At the Supreme Court **HCJ 755/20**

Sitting as the High Court of Justice

In the matter of:

1. **Maghames, ID No.**
2. **Maghames, ID No.**
3. **Maghames, ID No.**
4. **HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger**

   Registered Association No. 580163517

Represented by counsel Adv. Benjamin Agsteribbe (Lic. No. 58088), and/or Adv. Daniel Shenhar (Lic. No. 41065), and/or Adv. Tehila Meir (Lic. No. 71836), and/or Adv. Nadia Daqqa (Lic. No. 66713), and/or Adv. Aaron Miles Kurman (Lic. No. 78484), and/or Adv. Maisa Abu Saleh-Abu Akar (Lic. No. 52763).
of HaMoked - Center for the Defence of the Individual founded by Dr. Lotte Salzberger
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Tel: 02-6283555; Fax: 02-6276317

The Petitioners

- v -

1. **Military Commander in the West Bank**
2. **Ministry of Defense**

Represented by counsel from the High Court Department - State Attorney's Office
of 29 Salah a-Din Marah, Jerusalem
Tel: 02-6466590, Fax: 02-6467011

The Respondents

Urgent Petition for Order Nisi and Interim Injunction

A petition is hereby filed for an Order Nisi, directed at Respondents 1-2 and instructing them to:

Desist from exercising the power granted under Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: Regulation 119 or the Regulation), including confiscation, demolition or any other damage to the family home of Petitioners 1-3 and other homes.

At least, **suspend** use of powers under Regulation 119, including confiscation, demolition or any other harm to the family home of Petitioners 1-3 pending a conclusive decision by an extended panel of this Honorable Court with regards to the legality of the house demolition policy and the injuring of innocents on grounds of deterrence, covering all aspects and facets of this policy. This request is made in light of recent developments on the international scene and the growing likelihood that individuals responsible for designing and implementing this policy will, sooner or later, be exposed to personal criminal liability in the international arena, as well as the fact that the Regulation on which the power is predicated is 75 years old and the case law sanctioning its use is more than forty years old. These facts justify, in fact, necessitate, a hearing by an extended panel of this Honorable Court and the suspension of this power pending the final decision of the Honorable Court in this matter.

The confiscation and demolition order dated January 23, 2020 is attached hereto and marked P/1.

The Honorable Court is also requested to issue an Interim Injunction instructing the Respondents to appear and show cause:

A. Why, given the disproportionality of the order which is the subject of the petition, they should not refrain from causing the certain physical and mental harm associated with the destruction of the family home of Petitioners 1-3, innocent people who the Respondents acknowledge they are using as a tool and nothing more for the purpose of sending an alleged and uncertain message to potential third parties;

B. Why, prior to executing the order to demolish the home of Petitioners 1-3 and destroy their lives, they should not present both them and the public in the State of Israel with reliable, factual data that unequivocally confirms their contention that the policy of demolishing homes as a deterrent serves its purpose and is therefore necessary and proportionate. This request is made in light of the profound and grievous harm the policy and the order issued pursuant thereto cause the Petitioners' family. These are fundamental facts without which there is no possibility to evaluate, and hence no possibility to determine, whether the order issued against the family home of Petitioners 1-3 and the policy pursuant to which the order had been issued meet the tests of proportionality and reasonableness.

C. Why, in the framework of using the power granted in Regulation 119, the Respondents should not refrain from establishing tight and arbitrary schedules that do not provide the victims of the policy with enough time to file objections and court petitions in a proper manner, as accepted in other administrative measures.

Urgent request for Interim and Temporary Injunctions

1. This petition concerns a decision made by Respondent 1, based on the policy of Respondent 2, to demolish a residential structure which is the family home of Petitioners 1-3. This structure is home to three family members, a couple and their daughter, who are innocent and against whom there are no allegations.

2. This urgent request is made given that there is no dispute that the execution of the demolition order and the destruction of the family home would cause deliberate substantive, irreversible harm to both the physical structure which houses an entire family as well as to the lives and mental wellbeing of Petitioners 1-3, as the destruction of their home would also erase the experiences and memories they have amassed in it over the years.

3. In light of the aforesaid, the Honorable Court is moved to urgently issue a Temporary Injunction, subsequently rendering it an Interim Injunction, ordering the Respondents, or anyone acting on their behalf, to refrain from causing any harm to the Petitioners' family home until the conclusion of proceedings in this petition. This request is made after **Respondent 1 has informed the Petitioners that execution would not be stayed any further than January 28, 2020 at 6:00 P.M.**

4. The issue at stake is the use of a power that has far reaching implications, profoundly and grievously injuring the spirit and property of innocents, a power the legality of which is heavily doubted in the international legal arena as well as in the Israeli legal arena, including in this Honorable Court. On the other hand, it appears beyond dispute that other than being blood relations of a person accused of committing a terrorist attack, Petitioners 1-3 have no connection to the act that prompted the issuance of this order. In the circumstances, the balance of convenience clearly leans toward the interests of the Petitioners. On the one hand, execution of the demolition order would, with certainty, cause the Petitioners severe, irreparable damage that extends well beyond rendering an entire family homeless. On the other, not only will public interest not sustain any substantive harm due to a delay in executing the order pending the resolution of this petition, but rather, a resolution of the issues raised in this petition will undoubtedly serve the broader public interest. This interest requires a clear decision on the question of the legality of the house demolition policy pursuant to Regulation 119 and the demolition of my clients' home in particular. There is a real need for a proper response to the current developments on the international scene surrounding the jurisdiction of the International Criminal Court vis-à-vis policies employed by the State of Israel in the Occupied Palestinian Territories ((hereinafter: also OPT), and to the question of the possible exposure of the individuals involved in designing and implementing the house demolition policy to personal criminal liability over the demolition of the Petitioners' home, and the homes of others like them.

5. In light of all the above, the Honorable Court is hereby requested to grant Petitioners 1-3 a Temporary Injunction, subsequently made into an Interim Injunction, staying the execution of the confiscation and demolition order pending a decision on the merits of this petition.

Motion for extended panel

1. In accordance with Section 26 of the Courts Law [Incorporated Version - 1984], the Petitioners hereby move the Honorable Court to exercise its authority and schedule the hearing in this petition and the issues raised therein before as extended a bench as possible.

2. The issue of principle due to which an extended panel is hereby requested is the legality of using Regulation 119 and the house demolition policy practiced by Israel pursuant thereto based on an alleged need for unsubstantiated deterrence against potential third parties.

Grounds for motion submission:

3. Recent developments on the international scene have resulted in a current review by the International Criminal Court regarding its jurisdiction to hear claims filed against Israeli citizens over Israel's policies and actions in the OPT.

4. Thus, it will not be long before the ICC delivers a decision in this matter, which has been brought before it. Should the ICC find that it has jurisdiction to hear such matters, the house demolition policy employed by Israel pursuant to Regulation 119 would conceivably have a place of honor in the list of applications brought before the ICC.

5. Given these developments, and that, according to this Honorable Court, the only justification for the house demolition policy and its application thus far is a regulation made 75 years ago and a rule produced by this Court more than forty years ago, it appears that not only has the time come to hold a hearing before an extended panel on the legal issues of principle arising from use of this alleged power, but a real and immediate need has arisen to thoroughly examine the issue and provide conclusive clarification. Petitioners' arguments are bolstered by the fact that the legality of using the Regulation from the outset has been fiercely disputed among legal scholars for many years. Most scholars share the opinion that use of the Regulation is unlawful, and in a considerable number of the cases it has heard on this matter, this Honorable Court delivered minority opinions that clarified the time has come to revisit the rule. The Petitioners believe it is the right of both agents of the State and its citizens, as well as the right of the Petitioners, to know with the highest attainable level of certainty whether the exercise of this power - designing the house demolition policy, implementing it pursuant to Regulation 119 for the purpose of deterrence and approving it - may amount to a war crime and whether and to what extent it leaves any party open to personal criminal liability.

6. This petition concerns the decision made by the Petitioner to demolish the home and destroy the lives of Petitioners 1-3. The order, issued by the Respondent, was approved by Respondent 2 and it is based on an Israeli policy that rests on Regulation 119. The official position of the State is that taking the cruel act of systematically destroying homes and erasing all experiences and memories associated with the demolished edifices from the lives of individuals and families every time a fatal terrorist attack takes place is essential for purpose of deterrence.

7. However, while there is no dispute, nor can there be, with regards to the depth and certainty of the injury to Petitioners 1-3 (as well as others who have already been harmed by the house demolition policy), the other part of the equation - i.e., the proportionality, reasonableness and legality of the policy pursuant to which demolition orders are issued - has not been considered for at least four decades. In fact, it has never been thoroughly examined. In addition, it has never been proven, and therefore, never conclusively determined, that systematically injuring so many individuals, destroying the homes and lives of so many who have done nothing wrong, achieves its purpose with certainty or near certainty. Moreover, the question of whether the house demolition policy may have unfortunately achieved the opposite of the alleged deterrence routinely presented as the reason for using it has never been explored.

8. Petitioners 1-3 are the Respondents' next victims, next in an ever-growing list of persons fated to serve the Respondents as a tool for sending a message to potential third parties, all as their dignity and most basic rights are trampled upon. The Petitioners maintain that the matter of Petitioners 1-3 cannot be determined, and their lives may not be destroyed, without first addressing the questions raised in the petition by way of a hearing by an extended panel of this Honorable Court.

1. [sic]A major development has recently taken place on the international scene, as the question of the ICC's jurisdiction to hear applications concerning Israel's policy and acts in the OPT has been brought before the ICC for the first time. The application, filed by the ICC Prosecutor, will be decided sooner or later. This development presents the real possibility that Israeli citizens responsible for designing and implementing policy may soon find themselves open to claims, arrests and prosecution. This development occurs when the prevalent position among experts on human rights, international humanitarian and international criminal law - in Israel too, though mainly abroad - is that the policy of systemic house demolitions based on the Regulation and the orders issued pursuant thereto, are unlawful, has taken hold. These voices join those heard from justices of this Honorable Court with regards to the need to address the legality of continued use of the Regulation.

2. The Petitioners maintain that at the current stage, and in the state of affairs that has emerged, continued approval for the house demolition policy pursued by Israel based on a 75-year-old regulation and a 40-year-old precedent against the backdrop of the developments described above justifies and even requires a thorough examination of this complex issue and all its aspects, and clarification of the matter by an extended panel.

3. The matter of Petitioners 1-3 presents no novelty other than the fact that these are three individuals who have done nothing wrong, yet find themselves as a tool at the hands of the Respondents who wish to use them as an instrument and deliberately cause harm to their property and dignity, with everything this entails. However, it is precisely because of this that it is a most suitable case for revisiting the legality of using the Regulation in a hearing by an extended panel of this Honorable Court.

4. Undeniably, the Honorable Court may once again find the policy to be without flaw and rule it legitimate after deliberating on the issue. However, a thorough deliberation and a presentation of the full details of the matter, while comprehensively addressing domestic law and the provisions of international law, as requested by the Petitioners, is essential, particularly given the fact that such deliberation has never been undertaken by this Honorable Court, nor has there been deliberation of the rule that sanctioned and solidified the use of the draconian power to demolish homes more than four decades ago.

5. The Petitioners maintain that following the developments described above, a full, comprehensive review of this issue has become necessary, even unavoidable. Hence the motion for a hearing before an extended panel.

Factual background

The parties

6. **Petitioners 1-2** are a married couple living in Bir Zeit in the Occupied Palestinian Territories who are in the sixth decade of their lives. They are the parents of Yazan Maghames, who is accused of perpetrating an attack on August 23, 2019, due to which the Military Commander issued a confiscation and demolition order for their home on January 23, 2020 (hereinafter: the family home, or the Petitioners' family home).

7. **Petitioner 3** is the adult daughter of Petitioners 1-2. She lives with them and is their dependent (hereinafter, with Petitioners 1-2, also the Petitioners).

8. **Petitioner 4,** is a registered non-profit association that has taken upon itself to provide assistance to Palestinians who have fallen victim to abuse or discrimination by state authorities, including defending their rights in court, whether on its own behalf as a public petitioner or as counsel for individuals whose rights have been violated.

9. **Respondent 1** (hereinafter: the Respondent, and together with Respondent 2, the Respondents) is the Israeli Military Commander of the West Bank, who, on January 23, 2020, signed an order for the confiscation and demolition of the Petitioners' family home. He is the Military Commander referred to in Regulation 119 pursuant to which the order was issued.

10. **Respondent 2** is the Minister of Defense and the official responsible under **Basic Law: The Military** and on behalf of the Government of Israel, for the Respondent and for designing the systemic house demolition policy employed by the Respondent, and in this case, in the matter of the Petitioners.

The facts in brief and exhaustion of remedies

11. The Petitioners' family home is a private residence they built in 1996 in Bir Zeit. The family home and land are registered under the name of the late father of Petitioner 1. The home has three bedrooms. One bedroom had been used by Yazan, another by Petitioners 1-2 and the third by Petitioner 3.

12. On Friday, January 10, 2020, at 10:30 P.M. Petitioners' counsel received notice of intent to confiscate and demolish the family home where Yazan had lived (hereinafter: the notice), pursuant to Regulation 119.

13. According to paragraph 2 of the notice, the measure was taken since Yazan, who had lived in the home slated for confiscation and demolition, had played a role in the execution of an attack on August 23, 2019, in which a teenaged girl, Rina Shenrav, was killed and her brother and father were injured. The notice stated the Petitioners would be able to file an objection no later than January 14, 2020.

    A copy of Respondent's notice dated January 10, 2019 is attached hereto and marked **P/2**.

14. On January 14, 2020, the Petitioners filed an urgent objection with the Respondent (hereinafter: the objection) with respect to his intent to issue a confiscation and demolition order. The objection notes, inter alia, that the intent to invoke Regulation 119 and destroy the family's home was fundamentally flawed. In the objection, the Petitioners clarified to the Respondent, inter alia, that not only did the measure constitute deliberate cynical use of innocents as a means for sending a message by destroying their physical home, but it also constituted intent to erase some of the memories of a human being's life, with everything this entails. The Petitioners also cautioned the Respondent, in their objection, that according to international law, those involved in the measure may be held personally criminally liable, particularly given the developments currently underway on the international scene, as described above in the motion for an extended panel. The Petitioners further highlighted the blatant disproportionality and the glaringly punitive nature of the language used in the notice and the Respondent's conduct in their matter.

    A copy of the objection is attached hereto and marked **P/3**.

15. As stated, on January 23, 2020, the Respondent replied to the objection filed by the Petitioners and issued a confiscation and demolition order for the family home.

    A copy of the Respondent's reply to the objection is attached hereto and marked **P/4.**

16. Thus, in the circumstances of the matter, and given the unreasonable and disproportionate decision to use innocents as an instrument to send messages and deliberately destroy the home of individuals who had committed no crime, profoundly harming their lives, dignity and property, the Petitioners are forced to turn to this Honorable Court with this urgent petition.

<u>The legal argument</u>

17. Petitioners' legal argument is comprised of two parts, the first of which addresses arguments of principle, due to which an extended panel was requested at the opening of the petition.

18. In this section of the petition, the Petitioners will argue that the systemic house demolition policy employed by the Respondents through Regulation 119 is unlawful, as it defies fundamental tenets of morality and justice, contradicts international humanitarian law, international human rights law, and even Israeli law, both administrative and constitutional. The Petitioners will further argue in this part of their submission that the systemic house demolition policy based on Regulation 119 constitutes a breach of international criminal law. Finally, the Petitioners will argue that support for revisiting this painful issue and having an extended panel hold an in-depth, thorough discussion thereof has been expressed from within this Honorable Court, and, given recent developments surrounding the jurisdiction of

the ICC, it appears that the time has come to have an extended panel consider the legality of using Regulation 119.

19. With respect to the individual section of the argument, the Petitioners will argue that the proceeding initiated against them by the Respondent and the order regarding the family home with which it culminated should be struck down as the decision was unreasonable and disproportionate, and the process was born of sin. The position of the Petitioners, as detailed below, is that the proceeding is clearly improper and glaringly punitive and vindictive. It is a proceeding the Respondent initiated simply as a formality, while clearly attempting to deny the Petitioners the right to due process and ignoring their strong accusations against him, a proceeding that ended with a decision that fails to meet the tests of proportionality. We shall address matters in order.

Regulation 119

20. The Respondent's alleged power to demolish Palestinian homes within Israeli territory and in the Occupied Territories and the systematic home demolition policy practiced by the Respondent with respect to terrorist attacks that result in fatalities, a policy as part of which the order in the matter of the Petitioners herein was issued, is rooted in Regulation 119, a 75-year-old holdover from the British Mandate.

21. Though everyone knows the Regulation originates from a time in which severely hurting and punishing innocents were considered legitimate tools to be used by foreign rule governing a population not its own in areas under its control, and despite the many developments that have occurred in the world in general and in the legal world in particular since that time, Israel refuses to face facts and, in the year 2020, continues to argue this is a perfectly legitimate practice. In addition, it is worth noting that the legal basis for continued use of this archaic Regulation into the present day is also rooted in jurisprudence produced by this Honorable Court more than forty years ago in HCJ 434/79 **Sihweil v. Commander of the Judea and Samaria Area** (reported in Nevo) (hereinafter: **Sihweil**). Several years later, in its judgment in HCJ 879/86 **Ramzi Hana Jaber v. GOC Central Command** (reported in Nevo), the Court once again clarified that Regulation 119 was considered **domestic law**.

22. However, in the judgment in HCJ 879/86, the Honorable Court did not ascribe any significance to the fact that this was not truly domestic law, but rather law enacted by foreign rulers who preceded Israel in ruling over a population other than their own.

23. The house demolition policy practiced in 2020, is, therefore, based on a 75-year-old regulation and 40-year-old ruling, with the legitimacy of the continued use of Regulation 119 not having been practically or substantively examined.

The purpose of house demolitions is invalid

24. While the Respondents have made sure to note over the years that house demolitions are pursued exclusively for the purpose of deterrence, an argument the Petitioners maintain fails to rectify the illegality of the act, as detailed below, rather than, heaven forbid, for the purpose of revenge or punishment, reality sadly points in the complete opposite direction.

25. The matter must be stated as it truly is. The Regulation itself evinces its true purpose. Firstly, it appears under the section heading, "Miscellaneous **Penal** Provisions." Secondly, it addresses the possibility of **forgiveness**, and thirdly, as noted above, the era in which it was enacted speaks to its nature as well. This draconian measure was birthed at a time when collective punishment, vengeance and reprisals against innocents were par for the course.

26. The fact that this is not an act of deterrence, but a procedure based on the motives of vengeance and punishment and nothing more, can be gleaned from the procedure the Respondent held in the matter of the Petitioners herein, which is presented in detail in the individual segment of the petition herein.

27. In brief, the phrasing used in the notice sent to the Petitioners - which fails to even mention, as has been the case in such notices in the past, that Respondent 1 believes this measure could deter potential terrorists and assist in maintaining the security of the Area - the timing for the delivery of the notice to counsel, the patently unfair timelines given to the Petitioners to challenge the plan to use them, while fully aware of their innocence, by way of direct harm to their physical home and by erasing their memories and experiences; the absence of any pertinent response to the serious charges made by the Petitioners in the objection they submitted to Respondent 1; and the calls made by various segments of the population in the media and on social media to effect "immediate deterrence" - all of which cry out punishment and revenge.

28. However, even if we assume, for the intellectual exercise, that this act is meant purely for deterrence, it remains a fundamentally improper policy that must be abandoned immediately.

29. The argument that house demolitions are required for the purpose of deterrence hides the direct, deliberate and horrifying punishment of innocents - whatever the purpose. "Deterrent" house demolitions mean permission to knowingly, deliberately and gravely hurt a person who has done nothing wrong by destroying their physical home and erasing the memories and experiences they had gathered within this home over the years. Moreover, it means lending legitimacy to the use of human beings as vessels for transmitting messages to third parties, while seriously hurting them.

30. Therefore, even if the purpose for which a person is punished so cruelly is allegedly deterrence, such purpose cannot rectify the illegality of the harm caused to said person. It is an act that directly and deliberately penalizes individuals who had done nothing wrong, while violating their dignity and property and using them as tools to send a message. Thus, even according to the Respondents, who cite an alleged deterrent purpose, without deliberate punishment and use of individuals as tools, there can be no deterrence.

31. Moreover, The Petitioners maintain, with all due respect, that the deterrent act of destroying the homes and lives of others is not a byproduct of the act committed by their family members as Honorable Justice Sohlberg remarked in his judgment in HCJ 5290/14 **Qawasmeh v. Military Commander of the West Bank** (reported in Nevo):

> Indeed, injuring a family member – who committed no sin – in a manner which will cause him to remain without a roof over his head, contrary to fundamental principles, is troublesome. But this should be well remembered, that also in

> criminal proceeding the purpose of which is punitive – as distinct from the deterrent purpose herein – innocent family members are injured. The imprisonment of a person for a criminal offense committed by him, necessarily injures his spouse, children and other relatives, both physically and mentally. There is no need to elaborate on the deprivation arising from a person's incarceration, which are suffered by his family members.

32. On the contrary, unlike a prison sentence on criminal charges, which necessarily involves harming others as a byproduct, the matter herein involves the cynical, deliberate, direct and avoidable, punishment of others, all while legitimizing the Respondents' use of individuals as tools for the purpose of sending purported messages to potential third parties. Such punishment is unrelated to the act committed by their family members, and not only are the Respondents not compelled to take this measure, but rather, the Petitioners maintain, they are entirely prohibited from taking it.

33. Note well that contrary to the conduct of the Respondents in 2020, even Regulation 119, enacted 75 years ago, does not compel the Respondents to hurt and use innocents by destroying their homes and lives. It merely enables them to do it.

34. In other words: whatever the purpose of a house demolition may be, it is an exceptionally cruel and improper punitive act that legitimizes the use of innocents as instruments by destroying their lives both physically and mentally over the acts of others.

35. The fact that criminal law in Israel acknowledges the principle of personal responsibility and does not permit punitive action against innocents for purposes of deterrence - although it is conceivable that deterrence will aid in reducing crime - is also suggestive, indicating that using of Regulation 119 is wrongful and punishing innocents is prohibited no matter the purpose.

36. The salient remarks made by Honorable Justice Mazuz in paragraph 8 of his judgment in HCJ 7220/15 **'Aliwa v. IDF Commander in the West Bank** that substantively, the act in question is purely punitive and extremely harsh, are relevant to the Petitioners' position:

> 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 40F and 40G of the Penal Code, 5737-1977) (reported in Nevo).

37. For all the above reasons, the Petitioners maintain that the time has come to say enough to house demolitions and to establish the purpose for which it is pursued is invalid. This act is rooted in a different time in history, a time in which the

punishment of innocents and their use as instruments was considered a legitimate tool at the hands of a foreign power ruling a population other than its own.

House demolitions in international law

38. Having clarified that house demolitions constitute a cruel act of punishing innocents, regardless of its purported purpose, an act based on a 75-year-old regulation and 40-year-old jurisprudence, we clarify why the continued use of Regulation 119 contravenes the provisions of international law. However, before proceeding, we recall once again that the issue of the legality of house demolitions under international law has not been examined to this day, either practically or theoretically.

> 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. (From the judgment of Honorable Justice Mazuz in HCJ 7220/15 **'Aliwa v. IDF Commander in the West Bank** (reported in Nevo)).

39. The Respondent is obligated to respect international humanitarian law and the law of occupation included therein. The Respondent is the trustee of the Occupied Territories. He is not the sovereign therein. His powers in the occupied territory are vested in him in their entirety pursuant to international law, which forms the sole normative basis for the exercise of said powers (HCJ 2150/07 **Abu Safia v. Minister of Defense** (reported in Nevo)).

The Hague Convention: Customary international law predating Regulation 119

> The Judea and Samaria areas are held by the State of Israel in belligerent occupation. The long arm of the state in the area is the military commander. He is not the sovereign in the territory held in belligerent occupation (see The Beit Sourik

> Case, at p. 832). His power is granted him by public international law regarding belligerent occupation. The legal meaning of this view is twofold: first, Israeli law does not apply in these areas. They have not been "annexed" to Israel. Second, the legal regime which applies in these areas is determined by public international law regarding belligerent occupation (see HCJ 1661/05 The Gaza Coast Regional Council v. The Knesset et al. (yet unpublished, paragraph 3 of the opinion of the Court; hereinafter – The Gaza Coast Regional Council Case). In the center of this public international law stand the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter – The Hague Regulations). These regulations are a reflection of customary international law. The law of belligerent occupation is also laid out in IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – the Fourth Geneva Convention). The State of Israel has declared that it practices the humanitarian parts of this convention. The government has thus informed the court in numerous petitions. In light of that declaration on the part of the government of Israel, we see no need to reexamine the government's position. (HCJ 7957/04 **Mara'be v. Prime Minister of Israel** (reported in Nevo)).

40. First and foremost, the house demolition policy pursued under Regulation 119 contradicts Art. 50 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land, 1907 (hereinafter: the Hague Convention), which prohibits collective punishment, as well as Regulation 23 of the Hague Convention, which prohibits harm to and destruction of property.

41. The Hague Convention precedes Regulation 119 by decades, and its provisions form part of customary law (see, on this issue, inter alia, CrimA 336/61 **Adolf Eichman v. Attorney General** and HCJ 785/87 **Afu et al. v. IDF Commander in the Judea and Samaria Area** (reported in Nevo).

42. In the abovementioned judgments, the Honorable Court cited the interpretive rule whereby inasmuch as the provisions of customary international law and written Israeli law are not contradictory, domestic law must be interpreted in a manner congruent with customary international law.

43. As stated, Regulation 119 came into the world in a different time, and it is law that has been imposed by foreign rulers on the population in territories they controlled time and again. Yet, even if we ignore this, Regulation 119 does not compel the military commander to use the power granted therein to harm innocents.

44. In conclusion, we note that according to the Petitioners, the systematic policy of using innocents as instruments and punishing them by demolishing their homes and destroying their lives for the purpose of sending messages to potential third parties is incongruent with Art. 43 of the Hague Convention. In the matter herein, given that it is clear the Regulation is not intended to allow the population living under foreign military rule to continue living their lives normally, but rather, a tool held by successive foreign rulers against the local population, which is not their own population, for the purpose of taking vengeance upon them when the need arose,

the Petitioners maintain that Regulation 119 cannot be reconciled with Art. 43 of the Hague Convention.

The Fourth Geneva Convention

45. The systematic policy of house demolitions practiced by Israel pursuant to Regulation 119 also contradicts two key provisions in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – the Fourth Geneva Convention). As is known, the Fourth Geneva Convention, alongside the Hague Convention, forms the basis of international humanitarian law. More specifically, use of Regulation 119 contravenes Art. 33 which prohibits collective penalties and reprisals against protected persons and their property, as well as Art. 53 of the Convention which prohibits the occupying power from destroying homes and property. The Fourth Geneva Convention, like the Hague Convention, constitutes customary international law that compels the Respondents to act accordingly. The fact that Regulation 119 preceded this Convention is immaterial and provides no cause to legitimize a systemic policy of punishing innocents.

46. Accordingly, Arts. 146-147 of the Fourth Geneva Convention provide that wherein Arts. 33 and 53 of the Convention are violated, such violations constitute grave breaches of the Convention. As stated, the Petitioners maintain that Regulation 119, pursuant to which the systematic policy is employed, does not constitute domestic law in the sense the Respondents seek to ascribe thereto, but rather, the adoption of a provision that, at the time of its enactment 75 years ago, constituted a legitimate tool at the disposal of foreign rule in its dealings with the population under its control.

47. Given the aforesaid, and as detailed in the opening of this petition, the Petitioners maintain that the continued implementation of the house demolition policy practiced pursuant to Regulation 119, in the current format, wherein this Honorable Court has entirely avoided addressing the issues of principle surrounding use of Regulation 119, is no longer feasible and the issue requires thorough clarification by an extended panel of this Honorable Court.

Human Rights Law

48. Aside from the Respondents' duty to obey the rules of international humanitarian law that form part of customary law, the Respondent is also obligated to follow international human rights law; First and foremost, the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights from 1966, which Israel has signed and ratified. This was the ruling of the International Court of Justice in the matter of the separation fence. This Honorable Court has also examined the actions of the military commander according to these norms. (HCJ 9132/07 **al-Bassiouni v. Prime Minister**, TakSC 2008(1) 1213; HCJ 7957/04 **Mara'abeh v. Prime Minister of Israel**, TakSC 2005(3) 3333 Para. 24; HCJ 3239/02 **Mar'ab v. IDF Commander**, TakSC 2003(1) 937; HCJ 3278/02 **HaMoked: Center for the Defence of the Individual v. IDF Commander in the West Bank**, IsrSC 57(1) 385).

49. The Petitioners maintain that Regulation 119 - and by inference the policy pursued according thereto - contradicts the following articles of the International Covenant on Civil and Political Rights: Art. 7 (the right not to be subjected to cruel, inhuman or degrading treatment or punishment); Art. 17 (the right not to be subjected to arbitrary or unlawful interference with one's home); Art. 12 (the right to freely

choose one's place of residence) and Art. 26 (the right to equality before the law). We note too, that the same was held by the UN Human Rights Committee, which is entrusted with monitoring the implementation of the convention by the various States Parties in its opinion on Israel from 2003.

50. Regulation 119 - and by inference the policy pursued according thereto - also contradicts several articles of the Covenant on Economic, Social and Cultural Rights, primarily Art. 11 (the right to housing and an adequate standard of living) and Art. 10 (special protections for the family unit); the Regulation also contradicts Arts. 12, 13 and 17 of the Universal Declaration of Human Rights 1948.

51. In short, Regulation 119 and the policy pursued by the Respondents, even in 2020, completely contradicts a host of binding conventions and provisions, some of which constitute customary international law.

52. The continued use of the systematic policy of punishing innocent Palestinians and the use made of them by the Respondents by way of demolishing their homes and destroying their lives whenever a lethal terrorist attack takes place, citing a need for deterrence, therefore, constitutes an ongoing violation of international humanitarian and human rights law. It may also amount to a war crime under the Rome Statute of 1998, which constituted the International Criminal Court and codified severe violations of customary prohibitions and the grave breaches listed in Art. 147 of the Fourth Geneva Convention.

53. Thus, and given the latest developments on the international scene, wherein the ICC has been presented with a request to make a ruling on its jurisdiction with respect to claims addressing Israeli policies and actions in the Occupied Territories, the Petitioners take the position that it is proper, and required, to have an extended panel of this Honorable Court revisit the issue of the legality of Regulation 119 and its use in justification for the policy in practice.

Collective punishment contradicts fundamental tenets of morality and justice and it is prohibited in Jewish law

54. In addition to all the aforesaid, and, perhaps first and foremost, collective punishment contradicts the fundamental tenets of morality and justice, including Jewish values.

> Far be it from You to do such a thing as this, to slay the righteous with the wicked, so that the righteous should be as the wicked; far be it from You! Shall not the Judge of all the earth do right?" (Genesis 18:25).

55. Therefore, alongside the prohibition on collective punishment expressed, as aforesaid, in customary international law, it is a prohibition that is congruent with Jewish and moral values. This has been expressed in the jurisprudence of this Honorable Court as well:

> This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets: "The soul who sins shall die. The son shall not bear the guilt of the father, nor the father bear the guilt of the son. The righteousness of the righteous shall be upon himself, and the wickedness of the wicked shall be upon himself". (Ezekiel 18:20). One shall not punish

> without warning, and one shall not strike but the sinner himself. This is the law of Moses, and as written in the Book of the Law of Moses: "Fathers shall not be put to death for their children, nor shall children be put to death for their fathers; but a person shall be put to death for his own sin". (II Kings 14:6).
>
> ... **Since the establishment of the state - certainly since Basic Law: Human Dignity and Liberty - when we have read Regulation 119 of the Defence Regulations, we have read it and vested it with our values, the values of the free and democratic Jewish state. These values guide us on the path of justice during our people's glory days of old and our own times are no different.** "They shall say no more, the fathers have eaten sour grapes and the children's teeth are set on edge. But every man that eats sour grapes, his teeth shall be set on edge." **(**HCJ 2006/97 **Ghneimat et al. v. GOC Central Command,** IsrSC 51(2), 651, 655-654) (emphasis added, B.A.).

56. The house demolition policy practiced pursuant to Regulation 119 strikes at the nucleus of dignity. As stated above, it does not involve solely the destruction of a person's home, but also the erasure of all the memories and experiences they have gained within their home. Within a family home, children are born, people mature, marry and even pass away. A policy that systematically uses people's lives by erasing these memories and experiences along with the destruction of the physical structure solely to convey a message which has never been proven to have been successfully conveyed, is a policy that fundamentally defies the most basic values of morality and justice.

The principle of proportionality

> One of those foundational principles which balance between the legitimate objective and the means of achieving it is the principle of proportionality. According to it, the liberty of the individual can be limited (in this case, the liberty of the local inhabitants under belligerent occupation), on the condition that the restriction is proportionate. This approach crosses through all branches of law. In the framework of the petition before us, its importance is twofold: first, it is a basic principle in international law in general and specifically in the law of belligerent occupation; second, it is a central standard in Israeli administrative law which applies to the area under belligerent occupation. We shall now briefly discuss each of these. [...] Proportionality is not only a general principle of international law. Proportionality is also a general principle of Israeli administrative law. (See, Segal Z., The Cause of Action of Disproportionality in Administrative Law, HaPraklit 50 (1990); Zamir, The Administrative Law of Israel Compared to the Administrative Law of Germany, 2 Mishpat U'Mimshal 109, 130 (1994). HCJ 2056/04 **Beit Sourik Village Council et al. v. Government of Israel** (reported in Nevo), paragraphs 36 and 38.

57. Should this Honorable Court find that all the aforesaid does not suffice for a ruling that Regulation 119 and the policy practiced pursuant thereto are unlawful, in addition to the aforesaid, in the Petitioners' view, Regulation 119 and the policy practiced pursuant thereto also fail to comply with the principle of proportionality accepted in international humanitarian law and the principle of proportionality as required in Israeli administrative-constitutional law. We shall elucidate.

58. According to the longstanding jurisprudence of this Honorable Court, Regulation 119 remained valid subsequent to the enactment of the basic laws. However, it has long since been established that despite the aforesaid, the power granted by the Regulation should be interpreted in the spirit of Basic Law: Human Dignity and Liberty.

> The exercise of powers under Regulation 119 of the Defence Regulations must be the result of balancing: between the severity of the act committed by the terrorist and the severity of the chosen sanction; between the harm caused to the terrorist's family and the benefit gained by deterring other potential terrorists; between the rights of the terrorist's family to their property and the protection of public safety. Achieving such a balance, as part of the known constitutional tests, requires that the chosen deterrent measure logically leads to the fulfilment of the proper purpose; that the measure is the least injurious to the protected right in furtherance of the proper purpose; and that the chosen measure also meets the third subtest of relevant "proportionality", in other words, demonstrate a proper relation (proportionality in the narrow sense) between the benefit gained by the act and the fulfilment of the purpose underlying it and the possible harm this may cause to the constitutional right (See, Aharaon Barak, **Proportionality in Law**, 471 (2010); Compare: CrimApp 8823/07 **A. v. State of Israel**, paragraph 26 of the judgment of my colleague, Vice-President E. Rivlin ([reported in Nevo], February 11, 2010)). In this framework, it must also be shown that the same purpose cannot be achieved by means of a measure less drastic than demolishing or sealing a home (see: HCJ **Abu Dheim**, **Sharif**) (HCJ 5696/09 **Mughrabi v. GOC Homefront Command**, para. 12 of the judgment) (reported in Nevo).

59. The troublesome fact is that while this Honorable Court has long since ruled that use of the power must meet the tests of proportionality in individual cases, it has never considered the proportionality of the policy of systematic house demolitions pursuant to Regulation 119 on its own right.

60. The Petitioners demonstrate below that the policy itself runs entirely counter to the principle of proportionality and fails to meet all three of the subtests put in place to examine this matter.

<u>The test of rational connection</u>

61. This test requires an examination of whether the measure taken by the Respondents, that is the house demolition policy, serves the deterrent purpose they purport to seek.

62. It is the Petitioners' understanding that the Respondents have never proven - and, in fact, have never been required to prove - that they satisfy the test of rational connection.

63. And so, while, at one end there is systematic, deliberate use of human beings as instruments, as part of which said individuals are punished and their property and dignity are, with certainty, most deeply and grievously violated, wherein, in addition to demolishing their physical home, the memories and experiences gained by these victims in their homes over the years are erased, when, at the other end, there has been no proof that the purpose has been achieved or advanced.

64. And so, although presumably, the more devastating the harm caused to innocents by the Respondents the more solid the evidence that the alleged purpose is achieved should be, the policy is repeatedly approved without the Respondents having met their burden of proof and without having satisfied the first test.

65. Note that the policy's failure to meet the tests of proportionality has not escaped the attention of the Court and the matter emerges from the extensive jurisprudence on this matter.

> Having said all that, and looking to the future, as broad as the discretion of the military commander may be, as discussed by us above, **I am of the opinion that the principle of proportionality cannot be reconciled 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 <u>presumption</u> in a manner which can be examined.** (Remarks of Honorable Justice (retired) Rubinstein in HCJ 8091/14, paragraph 28 (emphasis added, B.A.).

And further:

> 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").
>
> **<u>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.</u>** From paragraph 8 of the judgment of Honorable Justice Mazuz in HCJ 7220/15 **'Aliwa v. IDF Commander in the West Bank** (emphasis added, B.A.).

And further:

> There may, however, be room to wonder whether this deterrence is in fact achieved through the exercise of the powers granted to the Respondents under Regulation 119. It would seem that the military authorities have done so; despite believing that there was a connection between the demolition of terrorists' houses and deterrence, they noted that as a system there is tension between deterrence and "the price of demolition"; even concluding that "the tool of demolition in the framework of a deterrent element has been eroded'" (see slides 17, 20 and 22 of the presentation given by the Committee under Major-General Ehud Shani which examined this subject in 2004 and 2005, which was attached as Exhibit 1 to the HaMoked petition) (Para. 4 of the judgment of Honorable Justice U. Vogelman in HCJ 5839/15 **Raad Sidr v. IDF Commander in the West Bank**) (reported in Nevo).

66. Moreover, when this Honorable Court addresses the question of achieving the purpose allegedly sought by using Regulation 119, jurisprudence utilizes the cautious language of hope, hypothesis, etc.

67. It is the Petitioners' position that the aforesaid proves their contention that the Respondents have never successfully passed, nor have they been required to pass, the tests of proportionality, and not by chance. The Respondents' claim that the implementation of the policy based on Regulation 119 serves the purported purpose of deterrence has not and cannot successfully meet these tests.

68. There is another matter to consider in addition to the above. To make a definitive ruling as to whether the house demolition policy meets the tests of proportionality, or at the least, to assess this to a level of near certainty - which is required given the certain, serious and deliberate harm to innocents whom the Respondents use in order to send a message - the equation must be completed, and in addition to the issue of fulfilment of the purported purpose, the issue of whether and how many terrorists and terrorist supporters this policy has produced must also be explored. However, it appears impossible to answer these questions, and in any event, they have yet to be answered at the time of writing. Therefore, for this reason too, it can be said that the house demolition policy fails to meet the first test of proportionality.

<u>The test of least injurious measure</u>

69. The issue of whether the house demolition policy pursuant to Regulation 119 meets this test also has a simple answer. Once the Respondents were permitted to use Regulation 119, to design and implement the injurious policy while the Honorable Court confined its judicial review to the question of how the power is exercised in individual cases, and relied on the professional opinion of security officials who have not been required to prove that the measure fulfills its purported purpose, it is clear that less injurious possibilities have never been truly considered. Thus, the house demolition policy also fails to meet the second subtest.

<u>The test of proportionality in the narrow sense</u>

70. The house demolition policy also fails to meet the final test, which evaluates whether the harm caused is appropriately proportionate to the benefit gained. As stated above, on the one hand, there is certain, grievous violation of the core of human dignity caused by the policy over the years to numerous individuals who have done nothing wrong. On the other hand, the desired purported purpose of

saving lives has never been examined, and, as stated above, cannot be examined. As such it is clear that this test has not been undertaken and had it been undertaken, the policy would have not passed it. This purpose rests on hope and conjecture, with the Honorable Court traditionally refraining from deliberating the issue on its merits, relying on security officials, who, in turn, rely on the Honorable Court.

71. And so, it is the Petitioners' position, particularly given the developments mentioned above in the motion for a hearing before an extended panel, that the time has come to break this vicious cycle and properly examine the matter and in-depth. It is not possible to have the policy continue when, given the aforesaid, it clearly cannot satisfy the tests of proportionality.

72. This completes the Petitioners' argument of principle against the use of the systematic house demolition policy pursuant to Regulation 119.

The position of the Court on the legality of using Regulation 119

73. As is known, in judgments from recent years, a significant number of justices of this Honorable Court have made comments regarding the use of Regulation 119 and the Respondent's power to execute house demolitions pursuant thereto.

> ... **The arguments which were raised (against the use of Regulation 119, B.A.) 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.** (Comments of Honorable Justice Mazuz in HCJ 7220/15 **'Aliwa v. IDF Commander in the West Bank** (dated December 1, 2015) (emphasis added, B.A.).

74. In HCJ 8150/15 **Daud Abu Jamal** (hereinafter: **Abu Jamal**), Justice Mazuz stated as follows in paragraph 3 of his judgment:

> On several occasions in the past two years, I have expressed my opinion on these issues, whereby the use of Regulation 119 raises a slew of difficult legal questions both in terms of international law and in terms of Israeli constitutional law, which, in my opinion, have yet to receive a proper and sufficient response in the jurisprudence of this Court...

75. This view on opening the issue of using Regulation 119 for a hearing before an extended panel was shared by Justice Baron in Abu Jamal, noting: "**I note, however, that I share the call for reconsideration of this rule by an extended panel**".

76. In HCJ 1630/16 **Masudi Fathi Zakaria v. IDF Commander**, Honorable Justice Vogelman also commented that the legality of using Regulation 119 should be revisited by an extended panel (judgment dated March 23, 2016):

> In addition, and despite my position that for as long as the rule has not been changed it should be followed, **I added that I thought it would be advisable to revisit said rule in order to fully examine all issues which may arise under local law**

as well as all issues which may arise under international law (emphasis added, B.A.).

77. In that judgment, Honorable Justice Vogelman notes that other justices have expressed similar positions on the issue of having the legality of using Regulation 119 revisited by an extended panel:

> Ever since the Sidr judgment was given, additional voices were heard regarding the use of Regulation 119 for house demolition purposes, in different variations and emphases (see for instance the opinion of Justice M. Mazuz in HCJ 7220/15 **'Aliwa v. Commander of IDF Forces in the West Bank** (December 1, 2015), and paragraph 13 of his opinion in HCJ 8150/15 **Abu Jamal v. GOC Home Front Command** (December 22, 2015) ("In my opinion, a sanction which is aimed at harming innocents, cannot stand"). See also paragraph 2 of the opinion of Justice Z. Zylbertal, ibid. ("The reasons given by Justice Mazuz are compelling and based on fundamental constitutional principles as well as on basic principles of justice and fairness. Had said issues been brought to this court for the first time, it is possible that I would have concurred with the main principles of his position"); see also paragraphs 1-2 of the opinion of Justice D. Barak-Erez in HCJ 8567/15 **Halabi v. Commander of IDF Forces in the West Bank** (December 28, 2015) ("We have no alternative at this time but to respect the current judgments of this court, and to refrain from the practice of applying different law by different judicial panels […] Indeed, ostensibly, there is merit to the argument that the use of a power concerning house demolition raises difficulty in terms of the proportionality requirement […] However, according to the principles of conduct which are binding on this court as an institution and despite the difficulty associated therewith, I concur with the recommendation of my colleague Deputy President E. Rubinstein to dismiss the petition at bar"). See also the opinion of Justice Z. Zylbertal, ibid. Prior to Sidr, see paragraph 1 of the opinion of Justice E. Hayut in HaMoked ("The issues raised in the petition are difficult and troubling and I will not deny the fact that taking the path of case law in this matter is not easy").

78. Honorable Justice (retired) Joubran joined these comments in Bank:

> I must admit and cannot deny the fact that I am not comfortable with the use of the authority established in Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: Regulation 119), for the issue of confiscation and demolition orders against the homes of perpetrators (hereinafter: the authority), while all other inhabitants of these houses were not involved in terror activity...
>
> **The exercise of the authority raises difficulties under local law and international law, which in my opinion have not yet been thoroughly addressed by the court in its**

> **judgments, particularly in view of the increasing use of this authority, against the backdrop of the severe security situation and the rising wave of terrorism.**

79. Some two months ago, Honorable Justice Baron repeated her clear view on the issue in HCJ 6420/19 **Salah al-Asafra v. IDF Commander in the West Bank** (reported in Nevo):

> Terrorists must face justice in the strictest sense for their heinous acts. **Nevertheless, house demolitions cannot serve as reprisal against or punishment of *innocent* family members. Collective punishment is prohibited under international law and violates fundamental human rights. I have already expressed my opinion that for this reason, there is room to have an extended panel of this court revisit the issues arising from the exercise of the powers granted by Regulation 119** (see also, remarks of Justice U. Vogelman in HCJ 2356/19 **Barghouti v. Military Commander of the West Bank** [reported in Nevo] (April 11, 2019); Justice **M. Mazuz** in HCJ 974/19 **Dahadha v. Military Commander of the West Bank** [reported in Nevo] (March 4, 2019); Justice G. Kara in HCJ 8886/18 **Jabarin v. Military Commander of the West Bank** [reported in Nevo] (January 10, 2019)). (emphasis added, B.A.).

80. It appears, therefore, that there is no dispute that the matter of the legality of using Regulation 119 is a complex one, and that there is no question more worthy of being considered by an extended panel. It also appears that the sole reason the Honorable Court has thus far refrained from deliberating on the legality of using Regulation 119, confining its judicial review to the manner in which the power is employed in individual cases only, does not lie with the legitimacy of the Regulation or its morality, nor its having satisfied the tests of proportionality and reasonableness. As detailed above, these matters have never been considered. Use of Regulation 119 continues into 2020, despite the legal and moral difficulties it raises, solely on the basis of case law dating back more than four decades. However, the Petitioners maintain that the developments currently taking place on the international scene, in conjunction with the fact that in the current wave of demolitions, including the demolition that is the subject of this petition, use of the power granted by Regulation 119 has been expanded to apply to innocents from a wider circle, render revisiting the legality of the policy in practice and the use of Regulation 119 inevitable and even imperative. For all these reasons, the Petitioners move the Honorable Court to disqualify use of Regulation 119 and the policy practiced pursuant thereto in absolute terms, or, alternatively, to suspend use of Regulation 119 pending a thorough examination and ruling on the matter by an extended panel.

<u>Use of the power in the Petitioners' particular case</u>

81. Notwithstanding the Petitioners' position, as detailed above, that the systematic policy practiced by Israel pursuant to Regulation 119 is fundamentally and completely unacceptable as it contradicts international humanitarian law, international criminal law, human rights law, basic rights and fundamental principles of justice and morality, this Honorable Court currently, and so long as it has not ruled otherwise, upholds the use of Regulation 119 for deterrence ruling it legitimate when required in order to prevent further harm to innocents (HCJ 2418/97 **Abu Fareh v. Military Commander**, IsrSC 51(1) 226; HCJ 6996/02

Z'urub v. Military Commander in Gaza, IsrSC 56(6) 407 and more). As this is the case, the Petitioners will address the impropriety of the manner in which the power was exercised in their particular case in this section of the petition.

82. According to the position of the Petitioners, which is detailed below, the proceeding initiated against them by the Respondent and the decision reached at its conclusion in the form of an order for the confiscation and destruction of their home and lives are tainted by unreasonableness and disproportionality. The proceeding itself, and the manner in which it was pursued, attest to the fact that its motivations are punishment and vengeance against innocents, rather than deterrence, as alleged. In addition, the Petitioners believe that even according to the Respondents, who believe using Regulation 119 is legitimate, the process and decision in their matter fail to meet even the requirements of this improper regulation.

Improper notice

83. As stated in the appeal, the Petitioners submitted to the Respondent, late Friday night, January 10, 2020, counsel for the Petitioners received notice that the Respondent was planning to confiscate and demolish the Petitioners' home. As stated in the notice, the measure was being taken due to the fact that their son, Yazan, had been accused of perpetrating a terrorist attack on August 23, 2019 in which a teenaged girl, Rina Shenrav, was killed and her brother and father were injured.

84. The notice attached to the petition as Exhibit P/2 speaks for itself. First, it does not regard the Petitioners as human beings. Conceivably, such a cruel notice, informing innocent people that the Respondent has decided to use them as an instrument for transmitting messages to potential third parties, punish them and destroy their lives, should be addressed to the affected persons directly, cite their names, delivered during the day, and express regret for the need to take such a draconian measure due to the need to effect deterrence.

85. In this case, however, not only does the notice in question fail to treat the Petitioners as human beings who are hurt by the employment of the cruel methods in their matter, but it does not even bother to cite the reason for the commencement of the proceeding against them. While the Respondents claim the act is necessary for the purpose of alleged, unproven deterrence, the language of the notice clearly indicates it is a punitive, vindictive act. All that is said in the notice is that the military commander was exercising his power under Regulation 119 and informing of his plan to destroy the home due to the terrorist attack of which the Petitioners' son is accused. There is no mention of the cause of deterrence alleged by the Respondents.

86. We note that in the past, notices sent to victims whom the Respondent decided to use through no fault of their own included at least an attempt at an appearance of due process. Such notices would specify that the Respondent took the position that using and punishing the families **may** deter **potential** terrorists.

    A copy of a past notice citing the reason it was send is attached hereto and marked **P/5**.

87. The Respondent's conduct in the matter of the Petitioners, whose innocence is undisputed, as is the fact that the Respondent is using and punishing them for no fault of their own, brings the impropriety of the proceeding into sharper focus.

88. Moreover, innocent people whom the Respondent claims he is forced to punish by destroying their home and life through no fault of their own due to a constraint of deterrence should not intentionally receive such a message in the late evening. A notice given to innocent people should treat them properly, as human beings. Additionally, when sending notice to innocents, the Respondent has an obligation to explain to the addressees why he must take such a draconian measure against them. None of this was done.

89. Furthermore, were this measure, a measure requiring such profound harm to innocents who were being used as tools despite having done no wrong for substantive grounds of deterrence, truly unavoidable, then, following the delivery of a legitimate and as respectful as possible a notice, the Respondent would have made sure to give the addressees a more reasonable timeline for appealing such a draconian notice. When innocents receive notice of a plan to destroy their lives to the ground; when they are required to dissuade the Respondent from punishing them; when they have done nothing wrong, the Petitioners, and people like them, are deserving of a timeline that is much more reasonable than just a few days. It is inconceivable that a person who receives a parking ticket is given several weeks to appeal the ticket, whilst a person whose life the Respondent is planning to destroy is given no more than a handful of days to attempt to save their life and home. The Petitioners, and others in their predicament, who have committed no crime or sin, are, therefore, deserving of at least the timelines accepted for filing appeals and petitions in ordinary administrative proceedings. Giving tight schedules prevents victims of the systematic house demolition policy from preparing their arguments properly and thoroughly, which, the Petitioners maintain, constitutes a severe violation of the right to due process.

90. It is noted at this point that an argument that the tight schedule given to innocents is reasonable due to the need for deterrence does not hold water.

91. Any sensible person would see that inasmuch as there are some potential terrorists out in the world, heaven forbid, who are following the proceedings launched by the Respondent against the Petitioners, and checking to see if the Respondent is trying to deliver any "deterring" messages to them - they do not sit with a stop watch, measuring how much time the Respondent's victims were given to challenge his decision, nor do they determine or undertake to be deterred by the draconian acts to a lesser or greater degree in accordance with how short or long the military commander makes the timeline. It is entirely inconsequential for the alleged recipients of the message and for their alleged deterrence whether the Petitioners and others like them had been given three, 14, 21 or 30 days to make their case to the Respondent and the Court against the Respondents' cruel use of the Petitioners, their lives and their property.

92. Therefore, and inasmuch as it has not been proven otherwise, the sole reason for producing such a short timeline, particularly in view of the nature and essence of the irreversible harm against which the Petitioners and others in their predicament attempt to defend themselves, is vengeance and crowd pleasing. As such, for these reasons, the Petitioners maintain that the notice sent to them by the Respondent is tainted by extreme unreasonableness and unfairness.

The response to the appeal

93. As stated above, on January 23, 2020, the Petitioners received the response to their appeal, attaching the order challenged in the petition herein. However, as detailed

below, at this stage too, the Respondent persisted in his unreasonable, disproportionate and unfair conduct in their matter.

94. In the response to the appeal, the Respondent first addressed the arguments of principle raised by the Petitioners regarding the illegality of using Regulation 119 and implementing the policy pursuant thereto, dutifully reciting the argument that this Honorable Court has ruled the power may be used.

95. Thereafter, the Respondent proclaims, without offering any convincing arguments, that using the power in the Petitioners' particular case, while destroying their home to the ground, despite their innocence, is proportionate - paras. 8-9 of the appeal.

96. In para. 10 of the response, the Respondent dismisses the serious allegations regarding the restrictive schedule given to the Petitioners, instead, tersely informing the Petitioners that this is the same timeline given in other cases.

97. In para. 11 of the response, the Respondent again confirms the Petitioners' argument that the notice is rooted in the cause of punishment and vengeance.

98. In para. 16 of the response, the Petitioners are again given an intolerably tight timeline for filing a petition with the deadline set at 6:00 P.M. on January 28, 2020.

99. To the argument made by the Petitioners in their appeal to the effect that they are innocent and therefore their house should not be demolished and certainly not destroyed to the ground, the Respondent responds with a citation that innocence does not, in and of itself, preclude harming them.

100. This remark does not constitute a pertinent explanation and indicates that the Petitioners' matter was never considered substantively, with an open mind and heart. The Petitioners maintain that since they are innocent people who are being cynically used, not because of their own actions, but because of the actions of another, the Respondent should consider their case thoroughly and pertinently and clarify why, despite this, he is compelled to use them and punish them. For the Respondent, however, it is enough to provide a general answer that despite their innocence, which is undisputed, there is no impediment to harming them and, therefore, he was harming them. Such a response renders meaningless the hearing process in which the Petitioners can make their case against the plan to destroy their lives to the ground.

101. The same holds true for the arguments the Respondent makes in response to the appeal with respect to the schedule given to the Petitioners and people like them. The Respondent does not respond to the arguments made by the Petitioners, instead confining himself to a proclamation that this is the same timeline given to his other victims. Additionally, the Respondent contradicts himself when he claims in para. 10 that the Petitioners did not submit a request to consider an extension for the appeal prior to making same.

102. With respect to the statements made in para. 10 of the response to the appeal, the Petitioners wish to highlight their argument of principle on this matter once again. When the Respondent sets out to harm innocents by punishing them for no fault of their own and using them as instruments to send a purported message to other parties, he has a basic duty to treat them properly and respectfully. Proper treatment means providing notice during reasonable hours rather than late at night and giving the individuals who find themselves in a situation where they have to defend themselves against the draconian measure he seeks to take against them a proper

opportunity. A proper opportunity means setting reasonable timelines for filing appeals and petitions. Given that the affected individuals are innocent people who have found themselves in extreme duress over the actions that are not their own, the timelines give to them should be at least those accepted in any other administrative procedure.

103. Moreover, the Respondent's demand that a person who has done nothing wrong yet finds themselves draconianly punished by the Respondent and having to dissuade the Respondent from destroying their lives should also have to beg for more time to fight the Respondent's plan is improper. What is more, the Petitioners' matter shows that the Respondent's contention that they had to submit a request for an extension before filing the appeal is self-contradictory. In the appeal, the Petitioners asked for a more reasonable timeline for filing a petition. And yet, even this early request did not move the Respondent to change his conduct and desist from mistreating innocents.

104. And so, for all the aforementioned reasons, and particularly in view of the grave harm the Respondent seeks to inflict on the Petitioners, their position is that the response was not properly explained, evincing that the Petitioners' matter had not been considered with an open mind and heart. The response also evinces that the Respondent was determined to go forward with the demolition of the Petitioners' home to the ground, despite their innocence. It is noted that the response to the appeal, which clarifies that the Respondent never bothered considering a way to reduce the harm to the Petitioners given their innocence by way of restricting the order to the son's room, renders the Respondent's decision to destroy the home disproportionate.

105. We emphasize that even if the Petitioners' arguments regarding the improper manner in which the Respondent exercised his power in their matter are dismissed, they beseech this Court to intervene in the matter and make a general ruling that inasmuch as use of Regulation 119 continues to be upheld, given the serious impingement on the due process rights of people who have done nothing wrong, the timelines for submitting appeals and petitions by innocent families who are forced to make a case against the Respondent's decisions and plans to harm them, would be brought on par with those practiced in other administrative proceedings.

The order

106. The order the Petitioners received with the response to their appeal noted that it had been issued due to "urgent military needs", an imperative arising from due to the terrorist attack of which the Petitioners' son is accused.

107. The Petitioners maintain that the response to the appeal, as well as the order, lack proper explanation, once again indicating that they are motivated by vengeance and collective punishment of innocents rather than deterrence. We shall elucidate.

108. The language used in the order, like that used in the notice preceding it, clarifies once more that this is purely a punitive act against innocents rather than deterrence as alleged.

109. The Petitioners also reject said "urgent military needs" claimed by the Respondent in the order issued in their matter. The notice addressed to the Petitioners and notifying them of the intention to punish them for the actions of their son, which is the notice against which they defended themselves as well as they were afforded the opportunity to do, made no mention of any sort of urgent military need that

necessitates harming them and using them as innocents, nor was it proven that these urgent military needs compelled the full destruction of their home rather than a less injurious measure.

110. For all the aforesaid reasons, the Petitioners believe that the order, as the process preceding it, including the notice and the response to the appeal filed against the notice, fail to meet basic good governance requirements - on the assumption that deliberate, direct harm to innocents and their use as a tool for conveying a message can be a legitimate, proper proceeding.

The tests of proportionality

111. Proportionality and balance are overarching principles that govern the scope of the Respondent's discretion. This is the case in general, and all the more so with respect to the exercise of this exceptional power to harm innocents for no fault of their own and use them as instruments while grievously violating their dignity:

> The exercise of powers under Regulation 119 of the Defence Regulations must be the result of balancing: between the severity of the act committed by the terrorist and the severity of the chosen sanction; between the harm caused to the terrorist's family and the benefit gained by deterring other potential terrorists; between the rights of the terrorist's family to their property and the protection of public safety. Achieving such a balance, as part of the known constitutional tests, requires that the chosen deterrent measure logically leads to the fulfilment of the proper purpose; that the measure is the least injurious to the protected right in furtherance of the proper purpose; and that the chosen measure also meets the third subtest of relevant "proportionality", in other words, demonstrating a proper relation (proportionality in the narrow sense) between the benefit gained by the act and the fulfilment of the purpose underlying it and the possible harm this may cause to the constitutional right (See, Aharaon Barak, **Proportionality in Law**, 471 (2010); Compare: CrimApp 8823/07 **A. v. State of Israel**, paragraph 26 of the judgment of my colleague, Vice-President E. Rivlin ([reported in Nevo], February 11, 2010)). In this framework, it must also be shown that the same purpose cannot be achieved by means of a measure less drastic than demolishing or sealing a home (see: **Abu Dheim**, **Sharif**) (HCJ 5696/09 **Mughrabi v. GOC Homefront Command**).

The test of rational connection

112. As noted in the general section of this petition, according to this test, consideration must be given as to whether the measure taken by the Respondents, that is the demolition of the Petitioners' home, serves the deterrent purpose they purport to seek, as noted in the response to the appeal, but omitted from both the notice and the order.

113. The Petitioners maintain that the Respondent has failed to satisfy this test and has not indicated that the certain, grave harm to the Petitioners and their dignity does achieve the purported purpose. This matter, as noted in the general section of the petition, cannot be resolved so long as neither the Court nor the Petitioners are

presented with comprehensive information that also refers to how many terrorists and terrorist supporters the act has produced.

The test of least injurious measure

114. According to the petitioners, the decision to harm them for no fault of their own, to destroy their house to the ground, to erase the memories and experiences attached to their home, for no fault of their own, also fails to meet the test of least injurious measure.

As noted, the Respondent did not bother to provide a pertinent answer to the Petitioners' query why there was an imperative need to destroy their home to the ground rather than resorting to a less injurious measure. Instead, in the response to the appeal, the Respondent relies on the argument that the Petitioners' innocence does not, in and of itself, preclude the possibility of destroying their home. According to the Petitioners, this argument shows their matter was never considered at all, and that the Respondent was determined from the very beginning of the proceeding to take vengeance upon them and punish them for the actions of their son for the simple reason that he is able to do so.

The test of proportionality in the narrow sense

115. It is the Petitioners' position that the Respondent's decision impugned in this petition also fails to meet the last test which evaluates whether the harm caused to the Petitioners is appropriately proportionate to the benefit gained. As stated above, on the one hand, there is no dispute as to the certain, grievous violation of the core of human dignity the decision causes the Petitioners, who have done nothing wrong. On the other hand, the desired purported purpose of saving lives has never been examined, and, as stated above, cannot be examined. As such, it is clear that the Respondent never applied this test and that even if he had, the decision would not have satisfied it. The fulfillment of the purpose rests entirely on hope and conjecture, while the Respondent destroys the home and lives of individuals accused of no wrongdoing with the stroke of a pen. Such conduct cannot be accepted and must be discontinued.

116. Thus, the Petitioners maintain that the proceeding initiated by the Respondent in their matter is unfair, unreasonable and disproportionate and therefore, inasmuch as the Court does not disqualify use of Regulation 119, or, alternatively, suspend the policy practiced pursuant thereto, the Honorable Court is moved to intervene in the Petitioners' particular case and rule that the manner in which the Respondent's power has been exercised is tainted by serious flaws that warrant its disqualification.

The Respondent's discretion

117. To conclude this petition, the Petitioners note that it is their position that the proceeding launched against them by the Respondent is fundamentally flawed, since, given the current climate in the State of Israel, it fails to meet the basic conditions set in case law according to Regulation 119. We shall elucidate.

> ... **[T]he above does not mean that the military commanders, who have the authority, are not required to use reasonable discretion and a sense of proportion in each case, nor that this court is not able or bound to intervene in the decision of the military authority, whenever the latter intends to exercise its authority in a way and manner**

> **that are unthinkable.** (HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, 46(3), 693 (hereinafter: Alamarin, p. 669) (emphasis added, B.A.).

118. It is the position of the Petitioners that the circumstances and public sentiment prevailing in 2020 in Israel, wherein certain government level officials as well as groups within the Israeli public put inordinate pressure on authorities involved in such sensitive proceedings, primarily on the Respondent, essentially tie his hands and render him incapable of exercising discretion as to whether or not to use his Regulation 119 powers. Moreover, it is the Petitioners' understanding that in the prevailing circumstances given the public sentiment and various calls over social media and traditional media, no military commander would today dare refrain from issuing a confiscation and demolition order after a fatal terrorist attack, other than in the most unusual circumstances, such as when the attack had been perpetrated by a person found to have been mentally ill. It is further noted that this sentiment was present in the matter of the Petitioners, with incessant calls to "deter" and demolish the family's home forming an inseparable part of the improper proceeding taken against the Petitioners.

119. Here too, the matter must be stated as it truly is. When, unfortunately, calls to take action increase, when men women and children have learned to recite the demand for immediate "deterrence", there is cause for alarm. The remarks made by Justice Barak-Erez in her ruling in HCJ 7961/18 **Na'alwah v. Military Commander of the West Bank** are relevant:

> Therefore, when deterrence serves as the foundation, the position of the bereaved families, though it is of significance and importance both emotionally and punitively (when there is a criminal proceeding), is of no particular preference. **In fact, an independent position which is contrary to the position of the security establishment may actually cast the use of the demolition orders in a punitive light, contrary to the official position of security officials** (see, 4597/14 **'Awawdeh v. Military Commander of the West Bank** [reported in Nevo], paragraph 19 (July 1, 2014); HCJ 8270/17 **Solomon v. IDF Commander in the Judea and Samaria Area** (reported in Nevo) (March 22, 2018)).

And further:

> ... **The justification for using the house demolition tool can only be deterrence. It absolutely cannot be appeasing public opinion.** (From the judgment of Honorable Justice Baron in HCJ 6420/19 **Salah al-Asafra v. IDF Commander in the West Bank** (reported in Nevo) (emphasis added, B.A.).

120. For all the aforesaid reasons, the Honorable Court is hereby requested to issue an Order Nisi and Interim Injunction as sought in the opening of this petition, to have an extended panel deliberate on the use of Regulation 119, and, after hearing the response of the Respondents and deliberating on the Petitioners' arguments, both on the matters of principle and on their individual case, render said orders conclusive.

121. This petition is supported by an affidavit signed before an advocate in the West Bank and sent to the undersigned by facsimile after telephone coordination. The

Honorable Court is hereby requested to accept this affidavit and the power of attorney, also sent by facsimile, in consideration of the objective difficulties affecting advocate client meetings.

January 28, 20200

Benjamin Agsteribbe

Counsel for the Petitioners

[File. No. 108769]