**At the Supreme Court** **HCJ 9353/08**
**Sitting as the High Court of Justice**

In the matter of:

1. _____ **Abu Dahim, Identity No.**_____, Resident of Jabal Mukaber, Jerusalem

2. **HaMoked: Center for Defence of the Individual founded by Dr. Lotte Salzberger (R.A**.)

Represented by Adv. Andre Rosenthal and/or Mustaffa Yachi
whose address for the purpose of service of process is
1 Ben Yehuda Street, Jerusalem 94264
Tel: 6250458; Fax: 6221148

**The Petitioners**

- Versus -

**GOC Homefront Command**
represented by the Office of the State Attorney
**Ministry of Justice, Jerusalem**

**The Respondent**

## Petition for *Order Nisi* and Interim Order

The Honorable Court is moved to invite the respondent to give reason why he changed his policy and went back to using his authorities by virtue of Regulation 119 of the Defence (Emergency) Regulations, 1945 (hereinafter: **Regulation 119**);

And also why his decision to use Regulation 119 against Petitioner 1's house, as shall be described below, should not be cancelled.

**As an interim remedy**, the Honorable Court is moved to give an order that prohibits any action on the part of the respondent or anyone on his behalf against petitioner 1's house, until the proceedings in this Petition are concluded.

A copy of the Petition is being transferred, upon the filing thereof to the Honorable Court, to the Office of the State Attorney.

> "And it came to pass, as soon as the kingdom was confirmed in his hand, that he slew his servants who had slain the king his father. But the children of the murderers he slew not: according to that which is written in the book of the law of Moses, in which the LORD commanded, saying, The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." [Translation: Webster's Bible Translation]. (Kings 14, 5-6) as quoted by the Honorable Justice Cheshin in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, *Piskei Din* 46(3) 693, on p. 706 across from the letter A.

**<u>The grounds for the petition are as follows:</u>**

1. a. Petitioner 1 (hereinafter: the petitioner) is the father of _____ Abu Dahim, who carried out the terror attack on March 6, 2008 at Yeshivat "Mercaz HaRav" in Jerusalem.

   b. The petitioner lives in an apartment building that belongs to him in Jabal Mukaber, Al Madaras St., across from the Arab Al Sawachara girls' school in Jerusalem.

   c. The apartment building consists of three floors, plus a basement floor. Each of the three floors is divided into two separate apartments, and each apartment has three bedrooms, a living room, a kitchen and a bathroom. In the top two floors there are also two balconies for each apartment.

   d. The petitioner's daughter and her two children live in the basement floor, which was noted in the plan and in the photograph attached hereto and marked with the letters **p 1A and p 1B** as "Floor 1". The respondent does not intend to cause harm to this floor.

   e. In the floor that was noted as a "basement" floor in the plan there are two apartments, which were leased to third parties. Due to the existence of the Order they are empty at this time. The respondent intends to confiscate and to demolish the interior of the apartments and to seal the floor.

   f. On the floor that was noted as the "ground" floor in the plan there are two apartments: the right one is used by the petitioner and his wife. The apartment consists of three bedrooms, a kitchen, a living room, a bathroom, and two balconies. The second apartment, on the left, has three bedrooms, a living room, a kitchen, a bathroom, and two balconies. The apartment is unfurnished, apart from two rooms: one room, the northeast room which belonged to the petitioner's son, _____. The second room – which has only a bed and a cupboard – is used by the petitioner's other son, _____, when he visits in

Israel. The respondent intends to confiscate and to demolish the interior of the apartments and to seal the floor.

g. The Petitioner's two married sons live together with their children and wives on the floor noted as floor "A". The respondent does not intend to harm this floor.

h. The access to all floors, except for the floor on which the petitioner's daughter lives, is through the stairwell.

i. The petitioner's son, _____, was signed on a marriage contract, and the wedding night was supposed to have been carried out in this summer. The petitioner or his family members had no knowledge of the son's intention of carrying out a terror attack. On the morning of the attack, the petitioner and his son even had a conversation about the son's expected wedding in the summer. The petitioner did not believe that his son is capable of committing such an act, and at first he was sure that it was a mistake in identity.

j. The path that the petitioner's son chose is contradictory to all the values and principles in which the petitioner believes and according to which he educated his children. The petitioner opposes any violent and terror activity as well as any harm to innocent civilians. Had he known of his son's intentions, the petitioner would have done everything he could to stop him. The petitioner's affidavit is attached hereto and marked **p/2**.

2. On August 6, 2008 the respondent notified with respect to his intention to confiscate and to demolish the petitioner's house. A copy of this notice is attached hereto and marked **p/3**.

3. On August 13, 2008, in accordance with an extension given by the respondent, the petitioner filed his objections through Adv. Yihya. A copy of this objection is attached hereto and marked **p/4**.

4. The objection was denied. A copy of a reply on behalf of the respondent is attached hereto and marked **p/5**. The reply was accompanied by a Confiscation and Demolition Order, which is attached hereto and marked **p/6**.

5. On September 2, 2008 the petitioners filed a petition to this Honorable Court – HCJ 7528/08. In that petition the petitioners requested to receive a copy of the findings of the Shani Report – which examined the advisability of exercising Regulation 119 of the Defence (Emergency) Regulations, 1945; the copy of the engineering plans which enable the respondent, as he alleges, to demolish the middle floors – floors 2 and 3 – in the four floor building, which belongs to Petitioner 1; and a copy of the evidence which tie the Petitioner's son, the perpetrator of the attack at Yeshivat Mercaz HaRav in March of this year, to an illegal organization. The Honorable Court was also moved to grant an interim order, which prohibits the activation of Regulation 119 until the conclusion of the proceedings in that petition.

6. Following the filing of the aforesaid petition, an interim order was given by the Honorable Court – similar to the order requested in this Petition. A copy of the order is attached hereto and marked **p/7**.

7. On October 29, 2008 a notice and a request to dismiss the petition was filed, in light of the fact that the petitioners had received what they sought. A copy of the notice in HCJ 7528/08 is attached hereto and marked **p/8**. According to the agreed between Adv. Helman, the respondent's counsel there, and the petitioners' counsel, an extension was given until November 6, 2008 for the purpose of filing this Petition to the Honorable Court.

**The petitioners' Arguments**

**The Change of Policy**

8. a. The petitioners argue that there is no room to change the respondent's policy, which was decided following the discussions in HCJ 7733/04 **Mahammud Ali Nasser and HaMoked: Center for Defence of the Individual v. Commander of IDF Forces in the West Bank**, according to which the respondent decided to take back his intention to use Regulation 119 in general.

   b. On December 13, 2004 a hearing was held in the aforementioned petition. At the end of the hearing, the continuation was postponed by 90 days, after a discussion between the court and the respondent's counsel there. A copy of the court's decision dated December 13, 2004 is attached hereto and marked **p/9**.

   Following the aforementioned hearing, a military committee was formed. In a previous petition – HCJ 7528/08 – which was filed by the same petitioners, we requested to receive a copy of the committee's findings, and evidence, if any, which tie the Petitioner's son to an illegal organization, as well as an engineering plan. Following the filing of the petition it became evident to the petitioners that this is a presentation which was prepared by the think tank headed by Major-General Shani. A copy of this presentation is attached hereto and marked **p/10**.

9. At first we will refer to data which were brought up by the think tank:

   a. On slide No. 20, p. 10 of Exhibit **p/9**, under the title "Main Insights", subtitle "The Erosion of the Tool", the following was noted:

      > "The tool of demolition in the context of the deterrence component is "eroded"."

   b. On slide No. 22, p. 11 of Exhibit **p/9**, under the title "Main Insights – Continuation" the following was noted:

      > "<u>The Deterrence (State of Mind - 1)</u> – there is a consensus among the intelligence agencies with respect to the correlation between demolition of terrorists' houses and deterrence. In light of the sensitivity of the matter, the Central Command is carrying out a balanced and regulated process for the demolition of terrorists'

houses (The NPT Committee, Determination of Criteria and so forth) – but the deterrence factor still should only be factored **as part** of the considerations." (Emphasis in original, A.R.).

c. On slide No. 27, p. 14 of Exhibit **p/9**, under the title "A Different Approach to the "Automatic" Thought Process in the matter of Demolition of Houses (State of Mind - 4)" a chart which we describe as follows:

Under the title "Fairness":

"A military action the effect of which creates public pressure in order to gain a certain achievement." There are three arrows which are coming out of the title and which lead to three components:

1. "Deterrence: of the Palestinian public and of the terror organizations for the purpose of reduction in the suicide attackers' phenomenon."

2. "Will: for the Israeli public – "Indeed the IDF is acting…".

3. "Denunciation and prevention: with respect to the Palestinian civilian population and with respect to the Authority for denouncing the launching of Qassam rockets and mortars."

These three components lead to one title: "The Objective Result": Harming many individuals and a lot of property." (Emphasis in original, A.R.).

And this leads to the third title: "The effect created:

1. The Effect – Lack of Legitimacy

Reverse effect

2. "This is not what we meant…"

d. On Slide No. 28, on p. 14 of Exhibit **p/9**, the title of which is "The Legitimacy", the following was noted:

And even though it is all legal…

In the test of the international law

In the test of the international community

In the test of democracy

In the test of self image

> In the test of quantities
>
> **The action is no longer legitimate and is at the edge of the law!!!** (Again, emphasis is in original, A.R.).

e. On Slide No. 33, on p. 17 of Exhibit **p/9**, the title of which is "**In Conclusion**", the following was noted:

> "The IDF, in a Jewish and democratic State, cannot be walking on the edge of legality and all the more so on the edge of legitimacy!!!" (As in original, A.R.).

10. a. The findings of the think tank were partially published at that time in the media. We refer to part of an article that was published by Amnon Strashnov - who in the past was, *inter alia*, the President of the Military Court in Ramallah, the MAG and a Tel Aviv Jaffa District Court Justice – in "Haaretz" newspaper on February 21, 2005, under the title "Beyond Security Considerations":

> "It would not be superfluous to note – as the committee has determined as well – that in no case was it proven that the demolition of the houses led to the cessation of terror acts or to the reduction of the same in any significant manner, and perhaps it even led to the contrary. It has been found that also the deterrence factor did not work in this case."

A copy of this article is attached hereto and marked **p/11.**

b. We have learned that the think-tank determined that the use of Regulation 119 has contrary results. Instead of serving as a tool for deterrence of the masses, and preventing future terror attack in the context of the Israeli-Palestinian conflict, the use of the Regulation increases hatred, deepens the lines of conflict and spurs additional vengeance attacks .

c. Following the presenting of the presentation the policy was changed. The Defence Minister adopted the think tank's recommendations. Since then, the use of Regulation 119 was discontinued and this is despite the existence, unfortunately, of attacks no less murderous than the case at bar. (For example: an attack dated April 17, 2006 in the Old Tel Aviv Central Bus Station; an attack dated December 5, 2005 near the shopping mall in Netanya. According to "B'tselem" Data – Israeli Civilians Killed by Palestinians in Israel).

d. The petitioners argue that the findings of the think tank are also valid today, three years after the discontinuation of the use of this Regulation, and that there is no justification for changing the policy once again.

e. The Honorable Court determined in HCJ 7733/04 **Mahammud Ali Nasser and HaMoked: Center for Defence of the Individual v. Commander of the IDF Forces in the West Bank** that:

> "As the respondent noted, at this point there is no intention to demolish the Petitioner's house. This decision derives from the change of policy with respect to the use of authority by virtue of Regulation 119 of the Defence Regulations.
>
> …
>
> In addition, it would not be superfluous to note that the fundamental issue of the demolition of houses in the region is being discussed in a petition which is pending in this very court (HCJ 4969/04 **Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Southern Command in the IDF***)*, and for this reason as well there is no need to address these arguments in this Petition."

In HCJ 4969/04 **Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Southern Command in the IDF** it was determined as follows:

> "5. We have come to the conclusion that in view of the respondents' notice with respect to the intention of avoiding the demolition of houses this is not the time to discuss the Petition on its merits. A decision on the petitioners' fundamental arguments is not necessary at this time."

**"Guilt by association"**

11. a. We refer to a segment in David Cole's article, "Terror Financing, Guilt by Association and the Paradigm of Prevention in the "War on Terror" in Counterterrorism: Democracy's Challenge (Bianchi & Keller eds., Hart Pub. 2008) – Georgetown Law, Faculty Working Papers, at p.240.

> "The third statute that the government relies upon to penalize support of "terrorists" is the International Emergency Economic Powers Act (IEEPA). This statute was originally enacted to empower the President during emergencies to impose economic embargoes on foreign nations. It was used exclusively for that purpose until 1995, when President Bill Clinton first used it not to target nations as a matter of nation-to-nation diplomacy but to target disfavored political groups. Clinton named ten Palestinian organizations and two Jewish groups as "specially designated terrorists". … After the attacks of 11 September 2001, President Bush invoked the same authority to name 27 "specially designated global terrorists". … At the same time he authorized the Secretary of the Treasury to designate still others using extremely broad criteria. Until recently, the Treasury Secretary could designate an

> individual or entity based solely on a finding that he or it was merely "otherwise associated with" someone else on the list. In 2006, a federal court declared that provision unconstitutional: *Humanitarian Law Project v. US Dept of Treasury*, 463 F Supp 2d 1049 (CD Cal, 2006). The Treasury Department then amended its regulations to define "otherwise associated" more narrowly, to mean those entities … or individuals that "own or control; or (b) …attempt, or … conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to a designated entity."

The presence of the association itself, "otherwise associated", was sufficient for enabling the activation of the authority by the Minister of Finance until the court intervened and decreased the scope of the authority. In the case at bar, the family association between the petitioner and the performer of the attack sufficed in order to enable the activation of the authority.

b. The petitioners argue that there is a need to reduce the scope of the authority, in the spirit of the Basic Law: Human Dignity and Liberty. We argue that the Regulation itself cannot meet the restriction clause in the law, an argument that was dismissed numerous times by the Honorable Court in previous cases. The petitioners argue that the scope of the authority should be reduced: only if it is proven that the house tenants have a connection to the actual performance of the attack – and not only a blood connection to the performer thereof – will it, perhaps, be possible to activate Regulation 119. The petitioner's guilt is due to his relation to the performer of the attack – he is his father. The petitioners argue that the Honorable Court's intervention is required in the case at bar, as it was carried out in other cases, in which the respondent, or anyone on his behalf, exercises authorities that exist in the book of laws, and which belong to another era. There is no disagreement that Regulation 119 is a legal procedure in the State of Israel, but the circumstances of its birth are not similar to the State's situation today.

c.

> "The Supreme Court has declared guilt by association 'alien to the traditions of a free society and the first Amendment itself". It violates both the Fifth Amendment, which requires that guilt must be personal, and the First Amendment, which guarantees the right of association." Cole at page 241.
>
> In the Judgment *Scales v. United States* 367 US 203 (1961), it was determined as follows:
>
> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity,

> … that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." at 224-5.

The petitioners believe that this Honorable Court is also acting in the same spirit. A blood connection to the perpetrator of the horrendous attack is not sufficient to enable the respondent to seal two floors in the house.

d. The Honorable Justice (Ret.) Barak in 2316/95 Further Criminal Hearing **Ganimat v. the State of Israel**, as quoted in FHHCJ 2161/96 **Sharif v. GOC Homefront Command**, Piskei Din 50(4), 485:

> "Upon the enactment of the basic laws on human rights a significant change occurred in the Israeli legal field. Any legal plant therein is affected by this change. This is the only way that harmony and unity in the Israeli law will be achieved. The law is a system of connected vessels. A change in one of those tools affects all tools. There is no possibility of distinguishing between old law and new law when it comes to the interpretive impacts of the basic law. Indeed, any administrative discretion that is granted according to the old law is required to be exercised in the spirit of the basic laws; any judicial discretion that is granted according to the old law is required to be exercised in the spirit of the basic laws; and in general, any statutory norm should be interpreted under the inspiration of the basic law".

e. Professor Kenneth Mann published an article in the Middle East Review of International Affairs, Vol 8, No. 1 (March 2004), the title of which is: "Judicial review of Israeli Administrative Actions Against Terrorism: Temporary Deportation of Palestinians from the West Bank to Gaza". The following was written on p. 31:

> "Under the Court's jurisprudence, the essence of a preventive sanction is that it is addressed to a proven source of danger – an individual against whom evidence of dangerousness has been presented and a determination of actual dangerousness made. In contrast, a deterrent sanction addresses a general population within which it is assumed that is a statistically supported latent danger, but imposition of the sanction is not based on proving the dangerousness of any particular individual."

f. We refer to several judgments in which it was determined by this Honorable Court that even in the case of a preventative measure, in order to enable severe harm to human rights in the State of Israel, as a Jewish and democratic state, there is need for evidence that ties the victim itself and general

prevention or a vague argument with respect to the "deterrence of the masses" are not sufficient.

g. In HCJ 2/97 **Abu Arafat et al. v. Major-General Shmuel Arad – GOC Homefront Command et al.** it was determined:

> "7. … Second, the respondents emphasize that there is no room to draw and infer from the criminal law, since Regulations 119's purpose is not punitive, but preventative."

And if the issue at hand is a preventative measure, the petitioners argue that this Honorable Court has already decided in the past that the scope of the powers of the respondent, or anyone acting with the same powers, should be reduced when activating draconian powers – as in the case at bar.

h. It was determined in the past, already in HCJ 554/81 **Branssa v. GOC Central Command**, Piskei Din 36(4) 247, 249-250, as follows:

> "This is the appropriate place to emphasize, for the avoidance of any doubt, that the authority, the boundaries of which were outlined in Regulation 110, cannot be activated in order to punish a certain person for his past acts or in order to serve as a substitute for criminal proceedings. The authority is preventative, in other words forward looking, and cannot be used, unless it is required in order to prevent a foreseen danger…
>
> The authority could not be exercised according to Regulation 110, unless the entirety of the evidence, brought before the military commander, indicated future foreseeable danger posed by the petitioner, unless steps are taken which are intended to limit his actions and to prevent a substantial part of the damage foreseen from him…"

i. In Further Criminal Hearing 7048/97 **Anonymous Persons v. the Minister of Defense**, Piskei Din 54(1) 721, 743-744 (2000), it was determined as follows:

> "The prejudice to liberty and to dignity is so substantial and deep that it cannot be tolerated in a country that is a proponent of liberty and dignity, even if state security reasoning leads to carrying out this step… A person should not be detained in an administrative detention unless he himself, with his own actions, constitutes a danger to the state's security. This was the state of affairs before the enactment of the Basic Law: Human Dignity and its Liberty. This is certainly the case after this basic law was enacted, and raised the human liberty and dignity to a super-statutory constitutional level."

j. HCJ 9534/03 **Adris v. the Commander of the IDF Forces in the West Bank**, Takdin Elyon 2003(3) 82 (2003) determined as follows:

> "The military commander has broad discretion and he can choose from the prevention measures which are at his disposal the most effective measure for preventing the danger to national security. Furthermore, for the purpose of choosing this measure, the commander is also entitled to consider considerations of deterring the masses, provided that the person himself constitutes danger to the State's security."

k. HCJ 7015/02 **Ajuri v. IDF Commander in the West Bank**, Takdin Elyon 2002(3) 1021, 1030 (2002), determined as follows:

> "Our nature as a democratic state that is a proponent of freedom and liberty leads to the conclusion that a person's residence is not delimited unless that person himself, with his own actions, constitutes a danger to the State's security… note well: the purpose of the delimitation is not punishment. Its purpose is prevention. It is not intended to punish the person whose residence has been delimited. It is intended to prevent him from continuing to constitute a security threat."

l. The European Court of Human Rights also determined that the limitation of human rights must be based on an evidential basis, which ties the person himself, and not based on a blood connection. In **Labita v. Italy** (Application No. 26772/95), judgment of 6 April 2000, para. 196-7), the court determined that the fact that the petitioner's wife is the sister of the mob leader (who in the meantime died) is not sufficient in order to enable the implementation of such grave limitations, without any substantial piece of evidence which indicates a significant threat from the petitioner himself.

12. a. It is not at all important to the respondent whether the house tenants were in any way connected to the planning of the attack. In the case at bar it is clear to all that the attacker's family members were unaware of his intentions ahead of time, and did not cooperate with him in any way whatsoever, when he decided to carry out his intentions.

b. In a reply to HCJ 7528/08 **Abu Dahim and HaMoked: Center for Defence of the Individual v. GOC Homefront Command** it was disclosed that:

> "… the decision of the Homefront Commander to instruct the confiscation and demolition of the aforesaid floors **was not based on evidence material that connects the attacker to illegal organizations**, according to your definition, but on evidence which indicate that the attacker carried out a serious and violent offence, grounded in nationalistic motivations,

> against the Defence Regulations." (Emphasis in the original, A.R.).

A copy of the letter dated October 7, 2008, of the Legal Advisor to the Homefront Command, Captain Roy Reiss, is attached hereto and marked **p/12**.

c. The petitioners argue that a person who intends to carry out an attack and to kill innocent people – and himself – thus proving how little he actually values life – of others and of himself – will not be affected by any future danger to his family's home. The petitioners also argue that a relative who is living with a person who intends to carry out an attack will prevent him from doing so not due to the concern of harm to his property, but due to his values as a human being.

13. The petitioners examined with an entirely random test the past use of Regulation 119, and it transpired that in all the judgments which were examined, the presence of a connection between the perpetrator of the attack and illegal organizations was noted, and this is something which, as aforesaid, is not present in the case at bar. The petitioners allege that this circumstance was not taken into consideration when it was decided to activate Regulation 119. According to Captain Reiss's reply, Exhibit **p/11** of the petition, the reason for the activation of the Regulation is the fact that the perpetrator acted on nationalistic grounds. The petitioners argue that the respondent is activating Regulation 119 on a racial basis. A Jewish family of the perpetrator of an offense, which is no less severe than the offense committed by the son of the petitioner, on nationalistic grounds, without any connection to a hostile organization, is not subject to the danger of demolition and sealing of its house due to its son's actions.

Below are the results of the random examination:

a. In HCJ 10467/03 **Sharbati et al v. GOC Homefront Command**, Piskei Din 58(1), 810, pp. 811-812, it transpires that "the Petitioner's son… was recruited to Hamas's military faction…"

b. In HCJ 8084/02 **Abbasi v. GOC Homefront Command**, Piskei Din 57(2), 55, pp. 58-59, it transpires that an indictment was filed against the petitioners, and which attributes to them, *inter alia*, "membership in a terror organization".

c. HCJ 6996/02 **Zaaruv v. the Commander of the IDF Forces**, Piskei Din 56(6), 407, pp. 408-409, on May 12, 2002, the son left the house "on a mission on behalf of a terror organization…".

d. In FHHCJ 2161/96 **Sharif v. GOC Homefront Command**, Piskei Din 50(4) 485, pp. 488-489, the perpetrator of the attack was "a senior Hamas activist who was a member of Hamas's military faction (the Izz al-Din al-Qassam Squads…").

e. In HCJ 987/89 **Kawagee v. the Commander of the IDF Forces**, Piskei Din 44(2) 227, pp. 230-231, it transpired that the petitioner's son "admitted to being a member of the Shabiba organization in the village of Tamun".

f. In HCJ 2209/90 **Shouahin v. The Commander of the IDF Forces in the Region**, Piskei Din 44(3), 875, pp. 877-878, it transpired that "the leader of the shock forces in the village of Yatta" was living in the Petitioner's house.

g. In HCJ 893/04 **Teib Ali Farj et al v. Commander of the IDF Forcers in the West Bank**, Takdin Elyon 2004(1), 2123, p. 2124, it transpired that the petitioner's son "is head of the infrastructure of the terror organization the Popular Front for the Liberation of Palestine".

h. In HCJ 6189/94 **Taisir Ben Yossef Abdul Nabi v. the Minister of Defence**, Takdin Elyon 94(3), 1277, it transpired that the "terrorists were members of the Hamas organization" and it was decided to seal their houses.

i. In HCJ 6026/94 **Abed Al Rahim Hassan Nazal v. The Commander of the IDF Forces**, Piskei Din 48(5), 338, pp. 347-348, despite the death of the terrorist, Regulation 119 was used "since in this case it is a terrorist who is a member of an extreme Islamic terror organization, the members of which "view death while attacking Israeli targets a positive result which guarantees their place, as martyrs, in the afterlife." The second consideration is the severity of the attack; in view of the increase in severe attacks that were carried out in recent months by extreme terror organizations…"

   That judgment also determined:

   "Indeed this act was carried out as a mission on behalf of a terror organization, which in its publications following the attack not only boasted in the horrible act of murder, but also announced its intentions to repeat the performance of additional murder acts by suicide terrorists. The necessity of deterrence, under these circumstances, is clear and apparent. This necessity is what dictated the turning point in the security system's policy, and under these circumstances I cannot say that the turning point was not required due to the new circumstances."

j. In HCJ 5518/90 **Achmed Ali Abu Tais v. the Commander of the IDF Forces**, Takdin Elyon 91(1), 227, it transpired that "each one of three young men who were involved in intensive activity in the shock committees of the Fatach Organization…"

k. In HCJ 361/82 **Hassan Hallaf Aliel Chamri v. the Commander of the Judea Region**, Piskei Din 36(3), 439, pages 440-441, "it also transpired from the investigation that the two performed the act of murder, as a mission given to them as members of the Fatach Organization".

l. In HCJ 8575/03 **Azadin v. The Military Commander in the West Bank** it transpired that "the evidence collected after the attack led to an unequivocal conclusion, according to which the attacker is Ramez Fahmi Azadin Al Salim (hereinafter: **the terrorist**), the son of the petitioner (hereinafter: **the petitioner**).

   This determination was based on finding the Terrorist's identification certificate in the scene of the terror attack and on the publication of his name

in the Izz al-Din al-Qassam Squads' website, as the perpetrator of the terror attack."

m. In HCJ 8262/03 **Abed al Kader Abu Salim v. the Commander of the IDF Forces in the West Bank**, it transpired that "the petitioner's son was an activist in the Hamas movement in his village…".

The petitioners argue that the use of Regulation 119 in the case at bar is improper due to the racial considerations which guide the same.

**Various Arguments**

14. The petitioners argue, despite the judgment of this Honorable Court in the past that this is a "punitive" regulation. From a review of the Regulations themselves it clearly transpires, and without a shadow of a doubt that this is a pure and simple punitive regulation. Regulation 119 originally appears on p. 50 under the title Part XII – Miscellaneous Penal Provisions.

We are unable to punish a man who died. Moreover, punishing the petitioner and his family due to the acts of the family member, when there is no evidence which indicates a connection between the perpetrator's acts and his family members who live in the same house, apart from the blood connection, is an act which is based on vengeance and provision of a reply to the vengeance cries which come from the street. This is also a collective punishment which is prohibited by any law.

15. The petitioners argue that the use of Regulation 119 does not coincide with the State of Israel's values as a Jewish and democratic state: "The fathers shall not be put to death for the children", in other words my father is not responsible for my actions. What transpires from the history of the use of Regulation 119 for the duration of the State of Israel's existence indicates that this saying is true as long as the perpetrator of the terror attack – regardless of a connection to a hostile organization – is Jewish.

**The Engineering Examination**

16. In the context of HCJ 7528/08 we requested to receive an engineering plan which enables the respondent to demolish two floors in a four floor building. The respondent also stated that after the sealing and the demolition it will be possible to use the top floor – as it is today. In the first engineering plan which was submitted to the petitioners' counsel, it was stated that instead of demolishing the floors, the respondent will be satisfied with the sealing thereof. A copy of this initial opinion is attached hereto and marked **p/13.** Following the receipt of the opinion, the petitioners' counsel applied to the respondent's legal advisor and requested clarifications. A copy of this application is attached hereto and marked **p/14**. An additional opinion was transferred to the petitioners' counsel: its copy is attached hereto and marked **p/15.**

17. a. An engineer on behalf of the petitioners, Mr. Yoram Kadman, visited the house on October 30, 2008. According to his opinion, due to the absence of engineering plans for the time of building of the house, and according to calculations made after visiting the location, the sealing method suggested by

the respondent's engineers endangers the entire building. Mr. Kadman determines:

> "I completely reject the conclusions of Cohen, the engineer, who says that since the structure looks okay then it can be presumed that this is a structure built according to the customary rules and standards."

Mr. Kadman also adds:

> "After the examination which I carried out, and which is based on the findings that were described below, indeed any action which will add a load to the existing structure will clearly endanger its stability."

A copy of this opinion is attached hereto and marked **p/16.**

**Revenge**

18. The matter should be stated clearly: this is an action whose main purpose is revenge. The voices of the street and the establishment demand so. These are irrelevant considerations. Right wing groups tried to carry out a pogrom at the Petitioner's house promptly after the terror attack occurred. The police stood by – albeit protecting the Petitioner's house, but not preventing the destruction of private property in the village.

    The political system in Israel is turbulent. The prime minister, even before announcing his intention to retire, spoke firmly of the need of action against the Petitioner's house. The Minister of Defence, coming from a party which aspires to be in power, presented a position just as firm. The Interior Security Minister also joined the vengeance voices emerging from the leadership of the Jewish and democratic State. This is the continuation of the same policy since the establishment of the State: they are Arabs. They only understand the language of force. It must not be forgotten that the perpetrator of the attack is a resident of the State, and by this he also expressed the failure of the State.

19. We refer to the minority opinion in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip,** Piskei Din 46(3) 693, on p. 705 and so forth:

> "Acts of legislation which were created during the Mandate period – including the Defence Regulations – had one meaning during the Mandate period and were awarded another meaning after the establishment of the State, and indeed the values of the State of Israel – a Jewish, free and democratic state – are significantly different than the basic values that the Mandate-holder laid down in Israel. Our basic principles – and in our days – are the basic principles of a lawful democratic state which is the proponent of freedom and justice, and these principles are the ones who will infuse life into the interpretation of these and other acts of legislation.

> See and compare, for example: HCJ 680/88 **Schnitzer et al v. Chief Military Censor et al.** Piskei Din 42(4) 625, 617 and so forth (the opinion of Justice Barak).
>
> This was the state of affairs since the establishment of the State, and certainly it is so 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 universal human values, including the value "there shall be no violation of the property of a person" (Section 3 of the Law) and "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required" (Section 8 of the Law)."

20. The petitioners claim that the irrelevant considerations are guiding the respondent in his decision to activate Regulation 119, in other words – revenge. Furthermore, we cannot recall any case in which the perpetrator of the attack was Jewish, who caused the death of innocent civilians and/or residents – albeit Arabs – and in which a decision was made to take action in the context of Regulation 119 against his family. It is clear to us that the number of cases is not similar, however deterrence is deterrence. The blood of a dead Jew is no thicker than the blood of any other dead person.

21. Since the judgment in the aforementioned HCJ 7733/04 **Nasser** was given on June 20, 2005, a little more than three years have passed. Since the attack in Yeshivat Mercaz HaRav there have been additional attacks carried out by drivers of heavy machines; in one of them people were killed. In addition, there was another incident, in which a young driver lost control over his vehicle and hit soldiers on Shivtei Israel St.; three soldiers were lightly wounded.

    Even if it were possible to determine that the case at bar is "ideologically" based, due to the identity of the perpetrator and the identity of the victims, the fact that this is an act that also derives from desperation and helplessness, in view of the sad and hopeless status of the permanent residents of East Jerusalem, cannot be disregarded. This situation may even lead to loss of sanity.

22. The petitioners argue that the respondent or the State do not have any "answer" or practical solution for phenomenon of suicide bombers or of perpetrators of other attacks, as in the case contemplated in this Petition. As long as the State of Israel refuses to converse with its enemies and supports, mostly, the language of force, and as long as there is no end to this conflict, performance of acts such as the act carried out by the son of the petitioner's family will continue. The use of the Regulation was intended to sooth the public opinion and to point out a practical action carried out by the security system. Nothing more. We argue that this is an improper and irrelevant consideration.

**Conclusion**

23. We refer to the statements of the Supreme Court in HCJ 6288/03 **Saada et al. v. GOC Homefront Command**, Takdin Elyon 2003(4), 404, p. 406:

> "And nevertheless, and despite the legal grounds, it is a troublesome thought from a moral perspective that the terrorist's sin is being borne by his family members, who as far as it is known did not assist him or know about his actions. This troubling thought is routed in an ancient principle in the Jewish tradition according to which "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin." (Deuteronomy 24, 16; and compare to Justice M. Cheshin's words in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, Piskei Din 46(3) 693, 705-706). The Sages of Blessed Memory even criticized King David for having violated this principle by not sparing Saul's seven sons (Samuel II 21, 1-14) and took pains to resolve the difficulty (Yevamot 79, 71)."

Justice Tirkel continues and writes:

> "However, the chance that demolishing a house, or the sealing thereof, shall prevent bloodshed in the future requires us to harden the heart and to spare the life, which may fall victim to terrorists' horrific acts, more than it is worthy to spare the tenants of the house. There is no other choice."

With respect to the latter part of the quotation above, we request to mention that use of force against Palestinians has already been carried out for many years. We believe that the fact that the actions of some of the State's residents spurs disgust, and even more than that, should not dictate the respondent's actions. The Honorable Court is moved to intervene and to restrain the respondent, who is acting as a representative of a Jewish and democratic State, and to signal the continuation of the change in direction which led to the non use of Regulation 119 for 3 years since the discussion in HCJ 7733/04 mentioned above.

24. Therefore, the Honorable Court is moved to grant the requested orders and to make them final.

Jerusalem, November 6, 2008

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Andre Rosenthal
Counsel for the petitioners