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At the Supreme Court Sitting as the High Court of Justice

HCJ 7220/15

Before:	**Honorable Justice N. Hendel** **Honorable Justice U. Shoham** **Honorable Justice M. Mazuz**
The Petitioners:	**1. _____ 'Aliwa** **2. HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger**
	v.
The Respondent:	**Commander of IDF Forces in the West Bank**
	Petition for *Order Nisi* and Interim Order
Session Date:	Heshvan 22, 5776 (November 4, 2015)
Representing the Petitioners:	Adv. Labib Habib
Representing the Respondents:	Adv. Yonatan Zion-Mozes; Adv. Yuval Roitman

Judgment

Justice U. Shoham:

1. This petition concerns a seizure and demolition order which was issued against the home of petitioner 1(hereinafter: the **petitioner**), located in the city of Nablus, pursuant to Regulation 119 of the

Defence (Emergency) Regulations , 1945 (hereinafter: **Regulation 119**). The order which was issued on October 25, 2015, by General Major Roni Numa, the military commander of IDF Forces in Judea and Samaria, stated, *inter alia*, that "**This order is issued in view of the fact that the inhabitant of the house Rajeb Ahmed Mohammed 'Aliwa, ID No. 905171328 (petitioner's husband – U.S.) acted together with others for the execution of a terror attack which took place on October 1, 2015, during which the late Henkin spouses were shot to death**."

Petitioner 2 is HaMoked: Center for the Defence of the Individual, which is represented, like the petitioner, by Advocate Labib Habib.

The Petition

2. In the petition before us it was argued that on October 20, 2015, the respondent gave notice of his intention to seize and demolish the apartment in which the petitioner and her family members lived (hereinafter: the **apartment** or the **house**), according to Regulation 119. The notice mentioned the possibility to submit an objection to the respondent until October 22, 2015, at 12:00. On October 22, 2015, an objection was submitted, which was rejected by a letter sent from the legal advisor's office of the Area, along with the seizure and demolition order being the subject matter of this petition, which was attached thereto.

3. The petition clarified that the apartment in which lived the spouses, Rajeb Ahmed Mohammed 'Aliwa (hereinafter: **Rajeb**) and the petitioner together with their two year old son, was located on the floor above the ground floor in a four story building consisting of two wings, while the two upper floors were undergoing construction which was in its final stages. This case concerns an apartment of about 50 sq. meters, after the floor was divided into two apartments, which consists of a bedroom, living room, kitchen and bathroom.

4. The petition argues that the seizure and demolition order (hereinafter: the **order**) was issued hastily without a real hearing and that in fact, the hearing was conducted for the sake of appearance only, whereas respondent's decision "**was made long ago**". It was also argued that the right to be heard in the case at hand was not actually granted in view of the fact that the interrogation material, on which the suspicions against Rajeb were based, was not disclosed to the petitioners. It was also argued that the order stated that "**Rajeb acted together with others for the execution of a terror attack**", but it was not argued that he himself took part in the shooting, as was argued with respect of other members of the same cell. In addition, Advocate Habib also argued that the suspicions against Rajeb have not been proved, and that as far as he was concerned "**a situation in which sanction is taken against a residential unit before judgment is entered against the suspect by a court of law, is unacceptable**." Therefore, the petitioners argue that we should wait until a judicial decision in Rajeb's case is made, mainly in view of the fact that we are concerned with "**impingement on property and the right to hold property, not only of the suspect but also of his family members**."

5. Beyond the specific arguments, the petition argues that Regulation 119 runs contrary to international humanitarian law, which constitutes the exclusive normative basis for the exercise of the powers of the military commander in an occupied area. Particularly, reference was made by Adv. Habib to Article 33 of the Fourth Geneva Convention which prohibits collective punishment and reprisals against protected persons and their property, and to Article 50 of the Hague Regulations which also prohibits collective punishment, in addition to different provisions in UN conventions such as the Covenant on Civil and Political Rights and the Covenant on Social and Economic Rights which also prohibit, according to Adv. Habib, collective punitive measures of this sort.

6. It was further argued that the seizure and demolition order did not satisfy the proportionality tests in view of the fact that the demolition of petitioner's apartment for deterrence purposes, ostensibly, did

not satisfy the rational connection test between the measure and the objective; the "**less injurious measure**" test; as well as the proportionality test in its narrow sense, namely, "**the harm vis-à-vis the gain test**". It was argued in this context that real discretion was not exercised regarding the need to use house demolition, but that we were rather concerned with the execution of a decision taken by the political level to use house demolition. The discrimination argument between Palestinian residents and Jewish assailants, such as Ami Popper who massacred innocent workers, whose homes were neither demolished nor sealed, was also raised.

7. Alternatively, the petitioners request that to the extent the primary remedy for the revocation of the order is denied, the respondent should refrain from demolishing the apartment by detonation, so as to prevent area damage to adjacent apartments, since past experience shows that the neighbors of a demolished house do not receive any compensation for the damages inflicted on them.

8. In the framework of the petition an interim order was also requested prohibiting the seizure and demolition of the apartment until a decision in the petition is given. On October 27, 2015, Justice **D. Barak-Erez** issued "**an interim injunction prohibiting the seizure and demolition of the structure being the subject matter of the petition until otherwise resolved by this court**."

Respondent's response to the petition

9. In his response the respondent noted that from the beginning of 2013 and until these days we witness a continuous escalation in the security situation and a constant increase of terror activity against the state of Israel, its citizens and residents, both within state territory as well as in the Judea and Samaria area (hereinafter: the **Area**), which is expressed in a general increase in the number of attacks, including popular terror attacks, but also severe attacks, in which firearms are used. A table was attached to respondent's response which included the details of dozens of different attacks which were carried out from the beginning of 2014 until the date on which the response was submitted. Against the backdrop of the escalation in the security situation, which peaked in the last several weeks, the respondent is of the opinion that the exercise of the authority according to Regulation 119 against the structure in which lived the perpetrator who was involved in the killing of the late Henkin spouses in front of their children "**is crucial for the purpose of deterring additional potential perpetrators from carrying out additional similar attacks**."

10. With respect to the attack in which the late Henkin spouses were killed, the respondent noted that the killing was committed on October 1, 2015, at the Beit Furik junction area by three perpetrators who belonged to a Hamas cell in Nablus. The cell itself consisted of five activists, while other than the perpetrators who took part in the attack itself, there was another activist whose duty was to "**open traffic artery**", and the cell commander who was not in the car – Rajeb, petitioner's husband. It was also stated that the interrogation of the cell members has not yet been completed, but that a "clear picture" has already been obtained concerning Rajeb's direct involvement in the planning of the attack, in the recruitment of the other perpetrators and in their equipment with firearms. After the killing was committed, Rajed received a full report of its results. He also arranged the transfer of one of the perpetrators who was injured during the attack to a hospital in Nablus, and even used his own money to pay for the treatment. Based on the open and privileged interrogation materials, the respondent is of the opinion that **"he has administrative evidence at a close to certainty probability level concerning the involvement of the perpetrator (Rajeb) in the execution of the attack, which enable and justify the exercise of the authority according to Regulation 119 against the structure in which he lived**." The apartment in which Rajeb lived is located in the Dahiya neighborhood in Nablus. It was noted that the apartment was located on the middle floor in a three story building and that said floor consisted of an additional apartment.

11. With respect to petitioners' legal argument, the respondent argued that the legal arguments which were raised were not new and that they have already been discussed in many judgments which were given in the past by this court, first and foremost in the general judgment regarding the exercise of the authority under Regulation 119, which was given in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) (hereinafter: **HaMoked case**). After said judgment, several specific petitions were heard regarding the issue of seizure and demolition orders, all of which were premised on that the military commander was authorized to issue an order according to Regulation 119, when in his opinion it was required to deter potential perpetrators (see, for instance, HCJ 7823/14 **Ghabis v. GOC Home Front Command** (December 31, 2014)(hereinafter: **Ghabis**); HCJ 8066/14 **Abu Jamal v. GOC Home Front Command** (December 31, 2014); HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015)(hereinafter: **Sidr**).

12. It was further argued that the underlying objective of the exercise of the authority according to Regulation 119 was to deter rather than to punish, with the premise being that "**a potential perpetrator who knows that his family members may be harmed should he carry out his evil plan – may consequently be deterred from carrying out the attack planned by him**." In addition, deterrence also applies, sometimes, to the family members, when they know of the perpetrator's plans, so as to cause them to take action to prevent the act, for fear of being harmed. According to the respondent it is not a collective punishment against uninvolved persons "**but rather an incidental impingement only to the deterring purpose of the exercise of the authority**". The respondent also argued that having been aware of the difficult consequences arising from the exercise of Regulation 119, he exercised his authority only in severe cases, for the purpose of creating sufficient and proper deterrence against potential perpetrators, while the exercise of the house demolition sanction was "**a derivative of the circumstances of time and place**". Accordingly, in the years in which terror activity declined, the authority was exercised quite rarely, whereas in periods in which acts of terror became a daily routine, it was necessary to exercise the authority much more frequently "**for the purpose of deterring and uprooting the affliction of terror, so as to prevent it from expanding and spreading even further**".

13. With respect to the issue of the order in Rajeb's case the respondent noted that it was done "in consideration of the severity of the attack in which the late Henkin spouses were killed in cold blood in front of their young children". According to the respondent "**it is extremely crucial to deter to the maximum extent possible additional attacks in this manner in the future"**.

14. In connection with the demolition method of petitioner's home the response stated that according to the engineering opinions, blade charge explosives would be used "of the type of framework of modular targeted breaking and entry" which would be sealed by sand sacks for the reduction of area damage. It was also stated that "**To the extent that as a result of negligent planning and/or execution of the demolition of the structure designated for demolition the structures adjacent thereto will be damaged, the state will agree ex gratia to repair the structure or compensate the owner of the structure for the direct damage which will be caused to the structure, all subject to an appraiser's opinion on its behalf**." Said agreement was conditioned upon several conditions including that "**the flaw in the action did not occur as a result of disturbances, riots and any other act of retaliation encountered by the force on site**."

    In view of the above, the respondent is of the opinion that there is no cause for intervening in his decision to exercise his authority according to Regulation 119 against the apartment in which the perpetrator lived.

The hearing in the petition

15. In the beginning of the hearing in the petition, the state notified that it was willing to discuss this petition as if an order nisi was granted therein. Thereafter we heard the arguments of Adv. Labib Habib, petitioners' counsel, who reiterated the main things which appeared in his petition. According to Adv. Habib, there is no support for the argument that house demolition indeed serves the deterrence factor, and as far as he is concerned the opposite is true – since it increase hatred and the desire to take revenge. Adv. Habib added that it constituted collective punishment of innocent persons, which was unlawful according to international law "**and also morally**". As a second "**defense line**" Adv. Habib argued that the level of Rajb's involvement in the attack was low since he did not take part in the shooting itself, and there were no substantiated evidence which indicated that he was the commander of the cell. It was further argued that contrary to the other cell members Rajeb could not be indicted of the offense of murder and that at the utmost it concerned aiding and abetting the members of the cell. Finally, it was argued that Rajeb was held innocent and that it would be appropriate to wait until the legal proceedings against him shall have been completed and only then decide whether to realize the seizure and demolition order. With respect to the demolition method, Adv. Habib repeated the argument that there was no room to use explosives in view of the anticipated area damage, and that in any event the state should undertake to compensate the owners of the adjacent apartments, without any condition. Adv. Habib expressed his consent that we review the privileged material concerning Rajeb's involvement in the murderous attack, material which adds up to the statements given by him to the police, and the privileged material which was intended to substantiate the state's argument concerning the deterring purpose underlying the authority according to Regulation 119.

16. Respondent's counsel, Adv. Mozes, argued in response that there was no need to wait for the completion of the criminal proceeding in Rajeb's case and that according to the judgments of this court, administrative evidence which satisfied the military commander, was sufficient. As to the scope of Rajeb's involvement, it was argued that he was directly involved in the attack in view of the fact that he was the one who recruited the activists, planned the specific attack and equipped the perpetrators with firearms. During the hearing, notice was received from the military prosecution in Judea and Samaria regarding Rajub, which stated as follows: "**Considering the fact that the interrogation has not yet been completed, and based on the material which was transferred for our review at this stage, *prima facie* the intention is to attribute to the petitioner the offense of intentional causation of death**". It should known that the offense of intentional causation of death pursuant to section 290(a) of the Order regarding Security Directives [Consolidated Version](Judea and Samaria)(No. 1651), 5770-2009, is the parallel of the offense of willful murder according to section 300(a) of the Penal Law, 5737-1977. It was also stated that the decision to issue the seizure and demolition orders to all cell members was made by the highest officials in view of the current severe security circumstances, for the purpose of deterring potential perpetrators from committing additional acts of terror.

    In view of the above, we were requested to deny the petition.

Discussion and Decision

17. It should be clarified at the outset that in the context of this petition I do not find any reason to discuss the general issue, which pertains to the mere exercise of the authority to issue seizure and demolition orders according to Regulation 119. Said issue has already been discussed and resolved in a host of former judgments headed by the judgment given in **HaMoked case**, while a petition for a further hearing in this issue was denied (HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense**)(November 12, 2015). I do not think that there is any need, under these circumstances, to discuss and resolve *de novo* the general issues, so as to prevent a situation in which instead of being a "**court of law**" this institution becomes a "**court of justices**", in the words of Justice **Zilberg** in FH 23/60 **Blen v. Executors of the Will of the Deceased Reimond Litwinski**,

IsrSC 16(1) 71, 75 (1961) (and see also the words of Justice **U. Vogelman** in paragraph 2 of his opinion in **Sidr**; the words of Justice **E. Hayut** in paragraph 1 of her opinion in **HaMoked** case; and recently, the holding of the President **M. Naor** in HCJ 7040/15 **Hamed v. The Military Commander of the West Bank Area** (November 12, 2015)(hereinafter: **Hamed**) in paragraph 26 of her opinion, according to which "**Judicial scrutiny over the exercise of the authority under Regulation 119 of the Defence Regulations should therefore focus on the discretion level**").

18. Nevertheless, and in view of the fact that the exercise of the authority under Regulation 119 inflicts a severe impingement on the fundamental rights of the inhabitants of the house designated for seizure and demolition, with the presumption being that they are not involved in any unlawful activity, a host of directives and criteria was established by this court in its judgments which qualify and limit the manner by which the discretion of the military commander should be exercised. Firstly it was held that the military commander may use Regulation 119 only when it can serve the purpose of deterrence, since it is the only purpose underlying the exercise of the authority. Hence, the military commander may not exercise the authority as a punitive measure which constitutes collective punishment of uninvolved persons (see, inter alia, HCJ 5290/14 **Qwasmeh v. The Military Commander of the West Bank Area** (August 11, 2014)(hereinafter: **Qwasmeh**); HCJ 4597/14 **'Awawdeh v. The Military Commander of the West Bank Area** (July 1, 2014)(hereinafter: **'Awawdeh**); HCJ 5696/09 **Mughrabi v. GOC Home Front Command** (February 15, 2012)(hereinafter: **Mughrabi**)). It was further held that in the use of Regulation 119 the military commander should exercise reasonable discretion, act proportionately and in a manner which conforms, to the maximum extent possible, with the spirit of the Basic Law: Human Dignity and Liberty (**'Awawdeh**; **Mughrabi**; HCJ 8084/02 **Abassi v. GOC Central Command**, IsrSC 57(2) 55, 59 (2003)).

Among the considerations which the military commander should take into account when he intends to use his authority under Regulation 119, the court specified the following considerations:

> a. The severity of the acts that are attributed to such suspect who resided in that structure and the existence of verified proof of the performance thereof by that suspect should be taken into account.
>
> b. The extent of involvement of the remaining residents of the house, in most cases the family members of the terrorist, in his terrorist activity, may be taken into account. Lack of evidence pertaining to awareness and involvement on the part of the relatives does not in and of itself prevent the exercise of the authority, but such factor may affect as aforesaid the scope of respondent's order.
>
> c. A relevant consideration is whether the residence of the suspect perpetrator can be deemed as a residential unit that is separate from the remaining parts of the structure.
>
> d. It should be checked whether the suspect's residential unit can be demolished without harming the remaining parts of the structure or neighboring structures; if it turns out that the same is not possible, then making-do with sealing the relevant unit should be considered.
>
> e. The respondent must take into account the number of persons who may be harmed by the demolition of the structure and who are assumedly innocent of any crime and were also not aware of the suspect's acts. (HCJ 1730/96 **Salem**

v. Commander of IDF Forces in Judea and Samaria Area, IsrSC 50(1) 358, 359 (1996); **Qawasmeh**, paragraph 22).

However, case law emphasized that the above criteria were not all-inclusive and that each case should be considered according to its own circumstances, including circumstances of time and place ('**Awawdeh**).

Based on the above specified principles I will therefore turn to examine the specific case before us.

19. We shall firstly commence with the data which indicate of a significant rise in the wave of terror which hits the state, with emphasis on East Jerusalem and the Judea and Samaria Area. Over the course of the last three years there has been an increase in terror activity, but the severe escalation commenced on new years' eve 5776 which continues until these date, and no one can tell when it will end. During said period dozens of attacks were carried out, the vast majority of which in the format of a single perpetrator, when the main characteristics are stabbing attacks, ramming or combined attacks. At the same time, shooting attacks were also carried out, such as the attack being the subject matter of this petition, and it should be noted that this murderous attack is exceptional in nature, due to the fact that the perpetrators were members of the Hamas organization. According to the data introduced by the respondent, as of new year's eve and until October 25, 2015, about 778 attacks were carried out in which eleven Israelis were killed and about hundred other were wounded. Each and every day we hear of several attacks which occur throughout Israel and the Judea and Samaria Area, which severely impinges on the sense of safety of the inhabitants and citizens of the state, and raises anxiety and fear of another attack which hides behind the corner.

20. With respect to the administrative evidence in Rajeb's case, it seems that the respondent has established proof that Rajeb was the commander of the cell which executed the attack and that he was ostensibly personally involved in the hideous killing, as a collaborator (on the different tests for the classification of a collaborator, including a person who heads the organization even if he himself does not actually carry out the criminal act, see, inter alia, CrimApp 4428/13 **Shitrit v. State of Israel** (April 30, 2014); CrimApp 5706/11 **Ron v. State of Israel** (December 11, 2014); CrimApp 7477/08 **Getz v. State of Israel** (November 14, 2011)). Rajeb gave not less than six statements in the police, in which he admitted to everything which was attributed to him, and in short his words may be summarized as follows: Rajeb belonged to the Hamas organization, and in this framework he obtained an M-16 assault rifle and a 14 handgun, and according to his statement dated October 3, 2015, "**I have been all my life in Hamas and this gun I mentioned belongs to Hamas**". After he heard of "**problems in Al-aqsa Mosque**" Rajeb met with two persons, Yichya and Samir, to whom he wanted to give the firearms for the purpose of executing shooting attacks against Israeli targets, *inter alia*, to revenge "**the story of the Dawabshe family which was burnt**". The two agreed to carry out shooting attacks and after the M-16 assault gun was given to them Rajeb was informed that they shot at a settlers' car near the Beit Furik blockade but that no one was wounded in said shooting. After this attempted attack, another attack was planned and for this purpose a third person called Karem was joined to the cell. Rajeb explained to him the nature of the military action that Yichya and Samir intended to carry out and offered him to join them, while having equipped him with a handgun. After the attack in which the late Henkin spouses were killed, Rajeb was informed that Karem was wounded from bullet and the "**his left arm was bleeding badly**". Shortly thereafter, Rajeb arranged Karem's hospitalization in a hospital in the Rafidiya neighborhood and even paid the hospital 5,000 ILS for the costs of Karem's operation. In a statement dated October 6, 2015, Rajeb noted that after he had recruited Yichya and Samir for the activity, he sent them to take excursions in the Beit Furik area to "**check the movement of the cars of the Israeli settlers who were driving that road**." In a statement dated October 7, 2015, Rajeb said with respect to the purpose of collaboration that "**the purpose was to kill Jewish settlers due to the mess they did in Al-aqsa Mosque and also because of the killing of the Dawabshe family**."

We have reviewed, with the consent of petitioners' counsel the privileged material concerning Rajeb and in it support for Rajeb's statements regarding his senior position in the Hamas organization and his activity as the commander of the terror cell which executed the murderous attack. Even if we are concerned with evidence that has not yet been examined by the court, the argument of Adv. Habib that it would be appropriate to wait for the completion of the legal proceedings in Rajeb's matter, should be denied. It has already been held long ago that the exercise of the authority according to Regulation 119 "**is not conditioned upon the conviction of the perpetrator under criminal law, but it is rather sufficient that administrative evidence was presented to the respondent which satisfied him that the offense was committed by the inhabitant of the house designated for demolition**" ('**Awawdeh**, paragraph 21)

21. The main issue which concerned us in this petition pertains to the effectiveness of house demolition for deterrence purposes, as there is no dispute that it is the only purpose which can justify the exercise of this severe and offensive power. As was held in **HaMoked** case:

> "The principle of proportionality does not reconcile with the presumption that choosing the drastic option of house demolition or even the sealing thereof always achieves the longed-for objective of deterrence, unless data are brought to substantiate said presumption in a manner which can be examined… Therefore, I am of the opinion that State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused" (paragraph 27 of the opinion of Justice (as then tiled) **E. Rubinstein**).

Adv. Mozes, respondent's counsel, argued in the open part that deterrence of potential perpetrators and their family members, who may dissuade the perpetrator from carrying out his evil plan, is examined from time to time by the highest officials of the security forces as well as by the senior political and legal levels, and the conclusion is that under the circumstances of time and place, it is an effective deterring tool, to the extent that the demolition order is executed shortly after the date of the attack. In the privileged part, we were introduced with an up-to-date opinion dated November 9, 2015, in the context of which examples of cases were presented in which attacks were prevented, or in which the perpetrator had serious doubts as to whether to carry out the attack, due to the concern that the family house would be demolished. At the same time, there was quite a significant number of cases in which the family members of the perpetrator, who were aware of the intention to carry out an attack, acted to thwart said intention, due to the fear of a severe response in the form of house demolition. On the other hand, we were also presented with the possibility that house demolition could increase the motivation for the execution of attacks out of a desire to take revenge, but the ultimate conclusion was that the gain of deterrence obtained from exercising the house demolition measure is quite significant and immeasurably exceeds the concern of revenge attacks.

22. After I heard the arguments of the parties and reviewed the privileged material I am satisfied that the respondent met the burden which rests on him to show that the exercise of the authority according to Regulation 119 has a deterring effect, and it seems that things have been seriously considered lately against the backdrop of the acts of terror which have been taking place over the last weeks (see, in this context, the position of the President **M. Naor** in **Hamed**, paragraph 29; the words of Justice **N. Sohlberg**, in paragraph 1 of his opinion, and the comment of Justice **H. Melcer** regarding the weight which should be attributed to the attempts of the family members to dissuade the perpetrator prior to the execution of the attack, from realizing his said intention).

23. With respect to petitioners' argument that they are discriminated against as compared to Jewish perpetrators, I am of the opinion that this argument was merely made while no sufficient factual infrastructure was presented for the existence of selective enforcement which did not stem from pertinent considerations. As noted by Justice **Y. Danziger** in **Qawasmeh**:

> In view of the fact that Regulation 119 has a deterring rather than a punitive purpose, the mere execution of hideous terror acts by Jews, such as the abduction and murder of the youth Mohammed Abu Khdeir, cannot justify, in and of itself, the application of the regulation against Jews, and there is nothing in respondent's decision alone, not to exercise the regulation against the suspects of this murder, which can point at the existence of selective enforcement. (*Ibid*., paragraph 30).

Therefore, petitioners' argument on this issue should be denied.

24. Finally, with respect to the demolition method, an engineering opinion was presented to us which indicates that walls and partitions which do not affect the stability of the entire structure would be demolished, while one exterior wall would be demolished by "**hot detonation**", which would be executed in a controlled manner with specifically targeted explosive charges which were planned to reduce area damage. It seems that the content of said opinion satisfies the concern that the stability of the structure would be injured and that damage would be caused to the adjacent apartments.

25. To complete the picture it should be noted that in the framework of the judgment which was given in **Hamed** the court approved the seizure and demolition orders which were issued against the houses of the members of the murderous cell, Yichya, Samir and Karem who acted under the guidance and command of Rajeb, as described above.

26. Based on the above said, I am of the opinion that the military commander exercised his discretion in connection with the issue of the seizure and demolition order being the subject matter of this petition reasonably and proportionately, and therefore I do not see any reason to intervene in his decision.

Therefore, I will propose to my colleagues to deny the petition.

Justice N. Hendel:

I join the judgment of my colleague, Justice **Shoham**.

Due to the importance of the issue of house demolition pursuant to Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**), I found it appropriate to add the following.

I find this issue to be legally difficult. In this specific file it would be appropriate to aim the spotlight at the following details: (a) petitioner's husband, Rajeb 'Aliwa (hereinafter: **Rajeb**) - with respect of whom it has been ostensibly proved that he had caused the death of individuals – the late Henkin spouses – is still alive. Hence, his connection to the house has not changed and the demolition may therefore be regarded as a sanction which focuses on him. (b) At this stage it seems that Rajeb committed the offense of intentional causation of death together with three additional perpetrators, the petitions against the demolition of their homes by virtue of Regulation 119 were denied (see HCJ 7040/15 **Hamed v. The Military Commander of the West Bank Area** (November 12, 2015), by the President **M. Naor** and the Justices **H. Melcer** and **N. Sohlberg**; hereinafter: **Hamed**). Hence, a decision according to which only Rajeb's home would not be demolished is inconceivable – particularly in view of the central role he played in the attack. (c) This court has repeatedly rejected, in the framework of the hearings of the petitions which were filed with it, the

general arguments which were raised against the mere use of the measure of house demolition (for a partial review see the decision of the Honorable President **M. Naor** in HCJFH 360/15 **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger v. Minister of Defense**, paragraph 1 (November 12, 2015), and the judgments mentioned therein). (d) During the last two months the state of Israel has been experiencing a severe wave of terror – even as compared to other periods. According to data presented in the hearing, during the 40 days which passed from new year's eve until October 25, 2015, about 770 attacks were carried out, in which eleven Israelis were killed and about hundred additional human beings were wounded.

To complete the picture, it should be noted that the privileged material which was presented to us, which substantiates the assumption that house demolition according to Regulation 119 creates effective deterrence, was more convincing than I have expected it to be. However, despite the fact that deterrence constitutes a necessary condition for the approval of house demolition according to Regulation 119, it cannot constitute the exclusive consideration in that regard – on the general level as well as on the specific level. Therefore, it is important to note that given the fact that there is no general flaw in demolition, it does not revoke the need to specifically examine each and every case (thus, for instance, in **Hamed** this court ordered to refrain from demolition in view of the fact that the house was not owned by the perpetrator – but was rather rented). As aforesaid, a clarification should be added, which reconciles with case law as well as with the statement of the state, that the demolition measure would be used in a cautious and limited manner.

The material indicates that this court has discussed petitions of this kind over a period of dozens of years. The time element itself intensifies the constraints with which the state must cope when fighting the phenomenon of terror which poses danger to its citizens and injures them.

Justice M. Mazuz

1. Having reviewed the opinions of my colleagues, Justices **N. Hendel** and **U. Shoham**, I cannot join their position and the conclusion they have reached.

2. As indicated from the overview of the issues in the opinion of my colleague, Justice **Shoham**, general basic arguments were raised in the petition at hand concerning the validity of Regulation 119 of the Defence (Emergency) Regulations, 1945 and the manner by which it is employed, alongside specific arguments pertaining to the specific circumstances of the petition at hand.

   Among other things, it was argued that Regulation 119 runs contrary to the rules of international humanitarian law, including those prohibiting collective punishment and causing damage to property, as well as contrary to international human rights law. Arguments were also raised concerning the proportionality principles of Israeli constitutional law, including arguments regarding discrimination and arguments concerning the effectiveness of the sanction and its reasonableness. Along with the general basic arguments, the petitioners also raised arguments regarding the hearing procedures which took place prior to the issuance of the order, and which, they claim, were conducted for the sake of appearances only. It was also argued that in view of the fact that Rajeb did not take part in the fatal attack itself, and of the circumstances under which his admissions were taken which may lead to their invalidation, it would be appropriate to wait until judgment was given in his case, before irreversible action is taken against his family home. Finally, it was argued as to the demolition method and the expected damage to the surrounding area in view of the fact that the apartment was located on the middle floor of a four-story building and the demolition was planned to be executed using explosives.

3. The arguments which were raised are weighty and, in my opinion, worthy of thorough examination. While it is true that the general-basic arguments made herein and similar arguments have already been raised in the past, in my opinion they have not been thoroughly and comprehensively discussed as required, at any rate, not recently or fully. This is particularly so in view of the many difficulties use of Regulation 119 raises, the main points of which I shall address below. I do not think that the response of the state to the petition at hand adequately addressed petitioners' arguments – either the general-basic arguments or the specific arguments. The section of the response which contains the "response to petitioners' arguments" holds about six pages only and the vast majority of it consists of citations from past judgments.

   Indeed, this case concerns a very grave incident of a murderous shooting attack, and the need for a decisive, deterring response is understandable. However, it does not relieve us from the need to thoroughly and meticulously examine the entire circumstances and arguments in this matter, in view of the severity of the impingement involved in using Regulation 119 against the family members of the perpetrator, who are not alleged to have had any involvement in the attack. I shall remind in connection with the case at hand that seizure and demolition orders have already been issued against the homes of those who were directly involved in the attack, the execution of which was approved some time ago (HCJ 7040/15 **Hamed v. Military Commander of the West Bank** (November 12, 2015), hereinafter: **Hamed**), whereas in Rajeb's case there is no dispute that he did not take part in the shooting attack and what is attributed to him in the order is that he "was part of a group that took action toward carrying out a terror attack". It should be noted that respondent's response also states that the investigation in Rajeb's case was "ongoing" (paragraph 9, *ibid*.). Under these circumstances, I do not think that we have sufficient grounds for denying the petition.

4. The renewed use of Regulation 119 in the Judea and Samaria Area and East Jerusalem after approximately a decade (2005-2014) during which it had been frozen raises a host of difficult legal questions, which in my view, have not been adequately or recently addressed in the jurisprudence of this court. The court has recently dismissed attempts to raise these issues for renewed, comprehensive discussion (HCJ 8091/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014); HCJFH 360/15 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (November 12, 2015)). The main reason cited was that these issues had already been discussed and resolved in previous judgments. However, a careful examination indicates that deliberation of these issues in previous judgments was not exhaustive. Furthermore, these were mainly judgments handed down in the 1980s and early 1990s, prior to the constitutional era in Israeli law, and in the time that has elapsed, considerable changes have also occurred in the norms of international law pertaining to this issue.

5. In view of my colleagues' position that this petition should be dismissed, I see no reason to discuss here in detail said general and basic questions concerning the validity of Regulation 119 and the manner in which it is employed, and I shall only make some brief comments in that regard.

6. There is ample literature, Israeli and foreign, which discusses the status of Regulation 119 relative to the provisions of international humanitarian law (the laws of armed conflict), international human rights law and the principles of Israeli administrative and constitutional law.

   See for instance (in chronological order): M. Shamgar, 'The Observance of International Law in the Administered Territories', 1 Israel Year Book on Human Rights (1971), 262; Reicin, 'Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories', 8 Cardozo L. Rev. (1987) 515; M. 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. (1990) 1195; David Krezmer "HCJ Criticism on the Demolition and Sealing of Houses in the Territories" Klinghoffer Book on Public Law 305, 336-337

(1993); D. Simon, 'The Demolition of Homes ; (1993) 337-336 ,305 in the Israeli Occupied Territories', 19 Yale J. Int'l L. (1994) 1; Halabi, 'Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis', 5 Temp. Int'l & Comp. L. J. (1991) 251; E. Zilber, 'The Demolition and Sealing of Houses as a Means of Punishment in the Areas of Judea and Samaria During the Intifada up to the Oslo Agreement (MA thesis, Bar Ilan University, Israel, 1997); Y. Dinstein The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing Off of Houses 29 Israel Year Book on Human Rights (1999) 285; D. Kretzmer, 'The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories' (State University o f New York Press, 2002); E. Gross, 'Democracy's Struggle against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area', 30 Ga. J. Int'l & Comp. L. (2002) 165; S. Darcy, 'Punitive House Demolitions, The Prohibition of Collective Punishment, and the Supreme Court of Israel', 21 Penn St. Int'l L. Rev. (2002) 477; B. Farrell, 'Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119', 28 Brook J. Int'l L (2003) 871; A. Zemach, 'The Limits of International Criminal Law: House Demolitions in an Occupied Territory', 20 Conn. J. Int'l L. (2004), 65; D. Kretzmer, 'The Supreme Court of 16 Israel: Judicial Review During Armed Conflict' (2005) 47 German Yearbook o f International Law 392; Amichai Cohen, 'Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories' (2005) 38 Israel Law Review 24.

7. The vast majority of the authors, Israeli and foreigner, are of the opinion that Regulation 119 runs contrary to a host of provisions of international humanitarian law and international human rights law, and first and foremost, the prohibition on collective punishment, enshrined in Article 50 of the regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, 1907 (hereinafter: the **Hague Regulations**), and Article 33 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War, 1949 (hereinafter: the **Geneva Convention**). The interpretation given to this prohibition by the ICRC, international tribunals and foreign and Israeli scholars, in the context discussed above as well as in general, demands a substantive examination of whether Regulation 119 complies with said prohibition, and if so – under what conditions.

   Another prohibition imposed by international humanitarian law which raises questions and difficulties with respect to the use of Regulation 119 is the prohibition on the seizure and destruction of the property of protected persons: Article 23(g) of the Hague Regulations and Article 53 of the Geneva Convention.

   Similar prohibitions also ostensibly derive from different provisions of international human rights law and international criminal law.

8. In addition, the finding, often repeated in case law, that the sanction employed under Regulation 119 is a deterring rather than punitive measure, is not free of doubts. Firstly, Regulation 119 is located in Part XII of the Defence Regulations entitled "Miscellaneous Penal Provisions". Secondly, the fact that a sanction is a deterring measure does not, in and of itself, preclude it from acting as a punitive sanction at the same time. A sanction is classified according to its nature and not necessarily according to its objective, and in any event, deterrence is one of the clear objectives of criminal punishment (Sections 40 and 40G of the Penal Code, 5737-1977).

   It should be noted in that regard that in the first judgment in which Regulation 119 was discussed by this court, the sanctions permitted thereunder was defined by the court as "unusual punitive measures whose main purpose is to discourage similar acts" (HCJ 434/79 **Sahweil v. Commander of the Judea and Samaria Area**, IsrSC 34(1) 464, paragraph 3 (1979), hereinafter: **Sahweil**, and see also

HCJ 1056/89 **Hamed Ahmad a-Sheikh v. Minister of Defense** (March 27, 1990), where Regulation 119 was defined as "a deterring punitive measure"). To the extent that it is indeed a punitive sanction, even if its purpose is deterrence, then, in addition to the significance this fact has on the issue of collective punishment, it has additional ramifications, including on the procedural aspect of the process by which a decision is made, the timing of the decision and the level of evidence required for it.

In addition to the above, there is the factual-evidentiary question of whether the efficacy of this sanction as a deterrent has been properly proven, including questions concerning the type and evidence required and its weight.

9. Using the authority in East Jerusalem area also raises the question of whether residents of this area are "protected persons" in terms of international humanitarian law, and as such come under the provisions of the Hague Convention and the Geneva Convention. Even if said conventions do not apply in East Jerusalem, there is no dispute as to the applicability in this area of human rights conventions, to which Israel has been a party since the early 1990's, primarily the Covenant on Civil and Political Rights from 1966 (ICCPR). These covenants include a host of provisions relevant to the case at hand. It should be noted that the committees overseeing said covenants have repeatedly criticized the State of Israel for its house demolition policy.

10. Though it has been held in the past that even if Regulation 119 cannot be reconciled with the provisions of international customary law, it is still valid as an internal statutory provision which trumps a provision of international law (see the judgment in **Sahweil** and additional judgments which followed it). However, this finding is not free from doubt either, for a host of reasons which this is not the place to specify in detail, particularly given that the matter are concerns a territory held under belligerent occupation.

11. In addition to aspects of international law, use of the authority granted under Regulation 119 raises perplexing questions vis-à-vis domestic Israeli law, partly also given the impact of the basic laws, mainly in terms of proportionality, which is also an important principle under the laws of armed conflict within international law. It should be recalled that it has been frequently held that Regulation 119 should be used with caution and interpreted in the context of Basic Law: Human Dignity and Liberty and the limitation clause therein (HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 57(2) 55, 59 (2003); HCJ 4597/15 **'Awawdeh v. Military Commander of the West Bank Area**, paragraph 17 (July 1, 2014); HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank Area**, paragraph 22 (August 11, 2014); HCJ 6745/15 **Abu Hashiyeh v. Military Commander of the West Bank Area** , paragraph 12 of the judgment of Deputy President E. Rubinstein (December 1, 2015), hereinafter: **Abu Hashiyeh**).These questions require an examination of the relation between principles of Israeli administrative and constitutional law and how and under what conditions Regulation 119 is used in practice, as well as the establishment of limitations on the manner in which the authority is used that derive from these principles, including the limitation clause tests.

12. A thorough examination of the questions which were only outlined above, may lead to conclusions regarding the employment of sanctions under Regulation 119 *per se*, as well as the limitations and qualifications on how it may be used. It should be emphasized that imposing limitations and qualifications on the use of the Regulation according to the rules of Israeli administrative and constitutional law might have a positive impact, even if partial, on the issue of compatibility with the rules of international law.

13. An examination of Regulation 119 according to the rules of Israeli administrative and constitutional law as aforesaid, may require a determination of limitations and qualifications on its use, as well as various distinctions regarding what may and may not be permitted in this matter, including:

a. A distinction between a house which is the home and property of the perpetrator, and a house in which he is merely an "incidental resident", such as the parents' home where he lives, sometimes only partially, such as a student who stays in the house only on holidays etc. (2630/90 **Karakreh v. Military Commander of IDF Forces in the Judea and Samaria Area** (February 12, 1991), and compare recently in the above mentioned **Hamed**, in which the possibility to act against a house in which the perpetrator had the status of a lessee only was limited);

b. A distinction between cases in which the house was in fact used for the perpetrator's terrorist activities (such as for storage of ammunition, or for meetings with his accomplices in the terrorist activity), and cases in which the house was used by the perpetrator as his residence only (see on this issue the above mentioned **Sahweil**, and also HCJ 22/81 **Hamed v. Commander of Judea and Samaria Area**, IsrSC 35(3) 223 (1981));

c. A distinction between cases in which the family members of the perpetrator, the occupants of the house designated for demolition or sealing, were to a certain extent parties to the perpetrator's actions, and cases in which the family members were completely unaware of the perpetrator's intentions or even expressed their disagreement with his actions. Accordingly, in HCJ 987/89 **Kahawaji v. Commander of IDF Forces in the Gaza Strip Area**, IsrSC 44(2) 227, 230 (1990) the court held that: "Indeed, in employing the sanction pursuant to the above Regulation 119 and with respect to the question of the scope of its use, one should consider, *inter alia*, its effects on all those who may be harmed by it and in that regard one should take into account to what extent the occupants of the building aided the execution of the injurious activity and what measures, if any, they took to prevent it" (and see recently the remarks of Justice **Hayut** in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014); the remarks of Justice **Vogelman** in HCJ 5839/15 **Sidr v. Commander of IDF Forces in the West Bank** (October 15, 2015), hereinafter: **Sidr**); the remarks of Justice **Melcer** in **Hamed**, paragraph 4(b).

d. Restrictions on the timing for issuance of the order and its execution date (see recently the above mentioned **Abu Hashiyeh** and **Sidr**);

e. Circumstances which may justify requiring a criminal conviction as a condition for issuing an order pursuant to Regulation 119, rather than relying on administrative evidence alone, as opposed to cases in which the above may be unnecessary (such as an uncontested confession) or impossible (such as when the perpetrator was killed or escaped), and the what evidence is required in such cases;

f. The application of the proportionality test in the narrow sense for the purpose of determining the proper correlation between the severity of the actions due to which the Regulation was invoked and other relevant circumstances for its use, and the severity level of the sanction: seizure only, sealing (partial or complete), or demolition (partial or complete).

14. These distinctions and limitations (not an exhaustive list) may have, as aforesaid, ramifications on the legitimacy of using Regulation 119 *per se*, as well as on the manner in which it is employed and the level of the sanction imposed.

15. In view of all of the above I cannot join my colleagues in their opinion regarding the dismissal of this petition. Had my opinion been heard we would have requested the respondent to provide a detailed response to all of the above questions before making a decision.

I was decided to deny the petition as specified in the judgment of Justice **U. Shoham**, who was joined by Justice **N. Hendel**, against the dissenting opinion of Justice **M. Mazuz**.

Given today, Kislev 19 5776 (December 1, 2015).

Justice Justice Justice