Dear Judge Leroux,

**Letter of Request: Your ref No. 2017/105**

Our ref. No.

We write further to the Letter of Request, dated 1 July 2019 (hereinafter: "the Request"), which we received on 1 September 2019. In the Request, the Government of the State of Israel is asked to provide mutual legal assistance pursuant to the European Convention on Mutual Assistance in Criminal Matters 1959 (hereinafter: "the Convention”), ratified by the State of Israel in 1967.

Our understanding is that the Request arises in the context of a complaint received by the Belgian authorities and which states that the complainants, residents of the Gaza Strip (including a Gazan who is a Belgian citizen since July 11, 2008), allege that an incident which occurred during a military operation conducted by the Israel Defense Forces (IDF) on the 5th of January 2009 violated International Humanitarian Law (IHL) and the Belgian Penal Code.

The Israeli authorities hold in the highest regard their Belgian counterparts as well as our strong bilateral relationship on cooperation on criminal as well as other matters. We therefore wish to convey the following:

1. The Israeli authorities do not consider that the assistance sought falls within the scope of the Convention, as it is our understanding that the Convention does not apply to matters relating to a State's military operations as indicated in the language of Article 2, and therefore there is no obligation to accede to the Request within the framework of the Convention.[[1]](#footnote-2)
2. The acts as alleged by the complainants and described in the Request are acts of Israeli government officials performed in their official capacity and, by extension, embody the sovereign functions of the Government of Israel. Accordingly, pursuant to the long-standing principle of sovereign immunity under customary international law, these officials enjoy immunity from civil and criminal proceedings outside their nation state with respect to the acts alleged by the complainants and reflected in the Request.
3. Please note that this letter does not constitute a waiver of immunity. Israel expressly asserts its sovereign immunity on behalf and in favour of all Israeli officials, acting in their official capacity, from the exercise of jurisdiction in this matter by the Kingdom of Belgium.
4. Consideration should further be given to the principle of subsidiarity, which requires foreign states to exercise restraint and caution before exercising jurisdiction over crimes allegedly committed outside their sovereign territory, by foreign nationals, even if their domestic criminal law enables them to do so. This entrenched legal principle expresses the mutual respect due between sovereign states. In this regard, Israel and Belgium's longstanding bilateral relationship in the legal sphere, including on extradition matters, reflects mutual respect for the independence and impartiality of our respective legal systems.
5. Indeed, Israel has a robust criminal justice system which includes the examination and investigation of any alleged misconduct in an independent and effective manner. Specifically in the context of military operations, this system includes an independent military examination and investigation system which is overseen by Israel’s civilian justice system, including the Attorney General of Israel which has multiple layers of review to ensure impartiality and independence. Furthermore, any interested party (including non-governmental organisations) or any person (including those who are neither citizens nor residents of Israel) potentially affected by the actions of government authorities can file a petition to Israel’s High Court of Justice (HCJ). In such cases the HCJ reviews if the government action in question is *ultra vires*, unlawful, or substantially unreasonable.[[2]](#footnote-3)
6. Throughout and following the military operation between 27 December 2008 and 17 January 2009 carried out in response to continuous rocket attacks launched towards Israeli cities and towns and the ongoing attempts of the EU-designated terrorist organization Hamas to infiltrate its territory for the purpose of carrying out terrorist attacks, Israel conducted independent examinations and investigations of its conduct. Overall, Israel fully examined allegations raised by interested parties and non-governmental organizations regarding the Operation in Gaza in 2009, including allegations that were raised in the UNHRC Fact-Finding Mission on the Gaza Conflict (also known as the "Goldstone Report"[[3]](#footnote-4)). Israel published unclassified information regarding these examinations and investigations, in three reports that are publicly available, regarding the factual and legal basis regarding the circumstances that led to the operation; Israel's conduct and the examinations and investigations. [[4]](#footnote-5) Israel has also published its position with regard to the Goldstone Report.[[5]](#footnote-6)
7. To this day (over 10 years since the alleged incident), the complainants have **not** even attempted to exhaust their remedies with the appropriate Israeli authorities, nor have they made a good faith effort at pursuing the legal avenues open to them in Israel.
8. In light of these considerations, the Israeli authorities would respectfully observe that Belgium is not the appropriate forum for any criminal proceedings regarding the matters to which your letter refers. Alongside the fact that Israel has the closest jurisdictional links to this matter, Israel is a jurisdiction which upholds the rule of law through authorities capable of investigating and prosecuting criminal offences committed by its citizens, including allegations of grave breaches of IHL.
9. In addition, the Letter seeks information related to a military operation undertaken by the Israeli authorities and the IDF. As a general matter and similarly to other countries, Israel is unable to provide the information collated with regard to the conduct of specific military operations, as this information is subject to statutory privilege under Israeli law. Additionally, the information may also be classified in the interest of national security. Therefore, we are unable to relay the requested information.
10. Finally, and without prejudice to our position on the above issues, you may wish to note that, while the plot of land where the facts allegedly took place is apparently located in the Gaza Strip, Israel disengaged from the Gaza Strip in 2005 (which included the withdrawal of all military and civilian presence from the region). Moreover, in 2007, the EU-designated terrorist organization Hamas took over the Gaza Strip in a violent coup. Therefore, Israel has no effective control over the Gaza Strip.

We wish to take this opportunity to express our assurances of the highest consideration for the Belgian legal system and its institutions. We thank you for your consideration of this response.

Kind regards,

Yuval Kaplinsky, Director

Department of International Affairs

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1. “*Assistance may be refused: (a) if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.*” [↑](#footnote-ref-2)
2. See, in this context, relevant information at The State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects* (May 2015), p. 223-224, 228-230, *available at*: <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> . [↑](#footnote-ref-3)
3. In a declaration published on 11 April 2011 Justice Goldstone observed that after reviewing the result of the examinations of the Israeli authorities, and of the United Nations, had he known all the relevant elements at the time of drafting his report, “the Goldstone Report would have been a different document” see **Richard Goldstone, *Reconsidering the Goldstone Report on Israel and war crimes* (Washington Post, 11 April 2011)*,*** *available at:* <http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html> [↑](#footnote-ref-4)
4. The Operation in Gaza 27 December 2008 - 18 January 2009  – Factual and Legal Aspects (July 2009), available at: <https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf>; *See also* Gaza Operation Investigations: An Update (January 2010), *available at:* <https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf>; Gaza Operation Investigations: Second Update (July 2010), *available at:* <https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaUpdateJuly2010.pdf>. [↑](#footnote-ref-5)
5. Initial Response to Report of the Fact Finding Mission on Gaza Established Pursuant on Resolution S-9/1 Of The Human Rights Council(24 September, 2009), *available at:* <https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GoldstoneReportInitialResponse240909.pdf>;. [↑](#footnote-ref-6)