

**Adalah** The Legal Center for Arab Minority Rights in Israel

عدالة المركز القانوني لحقوق الأقلية العربية في إسرائيل

עדאלה המרכז המשפטי לזכויות המיעוט הערבי בישראל



## **Adalah's Report to:**

### **The United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict**

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## Section I: Major Findings of Report

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Adalah submits this report to the United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict. The report assesses **two key aspects** of Israeli law and practice relevant to the work of the UN Commission:

1. Israel's investigatory mechanisms into the conduct of its military during armed conflicts and its progress with investigations into "Operation Protective Edge".
2. The availability of civil tort compensation remedies before Israeli courts available to Palestinian civilians, residents of Gaza, who were harmed by the Israeli military;

**The major findings of the report on the Israeli investigatory mechanisms into the military and Israel's duty to investigate are:**

1. The UN Fact-Finding Mission on the Gaza Conflict in 2009 ("The Goldstone Mission") raised serious doubts about Israel's willingness to carry out genuine investigations concerning Operation Cast Lead as required by international law. The Mission also found that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult. Israel failed to abide the Goldstone mission's recommendations, as well as those of the subsequent Committee of Experts, to take all appropriate steps to launch appropriate investigations that conform to international standards.
2. The Israeli Supreme Court in a 2011 judgment ("The Adalah Case") refused to intervene in the Military Advocate General's (MAG) decisions not to open any investigations into Israeli military attacks in Gaza in 2004, which resulted in enormous loss of life and injury of civilians and extensive damage to homes. The Court reiterated its previous decisions in ruling that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances. To date, the Court has never issued any order to the MAG to open a criminal investigation or to indict any individual regarding alleged suspicions of the commission of war crimes in Gaza.
3. The Supreme Court in the Adalah Case also evaded serious discussion on the question of which circumstances trigger the initiation of an investigation. In fact, the Court has never set forth any guidelines under which a criminal investigation should be opened in cases involving alleged IHL violations.
4. Under intensive international pressure following Operation Cast Lead and the 2010 Gaza Flotilla events, the Israeli government formed the Turkel Commission. Despite the Commission's contention otherwise, its 18 recommendations issued in 2013 illustrate serious shortcomings in Israel's investigatory mechanisms. The recommendations of the Turkel Commission also *do not* fully comply with the international standards of the duty to investigate: they do not offer a solution for the "dual role" played by the MAG, which continues to create serious conflicts of interest, and they do not include clear guidelines regarding *under what circumstances* an investigation into allegations of IHL and IHRL violations must be opened. Further, although two years have passed since the issuance of the Turkel report, Israel has implemented almost none of the recommendations, despite its commitment to do so, and little has changed.
5. To date, Israel's investigations into its 2014 Operation Protective Edge fall far short of the international standards of independence, impartiality, effectiveness,

promptness and transparency. There is a lack of an independent and impartial investigatory mechanism; the MAG only provides vague arguments about the existence of military necessity and military targets; there is a lack of a time frame for examinations and investigations, which raises concerns about promptness; the MAG is unwillingness to disclose information on witnesses and testimonies, and other evidence, which reveals a lack of transparency; and it is still unclear under what circumstances the MAG will open an investigation. Further, Israeli government officials such as Defense Minister Moshe Ya'alon have made statements against the opening of investigations by the MAG.

6. All of the above shows that Israel's current probes into Operation Protective Edge are likely to lead, as they did in the past, to a lack of criminal investigations, prosecutions, and punishment of perpetrators of serious IHL and IHRL violations against Palestinians in Gaza. There is still an absence of war crimes legislation in the domestic Israeli criminal law. Further, there is no Israeli penal law imposing direct criminal liability on military commanders and political leaders for IHL violations. Therefore, current Israeli law and practice strongly indicates that Palestinian residents of Gaza are unable to obtain an effective remedy from the Israeli justice system for suspected war crimes committed against them by the Israeli military.

**The major findings of the report on civil tort compensation remedies are:**

1. Israel imposes numerous barriers on Palestinian residents of Gaza who submit civil lawsuits to request compensation for injuries that resulted from attacks by the Israeli military. These barriers essentially prevent Palestinians in Gaza from receiving civil remedies and compensation for their injuries by the military from Israeli courts.
2. These barriers to civil remedies include, among others, banning Palestinians in Gaza from entering Israel, restricting the statute of limitations period, and imposing high financial guarantees, all of which are nearly insurmountable for Gazan residents.
3. The only exception to Israel's policy of banning the entry of Gazans into Israel in order to pursue their legal proceedings is in "humanitarian cases", a category that is not clearly defined by Israeli law.
4. The Israeli military, who are responsible for the injuries and who are the respondents in the lawsuits, are also the same authority that examine Gazan residents' applications to enter Israel to pursue their legal proceedings, and have the power to deny or accept the requests. Thus in this matter, the State of Israel and its military "wear two hats" and operate with a severe conflict of interest.
5. Over the years, the State of Israel has enacted legislation that imposes bans and restrictions on Palestinians in order to exempt itself from compensating Palestinians for injuries that resulted from military attacks.
6. In its December 2014 judgment, the Supreme Court upheld onerous regulations set by the State Attorney's Office that, in the past, prevented Gazans from entering Israel to pursue their legal cases. This decision contradicts a 2006 Supreme Court decision that upheld the constitutional right of access to Israeli courts for Palestinians in civil tort cases. In practice, the 2014 decision effectively closes the doors of the Israeli courts to Gazans' for their civil compensation claims. This constitutes a serious breach of Israel's obligations under international law.

## SECTION II: Israel's Duty to Effectively Investigate Allegations of International Law Violations during its Military Operations in Gaza

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This section reviews the mechanisms by which Israel investigates allegations of war crimes and other serious allegations of international humanitarian law and human rights law conduct of its military during armed conflicts, and assesses the extent to which these mechanisms are in compliance with international standards. The section opens with an examination of the period after Israel's 2008-2009 military operation "Cast Lead" (OCL) in the Gaza Strip, and the report of the UN Fact-Finding Mission on the Gaza Conflict (the UN FFM Report or the "Goldstone Report"), produced in 2009, and several conclusions of the follow-up Independent Committee of Experts from 2010 and 2011. The next part examines a 2011 Israeli Supreme Court decision on the duty to investigate, and shows how essentially the Supreme Court refuses to intervene in the military's decisions in this regard, essentially exempting the military from explaining the severe consequences of its activities in Gaza, which resulted in the enormous loss of life and injury to civilians and their homes. The section goes on to discuss the "Turkel Commission Report", which was published in 2013, finding that its recommendations, relevant to this discussion, fall far short of international standards. Finally, the section assesses Israel's current probes and investigations into events that took place during the latest Gaza War in the summer of 2014, named operation "Protective Edge". The main findings of this section are:

1. The UN Fact-Finding Mission on the Gaza Conflict in 2009 ("The Goldstone Mission") raised serious doubts about Israel's willingness to carry out genuine investigations concerning Operation Cast Lead as required by international law. The Mission also found that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult. Israel failed to abide the Goldstone mission's recommendations, as well as those of the subsequent Committee of Experts, to take all appropriate steps to launch appropriate investigations that conform to international standards.
2. The Israeli Supreme Court in a 2011 judgment ("The Adalah Case") refused to intervene in the Military Advocate General's (MAG) decisions not to open any investigations into Israeli military attacks in Gaza in 2004, which resulted in enormous loss of life and injury of civilians and extensive damage to homes. The Court reiterated its previous decisions in ruling that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances. To date, the Court has never issued any order to the MAG to open a criminal investigation or to indict any individual regarding alleged suspicions of the commission of war crimes in Gaza.
3. The Supreme Court in the Adalah Case also evaded serious discussion on the question of which circumstances trigger the initiation of an investigation. In fact, the Court has never set forth any guidelines under which a criminal investigation should be opened in cases involving alleged IHL violations.
4. Under intensive international pressure following Operation Cast Lead and the 2010 Gaza Flotilla events, the Israeli government formed the Turkel Commission. Despite the Commission's contention otherwise, its 18 recommendations issued in 2013 illustrate serious shortcomings in Israel's investigatory mechanisms. The recommendations of the Turkel Commission also *do not* fully comply with the international standards of the duty to investigate: they do not offer a solution for the "dual role" played by the MAG, which continues to create serious conflicts of interest, and they do not include clear guidelines regarding *under what circumstances* an investigation into allegations of IHL and IHRL violations must be

opened. Further, although two years have passed since the issuance of the Turkel report, Israel has implemented almost none of the recommendations, despite its commitment to do so, and little has changed.

5. To date, Israel's investigations into its 2014 Operation Protective Edge fall far short of the international standards of independence, impartiality, effectiveness, promptness and transparency. There is a lack of an independent and impartial investigatory mechanism; the MAG only provides vague arguments about the existence of military necessity and military targets; there is a lack of a time frame for examinations and investigations, which raises concerns about promptness; the MAG is unwillingness to disclose information on witnesses and testimonies, and other evidence, which reveals a lack of transparency; and it is still unclear under what circumstances the MAG will open an investigation. Further, Israeli government officials such as Defense Minister Moshe Ya'alon have made statements against the opening of investigations by the MAG.
6. All of the above shows that Israel's current probes into Operation Protective Edge are likely to lead, as they did in the past, to a lack of criminal investigations, prosecutions, and punishment of perpetrators of serious IHL and IHRL violations against Palestinians in Gaza. There is still an absence of war crimes legislation in the domestic Israeli criminal law. Further, there is no Israeli penal law imposing direct criminal liability on military commanders and political leaders for IHL violations. Therefore, current Israeli law and practice strongly indicates that Palestinian residents of Gaza are unable to obtain an effective remedy from the Israeli justice system for suspected war crimes committed against them by the Israeli military.

Major developments concerning Israel's investigatory mechanisms and practices from the Report of the UN Fact-Finding Mission on the Gaza Conflict (the "Goldstone Report") through Operation "Protective Edge" follow below.

#### **1. 2009 - The Report of the UN Fact-Finding Mission on the Gaza Conflict**

On 3 April 2009, three months after the conclusion of Israel's operation "Cast Lead" in the Gaza Strip, the UN Human Rights Council established the UN Fact Finding Mission on the Gaza Conflict (FFM) with a mandate "to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after."

The Mission published its report in September 2009. In part four of the report, on "Accountability and Judicial Remedies", the Mission reviewed the initial probes that Israel conducted regarding allegations of violations of the laws of war committed by its armed forces against residents of Gaza, and Israel's criminal investigatory system and made a series of related recommendations. According to the FFM, the way in which Israel dealt with allegations of serious wrongdoing by its military personnel failed to comply with the international principles of independence, impartiality, effectiveness, promptness and transparency.<sup>1</sup> The Mission found that the mechanism of 'operational de-briefings' used by the Israeli military was insufficient and failed to meet international standards:

"Operational debriefing, to review operational performance, is not an appropriate tool to conduct investigations of allegations of serious violations of

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<sup>1</sup> Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. Para. 1814-1816 A/HRC/12/48 (September 25, 2009).

human rights and humanitarian law. It appears to the Mission that established methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards have not been adopted. The operational debriefings as well as the five “expert” investigations carried out by the Israeli armed forces into events during the December–January military operations in Gaza appear to have relied exclusively on interviews with Israeli officers and soldiers. As such, these investigations did not comply with required legal standards.”<sup>2</sup>

The Mission further stressed the unprofessional way in which investigations were carried out, making it virtually impossible to prove the charges beyond reasonable doubt. According to the FFM, military criminal investigators did not seem interested in interviewing victims or witnesses and the quality of evidence gathered was low.<sup>3</sup>

The Mission concluded that, “there are serious doubts about the willingness of Israel to carry out genuine investigations in an impartial, independent, prompt and effective way as required by international law. The Mission is also of the view that the Israeli system presents inherently discriminatory features that have proven to make the pursuit of justice for Palestinian victims very difficult.”<sup>4</sup>

The Mission recommended that the Government of Israel take all appropriate steps, within a period of three months, to launch appropriate investigations that are independent and in conformity with international standards, into the serious violations of IHL and IHRL reported by the Mission and any other serious allegations that may come to its attention. It further recommended that in parallel an independent committee of experts in international humanitarian and human rights law be established to monitor and report on any domestic legal or other proceedings undertaken by the Government of Israel in relation to the aforesaid investigations.<sup>5</sup> The UN Human Rights Council decided in its Resolution 13/9 to establish this committee and to also review the independence, effectiveness, genuineness of any domestic investigations (both by Israel and the Palestinians) and their general conformity with international standards.

The resulting committee published two reports, the first in 2010 and the second in 2011. Both reports concluded that Israel had failed to demonstrate any real indication that it had opened any investigations into “Operation Cast Lead” that conformed to the aforementioned international standards. According to the independent experts, Israel’s demonstrated practice of opening only a very small percentage of investigations into alleged violations by its military forces during OCL casts doubt on the impartiality of the system in general, and the MAG in particular. Following Israel’s OCL, in which approximately 1,400 Palestinians were killed, 400 incidents were initially examined by the military, of which only 52 resulted in the opening of criminal investigations.<sup>6</sup> Of those 52 cases, only three resulted in the filing of indictments, and the most severe punishment delivered was in a case of the theft of a credit card.<sup>7</sup>

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<sup>2</sup> Ibid. at para. 1819.

<sup>3</sup> Ibid. at para. 1829.

<sup>4</sup> Ibid. at para. 1832.

<sup>5</sup> Ibid. at para. 1869.

<sup>6</sup> Human Rights Council, Report of the Committee of independent experts in international humanitarian and human rights law pursuant to Council resolution 13/9, U.N. Doc. ¶ 24, A/HRC/16/24 (May 5, 2011).

<sup>7</sup> Amnesty International, *Families Under the Rubble* (2014) at 40, available at:

Adalah and its partner human rights organizations Al Mezan and Al Haq sent complaints to the Israeli military authorities and demanded that Israel open independent, impartial, and prompt criminal investigations into 10 separate incidents that occurred during OCL, including into suspected war crimes. These cases involved killings, injuries, and the prevention of medical treatment, home demolitions, and the use of Palestinian civilians as human shields. The Israeli military closed all of the cases, except for one in which an officer was disciplined for using a Palestinian civilian as a human shield for 24 hours. In many cases, the human rights organizations and the victims learned solely from Israel's reports to the Independent Experts Committee or the media that the cases were closed.

By contrast, the UN FFM investigated three of the cases brought by Adalah, Al Mezan and Al Haq and reported grave factual and legal findings in each case, including the commission of war crimes. A summary of each complaint, the status of the Israeli military investigations, and specific findings of the UN FFM on the relevant cases appear in Appendix 1.

## **2. 2011 - Israeli Supreme Court decision in Rafah case (Adalah case):<sup>8</sup>**

On 8 December 2011, the Israeli Supreme Court rejected a petition submitted by Adalah, in cooperation with the Palestinian Center for Human Rights (PCHR) and Al-Haq (jointly referred to as the "petitioners").<sup>9</sup> The petition demanded that the Israeli authorities open a criminal investigation into the killings and injury of civilians and into the extensive damage to homes in the Gaza Strip in 2004. The loss of life and damage to property occurred during the Israeli army's military Operations 'Rainbow' and 'Days of Penitence', both of which took place before Israel's unilateral disengagement from the Gaza Strip.

In rejecting the petition, the Supreme Court determined that the petition was too general. The justices ruled that the petition did not specify particular cases in which criminal offenses were committed, and instead complained about the attack against civilians and civilian targets in general. According to the Court, it can only order a criminal investigation if there appears to be a sufficient foundation for an investigation in a specific case. The Court ruled that such an analysis was not possible here because the events described were complex and large-scale operations. The Court concluded that in certain circumstances, criminal investigations are not the appropriate tool of review.

This ruling came despite the fact that the petitioners presented specific incidents in which the Israeli military was suspected of having severely violated the rules of warfare. In addition, the petitioners emphasized that shortly after the two operations concluded, PCHR in Gaza submitted dozens of complaints to the Israeli authorities demanding investigation of specific incidents. The authorities failed to respond to most of these complaints, and offered only brief or partial responses to a few others. Instead of clarifying for the respondents why

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<http://www.amnesty.org/en/library/asset/MDE15/032/2014/en/613926df-68c4-47bb-b587-00975f014e4b/mde150322014en.pdf> and B'Tselem, *Israeli authorities have proven they cannot investigate suspected violations of international law by Israel in the Gaza Strip*, (Sept. 5, 2014): [http://www.btselem.org/accountability/20140905\\_failure\\_to\\_investigate](http://www.btselem.org/accountability/20140905_failure_to_investigate).

<sup>8</sup> This section is based on the case analysis presented in a briefing paper prepared by Adalah on behalf of Adalah, PCHR and Al Haq regarding the state's obligation to investigate suspected grave violations of international law committed in the Gaza Strip during the 2004 military Operations 'Rainbow' and 'Days of Penitence', see:

<http://www.pchrgaza.org/files/2012/Gaza%20Case%20Review%20English.pdf>

<sup>9</sup> HCJ 3292/07 *Adalah – The Legal Center for Arab Minority Rights in Israel v. Attorney General* (decision delivered 8 December 2011) (hereinafter: "the Adalah case").



the army did not address these complaints, the Court chose to disregard these facts and to reject the petition.

Further, the Court ruled that even if the petition had focused on specific incidents, its ability to intervene in the army's decision not to investigate is, in any case, very limited:

“As is well known, the principle of maximal restraint in judicial intervention in the decisions of the executive authority in regard to investigation and criminal indictment is deeply embedded in the judicial tradition of this court. Like the attorney general, the prerogative given to the chief military prosecutor on the question of whether to order the initiation of criminal proceedings is very broad... **In accordance with this view, intervention in the professional decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances.**” (Emphasis added.)

The Court's ruling indicates that petitions calling for investigations of suspected war crimes, even if they focus on specific incidents and are supported by a strong evidentiary foundation, are unlikely to go forward due to the court's policy of restraint when asked to intervene in the decisions of the heads of the prosecution.

In the view of the petitioners, the Court's ruling also lacks a practical discussion of the duty of a state party engaged in armed conflict to investigate serious allegations of harm to civilians, and an analysis of when such allegations justify the opening of a criminal investigation in accordance with the laws of warfare. The Court's treatment of this issue is superficial and evasive. The court explained that:

“The sides before us are divided on the question of what constitutes an indication that a suspicion exists that justifies opening a criminal investigation of a particular incident ... we addressed the question of whether a criminal investigation should automatically be initiated in every incident in which a civilian dies as a result of activity by the security forces in a parallel petition submitted to the court on this subject, HCJ 9594/03, *B'Tselem v. Chief Military Prosecutor* (decision delivered 21 August 2011), and we do not deem it necessary to elaborate on this issue here...”<sup>10</sup>

The Court reviewed the decision in HCJ 9594/03, *B'Tselem v. Chief Military Prosecutor* and indicated that in regard to situations of armed conflict, as opposed to a situation of occupation (although the definition of incidents “of a real belligerent nature” is unclear and requires study), this question was not resolved at all. In the *B'Tselem* case, the court ruled:

“13 ... However, in regard to this region, in the absence of control in the Gaza Strip and in light of the armed conflict, it cannot be determined that every incident of death of a civilian uninvolved in warfare raises – in itself – a suspicion of criminal conduct that justifies initiating an investigation...”

Therefore, when the Court was presented with a petition demanding a ruling on the specific question of what indications for suspicion of criminal conduct during an armed conflict justify initiating an investigation, the Court chose to evade any discussion of the issue. However, the Court did state that:

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<sup>10</sup> ICRC's Rules of Customary International Law, paragraph 25.

“The very fact that civilians were harmed is not sufficient to constitute a real suspicion that criminal offenses were committed in violation of the laws of warfare. In the absence of evidence that criminal offenses were committed, there is also no obligation to conduct a criminal investigation of the incidents.”<sup>11</sup>

This ruling is also problematic for several reasons. Firstly, from the state’s perspective only the intentional killing of civilians constitutes a war crime. Accordingly, as long as the harm to civilians is not intentional and therefore does not constitute a war crime as defined by the state, there is no obligation to investigate. This is how the state expressed its position in its response to the petition in HCJ 9594/03, *B’Tselem v. Chief Military Prosecutor*, to which the court referred:

“Article 8 of the [Rome] Statute [of the International Criminal Court] stipulates the war crimes that fall under the court’s jurisdiction. The crimes relevant to our case are the crimes pertaining to the killing or attacking of ‘protected persons.’ As the Court’s Statute indicates, international law assigns blame only when the harm to innocents is accompanied by a mental element of intention or willfulness, and not when the harm to innocents is unintentional.”<sup>12</sup>

First, intent can only be determined in the course of investigation. Second, the state’s stance is inconsistent with international law. Contrary to the state’s interpretation of Article 30 of the Rome Statute, the article itself suffices with “awareness” as the mens rea for applying the directives of the Statute. Moreover, the Rome Statute and its official interpretation indicate that many offenses constitute war crimes even if the mental element does not amount to “intention.” In the official interpretation of the mental element required for an offense listed in Article 8(2)(a)(i) in the Rome Statute as a war crime of willful killing, “recklessness” is also considered a sufficient mental element for constituting a crime.<sup>13</sup>

In Article 8 of the Rome Statute, the severity of the consequence of attacks constitutes an element of some of the crimes listed. One such example is Article 8(2)(b)(iv), which refers to the crime of launching an attack with the knowledge that it will cause excessive injury to the lives of civilians. Even though international law recognizes the possibility of incidental injury to civilians, it stipulates that this does not necessarily justify causing foreseeable harm to civilians or civilian property that is excessive relative to the concrete and direct military advantage anticipated from the attack. Therefore, excessive damage to civilians constitutes one of the elements of the crime.<sup>14</sup> Notably, there is unanimous agreement that this definition of a crime applies to a reckless perpetrator who was aware of the danger involved in an action but chose to proceed with the act.<sup>15</sup>

Moreover, in Article 8(2)(b)(i), which deals with the crime of an intentional attack against a civilian population or individual civilians who are not taking a direct part in hostilities, the fact that not all possible measures of caution are taken to prevent harm to civilians is also sufficient to constitute a foundation of the crime.<sup>16</sup>

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<sup>11</sup> The *Adalah* case, footnote 1, para. 13 of Justice Beinisch’s decision.

<sup>12</sup> Section 89 of the state’s response.

<sup>13</sup> Knut Dormann, “Elements of War Crimes under the Rome Statute of the International Criminal Court,” ICRC 2003, p. 42, 43.

<sup>14</sup> Dormann, p. 161. See also p. 163 on the conditions for the legality of attacking.

<sup>15</sup> The reference is to comment 36 in the text, which was adopted by the Preparatory Committee of the International Criminal Court, Dormann, p. 165.

<sup>16</sup> See Dormann, p. 131-132.

In addition, and relevant to the case at hand, repeated unintentional harm to civilians during the course of military activity directed against a legitimate target constitutes a pattern of conduct that endangers the lives of innocent civilians, and may constitute a violation of the laws of the International Criminal Court.<sup>17</sup>

Therefore, international criminal law recognizes many crimes in which disproportionate damage constitutes an element of the crime. The existence of disproportionate damage itself creates suspicion that criminal acts were committed and as such, mandates an investigation of the incident. Hence, according to international law, it should not be the question of “whether a war crime was committed intentionally” that determines whether or not to open a criminal investigation. In addition, under Israeli penal law, the test of whether to investigate is whether there is a suspicion of a crime. This test applies to many types of criminal offenses that do not amount to war crimes.

The Israeli army refused to release any details concerning its conduct in these two operations in Gaza, such as the relevant information about the choice of targets, the decision to attack the targets, the means of attacks selected, the timing of the attacks, and the measures of caution that were taken to prevent harm to civilians and civilian property. This information and other data relevant for examining the legality of the attacks are exclusively in the army’s possession. This data is needed to assess the legality of the attacks, the way they were carried out, the consequences in terms of the harm to civilians and civilian property, the scope of the damage caused, the circumstances of the attacks, and if there was a justification for denying the protections granted to civilians or civilian property from attacks. The more severe the consequences of a military attack are to civilians and civilian property, without any known or apparent grounds for denying their protection, the greater the suspicion that the criteria of proper conduct were violated and that reckless, negligent, or even intentional criminal acts were committed. In this situation, there is a duty to investigate these allegations. In the view of Adalah, PCHR and Al Haq, the Court should have ordered the state to respond to the crux of these suspicions and to demonstrate whether and how the army investigated these suspicions in order to confirm or refute them.

Moreover, in its decision, the Court mixed two separate issues: the question of when the duty arises to open an investigation regarding suspected war crimes and the question of whether sufficient evidence exists for determining that war crimes were indeed committed. The Court ruled that, “the petition, as noted, is based on interviews and media reports that cannot constitute evidence in a criminal proceeding, and on the reports of international organizations... this meager evidentiary infrastructure cannot stand as the basis for a criminal conviction, in light of the high threshold of proof required in a trial of this sort.”<sup>18</sup>

Besides the fact that the petition included evidence beyond what the Court noted in its ruling, the Court should have examined the evidence provided in order to check whether a basis was established for suspicion that crimes were committed, and thus to clarify what the state did in order to investigate these suspicions. Instead, the Court examined whether there is sufficient evidence for a criminal conviction. There is an obvious and substantial difference between the two tests: Article 59 of the Israeli Criminal Procedure Law [Consolidated Version] - 1982 stipulates that in the event of a complaint of a criminal offense, the police authorities are obligated to open an investigation; thus, the law does not permit the police any prerogative or option to refuse. This standard is not the same vis-à-vis indictment. The law demands that there be “sufficient evidence” for the filing of an indictment, which is a

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<sup>17</sup> Dormann, p, 169.

<sup>18</sup> Dormann, paragraph 11.

test of whether there is a reasonable possibility of conviction.<sup>19</sup> The same applies to the Court's comment about the protections in criminal law; without an investigation, it is impossible to know whether or not the suspect is entitled to the protections of criminal law. These protections should apply when considering the question of prosecution and not at the stage of determining whether to initiate an investigation.

The Supreme Court's decision effectively grants the state and the army an exemption from explaining the severe consequences stemming from the military activity in the framework of these two operations. Moreover, and perhaps more alarmingly, setting a strict evidentiary standard, as in this case, will lead to a situation in which it is impossible to substantially examine the lawfulness of any military action, including whether severe consequences are a result of genuine military need or constitute a deviation from the law.

This is not the first time that the Supreme Court has refrained from engaging in questions that directly pertain to international law and the obligations it imposes on the Israeli authorities, by adopting various excuses and arguments. Prof. Eyal Benvenisti of Tel Aviv University Faculty of Law has analyzed the various techniques used by the court to avoid the precise application of international law.<sup>20</sup> The threshold arguments in this ruling comprise yet another one of these techniques.

### **3. 2013 - The Turkel Commission Report**

In the aftermath of OCL and the 2010 Gaza Flotilla incident, and as a result of strong international pressure, the Israeli government formed the Turkel Commission, in part to "identify principles and methods to improve the mechanisms [for examining and investigating complaints and claims of violations of international humanitarian law] in Israel, to ensure that they conform to the rules of international law and to the currently prevailing trends in other countries."<sup>21</sup> According to the Turkel Commission's recommendations, even this government-appointed body found out that Israel's investigatory mechanisms fell far short of internationally recognized standards. However, the Commission articulated its findings simply as recommending "improvements" to the existing mechanisms.<sup>22</sup> The fact that the Turkel Commission made 18 recommendations to strengthen the system essentially confirms the criticisms voiced by human rights organizations<sup>23</sup> as well as Israeli legal scholars<sup>24</sup> over the years regarding the bias and inadequacies of Israel's investigatory mechanisms. Despite the Commission's contention otherwise, these recommendations

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<sup>19</sup> HCJ 5675/04 *Movement for Quality Government in Israel v. The Attorney General et al.*, PD 59(1) 199 (2004).

<sup>20</sup> Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts," 4 EUR. J. INT'L L. 159, pp. 181-182 (1993).

<sup>21</sup> The Second Turkel Commission Report "Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law. For the full report, see:

<http://www.turkelcommittee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf>.

<sup>22</sup> Turkel Report, *supra* note 9, at 361 (recommending procedural and structural changes to Israel's current investigative procedures).

<sup>23</sup> See Adalah, Physicians for Human Rights – Israel and PCATI's analysis of the Turkel Report: <http://www.stoptorture.org.il/files/PDF%20Adalah%20PCATI%20PHR%20Statement%20The%20Turkel%20Report%2028.2.2013.pdf>; See "Goldstone's statements support our consistent position," 4 April 2011: <http://www.acri.org.il/en/2011/04/04/1888/>

<sup>24</sup> See for example Amichai Cohen and Yuval Shany, "The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigation," Jerusalem: Policy Paper 93, December 2011.

clearly illustrate serious shortcomings in Israel's investigatory mechanisms and the need for marked changes in order to comply with international law.<sup>25</sup>

The Turkel Commission's recommendations include, among others:

- Initiating legislation for all international law offenses that lack a corresponding domestic offense in Israeli criminal law;
- Enacting legislation to impose direct criminal liability on military commanders and their civilian superiors where they did not take all reasonable measures to prevent offenses committed by their subordinates;
- Strengthening the status and independence of the Chief Military Prosecutor (CMP) because of the dual hat of the MAG;
- Implementing reporting procedures, including the documentation of the scene of an incident, the seizure and storage of all exhibits and documents that may assist the examination and/or investigation;
- Implementing a strict documentation procedure for all examination and investigation actions carried out, in a file, and for all decisions made, especially in cases of alleged violations of IHL;
- Establishing a fact-finding assessment mechanism [FFAM] with a specially-appointed team, the findings of which should form the basis of the MAG's determination of whether or not an investigation is necessary;
- Establishing a timeframe of a few weeks for the MAG's decision of whether to open an investigation, and setting a maximum period of time in which either to adopt legal or disciplinary measures or to close the case, and placing an obligation on the MAG to give reasons for his decision not to open an investigation, and to apply the arrangements provided in the Rights of Victims of Crime Law – 2001.

However these recommendations *do not* fully comply with the international standards of the duty to investigate for the following two main substantive reasons:

- The Turkel Commission's recommendations do not offer a solution for the "dual role" played by the MAG – a strong critique which was also voiced by the Independent Committee of Experts in 2011. The MAG still both provides the military with legal advice prior to and during military operations and subsequently decides whether to initiate a criminal investigation. This could lead to a situation in which the MAG would need to decide whether to investigate his own conduct or that of his subordinates. Such a situation would clearly violate the requirement of independence. On the other hand, the MAG recently reaffirmed that the decision to open or close an investigation could be challenged before the AG and that it is subject to judicial review by the Israeli Supreme Court. As the "Adalah case" discussed above clearly indicates, the Supreme Court, however, is extremely reluctant to intervene in these decisions, and essentially it does not. Further, the MAG has failed to communicate decisions and the reasons for these decisions regarding investigations to complainants, which also leaves this appeals process ineffective in practice.
- The Turkel Commission did not specify *under what circumstances* there is an obligation to investigate cases of the killing of civilians. For example, the Commission provides no guidance as to whether an investigation should be opened when the killings resulted from an attack that did not distinguish between civilians and

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<sup>25</sup> See for example Amichai Cohen and Yuval Shany, The IDF and Alleged International Law Violations: Reforming Policies for Self-Investigation, Jerusalem: Policy Paper 93, December 2011.

combatants, or when the attack resulted from a disproportionate attack that caused excessive damage.<sup>26</sup> The Commission was satisfied with a general statement that an attack, which incidentally causes the death or injury of a civilian during an armed conflict, does not necessarily raise suspicion of a criminal violation.<sup>27</sup> The Commission added that the context in which the death or injury occurred would determine whether there is a reasonable suspicion of war crimes,<sup>28</sup> but this statement does not include clear guidelines regarding *under what circumstances* a suspicion that requires the opening of an investigation exists. The Supreme Court, as noted above in the Adalah Case and the B'Tselem Case, has evaded a clear ruling on this issue, and has thus effectively granted the state and the military an exemption from explaining the severe consequences stemming from military conduct.

Therefore, to date, Israel has implemented few recommendations and little has changed. Initially, it was reported that the state would issue a report containing its final decisions on the 18 Turkel recommendations by October 2014. This did not happen. Government officials then stated that there would be an announcement on the matter by the end of December 2014. There was none. The way in which Israel has been dealing with the recommendations – or rather its failure to do so – coupled with the severe shortcomings of these recommendations demonstrates that Israel has systematically failed to meet the international standards of the duty to investigate and is unwilling to do so.

#### **4. 2014 - Operation "Protective Edge"**

Operation Protective Edge began on 8 July 2014 with massive airstrikes by the Israeli air force in the Gaza Strip, followed by a ground invasion by troops and tanks. According to figures collected by the UN Office for the Coordination of Humanitarian Affairs (OCHA), between 8 July and the end of August 2014, at least 2,131 Palestinians were killed in the fighting, including 501 minors, 257 women, and 85 people over the age of 60.<sup>29</sup> According to the Palestinian Health Ministry, by 31 August 2014, 2,146 Palestinians had been killed in the Gaza Strip.<sup>30</sup> In addition, thousands of homes were destroyed and hundreds of thousands of people were displaced from their homes that no longer exist.

Adalah and Al Mezan filed 11 complaints to the Israeli authorities including the MAG concerning about 20 incidents in which the Israeli army targeted the civilian population and civilian objects in Gaza, such as homes, schools, hospitals and ambulances. The human rights organizations demanded the immediate opening of independent criminal investigations into these events, which amount to suspected war crimes committed by the Israeli military in Gaza.<sup>31</sup> The details of the complaints, as well as joint principle letters sent by Adalah and Israeli human rights organizations to the Israeli authorities, are listed in the following chart:

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<sup>26</sup> See Adalah Briefing Paper on the Turkel Report, Part II, by Attorney Fatmeh El-Ajou, available at: <http://www.adalah.org/uploads/oldfiles/Public/files/English/Publications/Articles/2013/Briefing-Paper-Turkel-II-El-Ajou.pdf>.

<sup>27</sup> Turkel Report, *supra* note 9, at 92.

<sup>28</sup> Turkel Report, *supra* note 9, at 93.

<sup>29</sup> OCHA, Gaza Emergency situation report, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_sitrep\\_04\\_09\\_2014.pdf](http://www.ochaopt.org/documents/ocha_opt_sitrep_04_09_2014.pdf).

<sup>30</sup> Palestinian Ministry of Health, available at: <http://www.moh.ps/attach/761.pdf>.

<sup>31</sup> A full list of the complaints and their current status filed by Adalah and Al Mezan is included in Appendix III.

<b>Date Complaint Filed (2014)</b>	<b>Content of Complaint</b>	<b>Link to Press Release</b>
July 10	Demand that Israeli military stop targeting civilians and open investigations. 6 events cited including the bombing of the Kawari family's home in Khan Younis on 8 July, which resulted in the killing of 8 civilians, including 6 children, and injury of 25 others; and an attack on a journalists' car, which was clearly marked "TV", resulting in the killing of 9 people.	<a href="http://adalah.org/eng/Articles/2304/Adalah-to-Defense-Ministry:-Israeli-military-stop">http://adalah.org/eng/Articles/2304/Adalah-to-Defense-Ministry:-Israeli-military-stop</a>
July 15	Demand for investigation into attack on a center for people with disabilities. The attack resulted in the deaths of two women, Suha Abu Saada (38 years old) and Ola Hahi (31 years old). Both patients suffered from mental and physical disabilities. Another 4 women were injured in the strike, including a caretaker at the center (with Al Mezan).	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 15	Demand for investigation into targeting of hospitals, medical centers, medical staff (with Al Mezan)	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 17	Demand for investigation into attack of home of Haj family in Khan Younis refugee camp killing eight members of the family. According to reports an Israeli missile hit the family home at 1:20am on 17 July 2014 during air strikes on the refugee camp (with Al Mezan)	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 17	Demand for an investigation into Israeli military's attacks on Gaza's water infrastructure, as well as the killing of three Palestinian municipal workers and the injury of dozens more while they were attempting to repair this infrastructure. On 15 and 16 July 2014, Israeli missiles destroyed the water supply to more than 900,000 Palestinian residents of Gaza, creating a severe health crisis. The military continued their fire even as workers tried to stop the water leakage and restore damaged infrastructure (with Al Mezan).	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>

July 18	Demand for investigation re targeting of children on fishermen's beach in Gaza which resulted in the killing of four children from the Bakr family – Ahed (10 years old), Zakariya (10), Ismail (10) and Mohammed (11) – and injury of others on 18 July 2014 by a missile fired by the Israeli Navy while the children were playing football. Numerous international journalists witnessed the event and reported on it extensively in the international media. <sup>32</sup> (with Al Mezan)	<a href="http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7">http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7</a>
July 21	Demand for investigation re targeting of children feeding pigeons on a house rooftop on 17 July 2014 which resulted in the killing of three young boys from the Shuhaiber family – Wasim (7), Afnan (8) and Jihad (8) – in an air strike on their home (with Al Mezan).	<a href="http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7">http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7</a>
July 24	Demand for an investigation into attacks on Al Aqsa & Bet Hanoun hospitals & ambulances (with Al Mezan).	<a href="http://adalah.org/eng/Articles/2314/Adalah-demands-independent-investigation-into-on">http://adalah.org/eng/Articles/2314/Adalah-demands-independent-investigation-into-on</a>
July 25	Demand for the names, locations of Gaza detainees in Israel	<a href="http://adalah.org/eng/Articles/2312/Adalah-demands-that-Attorney-General-announce-the">http://adalah.org/eng/Articles/2312/Adalah-demands-that-Attorney-General-announce-the</a>
July 27	Demand for an investigation into attacks on UNRWA schools and safe facilities. The facilities were sheltering 300 displaced persons, of whom 15 were killed and over 100 injured. The majority of the injured were women and children (with Al Mezan)	
August 6	Pre-petition demanding more permits for ambulances to transfer the wounded from Gaza to WB for medical care	
August 31	Demand for investigations into additional attacks on UNRWA schools and safe facilities (with Al Mezan)	<a href="http://adalah.org/eng/Articles/2322/Adalah-and-Al-Mezan-demand-the-opening-of-into-the-of">http://adalah.org/eng/Articles/2322/Adalah-and-Al-Mezan-demand-the-opening-of-into-the-of</a>

<sup>32</sup> For example, the incident was covered in the *New York Times*: [http://www.nytimes.com/2014/07/17/world/middleeast/visceral-accounts-of-gaza-attack-that-killed-4-boys.html?\\_r=2](http://www.nytimes.com/2014/07/17/world/middleeast/visceral-accounts-of-gaza-attack-that-killed-4-boys.html?_r=2); by NBC news: <http://www.nbcnews.com/storyline/middle-east-unrest/innocent-gone-israeli-strike-gaza-kills-four-children-n157301>; and *The Guardian*: <http://www.theguardian.com/world/2014/jul/16/witness-gaza-shelling-first-hand-account>



Sept. 1	Demand for investigation re the direct attack on a soap and other cleaning materials factory (with Al Mezan)	
July 14	Joint letter regarding calls to vacate northern Gaza (with ACRI, B'Tselem, Amnesty-Israel, Gisha, PHR, PCATI, Yesh Din, HaMoked)	<a href="http://adalah.org/eng/Articles/2307/Joint-letter:-Grave-concern-regarding-Israeli-to">http://adalah.org/eng/Articles/2307/Joint-letter:-Grave-concern-regarding-Israeli-to</a>
July 21	Joint letter with ACRI and others about targeting civilians, especially home demolitions	<a href="http://www.acri.org.il/en/2014/07/21/gaza-int-law/">http://www.acri.org.il/en/2014/07/21/gaza-int-law/</a>
July 23	Joint letter with GISHA and others about preventing the collapse of essential infrastructure water and electricity	<a href="http://www.acri.org.il/en/2014/07/23/gaza-infrastructure/">http://www.acri.org.il/en/2014/07/23/gaza-infrastructure/</a>

During September-December 2014, the MAG replied to some of the complaints sent by Adalah and its partners regarding whether or not the MAG would investigate the attacks. To date, the MAG informed Adalah that it would open an investigation only in two cases:

- The attack involving the killing of the 4 children on the beach on July 18.
- The attack on UNRWA school in Beit Hanoun on July 24.

In its responses to Adalah, the MAG detailed the mechanism of examination that it is applying and informed as to whether it will or will not open an investigation. After reviewing all the responses, Adalah identified some clear major patterns, which substantially deviate from the international law requirements of the duty to investigate: independence/impartiality, effectiveness, promptness and transparency.

*1. Lack of independent investigatory mechanism (independence/impartiality):*

The MAG informed Adalah that each complaint he received was referred to a Fact-Finding Assessment Mechanism (FFAM), which assessed the facts of the event in relation to "exceptional incidents" that occurred during the operation. According to the MAG, the purpose of the assessment was to provide the MAG with information that would assist him in determining whether to open an investigation and in order to learn lessons for the future. Therefore the decision-making body as to whether or not to open an investigation is still the MAG and not an independent body. Adalah stressed in its response to the MAG that this mechanism creates a clear conflict of interest. An investigative body that is not independent is carrying out the examinations and investigations, it belongs to and is under the authority of the military and is within the hierarchy and internal organization of the army.

*2. Vague arguments about the existence of military necessity, military targets:*

In all of its responses stating that no investigations would be opened, the MAG did not provide detailed reasoning to justify attacks on civilians and civilian objects, and except for the mere allegation that "there was a military necessity" or "the civilian object was a military target" or "a warning was provided beforehand", it did not provide further details.

For example, in the case of bombing the Kawari family home in Khan Younis on 8 July 2014, which resulted in the killing of eight civilians, including six children, and the injury of 25 others, the MAG argued that the building was attacked after "it was used for military purposes by Hamas." The MAG did not provide any information on the timing of using the building for military purposes by Hamas, nor did it address what the "military purposes" were. The MAG argued that it "warned" the family by telephone and by using the "roof-knocking" warning. During the launching of the missile towards the family's home, the Israeli military belatedly identified a "few people" who had previously vacated the family's home, and who were returning to their homes "for unclear reasons" and "seemingly they were killed". The MAG stated that, "despite the unfortunate circumstances, there was no defect in the Israeli military activity" and thus no investigation would be opened.

Another example involves the killing of 9 journalists after an Israeli missile attack on their car on 9 July 2014. The MAG stated that the military targeted a vehicle about which it had intelligence information in that it "was used to deliver weapons used against the IDF during the day." The MAG added that "apparently the vehicle was marked with "TV" and the military was not able, in real time, to identify the vehicle as a journalist vehicle." The MAG stressed that there was no defect in the attack and thus no investigation will be opened. The MAG did not specify, how, when and where the vehicle was used for militaristic purposes; what steps it undertook to verify that the vehicle did not include any civilians; and what evidence it had against each journalist in the vehicle at the time of the attack.

*3. Lack of a time frame for examinations and investigations (promptness):*

In his responses to Adalah, the MAG did not provide a specific time frame for the inquiry and the investigations. The only statement provided was that the inquiries by the FFAM would be undertaken in "a short time". The MAG did not address any time frame for the subsequent investigations by MAG. In reply Adalah requested that the MAG determine and declare a timeframe for the inquiries and the investigations.

*4. Unwillingness of the MAG to disclose information on witnesses and testimonies, and other evidence (lack of transparency):*

According to the responses received, the MAG emphasized that all investigative material and evidence that it gathers and relies on is classified or "secret", including the identity of witnesses. Adalah informed the MAG that preventing lawyers who are representing complainants/victims from reviewing investigatory materials is too broad and sweeping, and amounts to an illegal general prohibition on disclosure. By obscuring all evidence and materials without exception, the MAG raises suspicion about its validity and accuracy. Such policies lack transparency. Thus, Adalah demanded that the MAG declare whether it had met with any Palestinian witnesses in Gaza, and to explain its relationship with the witnesses in reference to various cases in which the MAG decided not to open an investigation.

*5. Unclear circumstances under which the MAG will open an investigation:*

In all of its replies to Adalah, the MAG did not clarify or detail under which circumstances it will open investigations. The MAG also did not provide any update on adopting clear and written legal norms, which would anchor international law principles on the circumstances, which trigger the opening of a criminal investigation. Adalah requested additional information from the military prosecution about its decisions on whether or not to open investigations. The public is not made aware of these decisions and even the complainants/victims themselves are often left uninformed.

A summary of each complaint filed by Adalah and Al Mezan into Operation Protective Edge and its status, as is known from the MAG, is provided in Appendix 2.

In addition to all of the circumstances detailed above which clearly show that Israel's investigations in Operation Protective Edge to date fall far short of international standards, Israeli officials have also made statements against the opening of investigations by the MAG.

### **Israeli officials' statements against opening investigations**

The MAG has been under pressure by Israeli politicians not to investigate. These statements send a message to the MAG that his decisions, especially in sensitive cases, have no support from the top of the defense establishment.

For instance, in early January 2015, Defense Minister Moshe Ya'alon stated during an Israeli military study day that there is no reason for a criminal investigation into the "Black Friday" incident, in which the Israeli military reportedly killed 130 to 150 Palestinians following the kidnapping of an Israeli soldier who was later found killed. Minister Ya'alon was quoted stating that: "A great many rumors and statements are circulating, for example about the incident concerning the Givati Brigade on that Friday in Rafah. That incident is not being investigated by the army's Criminal Investigation Division. It is an operational incident during which decisions of various kinds were made, not something that is investigated with the tools of criminal law. It needs to be probed with the tools of military command so that there may be improvement next time."<sup>33</sup>

In addition Ya'alon further addressed the differences between criminal and military investigations, stating that the only cases he perceives to be subject of criminal investigations *do not* include attacks by the military but regular criminal incidents such as looting, rape or deliberately shooting someone waving a white flag. He was quoted as stating: "A [criminal] investigation looks for people to blame. It looks at the past. There are times when this is vital: If someone, during a battle, committed a crime – for example, looting, rape or deliberately shooting a woman or a child or somebody waving a white flag – that is breaking the law, and that has a criminal aspect. That is where the Criminal Investigation Division engages in a criminal investigation."<sup>34</sup>

### **Conclusion**

As its preliminary probes into incidents that occurred during the 50-day War on Gaza during the summer of 2014 clearly show, Israel's investigatory mechanisms into the conduct of its military during armed conflict are fundamentally flawed and fall far short of international standards of independence, impartiality, effectiveness, promptness and transparency. Israel has made no significant progress in this regard in the aftermath of operation "Cast Lead" in 2008-2009, which led to a series of domestic and international inquiries into these mechanisms and high-profile reports containing recommendations for improvements. Current Israeli law and practice strongly indicates that Palestinian residents of Gaza are unable to obtain an effective remedy from the Israeli criminal justice system for suspected war crimes committed against them by the Israeli military.

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<sup>33</sup> See Haaretz, 8 Jan 2015: <http://www.haaretz.com/news/diplomacy-defense/.premium-1.636074>

<sup>34</sup> Ibid.

### **Section III: Barriers to Gazans' Access to Israeli Courts in Civil Compensation Cases against the Military**

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This section of the report reviews the right to a civil legal remedy and the right to access to Israeli courts by Palestinian residents of the Gaza Strip who submitted tort compensation lawsuits against the Israeli security forces. The main findings of this section are:

1. Israel imposes numerous barriers on Palestinian residents of Gaza who submit civil lawsuits to request compensation for injuries that resulted from attacks by the Israeli military. These barriers essentially prevent Palestinians in Gaza from receiving civil remedies and compensation for their injuries by the military from Israeli courts.
2. These barriers to civil remedies include, among others, banning Palestinians in Gaza from entering Israel, restricting the statute of limitations period, and imposing high financial guarantees, all of which are nearly insurmountable for Gazan residents.
3. The only exception to Israel's policy of banning the entry of Gazans into Israel in order to pursue their legal proceedings is in "humanitarian cases", a category that is not clearly defined by Israeli law.
4. The Israeli military, who are responsible for the injuries and who are the respondents in the lawsuits, are also the same authority that examine Gazan residents' applications to enter Israel to pursue their legal proceedings, and have the power to deny or accept the requests. Thus in this matter, the State of Israel and its military "wear two hats" and operate with a severe conflict of interest.
5. Over the years, the State of Israel has enacted legislation that imposes bans and restrictions on Palestinians in order to exempt itself from compensating Palestinians for injuries that resulted from military attacks.
6. In its December 2014 judgment, the Supreme Court upheld onerous regulations set by the State Attorney's Office that, in the past, prevented Gazans from entering Israel to pursue their legal cases. This decision contradicts a 2006 Supreme Court decision that upheld the constitutional right of access to Israeli courts for Palestinians in civil tort cases. In practice, the 2014 decision effectively closes the doors of the Israeli courts to Gazans' for their civil compensation claims. This constitutes a serious breach of Israel's obligations under international law.

For decades, Israeli law has recognized the right of residents of the Palestinian territory, who were harmed by security forces' actions, to submit lawsuits in Israel in accordance with Israeli torts law, and to receive compensation for damages they sustained.

In July 2005, the Israeli parliament (the Knesset) amended the Civil Wrongs (Liability of the State) Law (Amendment Number 7). The new amendment denied Palestinian residents of the Occupied Palestinian Territory (OPT) the right to compensation from the state of Israel for damages caused to them by the Israeli security forces, including those damages caused outside of the context of a military operation (with some minor exceptions). The amendment was to operate retroactively in cases of damages sustained since the beginning of the second Intifada in September 2000.

In response to this amendment, human rights organizations brought a petition before the Israeli Supreme Court in September 2005. They demanded that the Court declare void the new amendment to the Civil Wrongs (Liability of the State) Law,<sup>35</sup> as it grossly violates

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<sup>35</sup> Human rights organizations Adalah, HaMoked and the Association for Civil Rights in Israel (ACRI) submitted the petition on behalf of Al-Haq, The Palestinian Centre for Human Rights, B'Tselem,

fundamental principles of international humanitarian law (IHL) and international human rights law (IHRL), and breaches basic rights in contravention of Israel's Basic Law: Human Dignity and Liberty, and is therefore unconstitutional.

In December 2006, the Supreme Court, in a unanimous ruling delivered by nine justices, decided that the State of Israel could not prevent Palestinians in the West Bank and Gaza, who have been harmed by the Israeli military, from accessing the Israeli courts. The Court determined that residents of the OPT, including the Gaza Strip, have the right to submit tort lawsuits against the Israeli security forces to Israeli courts as part of their constitutional rights to life, physical integrity and property, which are anchored in the Basic Law: Human Dignity and Liberty. The Supreme Court therefore annulled the amendment to the law.

However, despite the Supreme Court's ruling in the case, *Adalah v. the Minister of Defense*, Israel has pursued a strict policy after the disengagement from the Gaza Strip in 2005 that prevents Palestinians from Gaza from entering Israel, and has therefore denied them the possibility of realizing their right to legal remedy and their right to access the courts.

### **The disengagement plan and the blockade of Gaza Strip**

Prime Minister Ariel Sharon first suggested the Israeli disengagement from Gaza in December 2003. The Israeli government adopted the plan in June 2004 and implemented it in August 2005. The plan included the withdrawal of the Israeli army from Gaza and the dismantling of all Israeli settlements there. Shortly after the disengagement, in 2006, Hamas won the Palestinian Legislative Council elections, and in 2007, Hamas took control of the Gaza Strip by force, replacing the Palestinian Authority and the Fatah government. Following Hamas' takeover, Israel imposed a blockade on the Gaza Strip, sealing its "border crossings" and toughening its policy towards Gaza, including by imposing sanctions against the civilian population in Gaza by reducing the supply of fuel and electricity and severely restricting the movement of people and goods to and from the Strip. Since this decision, Israel's declared policy is that the granting of permits to Gazans for entry into Israel and for transit to the West Bank is strictly limited to exceptional and urgent humanitarian cases, which has significantly reduced Gazans' access to Israeli courts in civil lawsuits.<sup>36</sup>

As a result of the denial of the entry into Israel to plaintiffs and their witnesses from Gaza, or, alternatively, the denial of entry of attorneys from Israel into Gaza, the plaintiffs' capability to meet the obligations imposed on them by the Rules of Civil Procedure and the Evidence Ordinance<sup>37</sup> is severely hampered and at almost all times rendered impossible.

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Physicians for Human Rights-Israel, The Public Committee Against Torture in Israel and Rabbis for Human Rights. *H.C. 8276/05, Adalah, et al. v. The Minister of Defense, et al.* (decision delivered 12 December 2006).

<sup>36</sup> See the policy document regarding the movement of people between the State of Israel and the Gaza Strip which was published by the Ministry of Defense Office of the Coordinator of Government Activities in the Territories available at [http://www.cogat.idf.il/Sip\\_Storage/FILES/3/2533.pdf](http://www.cogat.idf.il/Sip_Storage/FILES/3/2533.pdf).

<sup>37</sup> Civil Procedures Rules 5744 – 1984. See Section 15 of the Evidence Ordinance (New Version) 5731 - 1971 (Hereinafter: "Evidence Ordinance") for the requirements an affidavit must meet so that it complies with the requirements of the laws of evidence in Israeli law, and Provision no. 1 521(a) of the Civil Procedures Rules. Regarding appearance for an examination by medical specialists in Israel and submission of principal affidavits, see Section 17 (a) of the Evidence Ordinance that determines that if the person who submitted an affidavit does not appear for questioning the court is empowered to disqualify the affidavit as evidence, and Rule 522 (d) of the Civil Procedures Rules that determines a

Obviously, due to this denial of entry into Israel, the claimants and their witnesses cannot appear at evidence hearings to give their testimony, and consequently they cannot meet the burden of proof imposed upon them and the courts dismiss their lawsuits.<sup>38</sup> This policy denies claimants' the right to be present at the legal proceedings that take place in the framework of their cases.

Moreover, Israeli military commanders deny permits to enter Gaza to Israeli attorneys who represent claimants from Gaza Strip in Israeli courts. Attorneys seek to meet with their clients and collect evidence and/or affidavits. The state denies the permits on the ground that the Gaza Strip is under closure and that the persons submitting the request do not meet the criteria for entry permits into the Gaza Strip.

In addition to the problem of entry, numerous further barriers stand in the way of Gazan plaintiffs' access to Israeli courts, and can be summarized as follows:

1. For such cases, Section 5a(c) of the Civil Wrongs Law sets a different, shorter statute of limitation of only two years (instead of seven) from the day of the event during which the injury took place. The injured parties are required to provide a notice in writing within 60 days of the act that led to the injury and to submit their lawsuit within two years of the date of the event. If they do not, the statute of limitations claim will be raised against them. Thus, this shortened timeframe makes it exceedingly difficult for Palestinian residents of the OPT who were injured by the security forces' actions to sue for damages in Israeli courts.<sup>39</sup>
2. The plaintiffs must prove that their lawsuits are not based on an act of war for which the state is exempted from liability towards those injured. Moreover, the law determines that Sections 38 and 41 of the Civil Wrongs Ordinance (new version), which center on the transfer of the burden of proof when there is a claim of recklessness regarding "dangerous matters" and when there is a claim of "the matter speaks for itself", do not apply to tort lawsuits against the state, so that the burden of proof rests on the plaintiffs.<sup>40</sup>
3. High financial guarantees pose an additional barrier on plaintiffs. According to regulation 519 of the Civil Procedures Rules–1984, the court may order the plaintiff to deposit a guarantee to ensure the payment of the respondent's expenses; if this is ordered and the guarantee is not deposited at the set date, the lawsuit is dismissed. The average sum of the guarantee is NIS 30,000 (approx. US \$7,600, EUR 6,730). In many cases, the plaintiffs are forced to withdraw their lawsuits because they are

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similar rule concerning a person who submitted an affidavit and who is not a petitioner if his adversary requested he be questioned and the witness did not appear.

<sup>38</sup> On the burden prerequisite of persuasion and the burden of proof that is imposed on a litigant in a civil procedure see AH [Additional Hearing] 4/69 *Neuman v. Cohen* 24 (2) 290-292. See also Y. Kedmi On Evidence-Law in the Mirror of Case Law, Part Three, Diyonon Publishers, 1999, p. 1273.

<sup>39</sup> Regarding the policy of raising the statute of limitations claim in response to lawsuits submitted against the state concerning actions of the security forces in any area where there is a factual or legal basis for such a process, see the state's reply in HCJ 9408/10, *The Palestinian Center for Human Rights v. The Attorney General* to the petitioners' request for an extension of the period of limitation for the submission of tort lawsuits by persons injured during the "Cast Lead" military operation, section 18.

<sup>40</sup> See Sections 5a(2), 5a(3) and 5a(4) of the Civil Wrongs Law.

unable to meet this financially burdensome precondition, or alternatively lawsuits are rejected because the guarantee was not deposited.<sup>41</sup>

4. In past years, the courts have begun to compel each claimant to deposit an average guarantee of NIS 20,000 to ensure the respondents' (the state's) expenses. The guarantee sums set in some of these files amount to hundreds of thousands of shekels. In the case of the deceased *Abu Haleem* and 7 others, for example, the guarantee stands at NIS 1,200,000 (approx. US \$303,860, EUR 269,300). In July 2012, the Israeli Supreme Court denied the claimants' request for permission to appeal against the lower courts' decision on the financial guarantee.<sup>42</sup>
5. A Gaza resident who succeeded in overcoming all the above, will encounter a further physical barrier due to Israel's policy preventing him from entering Israel. Thus he is denied the possibility of following the legal process, which in fact constitutes a denial of the right to bring a claim in Israel.

As a result of these barriers, courts routinely dismiss these lawsuits, and in many cases also order the plaintiffs' to pay the respondent's (the state) expenses. In several cases, even where attorneys representing the parties reached an agreement to postpone hearings because of the closure policy, the courts decided at their own initiative, and without a request by the counsel of the state, to dismiss the lawsuits in the name of the "public interest", ruling that the postponements will affect other litigants in Israel.

Under these circumstances, the parties in many cases reach an agreement to suspend the legal proceedings and resume them within a set period of time.<sup>43</sup> Evidently, the above noted agreements reached in court failed to provide a solution to the problem as, in keeping with the agreements between the parties, the court proceedings are renewed only for the plaintiffs to once more encounter the same recurring difficulties in a circle of denial of entry and repeated postponements.<sup>44</sup>

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<sup>41</sup> See for example court decision in CC 24651/06 *The Elshawwa Estate v. The State of Israel*, judgment of 18.1.2009 accepting the petitioners' request to withdraw the petition; CC (Haifa District Court) 1106/05 *Ahmed Mohammad Elbashiti v. The State of Israel*, verdict of 29.6.2009 ordering the halting of the lawsuit, CC (Magistrates Court Hadera) 3443/07 *Estate of the late Hassan Radwan Shahin Sha'at v. The State of Israel*, request to withdraw the lawsuit and the verdict of 4.3.2009; CC (Haifa District Court) 183/07 *The State of Israel v. Farid Shaban Hajji*, decision of 1.2.2009 rejecting the petition; CC (Herzliya Magistrates Court) 1624/06 *The Estate of Samah Yussuf Abu Gezer v. The State of Israel*, verdict of 14.1.2009; CC (Haifa District Court) 499/07 *The Estate of the late Sabah Mohammad Harara v. The State of Israel*, verdict of 26.7.2008 erasing the petition in accordance with an arrangement reached by the parties; CC (Herzliya Magistrates Court), *The Estate of Elatsar v. The Ministry of Defense*, verdict of 10.6.2008; CC (Herzliya Magistrates Court) 1622/06 *The Estate of Hajazi v. The Ministry of Defense*, verdict of 10.6.2008.

<sup>42</sup> See AR 9148/11, *The Estate of the Late Abu Halima et al v. The State of Israel – Ministry of Defense*.

<sup>43</sup> CC (Hadera Magistrates Court) 1394-07 *Elhalo v. The Ministry of Defense* (decision of 13.2.2011); CC (Hadera Magistrates Court) 5843/04 *Akel v. The State of Israel* (decision of 15.3.2011); CC 831/05 (Haifa District Court) *Estate of Melek v. The State of Israel – Ministry of Defense* (decision of 20.1.2011); CC 382/05 (Haifa District Court) *Allaloh v. The State of Israel* (decision of 1.3.2010).

<sup>44</sup> CC (Hadera Magistrates Court) 4915-05 *Owad v. The State of Israel* (decision of 9.9.2009). The court, on 9.9.2009, ordered the dismissal of the petition because of the inability of the petitioners to fulfill their obligations and submit affidavits as required by the law. This petition was submitted again to the Herzliya Magistrates Court (CC 10959-06-10). On 4.4.2011, the court ordered the completion of the procedures within 90 days and scheduled a hearing for 24.10.2011, which was postponed until a pre-trial meeting set for 6.9.2012. In the case of CC 5984-04 (Hadera Magistrates Court), *The Estate of Abu Saliman v. The Ministry of Defense*, the court, on 8.2.2010, dismissed the petition due to the

### **Examples of cases dismissed because of Israel's policy of denying entry**

Today, scores of tort lawsuits remain pending before various courts in Israel in which Israel's denial of entry of plaintiffs and their witnesses into Israel constitutes a barrier that thwarts the continued deliberation of these cases. As stated, these barriers eventually lead to the dismissal of lawsuits, along with the imposition of the payment of high expenses on the plaintiffs. The following cases are a few examples of lawsuits that were dismissed in the courts as a result of the state's policy of denying entry:

#### **1. *Hajaj v. The Ministry of Defense***

On 1 February 2007, a tort lawsuit was filed to the Haifa District Court on behalf of the Hajaj family from the Gaza Strip. Several of the family members had been injured by missiles fired towards them from an Israeli aircraft on 8 July 2006, while other plaintiffs were relatives of deceased persons who were killed in the same event. The petitioners deposited a guarantee of NIS 30,000 to cover the expenses of the defendant. However, due to the closure of the Erez border crossing, the counsel for the petitioners, Attorney Younis, could not enter the Gaza Strip, and likewise the petitioners could not enter Israel. An attorney-client meeting therefore could not be held in a manner that would allow the exchange of documents and the signing of affidavits in response to the state respondents' questionnaires. This situation led to the submission of numerous requests for extensions of time. The respondent requested that the lawsuit be dismissed, arguing that the petitioners were unable to complete the preliminary procedures in the case. On 14 February 2009, the court accepted the state's request and dismissed the petition. Judge Zarankin ruled as follows:

"4. In my view, there is no option other than to dismiss the lawsuit. Almost two years have passed since the last arguments were submitted in this case, and in spite of recurrent requests by the petitioners for extensions of time, they have still not succeeded in completing the above preliminary procedures. The petitioners, as stated, live in Gaza City and are unable to enter the area of the state, and therefore, they cannot hold meetings with their lawyer or sign various documents in front of him. They cannot stand before the court to give their testimony, in order to prove their case. I believe that because of the aforementioned circumstances, the situation cannot be expected to change in the foreseeable future, and even if the plaintiffs were able to surmount the 'obstacle' of the preliminary procedures, it would not be possible to examine the lawsuit itself."

CC (Haifa) 183/07 *Hajaj v. The Ministry of Defense* (verdict of 14 December 2009).

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difficulties the petitioners encountered entering Israel while maintaining the right of the petitioners to renew their lawsuit until 1.9.2010, without the state claiming it is obsolete on the basis of the Statute of Limitations. This petition was submitted again at the end of August 2010 to the Haifa Magistrates Court (CC 47590-08-10). After the submission of a variety of affidavits and legal documents from the previous lawsuit, the case was set for evidentiary hearings. However, hearings that were scheduled for this purpose have been repeatedly postponed because it was not possible for the witnesses from Gaza to be present at the hearings.



## **2. *The Estate of Abu Saiid v. The State of Israel***

In 2004, plaintiffs submitted a lawsuit to the Hadera Magistrates' Court on behalf of 15 members of the Abu Saiid family from the Gaza Strip. Several of the plaintiffs were injured by Israeli military forces and others are relatives of other persons who were killed. Because the petitioners were unable to enter Israel to testify in court, the parties filed requests to postpone the dates of the hearings. On 6 December 2009, the court rejected a request that was agreed upon by both parties to postpone the date of the hearing, and ordered the dismissal of the lawsuit due to idleness on the following grounds:

"4. In January 2009, I cancelled a scheduled evidentiary hearing because it was not possible for the petitioners to enter Israel. The hearing of evidence was scheduled for 8 December 2009 and today, again, I was given an (agreed upon) request to postpone the date of the hearing for the same reason. There are many other similar cases pending before me, including those of the counsel for these petitioners, where a similar problem also arose. I warned him on several occasions that, with all the sorrow and understanding of the situation of the petitioners, I cannot postpone the case again and again over the years on similar grounds, as this harms other cases pending before me.

5. As this is the state of affairs, I decided, in view of the last request for postponement, to dismiss the petition due to idleness."

CC (Hadera) 4364/04 *Estate of Abu Saiid v. The State of Israel* (verdict of 6 December 2009).

Note: This lawsuit was re-filed to the Haifa Magistrates' Court (CC 47617-08-10) *Kamala Salah et al. v. The State of Israel*. The court decided, at the initiative of the counsel of the state as the respondent, that the fate of the lawsuit would be contingent on this petition.

## **3. *The Banat Estate v. The State of Israel***

In this case, three tort lawsuits relating to the 2004 killings of Ahmed Banat, Mohammad Luvad and Mohammad Elmadhin were combined and all the preliminary procedures were completed (CC (Hadera Magistrates Court) 4416/04, 4417/04 and 4418/04). However, the court ordered the dismissal of the lawsuits, despite the fact that the state, the respondent, had requested the postponement of the hearings and the deadline for submitting its evidence. The court decided to dismiss the lawsuits on the grounds of idleness because the witnesses did not enter Israel, finding that it was not possible to pursue the lawsuits endlessly.

On 20 May 2010, in response to the petitioners' request to cancel the court's decision to dismiss the lawsuits, the state respondent's counsel wrote in section 9 of his letter:

"6. Notably many courts handed down similar decisions in this matter and dismissed lawsuits due to idleness because witnesses from Gaza did not appear for hearings over a period of time... However, this is a matter of a series of many similar decisions made under identical circumstances, that should the need arise, the respondent would make use of."

In the framework of CA (Haifa District Court) 7420/06/10 *The Banat Estate v. The State of Israel* (verdict of 20 September 2010), the dismissal was voided and the case was returned for deliberation to the lower court.

#### **4. *Elmakadama Estate v. The State of Israel***

A lower court dismissed a lawsuit filed in 2005 for members of the *Elmakadama* family because it was impossible to make progress in the legal procedures due to the closure of Gaza. The petition was later placed on the schedule of hearings at the parties' request. After the witnesses' entry into Israel was again denied, preventing them from appearing at an evidentiary hearing, the court decided to dismiss the petition, on 11 March 2010 (CC 1542/05 (Hadera Magistrates' Court) *Elmakadama Estate v. The State of Israel*). This lawsuit was refiled to the Nazareth Magistrates' Court (CC 15084-03-11) on 8 March 2011.

#### **5. *Mahmud Musa Elsherif vs. The State of Israel***

On 14 December 2008, the Hadera Magistrates' Court dismissed a tort lawsuit (CC 442-01) submitted by *Elsherif* after the petitioner was prevented from pursuing the case due to the denial of his entry into Israel for both an examination by a specialist for a medical opinion, and for a scheduled evidentiary hearing in the case. In accordance with an agreement with the state, the lawsuit was re-filed to the Haifa Magistrates' Court (CC 22539-6-10). The case then encountered the same barriers the previous lawsuit encountered.

#### **6. *Estate of the Late Sarsur v. The State of Israel***

In the matter of the *Estate of the Late Sarsur v. The State of Israel* (CC (Haifa District Court) 353/06), the state respondent submitted a request for the dismissal of the lawsuit on grounds that a document-disclosure affidavit had not been submitted, and requested that the court order the petitioners to pay the respondent's expenses. The petitioners were prevented from submitting the document-disclosure affidavit due to the respondent's own policy, which makes it impossible for the petitioners to meet with their attorneys. On 4 April 2011, the court dismissed the petition and ordered the petitioners to pay the respondent's legal expenses, totaling NIS 30,000 (approx. US \$7,600, EUR 6,730), noting that:

"4... It is not the first time that the petitioners do not abide by the decision of the court regarding replies to questionnaires, the provision of principal affidavits and document disclosure... (lines 20-21, page 4 of the protocol).

... This behavior can only be viewed as serious contempt of court procedures and court decisions and there is no other option than to put into action the required sanction, the dismissal of the lawsuit.

I am, therefore, dismissing the lawsuit and ordering the petitioner to pay the respondent's legal expenses to the total of 30,000 NIS".

In contrast, in the case of CC (Haifa Magistrates' Court) 2956-07 *Elbishawi v. The Ministry of Defense*, it became clear that the state would allow the entry of its own witnesses from Gaza, while refusing entry to the plaintiff's witnesses. Judge Krai-Giron noted the unreasonableness of this situation and ordered the counsel of the state to examine the possibility of questioning all witnesses from Gaza in court.

In addition, lower courts and courts of appeal rejected requests to hold the hearings in video-conference. On 17 July 2011, in the matter of *The Ministry of Defense v. Frej*, the District Court annulled the decision of the Magistrates' Court to permit the petitioners' witnesses from the Gaza Strip to testify via video-conference and to allow the litigation to be conducted this way. The District Court determined that:

"The practice the previous court allowed cannot ensure the proper administration of the trial...This conclusion would have been inevitable, even if it signified that the doors of the court are blocked to the submission of claims against the petitioner by the respondents ..."

See CAA (Nazareth District Court) 35950-04-11 *The Ministry of Defense v. Frej* (verdict of 17 July 2011).

**Challenging the constitutionality of Israel's policy of denying entry: Maher Abu Daqqa v. The Minister of the Interior**

Between In the years 2010 and 2012, Adalah corresponded with several Israeli ministries regarding the state's policy of denying entry permits to plaintiffs and their witnesses from Gaza, and against the refusal to grant Israeli attorneys exit permits into Gaza. The correspondence revealed that the state would grant entry into Israel for the purpose of court litigation only for exceptional humanitarian grounds without clarification.<sup>45</sup> On 27 September 2012, Adalah submitted a petition to the Israeli Supreme Court challenging the

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<sup>45</sup> Adalah's letter to ministries dated 14.10.2010. A reply to Adalah's letter was sent by Attorney Ruth Bar, Assistant to the Minister of Defense dated 25.10.2010. Bar's letter stated that at this time, for obvious political and security reasons, the entry of Gaza residents into the State of Israel is not permitted with the exception of humanitarian cases and that the complainants did not give sufficient weight to the overall relevant circumstances including the nature of the current regime in the Gaza Strip. Due to the lack of written criteria for meeting the "humanitarian grounds", on 25.5.2011 Adalah requested the Defense and Interior ministers to issue guidelines to the regional commanders granting permits for a temporary stay to litigants and their witnesses from the Gaza Strip. In 19.6.2011 a reply was received by Attorney Shai Nitzan, Deputy to the State Attorney (Special Tasks) who claimed that Gaza residents do not have a right to enter Israel for any purpose whatsoever, and the authorized bodies are not obligated by law to permit their entrance. Therefore, the denial of entry into Israel to Gaza residents rests according to Nitzan within the framework of the prerogatives any state has in deciding who will enter it, and that the persons in question are subjects of an adversary in an armed conflict. Attorney Nitzan also claimed that the denial of entry to plaintiffs and their witnesses does not make it difficult to conduct the lawsuit and that this issue arises only in those cases where the lawsuit reaches the evidentiary stage regarding the question of whether a wrong was committed by the state towards the plaintiff. Only then is it vital that a certain witness come to Israel from the Gaza Strip to give his testimony. Attorney Nitzan added that in these cases, the claimant whose entry as well as the entry of his witnesses was denied, may approach the appropriate court regarding his private matter, and raise his objections to this decision employing the administrative legal tools at his disposal. Attorney Nitzan, therefore, did not in any way refute the existence of a policy denying entry into Israel. Therefore, on 24.10.2011, Adalah submitted an administrative petition against this policy to the Jerusalem District Court (AA 31179-10-11 (Jerusalem District Court), *The Estate of the late Kamala Saliman et al. v. The Minister of the Interior et al.*) However, following comments made by the court during a hearing on 27.2.2012 based on Attorney Nitzan's letter where in certain cases the entrance into Israel of residents of the Gaza Strip for litigation purposes would be permitted, Adalah decided to withdraw the petition while retaining its arguments for submission in a different manner. Later on, Adalah inquired with Attorney Nitzan about the cases in which claimants or witnesses from the Gaza Strip would be allowed entry and what the criteria are for granting an entrance permit. On 8.8.2012, a letter from the international law section of the office of the Military Judge Advocate General dated 7.8.2012 was received by Adalah in which it stated that "...the entry of residents of the Gaza Strip into Israel will only be possible in exceptional humanitarian cases... in the framework of this policy, all of the requests that are received are individually examined by the responsible parties... we will emphasize in this regard that entry for the purpose of conducting legal procedures does not constitute, as of itself, an exceptional humanitarian ground which justifies granting an entry permit into Israel." Although, superficially, it appeared to be a change in the position of the respondents, that was not the case.

legality of Israel's policy of denying entry and detailing all the aforementioned barriers to access to the Israeli courts imposed on plaintiffs from Gaza.<sup>46</sup> The petition emphasized that the policy contradicts the Supreme Court's decision in *Adalah v. The Ministry of Defense*, in which the Court ruled that those damaged by military operations do have a right to submit claims for damages in Israeli courts. The petition stressed that the policy of denying entry infringes the rights to a legal remedy, to life, and to bodily integrity, and constitutes a violation of IHL. IHL includes clear instructions that those injured in a conflict must receive compensation. Further, Israel's policy and practice of denying entry contradicts statements made by the state in international fora and in other national courts that Gazans can submit claims for a legal remedy to Israel's domestic courts. However, Israel's denial of entry to Gazans for the purpose of accessing Israeli courts contradicts these statements and refutes Israel's arguments in this regard.

### **New regulations governing the entry of Gazans into Israel**

In October 2014, the Israeli State Attorney informed the Supreme Court that in May 2013 it had adopted new regulations to govern the process of dealing with applications made by Gazan residents to enter Israel to pursue their lawsuits. The text of these regulations demonstrates that they have created no change in the legal situation about the general rule banning Gaza residents from entering Israel to pursue legal proceedings. The only exception to this general rule set forth in the regulations is for "humanitarian" cases. Significantly, the new regulations result in a strong conflict of interest, since the State of Israel – i.e. the respondent in these lawsuits – is the same body that may accept or dismiss applications by Gaza residents to enter Israel.

According to the new regulations, applications will be examined individually and according to the following criteria:

1. The absence of security or criminal grounds to deny entry to the applicant.
2. The possibility that preventing the applicant from entering Israel would jeopardize the legal proceedings, and here the stage reached in the legal proceeding is part of the consideration.
3. The existence of exceptional humanitarian circumstances that justify a deviation from the general policy of closure, such as:
  - a. The circumstances of the incident in question;
  - b. The type and scope of the damage allegedly incurred by the applicant and the remedy requested;
  - c. The identities of the parties to the legal proceedings and their relation to the incident;
  - d. Other exceptional humanitarian circumstances related to the legal proceedings and their results.

The regulations contain the following two examples to illustrate instances when a case may be considered an "exceptional humanitarian" case:

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<sup>46</sup> HCJ 7042/12 *Abu Daqqa, et al. v. The Interior Minister, et al.* (decision delivered 16.12.2014). Adalah submitted the petition against the Ministry of Defense, the Interior Ministry, and other administrators on behalf of four individuals from Gaza with cases pending in the Supreme Court, the Al Mezan Center for Human Rights, the Palestinian Center for Human Rights (PCHR), Physicians for Human Rights – Israel and in the name of Adalah.

1. The lawsuit was filed by the family of a person who was killed in the relevant event and as a result they lost their income resource.
2. Or that the plaintiff was harshly injured and as a result he is in deep distress.

The regulation also establishes onerous procedures for submitting applications; if these procedures are not followed in full, then the application will be dismissed automatically. The procedures oblige the plaintiffs to disclose to the Israeli authorities all of their documentation related to the legal proceeding, including details of their witnesses, which enables the Israeli authorities to maneuver and accommodate their legal defense beforehand and receive all the information, witnesses and material that the plaintiff is willing to submit to court. The application must be submitted to the Palestinian Civil Affairs Committee in Gaza. The application should be submitted promptly: in general, applications that are submitted fewer than 90 days before the requested date of entry to Israel will be denied. Thus if the plaintiff receives a notice for a hearing before the court 60 days before the date of the hearing, his application to enter Israel will be dismissed. The applicant must provide in full a large amount of information about the plaintiffs, the legal proceedings, the lawyers representing in the case, and whether the State of Israel is a party to the lawsuit. The applicant must establish the necessity that requires him/her to enter Israel to pursue the legal proceedings in Israel and what were the other steps/options that were undertaken by the applicant to pursue the legal proceedings and why these options failed. Such a demand is originally not clear since there are no other options to pursue the legal proceedings except in cases of entry to Israel and accessing the Israeli courts where the lawsuits have been submitted. In addition the application must also disclose the financial situation of the plaintiff and state to what extent the amount of compensation requested in the lawsuit is essential for his/her livelihood.

In order to facilitate the enforcement of these regulations the State Attorney issued written instructions in June 2013 under the title of "Instructions for Addressing Complaints Submitted by Gaza Residents in the context of [military operation] 'Cast Lead'".<sup>47</sup> The instructions recognized the difficulties involved for Gaza residents in completing the prescribed legal proceedings and recommended that the state attorneys facilitate some of the proceedings as follows:

1. The state attorney may suspend the obligation of the plaintiff to submit an expert medical opinion until a later date;
2. He or she may decide to forfeit cross examination of the plaintiff's witnesses, residents of Gaza, in certain procedures;
3. He or she may agree to the submission of affidavits by Gaza residents that are not properly signed according to the law;
4. He or she may agree to arrange a video-conference to allow Gaza residents to give testimony; the video conference should be conducted in a foreign country that has friendly relations with Israel, which obviously requires the witnesses to travel outside Gaza.

However, these means of facilitating legal proceedings may only be applied on condition that they "*do not create real harm to the State's ability to defend itself*" (articles 11 and 14 of the instructions; emphasis added). Since any relaxation in the proceedings may harm the state's ability to defend itself, it would naturally lead to dismissing all applications to enter

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<sup>47</sup> According to the State's statement provided to the Supreme Court, this regulation applies also on lawsuits in other contexts and they regulate the procedures to be adopted and considered by the State Attorneys while dealing with lawsuits submitted by Gaza residents.

Israel. In practice, it appears that these new instructions have not brought about any improvement in the situation for plaintiffs for Gaza, since Israel has released no information about applications for entry in such cases that have been accepted. In addition, a report published by the Gisha Center based on information obtained through the Freedom of Information Act revealed that between March 2013 and November 2014, of 55 applications that were submitted in accordance with the new regulation for permission for 187 residents of Gaza to enter Israel, 49 were denied and the remaining six were still under examination at the end of November 2014. None were granted. Thirteen of these applications related to permits requested to enter Israel for the purposes of meeting lawyers.<sup>48</sup>

The State Attorney's regulations indicate that the state – which is the respondent in these lawsuits – abuses its power at the border crossings between Gaza and Israel by allowing witnesses to enter Israel only if their testimony does not harm the state's position in the legal proceedings, in a clear conflict of interests. This practice denies the possibility for plaintiffs from Gaza of obtaining a fair remedy before the Israeli courts.

### **The Supreme Court's decision in HCJ 7042/12 Maher Abu Daqqa v. Minister of the Interior**

On 16 December 2014, the Supreme Court of Israel dismissed a petition in the case of Maher Abu Daqqa and four other Gaza residents and human rights organizations, filed by Adalah, ruling that the plaintiffs should continue to apply for permission to enter Israel in order to fulfill the criteria set forth in the aforementioned Regulation. All five petitioners were Gaza residents who submitted lawsuits in Israeli courts requesting compensation for injuries that resulted from Israeli security forces' attacks. For example, the first petitioner submitted a lawsuit after being shot and wounded by Israeli security forces on 12.8.2011. An evidentiary hearing in his case was scheduled for 19.12.2011. His application to enter Israel for the purpose of being present together with his witnesses was denied. The second petitioner, a fisherman, submitted a law suit on 11.10.2010 requesting compensation for injuries caused to him after being shot by an Israeli soldier on 5.10.2008 while fishing near the Rafah coast. He was seriously wounded. The court that heard his case determined that he must pay NIS 14,000 NIS (approx. US \$3,700) to guarantee the expenses of the respondent – the State – in case the lawsuit is rejected. He was also required to submit a medical opinion by an expert physician but the state opposed his request to submit an expert opinion by a non-Israeli expert. His application to enter Israel in order to be examined by the Israeli medical expert was dismissed. Although the Supreme Court dismissed the petitioners' request to grant them access to Israeli courts, it did refer in the ruling to the state's conflict of interests. This conflict is created by the fact that the state occupies both the position of the respondent before the court and is the authority that determines who can and who cannot enter Israel in order to access the court. Justice Elyakim Rubinstein stated in the decision that, “The state simultaneously wears two hats, that of the party responsible for security on the one hand, and that of the respondent on the other, and it must take care, as far as possible, not to confuse between the two.”

The court did not address the grave violation of the complainants' constitutional rights and of their rights to compensation for damages incurred by them resulting from the state's policy of closure. Justice Rubinstein stated that, “it is unbecoming to address the issue through the prism of constitutional law and [we] feel it should only be addressed from the practical perspective”, adding that in the filing and pursuit of lawsuits, “security should not be harmed.”

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<sup>48</sup> <http://www.haaretz.co.il/news/politics/.premium-1.2528082> (Hebrew, 2 January 2015). Information delivered by Ministry of Defense to Gisha Center on 13 November 2014.

Although the court criticized the new regulations, it nonetheless required the complainants to abide by them. This is despite the fact that the Attorney General was unable to provide a single example of an individual who obtained a permit to enter Israel under these regulations. The court's judgment effectively denies Gaza residents the ability to access the courts in Israel, and it endorses a set of illegal regulations that violate the complainants' constitutional rights. The lack of effective means of accessing the Israeli courts will result in the dismissal of these tort lawsuits on the grounds that the complainant or his/her witnesses failed to attend court hearings.

The denial of Gaza residents' access to Israel courts in fact denies residents of Gaza an effective remedy in civil lawsuits through which they seek lawful compensation for damages from the Israeli army. This judgment not only contradicts the court's decision in *Adalah v. Minister of Defense*, but also constitutes a serious breach of Israel's obligations under international law, which apply to situations of armed conflict as well as occupation.<sup>49</sup>

#### **ADALAH CALLS ON THE COMMISSION OF INQUIRY-GAZA TO URGE ISRAEL:**

1. To cease violating IHL and IHRL rules and norms and enable Palestinians to receive a full effective remedy in their civil lawsuits;
2. To allow Gaza residents to enter Israel to pursue their legal proceedings in all cases and not only in humanitarian cases;
3. To amend its legislation to comply with international norms and cancel restrictions on pursuing effective legal remedies for victims;
4. Alternatively, even when security reasons are generally justified, the court to which the lawsuit was submitted, should have the authority to review and decide upon the plaintiff's application to enter Israel. Providing this authority to the presiding judge in the lawsuit will eliminate the state's conflict of interest in this regard, and enable the judge, who is familiar with the case and the procedures to determine the necessity of the entry of the victim and his witnesses;
5. Further, even when security reasons are generally justified, the state should examine alternatives that permit Gaza residents to enter Israel for their legal proceedings. The state can provide transport to the Gaza plaintiff to the Israeli court; and/or allow lawyers representing in the case to meet their Gaza clients at the Erez checkpoint for the purpose of the legal proceedings.

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<sup>49</sup> See Article 3 of the Hague Convention 1907; Article 148 of the Fourth Geneva Convention of 1949 and the regulations set in Article 91 of the First Protocol to the Geneva Conventions of 1977. See also Article 2 of the ICCPR and Article 14 of ICAT. In addition, in 2006, the UN General Assembly adopted a document of principles and guidelines regarding the right of victims of severe violations of international humanitarian law and international human rights law to compensation. States were required to ensure, through legislation and other administrative means, the rights of victims to remedy, due process and access to justice (article 12(b)). Article 12 of the guidelines determines that states will ensure in their laws the rights of victims to access the courts and the right to independent due process.

## SECTION IV: Appendices

### APPENDIX I:

#### Status of complaints submitted to the Israeli authorities by Adalah, Al Mezan and Al Haq – Operation Cast Lead 2008/2009

##### A. Cases of killings, injuries, prevention of medical treatment, home demolitions

Incident in Gaza/ Date of Complaint	Status of Israeli military investigation
<p><b>1. Abed Rabbo Family</b></p> <ul style="list-style-type: none"> <li>On 7.1.2009, intentionally shooting at the family and killing two sisters (aged 3 and 9 years-old). Another sister (aged 5) and their grandmother (aged 54) were also injured. The young girl is still being treated in Belgium.</li> <li>Preventing an ambulance from evacuating the injured family.</li> <li>Fatally shooting Adham Naseir (aged 37) on Al Quds Street on his way to help in evacuating the grandmother.</li> <li>Demolishing houses in Eizbet Abed Rabbo that were under the army's effective control, after they ordered the inhabitants to evacuate the area. All houses were totally destroyed.</li> </ul> <p>Date of Complaint: <b>4 June 2009</b></p>	<p>The Israeli Military Police opened an investigation. They interviewed members of the Abed Rabbo family and Adham's relative, who accompanied the victim at the time of the incident. Adalah received requests from the Military Police for maps, pictures, aerial shots and medical documents which were provided by Al Mezan. Adalah also submitted affidavits of the witnesses who could not go to Erez. On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response</b>.</p> <p>The human rights organizations learned <i>solely</i> from Israel's report of July 2010 (paras. 108-109) that the <b>MAG had decided to close the case</b> after concluding that the evidence was insufficient to initiate criminal proceedings.</p> <p>In addition, Israel's report did not address the prevention of the medical evacuation of the Abed Rabbo family or the destruction of the homes in the Ezbit Abed Rabbo area, which indicates that these aspects were not investigated at all.</p> <p>On 18 October 2010 Adalah sent a letter to the MAG asking for the investigation materials based on the victims' rights for such information. <b>This letter was not answered</b>. On 11 January 2011 Adalah resent the letter emphasizing that all letters had gone unanswered. This most recent letter was also not answered.</p>
<p><b>The findings of the Goldstone Mission on this case included the following:</b></p> <p><u>(i) Factual findings</u> (Para. 777-779)</p> <ul style="list-style-type: none"> <li>Witnesses are credible and reliable and testimonies are consistent.</li> <li>A man, a young and elderly woman and 3 small girls, some with white flags, stepped out of the house and waited for instructions for several minutes.</li> <li>There was no reasonable ground for the soldier shooting to assume that any of the members of the group were directly participating in the hostilities.</li> <li>The soldier deliberately directed lethal fire at Souad, Samar and Amal Abd Rabbo and at their grandmother, Hajja Souad Abd Rabbo.</li> </ul> <p><u>(ii) Legal findings</u> (Para. 809-821)</p> <ul style="list-style-type: none"> <li>Israeli armed forces[s] carried out direct intentional strikes against civilians.</li> <li>There was no reasonable ground for the Israeli armed forces to assume that the civilians attacked were in fact taking part in the hostilities and thus had lost impunity against direct attacks.</li> <li>Forces had violated the prohibition under international law... that the civilian population as such will not be the object of attack.</li> <li>Israeli armed forces denied medical emergency services access to the wounded civilians.</li> <li>The State of Israel would be responsible under international law for these intentionally wrongful actions carried out by its agents.</li> </ul>	



<ul style="list-style-type: none"> <li>▪ The conduct of the Israeli armed forces amounted to violations of the right to life where the result was death, and to violations of the right to physical integrity, and freedom from cruel and inhuman treatment in other cases.</li> </ul>	
<p><b>2. Salha Family</b></p> <ul style="list-style-type: none"> <li>▪ Israeli air strike against the Salha family home in Beit Lahiya, in the early hours of 09.01.09.</li> <li>▪ As a result, six family members were killed after “a knock on the roof” attack; house totally destroyed.</li> </ul> <p>Date of Complaint: <b>27 October 2009</b></p>	<p>Since the submission of the complaint no response has been received from the MAG. On 24 February and 24 May 2010, Adalah sent letters seeking information, but <b>received no response</b>.</p> <p>A press release published by the Israeli military on 6 July 2010 indicates that <b>this case might have been closed</b>: “It was also decided that legal measures would not be taken in additional incidents examined by the Military Advocated General because, according to the rules of warfare, no faults were found in the forces actions. In other cases, there was not enough evidence proving that the legal measures needed to be taken.”<sup>50</sup></p>
<p><b>3. Abu Eisha Family</b></p> <ul style="list-style-type: none"> <li>▪ Shelling of the family’s home in the Al-Naser neighborhood in Gaza City, in the middle of the night on 05.01.09.</li> <li>▪ At the time of the shelling, 26 family members were in the house. As a result of the bombing, five people were killed and the remainder wounded.</li> <li>▪ The bombing destroyed completely the house, and damaged many neighboring homes and injured many of their inhabitants.</li> </ul> <p>Date of Complaint: <b>22 November 2009</b></p>	<p>On 22 November 2009, Adalah received a letter from the AG's Office stating that the complaint was under examination.</p> <p>On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response</b>.</p> <p>A press release published by the Israeli military on 6 July 2010, indicates that <b>this case might have been closed</b>.<sup>51</sup></p>
<p><b>4. Said Siam Family</b></p> <ul style="list-style-type: none"> <li>▪ Assassination of former Interior Minister in Gaza, Said Siam, on 15.01.09.</li> <li>▪ Israeli war planes shelled a house where the minister’s family lived, which resulted in the killing the minister and four family members.</li> <li>▪ The attack also resulted in the deaths of six civilians in neighboring buildings, and the injury and maiming of dozens of others, in addition to the wanton destruction of many buildings</li> </ul> <p>Date of Complaint: <b>22 November 2009</b></p>	<p>On 11 January 2010, Adalah received a letter from the AG's Office stating that the complaint had been referred to the MAG for his examination.</p> <p>On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response</b>.</p> <p>A press release published by the Israeli military on 6 July 2010, indicates that <b>this case might have been closed</b>.<sup>52</sup></p>

<sup>50</sup> The Israeli military, “IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigations into incidents during Operation Cast Lead,” 6 July 2010 (English) available at: <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

## B. Cases of Palestinian civilians, including minors, being used as Human Shields

Incident in Gaza/ Date of Complaint	Status of Israeli military investigation
<p><b>1. Abbas Ahmad Ibrahim Halaweh, from Beit Lahiya</b></p> <p>On 05.01.2009, he was captured, ordered to strip, then handcuffed and blindfolded. He was used as a human shield during his detention for a week, from 05.01.09 to 12.01.09.</p> <p>Date of Complaint: <b>8 April 2009</b></p>	<p>The Military Police opened an investigation and interviewed the victim. They requested maps and aerial shots showing the places that the victim searched for the army when he was used as human shield.</p> <p>On 24 February 2010 <b>the media announced the closure</b> of the investigation; the Military Police did not inform the victims or their legal representatives of the decision.<sup>53</sup></p> <p>In response, Adalah sent a letter to the MAG and AG demanding the reasons for the closure of the case.</p> <p>On 1 March 2010, a response was sent to Adalah stating that the letter has been passed on to Mr. Shai Nitzan, the Deputy State Attorney for Special Affairs.</p> <p>According to Israel's July 2010 report, the <b>MPCID found that at no time had Mr. Halaweh been made to walk ahead of the soldiers or used as a human shield</b> (para. 50). The investigation also found no evidence of physical abuse (para. 51). Consequently the MAG found that there were no grounds for any proceedings and <b>closed the case</b> (para. 52).</p> <p>On 18 October 2010 Adalah sent a letter to the MAG asking for the investigation materials based on the victims' right to information. <b>This letter was not answered.</b> On 11 January 2011 Adalah resubmitted the letter demanding information regarding the decision to close the investigation. <b>This letter was not answered.</b></p>
<p><b>2. Majdi ElAbed Ahmad Abed Rabbo, from Eizbet Abed Rabbo, Jabalia</b></p> <ul style="list-style-type: none"> <li>On 05.01.2009, the victim was captured, ordered to strip, handcuffed and blindfolded. He was used as a human shield for more than 24 hours.</li> </ul> <p>Date of Complaint: <b>8 April 2009</b></p>	<p>The Military Police opened an investigation and interviewed the victim. They summoned witnesses mentioned in his testimony, some of whom were also used as human shields. Some witnesses refused to cooperate with the army out of fear and lack of trust. The MP also requested medical reports.</p> <p>Mr. Abed Rabbo and the human rights organizations learned <i>solely</i> from Israel's July 2010 report that <b>disciplinary action had been taken against an officer.</b></p> <p>According to the report, the only wrongful act was that the officer authorized the unit to allow Mr. Rabbo to enter the house (para. 44), which he should not have done, regardless of Mr. Abed Rabbo's request (para. 45). Due to the commander's belief that by consenting to the request he was minimizing the potential damage caused to Mr. Abed Rabbo's house, and that Mr. Abed Rabbo was not injured, the MAG opted for disciplinary action rather than a criminal indictment (para. 46).</p>

<sup>53</sup> See Adalah's Press Release, "Israeli Army Closes Military Investigations into Two Human Shields Cases from the War on Gaza without Informing the Victims," 25 February 2010, available at: [http://www.adalah.org/eng/pressreleases/pr.php?file=25\\_02\\_10\\_2](http://www.adalah.org/eng/pressreleases/pr.php?file=25_02_10_2)

	<p>Israel's July 2010 report <b>does not detail any serious efforts by the MPCID to investigate these events.</b> It does not set out the methods used to investigate the complaints, simply stating that the MPCID interviewed the victims, questioned the soldiers, and found that the evidence did not substantiate the complaints.</p> <p>On 18 October 2010 Adalah sent a letter to the MAG asking for the investigation materials based on the victims' rights for such information. <b>This letter was not answered.</b> On 11 January 2011 Adalah sent the letter again with a reminder and demand for seasonings for the decision to close the investigation. <b>This letter was not answered.</b></p>
<p><b>The findings of the Goldstone Mission in the cases of Abbas Ahmad Ibrahim Halaweh and Majdi ElAbed Ahmad Abed Rabbo included the following:</b></p> <p><u>(i) Factual findings</u> (Para. 1090- 1095)</p> <ul style="list-style-type: none"> <li>▪ Witnesses are credible and reliable.</li> <li>▪ The Israeli armed forces captured these individuals and, in some cases, their families, and forced them at gunpoint to search houses together with the Israeli armed forces.</li> <li>▪ They were all subject to cruel, inhuman and degrading treatment during their captivity.</li> </ul> <p><u>(ii) Legal findings</u> (Para 1096- 1107)</p> <ul style="list-style-type: none"> <li>▪ The use of the "neighbour procedure" [a method of using civilians as human shields] constitutes a violation of fundamental human rights norms. It puts the right to life of the civilians concerned at risk in an arbitrary and unlawful way</li> <li>▪ The anguish to which civilians are forced at gunpoint to enter houses, which might be booby-trapped or harbor combatants who might open fire on them, can only be described as cruel and inhuman treatment.</li> <li>▪ The intentional use as human shields in these cases qualifies as inhuman treatment of and willfully causing great suffering to protected persons under the Fourth Geneva Convention. As such, the Mission considers the conduct of the Israeli armed forces in relation to such persons to amount to grave breaches of the said Convention. The use of human shields is also a war crime</li> </ul>	
<p><b>3. Raji Mesbah Abdallah Abed Rabo from Eizbet Abed Rabo, Jabalia</b></p> <ul style="list-style-type: none"> <li>▪ On the 05.01.2009, immediately after his arrest, the victim was forced to sit in a rigid position for 20 minutes with a gun pointed to his head. He was used as a human shield for 3 days from 05.01.09 to 07.01.2009.</li> </ul> <p>Date of Complaint: <b>8 April 2009</b></p>	<p>The Military Police opened an investigation, interviewed the victim and summoned witnesses mentioned in his testimony, to testify. The Military Police requested medical documents.</p> <p>On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response.</b></p> <p>On 18.10.2010 Adalah sent a letter to the MAG inquiring about the status of the investigations. This letter was not answered.</p> <p>On 11.1.2011 Adalah sent the letter again with a reminder and demand for answers. This letter was not answered.</p>
<p><b>4. Alaa Mohammad Ali Al-Aatar and his brothers, Ali and Nafiz - all under the age of 16 - from Al-Atatra Neighborhood (3 brothers – minors)*</b></p> <ul style="list-style-type: none"> <li>▪ On 05.01.2009 the victims were captured and used as human shields for 3 days. One of the victims was beaten, blindfolded and ill-treated and was held with around 100 other detainees in a man-made pit for 4 days in inhuman conditions.</li> </ul> <p>Date of Complaint: <b>8 April 2009</b></p>	<p>The Military Police opened an investigation and requested maps, aerial shots, the locations where they were used as human shields and the location of the pit. They also requested medical documents.</p> <p>On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response.</b></p> <p>On 18.10.2010 Adalah sent a letter to the MAG asking about the status of the investigations. This letter was not answered.</p> <p>On 11.1.2011 Adalah sent the letter again with a reminder and demand for answers. This letter was not answered.</p>

<p><b>5. Abd El Karim Mostofa Salah and his minor son, Ameen (aged 14), from Eizbet Abed Rabo, Jabalia</b></p> <ul style="list-style-type: none"> <li>▪ The victims were handcuffed continuously and used as human shields for a period of 10 days. After that they were ill-treated, blindfolded and beaten with soldiers' helmets on their way to Israel. The son, Ameen, was released after five days in detention and the father was detained as an 'unlawful combatant'.</li> </ul> <p>Date of Complaint: <b>18 June 2009</b></p>	<p>The Military Police opened an investigation, interviewed the victim and summoned witnesses mentioned in his testimony to testify. The Military Police requested medical documents.</p> <p>On 24 February and 24 May 2010, Adalah sent letters seeking updated information, but <b>received no further response</b>.</p> <p>On 18.10.2010 Adalah sent a letter to the MAG asking about the status of the investigations. This letter was not answered. On 11.1.2011 Adalah sent the letter again with a reminder and demand for answers. This letter was not answered.</p>
<p><b>6. Mohammad Alatar and his minor son (aged 10), from Beit Lahiya*</b></p> <ul style="list-style-type: none"> <li>▪ On 05.01.2009 the victims were used as human shields, blindfolded, handcuffed, and held in a man-made pit surrounded with barb-wired, with 70 others for three days.</li> </ul> <p>Date of Complaint: <b>6 July 2009</b></p>	<p>No military police investigation has yet been opened.</p> <p>On 24 February and 24 May 2010, Adalah sent letters requesting information regarding whether the military were planning or had opened an investigation, but <b>received no further response</b>.</p> <p>On 18.10.2010 Adalah sent a letter to the MAG asking about the status of the investigations. This letter was not answered.</p> <p>On 11.1.2011 Adalah sent the letter again with a reminder and demand for answers. This letter was not answered.</p>

## APPENDIX II:

### Adalah's Work on Gaza Complaints, updated December 2014

Date Complaint Filed (2014)	Content of Complaint	Status of Complaint	Link to Press Release
July 10	Demand that Israeli military stop targeting civilians and open investigations – 6 different events referenced	<p>Sept. 2014 - Military informed Adalah that no investigation would be opened into 2 cases:</p> <ul style="list-style-type: none"> <li>- Kaware family home</li> <li>- Journalists' car</li> </ul> <p>Also informed that the reasons for not opening investigations were based on secret evidence. In response, Adalah sent a list of questions to the military concerning these cases.</p> <p>Dec. 2014 – Military informed Adalah that no investigation would be opened into the case of the Hamed family home. In their response, the military said that the attack was targeting Khafet Hamed, a commander in Hamas and three other Hamas militants that were killed with him.</p>	<a href="http://adalah.org/eng/Articles/2304/Adalah-to-Defense-Ministry:-Israeli-military-stop">http://adalah.org/eng/Articles/2304/Adalah-to-Defense-Ministry:-Israeli-military-stop</a>
July 15	Demand for investigation into attack on the shelter for disabled people in Beit Lahia (with Al Mezan)	Dec. 2014 - Military informed Adalah that no investigation would be opened. In their response, the military said that they were targeting a weapons warehouse that was located in the home of a Hamas militant. The military wrote that they knew about a kindergarten in the building and not a shelter for the disabled, and that was the main reason for the attack being at night.	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 15	Demand for investigation into targeting of hospitals, medical centers, medical staff (with Al Mezan)	<p>Dec. 2014 - Military informed Adalah that no investigation would be opened. In their response, the military said that the buildings of the Wafa hospital were all evacuated and that they were used for military purposes by Hamas. The military also informed Adalah that only one attack was made without a warning, although there was no collateral damage and hence does not amount to grave breaches.</p> <p>Dec. 2014 - Military informed Adalah no investigation would be opened into the case of an attack on an area of land adjacent to the headquarters of the Palestinian Red Crescent in Jabaliya. The military said that there were rocket launchers on that land which were used against the military. The military also said that the attack was in accordance with the laws of war.</p>	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 17	Demand for investigation into attack of home of Haj	No response	<a href="http://adalah.org/eng/Articles">http://adalah.org/eng/Articles</a>

	family in Khan Younis refugee camp (with Al Mezan)		<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">es/2308/Adalah-demands-investigations-into-suspected-war</a>
July 17	Attacks on water infrastructure & the killing of workers fixing it (with Al Mezan)	No response	<a href="http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war">http://adalah.org/eng/Articles/2308/Adalah-demands-investigations-into-suspected-war</a>
July 18	Demand for investigation re targeting of children on beach in Gaza (with Al Mezan)	Sept. 2014 – Military informed Adalah that it is opening an investigation. Adalah and Al Mezan have sent 3 more affidavits from witnesses, and are trying to organize testimonies	<a href="http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7">http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7</a>
July 21	Demand for investigation re targeting of children feeding pigeons on house rooftop (with Al Mezan)	No response	<a href="http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7">http://adalah.org/eng/Articles/2313/Adalah-demands-investigations-into-killings-of-7</a>
July 24	Al Aqsa & Bet Hanoun hospitals & ambulances (with Al Mezan)	Dec. 2014 - Military informed Adalah that no investigation would be opened. In their response, the military said that they could not detect the mentioned attack and that the complaint was not sufficient.	<a href="http://adalah.org/eng/Articles/2314/Adalah-demands-independent-investigation-into-on">http://adalah.org/eng/Articles/2314/Adalah-demands-independent-investigation-into-on</a>
July 25	Demand for the names, locations of Gaza detainees in Israel	State response – most released; others met lawyers; ask for specific names; some unlawful combatants	<a href="http://adalah.org/eng/Articles/2312/Adalah-demands-that-Attorney-General-announce-the">http://adalah.org/eng/Articles/2312/Adalah-demands-that-Attorney-General-announce-the</a>
July 27	Attack on UNRWA schools and safe facilities (with Al Mezan)	Sept. 2014 – Military informed Adalah that it is opening an investigation. Adalah learned from the media that Israel is cooperating with the UN Board of Inquiry independent investigation	
August 6	Pre-petition demanding increase in permits for ambulances to transfer the wounded from Gaza to WB for medical care (with Al Mezan)	No action	
August 31	Additional Attacks on UNRWA schools and safe facilities (with Al Mezan)	Sept. 2014 – Military informed Adalah that it is opening an investigation. Adalah learned from the media that Israel is cooperating with the UN Board of Inquiry independent investigation	<a href="http://adalah.org/eng/Articles/2322/Adalah-and-Al-Mezan-">http://adalah.org/eng/Articles/2322/Adalah-and-Al-Mezan-</a>

			<a href="#">demand-the-opening-of-into-the-of</a>
Sept. 1	Demand for investigation re the direct attack on a soap and other cleaning materials factory	No response	
<b>JOINT LETTERS</b>			
July 14	<b>Joint letter</b> regarding calls to vacate northern Gaza (with ACRI, B'Tselem, Amnesty-Israel, Gisha, PHR, PCATI, Yesh Din, HaMoked)	No action	<a href="http://adalah.org/eng/Articles/2307/Joint-letter:-Grave-concern-regarding-Israeli-to">http://adalah.org/eng/Articles/2307/Joint-letter:-Grave-concern-regarding-Israeli-to</a>
July 21	<b>Joint letter</b> with ACRI and others about targeting civilians, especially home demolitions		<a href="http://www.acri.org.il/en/2014/07/21/gaza-int-law/">http://www.acri.org.il/en/2014/07/21/gaza-int-law/</a>
June 22	<b>Joint letter</b> with HR NGOs in Israel to Refrain from collectively punishing civilians (West Bank)	No action	<a href="http://www.acri.org.il/en/2014/06/22/collective-punishment/">http://www.acri.org.il/en/2014/06/22/collective-punishment/</a>
July 23	<b>Joint letter</b> with GISHA and others about preventing the collapse of essential infrastructure water and electricity		<a href="http://www.acri.org.il/en/2014/07/23/gaza-infrastructure/">http://www.acri.org.il/en/2014/07/23/gaza-infrastructure/</a>

**APPENDIX III:**  
**ISRAELI SUPREME COURT DECISION ON BAN OF ENTRY FOR GAZANS TO ACCESS COURTS**

*Translated from the original Hebrew by Adalah*

**The Supreme Court**  
**Sitting as the High Court of Justice**

**HCI 7042/12**

Before:           The Honorable Justice E. Rubinstein  
                      The Honorable Justice N. Solberg  
                      The Honorable Justice U. Shoham

Petitioners:     Maher Ismail Abu Daqqa et al.

v.

Respondents:   The Minister of the Interior et al.

Petition for an *Order Nisi*

Date of hearing: 3 November 2014

Counsel for the Petitioners: Adv. Hassan Jabareen; Adv. Sawsan Zaher [Adalah]

Representative of the Respondents: Adv. Avishai Kraus

**DECISION**

Justice E. Rubinstein

**A.**       How will it be assured in practice that residents of the Gaza Strip who seek to petition the State of Israel for damages will have the possibility of doing so? As this right in itself was recently recognized in case law, the question that remains is that of its realization within understandable security constraints that have led to restrictions on the entry of residents of Gaza into Israel. The petition (submitted on 27 September 2012) concerns the request of Petitioners 1-4 who are residents of the Gaza Strip (and Petitioner 5, a witness on behalf of one of them) to receive entry permits into Israel so that they can continue to pursue the tort lawsuits they filed under the Civil Torts (State Liability) Law 5712-1952. All of the Petitioners request that general criteria be set for similar cases that require residents of the Gaza Strip to apply for entry permits into Israel for legal proceedings. Petitioners 6-9 are public petitioners acting in the framework of their activity in human rights organizations.

**B.**       The petitioners claim that the established policy, under which entry permits into the Gaza Strip, and from the Gaza Strip to Israel, are only given in urgent humanitarian cases, has led to the denial of the right of Gaza Strip residents to access courts in Israel. In their view, this policy contravenes the decision of this Court in HCI 8276/05 *Adalah Legal Center for Arab Minority Rights in Israel vs. the Minister of Defense* (2006), (hereinafter: the *Adalah case*), according to which residents of the West Bank and the Gaza Strip who were harmed



by the security forces have a constitutional right to sue the state in Israeli courts of law for damages caused them by the security forces, a right that is derived from the right to life, physical integrity and property. It was further claimed in the petition that the Respondents must exercise their authority under the exception set in Section 3b(3) of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003, which states that "the regional commander may grant a permit to stay in Israel for the purposes enumerated below...(3) For a temporary purpose, and provided that the permit to stay for the aforesaid purpose shall be granted for an accumulated period that does not exceed six months". The petitioners argue that although the regional commander's authority is discretionary, its exercise is mandatory in view of the scope and nature of the rights that were breached; failing to exercise it, in the opinion of the petitioners, signifies locking the gates of the court before injured parties who are residents of the Gaza Strip.

### **Previous Proceedings**

C. On 27 September 2012, the Respondents were requested to submit a preliminary response to the petition and it was submitted on 11 December 2012. In it the respondents claimed that the petition should be dismissed out of hand as there is an alternative remedy in the form of an appeal to a Court for Administrative Affairs. Following the submission of the preliminary response, an additional decision was rendered on 11 December 2012 stating that due to the existence of an apparent overlap between this petition and another petition— HCJ 9408/10 *The Palestinian Center for Human Rights v. the Attorney General* – which was scheduled for deliberation on 29 January 2013, the delivery of a decision on the petition at hand would be postponed until after the hearing was held and a decision was made concerning the additional petition. HCJ 9408/10 concerns the request to order the Respondents to refrain from invoking the statute of limitations argument in the framework of tort claims relating to events that transpired during "Operation Cast Lead" in view, *inter alia*, of the contention that the denial of entry into Israel to residents of Gaza undermines their ability to conduct lawsuits in Israel as aforementioned; see the ruling of 26 July 2012 in this matter which detailed the complexity of the issue. In the decision of 29 January 2013 we proposed that:

"The matters under discussion that rise from all of the court documents, such as the policy of the entry into Israel from Gaza of parties to a civil lawsuits, procedural issues such as visual documentation, the reception of affidavits, agreed postponements in certain cases, and more, will be expressed in the guidelines issued by the State Attorney. We believe that in this way the state's position on matters of principle raised in various cases will be properly clarified. We note that it is evident that the security situation is a major factor to be considered, yet even in this complex framework, we seek to achieve maximum procedural fairness, and no doubt this is also the position of the state."

Following the publication of the guidelines on 23 June 2013, a ruling was delivered in HCJ 9408/10, rejecting the petitioners' request. This decision was made in the wake of the respondents' declaration that they acted in accordance with the court decision of 29 January 2013, which ordered them to prepare State Attorney's Guidelines that will incorporate the various relevant issues necessary to ensure maximum procedural fairness for Gaza residents in proceedings in Israel that they are party to. In their previous notice of 20 May 2013, the respondents updated the court regarding the establishment of the "Procedure for Examining Requests of Palestinian residents of Gaza to Enter for the Purpose of Pursuing Judicial

Proceedings in Israel.” The stated purpose of the procedure is to regulate the entry of plaintiffs and their witnesses from Gaza to Israel for the purpose of pursuing legal proceedings. A draft of a letter was presented to the court which was later rewritten by the State Attorney in the form of guidelines to the Tel Aviv District Attorney’s Office (Civil) regarding the methods of treating lawsuits of this kind. The letter containing the guidelines was signed on 26 June 2013 by the State Attorney and its heading was “Guidelines regarding the Treatment of Lawsuits of Gaza Residents that Concern Operation Cast Lead.”

**D.** Following the delivery of the decision in HCJ 9408/10, the parties to the petition before us were requested to inform the Court of their position concerning relevant ramifications. In the Petitioners’ notice of 29 September 2013, it was stated that, in their view, the petition before us has not been rendered redundant regardless of the new procedure and the State’ Attorney’s guidelines. According to them, the procedure has its drawbacks and cannot, therefore, remedy the flaws attested to in the framework of the petition. The Respondents’ notice of 27 October 2014 states that, in their view, the petition should be dismissed out of hand due to failure to exhaust of procedures in consideration of the fact that the Petitioners did not submit requests under the new procedure that relates to this matter, and did not exhaust the judicial and administrative appeal procedures set in it. The Respondents claimed, in addition that Petitioners' argument regarding the difficulties that the new procedure contains are haphazard, and are based on a mistaken assumption that the procedure will absolutely and undoubtedly prevent the pursuit of legal proceedings of Gaza residents in Israel.

## **Discussion**

**E.** At the outset of the hearing held before us on 3 November 2014, the counsel for the Petitioners argued that the very existence of the procedure contradicts the Court’s ruling in the Adalah case. That case stated that residents of Gaza have a constitutional right to access courts in Israel owing to the fact that the procedure defines granting access to courts in Israel as an exception to the general policy [banning entry - Adalah] and requires the submission of a request. It was also argued that the wording of the State Attorney’s guidelines concerning this question qualifies humanitarian considerations by also including that there should be no concrete harm to the state’s ability to defend itself in the lawsuit. The state, therefore finds itself in a conflict of interest – between its role as the authority that permits or denies the entry of petitioners and their witnesses into Israel, and its position as a defendant. This conflict of interest, and the actual power to employ discretion regarding the entrance of witnesses, harm, in the view of the petitioners, the fairness of the proceedings. It was proposed that the court that deliberates a case will make the decision regarding entrance. And finally, the petitioners stated that if the procedure is analogous to a law, then it is an unconstitutional law that is contrary to the Adalah case, the declaration made by the state to the Turkel Commission following the “Mavi Marmara” flotilla [in 2010 – Adalah] stating that the residents of Gaza have effective access to the courts in Israel, and declarations made by the State in the framework of lawsuits abroad stating that the doors of the courts in Israel are open to the people of Gaza who can claim compensation for their damages.

**F.** In reply, the Respondents claim that a significant change in circumstances has taken place by the establishment of the procedure and the publication of the State Attorney’s guidelines, and that arguments regarding the procedure are hasty and lack a factual basis, *inter alia*, because requests have not yet been filed under it. The Respondents also referred to the Petitioner’s contention that the very existence of the procedure violates the

constitutional right that was recognized in the Adalah case. In their view, no one who is not a citizen or a resident has a vested right to enter Israel, and this fact was not disputed in the Adalah case. Furthermore, it was also noted, that in view of the security situation in the Gaza Strip, it is not possible to allow automatic entry into Israel, and the purpose of the procedure is to regulate the application process and to thereby balance between the necessary security consideration and the granting of permission to enter Israel in order to conduct a legal procedure. In regard to the petitioner's claim against the wording of the State Attorney's guidelines, the counsel for the Respondent's stated that its intention is to instruct attorneys who defend the state in proceedings in whose framework it is sued for damages by Gaza residents to be as flexible as possible towards the petitioners in matters of procedure, as long as this does not interfere with the conduct of the defense, i.e. bringing the truth to light, in the view of the Respondents. The representative of the Tel Aviv Attorney's Office provided an example of flexibility through the fact that in many cases it does not insist on the submission of a medical opinion, and the willingness to receive affidavits by fax.

## **Decision**

**G.** The decision in the Adalah case annulled article 5c of Amendment 7, 5765 – 2005, of the Civil Torts (State Liability) Law 5712-1952, which exempted the state from all liability for compensation for any damages caused by the actions of the security forces in a designated conflict zone, (while determining a committee for payment Ex Gratia). As a result, the possibility of submitting a lawsuit does exist.

**H.** Consequently, as there is no dispute regarding the fact that residents of the Gaza Strip have a legal possibility to claim damages in Israel, and there is no dispute concerning the security situation which mandates constraints on entry, the question is pragmatic - finding the appropriate balance between security needs and the possibility of conducting a legal proceeding. The state simultaneously wears two hats, that of the party responsible for security on the one hand, and that of the defendant on the other, and it must take care. as far as possible. not to confuse between the two.

**I.** We will emphasize: there is no dispute that the issue of security must not be treated lightly and, therefore, the case at hand must be decided in consideration of this constraint. As the gates have not been locked before the Petitioners, it is appropriate to address the most effective course to approach this matter. In AAA 4620/11 *Kishawi v. Minister of Interior* (2012), Justice Vogelman summarized the judicial approach to the issue of entry from Gaza:

“The premise for review, as accepted in any sovereign state, is that foreign nationals have no vested right to enter the territory of the State of Israel. Based on the sovereignty principle, the authorities of the state have broad discretion to decide who enters its territory, although this discretion is subject to judicial review according to the causes for review customary in administrative law. As ruled on more than one occasion, this rule is relevant also to applications for entry permits made by Gaza residents...The authorized party for permitting the above to stay in Israel temporarily is the commander of the region in accordance with his authority set in Article 3b of the Citizenship and Entry into Israel Law (Temporary Order) 5763-2003 (hereinafter: the temporary order). We will recall that in relation to our matter the “commander of the region” according to the definitions of the temporary order is “someone

authorized by the Minister of the Interior, with the consent of the Minister of Defense". Under the customary policy of the Respondents – based, *inter alia*, on the decision made by the Ministerial Committee for Security Affairs on September 2007 – permits for entry into Israel are only given to residents of the Gaza Strip in exceptional humanitarian cases, such as visits for medical needs. [...] In view of this policy, the requests of Gaza Strip residents to receive entry permits into Israel are examined individually only if it is found that they meet the above exceptional humanitarian grounds. [...] This court has, on several occasions, determined that there is no cause to intervene in this policy, provided that in exercising discretion in implementing the policy, the competent authorities give appropriate weight to humanitarian considerations.[...]while taking into account the changes that took place in the scope of the state's obligations to the residents of Gaza in light of the implementation of the Disengagement Plan in 2005 and the rise of the Hamas to power. [...] *Inter alia*, it was decided that entry into Israel for the purpose of visiting imprisoned family members, passage through Israel for the purpose of study in the West Bank, and visits to family in the West Bank do not constitute grounds for the humanitarian exception which justifies entry into Israel in the framework of the customary policy."

In contrast, it is appropriate to make it possible to file claims in practice. How does one resolve this matter?

J. If we look at the dispute between the sides, it appears that although it is possible to raise the matter to the higher levels of constitutional issues, as requested by the petitioners, this is not at all required, and not every case is necessarily a platform for questions such as these. We believe that the appropriate way to resolve the matter is pragmatic, by giving a proper chance, as will be specified, to the procedure and the guidelines that were prepared by the State Attorney's office, although as stated these do not lack flaws. It should also be noted that since the state documents – the procedure and the guidelines that are detailed in themselves – addressed the matter of "exceptional humanitarian circumstances", the question that remains is how these circumstances will be interpreted in practice to achieve the guidelines' aim.

K. We will open with the "Procedure for Examining Requests of Palestinian Residents of Gaza to Enter for the Purpose of Pursuing Judicial Proceedings in Israel" that was issued - as aforesaid - in May 2013 (after their approval in March 2013).

L. The procedure is based on the general policy according to which the entry of Palestinian residents of Gaza into Israel will only be permitted in exceptional humanitarian cases requiring coordination between the Gaza DCO (the party authorized to allow entry), security agencies, the State Attorney's Office, the regional attorney's office, and professional entities (Section 2)). After referring to the general policy and the need for an individual examination in its framework, the following considerations are listed (Section 5):

- "1. The absence of a specific security- or criminal-related motive;
2. The possibility that denying the applicant's request may thwart or seriously harm the legal proceedings. In this context, the progress of the legal case will also be taken into account.

3. The relevance of exceptional humanitarian circumstances that justify deviating from the overarching policy. Such circumstances may take many forms, including:

- (1) The circumstances under which the event being adjudicated occurred;
- (2) The kind of harm and the extent of damage allegedly caused to the plaintiff and the requested compensation;
- (3) The parties in the case, and if the plaintiff was not directly harmed, their relationship with the person who was directly harmed;
- (4) Exceptional humanitarian circumstances that apply to the legal proceedings and its outcome.

For the purposes of these guidelines, examples of exceptional humanitarian circumstances would be a case being pressed by dependents of a person whose death is the subject of the court case, or if the plaintiff has incurred serious injuries that have caused much distress.”

**M.** The request must be filed through the Palestinian Civil Committee in the Gaza Strip (Section 6). In certain cases where the Committee prevents filing a request – directly through the Gaza DCO (Section 7). Afterwards the timetable is described (filing a petition no later than 90 days prior to the requested date of entry) (Section 8), and a list of the documents needed for the processing of the request is provided (Section 9). Afterwards, the decision making process and the method of providing the reply are described.

**N.** The State Attorney’s guidelines “Regarding the treatment of claims of Gaza residents concerning ‘Operation Cast Lead’” were issued on 26 June 2013 in a letter sent by the State Attorney to the Tel Aviv District Attorney (Civil). The guidelines outline the background, including the general policy as above described, of the State’s defense in the framework of a lawsuit in cases when state officials are unable to reach the plaintiff’s place of residence and the scene of the event. However, it must be stated that there is no prevention against the submission of claims to courts in Israel. The guidelines refer to the above mentioned procedure stating (Section 8) that “the purpose of the procedure is to allow—as possible –the entry into Israel of plaintiffs and their witnesses who are residents of Gaza for the purpose of conducting legal proceedings, in exceptional humanitarian cases, in which there is no individual entry prohibition on the basis of security or criminal considerations...”. A section of the guidelines is devoted to the procedural conduct of the state in these cases. We will not deny that we found room for criticism of the wording of this section, even if it was not intentional, which reverts to the aforementioned two hats of the state.

**O.** Section 11 states “...the attorneys who conduct the proceeding must examine all possible judicial procedural means in a manner that will enable the claims to proceed even in the absence at the hearing of witnesses who are residents of the Gaza Strip, of course as long as this does not substantially harm the ability of the State to defend itself.” This may create an impression that the issue of the entry of witnesses is linked to the ability of the State to defend itself and not to the needs of the judicial proceeding. It must be noted here that the assertion that the relevant test is the ability of the state to defend itself and not the fairness of the proceeding requires clarification on our part. We believe, this must be interpreted to say that as possible by consent, the sides will waive the need for presence of witnesses in order to reduce the number of entries into Israel due to security concerns, although this does not prevent their counsel from insisting on the need for the testimony of a certain witness, in which case entry must be allowed in the absence of a prohibition on security or criminal grounds. We will now examine the other sections of the guidelines which allegedly reduce the difficulty noted above and better suit the appropriate approach to the matter.

**P.** Section 12 and its subsections include the state's consent to postpone the fulfillment of the plaintiff's obligation to append a medical opinion until the latest possible date. The request for a the preliminary hearing on the question of the existence of a "wartime action" (according to section 5(b) of the Civil Wrongs Law) which waives the cross examination of the plaintiffs' witnesses, unless it is imperative in the opinion of the counsels for the state, and yet allows the cross examination of the state's witnesses by the plaintiff; submission of affidavits by computer or fax; and when the above warrants the examination of Gaza residents who submitted affidavits, the petitioner will be instructed to follow the entry procedure, and should he be refused, the option of visual documentation in a foreign state that maintains relations with Israel will be examined. In exceptional cases the withdrawal of a lawsuit by consent will be allowed, while undertaking not to raise the Statute of Limitations claim for a prescribed period in the future, beyond the short period set in the statute. And finally "Should the petitioner see at the end of this period of time that he still cannot conduct his claim properly due to the prevention of his entry, and the entry of his witnesses, into Israel, and he submits a request to extend the prescribed period, the State Attorney's office will consider an affirmative response to the request." Section 14 makes it possible to deviate from the above in special and exceptional circumstances "that primarily concern the consideration of preventing a substantial harm to the state's defense." As was explained to us at the hearing, this refers to the legal defense (not defense in the sense of security). In Section 16 that concerns claims beyond "Operation Cast Lead", it was stated that the actions of the State Attorney's Office on the procedural level will be examined "as needed, while balancing the interests of access to courts and the right of the state to defend itself, and while protecting the interests of the public that are linked to the issue of the entry of Gaza residents into Israel."

**Q.** At the outset of our response to the above, it must be noted that our Jewish Law sages were meticulous in regard to procedural fairness and I bring the sayings of Maimonides in relation to the Halacha (*Sanhedrin* 21, a), "it is a worthy deed to judge righteously, as it is written: "in righteousness thou shalt judge thy neighbor" [Leviticus 19:15]. What is righteousness in a judgment? It is holding both litigants equal in everything: not permitting one to speak at length, while telling the other to be brief, not to show courtesy to one and speak softly to him while being discourteous to the other addressing him harshly." It is fitting that these sayings be before us in an Israeli court, but the needs of security are not less important, because we are not in Switzerland and the court is not exist in a bubble. At any rate, fairness towards all is a fundamental rule that must not be deviated from. The challenge lies in its implementation.

**R.** Clearly, state officials sought to find a way, through the procedure and the guidelines, to make it possible to conduct legal proceedings within the general policy which establishes that entry from Gaza is only possible for exceptional humanitarian reasons, a policy that received judicial confirmation in the above Kishawi case. In truth, the term "exceptional humanitarian reasons" is not ostensibly applicable to the submission of a lawsuit and, therefore, the procedure and the guidelines are facing a great challenge in finding a way to also include claims in this definition and in balancing between the recognized possibility of submitting a claim (the Adalah case), security needs and the general policy set due to these (the Kishawi case), and the absence of the right to enter Israel regularly. Hence, the cumbersome wording of the procedure and the guidelines.

**S.** As stated, we have reached the conclusion that it is unbefitting to address the issue through the prism of constitutional law and feel it should only be addressed from the

practical perspective. The bottom line should at the very least be that it is possible to submit a claim and that security should not be harmed. We believe that this is possible without unduly hampering the plaintiffs and their representatives in fairness, as aforesaid, to all. We will emphasize that precisely because the state itself is a party to the proceedings, it must pursue a policy of procedural fairness with greater diligence.

**T.** The practical approach implies an examination of the actual implementation of the procedure and the guidelines. The petitioners must follow the course set in the procedure and the guidelines so that it will be possible to assess its effectiveness. In our view, the principal issue is not the semantics that exclude claims from the definition of exceptions on humanitarian grounds, but the realization of the possibility to submit a claim. This refers to two courses that are meant to converge, even if these matters are not technically simple. On the one hand, the state undertakes to make efforts to facilitate the proceeding by easing procedures as mentioned, and on the other, the Petitioners must act according to the procedure and exhaust its possibilities, including an appeal to the DCO through the Palestinian Civil Committee. Should the committee prevent the submission of a request, they should appeal directly to the DCO. It is also possible to appeal to the DCO against the denial of entry, and afterwards there is a possibility of filing an administrative petition to the Beer Sheva Court for Administrative Affairs and to submit an appeal to this Court. It is, of course, appropriate to make every effort not to go through the whole chain of procedures as state officials will, as possible, facilitate the process by removing the maximum number of technical-procedural barriers in consideration of security constraints, and the above does not presume anything at all concerning the claims per se.

**U.** All must be examined, as aforesaid, on the ground and, therefore, it is not acceptable to us that, as claimed, requests are not being submitted. The petitioners will do their part and the state will do its part so that the pursuit of the claims will be fair and efficient. Even if the state's interest is not to encourage claims, when these are filed, they must have their day, whatever the final substantive outcome will be.

**V.** This is the challenge, and the rights of the parties are reserved. In consideration of all of the above, the petition is dismissed without an order for expenses.

Judge U. Shoham:

I agree.

Judge N. Solberg:

I agree with all that was said by my colleague, Justice E. Rubinstein.

I will only note that the institution of the "Procedure for Examining Requests of Palestinian Residents of Gaza to Enter for the Purpose of Pursuing Judicial Proceedings in Israel" along with the State Attorney's guidelines should have – in practice – put an end to the litigation of this petition. The situation in respect of the issue under discussion, taking into account the interaction between Palestinian residents of Gaza and the State of Israel, is complex and sensitive. My colleague addressed this, but before this Court is required to deliberate the provisions of the procedure and the guidelines, into which a great deal of effort and thought were invested, it would be advantageous for the petitioners to submit requests in

conformity with the procedure and to follow its course leading to a competent court in Israel.

I state my view not due to laziness of thought, but in the interest of the practical advantage. Note: the petitioners did not try to proceed on the course set by the procedure, and in any case their arguments were unfounded having been made on the basis of the assertion that the procedure will certainly and absolutely prevent the conduct of their legal proceedings. But this is not so, as is clearly evident from the reading of the provisions of the procedure, and with regard to my colleague's statement. There is no point in resorting to theoretical claims without laying the groundwork on the practical level. The petitioners did not in any way demonstrate whether, why, and for what reason the conduct of their legal proceedings is likely to be thwarted. We will recall: a resident of Gaza who is a party to a legal proceeding in Israel, who applied for entry into Israel and whose request was denied, is allowed to appeal against the decision to the Gaza DCO. If the denial continues, he may submit an appeal to the Beer Sheva Court for Administrative Affairs, and may appeal against its judgment to the Supreme Court.

This is the rule: The purpose of the High Court of Justice is not to deliberate a matter that is not fully ripe. The exhaustion of remedies must precede, followed by judicial review (I addressed this matter broadly elsewhere: "Keep the Law and Do Justice", Din V'Dvarim 8 (5774), 13, 22-24).

To dispel all doubt I will stress: all of the aforesaid does not detract in any way whatsoever from the obligation state has to carry out its duty, as stated by my colleague, so that the treatment of claims made by residents of Gaza will be fair and efficient.

Given today, 24 Kislev 5775 (16 December 2014)