Andre Rosenthal / Attorney at Law

13/08/2008
Reference No. 2322

To:
GOC Homefront Command
Represented by the Chief Military Prosecutor
HaKiriya, Tel Aviv
Per facsimile: 03-5694526, Telephone: 03-5693374

Sirs,

Re: Objection to the use of Regulation 119 against the Abu Dahim family home, Jabel Mukhbar, Jerusalem

1. We shall first refer to the Biblical verses cited by the honorable Justice Heshin in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, *Piskei Din* 46(3) 693, 706:

> "And it came to pass when the kingdom was firmly in his control that he slew his servants who killed the king his father, but he did not put the sons of the killers to death, in accordance with what is written in the book of the law of Moses that God commanded him as follows: fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers, but a man shall die (read: be put to death) for his own sin." (II Kings 14: 5-6)

As you know within the framework of the court hearing in HCJ 7733/04 **HCJ 7733/04**, **Mahmud Ali Nasser and the Center for the Defence of the Individual v. Commander of IDF Forces in the West Bank** the Supreme Court Justices expressed their displeasure with the implementation of Regulation 119. In the wake of an exchange of words between counsel for the respondent there, Adv, Horin, and the court, the hearing was postponed, and after that it was announced that a military commission was being established to investigate the use of Regulation 119. The commission's recommendations were only partially published in the media:

> "It goes without say – as the commission has also established – that in no instance has it been proved that house demolitions have led to a cession in terror attacks, or to any significant decrease in them, and perhaps the opposite has occurred. So that we find that it has not even been successful as a deterrent factor".
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> "Over and above security considerations" by Amnon Shtrasnov, *Haaretz*, 21 February, 2005

We have learnt that the commission held that employing Regulation 119 has had the opposite effect. Instead of serving as a vehicle for deterring the public and thus preventing the commission of future attacks within the framework of the Palestinian-Israeli dispute, using this Regulation has increased the hatred, has deepened the lines of conflict and has led to the commission of further revenge attacks.

It is not clear to us how these things have changed between 2005 and 2008 and why it was decided to ignore the commission's recommendations and to implement the Regulation.

2. We are not aware of any link, in the event that such exists, between the perpetrator of the attack and illegal organizations. In the event that there is evidence that proves such a link, and this evidence is not classified, we request to receive it and to allow us to relate to such evidence.

3. A. It is our contention that one must interpret the authority that is given in the regulation in the spirit of the provisions of the Basic Law: Human Dignity and Liberty. We refer to the dicta of the honorable Chief Justice (ret.) Barak in FCH 2316/95 **Ganimat v. State of Israel** as it was cited in FHHCJ 2161/96 **Sharif v. GOC Homefront Command**, *Piskei Din* 50(4) 485:

> "With the enactment of the Basic Laws with respect to human rights the legal arena in Israel has undergone significant change. Every legal outcome has been influenced from this change. Only in this manner will harmony and unity be attained in Israeli law. The law is a system of interrelated tools. A change to one of these tools influences all of the other tools. There is no possibility of distinguishing between an old law and a new law with respect to the impact interpretation of the Basic Law will have. Indeed, any administrative discretion that was granted in accordance with the old law should be exercised in the spirit of the Basic Laws; generally all legislative norms must be interpreted in light of the Basic Law".

B. In light of the above ruling we argue that Regulation 119 has no valid purpose. The legal fiction which states that it is not a penal regulation and its exclusive aim is to deter the public can no longer be sustained. A study of the regulations themselves clearly reveals, without a shadow of a doubt, that we

are dealing with an exclusively penal regulation. Regulation 119 appears in the original, on page 50 under the title Part XII - Miscellaneous Penal Provisions; and in Hebrew, Part 12 Miscellaneous Penal Provisions.

We lack the ability to punish someone who has died. And even more so, we cannot punish his family because of his deeds, where there is no evidence that proves a link between the actions of the perpetrator and his family members who live in the same house, aside from blood relations. This is an act that is based on revenge and is a way of accommodating the calls for revenge that emanate from the street. It is also collective punishment.

4. As we see it, to punish family relatives because of the actions of the son in the family is not a valid purpose. We argue that using Regulation 119 does not comply with the values of the State of Israel as a Jewish and democratic state; "fathers shall not be put to death because of their sons", in other words my father is not responsible for my actions, so long as I am of the Mosaic persuasion.

The declared intention is public deterrence. The Supreme Court related to this purpose, in another context, in a case where the Military Commander in the West Bank wanted to assign a place of residence to the families of the perpetrators. In HCJ 7015/02 **Ajuri v. Commander of the IDF Forces** it was held, *inter alia:*

> "27. May the military commander, when making a decision about assigned residence, take into account considerations of deterring others? As we have seen, what underlies the measure of assigned residence is the danger presented by the person himself if his place of residence is not assigned, and deterring that person himself by assigning his place of residence. The military commander may not, therefore, adopt a measure of assigned residence merely as a general deterrent to others."

We argue that here too one may not use Regulation 119 for the purpose of a "public deterrent", especially since any connection between the tenants of the house and the perpetrator is confined exclusively to blood ties – and nothing further.

We argue that if the purpose of public deterrent is not enough to enable the assigning of a place of residence to the family member of a perpetrator who participated with him at the time of the commission of the attack one cannot claim that a public deterrence can serve as a valid purpose for using regulation 119.

5. A. The manner of exercising authority in this case. The confiscation and demolition of the basement floor and the ground floor excessively harms innocent persons. The basement floor has two apartments that are rented to foreign persons, currently United Nations employees. The ground floor also contains two apartments: the apartment belonging to the parents of the

perpetrator and a separate apartment, which is practically empty, and which housed the perpetrator and his siblings, when he lived in Israel. Access to the floor which is marked on the sketch as Floor 1 and Floor A – upon which a decision was made not to demolish - is through the stairway that goes through the whole building. It is not clear to us how the tenants of these apartments will be able to enter their apartments. It is also not clear to us how it would be possible to demolish the intermediate floors in the four-storey building and still maintain the building's integrity.

We dispute your holding that exercising this authority – the confiscation and demolition of 2 floors in the building – is proportional.

B. According to the wording of Regulation 119 –

> "When a structure or land that has been forfeited by Order of the military commander as aforesaid, the Minister of Defence may at any time, by Order, renounce the confiscation wholly or in part…"

From the moment a decision was made, in his capacity as Commander of the Homefront Command, to confiscate and demolish the two floors of the building, the Minister of Defence is prevented from considering the exercise of, his authority, *viz.* the renunciation, that is granted to him under the law.

6. It is clear that this remnant from the British mandate has no place in the statute books of a Jewish and democratic State. Employing this Regulation harms innocent persons whose guilt has not been proven; and against whom there is no claim at all of any guilt.

There is good reason to state things very clearly: it involves action with the chief aim of revenge. The voices from the street and the establishment demand this. These are foreign considerations. Right wing groups have attempted to carry out a pogrom at my client's home soon after the attack. The police stood by the side, and while they indeed did protect my client's home they did not prevent damage to private property in the village.

The political system in this country is raging. The prime minister, even before announcing his intention to resign, spoke forcefully of the need to take action against my client's home. The Minister of Defense, a member of a party vying for power, spoke no less forcefully. The Minister of Public Security also joined the voices of revenge that has cut through the leadership of the Jewish and democratic state. This is a continuation of the same policy that has been with us from the beginning of the establishment of the State: they are Arabs, they only understand the language of power. We cannot forget that it was a resident of the country who carried out the attack and thus also expressed the failure of the State.

7. We refer to the minority opinion in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, *Piskei Din* 46(3) 693. 705 ff:

> "Legislation that originated during the British Mandate — including the Defence (Emergency) Regulations — was given one construction during the Mandate period and another construction after the State was founded, for the values of the State of Israel — a Jewish, free and democratic State — are utterly different from the fundamental values that the mandatory power imposed in Israel. Our fundamental principles — even in our times — are the fundamental principles of a State that is governed by law, is democratic and cherishes freedom and justice, and it is these principles that provide the spirit in constructing this and other legislation. See for example, by way of comparison: HCJ 680/88 **Schnitzer et al. v. Chief Military Censor et al.**, *Piskei Din* 42(4) 625, 617 onwards (per Justice Barak).
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> This has been so since the founding of the State, and certainly after the enactment of the Basic Law: Human Dignity and Liberty, which is based on the values of the State of Israel as a Jewish and democratic State. These values are general human values, and they include the value that 'One may not harm a person's property' (section 3 of the law) and 'The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive' (section 8 of the law)."

8. We argue that you have been guided by foreign considerations in your decision to implement regulation 119, namely revenge. Moreover we cannot recall a single case where the perpetrator of the act was of the Mosaic persuasion and caused the death of innocent citizens and/or residents – albeit Arabs – and it was decided to take action within the framework of Regulation 119 against the perpetrator's family. It is clear to us that the number of cases is in no way similar, yet deterrence is deterrence and the blood of someone of the Mosaic persuasion is no redder than the blood of any other dead person.

9. Ever since the judgment in HCJ 7733/04 **Mahmud Ali Nasser and the Center for the Defence of the Individual v. Commander of IDF Forces in the West Bank** above was handed down on 20 June, 2005 little more than three years has passed. Lately three attacks have been carried out in Jerusalem, "Merkaz Harav" – the subject of this objection – and two other attacks involving drivers of heavy vehicles. No link has been proven between each of these attacks. Even if it were possible to determine that in our case the action was "ideologically" motivated, because of the identity of the perpetrator and the identity of the victims, one cannot ignore the fact that it involves activity that flows from desperation and helplessness in light of the miserable situation and the hopelessness of the permanent residents of east Jerusalem. These factors are bound to lead to a loss of sanity.

10. By implementing Regulation 119 you highlight your weakness. Neither you nor the Sate has any "answer" or practical solution to the phenomenon of suicide bombers or other perpetrators of attacks, such as in the case that forms the subject of this objection. The solution, as you and we well know, is only political, and through compromise. So long as the State of Israel refuses to talk to its enemies and professes, for the main part, the language of strength, then there is no end in sight to the endless conflict, and actions like those committed by the son of the Abu Dahim family at the Merkaz Harav Yeshiva will continue to be carried out. Employing this regulation is designed to calm public opinion and to point to the practical activity that is carried out by the security apparatus. We argue that this is a foreign and invalid consideration.

11. Therefore for all the reasons detailed above, we request from you that you receive our objection and withdraw your decision to make use of Regulation 119 in any manner of form.

Yours faithfully,

(Signed)

Andre Rosenthal/ Attorney at law

CC: The Center for the Defence of the Individual, T.M. 54910