



## **Analysis of Israeli Supreme Court Decision**

### **Israel's Self-Granted Immunity from Civil Liability for the Killing and Injuring of Palestinians in Gaza: The Case of Attiya Fathi al-Nabaheen**

July 2023

The right to an effective remedy is a fundamental human right that is enshrined in international law and is derived from an individual's right to life, physical integrity, and property. In the case of Palestinians living under Israeli military occupation, Israel has actively sought to evade its responsibility and has refused to compensate victims of its military assaults, imposing numerous procedural, financial and judicial barriers and obstacles to prevent Palestinians from suing for and receiving civil remedies in Israeli domestic courts.<sup>1</sup>

This paper will discuss the 2012 Amendment No. 8 to Israel's Civil Wrongs Law, which effectively bans Palestinians from seeking compensation in Israeli civil courts for any damages resulting from any Israeli action in the occupied Gaza Strip, without assessing whether these actions are considered "warfare action" and even when these actions are clearly unlawful or deliberately harm civilians.<sup>2</sup> This 2012 amendment creates a total ban on civil suits against Israel by residents of the Gaza Strip, a stricter standard than the already very limited liability regime that applies to residents of the occupied West Bank, which requires an individual assessment of each action and a determination of whether the act qualifies as a "warfare action".

This paper will also analyze the July 2022 Israeli Supreme Court decision that upheld Amendment No. 8 in a case brought by Adalah and Al Mezan Center for Human Rights on behalf of Attiya Fathi al-Nabaheen, a Palestinian boy who was shot by the Israeli military on his fifteenth birthday, while on his family's property—an injury that left him quadriplegic.<sup>3</sup> In February 2023, the Supreme Court's Chief Justice rejected a request for an additional hearing, submitted by Adalah and Al Mezan, to reconsider the case.

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<sup>1</sup> See more in Adalah's briefing paper, [Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts](#), May 2013.

<sup>2</sup> The Civil Wrongs Law, as stated in Article 1, defines an "warfare action" as "including any action to combat terror, hostile acts or insurrection, as well as an act aimed at preventing terrorism, hostile acts or insurrection hostile acts, or uprisings..."

<sup>3</sup> Israeli Supreme Court, Civil Appeal 993/19, *Anonymous [Nabaheen] v. Israeli Defense Ministry* (decision delivered 5 July 2002). See Supreme Court judgment [Hebrew], [here](#) and the summary of the judgment in English [here](#).

## I. Amendment No. 8 of Civil Wrongs (Liability of the State) (2012)

In 2012, the Knesset enacted Amendment No. 8 to the Civil Wrongs Law (Liability of the State) - 1952 (hereinafter "Amendment No. 8").<sup>4</sup> This amendment bans residents of an "enemy territory"—as so-declared by the Israeli government—from seeking compensation from Israel for any damages, whether it resulted from a "warfare action" or not. Based on the 2007 Israeli declaration of Gaza as an "hostile territory," the Israeli government issued an order on 7 October 2014, designating the Gaza Strip as an "enemy territory" for the purposes of the Civil Wrongs Law, applicable retroactively beginning 7 July 2014.<sup>5</sup> The order was to apply to all Palestinians residing in Gaza wounded or killed by the Israeli military during the 2014 war on the Strip, so-called "Operation Protective Edge", during which the Israeli military killed 2,219 Palestinians and destroyed 8,381 residential houses.<sup>6</sup> As a result of this order, Palestinian residents of Gaza have been prohibited from submitting tort lawsuits due to harmful actions of Israeli forces.

Amendment No. 8 introduced Article 5/B-1 into the law, which stipulates that the state is exempted from providing any civil remedies with respect to "subjects of a state that is an enemy, or a person who is not an Israeli citizen and resides in a territory outside of Israel that the government has declared, by order, as an enemy territory." This provision, in conjunction with the government's declaration of the Gaza Strip as an "enemy territory" in 2014, prevents all residents of Gaza from seeking civil remedies in Israeli courts.<sup>7</sup> The amendment was enacted to override a 2006 Supreme Court judgment in the case of *Adalah v. Minister of Defense*.<sup>8</sup> In the 2006 judgment, an expanded panel of the Court invalidated a sweeping provision that exempted the state from all liability for damages arising from acts of war in areas declared by the Defense Minister as "conflict zones".

In addition to Article 5/B-1, Article 5—reintroduced through Amendment No. 8—exempts Israel from paying compensation to individuals who are harmed in an event defined as "warfare action" of the Israeli military. This provision severely restricts the principle of state responsibility and is used to additionally deprive victims in the West Bank of their right to seek a remedy for the harm they have suffered at the hands of the Israeli military. Taken together, the immunity

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<sup>4</sup> See Hamoked, [The Knesset approved Amendment No. 8 of Civil Wrongs \(Liability of the State\) Law: Israel continues to exempt itself from liability for damage caused by its soldiers in the OPT and raises additional obstacles on the way of Palestinians to sue compensation for the damage sustained by them](#). Also see [an English translation] of Amendment No. 8 [here](#).

<sup>5</sup> See the announcement on Israel's declaration of Gaza as hostile territory, dated 19 September 2007, available [here](#). See also the Civil Wrongs Order (State Liability) (Declaration of Enemy Territory – Gaza Strip), 2014. See the unofficial English translation available [here](#) and the original Hebrew version available [here](#).

<sup>6</sup> See Al Mezan, [Operation Protective Edge in Numbers – A Statistical Report on Civilian Casualties and Destruction of Property by the Israeli Occupation Forces between 7 July and 26 August 2014](#), 2015.

<sup>7</sup> Article 5/B-1 has a very limited exception that applies to residents of "enemy territory" who legally stay in Israel.

<sup>8</sup> H.C. 8276/05, *Adalah, et. al. v. The Minister of Defense, et. al.*

See more here: ['No Compensation Law' Revoked - Adalah](#), see judgment available in English: [HCJ 8276/05 Adalah Legal Centre for Arab Minority Rights in Israel and others v. Minister of Defence et. al](#)

granted to state authorities through Amendment No. 8 negates the rights of Palestinians—whether they live in Gaza or the West Bank—to a remedy.

In the case of Gaza resident Attiya Fathi al-Nabaheen, Adalah and Al Mezan challenged the constitutionality of Article 5/B-1, before an Israeli District Court and twice before the Israeli Supreme Court. In all three instances, the courts upheld the amendment. These decisions follow a long history of the Israeli courts—and most notably, the Supreme Court—working in concert with the Israeli military, primarily functioning to rubber stamp their violent actions, while providing no criminal or civil checks or remedies on the harm they have and continue to cause to Palestinian victims.

## **II. The Case of Attiya Fathi al-Nabaheen**

On 16 November 2014—almost three months after the 2014 war on Gaza, and outside of the conduct of hostilities—Israeli forces opened fire on then-15-year-old Attiya Fathi al-Nabaheen in on his family’s property, near the Al-Bureij Refugee Camp in the Gaza Strip, less than 500 meters from the fence between Israel and Gaza. Nabaheen was shot on his 15th birthday. As a result of the shooting, Nabaheen was left a quadriplegic, expected to be confined to a wheelchair for the rest of his life.<sup>9</sup>

Seeking redress and reparation for the damage that the unwarranted shooting inflicted on their son, Al Nabaheen’s family, represented by Al Mezan, initiated legal proceedings before Israeli courts. On 25 November 2015, Al Mezan submitted a civil compensation notice within the required, restrictive timeframe to the compensation office at the Israeli Ministry of Defense.<sup>10</sup>

In 2016 Adalah and Al Mezan filed a lawsuit on behalf of Nabaheen and his family seeking monetary tort damages to the Be'er Sheva District Court. In response, the State invoked Article 5B set in Amendment No. 8, arguing that Nabaheen was not eligible for damages simply because he is a resident of an “enemy territory.” This case marked the first use of such a claim by the State, as Gaza had been declared an “enemy territory” only in 2014. In response, Nabaheen argued that Amendment No. 8 was unconstitutional and a violation of international law, since it denies an effective remedy to all Palestinian residents of Gaza solely because they live in Gaza.<sup>11</sup>

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<sup>9</sup> Al Mezan Center for Human Rights, “IOF Opens Fire East of Al Bureij Refugee Camp”, 16 November 2014, available [here](#).

<sup>10</sup> Article 5A of Israel's Civil Wrongs Law introduces specific procedural restrictions that apply exclusively to Palestinians who wish to submit claims for remedies, setting them apart from all other civil procedure cases.

<sup>11</sup> C.C. (Beer Sheva) 45043-05-16 A.N. (minor) et al. v. The State of Israel (decision delivered 4 November 2018).

### III. Judgment of the District Court

On 4 November 2018, the District Court accepted the State's arguments wholesale. The Court ruled that, in light of the state of war between Israel and Hamas, there could be no distinction drawn between civilians and combatants, and that the State could not distinguish between lawsuits submitted by these two 'categories' of Gaza residents. This fact, the Court reasoned, created difficulties in terms of collecting and examining the evidence and lawsuits would most probably be brought by "enemy aliens" to Israeli courts in bad faith. The Court therefore upheld the constitutionality of Article 5/B-1 of Amendment No. 8.

### IV. Judgment of the Supreme Court

Following the District Court's decision, on 7 February 2019, Adalah and Al Mezan on behalf of Nabaheen appealed the decision to the Supreme Court, arguing that the judgment violated both Israeli and international law, the latter requiring that protected civilians be entitled to effective legal remedies.<sup>12</sup>

The appeal argued that the law is based on the "enemy alien" doctrine, which determines that any individual situated in a territory declared as "enemy territory" is to be considered an enemy. This doctrine is racist, outdated, and dangerous, as it denies human rights and allows harm to civilians based solely on their ethnic and national affiliation.

In July 2022, the Supreme Court issued its decision,<sup>13</sup> upholding Article 5/B-1 in its entirety and finding that the law satisfies the tests of the constitutional limitation clause.<sup>14</sup> The Court unanimously concluded that the law serves two "legitimate" purposes: first, preventing "economic or moral assistance to the enemy"; and second, adapting the laws governing damages to the exceptional conditions prevailing during wartime. Additionally, the Court determined that, despite its broad scope, the law meets the tests of proportionality under Israeli law, with respect to claims for damages "closely linked to the conflict with the Gaza Strip". Despite this ostensibly limiting condition, the Court did not require any individual test or inquiry

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<sup>12</sup> See Rule 149, Customary IHL Database (A State is responsible for violations of IHL attributable to it, including those committed by its armed forces); Rule 150, Customary IHL Database (A State responsible for violations of IHL is required to make full reparation for the loss or injury caused); International Covenant on Civil and Political Rights, Art 2(3) (applies also in emergency situations, as recalled by the UN Human Rights Committee, General Comment n. 29, Article 4 (2001)); The Hague Convention IV, Art. 3 (A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.); Additional Protocol (I) to the Geneva Conventions, Art. 91 (A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.); UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147, available [here](#).

<sup>13</sup> See Adalah and Al Mezan, [In a most dangerous precedent, Israeli Supreme Court OKs sweeping immunity for the state, denies all civil remedies to Gaza victims of war crimes](#), 7 July 2022.

<sup>14</sup> The Constitutional Limitations Clause, which is part of the Basic Law: Human Dignity and Liberty, states that individual rights may only be limited by a "law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."

to determine whether the cases presented are, in fact, “closely linked to the conflict with the Gaza Strip.”

The Court’s determination that the law serves an “appropriate purpose”—that is, to prevent “economic or moral assistance to the enemy”—is demonstrative of its long-term mobilization against Palestinians. The Court argued that exempting the State from liability would prevent “the enemy state or the controlling entity in the enemy territory from deriving any benefit, whether economic or reputational, from a claim for damages that one of its nationals files against the enemy state.” The mention of Israel’s “reputation” in this decision makes clear that the Court is working in concert with Israel’s armed forces, government, and legislature to together shield the state from accountability, including its reputation in international spheres.

Despite seeming to limit its judicial review to cases “closely linked to the conflict,” Justice Grosskopf elaborated that “at this time, the main interactions between the security forces of the State of Israel and the residents of the Gaza Strip located within the area, are related to conflict and are essentially similar to military activity.” Justice Grosskopf even referred to “civilian protest” near the border as a potential event that would be “closely linked to the conflict”. This statement implies that essentially all actions taken by the Israeli military against Palestinians in the Gaza Strip would fall under the definition of “closely linked to the conflict,” thus granting the State of Israel immunity from civil liability in any actions that harm or kill Palestinians within Gaza, even if such actions amount to crimes under Israeli or international law.

The Court further determined that Article 5/B-1 does not run counter to international law. However, Justice Sohlberg stated that *even if* a violation of international law were to occur, it would not nullify explicit legislation passed by the Knesset, such as the article in question, because the rights and norms of public international law cannot supersede Israeli domestic legislation.

## **V. Request for an Additional Hearing**

On 25 August 2022, Adalah and Al Mezan filed a request for an additional hearing to the Supreme Court due to the far-reaching, sweeping implications of this ruling. The request for an additional hearing argued that the Court’s decision contradicts previous Supreme Court precedent and establishes a new legal precedent that warrants further review. The Nabaheen ruling endorses the outdated concept of “enemy aliens” in Israeli law to the fullest extent, providing the State with immunity from any claims by Gaza residents at any time, regardless of the circumstances. This ruling constitutes a form of collective punishment and represents a significant departure from established principles under Israeli and international law.

## **VI. Rejection of request**

On 15 February 2023, Chief Justice Esther Hayut rejected the request for an additional hearing.<sup>15</sup> This decision comes despite the Chief Justice's acknowledgement of the adverse implications of the ruling, noting that "the outcome of the court ruling for the petitioner himself is difficult, as well as its possible implications for residents of the Gaza Strip in future similar circumstances".

Chief Justice Hayut stated that the ruling should be considered within the context of a case that posed an indirect challenge to the constitutionality of the law, through an appeal of a lower court decision in a specific case, as opposed to a direct petition to the Supreme Court sitting as a High Court, and challenging the law. Justice Hayut emphasized that the Court's ruling upheld the constitutionality of Article 5/B-1 solely in relation to tort claims that are "closely linked to the conflict." However, as stated in the request (see section IV above), the Court's interpretation of what qualifies as "closely linked to the conflict" includes essentially any and all actions carried out by the Israeli military against Palestinians in Gaza. This decision is tantamount to granting full immunity from civil compensation and damages for Israel's actions, regardless of the circumstances. Therefore, Chief Justice Hayut has effectively reaffirmed and greenlighted imposing a flat ban on claims to remedy by Palestinian residents of Gaza.

## **VII. Conclusion**

International law requires states to provide victims of human rights violations with effective remedies, including compensation, regardless of the victim's place of residence. Accordingly, the complete denial of civil remedies for Palestinian residents of Gaza violates their right to an effective legal remedy as enshrined under international human rights and humanitarian law, and constitutes a prohibited form of collective punishment.

The seriousness and potential implications of this case was already noted after the District Court ruling, including by the United Nations Commission of Inquiry on the Protests in the Occupied Palestinian Territory (COI) in its March 2019 report.<sup>16</sup> The COI concluded that "[t]he ruling, and the law on which it is based, excludes Gazan residents from eligibility for compensation under the law, without examining the harm itself. In doing so, Gazan victims of violations are denied the main avenue to fulfill their right to 'effective legal remedy' from Israel that is guaranteed to them under international law."<sup>17</sup> The COI further emphasized the significance of this ruling, stating that "[t]he importance of this ruling is thus difficult to overstate."<sup>18</sup> Indeed, this ruling and the law on which it is based excluded thousands of

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<sup>15</sup> Additional Civil Hearing (SCT) 5653/22 *Attiya Nabaheen v. Israeli Defense Ministry* (decision delivered on 15 February 2023), the [Hebrew] decision is available [here](#).

<sup>16</sup> See the Report of the detailed findings of the independent international Commission of inquiry on the 2018 protests in the Occupied Palestinian Territory, particularly paras. 755-757, available [here](#).

<sup>17</sup> *Ibid.*, para. 756.

<sup>18</sup> *Ibid.*

Palestinians killed or wounded by Israeli forces during Gaza’s Great March of Return,<sup>19</sup> as well as during other incidents of daily violence occurring outside the conduct of hostilities.

By denying such a right, Israel evades its responsibilities as a State to investigate, prevent, and take responsibility for violations by its state organs, including its armed forces. With this ruling, the Israeli Supreme Court grants full immunity to the Israeli military and the State of Israel for illegal, and even criminal, actions taken during the course of military and non-military operations in Gaza and leaves their victims without any recourse to compensation or other remedies from Israel. Amendment No. 8 to Israel’s Civil Wrongs Law leaves Palestinians in Gaza, victims of Israel’s war crimes and crimes against humanity—currently under investigation by the International Criminal Court—without any access to civil remedies within the Israeli legal system. This forms part of Israel’s overall regime of impunity afforded to the State and its authorities—including the armed forces and the police—with regard to their treatment of Palestinians in all areas under its jurisdiction and control, and demonstrates the Supreme Court’s instrumental role in cementing the system of impunity.<sup>20</sup>

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<sup>19</sup> According to Al Mezan field monitoring and documentation, during the Great March of Return, Israeli forces killed 217 Palestinians and wounded another 19,237. See Al Mezan, Attacks on Unarmed Protesters at the “Great March of Return” Demonstrations – A Two-Year Report from the Start of Demonstrations on 30 March 2018, March 2020.

<sup>20</sup> Israel’s policy of granting near-absolute immunity to its armed forces for injuring and killing Palestinians is a well-documented fact. Recently, this policy has been further highlighted by the coalition agreements of the new government, which openly commit to enshrining such impunity into law. For more information, see [Adalah’s Analysis of the New Israeli Government’s Guiding Principles and Coalition Agreements and their Implications on Palestinians’ Rights](#), January 2023