Israel Defense Forces
Judea and Samaria Area
Legal Advisor's Office
P.O.Box 5, Beit El 90631
Tel: 02-9977071/711
Fax: 02-9977326
363/00 - Temporary
Tishrei 26 5775
October 9 2015

To
Advocate Lea Tsemel **By fax: 02-6289327**

Dear Colleague,

Re: Appeal against the intention of the Military Commander to take measures for the seizure and demolition of the residential unit in which lived _____Abu Hashiyeh, ID No. _____
Reference: your letter dated October 7, 2015

1. Your letter to the Military Commander of IDF Forces in the Judea and Samaria Area regarding the intention to take measures for the seizure and demolition of the residential unit in which lived the perpetratort _____ Abu Hashiyeh, in Askar camp in Nablus, was brought to the attention of the military commander, was examined by him and the following is his decision in the above referenced matter.

The power of the military commander to act in Area A

2. On this issue it was noted in the appeal that in view of the fact that the residential unit was located in Askar camp which constituted part of Area A, it was doubtful whether the military commander had the power to take measures for the demolition of the residential unit and a question was raised, whether the authorization of the Palestinian Authority was obtained.

3. In this regard it should be noted that the provisions of the interim agreement in which the powers mentioned in the appeal were established with respect to the division of the security and civil responsibility in the Judea and Samaria Area, do not prevent the military commander from exercising his powers according to Regulation 119 of the Defence Regulations.

4. That, in view of the fact that the interim agreement was incorporated into the internal law of the Judea and Samaria Area through the Proclamation Regarding Implementation of the Interim Agreement (Judea and Samaria)(No. 7), 5756-1995 (hereinafter: the **Proclamation**) which stipulates, in section 6B thereof, that "*The decision of the commander of IDF forces in the region that the powers and responsibilities remain with him will be decisive for this matter*."

5. In view of the fact that it was held by the Supreme Court[1] that the provisions of the Proclamation take precedence over the provisions of the interim agreement, your argument according to which the military commander of IDF forces has no authority to act in Area A cannot be accepted, and hence, there is also no obligation to obtain the consent of the Palestinian Authority for such action.

6. Finally we would like to note that this issue has been recently examined by the Supreme Court in HCJ 5290/14 **Qawasmeh et al. v. The Military Commander et al.**[2] (hereinafter: **Qawasmeh**) which stated as follows:

> I also found no merit in petitioners' arguments in HCJ 5290/14 concerning respondent's authority to act in Area A. Petitioners' arguments on this issue do not reconcile with the fact that respondent's authority is regulated by the law which applies to the Area and is not controlled directly by the Interim Agreement. As noted by the respondent, the provisions of the Proclamation grant the respondent very broad discretion in the interpretation and application of the provisions of the Interim Agreement, and they do not prevent the respondent from acting in Area A when such activity is required for the purposes of safeguarding security.
> …
> Hence, respondent's authority to apply Regulation 119 of the Defence Regulations reconciles with the law which applies to the Area as well as with the provisions of the Interim Agreement. It should be further noted that I accept respondent's position according to which the acceptance of petitioners' interpretation of the Interim Agreement and the law which applies to the Area will grant broad 'immunity' from the application of Regulation 119 to any potential terrorist who resides in Area A, a result which does not reconcile with the deterring purpose of Regulation 119. Therefore**, I do not think that in exercising his authority according to Regulation 119, the respondent should take into consideration, as distinct from the deterring issue, the geographic location of the house designated for demolition**. (Emphasis added S.B-A.A)

<u>The scope of the decision of the military commander according to Regulation 119</u>

7. In the appeal a demand was raised to demolish only one room and bathroom which were allegedly used by the perpetrator, *in lieu* of the demolition of the entire residential unit on the first floor which serves the nuclear family of the perpetrator.

8. In this regard it should be noted that the decision to take measures for the demolition of the residential unit in which the entire nuclear family lives, rather than to demolish solely the room of the perpetrator and his brother, namely, the entire first floor of the structure, is based on the intention of the military commander to attain a clear deterring purpose, which the military commander believes would be achieved only by the demolition of the residential unit in its entirety.

9. Therefore, your argument in this regard was not accepted by the military commander.

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[1] HCJ 2717/96 **Waffa v. Minister of Defence**, IsrSC 50(2) 848, 853 (1996).

[2] The judgment was given on August 11, 2014, and was published in the Judicial Authority webstise.

The demolition method of the residential unit

10. The appeal argued further that the military commander should have specified in the notice which was delivered to your clients the demolition method, and should have provided a proper engineering opinion for their review and examination.

11. In this regard it should be noted that the demolition plan of the residential unit was prepared by professionals on behalf of the military commander following a precise mapping of the residential unit which took into consideration its engineering characteristics. The execution method which was chosen is the best execution method given the tools available to the engineering professionals, and considering the need to refrain, to the maximum extent possible, from causing damage to neighboring structures or parts of the structure which are not designated for demolition, namely, the upper floor.

12. These issues were also discussed in the **Qawasmeh** petition where it was held by the court that it did not find reason to direct the military commander to transfer for petitioners' review the engineering opinion or to interfere with the demolition method.[3]

13. For these reasons and in the absence of statutory obligation, the military commander rejected your above request.

The "cause to take injurious measures against the house" and the "argument of collective punishment"

14. As alleged in the appeal, the perpetrator wanted to put an end to his life due to frequent and violent fights with his family members and "*was the black sheep of a perfectly normative family*.", and the family members are expected to be the main victims of the demolition which constitutes collective punishment completely contrary to international humanitarian law.

15. In addition it was argued that the proceeding against the perpetrator was still pending before the court and that judgment in that case has not yet been given.

16. With respect to the argument concerning the nature of the relationships between the perpetrator and his parents we would like to cite from the judgment of the Supreme Court in HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense**:[4]

> "… the fact that a decision was made to demolish the entire house rather than to seal a room or demolish a certain part of the house, does not necessarily indicate that the measure which was chosen was not proportionate and justifies the interference of this court in the discretion which is vested, as aforesaid, in the security forces (…) As aforesaid, **proportionality is examined, first and foremost, *vis-à-vis* the severity of the action attributed to the suspect**, from which derives the required scope of deterrence, and I will emphasize again the above specified criteria and the meticulous discretion which should be exercised.

[3] Paragraph 31 of the judgment.

[4] Given on December 31, 2014 and was published in the Judicial Authority website.

(Emphasis added S.B-A.A)

17. The argument according to which the demolition of the family home runs contrary to international law as it constitutes unlawful collective punishment is an argument which has been discussed many times in the past, and has even been raised during the last two years in a host of judgments on this issue. As is known, this argument has been discussed and rejected time and time again by the Supreme Court.[5]

18. The examination of the suspicions against the perpetrator and the fact that judgment in his case has not yet been given, has no weight in the case at hand. According to the judgments of the Supreme Court on this issue[6], the mere existence of satisfactory administrative evidence, as such exist in the case at hand, justifies the exercise of the authority according to Regulation 119 of the Defence Regulations and there is no need to wait until the perpetrator is convicted.

19. Therefore, the military commander rejects your argument on this issue.

The purpose of the demolition

20. It is argued in the appeal that there is no certainty that the demolition of the perpetrator's home would assist in safeguarding the security of the Area or deter other perpetrators, and that it is only a "*very hesitant speculation*" and that the committee headed by Major General Shani stated that it was "*a very dubious possibility, the harm of which to the security of Area is much greater than its benefit.*"

21. In view of the fact that the effectiveness of the use of Regulation 119 of the Defence Regulations has been discussed and rejected by the Supreme Court, *inter alia* in the context of the petitions cited in our letter above, there is no room to elaborate on this issue in our response. Therefore, this argument is rejected by the military commander who is of the opinion that at this time, in view of the escalation in the security condition, this regulation should be used in the case at hand.

22. It was further argued in the appeal that the decision to take measures for the demolition of the home of the perpetrator stemmed from motives "*of mere revenge following the killing of the late Henkin spouses*."

23. The position of the military commander is that this frivolous and baseless argument should be totally rejected. The decision to take measures for the demolition of the residential unit in the case at hand has indeed been made after the terror attack in which the late Henkin spouses had been murdered. However, unfortunately, in addition to said terror attack, several additional murderous terror attacks and attempted terror attacks were committed, which attest to the fact that a material adverse change has occurred in the security condition and that exigent measures must be taken to deter and prevent the execution of additional terror attacks. The decision of the military commander to renew the exercise of his powers according to Regulation 119 of the Defence Regulations, is **educated and calculated and is made** only against the backdrop of the circumstances of

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[5] See HCJ 8091/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense**.

[6] See **Qawasmeh** in paragraph 27 of the judgment; HCJ 4597/14 **'Awawdeh v. The Military Commander in the Judea and Samaria Area**, dated July 1, 2014, published in the Judicial Authority website.

time and place which require that such decision be made based on clear reasons of the security of the Area.

Discrimination in the enforcement of punishment and deterrence

24. In response to your arguments regarding discrimination in the enforcement of punishment and deterrence we wish to refer to paragraph 30 of the judgment of the Supreme Court in **Qawasmeh** where it was held, *inter alia*, as follows:

> "… In view of the fact that regulation 119 has a deterring rather than a punitive purpose, the mere execution of hideous terror acts by Jews, such as the abduction and murder of the youth Mohammed Abu Khdeir, cannot justify, in and of itself, the application of the regulation against Jews, and there is nothing in respondent's decision alone, not to exercise the regulation against the suspects of this murder, which can point at the existence of selective enforcement."

25. In view of the great relevancy of the above to the case at hand, we are of the opinion that there is no need to further elaborate on this issue in response to said arguments and we wish to inform you that this argument was also rejected by the military commander.

Conclusion

26. In view of all of the above, having examined your arguments, the military commander decided to deny the appeal in its entirety.

27. Therefore, the attached seizure and demolition order is hereby delivered which pertains to the residential unit of the nuclear family of the perpetrator, which is located on the ground floor of the structure.

28. It should be emphasized that the enforcement of this order will not commence before October 12, 2014, at 12:00.

Very truly yours,

(Signed)

Sandra Beit-On Ofinkero, Major
Head of Division Infrastructure and Seam Zone
On behalf of the Legal Advisor