

No Right to Compensation

By Fady Khoury ¹

The state shirks its legal responsibility towards Palestinians who were inadvertently hurt during Israeli military activity in the West Bank and Gaza. Fady Khoury writes on the legal mechanisms that protect the security of everyone, except 'you know who'

Many issues arise within the framework of the Israeli occupation of the West Bank and Gaza.² One of these issues, which has been relegated to the far corners of public discourse, concerns the controversial treatment of civil lawsuits filed by Palestinians against the State of Israel or the Israeli army. Recently, a short item in the Hebrew edition of Ha'aretz newspaper informed us that the Jerusalem District Court had rejected the compensation claim submitted by Palestinian residents of Khan Yunis in Gaza, whose relatives, Fatma Wahabe and her son Khaled, were unintentionally killed during an operation of the security forces. The judge, Chana Ben Ami, classified the activities carried out by the army as "combat actions", which, by law, releases the state from paying compensation.

As a rule, Israeli law strictly limits the state's tort liability for damages caused by the Israeli military to Palestinians, through procedural obstacles and substantive distinctions. The law places numerous restrictions and obstacles in the way of Palestinians who were either harmed physically or whose property was damaged, and who seek to realize their right to access the courts. This right has long been recognized as a constitutional right of the citizens of the state, and in certain instances, such as the compensation law judgment,³ also as a constitutional right of Palestinians in the Occupied Palestinian Territory (OPT) in relation to claims against Israel. The right to a legal remedy is an additional right that is violated by these restrictions.

The Civil Wrongs (Liability of the State) Law, 1952 ⁴ exempts the state from responsibility from paying compensation for damages caused to Palestinians under certain circumstances. In 2009, Amendment No. 7 to the law was passed, by which the Knesset exempted the State from providing compensation for damages that occurred in a "conflict zone", defined as "a zone outside the territory of the State of Israel, which the Minister of Defense has declared, ... in which the security forces acted, or were present in the zone within the context of a conflict." The Minister of Defense was also authorized to retroactively designate any area he sees fit as a conflict zone. Following the submission of a petition by Adalah ⁵ to the Supreme Court against the sweeping provisions of the amendment, the above article of the law was repealed on the grounds of disproportionality. The Supreme Court stated:

¹ The author is a legal apprentice (stagiaire) with Adalah. This article was originally published in Haokets on 30 October 2011 in Hebrew.

² In my view, although Israel has physically disengaged from the Gaza Strip, the blockade of Gaza comprises a de facto occupation as it maintains Israel's effective control of the region.

³ See: [High Court of Justice, Israeli Supreme Court] HCJ 8276/05, Adalah, et al v. The Minister of Defense, et al: http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf

⁴ For the English translation of the law, see: <http://www.adalah.org/features/compensation/law-e.pdf>

⁵ See: http://www.adalah.org/eng/pressreleases/pr.php?file=05_09_01 and <http://www.adalah.org/eng/complaw.php>

“Amendment 7 ... excludes [the state from] liability in torts for all damage that is caused in a conflict zone by the security forces, even as a result of acts that were not done in the course of the combatant activity of the security forces. This amplification of the state’s exemption from liability is unconstitutional. It does not adopt the least harmful measure that achieves an exemption from liability for combatant activities. It releases the state from liability for tortious acts that are in no way related to combatant activities, no matter how broadly the term is defined. Nothing in the ordinary activities of law enforcement that are carried out by the security forces in a territory controlled by them justifies an exclusion from the ordinary law of torts.” (Paragraph 35 of former Chief Justice Barak’s ruling).

The remaining valid provisions of the law at this time classify the security forces' operations according to their nature, which in practice determines when the State will be obliged to provide compensation for damages caused by its forces. The law states that Israel is not responsible for damages that occurred as a result of a combat operation, and is therefore exempt from providing compensation for any harm caused to a Palestinian, whether physical harm or property damage, which resulted from operational mistakes made by the army. This applies even if the harmed Palestinian was not in any way involved in the events that caused the army to undertake the operation and was not a target of the operation.

In other words, from the moment the army embarks on a combat operation, legally defined as such by the Israeli courts of course, considerations for preventing potentially extensive damage are not part of its strategy. On the contrary, the above distinction creates an incentive for the security forces to realize their aims by camouflaging routine law enforcement activities under the cloak of security needs which require carrying out combat operations. And this, obviously, without entering into a discussion of additional rationales included in compensation laws, such as the right to property and life, which were also applied in the framework of the basic laws to Palestinian residents of the Gaza Strip and the West Bank.

Moreover, there are legal procedural limitations alongside these substantive restrictions. Civil lawsuits are based on the Civil Law Procedure Regulations that determine numerous procedural rules. Palestinians who file claims in Israeli courts are not excluded from complying with these rules; in fact, the opposite is true. Many lawsuits are rejected or immediately dismissed because of the complainants’ inability to comply with these legal procedures.

For example, the plaintiff must be physically present during various stages of the legal procedure: providing testimony in court, appearing for cross examination by the respondent, being present for expert medical examinations required by the respondent, etc. According to the above procedures, failing to be present when demanded results in the annulment of the affidavits of the plaintiffs and their witnesses. The immediate outcome of the non-compliance of Palestinian complainants with the conditions of these procedures is the dismissal of their lawsuits by the courts, and their being required to pay for the state's legal expenses.

In this way, an absurd situation is created in which the State, through a regional commander, refuses to grant entry permits to Palestinian complainants so they can partake in their own legal proceedings. At the same time, the state demands the dismissal of the claims on grounds that witnesses did not appear, a situation that it brought about. Adalah submitted a petition against this policy to the Jerusalem Court for Administrative Affairs.⁶ A decision in this matter has not yet been delivered. Until it is, many Palestinians will continue to absorb the damages caused by the Occupation, which acts under the cover of protecting everyone's security, except that of the Palestinians themselves.

⁶ See: http://www.adalah.org/eng/pressreleases/27_10_11_1.html.