Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts

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Introduction

The Israeli army's presence and actions in the Occupied Palestinian Territory (OPT) frequently cause loss of life, physical injury and damage to the property of Palestinian residents. Since the outbreak of the Second Intifada in September 2000 at least 6,704 Palestinians in the OPT have been killed by the Israeli army[1] and at least 31,008 injured.[2] Israeli forces destroyed or demolished 12,575 homes – during military operations, as consequence for the residents' lack of permits, or as collective punishment against families – while tens of thousands more houses were damaged and often rendered uninhabitable.[3] The number of Palestinians held in Israeli prisons since the Second Intifada ranged from 3,000 to 10,000 per year, with an approximate average of 5,000 per year.[4]

Palestinian victims of the Israeli army have filed tort lawsuits against the State of Israel to demand compensation for damages they sustained, in order to rehabilitate themselves and resume their former lives to the extent feasible. The right to compensation is a constitutional right that is derived from the individual's right to protection of his life, physical integrity and property. However, Israel actively seeks to evade responsibility for compensating the victims and has placed numerous barriers and obstacles in their way to receiving legal remedy from the Israeli courts. Israel's efforts to block these lawsuits intensified following the Second Intifada and have culminated in new amendments to the law ever since. By depriving the victims an effective legal remedy, Israel is acting contrary to its obligations under international law. The obligation to make reparations has its roots in general principles of state responsibility, as expressed in the *Chorzów Factory* case;[5] Article 3 of the 1907 Hague

[1] B'Tselem, Statistics on Fatalities from Operation "Cast Lead" to April 2013, Fatalities during Operation "Cast Lead" and Fatalities since the outbreak of the Second Intifada and until Operation "Cast Lead": http://www.btselem.org/statistics

[2] PCHR, Statistics related to the Second Intifada from September 2000 to April 2011: http://www.pchrgaza.org/portal/en/index.php?option=com_content&view=article&id=3044:statistics-related-to-the-al-aqsa-second-intifada-&catid=55:statistics&Itemid=29

[3] ICAHD, Submission to the UN Human Rights Council, March 2012: http://www.icahd.org/node/458

[4] B'Tselem, Statistics on Palestinians in the custody of the Israeli security forces: http://www.btselem.org/statistics/detainees_and_prisoners

[5] *Case Concerning the Factory at Chórzow (Poland v. Germany)*, Merits, Permanent Court of International Justice (PCIJ), Series A, No. 17 (1928), p. 47.

Convention IV; Article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions; and in other international human rights instruments.[6]

The barriers to an effective remedy that Israel creates are substantial, procedural and practical. Their purpose is to make it extremely difficult for Palestinians harmed by the Israeli military to file tort lawsuits and receive compensation. At the same time that Israel created these barriers, it also claimed before foreign courts and other international forums that these victims had an effective remedy before Israeli courts.[7]

The Civil Wrongs Law

While under Israeli tort law liability is regulated by the Torts Ordinance (New Version), 1968, the liability of the state and anyone acting in its behalf is regulated by special legislation: the Torts (State Liability) Law 1952 (hereinafter "the Civil Wrongs Law"). This law determines that the state also has liability in torts.[8]

During the Second Intifada, the Israeli government initiated an amendment to the Civil Wrongs Law that aimed to exempt the state from liability and all responsibility for damages sustained during military actions in the OPT, including illegal actions. The Knesset approved the amendment in 2005. Adalah, together with other human rights organizations in Israel and the OPT submitted a petition to the Israeli Supreme Court arguing that the amendment denied basic human rights to Palestinian victims. The court accepted the petitioners' main arguments and annulled the provision, ruling that it was unconstitutional as it granted absolute and unjustified immunity to the state. The court also recognized Palestinian victims' rights to submit tort lawsuits against Israel in Israeli courts in cases where harm was caused to their lives, physical integrity and property.[9] However, other barriers in the law prevent victims from obtaining a legal remedy from the Israeli courts.

Prerequisites for the submission and litigation of lawsuits

According to the Civil Wrongs Law, injured parties who are residents of the West Bank or the Gaza Strip must submit a notice in writing to the Israeli Ministry of Defense regarding the event in which they were injured *within 60 days of the event*.[10] This obligation is not imposed on persons who submit other types of tort lawsuits. The law further stipulates that the courts will not consider a lawsuit if the notice is late.

[6] Roland Bank and Elke Schwager, "Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?" 49 *German Yearbook of International Law* (2006), 367 (398 ff).

[7] See, e.g., the Military Advocate General's second position paper, submitted on 19 December 2010 to the Public Commission to Examine the Maritime Incident of 31 May 2010 (The Turkel Commission), on Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, pp. 76-77: http://www.mag.idf.il/sip_storage//FILES/9/949.pdf (in Hebrew).

[8] Article 2 of the Civil Wrongs Law, 1952.

[9] HCJ 8276/05, *Adalah v. The Minister of Defense* (decision delivered 12 December 2006).

[10] Article 5a(2) of the Civil Wrongs Law.

The Civil Wrongs Law reduced the statute of limitations as it relates to these lawsuits from the customary seven years to just two years.[11] The state has claimed that "grounds for suspension", as set forth in the general statute of limitations[12] and according to which the period of limitation may be frozen, do not apply to lawsuits with a shortened statute of limitations, thus leaving the victims with only a brief period of time in which to exercise their rights.[13] Consequently, due to the crisis in the Gaza Strip created by Israel's "Cast Lead" military operation (December 2008-January 2009), many Palestinians harmed during the offensive were unable to submit their lawsuits within the required timeframe, and their claims may be and have been rejected on the ground that they have become invalid.

In September 2007, Israel declared the Gaza Strip to be a "hostile entity", and has imposed additional sanctions against its civilian population, including further restrictions on the movement of people to and from Gaza.[14] Since this declaration, Israel's declared policy has been to grant permits to Gazans to enter Israel and to transit to the West Bank solely in exceptional and urgent humanitarian cases.[15] Entering Israel for the purpose of completing legal procedures is not listed in the exceptions to Israel's closure of Gaza. This policy is not in line with the provisions of laws that govern entry into Israel, which grant certain Israeli officials the authority to issue entry permits to Gaza residents for a temporary purpose that is not for humanitarian or medical reasons.[16] Furthermore, Israeli law bans Israelis from entering and staying in Gaza without a permit from the military commander.[17]

As a result of the current restrictions, Gaza residents cannot enter Israel and Israeli attorneys cannot enter Gaza. Victims of military actions therefore cannot hold meetings with their attorneys, and attorneys cannot complete necessary legal work such as visiting the scene of the event, hearing witness accounts, etc. The 60-day demand for submitting a written notice and the two year statute of limitations for filing a lawsuit, as specified in the Civil Wrongs Law, consequently becomes an often impossible undertaking. Moreover, even in cases where the injured parties and their attorneys manage to overcome these obstacles, they face yet further barriers.

The financial obstacle: the deposit of a guarantee by the victims

In most lawsuits submitted by parties injured by the Israeli security forces, the state asks the court to compel the plaintiff/s to deposit a guarantee to ensure that its expenses will be paid.

[11] Article 5(a)3 of the Civil Wrongs Law.
[12] The Statute of Limitations Law, 1958.
[13] See, e.g., the state's response to HCJ 9408/10, *The Palestinian Center for Human Rights v. The Attorney General* (pending, para. 17).
[14] Or the Prime Minister's Office announcement of 19 September 2007 (in Hebrew): http://www.pm.gov.il/PMO/Archive/Spokesman/2007/09/spokecab190907.htm
[15] See a policy paper on the movement of people between the State of Israel and the Gaza Strip published by the Israeli Ministry of Defense and the Coordination of Government Activities in the Territories (COGAT): http://www.cogat.idf.il/Sip_Storage/FILES/3/2533.pdf (in Hebrew).
[16] See article 3b(3) of the Citizenship and Entry into Israel Law (Temporary Order), 2003.
[17] Article 24(a) of the Implementation of the Disengagement Plan Law, 2005.

By law, the court is permitted to do so, and if it does and the guarantee is not deposited by the set date, then the petition is dismissed.[18]

In the lawsuits submitted by parties injured by the Israeli security forces prior to "Operation Cast Lead", the average guarantee was NIS 30,000 (US$8,570 or EUR 6,120). Many petitioners were forced to withdraw their petitions because they were unable to meet this condition, or, alternatively, the courts dismissed the lawsuits because a guarantee had not been deposited in time.[19]

In recent years, victims of "Cast Lead" have submitted lawsuits and the state has subsequently filed requests for guarantees in all of these cases. The courts have adopted a procedure in these cases that compels each plaintiff to deposit a guarantee totaling NIS 20,000 to cover the state's expenses. To date, the sum of the guarantees demanded in ***each*** these lawsuits totals hundreds of thousands of shekels and, in some cases, over one million shekels [20,000 NIS times the number of the plaintiffs in the lawsuit]. In the case of *El-Samouni*,[20] for example, the guarantees were set at over one million shekels. In this case, the Israeli military aerially bombed the El-Samouni house, which resulted in the death and serious injury of dozens of family members. This sum was determined with disregard to the existing legal regulations requiring lawsuits that are based on the same grounds or concern the same legal or factual questions to be joined.[21] Therefore, there is no ground for determining the amount of a guarantee based on the number of plaintiffs rather than per lawsuit. However, the Supreme Court has refused to intervene in this matter.[22]

The closing of crossings and the dismissal of lawsuits due to non-appearance

As a result of the restrictions and obstacles discussed above, plaintiffs and their witnesses from Gaza cannot appear at court hearings and, consequently, the plaintiffs' ability to fulfill the legal procedures necessary to prove their claims is severely curtailed, and in many cases completely nullified.[23] Petitioners are, for example, prevented from submitting affidavits and

[18] Regulation 519 of the Civil Law Procedure Regulations, 1984.
[19] See, e.g., court decision in Civil Case (Haifa District Court) 1106/05, *Ahmed Mohammad Elbashiti v. The State of Israel* (decision delivered 29 June 2009), Civil Case (Haifa District Court) 183/07, *The State of Israel v. Farid Shaban Hajij* (decision delivered 1 February 2009), ordering the dismissal of the petition, Civil Case (Herzliya Magistrates' Court) 1624/06, *The Estate of Samah Yussuf Abu Gezer v. The State of Israel* (decision delivered 14 January 2009), Civil Case (Herzliya Magistrates' Court) 1816/06, *The Estate of Elasar v. The Ministry of Defense* (decision delivered 10 June 2008), Civil Case (Herzliya Magistrates' Court) 1622/06, *The Estate of Hajazi v. The Ministry of Defense* (decision delivered 10 June 2008), Civil Case (Haifa Magistrates' Court) 3608/07, *Salah v. The State of Israel* (decision delivered 14 May 2008).
[20] Civil Case (Beer Sheva District Court) 9548/11, *Al-Samouni v. The State of Israel*.
[21] See Regulation 19 of the Civil Law Procedure Regulations and Civil Appeal 560/94, *Yosef Shosana et al. v. Heftziba Construction, Development and Investments Ltd.*, PD 48(4) 63 (1994).
[22] In Civil Appeal Request 9148/11, in the matter of the late Abu Halima, the sum of the guarantee that was set is at least 260,000 NIS. In Civil Appeal Request 9155/11, in the case of the late Samur, the set sum is at least 240,000 NIS, and in Civil Appeal Request) 493/12, in the case of the late Abed, the sum of the guarantee has been set at a minimum of 600,000 NIS. The appeal requests were all rejected in a decision dated 5 July 2012.
[23] Civil Law Procedure Regulations and the Evidence Ordinance (New Version), 1971.

responses in affidavits to questions made by the respondents,[24] from appearing for an examination by expert physicians in Israel, and from presenting their testimonies before the court.[25] Thus, in reality, the state denies plaintiffs the opportunity of proving their claim.[26]

The state, as the respondent, submits requests to dismiss lawsuits claiming that the petitioners had not fulfilled their legal obligations. A relevant case is that of members of the Hajaj family, who were injured by Israeli missile fire in 2006. A lawsuit concerning the incident was submitted to the Haifa District Court. However, due to the closure of the Erez border crossing, it was not possible for the plaintiffs' attorney to enter Gaza or for the plaintiffs to enter Israel. As a result, the attorney could not hold a meeting with the clients, which would have allowed the necessary exchange of legal documents and the signing of affidavits in response to the respondents' questions. They were compelled to submit numerous requests for extensions. Finally, the state asked the court to dismiss the lawsuit on the ground that the petitioners had not completed the preliminary legal procedures. The court accepted the state's request and dismissed the lawsuit.[27] The Sarsur case, brought before the Haifa Magistrates' Court, had a similar outcome. The state again filed a request to dismiss the lawsuit because the plaintiffs were unable to submit an affidavit disclosing their evidence, and the state also requested that the plaintiffs pay court expenses. On 4 April 2011, as a result of the plaintiffs' inability to meet with their attorneys to submit their affidavit, the court dismissed the lawsuit and ordered the plaintiffs to pay the state's expenses, totaling NIS 30,000.[28]

In some cases, the courts ordered the dismissal of lawsuits at their own initiative, without the state's request. An example is the case of Abu Said, in which the court dismissed the lawsuit on the ground of idleness. The judge determined:

> 4. In January 2009, I cancelled a scheduled evidentiary hearing because it was not possible for the petitioners to enter Israel. The hearing of evidence was scheduled for 8 December 2009 and today, again, I was given an (agreed-upon) request to postpone the date of the hearing for the same reason. There are many similar cases pending before me, including plaintiffs represented by the same counsel, in which a similar problem arose. I warned him on several occasions that despite the sorrow and understanding of the petitioners' situation, I cannot repeatedly postpone

[24] See Article 15 of the Evidence Ordinance and Regulation 1 and 521(a) of the Civil Law Procedure Regulations regarding the conditions that an affidavit must meet under the Israeli laws of evidence.
[25] See Article 17(a) of the Evidence Ordinance (New Version), which provides that if a person who submitted an affidavit does not appear for questioning, the court is permitted to disqualify the affidavit as evidence. See also Regulation 522(d) of the Civil Law Procedure Regulations, which lays down a similar rule regarding a person who submitted an affidavit and who is not a litigant, should they be called for questioning and do not appear.
[26] Regarding the burden of persuasion and the obligation of proof imposed on a litigant in a civil process, see Request for Additional Hearing 4/69, Neuman v. Cohen, 24(2) 290-92. See also Yaakov Kedmi, *On Evidence - The Law through the Looking Glass of Case Law* (Dionon Publishers, 1999), p. 1273 (in Hebrew).
[27] Civil Case (Haifa District Court) 183/07, *Hajaj v. The Ministry of Defense* (decision delivered 14 December 2009).
[28] Civil Case (Haifa Magistrates' Court) 353/06, *The Estate of the Late Sarsur v. The State of Israel* (decision delivered 4 April 2011).

the case for years on similar grounds, as this harms other cases pending before me.

5. As this is the state of affairs I have decided, in view of the last request for a postponement, to dismiss the petition due to idleness.[29]

Clearly, the plaintiffs' ability to enter Israel is not within their control, but rather in the state's hands in its role as the executive authority of Israel. This state of affairs is therefore marred by both the absence of good faith and a serious conflict of interests.

A further example is the *Elbishawi* case. On 13 January 2005, Hassan Lutfi Elbishawi, his wife Hanan, who was about to give birth, and her sister Dalal, made their way from their home in the village of Um Ansar, north of Gaza City, to hospital. Their neighbor, Alaa Hasona, drove the three in his car. When they were in the Fados neighborhood of Beit Lahiya, soldiers opened fire on them from the direction of a local building that had been taken over by an Israeli military unit. Hasona was hit in the head and died at once. Elbishawi was wounded in his thigh and hand. Once the car had come to a stop, Dalal tried to get out and call for help, but one of the soldiers ordered her to stop. When she tried to explain that they were rushing to hospital, soldiers ordered her to be quiet and one of them struck her with his rifle. The soldiers then took them to a nearby building which they had previously occupied. The soldiers refused to help Elbishawi despite his injuries. The three were taken to receive medical assistance only an hour and a half later, after the soldiers had left the building. In response to the tort lawsuit that the Elbishawi family submitted,[30] the state agreed to allow its own witnesses to enter Israel from Gaza, but refused to issue entry permits to the plaintiffs' witnesses. The case is still pending. This impasse has been reached in scores of other lawsuits, many of which have now been dismissed.[31]

Adalah filed a petition to the Supreme Court in September 2012, in which it is challenging the state's policy of banning residents of Gaza from entering Israel for the purpose of realizing their right to access the courts and completing the necessary legal procedures in lawsuits filed against the Israeli security forces.[32] On 14 February 2013, the Magistrates' Court in Beer Sheva dismissed a case of civilians who were injured during "Cast Lead", accepting the state's argument that the power of attorney given by the plaintiffs to the legal counsel was not signed, and rejecting the counsel's explanation that the state prohibited him from visiting Gaza or the plaintiffs from entering Israel.[33]

Further obstacles in law preventing plaintiffs from Gaza from receiving compensation

[29] Civil Case (Hadera Magistrates' Court) 4364/04, *The Estate of Abu Said v. The State of Israel* (decision delivered 6 December 2009).
[30] Civil Appeal (Haifa Magistrates' Court) 2956/07, *Elbishawi v. The Ministry of Defense*.
[31] See additional examples in Adalah's case, Administrative Petition (Jerusalem District Court) 11-10-31179, *The Estate of the Late Kamala Abu Said v. The Minister of the Interior* (decision delivered 27 February 2011).
[32] HCJ 7042/12, *Abu Dakka, et al. v. The Minister of the Interior, et al.* (pending).
[33] See Civil Case (Beer Sheva Magistrates' Court) 15084-03-11, *Al-Makadmeh, et al. v. The State of Israel* (decision delivered 14 February 2013).

- *Exemption from liability based on the circumstances of an "act of war" and heavier burden of proof*

The Civil Wrongs Law determines that, "The state is not civilly liable for an act undertaken in the course of a military operation of the Israel Defense Forces."[34] The definition of a military operation has been refined over the years in the rulings of various Israeli courts in a variety of cases. The rule concerning the question of state liability in torts for any military action which affects local residents was determined in the case of *Bani Oudeh*.[35] The tests according to which a military operation is defined as either a combat or police operation were also set forth in this case. Not every military action is considered an "act of war":

> The army conducts various "actions" in the areas of Judea, Samaria [the West Bank] and Gaza which create different types of dangers. Not all actions are "acts of war"… Therefore, in providing an answer to the question of whether an action is an act of war, all the circumstances of the incident must be examined. The purpose of the action, the location of the incident, the duration of the activities, the identity of the military force involved, the threat that preceded it or was foreseen from it, the strength and size of the military force involved, and the duration of the incident must all be examined. All of these factors shed light on the nature of the distinct danger that was created by the act.[36]

A definition of the term "act of war" was added in a 2002 amendment to the Civil Wrongs Law, which defines it as "Any action to combat terror, hostile acts or insurrection, and also any action as stated that is intended to prevent terror, hostile acts or insurrection undertaken in circumstances of danger to life or limb". This is a broader definition of "act of war" than that which appeared in the *Bani Oudeh* decision.[37]

In the framework of torts lawsuits submitted during Operation "Cast Lead", the state claimed that the various activities that caused the alleged damages fell within the definition of an "act of war", and therefore that "the state has full immunity from a torts lawsuit, both by virtue of it being an act of state according to the Civil Torts (State Liability) Law – 1952 and from the viewpoint of case law".[38] The state contended that:

> All military activities carried out by the IDF [Israel Defense Forces] and the security forces in the Gaza Strip, beginning in the month of September 2005 and even more so after the takeover of the Gaza Strip by Hamas in June 2007, and most certainly in the course of Operation "Cast Lead", are based on the

[34] Article 5 of the Civil Wrongs Law.
[35] Civil Appeal 5964/92, *Beni Ouda v. The State of Israel* PD 56(4) (2002).
[36] Ibid., pp. 8-9.
[37] HCJ 8276/05, *Adalah v. The Minister of Defense* (decision delivered 12 December 2006), para. 6 of the verdict. See also Civil Appeal 3675/09, *The State of Israel v. Daoud*, paragraph 13 of the verdict, and Civil Appeal 8384/05, *Salam v. The State of Israel* (decision delivered 7 October 2008), para. 3 of the verdict.
[38] See, e.g., the state's request in Civil Case (Nazareth Magistrates' Court) 1171601/11, *The Late A.M. Balousha v. The State of Israel* (pending).

> authorities granted to the Israeli Army and the State of Israel under the laws of war. The only normative basis on which IDF operations in the Strip are currently grounded is that of the laws of war, and in accordance with this, the one and only classification of our activities is, for all intents and purposes, that of an "act of war".[39]

The Israeli courts have tended to accept this argument by the state. The Nazareth District Court recently delivered a judgment in the case of Aldaia, whose home was mistakenly hit by the Israeli military on 6 January 2009, resulting in the death of 22 people and the injury of many others. The state claimed that the attack came within the context of a military operation. The court determined that:

> Operation "Cast Lead" was a broad operation in the area of the Gaza Strip which began on 27 December 2008 and ended on 18 January 2009. 102 divisions, tens of thousands of fighters and soldiers, including several thousand reserves soldiers, most of whom were called up under emergency orders, took part in the fighting…
>
> Although in our case, contrary to the case of Afana, in which a police station was bombed, which, according to the stated contention was unequivocally a legitimate target, the respondent admits that the home of the plaintiffs was attacked in error since it was located close to the actual target. However, as long as the case law, according to which *"the state is liable in torts for a police action which was undertaken in circumstances of negligence or another tort wrong, but was exempted from this responsibility when the courts found that the acts of the soldiers which caused the damage complied with the definition of an act of war, even without deliberation of the question of negligence"* (Section 71 of the plaintiffs' closing arguments) has not been explicitly altered by the Supreme Court or through a legislative amendment, I do not see myself at liberty to deviate from it. Therefore, although under the circumstances under discussion the state admits that the plaintiff's home was attacked in error, the operation still falls under the protection of Article 5 of the Civil Wrongs Law.[40] [Emphasis added]

Hence, it is to be expected that all lawsuits submitted in relation to Operation "Cast Lead" will be dismissed based on the same argument, even if the specific action that caused the damage violated the laws of war.

In addition to the broad definition and interpretation of the term "act of war", other provisions were added to the Civil Wrongs Law to create difficulties for plaintiffs and help the state evade responsibility. Under the 2002 amended law, the tort regulations – according to which the burden of proof is transferred to the state when negligence is claimed concerning

[39] Ibid.
[40] Civil Case (Nazareth District Court) 35106-08, *The Late A.M. Eldaya v. The State of Israel* (decision delivered 5 September 2012).

"dangerous matters",[41] and where there is a claim of *res ipsa loquitur* ("the thing speaks for itself")[42] – do not apply to torts lawsuits brought against the state.[43] The burden of proof therefore remains on the plaintiffs' shoulders. By leaving the burden of proof with the plaintiffs, Israel has made it difficult for victims to prove state liability.

- *Amendment no. 8 to the Civil Wrongs Law*

Following the 2006 Supreme Court's ruling in the case of *Adalah v. The Minister of Defense*, the state initiated legislation to circumvent it. On 16 July 2012, the Knesset enacted Amendment no. 8 to the Civil Wrongs Law, which places additional obstacles before injured parties who sue for damages. First, the amendment modifies the term "act of war" by replacing the paragraph that stated that such an act existed when there was imminent danger to the life and body of Israeli soldiers. The new definition requires that for an act to be defined as an act of war, it should be considered in "terms of its nature; including the purpose, location, or the danger on the [security] force as a result of conducting the operation". Moreover, the amendment determines that, "If the state asserts, as a preliminary claim, that it is not liable for the damages because the deed for which it was sued was a 'military operation', the court will promptly deliberate this claim, and if it finds that the deed was, as stated, a military operation, it will dismiss the lawsuit." In enacting the amendment, the legislator disregarded the fact that, in many cases, in order to determine whether an action was an act of war, the need to present evidence and hear witnesses will arise. The amendment may encumber rather than simplify the legal process, and make it necessary to hold a 'trial within a trial' on the classification of the operation in question. The denial of the plaintiffs' right to present evidence that may shed light on the nature of the operation violates their right to a fair trial and thus their constitutional rights to access the courts and receive a legal remedy.

On 14 February 2013, the Beer Sheva District Court dismissed a tort lawsuit brought by 42 plaintiffs including individuals who were injured during "Cast Lead" and the estates of other civilians killed during the same attack. The state invoked the no liability provision as a preliminary argument and claimed that the attack fell within the definition of an "act of war". The court accepted the argument and dismissed the lawsuit in a short decision, explaining that there was no need to check whether the attack that caused widespread destruction and the deaths and injuries of many civilians was lawful under the laws of war or if there was negligence on the part of the Israeli armed forces, since such positive findings would not supersede the "act of war" exemption. Despite the fact the court dismissed the case in the preliminary stage, it decided to order the plaintiffs to pay the state NIS 20,000 in legal expenses, thereby making the victims compensate the perpetrator.[44]

[41] Article 38 of the Torts Ordinance (New Version), 1968.
[42] Article 41 of the Torts Ordinance (New Version).
[43] Articles 5a(2), 5a(3) and 5a(4) of the Civil Wrongs Law.
[44] Civil Case (Beer Sheva District Court) 34232-08-10, *The Estate of Arafat Mohammad Abd al-Dayim, et al. v. The State of Israel* (decision delivered 14 February 2013).

Until its most recent amendment in 2012, the Civil Wrongs Law did not distinguish between the West Bank and the Gaza Strip.[45] Although the Supreme Court determined in *Elbasiuni v. The Prime Minister* that Israel was no longer in effective control of Gaza,[46] the court had previously determined in *Adalah v. The Minister of Defense* that even if Israel's military control of Gaza had ended, as the state claimed, there was still no justification for a sweeping exemption for the state's liability in torts.[47] In the 2012 amendment, the legislator altered the situation and left the matter to the government's discretion. Prior to the amendment, it was determined by law that the state would not be liable for damage caused to a subject of an enemy state. In the 2012 amendment, the legislator broadened this provision to apply also to residents of any area outside Israel that the government proclaimed to be "enemy territory".[48] This provision is effective retroactively from 12 September 2005, the day of the implementation of Israel's Disengagement Plan from the Gaza Strip. In the explanatory notes to the bill, the government stated that it was considering proclaiming Gaza an "enemy territory".[49]

Despite the government's statement that Gaza had not yet been declared an "enemy territory", in the recent case of *Abed Rabbo*, the Beer Sheva District Court, which denied the lawsuit based on the expiration of the statute of limitations, further stated that the case would still have been dismissed based on the exemption of liability, because the plaintiffs were "subjects of an enemy state". The court therefore rejected the plaintiffs' argument that this exemption did not apply to the Gaza Strip since Amendment no. 8 referred to a *future* proclamation by Israel of Gaza as an "enemy territory", a move that has not yet been made.[50]

The 2012 amendment made other changes regarding jurisdiction. It determined that new lawsuits would be submitted, and older ones would be transferred, to the authorized courts in the Districts of Beer Sheva and Jerusalem, depending on which was closer to the location of the incident under consideration. Thus, lawsuits from Gaza must be submitted in the Beer Sheva District Court, and lawsuits from the West Bank must be submitted in the Jerusalem District Court. The stated reason for the designation of judicial authority is to create

[45] See the definition of a region in Article 5a(1) of the law.
[46] HCJ 9132/07, *Elbasiuni v. The Prime Minister* (decision delivered 30 January 2008, unpublished), para. 12 of the verdict.
[47] Para. 36 of the verdict.
[48] See Article 5b (a)(1) of the current version of the law.
[49] As mentioned above, the Israeli Government declared the Gaza Strip a "hostile entity" in September 2007. Given that the explanatory notes to the bill refer to a *future* declaration of Gaza as an "enemy territory", the proclamation can be assumed to relate to a separate kind of designation, with government deliberately differentiating between "enemy territory" and "enemy entity".
[50] Civil Case (Beer Sheva District Court) 11383-01-11, *Abed Rabbo v. The State of Israel* (decision delivered 10 March 2013). The *Abed Rabbo* decision was based on a previous decision of the same court in Civil Case 5193/08, *Masri Gabon Company Ltd. v. The State of Israel* (decision delivered 15 April 2012). In the *Abed Rabbo* case, the court noted that the addition of the 2012 amendment with regard to "enemy territory" was an alternative to the "enemy state" exemption, and that the court had already decided, in the *Masri Gabon Ltd.* case, that the enemy state exemption did apply to Gaza since it was controlled by Hamas, a designated terrorist organization. It should be noted that this argument was also not the main ground for the dismissal of the *Masri Gabon Ltd.* case, in which the court held that the incident in question fell within the definition of an "act of war".

uniformity in the verdicts in light of the state's dissatisfaction with the judgments of the courts in the Northern and Central Districts. However, this stipulation makes it harder for lawyers to manage cases in distant districts.

Conclusion

While Israeli legislation and case law guarantees the rights of Palestinian victims of the Israeli security forces to obtain a legal remedy in the Israeli courts, and notwithstanding the importance and preeminent status of the right to access the courts within the Israeli justice system,[51] the right to receive a legal remedy is denied in practice due to the manifold obstacles placed before it by the State of Israel. These obstacles turn a right that is guaranteed in law into a theoretical right that cannot be realized, and which leaves the victims without legal remedy.

[51] Civil Appeal (HCJ) 733/95, *Arpel Aluminum Ltd. v. Kalil Industries Ltd.* PD 51(3) 577, 590-591, 628-630 (1997). See also Civil Appeal Request (HCJ) 993/06, *The State of Israel v. Dirani* (unpublished) (decision delivered 18 July 2011), in which Justice Procaccia spoke extensively about the standing of the right to access the courts in Israeli law and surveyed the relevant case law comprehensively.