At the Supreme Court **HCJ 4410/08**
Sitting as the High Court of Justice

In the matter of:

1. The Estate of the Late _____ **Mahmud**, **Identity No._____**
2. _____ **Mahmud**, **Identity No._____**
3. _____ **Mahmud**, **Identity No._____**
4. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger - registered non profit organization**

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The Petitioners

- Versus -

1. **The Central District State Attorney's Office**
2. **The State Attorney**
3. **The Attorney General**

Represented by the office State Attorney's Office
Salah El-Din 29, Jerusalem

The Respondents

Petition for *Order Nisi*

A petition for an *Order Nisi* is hereby filed which is directed at the respondents ordering them to appear and show cause:

A. Why they will not exercise their authority and decide, without delay, whether or not to place the accused in the death of the late youth _____ Mahmud on trial.

B. Why they will not justify and enumerate the reasons for which a decision in the matter of putting them on trail has been delayed for **a year and a half**, despite the fact that a police investigation has already ended and the tragic death took place as far back as 2003.

Request for Urgent Hearing

The honorable court is requested to set a date for an urgent hearing on this petition. The petitioners have waited for five years to clarify the circumstances of the illegal shooting that led to the death of the deceased. Ever since 2003 the petitioners have been shrouded in darkness and uncertainty. An investigation into the incident was opened four years ago and ended one and a half years ago. Ever since, and for a period of many months the respondents have avoided exercising their authority under the law, and all this before any type of legal or disciplinary proceeding has commenced to enforce judgment against the accused in this case. A process such as this is also expected to continue for a long time. Every day that passes the prospects for revealing the truth decrease, and the petitioner's basic rights are even further harmed. The continuous stalling by the investigative and prosecuting authorities must end.

The grounds for the petition are as follows:

Introduction

1. This petition is filed against the backdrop of the investigative and prosecuting authorities' failed handling of the complaints of Palestinians, with respect to criminal activities that have been carried out by the security forces of the State of Israel in the occupied territories.

2. The authorities' handling of suspicions of criminal deeds consists of a number of stages: receipt of the complaint, verification and the opening of an investigation, the carrying out of an investigation, and the gathering of evidence. Upon completion of the investigation the investigation file is transferred to the prosecution in order to make a decision on whether to proceed to trail or to conduct a disciplinary hearing, or alternatively to close the file because of the reasons listed in the Law.

3. Already at this early stage it should be noted that as a rule upon the closing of an investigation file the injured party is allowed to study the contents of the investigation and to plan his steps in accordance with the findings. It is within his right to file a petition on the prosecution's decision to close the case. In addition, and depending upon the circumstances, he is able to continue to realize his rights using the avenue of a civil claim. Aside from the interest of the individual complainant, studying the contents of the investigation is also takes on public importance of the first order. Examining the way in which they carried out the investigation, in light of which a decision was made by the prosecution, is vital for enhancing supervision and control over the work of the investigating and prosecuting authorities. Granting an opportunity to study the contents of the investigation is also essential for strengthening democracy and the rule of law in the State of Israel.

4. Collective experience has shown that the authorities' handling of complaints is fraught with serious failures: significant delays in opening an investigation, reckless mismanagement of the investigation, arbitrary closing of the files while ignoring the evidentiary material, and at a later stage, the piling on of difficulties for receiving investigation material. Foot-dragging and continuous non-replies to the complainant's application is another of the "terrible evils" that typify the authorities' handling.

5. This petition is also directed as stated to that stage of the process in which authority is exercised in deciding whether to commit the case to trial. In the case of the petitioners before us, this stage has been tainted by drastic and unreasonable delays. However, even the overall picture reveals a problematic and continuous pattern of handling complaints. At the end of the day the impression one receives is of a policy whose stated goal it is to obstruct Palestinian complainants and plaintiffs, and to avoid verifying the truth and enforcing the law against those involved in criminal activity in the territories.

The Factual Foundation

The parties

6. **Petitioner 1** is the legacy of the deceased minor _____ Mahmud, a resident of Tulkarem, who was shot to death by bullets fired by the security forces on 27 May, 2003 close to his home, at the age of 16 years (hereinafter: the "**deceased").**

7. Petitioners 2-3, residents of Tulkarem, are the parents and legal heirs of the deceased (for the sake of convenience and where necessary, petitioners 1-3 will be grouped together and referred hereinafter as the "petitioners").

8. **Petitioner 4** is a human rights organization which is active in the enhancement of humanitarian law in the occupied territories, and assists Palestinians, residents of the territories whose rights have been breached by Israel.

9. **Respondent 1** is the body authorized under the law to make decisions to commit a case to trial, or alternately to close an investigation file without adopting any form of legal action.

10. **Respondent 2** is the head of the sate attorney's office, entrusted with maintaining the rule of law and with proper administration in the State of Israel, including responsibility for enforcing the law amongst the various branches of the government, including amongst the security forces. He is the professional in charge of respondent 1, supervising its activities, and where necessary delegating the authority to make a decision to commit a case to trial.

11. **Respondent 3** is the head of the general prosecution services and the law enforcement system in Israel. By virtue of his job and activities he is responsible for the activities of respondents 1-2, and they are subordinate to him.

The incident

12. On the morning of 27 May, 2003 at approximately 11 a.m. the deceased, a 16 year old boy at the time f the event, completed his school day at the Alfadila School in Tulkarem. The deceased left the school and walked in the direction of his home. On the way he stopped nearby a restaurant that was close to the Jamal Abed-AlNasser square, a short distance from the town's main road. A number of students, who were also returning from school, started to throw stones at an army jeep which was parked in the vicinity. At that time security forces personnel were inside the vehicle and in all probability were border guard policemen. An additional army jeep then arrived at the scene**.**

13. Suddenly shots were heard from the direction of the army vehicles. The deceased was shot and injured in the upper torso and collapsed. The reason for the shots and the identity of the shooters has not been clarified.

14. The students lay their wounded friend at the entrance of the nearby pharmacy. The pharmacist requested that he apply first aid, but the soldiers and/or policemen prevented him from doing so, by aiming their weapons at the pharmacist and threatening to shoot him. Later a Red Crescent ambulance arrived at the scene. The deceased was then taken to the Thabat Thabat hospital in Tulkarem. A short while later he was pronounced dead**.**

The events described above shall hereinafter be referred to as the **"incident".**

Opening the investigation

15. On 10 September, 2003 the petitioners, through petitioner 4 applied to the State prosecutor for the central command with a request to open an investigation into the incident.

A copy of the petitioner's application dated 10 September, 2003 is attached to the petition and marked **appendix p/1**.

16. After a number of memoranda the prosecutor for the central command, Lieutenant Colonel Liron Liebman on 25 February, 2004 replied that the IDF soldiers were not involved in the incident. He directed the petitioners to file a complaint with the Police Investigation Department at the Ministry of Justice (hereinafter: the **PID).**

A copy of the reply by the prosecutor for the central command dated 25 February 2004 is attached to the petition and marked **appendix p/2.**

17. On 30 March, 2004 the petitioners applied to the PID demanding that it open an investigation. On 9 May, 2004 a reply was received from the head of the PID, Mr. Herzl Shviro stating that an investigation into the incident would not be handled by the PID and therefore it had been transferred for handling by the District of Judea and Samaria Investigations Department of the Israel Police.

A copy of the petitioners' application dated 30 March, 2004 is attached to the petition and is marked **appendix p/3.**
A copy of the reply of the Head of the PID dated 9 May, 2004 is attached to the petition and is marked **appendix p/4.**

18. On 29 July, 2004, after a number of memoranda were sent, confirmation was received from the police that in fact the aforesaid investigation was opened.

A copy of the police's reply dated 29 July, 2008 is attached to the petition and is marked **appendix p/5.**

19. It is indeed noteworthy that the investigation into clarifying the circumstances of the death of the deceased was opened, so it was discovered by the petitioners, after the passing of **more than a year** since the day of the incident, and this too was only because of their application to the authorities. If this was not bad enough, as they later discovered, the opening of the investigation was merely for the sake of appearances. Much time passed before tangible investigative work was actually performed.

20. In the reply to the petitioners' applications to be kept abreast of the situation of the investigation file, they were informed that the investigation had been frozen immediately after they were informed that it was opened. The file was transferred, on 31 August, 2004in order to receive guidelines from the chief military prosecutor. For reasons that were not made clear to the petitioners, the file "sat" on the desk of the chief military prosecutor's office and its handling was delayed for **more than a year**. Only on 14 November, 2005 was the file returned from the prosecutor's office for further handling by the police.

A copy of the police's reply dated 20 March 2005 is attached to the petition and is marked **appendix p/6.**
A copy of the police's reply dated 15 May, 2005 is attached to the petition and is marked **appendix p/7.**
A copy of the petitioners' application to the chief military prosecutor dated 18 August, 2005 is attached to the petition and is marked **appendix p/8.**
A copy of the reply by the chief military prosecutor dated 30 August, 2005 is attached to the petition and is marked **appendix p/9.**

A copy of the reply by the chief military prosecutor dated 26 September, 2005 is attached to the petition and is marked **appendix p/10.**
A copy of the police's reply dated 10 April, 2006 is attached to the petition and is marked **appendix p/11.**

21. However, even after the file was returned to the police, the investigation was still not handled through an expedited route. From this date and over the course of a long period, the police continued to freeze the handling of the investigation, **with the knowledge of the respondents.** Despite the fact that the police was explicitly authorized to investigate the source of the firing in the case before us (see section 49(i) to the Police Ordinance [New version]; National Headquarters Order No. 06.03.03, published in the Police National Headquarters Gazette Notice 1/96) there was someone who chose to cast doubt on this and preferred to sit around and do nothing, without investigating.

22. Owing to this serious matter petitioner 4 applied to the police and to respondents 2-3, and complained to them that the investigation into such serious incidents was frozen for such a long time, and for irrelevant considerations. It appears that this is not the place to expand upon this matter within the framework of this petition. Nonetheless, it is important to emphasize that as a result of the investigation having been frozen the handling of the incident was delayed for a long time, even before it reached the table of respondent 1. Therefore upon receipt of the file it must expedite handling the file and must rectify the damage.

A copy of the relevant section of the Police Ordinance and the National headquarters Order is attached to the petition and marked **appendix p/12.**
A copy of petitioner 4's application to the commander of the Judea and Samaria District dated 23 February, 2006 is attached and marked **appendix p/13.**
A copy of petitioner 4's application to respondent 3 dated 24 May, 2006 is attached and marked **appendix p/14.**
A copy of petitioner 4's application to respondent 2 dated 19 July, 2006 is attached and marked **appendix p/15.**
A copy of the reply on behalf of respondent 2 dated 3 August, 2006 is attached and marked **appendix p/16.**

<u>Ending the investigation and transferring the file to respondent 1 to make a decision</u>

23. At a certain stage, as far as the petitioners are aware, respondent 2 or someone on its behalf approached the police and instructed it to continue and investigate the circumstances of the incident. And so on 31 December, 2006, after **three and a half years** had passed from the date of the incident and **two and a half years** after the day of opening the investigation, they announced the end of the investigation and the transfer of the file to respondent 1 for the purpose of making a decision whether to commit the case to trial.

A copy of the police notice dated 31 December, 2006 is attached to the petition and marked **appendix p/17.**

24. However, as opposed to what was expected, respondent 1 did not find that the past handling of the file was in any way exceptional, which would thus require urgent attention. When the file eventually arrived at its premises, it did not act to repair the damage that was already detectable in the behavior of the authorities. It did not expedite the handling of the file. Respondents 2 and 3 were also unconvinced of the importance and seriousness of the case, and thus – one delay followed the next. As of **the time of writing these lines, a year and a half after the file was transferred to respondent 1, the latter has not yet found the time to exercise its authority and has yet to make a decision with regard to committing to trial.**

25. Henceforth, the factual foundation comes down to countless applications and reminders sent by the petitioners, in their attempt to receive a reply as to whether or not those involved in the incident would be placed on trial.

A copy of the petitioners' application to the Office of the Central District Attorney dated 5 February, 2007 is attached to the petition and marked as **appendix p/18.**
A copy of the petitioners' application to the Office of the Central District Attorney dated 12 March, 2007 is attached to the petition and marked as **appendix p/19.**
A copy of the petitioners' application to the Office of the Central District Attorney dated 12 April, 2007 is attached to the petition and marked as **appendix p/20.**

26. Additionally the petitioners applied to respondent 1, seeking clarification by telephone on 16 May, 2007, 9 July, 2007, 26 July 2007 and 5 August 2007. During the telephone conversations the petitioners were unofficially informed, that to all appearances the file was "on the way to being closed because of lack of evidence". Nonetheless, as far as the petitioners are aware, no formal or authorized decision has been made to close the file.

27. On 9 August, 2007 an employee of petitioner 4, Mrs. Gilat Fisher made telephonic contact with Adv. Rakefet Mohar from respondent 1. In the course of the conversation Adv. Mohar pointed out that the handling of the file had been transferred to the Central District Prosecutor, and added that "apparently the file has been closed".

28. Petitioner 4 continued to follow up the matter and tried to clarify whether any progress had been made with the file. It applied to Adv. Rakefet Mohar on two occasions by telephone, on 18 September, 2007 and on 7 October, 2007, and also in writing on 23 October, 2007, but all of this was in vain.

A copy of petitioner 4's application to Adv. Mohar dated 23 October, 2007 is attached to the petition and marked as **appendix p/21.**

29. On 13 November, 2007 petitioner 4 applied to Adv. Rakefet Mohar by telephone one more time. Adv. Mohar clarified that she had already completed the handling of the file by August 2007. Ever since then they had been waiting for a decision in the file which had been under the custody of the prosecutor for the central district, Adv. Rachel Sheber.

30. On 19 November, 2007 the petitioners applied to the prosecutor for the central district, Adv. Sheber in a final attempt to clarify the fate of the file. It is noteworthy that there was no response to their application, even after a memorandum was sent on 23 December, 2007.

A copy of the petitioners' application to the prosecutor for the central district dated 19 November, 2007 is attached to the petition and marked **appendix p/22.**
A copy of the petitioners' application to the prosecutor for the central district dated 23 December, 2007 is attached to the petition and marked **appendix p/23.**

31. It should be noted that at no stage was a claim ever made that the case had been sent out to the police for its investigation to be completed. In other words throughout the period that has passed, the file has been "gathering dust" in the offices of respondent 1, without being handled and without any decision being made.

32. Therefore, over the course of a long period, respondent 1 did not feel it appropriate to exercise their authority, and did not even justify the lack of action on its part. In addition respondents 2-3 have avoided exercising their power over respondent 1 and are not concerned that the latter act in accordance with the law.

33. To summarize this chapter, the investigation file dealing with the death of the deceased from shots fired by the security forces has been left with respondent 1 since December 2006. Until today, a **year and a half later**, there has still been no decision on the file with regard to committing the case to trail. Let us not forget that the decision making process by the investigating and prosecuting authorities, whose constant postponement and slothfulness cries out to the heavens, relates to a shooting incident that took place in May, 2003.

34. To complete the picture it should be pointed out that on the basis of the incident a civil claim (T.A. 5610/05 **The Estate of the Late Muhammad Mahmud v. The State of Israel**) has been pursued. The petitioners were forced to file a claim without the contents of the investigation and without having clarified the circumstances in their entirety, and this was only in order that their claim be filed within the shortened two-year period of the statute of limitations. The complaint is pending at the Jerusalem Magistrate's Court.

The Legal Argumentation

Unreasonable Laches

35. Section 62 of the Criminal Procedure Law [Consolidated Version], 5742-1982 grants respondent 1 the authority to decide whether to commit a case to trial. There is no dispute that respondent 1 **is obliged** to exercise its authority, **is obliged** to exercise its discretion and to come to a decision. The petitioners' aver that the obligation to exercise means also that there is an obligation to exercise discretion with appropriate speed and to reach a decision within a reasonable timeframe. It is clear then that in this case, a delay of a year and a

half in arriving at a decision is fairly radical, and deviates from the norm and from the reasonable, and harms the essential rights of the petitioners.

36. It shall right away be mentioned that the petitioners are not claiming that respondent 1 should have made a decision offhandedly and on the spot. In the nature of things the decision to serve an indictment or alternately to set aside a file entails careful and punctilious examination of the contents of the investigation and is only performed after much deliberation. Nevertheless, a year and a half has already passed and there is still no decision. The amount of time taken by the respondent is completely unreasonable and unjustified. It is apt at this juncture to quote the words of Professor Yitzhak Zamir in his book *Administrative Authority*, volume 2, 705 (1996):

> **Indeed there are cases which need continuous and comprehensive investigations and yet there are also investigations that continue for a period that exceeds the reasonable time period. The need to establish a comprehensive investigation can sometimes serve as an unveiled excuse for an unjustified delay. This kind of delay, which is commonly referred to as "foot-dragging", is liable to arise from a heavy workload that has been placed upon the authorities, from faulty administrative arrangements, from recklessness, or even, from bad intentions. For example, it is possible that the authority, which has already made up its mind not to grant an application of a certain person, but finds it inconvenient to explicitly reject him, since such rejection will expose it to review, prefers to send him back and forth.**

37. It is true that enacted legislation does not positively establish time limits for respondent 1 to reach a decision. Yet, a founding principle of administrative law determines that the authorized body must act with reasonableness, and "reasonableness also means complying with a reasonable time schedule" (See: Zamir, *ibid.* 706).

38. As a rule the time taken to reach an administrative decision should not exceed 45 days (compare: Amendment of Administrative Arrangements (Decisions and Reasons) Law, 5719-1959). In complex issues, like in the matter of committing a case to trial, it is likely that the reasonable time period would be somewhat extended. Nevertheless, this cannot be interpreted to mean that the Authority is exempt from all time limits. Section 11 of the Interpretations Law, 5741-1981, determines that when there is an obligation to do something – without a specific time for performance being determined – it means that there is an obligation to do it within "reasonable time". Indeed, the obligation to act with appropriate speed is one of the primary concepts of proper administration. A determination of the question what is "appropriate speed" or what is "reasonable time", are dependent on the circumstances of the case (See: Zamir, *ibid.* 714, 717).

39. What is a "reasonable" time period for our purposes? In order to provide an adequate response to this question one has to take into account, first and foremost, the seriousness of the incident. The outcome of the incident – death – raises the possibility of charging someone with one of the most serious offences in punitive law. In any event, it involves a suspicion of a serious criminal act, a deliberate strike by the security forces of a minor who was involved in innocent activity or at the very least criminal negligence and the avoidance of adopting all possible measures to defend the civilian population from harm. It is safe to assume that the suspects in this act are roaming about freely. It is even possible that they currently continue to bear arms despite the apparent danger.

40. Additionally one must also take into account the "foot-dragging" and severe stalling in the actual handling, an issue that has already been the subject of a complaint, and which may be attributed to the obligation on the investigating and prosecuting authorities, and which also includes the respondents' obligation. As shall be detailed below, decisive weight should be given to the damage that shall be caused, as a result of the stalling, to the petitioners and to their basic rights, as well as to the possibility for revealing the truth with the passing of time. Likewise, one must apply one's mind to the fact that the aforesaid stalling does not comply with Israeli Constitutional Law or with the State of Israel's obligations as defined by international law. Finally one should take into account the fact that the stalling and avoidance in exercising criminal enforcement powers undermines the public's trust in law enforcement and encourages further violations of the law.

41. **Emerging from all of the above is the fact that it was incumbent upon respondent 1 to reach a decision promptly, within a mere few weeks from the day the investigation into the incident was completed. At the same time it was incumbent upon respondents 2 and 3 to ascertain that this was indeed done, and to ensure that the handling of the petitioners' case is given preference. Waiting for respondent 1's decision for a year and a half is unacceptable. The hurdles placed by the respondents therefore bear out this court's intervention.**

42. However much the respondents may argue that there were technical difficulties, a heavy workload, a human resources shortage and the like, it should be noted that claims of this nature were up until now not heard by the petitioners. Moreover, these are not magic words that grant the respondents a certificate or seal of proper administration. Not only has respondent 1 postponed its decision for a year and a half, but also these type of reasons cannot justify the unreasonable and disproportionate harm done to their human rights (See: HCJ 2557/05 **The Majority Staff v. Israel Police**, *Takdin Elyon* 2006(4) 3733, 3747 (2006); HCJ 253/88 **Sajadiah v. Minister of Defence**, *Piskei Din* 42 (3) 801, 820 (1988)).

43. Even more so, it appears that our case does not at all involve any type of technical difficulty, to which one can attribute respondent 1's stalling. From the telephone clarifications made by the petitioners it emerges that in this file recommendations and conclusions had already been made, and the apparent intention of respondent 1 was to close the file. Why then does it require many

more months until coming to its final decision and conveying a reasoned notification to the petitioners in this spirit? Only the respondents can answer this.

Harm to the petitioners' rights

Harm to the right to file an appeal

44. As is well know, respondent 1's decision, when it is made, does not put an end to the story. The decision to commit a case to trial sets into motion a legal or disciplinary hearing against the accused. On the other hand, a decision to close a file enables the petitioners to file an appeal on it, and additionally he may file a civil claim for damages. All of this may only be done after they have been given an opportunity to be informed up close of what occurred and the way in which the investigation of the incident was conducted, through studying the contents of the investigation.

45. The right to file an appeal is explicitly granted to one harmed by a violation of the law (see: section 64 of the Criminal procedure Law [amended version], 5742-1982). In order not to harm the right to file an appeal, the decision of the prosecuting authorities needs to be delivered with appropriate speed. So long as no decision has been made on committing the case to trial, it is not possible to file an appeal, since at this stage there is nothing against which to appeal. At the same time, a continuous delay at making a decision – and the resultant filing of an appeal at a later stage - very much dulls the effectiveness of the latter. With the passing of time, the details are forgotten and the memories become blurred. The ability to clarify the circumstances of the incident, as well as extracting evidence from the scene of the incident and gathering evidence, are likewise harmed, if not completely frustrated. Even if the appeal should be accepted and the investigation renewed, in many cases there is not enough to sustain a complete investigation at that point in time.

46. Even if it should eventually be decided, after continuous delay, to serve an indictment against those who were involved, the possibility to conduct a just and effective legal proceeding has already been harmed. Because of the delay, there are diminishing prospects for discovering the truth and for enforcing the law against the guilty parties. Thus for example, a delay from the time of opening the investigation until the time of serving an indictment is liable to establish a justifiable defence for the accused as a result of the conduct of the authorities, which results in their acquittal. (Compare CrimA 4855/02 **The State of Israel v. Borobitz**, *Piskei Din* 59(6) 776, 932-933 (2005); Mag. Crt (Jer.) 6407/06 **Yitzhaki v. The State of Israel**, *Takdin Mehozi* 2006(4) 608, 613 (2006); CrimApp (Haifa) 4088/05 **The State of Israel v. Ditzi**, *Takdin Mehozi* 2005(4) 1259 (2005)).

Harm to the right of access to the courts

47. Moreover, the deal harms the ability of an injured party to file a claim in court. On the surface there appears to be no correlation between the two since a decision to commit to trial is made within the framework of a criminal

proceeding and is the responsibility of the Sate authorities, whereas filing a claim is within the sphere of civil law and it is entirely at the initiative of the injured party. In practice these two things are inextricably linked.

48. Indeed there is no impediment to filing a claim at the same time as the criminal proceeding, and even when the investigation file is still open. This was even done in the present case, but only because there no other option. So long as the findings of the investigation are not publicized, whether through exposing them in a criminal law proceeding or whether through revealing the investigation material to the victim of the crime, the latter is left in the dark with respect to the exact circumstances in which he was harmed.

49. The investigative and prosecuting authorities have a monopoly over investigating suspicions and gathering evidence. How is it possible for the petitioners to know the precise facts? How is it possible for them to identify with any certainty the person who committed the injustice towards them, and under what circumstances? How is it possible for them to know whether a sincere and credible effort has been made to investigate the incident and to enforce the law against the guilty parties? How is it possible to construct a sufficient factual foundation and to consolidate a cause of action, so that a deficient or futile compliant is not filed? For the purpose of all the above the petitioners require the contents of the investigation that has been accumulated by the police in connection with the death of the deceased.

50. The customary practice is that the contents of the investigation are only delivered to the petitioners for their perusal after respondent 1's decision with respect to committing the case to trail has been made. Indeed the policy of the prosecuting authorities generally speaking is not to allow any perusal of the, material as long as it has not been decided whether to issue an indictment or to dismiss the file (see State Prosecutor Guidelines no. 14.8). Since this is the situation, the petitioners have been forced to wait. Ever since May 2003 they have been waiting for a significant development in the file. Even with the passing of **a year and a half** since the date on which the file was transferred to respondent 1, they are still waiting.

51. The right of access to the courts is a basic constitutional right in Israeli law. Court rulings have attached great importance to the right of access to the courts, and views it as a guarantor for preserving the other basic rights:

> **"The right of a man to have his day in court has been recognized as a typical constitutional right… realization of the right of access to the courts is on many occasions the condition for the ability to enforce other basic rights…"**

(See**:** CAA 3601/04 **Lin Venchun v. The State of Israel**, *Takdin Elyon* 2007(4) 877, 879 (2007) and the citations brought there)

And also:

> **"As is well known, the right of access to the courts constitutes a basic and important right in our legal theory, some of whom have viewed it as a supra-statutory, constitutional right … the core of the right of access to the courts in our legal theory is derived from the need to ensure that one who claims that he is entitled to legal relief, may bring his case before the judicial bodies, in order that the latter may determine the matter"**

(See: M.C.M. 6479/06 **Israel Discount Bank Ltd. v. Moshe**, *Takdin Elyon* 2007(1) 323, 328 (2007); see also: Aharon Barak *Interpretation in Law* Vol. 3 703-704 (5754)).

52. Therefore, the aforesaid delay hinders, and is even liable to completely thwart any possibility of filing a civil claim for damages. The petitioners' right of access to the courts of law is thereby harmed.

53. Moreover, there is another aspect to the burdening of the petitioners and to the harm derived therefrom to their accessibility to the courts. In regulation no. 4 to the Civil Damages (State Responsibility) Law 5712 – 1952, the statute of limitations for filing a civil claim for damages against the state has been significantly reduced. A Palestinian plaintiff, who seeks to file a damages claim against the State of Israel, for actions carried out by the security forces in the territories, is required these days to do so within two years of the date of the incident, instead of seven years. After two years has passed the injured party may not demand compensation and reimbursement for his damages through filing a claim in court.

54. In the present case, five years has already passed since the incident. In order to comply with the requirements of the statue of limitations, the petitioners were forced at that time to file a claim, without the contents of the investigation and without them knowing the complete and essential facts of their claim. Their prospects for success in their claim were thereby harmed. This in turn harmed their essential rights to apply to the courts and to receive judicial relief.

55. To summarize this chapter, the continuous and unjustified delay in making a decision in the matter of committing the case to trial harms the petitioners' right of access to the court. One cannot take effective legal measures – to file a claim or appeal respectively – without first of all studying the contents of the investigation. However it is not possible to study the contents of the investigation, without first receiving respondent 1's decision with regard to committing the case to trial. Thus this involves links in the same chain, which hold each other together.

<u>Harm to other constitutional rights</u>

56. The respondents' obligation to act, and to decide is derived from their obligation to preserve the petitioners' constitutional rights. The incident under investigation harmed the right to life of the deceased youth. The deceased was allegedly shot by Border Guard Policemen without any justified reason.

57. The right to life rests at the very foundations of human rights. Without it, there is no value to other rights. The obligation placed upon the state is not confined to the prohibition against harming the right to life, but also includes the obligation to actively defend it (section 4 of Basic Law: Human Dignity and Freedom). According to a number of viewpoints in political theory, the desire of human beings to defend their lives from violence and arbitrary belligerence is the solitary justification for the fact that they surrender some of their liberty and strength for the benefit of the state sovereign. A political regime that does not defend the right to life therefore loses its legitimacy to exist.

58. For the purpose of safeguarding the right to life rules have been established, *inter alia,* in criminal law that prohibit acts of murder, manslaughter and culpable homicide. In order to protect the right to life the authorities have been granted investigative powers, and the respondents have been granted the authority of prosecution. When the legally recognized enforcement mechanisms are not operated or are inadequately operated, it follows that there will be an erosion in the scope of protection that is provided for the right to live in any given society. When in certain contexts the enforcement system proves to be a spectacular failure (and in our case: when the failures pertain to harms perpetrated against Palestinians by the security forces) the erosion to the right of life occurs against a pattern of discrimination. In practice a situation is created in which the blood of certain individuals is less red than that of other individuals. A situation is thus created in which it is intimated that permission has been given to harm these particular individuals.

59. A person whose life was prematurely cut short by someone else is entitled to the launching of an appropriate criminal proceeding and to the enforcement of the law against the accused. After his death, this right is transferred to the members of his family. This secondary right flows from the right to life.

The following has thus been determined with respect to a civil damages proceeding, but applies *mutatis mutandis* to a criminal proceeding:

> **"Tortious liability protects a number of rights of the injured party, for example the right to life, to liberty, to dignity and to privacy. The laws of tort are one of the main tools through which the legal system protects these rights; they are the balance which the law establishes between the rights of individuals, amongst themselves and between the right of the individual and the public interests. The negation of tortious liability or the limitation thereof harms the protection of these rights. These constitutional rights are thereby harmed".**

(See HCJ 8276/05 **Adalah: The Legal Center for Arab Minority Rights in Israel v. Minister of Defense**, *Takdin Elyon* 2006(4) 3675 (2006))

60. The right of the victim, that the law be enforced against those responsible for his death, is also enshrined in the consistent rulings of the European Court of Human Rights. The right to life is enshrined, *inter alia,* in article 2 of the

European Convention on Human Rights, which imposes on the states the obligation to undertake a thorough, swift and effective investigation to clarify the circumstances of the death. The purpose of the investigation is to ensure adherence to the provisions of criminal law which are intended to protect the right to life. The investigation is intended to ensure that when state officials are involved in the commission of an act, they bear the responsibility. The purpose of the investigation is to identify those responsible and to punish them.

(See recently: **Brecknell v. United Kingdom**, 46 E.H.R.R. 42 (2008); **Ramsahai v. Netherlands**, 46 E.H.R.R. 43 (2008); **Estamirov v. Russia**, 46 E.H.R.R. 33 (2008); **Ognyanova v. Bulgaria**, 44 E.H.R.R. 7 (2007); **Anguelova v. Bulgaria**, 38 E.H.R.R. 31 (2004)).

61. The petitioners' constitutional rights to dignity and their right to fair process also requires an appropriate criminal proceeding, within the framework of which the death of the minor is swiftly and efficiently investigated. The petitioners' constitutional rights to dignity and fair process are listed in articles 2 and 4 of the Basic Law: Human Dignity and Liberty. These rights have merited the important and significant enshrinement in Israeli law (See Aharon Barak, *ibid.,* 422, 431). Article 11 of the Basic Law determines that all governmental authorities are bound to respect the rights under this Basic Law. However it is doubtful whether the respondents' conduct complies with this constitutional obligation.

62. The right of the deceased, the victim of the crime, and his family members to serious and swift handling of the complaint and to the enforcement of the law against the accused is also enshrined in laws that regulate the rights of victims of a crime. In recent years there has been an increasing trend, both in Israel and the rest of the world, to recognize the rights and position of victims of a crime within the framework of a criminal proceeding (See HCJ 5961/07 **Jane Doe v. The State Attorney**, *Takdin Elyon* 2007(3) 4611 (2007); FCH 2316/95 **Ganimath v. The State of Israel**, *Piskei Din* 49(4) 589, 656 (1995)).

63. Section 1 of The Crime Victims' Rights Law 5761-2001 determines that the aim of the Law is to establish the rights of crime victims and to protect their human dignity. The law thereby recognizes that from the perspective of the damage caused by a criminal act it is insufficient to only consider what was perpetrated upon society as a whole, rather one must also consider the damage caused to the individual victim and to set one's mind to the difficulties with which he has been forced to contend as a result of the criminal act. The crime victim has rights and legal standing in a criminal proceeding that is derived from the value of human dignity. (See: HCJ 5961/07 above, CrimA (Jerusalem) 30688/06 **The State of Israel v. M. A.**, *Takdin Mehozi* 2007(1) 6834 (2007). CA (T.A) 1009/02 **The State of Israel v. Yetah**, *Takdin Mehozi* 2002(1) 829 (2002)). Further down, section 12 of the Law determines that proceedings which pertain to sexual or violent crimes must be held **within a reasonable time**, in order to prevent the delay of justice to the complainant. Section 22 transfers the rights in the law to family members of the victim, where the crime caused his death.

Harm to the revelation of the truth and to effective investigation.

64. There is no need to overstate the fact that the revelation of truth is the primary purpose that rests at the foundation of a criminal investigation and a legal proceeding. Delay is the bitter enemy of this goal. And it should be fought against.

65. As has already been stated, as the time passes, it becomes more difficult to retrace the circumstances of the incident, if it appears that indeed there is a need to complete the investigation, or that the investigation was recklessly conducted. Indeed this is no place within the framework of this petition to enumerate the many failures that have been uncovered within this investigation, or the degree of effectiveness of these very same investigations. However, one cannot ignore the fact that in the present case the decision to open an investigation was only made a full year after the day of the incident. Later on the investigation was frozen for a long time, and eventually lasted two and a half years for no practical justification. Not only was respondent 1 aware of these failures, but it also bears the responsibility for them. Respondent 1 is the professional body that is under legal obligation to instruct the investigative factors, to supervise their work, to order the completion of the investigation if necessary and to see to it that the law is enforced. Respondents 2-3 are the central "players" in law enforcement. When they failed in their supervision over respondent 1, they became full partners in this inferior conduct.

66. Respondent 1 is currently spicing its recklessness with a dose of maliciousness. Instead of expediting their handling of the matter, especially considering the failures of the past, they are using precious time, sluggishly conducting themselves, discarding and ignoring the petitioners' appeals. Any type of delay, including foot-dragging in reaching a decision of whether to commit to trial, frustrates the possibility of effectively completing an investigation. Experience has shown, as has recently been demonstrated in a petition concerned with delivering contents of the investigation for the perusal of the injured party that is pending before the court (HCJ 4198/08 **Eloridan v. Commander of Central Investigation Unit**), that even if a decision is made to close the file, the petitioners are still liable to wait a long time – many months and even years – until they will receive the contents of the investigation, and only then, after studying it, may they decide how to proceed.

67. The end result is that an appeal and/or a civil claim generally speaking is filed a number of years after the incident. It is therefore clearly self-evident that with the passing of time there are diminishing prospects that the truth will be uncovered and the law will be enforced upon the accused. Against this backdrop the respondents' failures are grievous and outrageous.

Violation of International Law

68. Israel is not a desert island. It is part of the international system. This system includes humanitarian arrangements, which the Government of Israel regards itself obligated to uphold (see HCJ 5591/02 **Yassin v. Ben David – Camp**

Commander, *Piskei Din* 57 (1) 403, 408 (2002)). Indeed, delaying the reaching of a decision to commit to trial is not only a breach of Israeli Administrative and Constitutional Law. It also does not gel with the demands of international law.

69. The incident which forms the subject of this petition raises the suspicion of illegal shooting at a protected civilian population, shooting which caused the death of a minor who was innocent of all wrongdoing. Apparently it involved a serious violation of the rules of war. Against this backdrop, one would have expected decisive and uncompromising means of enforcement on the part of the respondents, while assigning appropriate weight to the vulnerable position of the civilian population in the territories. However the delay – in handling the complaint, in the investigation and in committing the matter to trial - can only be interpreted as the ignoring, scorning and non-enforcement of international humanitarian law.

70. There is an obligation upon the respondents to investigate and place the suspects on trial for committing criminal activity in the territories, a fortiori when it involves serious violations of the rules of war. They must do this as soon as possible. Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: "**Fourth Geneva Convention**") determines:

> **"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention."**

71. This obligation imposes an active duty upon all states to investigate and put on trial all those responsible **as soon as possible**. The following interpretation of article 146 of the of the Convention by the learned Picte appears in his commentary to the Convention:

> **"The obligation on the High Contracting Parties to search for persons accused to have committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed." (Emphasis added)**

(See: Jean S. Picte, *The Geneva Conventions of 12 August 1949*: Commentary 593 (International Committee of the Red Cross) (1994)).

72. Thus article 86 of Protocol 1 Additional to the Fourth Geneva Convention,1977 also determines:

> **"The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."**

73. In the circumstances of this case, the firing by the security forces caused the death of the minor, and the investigative and prosecuting authorities' failed handling also constituted a breach of article 38 of the Convention on the Rights of the Child, 1989:

> **"In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."**

74. Aside from opening an investigation and putting those involved on trial, a state that is in breach of international humanitarian law must pay full compensation for the harm done to the body and to the property. This is repeated in article 3 of the Hague Convention on Laws and Customs of War on Land, 1907 and in article 91 of Protocol 1 Additional to the Fourth Geneva Convention. Similarly in December, 2005 the General Assembly of the United Nations adopted a declaration regarding the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (See: General Assembly resolution 60/147: Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December, 2005.

75. As has been detailed above, a radical delay in reaching a decision to commit a case to trial prevents the possibility of studying the contents of the investigation and of comprehending the facts of the incident as they took place. The result is that the injured party, who wishes to file a claim for damages, will in many instances miss the time limit set by the statute of limitations, and in other cases will file a complaint rife with "holes", since he does not possess sufficient details about the incident. This unduly heavy burden upon conducting a civil process harms the rights of victims to be reimbursed for their damages and to be granted compensation. Therefore, a delay on the part of respondent 1 coupled with the avoidance of exercising authority to commit a case to trial – in and of themselves – are a breach of international humanitarian law.

76. We shall conclude that the commonly held approach is that international conventions that protect various basic rights, including in a time of armed hostility, impose on the states an active duty to investigate, to commit a case to trial and to compensate in cases where one of the rights enshrined in the conventions were breached. One may derive this obligation also by virtue of customary international law and from general principles of law (see: Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*

24, 38, 40 (Oxford University Press) (1995). The respondents, who are governmental authorities, are duty bound to act pursuant to this obligation, and to act with appropriate speed for the purpose of fulfilling the state's obligation in accordance with international law.

Harm to the public trust and providing an "incentive" to criminal behavior

77. The delay in enforcing the law and in making a decision with respect to committing the case to trial does not only harm the petitioners. It harms the protected civilian population in the territories and the broader public. Eventually it also harms the respondents themselves as well as their ability to carry out their job of preserving the law and enforcing it. The delay sends an overly indulgent message, according to which complaints of serious criminal conduct are not handled. It encourages criminal behavior that endangers the rule of law. Damage is also caused to the values of proper administration and public trust in the investigative and prosecuting bodies. Therefore, it is an interest of the first degree to the general public that law enforcement be carried out swiftly and decisively:

> **"The key to upholding pubic service worthy of its name is public trust in the rectitude of that public service … public trust is the back-rest of the public authorities and it enables them to perform their functions."**

(See: HCJ 1993/03 **The Movement for Quality Government v. The Prime Minister**, *Piskei Din* 47(2) 229, 262 (1993)).

78. The respondents are required to ensure that criminals who are numbered among the security forces are punished. Immunity from justice and punishment has a destructive influence over the rule of law and over public trust. The risk is that those who obey the law and act in accordance with the law will reach the conclusion that it is preferable to act like everyone else and to violate the law, since in any event the law is not enforced and its safeguarding is the preserve of the very few. Thus it was stated in the context of disobedience to the rules of war:

> **"…one has to stress the rules of International Humanitarian Law can be and are often respected. Scepticism is the first step towards the worst atrocities. Indeed, if we want the public at large to respect these rules, it must become politically incorrect to be sceptical about IHL…**

And further on**:**

> **despite the explanations of sociologists and international lawyers, our societies are still profoundly impregnated by the idea that the rules are only valid of their violations are punished. The widespread, nearly generalized impunity me by violations of IHL had therefore a terribly**

corrupting effect, including on those accepting the rules, who are left with impression that they are the only ones who comply with them."

(Marco Sassoli & Antoine A. Bouvier, *How Does Law Protect in War - Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 258 (International Committee of the Red Cross) (1999).

79. Therefore, respondent 1's avoidance in exercising its authority with regard to committing the case to trial, for such a long period of time, encourages criminal activity. Failure in the consistent enforcement of international humanitarian law provokes further breaches of the rules of war. The consequences that flow from the respondents' behavior is that the agents of the state – security forces personnel who operate in the territories – do not believe that they are liable to be put on trial and to pay in accordance with the full force of the law for the illegal acts they perform. Tolerance and indulgence, even if that is just prima facie the case, towards illegal acts create a climate of exemption and immunity from punishment (see: CrimA 4872/95 **The State of Israel v. Ayalon**, *Piskei Din* 53(3) 1, 8-9; Human Rights Watch: *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing*, available *at* www.hrw.org/reports/2005/iopt0605/ (2005)).

Conclusion

80. A Palestinian minor was killed from illegal shooting, apparently from the Israeli security forces. **Five full years have passed, and there still has not been a decision whether to put those involved in the incident on trial.** Respondent 1 has avoided exercising its authority in this case. Respondents 2-3 have covered up their failures without taking any action on their part. They have thus exacerbated the serious criminal incident by unreasonably and radically delaying the handling of the complaint. This delay is likely to frustrate the uncovering of the truth and harms the essential rights of the deceased minor and his family members.

81. From telephonic clarifications which were undertaken by petitioner 4 it turned out that the handling of the petitioners' complaint had already ended and the "file was on its way to being closed". The expectation was that the respondents would quickly put an end to the continuous foot-dragging. However over the course of many months nothing was done, despite the fact that in the past the file was classified as being in "deep freeze". In light of the conduct of the investigating and prosecuting authorities in this episode, it is difficult to escape from the impression that they took alien considerations into account in their activities, for example the attempt to conceal failures in the investigation and to make it difficult and burdensome for the Palestinian victim.

82. This petition is supported by an affidavit that was signed before an attorney in the West Bank and sent to the undersigned by fax, after coordinating matters over the telephone. The honorable court is requested to accept this affidavit,

and the power of attorney which was also given by fax, considering the objective difficulties of a meeting between the petitioners and their counsel.

83. For all these reasons the honorable court is requested to issue an *order nisi* as requested at the beginning of this petition, and after receiving the respondent's response, make it absolute. The court likewise is requested to order the respondent to pay the Petitioners' costs and attorney fees in addition to the lawfully prescribed VAT.

Jerusalem, 18 May. 2008

Adv. Alon Margalit
Counsel for the petitioners

[T.S. 28532]