At the Supreme Court
Sitting as High Court of Justice **HCJ 1631/16**

In the Matter of: **1._____Aleiwi, ID_____**
2. Hamoked:Center for the Defence of the Individual
Founded by Dr. Lotte Salzberger
all represented by counsel, Andre Rosenthal, Adv.
License No. 11864
Of 15 Salah a-Din St. POB 19405, Jerusalem 91194
Tel: 02-6250458; Fax: 02-622148

The Petitioners

v.

Commander of the IDF Forces in the West Bank
Represented by the State Attorney's Office

The Respondent

Petition for an Order Nisi and a Temporary Injunction

The Honorable Court is requested to order the Respondent to appear and show cause why he should not revoke the seizure and demolition order signed on February 23, 2016, and directed against the apartment "two floors above the building's entrance floor" in a seven-story building in the city of Nablus; alternatively, the Respondent will be requested to show cause why he does not reduce the scope of the order and consent to partial sealing;

As an interim relief, the Honorable Court is requested to direct the Respondent or anyone acting on his behalf to refrain from causing any damage whatsoever to the apartment that is the subject of the order until the termination of proceedings in this petition.

The demolition order will go into effect at the end of the day on February 28, 2016. A copy of the above order is attached hereto and marked **A'1**.

The grounds for the petition are as follows:

1. a. Petitioner No. 1, Mrs._____ _____ Aleiwi is the wife of _____Aleiwi who was charged with several offenses in the Samaria (Shomron) Military court. The petitioner lives in an apartment on the first floor of the building. The building is a seven-story building, with two apartments on each floor. Part of the building is located below street level, and three stories are located above the commercial and parking floor which is on the level of the road. A photograph of the southern front of the building is attached hereto and marked **A'2**.

   b. the apartment of Petitioner No. 1 includes three bedrooms, a kitchen, living room, family room, two bathrooms and a balcony on the south side.

   c. Petitioner No. 1 lives in the apartment with her eight children. Petitioner No. 1 had no knowledge whatsoever of her husband's plans prior to his alleged involvement in an attack that was committed by other persons on October 1, 2015.

   The affidavit of Petitioner 1 is attached hereto and marked **A'3**.
2. Petitioner No. 2 is a human rights organization which has taken upon itself, *inter alia*, to assist Palestinian victims of cruelty or deprivation by state authorities, including the protection of their status and rights in the courts, either in its own name as a public petitioner or as counsel for persons whose rights have been violated.
3. On February 5, 2016, a notice was received in the office of the undersigned concerning the intent to seize and demolish the apartment that is the subject of this petition. A copy of the notice, which carries no signature or date, is attached hereto and marked **A'4**. An indictment was apparently submitted to the Samaria Military Court against the husband of Petitioner No.1. A copy of the indictment is attached hereto and marked **A'5**. An extension for submitting an objection was granted until 9:00 AM on February 10, 2016.
4. On February 10, 2016, an objection on behalf of the Petitioners was submitted. A copy thereof is attached hereto and marked **A'6**.
5. On February 24, 2016, a response was received rejecting the objection. At the same time, it was stated that the execution of the order will be delayed until February 28, 2016. A copy of the rejection of the objection is attached hereto and marked **A'7**. Some of the evidence material was also sent at the request of the counsel for the Petitioners. This included the minutes of the interrogation of _____Aleiwi by the General Security Service (GSS) interrogators and police notices.

<u>The Evidence</u>

6. The indictment, appendix A'5, details the evidentiary infrastructure which, seemingly, served the Respondent in making his decision to issue an order pursuant to Regulation 119. _____Aleiwi was charged with premeditated manslaughter. The following were itemized in the details of the offense:
   a. During the month of September or thereabouts, Rajeb and Yihya reached an agreement regarding a shooting attack that the military cell will carry out, in the course of which, other than achieving the military cell's principal aim, i.e. causing the death of Jewish settlers, it will attempt to abduct a Jewish settler (hereinafter: "**abduction**").

b. Later, in light of the agreement made between Yihya and Rajeb regarding an abduction, Rajeb approached the **accused** and requested his approval and assistance in carrying out the aforementioned attack.

In response, the latter stated that he will contact his superiors, and then update Rajeb. Shortly thereafter, _____(the accused A.R.) contacted several people, including Iyad and Bassem, and informed them of the cell's plan to carry out an abduction and requested their approval. Iyad and Bassem sanctioned the implementation of the above described attack. The **accused** then updated Rajeb that they have permission to execute the abduction and that he will assist him in transporting and concealing the kidnapped person as requested. (Emphasis in the original A.R.).

On October 1, 2015, the attack was carried out at the Beit Furik intersection. Two people were killed. The attack was carried out by other persons.

7. a. In the minutes of his interrogation,_____Aleiwi talks about the level of his involvement in this attack. In the protocol of October 7, 2015, 03:40 PM and onward, section 5(2), the following was recorded:

2. Around September 29, 2015, Ghreb came to the interrogee and told him that there is a possibility that they "will bring a head", meaning they may be able to carry out an abduction, and that he wants to know what to do afterwards. The interrogee said he will give him a reply.

3. The interrogee approached Bassem Tzaiya who told him that if they succeed in the abduction everything will be fine, without adding further specifications.

4. The interrogee also approached Iyad Abu Zahra who reached an agreement with him that, should the cell succeed in the abduction, they will bring the abducted person in a vehicle to Mentaza in Nablus and from there he will take care of matters.

In the protocol of October 22, 2016, _____Aleiwi reiterates the remarks as noted in section 16(1)(2)(1) and (2). A copy of the relevant pages of the interrogation of _____Aleiwi by the GSS interrogators is attached hereto and marked **A'8** and **A'9** respectively.

According to this evidence, and to the text of the indictment itself, it is clear that _____ approached his superiors in order to receive their approval for the execution of the attack. The Petitioners further argue that according to the wording of the indictment and the minutes, it is clear that he was not responsible for the operation. There is no doubt that he was involved in the offence, but it is our contention, without passing judgment, that he was not in the inner circle as he had to contact two superiors to get their approval.

. b. The Respondent's response to the objection, which raised the above contention, was not written on the basis of the minutes of the interrogation and stated as follows"…the role the perpetrator played in the attack suffices to bring the military commander to the decision that the powers pursuant to Regulation 119 must be exercised in the case at hand, and to act to seize and demolish the perpetrator's residential apartment." (Appendix A'7 to the petition).

. C. According to the Petitioners, the exercise of Regulation 119 in the case at hand against the home of _____ Aleiwi does not meet the test of proportionality.

8. The Petitioners wish to refer to section 8 of the minority opinion in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** in all that relates to the presupposition accepted by the court concerning the weight of proportionality in the exercise of Regulation 119:

> "The exercise of the power pursuant to Regulation 119 should be examined in light of the impact of the Basic Law: Human Dignity and Liberty, particularly from the aspect of proportionality, namely – a rational link between the measure taken and the achievement of the purpose; the least possible violation of protected human rights (human dignity and the right to property) in order to achieve the purpose; and an appropriate relation between the purpose and the measure taken (HCJFH 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485 (1996); HCJ 9353/08 **Abu Dheim v. GOC Home Front Command**, paragraph 5 (January 5, 2009); **Hamed**, *Ibid*.).
>
> The issue at hand should be therefore examined on the basis of these principles – which appear to be acceptable to all and which were reiterated numerous times in the rulings of this court."

The Court is requested to intervene in the case at hand and to determine that the exercise of Regulation 119 against the alleged perpetrator of the offence of premeditated manslaughter, who was not in the inner circle, does not meet the test of proportionality.

Additional Arguments

9. The question raised before this Honorable Court is whether the Honorable Court holds the view that the demolition of the apartments or homes of relatives of perpetrators – perpetrators who were killed or are standing trial – is an established practice that must be respected; And whether the power of the argument regarding the "deterrence of many" is strong enough to overcome the numerous arguments against the measure of house demolitions. Regulation 119 of the Defense (Emergency), 1945, was already employed in the days of the British Mandate. The use of this regulation continued after the establishment of the state and continues all the more forcefully since the occupation of the Territories in 1967. Thus, the State of Israel continues to exercise the regulation in a desperate attempt to eradicate violent resistance by the Palestinians – with the exception of a brief period from 2005 when the Chief of Staff, the current Minister of Defense, accepted the recommendations of a military committee established following the remarks made by this Honorable Court in the framework of the deliberation of HCJ 7733/06 **Nasser v. Commander of IDF Forces in the West Bank**. The exercise of the regulation has not stopped – and the attacks have not stopped.
10. a. In HCJ 5839/15 **Sidr et al v. Commander of IDF Forces in the West Bank** (published in Nevo), in section 6 of his opinion, the Honorable Justice Vogelman, after stating his belief that Regulation 119 must not be exercised in the absence of a causal link between the tenants of the house and the actions of the perpetrator – in this case the wife of _____Aleiwi – due to lack of proportionality, and that the demolition of a house must not be compared to the "mere" loss of property, expresses his agreement with judicial precedent as follows:

> "Therefore, although I would propose that we re-evaluate the judicial precedent so as to explore the full breadth of issue in relation to both domestic law and international

law, so long as this judicial precedent stands, I bow my head before the opinion of this Court".

b. In HCJ 8150/15, **Abu Jamal v. GCO Home Front Command** (published in Nevo), the Honorable Justice Zylbertal also ruled not to deviate from judicial precedent stating:

> "The arguments of Justice **Mazuz** are weighty arguments which are based on fundamental constitutional principles as well as on basic arguments of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have joined the main principles of his positions".

11. a. the Petitioners refer to Article 20 (b) of the Basic Law: the Judiciary, that determines:

> "A rule laid down by the Supreme Court shall bind any court other than the Supreme Court".

b. In this regard we request to refer to the remarks of the Honorable Justice Elon in CA 2251/90, **Haj Yihya v. State of Israel**, IsrSc 45(5) 221, 271-72, which initially specify the considerations employed by a judge when he decides not to deviate from previous rulings, but then add the following.

> "Alongside these considerations, vast importance must be given to the freedom of Supreme Court justices to rule, and to their independence from binding precedents. Sustaining the intellectual freedom of a judge, which makes it possible to change existing precedents is appropriate and desirable, and is of particular importance in a society such as ours, whose process of consolidation is still ongoing, and whose internal disagreements are fierce and sharp regarding fundamental positions relating to the field of beliefs and opinions, the ways of the world and society, culture and lifestyle, policy and economy".

c. The Petitioners refer to the remarks made by the Honorable Court in its early days in CA 376/46 **Rosenbaum v. Rosenbaum** (published in Nevo):

> "32. In summary, it is clear that I am not belittling the importance of the principle of stability of judicial precedent in the delivery of verdicts. But between truth and stability – truth is preferable [opposite the letter a',e' 254 in the [Hebrew] printout from the Nevo website.]"

And further, on page 254, opposite the letter e':

> "Fear of a mishap cannot bring me to adhere to a judicial precedent that in my opinion is wrong".

12. The Petitioners wish to refer to Aharon Barak's book "The Judge in a Democratic Society", page 242, where he states "nothing about a precedent is holy…".
13. The study of the rulings of the Honorable Court in all that regards house demolitions reveals a grim picture of extreme self-restraint, and minimal intervention in the discretion of security officials who operate under the political echelon which openly declares its desire to continue to demolish homes. The question to be decided in this case is **whether the justices on the panel are willing to continue to believe that the policy of home demolitions has not only proven itself by significantly reducing terror attack, but also constitutes a case where the end justifies the means.**

    The Petitioners' contention is that even if there is no difficulty in justifying the goal of reducing terror attacks – the means is utterly flawed.
14. The Petitioners argue that "racial profiling" considerations underlie the failure of the court to intervene against acts carried out against some of the population of the area that has been occupied for the last 49 years. This Honorable Court which outlawed the nearly wholesale use made by government authorities of "permits" for interrogation, i.e. torture, of Palestinian detainees suspected of "security offenses" – a concept so broad that it encompasses not only the actual perpetrator but also someone who has a meeting in a café with a social activist in an organization that was declared illegal. This decision was delivered despite the years long vigorous opposition of the state authorities, including the General Security Service (see **HCJ 5100/94 Public Committee Against Torture in Israel vs. the Government of Israel** (published on the Nevo).
15. The arguments against the ongoing exercise of Regulation 119 of the Defense (Emergency) Regulations, 1945, have all been rejected by this Honorable Court time after time. The common thread that runs through the rulings is their reliance on the importance of the precedent.

    The Petitioners refer to the words of the Honorable Justice Cheshin in HCJ 2006/97, **Janimat et. al v. OC Central Command** (published in Nevo) contending that although his remarks are an integral part of the state's legal system, they are deferred to the sidelines when the matter concerns the rights of the other. Justice Cheshin stated the following :

> "The fundamental principle will remain unchanged, and will not be swayed to the right or to the left: a man shall be held accountable for his own transgressions and punished for his own deeds …this fundamental principle we refer to descends to the foundations of authority and concerns the discretion of the authority and the issue of compatibility ('proportionality' ''relevance') between the wrongful act and the sanction of the authority".

The Respondent is not in possession of any evidence which can link between the perpetrator of the stabbing attack and his wife and children, other than a family relationship.

The Petitioners request to know why this basic principle is retracted in matters that concern a population that is a protected population according to the standards of international law. The humanitarian sections of the 1949 Geneva Convention are accepted by the Respondent. This stance was declared in the course of deliberations of petitions that were submitted to the court on the bombing of ambulances by the Respondent, and it was expressed in the

ruling in HCJ 2936/02 **Physicians for Human Rights v. the Commander of the IDF forces in the West Bank**:

> "We see fit to emphasize that our combat forces are required to abide by the rules of humanitarian law regarding the care of the wounded, the ill, and bodies of the deceased. The fact that medical personnel have abused their position in hospitals and in ambulances has made it necessary for the IDF to act in order to prevent such activities, but it does not, in and of itself, permit sweeping breaches of humanitarian rules. Indeed, this is also the declared position of the State. This stance is required, not only under the rules of international law on which the petitioners have based their arguments here, but also in light of the values of the State of Israel as a Jewish and democratic state".

The Petitioners contend that the demolition of the apartment of Petitioner 1 constitutes a violation of the humanitarian rules of the Geneva Convention and, therefore, by the standards of the state itself, the demolition is unlawful.

16. It is difficult for the Petitioners to comprehend how the court can determine, time after time, that the use made of the legal term "deterring others" – a term prescribed in Article 40g of the Penal Law, 5737 - 1977, as part of the considerations taken into account by a judge who determines the appropriate scope of punishment – can be employed for the purpose of exercising Regulation 119 against innocent people. One possible explanation lies in "racial profiling" as noted above, and also in Israeli society's denial of the existence of the other – the Palestinian.
17. The thread linking past and present judgments regarding the implementation of Regulation 119 is the court's denial of the existence of the other, the Palestinian, who lives under the rule of the state in conditions we do not intend to elaborate on here. In the case at hand, the other is a woman, and her eight children, whose husband, the father of the children allegedly committed an act without their knowledge or consent and who is now, in addition, facing the destruction of her apartment. This is the spirit of the times, dating back to the founding of the state.
18. The government of Israel again and again reiterates its declared position that it desires to demolish the homes of perpetrators of terrorist attacks, and the Honorable court sanctions this time after time.
19. The Petitioners requested that in the event that the objection is rejected, they will be given a copy of the demolition plan. Instead, it was stated in the response that "the house demolition will be carried out manually, by means of demolishing the partitions in the apartment". It was also stated that the interior of the apartment will be filled with "barbed wire fences" and "dual component polyurethane type foam material".

    The Respondent's declarations regarding precautionary means that will be taken during the demolition of apartments in high-rise buildings have been given in a number of cases in the past. Yet despite the Respondent's statements, in the case of the Amar family's house in the Qalandiya refugee camp, following the destruction of the top floor of a three-story building, it was determined that the remaining parts of the building were a hazard due to the damage caused to the lower floors by the demolition, and it was completely destroyed

by the Palestinian Authority (see: HCJ 7081/15 **Amar v. Commander of the IDF Forces in the West Bank**, published in Nevo).

Should the petition be rejected, the Honorable Court is requested to order the Respondent to provide the Petitioners with a copy of the demolition plan, and to allow a reasonable period of time for an engineer on their behalf to examine the plan to express his objections, if any.

Past experience has shown that during the demolitions, even after declarations were given before this Honorable Court, damage is often caused to neighboring apartments and even to nearby buildings. A copy of photographs of the building and its surroundings is attached hereto and marked **A'10**.

20. The Petitioners request that the Honorable Court will call for a change in policy, as in the case of the petition against the use of torture, and curb the use of force by the government.

The Petitioners contend that the exercise of Regulation 119 against the Palestinian population - within the 1967 borders and in the West Bank – is made possible by the ongoing denial of on the part of Israeli society of the existence of the other, i.e. the Palestinians. The "needs of the hour" in the words of the Honorable Justice Elon in the above **Yihya** case, are today the "needs of vengeance". By failing to intervene in the actions of the state authorities towards this population, the court upsets the balance and fails to protect the basic rights of the other. The court has "fixated" on the notion that it must not intervene in the acts of the Respondent since the time that the political echelon determined that the appropriate government response to terrorist attacks is the demolition of the homes of the perpetrators' families. The Petitioners request the Honorable Court to again review the acts committed in the name of the only democracy in the Middle East, a state that professes to be a "light onto nations" guided by ancient principles of justice, and to grant the order requested and, after hearing the arguments of the parties, to render it absolute.

Jerusalem, Today, February 28, 2016

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Andre Rosenthal Adv.
Counsel for the Petitioners

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