At the Supreme Court
Sitting as the High Court of Justice

HCJ 6477/11

In the matter of:

1. HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger
2. Yesh Din – Volunteers for Human Rights

all represented by counsel, Adv. Michael Sfard and/or Shlomi Zachary and/or Avisar Lev and/or Emily Schaeffer and/or Ido Tamari and/or Carmel Pomerantz
of 45 Yehuda Halevy St., 65157; Tel: 03-6206947/8/9; Fax: 03-6206950

v.

1. Military Police Investigation Unit Commander
2. Military Advocate General

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 if they so wish:

A. Why it shall not be established that bringing civil action against the State does not create an obstacle to accessing investigative materials collected by the Military Police Investigation Unit (MIU) and as a result:

   1. Why sections 10(d) and 10(e) of the procedure entitled "Processing External Requests to Access Investigative Materials collected by MIU" (hereinafter: the procedure) should not be revoked; except with respect to criminal legal proceedings concerning an investigated incident regarding which review is sought;

   2. Why they shall not instruct that sections 11 and 12 of the procedure be amended such that the civilian state attorney's office is excluded;

3. Why the civilian state attorney shall not be excluded from the list of agencies involved in examining a request to review investigative materials which appears in section 31 of the procedure;

B. Why the timetables set forth in sections 29-32 of the procedure shall not be transformed into timetables that allow crime victims to exercise their rights effectively by stipulating that a review of MIU investigative materials must be made possible within 30 days of submission of a request for review;

C. Why the procedure shall not set forth that the official authorized to decide on appeals against MIU decisions regarding furnishing investigative materials under the procedure is the military advocate general or another official within the military advocacy authorized by him for this purpose and who is not part of the military prosecution.

I. Introduction

1. This petition concerns a new procedure introduced within the IDF which severely violates the rights of crime victims who have filed a complaint with the MIU to review investigation files after they are closed. Such review is primarily required in order to properly consider submitting an appeal against the decision to close the file that was opened as a result of their complaint and in order to examine whether the investigation of their case was conducted properly.

2. The new procedure regulating the possibility to review MIU investigation files, "Procedure for Processing External Requests to Access Investigative Materials collected by MIU" was formulated in view of an undertaking by the respondents in HCJ 4194/08 **Al-Wardian et al. v. MIU Commander et al.** (hereinafter: **Al-Wardian**). The procedure establishes various provisions for accepting or denying requests to review investigation files. The Petitioners herein argue that the arrangements included in the new procedure unreasonably limit crime victims' right to review investigation files and that some of the procedure's provisions are unreasonable to such an extent as to render the right of access meaningless.

II. The Facts

A. The Parties

3. Petitioner 1, HaMoked: Center for the Defence of the Individual (hereinafter: HaMoked) is an Israeli human rights organization dedicated to promoting human rights in the Occupied Palestinian Territories (OPT). As part of its activities, HaMoked represents Palestinian residents who have fallen victim to violence on the part of security forces. HaMoked files complaints to the MIU and monitors its investigations on behalf of its clients. HaMoked relies on the right of access in order to consider the submission of appeals. In suitable cases, lawyers working for HaMoked file civil claims in Israeli courts on behalf of the Palestinian victims.

4. Petitioner 2, Yesh Din – Volunteers for Human Rights (hereinafter: Yesh Din) is the legal channel for the activity of a human rights organization established for the purpose of supporting, entrenching and protecting the human rights of protected persons in the territories conquered by the State of Israel, by, *inter alia*, promoting and empowering law enforcement proceedings in the West Bank with respect to offenses allegedly committed against Palestinians by Israelis – civilians and members of the security forces alike. As part of its activities, Yesh Din monitors hundreds of complaints filed with the MIU, police stations and precincts in the Judea and Samaria district and the Police Investigations Unit. The organization accompanies the victims throughout the criminal proceedings opened following their complaints.

5. Yesh Din's legal team represents the victims of the crimes whose investigation the organization monitors. This work routinely involves the examination of investigation files which are closed without charges being laid. Where the legal team believes a file was closed without the investigation having been exhausted, or in cases in which no indictment was served despite sufficient evidence for laying charges, Yesh Din appeals the decision to close the case on behalf of the complainants.

6. As of May of this year, crime victims whom the organization accompanies have requested, via Yesh Din's legal team, to review some 60 MIU investigation files that were closed without indictments. Following review of these files, the organization submitted five appeals to the military advocacy. One of the appeals has been rejected and the rest remain pending.

7. Respondent 1 is the commander of the MIU, who is entrusted with investigating incidents of suspected criminal offenses allegedly committed by IDF soldiers.

8. Respondent 2 is the Military Advocate General (hereinafter: MAG) who heads the military prosecution and within this capacity, is entrusted with establishing the procedures by which the MIU operates including, to the best of our knowledge, the issuance of the procedure which is the subject matter of this petition.

B. The practice prior to the procedure

9. Much has been written and said about the IDF's policy with respect to investigating complaints of alleged crimes committed by soldiers in the OPT. This issue has been the focus of public debate, human rights reports and the mandate of a public commission appointed by the Government of Israel (the Turkel Commission for investigating the flotilla incident was authorized to investigate the issue and make recommendations). In addition, many legal actions, including in this Honorable Court, concern issues related to the IDF's policy on investigations.

10. Thus for example, research conducted by Petitioner 2 found deficiencies in all stages of IDF law enforcement units' processing of complaints submitted by Palestinians with respect to alleged violations of their rights by IDF soldiers. The research indicated there were a number of impediments which preclude proper processing of complaints beginning with difficulties in filing the complaint in the first place, giving statements to

the MIU, opening an MIU investigation and ending with the small number of indictments and lenient punishment. See reports by Petitioner 2 on this issue:

a. Investigations of Criminal Offenses by IDF Soldiers against Palestinians and their Property: Figures for 2000-2007, data sheet published by Yesh Din – Volunteers for Human Rights on December 18, 2007.

b. Exceptions, Prosecution of IDF Soldiers during and after the Second Intifada, 2000-2007, comprehensive report published by Yesh Din – Volunteers for Human Rights on December 25, 2008.

c. Investigations of Criminal Offenses by IDF Soldiers against Palestinians and their Property: Unit Index 2006-2007, data sheet published by Yesh Din – Volunteers for Human Rights in April 2008.

d. Investigations of Criminal Offenses by IDF Soldiers against Palestinians and their Property: Indictments 2000-2007, data sheet published by Yesh Din – Volunteers for Human Rights in July 2008.

e. Investigating IDF Offenses against Palestinians, Yesh Din's Monitoring of MAOA Squad, data sheet published by Yesh Din – Volunteers for Human Rights in October 2009.

f. Investigations of Criminal Offenses by IDF Soldiers against Palestinians and their Property: Figures for 2000-2009, data sheet published by Yesh Din – Volunteers for Human Rights on February 4, 2010.

11. This petition addresses only one of the myriad failures with respect to the rights of crime victims reviewed in the above reports: the right of crime victims to review the investigation files opened as a result of their complaints to the MIU and closed without indictments.

12. At the same time, it is worth noting that reviewing files is a necessary condition for uncovering additional deficiencies and their underlying causes and for correcting them.

13. **In the past, review of closed investigation files was made available to crime victims without a written procedure, subject to an examination of the information security department which censored particulars considered confidential details which cannot be disclosed due to state security. Obtaining approval for reviewing the file was a protracted and complicated process, often lasting many months. In some cases, the Respondent refused to allow review without providing reasons.**

14. Over the past three years, Petitioner 2 has requested to review some 70 cases after they were closed by MIU in order to consider the possibility of appealing the decision to close the file. To date, review has been made possible in 45 cases, **with approval in one case taking 544 days (a year and a half!). The average wait time for a response to a request to review a file is about 150 days! (five months)**.

15. The great delay in fulfilling the complainants' right to access investigation materials severely impedes their ability to effectively exercise their right to appeal the decision to close the investigation file which was opened as a result of their complaint. Clearly, a year-and-a-half-long gap decreases the chances of taking required investigative measures which have not yet been taken and the possibility of making findings and interviewing witnesses who have a fresh memory of the incident.

16. Giving complainants access to investigation files is designed to allow them to know what became of the complaint. In some cases, the findings of the investigation provide complainants with details of the violation of their rights, or reveal that the person named in the complaint is innocent. In some cases, the complainant may discover that the investigation was closed without fundamental measures being taken, such as summoning eye-witnesses whom the complainant or another witness mentioned in their statement. In these cases, the appeal filed on the complainant's behalf would constitute a demand to reopen the investigation file and complete the missing investigative measures. Such a demand for completing missing investigative measures naturally becomes less relevant the more time elapses from the time of the incident.

17. An appeal in which the complainant requests an indictment on the grounds that there is sufficient evidence is also severely impaired by the time that elapses before he or she is given access to the investigation file considering that witnesses' memory wanes and that the capacity to hold criminal proceedings long after the incident occurred is inherently diminished.

18. In addition to the issue of delays in fulfilling the right of crime victims to access investigation materials, in the past access to some investigation files was denied entirely either for security reasons or for reasons internal to the proceeding. In addition, the fact that civil proceedings were taking place concomitantly with the criminal investigation was cited as a reason for denying the right to access investigative materials in various cases.

19. The investigation files which were the subject matter of the **Al-Wardian** petition are examples of such cases. These files were opened following complaints by petitioners 6-7 and 9-10 therein. In these files, the crime victims' request to access the investigation files was denied due to the civil proceedings taking place simultaneously with the criminal proceedings with respect to the same incidents.

20. The **Al-Wardian** petition was filed in view of the prolonged delay in allowing crime victims to access closed investigation files and the denial of such access to crime victims who had brought civil action or given notice that they were considering civil action as a result of the alleged harm they suffered at the hands of IDF soldiers.

C. Al-Wardian

21. The petition in HCJ 4194/08 **Al-Wardian et al. v. MIU Commander et al.** (hereinafter: **Al-Wardian**), was filed on behalf of Palestinian residents of the OPT who had filed complaints with the MIU following alleged offenses committed against them by IDF soldiers. These complainants were accompanied by Petitioner 1. They requested to

review the investigative materials collected regarding the incidents which were the subject matter of their complaints after the files had been closed. Their requests were denied or remained unanswered for lengthy periods of time.

22. The Court was requested to provide a remedy that would allow the petitioners to exercise their right to access investigation files opened as a result of their complaints. The requested remedy would also lead to the revocation of the policy whereby a civil claim establishes cause for prohibiting the transfer of MIU investigative materials to crime victims as long as the civil claim regarding the investigated incident is pending or planned. The petitioners also requested the formulation of a procedure for providing MIU investigative materials in closed investigations to complainants and crime victims within a reasonable time from the termination of the investigation, irrespective of the existence of a civil claim or an intent to take civil legal action in future.

23. The **Al-Wardian** judgment, delivered on December 10, 2009, provided the petitioners with this final remedy with respect to instructing the military to formulate a written procedure which would define the various conditions for furnishing investigative materials as stated above, the relevant timetables for this purpose and would address the conditions for furnishing investigative materials in connection to a civil claim (the remedy relating to the petitioners' individual rights to access investigative materials was granted with the State's consent).

    A copy of the **Al-Wardian** judgment is attached hereto as **Exhibit 1**.

24. Following this judgment, the Respondents were required to formulate a procedure for furnishing MIU investigative materials within 3 months. The procedure formulated as a result of the process described above is the subject matter of this petition.

D. Procedure for Processing External Requests to Access Investigative Materials collected by MIU (the procedure)

25. The procedure in the title was sent to counsel for Petitioner 1, which was Petitioner 11 in the aforementioned **Al-Wardian**, in May 2010.

    The Procedure for Processing External Requests to Access Investigative Materials collected by MIU is attached hereto as **Exhibit 2**.

26. As stated, the practice prior to this procedure enabled fulfilling the right of complainants to access investigation files which were opened as a result of their complaint and closed without indictment, provided the complainants had not filed and were not considering filing a civil claim against security forces for the incident which was the subject matter of the complaint. Such requests were granted following extremely protracted periods of time from submission of the request to make a copy of the file. These protracted wait times often effectively prevented the possibility of appealing closures on the grounds that the investigation had not been completed. This reality led to the **Al-Wardian** petition and the decision to instruct the State to formulate a procedure that would regulate these matters in a manner that was reasonable, acceptable and subject to judicial review.

27. Yet, on these very issues, not only has the new procedure perpetuated the unacceptable situation which gave rise to the **Al-Wardian** petition, leaving all its deficiencies intact, but the Respondents included therein blanket provisions which exacerbate the situation. These provisions effectively deny Palestinian crime victims the possibility to exercise their right to access investigation materials shortly after the investigation is terminated.

I. Rejection of requests for investigative materials out of hand

28. With respect to the conditions for divulging investigative materials to crime victims who had filed a 'notice of damage' with the Ministry of Defense or who have filed a civil claim against security forces, the new procedure sets forth that requests by such individuals to review investigative materials shortly after the investigation is terminated will be rejected out of hand (no less!). The procedure states:

> Rejection out of hand of a request to review investigative materials
>
> 10. Prior to reviewing the request on its merits, the HMD commander shall ascertain the following:
>
> …
>
> d. Whether legal action, criminal or civil, is underway in civilian courts.
>
> e. Whether civil action against the Ministry of Defense or another military agency is underway as a result of the incident named in the request or whether a notice of damage has been filed with respect to the incident (the inquiry shall be directed to the claims and insurance branch of the Ministry of Defense).
>
> 11. If the file is the subject matter of any legal proceeding (related to the state attorney's office or the military advocacy), the applicant shall be notified thereof and informed that no particulars contained in the file may be divulged without contacting the state attorney's office or the military advocacy as relevant (by way of contacting counsel in the process of disclosure or by taking legal action). Processing of the request shall terminate thereafter.
>
> …
>
> 31. The procedures required for processing a request involve many different IDF units: the relevant MIU base, IDF archives, MIU headquarters, the information security department, and may also include civilian district attorneys and the Ministry of Defense.

29. The procedure's provisions thus establish that a crime victim's right to access an investigation file is rejected out of hand under the following two conditions: if civil action is pending in a court of law in his matter, or if he has revealed that he was considering taking legal action and had fulfilled an administrative duty imposed upon him and by giving the Ministry of Defense a notice of damage. For this purpose, the state attorneys were brought into the process of approving or rejecting access to files out of hand.

30. It should be noted in this context, that Sec. 5(a)2 of the Civil Wrongs (Liability of the State) Law 5712-1952, Amendment No. 4, 5762-2002, restricts the right of residents of the Area to sue for damages following injuries caused by security forces. Under this Section, an injured party, or someone acting on his behalf, must notify the Ministry of Defense in writing (notice of damage) within 60 days of the incident. In the absence of special reasons for doing so, the courts are precluded from hearing claims against security forces if the claimant did not submit the claim as per the provisions of the Civil Wrongs Regulations (Liability of the State) (written notice of damage) 5763-2003. Therefore, since 2003, according to the aforementioned Law and Regulations, an injured party must provide the Ministry of Defense with the full details of the damages he incurred at a very early stage and prior to the inquiry into the criminal complaint he submits, in order to reserve his right to have his claim heard by a court of law, inasmuch as he decides to file such claim within two years of the date of the event.

31. Note: These provisions contradict the position of the Respondents in **Al-Wardian**. First, given a pending civil claim: in their preliminary response dated July 23, 2008, the Respondents expressly stated (sec. 7) that they were also of the opinion that the rule whereby filing suit "**does not create an obstacle to receiving investigative materials for the purpose of appealing the closure of an investigation**". At the same time, the Respondents clarified: "In our opinion, the need for clarifying a civil claim may sometimes affect the timing and procedure for providing information. However, every claim is individually examined". Thus, the Respondents agree on the rule that investigation materials are to be handed over shortly after the investigation is terminated. In addition to all this, the exception – namely delays in divulging information and changes to the procedure – require a judicial decision based on the merits of the case. Therefore, an administrative provision authorizing the Respondents to reject a request out of hand in an administrative process is unreasonable and rises to the level of *ultra vires*.

    Preliminary response on behalf of the Respondents dated July 23, 2008 is attached hereto as **Exhibit 3**.

32. Note: the dispute in **Al-Wardian** revolved around a Palestinian crime victim's right to receive MIU investigative materials shortly after the termination of an investigation, namely prior to filing a claim in the court. The reduction of the limitation period to two years, as prescribed by Amendment No. 4 to the Law,[1] combined with the extended period of time during which army officials did not hand over investigation materials, whilst giving the applicants empty excuses, as detailed in **Al-Wardian**, are the causes

[1] Sec. 5.a.(3) of the Law.

that led to the balance of interests shifting (as argued by the Respondent there). The respondents have allowed themselves to deny Palestinian crime victims' rights and have relegated them to a clearly inferior position while blatantly ignoring the reduced period of limitations which was inserted into the Law at their request and for their needs (see below). Beyond the substantive infringement of the Petitioners' rights, taking legal action prior to reviewing investigative materials and exhausting the process of appeal coupled with the need to fight for the right to access information in the framework of the claim causes harm to the justice system, wastes the court's time and causes injury to crime victims in addition to precluding monitoring of the investigative process.

33. And now, what has been presented to the court as the exception to the rule to be employed only rarely in specific circumstances and subject to a judicial decision on divulging materials to the plaintiff has been inserted into the procedure as a blanket provision which gives military authorities the power to reject any request out of hand.

34. Secondly, with respect to the 'notice of damage': in **Al-Wardian**, the Respondents duly refrained from making arguments (either orally or in writing) with respect to the notice of damage filed to the Ministry of Defense. The Respondents did not claim that the exception allowing delay or denial of access to investigative materials shortly after the investigation is terminated applies to the notice of damage. However, in the provision, the Respondents empowered themselves to determine that giving a notice of damage is tantamount to taking legal action against the state and must be treated as a civil claim that has been filed with the court (no less!). The Respondents surpassed themselves and inserted into the provision a sweeping preliminary condition requiring the MIU reject any request to review investigative materials inasmuch as the applicant has submitted a notice of damage to the Ministry of Defense with respect to the incident about which he complained to the MIU.

35. Giving notice to the Ministry of Defense does not and was never meant to constitute legal action against the state. "Its purpose is to allow security forces to make inquiries regarding the circumstance of the incident and the reported injuries shortly after they occur, thereby precluding the possibility of raising claims regarding injuries caused by security forces long after the incident, when it is usually no longer possible to clarify the circumstances."[2] The position of security forces with respect to evidence improved once the legislator adopted the official aim of the Law and passed the amendment. Since then, the possibility that injured parties will make false accusations which security officials cannot clarify has decreased.

36. Following Amendment No. 4, as stated, the courts do not hear a claim if a notice of damage has not been filed with respect to the incident within 60 days of its occurrence. This means that for the injured party, not filing such notice within the specified time, is tantamount to relinquishing the legal right to file suit against security forces in future, if, after studying the situation properly, he should decide to do so. The result is that in implementing the procedure, the military is denying all Palestinian residents of the Area the right to access investigative materials shortly after an investigation is terminated.

[2] Proposed Bills 5757, No. 2645, p. 497, explanatory notes on Sec. 6, pp. 501-502.

Using a seemingly innocent provision, the Respondents violate the Petitioners' substantive and vested rights and, *inter alia*, tip the required balance between an injured party and the party that caused the injury – plaintiff and defendant, deny the right of crime victims to fully exercise their rights and prevent essential monitoring of the investigation.

37. All this while the parties that caused the damage are the same parties that formulated the procedure.

II. Timetable for granting access

38. With respect to the timetable for providing investigative materials to crime victims who appeal the decision to close the investigation, the procedure sets forth as follows:

> *Timetables*
>
> 30. To the extent possible, efforts must be made to complete the process of reviewing the application, reaching a decision on providing the materials and providing the materials in practice, after having received responses from all relevant officials, within 75 days. This timetable applies to average MIU files of approximately 100 pages.

39. As demonstrated, the timetable that was established is 75 days between submission of the request and a decision on whether or not to provide the investigative materials in an average file of 100 pages.

40. This generous timetable is inconsistent with the norms accepted in other branches of law which are analogous to the issue at hand. Furthermore, it is not compulsory ("to the extent possible"). It sets no timetable for files that have 200 pages (if the ratio is direct, does one have to wait 150 days for a decision on the right to access investigative materials in a 200-page file?) Yet, this is not all. The procedure gives instructions on measures to be taken when this generous timetable is exceeded:

> 32. The above notwithstanding, if the officials processing the request do not complete their work within 75 days of receiving the request, the head of the monitoring and investigation division will make inquiries regarding the request's processing status. If processing officials have to complete their work within 90 days of receipt of the request, the head of the monitoring and investigation division will notify the applicant of the reason for the delay.

41. **Note well: if the time frame established in the procedure is exceeded, the head of the monitoring and investigation division must make inquiries. However, he is only required to notify the applicants of the delay 15 days after the deadline noted in the section on timetables has passed**!

42. **Moreover, once 90 days have elapsed from submission of the application and the head of the monitoring and investigation division notifies the applicant of the delay**

in providing the materials, the "timetable" becomes open ended. After notification is given, there is no further obligation on the part of the competent military official to meet any schedule and/or notify the applicant.

III. Appealing a decision not to hand over investigative materials

43. Another issue regulated in the procedure is how an applicant may appeal a decision to deny him access to investigation materials:

> 19. An applicant who wishes to appeal an MIU decision with respect to the provision of investigative materials may contact the head of the monitoring and investigation division in writing, listing the grounds for the appeal and explaining how his interest trumps the interest protected by the decision. The monitoring and investigation division will respond to the appeal in a manner which does not compromise any public interest.
>
> 20. In cases where the investigation materials were not furnished due to non-approval by the information security department, the applicant must appeal the decision to the information security department or to the appropriate court. Such an appeal will not be processed and the applicant shall be referred to the information security department."

44. Secs.19 and 20 of the procedure, quoted above, effectively stipulate that an appeal of an administrative decision not to provide investigation materials to the applicant is to be submitted to the same official who made the administrative decision which is the subject matter of the appeal (!). The rules of good governance require separation between the entity making the decision from which appeal is sought and the entity entrusted with reviewing the appeal.

E. Exhaustion of remedies

45. As stated above, the **Al-Wardian** judgment was delivered on December 10, 2009 and gave the state 30 days to formulate a procedure which would define the conditions for handing over investigation materials, the timetable for doing so and the conditions for handing over investigation materials in connection with filing a civil claim.

46. On May 11, 2010, two months past the deadline given by the court, Adv. Ido Bloom, acting on behalf of Petitioner 1 (Petitioner 11 therein), contacted the commander of the MIU, the chief military prosecutor, the head of external relations at the information security department and the legal advisor for the intelligence corps at the intelligence corps headquarters, demanding to receive the procedure.

    A copy of Petitioner 1's communication of May 11, 2010 is attached hereto as **Exhibit 4**.

47. On May 18, 2010, Petitioner 1 received the response of Captain Guy Conforti, Legal Advisor for the MIU enclosing the procedure which is the subject matter of this petition.

A copy of the response of the MIU legal advisor is attached hereto as **Exhibit 5** (the procedure is attached hereto as **Exhibit 2**).

48. !!!On August 9, 2010, Adv. Hava Matras-Irron sent a detailed document to Captain Guy Conforti on behalf of Petitioner 1. The document contained Petitioner 1's full response to the arrangements stipulated in the procedure, which, in Petitioners 1's view, are inconsistent with the Respondents' position in **Al-Wardian** as presented to the Court and do not provide an appropriate solution for the issues raised by the Petitioners in their submission. Among others, Petitioner 1 took issue with the possibility of denying access to investigative materials as a result of fulfillment of the requirement to file a notice of damage and the existence of a pending or future civil claim. Petitioner 1 also took exception to the unreasonable timetables for fulfilling the right to access investigation files and the decision that the head of the monitoring and investigation division would serve as the official entrusted with reviewing appeals against his own decisions.

49. The letter also included a demand for the documents enumerated in sec. 16 of the procedure, which are the chief military prosecutor's guidelines of May 1, 2002 and the information security department guidelines.

A copy of the letter from Adv. Hava Matras-Irron dated August 9, 2010 is attached hereto as **Exhibit 6**.

50. On September 16, 2010, Gilat Fisher, client advocacy coordinator with Petitioner 1, sent another communication to Captain Guy Conforti, Legal Advisor to the MIU, recalling that Petitioner 1's response to the new procedure remained unanswered and that the missing materials requested in the letter dated August 9, 2010 (Exhibit 6 herein) had not been provided.

A copy of the letter from Gilat Fisher dated September 16, 2010 is attached hereto as **Exhibit 7**.

51. On October 7, 2010, Captain Guy Conforti, Legal Advisor to the MIU confirmed receipt of Petitioner 1's previous communication and notified that the issues raised therein were under review and that a response would follow. Captain Guy Conforti enclosed the chief military prosecutor's guidelines of May 1, 2002 and added he was unable to send the information security department guidelines as these were classified and he had no access thereto.

A copy of the response of the legal advisor to the MIU dated October 7, 2010 is attached hereto as **Exhibit 8**.

52. On December 15, 2010, Adv. Hava Matras-Irron sent another communication to Captain Guy Conforti, Legal Advisor to the MIU, on behalf of Petitioner 1, repeating her request for a pertinent response on the issue of the deficiencies in the procedure listed in her detailed response of August 9, 2010 (Exhibit 6 herein).

A copy of the letter from Adv. Hava Matras-Irron dated December 15, 2010 is attached hereto as **Exhibit 9**.

53. At the time of writing and despite the many months that have elapsed since the communication detailing Petitioner 1's grievances with respect to the procedure's arrangements, particularly the preclusion of access to investigation files due to a pending or planned civil claim, the timetables and the issue of the official to whom appeals against decisions denying access should be addressed, no response has been forthcoming.

54. Hence the petition at bar.

III. The Legal Argument

A. **The argument in brief**

55. In brief, the Petitioners argue that the arrangements offered by the procedure on three matters must be rejected on the grounds that they are extremely unreasonable, motivated by extraneous considerations and disproportionately infringe upon fundamental rights. We refer to the following three issues:

    a. The option to deny a request to access investigative materials due to a pending or potential civil claim, including involvement by state attorneys in decisions whether or not to furnish materials;

    b. The lax and optional timetable for reaching a decision whether to grant the right to access investigation files;

    c. The fact that the official to whom appeals against decisions to deny the right to access investigative materials must be directed is the official who makes the original decision.

56. We hereinafter argue that the arrangement contained in secs. 10, 11 and 31 of the procedure, which were presented in the section entitled "The Facts" above and which determine that filing a civil claim and a notice of damage constitute preliminary grounds for rejecting an application to access investigation materials and that the state attorney is one of the possible entities in the chain of officials examining an application for access to investigation materials must be invalidated both due to the unreasonable restriction of the right to access investigative materials and on the grounds that the aforesaid arrangement is based on an extraneous and unacceptable motivation (the desire to deny a complainant access to documents which may assist him in a civil claim).

57. We hereinafter argue that the timetable set forth in sec. 30 of the procedure must be invalidated as it is extremely unreasonable.

58. We hereinafter argue that the arrangements for appealing a decision not to hand over investigative materials to the applicant, set forth in secs. 19 and 20 of the procedure, are unlawful on the grounds that they do not meet the standard for good governance and cause disproportionate injury to the appellant's right to be heard.

B. **The right to access investigation materials:** source and scope

59. The procedure relates to handing over investigative materials to crime victims and other individuals. The right of crime victims to access these materials derives from the rules of

natural justice which provide the basis for *due process* for individuals who complain of a crime committed against them.

60. The administrative authority's duty to ensure the fairness of the procedure originates, as aforesaid, in the rules of natural justice, namely **the right to be heard and the requirement for impartiality**. These rules express the baseline for procedural fairness without which it is difficult to see how a process has the qualities necessary for assuring a result that is not inherently unjust.

61. The rules of natural justice require, therefore, that a decision which impacts individuals be made only after said individuals are given the opportunity to present arguments against it to the deciding official. Case law has gone further to determine that in order for the right to be heard to be substantive and effective (rather than theoretical, formal or symbolic), it must be based on sufficient disclosure of the information used for arriving at the administrative decision. Without such disclosure, the individual is unable to know the reasons for the decision against which he seeks to argue and his right to be heard becomes a dead letter.

62. Being apprised of the information used for arriving at the decision constitutes **the right of access** and as stated, it is an inherent part of **the right to be heard**.

63. **The decision** in the case at hand is the decision to close an investigation file without serving indictments and without conducting further investigative measures. **The right to be heard** is the right of the individual affected by the decision (in our case: the complainant) to file an appeal in which he pleads his case against the decision. **The right of access** is the right to review the case file in order to understand the basis for the decision.

64. Therefore, in the case at hand, denying of the right of access negatively affects the possibility of effective and serious appeal (i.e. an infringement on the right to be heard), and compromises the **fairness** of the process by which the decision to close the investigation file was made.

65. As stated, the right to be heard relies primarily on pleading effectively and cannot be deemed to be fulfilled if pleading is inherently ineffective. **The right of access** is derived from the right to be heard as a means for enabling effective pleading. The underlying concept is that a person cannot plead his case effectively when he does not know the factual and legal basis for the decision. Therefore, in order to fulfill the right to be heard effectively, the individual is entitled to have access to all the information that was available to the authority at the time it made its decision on his matter. This right is personal. It is the right of an individual who was harmed by an administrative decision and it is different from the general right of access to information set forth in the Freedom of Information Act.

66. The importance – and logic – of granting a right to access the material which formed the basis for the decision is self-evident, as President (as was his title then) Barak held in a different context: LCA 291/99 **D.N.D Stone Supplies Jerusalem v. VAT Director**, IsrSC 58(4) 221, p. 232 (emphases added):

> In this state of affairs [when the person seeks to appeal an administrative decision regarding his case], the individual has a right to know the basis for the decision. **Only such knowledge guarantees that his appeal against the authority's decision will be pertinent and focused. Only an appeal that relies on full information can be an effective appeal which fully exercises the appellant's right to be heard and to challenge the information used against him directly. For this reason, the right of access is generally seen as an aspect of the right to be heard.**

67. The general rule in the case law of the Supreme Court is that a person who is involved in a decision made by an administrative authority has a right to review the documents collected by the authority for the purpose of reaching its decision (see for example, CA 6926/93 **Israel Shipyards LTD v. Israel Electric Corp.**, IsrSC 48(3) 749, 796) where Justice Cheshin held:

> This is the doctrine: public documents are open, in principle, to the person involved and should an authority refuse to allow said person access to the documents, either generally or individually, the authority bears the onus of substantiating its refusal.

68. Thus, where an individual has a right to plead against an administrative decision pertaining to him, he may, in general, access the material which formed the foundation for the decision. See the instructive judgment of the Honorable Court – HCJ 10271/02 **Avraham Fried v. Israel Police Force, Jerusalem District et al.** (Pador, (unreported) 06 (17) 374) (hereinafter: **Fried**), which deals specifically with the right to access investigative materials in a file which did not lead to an indictment. Justice Adiel held therein that:

> **The right of access is inextricably linked to the right to be heard** (in view of its importance for exhausting the individual's other procedural rights. **Basic fairness in the relationship between an individual and an authority dictates that this right be strictly upheld** (cf: HCJ 7895/00 **Aloni v. City of Jerusalem Comptroller**, IsrSC 57(4) 577) (*id.*, sec. 6)
>
> (all emphases added unless otherwise stated, M.S.)

69. All this was true prior to the Freedom of Information revolution caused by the Freedom of Information Act 5758-1998. The Act expanded the rule conferring the right of access to public documents such that it no longer applies only to individuals with a personal stake in the information collected by the administrative authority and elevates freedom of information to the status of a fundamental right. The explanatory notes to the Freedom of Information Bill are relevant:

> The right to receive information from a public authority is a fundamental right in a democratic regime. It is a basic prerequisite for

> upholding freedom of speech and fulfilling other political rights as well as other human rights relating to all aspects of life. Greater access to information will assist in promoting social values, including equality, the rule of law and respect for human rights, and will allow better public monitoring of state actions.

(Explanatory notes for the Freedom of Information Bill 5756-1996, Bills 2523, p. 608; Explanatory notes for the Freedom of Information Bill, 5757-1997, Government Bills 2630, p. 397).

70. Thus, having demonstrated that the right of access has gained independent status as one of the cornerstones of due process, it is clear that despite the fact that this is not an absolute right, infringement of it must be given considerable weight in any arrangement relating to the issue. In the case at bar, the three arrangements which are the subject matter of the petition constitute a substantive and unreasonable restriction of this very right.

71. The administrative decision to close an investigation without filing indictments cannot be challenged without reviewing the basis for the decision, i.e. the investigative material in the file that is about to be closed. Exercising a crime victim's right to plead against a decision to discontinue an investigation by way of filing an appeal, without knowing anything about the actions taken in the investigation or their results, is akin to shooting in the dark and certainly does not meet the test of effective pleading.

72. A crime victim's right to access the investigative materials collected as a result of his complaint after a decision was made not to file indictments is a classic example of how the right to be heard is drained of any meaning in the absence of the right of access.

73. In our view, when the arrangements for handing over investigative materials to crime victims were established in the process of formulating the procedure which is the subject matter of the petition, the infringement on the right of crime victims to be heard and their right of access was not duly considered. A balance between infringement of the right to be heard and the right of access and other interests that create a situation in which the rights become meaningless, cannot be considered reasonable or proportionate.

C. <u>Remedy A – the pending or prospective civil claim – extraneous and unacceptable consideration</u>

74. The first remedy sought in this petition concerns secs. 10 (d) and (e), 11, 12 and 13 of the procedure which is the subject matter of the petition. These sections establish the crime victim's right to review investigative materials when a civil claim against security forces regarding the incident has been filed or is being considered. **Note: the person filing or planning to file the civil claim does not necessarily have to be the complainant requesting access to the investigative materials. The fact that a civil claim is underway or may take place is sufficient for denying access.**

75. According to the procedure, a crime victim's right of access, the prerequisite for effectively exercising the right to be heard by way of appealing a decision to discontinue

an investigation without results, is **denied *in limine*** any time any person is considering filing suit against security forces for damages incurred in the incident which is the subject matter of the complaint and certainly where such suit was filed prior to submission of the request for review.

76. The procedure is phrased clearly and unambiguously. It ostensibly leaves no room for discretion: "**If the file is the subject matter of any legal proceeding (related to the state attorney's office or the military advocacy), the applicant shall be notified thereof and informed that no particulars contained in the file may be divulged**..." (see also sec. 10 which stipulates rejection out of hand if there is a civil claim or a notice of damage under the Civil Wrongs (Liability of the State) Law)).

77. **The Petitioners argue that the question of whether or not a civil claim is taking place and the interests of the State as a litigant in a civil case constitute <u>extraneous and unacceptable considerations with respect to access to investigation files by crime victims</u>.** The Petitioners argue that the State is abusing the powers it has in the realm of pubic law in order to gain an advantage as a civil litigant.

78. Indeed, in addition to breaching the rules of natural justice, the procedure is flawed by the insertion of extraneous considerations into an administrative decision. Administrative law requires the authority to exercise the powers vested in it by law only in pursuit of purposes for which said power was granted. This restriction is one of the dictates of the rule of law, which requires an administrative authority to serve the purposes for which it was established.

79. In the case at hand, the power vested in the authority is the power to consider whether to allow a crime victim to access MIU investigative materials in a file opened following his complaint. The purpose of the power stems from the powers of the military police, the agency in charge of enforcing military law on IDF soldiers and commanders.

80. In reviewing a request to access investigative materials, the range of considerations the MIU is permitted to take into account covers considerations of justice, law and order, public order and state security. The MIU is also empowered to make considerations stemming from the general purposes of our legal system, such as the right to privacy.

81. However, the new procedure introduces a new consideration which is to be made while processing a crime victim's request for access, namely, a consideration regarding monetary damages caused to the State as a civil litigant in a civil claim filed with respect to the incident which is the subject matter of the complaint.

82. The matter should be clearly stated: **When a crime victim seeks to access investigative materials for the purpose of considering whether or not to appeal a decision to close the case without filing indictments, considerations of civil litigation regarding the same incident are extraneous and unacceptable.**

83. Appeals against the closure of MIU files, just as appeals in the parallel enforcement apparatus of the Israel Police, have been a routine practice for years. The right of crime victims to appeal the closure of an investigative file without indictments is cited as a preferred interest for granting the right of access in the military prosecutor general's

guidelines of May 1, 2002, the same guidelines the procedure refers to as a source for setting criteria for handing over investigative materials (sec. 16 of the procedure, sec. 3 of the military prosecutor general's guidelines, May 1 2002)

Sec. 3 of the Military Prosecutor General's Guidelines, May 1 2002 is attached hereto as **Exhibit 10**.

84. By inference, Sec. 64 of the Criminal Procedure Law (Incorporated Version) 5742-1982, which addresses the right to appeal the decisions of the Israel Police and the state attorney's office indicates that:

> a. A complainant may appeal a decision not to investigate or not to charge for reasons of lack of public interest in the investigation or trial, lack of sufficient evidence or lack of guilt, as follows:
>
> …

The list provided thereafter enumerates the agencies whose decision may be appealed and the relevant agencies to which the appeals must be submitted.

85. As sovereign, the State operates enforcement agencies, authorizes investigative agencies and runs a judicial system. However, as a litigant in a civil claim, the State is a private entity for all intents and purposes and conflating its interests as such with its powers as a sovereign is a severe breach of the prohibition on extraneous considerations.

86. Note: Sec. 2 the Civil Procedure Law (State as Litigant) 5718-1958 also stipulates: "For the purpose of proceedings, the State is deemed as any person". As any person, it is inconceivable that it should be allowed to use its special powers as the operator of the investigation and enforcement apparatus to protect its interests as a civil litigant – in this case, by denying access to those entitled as a result of their rights within the criminal procedure, or by putting pressure on crime victims not to file civil claims in addition to filing criminal complaints against security forces.

87. Such a situation is akin to the State using its police to investigate a question which is the focus of a civil claim against it or against one of its institutions. For instance: consider a claim against the National Insurance Institute in which the plaintiff claims he suffers from a disability. Is it conceivable that instead of using (and paying) a private investigator to find out whether the plaintiff is truthful, the National Insurance Institute contacted the police and asked it to use its special powers for such an investigation? This is clearly inconceivable. The same holds true for the matter at hand. Using the MIU's discretion on granting access to investigative materials cannot be influenced by considerations of any procedural advantage that may be gained by the State as a private litigant in any way. **This is abuse of the State's powers. These are extraneous and unacceptable considerations and interests which contaminate the decision and make it unacceptable**.

88. **If this were not enough, as noted above, the administration surpasses itself and rejects requests out of hand not only when there is a pending civil claim due to the**

investigated incident, but also when any person (not necessarily the complainant in the criminal file) has given the Ministry of Defense notice of damage under Sec. 5a(2) of the Civil Wrongs (Liability of the State) Law 5712-1952, Amendment No. 4, 5762-2002.

89. **And so the absurdity reaches new heights: The complainant is denied the right of access and with it, the right to be heard effectively, due to a concern that in future, he or someone else may (or may not) sue the State over the investigated incident. This is clearly unreasonable. It is an insertion of an extraneous consideration into the authority's decision making process.**

The procedural arrangement vs. the State's position in **Al-Wardian**

90. Secs. 10 (d) and (e), 11, 12, 13 and 31 of the procedure, which is the subject matter of this petition, stipulate that filing a claim against the state, or submitting a notice of damage preclude access to investigative materials. This contradicts the State's position in **Al-Wardian**.

91. As recalled, in **Al-Wardian**, Petitioner 1, along with other petitioners, challenged the practice in force prior to the procedure. In the judgment, the High Court of Justice instructed the Respondents to formulate a procedure for accessing investigative materials.

92. The State's position in **Al-Wardian** entirely contradicts the arrangement in the procedure:

> The Respondents' position is that filing a claim against the State does not create an obstacle to receiving investigative materials for the purpose of appealing the closure of an investigation file".
> See **Exhibit 3** (sec. 23, herein)

93. It follows that the Respondents, who formulated the procedure following the Court's instructions and the former practice, used the opportunity that presented itself to restrict the right of access and help the State in civil proceedings in sharp contrast to the purpose for which they had been instructed to formulate the procedure in the first place and in contrast to the State's position with respect to the appropriate right of access of MIU cases.

The State Attorney's parallel procedure with respect to review of police investigative materials

94. Sec. 14.8 of the state attorney guidelines entitled "Requests by Various Parties to Access Information from Investigation Files" is parallel to the procedure which is the subject matter of the petition. It regulates the issue of access to police investigative materials.

95. The procedure explicitly states that the crime victim's interest in the investigative materials for the purpose of a civil claim with respect to the investigated incident is legitimate and central. The procedure **does not mention the question of whether there is a pending civil claim against the state due to the incident among the considerations which are relevant to the issue of access**.

96. Sec. 14.8 has recently undergone amendments which are the subject matter of a different petition filed by Petitioner 1 (HCJ 5090/11 **Yesh Din – Volunteers for Human Rights et al. v. State Attorney**). However, on the issue at hand, neither the current nor previous (more liberal) version of the guidelines contain any reference to the existence of a civil claim against the state as a consideration for denying access.

A copy of sec. 14.8 of the state attorney's guidelines on "Requests by Various Parties to Access Information from Investigation Files" is attached hereto as **Exhibit 11**.

97. Moreover, the previous, 2002, version of the state attorney's guidelines regarding crime victims' right to access police investigation files which have been closed stated the position that access **for the purpose of filing a civil claim** is legitimate and constitutes a consideration in favor of granting the right of access:

> Such is the case when the police decide to shelve an investigation file and a complainant wishes to appeal this decision, or petition the HCJ against the decision to close, and requests access to the material for this purpose. In such a case, **access is to be granted unless there is a substantive interest, of the type listed below, which precludes access.** However, if a complainant wishes to access the material for the purpose of filing a civil claim against the suspect, he does have a legitimate interest in accessing the material, but this interest is not as strong as in the former case."
>
> (emphases in original, M.S.)

98. **We emphasize: this petition is not directed at the right of crime victims to access investigative materials for the purpose of using them in a civil case. The Petitioners represent complainants who wish to exhaust criminal proceedings with respect to crimes committed against them**.

99. Yet, the state attorney's guidelines detailed above indicate that not only does the existence of a parallel civil claim not constitute a consideration for withholding investigation materials, but that in some cases it alone constitutes sufficient interest for handing over materials.

<u>The Respondents' solution: a motion for disclosure in a civil case</u>

100. The procedure proposes an alternative solution for the infringement of the rights of crime victims who have filed a civil claim or notice of damage. The proposed solution is disclosure within the framework of the civil proceedings in court.

101. Our view is that this proposal does not provide a solution for the rejection of requests for access out of hand; first, practically, the disproportionate delay in exercising the right of access, and as a result the right to be heard, renders these rights meaningless; second, substantively, the right of access is distinct from procedural rights in a civil trial and the two must not be confused; third, the complainant seeking access is not always the

plaintiff in the civil proceeding, and yet, under the proposed solution, he would still be denied the right of access.

102. More particularly: The time that elapses from the moment a civil claim is filed until the the procedural right to disclosure fulfilled is often extremely protracted. The reason for this is the balance between the interests of the parties to a civil proceeding. Many civil claims are settled prior to disclosure and disclosure itself is often a protracted process. In this situation, the proposed solution of referring the complainant to civil disclosure proceedings will invariably frustrate the possibility of accessing investigative materials within a time frame that enables submitting an effective appeal and demanding the investigation be reopened and indictments be filed if necessary.

103. In addition to the prolonged delay that would be caused to access requests by litigants in civil proceedings, as recalled, **some of the complainants whose requests are rejected out of hand have not filed civil claims at all but only notices of damage which are designed to reserve their right to file a civil claim in future. Suspending these individuals' ability to plead their case pending submission of a future civil claim, in the context of which disclosure may occur much later if at all, means the negation of the possibility of pleading against discontinuation of the investigation**. It is impossible to anticipate when the victims might be able to file the civil claim, how long before the file is set down for trial, how long preliminary arguments will be heard etc.

104. As stated, a third group of complainants who would be denied the right of access under the procedure are those who have not filed a civil claim and do not intend to do so but are nevertheless denied access because **another party** has filed or intends to file suit with respect to the incident about which they complained.

105. In light of the foregoing, it is clear that suspending the right of access and the right to plead against the closure of an investigation without results until all civil proceedings, pending or potential, have been completed, effectively negates crime victims' right of access and as a result their right to be heard.

106. To conclude on this point: the right to access a file for the purpose of considering submission of an appeal is a crime victim's substantive right within the framework of criminal proceedings. Its purpose, scope and time frame derive from the criminal proceeding and are designed to improve it. Disclosure, in the meaning of the term in civil proceedings, is merely a procedural right within in the civil proceeding and its scope, time table and limitations are derived thereof. Sending crime victims to exercise their rights via a complicated and indirect route designed for different purposes is a veritable legal obstruction.

<u>Civil proceedings – an extraneous consideration, conclusion</u>

107. As noted, the purpose of the Respondents' power to allow or prohibit access to investigation materials to crime victims after the investigation file that was opened as a result of their complaint was closed without indictment does not include the State's interest in gaining an advantage over its adversaries in civil proceedings. We have

demonstrated that the alternative of exercising the right of access via disclosure in civil proceedings is neither substantively nor practically reasonable.

108. An administrative authority's duty to use reasonable discretion in any decision requires that certain considerations be made and others be left well out of range. In our view, whether or not a civil claim or notice of damage against security forces due to the incident which is the subject matter of the complaint has been filed has no place among the relevant considerations which are to be taken into account within the scope of the discretion granted to investigative agencies regarding the right to access investigation files. Such a consideration is in effect an attempt to protect the State's interest as a party to civil proceedings by violating the rights of crime victims in the criminal proceedings.

D. Remedy B – the timetable for reaching a decision on a request for access set forth in the procedure is extremely unreasonable

109. The timetable set forth in the new procedure as noted in secs. 27-31 herein effectively allows an indefinite delay in responding to a request for access.

110. The procedure does indeed stipulate a desirable time frame of 75 days for responding to a request to access investigative materials, but even this deadline, which exceeds the norm in civilian institutions (see below), is flexible and the procedure allows for deviations.

111. **The Petitioners argue that 75 days to decide whether or not to grant access is an unreasonably long period of time. The Petitioners maintain that this initial deadline would prevent the possibility of effective appeal in many cases**.

112. To compare, the Petitioners refer to Sec. 65 of the Criminal Procedure Law (Incorporated Version) 5742-1982, which establishes the right to appeal a police or state attorney decision to close an investigation file. This section stipulates a 30-day period for submitting an appeal, thereby mandating access within a few days so as not to prevent the right of appeal.

113. Try as we might, we were unable to find any reason for the gap between the timetable set by the legislator for filing an appeal (and as a result for granting access to investigative materials) in the civilian justice system and the long and flexible time frame the procedure grants the military. We note that the issue of classified material is not exclusive to military investigations and police investigations commonly include classified information and documents, which the police or state attorney refuse to divulge. Moreover, not all MIU files include classified material or information. Nevertheless the procedure makes no distinction between files that contain classified materials and files that do not.

114. **The Petitioners argue that the ability to extend the deadline for reaching a decision whether to grant access is extremely unreasonable and will, in effect, result in denying an effective right to be heard**.

115. As noted, the procedure establishes that if the 75-day mark is exceeded, the delay would be examined for 15 full days by the head of the monitoring and investigation division and only then will an explanation of the delay be sent to the applicant in writing. Once 90

days elapse from submission of the request, there is no additional obligation or restriction with respect to the time it takes until a pertinent response to the request for access is provided. In fact, the procedure contains no limitation on the further extension granted from that moment on for reviewing the request, so that, according to the language of the procedure, **the delay may continue indefinitely**.

116. How is the timetable related to the denial of the right of access? As noted, access is required for an effective hearing. In cases where access to investigation files is delayed for months and even years and when there is effectively no time limit for processing requests for access, in all likelihood, by the time a crime victim is finally given access to the closed file, a demand to reopen and complete the investigation would be entirely pointless due to the prolonged period of time that had elapsed (or the possibility of trying the suspects would be compromised due to the passage of time).

117. In the situation described above, in which the right of access, and in our case, the right to appeal a decision to discontinue an investigation without indictments, is denied as a result of setting timetables that may span many months, there is a real danger that the timetable would render the right of access and with it the right to be heard meaningless, thereby breaching the principles of natural justice.

118. The possibility of delaying review for many months, as stipulated in the procedure, is particularly problematic considering the long and exhausting process many MIU files undergo prior to being closed. According to the IDF's policy, investigations are launched only after the results of a long internal inquest (which may take over a year). At the end of the inquest, the military prosecutor is presented with recommendations. He reviews the conclusions of the inquest and decides whether or not to order an MIU investigation.

119. The following are some figures regarding files in which "clarification" was required prior to deciding on an MIU investigation: On January 30, 2011, Petitioner 1, Yesh Din, was monitoring 15 files which were undergoing "clarification" prior to the military advocacy's decision **whether or not to launch a criminal investigation**. Notice of the incidents which were the subject matter of these files was given an average of 566 days before January 30, 2011, that is, **nearly a year and seven months** before. Eight of these files were awaiting decision for over 18 months. In three of the cases, between 12 and 18 months had passed between notice and the decision. In three others, the delay was under a year.

120. In light of the great delay in clarifying files, it is clear that any further unlimited delay of a crime victim's request for access would further decrease the chances of an effective appeal.

121. Therefore, the Petitioners argue that the timeframe set in the procedure which is the subject matter of the petition is extremely unreasonable and must by struck down. The considerable weight given to the institutional interest of allowing each and every agency listed in sec. 31 of the procedure to review the request for access at its leisure (the relevant MIU base, IDF archives, MIU headquarters, the information security department, and perhaps also civilian district attorneys and the Ministry of Defense) on the one hand and the negligible amount of weight given to the right of access and the

right to be heard creates an inappropriate and disproportionate balance between the relevant interests.

122. The Petitioners argue that the drafters of the procedure did not give appropriate weight to the competing interests, and as Honorable Justice (as his title was at the time) Aharon Barak held in HCJ 389/90 **Yellow Pages Inc. v. Israel Broadcasting Authority**, IsrSC 35(1) 421 (1980) "*the principle of proportionality leads to the rejection of administrative discretion which does not give appropriate weight to the different interests the administrative authority must consider in making its decision*". It follows that the provisions relating to the timetable for allowing review must be revoked.

123. It is our understanding that the drafters of the procedure gave little if any weight to the right of access and the right to be heard. It may be argued that **in effect, these considerations were completely ignored** and therefore the provisions regarding the timetable for review are unacceptable. See on this issue, HCJ 256/88 **Medinvest, Herzliya Medical Center v. Ministry of Health ED**, IsrSC 44(1) 19 (1989), HCJ 5445/93 **City of Ramla v. Ministry of Interior**, IsrSC 50(1) 397 (1994); HCJFH 3299/93 **Vichslebaum v. Minister of Defense**, IsrSC 49(2) 195 (1995).

E. <u>Remedy C – submitting appeals to the official whose decision is being appealed creates prejudice and conflict of interests</u>

124. Secs. 19 and 20 of the procedure, which is the subject matter of the petition, stipulates that <u>an appeal against a decision not to allow review of investigative materials is to be submitted to the head of the monitoring and investigation division at the MIU – the very same official who decided not to deny access and whose decision is being appealed</u>!

125. The procedure further stipulates that inasmuch as the cause for denying access is refusal by the information security department, the appeal is to be submitted to and reviewed by said department. Thus, in this case also, the official who makes the decision is the same as the official reviewing the appeal.

126. Let us recall basic concepts – good governance demands that appeals against administrative decisions are heard by an official different from and preferably superior to the one making the original decision.

127. The administrative official who made the original decision has already exercised his discretion on the matter and formed his position. Unsurprisingly, directing appeals to the very same official creates a sense that there is prejudice and that the "game is fixed" as it cannot be expected that the deciding official would alter his decision rather than defend it, except in rare cases.

128. The basic requirement that an independent body review the appeal is mandated by the rules of natural justice: when the deciding official monitors and reviews his own decision, there is real concern that the review will be marked by prejudice since preconceptions are a given.

129. Therefore, the Petitioners argue that the minimum required in order for the procedure to meet the standards of good governance is to repeal secs. 19 and 20 thereof, which

establish that a decision not to hand over investigative materials must be appealed to either the MIU or the information security department, depending on who issued the refusal, and stipulating instead that a separate and independent agency review appeals of refusals to provide investigative materials to individuals who request access.

IV. Conclusion

130. In view of all the above arguments, the Honorable Court is hereby requested to accept the petition by way of issuing an order nisi instructing the Respondents as requested and rendering it absolute following a hearing.

131. The Honorable Court is also required to order the Respondent to pay Petitioner's expenses and legal fees including VAT and interest as required by law.

7 September, 2011

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Michael Sfard Adv.
Counsel to the Petitioners