

**Memorandum on the Status Domestic Investigations Conducted into Alleged Violations
of International Law committed in the Context of Operation 'Cast Lead'
Submitted by the Palestinian Centre for Human Rights**

Introduction

1. This memorandum is presented to the Committee of Independent Experts by the Palestinian Centre for Human Rights (PCHR) in order to facilitate the preparation of their second report, due to be submitted to the UN Human Rights Council at its sixteenth session.

2. At the outset, PCHR note that a significant number of the alleged violations of international law committed in the context of Operation 'Cast Lead' constitute international crimes. Three principal issues arise by virtue of this fact.
 - First, customary international law obliges the relevant national authorities to initiate genuine investigations and, where appropriate, prosecutions, with respect to all alleged international crimes.¹ This was reinforced by UN General Assembly Resolutions 64/10 and 64/254. It is noted that such investigations must, *inter alia*, be independent and impartial,² address all those individuals with suspected criminal responsibility (including, where appropriate, senior military and political leaders),³ analyse the entire operation (i.e. the overall policy),⁴ and be capable of leading to the identification and prosecution of those responsible.⁵
 - Second, in the event that the responsible national authorities fail to comply with this obligation, the international community (and individual member States thereof) have an interest in ensuring that those alleged responsible are held to account.⁶ It is noted that this is an *obligation* with respect to grave breaches of the Geneva Conventions,⁷ and that the Security Council has deemed such prosecutions to contribute to the 'maintenance of international peace and security'.⁸
 - Third, States who commit international crimes are under a customary international law obligation to provide reparation.⁹ This obligation also forms a core component of public international law vis-a-vis State

¹ See, for example, Rule 158, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, (ICRC, 2005).

² *Findlay v. the United Kingdom*, European Court of Human Rights, Application No. 22107/93, 25 February 1997, §73; *R. v. Genereux*, 1. S.C.R. 259, [1992]. Available at: <http://csc.lexum.umontreal.ca/en/1992/1992scr1-259/1992scr1-259.html>; *Bati v. Turkey*, European Court of Human Rights, Application No. 33097/96, 57834/00, 3 September 2004, §135.

³ See, for example, Articles 25 and 27 of the Rome Statute of the International Criminal Court.

⁴ *Ergi v. Turkey*, European Court of Human Rights, Application No. 23818/94, 28 July 1998, §84.

⁵ *Hugh Jordan v. the United Kingdom*, European Court of Human Rights, Application No. 24746/94, 4 August 2001, §107; *McCann and Others v. the United Kingdom*, European Court of Human Rights, Application No. 18984/91, 27 September 1995.

⁶ Antonio Cassese, *When May Senior State Official be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 European Journal of International Law 4, 853, 891 (2002).

⁷ Article 147, Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

⁸ See, Security Council Resolution 955, 8 November 1994, U.N. Doc. S/Res/955; Security Council Resolution 827, 25 May 1993, U.N. Doc. S/Res/827.

⁹ See, for example, Rule 150, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, (ICRC, 2005).

responsibility for internationally wrongful acts.¹⁰ PCHR further contend that – owing to the nature of a number of the alleged crimes, and in accordance with the Article 33 of the International Law Commission’s *Draft Articles on State Responsibility for Internationally Wrongful Acts* – Israel’s obligation to provide reparation is owed to the international community as a whole.

3. The information provided in this update is supplementary to previous information submitted by PCHR to the Committee, and provides an update of information relating to PCHR’s clients, correct as of 17 February 2011.
4. PCHR emphasize that the information presented to the Committee in August 2010, in particular *Genuinely Unwilling: An Update, The Failure of Israel’s Investigative and Judicial System to Comply with the Requirements of International Law, with particular regard to the Crimes Committed during the Offensive on the Gaza Strip (27 December 2008 – 18 January 2009)*,¹¹ remains pertinently relevant; see also *Memorandum on Legal proceedings to seek reparations for Palestinian victims of violations committed by Israeli Armed Forces* submitted to the Committee in the context of its First Report. In particular, it is emphasised that **the Israeli investigative system as whole, including as this relates to civilian supervision, is flawed, either in law, in practice, or both.** This reality precludes genuine investigations and prosecutions in accordance with the requirements of international law. This conclusion is underlined by the information provided herein, evidencing as it does the systematic denial of victims’ rights to an effective judicial remedy and a systemic disregard for the fundamental dignity of these individuals. PCHR note that of **490 criminal complaints only 21 responses have been received** (19 of which are interlocutory). **Of 1,046 civil complaints, responses have only been received with respect to 26 applications**, of which only two were conclusive. To underline this point, **communications (i.e. a response of any form)** have only been received with respect to 4.28% of criminal complaints, and 2.48% of civil complaints.
5. It is noted that one of the core components of the rule of law is the requirement that the law be applied equally. In this regard all parties suspected of committing international crimes must be held to the same standards.¹² In this regard PCHR note that the procedures undertaken to-date by the government in Ramallah do not constitute genuine criminal investigations in accordance with the requirements of international law. It is noted that due to the current geographical and political division within the occupied Palestinian territory, the Committee mandated by the government in Ramallah were unable to visit the Gaza Strip, and conduct investigations, interviews, and so on. As a consequence of this reality, it is equally impossible for the government in Ramallah to exercise the necessary authority in the Gaza Strip to issue arrest warrants, and hold any suspected perpetrators criminally responsible. It is also noted that the findings of the Committee established by the

¹⁰ See in this regard, International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (2001), U.N. Doc. A/56/49(Vol.1)/Corr.4.

¹¹ Available at: <http://www.pchrgaza.org/files/2010/Genuinely%20Unwilling%20-%20An%20Update.pdf>.

¹² Provided the institutions necessary for the effective administration of justice are in place.

government in Ramallah cannot be used in court as part of criminal proceedings. PCHR emphasize that *no genuine criminal investigations or prosecutions* have been conducted either by the government in Gaza or the government in Ramallah.

6. In summation, PCHR firmly believes that **no genuine criminal investigations have been conducted with respect to alleged violations of international law committed in the context of Operation 'Cast Lead'**. This conclusion is based both on experience gained representing clients, and a legal analysis of all parties' investigative systems and the results to-date. PCHR believe that the interests of justice demand that recourse now be had to mechanisms of international criminal justice, and call upon the Committee to recommend – in keeping with the recommendations of the UN Fact-Finding Mission on the Gaza Conflict – that the Security Council, acting under Chapter VII of the UN Charter, refer the situation in Israel and the occupied Palestinian territory to the Prosecutor of the International Criminal Court, in accordance with Article 13 (b) of the Rome Statute.

Criminal complaints

7. PCHR submitted **490 criminal complaints**, on behalf of **1,046 victims**, to the Israeli Military Prosecutor requesting the opening of a criminal investigation.
8. In response to these 490 complaints, PCHR has received **responses with respect to 21 cases**.
9. The communications received to-date from the office of the Israeli Military Advocate General can be broken down as follows:
 - 19 responses indicating that the complaint has been received, that it will be checked, and PCHR will be informed of the result;
 - 1 response indicating that the case was closed as the witness would not travel to Erez crossing for interview;
 - 1 response indicating that a soldier had been charged.¹³
10. PCHR note that a number of cases relating to PCHR's clients have ostensibly been closed, as reported, *inter alia*, by the Israeli media. However, PCHR has only received notification that a file was closed in one instance.
11. Those 21 cases for which responses have been received are as follows:¹⁴
 - **Nezzar Rayan**. Complaint requested the opening of an investigation into 26 incidents: 16 killings, 1 injury, 6 total destruction of property, 3 partial destruction of property.

¹³ This relates to the theft of a stolen credit card, for which a soldier was convicted and served seven and a half months in prison. PCHR note that this is the only 'jail time' arising consequent to Operation Cast Lead.

¹⁴ Please allow for inaccuracies with spelling as a result of transliteration from Arabic.

- **Al-Daia.** Complaint requested the opening of an investigation into 28 incidents: 22 killings, 1 injury, 1 total destruction of property, 4 partial destruction of property.
- **Abu Eisha.** Complaint requested the opening of an investigation into 7 incidents: 5 killings, 1 total destruction of property, 1 partial destruction of property.
- **UNRWA training college.** Complaint requested the opening of an investigation into 41 incidents: 13 killings, 28 injuries.
- **Beit Lahia UNRWA School.** Complaint requested the opening of an investigation into 11 incidents: 2 killings, 9 injuries.
- **Shatta UNRWA School (Beach Camp).** Complaint requested the opening of an investigation into 3 incidents: 3 killings.
- **Abd-Dayem (Flechette case).** Complaint requested the opening of an investigation into 22 incidents: 5 killings, 17 injuries.
- **Al-Samouni Family.** Complaint requested the opening of an investigation into 94 incidents: 27 killings, 35 injuries, 26 total destruction of property, 6 partial destruction of property.
- **Alaiwa.** Complaint requested the opening of an investigation into 10 incidents: 5 killings, 4 injuries, 1 partial destruction of property.
- **Abu Halima.** Complaint requested the opening of an investigation into 14 applications: 8 killings, 5 injuries, 1 partial destruction of property.
- **Nezzar Wehade.** Complaint requested the opening of an investigation into 1 incident: 1 injury.
- **Omar Kanu.** Complaint requested the opening of an investigation into 1 incident relating to the theft of money. This case was closed as the witness was too afraid to travel to Erez crossing for interview.
- **Ahmed Rafiaa.** This is the credit-card case, for which a soldier was convicted.
- **Amr Jedeli.** Complaint requested the opening of an investigation into 4 incidents: 1 killing, 2 injuries, 1 partial destruction of property.
- **Mohammed Subuh.** Complaint requested the opening of an investigation into 1 incident: 1 injury.
- **Khaled Al Habeel.** Complaint requested the opening of an investigation into 1 incident relating to the damage of a fisherman's boat.
- **Anwar Abbas Hasuna.** Complaint requested the opening of an investigation into 1 incident: 1 injury.
- **Ashraf Jabr.** Complaint requested the opening of an investigation into 1 incident: 1 injury.
- **Ayman Shamea.** Complaint requested the opening of an investigation into 1 incident: 1 injury.
- **Ahmed Simri.** Complaint requested the opening of an investigation into 1 incident: 1 killing.
- **Abd Al-Fatah Namrouti.** Complaint requested the opening of an investigation into 1 incident: 1 partial destruction of property.

12. PCHR wish to highlight the paucity of responses received from the office of the Israeli Military Advocate General. **No response whatsoever has been received from the relevant Israeli authorities with respect to 469 criminal complaints (relating to**

776 victims). Furthermore, **no further responses** have been received in relation to the 19 interlocutory responses above.

13. PCHR further note that these 21 responses represent the totality of responses received. No further information has been communicated, and as can be seen, **no updates on any investigations have been provided.**
14. In total, **53** of PCHR's clients were summoned to Erez crossing by the Israeli Military Police Criminal Investigation Division. The lack of respect shown to a number of these witnesses was noted by the Committee in its first report. It is noted that these witnesses were summoned with respect to *criminal complaints*, and not civil complaints, as reported by the Committee in its first report.

Civil Complaints

15. PCHR submitted **1,046 requests for reparation on behalf of 1,046 victims** to the Compensation Officer at the Israeli Ministry of Defence. Indeed, it is noted that the right to reparation is an equally fundamental component of the right to an effective remedy and also constitutes a component of customary IHL: A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.¹⁵
16. According to Israeli law compensation requests must be submitted to the Compensation Office at the Israeli Ministry of Defence **within 60 days of the incident**; this initial complaint is made via a standardised form. Dependent upon the filing of this initial complaint, a tort case may be filed before the Israeli civil courts, however this must be done **within two years of the incident.**¹⁶
17. As previously reported to the Committee, PCHR have received virtually no response from the Compensation Office at the Ministry of Defence. **With respect to the 1,046 compensation applications filed, responses have been received in relation to 26 applications** (17 responses total) have been received as of 17 February 2011. **Absolutely no communication – even acknowledging receipt of the complaint – has been received from the Israeli authorities in the overwhelming majority of the cases.** PCHR routinely submit letters to the relevant authorities, requesting information and so on.
18. The responses received from the Ministry of Defence can be broken down as follows:
 - 4 responses, relating to **11 applications**. Responses noted that they had received complaints from another lawyer, asked that issue be resolved.
 - 11 responses, relating to **13 applications**. Interlocutory responses, noted

¹⁵ See, for example, Rule 150, Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, (ICRC, 2005).

¹⁶ There is the possibility that this two year statute may not apply given the current reality in the Gaza Strip. This is currently the subject of a petition filed by PCHR before the Israeli High Court of Justice. As a rule, and according to a direct reading of the law, however, all cases must be filed within two years.

receipt of complaint, said that would be checked, and PCHR would be contacted with the results.

- 1 response, relating to **1 application**. Response noted that this case had been filed by PCHR before a civil court in Israel. Case is that of Osama Abu Safiya.
- 1 response, relating to **1 application**. Response noted that compensation was refused, on the basis that the event was a military operation. Case is that of Anwar Hasouna.

19. Other communications from the Ministry of Defence:

- On 3 March 2009 PCHR received a letter noting that 'your application has been received and is being checked and translated'. No reference was made to which application was being referred to.
- On 2 May 2010, in response to 33 letters submitted by PCHR requesting information of behalf of 87 applications, a response was received noting receipt of the letter. No reference was made to the applications.
- On 15 June 2010, in response to 45 letters submitted by PCHR requesting information of behalf of 108 applications, a response was received noting receipt of the letter. No reference was made to the applications.
- On 30 January 2011, in response to 55 letters submitted by PCHR requesting information on behalf of 67 applications, a response was received noting receipt of the letter. This response is the only one which referenced to the original 55 letters.

20. With respect to the above communications, it is noted that letters requesting information on all 1,046 applications are routinely sent to the Israeli Ministry of Defence by PCHR. For example, on 22 November 2010, a letter was sent on behalf of all 1,046 civil complaints; no response to this letter has been received as of 17 February 2011. The above mentioned correspondence represents the totality of the communications PCHR has received in response.

21. On 17 November 2010, a letter was sent on behalf of PCHR by Attorney Michael Sfarid to the legal advisor to the government in the Ministry of Justice, the legal advisor to the Ministry of Defence and the Director of the Civil Department at the Israeli General Prosecution Office **requesting an extension of the two year statute of limitations** regulating civil claims in light of Israel's absolute closure of the Gaza Strip.¹⁷

22. On 12 December 2010, PCHR received a response to the 18 November 2010 letter from the legal advisor to the Ministry of Defence. This response failed to address the substantive issues presented in the original letter, in particular the difficulties relating to **effective** representation and **effective** access to a court.¹⁸

23. On 21 December 2010, a petition was filed before the Israeli High Court of Justice by

¹⁷ Unofficial translation included as an Annex 1.

¹⁸ Unofficial translation included as Annex 2.

PCHR and Attorney Michal Sfar. The petition, directed to the Legal Advisor to the Israeli government and the State Prosecutor, requests the suspension of the statute of limitations (normally 2 years) through the issuance of a preliminary order to have general validity with respect to all cases arising from Operation Cast Lead. The suspension of the statute of limitations is requested in order to ensure that individuals in Gaza's right to an effective remedy is not denied (as a result of, *inter alia*, the Israeli-imposed absolute closure of the Gaza Strip). It was asked that the petition be dealt with urgently (i.e. before expiration of statute of limitations on 27 December 2010).

24. On 22 December 2010, the Israeli Supreme Court decided the following:
- i. The legal advisor to the Israeli government and the State Prosecution is required to respond to the petition by 17 March 2011.
 - ii. There is no reason to urgently consider the petition before 27 December 2010.

The Court also expressed doubts about the petition, wondering whether it justifies its intervention.

25. As of 17 February 2011, **no single offer to settle** has been advanced by the Israeli Ministry of Defence. PCHR note that a number of cases relating to PCHR's clients have been acknowledged to have been the result of 'mistakes' made by the IDF.
26. Between June 2010 and January 2011 PCHR filed **100 tort cases** before Israeli courts, relating to the interests of approximately 600 victims. Due to the Israeli-imposed absolute closure, it is not possible for PCHR's lawyers to represent clients within the Israeli judicial system. As a result these cases are filed on behalf of PCHR by a lawyer based in Israel. It is noted that numerous **requests by this lawyer to access Gaza in order to meet with clients have been denied**, with evident implications with respect to effective representation; see Annex 3 below. To-date, **PCHR has not received any relevant communication regarding these cases**. The initial court fee in these cases has been paid. As a next step in these cases a court insurance fee will be fixed by the court, the amount of which varies according to the damage claimed (without adhering to any set guidelines). Typically, this amount constitutes an insurmountable obstacle for the Palestinian victims, and results in the cancelling of the case.¹⁹ For further information on issues related to the difficulties in taking civil cases before the Courts, the Committee is referred to PCHR's previous submissions, and Annex 1, and Annex 3 below.
27. Due to resource restraints, PCHR was unable to file tort cases on behalf of all its clients; approximately 400 victims, for whom PCHR had filed a damage application, were consulted, and advised, where possible to obtain the services of a private lawyer in order to file a reparation case before the civil courts prior to the expiry of the statute of limitations. However, it is noted that PCHR submitted the petition to

¹⁹ See for more details the Memorandum on Legal proceedings to seek reparations for Palestinian victims of violations committed by Israeli Armed Forces, submitted to Committee for first report.

the Israeli High Court of Justice on behalf of all 1,046 victims, and that PCHR continues to represent all these victims with respect to both the initial damage complaints submitted to the Compensation Officer, and the, separate, criminal complaints submitted to the Military Advocate General.

28. PCHR emphasize that virtually no communications have been received from the relevant Israeli authorities, and that details regarding specific cases have not been forthcoming. **In total, of 1,046 compensation applications, PCHR have received responses in relation to 26 applications.**

Additional Information

29. With respect to civilian supervision of the Israeli investigative systems, and in particular the decisions of the Military Advocate General and the Attorney General, PCHR wish to highlight the following. In *John Doe*, the Israeli High Court of Justice ruled that the margin of discretion awarded to the Attorney General regarding the decision to issue indictments is extremely wide, particularly with respect to decisions which are based on an examination of the evidence;²⁰ a similar finding was reached with respect to the authority of the Military Advocate General in the *Suffan* case.²¹ Evidently, **this margin of appreciation will apply, in particular, to the decision to open or close an investigation, or to indict.** Consequently, the scope of judicial review (i.e. civilian supervision) is actually extremely limited. As noted by the High Court of Justice:

“The decision made by the prosecuting authorities to close an investigation file on the basis of a lack of sufficient evidence [...] normally falls within the ‘margin of appreciation’ that is afforded to the authorities and curtails – almost to nil – the scope of judicial intervention. I was unable to find even one case in which this court intervened in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.”²²

It must be emphasized that both the Attorney General and the Military Advocate General make decisions on the basis of evidence obtained by flawed investigations (i.e. operational debriefings or command investigations). The civilian judicial system is left with an extremely small – effectively non-existent – margin with which to review such decisions, negating the possibility of civilian oversight, and leaving a significant portion of the decision to open a criminal investigation in the hands of those implicated in the commission of an alleged crime.

²⁰ HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008)

²¹ HCJ 425/89, Suffan v. The Military Advocate General, PD 43(4) 718, 727 (1989).

²² HCJ 5699/07, Jane Doe (A) v. The Attorney General (decision delivered on 26 February 2008), para. 10 of Deputy Chief Justice Rivlin’s ruling. Emphasis added.

30. In total, it appears that the Israeli Military Advocate General has issued **4 indictments** with respect to crimes committed in the context of Operation Cast Lead:²³

- One individual was convicted of the theft of a credit card (looting) and served seven and a half months in prison;
- Two individuals were convicted in relation to using a nine year old boy as a human shield, and each given a three month suspended sentence;
- One individual has been charged in relation to the shooting of a group of unarmed civilians carrying white flags (resulting in the death of two women), the case is still pending.

Significantly, **these indictments failed to reflect the gravity of the actual crimes committed**. The soldier indicted in connection with the shooting of an unarmed white-flag bearing civilian was charged with manslaughter as opposed to the grave breach of willful killing;²⁴ the two soldiers convicted in relation to using a 9 year old boy as a human shield were charged with offenses relating to 'inappropriate behavior' and 'overstepping authority', despite a previous ruling of the Israeli High Court of Justice regarding the use of human shields. PCHR believe that the three-month suspended sentence handed down illustrates a callous disregard for the requirements of international law, and the fundamental dignity of the victim.

²³ It is noted that not all of these cases relate to PCHR's clients; this is general information known to the best of our knowledge.

²⁴ For further significant inconsistencies with respect to this indictment see, Palestinian Centre for Human Rights, *Genuinely Unwilling: An Update*, August 2010, §4.4.1.

Annex 1: Translation of the letter sent by the office of Michel Sfard to the following persons asking for the extension of the statutory of limitation and explaining the problem of eyewitnesses' inability to access the court

Michel Sfard – Lawyer Office

Michel Sfard – Lawyer

Shlomi Zacharia – Lawyer

Avi Thar Kib – Lawyer

Omiki Scheffer – Lawyer

Eido Tamari - Lawyer

Via registered mail

17 November 2010

To the attention of:

Legal advisor to the government Director of the Civil Department	legal advisor to the Ministry of Defense	
Attorney Yehuda Feinstein Zndberk	Attorney Ahaz Ben Ari	Attorney Hayat
Ministry of Justice Prosecution	Ministry of Defense – Hecria	General
Salah Addin St. 29 Jerusalem 91010 91010	Kablan St. 22 Tel Aviv	Salah Addin St. 29 Jerusalem
Fax: 026467001	Fax: 036976746	Fax: 026272677

Re.: Extension of the Statutory of Limitation of Claims Relating to Damages Caused During Operation "Cast Lead" by Virtue of the Civil Torts Law (State's Liability) of 1952

Our Client: the Palestinian Centre for Human Rights (PCHR)

Greetings,

1. Our client, a Palestinian human rights organization that works in the Gaza Strip, granted us a power of attorney to address you as detailed below.
2. Our client represents 1,046 Palestinians from the Gaza Strip who submitted notices to the Ministry of Defense (based on the requirement of Article 5 (a) of the Civil Torts Law (State's Liability) of 1952 (hereinafter referred to as the Law)) in connection with filing claims relating to damages caused to persons and to property as a result of the operations of the Israeli army during Operation "Cast Lead." It should be noted that Operation "Cast Lead" took place between December 2008 and January 2009. **(A list of the names and ID card numbers of the claimants will be sent to you within the next week.)**
3. As you know, in Article 5 (a) (3), the Law determines two years as statutory of limitation for claims relating to damages caused by the Israeli army. The statutory of limitation for the actions of the Israeli army during Operation "Cast Lead" is about to expire. Accordingly, we are sending this letter in the name of our client.
4. As you well know, Gaza has been closed since June 2007. In its decision taken on 19 September 2007, the Cabinet announced Gaza as a "hostile entity." Since then, Israel has imposed more restrictions and has tightened the siege. As a part of the closure, movement of people from and to Gaza has been restricted. Only certain goods and materials determined by the security service and necessary to prevent a humanitarian crisis are allowed to enter Gaza. Of course Israelis are totally denied access to the Gaza Strip.
5. This situation prevents Gaza population from accessing services they received in the past from Israel and from Israelis. In this context, Gaza population can not attend sessions at Israeli courts considering claims filed by them and they can not meet with their Israeli lawyers.
6. In view of this situation, Israeli lawyers can not represent people from the Gaza Strip because they are denied basic needs of appropriate representation. They can not have relationships with their clients, they can not meet with them, they can not have their clients' signature on documents, they can not provide advice to their clients face to face, they can not have access to the incident scene and collect evidence and they can not meet with eyewitnesses and experts in the Gaza Strip.
7. In addition, Gaza people are not allowed to have access to Israel, even for the purpose of making testimonies as a part of legal measures. Moreover, cases filed by people from the Gaza Strip were stroke off because the court was not able to manage such cases. For example, please see: civil file 183/2007 (Haifa) Farid Shaaban et al v. the Ministry of Defense (decision dated on 24 December 2009), civil file 4364/2006 Heirs of Abu Said v. the State of Israel (decision dated on 22 December 2009) and civil file 1542/2005 Heirs of Sabri v. the State of Israel (decision dated on 11 March 2010).
8. The result of the above is the reality imposed by Israel on the population of the Gaza Strip as well as the continued closure imposed on the Gaza Strip. This reality with the closure prevent any possibility to manage any serious legal action in Israel, especially in view of the Israeli lawyers' inability to sincerely represent their Palestinian clients and in

view of restrictions imposed on the movement of claimants and eyewitnesses to Israel to file cases and to testify.

9. Therefore, since the end of the attack, Gaza population, including the clients of our client, have not been able to effectively prepare for filing claims against those who caused damage to them, in accordance with their claims. During this period, Gaza people have not been seriously and effectively represented by Israeli lawyers who were unable to effectively manage actions in Israeli courts.

10. Further, denying access to effective representation together with the restricted statutory of limitation grant immunity to the Israeli military and to its soldiers and leaders against claims relating to damages that they may have caused in violation of the relevant Israeli law and/or war laws.

11. The restriction of the statutory of limitation prevents Gaza people from taking legal actions. This effectively leads to the cancellation of Gaza people's right to claim compensation from the fighting force which caused damages to them.

12. This constitutes a violation of the fundamental right to receive compensation for damages caused as a result of violating the war laws which is guaranteed by the International Humanitarian Law. This also constitutes a breach of the right to go to court and the right to claim compensation for violation of fundamental rights. These rights are granted to every human being and are determined either in the Israeli law or in International Human Rights Law.

13. We would like to draw your attention to Article 3 of the Hague Regulations of 1907 which states:

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

(See also Article 148 of the Fourth Geneva Convention of 1949 and Article 91 of Protocol I Additional to the Geneva Conventions.

14. In the report addressing the protection of war victims in 1993, the International Committee of the Red Cross (ICRC) referred to Article 91 of Protocol I Additional to the Geneva Conventions:

15. As mentioned above, and based on our understanding, as long as no action is taken to prevent the use of the statutory of limitation, the resulting situation constitutes a prejudice to the fundamental rights which are guaranteed by the international law and by the Israeli law:

The right to go to court and the right to receive compensation for violation of human rights.

16. The right to go to court means the ability to have actual and effective access to court. It does not mean having theoretical access to court, allowed only in case of unreasonable sequence of events. When it is practically impossible to have access to services provided by lawyers and when victims can not go personally to court, then this right is violated. When the statutory of limitation is applied in a way that prevents the enjoyment of the right to go to court, this violation is material. The right to go to court is admitted by the Israeli law. It is guaranteed by virtue of Article 2 (3) (a) of the International Covenant on Civil and Political Rights (ICCPR) of 1966, Article 6 of the European Convention on Human rights (ECHR), Article 7 of the African Charter on Human and People's Rights (AFCHR) and Article 1 of the American convention on Human Rights (ACHR). With regard to this issue, the statements of former Judge Hussein in the civil case 733/1995 Orfil Aluminium Ltd. v. Klil Industries Co. Ltd (Israeli decision (3), 577, 590-591) are applicable:

The right to go to court is not a fundamental right based on the normal concept of fundamental rights. This right is a part of another group of patterns of the law. It can be said that – as I say – this right lies in a class higher than that of fundamental rights. It is essential for the survival of other fundamental rights. The right to go to court is the life tube leading to court. It is a base for the survival of the judicial power and the rule of the law ...

Blocking the way to court – either directly or indirectly – even if partially, destroys the reason of being of the judicial power. Any prejudice to the judicial power means prejudice to the democratic principal of the State.

In view of the absence of the judicial power and in view of the lack of criticism directed to individuals and to the authority, the situation of the people deteriorates. In view of the lack of judicial criticism, the rule of law vanishes and fundamental rights disappear. See and compare petition no. 294/89 the National Insurance Institution v. the Objections Committee in accordance with Article 11 of The Act of Compensations for Victims of Hostilities of 1970 – decision (5), 445, 450, the law disappears by blocking the way to the court and the law also disappears if the judge is absent."

17. The effective fundamental right is the right to go to court. This right is violated in case of immunity. All the conventions of the International Human Rights Law stress the importance of this right. See Article 2 (3) of the ICCPR, Article 13 of the ECHR, Article 26 of the AFCHR and Article 25 of the ACHR.
18. In view of the above and in accordance with our understanding, the statutory of limitation must be extended.
19. As it is known, in Article 5 (a) (3), the Law allows the court to extend the statutory of limitation to one year if the court is convinced that the claimant was reasonably

unable to file a claim within the deadline. However, it is not realistic to expect the supposed claimants, who, as it is understood, can not file claims, to request the court to extend the statutory of limitation. It is also not clear if a one-year extension would be enough or not.

20. In view of these conditions, we request you, in your capacity as the head of the judicial system of the State of Israel, to express your consent to extend the statutory of limitation and to give orders to prosecutors who represent the State in damage cases not to apply the statutory of limitation until the situation in the Gaza strip is essentially changed, and especially until Gaza people can have access to Israel and appear before the courts.
21. We think that this is the right, just and logical action to be taken in view of such conditions. In addition, we think that this is one of the cases that require the legal use of your wisdom to announce your consent to extending the statutory of limitation and to give orders to prosecutors not to apply the statutory of limitation until the renewal of Gaza people's access to Israel and appearance before courts. In our opinion, any other decision would be extremely unreasonable and would flagrantly violate the right to go to court.
22. Besides being an administratively flawed decision, failure to respond to our request will force the clients of our client to look for assistance in other international courts. When victims of international conflicts are denied access to domestic courts, they can have access to international courts.
23. Therefore, I request you to inform us if you approve the request of our client and if you agree to make a reliable promise so I can provide advice to our client concerning the judicial possibilities available to them
24. In view of the short time left to our client, I appreciate your prompt response.

Sincerely,

Michel Sfrad – Lawyer

Eido Tamari – Lawyer

Annex 2: Response to Annex 1

State of Israel

Legal Advisor to the Security Service

12 December 2010

To the Attention of:

Mr. Michel Sfrad

Mr. Eido Tamri

45 Yehuda Halevi St.

Tel Aviv

Greetings,

Re.: Statutory of Limitation of Claims in Accordance with the Torts Law (State's Liability) of 1952 Concerning Damages Caused During "Operation Cast Lead"

Your Letter Dated on 18 November 2010

1- We studied your request to extend the statutory of limitation so you can file claims relating to damages which, according to your claim, were caused by the Israeli army during Operation Cast Lead. Unfortunately, we decided not to respond to this request for the following reasons:

a. First: I would like to note that no power of attorney was attached with your letter to indicate that the organization which is called (PCHR) is your client.

Further, you have not sent any power of attorney that indicates that this organization and you represent 1,046 Palestinians from the Gaza Strip concerning whom you addressed us.

As the mentioned power of attorney is not presented, we can not address you as representatives of the entities or persons in whose name you are proud to address us.

b. Essentially, I would like to explain that, as few States in the world, Israel allows the population who live in the territory of a hostile entity to file damage claims against Israel in Israeli courts under pretexts relating to activities relating to armed confrontation with that hostile entity. This does not prejudice Israel's right to defense in accordance with the essential law and within the framework of the mentioned claims.

c. The population of the Gaza Strip still can file claims in the different courts in Israel while security and other restrictions are imposed on the movement between the State of Israel and the Gaza Strip. While there are many communication means, you can not claim that the restrictions imposed on the

movement between the State of Israel and the Gaza Strip prevent Gaza population from filing damage claims in Israel.

- d. The numbers of notices and claims that have been submitted by persons from the Gaza Strip concerning Israel's activities during Operation "Cast Lead" are really clear and indicate that your claim that Gaza population can not access courts in Israel is baseless. So far, the Ministry of Defense has received approximately 1,500 notices relating to claims and more than 270 Palestinian claimants have filed claims with courts in Israel in connection with damages that, according to their claims, were inflicted on them as a result of actions taken by the State of Israeli during Operation "Cast Lead."

In addition, as you certainly know, people from the Gaza Strip file petitions either with the Supreme Court in its capacity as a Supreme Court of Justice or with the Central Court in its capacity as an administrative affairs court. Contrary to your claim, there have been no obstacles – either initial or practical – that prevent Gaza population from filing damage claims in Israel and from taking necessary measures to file such claims.

- 2- In order to remove suspicions, the above does not include any acknowledgement that your letter describes the status of the movement between the State of Israel and the Gaza Strip or the prevailing situation in this regard. Also, the above does not include any consent to judicial terms you are using, especially your claim regarding the prejudice to rights granted by the law.
- 3- The last point which I would like to raise is that I strongly protest against the threats at the end of your letter. It would be better if such threats were not mentioned.

Sincerely,

Ahaz Ben Ari

Legal Advisor

Copy to:

- 1- Legal Advisor to the Government.**

- 2- Director of Civil Department at the State Prosecution.
- 3- Prosecution of Tel Aviv District (civil)
- 4- Head of Compensations Office.
- 5- Head of Advice and Constitution Department, Principal Military Prosecution.

Annex 3: Translation of letter sent by Adalah relating to Israel's policy of blocking Gaza resident's access to Israeli courts

14 October 2010

To:

Mr. Yaakov Neeman
Minister of Justice
29 Saladin Street
Jerusalem 91490
By fax: 02-6285438

Mr. Ehud Barak
Minister of Defense
37 Kaplan Street
Tel Aviv 61909
By fax: 03-9676218

Mr. Yehuda Weinstein
Attorney General
29 Saladin Street
Jerusalem 91010
By fax: 02-6467001

Dear Sirs:

Re: The policy of blocking Gaza residents' access to the Israeli courts in damage lawsuits filed against the Israeli security forces

Following many calls from attorneys representing Palestinians from Gaza in torts lawsuits in Israeli courts against the security forces, we are contacting you in regard to the policy that blocks access to courts to plaintiffs who are residents of the West Bank and Gaza and witnesses on their behalf, thus preventing them from exercising their right to compensation. We argue as follows:

1. Attorney Tamim Younis, Attorney Hussein Abu Hussein and other attorneys from Israel often file torts lawsuits in various courts against the Ministry of Defense on behalf of Palestinian residents for damages caused to [Palestinian] residents or to their family members as a result of the Israeli security forces' activity against them in the West Bank and Gaza Strip (hereinafter: "the lawsuits"). The legal basis for these lawsuits is sections 5A and 5B of the Civil Torts Law (State Liability) – 1952 (hereinafter: "the Civil Torts Law").
2. The plaintiffs encounter enormous obstacles in bringing these lawsuits that ultimately prevent them from having their day in court. These obstacles include physical and economic barriers. The physical barriers stem from the state's policy of denying entry to plaintiffs and witnesses on their behalf, including eyewitnesses, from the region of their residence into Israel, particularly residents of Gaza. The economic obstacles stem from the requirement that plaintiffs pay a guarantee of NIS 30,000 [US \$8,000] on average, a sum that is hard for most residents of the Occupied Territory to raise in light of the difficult socio-economic

situation there, especially in Gaza. [These barriers] leave the plaintiffs without any alternative except to withdraw their lawsuits.

3. As is known, severe restrictions on the freedom of movement of Palestinian residents from the West Bank and Gaza have been imposed during the past decade. Moreover, for over three years already, the Gaza Strip has been almost completely closed off. The government's policy only allows the exit of Gaza residents and their entry into Israeli territory in a limited number of humanitarian cases.
4. As a result, Palestinian plaintiffs and Gaza residents in particular, are unable to meet with their attorneys in Israel. The evidentiary proceedings are delayed in these lawsuits because the plaintiff's witnesses cannot come to court to give testimony or to present documents. Ultimately, the lawsuits are dismissed by the courts because it is impossible to move forward on the cases.
5. Most of the lawsuits filed met with repeated requests by the representatives of the defendant (the State Prosecutor's Office) to dismiss these lawsuits because the plaintiffs were not managing to conclude the preliminary proceedings in the case. [These matters include] bringing the plaintiffs' original power of attorney, taking affidavits, filling in answers to questionnaires and signing forms to waive medical confidentiality, and inheritance decrees. In addition, the state as the defendant, asked the court to dismiss the lawsuits because the plaintiffs' witnesses did not appear at the evidentiary hearings, while the state itself did not permit the entry of the plaintiffs or their witnesses. In the case of Palestinians who are residents of the Gaza Strip, the closure policy imposed by the government completely prevents their entry to Israel for legal purposes.
6. The attorney's request for plaintiffs or their witness from Gaza to receive entry permits to Israel in order to testify in court were all refused.

As an example, attached here is the request for an entry permit from Gaza to Israel that was submitted by the law firm of Attorney Tamim Younis, marked as Appendix 1, and the [state's] letter of response, marked as Appendix 2.

7. The numerous requests by plaintiffs' attorneys for an entry visa to Gaza that were submitted by the Coordination and Liaison Administration (CLA) in Gaza were also categorically denied. The director of the CLA explains the rejection by stating that the attorneys do not meet the criteria for entry to Gaza, according to current policy directives.

As an example, attached here is the request for an entry visa to Gaza that was submitted by the law firm of Attorney Tamim Younis, marked as Appendix 3, and the letter of response, marked as Appendix 4.

8. The procedure for dealing with these lawsuits is expressed in the court's ruling in the case of **Farid Sha'aban**²⁵ who is represented by Attorney Younis. In this case, Judge Zarankin noted the circumstances of the Gaza residents and the difficulty in meeting with attorneys and appearing in the courts. Nonetheless, he ruled that

²⁵ Civil Lawsuit 183/07 (Haifa) **Farid Sha'aban et al. v. Ministry of Defense** (ruling from 14 December 2009).

“there is no alternative but to dismiss the lawsuit” because over the course of two years the plaintiffs had not succeeded in completing the preliminary proceedings, and they were not expected to be able to do so in the near future.

9. Similarly, Judge Sharabi ruled on 6 December 2009 in the **Kamaleh Abu Sa’id**²⁶ case, also represented by Attorney Younis, to dismiss the lawsuit for lack of action. The case was pending in the court since 2004 without any possibility of conducting evidentiary hearings because the plaintiffs were not allowed to enter Israel. The same thing occurred in the case of **Nuha Sabri**,²⁷ where Judge Sharabi decided on 11 March 2010 to dismiss the lawsuit because it was impossible to move forward in the case due to the plaintiff’s difficulty in entering Israel. In addition, on 6 March 2010, Attorney Younis’s request to overturn the court’s decision to dismiss three lawsuits that had been merged²⁸ was rejected due to inaction in similar circumstances to those described above.
10. The plaintiffs’ attorneys in these lawsuits must act quickly and under time pressure to prevent their clients from being denied the right to compensation due to the requirements of advance notice and the statute of limitations as stipulated in Section 5A(2) and 5(A)3 of the Civil Torts Law (requiring written notice within 60 days of the action of the security forces and setting a statute of limitation of two years from the day of the action). Further, the plaintiffs also face absurd procedural obstacles that turn their right to appeal to the courts and receive a remedy into a dead letter; in effect, their rights become devoid of content.
11. Another obstacle for plaintiffs from the Occupied Territory in filing torts lawsuits for damages they incurred due to army activity is economic. According to Regulation 519 of the Civil Procedure Regulations -1984, the court is entitled to order the plaintiff to deposit a guarantee for payment of the defendant’s expenses. If this is so ordered and the guarantee is not deposited by the stipulated date, the lawsuit will be dismissed. Plaintiffs are often forced to withdraw their lawsuits because of the heavy sums they are required to pay as a guarantee as a condition for continuing the legal process.
12. In a long series of rulings,²⁹ the plaintiffs decided, with the state’s consent as the defendant, to withdraw their lawsuits because they did not deposit a guarantee under the condition that the lawsuits would be renewed upon deposit of the guarantee, payment of the defendants’ expenses and submission of an exhibits file and affidavits of primary testimony by the plaintiffs. In other cases, the failure to deposit the guarantee has not only led to expunging the lawsuit, but it has also led to its dismissal, which constitutes a final and absolute barrier preventing the plaintiffs from suing for their damages at another date.³⁰
13. The obstacles faced by plaintiffs are not only economic and physical: The law itself defines the state’s liability as only pertaining to damages caused by activity

²⁶ Civil Lawsuit 4364/04 **Estate of the late Kamaleh Abu Sa’id et al. V. State of Israel** (ruling from 12 December 2009).

²⁷ Civil Lawsuit 1542/05 **Estate of the late Nuha Sabri et al. v. State of Israel** (ruling from 11 March 2010).

²⁸ Civil Lawsuit 4416/04, Civil Lawsuit 4417/04, Civil Lawsuit 4418/04.

²⁹ In a series of rulings, the courts decided to accede to plaintiffs’ requests to withdraw the lawsuit and leave an opening for re-submitting it under agreed-upon conditions. For example: Civil Lawsuit 1714/06 **Estate of the late Ibrahim Abd as-Salam Jabr v. Ministry of Defense**, Civil Lawsuit 1624/06 **Estate of the late Samh Yusuf Abu Jsr et al. v. Ministry of Defense**; Civil Lawsuit 499/07 **Estate of the late Mhammad Haseen Shurbaji et al. v. Ministry of Defense**.

³⁰ Civil Lawsuit 4323/05 **Estate of the late Rami Muhammad Ma’in Abu ‘Oun et al. v. State of Israel**; Civil Lawsuit 24666/06 **Estate of the late al-Masri v. Ministry of Defense**; Civil Laswuit 7978-02-09 **Kandeel et al. v. Ministry of Defense**.

that is not warfare. This exemption makes it difficult for plaintiffs from the outset in light of the broad interpretation of “act of war”. Nearly every activity conducted by the army is considered an act of war.

14. As is known, the [Israeli] Supreme Court has recognized the right of residents of the Palestinian territory who are harmed by army activity to receive compensation – as a constitutional right that enjoy the protection of a basic law. See paragraph 24 of HCJ 8276/95 **Adalah et al. v. Minister of Defense et al.**, a judgment from 12 December 2006. The Supreme Court determined that Section 5C of Amendment 7 of the Civil Torts Law, which prevented the filing of lawsuits for damages caused to Palestinians by security forces, is invalid due to its disproportionate violation of the right to property, and the right to life, dignity and privacy. Nonetheless, as we explain below, the violation of the right to property, life and access to the courts remains unabated in light of the policy practiced in dealing with the lawsuits.
15. Blocking the way for Palestinian residents of Gaza to demand compensation for damages is completely contrary to the principle of the right of access to the courts. Therefore, their right to property is also violated. The right of access to the courts is a supreme right and one of the essential foundations of a democratic regime. The words of former (ret.) Supreme Court Justice Heshin in the **Arfel** case are appropriate here:

“The right of access to the court is not a basic right in the usual sense of the concept of a basic right. It refers to another set of norms in the legal system. It can be said – and I will say it – that it is higher than a basic right. In fact, it is an essential and vital condition for the existence of the rest of the basic rights. The right of access to the courts is the court’s channel of life. The underpinnings for the existence of the judicial authority and the of the rule of law.... Blocking the way to the court – whether directly or indirectly – even if only partially, undermines the *raison d’etre* of the judicial authority. And harming the judicial authority means harming the democratic foundation of the state. Without a judicial authority, without oversight of the actions of the individual and the government, the people will act wildly and the state will be lost. Without judicial review, the rule of law will be lost and basic rights will disappear...”

Civil Lawsuit 733/95 **Arfel Aluminium Ltd. v. Kalili Industries Ltd.** PD 51 (3) 577, 590-591, 628-630 (1997).

16. Thus, the state’s sweeping policy of denying requests to leave or enter the Gaza Strip severely violates the right of access to the courts. Judicial rulings have established that the right of access to courts is a supra-legal constitutional right and a guarantee for the existence of the other rights. Former (ret.) Supreme Court Justice Goldberg emphasized this in the **Arfel** case, stating:

“An appropriate policy is one that does not lock the door before a person seeking a remedy from the judicial authority. Accessibility to the

judicial authorities derives from the view that in a democratic regime 'the primary institutional function assigned to the judicial authority, and for which the institution of the court was created and exists, is the function of ruling in disputes' (from President Agranat's article 'The Contribution of the Judicial Authority to the Enterprise of Legislation' [37], p. 256) This is so regardless of whether the dispute is between individuals or between an individual and the governmental authorities."

Ibid., p. 590

17. The prevention of entry and exit to and from the Gaza Strip by state authorities is a sweeping prohibition. Just recently, the Supreme Court noted the non-validity of such a sweeping policy of prohibition and stated that the authorities should take into consideration special and exceptional cases even while implementing a strict policy. The words of Justice Meltzer in the **Hlehel** case are appropriate here:

"The authority should act while exercising case-specific judgment and should examine each case on its own merits. This is the issue of 'the special case' in administrative law and the administrative authority is obligated to consider it as part of its judgment. If it fails to do so – this would render its decision defective."

HCJ 2390/10, **Alaa Hlehel et al. v. Minister of Interior et al.** (ruling delivered 23 May 2010).

18. Furthermore, the policy practiced in the courts as well as the position of the state's authorities is contrary to the international law that applies to the residents of Gaza and the West Bank as residents of occupied territory. The state's obligation to protect the occupied population includes a positive duty to pay compensation for damages caused to the protected residents. The state's obligation to compensate protected residents is anchored in Article 3 of the Fourth Hague Convention of 1907 and Article 148 of the Fourth Geneva Convention of 1949, as well as in Article 91 of the First Additional Protocol to the Geneva Convention of 1977.
19. The right for [compensation] of Palestinian residents of the occupied territory who are injured from the security forces' activity is also anchored in international human rights law. Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) requires the state to compensate those who are harmed by its activities (see General Comment 31 of the UN Human Rights Committee, which is the official interpretation of the ICCPR, paragraph 16). See also Article 14 of the International Convention Against Torture.
20. In the **Chorzow** case, the Permanent Court of International Justice, the forerunner of the International Court of Justice, ruled that an iron rule in international law is that the violation of an obligation creates an obligation to compensate. The ruling states:

"It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation

[...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."

Permanent Court of International Justice, **Chorzow Factory Case**, 13 September 1928 (Series A, No. 17, p. 29).

21. The International Court of Justice in the Hague, in an advisory opinion on the illegality of the Separation Wall in the occupied Palestinian territory issued in 2004, stipulated an obligation of compensation for those harmed by a violation of the international law:

"Israel has the obligation to make reparation for the damage caused to all the he Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction."

Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory, ICJ, Advisory Opinion, 2004, 198, paragraph 152 F.

22. In light of the above, and in order to allow residents of Gaza to exercise their right to receive compensation for damages caused to them; to make the courts more accessible to those demanding their rights, which have been violated by the security forces; and to enable a fair and effective hearing, you are requested as follows:

- A. To set clear guidelines and directive for the authorities that are responsible for granting entry permits to Israel, under which entry permits would be granted to plaintiffs and witnesses among the residents of Gaza who seek to enter Israel for legal purposes;
- B. To set clear guidelines and directives for the authorities that are responsible for granting entry permits to the Gaza Strip, under which entry permits to the Strip would be granted to the Israeli attorneys and their law clerks who represent plaintiffs from the Gaza Strip and seek to enter the Strip in order to meet with their clients.

Very respectfully,

Hassan Jabareen, Attorney

Fatmeh El-'Ajou, Attorney

cc:

Judge Moshe Gal, Courts Administration Office

22 Kanfei Nesharim, Jerusalem 95464

via fax: 02-6513191