benefits, we have a bluff. I suggest that we check how many people chose terrorism as a result of having been victims of these acts or having witnessed them. Because benefit is examined not only according to what it did to a certain person who may have decided to refrain from taking an action, but one must also examine the motivation it instills in other people, what forces for terrorism are caused by this type of activity, which is unjust and inhumane (from protocol number 342 of the meeting of the Constitution, Law and Justice Committee on human rights and the purity of arms in the fight against terror, December 6, 2004).

266. In the total absence of empirical data about the degree of the effectiveness of the alleged "deterrence", imposing such a draconian punishment leading to irreversible damage on

the innocent, is brazenly disproportionate and is contrary to the fundamental principles of common sense and legal logic.

267. As aforesaid, "Reasonableness requires that the more complex the administrative decision or the harsher its consequences, weightier data should be presented to the authority. A particularly severe violation of a fundamental right must be based on particularly reliable and convincing data" (HCJ 987/94 **Euronet Gold Lines (1992) Ltd. et al. v. Minister of Communication et al**., IsrSC 48(5) 412, paragraph 11(d)).

268. These principled decisions were also made in the specific context of exercising the authority by virtue of Regulation 119. As was held in HCJ 4597/14 **'Awawdeh v. Military Commander of the West Bank Area** (July 1, 2014) "there is no dispute that the sanction according to Regulation 119 is a harsh sanction severely violating the fundamental rights of the perpetrator and mainly of their family members: **therefore it is required that the administrative evidence are particularly strong, "clear, unequivocal and convincing evidence…**".

269. And indeed, even if weighty security considerations are on the line, there is no justification for violating Petitioners' human rights on the basis of unsubstantiated assumptions, and there is no justification for reducing the level of proof that the Respondents should bring for this purpose.

270. To summarize the complexity of the use of Regulation 119, we shall bring the words of the Honorable Justice H. Kabub in **Alrafai:**

> The state of Israel, as a democratic state is obligated to protect the life of its citizens, thwarting any attempt to harm them. But it is obligated to do so without harming the life, personal property, real property and rights of innocent people who did nothing wrong and nevertheless are expected to find themselves without a roof over their heads.

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

271. The principle of the child's best interest as a primary principle requires no elaboration. The supremacy of this consideration in Israeli jurisprudence has been recognized many times and it has been often clarified that this principle can defeat other interests. Accordingly, for instance, it was held in FH 7015/94 **Attorney General v. A**., IsrSC 50(1) 48, 119: **The consideration of the child's best interest is a supreme consideration, the decisive consideration. Indeed, there are additional considerations alongside this consideration… but all of these considerations are secondary considerations, and they shall all bow before the consideration of the child's best interest**. And also in CA 549/75 **A v. Attorney General**, IsrSC 30(1) 459, 465: **There is no judicial matter pertaining to minors where the best interest of minors is not the major and primary consideration**."

272. As described above, three minors 16, 11 and 3 years of age reside in the apartment the subject of the demolition order. The demolition of the building and its consequences shall cause them a lot of suffering, shall critically violate their dignity and may irreversibly affect their future. The buildings connected by the apartment serve as the residence of

dozens of children who will have to watch how the building in which they live is being demolished. What have these children done wrong to deserve watching the demolition of their home, making them homeless? This harm is contrary to Israel's obligations according to the Convention on the Rights of the Child, particularly according to Article 2(b):

> **States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members**.

273. And according to Article 38 of the Convention:

> a. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
>
> b. 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.

274. It should be emphasized that Article 38(d) of the Convention imposes a positive obligation on the Respondents: in addition to the prohibition on the breach of international humanitarian law established by Article 38(a), Article 38(d) imposes the obligation to take steps ensuring protection of children in these situations. In their actions Respondents' misconduct is twofold.

275. And again, it should be reminded that the entire building in which the apartment the subject of the demolition order is located, is the residential home of dozens of additional minors who will have to watch and experience a violent and draconian act of house demolition, an act which can be traumatic for them and which may have long term consequences. The above is said considering also the long-term effectiveness of the deterrence.

276. The Respondents did not find it necessary to refer to these considerations, despite Petitioners' allegations and arguments in the objection and the obligation imposed on every administrative body making decisions affecting the condition of children. For this reason also Respondent's decision is unlawful and should be revoked.

In Conclusion

277. Harming the innocent, their lives and property is prohibited. This is the essence of the rule of law. The violation of this principle, particularly by state authorities, conveys a difficult and dangerous message. Precisely in these difficult days, a restraining message is required and the need to resort to the basic, just and moral principle:

> **Far be it from you to do such a thing—to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Shall not the Judge of all the earth do what is just?"** (Genesis 18:25)

These are precisely democracy's testing time. Precisely for times like these the court was designed to act as a restraining and balancing body.

278. This is the time to re-examine the effectiveness of this destructive tool. As shown above it seems that using it has not resulted in a decrease in the number of attacks, but quite the opposite. We are currently faced with a clear increase in the number of serious attacks. Hence, a responsible and serious examination is required, devoid of feelings of hatred and revenge which shall examine the tools which are actually effective and will decipher the substantial reasons and motives underlying any serious event similar to the case at hand.

279. And even if the language of Regulation 119 permits such an act, harming innocent people for all to see and beware, then we are obligated, and the Respondent is obligated, to interpret the authority and exercise it in the following spirit, as stated in the judgment of this honorable court by the Honorable Justice Cheshin:

> This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets: "The Soul that sins it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him" (Ezekiel 18:20). One should punish without warning and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses: "The father shall not be put to death for the children nor the children be put to death for the fathers; but every man shall be put to death for his own sin" (II Kings, 14:6).
>
> …Since the establishment of the state – certainly since the Basic Law: Human Dignity and Liberty – when we have read Regulation 119 of the Defence Regulations, we have read it and vested it with our values, the values of the free and democratic Jewish state. These values will guide us to ancient times of our people; and our times are no different: "They shall say no more the fathers have eaten sour grapes and the children's teeth are set on edge. But every one shall die for his own iniquity: every man that eats sour grapes, his teeth shall be set on edge." (HCJ 2006/97 **Ghanimat et al. v. GOC Home Front Command**, IsrSC 51(2) 651, 654-655; and see also the opinion of the Honorable Justice Cheshin in Hizran, Alamarin and Nazzal).

280. **Respondent's decision to issue a seizure and demolition order to the apartment located on the third floor of the building in which the Petitioners reside, for allegations that an attack justifying the exercise of the authority had been committed, when the decision which directly harms innocent family members**

unrelated to the incident follows an attack committed by a minor on the threshold of the age of criminal responsibility, when the cause of death of the Border Police Officer was not the stabbing committed by said minor, and when the ownership rights in the apartment do not belong to his family members, in view of the substantial flaws in the procedure in which the order was issued, and in view of the intention to carry out this demolition order in a manner leading to the expansion of the circle of victims to include many additional people who are not even related to the petitioners, blatantly deviates from the principle of proportionality and is contrary to the repeated comments of the Supreme Court in this matter.

In view of all of the aforesaid, the intervention of this honorable court is requested. For all the above reasons, the honorable court is requested to issue an *order nisi* and an interim order as requested in the beginning of the petition, and render them absolute after hearing Respondent's response.

This petition is supported by an affidavit signed before the undersigned.

August 3, 2023

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Nadia Dakka, Advocate
Counsel for the Petitioners