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December 31, 2015

To:

Major General Roni Nomeh
GOC Central Command
Via email: pniot-tzibur@mail.idf.il
and fax: 02-5305741

Number of pages: 23

URGENT!

Dear Sir,

Re: **Home of the Family of Harub, I.D. - Urgent Objection**

On behalf of my client and HaMoked: Center for the Defence of the Individual, I hereby submit the following objection against your intention to seize and demolish the house where my client's family resides:

1. At dawn, on December 30, 2015, military forces came to the home of my client's family and gave my client your notice concerning the intention to seize and demolish the apartment where Muhammad Harub, I.D. allegedly resided in the village of Dir Samat in the region of Hebron pursuant to Regulation 119 of the Defense (Emergency) Regulations, 1945 (hereinafter: "**Regulation 119**"). According to the notice this measure is being taken "because the person in

reference committed a terrorist attack on November 19, 2015 in the course of which three persons were shot to death...” According to the notice, it is possible to submit an objection against the decision until January 3, 2016 at 09:00 and, hence, this objection.

2. My clients will claim that the decision to seize and demolish the apartment is flawed on the following grounds:
 - A. My client and his family have no ties to the actions attributed to Mr. Harub, and in any case there is no justification for harming them by seizing and demolishing their home;
 - B. The decision to demolish the residential apartment is based on a flawed factual infrastructure in view of the fact that Mr. Muhammad Harub did not live in the apartment intended for destruction but in an apartment on the ground floor;
 - C. The notice regarding the demolition does not specify which of the apartments on the middle floor is designated for demolition;
 - D. Based on an expert opinion, regardless of which of the middle floor apartments is designated for demolition, the demolition of one of the middle floor apartments is likely to cause severe damage to the floor above it, the other apartment on the same floor, and to the floor below;
 - E. When measurements were taken prior to the issuing of the order, the soldiers caused considerable damage to the contents of all of the apartments in the building in a grave and unlawful manner, seriously violating the rights of innocent persons;
 - F. Home demolition is a forbidden act which breaches the basic rights of innocent people, and is contrary to international humanitarian law;
 - G. The demolition of a residential apartment will harm innocent individuals, including children;
 - H. The demolition of a residential apartment is disproportional in light of the harm that will likely be caused to additional apartments in the building;
 - I. The demolition of the apartment is disproportional in light of the anticipated harm to the members of the family who reside in the apartment and other family members who live in the building, and in view of the severe sentence that Mr. Muhammad Harub is expected to receive should he be convicted at the end of his court proceeding, which constitutes a sufficient means of deterrence,;
 - J. There is a substantial doubt whether the demolition of the apartment will indeed deter additional attacks.
3. In view of the aforesaid, we request that you declare the above decision void and refrain from taking any measures whatsoever against the family’s apartment.

The principal facts relating to the matter at hand:

4. The residential apartment is located in a three-story building which includes a ground floor and two additional floors. There is one apartment on the ground floor, two apartments on the first floor and one apartment on the upper floor. The building is registered in the name of my client, Harub.

5. The present objection concerns one of the apartments on the middle floor. **It must be already be emphasized, at this point, that the demolition order that was issued did not indicate which of the middle floor apartments is designated for demolition.** As aforesaid, there are two separate apartments on the middle floor. My client and his three children, two of whom are minors, live in one of these apartments, and Harub's brother and his wife live in the second apartment with their two young children, one of whom is two years old and the other four months old.
6. **Far graver is the fact that the notice issued by you refers to an apartment on the middle floor, and Mr. Harub does not reside in either of the apartments on this floor but on the ground floor. This should, therefore, suffice to revoke the decision concerning the demolition of my client's residential apartment.**
7. It must also be noted that my client and his family have no alternative place of residence and the building he owns is the only residence available to the family. It is clear that destroying one of the apartments on the middle floor may leave the family without a roof over its head.
8. It must also be noted that when the measurements were taken, the soldiers devastated my client's apartment and caused grave and irreversible property damage. The soldiers, thus, illegally proceeded to execute the demolition even before notice was given regarding the intent to seize and demolish the apartment. Thus, the rights of innocent individuals were breached unnecessarily and contrary to any law.

Photos of my client's apartment taken after the apartment was measured on November 20, 2014 are hereby enclosed and marked Annex A'.

The notice is unclear and based on a flawed factual infrastructure:

9. Due to the grave breach of fundamental rights, and the irreversible damage caused to family members who did no wrong, it was determined that the realization of the powers pursuant to Regulation 119 will only be implemented for the purpose of deterrence and subject to an appropriate administrative procedure, including strictly ensuring a factual basis, and granting notice and a fair opportunity to present an objection, and more (see HCJ 9353/08 **Abu Dheim v. GOC Home Front Command** (published in Nevo on January 5, 2009)).
10. As aforesaid, in the case at hand there is a fundamental flaw in the wording of the notice, which refers to erroneous information regarding Harub's place of residence, and in the absence of any indication which of the two middle floor apartments is designated for demolition.
11. Under these circumstances, the process lacks fundamental clarity and certainty, contrary to the obligation of good faith and fairness, and violates my client's right to plead his case. In view of the fact that certainty concerning the decision is critical to its execution and to the realization of my client's rights, these grave flaws suffice to render the decision void.

12. Moreover, despite the fact that any decision by an administrative authority concerning the implementation of its power, or its non-implementation, must be based on a proper factual infrastructure, no factual infrastructure was attached to your notice indicating that Muhammad Harub resided in one of the middle floor's apartments and not on the ground floor as claimed by members of his family, particularly by my client, the owner of the property.
13. To avoid all doubt, and in order to properly fulfill the legal obligation to hold a hearing and allow my client to fully voice all of his contentions concerning the matter at hand, I request to receive the apartment's mapping report and any other information relating to your claim regarding the residence of Muhammad Harub in one of the apartments on the middle floor, including the presentation of confidential material in paraphrased form.

Threat to Other Parts of the Building:

14. According to the expert opinion of Mr. Tayser Jabareen, a civil engineer, license no. 36465, who is also a building contractor, license no. 14390, which was supplemented by architectural sketches from his office, the whole building was built in one stage in the conventional system with a continuous static scheme.
Mr. Jabareen's expert opinion is attached hereby and marked as Annex B'.
15. The expert opinion reveals that irreversible damage may be caused to the other apartments in the building as a result of the demolition of an apartment on the middle floor. According to Mr. Jabareen, the demolition will cause severe constructive damage to the upper floor, which may possibly lead to its collapse; the other middle floor apartment may suffer constructive damage which may possibly lead to its complete destruction; and constructive damage may be caused to the ground floor both as a result of the blast itself and as a result of heavy concrete slabs falling on the apartment's ceiling. This is due to the fact that all of the apartments in the building share common constructive elements and, therefore, it is not possible to demolish one element without causing damage to the other parts of the building.
16. Disturbingly, no expert opinion on your behalf and/or specifications of the planned demolition means were attached to the demolition order. In addition, no information was provided concerning the precautionary measures you intend to take to ensure that no damage whatsoever will be caused to the other apartments in the building, and why it is necessary to totally demolish the apartment rather than to take less harmful and more secure measures.
17. Past experience has shown that this is not a question of theoretical damages or a trivial matter, even when the demolition is executed manually and targets non-constructive elements. In this respect it must be recalled that in the '**Awadeh case**, the army commander undertook not to execute the demolition order until he is satisfied that no damage will be caused to other apartments in the building (see the remarks of the counsel for the state on page 4 of the protocol of the hearing of June 30, 2014). Yet, despite the State's undertaking which was anchored in

the judgment, the demolition of the apartment that was the subject of the ‘**Awadeh case**’ caused damage to neighboring apartments.

18. In wake of the above, at a hearing held on October 14, 2015 in HCJ 5839/15 **Siedr v. Military Commander of the West Bank Area** (published on the Judicial Authority Website on October 15, 2015; hereinafter: “**the Seidr case**”), the Supreme Court justices chastised the flaw involved in causing these types of damages, and in the words of the Honorable Justice Fogelman: “**The things that happened should not have happened...**” It must be noted that, at this hearing, the Supreme Court also deliberated the possibility of compelling the State to compensate the neighbors whose apartments will be damaged as a result of a demolition action. This obligation was recently anchored in the ruling of the President of the Supreme Court in HCJ 7040/15 **Hamed v. the Military Commander of the West Bank** (published on the Judicial Authority Website on November 12, 2015, hereinafter: **the Hamed case**) that in paragraph 58 determined that “**there is no room to restrict in advance the obligation of the respondents to pay compensation to third parties...**”.

The prohibition of house demolition:

19. The demolition of a family’s home is a cruel and inhumane act that causes severe trauma to the family, gravely breaching its right to property and to housing and leaving it destitute, uprooted, with no roof over its head, and absolutely dependent on others.
20. The demolition of a home constitutes intentional harm to individuals who did no wrong and is contrary to a fundamental, moral, and primary legal principle according to which “**fathers shall not be put to death because of their sons, and sons shall not be put to death because of their fathers, but a man shall be put to death for his own sin**” (2 Kings 14, 5-6; and also see Justice Cheshin’s remarks in HCJ 2006/97 **Ghanimat v. the GOC Central Command**, IsrSc 51(2) 651, 654), and, hence, it is absolutely prohibited.
21. Moreover, it appears that there is no need to expand on the manner in which home demolitions breach protected human rights. Home demolition breaches the right to dignity, the right to existence with dignity and the right to property. Because home demolition harms innocent family members, who did not commit acts that led to the demolition, and in any event, cannot influence the decision in question, it gravely infringes on the autonomy of will, and the prerogative of an individual to be a master of his deeds, and to be responsible for their consequences (see and compare ADA 10/94 **John Doe v. the Minister of Defense** IsrSc 53(1), 97, 107).
22. House demolition is also contrary to international humanitarian law, which prohibits collective punishment and the damage and destruction of private property (Articles 33 and 53 of the Fourth Geneva Convention, Article 46 of the Hague Regulations).

23. Apart from strictly upholding the rules of proper administration, the exercise of power in the case at hand must also meet the tests of proportionality conducted after the authorized official strictly examined and appropriately balanced the interests at hand (see HCJ 1730/96 **Salam v. the Military Commander in Judea and Samaria**, IsrSc 50(1) 353, 359). As we will argue below, the decision to destroy the residential apartment of my client's family cannot be considered reasonable or proportional in the circumstances of the case at hand.

Harm to innocent persons:

24. As described in the section on the factual infrastructure, three children, two of them minors, reside in my client's house together with himself and his wife. His wife suffers from asthma, which may be exacerbated by the demolition actions and the damage they will leave. Muhammad Harub's brother and his wife and their two small children live in the apartment adjacent to my client's apartment, and another brother, his wife and two small children live on the upper floor. It is clear, according to the engineering expert opinion, that the demolition of the apartment may cause all of the other apartments in the building to collapse, leaving the entire family, numbering 12 persons, homeless.

25. In such circumstances, in the absence of a proper evidentiary infrastructure indicating that Muhammad Harub indeed resided in one of the middle floor apartments and not in the ground floor apartment, and in the absence of a claim that my client and the members of his family were aware of Muhammad's intentions, the decision to demolish the residential apartment on the middle floor cannot be considered reasonable or proportionate. This decision will cause immense suffering to innocent individuals and gravely violate their human dignity and most basic rights.

26. Furthermore, the harm that will be caused to the family's children breaches the children's rights and the obligations of the State of Israel under the Convention of the Rights of the Child and particularly under Article 2 (b):

- a. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

And Article 38 of the Convention:

- a. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
...
- d. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible

measures to ensure protection and care of children who are affected by an armed conflict.

See HCJ 769/02 **the Public Committee Against Torture in Israel v. the Government of Israel** (published in Nevo on December 14, 2006), and the references noted there, in regard to the application of human rights treaties in the Occupied Palestinian Territories

The decision is not proportional:

27. According to the rulings of the Supreme Court, in light of the grave breach of fundamental rights, the exercise of a military commander's power pursuant to Regulation 119 must be limited, and subject to the exercise of reasonable discretion and the tests of proportionality. In the aforementioned 'Awawdeh case' the Supreme Court determined:

“...in interpreting [Regulation 119], this Court limited its application and implementation and determined that the military commander is ordered to exercise reasonable discretion when implementing his power pursuant to it and to act in a proportionate manner...this determination was reinforced after the enactment of Basic Law: Human Dignity and Liberty. This Court determined that even if the Regulation is shielded by the article of the Basic Law that protects the validity of earlier laws, it must be interpreted in the spirit of the Basic Laws [...] There is no dispute that the exercise of the power pursuant to Regulation 119 violates human rights. It violates the right to property and the right to human dignity. Therefore, as we shall rule, the exercise of the authority must be proportional.”

28. In the aforementioned HCJ 769/02, the Supreme Court emphasized that the point of departure for the examination of proportionality of the decision is the right of innocent civilians:

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". That is the meaning of the proportionality requirement with which my colleague President Barak deals with extensively.

Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians. The State of Israel has a duty to honor the lives of the civilians of the other side. It must protect the lives of her own citizens, while respecting the lives of the civilians who are not subject to her effective control. When the rights of the civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of hostilities...

That duty is also part of the additional normative system which applies to the armed conflict: it is part of the moral code of the state and the fundamental principle of protecting human dignity. (Page 61, emphasis added, G.L.).

29. In the present case at hand, there is no rational link between the means and the stated purpose - the deterrence of potential assailants and the protection of the security of the area. In light of the grave violation of the rights of my client and his family, an exceptional degree of proof of the effectiveness of this drastic measure is required. However, not only is there no evidence that house demolitions serve the declared objective of this measure, but the security authorities themselves had, in the past, reached the conclusion that the policy of demolishing the homes of the families of assailants has not proven itself as a policy of deterrence. In light of this, in 2005, the Minister of Defense accepted the recommendations of the Shani Committee and decided to halt the exercise of power pursuant to Regulation 119 as the measure did not prove to be effective, and the harm caused by the demolitions exceeded their gains.
30. An additional doubt concerning the effectiveness of the use of Regulation 119 also arose in the context of a personal letter recently published on the internet by Mr. Shlomo Gazit, a retired major-general who headed Israel's military intelligence service and received the Ben-Gurion award for 2012. During his long military service he served, *inter alia*, as the Coordinator of Government Activities in the Territories, and as the head of IDF regional military and security rule department in the army general staff headquarters. Currently he serves as a senior researcher at the Jaffe Center for Strategic Studies at the Tel Aviv University, and as a research fellow at the Center for International Affairs at the Harvard University, the Woodrow Wilson Center in Washington, and at the United States Institute of Peace in Washington. In an article entitled "**Demolition of perpetrators' homes – Does it deter?**" Mr. Gazit seriously questions the effectiveness of house demolition, and, after he specifies weighty factors which can undermine the alleged deterrence, he concludes with the following piercing words:

About forty years ago we examined the issue and decided that the damage in house demolition exceeded the gain arising there from as far as we were concerned, and decided to refrain to the maximum extent possible from such a punitive measure.

What has changed ever since?

Mr. Gazit's article is hereby attached and marked Appendix C'.

31. It must be recalled that in the ruling in H CJ 8091/14 **Hamoked: Center for the Defence of the Individual v. the Minister of Defense** (published in Nevo on December 31, 2014), which concerned circumstances similar to those of our matter, it was determined by the majority of the justices on the panel that in future cases of house demolitions, the army will be required to present data concerning the alleged effectiveness of house demolitions as a means of deterrence. Deputy President Rubinstein stated as follows:

“...State agencies should examine from time to time the tool and the gains brought about by the use thereof, including the conduct of a follow-up and research on the issue, and to bring to this court in the future, if so required, and to the extent possible, data which point at the effectiveness of house demolition for deterrence purposes, to such an extent which justifies the damage caused to individuals who are neither suspects nor accused...”

Also see paragraph 6 of the decision of the Honorable Justice Hayut.

32. In light of data presented *ex parte* in the Hamed case, it is seemingly appropriate to immediately conduct the aforementioned research and not to persist in the policy of house demolition and sealing which is not based on a proper factual study that examined its results. You are requested, therefore, not to carry out the demolition of my client’s home or that of any other building before the above study is conducted as determined by the Supreme Court and its results are presented.
33. In light of the enormous and irreversible damage already caused to my client and his family, it does not suffice that a drastic measure such as this “may” achieve the aim of deterring the execution of additional violent actions. As it is undisputable that vast damage will occur, a significantly high level of certainty that a benefit will be attained is required to justify it.
34. In this specific case, it is not possible to view the destruction of my client’s residential apartment as a proportional measure, as it is expected that Mr. Harub, if he is convicted, will receive a severe sentence that will in itself constitute a significant deterrence to potential assailants. The employment of the additional means of destroying the apartment of family members, a measure that is harmful, irreversible, and that has far-reaching consequences additional apartments in the building, emphasizes all the more, that it is punishment for the sake of revenge and constitutes an excessive reaction that harms the innocent and cannot be considered proportionate in the circumstances of the matter. Only recently, Justice Fogelman, for good reason, remarked in his ruling in H CJ 5839/15 **Siedr v. the Military Commander on the West Bank** (published on the website of the Judicial Authority on October 15, 2015; hereinafter: “the **Siedr case**”) that:

“The exercise of power pursuant to Regulation 119 when there was no sufficient evidence that the suspect’s relatives were involved in hostile activities is disproportional”.

35. The Honorable Justice Mazus expanded on this in a minority opinion in H CJ 8150/15 **Abu Jamal et.al v. GOC Home Front Command** (unpublished, delivered on December 22, 2015):

“I am of the opinion that the power according to Regulation 119 should be exercised in view of the fundamental principles which derive from the mere fact that the state of Israel is a Jewish state ("a man shall be put to death for his own sin") and a democratic state (compare: H CJ 73/53 "Kol Ha'am" v. Minister of the Interior, IsrSC 7, 871 (1953)), and in view of the principles of our constitutional law, mainly from the aspects of proportionality, as well as in view of universal values. I am of the opinion that all these principles inevitably lead to the conclusion

that the sanction under Regulation 119 may not be taken against uninvolved family members, regardless of the severity of the event and the deterring purpose underlying the use of the power. It is needless to point out that apparently the biblical principle according to which "a man shall be put to death for his own sin" constitutes the ideological basis of the prohibition against collective punishment in international law...

In my opinion, considering the severe violation of the rights of those who did not sin, the inevitable conclusion which arises is that in cases in which no evidence exists regarding connection and involvement of the family members in the criminal act, the order should not be directed against them, and accordingly one should consider to refrain from exercising the sanction or at least limit it to the perpetrator's part in the house alone. (Emphasis added, G.L.)

36. Furthermore, harm caused to innocent individuals and collective punishment also have the negative results of increased hostility and hatred, and convey the feeling that Israel does not attach any value to the safety and well-being of residents of the Occupied Territories, even if they are innocent and are not involved in any hostile activity. This broad and indiscriminate harm, in contrast with harm that targets those who are guilty or deserving of punishment, may generate feelings of despair and the willingness to sacrifice oneself, and not fear and apprehension. The indiscriminate demolition you are planning may, therefore, contribute to the feeling of those nearby and distant that, in any case, they have nothing to lose and thus paradoxically harm Israel's security interests and foster additional attacks. It appears that this measure is not intended for deterrence but to placate public opinion in Israel that is demanding revenge.

Summary:

37. There is no foundation or legitimate purpose, in the matter at hand, to employ Regulation 119. Firstly, it is unclear to which of the middle floor apartments the notice regarding the demolition refers, a matter that in itself constitutes a fundamental flaw in the administrative decision which should render it void. Secondly, Mr. Mohammed Harub does not live in any of the middle floor apartments, but on the ground floor, and no evidence was presented maintaining differently. Thirdly, the demolition of one of the middle floor apartments may cause irreversible damage to the whole building and leave all of the apartments in an uninhabitable state, and, thus, in practice, leave a whole family homeless.
38. Furthermore, home demolition is a cruel and irreversible measure whose effectiveness is doubtful. In the circumstances of the matter, it is not possible to view the employment of such drastic means as proportional, particularly as my client and his family have no tie to the acts attributed to Mr. Muhammad Harub.
39. We, therefore, request that you rescind your intention to demolish one of the middle floor apartments.

40. As long as proceedings regarding the seizure and demolition of the apartment are pending, no action must be taken that will in any way damage the apartment. Furthermore, should it be decided to deny this objection, my client intends to submit an urgent petition to the Supreme Court. For this purpose, we request you allot us a reasonable period of time during which no action will be taken that will cause damage to the building. It must also be emphasized that all that was stated above does not exhaust my client's claims concerning the matter at hand and he reserves the right to supplement his claims as needed.

Respectfully,

[Handwritten signature]

Gaby Lasky, Adv.

Cc:

Major General Doron Ben-Barak, Judea and Samaria Legal Advisor

Via fax: 02-997326