At the Supreme Court
Sitting as the High Court of Justice

HCJ 5295/14
Scheduled for: August 7, 2014

Ikram Abu 'Ayesha and 6 others
all represented by counsel, Adv. Smadar Ben-Natan
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The Petitioners

v.

Military Commander of Judea and Samaria Area
represented by the State Attorney's Office
Ministry of Justice, Jerusalem
Tel: 02-6466715; Fax: 02-6467011

The Respondent

Respondent's Response

1. According to the decision of the Honorable Justice Z. Zilbertal dated July 31, 2014 and the decision of the Honorable President Grunis dated August 3, 2014, the respondent hereby respectfully submits his response to the above captioned petition.

2. The above captioned petition concerns the decision of the respondent by virtue of his authority pursuant to Regulation 119 of the Defence Regulations (Emergency), 1945 (hereinafter: the **Defence Regulations** and **Regulation 119),** to order, for deterrence purposes, the seizure and demolition of an apartment in which lived the terrorist, 'Amer Abu 'Ayesha (hereinafter: **'Amer Abu 'Ayesha**).

3. 'Amer Abu 'Ayesha, together with Marwan Sa'adi Abed Alafo Qawasmeh (hereinafter: **Marwan Qawasmeh**) and Husam Ali Hassan Qawasmeh (hereinafter: **Husam Qawasmeh**) are members of a Hamas cell which abducted and murdered, on June 12, 2014 three Israeli youths who were on

their way home from their schools: the late Naftali Frenkel, the late Gil-ad Shaer and the late Eyal Ifrach.

It should be noted, that the families of Marwan Qawasmeh and Husam Qawasmeh also filed petitions against the decision of the military commander to exercise his authority pursuant to Regulation 119 against the apartment and house in which these tow terrorists lived (HCJ 5290/14 and HCJ 5300/14, respectively).

4. The respondent will argue that this petition should be denied, in the absence of cause for intervention by the honorable court. The respondent will argue that against the backdrop of the severe deterioration of the security condition in the Judea and Samaria area, which reached its peak in the abduction and murder of the three Israeli youths about a month and-a-half ago, the exercise of the authority pursuant to Regulation 119 against the structures in which lived the members of the cell which executed the terror attack is imperative for the purpose of deterring other terrorists from carrying out additional severe terror attacks.

5. As will be clarified below, the vast majority of the general arguments raised by the petitioners is not new. These arguments have already been discussed and rejected in many judgments which were given by this honorable court.

   It should be added, that only recently, on July 1, 2014, the judgment of the Honorable Court (the Honorable Deputy President Naor, with the consent of the Honorable Justices Danziger and Shoham) was given in HCJ 4597/14 **'Awawdeh v. Military Commander of the Judea and Samaria Area** (hereinafter: **'Awawdeh**), in the context of which the Honorable Court reiterated the rulings which were established in connection with the exercise of the authority pursuant to Regulation 119, and denied said petition.

   Under these circumstances, the respondent will argue that there is neither cause nor justification to discuss these arguments once again within the framework of this petition.

6. In view of the deteriorating security condition, in view of the fact that it is extremely important to deter additional potential terrorists; and in view of the fact that the respondent is of the opinion that the exercise of the authority pursuant to regulation 119 for the seizure and demolition of the house of the terrorist 'Amer Abu 'Ayesha, would indeed significantly contribute to the deterrence of other terrorists – the respondent will request this honorable court to make a decision in the above captioned petition as soon as possible.

The main facts relevant to the matter

General - the deteriorating security condition in the Area over the last two years

7. Over the last two years, the security stability in the Judea and Samaria area (hereinafter: the **Area**) has been deteriorating. This is evidenced by an increase in the general number of terror attacks (including the number of severe attacks), in the number of spontaneous terror attacks and in the number of the injured Israelis.

8. This tendency is well reflected in the data concerning terror which accumulated from the beginning of 2013 until mid June 2014. Thus, in 2013, 1,414 terror attacks were registered in the Area, and in 2014, until this date, about 1,200 terror attacks were registered. In addition, during this period, an irregular increase in the number of Israeli casualties was also registered as a result of terror attacks launched from the Area (six Israelis were killed during this period, whereas in 2012 no Israelis were killed at all).

9. Furthermore, from the beginning of 2014 - and especially during the last months - there has been a sharp increase in the number of severe terror attacks, in which Israeli citizens were killed or in which firearms were used, as well as in attempts to carry out severe terror attacks.

It should be emphasized that this concerns dozens of consecutive terror attacks which indicate of a serious deterioration, such as the following events:

a. **March 2014**: The activity of a military Hamas fugitive from the Jenin refugee camp, who was directed by Hamas headquarters in the Gaza Strip to promote a host of terror attacks, including shooting attacks, against Israeli targets in the Area, was thwarted. The fugitive was killed in a military operation, during exchange of fire with IDF forces in Jenin.

b. **April 2014**: A shooting attack at an Israeli vehicle in Tarqumia checkpoint. In this terror attack one Israeli citizen was killed and two others were injured.

c. **April 2014**: Six activists of a military group from the areas of Jenin and Bethlehem were arrested. In this case, the intention of the group, directed by an "international Jihad" activist in the Gaza Strip, to promote a shooting attack against IDF forces in the Jenin area, was prevented.

d. **May 2014:** the intention of a suicide bomber to explode an explosive belt composed of improvised bombs, which was carried on his body, in Tapuach junction, was frustrated. The members of the cell from Nablus, which were behind the attempted terror attack, were arrested by IDF forces shortly thereafter.

e. **May 2014:** a shooting attack was carried out in Ramat Shlomo neighborhood in Jerusalem, in which a Palestinian terrorist shot at a group of Israeli citizens. The event ended without injuries.

f. **June 2014**: A shooting attack was carried out by Palestinian terrorist using small-arms, at an IDF position in Betunia. The military force shot at the terrorist who fled the scene. The event ended without injuries

g. **June 2014**: A shooting attack was carried out from a passing Palestinian vehicle, using small-arms, at an IDF position near the tunnels road/Bethlehem bypass. The event ended without injuries and the attacking vehicle fled the scene.

h. **June 2014**: An abduction and murder attack on June 12, 2014, in which three youths who were on their way home from their schools in the Gush Etzion area, were abducted and murdered. As will be specified below, according to respondent's information, this terror attack was planned and carried out by members of a Hamas cell, the terrorists Marwan Qawasmeh, 'Amer Abu 'Ayesha and Husam Qawasmeh.

i. **July 2014:** A shooting attack was carried out from a passing Palestinian vehicle, using small-arms, at an Israeli citizen in Rechelim junction in the Area. The citizen was moderately injured.

j. **July 2014:** A Hamas' attempt to carry out a terror attack in Israel, using a booby-trapped vehicle, was thwarted as the vehicle was seized in a military checkpoint in the Area.

k. **August 2014:** A ramming attack in Jerusalem, with a tractor which was driven an East Jerusalem resident. One Israeli citizen was killed and a few others were injured.

l. **August 2014:** A small-arms shooting attack in Jerusalem in which an IDF soldier was severely wounded.

10. It should be emphasized, that from the beginning of 2014, about 111 intended and attempted terror attacks were thwarted, in a variety of severe methods (abduction, bombs and shooting) in different regions in the Area.

11. In addition, during the last four quarters, a sharp increase in the level of alerts against abduction attacks, is noticeable, as follows:

a. In the third quarter of 2013 – **7** abduction alerts;
b. In the fourth quarter of 2013 – **8** abduction alerts;
c. In the first quarter of 2014 – **12** abduction alerts;
d. From the beginning of April 2014 – **15** abduction alerts.

12. The terror activity is mostly lead by local and "decentralized" groups, and by terrorists who answer the profile of a "single terrorist". The latter were conspicuous lately in view of the instability in the Area, and contrary to the past, they do not come from the margins of society but rather have a normative profile.

13. In view of the above, abduction for negotiation and release of prisoners remains the most favorable method of terror attacks by all groups on scene. Thus, lately, a significant increase was marked in the number of abduction routes directed by different terror activists, including from within Israeli prison (Hamas, Islamic Jihad and Tanzim activists). Until now, most of the routes were thwarted before they have operationally ripened.

14. We wish to update, that the vast majority of the above specified data concerning the deteriorating security condition in the Area have already been delivered to this honorable court about a month ago, within the framework of the proceedings in **'Awawdeh**, based on which the honorable court held that (paragraph 24 of the **'Awawdeh** judgment):

> "**In the beginning we have described the extreme circumstances currently prevailing in the Judea and Samaria area**, circumstances which lead to the conclusion that was adopted by the political echelon, that a change of policy was required. **I am of the opinion, that the data presented, all as specified above, constitutes a change of circumstances. There is no room to intervene with respondent's decision who has concluded that at this time actual deterrence was required, and that the demolition of the terrorist's house would result in such deterrence**. As held by us in our case law "the court is not inclined to intervene with the security agencies' evaluation concerning the effectiveness of using the measure of demolishing houses or sealing them as a means to deter others" (**Abu Dheim**, paragraph 11). Furthermore, as was noted in our case law more than once, it is impossible to conduct a scientific research which would prove how many terror attacks were prevented and how many human lives were saved as a result of taking the measure of house demolition (see, for instance: HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997)). **The conclusions arising from the severity of the recent events in Judea and Samaria are a clear matter for the respondent to attend to**. Petitioners' argument, that respondent's decision was tainted by extraneous considerations as a result of the kidnapping of the three

> youths, and did not derive from considerations of deterrence, is hereby rejected. The abduction of the youths constitutes part of the escalation in terror activity in the Judea and Samaria area, which underlies respondent's conclusion that a change of circumstances has occurred which justifies the intensification of the deterrence, by the demolition of 'Awwad's home. [Emphases added – the undersigned]

The terrorists - members of the Hamas cell which executed the abductin and murder attack

15. **Marwan Qawasmeh** – born in 1985, resident of Hebron. Was arrested for the first time when he was about eighteen years old, and at that time was sentenced to ten months in prison following his conviction of security offenses. Thereafter, he was arrested four more times, and in some of these events was held by virtue of administrative detention orders which were signed in his matter. In his last interrogation, in 2010, he admitted that he was recruited for military activity of Hamas in the Hebron area in 2009, that he was involved in military training in caves in the Hebron area, that he acted for the attainment of raw-materials for the manufacture of explosives, and that he assisted the organization to recruit additional youngsters for Hamas activity. For these actions Marwan Qawasmeh was imprisoned and was released from prison in March 2012.

16. **'Amer Abu 'Ayesha** – born in 1981, resident of Hebron. Was arrested for the first time in November 2005, and was held under administrative detention until June 2006. Later, he was arrested again for a short period in 2007. 'Amer Abu 'Ayesha's brother was a terrorist who was killed in November 2005, when he tried to throw a bomb at IDF forces. Even his father, Omar Abu 'Ayesha, was imprisoned several times following his conviction of terror offenses. The last time he was arrested was in 2008, when firearms and ammunition were seized in his home.

17. **Husam Qawasmeh** – resident of Hebron, about 40 years old, was imprisoned in the past (1995-2002) in view of Hamas activity, including being a member of cell which carried out bombing attacks. His family members were involved in the execution of severe terror attacks on behalf of Hamas. Thus, his brother, Hasin Qawasmeh, currently serves a life sentence for his part in a bombing attack near Jerusalem International Convention Center (Binyanei Hauma) in March 2011, in which a British tourist was killed and many others were wounded.

The involvement of the three terrorists in the abduction and murder of the three youths

18. On June 12, 2014 three Israeli youths were abducted – the late Naftali Frenkel, the late Gil-ad Shaer and the late Eyal Ifrach – from a hitchhiking stop in Gush Etzion, when they were on their way home from their schools.

19. The State has in its possession clear and unequivocal administrative evidence which show – **in a level almost reaching certainty** – that Marwan Qawasmeh and 'Amer Abu 'Ayesha were the ones who abducted and murdered the three youths on June 12, 2014, a murder which took place shortly after the abduction.

    Ever since the abduction and murder attack, Marwan Qawasmeh and 'Amer Abu 'Ayesha act like "fugitives" and hide from the security forces.

20. On June 30, 2014 the bodies of the three abducted youths were found in an area north of Beit-Kahel village, buried in a land plot owned by Husam Qwasmeh.

21. As soon as the bodies were found, Husam Qawasmeh left his home, hid, and intended to escape to Jordan with false papers, with the assistance of his family.

Husam was arrested by the security forces on July 11, 2014, in a house of a family member in Anata.

In his interrogation thus far Husam Qawasmeh admitted that he gave Marwan Qawasmeh and 'Amer Abu 'Ayesha who executed the abduction and murder headquarters services. Within the framework of his position, Husam obtained financing for the execution of the terror attack from Hamas activists in the Gaza Strip. He also admitted to have acquired weapons which were transferred by him to Marwan Qawasmeh. According to Husam Qawasmeh's interrogation, after the murder of the abducted youths, Marwan Qawasmeh met him, and the two drove together to the land plot which Husam acquired a few months earlier, and buried the bodies of the abducted youths over there. Later on, Husam assisted the two other terrorists to hide.

It should be emphasized that the gamut of the administrative evidence which the State has in its possession points – **in a level almost reaching certainty** – at Husam Qawasmeh's involvement in the terror attack.

22. In view of the fact that Marwan Qawasmeh and 'Amer Abu 'Ayesha have not yet been captured, and to avoid disruption of their interrogation after they are captured, and to avoid disruption of Husam Qawasmeh's interrogation which has not yet terminated, further details may not be disclosed within the framework of this open response, beyond the details specified above.

In any event, to the extent the honorable court finds it appropriate, and subject to petitioners' consent, the honorable court may be presented with the entire available information concerning the progression of the terror attack and the involvement of the three terrorists in the terror attack.

The exercise of the authority pursuant to Regulation 119 to seize and demolish the apartment in which 'Amer Abu 'Ayesha lived

23. On July 16, 2014 the respondent notified of his intention to "seize and demolish the west part of the firs floor in two story building in Hebron located in waypoint 208779/606900 […] in which lives **'Amer Omar Abed Alkader Abu 'Ayesha (ID No. 410783273)** (emphasis appears in the original – the undersigned].

In addition, it was stated that "This step is taken in view of the fact that the above referenced person, a former prisoner, executed on June 12, 2014 a terror attack, in which he abducted and later murdered, in unison with Marwan Sa'adi Abed Alafo Qawasmeh (ID No. 948406756) three Israeli youths, Gil-ad Shaer, Eyal Ifrach and Naftali Frenkel, near the settlement Alon Shvut. The position of the military commander is that this step may deter potential terrorists and promote the security of the Area." The notice also stated that the terrorist's family could appeal against the issue of the seizure and demolition order before the respondent, before a final decision in the matter is made by him.

A photocopy of the notice which was given on July 16, 2014 was attached to the petition as **Exhibit C**.

24. On July 17, 2014 the terrorist's family submitted to the respondent an appeal against the intention to use his authority pursuant to Regulation 119 towards the building. The appeal noted, inter alia, that "on June 30, 2014, prior to the receipt of this notice [the notice dated July 16, 2014 – the undersigned], IDF forces arrived to the family's home, and destroyed the east part of the second floor of the building in which the suspect lived with his wife and three children before June 12, 2014.

A photocopy of the appeal dated July 17, 2014 was attached to the petition as **Exhibit D**.

25. On July 28, 2014, after the respondent has examined the arguments of the appeal, a response letter was delivered to the petitioners by the respondent, in which it was stated, *inter alia*, that following the examination of the arguments "the military commander decided **to accept your appeal in part**, in the sense that **only that part of the two story building in which the terrorist and his nuclear family lived**, would be seized and demolished. Namely, **the north-east apartment on the upper floor of the building**. [Emphases appear in the original – the undersigned].

In addition, the response letter specified the factual background of the decision, and reference was made to the various arguments, factual and legal, which were raised in the appeal, and it was emphasized that:

> "19. In view of the information which was provided in the appeal, according to which the terrorist's apartment is the north-east apartment on the upper floor of the building, and not the apartment in which his family members currently reside (which is the apartment of the terrorist's brother), **the military commander of IDF forces in the Area decided to accept the appeal in part**. [Emphasis appears in the original – the undersigned].
>
> 20. **Accordingly, the intended demolition of the terrorist's home will be limited only to that part of the building in which the terrorist and his nuclear family lived, without causing any damage to the other parts of the building, or adjacent buildings**." [Emphasis appears in the original – the undersigned].

It was further emphasized in connection with the arguments which were raised in the appeal that:

> "25. It should be noted, that during the extensive search after the terrorist, the building was searched. Within the framework of the search, and **pursuant to the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009**, an operational break-in was carried out, of a wall in the terrorist's apartment on the second floor of the building, which was thought to have been a "double wall" which was used by the terrorist as a hiding place, based on information which was in the possession of the security forces, that there was a high risk, that the terrorist was armed and dangerous [Emphasis appears in the original – the undersigned].
>
> 26. On the other hand, the exercise of the authority under Regulation 119 of the Defence (Emergency) Regulations, 1945, pertains to the entire part of the building in which the terrorist and his nuclear family lived, in view of the fact that the purpose of the exercise of this authority is to create deterrence, and prevent the ability to reside in the entire part of the building in which the terrorist and his nuclear family live.
>
> 27. In view of the difference between the purpose of the search and the purpose of the demolition by virtue of Regulation 119, the search which was conducted does not revoke the authority of the

military commander by virtue of Regulation 119 and issue an order for the demolition of that part of the building in which the terrorist lived."

A photocopy of the response letter to the appeal dated July 28, 2014 was attached to the petition as **Exhibit E**.

26. Accordingly, on July 28, 2014, after the respondent decided to accept the decision in part, as aforesaid, the respondent signed, by virtue of his authority under Regulation 119, a seizure and demolition order of the the north-east apartment on the upper floor of a two story building in Hebron, in which the terrorist 'Amer Abu 'Ayesha lived.

    A photocopy of the seizure and demolition order dated July 28, 2014 was attached to the petition as **Exhibit A**.

27. Following the above, on July 29, 2014, a letter was sent by petitioners' counsel to the respondent, in which the respondents requested to know how the demolition would be carried out. In addition they requested an extension for the filing of the petition until August 4, 2014.

    A photocopy of the letter of petitioners' counsel dated July 29, 2014 was attached to the petition as **Exhibit K**.

28. On July 29, 2014, respondent's response was sent to petitioners' counsel, which stated, *inter alia*, that "The demolition will be carried out without causing damage to the other parts of the building or to adjacent buildings". It also stated that "Please be informed, that in view of the holiday, the execution of seizure and demolition order which was attached to our above referenced letter dated July 28, 2014, will not commence before Thursday, July 31, 2014, at 18:00."

    Photocopy of respondent's response dated July 29, 2014 was attached to the petition as **Exhibit L**.

29. On July 31, 2014 the above petition was filed, along with a request for an interim order which would direct the respondent to refrain from causing irreversible damage to petitioner's home, until judgment is given in the petition.

The Legal Argument

30. The respondent will argue that the petition should be denied, as specified below.

The exercise of the authority to seize and demolish - general

31. The authority to order the seizure and demolition of a structure pursuant to Regulation 119 of the Defence Regulations, is vested with the military commander of the Judea and Samaria Area from the entry of IDF Forces into this area in June 1967, which regulation constitutes part of the local law.

    Regulation 119 of the Defence Regulations provides, in its binding English version, as follows:

> "A Military Commander may by order direct the forfeiture to the government… of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed… any offence against these regulations involving violence or intimidation or any military court offence."…

And the regulation in its Hebrew version:

> [Hebrew Version]

32. Regulation 119 authorizes the respondent, as aforesaid, to seize and demolish the entire structure in which the terrorist lives with his family members. However, according to case law rendered by this honorable court, whenever the respondent decides to exercise the authority pursuant to Regulation 119, he must exercise his said authority reasonably and proportionately, taking into consideration an array of concerns which were specified by the court in its judgments.

According to case law, the purpose of exercising the authority pursuant to Regulation 119 is solely to deter and not to punish. Hence, the authority pursuant to Regulation 119 is not exercised as a punishment for the carrying out of a terror attack in the past, but is rather exercised only if the military commander reached the conclusion, that the exercise of the authority is required to deter terrorists from carrying out additional terror attacks in the future – and for this purpose only. The underlying premise is that a terrorist who knows that his family members may be injured if he carries out his plan – may consequently refrain from carrying out the terror attack which was planned by him. Occasionally, the deterrence is also directed at the family members of the terrorist, who are aware of his plans, and is intended to cause them to take action to prevent the terror attack in view of the concern that their home would be damaged should they fail to do so.

33. According to case law, the harm inflicted on additional people who live in the house of the terrorist with respect of which a decision was made to exercise the authority under Regulation 119, does not constitute a collective punishment, but is rather an impingement ancillary to the deterring purpose of the exercise of said authority.

It was so held, for instance, in HCJ 798/89 **Shukri v. Minister of Defence,** TakSC 90(1) 75 (1990) as follows:

> The authority conferred upon the Military Commander pursuant to regulation 119 is not an authority for collective punishment. The exercise thereof is not designed to punish the Petitioner's family. The authority is administrative, and its exercise is designed to deter, thus maintaining public order…
>
> We are aware of the fact that the demolition of the building damages the dwelling of the petitioner and his mother. True, this is not the purpose of the demolition, but it is its outcome. This bitter outcome is designed to deter potential perpetrators of terror attacks, who must understand that through their actions they themselves cause harm not only to public safety and order, and not only to the lives of innocent people, but also to the wellbeing of their own loved-ones.

And see also the words of the Honorable Justice (as then titled) Mazza, in the majority opinion in a judgment given by an extended panel of five justices in HCJ 6026/94 **Nazal v. Commander of IDF Forces in Judea and Samaria Area**, IsrSC 48(5) 338 (1994) (hereinafter: **Nazal**), as follows:

> We should therefore reiterate what has been said more than once: the purpose of using the measures conferred upon the authority of the military commander according to regulation 119 (1), in pertinent part, is to deter potential terrorists from the execution of murderous acts, as an essential measure to maintain security… the exercise of said sanction indeed has a severe punitive implication, which injures not only the terrorist but also others, mainly his family members who live with him, but it is neither its purpose nor designation.

34. The security forces, in general, and the respondent, in particular, are aware of the severe implications of the exercise of the sanctions under Regulation 119, and particularly when an irreversible measure is taken, such as demolition. The military commander is directed to exercise his authority to order house demolitions only in such severe cases in which the "regular" punitive and deterring measures, by their nature, cannot sufficiently and properly deter terrorists physically and mentally.

35. The exercise of the sanction of house demolition is a derivative of the circumstances of time and place. In as much as terrorism changes from time to time, the respondent is obligated to act accordingly and to the extent required, change the measures taken to encounter the danger and annihilate it in the course of Israel's fight against the hostile and murderous terror activity.

In this regard, it has already been held by this honorable court by the Honorable President Shamgar in HCJ 358/88 **The Association for Civil Rights in Israel v. GOC Central Command**, IsrSC 43(2) 529, 539 (1989), as follows:

> The prevention of acts of violence is a condition for maintaining public safety and order. There is no security without law enforcement, and law enforcement will not be successful and will not be effective if it does not also have a deterrent effect. The scope of the measures taken to enforce the law is, in any event, related to the seriousness of the offense, to the frequency of its commitment and to the nature of the offense committed. If, for example, there is a proliferation of murders of people because of their contacts with the military authorities, or if attacks are launched which are intended to bum people or property so as to sow terror and fear, more rigorous and more frequent law enforcement is required. The above said is applicable to any area, and areas under military control are no exception in this regard; to the contrary, the maintenance of order and security and the enforcement thereof in practice are, according to public international law, among the central tasks of the military regime.

And in the judgment which was given about a month ago in **'Awawdeh** it was held as follows:

> In the beginning we have described the extreme circumstances currently prevailing in the Judea and Samaria area, circumstances which lead to the conclusion that was adopted by the political echelon, that a change of policy was required. I am of the opinion, that the data presented, all as

specified above, constitutes a change of circumstances. There is no room to intervene with respondent's decision who has concluded that at this time actual deterrence was required, and that the demolition of the terrorist's house would result in such deterrence. As held by us in our case law "the court is not inclined to intervene with the security agencies' evaluation concerning the effectiveness of using the measure of demolishing houses or sealing them as a means to deter others" (**Abu Dheim**, paragraph 11). Furthermore, as was noted in our case law more than once, it is impossible to conduct a scientific research which would prove how many terror attacks were prevented and how many human lives were saved as a result of taking the measure of house demolition (see, for instance: HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997)). The conclusions arising from the severity of the recent events in Judea and Samaria are a clear matter for the respondent to attend to. Petitioners' argument, that respondent's decision was tainted by extraneous considerations as a result of the kidnapping of the three youths, and did not derive from considerations of deterrence, is hereby rejected. The abduction of the youths constitutes part of the escalation in terror activity in the Judea and Samaria area, which underlies respondent's conclusion that a change of circumstances has occurred which justifies the intensification of the deterrence, by the demolition of 'Awwad's home.

36. In view of the fact that the authority according to Regulation 119 is exercised in response to terror activity, it is not surprising, that the scope of its exercise over the years was directly related to the scope of the terror attacks and their severity. Thus, during the years in which there was a decline in terror attacks, the authority according to the regulation was exercised more rarely, whereas in periods during which terror attacks became a "daily routine", the security forces had to use their authority under the regulation more frequently, in order to deter and cut off the roots of terror, so as to prevent them from spreading even further.

37. This is the place to note once again that the taking of measures according to Regulation 119, is based, first and foremost, on a host of balances. A balance between the severity of the act of terror and the scope of the sanction; a balance between the expected injury which would be inflicted on the family of the terrorist and the need to deter potential future perpetrators of terror attacks; a balance between the basic right of every person to his property and the right and duty of the government to maintain public order and safety, and protect the wellbeing and security of the citizens and residents of Israel.

38. Thus, within the framework of this balancing work, weight is attributed to the severity of the acts, the circumstances of time and place; the residency connection between the terrorist and the house; the size of the house; the effect of the measure taken on other people; engineering concerns and such other considerations. Only after the weighing, examination and balancing of the entire array of considerations which are relevant to the circumstances of the matter, shall the military commander decide whether to use the measure of seizure and demolition of a structure, and to what extent (see, for instance, the judgment given by an extended panel in **Nazal**).

39. About nine years ago, when there was a decline in terror attacks, a think tank headed by Major General Udi Shani recommended, in a report entitled "Rethinking House Demolitions", to reduce the use of Regulation 119 as a method, up to complete cessation, while retaining the option to use this measure in extreme cases. A presentation to that effect was made in a meeting held by the IDF

Chief of Staff in February 2005. Upon the conclusion of said meeting, the IDF Chief of Staff decided to suspend, at that time, the exercise of the authority under Regulation 119. However, it should be emphasized, that the IDF Chief of Staff also determined that this decision could be re-visited in extreme cases (as recommended by the think tank). This policy, which was adopted by the IDF Chief of Staff, was ratified by the Minister of Defence. In the same context it was also determined that should there be an extreme change of circumstances, the decision shall be reconsidered.

And indeed, following a substantial increase in the involvement of East Jerusalem residents in terror activity in 2008-2009, the GOC Home Front Command issued three orders by virtue of his authority under Regulation 119, which were directed against the houses of the terrorist who carried out the attack at Merkaz Harav and the terrorists who performed two ramming attacks in Jerusalem. As will be described in detail below, the three petitions which were filed with the honorable court against these decisions – HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (reported in the Judicial Authority Website, January 5, 2009) (hereinafter: **Abu Dheim**), HCJ 124/09 **Dwayat v. Minister of the Defence** (reported in the Judicial Authority Website March 18, 2009; hereinafter: **Dwayat**); and HCJ 5696/09 **Mughrabi v. GOC Home Front Command** (reported in the Judicial Authority Website, February 15, 2012; hereinafter: **Mughrabi**) - **were denied**.

As to the arguments concerning collective punishment and injury of innocent people and the violation of the principle of the child's best interest

40. The petitioner argue that the family members who will be injured as a result of the demolition of the house – the terrorist's wife and children – are innocent, and that the impingement which would be inflicted on the children was not taken into consideration, according to the principle of the "child's best interest".

41. According to case law, the awareness or assistance provided by the family members to the terrorist, for the purpose of carrying out his intention to execute the terror attack with respect of which the authority under Regulation 119 was exercised, is not required for the purpose of formulating the authority under said Regulation.

It is hereby noted that arguments similar to petitioners' above argument have already been raised and rejected by this honorable court many times. On this issue, see, for instance, the judgment in HCJ 2418/97 **Abu Phara v. Commander of IDF Forces in the Judea and Samaria Area**, IsrSC 51(1) 226 (1997), as follows:

> Indeed, it is true that there is no evidence which ties the petitioner and the family members of the terrorist with the acts attributed to him, but as was held more than once, the demolition of a structure is designed to deter rather than to punish and its purpose is "to deter potential perpetrators of terror attacks, who must understand that through their actions they themselves cause harm not only to public safety and order, and not only to the lives of innocent people, but also to the wellbeing of their own loved-ones".

And see also see the court's words in its judgment in HCJ 6996/02 **Za'arub v. Commander of IDF Forces in the Gaza Strip**, IsrSC 56(6) 407 (2002), as follows:

> Furthermore, we are of the opinion that in view of the fact that the respondent took into consideration the engineering structure of the house

and the fact that all of the inhabitants of the house were living together, but nevertheless concluded that in view of the circumstances of time and place, decisive importance should be given to deterring considerations, the respondent did not exceed the legitimate limits of his discretion, even if there is no evidence that the other inhabitants of the house were aware of the actions of the son.

And see also on this issue the judgment of the Honorable Justice (as then titled) Naor in HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (reported in the Judicial Authority Website, January 5, 2009), as follows:

"6. The argument which also arose in the petition before us, according to which it is neither appropriate nor moral that the terrorists' family members, who did not help him and were not aware of his plans, shall bear his sin, was discussed in our case law. This argument was raised in the past and was rejected. Justice Turkel wrote in this matter in HCJ 6288/03 **Sa'ada v. GOC Home Front Command**, IsrSC 58(2) 289, 294 (2003)) (the **Sa'ada** Case):

> "Despite the judicial rationales, the idea that the terrorists' family members, that as far known did not help him and were not aware of his actions are to bear his sin, is morally burdensome. This burden is rooted in the Israel tradition's ancient principle according to which "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin." (*Deuteronomy*, 24, 16; and compare to Justice M. Heshin judgment in HCJ 2722/92 **Alamarin v. IDF Commander in the Gaza Strip**, IsrSC 46(3) 693, 705-706). Our Sages of Blessed Memory also protested against King David for violating that principle by not sparing the seven sons of Saul (*Samuel II*, 21, 1-14) and worked hard to settle the difficulty **(**Yevomos, 79, 1). But the prospect that a house's demolition or sealing shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' horror doings, more than it is appropriate to spare the house's tenants. There is no other way."

7. Similarly, it was argued before us that the terrorist's family members were not related to the terror attack and that the father even opposed such acts. For this matter it is sufficient to refer to the ruling in HCJ 2418/97 **Abu-Pharah v. IDF Commander in Judea and Samaria Area**, IsrSC 51(1) 226 (1997) and to HCJ 6996/02 **Za'arub v. IDF Commander in the Gaza Strip**, [IsrSC] 56(6) 407 (2002) in which it was ruled that deterrence considerations sometimes oblige the deterrence of potential perpetrators who must understand that their actions might harm also the well-being of their loved ones, even when there is no evidence that the family members were aware of the terrorist's doings.

And also see the recent 'Awawdeh judgment, which held, in paragraph 22 thereof, as follows:

> The court's position regarding this issue may be summarized by the words of Justice Turkel in **Sa'ada**, which were quoted time and again:
>
> > The idea that the terrorists' family members, that as far known did not help him nor were aware of his actions are to bear his sin, is morally burdensome […] However, the prospect that the demolition or sealing of a house shall prevent future bloodshed compels us to harden the heart and have mercy on the living, who may be victims of terrorists' heinous acts, more than it is appropriate to spare the people dwelling in the house. There is no other way (**Sa'ada,** page 294. See also **Abu Dheim**, paragraphs 6-7 of my judgment).

And as to the violation of the best interests of the children of 'Amer Abu Ayesha, reference is also made to the words of the Honorable Justice Barak in the majority opinion in HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651 (1997) (**Janimat**), as follws:

> We did not find in petitioners' arguments anything which may justify a deviation from the ample authority in this matter. We are aware of the fact that the demolition of the house will leave petitioner 1 and her children without a roof over their heads. This is not the purpose of the demolition order. It is not punitive. Its purpose is to deter. Nevertheless, it bears harsh consequences to the family members. The respondent is of the opinion that the taking of this measure is essential, to prevent additional attacks on the lives of innocent people. He maintains that the pressure exerted by the families may deter the terrorists. There is no absolute assurance that this measure is indeed effective. However, considering the few measures with which the State is left to defend itself against "human bombs", this measure should not be taken lightly.

<u>As to the arguments that the decision concerning the seizure and demolition is in contrary with the rules of international law</u>

42. The petitioners argue in their petition that the demolition of the terrorist's apartment is in contrary with the rules of international law.

43. This honorable court held in a host of judgments that the exercise of the authority according to Regulation 119, for the purpose of deterrence, was a completely legitimate action, which complied with both international law and local law. Various arguments which were raised in many petitions against this step, which focus mainly on the argument that this step constitutes a collective punishment and that it is in contrary with international law and local law, were rejected by this honorable court, and the Supreme Court confirmed the general lawfulness of said action in a host of judgments (see, for instance only, **Nazal**; HCJ 897/86 **Jaber v. GOC Home Front Command**, IsrSC 41(2) 522 (1987); HCJ 2977/91 **Salem v. Commander of IDF Forces in the West Bank**, IsrSC 46(5) 467 (1992); FHHCJ 2161/96 **Sharif v. GOC Home Front Command**, IsrSC 50(4) 485 (1996); HCJ 6996/02 **Za'arub v. Commander of IDF Forces in the Gaza Strip**, Takdin 2002(3) 614 (2002)).

44. As specified above, most of the arguments raised by the petitioners, were rejected time and again by the honorable court, and the respondent will argue that, as has already been held in previous petitions in the past, there is no cause nor justification for the re-examination of these arguments by the court once again within the framework of this petition.

On this issue, see for instance, the **Janimat** judgment, where it was held by the honorable court that there was no need to discuss again the general issues, in view of the fact that they have already been resolved in the past, as follows:

> "**…<u>the petition raises additional arguments concerning the authority of the military commander to use regulation 119 of the Defence (Emergency) Regulations, 1945. These arguments have all been raised in the past. They were rejected by this court in many judgments. Indeed, regulation 119 of the Defence Regulations – a statute from the Mandatory era which is currently in effect in the Area – grants the military commander authority and discretion to take measures against a structure, which is occupied by a person who committed a serious offence against the Regulations. We did not find in petitioners' arguments anything which may justify a deviation from the ample authority in this matter</u>**. We are aware of the fact that the demolition of the house will leave petitioner 1 and her children without a roof over their heads. This is not the purpose of the demolition order. It is not punitive. Its purpose is to deter. Nevertheless, it bears harsh consequences to the family members. The respondent is of the opinion that the taking of this measure is essential, to prevent additional attacks on the lives of innocent people. He maintains that the pressure exerted by the families may deter the terrorists. There is no absolute assurance that this measure is indeed effective. However, considering the few measures with which the State is left to defend itself against "human bombs", this measure should not be taken lightly. For these reasons I would deny the petition. (Honorable President Barak, pages 653-654).
>
> ….
>
> I join the opinion of my colleague the President. No scientific study which can prove how many terror attacks were prevented, and how many human lives were saved as a result of deterring acts of house sealing and demolition, has ever been conducted, nor can such study be conducted. However, as far as I am concerned, it is sufficient that one cannot refute the position according to which a certain deterring effect exists, to prevent me from interfering with the discretion of the military commander. (Honorable Justice Goldberg, page 655)(Emphasis added – the undersigned)

Also see the comments made in a similar matter, in the judgment in HCJ 6868/02 **a-din v. Commander of IDF Forces in the Judea and Samaria Area** (reported in the Judicial Authority Website, August 8, 2002)

> As to the general problem, it has been discussed in many judgments, and we do not think that it should be discussed again at this present time.

As to the argument that the demolition at this time will violate 'Amer Abu 'Ayesha's presumption of innocence

45. The petitioners argue that 'Amer Abu 'Ayesha has not yet been arrested and convicted, he has neither been indicted nor convicted, and the demolition of his residential home will violate his presumption of innocence.

46. The respondent will argue that this argument should be rejected, in view of the fact that according to case law, the exercise of the authority under Regulation 119 is not conditioned on the conviction of a terrorist in the commitment of the offense. See on this issue HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1), 810 (2003), as follows:

> Petitioner's counsel argued further that it was not appropriate to take an administrative measure of this kind, while Sharbati's trial was still pending and has not yet been concluded. In this regard too, the ruling is clear, namely, the language of regulation 119 does not condition the use of the measures made available by it to the military commander, on a person's conviction.

And see also the comments made on this issue in **Nazal**, as follows:

> Furthermore: the power to exercise said authority is not conditioned on the conviction of any person of having committed an offence; since, according to the language of the regulation, it is sufficient that the military commander is satisfied that the offence was committed by the inhabitants of any area, town, village, quarter or street, or any one of them, so that he may have the authority to seize any house, structure or land situated in the place in which the offender resided.

Reference is made to the fact that a similar argument was recently rejected in **'Awawdeh**, as follows:

> The petitioners argued that it was advisable to wait for the conclusion of 'Awwad's trial, and only if convicted – the demolition of his house should be considered. However, as specified above, it has already been held in our case law, that the authority pursuant to regulation 119, may be exercised based on administrative evidence attesting to the fact that a terrorist was living in the house the demolition of which was sought (see: **Nazal,** page 343; **Sharbati**, page 815).

47. As specified above, the State has clear and unequivocal administrative evidence which indicate – **in a level almost reaching certainty** that 'Amer Abu 'Ayesha abducted and murdered together with Marwan Qawasmeh the three youths on June 12, 2014.

As aforesaid, due to the fact that Marwan Qawasmeh and 'Amer Abu 'Ayesha have not yet been captured, and to avoid the disruption of their interrogation after they are captured, and to avoid the disruption of the interrogation of Husam Qawasmeh which has not yet been concluded, further details may not be disclosed in this open response.

Anyway, to the extent the honorable court finds it appropriate, the existing information concerning the progression of the terror attack and the involvement of the three terrorists in the terror attack may be presented before the honorable court.

48. And it should also be specifically stated, that there is no preclusion that 'Amer Abu 'Ayesha will extradite himself to the hands of the security forces and will give his version of the events. However, obviously, the fact that he avoids the rule of law cannot prevent the exercise of the authority pursuant to Regulation 119 against the apartment in which he lived.

As to the arguments concerning the initial damage caused to the apartment

49. The petitioners raise arguments concerning the damage which was caused to the apartment during the operational activity for the location of the terrorist, including, *inter alia*, that no damage should be caused to them, in addition to the damaged which they have already suffered.

50. Reference is made to the answer which has already been given in this regard, which was quoted above, in the response to the appeal dated July 28, 2014 (see Exhibit E to the petition), as follows:

> "25. It should be noted, that during the extensive search after the terrorist, the building was searched. Within the framework of the search, and **pursuant to the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009**, an operational break-in was carried out, of a wall in the terrorist's apartment on the second floor of the building, which was thought to have been a "double wall" which was used by the terrorist as a hiding place, based on information which was in the possession of the security forces, that there was a high risk, that the terrorist was armed and dangerous [Emphasis appears in the original – the undersigned].
>
> 26. On the other hand, the exercise of the authority under Regulation 119 of the Defence (Emergency) Regulations, 1945, pertains to the entire part of the building in which the terrorist and his nuclear family lived, in view of the fact that the purpose of the exercise of this authority is to create deterrence, and prevent the ability to reside in the entire part of the building in which the terrorist and his nuclear family live.
>
> 27. In view of the difference between the purpose of the search and the purpose of the demolition by virtue of Regulation 119, the search which was conducted does not revoke the authority of the military commander by virtue of Regulation 119 and issue an order for the demolition of that part of the building in which the terrorist lived."

As to the argument that the measure chosen by the military commander is not proportionate under the circumstances

51. The petitioners argue that the decision to demolish the house of the terrorist is not proportionate.

The petitioners argue that it has not been proven that the demolition of terrorists' houses indeed deters other terrorists from carrying out their plans, and that there is no rational connection between the measure taken and the designated purpose. On this issue, the petitioners refer, *inter alia*, to the presentation which was prepared in the past by a think tank headed by Major General Udi Shani, following which the IDF Chief of Staff decided in 2005, to suspend, at that time, the exercise of the authority according to Regulation 119.

The petitioner argue further that the decision to resume the exercise of the authority according to Regulation 119 is tainted by extraneous considerations which stem from the abduction of the three youths, and that that this concern increases due to the damage which has already been caused to the terrorist's apartment.

52. The respondent will firstly argue that the argument according to which extraneous considerations were considered by him should be totally rejected. The respondent wishes to emphasize that the consideration which was taken by him in making the decision to exercise his authority according to Regulation 119 with respect to the terrorist's apartment, was the deterring consideration, namely, the need to deter additional terrorists from carrying out terror attacks, against the backdrop of the deteriorating security condition, which reached its peak in the abduction and murder of the youths.

It should be noted that a similar argument has already been recently rejected in **'Awawdeh**, as follows (paragraph 24 of the judgment):

> "Petitioners' argument, that respondent's decision was tainted by extraneous considerations as a result of the abduction of the three teens, and did not derive from considerations of deterrence, is hereby rejected. The abduction of the youths constitutes part of the escalation in terror activity in the Judea and Samaria area, which underlies respondent's conclusion that a change of circumstances has occurred which justifies the intensification of the deterrence, by the demolition of 'Awwad's home. As aforesaid, the indictment against 'Awwad was filed recently, on June 22, 2014. As is recalled, the hearing before us was held before it became known that the abducted youths were murdered."

53. The respondent will argue, that his decision to exercise the authority according to Regulation 119 and demolish the apartment of the terrorist is absolutely proportionate, under the circumstance of this case, in view of the fact that the decision to demolish pertains only to the apartment in which the terrorist lived, rather than to the entire building in which the apartment is located.

54. The respondent will argue that this is an extreme case, in which, according to the decision of the IDF Chief of Staff from 2005 itself, the authority according to Regulation 119 may be exercised. The respondent will argue that the essential need to deter potential perpetrators of terror attacks by exercising the authority according to Regulation 119 is as doubly as important in the case of the terrorist at hand, in view of the need to deter other dangerous terrorists from the execution of severe terror attacks, and particularly, from the execution of abduction and murder attacks.

55. Moreover: the respondent will argue further that the deteriorating security condition in the Area, which reached its peak in the abduction of the three youths, constitutes a clear change of circumstances which justifies the current change of the general policy which was adopted in 2005, in the same exact manner that the deteriorating security condition in Jerusalem in 2008-2009 constituted a material change of circumstances, which caused the GOC Home Front Command at that time to exercise the authority according to Regulation 119 against houses which were occupied by terrorists, residents of East Jerusalem.

56. We wish to note that similar arguments concerning the ostensible ineffectiveness of the exercise of the authority according to Regulation 119, and concerning the possibility to use regulation 119 upon the occurrence of a change of circumstances after the decision of the IDF Chief of Staff from 2005, have already been discussed and rejected in paragraphs 8-11 of the **Abu Dheim** judgment, given by the Honorable Justice (as then titled) Naor, as follows:

"8. Case law which preceded the change of policy in 2005, discussed more than once the question of the effectiveness of demolition or sealing of a house in which a terrorist resided. In that regard it was held that this was a matter for the security forces to evaluate, and that the court had no reason to doubt the security forces' evaluation that this measure was effective (see the above **Sa'ada**, pages 292-293). Case law cited, more than once, the words of Justice E. Goldberg in **Janimat**, according to which a scientific study which could prove how many terror attacks were prevented and how many lives were saved as a result of the deterrence created by house sealing and demolition, has never been conducted, nor could it be conducted, but the fact that the position according to which a certain deterring effect existed could not be refuted, was sufficient in order to refrain from interfering with the discretion of the military commander. (HCJ 2006/97 **Janimat v. GOC Central Command**, IsrSC 51(2) 651, 655 (1997), On the issue of regulation 119 as a deterring measure, see also: HCJ 798/89 **Shukri v. The Minister of Defence** (not yet published, January 10, 1990); HCJ 8262/03 **Abu Salim v. IDF Commander in the West Bank**, IsrSC 57(6) 569 (2003); HCJ 8575/03 **Azadin v. IDF. Commander in the West Bank**, , IsrSC 58(1) 210 (2003); the above **Nazal**, in paragraph 11; HCJ 10467/03 **Sharbati v. GOC Home Front Command**, , IsrSC 58(1) 810 (2003) etc.). During many years the court acknowledged that the use of the aforesaid regulation was intended to deter, to deter and not to punish or revenge. The court even abstained in the past from disputing the security forces' evaluation in the matter of the effectiveness of the deterrence.

9. And here we arrive at petitioners' principal argument: as aforesaid, the petitioners turn the attention to the fact that in 2005 the respondent's policy changed following discussions that took place in HCJ 7733/04 **Nasser v. IDF Commander in the West Bank** (not yet reported, June 20, 2005) ("**Nasser**"). According to the petitioners, the respondent changed his policy and decided to retract his intention to use regulation 119. Petitioners' counsel notes that within the framework of the hearing of the above mentioned petition, a session was held on December 13, 2004 before President Barak, Justice M. Cheshin and Justice Hayut. Upon its conclusion, the session was adjourned for 90 days. As indicated by the decision – the purpose of the adjournment was to enable the parties to consider an offer according to which one room on the second floor will be demolished or sealed. Following the hearing in the petition, a think tank headed by Major General Shani was set up. In the presentation prepared by the think tank which was received by petitioner's counsel within the framework of the former petition, it was stated that the act of demolition was no longer legitimate and that it was "lawfully marginal although it satisfies the tests of international law, the test of the international community, the test of democracy, the test of self image and the test of quantities". In conclusion the presentation indicated that "IDF, in a Jewish democratic state, cannot walk on the verge of legality, and all the more so on the verge

of legitimacy!!!", The petitioners claim that following the aforesaid presentation the policy was changed: the Minister of Defence adopted the think tank's recommendations and ever since the use of Regulation 119 was halted although there were deadly terror attacks since then. The petitioners claim before us that the findings of the think tank are currently valid too, three years after the use of regulation 119 was suspended and that there is no justification to change the policy and resume the use of the aforesaid regulation. It seems that this claim, concerning the reinstatement of the former policy which was applied before 2005 is the only claim in the petition before us with respect of which there is no ruling in this court's case law.

10. Respondent's response argues in this regard that the presentation of the think tank headed by Major General Shani indicates that the think tank noted that the exercise of the authority was proved, in the opinion of all security forces, as an additional factor in the deterrence of terrorists. They also refer to the fact that in the ways of actions recommended by the think tank it was indeed recommended that, in general, there should be a reduction in house sealing or demolitions, up to cessation, while retaining the option to use it in extreme cases. In February 2005, after discussing the aforesaid presentation, the IDF Chief of Staff decided to suspend at that time the use of the aforesaid regulation, but also determined that there shall be room to review the decision in extreme cases as was recommended by the think tank. Following the IDF Chief of Staff's decision, the state gave notice of the decision to suspend the use of the authority pursuant to the aforesaid regulation, in various petitions that were pending before this court, but it was well clarified that it was not an irreversible decision, and that there existed an option in appropriate circumstances to use the aforesaid regulation in the future. The state refers for this matter to some judgments that were given in petitions that were pending at that time. Thus, in **Nasser** which was explicitly mentioned by petitioners' counsel, it was explicitly stated that if a change of policy was decided upon (namely, resuming the use of the above authority), then the petitioner would be entitled to a hearing (and see also: HCJ 4969/04 **Adalah v. GOC of Southern Command** (not yet published, July 13, 2005); HCJ 295/04 **Sa'ad v. IDF Commander** (not yet published, April 7, 2005); HCJ 294/04 **Hajazi v. IDF Commander in the West Bank** (not yet published, May 4, 2005) in which similar notices were given). In view of the State's notices, the court refused to hear the above mentioned petitions which became theoretical. Thus, the option to change the policy again existed even when the various petitions were dismissed without prejudice. Furthermore, the respondent claims that *prima facie* it is clear that our matter concerns a severely extreme case, in which, even according to the policy set forth by the IDF Chief of Staff in the beginning of 2005 in accordance with the recommendation of the think tank, the exercise of the authority under regulation 119 could be considered. Therefore, claims the respondent, this is sufficient for rejecting petitioners'

claim with respect to the change of policy. Nevertheless, the respondent clarifies that he intends to exercise his authority pursuant to regulation 119 also against houses which were occupied by other terrorists residents of East Jerusalem, and that in view of the change of circumstances which has occurred since the decision was made in 2005, there is no preclusion which prevents a change of policy that would enable the use of the aforesaid regulation. The respondent claims that the general principal is that policy can be changed upon change of circumstances (see for example: A.P.A. 1386/04 **The National Council for Planning and Building v. Neot Rosh Ha'ayin Association, Registered Association** (not yet published, May 20, 2008). The respondent notes that according to data produced by the Israel Security Agency (ISA), since 2007 there has been a wave of terror in which residents from East Jerusalem are involved. The wave of terror intensified in 2008. Unlike the past, a main characteristic of the current wave of terror, besides its scope, is that residents of East Jerusalem perform the terror attack themselves and do not serve, as in the past, as mere collaborators of terrorists residents of the Area. The security forces have gathered information on the intentions of residents of East Jerusalem to perform additional terror attacks, and some additional terror attacks planned to be performed by residents from East Jerusalem were thwarted. The respondent added to his response an overview prepared by the ISA concerning the involvement of residents of East Jerusalem in acts of terror. This review is updated as of September 22, 2008. This overview indicates that in 2008, 104 residents of East Jerusalem were arrested due to involvement in terror attacks, while during the entire period from 2001 until 2007, 374 people were arrested. It is, therefore, a steep increase in the number of terrorists from East Jerusalem. The overview mentions prominent terror attacks in 2008 including the car ramming terror attack in Tzahal Square in which 18 Israeli civilians were injured; the ramming attack in Mapu Street by tractor in which an Israeli civilian was severely wounded and 22 were lightly wounded; a shooting attack in the Old City in which one policeman was killed and another policeman was wounded; a ramming attack by tractor in Jaffa Street in which 3 Israelis were killed and 42 were wounded; a stubbing terror attack in the Old City, near Nablus Gate in which an Israeli civilian was wounded; a terror attack near Shuafat Refugee Camp in which a border policeman was killed and a policewoman was severely wounded, and obviously - the terror attack at Merkaz Harav Yeshiva that was carried out by petitioner's son. The ISA also indicates in its overview that in order to cope with the new threat, the use of deterring measures should be intensified, including demolitions of terrorists' houses and the imposition of harsher sanctions against the terrorists' families, the increase of Israeli security presence in East Jerusalem, exhaustion of judgment with criminal offenders who commit offenses of trading and possessing weapons and pressing charges against whomever intends to perform a terror attack. The respondent notified in his response that he intended to use regulation 119 (subject to a hearing) in two other cases of tractor terror attacks.

11. Our position is that there is no room to intervene with respondent's change of policy. The new-old policy relies upon the aforesaid opinion of the ISA, and it is shared by the IDF Chief of Staff and the Minister of Defence. Indeed, an authority can change its policy and it may certainly change it upon a change of circumstances. With respect to terrorists residents of East Jerusalem the respondent demonstrated with concrete data, the highlights of which we mentioned above, that there indeed was a change of circumstances. As was ruled by this court in the past, this court is not inclined to intervene with the security forces' evaluation concerning the effectiveness of the measure of house sealing or demolition as a factor which deters others. This was also the case when a few years ago there was a change of policy following the recommendations of the think tank headed by Major General Shani. As mentioned by us above, case law held more than once, that a scientific study that can prove how many terror attacks were prevented and how many lives were saved as a result of taking the aforesaid measure could never be conducted. In this regard nothing has changed. Indeed, the reality as well as the severity of the events changed. The conclusions to be drawn from that are a clear matter for the security forces to evaluate.

And see also on this issue, paragraph 5 of the judgment of the Honorable Justice Levy in **Dwayat**, as follows:

> The initial burden to show that a governmental act is proportionate, should usually be imposed on the administrative authority. Having met it, the party contesting it may show that it has no merit (HCJ 366/03 **Commitment to Peace and Social Justice Society v. Minister of Finance**, paragraph 18 of my judgment (not yet reported, December 12, 2005); HCJ 6427/02 **Movement for Quality Government in Israel v. The Knesset** paragraph 21 of the judgment rendered by the President A. Barak, (not yet reported, May 11, 2006)). On the issue of demolition of terrorists' houses it has been held in the past and recently again, that the security forces had shown that the measures exercised were proportionate. The conclusion that the demolition had a deterring effect was more than substantiated (HCJ 6996/02 **Za'arub v. IDF Commander in the Gaza Strip**, IsrSC 56(6) 407, 410 (2002); HCJ 8262/03 **Abu Salim v. IDF Commander in the West Bank**, IsrSC 57(6) 569, 574 (2003); that it carried a special weight among the exercised measures (HCJ 10467/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810, 814 (2003)); and that in view of its contribution to the most important value of all – saving human lives, it successfully passed the general benefit balance (HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (not yet reported, January 1, 2009)). And it was so written by Justice E. Rubinstein:
>
> > Sealing or demolishing the terrorists' houses is not a matter of exhilaration, exhilarating punishment or exhilarating revenge, although the feelings of every descent man extremely rebel when someone takes an

> innocent fellowman's life out of blind animosity. If the demolition had derived only from bad feelings, worse than the inferno – it would not have been accepted in a proper law abiding state. But we are concerned and this is the emphasis, with the issue of the benefit in a forward-looking perspective [*ibid,* in the first paragraph of his judgment].

It has also been so held recently in '**Awawdeh**, as follows:

> It should be further noted that the effectiveness of the deterrence embedded in house demolitions is subject to the evaluation of the security agencies (see: HCJ 7473/02 **Bachar v. Commander of IDF Forces in the West Bank**, IsrSC 56(6) 488, 490 (2002) (hereinafter: **Bachar**); **Sa'ada**, pages 292-293; **Sharbati,** page 814; **Abu Dheim**, paragraph 8 of my judgment; **Mughrabi**, paragraph 13 of the judgment of Justice H. Melcer)…
>
> …
>
> **In general, the authority may change its policy, even if the policy was implemented for almost a decade, and particularly, it may do so due to a change of circumstances**. As mentioned in **Abu Dheim**, when the decision to suspend the exercise of the authority under regulation 119 was made, the State clarified that it would be possible to exercise said authority in the future under appropriate circumstances (see also: **Dwayat**; **Mughrabi**). Accordingly, as described above, in 2008-2009 it has exercised this authority in East Jerusalem, when the intensification of terror acts in the area justified the use of this measure. **In the beginning, we have described the extreme circumstances currently prevailing in the Judea and Samaria area, circumstances which lead to the conclusion that was adopted by the political echelon, that a change of policy was required.** I am of the opinion, that the data presented, all as specified above, constitutes a change of circumstances. There is no room to intervene with respondent's decision who has concluded that at this time actual deterrence was required, and that the demolition of the terrorist's house would result in such deterrence. As held by us in our case law "the court is not inclined to intervene with the security agencies' evaluation concerning the effectiveness of using the measure of demolishing houses or sealing them as a means to deter others" (**Abu Dheim**, paragraph 11). Furthermore, as was noted in our case law more than once, it is impossible to conduct a scientific research which would prove how many terror attacks were prevented and how many human lives were saved as a result of taking the measure of house demolition (see, for instance: …). The conclusions arising from the severity of the recent events in Judea and Samaria are a clear matter for the respondent to attend to. …" [Emphases added – the undersigned].

57. The petitioners also argue that the demolition of the terrorist's apartment is not the "lease injurious measure."

Our response this argument is that the respondent is of the opinion that there is no other measure which can equally achieve the essential deterring purpose as such may be achieved by the exercise of the authority according to Regulation 119 against the residential apartment of the terrorist.

In addition it should be emphasized that the order pursuant to Regulation 119 does not only provide for the demolition of the apartment but of its seizure as well. The respondent will argue that the fact that the apartment has already been damaged when it was searched in an attempt to locate the terrorist does not provide the necessary level of essential deterrence, and that the deterrence would be achieved only by the demolition of the apartment and the prevention of the ability to use it in the future, by "its seizure and the completion of its demolition".

As to the argument of discrimination as compared to Jewish terrorists

58. The petitioners argue that the demolition is not proportionate also due to the fact that the authority under Regulation 119 is not exercised against Jewish terrorists.

59. Similar arguments have already been raised before the honorable court in the past, and were rejected by it. On this issue, reference is made to the words of the Honorable Justice Levy in HCJ 10467/03 **Sharbati v. GOC Home Front Command** (published on the Judicial Authority Website, December 15, 2003) as follows:

> I suggest resorting in the same manner to petitioners' other argument concerning discrimination between Palestinian terrorists and Jewish terrorists with respect to the sealing or demolition of houses. As aforesaid, the purpose of these measures is to deter and not to punish. The phenomenon of Jewish terrorists which is extremely severe is quite rare, whereas the vast majority of the Jewish population in Israel condemns it and is revolted by it. Hence, to deter this population the above referenced sanctions need not be taken. Regretfully, on the other hand, the situation as far as the Palestinian population is concerned, is different. On this issue, reference to the large number of terror attacks which were carried out and to the many others which were thwarted suffices. Reference in this regard should be mainly made to the manifestations of rejoice following killings of Jews, and to the "feasts" held by the family members of those who are regarded as "Shahids" after the families are notified of the death of their sons. In my opinion, the above clarifies the extent to which the population in the areas occupied by Israel encourages the actions of the suicide-terrorists, and explains the increasing number of those who are willing to act as "living bombs". Under these circumstances, the need to look for deterring measures to reduce the killing circle, is an existential need of the highest level, and hence, we are not concerned with discrimination, but rather with a measured and balanced exercise of Regulation 119."

Regarding the rejection of the above discrimination argument also see:

The **Nazal** judgment, which was given by an extended panel of five Justices (*ibid*, paragraph 10 of the judgment).

60. We wish to update that security agencies are of the opinion that the distinction drawn by the honorable court and which was quoted above from the judgment in HCJ 10467/03 concerning the exercise of Regulation 119 is currently applicable, as well.

As to the anticipated damage to the other parts of the building and adjacent buildings

61. The petitioners argue that the demolition of the terrorist's apartment will cause damage to the other parts of the building and to adjacent structures. The petitioners try to base their above argument on an opinion of an engineer on their behalf, and on damages which were allegedly caused during the demolition of the terrorist's apartment being the subject matter of **'Awawdeh**.

62. In the response to petitioners' appeal it was clarified that the respondent decided that the demolition of the apartment would be carried out "provided he is convinced that the demolition does not damage the other parts of the building or adjacent structures."

63. We wish to update, that in the case at hand, the intention is to demolish the exterior walls of the apartment of the terrorist 'Amer Abu 'Ayesha, located between the apartment's support posts, without causing damage to the roof and the support posts of the apartment.

    Under these circumstances, the opinion of the engineer which was attached to the petition, as well as the arguments concerning the damage which was caused to the structure in which the apartment of the terrorist whose matter was heard in **'Awawdeh** was located – are not relevant in this matter for the execution of the decision concerning the seizure and demolition of the apartment being the subject matter of the petition.

64. Parenthetically, it should be noted that in the beginning of the petition the honorable court was requested to hold, that compensation should be paid by the military commander for the damage which would be caused as a result of the demolition.

    Following the provisions of the previous paragraph, the position of the State is that at this stage said request is theoretical and it should be examined in the future, if and to the extent required, by the competent court having the relevant subject matter jurisdiction, under the circumstances of the matter.

    It should be emphasized that nothing in the above-said constitutes any consent to petitioners' request for compensation for damages which will be caused as a result of the demolition, and that to the extent that in the future any such proceeding is instituted with the competent court – nothing herein shall prejudice any of the State's arguments and rights in such proceeding, all of which are reserved.

Conclusion

65. The respondent will request the honorable court to reject the petition.

66. In view of the deteriorating security condition, including the extremely severe terror attack being the subject matter of this petition; and in view of the fact that the respondent is of the opinion that the exercise of the authority under Regulation 119 will indeed significantly contribute to the

deterrence of additional perpetrators of terror attacks – the respondent will request the honorable court to reject the petition without issuing an *order nisi*, and give a decision therein as soon as possible.

67. The facts specified in this response are supported by the affidavit of General Major Nitzan Alon, IDF GOC Central Command, and commander of IDF Forces in the Judea and Samaria area.

Today, 9 Av 5774
August 5, 2014

(signed)
Aner Helman, Advocate
Deputy Director of HCJ Petition Department
State Attorney's Office

(signed)
Avinoam Segal-Elad, Advocate
Senior Deputy, State Attorney's Office