At the Supreme Court **HCJ 5314/08**
Sitting as the High Court of Justice

In the matter of:

1. **_____ Jarusha, ID No. _____**
2. **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – R.A.**

All represented by counsel, Adv. Alon Margalit (Lic. No. 35932) and/or Abeer Jubran (Lic. No. 44346) and/or Yossi Wolfson (Lic. No. 26174) and/or Yotam Ben Hillel (Lic. No. 35418) and/or Hava Matras-Irron (Lic. No. 35174) and or Sigi Ben Ari (Lic. No. 37566) and/or Ido Blum (Lic. No. 44538) and/or Yadin Elam (Lic. No. 39475)
Of HaMoked Center for the Defence of the Individual, founded by Dr. Lotte Salzberger – R.A.
4 Abu Obeida St., Jerusalem, 97200
Tel: 02-6283555; Fax: 02-6276317

The Petitioners

v.

1. **Military Advocate General**
2. **Chief Military Advocate General**

Represented by the State Attorney
29 Salah-a-Din Street, Jerusalem 91010

The Respondent

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 should not exercise their powers and decide, without delay, whether or not to press charges against the offenders who caused the death of the deceased, _____ Jarusha.

b. Why they should not explain and specify the reasons that caused a delay of about **two and-a-half years** in rendering the decision to press charges, despite the fact that the investigation of the Military Police Investigations Unit has long ended and that the tragic death has occurred in 2001.

Request for Urgent Hearing

The honorable court is requested to schedule an urgent hearing in the petition. The petitioners have been waiting, for about **seven years**, for the clarification of the circumstances of the illegal shooting that caused the deceased's death. Since 2001 the deceased's family has been shrouded in darkness and uncertainty. The investigation of the incident commenced six years ago and ended about two and-a-half years ago. Ever since, for many months and years, the respondents have been refraining from exercising their powers under the law, even before any criminal or disciplinary proceeding has been initiated to enforce the law against the offenders in this case. It is expected that such proceeding will be lengthy. With each passing day, the prospects for revealing the truth decrease and material rights of the deceased's family are violated. The protracted delay in the actions of the military investigative and prosecuting authorities – must come to an end.

The grounds for the petition are as follows:

Preface

1. This petition is filed against the backdrop of the failed manner by which the military investigative and prosecution authorities handle complaints of Palestinians with respect to criminal offenses committed by the Israeli security forces in the occupied territories.

2. The authorities' handling of suspicions of criminal offenses consists of several stages: receipt of the complaint, verification and commencement of an investigation by the Military Police Investigations Unit (hereinafter: **MIU**), conducting an investigation and gathering evidence. Upon completion of the investigation, the file is transferred to the Military Advocate General, in order to make a decision on whether to take criminal or disciplinary action, or alternatively, to close the file as per the causes specified in the law. This petition concerns this final stage, of making a decision to press charges.

3. It should already be noted at this early stage, that as a general rule, when a file is closed, the injured party – or his family members, is entitled to review the investigation materials and plan his steps according to the findings. He may appeal the decision of the Military Advocate General to close the file. In addition, and according to the circumstances, he may continue to realize his rights by filing a civil suit. Other than the interest of the individual complainant, the review of the investigation materials has public importance of the first degree. The examination of the manner by which the investigation has been conducted, and in view of which the decision of the Military Advocate General has been made, is required for the purpose of increasing the supervision and control over the operations of the military investigative and prosecution authorities. The review of investigation materials is required to reinforce democracy and the rule of law in the State of Israel, to which the state's army and its soldiers are also subordinate.

4. Accumulated experience shows that the handling by military authorities of Palestinians' complaints consists of major flaws: considerable delays in the opening of investigations, investigations are

negligently conducted, files are scandalously closed while evidentiary material is disregarded, and at a later stage, the receipt of investigation materials is encumbered. Procrastination and protracted failure to respond to the complainant's requests are additional "ailments" which characterize the handling by the authorities.

5. As aforesaid, the petition concerns only a segment of the process, that is the stage in which the power to decide whether to press charges is exercised. In the matter of the above petitioners, this stage is infected by extreme and unreasonable delay. However, the overall picture reveals a problematic and continuous pattern of complaints' handling. By the end of the day, there seems to be a policy the goal of which is to block Palestinian complainants, and refrain from revealing the truth and enforcing the law against soldiers involved in the commitment of criminal offenses in the territories.

Factual Infrastructure

The Parties

6. **Petitioner 1** (hereinafter: the **petitioner**), resident of Tulkarem, is the brother and one of the heirs of the deceased, _____ Jarusha, who was shot and killed by the security forces on October 31, 2001 (hereinafter: the **deceased**). The deceased's mother waived her part in the estate in favor of the petitioner. Another part in the estate belongs to the deceased's two wives. Under the law, the petitioner is entitled to receive information of the stage of the criminal proceeding concerning his brother's death, and that the proceeding be conducted in a timely manner. If a decision is made to close the file, without pressing charges, the petitioner is entitled to appeal such decision.

7. **Petitioner 2** (hereinafter: **HaMoked**) is a human rights organization which acts to increase the enforcement of humanitarian law in the occupied territories and assists Palestinians, residents of the territories, whose rights were violated by Israel.

8. **Respondent 1** (hereinafter: **respondent 1**) is the competent authority, under the law and according to military orders, to decide whether charges should be pressed, and alternatively, whether the investigation file should be closed with no legal or disciplinary action taken.

9. **Respondent 2** (hereinafter: **respondent 2**) is the head of the military prosecution and is entrusted with enforcing law and order in the Israeli Defence Forces (IDF). By virtue of his position and duties he is, among other things, in charge of the military investigative and prosecution authorities and of the military disciplinary law. He is professionally in charge of respondent 1, supervises its operations and the latter is subordinate to him.

The Event

10. The morning of October 31, 2001, was a regular and ordinary morning in Tulkarem. On or about 09:00 in the morning the deceased, who was born in 1961 and who was a resident of the city, parked his car in the courtyard of his sister's house. In the al-Safa building, distanced about 200 meters from the sister's house, a military post manned by Israeli security forces personnel was located at that time.

11. While the deceased was parking his car, a tank and an armored personnel carrier (APC) started to approach the sister's house from the military post, up to about 30 meters from the car. Suddenly, fire was opened from the military vehicles towards the deceased's car, with no clear reason and without warning. The deceased was injured in his upper body and collapsed. He was carried into the sister's house by a family member.

12. A few minutes later a Red Crescent ambulance arrived to the house. The access to the house was blocked since the tank and the APC have been still standing on the road. The soldiers detained the medical team for a few minutes and thereafter refused to let the deceased be carried away on a stretcher. The deceased was taken from the house to the ambulance, carried and supported by family members. Before he was put in the ambulance, the soldiers searched him. They took away his wallet which contained money and various documents. The wallet has never been returned.

13. The deceased arrived at the Thabat Thabat Hospital in Tulkarem in a critical condition, suffering from heavy hemorrhage in his left lung and liver. He was operated on, but his condition has not stabilized. Shortly thereafter he died of his wounds.

The above described events will be hereinafter referred to as: the **event**.

Opening an Investigation

14. On March 25, 2002, the deceased's family wrote, through HaMoked, to the legal advisor to the West Bank and demanded that the event be investigated. A copy of the letter was delivered to the military advocate to the central command.

    A copy of petitioners' letter dated March 25, 2002 is attached to this petition and marked **Exhibit P/1**.

15. On March 26, 2002, the legal advisor to the West Bank replied that the petitioners should write directly to the military advocate to the central command. On April 30, 2002 the petitioners wrote directly to the military advocate to the central command. On the same day, the military advocate replied that the complaint was under review. The petitioners do not know when, following the preliminary review, a formal investigation was launched. Therefore they assume that this was the date on which the investigation of the event commenced.

    A copy of the response of the military advocate to the central command dated April 30, 2002 is attached to this petition and marked **Exhibit P/2**.

16. Since several months have elapsed without any development in the file, the petitioners wrote, on December 25, 2002, to respondent 1 and requested an update. They were informed that the file was still under review. From this date and for over two years the petitioners have contacted respondent 1 and the MIU, on various occasions, in writing and by phone, and were informed that the complaint was under investigation.

A copy of petitioners' letter dated December 25, 2002 is attached to this petition and marked **Exhibit P/3**.

A copy the response of the military advocate to the central command dated January 1, 2003 is attached to this petition and marked **Exhibit P/4**.

A copy of petitioners' letter dated August 7, 2003 is attached to this petition and marked **Exhibit P/5**.

A copy of MIU's response dated September 1, 2003 is attached to this petition and marked **Exhibit P/6.**

17. On February 9, 2005, in the course of a telephone conversation with Oded from the MIU, information was given that the investigation had ended and that the file had been transferred to respondent 1. However, on April 28, 2005, petitioners' inquiry with respondent 1 revealed that the file had been remanded to the MIU for additional complementary investigation.

    A copy of respondent 1's response dated April 28, 2005 is attached to this petition and marked **Exhibit P/7.**

18. On August 3, 2005, respondent 1 informed, in response to petitioners' inquiry, that the file was still undergoing additional complementary investigation.

    A copy of respondent 1's response dated August 3, 2005 is attached to this petition and marked **Exhibit P/8**.

Completion of the investigation and transferring the file to respondent 1 to make a decision

19. On October 27, 2005, information was received, in the course of a telephone inquiry with the MIU, that **the investigation had been completed** and that the file had been transferred to the military advocate's office to the northern command for the purpose of making a decision as to whether or not charges should be pressed. Ever since, for more than **two and-a-half years**, the file has been wandering between the various military advocate offices, respondent 1's branches, and yet a decision as to whether or not charges should be pressed has not been made.

20. On December 19, 2005, the military advocate's office to the northern command informed, in response to petitioners' inquiry, that the military advocate's office to the central command was handling the file.

    A copy of the response of the military advocate's office to the northern command dated December 19, 2005, is attached to this petition and marked **Exhibit P/9**.

21. On February 7, 2006, the petitioners wrote to the military advocate's office to the central command and requested to receive an update concerning the status of the file, but their request has never been answered.

A copy of petitioners' letter dated February 7, 2006, is attached to this petition and marked **Exhibit P/10**.

22. On April 4, 2006, the petitioners found out, in the course of a telephone inquiry with the military advocate's office to the central command, that the handling of the file was still in process.

23. The petitioners wrote again to the military advocate's office to the central command on May 15, 2006, June 25, 2006, August 10, 2006, September 26, 2006, November 7, 2006, January 3, 2007 and February 21, 2007, all in an attempt to find out whether a decision was made to press charges against any of the individuals involved in the event, or whether the file was closed. Petitioners' letters have not received an orderly written response. From a few informal phone inquiries, the petitioners learnt that no decision has yet been made in the file.

    A copy of petitioners' letter dated May 15, 2006 is attached to this petition and marked **Exhibit P/11.**

    A copy of petitioners' letter dated June 25, 2006 is attached to this petition and marked **Exhibit P/12.**

    A copy of petitioners' letter dated August 10, 2006 is attached to this petition and marked **Exhibit P/13.**

    A copy of petitioners' letter dated September 26, 2006 is attached to this petition and marked **Exhibit P/14.**

    A copy of petitioners' letter dated November 7, 2006 is attached to this petition and marked **Exhibit P/15.**

    A copy of petitioners' letter dated January 1, 2007 is attached to this petition and marked **Exhibit P/16.**

24. On February 21, 2007, the petitioners wrote again to the military advocate's office to the central command. On the same day, the military advocate to the central command, Lieutenant Colonel Ehud Ben Eliezer, wrote, in response, that a draft decision in the file was written which was transferred to the chief military prosecutor, for his review and approval. It should be noted that this significant development occurred only after **the elapse of five years** from the date the investigation of the event has commenced.

    A copy of petitioners' letter dated February 21, 2007 is attached to this petition and marked **Exhibit P/17**.

    A copy of the response of the military advocate's office to the central command dated February 21, 2007 is attached to this petition and marked **Exhibit P/18**.

25. The petitioners continued to follow up and tried to find out whether there was any development in the file. They contacted the military advocate's office to the central command, by phone, on March

29, 2007 and April 11, 2007, but to no avail. Additional written reminders were sent on May 15, 2007 and July 8, 2007, which also remained unanswered.

A copy of petitioners' letter dated May 15, 2007 is attached to this petition and marked **Exhibit P/19**.

A copy of petitioners' letter dated July 8, 2007 is attached to this petition and marked **Exhibit P/20**.

26. On August 19, 2007 the petitioners wrote to the military advocate to the central command, Lieutenant Colonel Ehud Ben Eliezer and complained that the file had been waiting for the decision of the military advocate's office, **for nearly two years**. The letter remained unanswered.

    A copy of petitioners' letter dated August 19, 2007 is attached to this petition and marked **Exhibit P/21**.

27. On September 18, 2007, the petitioners wrote directly to the Chief Military Advocate General, Colonel Liron Libman, in an attempt to find out what happened with the file which was in his possession for **seven months**. A copy was sent at the same time to respondent 1. Needless to note that this letter remained unanswered, even after a written reminder was sent.

    A copy of petitioners' letter dated September 18, 2007 is attached to this petition and marked **Exhibit P/22**.

    A copy of the reminder dated October 18, 2007 is attached to this petition and marked **Exhibit P/23**.

28. On November 21, 2007, in the course of a phone inquiry, the petitioners were informed that the file was remitted by the office of the chief military prosecutor to the military advocate's office for operational affairs and was in its possession. Therefore, on November 22, 2007, the petitioners wrote to the latter to find out whether a decision had been made in the file. Petitioners' letter remained unanswered. A reminder was sent on December 23, 2007, to no avail.

    A copy of petitioners' letter dated November 22, 2007 is attached to this petition and marked **Exhibit P/24**.

    A copy of the reminder dated December 23, 2007 is attached to this petition and marked **Exhibit P/25**.

29. To conclude this part, the investigation file concerning the killing of the deceased by security forces fire is pending before respondent 1, and its various branches, since October 2005. Until this day, after the elapse of **about two and-a-half years**, no decision as to whether charges should be pressed has yet been made in the file. It should be remembered that the decision making process of the military investigative and prosecution authorities, which is all about delay and sluggishness, concerns an event from October 2001.

30. Hence, for a long period of time respondent 1 does not exercise its power, and does not explain its failure to act, although a draft decision has been lying in the file since February 2007, for about **one and-a-half years**. At the same time respondent 2 refrains from exercising his authority over respondent 1 and fails to ensure that it acts according to the law.

The Legal Argument

Unreasonable delay

31. Section 281 of the Military Justice Law, 5715-1955 (hereinafter: the **military justice law**) grants respondent 1 the power to decide whether disciplinary action should be taken and an indictment filed with the court martial (see: sections 280-281 and 282A of the military justice law; similar powers are granted to respondent 2 in sections 282, 282A and 299 of the law. The respondents are authorized to instruct the chief military prosecutor to file an indictment, according to sections 181, 300 and 303 of the law; see also sections 80-82, 87, 89 and 92 of the General Staff Order 33.0304 concerning an examination and investigation by the MIU). There is no dispute that respondent 1 **must** exercise its power, **must** exercise its discretion and decide.

32. Petitioners' argument is that the obligation to act means the obligation to act in a timely manner and decide within reasonable time. It is evident that in the case at hand a delay of about two and-a-half years in making a decision is extreme, exceeds reasonable and appropriate standard and violates material rights of the petitioner and his family members.

33. It should be immediately stated that the petitioners do not claim that respondent 1 should have made a decision immediately and offhandedly. Due to its nature, a decision to press charges, as a decision to close the file, involves a careful and strict examination of the investigation materials and is made after thorough deliberation. Nevertheless, two and-a-half years elapsed since respondent 1 has received the investigation file, and a decision – has not been made. The time period taken by respondent 1 is unreasonable and unjustified. Appropriate in this context are the words of Prof. Itzhak Zamir in his book **The Administrative Authority** volume B, 705 (1996):

> **Indeed, there are cases which require a thorough and lengthy examination, and yet in certain cases the duration of the examination exceeds reasonableness. The need to conduct a thorough examination may sometimes serve as an empty excuse for an unjustified delay. Such a delay, which is customarily referred to as "procrastination", may stem from heavy work load imposed on the authority, flawed administrative proceedings, negligence or even ill will. For instance, it is possible that the authority which has already decided not to approve an application of a certain individual, does not feel comfortable to explicitly reject it, since a rejection is exposed to criticism, and therefore it prefers to put him off repeatedly**.

34. Indeed the law does positively prescribe the time period during which respondent 1 should have made its decision. However, a fundamental principle of administrative law is that a competent authority should act reasonably and "reasonableness also means meeting a reasonable time schedule" (see: Zamir, *ibid*, 706).

35. Although respondent 1 is one of the military branches, it is subordinate to this principle. Like any public authority it must exercise its discretion fairly, reasonably, in good faith, without arbitrariness while taking into consideration all relevant data. See the words of Justice (as then entitled) Beinisch in HCJ 4723/96 **Atiya v. Attorney General** IsrSC 51(3) 714, 732 (1997):

> **Being in charge of law enforcement in the army the Chief Military Advocate General acts - along with the military prosecution system – as one of the branches of the entire law enforcement system. The military system as a whole is one of the governmental branches and according to our constitutional system is subordinate to the authority of the government… therefore the military system cannot dissociate itself from the principles which guide the general system and from upholding the general norms which obligate the governmental branches in the legal field**.

(see also: HCJ 11447/04 **HaMoked: Center for the Defence of the Individual, founded by Dr. Lotte Salzberger v. Attorney General**, TakSC 2005(2) 2796 (2005); HCJ 1284/99 **A v. Chief of Staff**, IsrSC 53(2) 62 (1999); HCJ 4537/96 **Shushan v. Chief of Staff**, TakSC 96(3) 259 (1996)).

36. As a general rule, an administrative decision should be made within a time period not exceeding 45 days (compare: Administrative Procedure Amendment (Statement of Reasons) Law 5719-1958; General Staff Order 08.0101 Applications of Civilian Parties – the Obligation to Respond and Give Reason). In complex issues, such as pressing charges, the reasonable time frame may be longer. Nevertheless, this does not mean that the authority is exempt of time limits. Section 11 of the Interpretation Law, 5741-1981, provides that a duty to do something, where no time for doing it is prescribed, means that it should be done in a "timely manner". Indeed, the duty to act in a timely manner is one of the basic principles of good governance. The decision what "timely manner" is or what "reasonable time" is, depends on the circumstances of each case (see: Zamir, *Ibid*, 714, 717).

37. What is the "reasonable" time period in our case? To answer this question one should take into account, first and foremost, the severity of the event. The consequence of the event – death – may result in pressing charges for one of the most serious offenses in criminal law. In any event, this case concerns a suspicion of a serious criminal offense, a deliberate injury to a person engaged in innocent activity by the security forces, or at least criminal negligence and failure to take all possible measures to protect civilian population from injury. The persons suspected of the offense, are probably wandering around, free. They may even continue to carry arms despite their alleged dangerousness.

38. In addition one should also take into account the "procrastination" and the heavy delay that occurred in the handling of this complaint, which were caused by the military investigative and prosecution authorities, including the respondents. As will be specified below, a decisive weight should be given to the damage that will be caused to the petitioners and their material rights as a result of the delay, as well as to the prospects to reveal the truth as time keeps lingering on. In addition, it should be taken into account that said delay does not conform with Israeli constitutional law and the

obligations of the State of Israel under international law. Finally, it should be taken into account that delays and failure to exercise criminal enforcement powers undermine public trust in law enforcement and bring about additional violatoins of the law.

39. **All of the above indicates that respondent 1 should have made a decision in the file promptly, within only a few weeks from the date the file was handed over to it. Since the investigation of the event has ended after such a long time, it should have given the complaint priority and expedite the handling thereof, in view of the fact that the previous proceedings have lingered for so long. Respondent 2 should have ascertained that this was indeed done. The fact that the petitioners have been waiting for respondent 1's decision for about two and-a-half years is unacceptable. Respondents' omission therefore justifies this court's intervention**.

40. To the extent the respondents raise arguments concerning technical difficulties, heavy workload, lack of personnel etc., it should be noted that arguments of this sort have not yet been presented to the petitioners. Furthermore, these are not magic words, which validate respondents' actions or grant them a seal of good governance. Not only that respondent 1's decision has been lingering for about two and-a-half years, but such excuses may not justify unreasonable and disproportionate violation of human rights (see: HCJ 2557/05 **Majority Headquarters v. Israel Police,** TakSC 2006(4) 3733, 3747 (2006); HCJ 253/88 **Sajdiya v. Minister of Defense**, IsrSC 42(3) 801, 820 (1988)).

41. Furthermore, it seems that in our case respondent 2's delay may not be attributed to this technical difficulty or another. Inquiries conducted by the petitioners *vis-a-vis* the authorities and the response of the military advocate to the central command indicate that a draft decision in the file has already been written in February 2007, and that recommendations and conclusions were made with respect thereto. Why then are so many additional months required before a final decision is made and the petitioners are provided with a reasoned notice that charges are to be pressed or that the file is to be closed? Respondents only know.

Violation of petitioner's right to appeal

42. As is well known, respondent 1's decision, when made, is not conclusive. A decision to press charges opens a criminal or disciplinary proceeding against the accused. On the other hand, a decision to close the file enables the petitioners to file an appeal. An appeal may be filed only after the petitioners are afforded the right to closely familiarize themselves with the occurrences and the manner by which the investigation of the event took place, by having the investigation materials reviewed.

43. It is common practice that investigation materials are made available for petitioners' review, only after a decision to press charges is made by petitioner 1. Indeed, the policy of the prosecuting authorities is that, as a general rule, investigation materials should not be made available for review, before a decision is made to either press charges or close the file (see: state attorney directive No. 14.8). Therefore, the petitioners must wait. Since October 2001 they have been waiting for a significant development in the file. And they are still waiting, even after the elapse of **about two and-a-half years** from the date on which the file was transferred to respondent 1.

44. The right to file an appeal is explicitly granted to the complainant by law (see: sections 64 and 2 of the Criminal Procedure Law [Consolidated Version], 5742-1982. In the absence of any other stipulation in the military justice law this arrangement applies). To avoid violation of the right to appeal, the decision of the military prosecuting authority must be made in a timely manner. For as long as a decision not to press charges has not been made, an appeal may not filed, since there is nothing to appeal against at this stage. At the same time, a lengthy delay in making a decision – and consequently filing an appeal at a late stage – infringes upon the efficiency of the latter. As time elapses, details are forgotten and memory blurs. The ability to clarify the circumstances of the event, as well as to gather evidence from the scene and to collect testimonies is infringed, if not utterly frustrated. Even if the appeal is accepted and the investigation is resumed, in many cases an additional complementary investigation at this stage is no longer viable.

45. Even if, after a lengthy delay, a decision is eventually made to press charges against any of the involved ones, the ability to conduct an efficient and just legal proceeding is infringed. Due to the delay, the prospects to reveal the truth and enforce the law against the offenders are reduced. Thus, for instance, the offenders may, in the meanwhile, be discharged of military service. After the elapse of one year from the date of discharge, they will no longer be subject to military jurisdiction and then disciplinary action may not be taken against them and an indictment may not be served against them with a court martial (see: sections 6 an 173 of the military justice law). In other cases a delay between opening an investigation and serving an indictment may establish an 'abuse of process' defense for the accused due to the authority's conduct, which may result in his acquittal (compare: CrimA 4855/02 **State of Israel v. Burovich**, IsrSC 59(6) 776, 932-933 (2005); MApp (Jerusalem) 6407/06 **Yitzhaki v. State of Isreal**, TakDC 2006(4) 608, 613 (2006); CrimC (Haifa) 4088/05 **State of Israel v. Ditzi**, TakDC 2005(4) 1259 (2005)).

46. To conclude this part, the lengthy and unjustified delay in making a decision to press charges violates petitioner's right to file an appeal. He can not take an effective legal action, without having first reviewed the investigation materials. However, the investigation materials may not be reviewed unless a decision has been first made by respondent 1 as to whether charges are to be pressed. These are inseparable links of the same chain.

Violation of crime victims' rights

47. The right of the deceased, a crime victim, and of his family members to have the complaint seriously and expeditiously handled and the law enforced against the offenders, is also entrenched in specific statutes which establish the rights of a crime victim. In recent years there is an increasing tendency, both in Israel and in countries all over the world, to acknowledge the rights and status of crime victims within the framework of the criminal proceeding (see: HCJ 5961/07 **A v. State Attorney** TakSC 2007(3) 4611 (2007); CrimFH 2316/95 **Ganimat v. State of Israel** IsrSC 49(4) 589, 656 (1995)).

48. Section 1 of the Rights of Victims of Crime Law, 5761-2001 (hereinafter: **crime victims law**), provides that the purpose of the law is to establish the the rights of a crime victim and to protect his human dignity. The law expresses the recognition that taking into consideration the damage caused by an offense to the society as a whole is not sufficient, and that the damage which was caused to the

individual victim should also be considered and the difficulties with which he must cope following the offense should be taken into account. A crime victim has rights and status in the criminal proceeding which are derived from the value of human dignity (see: HCJ 5961/07 above, CrimA (Jerusalem) 30688/06 **State of Israel v. M.A**., TakDC 2007(1) 6834 (2007); PPA (Tel Aviv) 1009/02 **State of Israel v. Itach**, TakDC 2002(1) 829 (2002)).

49. Section 8 of the crime victims law grants the victim the right to receive information regarding the manner by which the criminal proceeding is being conducted and of its stage, including the right to be notified of a decision not to press charges and of the right to appeal a decision to close the file. Section 12 of the law continues to provide that the proceedings concerning sex or violence crimes shall take place **within reasonable time** to prevent abuse of justice from the complainant. Section 22 grants the rights established by law to the victim's family members, including the siblings of a victim whose death was caused by the offense. It is evident that the petitioner and his family members suffered an abuse of justice due to respondents' extreme delay.

The neglect in the criminal proceeding erodes the right to life

50. Respondents' duty to act and decide stems from their duty to uphold petitioners' constitutional rights. The investigated event violated the right to life of the deceased, petitioner's brother. The suspicion is that the deceased was arbitrarily shot by soldiers.
51. The right to life rests at the very foundation of human rights. Without it, there is no value to other rights. The duty imposed upon the state is not confined to the prohibition against harming the right to life, but also includes the duty to actively defend it (section 4 of Basic Law: Human Dignity and Liberty). According to a number of political theory concepts, the desire of human beings to defend their lives from violence and arbitrary belligerence is the sole justification for having surrendered some of their liberties and powers in favor of the state's sovereign. A political regime which does not protect the right to life therefore loses its legitimacy to exist.

52. In order to safeguard the right to life the provisions of criminal law were, *inter alia*, established which prohibit acts of murder, manslaughter and causing death out of negligence. In order to safeguard the right to life the authorities were granted investigative powers, and the respondents were granted the power to press charges. When these enforcement mechanisms, which were established by law, are not used or are used in an inappropriate manner, the scope of protection afforded to the right to life in any given society is eroded. When the enforcement mechanisms specifically fail in certain contexts (and in our case: when the omissions pertain to injuries inflicted upon Palestinians by the security forces) the erosion of the right of life occurs in a discriminatory pattern. In practice a situation is created in which the blood of certain individuals is not as red as the blood of others. A situation is thus created in which a relative permission is impliedly given to harm these particular individuals.

53. A person whose life was prematurely cut short by another has the right that appropriate criminal proceeding be instituted and the law be enforced against the offenders. After his death, this right is granted to his family members. This secondary right derives from the right to life. Thus, it was held, with respect to a tortuous proceeding, which is also appropriate with respect to a criminal proceeding:

> **Tortuous liability protects several rights of an injured party, such as the right to life, to liberty, to dignity and to privacy. The laws of tort are one of the main tools with which the legal system protects these rights; they are the balance established by law between the rights of the individuals, in and amongst themselves, and between the right of the individual and public interest. The negation of tortuous liability or the limitation thereof infringe upon the protection of these rights. Hence, these constitutional rights are thereby violated.**

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

54. The right of the victim, that the law be enforced against those responsible for his death within the framework of a criminal proceeding, is also entrenched in the consistent judgments of the European Court of Human Rights. The right to life which is entrenched, *inter alia*, in article 2 of the European Convention on Human Rights, imposes on the states the obligation to undertake a thorough, swift and effective investigation to ascertain the circumstances of the death. The purpose of the investigation is to ensure adherence to the provisions of the criminal law which are intended to protect the right to life. The investigation is intended to ensure that when an offense is committed by state agents, responsibility shall be borne by them. The purpose of the investigation is to identify the offenders and 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).

55. The petitioner's constitutional right to dignity and his right to due process also require an appropriate criminal proceeding, within the framework of which the death of his brother is swiftly and efficiently investigated and the offenders brought to trial. The constitutional rights to dignity and due process are specified in sections 2 and 4 of the Basic Law: Human Dignity and Liberty. These rights were granted a significant and important status in Israeli law (see: Aharon Barak, *ibid.*, 422, 431). Section 11 of the Basic Law provides that all governmental authorities, including the army, must respect the rights under this Basic Law. However, it is doubtful whether the respondents' conduct complies with this constitutional obligation.

Harm to the uncovering of the truth and to effective investigation

56. Needless to point out that the uncovering of the truth is the main purpose underlying the criminal investigation and the legal proceeding. The delay is the bitter enemy of this purpose, and it should be fought against.

57. As has already been specified above, as time passes, it becomes more difficult to clarify the circumstances of the event, if it is determined that indeed there is a need to complete the investigation, or that the investigation has been negligently conducted. Indeed, it is not the place to discuss, in this petition, the numerous flaws discovered in MIU investigations, or the effectiveness of

such investigations. However, the fact that in the case at hand the investigation lingered for many years and that upon its termination it has not yielded adequate fruit, can not be disregarded. Later on an additional complementary investigation was required and eventually it had been conducted for three and-a-half years without any real justification.

58. When at last a draft decision in the file was written, it was lying on the desk of the chief military prosecutor for many months. Not only were the respondents aware of these failures, but they also bear the responsibility therefore. Respondent 1 is the professional body which is obligated to instruct MIU officials and supervise their work. It is responsible for having the law enforced by giving instructions to the MIU and the chief military prosecutor. Respondent 2 is a "central player" in the military law enforcement system. By his failure to supervise respondent 1, the MUI and the chief military prosecutor, he became a full accomplice to their misconduct.

59. Now respondent 1 adds insult to the injury of its negligence. Instead of expediting the handling of the matter, especially in view of past failures, it wastes valuable time, conducts itself sluggishly, neglects petitioners' applications and ignores them. A delay, in and of itself, including procrastination in making a decision as to whether charges should be pressed, frustrates the possibility to effectively complete an investigation. Experience shows, as illustrated in a petition currently pending before this court concerning the delivery of investigation materials to the injured party, for his review (HCJ 4198/08 **Al-Wardian v. Commander of the Military Investigation Unit**), that even if a decision is made to close the file, the petitioners will still have to wait a long time – many months and even years – until they receive the investigation material to their possession, and decide how to proceed after they study it.

60. Consequently, an appeal is generally filed a number of years after the event. It is therefore clear and self evident. As time passes, the lesser are the prospects to reveal the truth and enforce the law against the offenders. In view of the above, respondents' omission is severe and outrageous.

Violation of International Law

61. Israel is not a desert island but rather a part of an international system. This system includes humanitarian arrangements. The Government of Israel considers itself obligated to uphold such arrangements (see: HCJ 5591/02 **Yassin v. Ben David – Camp Commander**, IsrSC 57(1) 403, 408 (2002)). Indeed, a delay in making a decision to press charges is not only a breach of Israeli administrative and constitutional law. It does not conform with the requirements of international law either.

62. The event being the subject matter of this petition raises the suspicion of illegal shooting by soldiers at a protected civilian population, shooting which caused the death of an innocent man. *Prima facie*, a serious violation of the rules of war is involved. In view of the above, one would have expected the respondents to have taken decisive and uncompromising enforcement measures, while attributing appropriate weight to the vulnerable condition of the civilian population in the territories. However, the delay – in handling the complaint, in the investigation and in pressing charges – means disregard, disrespect and failure to enforce international humanitarian law.

63. The respondents must investigate and press charges against the suspects in committing criminal offenses in the OPT, and even more so when a serious violation of the rules of war is involved. They must do it as soon as possible. Article 146 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (hereinafter: the **Fourth Geneva Convention**) provides:

> **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.**

64. This obligation imposes on the states an active duty to investigate and put the offenders on trial **as soon as possible**. In his commentary to the Convention the scholar Pictet stated as follows:

> **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, <u>its duty is to ensure that the person concerned is arrested and prosecuted with all speed.</u> (emphasis added)**

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

65. Thus, Article 86 of the 1977 Protocol Additional to the Fourth Geneva Convention (Protocol I), also provides that:

> **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.**

66. The commonly held approach is that international conventions which protect various basic rights, including in a time of armed confrontation, impose on the states an active duty to investigate, to put on trial and to compensate if any of the rights entrenched in the conventions had been violated. This obligation also derives from 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, being governmental authorities, must abide by this obligation, and act with appropriate speed to fulfill the state's obligation under international law.

<u>Providing "incentive" to criminal behavior by soldiers</u>

67. The delay in enforcing the law and making a decision on the pressing of charges does not only harm the petitioner and the deceased's family members. Rather, it harms the protected civilian population in the POT and the public at large. Eventually it will also harm the respondents themselves and their

ability to carry out their duties to preserve the law and enforce it. The delay sends a lenient message, according to which complaints of serious criminal offenses are not properly handled. It encourages criminal behavior which puts the rule of law at risk. Damage is also caused to the values of good governance and the public trust in the military investigative and prosecuting bodies. Therefore, it is a primary interest of the public at large that law enforcement be carried out decisively and swiftly:

> **The key to upholding a suitable civil service is the public trust in the integrity of the civil service… public trust is the back-rest of the public authorities and it enables them to fulfill their duties."** (See: HCJ 1993/03 **Movement for Quality Government in Israel v. Prime Minister**, IsrSC 57(6) 817, 843 (2003); HCJ 6163/92 **Eizenberg v. Minister of Construction and Housing**, IsrSC 47(2) 229, 262 (1993)).

This is also reflected in the comments made by the court martial appeals court concerning the required handling of inappropriate behavior of soldiers against protected residents of the OPT:

> **The message should be clear and unequivocal and it should reach each and every soldier and commander. Such deeds, and even less severe ones, should not be overlooked, they must not be taken lightly and a soft reaction shall not suffice. Rather, the law should be forcefully enforced against those who fail, since as aforesaid, they besmirch the IDF, harm its image and the image of the state….**

(see: CMA 28/04 **First Sergeant B.S. v. Chief Military Prosecutor**, TakSR 2004(3) 115, 121 (2004)).

68. The respondents must ensure that offenders, members of the security forces, are punished. Immunity from trial and punishment has a devastating effect on the rule of law and public trust. The danger is that those who obey the law and act in accordance therewith will reach the conclusion that it is preferable to act like everyone else and violate the law, since in any event the law is not enforced and is upheld only by the very few. It was so 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 skeptical about IHL…**

And further:

> **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).

69. Therefore, respondent 1's avoidance from exercising its power to press charges for such a long period of time, encourages criminal behavior. The Failure to vigorously enforce international humanitarian law provokes further violations of the rules of war. Thus, as a result of respondents' behavior, state agents - security forces personnel acting in the OPT - do not believe that charges will be pressed against them and that they will be severely punished for the illegal acts committed by them. Tolerance and leniency, even if for the sake of appearance, towards illegal acts create a climate of exemption and immunity from punishment (see: CrimA 4872/95 **The State of Israel v. Ayalon**, IsrSC 53(3) 1, 8-9 (1995); A/04/84 **Elbaz v. Chief Military Prosecutor**, TakSR 2005(1) 41, 51 (2005);

Human Rights Watch: Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing, available at www.hrw.org/reports/2005/iopt0605/(2005)).

Conclusion

70. A protected Palestinian resident was killed from illegal shooting, apparently by Israeli soldiers. **Seven years have elapsed, and yet charges have not been pressed against any of the individuals involved in the event.** MIU's investigation has long ended, but respondent 1 has been avoiding, for about two and-a-half years, from exercising its authority and decide whether charges should be pressed. Respondent 2 covers up its omission by inaction of his part. Thus the severe criminal offense is coupled by an extreme and unreasonable delay in the handling of the complaint. A delay which may frustrate the uncovering of the truth and which violates the material rights of the deceased , the petitioner and their family members.

71. Phone inquires undertaken by HaMoked revealed that a draft decision concerning the pressing of charges has been lying in the file for about one and-a-half years. The expectation was that the respondents would quickly put an end to the lingering procrastination. However, for many months nothing was done, despite the fact that the MIU investigation had been conducted for a long time, and since then the file has been "wandering" around between the various military advocate offices and it seems that the handling thereof has been neglected. In view of the conduct of the military investigative and prosecuting authorities in this case, it is difficult to escape the feeling that extraneous considerations were involved in their actions, such as an attempt to conceal flaws in the investigation or to burden and harass a Palestinian victim.

72. This petition is supported by an affidavit which was signed before an attorney in the West Bank and sent to the undersigned by fax, after arrangements were made over the telephone. The honorable court is requested to accept this affidavit and the power of attorney which was also sent by fax, taking into consideration the objective difficulties of a meeting between the petitioners and their legal counsel.

73. In view of all of the above, the honorable court is requested to issue an *order nisi* as requested, and after receiving respondent's response, make it absolute. The honorable court is also requested to order the respondents to pay petitioners' costs and legal fees together with VAT as prescribed by law.

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Alon Margalit, Advocate
Counsel to the Petitioners

Jerusalem, June 15, 2008

[File No. 17263]