

Today, the \_\_\_\_\_ two thousand and eighteen,

at the request of:

**Mr ISMAIL ZIADA**, born on 7 March 1975, residing in **XXX**, for the purpose of these proceedings choosing as his address for service Linnaeusstraat 2A in Amsterdam (1092 CK), which is the office address of Liesbeth Zegveld, LL.M. and Lisa-Marie Komp, LL.M., who are appointed as attorneys in this matter,

I summoned:

1. **Mr BENJAMIN GANTZ**, born on 9 June 1959, residing in **XXX**, Israel;
2. **Mr AMIR ESHEL**, born on 4 April 1959, residing in **XXX**, Israel

serving my writ at these latter addresses and leaving a copy of this writ with:

to appear on [...], not in person but represented by an attorney, at the hearing of the District Court of The Hague in the law courts at Prins Clauslaan 60;

WITH THE NOTIFICATION THAT:

a. in the event that a defendant fails to appoint an attorney or fails to pay the court fee to be specified below in time, and the prescribed terms and formalities have been observed, the judge will declare this defendant to be in default through non-appearance and allow the claim described below, unless the judge is of the opinion that this claim is unlawful or unfounded;

b. in the event that at least one of the defendants appears in the proceedings and has paid the court fee in time, a single judgment will be rendered for all parties that will be deemed to be a judgment in a defended action;

c. upon appearing in the proceedings, each defendant will be charged a court fee, to be paid within four weeks, calculated from the time of appearing;

d. the amounts of the court fees are specified in the most recent schedule to the Act on Court Fees in Civil Matters (*Wet griffierechten burgerlijke zaken*), which can *inter alia* be found on the website: [www.kbvq.nl/griffierechtentabel](http://www.kbvq.nl/griffierechtentabel)

e. for a person of limited means, a court fee for persons of limited means as established by or pursuant to the law will be levied, if at the time when the court fee is charged he has submitted:

1° a copy of the decision to grant legal aid, referred to in Article 29 of the Legal Aid Act (*Wet op de rechtsbijstand*), or, if this is not possible as a result of circumstances that cannot reasonably be attributed to him, a copy of the application referred to in Article 24(2) of the Legal Aid Act, or

2° a declaration from the board of the Legal Aid Council referred to in Article 7(3)(e) of the Legal Aid Act, showing that his income does not exceed the income amounts referred to in the order in council issued by virtue of Article 35(2) of that act;

f. based on Article 15 of the Act on Court Fees in Civil Matters, a collective fee will only be charged once for defendants who appear represented by the same attorney and file identical statements or conduct identical defences;

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## **1 INTRODUCTION**

1. The plaintiff, Mr Ismail Ziada, is originally from the Palestinian Territories. His family lives in Gaza. He lost a large part of his family when the family's residential building was bombed by Israel on 20 July 2014. In this bombing, the house was completely destroyed and seven of the eight people present in the house were killed. The bombing was carried out in breach of international humanitarian law and fundamental human rights; for this reason, it constitutes an unlawful act towards Ismail Ziada.
2. Bombing the Ziada family residence occurred during Israel's armed attack on Gaza in 2014. The unlawful killing of the members of the Ziada family and the destruction of the house was no exception during this Israeli military operation. One of the objectives of the Israeli army's policy was to bomb civilian residential buildings. This policy is in breach of international humanitarian law.
3. The defendants, Benjamin Gantz and Amin Eshel, are the Chief of General Staff and Air Force Chief, respectively, in the Israeli army. They (in part) designed the policy of bombing residential buildings. In addition, as commanders of the air force and of the Israeli forces, they are fully responsible for the decision to bomb the Ziada family residence in breach of the applicable rules of international humanitarian law. On this account, they are liable for the damage that Ismail Ziada suffered.
4. Below, the plaintiff will first briefly introduce the parties. Following this, the plaintiff will outline the context of the Israeli-Palestinian conflict in which the attack of the Ziada family residence occurred. In so doing, the plaintiff will outline the situation in which the people in the Gaza Strip find themselves ensnared, in fact, in an area that is fully controlled by Israel. The plaintiff further outlines the armed attacks by Israel on the Gaza Strip in the last years, as well as the military mission in the scope of which the plaintiff's family residence was attacked. This will demonstrate that unlawful bombings of residential buildings by Israel are the rule rather than the exception and that as commanders, the defendants determine this policy. In Chapter 4, the plaintiff

will describe the facts underlying his claim, i.e. the attack on his family residence. Subsequently, the plaintiff will demonstrate that as a Palestinian, he does not have access to the court in Israel or in the Palestinian Territories, based on which the Dutch court has jurisdiction. In Chapter 6, the plaintiff will substantiate that Palestinian law applies to his claim and set out the relevant provisions of Palestinian law. Following this, based on fundamental principles of international humanitarian law, the plaintiff will explain why the attack on the Ziada family residence was unlawful. In the next chapters, the plaintiff will argue that the unlawful conduct can be attributed to the defendants, will negate the defences that they raised and outline the damage that he suffered. The plaintiff concludes his argument with the offer of proof and his claim.

## **2 PARTIES**

### **2.1 The plaintiff**

5. Ismail Ziada was born in the occupied Palestinian territories. In 1998, he met the Dutch Angelique Eijpe, married her and has lived in The Hague since [year]. They have three children.
6. In a bombing by the Israeli army in Gaza in July 2014, Ismail Ziada lost six family members.

### **2.2 The defendants**

7. Defendant 1, Lieutenant General Benjamin Gantz, was the Chief of General Staff of the Israeli army from February 2011 to February 2015.<sup>1</sup> As Chief of General Staff, he commanded the Israeli army and reported directly to the Minister of Defence, the

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<sup>1</sup> See the printout of the website of the Israeli Ministry of Foreign Affairs (**Exhibit X**).



Prime Minister and the Cabinet.<sup>2</sup> Today, Benjamin Gantz is a member of the Board of Directors and an advisor of various enterprises.<sup>3</sup>

8. Defendant 2, Major General Amin Eshel, was Air Force Chief of the Israeli army from 2012 to August 2017. In this position, he commanded the Israeli air force.<sup>4</sup>

### 3 BACKGROUND

#### 3.1 Introduction

9. Before discussing the specific facts of the bombing of the Ziada family residence, the plaintiff will offer a fairly extensive explanation of the continuous conflict between Israel and the Palestinian Territories and Israel's armed attack on the Gaza Strip in 2014. This is necessary to provide insight into the systematic manner in which Israel infringes the fundamental rights of the Palestinian population and the systematic manner in which residential buildings in Gaza were bombed during Operation Protective Edge in 2014, in breach of applicable law. Given that the defendants are responsible for the strategy that was followed in this armed attack, they are liable for the damage the attack caused.

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<sup>2</sup> See [https://en.wikipedia.org/wiki/Chief\\_of\\_General\\_Staff\\_\(Israel\)](https://en.wikipedia.org/wiki/Chief_of_General_Staff_(Israel)), seen on 1 February 2018.

<sup>3</sup> See <https://www.bloomberg.com/research/stocks/private/person.asp?personId=342629995&privcapId=269024>, seen on 1 February 2018.

<sup>4</sup> See J.A. Gross, After five years of Air Force Chief, Amir Eshel takes off, *The Times of Israel*, 15 August 2017, available at <https://www.timesofisrael.com/after-5-years-as-air-force-chief-amir-eshel-takes-off/>, seen on 1 February 2018.

## 3.2 The Gaza Strip

### 3.2.1 The geographical situation

10. The Gaza Strip is a small area, with approximately 40 km of coastline. The border with Israel in the north and east is 59 km long. The border with Egypt in the south is approximately 13 km long.<sup>5</sup> In total, the Gaza Strip measures some 365 km<sup>2</sup>. In 2014, an estimated 1.76 million people lived in this area, including 1.24 million refugees.<sup>6</sup> This makes the Gaza Strip one of the most densely populated areas on earth.<sup>7</sup>
11. The plaintiff submits a map indicating Israel and the occupied Palestinian Territories, in particular the Gaza Strip and the West Bank.<sup>8</sup> The plaintiff also submits a detailed map of the Gaza Strip, produced by the *United Nations Office for the Coordination of Humanitarian Affairs* (OCHA) in September 2014.<sup>9</sup> This map shows that the Gaza Strip is completely enclosed by walls and barbed-wire fences. Israel also blocks the sea, from six nautical miles off the coast. In addition, Israel controls the Gaza Strip's airspace. In the Gaza Strip, Israel controls all critical infrastructure services, such as telecommunication, water, electricity, sewerage systems.<sup>10</sup>
12. The OCHA map shows the border crossings from the Gaza Strip into Israel and Egypt as these existed in September 2014. At that time, there were only three border crossings in use. Rafah, the border crossing into Egypt, was open each day for 6 hours for emergencies and to let humanitarian supplies into Gaza. Karem Shalom, the border crossing into Israel, was open five days a week, but only for goods that had been licensed. Finally, there was the Erez border crossing in the north of Gaza, which was

<sup>5</sup> CIA, The World Fact Book: Gaza Strip, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>>, seen on 11 December 2017.

<sup>6</sup> OCHA, Map of Gaza, *access and movement*, September 2014, **Exhibit X**.

<sup>7</sup> See BBC, Key Maps: Gaza Strip population, available at <[http://news.bbc.co.uk/2/shared/spl/hi/middle\\_east/03/v3\\_israel\\_palestinians/maps/html/population\\_settlement\\_s.stm](http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/v3_israel_palestinians/maps/html/population_settlement_s.stm)>, seen on 11 December 2017.

<sup>8</sup> Map of Israel and the occupied Palestinian Territories, **Exhibit X**.

<sup>9</sup> OCHA, Map of Gaza, *access and movement*, September 2014, **Exhibit X**.

<sup>10</sup> Norwegian Refugee Council, *Resource Guide: Israel's Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 2.

open six days a week, but could only be used by a limited number of Palestinians carrying the requisite permit.

13. The same map from August 2017 demonstrates that the situation has further deteriorated since 2014.<sup>11</sup> The border crossing into Egypt, Rafah, is now closed and is only opened by way of exception.
14. In fact, the Palestinian population was and is penned up in the Gaza Strip. Only a very limited number of people can use the border crossings. The rest of the population is trapped in the Gaza Strip. Given that Israel maintains a tight grip on the Gaza Strip and the critical infrastructure services, the Palestinian population is at the mercy of Israel.

### 3.2.2 *The political situation*

15. The West Bank is ruled by Fatah, while Hamas has been the governing political party in the Gaza Strip since 2006. There has been a decade-long conflict between the two parties, which has only recently been settled.
16. Hamas is a well-developed organization that is sub-divided into several branches that are involved in social services, education, finance, media, religion and defence.<sup>12</sup> The organization is led by its political branch, which is headed by the Consultative Council and its Political Bureau.<sup>13</sup> Since 2006, Hamas has, in fact, been the government in the Gaza Strip; it rules Gaza.
17. Hamas also has a military branch, which is comprised of the Izzedin al-Qassam brigades. For reasons of security, the military branch is strictly separated from all other bodies within Hamas.<sup>14</sup> Even though the military branch falls under the leadership of the two political bodies mentioned above, its members are largely kept

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<sup>11</sup> OCHA, Map of Gaza, *access and movement*, August 2017, **Exhibit X**.

<sup>12</sup> Khaled Hroub, *Hamas: A beginner's guide*, Pluto Press – London (2006), p. 118.

<sup>13</sup> Khaled Hroub, *Hamas: A beginner's guide*, Pluto Press – London (2006), p. 121.

<sup>14</sup> Khaled Hroub, *Hamas: A beginner's guide*, Pluto Press – London (2006), p. 118.

in the dark regarding the specific strategies of the Izzedin al-Qassam brigade, again for reasons of security.<sup>15</sup>

18. Even though Israel regards Hamas as a terrorist organization, it is, in fact, the government of Gaza and it is only the military branch of Hamas that uses violence. The other Hamas bodies provide social and cultural facilities for the Palestinian population.

### 3.3 Israel is an occupying power in the Palestinian Territories

19. In 2004, the International Court of Justice (ICJ) ruled that Israel qualifies as an occupying power of the Palestinian Territories.<sup>16</sup> In addition, the ICJ determined that the Fourth Geneva Convention of 1949, which pertains to occupied territories, is applicable to the Palestinian Territories.<sup>17</sup>
20. In 2005, Israel withdrew its troops from the Gaza Strip (referred to as the Israeli ‘disengagement’).<sup>18</sup> Since then, the country has taken the position that it cannot be qualified as an occupying power in the Gaza Strip (any longer).
21. The UN and the doctrine do not share this point of view by Israel. Even after the ‘disengagement’ from the Gaza Strip in 2005, Israel is regarded as the occupying power of the Gaza Strip, because the country exercises complete control over the Gaza Strip’s sea and land borders, as well as over the airspace, telecommunication, water,

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<sup>15</sup> Khaled Hroub, *Hamas: A beginner’s guide*, Pluto Press – London (2006), p. 121.

<sup>16</sup> See IGH, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, available at <<http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>>, seen on 11 December 2017, par. 78.

<sup>17</sup> IGH, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, par. 101.

<sup>18</sup> UNGA, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4*, 24 June 2015, available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>, seen on 18 December 2017, par. 26.

electricity and sewerage systems within the Gaza Strip.<sup>19</sup> Both before and after 2005, the UN Security Council<sup>20</sup> and General Assembly<sup>21</sup> speak of an unlawful occupation by Israel of the Palestinian Territories, including the Gaza Strip, and condemned this occupation.

22. In 2014, the prosecutor of the International Criminal Court also concluded that Israel should be designated as an occupying power in the Gaza Strip, despite the fact that Israel denies this. The prosecutor noted that as a result, international humanitarian law, including the provisions that pertain to occupation, apply to the conflict between Israel and Hamas:

“Les hostilités entre Israël et le Hamas à l’époque des faits ne peuvent être fondamentalement qualifiées de conflit armé international puisqu’un tel conflit oppose au moins deux États. Toutefois, comme le confirme la jurisprudence de la Cour, il est précisé dans les Éléments des crimes que le droit des conflits armés internationaux s’applique également à un contexte d’occupation militaire. Bien que les autorités israéliennes affirment ne plus occuper Gaza, le point de vue prédominant au sein de la communauté internationale, au vu de l’ampleur et de l’étendue du contrôle qu’a conservé Israël sur le territoire de Gaza à l’issue de son désengagement en 2005, veut que ce pays demeure une puissance occupante, au regard du droit international. Suivant cette logique et au vu de la poursuite de l’occupation

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<sup>19</sup> Norwegian Refugee Council, *Resource Guide: Israel’s Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 2 (**Exhibit X**).

<sup>20</sup> See, for example, the following resolutions of the UN Security Council: Resolution 242 of 22 November 1967; Resolution 446 of 22 March 1979; Resolution 452 of 20 July 1979; Resolution 465 of 1 March 1980; and Resolution 2334 of 23 December 2016, S/RES/2334, all available at <http://www.un.org/en/sc/documents/resolutions/>, seen on 16 August 2017.

<sup>21</sup> See, for example, the following resolutions of the UN General Assembly: Resolution 55/133 of 28 February 2001; Resolution 58/99 of 17 December 2003; Resolution 62/108 of 10 January 2008; Resolution 65/105 of 20 January 2011; and Resolution 66/225 of 29 March 2012, all available at <http://www.un.org/en/sections/documents/general-assembly-resolutions/>, seen on 16 August 2017.

militaire exercée par Israël, le Bureau a estimé que la situation à Gaza pouvait être analysée dans le cadre d'un conflit armé international."<sup>22</sup>

23. Finally, in the doctrine, it is also predominantly felt that after 2005, as well, Israel occupies the Gaza Strip and that the obligations of an occupying power under international humanitarian law fall on Israel.<sup>23</sup>

### 3.4 The Israeli – Palestinian conflict

24. The Israeli-Palestinian conflict is one of the conflicts that dominate world history. Since the establishment of the State of Israel in 1948, the Palestinian population has been displaced and frequently falls victim to large-scale human rights violations. Since the establishment of the Israeli State and the many ensuing wars, the Palestinian population fled the country in large numbers. Within Palestine's historical borders, Palestinians primarily live in the Gaza Strip and on the West Bank. In these territories, the possibilities for supporting themselves are so poor and the human rights violations

<sup>22</sup> ISH, Office of the Prosecutor, 'Article 53 (1) Report on the Situation on Registered Vessels of Comoros, Greece, and Cambodia' 6 November 2014, available at < <https://www.icc-cpi.int/Pages/item.aspx?name=a-53-report-comoros-2014>>, seen on 11 December 2017, par. 16. In this report, the Office of the Prosecutor gives the reasons for the decision not to order a further investigation in connection with the interception by Israel of the "Flotilla" of six civilian ships, which tried to break the naval blockade on 31 May 2010. Emphasis added by attorneys.

<sup>23</sup> See, for example, J. Reynolds and S. Darcy, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', 15 *Journal of Conflict and Security Law* 2 (2010), p. 243. They conclude as follows: "The abuse of international legal rules, as well as the acute failure of both Israel and the Palestinian factions to fulfil their obligations to investigate and prosecute alleged crimes perpetrated by their forces, are indicative of a legal culture of evasion and manipulation, rather than compliance. Attempts to situate the Gaza Strip in a legal limbo, no longer occupied but not yet sovereign, are a further manifestation of such evasion. While events in Gaza have departed from traditional conceptions of warfare and occupation, and international humanitarian law's own limitations have been exposed by the many grey areas that arise in its application therein, sufficient clarity is retained when it comes to the effective control exercised by Israel over the Gaza Strip in order to categorize the territory as occupied. Embedded in the law is an assumption that occupation is a temporary situation which all parties to a conflict are to work in good faith towards remedying, as part of an agreed upon and sustainable resolution of the conflict. Otherwise and until that occurs, the Gaza Strip will remain occupied territory for the purposes of international humanitarian law." (Emphasis added by attorneys.) See also Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press (2009), p. 15. S. Weill and V. Azarova, 'The 2014 Gaza War: reflections on *jus ad bellum*, *jus in bello*, and accountability' in A. Bellal (ed) *The War Report: Armed Conflict in 2014*, Oxford University Press (2015), p. 369.

that the Palestinian population is suffering are of such a nature that numerous UN agencies and (investigation) institutions have been established to provide the displaced Palestinian population the most basic needs, to supervise the situation and to report on the situation.<sup>24</sup>

25. In international politics, a two-state solution based on the borders recorded after the Six-Day War in 1967 is still regarded as the most realistic solution to the conflict.<sup>25</sup> For this reason, for years, the international community has been fiercely criticizing the occupation of the Palestinian Territories by Israel and the settlement policy pursued in those territories.<sup>26</sup> Despite this, in the past years, Israel has frequently launched armed attacks on the Palestinian Territories. These will be further explained below.

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<sup>24</sup> Examples are the United Nations Relief and Works Agency (UNRWA), established in 1949, which is meanwhile providing 5 million Palestinian refugees basic needs; for more information, see <<https://www.unrwa.org/>>; the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, appointed in 1993, whose mandate comprises investigating violations of international and international humanitarian law in these territories by Israel; for more information, see <<http://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/PS/Pages/SRPalestine.aspx>>; the UN Committee on the exercise of the inalienable rights of the Palestinian people, established in 1975 to advise on possibilities to secure the exercise of rights by the Palestinian population, as well as the return of displaced people to their homes; for more information, see <<https://unispal.un.org/DPA/DPR/unispal.nsf/com.htm>>; the UN Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the Occupied territories, established in 1968, charged with the task of investigating Israeli practices that violate the human rights of the Palestinian population; see General Assembly Resolution 2443 (XXIII), available at <https://unispal.un.org/DPA/DPR/unispal.nsf/0/1FE2116573C8CFBE852560DF004ED05D>, all websites seen on 12 July 2017.

<sup>25</sup> See, for example, a report on the international conference that was held on the conflict in January 2017 at nu.nl, “Landen pleiten voor twee-statenoplossing Israel-Palestina” (Countries argue for a two-state solution for Israel-Palestine), 15 January 2017, available at <<http://www.nu.nl/midden-oostenconflict/4390314/landen-pleiten-tweestatenoplossing-israel-palestina.html>>; and the government’s website, “Betrekkingen Nederland – Palestijnse Gebieden” (Relations Netherlands – Palestinian Territories), <<http://www.nu.nl/midden-oostenconflict/4390314/landen-pleiten-tweestatenoplossing-israel-palestina.html>>, both seen on 20 July 2017. See also resolutions of the UN Security Council, for example Resolution 1397 of 12 March 2002 and Resolution 2334 of 23 December 2016, both available at <<http://www.un.org/en/sc/documents/resolutions/>>, seen on 16 August 2017.

<sup>26</sup> See, for example, a NOS report, “Internationale kritiek op Israël na legalisering nederzettingen” (international criticism of Israel following legalization of settlements), available at <<http://nos.nl/artikel/2157063-internationale-kritiek-op-israel-na-legalisering-nederzettingen.html>>; and an article in the Washington Post, “Israel rejects latest US criticism of settlement policy”, available at <[https://www.washingtonpost.com/world/national-security/israel-rejects-latest-us-criticism-of-settlement-policy/2016/10/06/c4e4cbda-8bd2-11e6-875e-2c1bfe943b66\\_story.html?utm\\_term=.7e4e223d2846](https://www.washingtonpost.com/world/national-security/israel-rejects-latest-us-criticism-of-settlement-policy/2016/10/06/c4e4cbda-8bd2-11e6-875e-2c1bfe943b66_story.html?utm_term=.7e4e223d2846)>, both seen on 20 July 2017.

### 3.5 Military operations of Israel in the Gaza Strip in 2005-2014

#### 3.5.1 Introduction

26. Between 2005 and 2014, Israel conducted several military operations in the Gaza Strip. From the Gaza Strip, missiles were frequently fired in the direction of Israel; however, most of these missed their target or were intercepted. Israel repeatedly responded to such incidents strongly, with a large show of force. Various UN committees have investigated the Israeli military missions and expressed criticism of violations of humanitarian law, resulting in the death of civilians. Already in 2009 one of these committees observed that this did not involve any incidental accidents, but that these violations were the result of a policy that was planned and approved at the political level.<sup>27</sup>

#### 3.5.2 Operation Summer Rains and Autumn Clouds

27. In the period September 2005 to November 2006, according to the UN, Israeli armed forces fired a total of 15,000 artillery grenades at the Gaza Strip and launched 550 air strikes. In addition, during this period Israel performed two military operations in the Gaza Strip called '*Summer Rains*' and '*Autumn Clouds*'. These missions killed an estimated 525 Palestinians. In the same period, some 1,700 rockets were fired from the Gaza Strip at Israel, wounding 41 Israelis.<sup>28</sup>

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<sup>27</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/158/66/PDF/G0915866.pdf?OpenElement>, seen on 14 December 2017, par. 61.

<sup>28</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 195.



### 3.5.3 Operation Cast Lead

28. At the end of 2008, Israel launched yet another military attack on the Gaza Strip called ‘Cast Lead’. This attack lasted from 27 December 2008 to 18 January 2009.<sup>29</sup> In this attack, some 1,400 Palestinians were killed, mostly civilians.<sup>30</sup> The UN established a commission of inquiry that was headed by Richard Goldstone. The Goldstone Commission reported that during Cast Lead, the Israeli Defence Force (IDF) incorrectly informed the civilian population regarding attacks to be launched and in a number of cases deliberately attacked the civilian population, without any military need to do so being involved.<sup>31</sup> The Goldstone Commission concluded that these violations of humanitarian law were the result of deliberate policy decisions:

“The Israeli armed forces possess very advanced hardware and are also a market leader in the production of some of the most advanced pieces of military technology available, including unmanned aviation vehicles (UAVs). They have a very significant capacity for precision strikes by a variety of methods, including aerial and ground launches. Taking into account the ability to plan, the means to execute plans with the most developed technology available, and statements by the Israeli military that almost no errors occurred, the Mission finds that the incidents and patterns of events considered in the report are the result of deliberate planning and policy decisions.”<sup>32</sup>

29. Thus, it is an established fact that during previous missions, the Israeli army was guilty of serious violations of international humanitarian law.

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<sup>29</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 330 and 333.

<sup>30</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 352-358.

<sup>31</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 50 and 705.

<sup>32</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 61. Emphasis added by attorneys.

### 3.5.4 *Operation Pillar of Defense*

30. From 14 to 21 November 2012, the Israeli Defence Forces (IDF) again conducted a military mission in the Gaza Strip, *Operation Pillar of Defense*. Between 1 July 2011 and 15 June 2012, 752 rockets were fired at Israel from the Gaza Strip. Most of these rockets exploded in unpopulated areas or were intercepted by the Israeli missile defence system “Iron Dome”.<sup>33</sup> On 10 November 2012, four Israeli soldiers were wounded by such a rocket.<sup>34</sup> In response, Operation Pillar of Defense was launched, in which the IDF carried out more than 1,500 air strikes in Gaza. During this operation, 174 Palestinians were killed, including an estimated 101 civilians, and 6 Israelis were killed, including 4 civilians.<sup>35</sup>

31. During this operation, 382 residential buildings in the Gaza Strip were destroyed.<sup>36</sup> The UN Human Rights Council conducted an investigation into this operation, including into the attacks on residential buildings. With regard to a specific attack at a residential building, the UN Human Rights Council concluded as follows:

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<sup>33</sup> UNGA, Report of the Special Committee to investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/67/372, 14 September 2012, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/510/30/PDF/N1251030.pdf?OpenElement>>, seen on 14 December 2017, par. 11.

<sup>34</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 – Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 5 March 2013, available at <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-35-Add-1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-35-Add-1_en.pdf)>, seen on 14 December 2017, par. 5.

<sup>35</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 – Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 5 March 2013, par. 6-7.

<sup>36</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 – Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 5 March 2013, par. 16.

“On 18 November, an Israeli air strike without prior warning hit a three-storey house belonging to the Al-Dalou family in Al-Nasser neighbourhood, central Gaza City. The airstrike killed 12 people, five of whom were children and four were women. Ten of those killed belonged to one family. Israel alleged that a member of the Al-Dalou family was affiliated with the Izz Al-Din Al-Qassam Brigades. The location where the incident took place is a heavily populated area. Two of the persons killed were neighbours, while a number of other neighbours were injured. Even if one member of the Al-Dalou family was affiliated with an armed group, and therefore potentially a legitimate military target, an attack under the given circumstances with the large number of civilians present, would not meet the requirement of proportionality, i.e., the anticipated concrete and direct military gain from the attack would not outweigh the anticipated civilian loss.”<sup>37</sup>

32. In addition, the UN Human Rights Council observed that even though the IDF did issue warnings to civilians regarding the attacks to be carried out, these warnings were given on such a large scale and contained such vague information that the UN Human Rights Council had considerable doubts regarding the effectiveness of the warnings.<sup>38</sup>

### 3.5.5 Conclusion

33. Between 2005 and 2014, Israel carried out four military operations in the Gaza Strip, in which thousands of Palestinian civilians were killed. The Goldstone Commission

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<sup>37</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 – Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 5 March 2013, par. 17. Emphasis added by attorneys.

<sup>38</sup> UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1 – Addendum: Concerns related to adherence to international human rights and international humanitarian law in the context of the escalation between the State of Israel, the de facto authorities in Gaza and Palestinian armed groups in Gaza that occurred from 14 to 21 November 2012, A/HRC/22/35/Add.1, 5 March 2013, par. 46.

and the UN Human Rights Council concluded that Israel violated various rules of international humanitarian law and fundamental rights of Palestinian civilians. In respect of these operations alone, the UN Human Rights Council concluded that it was Israel's policy to bomb residential buildings, in breach of international law. This policy was inspired by leading politicians and senior members of the IDF.

### 3.6 Military operation of Israel in the Gaza Strip in 2014: *Operation Protective Edge (OPE)*

#### 3.6.1 Reason for OPE

34. On 2 June 2014, an agreement was established between the two Palestinian political parties, Fatah and Hamas, aimed at the political reunion of the Gaza Strip and the West Bank. As a result, the parties could once more work more purposefully towards a two-state solution with Israel. Some people argue that the reconciliation between the two Palestinian political parties was the major reason for the military operation that Israel launched shortly thereafter.<sup>39</sup>
35. In addition, on 12 June 2014, three Israeli youngsters on the West Bank were kidnapped and killed. In response, the Israeli army conducted an intensive search on the West Bank, killing six Palestinians, arresting hundreds of Palestinians and searching many more residential buildings in two weeks.<sup>40</sup> Tensions were further fuelled by the murder of a 16-year old Palestinian boy in East Jerusalem on 2 July

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<sup>39</sup> See, for example, N. Thrall, 'How the West Chose War in Gaza – Gaza and Israel: The Road to War Paved by the West' in *The New York Times*, 17 July 2014, available at <https://www.nytimes.com/2014/07/18/opinion/gaza-and-israel-the-road-to-war-paved-by-the-west.html>; F. Elhousseini, 'Israel's Operation Protective Edge: Why now?' in *Middle East Monitor*, 21 July 2014, available at <<https://www.middleeastmonitor.com/20140721-israels-operation-protective-edge-why-now/>>; see also B. Ravid, who stated even before the reconciliation was established that Israel sees this deal as a threat: 'Palestinian Reconciliation is an Opportunity for Israel – Jerusalem chooses to see the unity deal as a threat, even after it long argued that Abbas doesn't represent the entire Palestinian people' in *Haaretz*, 24 April 2014, available at <<https://www.haaretz.com/israel-news/premium-1.587007?=&ts=1513012814022>>, all seen on 11 December 2017.

<sup>40</sup> S. Weill and V. Azarova, 'The 2014 Gaza War: reflections on *jus ad bellum*, *jus in bello*, and accountability' in A. Bellal (ed) *The War Report: Armed Conflict in 2014*, Oxford University Press (2015), p. 361.

2014.<sup>41</sup> In this period, an increasing number of rockets were fired at Israel from the Gaza Strip.<sup>42</sup>

36. On 7 July 2014, Israel launched a military operation in the Gaza Strip called *Operation Protective Edge* (OPE). The operation began with air strikes and was expanded by ground forces on 17 July 2014. OPE ended after 51 days on 26 August 2014 in a truce.
37. Because at that time, the unity government between Hamas and Fatah had not yet been established, the mission meant that Hamas in fact continued to rule over the Gaza Strip.

### 3.6.2 Objective of OPE

38. According to Israel, the objective of OPE was to protect the Israeli population from the rockets that were fired from the Gaza Strip and the tunnels that had been dug from the Gaza Strip into Israel. For this purpose, according to its own statements, Israel directed its military focus at:
  - 1) “Degradation of Hamas’s and other terror organizations’ military infrastructure, particularly with respect to their rockets and mortar launching capabilities, and, as the conflict proceeded,
  - 2) neutralisation of their network of cross-border assault tunnels.”<sup>43</sup>

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<sup>41</sup> See UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council Resolution S-21/1, A/HRC/29/52, 24 June 2015, available at <<http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>>, seen on 11 December 2017, par. 18.

<sup>42</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 55.

<sup>43</sup> State of Israel Ministry of Foreign Affairs, The 2014 Gaza conflict, 7 July – 26 August 2014: Factual and Legal Aspects, May 2015, available at <<http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/2014-Gaza-Conflict-Factual-and-Legal-Aspects.aspx>>, seen on 11 December 2017, par. 76-77.

### 3.6.3 *Impact OPE on the Gaza Strip*

39. Within a few days after Israel had launched the military operation, the UN Human Rights Council adopted a resolution in which it sharply criticized the fact that Israel apparently deployed tactics that are in breach of international humanitarian law, killing many civilians:

*“Condemns in the strongest terms [...] the latest Israeli military assault on the occupied Gaza Strip, by air, land and sea, which has involved disproportionate and indiscriminate attacks, including aerial bombardment of civilian areas, the targeting of civilians and civilian properties in collective punishment contrary to international law, and other actions, including the targeting of medical and humanitarian personnel, that may amount to international crimes, directly resulting in the killing of more than 650 Palestinians, most of them civilians and more than 170 of whom are children, the injury of more than 4,000 people and the wanton destruction of homes, vital infrastructure and public properties.”*<sup>44</sup>

40. In this resolution, the UN Human Rights Council also established an independent commission of inquiry. The mandate of this commission was among other things to investigate all violations of international humanitarian law by Israel during OPE.<sup>45</sup>
41. The commission published its report on 24 June 2015.<sup>46</sup> Its conclusions are shocking. The intensity and the scale of destruction that OPE caused in the Gaza Strip were unprecedented. In total, 2,251 Palestinians were killed in 51 days, more than half of

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<sup>44</sup> UNGA, Ensuring Respect for international law in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/RES/S-21/1, 23 July 2014, available at <http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session21/Pages/21stSpecialSession.aspx>, seen on 11 December 2017, p. 2-3.

<sup>45</sup> UNGA, Ensuring Respect for international law in the Occupied Palestinian Territory, including East Jerusalem, A/HRC/RES/S-21/1, 23 July 2014, p. 4.

<sup>46</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015.

which were civilians (1,462 people). 11,231 Palestinians were injured, more than half of which were women and children (3,540 women and 3,436 children).<sup>47</sup>

42. The destruction of civil infrastructure was also immense. Eighteen thousand housing units were destroyed, a large part of the electricity network, the water supply and sewerage systems were rendered useless and 73 medical facilities and a large number of ambulances were damaged.<sup>48</sup>
43. The attacks were so intensive that during the operation, 500,000 people within the Gaza Strip were displaced.<sup>49</sup> The UN commission described the situation during the operation in the Gaza Strip as follows:

“In Gaza, as Palestinians struggled to find ways to save their own lives and those of their families, they were confronted with intense attacks, with no way of knowing which locations would be hit and which might be considered safe. People began to move from one place to another, only to encounter attacks in the new neighbourhood, and they would have to move on. Closed into the Strip, with no possibility to exit at times, 44 per cent of Gaza was either a no-go area or the object of evacuation warnings. These terrifying circumstances created a sense of entrapment, of having “no safe place” to go.”<sup>50</sup>

44. It is clear that OPE had a very severe impact on the Palestinian population in the Gaza Strip. The bombings were so intensive <sup>51</sup> that a large part of the population was displaced and within the Gaza Strip it was hardly possible to flee to a safe area.

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<sup>47</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 20.

<sup>48</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 23.

<sup>49</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 23.

<sup>50</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 22.

<sup>51</sup> During the 51-day operation, the IDF carried out more than 6,000 air strikes; see UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 35.

### 3.6.4 *Policy of bombing residential buildings*

45. The commission established by the UN Human Rights Council observed that OPE not only caused massive damage, but also that during OPE, there was a policy of bombing residential buildings:

“It focuses on areas that reflect new patterns, notably attacks by Israel on residential buildings resulting in the death of entire families; Israel’s ground operations, which levelled urban neighbourhoods [...]”<sup>52</sup>

46. The commission investigated several cases in which residential buildings were bombed and concluded that a pattern of attacks on civilian residential buildings during OPE was involved.<sup>53</sup>

47. In addition to the commission, three non-governmental organizations (NGOs) extensively investigated the structural bombing of residential buildings and the manner in which military targets were selected during OPE. They also concluded that there was a policy of bombing residential buildings, in breach of humanitarian law.

48. Below, the plaintiff will individually discuss each of these sources and the conclusions that the organizations in question arrive at regarding bombing residential buildings.

#### 3.6.4.1 Findings of the UN Human Rights Council

49. The independent commission of inquiry of the UN Human Rights Council analysed the pattern of attacks on residential buildings. It noted that all attacks exhibit certain features, which indicated a deliberate policy aimed at the complete destruction of residential buildings, in which large numbers of civilian casualties were envisaged or

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<sup>52</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 26. Emphasis added by attorneys.

<sup>53</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 110-212.



accepted. The commission determined that this policy is in breach of international humanitarian law and that Israel committed war crimes. This analysis is relevant for a proper understanding of the unlawfulness of bombing the house of the plaintiff's family. For this reason, the plaintiff will quote the commission's analysis in full:

“The commission found that the fact that precision-guided weapons were used in all cases indicates that they were directed against specific targets and resulted in the total or partial destruction of entire buildings. This finding is corroborated by satellite imagery analysis. Many of the incidents took place in the evening or at dawn, when families gathered for *iftar* and *suhhur*, the Ramadan meals, or at night, when people were asleep. The timing of the attacks increased the likelihood that many people, often entire families, would be at home. Attacking residential buildings rendered women particularly vulnerable to death and injury.

In six of the cases examined, and in most cases reported on by non-governmental organizations, there is little or no information available to explain why residential buildings, which are *prima facie* civilian objects immune from attack, were considered to be legitimate military objectives. In relation to each attack on residential buildings that resulted in significant destruction and civilian deaths or injuries, the onus is on Israel to explain the factual elements that rendered the houses or the person(s) present inside a military target. Israel should provide specific information on the effective contribution of a given house or inhabitant to military action and the clear advantage to be gained by the attack. Should a strike directly and intentionally target a house in the absence of a specific military objective, this would amount to a violation of the principle of distinction. It may also constitute a direct attack against civilian objects or civilians, a war crime under international criminal law.

Although the commission found indications of possible military objectives in the remaining nine cases examined, it is not in a position to determine whether

they actually motivated the attacks in question. It appears that the potential targets were mostly individuals who were or who could have been present in the building at the time it was hit, presumably on account of their alleged links to the police, Hamas or an armed group. In that regard, international law provides that persons may be targeted only if they participate directly in hostilities or are members of organized armed groups with a continuous combat function.

With regard to proportionality, given the circumstances, a reasonable commander would have been aware that these attacks would be likely to result in a large number of civilian casualties and the complete or partial destruction of the building. Such circumstances differ from case to case, and include the residential nature of the targeted buildings; their location in densely populated areas; the timing of the attacks; and the frequent use of large bombs that were apparently meant to cause extensive damage. Given the absence of information suggesting that the anticipated military advantage at the time of the attack was such that the expected civilian casualties and damage to the targeted and surrounding buildings were not excessive, there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime.

Regarding precautions, the Israel Defence Forces stated repeatedly that its measures were more stringent than those required by international humanitarian law. In many incidents, however, the weapons used, the timing of attacks, and the fact that the targets were located in densely populated areas indicate that the Israel Defence Forces may not have done everything feasible to avoid or limit civilian casualties [...]

The limited effectiveness of the above-mentioned precautionary measures must have become abundantly clear in the early days of the operation, given that many buildings were destroyed, together with their inhabitants. The apparent lack of steps to re-examine these measures in the light of the

mounting civilian toll suggests that Israel did not comply with its obligation to take all feasible precautions before the attacks.

[...] These attacks raise concerns that Israel's interpretation of what constitutes a "military objective" may be broader than the definition provided for by international humanitarian law."<sup>54</sup>

50. The analysis by the commission of inquiry of the UN Human Rights Council makes it clear that international humanitarian law stipulates a number of conditions for each military attack. Firstly, the IDF must distinguish between civilians and combatants. Only military objectives in which an attack achieves a clear military advantage qualify as a legitimate military target. In principle, civilians and civilian infrastructure, such as residential buildings, are not legitimate military targets. This is called the principle of 'distinction'. An attack in which civilian casualties are expected may only be carried out if the expected military advantage that is achieved with the attack outweighs the number of expected civilian casualties. The IDF must make this consideration before the attack and properly substantiate its decision in this regard. This is called the principle of proportionality. To the extent that the IDF concludes that an attack is justified and proportionate, it must still take all possible measures to limit the number of civilian casualties to the extent possible, for example by warning civilians, by using precision-guided weapons and by carefully choosing the time of the attack.
51. In light of these principles, the commission of inquiry found that there are many signs indicating that the large number of civilian casualties and the many residential buildings that were destroyed during OPE were not an unfortunate side effect, but an objective that IDF pursued. This objective – attacks on civilians and residential buildings - is in breach of applicable humanitarian law.

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<sup>54</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 37-45. Emphasis added by attorneys.

52. In addition, based on the targeted manner, the intensity and duration of the attacks on residential buildings, the commission concluded that a *policy* of attacks on residential buildings was involved, which must have been approved *by the highest military officers*. The defendants were among these highest military officers.

“Furthermore, the large number of targeted attacks against residential buildings and the fact that such attacks continued throughout the operation, even after the dire impact of these attacks on civilians and civilian objects became apparent, raise concern that the strikes may have constituted military tactics reflective of a broader policy, approved at least tacitly by decision-makers at the highest levels of the Government of Israel.”<sup>55</sup>

And

“Questions arise regarding the role of senior officials who set military policy in several areas examined by the commission, such as in the attacks of the Israel Defence Forces on residential buildings [...]. In many cases, individual soldiers may have been following agreed military policy, but it may be that the policy itself violates the laws of war.”<sup>56</sup>

53. In a second, more detailed report, the commission established by the UN Human Rights Council further explained that military commanders did not revise the policy of bombing residential buildings when a few days after the start of the military operation it became clear that it was causing large numbers of civilian casualties. Nor could the collective call by a number of NGOs induce the military and political leaders to change this policy.<sup>57</sup>

54. Thus, according to the UN, the IDF deliberately continued the strategy of bombing residential buildings, even though it was clear that this was causing many civilian

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<sup>55</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 44. Emphasis added by attorneys.

<sup>56</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 77.

<sup>57</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 640-641.

casualties and the tactic therefore was in breach of the principle of distinction and proportionality.

#### 3.6.4.2 Findings of Amnesty International

55. *Amnesty International* also concluded that during OPE, bombing residential buildings was a deliberately pursued policy. In addition, the NGO severely criticized Israel, because the IDF provided hardly any information regarding the grounds based on which it marked a specific house as a military target. The NGO pointed out that it was the IDF's task to demonstrate that a person or object qualified as a legitimate target. *Amnesty International* established that during OPE, even in those cases involving some military interest, the fundamental rule to spare civilians to the extent possible was breached.

56. *Amnesty International* further concluded that bombing civilian homes was policy, which had been approved by the leaders:

“The fact that the Israeli military began carrying out aerial bombardment of inhabited homes in the first days of the conflict and that this tactic was used for the duration of the operation, as illustrated by the dates of the attacks in this report, seems to suggest that Israel's political leadership endorsed this manner of conducting hostilities.

The lack of any explanation from Israeli officials of what was being targeted and significant doubt in some of these attacks on civilian homes of whether a military objective was present are deeply disturbing. In those cases where Amnesty International has been able to determine the possible intended target, it has found either that it was not in fact a military objective, that the devastating toll on civilians and civilian property was out of all proportion to any military advantage from the attack and/or that Israel failed to take necessary precautions to minimize harm to civilians and damage to civilian objects. This is particularly evident given the alternatives available, including

postponing an attack until the target was not inside a house full of children and other civilians; using means of attack which are less devastating, as Israeli forces have done in other strikes targeting individuals which did not bring entire buildings down on top of their civilian residents; and giving effective warning to civilians in the targeted building and surrounding structures prior to carrying out the attack.”<sup>58</sup>

57. Thus, *Amnesty International* also takes the structural nature of the bombing of residential buildings during OPE to be proof that the highest military commanders imposed this as a policy on the IDF.

#### 3.6.4.3 Findings of *B'Tselem*

58. *B'Tselem* is an Israeli NGO that wants to contribute to ending the occupation of the Palestinian Territories. *B'Tselem* also concluded that the attack on residential buildings was a policy and that in and of itself, this policy was already in breach of applicable rules of international humanitarian law:

“The policy of bombing homes was implemented throughout the Gaza Strip all through the fighting [...]

These attacks were not carried out on the whim of individual soldiers, pilots or commanders in the field. They are the result of a policy formulated by government officials and the senior military command. These officials backed the policy of attacking homes, reiterating the argument that the attacks conform to IHL, and eschewing any responsibility for harm to civilians, laying the blame squarely on Hamas and its *modus operandi*.”<sup>59</sup>

<sup>58</sup> Amnesty International, *Families Under the Rubble: Israeli Attacks on Inhabited Homes*, 2014, available at <https://www.amnesty.org/en/documents/MDE15/032/2014/en/>, seen on 13 December 2017, p. 42.

<sup>59</sup> B'Tselem, *Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip*, Summer 2014, January 2015, available at [http://www.btselem.org/publications/summaries/201501\\_black\\_flag](http://www.btselem.org/publications/summaries/201501_black_flag), seen on 13 December 2017, p. 58. Emphasis added by attorneys.

59. Thus, *B Tselem* also concluded that the policy of bombing residential buildings had been ordered by senior IDF command, including the defendants.

#### 3.6.4.4 Findings of *Breaking the Silence*

60. Finally, the plaintiff refers to the statements by members of the Israeli army, IDF, itself, which have been collected by *Breaking the Silence*. *Breaking the Silence* is an NGO consisting of former IDF members, which seeks to promote transparency regarding the IDF's practices.
61. The NGO collected 111 statements by IDF members who took part in OPE. Based on these statements, *Breaking the Silence* outlines the following picture:

“While the testimonies include pointed descriptions of inappropriate behaviour by soldiers in the field, the more disturbing picture that arises from these testimonies reflects systematic policies that were dictated to IDF forces of all ranks and in all zones. The guiding military principle of “minimum risk to our forces, even at the cost of harming innocent civilians,” alongside efforts to deter and intimidate the Palestinians, led to massive and unprecedented harm to the population and the civilian infrastructure in the Gaza Strip. Policymakers could have predicted these results prior to the operation and were surely aware of them throughout.

This policy was evident first and foremost during the briefings provided to the forces before entering Gaza. Many soldiers spoke of a working assumption that Palestinian residents had abandoned the neighbourhoods they entered due to the IDF's warnings, thus making anyone located in the area a legitimate target – in some cases even by direct order. [...]

IDF policy determined the open-fire policy for the forces. Many of the soldiers testified that the rules of engagement they were provided with before the ground incursion into Gaza were unclear and lenient. The soldiers were briefed by their commanders to fire at every person they identified in a combat

zone, since the working assumption was that every person in the field was an enemy (see testimonies 2, 56, and 75). [...] The use of weapons and means of warfare that required approval in the past by senior officers – like firing a tank shell – were permitted at the discretion of junior commanders.

Alongside these instructions, soldiers testified to unabated fire on “suspicious points.” Commanders did not clearly define the meaning of the term “suspicious point,” so soldiers were free to interpret it in the field as they saw fit. In practice, almost every object or structure within the forces’ eyeshot had the potential to be considered suspicious and thus targeted (see testimonies 32, 34, and 84). Sometimes movements identified in the window of a house hundreds of meters away from the forces led to a strike on that house, based on the suspicion that it was an enemy lookout. [...]

Throughout ‘Protective Edge,’ the IDF operated according to one of three predetermined activation levels for opening fire (see testimonies 104 and 107). The officers charged with opening fire received orders during the operation about activation levels at any given moment. These changes in activation levels, among other things, determined the kinds of weapons to be used, as well as the safety ranges from civilians. The definitions provided were at times ambiguous, leaving junior officers with much discretion regarding the amount of fire to use, and the acceptable degree of collateral damage that may be caused. The limitations, which increasingly diminished as the operation progressed, and the changes in activation levels, were disregarded when there was suspicion that a soldier was kidnapped. [...]

In addition, the range of discretion officers were permitted in the various command centres was broader. According to officers that operated in command centres, there was a broad range of discretion allowed for reaching decisions regarding the identification of targets (authorization for identifying a target on the basis of intelligence). Permission was provided, in some cases, without being based sufficiently on intelligence, thus haphazardly



endangering civilian lives. In practice, the identification of many targets was done on the basis of unclear criteria, and attacks were authorized even in cases when there was partial information regarding the likelihood of harming innocent people (see testimonies 100, 102, and 108). Officers and soldiers that took part in activating forces, in general, and commanding attacks from afar, in particular, specified that it was easy to notice the impact from the combative, racist atmosphere during the operation. The public discourse in Israel, external to the military, influenced decisions made within the military regarding the determination of targets and the authorization of attacks. This impact was evident from the racist and violent statements voiced by decision-makers and the “trigger happy” attitude of officers responsible for authorizing attacks. [...]<sup>60</sup>

62. The statements reflect a number of practices that are relevant for the case at issue. Firstly, this involves the identification of a military target. The statements demonstrate that this decision was taken based on defective information, in which the fact of whether and how many civilians were near the target was not taken into account. Soldiers were also ordered to bomb all “suspicious” points; exactly what qualified as suspicious was deliberately not specified.
63. The second conspicuous practice pertained to the rules regarding the use of armed force. The statements reveal that during the operation, three categories were used. In each higher category of armed force to be used, the safety measures to protect civilians decreased. For example, the safety distance that had to be observed between civilians and the target became smaller. Moreover, in using armed force, a number of assumptions were used, such as the fact that – after a warning had been issued in specific areas – those areas did not contain any civilians. Each person still in that area

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<sup>60</sup> Breaking the Silence, *This is How We Fought in Gaza: Soldiers’ Testimonies and Photographs from Operation “Protective Edge”* (2014), available at <<http://www.breakingthesilence.org.il/pdf/ProtectiveEdge.pdf>>, seen on 13 December 2017, p. 16-22. Emphasis added by attorneys.

was presumed to be taking part in the fighting. He – or the house he was in – was fired at, without verifying any further what he was doing there or whether he was armed.

64. Finally, the statements by the IDF members demonstrate that the identification of military targets and the armed force to be used were determined by senior military commanders. They ordered that people in specific areas simply be designated as fighters, and determined what category of armed force had to be applied. Thus, the military leaders, including the defendants, had direct command over the strategy. This means that they are responsible to the extent that the attacks by the IDF were in breach of international humanitarian law and civilians were killed or suffered damage as a result of these attacks. In addition, in some cases, these decisions were deliberately delegated to junior IDF members; it was clear that they had broad discretion in this decision. In this latter case, as well, the responsibility for the (unlawful) decisions taken lies with senior command. After all, they deliberately delegated these decisions, without outlining clear decision frameworks. Under their command, a “trigger happy” and racist atmosphere prevailed within all layers of the IDF.

65. *Breaking the Silence* therefore concludes as follows:

“From all the testimonies that reached *Breaking the Silence*, a very disconcerting picture arises about the way IDF forces were instructed to operate during combat in Gaza. The operation, which was conducted under a policy determined by the most senior commanding ranks who instructed the soldiers’ conduct, casts grave doubt on the IDF’s ethics. [...]”<sup>61</sup>

66. Thus, the statements by IDF members analysed by *Breaking the Silence* demonstrate that the atmosphere within the IDF, in which the protection of civilians was increasingly disregarded, can be blamed on the senior commanding officers. Instead of ensuring that the attacks were carried out in conformance with the rules of international humanitarian law, they ordered the IDF to work based on assumptions,

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<sup>61</sup> *Breaking the Silence, This is How We Fought in Gaza: Soldiers’ Testimonies and Photographs from Operation “Protective Edge”* (2014), p. 23.

which in and of themselves are in breach of international humanitarian law, such as the assumptions that every person in a specific area is a fighter. In addition, the military leaders also delegated far-reaching decisions to junior IDF members, without providing any clear decision frameworks; this also contributed to the fact that many attacks were in breach of the principles of international humanitarian law.

#### 3.6.4.5 Interim conclusion: policy of bombing residential buildings

67. The commission of inquiry established by the UN Human Rights Council, *Amnesty International*, *B'Tselem* and *Breaking the Silence* conclude that during OPE, residential buildings were deliberately bombed. In addition, the organizations conclude that this policy was ordered or at the least approved by senior military commanders. Moreover, the high number of civilian casualties was foreseeable and it was apparent to everyone that the measures that were taken to warn civilians were ineffective. This means that the excessively high number of civilian casualties was envisaged, or was at least taken into the bargain by the leaders.

### 3.7 Conclusion

68. This chapter outlined the context of the bombing of the Ziada family's residence. In this context, it is relevant that the Gaza Strip is one of the most densely populated areas on earth, in which the Palestinian population is penned up. In addition, the Palestinian population as a whole is oppressed by Israel in the on-going conflict between Israel and the Palestinian Territories.

69. International humanitarian law stipulates the rules that apply in times of war and occupation. The rules constitute a lower threshold that must even be observed in exceptional situations. Respect for these rules is crucial in the context of any continuing occupation, such as in the Palestinian Territories.

70. Various UN bodies and NGOs have pointed out that both during OPE and during preceding military operations, Israel seriously violated rules of international humanitarian law. Acting in breach of humanitarian law, including the systematic bombing of residential buildings, was formulated as a policy by the commanding officers and dictated to the IDF.
71. It follows from the above that the bombing of the house of the plaintiff's family was not an exception. The specific facts of this attack will be set out below.

#### **4 FACTS: BOMBING OF THE ZIADA FAMILY RESIDENCE**

##### **4.1 Ziada family**

72. In 1948, when she was four years old, the plaintiff's mother, Muftia Mohamed Ziada, fled from a Palestinian village to the Gaza Strip. She had ten children, including the plaintiff. In 2002, a long-awaited wish came true when her ten sons collectively built a house for their mother in the Al-Bureij refugee camp. Here she could live under the same roof together with her children and grandchildren. At the time, the plaintiff managed the building logistics.<sup>62</sup>
73. The house was in block 12 of the Al-Bureij refugee camp, where a total of some 40,000 people lived. The plaintiff submits a map showing the location of the residence.<sup>63</sup> The house was three storeys high and divided into five residences. In July 2014, the following family members of the plaintiff lived in these residences:
- a. Muftia Mohamed Ziada, at the time 70, the plaintiff's mother;

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<sup>62</sup> S. Lindhout, "Één dode broer, of twee. Maar niet mijn moeder, niet mijn neefje" (One dead brother, or two. But not my mother, not my nephew), *De Volkskrant*, 9 August 2014, **Exhibit X**.

<sup>63</sup> Map showing the location of the Ziada family residence, **Exhibit X**.

- b. Jamil Shaban Ziada, at the time 53, the plaintiff's brother, together with his wife, Bayan Abdel Latif Ziada, at the time 39, and their two sons, at the time aged xx and xx years, and four daughters, at the time aged xx, xx, xx, and xx years;
  - c. Yousef Shaban Ziada, at the time 43, the plaintiff's brother, together with his wife, Khitam Ziada, at the time xx, and their four children, at the time aged xx, xx, xx, and xx years;
  - d. Khaled Shaban Hassan Ziada, at the time xx, the plaintiff's brother, together with his wife Kholoud Ziada, at the time xx, and his two sons, at the time aged xx and xx years, and his two daughters, at the time aged xx and xx years;
  - e. Omar Shaban Ziada, at the time 32, the plaintiff's brother, together with his wife, Hadil Sami Ziada, at the time xx, and their two children, at the time aged xx and xx years.
74. The plaintiff himself has not lived in the Gaza Strip since [year]. In 1998, he met his Dutch wife and he lives in The Hague with her and his three children.
75. In the four years prior to the bombing of his family's house in 2014, the plaintiff did not see his family. The Israeli authorities did not give him permission to travel into the Gaza Strip and his family members were not granted permission to leave the Gaza Strip. Due to the lack of anything better, they talked to each other via Skype as much as possible. They were also doing this on the afternoon of 20 July 2014, just before his family's house was bombed.<sup>64</sup>

#### 4.2 Attack on the Ziada residence

76. Since the beginning of OPE, the plaintiff had called his family as often as possible to stay up-to-date on what was happening in the Gaza Strip. In the evening prior to the

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<sup>64</sup> S. Lindhout, "Één dode broer, of twee. Maar niet mijn moeder, niet mijn neefje" (One dead brother, or two. But not my mother, not my nephew), *De Volkskrant*, 9 August 2014, Exhibit X.

attack on the residence, the plaintiff also spoke with one of his brothers in Gaza. His brother told him that the Al-Bureij refugee camp had been bombed by the IDF, even though there were no military activities by Hamas or any ground forces of the IDF in the camp. However, the brothers could not detect any pattern in the bombings, which seemed random.

77. In the morning of 20 July 2014, the plaintiff's mother sent all the women and children out of the house. She had a gut feeling; this was not a rational decision, because it was not safe on the streets and in Gaza city, either. Only the brothers Omar Shaban Ziada, Jamil Shaban Ziada and Yousef Shaban Ziada stayed home, just as Bayan Abdel Latif Ziada and Shaban Jamil Ziada, the wife and son of Yousef Shaban Ziada.<sup>65</sup> They were also two guests, i.e. Salah Zuheir Al Shashnya, at the time 23 years, and Muhammad Al-Maquadama, at the time 30 years.
78. Around 13.30, the residence of the Ziada family was hit by a missile fired by the IDF from a plane. Seven people who were in the house or in the immediate vicinity during or directly after the attack on the Ziada residence observed the attack and can testify about the attack.<sup>66</sup> This includes a statement by Salah Zuheir Al Shashnya, who was visiting Yousef and Omar Ziada during the attack and who survived the attack.
79. The statements reflect the following image. In the days preceding the attack on the Ziada residence, the Al-Bureij refugee camp had already been bombed several times, even though no military activities whatsoever were taking place in the camp, not by Hamas and not by ground forces of the Israeli army. The only warning that the residents of Al-Bureij had received from the IDF was a pamphlet that had been distributed in the refugee camp approximately one week prior to the attack, directing people to go to Deir Al Balah, approximately 5.5 km from Al-Bureij. In response, some families decided to leave Al-Bureij. Others stayed, because they had no other accommodation, including the Ziada family. In view of the fact that during *Operation*

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<sup>65</sup> S. Lindhout, "Één dode broer, of twee. Maar niet mijn moeder, niet mijn neefje" (One dead brother, or two. But not my mother, not my nephew), *De Volkskrant*, 9 August 2014, [Exhibit X](#).

<sup>66</sup> Witness statements, [Exhibit X](#).

*Protective Edge* (OPE), the Gaza Strip was bombed on a large scale and the warnings by the IDF both during OPE and during previous military operations were unclear and misleading, this was an understandable choice.<sup>67</sup>

80. Salah Zuheir Al Shashnya declares that just before the attack on the Ziada residence, a nearby house was hit. In response, one of the plaintiff's brothers, Yousef, decided to evacuate the family members who were present. He wanted to call a taxi for this. However, the attack on the Ziada residence followed almost immediately after the attack on the nearby house. The family did not have the time to actually leave the house.
81. The bombing raid made the entire house collapse. Neighbours and ambulance service workers stated that the bodies of the brothers Jamil and Yousef Ziada were found near the house on the ground. They were immediately taken to hospital. Neighbours and aid workers subsequently searched the rubble for other people. Salah Zuheir Al Shashnya, who was visiting Yousef and Omar Ziada at the time of the attack, was pulled alive from the rubble, while four other bodies were recovered; they were all taken to the hospital.
82. Neighbour Adham Radwan Ahmed Abdel Hadi states how the image of the destroyed house and the mutilated bodies shocked him. One of the plaintiff's brothers, Khaled, who was at work during the attack, arrived at the destroyed house and called out in panic for his brothers, his nephews and nieces and for his mother. To no avail. Six members of the Ziada family died in the attack:
  - a. Muftia Mohamed Ziada, 70, the plaintiff's mother;
  - b. Jamil Shaban Ziada, 53, the plaintiff's brother;
  - c. Bayan Ziada, 39, the wife of Jamil Shaban Ziada;
  - d. Yousef Shaban Ziada, 43, the plaintiff's brother;

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<sup>67</sup> For reports on the cramped situation in the Gaza Strip and the inefficiency of warnings by the IDF, see Chapter 3.5.3, 3.5.4, and 3.6.3.

- e. Omar Shaban Ziada, 32, the plaintiff's brother;
- f. Shaban Jamil Ziada, 12, the son of Jamil Shaban Ziada.

83. In addition, Muhammad al-Maqadameh, who at the time was visiting Omar Shaban Ziada, was killed in the attack. Salah Zuheir Al Shashnya, who was in the house during the attack, and Rami Riyad Abdel Kareem Al Najjar (28), who walked past the house during the attack were injured.

### 4.3 After the attack

#### 4.3.1 Consequences for the plaintiff and his family

- 84. Via the website of a local news site, the plaintiff learned that his family's house had been bombed and that two brothers and his twelve-year old nephew had died. Later, he read on a friend's Facebook profile that his mother, a third brother and his sister-in-law had not survived the attack, either. The plaintiff was in shock about the death of his family.
- 85. The deceased family members were all taken to the Al Aqsa hospital, where they were declared dead. One day after the attack, all six family members were buried side by side in the new cemetery of Al-Bureij, mother Muftia between her sons.<sup>68</sup>
- 86. The plaintiff was not able to attend the funeral, nor has he been able to visit the graves later, because Israel does not permit him to travel into the Gaza Strip. He was only able to have an obituary placed.<sup>69</sup>

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<sup>68</sup> R. Bos, "Likje verf om het graf terug te vinden" (A dab of paint to find the grave), *De Volkskrant*, 9 August 2014, **Exhibit X**. This is an interview with a brother of the plaintiff, Saed Ziada. Like the plaintiff, he did not live in the family residence in Al-Bureij.

<sup>69</sup> Obituary for the Ziada family, **Exhibit X**.



#### 4.3.2 Investigation by Israel's Military Advocate General

87. The bombing of the Ziada family residence was investigated by order of the *Military Advocate General* (MAG) by the *Fact-Finding Assessments Mechanism* (FFA). The *Military Advocate General* is a public prosecutor who investigates criminal offences committed by members of the IDF. In the event of exceptional incidents that occurred during a military operation, the MAG orders the FFA to conduct a further investigation.<sup>70</sup> The MAG also designated the bombing of the Ziada family residence as an exceptional incident, so that the FFA conducted an investigation.
88. Based on the FFA's investigation, the MAG decided that the soldiers who were responsible for the attack on the Ziada family residence would not be prosecuted.<sup>71</sup> As the reason for this decision – without offering any further explanation – the MAG contended that the house served as a command and control centre of the military branch of Hamas. The objective of the attack was allegedly to destroy this command and control centre and its staff. At the time of the attack, there was allegedly up-to-date information demonstrating that the centre emitted a threat to members of the IDF who were active in the area. The MAG claimed that Muhammad al-Maqadameh, who was visiting the house at the time of the attack, was a senior military member of Hamas.
89. The MAG noted that *after the attack* signs were allegedly found that indicated that three of the Ziada family members who were killed allegedly were also active military members of Hamas. The MAG failed to indicate what family members he was referring to and on what basis he arrived at this conviction.
90. Without offering any further explanation, the MAG stated that the expected civilian casualties in the attack of the Ziada residence were outweighed by the military

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<sup>70</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 611-612. Despite the reports on widespread destruction of civilian residences and the large number of civilian casualties during OPE, only a total of 190 cases were submitted to the FFA for investigation, *idem* p. 614.

<sup>71</sup> Decision of the MAG regarding the bombing of the Ziada family residence, 24 August 2016, **Exhibit X**.

advantage to be achieved. Thus, the attack allegedly complied with the requirement of proportionality and necessity. According to the MAG, there was no need to warn the civilians in the house, because this would not have been possible without frustrating the military objective. Moreover, the ammunition chosen allegedly contributed to limiting the number of civilian casualties. However, the MAG failed to explain what ammunition was used and how this contributed to protecting civilians. Finally, the MAG noted that the attack had been approved by the military commanders in question.

91. The MAG's report demonstrates that the attack on the Ziada family residence was approved by the competent military leaders. Thus, the decision to bomb the residence was not taken by the pilot of the fighter aircraft, in breach of the instructions from his commanders. In line with the policy and decision framework outlined above, the decision was taken by senior military commanders of the IDF, including the defendants. Thus, they are responsible for the damage that the plaintiff suffered as a result of the bombing.

#### **4.4 Conclusion**

92. The Ziada family residence was destroyed by an IDF air strike, in which six family members as well as one guest were killed. Another guest and a passer-by were injured in the attack. Prior to the attack, the family did not receive a warning that would have enabled the family to save themselves.
93. The attack is in line with a pattern in which residential buildings with civilians were destroyed as a policy. A commission established by the UN Human Rights Council and several NGOs conducted an investigation into this phenomenon and concluded that the destruction of residential buildings was a policy that had been approved by the highest-ranking Israeli military officials and politicians. However, as the

commission of inquiry and the NGOs noted, in and of itself, the policy is in breach of international humanitarian law.

94. Even though there are strong indications that the attack on the Ziada family residence and the umbrella policy of attacking residential buildings were in breach of international humanitarian law, the MAG did not initiate any criminal investigation into the attack. The grounds that the MAG advances for his decision have not been substantiated by any evidence, nor have the considerations pertaining to the principle of proportionality or the obligation to warn the residents been sufficiently detailed to actually provide any insight into what consideration of interests was made.
95. As commanders, the defendants are responsible for the policy that the IDF pursued during OPE in Gaza. The attack on the Ziada family residence was also ordered by IDF commanders. On this account, they are responsible for the bombing of the Ziada family residence. In addition, Gantz, defendant 1, is co-responsible for the defective investigation that the MAG conducted into the bombing, as will be further explained in Chapter 5.3.3 below. On this account, the defendants are liable for the damage that the plaintiff suffered as a result of the attack.

## **5 JURISDICTION OF THE DUTCH COURT**

### **5.1 Introduction**

96. The Dutch court has jurisdiction over this case by virtue of Article 9 (b) and (c) of the Dutch Code of Civil Procedure (DCCP). Based on these provisions, the Dutch court has jurisdiction if it is impossible for the plaintiff to initiate proceedings in another country or if the case has sufficient connecting factors with Dutch jurisdiction and it would be unacceptable to demand that the plaintiff initiates the proceedings in another country.

97. The plaintiff does not have any possibility to claim compensation of the damage that he suffered in civil proceedings in Israel or in the most obvious alternative forum, the Palestinian Territories. In addition, the criminal investigation that the Israeli *Military Advocate General* (MAG) conducted into the bombing of the Ziada family residence was not thorough or independent. This means that the Dutch court has jurisdiction over this case.
98. The fact that the plaintiff does not have access to a fair trial in Israel is demonstrated by various investigations. In its investigation into *Operation Protective Edge* (OPE), Israel's military attack on Gaza in 2014, the commission of inquiry established by the UN Human Rights Council examined in detail the civil and criminal trials that are available for victims in Israel.<sup>72</sup> Other UN commissions and NGOs have also conducted investigations into this. All these organizations conclude that Palestinians do not have any real possibility to submit infringement of their rights to an impartial and independent court.<sup>73</sup>
99. Below, the plaintiff will give an overview of the possibilities – or the lack of possibilities – that are available for him in Israel to claim compensation of the damage that he suffered in civil proceedings. Following this, the plaintiff will explain why the criminal investigation that the MAG conducted into the bombing of the Ziada family residence and the decision not to criminally prosecute the commanders, including the defendants, for this bombing, is not based on an adequate and independent investigation.

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<sup>72</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 607-651.

<sup>73</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, available at <https://undocs.org/A/71/364>, seen on 15 December 2017, par. 39.

## 5.2 Civil law possibilities for obtaining compensation for damage caused by the IDF

100. The plaintiff is unable to obtain satisfaction and compensation under civil law for the wrongful killing of his family members and the complete destruction of the family residence. The plaintiff will explain this.

### 5.2.1 The 'act of war' exception

101. Israeli law has provisions based on which the party that inflicts damage on another party is required to compensate this damage. However, there is an important statutory exception to this principle: the so-called 'act of war' exception.<sup>74</sup> Based on this exception, all claims for compensation of damage caused by an 'act of war' are inadmissible.<sup>75</sup>

102. The definition of an 'act of war' is very broad, and has been continually further extended in the past years.<sup>76</sup> Israeli courts rigorously apply the exception, so that any

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<sup>74</sup> For an overview of the various amendments that the Knesset adopted in this scope and the parliamentary discussions in this regard, see the Norwegian Refugee Council, Legal Opinion regarding the Implementation and Constitutionality of Amendment 8 of the Civil Tort Law (State Liability) in the context of Damages Claims of the Gaza Strip Residents, in *Resource Guide: Israel's Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 65-95.

<sup>75</sup> Pm source

<sup>76</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 62-64; UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 647. See also what the Nuhanovic Foundation says in this regard: "Israel's Civil Wrongs (Responsibility of the State) Law is the paramount law for obtaining compensation for civil torts in Israeli courts. The principle tenet of the Civil Wrongs Law is that 'the state is not civilly liable for injury sustained by a subject of a state that is an enemy, or to a person who is active in a terrorist organization, or to a person who was injured at a time that he was acting as an agent of such organization, or on its behalf, except for [certain limited exceptions]'. The law was adopted by the Knesset in 1952 and since then has been amended eight times. [...] Taken together, the amendments have steadily expanded the circumstances in which the State will not be liable for its actions while at the same restricting, by procedural and other requirements, the circumstances in which compensation claims can be brought.", available at < [http://www.nuhanovicfoundation.org/en/legal-instruments-4/civil-wrongs-liability-of-the-state-law-5712-1952-with-amendments//possible\\_unsafe\\_site](http://www.nuhanovicfoundation.org/en/legal-instruments-4/civil-wrongs-liability-of-the-state-law-5712-1952-with-amendments//possible_unsafe_site) >, seen on 26 October 2017.

claim for compensation of damage that has in any way been caused by the IDF is certain to fail from the start.

103. In the practice of the Israeli courts, this exception is actually applied. One example for rulings in which the Israeli judge declared a civil claim for payment of compensation inadmissible on account of the *act of war* exception is the ruling in *State of Israel v. Daud* dated 11 August 2011<sup>77</sup> and a ruling of February 2013, about which the Norwegian Refugee Council wrote the following:

“As an example of the burdens placed on victims, in February 2013, Israel’s District Court of Beersheba rejected a lawsuit filed by Al Mezan on behalf of the Salha family for the death of six family members, including four children under the age of 15, when their home was bombarded by Israeli air forces on 9 January 2009. In its ruling, the court stated that the claim must be denied since the attacks took place in the context of a “combat action”, without examining their nature or legality, and ordered the Salha family to pay the State of Israel ILS 20,000 (equal to USD 5,500) in lawyer fees.”<sup>78</sup>

104. Based on this exception alone, it should therefore be concluded that the plaintiff does not have any possibility of claiming compensation for the damage that he suffered in civil proceedings in Israel.

105. Numerous other circumstances that directly and indirectly limit or bar access to the Israeli court in a case like the one at issue can be added to this. The plaintiff lists these barriers below.

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<sup>77</sup> As cited in Norwegian Refugee Council, Legal Opinion regarding the Implementation and Constitutionality of Amendment 8 of the Civil Tort Law (State Liability) in the context of Damages Claims of the Gaza Strip Residents, in *Resource Guide: Israel’s Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 89 (Exhibit X).

<sup>78</sup> Norwegian Refugee Council, Individual Complaint on Access to Justice and Right to Effective Remedy for Palestinians in the Gaza Strip Whose Rights have been Violated by the Israeli Military, both in *Resource Guide: Israel’s Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 98 (Exhibit X).

### 5.2.2 *Other barriers to access to the court in Israel*

106. Israeli law contains numerous other provisions that are directly or indirectly intended to cut off access to the court for Palestinian complainants.

#### 5.2.2.1 Very short period of limitation

107. In as far as a claim for compensation of damage caused by the IDF were to fall outside the 'act of war' exception, the claim is largely rendered impossible by the periods of limitation under Israeli law. To file a claim, the complainant must have filed a complaint with the Ministry of Defence within *60 days* after the harmful event.<sup>79</sup> Subsequently, such a claim becomes definitively statute-barred after two years. For other claims for compensation of damage that are not related to damage caused during military operations by Israel, a limitation period of seven years generally applies. The additional requirement of filing a complaint with the Ministry of Defence within 60 days does not apply at all.

108. It is obvious that this very short period of limitation is an important threshold for access to the court, for everyone who suffers damage from actions by the IDF. After all, within 60 days after such a violent event, victims must file a complaint with the Ministry of Defence. However, it is obvious that the attention of victims will first focus on burying family members who died and possibly taking care of injured persons, as well as to mourning their loss. Obtaining legal advice in the scope of which they might become aware of the very short period of limitation will understandably not be the first thing on their minds. In addition, as further described under 5.2.2.3, it is hardly possible for Palestinians to travel into Israel from the Gaza Strip, so that

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<sup>79</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 65; UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 647.

filing a complaint with the Ministry of Defence is already impossible, in fact, for practical reasons.

109. The very short term for filing a complaint therefore excludes any claim for compensation by victims. Given that the victims of the IDF's actions are primarily Palestinians, it is this population group, in particular, that suffers the disadvantages of this very short period of limitation.

#### 5.2.2.2 Restrictive rules of the law of evidence

110. The applicable rules of the law of evidence in Israel also render it virtually impossible for complainants who do not live in Israel to submit a claim for compensation to the court. One example is the requirement that medical expert reports can only serve as evidence if these have been prepared by an Israeli doctor.<sup>80</sup> However, complainants who live in the Gaza Strip almost never get a permit to travel to Israel. For this reason, they are unable to have an Israeli doctor conduct a medical expert examination. Thus, this rule means that complainants who do not live in Israel generally cannot support their claim with evidence that is accepted by the Israeli courts.

#### 5.2.2.3 Practical obstacles

111. In addition, Israel has raised numerous practical obstacles as a result of which access to the court has been largely ruled out for Palestinians.

112. For example, foreign (including Palestinian) complainants must furnish security in advance for a possible order to pay the costs of the proceedings. This is not demanded

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<sup>80</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 67.



of Israeli plaintiffs. The deposits demanded are so high that most Palestinian complainants cannot pay these amounts.<sup>81</sup>

113. In addition, in principle, Palestinian complainants do not get permission to travel to Israel to take part in a hearing or to testify and any contact between plaintiffs and their attorneys is blocked by travel bans.<sup>82</sup> In this way, Israel prevents Palestinians from attending a hearing that pertains to their own case, or from being heard as witnesses. This is a serious breach of the right to be heard and the right to be assisted by an attorney. In this manner, as well, access to the court is considerably restricted for Palestinian complainants.

### 5.2.3 *The Israeli legal system is inherently discriminatory*

114. It is clear that the obstacles described above that restrict access to the court in Israel primarily disadvantage Palestinian complainants. Thus, these rules are discriminatory against Palestinians.

115. Karayanni, who examined the access to the court for Palestinian complainants, also arrived at this conclusion. He describes how discrimination against Palestinian complainants runs like a common thread through the Israeli legal system. In his words:

“This is exactly how Israel’s access to justice doctrine has been constructed: there are those who belong – Israelis, and those who do not – Palestinians.”<sup>83</sup>

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<sup>81</sup> M. Karayanni, The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs, in H. Watt and D. Fernández Arroyo (eds.), *Private International Law and Global Governance*, Oxford University Press, 2014, p. 232.

<sup>82</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 67; UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 649.

<sup>83</sup> M. Karayanni, The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs, in H. Watt and D. Fernández Arroyo (eds.), *Private International Law and Global Governance*, Oxford University Press, 2014, p. 231.

116. The fact that the Israeli legal system is inherently discriminatory against Palestinians is also demonstrated by a recent Note by the UN Secretary General, entitled “*Lack of faith in the Israeli judicial system*”, which describes a multitude of Israeli laws, practices and court decisions that are discriminating against Palestinians.<sup>84</sup> Here, the plaintiff only mentions three of the examples of such practices listed by the UN Secretary General. For a complete overview, the plaintiff refers to the Note by the UN Secretary General.

117. A first example is a ruling by Israel’s High Court of Justice of June 2015. In this ruling, the High Court of Justice approved a decree ordering the Ministry of Home Affairs to reject all requests for family reunion in Israel if one of the family members originates from the Gaza Strip. The UN Secretary General noted the following in this regard:

“The decree treats all civilians from Gaza as a security threat in a sweeping and discriminatory manner, instead of dealing with individuals on a case-by-case basis. The decree also gravely violates the right to family life.”<sup>85</sup>

118. In another ruling, Israel’s High Court of Justice deemed it permissible that houses of Palestinian families are demolished if one of the family members is suspected of being involved in an attack against the Israeli State or Israeli civilians. In so doing, Israel’s High Court of Justice approved a policy that is in breach of international humanitarian law, given that Article 33 of the Fourth Geneva Convention prohibits both collective penalties and reprisals.<sup>86</sup>

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<sup>84</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 55-60.

<sup>85</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 59. Emphasis added by attorneys.

<sup>86</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 60.

119. Finally, the plaintiff refers to the policy of the Israeli government to seize homes in occupied East Jerusalem that are owned by Palestinians, if the owners are temporarily absent. The Israeli government has acknowledged that the objective of this measure is to encourage expansion of Israeli settlements in the occupied Palestinian Territories.<sup>87</sup> This objective is in breach of the prohibition in Article 49 of the Fourth Geneva Convention to transfer the own population to occupied territories. Nevertheless, the Israeli High Court of Justice also approved this measure.
120. The examples mentioned here first of all reflect that the Israeli government extensively discriminates against the Palestinian population by creating policies that directly and seriously infringe the principles of international humanitarian law. In addition, the examples mentioned demonstrate that people of Palestinian origin cannot rely on the protection of the Israeli court. Quite the contrary, the Israeli High Court of Justice has legitimized such discriminatory measures by approving these policies.
121. Thus, to the extent that Palestinian complainants even have access to the court, they do not receive any legal protection in Israel.

#### 5.2.4 *Civil claims before the Palestinian court*

122. The Palestinian court can be considered to be the most obvious alternative forum for a claim for compensation of damage caused by the IDF. After all, the unlawful act occurred in the Palestinian Territories.
123. However, the plaintiff is unable to submit his claim to a Palestinian court, because any jurisdiction of Palestinian courts over the State of Israel and its bodies has been fully excluded by virtue of an agreement between Israel and the Palestinian authorities. With regard to other Israeli defendants, Palestinian courts only have

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<sup>87</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 57.

jurisdiction if the Israeli defendant explicitly agrees to this.<sup>88</sup> In the case at issue, it is clear beforehand that as commanders of the Israeli army, the defendants will not agree to submit the case to the Palestinian court.

124. Thus, the plaintiff cannot submit his claim to a Palestinian court.

5.2.5 *Interim conclusion: the plaintiff is unable to claim compensation of the damage that he suffered*

125. The above demonstrates that access to the court is completely blocked to the plaintiff in Israel and the Palestinian Territories.

126. Based on the 'act of war' exception, under Israeli law, the plaintiff's claim is inadmissible before the Israeli court. This exception is part of a legal system that largely blocks access to the court for this group of the population and discriminates against Palestinians in various ways. In as far as the plaintiff would nevertheless get access to an Israeli court, this cannot be designated as independent and unbiased, given that the Israeli High Court of Justice has maintained numerous measures that are in breach of international humanitarian law. Thus, no legal protection of Palestinians is involved.

127. The jurisdiction of the Palestinian court has been excluded by virtue of an agreement between Israel and the Palestinian authorities. Thus, the plaintiff cannot submit his claim to the Palestinian court, either.

128. This means that the plaintiff does not have access to the court in Israel and the Palestinian Territories.

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<sup>88</sup> M. Karayanni, The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs, in H. Watt and D. Fernández Arroyo (eds.), *Private International Law and Global Governance*, Oxford University Press, 2014, p. 216.

### 5.3 Criminal investigation into war crimes in Israel

#### 5.3.1 Introduction

129. In some legal systems, victims can also claim compensation in the scope of criminal proceedings. In addition, a criminal investigation contributes to finding out the truth and the prosecution and sentencing of perpetrators contributes to reparations for the victims. Thus, based on Article 146 of the Fourth Geneva Convention, States are required to criminally prosecute those who have committed war crimes or who have ordered such crimes to be committed.

130. However, in Israel, the plaintiff has no prospect of compensation or reparations whatsoever in the scope of criminal proceedings, because the Israeli criminal system that is responsible for investigating criminal acts of the IDF is not independent and does not conduct adequate investigations. The plaintiff will explain this.

#### 5.3.2 War crimes not punishable

131. In 2013, the Israeli NGO *Yesh Din* conducted an extensive investigation into making serious breaches of international humanitarian law punishable under Israeli law. It concluded that Israeli law does not include a provision that makes an act punishable as a war crime.<sup>89</sup> Even though Israel acknowledges that international humanitarian law applies and the IDF code of conduct explicitly stipulates compliance with the Geneva Conventions, the requisite penal provisions based on which acts in breach of these rules can be actually and appropriately punished are absent.<sup>90</sup>

132. A number of acts in breach of international humanitarian law have been made punishable under Israeli law as a normal offence. However, a large number of acts

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<sup>89</sup> Yesh Din, “Lacuna: war crimes in Israeli law and Court-Martial rulings”, July 2013, available at <http://files.yesh-din.org/userfiles/file/Reports-English/Yesh%20Din%20-%20Lacuna%20Web%20-%20English.pdf>, seen on 15 December 2017, p.23.

<sup>90</sup> Yesh Din, “Lacuna: war crimes in Israeli law and Court-Martial rulings”, July 2013, p. 26.

that are designated as war crimes under international humanitarian law have not been made punishable at all under Israeli law, including the following acts that are relevant for the case at issue:

- a. Deliberate attacks on civilians or buildings that are used by civilians, such as residential buildings;
- b. Acts in breach of the principle of proportionality.<sup>91</sup>

133. In addition, Israeli law does not recognize the principle of ‘*command responsibility*’.<sup>92</sup>

Based on that principle, military commanders can be held responsible for war crimes committed by individuals under their command, if they failed to do everything they could to prevent or punish such acts.

134. The *UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories* speaks of a pattern of impunity:

“The Israeli legal system does not criminalize certain international crimes, which hampers prosecution efforts. At the same time, certain cases do not trigger the duty to investigate, for example, cases in which those implicated have acted in line with military policies or open-fire regulations. The challenge here is to consider whether such policies or regulations are compliant with international law. Although the lack of an outcome in some specific cases may be justifiable, a clear pattern of impunity appears evident.”<sup>93</sup>

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<sup>91</sup> Yesh Din, “Lacuna: war crimes in Israeli law and Court-Martial rulings”, July 2013, p. 29. See also UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 645. Based on customary international humanitarian law, these acts are designated as a serious infringement of the principles of humanitarian law, which qualify as a war crime. See: International Committee of the Red Cross, Rule 156. Serious violations of international humanitarian law constitute war crimes, online at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156), seen on 1 February 2018.

<sup>92</sup> Yesh Din, “Lacuna: war crimes in Israeli law and Court-Martial rulings”, July 2013, p. 30-31.

<sup>93</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of

135. The above demonstrates that acts in breach of international humanitarian law frequently *cannot* be criminally prosecuted, because the relevant criminal provisions do not exist under Israeli law. The same is true for acts in breach of the prohibition on attacking civilians or acts in breach of the proportionality principle under international humanitarian law. This also means that the bombing of the Ziada family residence simply *cannot* be criminally prosecuted under Israeli law, because acting in breach of the principle of proportionality has not been criminalized. This means that under Israeli law, the bombing of the Ziada family residence can never be prosecuted as a war crime.
136. Thus, in Israel, the plaintiff does not have any prospect of reparations on account of a criminal conviction of the defendants for war crimes on account of acting in breach of relevant provisions under international humanitarian law.
137. To the extent that acting in breach of international humanitarian law has been made punishable as an ordinary offence, Israeli criminal law does not offer the plaintiff the possibility of demanding compensation as a victim. In addition, the Israeli criminal justice system does not satisfy fundamental requirements for a fair trial and insufficiently contributes to finding out the truth. The plaintiff will explain this.

### 5.3.3 *No independent investigation*

138. In Israel, the *Military Advocate General* (MAG) is responsible for conducting a criminal investigation into the acts of the IDF; he is supported in this by the *Fact-Finding Assessments Mechanism* (FFA), which investigates acts of IDF members by order of the MAG. However, neither of them is independent of the IDF.

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the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 41. Emphasis added by attorneys.

139. The FFA was incorporated by defendant 1, Gantz, in his capacity as IDF *Chief of General Staff*.<sup>94</sup> This means that the FFA cannot function independent of the IDF members – whom it should investigate – given that it has been incorporated by the IDF itself. In addition, the FFA consists of several fact-finding teams. Each team is headed by a senior IDF officer.<sup>95</sup> This also seriously detracts from the independence of the investigation teams, as these are the very teams that must investigate the acts of IDF members. Moreover, the FFA only has a very limited mandate. It only investigates “*exceptional incidents*”.<sup>96</sup>

140. With regard to the MAG, there are also serious doubts regarding his independence. Initially, the MAG is appointed pursuant to a recommendation of the IDF *Chief of General Staff*, defendant 1.<sup>97</sup> Thus, with regard to the MAG, as well, there are general doubts regarding his independence. This applies in particular in the case at issue, where the acts and instructions of the IDF *Chief of General Staff* are the focal point.

141. In addition, the MAG wears two hats. On the one hand, he is the legal adviser of the IDF *General Chief of Staff*, defendant 1, and other military leaders. In this role, the MAG has taken part in cabinet meetings regarding OPE several times. Moreover, the MAG directly advises during a military operation regarding the question of whether an attack satisfies the requirements of international humanitarian law. On the other hand, the MAG has the task of conducting a criminal investigation after the fact into the question of whether combat operations satisfy the requirements of international

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<sup>94</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 611; Amnesty International, *Families Under the Rubble: Israeli Attacks on Inhabited Homes*, 2014, p. 40.

<sup>95</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 611.

<sup>96</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 611; UNGA, Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/31/40/Add.1, 7 March 2016, available at <http://www.undocs.org/A/HRC/31/40/Add.1>, seen on 15 December 2017, par. 32.

<sup>97</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 621.



humanitarian law. Within the MAG's organization, even though these two tasks are performed by two separate departments, the commission of inquiry established by the UN Human Rights Council is nonetheless not convinced of the MAG's independence:

“The involvement of the MAG in policy discussions concerning the hostilities, and the role of MAG Corps legal advisors in decisions taken by the IDF during combat continue to raise questions about the MAG's ability to carry out independent and impartial investigations, particularly with regard to cases where soldiers may be following commands authorised by the MAG and his subordinates, but nonetheless may be suspected of having violated international humanitarian law or international human rights law.”<sup>98</sup>

142. Given that it was policy to bomb residential buildings, it is plausible that at some point, the MAG advised on the question regarding whether or not this is permissible. As the commission of inquiry of the UN Human Rights Council also notes, this means that the MAG cannot be expected to conduct a thorough and independent criminal investigation in a case like the one at issue.

143. A similar image emerges in a report of the *UN High Commissioner for Human Rights*, in which he investigates the extent to which Israel followed the recommendations made by the commission established by the UN Human Rights Council. In this report, the commission noted that in breach of applicable international standards, the MAG and the FFA are not independent of the command structure of the IDF, whose acts they must investigate.<sup>99</sup>

144. For this reason, any criminal investigation conducted by the MAG and the FFA does not qualify as an independent investigation. This is also true for the investigation that the MAG conducted into the bombing of the Ziada family residence.

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<sup>98</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 619. Emphasis added by attorneys.

<sup>99</sup> UNGA, Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/31/40/Add.1, 7 March 2016, par. 32.

#### 5.3.4 *Lack of transparency and effectiveness*

145. The commission of inquiry of the UN Human Rights Council notes that little is known regarding how the FFA and the MAG conduct their investigation, whether or not Palestinian witnesses are examined and whether means such as autopsy and medical examinations are used in this scope. In the past, the MAG stated that they also examined Palestinians in a case. However, the Palestinians reported that they had never been contacted by the MAG. In addition, the commission notes that even though the FFA members are knowledgeable in the area of military operations, no relevant training has been demonstrated in the area of conducting adequate criminal investigations into human rights violations.<sup>100</sup> Based on these reports, the thoroughness of the investigation that the FFA and MAG are conducting must be doubted.

146. In addition, the commission of the UN Human Rights Council is critical of the fact that in general, the MAG reports provide little insight into the grounds on which a certain decision is based:

“However, a detailed reading of the information provided on many of the incidents in those updates provides little clarity on the assessment by the FFA Mechanism and the MAG. The MAG updates rather make brief references to military necessity, military targets, warnings provided, fulfilment of the requirement of the principle of proportionality or the targeting process, and so on, without supplying an adequate level of detail to support the reasoning justifying actions that resulted in civilian harm.”<sup>101</sup>

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<sup>100</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 626.

<sup>101</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 628.

147. This criticism also applies to the case at issue. Even though the MAG conducted an investigation into the bombing of the Ziada family residence, the MAG report submitted as **Exhibit X** does not provide any insight into the grounds for the attack and the reasons based on which the MAG concludes that the attack is allegedly in line with international humanitarian law. The MAG suffices with non-substantiated arguments that there were fighters in the building and that all principles of international humanitarian law have been satisfied.

148. It appears to be the rule rather than the exception that the IDF assumes that someone is not a civilian solely and exclusively based on his presence in a specific location and that with its finding, the MAG legitimizes this rash assumption:

“These factual elements suggest that by assuming that the individuals were members of armed groups merely on the basis of their presence in a particular location, the IDF reversed the presumption of civilian status. In addition, the commission is concerned that the MAG appears to have validated this incorrect application of international humanitarian law.”<sup>102</sup>

149. The MAG’s investigation into the bombing of the Ziada family residence also suffers from a lack of transparency and displays an incorrect application of international humanitarian law. In his report, the MAG suffices with the argument that one of the guests present in the house was allegedly a fighter, without substantiating this in any way whatsoever. Moreover, according to the MAG, the presence of this man justified the bombing of the residence, even though seven civilians were present. In breach of humanitarian law, the MAG fails to provide any insight into the consideration of interests that he made in the scope of the principle of proportionality, which can support this conclusion. In addition, the MAG points out that it was allegedly demonstrated after the fact that three of the Ziada brothers present were allegedly also fighters. This also displays an incorrect application of international humanitarian law,

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<sup>102</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 632.

given that the consideration of interests in the scope of the principle of proportionality must be performed before an attack. Even if three of the brothers of the Ziada family were fighters, which they were not, this cannot be used to justify the attack after the fact.

150. The UN Human Rights Council describes the Israeli criminal investigation mechanism as ineffective and non-transparent, which means that the MAG legalizes acts that are in breach of international humanitarian law by concluding that they satisfy the requirements to be stipulated for such acts. The same was done in the investigation into the bombing of the Ziada family residence, in which the MAG concluded incomprehensibly and without any substantiation that the attack was legitimate and proportionate.

### 5.3.5 *No investigation into military commanders*

151. In addition to the fact that the investigation by the MAG and the FFA exhibits several defects as described above, they limited the investigation to the operational members of the IDF who are low in the command structure. The MAG and FFA largely disregard the acts of and instructions issued by the IDF commanders, including the defendants.
152. In its investigation, the commission established by the UN Human Rights Council observed that bombing residential buildings was carried out as a policy, in breach of international humanitarian law. A criminal investigation into the commanders of the IDF would have been in order in this scope. The commission noted that despite this, no criminal investigation into military commanders who approved this policy, including the defendants has been demonstrated.<sup>103</sup>

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<sup>103</sup> UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 640-642.

153. With regard to OPE, the FFA and the MAG only launched one investigation into a military commander, after an audio recording had surfaced in which he ordered his soldiers to bomb a civilian building in retaliation for the death of an IDF soldier. Despite the fact that this order was apparently issued in breach of international humanitarian law, the MAG did not initiate prosecution.<sup>104</sup>
154. This is in line with the image that also emerged in previous military operations. Both the commission of inquiry established by the UN Human Rights Council to investigate OPE and the *Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, which investigated previous military operations, note that in as far as any criminal investigation into the conduct of the IDF was initiated at all, the investigation pertained exclusively to soldiers low in the command structure. The conduct of military commanders was virtually never investigated. In addition, the criminal investigations into lower-ranking soldiers virtually never resulted in prosecution. Even if someone was prosecuted, a conviction was rarely handed down; in case of a conviction, the accused could count on low sentences.<sup>105</sup>
155. The NGO *B'Tselem* also believes that the investigations that were conducted under the management of the MAG were so ineffective that it announced in May 2016 that it would no longer make any reports.<sup>106</sup>

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<sup>104</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 52.

<sup>105</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, available at <http://undocs.org/A/69/347>, seen on 15 December 2017, par. 56 and 58; UNGA, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4, 24 June 2015, par. 650-651.

<sup>106</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, available at <https://undocs.org/A/71/352>, seen on 15 December 2017, par. 61.

156. Thus, there is, in fact, no real chance of a criminal investigation into the conduct of members of the IDF, and certainly not into the conduct of the commanders, including the defendants. This also proved true in the case at issue. Even though the MAG conducted an investigation into the bombing of the Ziada family residence, based on the shortcomings of the criminal justice system in Israel described above, it was clear in advance that the investigation would not (and could not) lead to any criminal prosecution.

#### 5.3.6 *Interim conclusion: criminal investigation does not lead to prosecution*

157. The investigation conducted by the commission established by the UN Human Rights Council and other UN bodies demonstrated that the criminal justice system in Israel exhibits serious defects. Specific acts in breach of international humanitarian law have not been made punishable at all. To the extent that this has been done, no independent and thorough investigation is conducted into the acts of the IDF members. Moreover, it was demonstrated both in OPE and in previous military operations that the acts of *commanders* of the IDF are fully disregarded. Nor does the investigation into the bombing of the Ziada family residence qualify as a thorough and independent criminal investigation.

158. The plaintiff concludes that in Israel, he does not have any prospect of reparations or of finding out the truth in the scope of criminal proceedings.

#### **5.4 Interim conclusion: no access to the court in Israel**

159. Based on the fact that both the criminal justice system in Israel is very defective in respect of the acts of the IDF and because legal proceedings under civil law for the compensation of damage caused by the IDF are, in fact, blocked, various UN committees and NGOs concluded that Palestinians do not have access to the court in

Israel.<sup>107</sup> Where these possibilities exist in theory, they prove to be illusory in practice. The UN Secretary General concludes:

“[...] the Special Committee fears that the separation of powers between the judiciary and executive branches in Israel is increasingly narrowing, potentially affecting the independence of the judiciary and the decisions of the courts in Israel. The Committee is also of the opinion that information received casts doubt on the ability of the domestic accountability mechanisms in Israel to bring any measure of justice to the victims of human rights and humanitarian law violations.”<sup>108</sup>

160. The jurisdiction of the Palestinian court as the most obvious alternative forum is excluded by contract. It is an established fact in advance that the defendants would not voluntarily agree to submit the case to the Palestinian court.

161. Thus, the plaintiff does not have any possibility to submit his claim to the Israeli or the Palestinian court.

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<sup>107</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/69/347, 25 August 2014, par. 69; UNGA, Report of the UN High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1: Addendum – Implementation of the recommendations contained in the reports of the independent commission of inquiry on the 2014 Gaza conflict and the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/31/40/Add.1, 7 March 2016, par. 39; UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories: Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, A/71/364, 30 August 2016, par. 41; Amnesty International, *Families Under the Rubble: Israeli Attacks on Inhabited Homes*, 2014, p. 41; Norwegian refugee Council, *Resource Guide: Israel's Policies towards the Gaza Strip Post 2005*, prepared for the Amsterdam Roundtable, October 2014, p. 96.

<sup>108</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, par. 64.

## 5.5 Article 9 (b) DCCP – *Forum necessitatis*

162. By virtue of Article 9 (b) DCCP, the Dutch court has jurisdiction if “*court proceedings outside the Netherlands prove impossible*”. Given that it is impossible for the plaintiff to initiate the case before the Israeli or Palestinian court either legally or in practical terms, this article applies in the case at issue.
163. After all, the above demonstrates that civil proceedings before an Israeli court have no chance of success, because the defendants can rely on the ‘*act of war*’ exception. Palestinian courts, as the most obvious alternative forum, have no jurisdiction over the plaintiff’s case.
164. Nor did the plaintiff have any prospect of reparations or compensations in the scope of an independent and thorough criminal investigation into the bombing of his family’s residence. Criminal prosecution of those responsible in Israel has already been dismissed by the MAG and – in view of the defective criminal justice system in Israel – was not expected, either.
165. Thus, the plaintiff *cannot* submit his claim to an Israeli or Palestinian court. This means that by virtue of Article 9 (b) DCCP, the Dutch court has jurisdiction.
166. In this scope, the plaintiff also refers to Article 1 of the Four Geneva Conventions, which stipulates that each State is required to safeguard compliance with the Geneva Conventions. With reference to this article, in its *Advisory Opinion on the Legal Consequences of a Wall*, the International Court of Justice stipulated that Israel’s regime in the Palestinian Territories constitutes a serious breach of international law, and is of such a nature that this also entails obligations for other countries.<sup>109</sup> This means that the Dutch State, as well, is required to prevent making any contribution to the continuation of the human rights violations that are the result of Israel’s politics.

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<sup>109</sup> See IGH, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, par. 159.



The Dutch court has a role to play here: the District Court should declare that it has jurisdiction and in this way contribute to compliance with the Geneva Conventions.

## 5.6 Article 9 (c) DCCP – Proceedings in Israel are unacceptable

167. To the extent that the District Court finds it implausible that the plaintiff does not have access to the court in Israel, the District Court has jurisdiction based on Article 9 (c) DCCP. Based on this article, the Dutch court has jurisdiction if the case has sufficient connecting factors with Dutch jurisdiction and the plaintiff cannot be demanded to initiate his case in another country.
168. The case at issue has sufficient connecting factors with Dutch jurisdiction, because the plaintiff has Dutch nationality and lives in the Netherlands with his wife and three children.
169. The plaintiff cannot be demanded to initiate his case in another country. After all, the most obvious forum for this would be the Israeli and Palestinian courts. In as far as it is not demonstrated by the above that the plaintiff cannot possibly submit his case to those courts, this in any event demonstrates that this is very difficult and that he has very little chance of success. After all, the Israeli State has raised numerous legal and practical obstacles to block claims on account of damage caused by the IDF.
170. It is unreasonable to demand that the plaintiff applies to a court whose jurisdiction over the case has been limited by contract, as applies for the Palestinian court. In addition, the plaintiff cannot travel to the Palestinian Territories without permission from the Israeli State. The plaintiff will not get this permission.
171. Nor can the plaintiff be demanded to submit his claim to a court that is part of a legal system in which Palestinians are structurally discriminated against and deprived of rights, as they are before the Israeli court. Such a system is also referred to as '*victor's justice*', in which the party that is in power tries war crimes according to its own rules and inherently unfairly.

172. In this regard, as well, the plaintiff refers to the obligation of the Dutch State to contribute to complying with the Geneva Conventions, as described above. Based on the above, the District Court should declare that it has jurisdiction over the case.

## 5.7 Conclusion: the Dutch court has jurisdiction

173. The above demonstrates that the plaintiff does not have access to the court in Israel or in the Palestinian Territories, or at least that he cannot be expected to submit the case to any court other than the Dutch court. For this reason, the Dutch court has jurisdiction over this case.

## 6 APPLICABLE LAW

174. The applicable law in this case is determined by rules of international private law, i.e. Article 10:159 of the Dutch Civil Code (DCC) in conjunction with Article 4 of the Rome II Regulation. Article 4 of the Rome II Regulation stipulates that the applicable law is the law of the country in which the damage occurs, irrespective of the country or countries in which the harmful event occurred and irrespective of the country or countries where the indirect consequences of that event occur. Based on Article 3, the Rome II Regulation has a universal character, which means that the designated law applies, irrespective of whether this is the law of a Member State.

175. The damage occurred in the Gaza Strip, which is part of the Palestinian Territories that are occupied by Israel. In occupied territories, the “law of belligerent occupation” applies (hereinafter: the law of occupied territories); the 1907 Hague Regulations, the Fourth Geneva Convention, and the First Protocol to the Geneva Conventions are part of this law.<sup>110</sup> In that case, the law of occupied territories also applies in the Gaza

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<sup>110</sup> In this scope, the plaintiff refers to Chapter 3.3, in which he explained that Israel is designated as an occupying power in the Palestinian Territories and on that account is bound by international humanitarian law.

Strip.<sup>111</sup> Most of these provisions are common law and on this account, as well, applicable in the Gaza Strip; moreover, Israel also acknowledges this.<sup>112</sup> These rules of international humanitarian law also stipulate that the law that originally applied in the occupied territory continues to apply in this territory.<sup>113</sup> Thus, this rule also indicates the applicability of the law of the Gaza Strip to the case at issue.

176. This means that the law of the Gaza Strip applies to the bombing of the Ziada family residence, just as the provisions of international humanitarian law and human rights. Below, the relevant provisions that pertain to the obligation to compensate damage will be discussed. The standards framework based on which it is to be assessed whether the bombing was lawful is formed by rules of international humanitarian law; this will be outlined in discussing the unlawful act.

## 6.1 Palestinian law in the Gaza Strip

177. The plaintiff had the *Internationaal Juridisch Instituut* (International Legal Institute) prepare a report in which the liability law that applies in the Gaza Strip is examined.<sup>114</sup> This report demonstrates that Palestinian law has been influenced from various sides, based on the turbulent history of the Gaza Strip, which was first part of the Ottoman Empire, then fell under the British Mandate, in 1948 was occupied by Egypt and, following the Six-Day War in 1967, was occupied by Israel.

178. The *Internationaal Juridisch Instituut* concludes that the Gaza Strip has more than one source of law. With regard to liability law, the *Internationaal Juridisch Instituut*

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<sup>111</sup> P. Maurer, Challenges to International Humanitarian Law: Israel's Occupation Policy, 888 ICRC Review 94 (2012), available at <https://www.icrc.org/en/international-review/icrc-150-years-humanitarian-action>, seen on 18 January 2018, p. 1506.

<sup>112</sup> P. Maurer, Challenges to International Humanitarian Law: Israel's Occupation Policy, 888 ICRC Review 94 (2012), p. 1506.

<sup>113</sup> Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention IV (hereinafter: 1907 Hague Regulations), Article 43.

<sup>114</sup> Expert report of the *Internationaal Juridisch Instituut* (International Legal Institute) dated 30 November 2017 (**Exhibit X**).

designates the British Civil Wrongs Ordinance from 1944 and Islamic law as the most important legal source.<sup>115</sup>

179. The British Civil Wrongs Ordinance is based on the *torts* system as this still exists today under English law. Thus, under the Civil Wrongs Ordinance, bombing the Ziada family residence in breach of the applicable rules of international humanitarian law would qualify as a tort.

180. The party that commits a tort must compensate the aggrieved party for the damage that directly results from the tort. The *Internationaal Juridisch Instituut* notes that under the Civil Wrongs Ordinance, compensation is based on the principle of full compensation:

“The fundamental principle upon which the law of damages for wrongful acts is founded is that of restitution in integrum. Since the damage once done can never be undone, the plaintiff is to be awarded such sum as he would have been in, had the accident not happened. On the other hand, an injured person may recover no more than a fair compensation.”<sup>116</sup>

181. Islamic liability law is also based on the principle that a person who inflicts damage on another person by an unlawful act, must compensate the damage that he caused. Within Islamic law there is even a school that argues that damage caused by a lawful act also gives rise to a compensation obligation.<sup>117</sup> However, given that the bombing of the Ziada family residence was in breach of the applicable rules of international humanitarian law, it is an established fact that under Islamic law, as well, the parties responsible are under an obligation to pay compensation.

<sup>115</sup> Expert report of the *Internationaal Juridisch Instituut* dated 30 November 2017 (Exhibit X), p. 14.

<sup>116</sup> S. Herzfeld as cited by the *Internationaal Juridisch Instituut*, Exhibit X, p. 7.

<sup>117</sup> *Internationaal Juridisch Instituut*, Exhibit X, p. 12.

182. Damage to property qualifies for compensation. In addition, under Islamic law, surviving dependents also have a claim for compensation on account of the death of family members.<sup>118</sup>

## 6.2 Conclusion: under Palestinian law, the plaintiff has a claim for compensation

183. Thus, the *Internationaal Juridisch Instituut* concludes that it is highly plausible that under Palestinian law, a breach of international humanitarian law would be designated as an unlawful act that gives rise to the obligation to pay compensation towards the plaintiff.<sup>119</sup> Based on applicable Palestinian law, the plaintiff can claim compensation for the damage to his property, as well as compensation for the death of his family members.

184. In the next chapter, the plaintiff will address the unlawfulness of the defendants' acts.

## 7 ACTING UNLAWFULLY

185. As extensively described in Chapter 3, various UN commissions and NGOs determined that the bombing of residential buildings during OPE was carried out as a policy and that this policy is in breach of international humanitarian law. Bombing the Ziada family residence was also in breach of applicable law and thus unlawful towards the plaintiff. The plaintiff will briefly outline the applicable standards below and discuss how the defendants acted in breach of these rules in respect of the bombing of the Ziada family residence.

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<sup>118</sup> *Internationaal Juridisch Instituut*, Exhibit X, p. 11 and 13.

<sup>119</sup> *Internationaal Juridisch Instituut*, Exhibit X, p. 15.

## 7.1 International humanitarian law

186. International humanitarian law stipulates standards that must be observed during an armed conflict and an occupation. The objective of these rules is to ensure a minimum of humanity in such exceptional situations in which force is used. In particular, civilians must be prevented from becoming the victims of combat operations. Three principles take centre stage here.

### 7.1.1 *The principle of distinction*

187. The principle of distinction in an armed conflict follows from written and unwritten rules of international humanitarian law. Common Article 3 of the Geneva Conventions of 1949 prohibits the use of violence against persons who do not take any active part in the hostilities; Article 48 of the First Protocol to the Geneva Conventions reads as follows:

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>120</sup>

188. Article 48 of the First Protocol to the Geneva Conventions codifies the starting point underlying international humanitarian law and therefore qualifies as a rule of common law. Thus, this article applies, irrespective of whether Israel signed the Protocol or not. The Commentaries to the text of the Protocol contain the following regarding Article 48:

“The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests:

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<sup>120</sup> Additional Protocol I to the Geneva Conventions, Article 48.

the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 (1) and in Geneva from 1864 to 1977 (2) is founded on this rule of customary law. It was already implicitly recognized in the St. Petersburg Declaration of 1868 renouncing the use of certain projectiles [...]"<sup>121</sup>

189. Thus, it is a rule of international common law that the parties to an armed conflict must distinguish between civilians and combatants<sup>122</sup> and between civilian objects and military targets at all times.<sup>123</sup>

190. Attacks are only permitted on military targets. Military targets are exclusively objects that by their nature, location, purpose or use actually make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definitive military advantage under the circumstances in force at that time.<sup>124</sup> This definition is part of international common law regarding armed conflicts.<sup>125</sup> Residential buildings are *prima facie* designated as civilian objects.<sup>126</sup> In addition, in case of doubts regarding whether an object is used for military or civilian purposes,

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<sup>121</sup> ICRC commentary of 1987 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=83C5B3FC27BB6F00C12563CD00434537>, par. 1863.

<sup>122</sup> International Committee of the Red Cross, 'Rule 1. The Principle of Distinction between Civilians and Combatants', *Customary International Humanitarian Law*, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1).

<sup>123</sup> International Committee of the Red Cross, 'Rule 7. The Principle of Distinction between Civilian Objects and Military Objectives', *Customary International Humanitarian Law*, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7).

<sup>124</sup> Additional Protocol I to the Geneva Conventions, Article 52 (2). International Committee of the Red Cross, 'Rule 10. Civilians Objects' Loss of Protection from Attack', *Customary International Humanitarian Law*, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule10](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10).

<sup>125</sup> International Committee of the Red Cross, 'Rule 8. Definition of Military Objectives', *Customary International Humanitarian Law*, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8).

<sup>126</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 38.

international humanitarian (common) law stipulates the assumption that the object has a civilian nature.<sup>127</sup>

191. The same applies with regard to the distinction between civilians and fighters. A civilian loses the protection he enjoys based on international humanitarian law if and during the time in which he actively participates in combat operations.<sup>128</sup> In assessing whether or not this is involved, the issue is active participation in combat operations. In this regard, a distinction must be made between a conflict party as a whole and its combat forces:

“Accordingly, the decisive criterion for individual membership in an organized armed group should be whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (“continuous combat function”). This illustrates that, just as with States, a conceptual distinction must be made between the non-State “party” to an armed conflict (i.e., the insurgency or rebellion as a whole) and its “armed or military wing”, which is charged with the conduct of hostilities on its behalf (i.e., the “organized armed group” or “armed force” in a functional sense).”<sup>129</sup>

192. Thus, in the context of the Gaza Strip, the mere fact that someone is a member of Hamas is insufficient to designate him as a military target. As described under heading 3.2.2, Hamas has several branches and bodies. Only members of the Izzedin al-Qassam brigades who actively participate in acts of war qualify as fighters. In case of doubt, a person should be designated as a civilian:

“In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle

<sup>127</sup> Additional Protocol I to the Geneva Conventions, Article 52 (3).

<sup>128</sup> See Additional Protocol I to the Geneva Conventions, Article 57 (3); Similarly: UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 56.

<sup>129</sup> N. Melzer, Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guide on the Notion of Direct Participation in Hostilities, 42 New York University Journal of International Law and Politics 3, 2010, p. 846.



of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.”<sup>130</sup>

193. Article 50 (3) of the First Protocol to the Geneva Conventions also stipulates that the presence of a fighter in a group of civilians does not mean that all persons are designated as fighters:

“The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>131</sup>

194. Thus, based on the principle of distinction, civilian objectives, such as residential buildings and civilians, may not be attacked. Direct attacks on civilians and large-scale destruction of civilian objects are both designated as war crimes.<sup>132</sup>

### 7.1.2 *The principle of proportionality*

195. The principle of proportionality in armed conflicts follows from unwritten rules of international humanitarian law and from Article 51 (5)(b) and Article 57 (2)(a)(iii) of the First Protocol to the Geneva Conventions.<sup>133</sup> Given that this principle is designated

<sup>130</sup> International Committee of the Red Cross, Interpretive Guide on the Notion of Direct Participation in Hostilities under International Humanitarian Law, available for downloading at <https://shop.icrc.org/guide-interpretatif-sur-la-notion-de-participation-directe-aux-hostilites-en-droit-international-humanitaire-2593.html>, seen on 31 January 2018, p. 76.

<sup>131</sup> Additional Protocol I to the Geneva Conventions, Article 50 (3).

<sup>132</sup> International Committee of the Red Cross, ‘Rule 156. Serious violations of international humanitarian law constitute war crimes’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule156).

<sup>133</sup> International Committee of the Red Cross, ‘Rule 14. Proportionality in Attack’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rule14](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule14).

as common law, this also binds Israel, despite the fact that Israel is not a party to the First Protocol.

196. Article 57 (2)(a)(iii) of the First Protocol to the Geneva Conventions is explicitly directed towards those who plan and order attacks and reads as follows:

“those who plan or decide upon an attack shall:

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>134</sup>

197. The principle of proportionality requires that prior to attacks on legitimate targets that (may) also cause civilian casualties and damage to civilian objects, every effort is made to assess the number of civilian casualties or objects that might be injured, killed or damaged by the attack.<sup>135</sup>

198. The attack may only be carried out if the number of civilian casualties to be expected bears a reasonable proportion to the anticipated military advantage. Ordering an attack in breach of the principle of proportionality is a war crime.<sup>136</sup>

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<sup>134</sup> Additional Protocol I to the Geneva Conventions, Article 57 (2)(a)(iii).

<sup>135</sup> International Committee of the Red Cross, ‘Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule18](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule18).

<sup>136</sup> Additional Protocol I to the Geneva Conventions, Article 85 (3) and International Committee of the Red Cross, ‘Rule 156. Serious violations of international humanitarian law constitute war crimes’, Customary International Humanitarian Law, online via International Committee of the Red Cross, ‘Rule 14. Proportionality in Attack’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156).

### 7.1.3 *The obligation to take precautionary measures*

199. The obligation to take precautionary measures in armed conflicts follows from Article 57 of the First Protocol to the Geneva Conventions and from unwritten rules of international humanitarian law and requires the following:

“In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>137</sup>

200. The obligation to spare civilians and civilian objects demands that various precautionary measures are taken and fulfils an important role in assessing whether the conduct was in conformance with the principles of distinction and proportionality discussed above.<sup>138</sup>

201. One of the required precautionary measures is the obligation to issue effective warnings to civilians prior to an attack, unless circumstances prevent this.<sup>139</sup> In this context, this could involve warning civilians in person, by telephone, by SMS message or in writing by distributing flyers. The warning must in any event be effective, in which the following considerations are relevant:

“The effectiveness will depend on three considerations: the clarity of the message, the credibility of the threat and the possibility of those receiving the warning taking action to escape the threat.”<sup>140</sup>

202. Based on a warning, civilians must have a realistic chance of escaping an attack. But even if they choose not to do this, they do not lose the protection they are entitled to

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<sup>137</sup> International Committee of the Red Cross, ‘Rule 15. Precautions in Attack’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15).

<sup>138</sup> Paul Ducheine and Eric Pouw, *ISAF Operaties in Afghanistan: oorlogsrecht, doelbestrijding in counterinsurgency, ROE, mensenrechten & ius ad bellum* (Wolf Legal Publishers, 2010), p. 120.

<sup>139</sup> International Committee of the Red Cross, ‘Rule 20. Advance Warning’, Customary International Humanitarian Law, online via [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule20](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule20).

<sup>140</sup> UNGA, Human rights in Palestine and other occupied Arab territories: Report of the United Nations Fact Finding Mission on the Gaza conflict, A/HRC/12/48, 25 September 2009, par. 513.

by virtue of international humanitarian law. This is only different if and as long as a civilian actively participates in combat operations.<sup>141</sup>

203. In addition, the means of the attack must be selected such that the chance of civilian casualties is limited to the extent possible.<sup>142</sup> This means that weapons must be used that can be aimed as precisely as possible at the envisaged target and which cause as little damage as possible.

#### 7.1.4 *Burden of proof*

204. The burden of proof that an attack is in accordance with the requirements of the three principles mentioned above falls on the defendants or the IDF. In this scope, it should also be noted that in the event of doubts, international humanitarian law stipulates that an object or person should be designated as civilian. Thus, this assumption must be refuted by the attacking party.

205. Israel itself acknowledges this, as demonstrated by a ruling of Israel's High Court of Justice, which notes:

“The burden of proof on the attacking army is heavy .... In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point: “[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious”<sup>143</sup>

<sup>141</sup> See Additional Protocol I to the Geneva Conventions, Article 57 (3); Similarly: UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 56.

<sup>142</sup> Additional Protocol I to the Geneva Conventions, Article 57 (2) (ii).

<sup>143</sup> See Israel High Court of Justice, Public Committee Against Torture v. The Government of Israel, 13 December 2006, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf), par 40. The relevant paragraph is also cited as State practice in the International Committee of the Red Cross, Practice relating

206. The UN Human Rights Council also writes that the IDF must prove that each attack carried out is in conformance with the requirements to be stipulated in this regard:

“In relation to each attack on residential buildings that resulted in significant destruction and civilian deaths or injuries, the onus is on Israel to explain the factual elements that rendered the houses or the person(s) present inside a military target. Israel should provide specific information on the effective contribution of a given house or inhabitant to military action and the clear advantage to be gained by the attack.”<sup>144</sup>

207. Because all three principles require that the IDF collects information, makes a consideration of interests and takes measures to prevent civilian casualties *prior* to the attack, the defendants must demonstrate that such a consideration of interests was also made regarding the attack on the Ziada family residence. As will be demonstrated by the next section, this is not the case.

## 7.2 Application to the facts of the case at issue

208. The facts of the case at issue indicate that the attack on the Ziada family residence on 20 July 2014 in the Gaza Strip was carried out in breach of the principles of international humanitarian law. After all, in the attack, a residential building was destroyed, seven civilians were killed, including an elderly women and a mother and her son. Based on international humanitarian law, it must be assumed that the attack was directed against civilian objects and civilians. In addition, the attack is in line with a series of systematic attacks on residential buildings in the Gaza Strip. Various UN agencies and NGOs have analysed a number of these attacks and conclude that a large number of these attacks were carried out in breach of the rules of international

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to rule 6. Civilians’ Loss of Protection from Attack, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule6](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule6), both seen on 30 January 2018.

<sup>144</sup> UNGA, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/52, 24 June 2015, par. 38.

humanitarian law. What is more, all these organizations conclude that the attacks on residential buildings and the civilians living in these buildings were carried out as a policy by the IDF, in which the large number of civilian casualties was not a regrettable incident, but the objective of the actions. This objective is diametrically opposed to the principles of international humanitarian law. In this scope, the plaintiff refers to the reports of the UN Human Rights Council and three NGOs, as discussed in Chapter 3.6.4. The fact that attacks on residential buildings during *Operation Protective Edge* were carried out in accordance with policy in and of itself gives rise to the assumption that the attack on the Ziada family residence was also unlawful. The plaintiff will explain below that the specific circumstances of the attack on the residence of his family do not refute this assumption.

209. The only source from which the plaintiff can infer what would have justified the attack on the residence of his family is the report of Israel's *Military Advocate General* (MAG).<sup>145</sup> In Chapter 5.3, the plaintiff already explained at length that several UN agencies criticize the MAG reports as insufficiently objective and of very poor quality. In addition, various UN commissions and NGOs have noted that neither the MAG reports nor any other source provide any information regarding the grounds based on which certain objects were attacked.<sup>146</sup> This is also true for the report that the MAG prepared regarding the attack on the Ziada family residence, so that in and of itself, this report cannot be considered to adequately substantiate that the attack on the Ziada family residence was justified.

210. The report does not include a single substantiating document and makes numerous assertions in general terms, without supporting these with any evidence or adequately substantiating these. For example, the report states that the object of the attack was to take out a Hamas "command and control centre". However, the Ziada family residence was not used as such a command centre, but as a residence. Just before the attack, the plaintiff spoke to his brother via Skype. During this call, he did not see any

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<sup>145</sup> The MAG's decision regarding the bombing of the Ziada family residence, 24 August 2016, **Exhibit X**.

<sup>146</sup> See what the plaintiff already explained in Chapter 3.6.4 above.

military activities in the residence, either. There is nothing that demonstrates that the Ziada family residence was in any way actually used as a military centre and on this account constituted a legitimate military target. Thus, the assumption that the house was a civilian object remains intact.

211. In this scope, the plaintiff refers to the military objective that was pursued with *Operation Protective Edge*, as represented in number 38. This was allegedly the destruction of rockets and mortar launching facilities and tunnels that were used by Hamas. However, the MAG report does not explain whether and how the attack on the Ziada family residence allegedly contributed to this objective. Given that there was no rocket and mortar launching system or a tunnel in or under the house, it is not likely that the attack contributed to the stated military target in any way, either.
212. The report also submits that there were indications that the building was being used by Mohammed Muqadama. He is the only person who is named in the MAG's report. Even though the MAG spells the name of this man differently, it is likely that this refers to Muhammad Al-Maquadama, who was a guest in the Ziada family residence at the time of the attack. According to the MAG, he was a "senior figure in Hamas' military observation force"<sup>147</sup>. Again, no substantiation or explanation is provided for this argument.
213. The mere statement that the Ziada family residence was being used as a military control centre is not only implausible in the complete lack of substantiation or explanation. The fact that various NGOs and the UN Human Rights Council observed that the IDF uses a definition of military targets that is so broad that it is in breach of international humanitarian law further supports this image.<sup>148</sup> For example, entire areas were designated as a "sterile zone" and everyone who was still present was assumed to be a fighter.

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<sup>147</sup> The MAG's decision regarding the bombing of the Ziada family residence, 24 August 2016, **Exhibit X**, p. 6.

<sup>148</sup> In this scope, the plaintiff refers to what he advanced in Chapter 3.6.4 above.

214. Even if it is true that Mohammed Muqadama could be designated as a fighter, his presence does not mean that as a result, the other people who were present in the house lose their status as civilian or the protection they are entitled to by virtue of international humanitarian law; thus, this means that the attack is also in breach of the principles of international humanitarian law, because the number of civilian casualties was not proportionate to the military advantage to be achieved and because no precaution whatsoever was taken to limit the number of civilian casualties.
215. The MAG further alleges that it was demonstrated *after* the attack that three of the brothers of the Ziada family were also fighters. Even if this had been the case, *quod non*, this discovery after the fact could not legitimize the attack, given that the principles of international humanitarian law require that it is determined *prior* to an attack whether a legitimate military target is involved. Moreover, the plaintiff's brothers were not fighters. Only Omar Shaban Ziada was a Hamas member, and he was not an active member. As argued above, mere membership in Hamas is insufficient to denote a person as a fighter.
216. The attempt to justify the attack using knowledge that was gained after the fact already demonstrates that the MAG did not actually make a consideration of interests in conformance with the rules of international humanitarian law. The same is true regarding the principle of proportionality, which requires a consideration of interests *prior* to the attack. The report shows that prior to the attack, it was only assumed that Mohammed Muqadama was a fighter. It is up to the defendants to demonstrate that the military advantage that would be achieved by killing him outweighed the large number of civilian casualties that would be caused in the attack, and outweighed the destruction of a residential building. There is nothing that demonstrates that this consideration of interests was actually made, or that the consideration made is transparent in any way, because the MAG suffices by stating that the attack was proportionate.<sup>149</sup> Given that six civilians were killed in the attack, two civilians were

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<sup>149</sup> The MAG's decision regarding the bombing of the Ziada family residence, 24 August 2016, **Exhibit X**, p. 6.



injured and a residential building was completely destroyed, the military advantage to be achieved bears no relation whatsoever to the civilian casualties that resulted from the attack. It is up to the defendants to demonstrate that this is otherwise, despite this disproportion.

217. Finally, the defendants failed to take precautionary measures to limit the number of civilian casualties as much as possible. The MAG's report demonstrates that prior to the bombing of the Ziada family residence, no warning was issued. The MAG states – again, without providing any substantiation or reasons – that this was not possible or required, because otherwise the objective of the attack would be thwarted. Nor does the MAG explain why it was not possible to kill Mohammed Muqadama, who apparently was the envisaged target, at some other time, at which fewer civilians would be killed and the destruction of a residential building could have been prevented.

218. In this scope, the plaintiff refers to the observation of a *Fact Finding Mission* established by the UN:

“Israel was in a strong position to prepare and issue effective warnings. The preparations for its military operations were “extensive and thorough.” Israel had intimate knowledge and sophisticated up-to-date intelligence in its planning. It had the means to use the landlines and mobile telephone networks. It had complete domination of Gaza's airspace. In terms of the practical capabilities of issuing warnings, it is perhaps difficult to imagine more propitious circumstances.”<sup>150</sup>

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<sup>150</sup> UNGA, Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, par. 511. Even though this investigation pertained to *Operation Cast Lead* that was launched in December 2008, this conclusion also applies for *Operation Protective Edge*, given that after 2008, as well, Israel fully controlled the Gaza Strip and the telecommunication in this territory.

219. Thus, Israel was in an excellent position to carry out attacks with the greatest possible precision and to effectively and swiftly warn civilians about any imminent attack. Despite this, the defendants apparently did not issue any instruction to this end.
220. In addition, it can be inferred from the fact that the building completely collapsed that the house was bombed using heavy artillery. Thus, the choice of the weapons to be used did not contribute to preventing any unnecessary civilian casualties and destruction.
221. Thus, the above demonstrates that the attack on the Ziada family residence was in breach of all three fundamental principles of international humanitarian law and thus unlawful. The attack severely infringed the prohibition on making civilians the target of an attack and destroying civilian property without any need; on this account, the attack could be designated as a war crime.

### **7.3 Conclusion: the attack was unlawful**

222. The above demonstrates that an attack is only lawful if a legitimate military target is attacked, if the expected number of civilian casualties is in proportion to the expected military advantage and if measures are taken to limit the number of civilian casualties to the extent possible. In the event of doubts, both objects and persons must be designated as civilian. The burden of proof that the stringent requirements for an attack have been satisfied falls on the defendants. The attack on the Ziada family residence is in breach of each of the three principles. Even if Mohammed Muqadama could be designated as a legitimate military target, the attack is still in breach of the principle of proportionality and the obligation to take precautionary measures. Thus, the attack is unlawful towards the plaintiff.

## 8 CULPABILITY

223. The unlawful attack on the Ziada family residence and the damage this attack caused can be attributed to the defendants.
224. As demonstrated by Chapter 3.6.4, bombing residential buildings in breach of international humanitarian law was carried out in accordance with policy during *Operation Protective Edge*. On account of their position, the defendants exercised decisive influence on the policy that was pursued during the military operation. After all, defendant 1 is the *Chief of General Staff* and thus the highest-ranking commander in the Israeli forces. As *Air Force Chief*, defendant 2 is the highest-ranking commander of the Israeli air force, which carried out the attack on the Ziada family residence. On this account, it is an established fact that they are (in part) responsible for the policy of bombing residential buildings in breach of humanitarian law.
225. More in particular with regard to the attack on the Ziada family residence, it is an established fact that this attack must be attributed to the defendants. After all, in his report, the MAG explicitly notes in respect of this attack that the decision to bomb the house was taken by the competent authorities.<sup>151</sup> As commander of the air force and the Israeli army, the defendants are ultimately responsible for this decision.
226. In this scope, the plaintiff once again explicitly refers to the reports of IDF members that the NGO *Breaking the Silence* collected, as cited in Chapter 3.6.4.4 above. In these reports, several lower-ranking soldiers state that the senior commanders ordered or encouraged them to carry out attacks that would obviously result in a large number of civilian casualties.
227. On account of their position and based on the reports of four different NGOs, the conclusion must be that the policy of bombing residential buildings in general, as well as the decision to attack the Ziada family residence can be attributed to the defendants.

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<sup>151</sup> The MAG's decision regarding the bombing of the Ziada family residence, 24 August 2016, **Exhibit X**, p. 6.

228. In as far as others also had some influence on this policy, this does not detract from the defendants' responsibility. After all, on account of their position, they were required and in the position to prevent any conduct in breach of international humanitarian law by the IDF.

## 9 DEFENCES OF THE DEFENDANTS

229. The Israeli *Military Advocate General* (MAG) investigated the bombing of the Ziada family residence and concluded that the attack was lawful. In the report, the MAG mentions several grounds that allegedly justified the attack. In Chapter 7.2 above, it has already been explained at length that the grounds stated in the report did not exist, nor could these grounds justify the attack had they existed. Thus, in this scope, the plaintiff refers to what he has already advanced to refute the defendants' defence.

230. In addition, the report of the NGO *B'Tselem* demonstrates that defendant 1, at the time *Chief of General Staff* Benjamin Gantz, takes the position that:

“The results in Gaza are devastating, and the tragic fault lies with Hamas leaders who operated from inside population centres.”<sup>152</sup>

231. However, the defence that any conduct in breach of international humanitarian law by the IDF can be blamed on the manner in which the Izzedin al-Qassam brigades of Hamas allegedly fought cannot succeed.

232. Acting in breach of the rules of international humanitarian law does not discharge the other party from the obligation to comply with the rules of international humanitarian law. With his comment, defendant 1 ignores the fact that a party to a conflict continues to be bound by the rules of international humanitarian law under all circumstances, as demonstrated by common Articles 1 and 3 of the Geneva Conventions and Article 1

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<sup>152</sup> B'Tselem, *Black Flag: The Legal and Moral Implications of the Policy of Attacking Residential Buildings in the Gaza Strip*, Summer 2014, January 2015, p. 59.

of the First Protocol to the Geneva Conventions. This rule is also acknowledged as international common law.<sup>153</sup>

233. Thus, even if it is true that Hamas did not comply with the rules of international humanitarian law, this cannot justify the unlawful attack on the Ziada family residence.

234. For the rest, the plaintiff is not aware of any defences by the defendants.

## 10 DAMAGE

235. The plaintiff has suffered damage as a result of the unlawful bombing of his family's residence in the Gaza Strip. This damage consists of material and immaterial damage.

236. As explained in Chapter 6, Palestinian law applies to the case at issue, based on which the plaintiff is entitled to claim full compensation of material damage and immaterial damage. Under Palestinian law, immaterial damage also includes the damage that the plaintiff suffered as a result of the death of his family members. Thus, the Dutch legal concept of emotional losses does not play a role in this case.

### 10.1 Material damage

237. The material damage consists of the loss of the Ziada family residence. The value of the house and the household effects in the house is estimated at EUR 300,000.00.

238. As already explained in Chapter 6, under applicable law, the principle of full compensation applies and the plaintiff is also entitled to compensation of the full

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<sup>153</sup> International Committee of the Red Cross, Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule140](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140), seen on 1 February 2018.

material damage suffered by his deceased family members. Thus, the plaintiff claims compensation of the full value of the residence and the household effects.

## 10.2 Immaterial damage

239. As immaterial damage, the plaintiff claims compensation for the anguish he suffered from the loss of six of his family members. In this scope, the plaintiff claims an amount of EUR [amount].

240. This amount is reasonable given that it is an established fact that the plaintiff lost a large part of his family at once as a result of the defendants' unlawful conduct. In view of the policy of bombing residential buildings, deliberate and targeted unlawful conduct by the defendants is involved, which could qualify as a war crime. The gravity of the infringement therefore justifies that the defendants are ordered to pay the amount referred to above to the plaintiff.

## 11 OFFER OF PROOF

241. On the date the case comes up, the plaintiff will have the exhibits submitted.

242. To the extent that the burden of proof falls on the plaintiff based on Article 150 DCCP, he offers to furnish evidence of all his arguments by all legal means. In particular, the plaintiff offers to furnish additional evidence by submitting documents or expert opinions. In addition, the plaintiff offers evidence by means of witnesses. The plaintiff himself can be examined as a witness. He can testify about what happened immediately prior to the attack, as he could see via the Skype call with his brother. The plaintiff can also testify regarding the fact that his brothers were not Hamas fighters. In addition, all persons who made a written witness statement, submitted as Exhibit X, can be examined as witnesses. This includes survivors of the attack, a

neighbour and rescue workers who were on site immediately after the attack. They can give a further explanation of what they have already stated in writing.

243. However, in this scope, the plaintiff points out that based on international humanitarian law, the assumption is that the Ziada family residence and the people present in this residence were civilians, as explained in Chapter 7.1.4. The burden of proof that this was otherwise and that the attack was allegedly justified on that account falls on the defendants.

## **12 CLAIM**

The plaintiff requests that in a judgment that is declared provisionally enforceable to the extent possible, the District Court:

- I. renders a declaratory judgment to the effect that the defendants acted unlawfully to the plaintiff based on the above and are jointly and severally liable to the plaintiff for the damage that he has suffered and will suffer in the future as a result of the unlawful conduct of the defendants;
- II. sets the compensation that the defendants are to pay to the plaintiff at **XXX** euros, plus the statutory interest as of 20 July 2014 ;
- III. orders the defendants jointly and severally to pay the costs of these proceedings, or at least to order each of the parties to pay its own costs, stipulating that if these costs have not been paid within fourteen days after the date on which judgment is rendered, statutory interest will be payable on these costs;

Costs of this writ:

### **13 LIST OF EXHIBITS**

#### **Exhibit 1.**