At the Supreme Court **HCJ 8091/14**
Sitting as the High Court of Justice

In the matter of:

1. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger**, R.A. 580163517
2. **Bimkom – Planners for Planning Rights**, R.A. 580342087
3. **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories** – R.A. 580146256
4. **The Public Committee Against Torture in Israel** – R.A. 580168854
5. **Yesh Din – Volunteers for Human Rights** – R.A. 580442622
6. **Adalah – The legal Center for Arab Minority Rights in Israel** – R.A. 580312247
7. **Physicians for Human Rights** – Israel, R.A. 580142214
8. **Rabbis for Human Rights –** R.A. 580151967

represented by counsel, Adv. Michael Sfard and/or Shlomi Zachary and/or Emily Schaefer and/or Anu Deuel-Luski and/or Noa Amrami and/or Roni Peli,
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The Petitioners

v.

1. **Minister of Defense**
2. **IDF Commander in the West Bank**

represented by counsel from the State Attorney's Office
Salah a-Din St., Jerusalem

The Respondents

Petition for Order Nisi

This is a petition for an Order Nisi wherein the Honorable Court is requested to instruct the Respondents to appear and show cause, if they so wish, why a declarative remedy to the effect that use of Regulation 119 of the Defense (Emergency) Regulations 1945, by way of confiscating and

demolishing or sealing the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens is unlawful, in that it breaches international humanitarian law, international human rights law and Israeli administrative and constitutional law, should be denied.

A. Introduction: Why revisit the legality of the house demolition policy, and why in a public petition?

1. This petition concerns a practice that has been followed by the State of Israel from the inception of the occupation of the West Bank (and, until the cessation of permanent military presence therein – also in the Gaza Strip). This is the practice of demolishing the homes of individuals suspected, accused or convicted of involvement in hostile activities against the State of Israel and/or its citizens, based on Regulation 119 of the Defense (Emergency) Regulations 1945 (hereinafter: the house demolition policy, Regulation 119 and the Defense Regulations respectively).

2. The use of house demolitions under the Defense Regulations has had its share of ups and downs over the decades of Israeli occupation over millions of Palestinian civilians. At times, the practice was abandoned completely, but there were years during which it was a daily affair, with hundreds of houses demolished or sealed.

3. As this petition is filed, we are in the throes of a rising tide of violence in Jerusalem and in the Occupied Palestinian Territories. We are also witnessing a return to the practice of house demolitions under the Defense Regulations, and with greater vigor than before. As detailed below, after years in which the power to demolish homes under Regulation 119 of the Defense Regulations was not put into use, over the five months preceding the submission of the petition herein, five homes of suspected terrorists have been demolished, and four more demolition orders, which have been contested, are currently under review. Some of the objections that have been filed have already been rejected. Experience foretells that these orders too will be brought before this Honorable Court.

4. Although Israel has used and continues to use a wide variety of governmental practices in the territories it occupied during the Six Day War, and though its policies and the practices of its various agencies have been the subject of keen public and legal debate in Israel and abroad, **it is difficult to imagine a power that has been the butt of more scathing, incisive, broad and comprehensive criticism than the house demolition policy under Regulation 119. In fact, we have not a single expert on international law who supports the argument that the house demolition policy is lawful, and most believe its implementation is a grave breach of international humanitarian law, and may, therefore, give rise to personal criminal liability as a war crime.**

5. Indeed, demolishing the homes of individuals suspected of involvement in terrorist attacks, with the harm caused to members of their household who pay the heavy toll of losing their home because of the actions (or suspected actions) of a relative, is perceived as a full, frontal and brutal violation of the customary prohibition on collective punishment (hereinafter: the collective punishment argument). Moreover, demolishing the homes of those defined under international law as "protected persons", is also perceived as an independent violation of the prohibition on damaging the property of protected persons (hereinafter: the protected persons property argument). **These are the fundamental arguments for impugning the practice and the policy and they are made, as we shall see below, in every paper, book and legal expert opinion penned on the subject.**

6. The consensus that the house demolition policy is unlawful is so broad, that in what is a rare occurrence, all of the top experts we know working in Israel in the relevant legal fields have written about the policy and analyzed it, and all determined that it is unlawful. We shall later refer to their essays. Additionally, the Petitioners have gathered some of these experts, who, as stated, have published academic articles about this policy and have taught about it – **Prof. Yuval Shany, Prof. Mordechai Kremnitzr, Prof. Orna Ben-Naftali and Prof. Guy Harpaz**, and their extensive expert opinion is attached to this petition. Some of the assertions included in the expert opinion are:

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

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

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

   This is indeed a clear and sharp message from those who together form the vanguard of the legal expert community in Israel.

The need to legally revisit fundamental questions

7. The aforementioned fundamental arguments impugning the use of Regulation 119 and other arguments have been presented to the Court dozens, if not hundreds of times. They have been reviewed and rejected.

8. However, though the lawfulness of the practice and the attendant policy has seemingly been addressed by the Honorable Court in hundreds of individual petitions against orders issued pursuant to Regulation 119, **in fact, the Honorable Court has not considered the legal arguments on their merits ever since the 1980s', nor has it addressed the criticism directed at those early judgments, or confronted the volumes of writing on this issue, and the petitions were dismissed citing the (scant) grounds provided in the early judgments on this issue from the 1970s and 1980s.**

9. Legal research into the history of rulings issued by the Honorable Court on this subject, which will be presented in detail below, demonstrates that despite the appearance of hundreds of judgments upholding the practice, the Honorable Court considered the collective punishment and protected persons' property arguments on their merits in two judgments only. The rest refer back to these first two judgments, or to judgments referring to them. Legal research proves that in practice, **over the last thirty years, the Court has not reconsidered the main legal arguments that the powers vested under Regulation 119 is unlawful and constitutes a breach (and a grave one at that) of legal provisions of a higher normative order**. Since the mid-1980's, the Honorable Court's judgments in petitions against the use of Regulation 119 have focused on attendant issues (such as the proportionality of the demolition, the right to a hearing, the expansion of the policy to the homes of suicide bombers etc.), rather than the fundamental arguments against the practice – the collective punishment argument and the protected persons' property argument. On these – the Honorable Court repeatedly refers back to earlier judgments, which in turn, refer to those first two judgments.

10. Moreover: Arguments alleging breach of customary international law were dismissed in those oft cited early judgments, based on the doctrine that holds domestic law preferable to international law when the two conflict. This position appears in the first judgment on the use of Regulation 119, HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464, 465 and blatantly so in the other central judgment, HCJ 897/86 **Ramzi Hana Jaber v. OC Central Command et al.**, IsrSC 51(2), 522, where the following remark is made:

> Regulation 119 forms part of the law that was in effect in the Judea and Samaria Area prior to the establishment of IDF rule therein (HCJ 434/79 **Nuzhat Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34 464, 465; HCJ 22/81 **Hamed v. Commander of the Judea and Samaria Area**, IsrSC 35, 223, 224; HCJ 274/82 **Hamamreh v. Ministry of Defense**, IsrSC 36 (2) 755, 756. In keeping with the rules of international public law, as expressed in Proclamation No. 2 issued by the IDF Commander in the Area, domestic law remained in effect under caveats that do not affect the matter at hand (see Article 43 of the Hague Regulations of 1907 and Article 64 of the Fourth Geneva Convention). It follows that powers granted pursuant to the aforesaid Regulation 119 constitute domestic law in force in the Judea and Samaria Area, which was not repealed during the previous regime or during military rule and we have not been presented with legal arguments for considering it null and void at this time.

11. The many judgments upholding orders to seal or demolish homes issued under Regulation 119 subsequent to these two judgments, did not revisit the fundamental arguments, and, as stated, referenced these judgments or judgments referring to them. Even the two most recent judgments, issued this year, on the issue of house demolitions did not address the fundamental arguments and the State Attorney's Office went so far as to state that they need not be reviewed given that a decision in their matter has already been rendered (see: HCJ 5290/14 **al-Qawasmeh et al. v. Military Commander et al.** (reported in Nevo, August 11, 2014), paragraphs 14 and 12, and HCJ 4597/14 **'Awawdeh et al. v. West Bank Military Commander** (reported in Nevo, July 1, 2014), from paragraph 16, hereinafter: **'Awawdeh**).

12. In this petition, therefore, we ask the Honorable Court to reconsider whether or not use of Regulation 119 is lawful, given the following:

    a. The fact that decades have passed since the Honorable Court last exhaustively reviewed the fundamental legal arguments against using Regulation 119, particularly the issue pertaining to the relationship between domestic law and customary international norms (we devote an important section to this matter below);

    b. Developments in international law since the 1980s which bolster the fundamental arguments against this policy, particularly the collective punishment and protected persons' property arguments, including case law produced by international tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights (ECHR). These developments were never addressed in the Honorable Court's expansive rulings on the issue of house demolitions;

    c. International criminal law as a legal field in general, and the branch dealing directly with offenses against protected persons, has developed greatly since the early judgments on house demolitions were issued. This matter has not been reviewed at all in the Honorable Court's expansive rulings on the issue of house demolitions.

13. Finally, it is our view that the expert opinion submitted with this petition, and the extensive writing by many other Israeli experts severely criticizing the rulings on this issue (detailed below) also require reconsideration of the Honorable Court's rulings. It is difficult to countenance a situation wherein the judiciary and the relevant academic community are so divided on such a central and fundamental legal question. It is our view that this is akin to a situation wherein the rulings issued by the Court are at odds with **all** constitutional law experts on the question of whether or not the Court may repeal legislation. A situation such as this requires, at bare minimum, a renewed principled discussion of such a central issue, which has not been addressed on its merits for many years.

The advantage of ruling on the matter via public petition

14. Moreover: this is a public petition. The Petitioners are human rights organization whose work is directed at defending and bolstering the protections afforded to human rights in Israel and in the territories it controls. They are not victims of this practice, nor have they been directly harmed by it. In this sense, this petition seeks judicial review of a policy irrespective of an individual case.

15. This is also the reason why, unlike the hundreds of petitions filed against the use of Regulation 119, this petition is not accompanied by a motion for an Order Nisi.

16. This is also the reason why this petition need not be heard under the pressure of a tight schedule dictated by a security establishment eager to execute the order it issued to "strike while the iron is hot".

17. In the past, such public petitions have enabled the Honorable Court to exhaustively deliberate the lawfulness of practices or policies that had led to dozens of individual cases being brought before the Court, but did not allow for an in-depth legal review as urgent, swift hearings were required.

18. This was the case, for instance, with respect to the special investigation measures (torture) used by the Israel Security Agency (ISA, formerly also known as the General Security Service or shin beit). Dozens, if not hundreds, of petitions were filed by individuals who were facing interrogations in which "moderate physical pressure" was expected to be used. All these petitions alleged that use of these measures amounted to torture and was illegal (see, e.g. HCJ 1998/96 **Abu Tabanah et al. v. Israel Security Agency** (the petition was withdrawn); HCJ 2104/96 **al-Qawasmeh et al. v. Israel Security Agency**; HCJ 7964/95 **Abu 'Ayash et al. v. Israel Security Agency** (not reported)). However, the issue was reviewed in-depth and decided only when a public petition was filed, irrespective of a specific case, allowing to invest more time and research efforts (HCJ 5100/94 **The Public Committee Against Torture in Israel et al. v. Government of Israel et al.**, IsrSC 53(4) 817).

19. This was also the case with respect to the petition that challenged the policy of extrajudicial assassinations (or as the Respondents refer to it: targeted killings). In this issue too, a public petition was required for the Court to make an exhaustive decision on the legal questions the policy raised (HCJ 769/02 **The Public Committee Against Torture in Israel et al. v. Government of Israel et al.**, TakSC 2006(4) 3958).

20. It seems to us that a subject so significant, so controversial, so critical such as the use of Regulation 119 of the Defense Regulations should be decided in a process that allows the appropriate time and legal research resources rather than under the pressure of a tight schedule and specific security need.

21. For all the aforesaid reasons and due to the pain the organizations suffer at the knowledge that a policy that is almost consensually viewed as a war crime is implemented with the approval of the

Honorable Court, and in the hopes that this matter will be thoroughly and exhaustively reviewed, this petition is brought before the Honorable Court as a public petition.

B. Factual Background

22. Below, we present the factual background and legal history of the Israeli policy of exercising the powers allegedly granted by Regulation 119 for the purpose of sealing and/or demolishing the homes of individuals suspected of involvement in terrorist activities against the State of Israel and/or its citizens. We begin by presenting the parties, and proceed to a detailed review of the development of this policy through the years, and the recent change therein, which is the cause of this petition.

I. The Parties

23. The Petitioners are all Israeli human rights organizations, working to bolster human rights protection in Israel and in the territories under its control

24. Petitioner 1 – **HaMoked**: Center for the Defence of the Individual, is a human rights organization whose mission, among others, is to assist resident of the Occupied Palestinian Territories who have fallen victim to abuse or discrimination at the hands of state authorities, including defending their rights and status in the courts, whether as a public petitioner or as counsel for victims of human rights abuses.

25. Petitioner 2 – **Bimkom**, is an association which uses research and professional tools to promote equality and social justice in terms of planning and land resource allocation and assists communities facing professional, economic or political challenges to exercising their rights in the field of planning.

26. Petitioner 3 – **B'Tselem** is an association which promotes human rights in the Occupied Palestinian Territories and battles their abuse by documenting various human rights violations, bringing them to the public's attention and to the attention of decision and policy makers.

27. Petitioner 4 – **The Public Committee Against Torture in Israel** is a registered public association in Israel, which focuses mostly on legal and public advocacy against torture and defending the rights of detainees and interrogatees.

28. Petitioner 5 – **Yesh Din** – is an Israeli human rights organization working toward bolstering and strengthening human rights in the occupied West Bank.

29. Petitioner 6 – **Adalah** is an organization that defends the human rights of Arab Palestinian citizens of Israel and those of Palestinians in the Occupied Palestinian Territories.

30. Petitioner 7 – **Physicians for Human Rights Israel** is an association of medical practitioners working to protect human rights in general, and the right to health in particular, both in Israel and in the territories under its control.

31. Petitioner 8 – **Rabbis for Human Rights** – is a registered association in Israel working toward strengthening the Jewish tradition of human rights.

32. The Respondents are the officials vested with the alleged power, under the Defense (Emergency) Regulations, to confiscate homes in Israel or in the territories it occupied and order they be sealed or demolished. Respondent 2 is the Military Commander in the West Bank. He holds all administrative and legislative powers in the territory held by the State of Israel under belligerent

occupation, in keeping with the rules of international humanitarian law and the laws of belligerent occupation. Therefore, he acts as the "military commander" for purposes of Regulation 119.

33. Respondent 1, the Minister of Defense, oversees the military on behalf of the government (see: Basic Law: The Military, Section 2(b)), and therefore instructs Respondent 1 on issues of policy, such as the issue which is the subject of this petition.

II. Regulation 119

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

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

36. The language of Regulation 119(1), as befits a regulation enacted by the British Mandate for the colonies it ruled, is the language of the occupier. It is the language of those who dominate a population devoid of rights, oppressed and ruled by force that knows few restrictions and little restraint. Unlike criminal penalties set forth in criminal law, Regulation 119 requires neither evidence nor a conviction. The sanction need not necessarily be used against the individuals suspected of breaching security themselves, but may be used against their neighbors, or residents of their community.

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

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

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

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

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

40. As such, the military commander preserved what he perceived to be the existing legal situation in these territories prior to the Israeli occupation. This preservation included the application of the Defense Regulations, including the above cited Regulation 119. The Honorable Court has been presented with numerous challenges against the application of the Defense Regulations pursuant to the proclamation, and has rejected them. In one of these challenges, the petitioners argued that the British authorities had repealed the Defense Regulations. It was argued that upon termination of the British Mandate, on April 29, 1948, the United Kingdom passed the Palestine Act 1948, revoking all British legislation within the Mandate. Another challenge contended that the Defense Regulations were revoked in the 1952 Jordanian Constitution. As noted above, the Supreme Court dismissed these challenges and ruled that the regulations applied to the West Bank and the Gaza Strip (see, Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (CUNY Press, 2002), pp. 121-124; see also, HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464.

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

III. Use of Regulation 119 until 2004

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

43. The frequency with which Israel has used this measure has changed over the years. In the absence of official figures on house demolitions, these figures are collected by Israeli human rights organizations. The figures referred to below have been collected by HaMoked: Center for the Defence of the Individual, (Petitioner 1 herein), and B'Tselem (Petitioner 3) and published periodically. For full figures and information on how they were collected see:

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

All sites last accessed in July 2014.

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

45. Despite the massive use of the regulation in the early years of the occupation, as described above, the HCJ was not asked to address the legality of punitive house demolitions pursuant to Regulation 119 until 1979. In HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464 (hereinafter: **Sahweil**), the Honorable Court heard the petition of a mother whose son had been convicted of aiding and abetting terrorists and possession of explosives. In addition to the five year prison sentence imposed on the son, the military commander also decided to seal his room in his mother's house, noting that the decision had not been made lightly and that it was the necessary minimum for deterrence only.

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

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

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

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

> Jordanian Kingdom and said statute remains in effect in the Judea and Samaria Area today.

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

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

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

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

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

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

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

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

But in practice, in this ruling, the Court adopted a broad interpretation of the Regulation. Counsel for the petitioners argued that the wording of the regulation did not permit the demolition of the home of a family where only one of its members was involved in the perpetration of a crime. This argument rested on the presence of the word "some", which denotes a number of perpetrators exceeding one. The Court rejected the argument, stating that "there is no literal or substantive basis for interpreting the expression 'some of the inhabitants' as referring to inhabitants whose number must necessarily be more than one" and regarded the argument as baseless. Another argument that was rejected was that the accused did not even live in the house but in a school in a neighboring village. The Court said of this, "The fact that during the school year they reside outside their parents' home does not preclude them from living in their parents' home and being inhabitants thereof during vacation periods, when they live with their parents…"

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

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

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

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

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

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

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

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

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

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

> It would appear that there is no basis in the said regulation, either in the literal text or in the spirit of what is stated there, for a construction that imposes such a far-reaching duty of restriction on the military commander. The contrary is true: the construction that make the authority broader has been adopted and applied by the various panels of this court with a significant number of similar petitions that have been brought before us in recent years (as Justice Cheshin also states in his aforesaid opinion).
>
> Nonetheless, I would like to point out that the above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court is not able or bound to intervene in the decision of the military authority, whenever the latter intends to exercise its authority in a way and manner that are unthinkable...

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

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

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

> that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive' (s. 8 of the law).

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

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

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

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

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

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

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

sound is the sound a piccolo, clear and pure, but inaudible in the commotion.

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

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

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

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

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

67. **The Shani Committee**: In late 2004 and early 2005, a committee headed by Maj.Gen. Ehud Shani examined the efficacy of house demolitions as a tool in the struggle against terrorism. The committee recommended freezing the use of this measure and then-military Chief of Staff Lt. Gen. Moshe Yaalon, accepted the committee's conclusion, adding that the military reserved the right to depart from its new policy in "extreme circumstances." A presentation of the committee's conclusions, which was provided to HaMoked, stated that "although house demolitions are one of the elements in the (limited) toolbox which the IDF possesses for the war against terrorism," the negative results of this policy such as strengthening the national identity of the Palestinian collective, and the fact that house demolitions are viewed as collective punishment which violates the principle of human dignity and respect for private property and contradicts liberal principles, intensifies the Palestinian refugee trauma, strengthens the claim that "the occupation corrupts" and creates a chasm which cannot be bridged. The presentation ends with an unequivocal

statement: “The IDF, in a Jewish and democratic state, cannot walk the line of legality, let alone the line of legitimacy!!!” [sic].

The presentation is attached hereto and marked **Appendix 1**.

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

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

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

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

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

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

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

IV. Renewed use of Regulation 119

72. In November 2008, HaMoked filed a petition on behalf of the father of the man who perpetrated the terrorist attack at the Mercaz Harav Yeshiva against the decision to seal his house. This marked the first time since 2005 that a decision was made to activate the powers included in Regulation 119 and to seize and seal the house that was the subject of the petition. According to the judgment, the decision to resume use of the power was made only after the attorney general had provided an opinion that there was no legal impediment to exercising the power if, in the

opinion of the competent official, such action was absolutely required for security reasons and subject to the rules of proportionality and the observance of proper procedure. The Court accepted the attorney general's position and added that when this power is used against residents of Israel (in other words, residents of East Jerusalem), the power emanating from the Regulations must be interpreted in the spirit of Basic Law: Human Dignity and Liberty.

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

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

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

> Indeed, it cannot be denied that acts of incitement and violence against Arabs have proliferated in Jewish society. It is regretful and one should act forcefully against such occurrences. However, the comparison is not in place, in view of the fact that the measure of house demolitions is not used in the Area in cases of incitement and violence, but only in particularly extreme cases of murder. I am not oblivious of the horrifying murder of the youth Muhammad Abu Khdeir, a case which rocked the foundations of our country and was condemned across the board. However, this is an extremely exceptional case. Therefore, I am of the opinion that there is no room for the artificial symmetry argued by the petitioners in support of their argument concerning discriminating enforcement

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

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

The report in Haaretz dated July 4, 2014, and the report in the Washington Post dated July 22, 2014 are attached hereto and marked **Appendix 2.**

78. In wake of these reports, Petitioner 1 made inquiries to the Respondent several times in order to find out whether indeed there was a plan to renew the demolition policy. The following is a detailed description of this entire procedure.

V. Exhaustion of Remedies

79. As stated in the previous section, the demolition orders that were issued and the media reports which were not denied (Appendices 1 and 2 above), indicated that the Respondents, on the orders of the Government of Israel, had apparently decided to change the policy regarding use of Regulation 119 and to reinstate it for the purpose of demolishing the houses of terror suspects.

80. Therefore, on July 8, 2014, Petitioner 1 sent an urgent letter to the Minister of Defense, the Attorney General and the IDF Commander in the West Bank, entitled "Use of Regulation 119 of the Defense (Emergency) Regulations 1945 for the Purpose of Demolishing the Homes of Families of Suspected Terrorists." The Petitioner explained that from orders issued in accordance with Regulation 119 in the days and weeks prior to its letter, as well as media reports, it appeared that Israel had once again decided to change its policy regarding Regulation 119, and to return to using it for the purpose of demolishing houses as punishment for the involvement of one or more of the occupants in terrorist attacks.

81. In its letter, the Petitioner noted that demolishing or sealing the homes of persons suspected of involvement in terrorist attacks or of holding office in unlawful organizations was illegal and constituted a grave breach of international law for the reasons specified in this petition (i.e., a violation of the prohibition on collective punishment and on the destruction of houses belonging to protected persons for reasons other than the necessities of military operations, and a violation of the prohibition on disproportionate use of force.)

82. The Petitioner demanded to know whether the government and the military planned to renew the policy of punitive house demolitions (referred to by government officials as "deterrent" rather than punitive).

The letter, dated July 8, 2014, is attached hereto and marked **Appendix 3**.

83. When no answer was forthcoming, and when additional house demolition orders were issued on the night of July 16, 2014 for the homes of suspects in the abduction and murder of Gilad Shaar, Naftali Frankel and Eyal Yifrach, on July 17, 2014, the Petitioner once again wrote to the Minister of Defense, the Attorney General and the IDF Commander in the West Bank. In the second letter, the Petitioner repeated the demand for the Respondents to clarify whether it had

indeed been decided to change the policy implemented by the state since 2005. On August 7, 2014 an additional reminder was sent by the undersigned.

The reminder letters, dated July 17 and August 7, 2014, are attached hereto and marked **Appendix 4**.

84. On August 26, 2014, a letter from Michal Hod, Assistant Attorney General, dated August 19, 2014, arrived at the office of the undersigned. It stated, in response to Petitioner's communication, that the powers granted under Regulation 119 are used with great care, and currently only in extreme cases. The letter also stated that any additional cases would be examined according to their particular circumstances.

The response dated August 19, 2014 is attached hereto and marked **Appendix 5**.

85. On November 17, 2014, the office of the undersigned received a letter from Adv. Gal Cohen, Senior Legal Department Director for Judea and Samaria at the Office of the Legal Advisor to the Security Establishment. Adv. Cohen listed the judgments issued in recent months, subsequent to the undersigned's communication, upholding the current policy on the use of the powers granted to the military commander under Regulation 119 with respect to house demolitions. The letter implies that the Respondents intend to continue the house demolition policy.

The letter dated November 17, 2014 is attached hereto and marked **Appendix 6.**

86. Hence the petition at bar, which seeks a prohibition on the exercise of powers pursuant to Regulation 119 for the purpose demolishing homes in extreme cases as in other cases.

C. The Legal Argument

I. The legal argument in brief and the opinion of the experts in international law

87. The Petitioners argue as follows:

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

   i. The principle prohibiting collective punishment;

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

   iii. The principle prohibiting disproportionate use of force;

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

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

d. That the use of Regulation 119 violates the principles of Israeli law and Jewish law, both of which prohibit collective punishment;

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

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

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

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

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

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

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

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

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

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

The expert opinion is attached hereto and marked **Appendix 7**.

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

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

94. As previously stated, beginning with the first judgment on the question of the legality of using Regulation 119, HCJ 434/97 in the matter of **Sahweil**, the Court rejected the arguments that the practice violated prohibitions stipulated in international law on the grounds that the Regulation

had been in force prior the occupation, and therefore could not be superseded by the laws of occupation. Dozens of court decisions following **Sahweil** repeated this argument and in the recent rulings on this issue, including the most recent of them (HCJ 4597/14 in the matter of **'Awawdeh**), the incongruence between the Regulation and the prohibitions stipulated in the Geneva Conventions and the Hague Regulations of 1907 (hereinafter: the Hague Regulations), were never again discussed.

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

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

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

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

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

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

<u>International law ranks higher than domestic law on the normative scale from the outset</u>

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

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

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

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

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

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

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

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

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

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

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

104. This concludes the discussion of international law.

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

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

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

HCJ 897/86 **Ramzi Hana Jaber v. OC Central Command et al.**, IsrSC 51(2), 522 (published in Nevo (May 6, 1987)

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

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

107. It is true that domestic law was afforded **protection** under Article 43 in that the article imposes on the occupying power an obligation to **respect it.** The idea behind the obligation to respect domestic law is to prevent the occupier from changing it according to its wishes. This is

predicated on the concept of the occupation as a **temporary trusteeship** wherein the occupier is precluded from making long term changes which are the purview of the sovereign (See: Orna Ben-Naftali & Yuval Shany, *International Law between War and Peace*, (Ramot2006) ((Hebrew) pp. 179-180).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

120. Furthermore, in a regime of occupation, the principle of separation of powers is nullified. As is known, the military commander is vested with the powers of all three branches of government. He is the legislature, the judiciary and, of course, the executive. In this state of affairs, it cannot be said that judicial intervention in the act of the legislator of the occupied territory violates the principle of separation of powers – which is non-existent in a regime of occupation to begin with.

Thus, this rationale for giving precedence to domestic law does not apply in the case at hand as well.

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

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

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

Occupying Power was bound to repeal or suspend these Regulations and certainly it could not legitimately rely on them.

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

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

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

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

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

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

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

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

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

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

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

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

III. Use of Regulation 119 constitutes prohibited collective punishment

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

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

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

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

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

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

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

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

136. In light of the above, from the point of view of the occupants of the demolished houses who were not involved in the act attributed to their family member, which was the reason for issuing the military order under Regulation 119 – the demolition is an act of punishment in the meaning of the term in the context of the prohibition on collective punishment, as specified below.

The prohibition on collective punishment in international law

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

On this matter see: J.M. Henckaerts & L. Doswald-Beck, CUSTOMARY INTERNATIONAL LAW 374-375 (Cambridge, 2005).

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

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.
>
> Pillage is prohibited.
>
> Reprisals against protected persons and their property are prohibited

139. And in Article 50 of the Hague Regulations concerning the Laws and Customs of War on Land 1907, which states:

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

140. According to the official commentary of the ICRC on the Fourth Geneva Convention, the prohibition on collective punishment does not refer only to penalties ordered by a court in criminal proceedings, but to <u>punishments of any other kind imposed on an individual or group for acts they did not commit</u>.

On this matter see:

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

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

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

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

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

143. Thus, the prohibition on collective punishment is a basic foundation of international humanitarian law, and specifically – the laws of occupation. **<u>It suffers no exceptions</u>** and it covers every type of sanction imposed on innocents in response to the actions of individuals, other than as a

preventative action with respect to same individuals (such as declaring a closed military zone or restricting on movement during a search for terrorists.)

The prohibition on collective punishment in human rights law

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

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

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

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

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

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

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

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

The prohibition of collective punishment in Jewish law

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! Will not the Judge of all the earth do right? (Genesis 18:25)

149. Jewish law, as is known, is a legal source in Israeli law (Legal Foundations Law, 5740-1980). We have, therefore, found appropriate to present the Court with the sources of Jewish law that address the question of the morality and legitimacy of collective punishment.

150. In his essay, "The Halakhic Aspect" (published in Rabbis for Human Rights**, Punitive House Demolitions: Legal and Halakhic Asepcts,** Jerusalem, 5751), Rabbi Moshe Zemer presents the Talmud discussion of the two verses which provide answers to this question and which, it seems, contradict one another.

151. While one verse describes God as punishing "the children and their children for the sin of the parents to the third and fourth generation" (Exodus 34:7), another states that "Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin" (Deuteronomy 24:16).

152. How can the contradiction be reconciled? The Babylonian Talmud suggests that the first verse deals with wicked sons "who keep hold of the actions of their fathers" (Tractate Brachot 7:71). In other words, personal responsibility and personal guilt are necessary and therefore only "wicked" sons are punished because they **carried on** the sins of their fathers, whereas good sons are not punished for their fathers' deeds.

153. Furthermore, Rabbi Yosef Bar Hanina, an Amora (Talmudic sage) of the third century, said that even though Moses handed down the decree "punishes the children and their children for the sin of the parents", which appears to permit collective and ongoing punishment, the prophet Ezekiel later abolished the decree and replaced it with "The one who sins is the one who will die" (Ezekiel 18:4; Babylonian Talmud Makot 24:71)**Thus, here too the approach is one of personal responsibility and only the person who committed the sin is to be punished.**

154. Ultimately, Rabbi Zemer found that the overall trend in the Talmud is that the relatives of a suspected criminal should not be punished without inquiry into their guilt or innocence.

<u>The destruction of Sodom</u>

155. Perhaps the best known and most poignant reference in the Pentateuch to the question of the legitimacy of collective punishment is the story of Sodom, where Abraham negotiates with God who had decided to destroy the wicked city of Sodom for the sake of the few righteous perhaps still living there.

156. This dramatic episode in which Abraham serves as counsel for the defense and pleads before the Judge of the Universe in so relevant and appropriate to the matter at hand:

> **23** Then Abraham approached him and said: "Will you sweep away the righteous with the wicked? **24** What if there are fifty righteous people in the city? Will you really sweep it away and not spare[e] the place for the sake of the fifty righteous people in it? **25** 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! Will not the Judge of all the earth do right?"
>
> **26** The Lord said, "If I find fifty righteous people in the city of Sodom, I will spare the whole place for their sake."

> [27] Then Abraham spoke up again: "Now that I have been so bold as to speak to the Lord, though I am nothing but dust and ashes, [28] what if the number of the righteous is five less than fifty? Will you destroy the whole city for lack of five people?"
>
> "If I find forty-five there," he said, "I will not destroy it."
>
> [29] Once again he spoke to him, "What if only forty are found there?"
>
> He said, "For the sake of forty, I will not do it."
>
> [30] Then he said, "May the Lord not be angry, but let me speak. What if only thirty can be found there?"
>
> He answered, "I will not do it if I find thirty there."
>
> [31]Abraham said, "Now that I have been so bold as to speak to the Lord, what if only twenty can be found there?"
>
> He said, "For the sake of twenty, I will not destroy it."
>
> [32] Then he said, "May the Lord not be angry, but let me speak just once more. What if only ten can be found there?"
>
> He answered, "For the sake of ten, I will not destroy it."

(Genesis 18:23-32)

157. There seems to be no need to say more about the meaning of these beautiful verses.

<u>The story of Korah</u>

158. When God told Moses and Aharon that he intended to severely punish the community of Korah, they asked, "will you be angry with the entire assembly when only one man sins?" God replied, "You have spoken well. I know and declare who sinned and who did not sin." (Rashi, Numbers 16:22)

    Thus, God confirms that he will not punish the community collectively but limit the punishment so that it harms only those who had sinned.

<u>City of Sinners</u>

159. The city of sinners is a city in which most of its inhabitants are idol-worshippers. The Torah declared, "You must certainly put to the sword all who live in that town. You must destroy it completely,[b] both its people and its livestock. You are to gather all the plunder of the town into the middle of the public square and completely burn the town and all its plunder as a whole burnt offering to the Lord your God." (Deuteronomy 13:15-16).

160. These verses seem to indicate that God has chosen to punish the city collectively. Many sages questioned whether God indeed intended to punish women and children who had not sinned, simply because they lived in a city of sinners. As a result, many commentaries appeared which sought to reduce the possibility of such a city actually existing, and argued that a city which has

even one mezuzah does not become a city of sinners and is not punished (Sanhedrin 113:71). Furthermore, it has been said that such a city had never been and never would be and that the verse comes only to warn and teach us that this is the punishment for a city of sinners (Sanhedrin 71:71).

161. What emerges from the above is that Jewish law vehemently opposes the idea of collective punishment and supports the concept of individual responsibility. We have not found in Jewish law any exceptions to the prohibition against collective punishment.

162. It is worth pointing out that this principled position was an innovation, certainly considering the period in which the Torah was written and even the period when the Talmud was completed. The stories of the Bible, in the spirit of "the laws of war" that prevailed in those days, naturally include incidents in which collective punishment was applied against nations and communities. Precisely in this context, the Bible's and its commentators' stand against collective punishment is novel and important.

Application: The implementation of Regulation 119 constitutes prohibited collective punishment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

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

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

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

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

171. Therefore, there is a connection between the prohibition on destruction of property by the occupying power which is not absolutely necessary for military operations, as stipulated in Article 53 and the prohibition on reprisals against property stipulated in Article 33(1), (See Pictet, 1958, p. 301.) That is, it can be said that destruction of property that does not constitute an act that is absolutely necessary for military operations (thus breaching Article 53.), and that is

carried out as a sanction against a person or a group for acts that they, themselves, did not commit, will be considered collective punishment in violation of Article 33(1)

172. Furthermore, there is broad consensus among scholars that the interpretation of the exclusionary clause in Article 53 of the Fourth Geneva Convention (which allegedly justifies the use of Regulation 119 of the Defense Regulations) – is extremely restricted and does not include the demolition of houses for deterrence or punishment but only when necessary for a military operation.

On this matter, see inter alia:

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

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

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

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

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

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

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

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

177. The UN Committee against Torture addressed Israel's punitive house demolition policy and found that in certain instances the policy indeed reached the point of cruel, inhuman and degrading treatment and punishment, thus violating Article 16 of the Convention, (which Israel

ratified in 1991). The Committee called on Israel to stop sealing and demolishing houses.[1] The committee reiterated this call in 2009.[2]

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

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

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

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

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

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[1] Conclusions and Recommendations of the Committee against Torture, Israel, U.N. Doc. CAT/C/XXVII/Concl.5 (2001) ,paras. 6(j), 7(g).
[2] Concluding Observations on Fourth Periodic Report Submitted by Israel, CAT/C/ISR/CO/4, 23 of June 2009, para. 33.
[3] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/C/79/Add.93 (18 August 1998), para. 24.
[4] *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR (21 August 2003), para. 16.
[5] *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/C/ISR/CO/3 (29 July 2010), para. 17.

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

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

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

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

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

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

The war crime of extensive destruction of protected property

[6] *Concluding Observations of the Human Rights Committee on the Fourth Periodic Report of Israel,* (adopted on 28 October 2014, advance unedited version- not yet published), para. 9

[7] Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mr. Miloon Kothari, E/CN.4/2003/5/Add.1, 12 June 2002.

[8] Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967, E/CN.4/2002/32, para. 31.

[9] *Selçuk and Asker v. Turkey*, ECHR judgment of 24 April 1998, p. 19; see additional judgment on this issue: *Akdivar v. turkey* 23 Eur. Ct. H.R. 143, 189-90 (1997).

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

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

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

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

a. Destruction of property;

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

c. The destruction is extensive and perpetrated wantonly;

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

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

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

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

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

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

189. The International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), addressed the question of the lawfulness of destroying property in occupied territory and was compelled to study the "military necessity" exclusion. True to the principle that the exclusion applies only to **operational** activities, in **Blaskic,** the ICTY determined the occupying power may not destroy movable or immovable property unless absolutely necessary for a military operation:

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

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

190. It was further established that:

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

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

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

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

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

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

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

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

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

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

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

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

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

> Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II
>
> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> …
>
> b. Collective punishments
>
> …

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

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

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

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

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

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

<u>The principal of proportionality in international and Israeli law</u>

199. Below we argue that the use of Regulation 119 – which constitutes use of force by the occupying power as part of an international armed conflict – comes under the laws governing use of force, including the principle of proportionality. Furthermore, the principle of proportionality has a parallel in Israeli law (See; HCJ 7957/04 **Mara'abe et al. v. The Prime Minister of Israel et al**., TakSC 2005 (3) 3333, p. 3340) (2005) 3333 (3) – the matter of the separation fence in the Alfei Menashe enclave).

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

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

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

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

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

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

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

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

206. In the jurisprudence of this Honorable Court, to determine whether a governmental act is proportionate, a three-phase test is applied: Is there a rational connection between the means chosen and the objective? Has the least injurious means been chosen from the spectrum of means that can be employed to achieve the objective? Is the harm caused to the protected interest greater than the benefit to the interest being sought in "absolute values" (see the **Beit Sourik**, para. 41).

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

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

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

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

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

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

VI. Use of Regulation 119 discriminates between Palestinians and Jews

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

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

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

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

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

217. This is not an issue of selective enforcement, as the matter at hand does not concern a practice of enforcement, but rather the imposition of a deterring sanction.

218. To the best of our knowledge, the Respondents argue that there is no need for "deterrence" in the Jewish sector. With due respect, this perfunctory claim must be substantially supported, which has not been the case.

219. In any event, we recall and clarify that our argument does not seek to have the unlawful practice of demolishing and/or sealing homes applied to the Jewish sector as well. Our argument is that its

discriminatory implementation creates an additional, independent unlawfulness that also demands its revocation.

D. Conclusion

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

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

222. After more than forty years in which this practice has been in used, and thirty years since the fundamental arguments against it were last heard – it is time to revisit it.

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

In addition, we ask the Honorable Court issue a costs order against Respondents for expenses and legal fees incurred by the Petitioners, plus VAT and interest as prescribed by law.

Date: _____

Michael Sfard, Advocate Noa Amrami, Advocate Roni Peli, Advocate

Counsel for the Petitioners