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25.2.2019

Expert Legal Opinion

At the request of Adv. Liesbeth Zegveld, we have prepared an expert legal opinion on the Legal status and the practice of Israeli courts with respect to civil claims brought by Palestinian claimants, particularly residents of the Gaza Strip, for damages caused by actions of the Israeli military and/or security forces.

Our office has extensive experience with such claims, spanning along thirty years. We were, therefore, asked to review the arguments made by the Defendants in the Incidental Conclusion Concerning Competence, and address the legal framework governing this issue and the practical application thereof in the courts, including barriers to access to justice as a result of legal changes over the years.

This expert legal opinion is written by us, the undersigned Adv. Hussein Abu Hussein & Adv. Reem Masarwa. Here are some details regarding their experience:

Hussein Abu Hussein, Adv.

Studies:

Tel Aviv University-The Faculty of Law

1971-1975 L.L.B in Law

1976-1978 Advanced Studies in Criminology.

Work & Legal Experience:

1976- Today Owner of Abu Hussein Law Office that includes 4 lawyers**.**

1997-1999 Instructor at the Criminal Law Clinic, University of Haifa- The Faculty of Law.

Publications:

2003	Co. Author of the book "Access Denied: Palestinian Access to Land in Israel" (with Fiona McKay).
	During the years, I have written tens of articles in legal publications.

Fellowships and Public involvement:

10/1976- today	Member of the Israeli Bar
1992- Today	Authorized Notary
1977-1982	Member of Um el Fahim Local Council.
1988	Co. founder of the Arab Association for Human Rights.
1988- 10/2014	Board member of the Arab Association for Human Rights.
1989- Today	Public Council member of "B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories".
1995-1999	Member of the national council of the Israeli Bar.
2003-2009	President of "Ittijah"- Arab NGO's network
3/2014-1/2018	President of "Adalah- The Legal Centre for Arab Minority Rights in Israel".

Reem Masarwa, Adv.

Studies:

2005-2007	LL.M - Master of Laws, the Faculty of Law, Haifa University.
10/2000- 2/2004	LL.B - Bachelor of Laws, the Faculty of Law, Netanya Academic College.

Work & Legal Experience

Abu Hussein Law **&** Notary Offices- Um El Fahem

12/2011- present	Attorney.
6/2005- 12/2007	Attorney.
3/2004- 3/2005	Professional Training.

Fellowships:

2005 – Present	Member of the Israeli Bar Association.
10/2014 - Present	Board member of the Arab Association for Human Rights- Nazareth.
2013- Present	Founder and board member of “Friends to Marrow” - Association for supporting the Bone Marrow Arab Donors Registry.
2006- Present	Founder and board member of "Al-Bir"- Association for Cultivating Culture and Community.
6/2017-2/2019	The "Search for Common Ground" & British Embassy Fellowship: Inter-Faith Dialogue & Leadership Program.

Background Information/Major Achievements

Over the years, Adv. Abu Hussein was involved in numerous of public activities/associations in the field of defending the rights of the Arab minority, such as the Committee for the Protection of Lands, Prisoners' Rights and Human Rights. At the outbreak of the first intifada Adv. Abu Hussein was a member of B'Tselem and the Association for Civil Rights in Israel.

Through his practice as a lawyer for a period of 42 years, he has worked in a range of fields related to Human Rights. The majority of the office clients were Palestinians from Israel as well as from the Occupied Palestinian Territories (OPT) & Gaza Strip.

The nature of this work was with reference to their legal status and to their relation to the State of Israel.

Adv. Reem Masarwa joined the office in the year 2004 as an intern and later on as an attorney. Through the years, she gained expertise in these cases which was enhanced in her research study during her master's degree.

Since the breaking of the 1st Intifada, Adv. Abu Hussein was the first lawyer in Israel, to bring tort cases to the Israeli courts, in the name of residents of the OPT & Gaza Strip against the Israeli army, on the basis of unlawful use of power by the Israeli authorities, against the Palestinians.

This legal issue was confirmed as precedent by nine judges of the Supreme Court in the case of civil appeal 5964/92 Bani Odeh vs. the State of Israel, in which I represented the casualties. In reliance to this precedence, thousands of Palestinians who suffered from injury inflicted by the Israeli security forces filed cases to the Israeli courts and in certain circumstance they got compensation for their damages.

In July 2005, the Israeli Knesset passed a law according to which Palestinian residents of the OPT & Gaza were banned to bring cases against the State of Israel to the Israeli courts. Since

we represented many families that suffered from such damages, we and other human rights NGOs brought a petition to the Supreme Court claiming that this law is unconstitutional[1].

The Supreme Court headed by -the Retired- President Aharon Barak accepted our arguments and confirmed that the law contradicts basic norms of Human Rights and could not prevail. This was a huge achievement for the NGOs and the victims.

Short time afterwards, the Israeli Knesset passed a new a version of the amendment that extended the definition of "war action". The new definition included wider activities of the state of Israel and its army, which caused the banning of the vast majority of the cases as we will explain hereby.

[1] HCJ 8276/05, HCJ 8338/05, HCJ 11426/05 Adalah - The Legal Center for Arab Minority Rights in Israel & others. V. Minister of Defense & others. Published on the website of the Supreme Court of Israel.

Contents

Introduction

1. "Ever since the Six Day War, Israel has held the territories of Judea, Samaria and Gaza (hereinafter: the Area) under belligerent occupation".[2] With this statement, Supreme Court President (Emeritus) Barak begins the judgment in Bani 'Odeh. This is how Israel's international legal status in the territories it seized in 1967 is defined, a status enshrined in public international law instruments regarding held territories. A legal situation of "belligerent occupation" imposes obligations on the occupying power and grants the residents of the occupied territory the status of "protected persons", which gives rise to several specific human rights.

2. As stated, Israel has held the Territories ever since 1967, and the Military Commander has been charged with securing Israel's security interests on the one hand and the needs of the civilian population on the other.[3]

3. Daily friction between residents of the Area and the military and its agencies gives rise to tortious acts. Residents of the OPT are prevented under military legislation from filing tort or civil claims in Palestinian courts against Israeli individuals and/or agencies in general and military agencies in general. Therefore, Palestinian who have suffered damage have sought remedy from Israeli courts in claims against the military.

4. International private law equips us with a formal solution for justice in cases where a civil wrong is committed in a certain locality, the decisive guideline on local jurisdiction and application of substantive law being the locality where the civil wrong was committed. However, as stated, Palestinian courts are precluded from considering disputes where one party is Israeli pursuant to military orders issued as early as in 1967.

5. Palestinians' path to the Israeli court system has not been a smooth one since the first Intifada broke out. The situation deteriorated during the al-Aqsa Intifada beginning in 2000 as a result of a spike in the number of Palestinian casualties, which flooded the Israeli courts with hundreds of civil claims. The Knesset responded by passing Amendment 4 to the *Civil Tort Act (Liability of the State) – 1952* (hereinafter: *The Civil Tort Act or Civil Tort Act (Liability of the State)*),[4] which placed procedural and substantive obstacles to making claims. The State did not stop there, and several years later, the Knesset passed *Amendment No. 7* to the *Act*, designed to deny Palestinian victims of the right to sue the military. This amendment was

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[2] CA 5964/92 *Jamal Qassem Bani 'Odeh et al., v. State of Israel*, IsrSC 56(4)1 (hereinafter: *Bani 'Odeh*). This general concept was formulated in the Supreme Court judgment in HCJ 393/82 *Jam'iat Iscan al-Ma'almoun al-Tha'auniya v. IDF Commander in the Judea and Samaria Area*, IsrSC 38(4) (hereinafter: *Jam'iat Iscan*).
[3] See: *Jam'iat Iscan* supra.
[4] *Civil Tort Act (Liability of the State) – 1952* (hereinafter: *Liability of the State Act*).

short lived. It was partly repealed in the Supreme Court ruling in *Adalah.*[5] Following this ruling, the Knesset made another amendment on July 23, 2012, redefining the term 'wartime action' to be broader and instituting further rules mandating preliminary discussion of the issue.

[5] HCJ 8276/05, HCJ 8338/05, HCJ 11426/05 *Adalah - Legal Center for Arab Minority Rights in Israel et al. v. Minister of Defense et al.*, IsrLR 352 (2) [2006] (hereinafter: *Adalah*).

Palestinians' right to file civil claims in Israeli courts - how?

6. *The Torts Ordinance*,[6] *Civil Tort Act (Liability of the State)* and Israeli civil law, in general, reflect Israeli society's perspective on justice between citizens and how order and safety within the country are to be maintained. These normative arrangements are theoretically designed to apply to acts carried out within the state and towards citizens or permanent residents thereof. Section 3 of the Ordinance provides entitlement to remedy in cases in which a party suffered harm or injury from a civil wrong "committed in Israel". Therefore, is it appropriate to apply the Israeli legal system to a person who carried out an act or has suffered injury from an act carried out in a place where a different legal system is in force.

7. Although a different legal system applies in the Occupied Palestinian Territories (hereinafter: OPT), the relation of Israeli administrative law to the OPT is not that of foreign law par excellence. Israel has ruled and continues to rule the West Bank under belligerent occupation and has retained control over the crossings into the Gaza Strip since Disengagement. In the *Gaza Coast Regional Council* case,[7] the Supreme Court repeated the basic tenets pertaining to the legal status of the held territories, whereby, they are held under belligerent occupation:

> The legal concept held by successive Israeli governments, as presented to the Supreme Court and accepted by the Supreme Court through the generations - is that these territories are held by the state of Israel under belligerent occupation.

8. The significance of this legal concept is twofold: First, the law, justice and administration of the State of Israel do not apply to these areas. The Government of Israel has not issued any order applying the state's law, justice and administration to Judea, Samaria and the Gaza Strip, nor has the Minister of Defence issued a proclamation on this matter under the Jurisdiction and Powers Order 1948.[8] These areas have not been "annexed" to Israel and are not part of the country. In the absence of an express or implied provision within legislation, Knesset laws do not apply to these areas.[9] Second, the legal regime applicable to these areas is governed by the rules of public international law, primarily the rules regarding belligerent occupation. Acting President M. Landau addressed this twofold significance in Dweikat, remarking that:

> "[T]he basic norm upon which the structure of Israeli rule in Judea and Samaria was built in practice, is, as stated, to this day a norm of

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[6] *The Torts Ordinance (New Version) 1968* (hereinafter: *The Ordinance*).
[7] HCJ 1661/05 *Gaza Coast Regional Council v. Knesset*, IsrSC 52(2) 529, 544.
[8] See, HCJ 390/79 *Duweikat v. Government of Israel*, IsrSC 34 (1) 1, 12 (hereinafter: *Duweikat*); see also, CA 54/82 *Levy v. Estate of 'Afanah Mahmoud (Abu Sharif)*, IsrSC 40(1) 374, 389.
[9] See Rubinstein and Medina, ibid, p. 1180; HCJ 2612/94 *Sha'ar v. Military Commander in the Judea and Samaria Area*, IsrSC 58(3) 675, 681.

> military administration and not application of Israeli law which carries with it Israeli sovereignty".[10]

9. Acting President M. Shamgar cited these remarks in agreement in another case, adding:

> "[T]he law of the State of Israel does not apply to these Regions. The basic legal principles by which the Regions are governed, and the legal system, were established in June 1967 and are concisely expressed in Proclamation No. 1 regarding the assumption of power and Proclamation No. 2 of the Israel Military Governor, which are interpreted according to the rules of public international law". (HCJ 69/81 *Abu Aita v. Regional Commander of Judea and Samaria*, IsrSC 37(2) 197, 228; (hereinafter: *Abu Aita*))

10. It is important to note that Israeli courts presented with civil claims filed by residents of the OPT did not raise the issue of local jurisdiction and the applicability of Israeli law to such incidents on their own initiative, nor did the State Attorney's Office object, evincing tacit acceptance of the extraterritorial application of these laws. Below we shall demonstrate that the many amendments made by the Israeli legislature to *The Civil Torts Act* and the development of a legal and practical position with respect to Israel's ties to the Gaza Strip post-Disengagement - an approach that espouses complete abdication of any responsibilities toward the civilian population there - have brought an end to civil claims against the State of Israel by Gaza residents.

11. This remark is in no way intended to paint a rosy picture with respect to the prospects of civil claims against the military or security forces by Palestinians from the West Bank. Raising a claim of 'wartime action', under its broad terms, presents a legal and practical barrier to Palestinians from both the West Bank and the Gaza Strip. However, as presented below, since Hamas rose to power, the legislature has developed a new legal position, declaring Gaza an enemy territory[11] and its residents enemy subjects.[12]

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[10] *Duweikat*, p. 12; see also HCJ 61/80 *Haetzni v. State of Israel*, IsrSC 34(3) 595; (hereinafter: *Haetzni*)
[11] *The Torts Order (Liability of the State) (Declaration of Enemy Territory - Gaza Strip) 2014*.
[12] Section 5b(a)(1) of *The Civil Tort Act (Liability of the State) 1952*.

Israeli imposed barriers impeding Gaza Strip claimants' access to justice

Barriers produced by *Amendment No. 4*:

a. Requirement for written notification of incident:

12. Under *Amendment No. 4*, the court may not consider a claim unless the injured party or their legal guardian submitted written notice within 60 days of the incidents, even in cases in which the authorities are aware of the incident. In rare, justifiable circumstances, notice may be submitted within 30 additional days (Section 5a (2) of the Act).

13. Thus, the Act imposes a duty on parties injured by actions of the security forces in the OPT to provide the Ministry of Defence with written notice of the specifics of the incident within 60 days of incurring the injury, using a predetermined format and following the steps specified in the Regulations.

14. Provision of said notice is a prerequisite for exercising the right to sue the state for the injury of which the party informed the Ministry of Defence. The court, for special reasons to be recorded, has discretion to hear a claim regarding an event notification of which was provided late.

15. The Regulations stipulate the procedure applicable to the party giving notice, the injured party or someone acting on their behalf, and the manner in which notice must be provided. Additionally, the Regulations stipulate sanctions against a party giving notice where the notice form was provided without the full details as required by law. In such a case: "Submission of the form shall not be deemed to constitute notification as required under Section 5a(2) of the Act". In the form, which is included as a schedule under Regulation 1, the injured party is required, as stated, to provide specifics regarding the incident, such as: the circumstances and place where the injury occurred, the nature of the injury, who and what caused it, names and identification numbers of witnesses, specifics of bodily harm and damage to property, specifics regarding medical treatment and regarding complaints filed with respect to the incident.

16. This notification requirement is a far-reaching departure from civil procedure practiced in the State of Israel. On the one hand, the state argued that claims made by Palestinians for damage incurred long before the suit was filed are difficult to evaluate and that the requirement for notice within 60 days would enable it to investigate the incident closer to the date on which it occurred. On the other hand, the difficulty in evaluating Palestinians' civil claims that do not involve 'wartime action' is, substantively, no different from the difficulties associated with any other ordinary civil claim.

17. Furthermore, unlike other defendants, security forces should have real-time information thanks to their orders and directives with respect to maintaining operations logs, holding operational inquiries, launching military police investigations, etc. Yet, in practice, despite Israel's official policy, it systematically avoids investigating incidents involving Palestinians immediately after their occurrence, and where investigations have been opened in response to demands from lawyers and/or human rights organizations, most of them have been negligent.

18. On June 22, 2005, world-renowned American human rights organization, Human Rights Watch released a report regarding the Israeli military's failure to investigate the death of OPT residents. The report thoroughly examines more than a dozen case in which Israeli military forces killed or seriously wounded Palestinian, British and American civilians in the OPT. The report emphasizes that most of the cases investigated did not take place in situations of armed conflict, and still, the organization found, "Most of Israel's investigations of civilian casualties have been a sham".[13]

19. Moreover, it is not difficult to imagine the objective difficulties Palestinian victims face in notifying the military of the incident in which the harm was sustained, as well as the power gap between potential Palestinian claimants and the military in the matter of disparity in access to information. Hundreds of thousands of Palestinians have been harmed by the military over the course of the occupation. Only a fraction mustered the courage to file notification to the military regarding the circumstances of their injury. An even smaller fraction went on to file civil claims. As such, on analysis of the final outcome, the requirement to notify the military is an insurmountable barrier to filing suit later. The absurdity can be illustrated through an example of a three-year-old orphan who loses both parents in a military operation. If the military is not notified within 60 or 90 days at most, the road to a civil suit is blocked. This minor will not be able to file a civil claim down the road. No fair legal system would tolerate such a situation.

20. In the hundreds of cases handled in our office over the years, we contacted the Military Police Criminal Investigation Department (MPCID) to inquire whether an investigation had been launched, and what its status and outcome were. Answers usually required countless follow-up inquiries and reminders and once delivered, the responses were generally vague and incomplete, amounting to phrases such as: "the file has not been located", "no investigation has been launched at this time", or "the file was closed due to lack of evidence". Our requests to review investigation files, in the rare cases where investigations had in fact been conducted, were also submitted to the courts during legal proceedings. In these cases too, the State Attorney's Office dragged its feet and provided access only after court orders were issued and

[13] https://www.hrw.org/news/2005/06/21/israel-failure-probe-civilian-casualties-fuels-impunity

not before further long delays due to censorship issues. We did, however, ultimately gain access to dozens of such investigations, enabling us to witness the lack of professionalism, and even negligence, that marks them.

21. The incompetence of the military's investigative authorities and the conflict of interests they are in when, and if, they investigate incidents that took place in the OPT is well documented. We refer to the B'Tselem reports attached to this opinion and a position paper released by Yesh Din,[14] for information regarding the negligent and/or patently unprofessional manner in which these investigations are conducted, as we have also witnessed as counsel when cross-examining military personnel and/or investigators in our court cases.

22. We note, in brief, from the report, that from the beginning of the Second Intifada in late 2000 until the end of 2015, B'Tselem contacted the Military Advocate General Corps (MAG Corps) with demands to investigate 739 cases in which Palestinians were killed, wounded, beaten or used as human shields by soldiers. All of these cases were investigated by B'Tselem and the MAG Corps was contacted only after they were found to be reliable. As of mid-2016, in a quarter of the cases (182), no investigation was launched; in nearly half (343), the file was closed with no measures taken and only in extremely rare cases (25) were indictments served against the implicated soldiers. Thirteen other files were forwarded for disciplinary action. An additional 132 cases were at various stages of processing, and the MAG Corps failed to locate another 44. These figures indicate that a complaint has only a 3% chance of leading to an indictment, while the odds that the MAG Corps would physically lose the file are nearly double.

b. Criminal prosecution under Israeli law

23. The constitutional responsibility of the executive to enforce the criminal law in Israel has been vested by law in the Attorney General. He has the primary powers to initiate and to discontinue criminal proceedings.

24. According to the Criminal Procedure Law [Consolidated Version], 1982, criminal offenses are under the responsibility of the state, since a criminal offense is considered as an offense against the whole society. The state is responsible to represent the society's interests, and it has the ability and the means to investigate and conduct the criminal proceedings by the Police.

[14] https://www.yesh-din.org/en/march-2018-data-sheet-law-enforcement-against-idf-soldiers-suspected-of-harming-palestinians-2016-summary/

25. In the OPT and Gaza, the military police is responsible for investigating incidents involving soldiers.

26. The issue of negligence in carrying out investigations and / or failure to conduct investigations was discussed extensively before. For this reason and for other considerations, the military prosecution has never filed an indictment for the murder of a Palestinian. At the most, indictments are filed for causing death by negligence.

27. The Supreme Court usually does not intervene in the discretion of the Legal Advisor or the Military Prosecutor not to investigate or not to indict or in which offence to indict.

28. A question that might arise is whether there is another path of a criminal procedure that could be used against individuals, such as soldiers or commanders of the army.

29. Section 68 of the Criminal Procedure Law allows any person to submit a criminal complaint in respect of a closed list of offenses specified in the Second Schedule of the Law[15].

30. However, section 69 of the law says that "A complaint under this Article shall not be filed against an employee of the State for an act he performed while performing his duties, except with the consent of the Attorney General".

31. According to interpretation given by courts, soldiers were considered as "state employees" and therefore, "The normative purpose of the law... is to protect soldiers from vain complaints, as ... other state employees"[16].

32. This procedure is exceptional and is not feasible for Palestinians who want to sue the soldiers and/or commanders of the army, especially because they will have to obtain the approval of the State Attorney, which is not realistic.

c. Reduced period of limitations on claims:

33. Amendment No. 4 to The *Civil Torts Act (Liability of the State)* instituted a reduced limitations period compared to the periods normally applicable to civil claims under The *Statute of Limitations* 1958 (hereinafter: The Statute of Limitations) and in Section 89 of The *Torts Ordinance* [New Version]. In the provision relevant to the matter herein, *Amendment No. 4*, Section 5a(3) sets forth:

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[15] The offenses for which a criminal complaint can be filed are offenses in which the public's interest is relatively small compared to a greater interest for individuals. Examples of offenses that allow the filing of a criminal complaint are violations of the Defamation Law, violation of privacy or causing nuisances such as noise.

[16] Criminal case 1191/86 Lt. Col. Yehuda Meir against Lieutenant Yair

> **The court shall not hear a claim filed more than two years after the day of the act that is the subject of the claim; however, the court may extend this period for an additional period that shall not exceed one year if it is convinced that the claimant did not have a reasonable opportunity to file his claim within the aforesaid period. Where the claimant was a minor on the day of the act, said period of extension shall not exceed three years...**

34. This reduced limitations period applies to any "claim against the state or against an agent of the state for damages arising from an act performed in the Area by the Israel Defence Forces". It replaces the ordinary seven-year period of limitations.

35. *The Statute of Limitations*, which applies to Israelis, institutes extended limitation periods in special circumstances. Where minors are concerned, the time before they turn 18 is not counted toward the limitations period (Section 10 of the Act), meaning that so long as the tortious incident occurred when the potential claimant was a minor, a claim may be filed by the parents. Once the minor reaches the age of 18, they have seven more years to file a claim. In contrast, a Palestinian minor from the OPT can only file a claim within two years. Otherwise, limitations apply.

36. In any civilized country, when an individual sustains serious bodily harm, a neutral agency immediately carries out a professional investigation, when the evidence on the ground is still fresh, in order to get at the truth and allow the authorities to make a real, informed decision as to whether a certain party was responsible for the harm and whether to charge said party.

37. As detailed in the "Requirement for written notification of incident", the military's negligence in conducting investigations and the patently unreasonably long duration of these investigations, if conducted in the first place, directly impact the prospects of civil claims filed by West Bank and Gaza Strip residents against the military in terms of reduced limitations as well, as potential claimants are unable to receive the results of the investigations in a timely fashion and/or rely on this evidence in their statements of claim, and, in many cases, during the litigation itself.

38. In addition, the reduced period of limitations puts Palestinian claimants in an untenable position. In cases of damage or injury caused by security forces, claimants rely on the results of the investigation to both prepare claims and weigh their prospects. The military's investigation policy was described above. Even when an investigation is conducted at another party's demand, such as counsel or human rights organizations, such investigations take many months to complete, and many more months go by until a decision is made as to whether to

launch criminal or disciplinary action against the implicated members of the security forces. The overall time amounts to years.[17]

d.1. Retroactive application of reduced limitations

39. In *Amendment No. 4*, Section 5a(3) contains the following side note:

> "With respect to a claim the cause of which is an act that took place prior to *Amendment No. 4* and the limitations period applicable thereto has not yet expired, the times specified in this clause shall be counted from the date of commencement of the Amendment, provided that in each case the period of limitations shall not exceed the limitations applicable under the law on the day of the act.

40. As stated above, *Amendment No. 4* to *The Civil Torts Act* instituted a two-year period of limitations from the date of the incident. The most egregious aspect of this amendment is the retroactive application of this provision. The effective implication of the above-quoted clause is that all actions that took place prior to August 1, 2002 (the commencement date of *Amendment No. 4*), expired on August 1, 2004, at the latest.

41. Below are two examples to illustrate the provision:

- The limitations on an incident that took place on July 25, 2002, would have run out on July 25, 2009, if it were not for the Amendment. However, due to the amendment, the limitations on this claim expired on August 1, 2004.

- The limitations on an incident that took place on May 5, 1998, would have run out on May 5, 2005 (seven years after the incident) if it were not for the Amendment. However, due to the amendment, the limitations on this claim expired on August 1, 2004.

42. There is no doubt that retroactive legislation of this sort severely undermines the principle of reliance. Justice Barak (as was his title at the time) addressed the threat retroactive legislation poses to the rule of law in the judgment in *Arbiv*[18]: "**Retroactive legislation undermines fundamental constitutional precepts. It undermines the rule of law, the certainty of law and public faith therein. It undermines the fundamental tenets of justice and fairness and the public's trust in governmental institutions".**

43. The interest of reliance in civil law may not be strong with respect to future acts, but it is certainly highly significant regarding past acts. While the injured parties would not have acted otherwise at the time the civil wrong was committed, the harmful effect of the Act is the denial of the right to sue. On this issue, the position of many of the injured parties took a

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[17] HaMoked: Center for the Defence of the Individual, **Annual Report 2002** (Jerusalem 2002), Violence Committed by Security Forces, pp. 39-52.
[18] PPA 1613/91 *Arbiv v. State of Israel*, IsrSC 56(2), 765, p. 777.

change for the worse. They had a strong constitutional interest to receive effective remedy for the violation of their constitutional rights, and whether they did not hasten to file a claim, or had spent a great deal of money collecting evidence and preparing a claim that has not been filed and would now never be launched - they suffered irreparable, unjustifiable harm.

d.2 Reduced limitations in the eyes of the court:

44. In CA 5250/08 *Mazen Sa'id Ahmad Khashan v. State of Israel*, the appellant, a resident of Jenin, born in 1989, sustained an injury to the abdomen as a result of shots fired at him, while playing with other children his age near the local school on the outskirts of Jenin where there was military action, on January 26, 2003 (he was about 14 at the time).

45. On, March 20, 2003, the International Committee of the Red Cross contacted military officials and provided them with details of the incident and the injury sustained by the appellant, as per his claim.

46. In May 2005, about two years after the incident, an MPCID investigation was launched. It lasted two years. During the investigation, the military's operational logs from the date of the incident were uncovered, and statements were collected from many personnel in the unit involved in the military action on the day of the incident. Statements were also collected from the claimant and three of his acquaintances (whom, he says, had witnessed the incident). The file, however, was closed.

47. A civil claim against the state with respect to the alleged damage was filed with the Haifa District Court on February 11, 2007. They filed a motion for dismissal in limine due to limitations, based on Sections 5a(2) and 5a(3) of *The Civil Torts Act*. The Haifa District Court granted the motion.

48. As noted, the claimant, a minor at the time of the incident, filed his claim with the court four years after the incident took place. As such, his claim falls within the period of time regarding which the court has discretion to extend limitations pursuant to the conditions enumerated in Section 5a(3) of the Act.

49. The interpretation of the term "reasonable opportunity" in the context of *The Civil Torts Act* had not been considered by the Supreme Court previously. However, several Magistrates and District courts have considered this interpretive question. A review of the decisions on this subject indicates that courts deliberating on the issue have mostly rejected motions for extension of limitations. Without developing clear criteria on the interpretation of the aforesaid term (see, e.g. CC (Beersheba) 1014/07, Capp (Beersheba) 6245/07 *State of Israel v. A. Raida et al.* (unreported, [Reported in Nevo] December 11, 2007); CC (Nazareth) 1247/04, Capp (Nazareth) 1575/05 *Rashid v. State of Israel – Ministry of Defence* (unreported, [Reported in Nevo] January 22, 2006) [hereinafter: Rashid]; Capp (Jerusalem) 8835/05 *State*

of Israel et al. v. Estate of Khaled Abadah et al. (unreported, [Reported in Nevo] September 25, 2006); CC (Kfar Sava) 1921/05; Capp (Kfar Sava) 3480/05 *State of Israel v. Nahed Ahmad Jalad* (unreported, [Reported in Nevo] August 24, 2008)).

50. The District Court held there was no room to extend the limitations period and that the late filing of the claim (24 months) impacts the state's ability to properly defend itself in a civil claim.

51. The Supreme Court dismissed the appeal. Justice Rubinstein thought, as did Justice Amit, that the term "reasonable opportunity" must be examined objectively, i.e., whether or not the concrete circumstances allowed the claimant to file the claim within the two-year span and held he had not been convinced there had been no "reasonable opportunity" to file the claim in the specific case. It would not be superfluous to note that in this case, the late filing of the claim would not have hurt the state's ability to face the evidence, as, as stated, the state was aware of the incident close to the date on which it occurred and had collected statements from the minor and from military personnel. Despite all this, the court refused to extend the deadline for the minor's claim.

52. This judgment fails to meet the test of judicial review as:

First, the legislator used the term "reasonable opportunity". This criterion encompasses enhanced consideration for the fact that the claimant was a minor at the time of the incident. In addition, the objective obstacles in the claimant's path due to the security situation in the OPT should also be taken into consideration.

Second, the interpretation of the term "reasonable opportunity" should reflect enhanced protection for minors who had not filed their claims, as mandated by the interest in protecting minors against limitations in cases where their parents (guardians) have failed to claim their rights.

Third, the legislature instituted a discriminatory period of limitations as it is counted while the potential claimants are still minors, causing a disproportionate violation of the right to access to justice. In this state of affairs, a claim is always in danger of the period of limitations expiring before minors are reasonably capable of making their own decisions and claiming their rights.

e. Revocation of applicability of Sections 38 and 41 of *The Torts Ordinance* to Palestinians:

53. The Israeli legislator has adopted into domestic law liability principles that originate in modern legal systems rather than relying on ordinary evidence laws alone. Intervention has been made in favour of the injured party in several torts, shifting the burden of proof regarding certain elements of guilt onto the defendant.

54. Section 38 of *The Torts Ordinance* sets forth that where a claim concerns damage caused by a dangerous subject, and the defendant was the owner or person in charge of said subject, the burden of proving there was no negligence for which the defendant is liable in respect to the dangerous subject lies with the defendant. In the same manner, Section 41 of *The Torts Ordinance* shifts the burden of proof to the defendant in cases in which the claimant does not and could not know the actual circumstances that caused the occurrence resulting in the damage incurred, where the damage was caused by some property of which the defendant had full control, and the court believes the occurrence causing the damage is consistent with the defendant having failed to exercise reasonable care rather than with his having exercised such care. In this scenario, the defendant is required to show there was no negligence for which they are liable with regards to the occurrence that led to the damage.

55. *Amendment No. 4* to *The Civil Torts Act* revoked these two presumptions, stipulating they would not apply to claims filed by Palestinians against the military and the security forces. However, the court was given discretion to apply the provisions of these sections, should it find it justified in the circumstances and for reasons that would be recorded.

56. The revocation of the two presumptions seals the fate of Palestinian claims almost completely, especially given the disparity in power and access to information between Palestinian claimants and the military. Most of the information regarding the activities of security forces in the OPT is in the hands and under the control of the military. The military has extensive resources: investigative agencies, databases, and others which provide it with far better capabilities to investigate and reach witnesses than victims have. In a situation where the two presumptions no longer apply, if claimants have no information regarding the circumstances of the damage - the identity of the soldiers, the type of weapon used, the object of the military operation, etc., their claims are obviously destined for dismissal and failure.

57. Despite the discretion given to the court to apply the two presumptions in exceptional circumstances and for special reasons, the courts have refrained from exercising this discretion and have not applied the presumptions to Palestinian claimants. (CA 6732/97 *Abuelaish v. State of Israel*, March 5, 2006) (Hebrew); CA 1459/11 *Estate of Naji Muhammad (Nabil) Nafe'a Hardan, Deceased v. State of Israel, Ministry of Defence*, paragraph 27 of the judgment).

58. It would not be superfluous to note that in a petition filed with the Supreme Court against *Amendment No. 4*, the court remarked, as a side note, that *Amendment No. 4* was "proportionate" and did "not give rise to any constitutional difficulty".[19]

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[19] See paragraph 35 in *Adalah.*

Further barriers following *Amendment No. 8*:

a. Expanded definition of "wartime action"

59. As described in greater detail below, *Amendment No. 8* expanded the definition of "wartime action" that appeared in *Amendment No. 4* such that it encompasses an extremely wide array of occurrences that would become immune to civil claims, even in tragic cases afflicted by glaring negligence.

b. The wartime action exception as a preliminary argument and restricted venues for filing claims:

60. *Amendment No. 8* compounded the procedural limitations introduced in *Amendment No. 4*, stipulating courts will hear claims of wartime action as a preliminary argument. The state contends this rule is justified as such an argument would obviate the need to consider the merits of the claim and examine whether the actions of the security forces were negligent or proportionate in the circumstances" (Explanatory notes to *The Civil Torts Act (Liability of the State) Amendment No. 8* 2008).

61. The amendment also stipulated that: "for reasons of efficiency and case law consistency, such claims shall be filed only in the courts in Jerusalem and Beersheba".

62. The practical meaning of this amendment is that the state provides only the evidence it requires to substantiate its claim that in incident falls under the definition of a wartime action, and, consequently, the court refrains from considering whether the use of any firearms had been negligent or constituted a breach of the laws of war. Therefore, even if the court might ultimately find that the decision to execute the shooting had been negligent, it would not necessarily mean that it was not a wartime action. In the words of the court: "The wartime action exception to state liability was meant to expropriate tort liability specifically in cases of negligent wartime action in view of the concept that wartime actions are not suitable for civil claims [CA 5964/92 *Bani 'Odeh v. State of Israel* [Reported in Nevo] (March 20, 2002), paragraph 9; Hardan, paragraphs 22-14]"[20], and subsequently, "the case herein also concerns a tragedy caused by an error, in the context of firing tank shells at an individual suspected to be directing enemy fire towards our forces. As in the matter of *al-Daya*, despite the tragedy and despite the error, the state is not civilly liable for the damage caused and the question of whether the shooting was reasonable or negligent, or whether or not it was compliant with the laws of war is neither valid nor relevant".[21]

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[20] See judgment in *Abuelaish*, paragraph 31.
[21] Ibid, paragraph 48 of the judgment.

Additional general barriers

a. Payment of monetary guarantee for state costs:

63. The state routinely seeks to have Palestinian residents of the West Bank or Gaza Strip who file civil claims against it to deposit a monetary guarantee, by cash or via bank guarantee to ensure coverage of state costs should the claim be dismissed. Such motions are made under Regulation 519 of *The Law of Civil Procedure 1984*. The argument the state makes in such cases is that orders to deposit a guarantee for coverage of its costs in the event that the claim is dismissed are required since the claimants live outside the jurisdiction of the State of Israel and Israeli judgments cannot be directly enforced in their places of residence.

64. The court routinely accepts these requests, and where the claimants are unable to make the deposits, the claims are dismissed without being considered on their merits. In any proper legal system, a claimant is ordered to pay defendant's costs, if at all, once proceedings are concluded and based on several considerations, including the outcome of the action, the amount sought, the work involved, the costs incurred and the conduct of each of the parties.

65. Given that Palestinians are not residents of Israel, the courts tend to require them to deposit monetary guarantees in disregard for the principle of access to justice and while employing the balance of convenience in a biased manner favouring the state, on the grounds that the claim has weak prospects due to "wartime action" claims.

66. Monetary guarantees range from 20,000 ILS to 80,000 ILS (€4,800 to €19,100). Given the dire socio-economic conditions and high rate of unemployment in the Gaza Strip,[22] this is a prohibitive burden, and a significant number of claimants are unable to produce the money required, resulting in the dismissal of their claims, while other potential claimants avoid filing a claim in the first place. To illustrate the difficulties facing Gaza residents, we provide the example of the "strawberry field" victims, who were represented by the undersigned in legal proceedings.

67. The claimants, in this case, filed a claim with the Haifa District Court, which came to be known as the *strawberry field* case,[23] CC 496/2007. In the claim, we alleged that on the morning of January 4, 2005, while members of the Ghaban family were working in their strawberry field in Beit Lahiya, eight of the claimants, all children and youths, were killed and three had lost limbs and remained permanently disabled as a result of one or more shells fired at them from an Israeli tank.

[22] https://unctad.org/en/PublicationsLibrary/tdb65_2_d3_en.pdf
[23] CC 496-07 *Estate of Muhammad Kamel Muhammad Ghaban, Deceased et al. v. State of Israel*.

68. At the state's request, the court ordered the claimants to deposit a monetary guarantee of 70,000 ILS to cover the state's costs should the claim be dismissed. Unfortunately for the claimants, the decision was given shortly before Operation Protective Edge, which took place between December 27, 2008, and January 18, 2009. When the undersigned, who represented the victims in the case, contacted them to inform them of the need to deposit a guarantee, he was told the claimants' families had begun feeding on the animal feed, as they had run out of food fit for humans (!).

69. As the claimants failed to comply with the decision of the court regarding the deposit of a guarantee, their claim was dismissed.

b. Signing powers of attorney:

70. Filing a civil claim in Israel requires a signed power of attorney from the litigant. The lawyer serves as the client's agent and may take action on their behalf according to agency laws. Until Hamas rose to power in Gaza in January 2006, lawyers would send clients in Gaza powers of attorney by fax and/or email, and the latter would sign them and return them by fax and/or email. It was self-evident that the powers of attorney were not signed in the presence of representing counsel. Such powers of attorney were submitted to the various Israeli courts without any objections on the part of the State Attorney's Office and/or the court system.

71. Lawyers followed the same procedure for signing medical confidentiality waivers, affidavits of response to questionnaires, affidavits of evidence in chief and so forth.

72. Subsequent to January 2006, the State Attorney's Office changed its policy, both with regards to powers of attorney and with respect to document verification, making matters difficult for claimants and their lawyers by demanding the claimants sign the original power of attorney in the presence of an Israeli lawyer who would provide confirmation.

73. This demand is extremely burdensome and nearly impossible to meet, as ever since Israel's disengagement from the Gaza Strip, Israelis have been prohibited from entering Gaza and Gaza residents have been prohibited from entering Israel. This state of affairs obviously stalls cases, preventing their advancement.

c. Document verification:

74. Israeli law requires anyone wishing to submit documents produced by an official agency of the Palestinian Authority to an Israeli court (such documents may be inheritance orders, judgments, medical documents, etc.) to have the documents verified by the Supervisor of Legal Assistance in Israel. Verification of official Palestinian Authority documents is regulated under *Emergency Order (Judea and Samaria Area and Gaza Strip - Adjudication of Offenses and Legal Assistance) (Palestinian Authority Areas - Legal Assistance in Civil Matters) 1999*.

75. In the matter of *Abu Sa'id*, following a decision rendered on May 27, 2014 (two years after the claim was filed) in which the court insisted on the filing of an inheritance order and power of attorney which have been lawfully verified, we contacted the office of the Supervisor of Legal Assistance at the Ministry of Justice (Palestinian Authority), asking for information on the procedure for verification of official documents produced by Palestinian Authority agencies in the Gaza Strip.

76. The response clearly stated that the Gaza Strip is considered a hostile entity and that the Supervisor of Legal Assistance does not verify any documents originating in Gaza, even if they had been verified and confirmed by the Ministry of Justice and the Ministry of Foreign Affairs in Ramallah. Counsel for the state in *Abu Sa'id* confirmed this in his notice to the court.

d. Entry of claimants and/or witnesses for court appearances: Protocol on entry for legal matters:

77. Restrictions imposed on the entry of Gaza residents into Israel allow the state to exert effective control over Gaza residents' ability to engage in legal action and demand their rights from Israeli courts.

78. The state's intervention in imposing these restrictions is a case of conflict of interests, given that most actions in which Palestinians from Gaza are involved are civil claims against state authorities. The fact that the state is both the defendant in these civil actions and the party with the power to decide under what circumstances Gaza residents may enter Israel compounds the power gap between Palestinian litigants and the state. As such, the protocol governing the entry of Gaza residents into Israel for the purposes of legal matters must take into consideration the inherent conflict of interest and significant power gap between the two parties, in order to allow for as much procedural fairness as possible.

79. Over the course of deliberations in HCJ 9408/10 *Palestinian Centre for Human Rights v. Attorney General et al.* (June 23, 2013), the Supreme Court, in a decision dated January 29, 2013, proposed the state reassess the issue of entry into Israel by Gaza Strip residents for the purpose of legal proceedings and have the State Attorney's Office draft a directive on the matter. Following the suggestion made by the court, in May 2013, the Coordination of Government Activities in the Territories (COGAT) released the *Protocol on processing applications for entry permits for reasons relating to legal proceedings in Israel* On September 4, 2014, more than a year after the protocol was released, Israeli NGO Gisha filed a Freedom of Information Application under *The Freedom of Information Act 1998* for figures on how the protocol was being applied.

80. On November 24, 2014, the COGAT Freedom of Information Officer provided her response, which indicated **not a single application had been approved since the release of the protocol**. Forty-nine applications were denied, and six were pending. The 55 applications had been filed by 187 residents. Of the 187, 170 had been denied, and 17 were still waiting for a response.

81. On July 7, 2015, Gisha sent a letter to the Attorney General and the Military Advocate General regarding existing arrangements for entry of Palestinians from the Gaza Strip to Israel for legal affairs, stating these were impracticable and citing the severe impingement of Palestinians' right to access to justice caused by these arrangements.

82. The existing protocol raises concerns on both the procedural and substantive plains. Procedurally - applicants are required to produce countless documents and details they do not normally have within an unreasonable timeframe. Substantively - applications are required to prove the legal action constitutes exceptional humanitarian grounds. In other words, proving there is an action underway that requires the applicant to enter Israel is insufficient. Rather, the action must be proven to constitute humanitarian grounds. This requirement forces the security establishment to dig deep into the legal action itself and examine whether it is justified and whether it constitutes humanitarian grounds, while weighing considerations it neither has the tools nor the power to weigh.

Examples from the field:

83. We wish to provide a concrete example from the field which, to the best of our professional knowledge, reflects the situation in hundreds of other matters of Gaza Strip residents who had filed claims against the Ministry of Defence for bodily harm and damage to property that resulted from various actions of the Israeli military.

84. The claim on behalf of the Abu Sa'id family from Gaza,[24] was filed on July 2012. An Israeli tank had shelled the claimants' home, located near the Gaza perimeter fence, causing the death of Ms. Na'ama Abu Sa'id and the injury of others. The matter was litigated at the Beersheba District Court for more than five years. Most of this time was a campaign of attrition against the claimants and their counsel by way of unreasonable procedural demands put forward by the state.

85. Counsel for the state insisted on an original power of attorney signed in the presence of an Israeli lawyer. At the same time, in its other capacity as the power controlling the border crossings, the state did not permit the claimants to enter Israel and/or their Israeli lawyers to enter the Gaza Strip.

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[24] CC 21677-07-12 *Estate of Na'ama Abu Sa'id et 11 al. v. State of Israel*.

86. We filed a brief to the court, arguing that under Section 3 of the Agency Law 1965, authorization can be granted in writing, verbally or through conduct. Such authorization must be produced in writing on demand with copies. In other words, inasmuch as authorization was granted in one of the three aforesaid manners, there is no impediment to providing a copy thereof to a third party. **The language used in the Act makes no requirement or the authorization being presented to be original and/or signed in the presence of a lawyer**. As such, it is possible to discern that the authorization may be presented even if, for instance, it had originally been sent by fax.

87. Moreover, in ST 147/02 (Tel Aviv) *Tel Aviv-Yafo Central Bar Association Committee v. A.* (December 31, 2002), the tribunal held that agency is present **whether in writing or verbally** and that **"Confirmation of a client's signature by a lawyer may be carried out without the client having signed in the presence of a lawyer"**. See ST 22/95 *A. v. Bar Association, IsrDC* 56(b), 94, 97.

88. Though the claimants' entry applications were denied, we suggested creative alternatives: We asked to provide the original powers of attorney signed by the Gaza claimants via a Red Cross representative and to file them along with an affidavit from a lawyer who oversaw the process whereby the powers of attorney were verified and delivered. The state vehemently objected. We made another suggestion: having the claimants sign the powers of attorney in the offices of a Gaza human rights organization, live via Skype shown in the courtroom in the presence of the adjudicating judge and counsel for the state. The state rejected this suggestion on the outlandish claim that the claimants might be under pressure from terrorists who deny them their free will to give power of attorney who were off camera!!!

89. Finally, we proposed approval be given for a meeting between a lawyer from our office and the claimants at Erez Crossing, for the purpose of having them sign the powers of attorney. This proposal materialized only after Israeli NGO Gisha filed an administrative petition against COGAT (AP 56769-07-*15 Abu Sa'id et al. v. COGAT*). Given the remarks of the Beersheba District Court at a hearing held on September 16, 2015, COGAT agreed to let the six claimants meet with their Israeli lawyers at Erez Crossing.

90. We note that two days prior to the meeting, Gisha received a letter from the International Law Department at the Military Advocate General Corps, stipulating three conditions for the meeting. First, it must be as short as possible and dedicated to signing the power of attorney only. Second, only one Israeli lawyer would be present. Third, the meeting between counsel and clients would not be private, but attended by security guards and soldiers as the military saw fit.

91. We accepted these terms for lack of choice and only for the sake of advancing the matter. We believe these conditions are extremely severe and unreasonable. They evince the state's unwillingness to show the required flexibility mentioned by the court for allowing meetings between Gaza residents and their Israeli lawyers. Some of these terms were also unlawful, as they breach lawyer ethics on attorney-client privilege. The obstacles placed by the state may discourage residents, causing them to forgo legal action in Israel, in breach of their basic right to access to justice.

92. It is worth noting that ostensibly, the *Protocol on processing applications for entry permits for reasons relating to legal proceedings* in Israel provides no guidance on requests by Israeli lawyers to meet with Gaza clients at Erez Crossing, and such an arrangement was possible only after an administrative petition was filed.

State civil liability: Review of amendments and liability exceptions

Background - the legal situation prior to *Amendment No. 4*:

93. The Torts Ordinance [New Version], in its original format (the Torts Ordinance 1944) gave the state full immunity from civil liability as inspired by the common law rule of "the King can do no wrong". Modern legal systems do not distinguish between the individual and the state with respect to civil liability, and the old rule of no liability has passed from this world. The modern state, like any other legal entity, bares civil liability for wrongs it commits.

94. *The Civil Torts Act* was enacted by the Knesset several years after the founding of Israel. On the one hand, the *Act* instituted the principle that "With respect to civil liability, the state shall be deemed as any incorporated body", as enshrined in Section 2 thereof. On the other, it provided for an exception to state liability from civil claims brought under *The Civil Torts Act*. Section 5 provides as follows: "The state is not civilly liable for an act performed through a wartime action of the Israel Defence Forces".

95. Over the years, the Israeli court has been asked to interpret and apply the term "wartime action" in cases brought before it. As early as in 1960, the Supreme Court ruled that to decide whether or not an act is a wartime action, "the act must be examined, not the war" (CA 311/59 *Tractor Station Factory v. Hayat*, IsrSC 14 1960).

96. The Act contained no definition for the term "wartime action" until *Amendment No. 4*. A definition was added for the first time on August 1, 2002. Until that time, the term "wartime action" had been interpreted in jurisprudence in the following, narrow, manner: [25]

> The language of Section 5 is aimed only at true wartime actions in the narrow and simple sense of this term, such as the gathering of forces for battle, combat attack, exchange of fire, explosions, etc., in which the special nature of warfare with its risks, and in particular its implications and results, is expressed.

97. *Bani 'Odeh*,[26] was a civil claim concerning an incident that occurred in 1988, at the beginning of the First Intifada, in which the claimant and Sa'ud Hassan Bani 'Odeh were hit by military forces' fire at the metal workshop where they worked in the village of Tammun, Jenin District. The forces had arrived in civilian clothes to arrest wanted individuals. Local residents who sensed the danger began fleeing, and the soldiers chased and fired at them. The claimant was hit in the knee, while Sa'ud Hassan Bani 'Odeh sustained serious injuries and was rushed to hospital where he succumbed to his wounds.

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[25] CA 623/83 *Asher Levy v. State of Israel*, dated March 11, 1986, paragraph 2.
[26] CC 334/89 *Jamal Qassem Bani 'Odeh v. State of Israel*.

The District Court examined all the evidence and ruled the action had been a quasi-policing action rather than a wartime action. The court noted it did not ignore the context in which security forces operate in the West Bank, but added that it could not hold that any attempt made by security forces to apprehend suspects in the Area constituted a wartime action. This distinction between a wartime action and a policing task became binding case law over the years and was adopted by the Supreme Court when it ruled in the appeal against the original District Court judgment, ten years after the fact and shortly before Operation Defensive Shield in 2002.

A panel of nine Supreme Court justices heard the case[27], and President Barak devoted special attention to the definition of "wartime action" [Barak, paragraph 10]:

> The action is a wartime action if it is a combat action, or a military combat operation conducted by the armed forces. It is not necessary that the action be carried out against the army of a state. Actions against terrorist organizations may constitute wartime actions. Thus, for example, the wartime nature of the action directed against an enemy (whether an organized army or terrorist groups) that seeks to harm soldiers is what is likely to create the special risk that justifies granting immunity to the state.

Further below therein:

> To answer the question of whether an activity is of a 'wartime' nature, all the circumstances of the event must be examined. One must inquire after the aim of the action, the location of the incident, the duration of the action, the identity of the acting military force, the threat that preceded it and was anticipated from it, the strength and scope of the acting military force, and the duration of the incident.

***Amendment No. 4*:**

98. With the outbreak of the Second Intifada in September 2000 in the background, and the overly narrow interpretation the Knesset believed the court had given to the term "wartime action", attempts to codify the issue of state liability for Intifada related damage resumed.

99. A government sponsored bill formulated in 1997 was again brought before the Knesset. The legislative efforts were successful, and the Knesset passed *The Civil Torts Act (Liability of the State) (Amendment No. 4) 2002* (July 24, 2002) (hereinafter: *Amendment No. 4*). Under this amendment, a definition for the term "wartime action" was added to Section 1 of *The Civil Torts Act*, as follows:

> "Wartime Action" – including any action of combating terrorism, hostile actions, or insurrection, and also any action as stated that is

[27] CA 5964/92 *Jamal Qassem Bani 'Odeh v. State of Israel* [Reported in Nevo] dated March 20, 2002

> intended to prevent terrorism, hostile actions, or insurrection undertaken in circumstances of risk to life or limb".

100. Thus, the definition clarifies and specifies, using inclusive language, that any action of combating terrorism, hostile actions, or insurrection, as well as any action intended to avert these, undertaken in circumstances of risk to life or limb constitutes a wartime action, which gives the state immunity from civil liability (*Adalah*, paragraph 35 and paragraph 40; CA 8384/05 *Salem v. State of Israel* [Reported in Nevo], paragraph 3 (October 7, 2008); LCA 8484/06 *Nitzan v. State of Israel* [Reported in Nevo], paragraph 3 (June 10, 2007)).

101. *Amendment No. 4* also introduced Section 5a, which provides for special arrangements for claims arising from damage caused by the actions of the military and security forces that are filed after the amendment's enactment, as reviewed above. Section 5a contains, inter alia, the requirement to provide notice of damage within 60 days as a prerequisite for filing a claim (Section 5a(2)); the reduction of the limitations period on such claims from seven to two years (Section 5a(3)); the retroactive application of the Amendment; the non-application of the rules on shifting the burden of proof in negligence affecting dangerous subjects, provided for in Section 38 of the *Torts Ordinance [New Version]*, and the rule regarding "self-evident" matters instituted in Section 41 of the *Ordinance* (Section 5a(4)).

***Amendment No. 7*:**

102. The legislator did not stop there. On July 27, 2005, the Knesset passed an additional amendment to *The Civil Torts Act*, further reducing state liability for tortious acts carried out in the OPT. The major change produced by the Amendment was the addition of Sections 5b and 5c to *The Civil Torts Act*, which exempt the state from civil liability for damage caused in a conflict zone as a result of the acts of security forces. The change was applied retroactively beginning on the first day of the conflict (September 29, 2000) and up to six months after the publication of *Amendment No. 7*.

103. This meant the courts would not hear claims filed between 2000 and 2005, concerning incidents the Minister of Defence declared had occurred in conflict zones. The Minister of Defence has invoked his power under this section, declaring conflict zones with respect to periods preceding the amendment's enactment (on February 9, 2006, and February 12, 2006, Official Gazette, 5942 and 5943 respectively). Several High Court petitions were filed by human rights organizations with respect to this amendment. The Supreme Court, sitting as the High Court of Justice ultimately accepted the petitions as far as they related to Section 5c, but dismissed them with relation to Section 5b.

104. The amendment was challenged in a petition filed with the Supreme Court sitting as the High Court of Justice by human rights organizations and private petitioners in *Adalah*. In the

decision therein, the court held that the exemption from state liability provided for in Section 5b in cases of damage incurred in a conflict zone as a result of actions carried out by security forces regardless of whether or not the damage was inflicted through a "wartime action" violated the constitutional rights of Palestinians (as well as their heirs and estates). The court also ruled this violation failed to meet the terms of the limitations clause enshrined in Basic Law: Human Dignity and Liberty.[28]

***Amendment No. 8*:**

105. On July 23, 2012, following the aforesaid judgment in *Adalah*, the Knesset again amended the definition of the term "wartime action", in *Amendment No. 8* to *The Civil Torts Act*, wherein the phrase "undertaken in circumstances of risk to life or limb" was replaced with "that is of a belligerent nature given its overall circumstances, including the object of the act, its geographic location or the threat to the force carrying it out".

106. *Amendment No. 8* further stipulated that Palestinian claimants could file their claims only with the courts in Jerusalem or Beersheba.

Interpretation of the term "wartime action" and its application over the years:

107. We have reviewed the background on state civil liability, the courts' judicial interpretation of the term "wartime action" and the amendments introduced to the Act over the years.

108. The courts have occasionally been asked to make distinctions between different types of military actions, giving meaning to the term as partly defined in *Amendment No. 4* in the process. In this manner, in CA 8384/05 *Salem v. State of Israel* [Reported in Nevo] (October 7, 2008) (hereinafter: *Salem*), the court ruled that a routine military patrol, normally classified as a policing task, had become a wartime action due to a change of circumstances wherein the unit came under distress and under real threat to the lives and safety of the soldiers.

109. The phrase "in circumstances of risk to life or limb" within the definition of "wartime action" under *Amendment No. 4* has been interpreted in several ways. In CA 3991/09 *State of Israel v. Estate of Fatimah Ibrahim Abu Samra* [Reported in Nevo] dated November 8, 2010, (hereinafter: *Abu Samra*), Justice S. Joubran [paragraph 19] made remarks that were alluded to in the Defendant's Incidental Conclusion Concerning Competence to the effect that this element has been interpreted as an objective risk, not merely a subjective assessment of risk by the soldiers.

110. On the other hand, in *Skafi* [CA 1864/09 *Estate of Ahmad Skafi v. State of Israel* [Reported in Nevo] dated September 7, 2011, paragraph 9], the court heard an appeal against the judgment

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[28] HCJ 8276/05 *Adalah - Legal Center for Arab Minority Rights in Israel v. Minister of Defense*.

of the Nazareth District Court denying the appellants' claim, holding that shots fired by soldiers killing a 15-year-old from Hebron came under state exemption from liability for wartime actions. The shooting took place when soldiers were on a sniper stakeout in Hebron, following intelligence information based on which the soldiers were instructed to fire at anyone carrying an M-16 or Kalashnikov rifle. It later emerged that what was perceived as a threat, had not been such in reality, since, as the District Court found, the Deceased had been holding a replica of an M-16.

111. The Supreme Court adopted the subjective approach to assessing risk:

> The District Court noted that the incident constituted 'an action intended to prevent terrorism, undertaken in circumstances of risk to life or limb'. There can be no dispute that the stakeout was an 'action intended to prevent terrorism'. The question that arises relates to the requirement for risk. The analysis in the judgment indicates that a subjective assessment of risk is sufficient to fulfil this requirement. This analysis is consisted with additional decisions produced by the District Courts (CC (Jerusalem) 5133/03 *al-Haika v. State of Israel*, paragraph 21 of the judgment, [Reported in Nevo], September 2, 2008; CC (Haifa) 112/98 *Muhammad v. Military Commander*, paragraph 10 of the judgment, [Reported in Nevo] February 26, 2003)).

112. In the case of **Rachel Corrie**, an American peace activist who was crushed to death by a military bulldozer on March 16, 2016, while she was protesting the demolition of Palestinian homes in Rafah, the Supreme Court upheld the District Court's decision to dismiss the claim, stating the military action during which Corrie died had been a "wartime action" as defined in *The Civil Torts Act*. The court noted the action during which Corrie died had been a razing action conducted by two armoured bulldozers protected by a *nagmachon.*[29] The court found this action met all the criteria laid out in jurisprudence for a wartime action, including, the location of the incident, the forces involved, the mission statement and the risks troops faced.[30]

113. The courts have recognized the exemption for wartime action in a wide variety of actions. For instance, it has been ruled that the actions of a military patrol to maintain public order should not be considered "wartime actions" so long as the patrol engaged in ordinary policing tasks and faces the risks ordinarily associated with such tasks. However, if a public disturbance, stone throwing or even shooting that put the unit's soldiers at risk develop, the action becomes a wartime action that is associated with special risks (CA 8384/05 *Masri Munir Salem v. State of Israel* (October 7, 2008).

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[29] A *nagmachon* is an armored personnel carrier with an armored underbelly.
[30] CA 6982/12 *Estate of Rachel Aliene Corrie, Deceased v. State of Israel*.

114. This position was upheld even when innocents were harmed during military action to disperse a public disturbance/demonstration (CA 9561/05 *'Awni Khatib v. State of Israel*, delivered on November 4, 2008; CA 3038/05 Muhammad Zidan v. State of Israel, dated August 9, 2006).

115. In LCA 3866/07 *State of Israel v. 'Atef Naif al-Maqusi*, the court exempted the state from compensating a 13-year-old who had been injured by shots fired by Border Police Under Cover Unit operatives in an incident that took place on May 18, 1993. The forces engaged in tracking wanted individuals at Jabalya Refugee Camp in the Gaza Strip (March 21, 2012).

116. A Palestinian citizen of Israel, who lives with schizophrenia, was shot by IDF soldiers who suspected him as he approached their post. The court ruled the shooting justified and exempted the state from paying compensation. The court ruled the soldiers' suspicions regarding the respondent's intentions as he was walking toward the post amounted to reasonable suspicion (LCA 5203/08 *Ibrahim Mthakal Aghabriya v. State of Israel*, judgment dated September 24, 2009).

117. Shots fired from a military stakeout at farmers carrying tools, which the **soldiers mistook for weapons**, were also recognized as a wartime action. The court added that the recognition of the act as a "wartime action" **would not change even if it later emerged that the soldiers' impression was inconsistent with reality** and even if they were found to have been negligent in using firearms. CC (Jerusalem) 5133/03 *Estate of Hisham Na'im al-Halaika v. State of Israel* (September 2, 2008).

Review of court judgments

118. As stated above, the Knesset passed *Amendment No. 8* on July 16, 2012, expanding the definition of wartime action. Therefore, to show the escalating trend in court decisions, we have seen fit to review judgments issued by courts of different instances between August 1, 2012, and January 1, 2019. The judgments of the Supreme Court refer to incidents that took place in both the West Bank and the Gaza Strip, whereas the judgments of the Magistrates and District courts are from the southern district, to which claims by Gaza residents had been deferred.

Review of High Court judgments as an appellate instance:

119. We have conducted a review of all judgments delivered during the stated timeframe with respect to the actions of Israeli military and security forces, and have found that as an appellate instance, the Supreme Court approved all judgments given by lower instances dismissing claims pursuant to the terms of the disclaimers stipulated in the *Act*. These decisions were made regarding a wide variety of circumstances: targeted assassinations, large-scale military operations, arrest raids, air raids, including ones pursued in error and based on false intelligence and resulting in the death of 22 individuals.

120. As noted above, *Amendment No. 8* gave the Beersheba District and Magistrates courts sole local jurisdiction over claims made by Gaza residents.

121. **LCA 5165/10 *Estate of 'Adnan Daud Hassan Taleb et 34 al. v. State of Israel* – dated August 6, 2012**.

The court dismissed the claimants' motion to extend the period of limitations in a claim filed under *The Civil Torts Act (Liability of the State)*, pursuant to Section 15 of *The Statute of Limitations*. Section 15 allows to stop the clock on limitations and refile a claim previously dismissed. The court dismissed the claimants' motion for an extension of the filing deadline, ruling the provisions on limitations in Section 5a(3) of *The Civil Torts Act (Liability of the State)* does not apply in tandem with Section 15 of *The Statute of Limitations*. *The Civil Torts Act (Liability of the State)* is *lex specialis* that overrides the provisions of *The Statute of Limitations* on this matter.

122. **LCA 2031/18 *A. v. State of Israel* - dated July 9, 2018**.

The Supreme Court denied a motion for leave to appeal from the judgment of the District Court with respect to extending the deadline for claim submission due to limitations. The court ruled that the lower court's holding that the action in question was a "wartime action" was

sufficient grounds to deny the motion for leave to appeal, as the claim would have been dismissed either way.

123. **LCA 4362/12 *Mustafa Kabaha v. State of Israel* - dated August 23, 2012**.

The Supreme Court dismissed a motion for leave to appeal from the judgment of the Haifa District Court which had denied the applicant's appeal from the judgment of the Haifa Magistrates Court. The Supreme Court ruled, as had the lower instances, that the state was exempt from liability for the damage incurred by the applicant (he had sustained hits from three rubber bullets, resulting in the removal of his left eye and head injuries), based on Section 5 of *The Civil Torts Act (Liability of the State) 1952*.

124. **CA 1459/*11 Estate of Hardan, Deceased, v. State of Israel* – dated June 16, 2013**.

During Operation Protective Shield, a military post set up for intelligence purposes near the city of Jenin had been converted into a stakeout for terrorists who had committed a shooting attack shortly beforehand. The incident resulted in the killing of innocent Palestinian civilians. The Supreme Court ruled the incident came under the terms of "wartime action" which gives the state immunity from claims, pursuant to Section 5 of *The Civil Torts Act*.

125. **CA 6982/12 *Estate of Rachel Aliene Corrie, Deceased v. State of Israel* - dated February 12, 2015**.

This judgment was reviewed above. We note further in relation thereto, that the Deceased was an American national who had been crushed to death by an armoured military bulldozer on the Philadelphi Route, east of Rafah, while protesting with other peace activists against house demolitions. The District Court ruled the razing action constituted a "wartime action", despite the fact that no combat activities were taking place and the protesters posed no threat to the soldiers, who were ensconced inside armoured bulldozers and/or armoured vehicles.

126. **CA 4112/09 *A. v. Military Commander* - dated January 3, 2012**.

The appellant, a resident of Hebron, was a bystander hit in a military air raid against a wanted individual who was planning to carry out a suicide attack. The court dismissed the appeal, rejecting the appellant's arguments against the legality of "targeted assassinations" in general, and in particular in situations where they pose a risk to civilians.

127. **LCA 5250/08 *Mazen Khashan v. State of Israel* - dated October 2, 2014**.

As a minor, the appellant, who resides in Jenin, sustained a bodily injury as a result of shots fired in his direction where military action was taking place. A civil claim he filed four years after the incident was dismissed in limine due to limitations pursuant to Sections 5a(2) and 5a(3) of the Act.

128. **CA 8279/12 *Estate of Faiz Musbah Hashem al-Daya, Deceased*, v. State of Israel (June 29, 2014)**.

During Operation Cast Lead, due to an operational error, a fighter jet launched an attack on the home of an innocent family, killing 22 members of the family and severely wounding another man. The District Court where the claim for compensation was brought ruled this was a wartime action as defined in *The Civil Torts Act (Liability of the State)*. The Supreme Court upheld the findings of the District Court in the appeal.

129. **CA 8148/13 *Sharikat Falastin Lilistithmar al-Siyahi* v. Minister of Defence September – dated 20, 2015**.

The Supreme Court upheld the finding that damage caused to a media company in the Hebron District and a hotel in the Bethlehem area during military activities in 2001-2002 was the result of "wartime actions".

130. **LCA 5179/11 *A. v. State of Israel* - dated May 2, 2013**.

The Supreme Court dismissed an appeal filed by a minor hurt in a security incident on April 27, 2004, in Tulkarm, holding that the shots were fired during a wartime action toward a man who was set to throw a firebomb, and the appellant was hurt while standing next to him.

131. **LCA 2785/17 *A. v. State of Israel - Ministry of Public Safety* - dated April 10, 2018**.

An appeal against the judgment of the District Court was rejected due to limitations. The claim sought compensation for bodily harm allegedly caused to the appellant during his arrest by the Israel Police in a village located in the Palestinian Authority, on criminal suspicions.

132. **CA 3974/12 *Zuhdi al-Masri v. State of Israel* - January 27, 2014**.

The appellant, a technician with a Palestinian telecommunications company, arrived at a school in Nablus for work purposes, wearing company uniforms. As he was working on the roof of the building, he was shot by soldiers from a special military unit stationed in and around Nablus, who thought he and another employee were terrorists planning to wire and detonate an explosive device. The court ruled that: "In light of the rule produced by this Court in numerous judgments, and recently in CA 1459/11 *Estate of Hardan, Deceased v. State of Israel* (June 16, 2013), even if the unit's soldiers were not in immediate danger, the element of risk must be subjected to a "softened" objective examination according to the specific circumstances of the incident and in the context of the Second Intifada which required soldiers to operate within densely populated areas while previous incidents and current intelligence indicate substantive suspicion of terrorist activity".

Review of judgments issued by the Magistrates and District Courts (Southern District) from August 1, 2012, to January 1, 2019:

133. To examine trends in the jurisprudence of the courts of first instance in the southern district, where Gaza claims have been deferred following *Amendment No. 8*, we searched Israel's largest legal database (www.nevo.co.il), using the keywords "wartime action" and "civil case". We selected decisions from August 1, 2012, to January 1, 2019, in cases where the defendant was the State of Israel. The search yielded 121 Beersheba Magistrates Court Judgments and 14 Beersheba District Court judgments.

134. We declare that we have conducted a meticulous examination of the outcomes in judgments of both the Magistrates and the District Court, and found the following conclusions:

A. All claims that were submitted to Beersheba District Court, were dismissed, based on acceptance of the state's claim of exemption due to "wartime action", as detailed in the table below.

B. 119 out of 121 of The Beersheba Magistrates Court Judgments were dismissed, based on acceptance of the state's claim of exemption due to "wartime action" and/or due to an inability to submit an original power of attorney and / or approved succession orders and / or deposit of a guarantee.

C. Only 2 out of 121 of The Beersheba Magistrates Court Judgments were ended with a compromise.

135. Given the large number of claims brought before the Magistrates Court, and so as not to overburden this document with the minutiae of the cases, we provide more detail on judgments issued by the Beersheba District Court, as per the table below:

Judgments of the Beersheba District Court
August 1, 2012, to January 1, 2019

	Case details	Date of incident dd.mm.yy	Incident details	Date judgment delivered (dd.mm.yy)	Outcome
1	CC 48460-01-12 *Estate of Tareq Mansur, Deceased et al. v. Ministry of Defence*	19.05.04	Shells fired from armed forces tanks and helicopters at a procession 5 dead, 3 injured	30.07.18	Claim dismissed
2	CC 40777-12-10 *Estate of Bisan Abuelaish, Deceased et al. v. Ministry of Defence*	16.01.09	Tank shells fired at claimants' home 4 dead (female), 4 injured	27.11.18	Claim dismissed
3	CC 45043-05-16 *A. v. Ministry of Defence*	16.11.14	Shots fired by soldiers at claimant 1 injured	04.11.18	Claim dismissed
4	CC 7503-01-11 *'Ammar al-Hilu v. State of Israel*	04.01.09	Shots fired by soldiers 2 dead, 2 injured	10.12.18	Claim dismissed
5	CC 1281-07 *Estate of al-Haya et al. v. State of Israel*	20.05.07	Missile fired from an aircraft at claimants' home 8 dead, 3 injured	21.10.12	Claim dismissed
6	CC 14833-11-12 *Estate of Ashraf al-Mughrabi et 20 al. v. State of Israel*	13.06.06	Missile fired at a car from an airplane 3 dead, 3 injured	17.02.13	Claim dismissed
7	CC 37687-10-12 *Estate of Mustafa Munib Sarsur, Deceased et 40 al. v. State of Israel*	22.03.04	Missiles fired from helicopters 6 dead Unspecified number of injured	14.02.13	Claim dismissed
8	CC 35484-08-10 *Abu Halimah et 12 al. v. State of Israel – Ministry of Defence*	04.01.09	Shots fired by soldiers 8 dead Unspecified number of injured	07.01.18	Claim dismissed
9	CC 34232-08-10 *Estate of 'Arafat 'Abed al-Dayam et al. v. State of Israel*	05.01.09	Flachette shells 5 dead Unspecified number of injured	14.02.13	Claim dismissed
10	CC 11383-01-11 *Estate of Muhammad 'Abd Rabo et 13 al. v. State of Israel*	07.01.09	Soldiers fired at claimants from a tank, as they were walking on the road, waving white flags, during a stand down declared by the military. 2 dead 2 injured See HRW report	10.03.13	Claim dismissed
11	CC 21677-07-12 *Estate of Na'ama Abu Sa'id et 11 al. v. State of Israel*	13.07.10	Flachette tank shell fired at shed where the claimants were sitting. 1 dead (female), 3 injured	20.11.17	Claim dismissed
12	CC 40563-12-10 *Estate of Muhammad Kharf et al. v. State of Israel*	27.12.08	Shells fired 2 dead	14.02.13	Claim dismissed
13	CC 26091-07-10 *Estate of Kharir Ba'lushah et al. v. State of Israel*	29.12.08	Claimants' home destroyed by shelling of a nearby mosque 5 dead (female), 4 injured from	27.12.12	Claim dismissed

			same family		
14	CC 35106-08-10 *Faiz al-Daya et al. v. Minister of Defence*[31]	06.01.09	During Operation Cast Lead, due to an operational error, a fighter jet launched an attack on the home of an innocent family, killing 22 members of the family	05.09.12	Claim dismissed

Below are further details on several judgments that reflect the current climate:

136. In *Abuelaish*,[32] four girls, all minors, were killed in their home, on January 16, 2009, during Operation Cast Lead, after two tank shells were fired at the window of the home. The military claimed soldiers had identified suspicious persons on the roof of the building, as the father, a physician who worked at a hospital in Israel, was giving an interview on Israeli TV about the military operation.

137. In *Abu Sa'id*,[33] the Beersheba District Court dismissed a civil claim brought by the heirs of a woman who had been killed by a shell fired at her house, near the perimeter fence. The court accepted the soldiers' contention that they had suspected figures approaching the fence.

138. The Gabon case,[34] concerned an aerial attack in the Gaza Strip on July 16, 2006, by "four pairs of fighter jets" that struck "chicken coops on the allegation that weapons tunnels were hidden in them". The aerial attack was followed by another operation in which the aforesaid coops were destroyed by other forces working with trackers and heavy equipment. The court ruled: "In the matter at hand, establishing the element of "risk to life" as stated above, in fact, goes beyond necessity, since in this matter, true wartime actions were underway involving fighter jets or tanks and armoured personnel carriers. We repeat that the 'risk to life' requirement contained in the definition of 'wartime action' applies in the context of 'an action taken to prevent terrorism...' as per the second alternative in the definition in Section 1 of *The Civil Torts Act*. According to the first alternative, when the action concerned is 'combating terrorism', this element is not required. As such, the definition of 'wartime action' applies to the context of attacks launched by fighter jets or tanks and armoured vehicles, even on the presumption that the lives of the pilots or armoured vehicle crews were not at risk... As we see, the events that are the subject of this claim were distinctly 'wartime actions. This was the case under the narrower definition of the term that preceded *Amendment No. 4* and all the

[31] This case was heard by the Nazareth District Court, despite the fact that it concerned an incident that took place in Gaza.
[32] CC 40777-12-10 *Estate of Bisan Abuelaish, Deceased et al. v. Ministry of Defense*.
[33] CC 21677-07-12 *Estate of Na'ama Abu Sa'id et 11 al. v. State of Israel*.
[34] CC 5193-08 *Masri Gabon LTD. et al. v. State of Israel*, dated April 15, 2012.

more so under the broad, updated definition added to *The Civil Torts Act* in *Amendment No. 4*. Therefore, the Defendant bears no civil liability for these incidents".

Interim summary: Trends in jurisprudence regarding the Gaza Strip following the 2005 Disengagement

The status of the Gaza Strip and its residents

139. In December 2017, Israeli NGO Gisha, released a review of ten seminal judgments delivered by the Supreme Court after Israel's unilateral disengagement from the Gaza Strip in 2005. The review addresses how the Supreme Court perceives the status and rights of Gaza residents vis-à-vis Israeli policy.

140. The ten judgments reveal a grim picture, wherein in the post-Disengagement era, Gaza residents have no clear legal status, and there is no system of law that applies to their relationship with Israel and grants them rights.

141. The judgments clearly indicate that Israeli courts, primarily the Supreme Court, have almost unquestioningly accepted Israel's legal position and upheld its policies toward Gaza's residents. In doing so, the courts have lent support to severe violations of the fundamental rights of Gaza residents, most notably, the right to freedom of movement.

142. So, for instance, in the very first significant judgment delivered after Disengagement, *Hamdan*,[35] the court noted that "law is not the focus of the circumstances, which are unique, sui generis".

143. Naturally, the court addressed Gaza's legal status post-Disengagement, which, the state contends had ended the Israeli occupation. In *al-Bassiouni* [36] the High Court of Justice adopted the state's position, ruling the occupation of the Gaza Strip had ended, and therefore, the laws of occupation no longer apply in their entirety. The court ruled Israel bears only humanitarian obligations toward Gaza's residents, partly due to its control of the crossings. The court did not indicate which authorities in international law give rise to these obligations. Gisha's review of the judgments reveals that as a clear system of law was abandoned in favour of a vague humanitarian framework, the state gained unlimited discretion, and Gaza residents were left with exceedingly weak rights protections.

Gisha's report (in English) is **attached** to this brief as **Annex A**.

[35] HCJ 11120/05 *Hamdan et al. v. GOC Southern Command*, dated August 7, 2007.
[36] HCJ 9132/07 *al-Bassiouni et al. v. Prime Minister*, dated January 30, 2008.

Denial of enemy subjects' right to file civil claims:

144. Section 5b of *The Civil Torts Act* qualifies state civil liability with respect to enemy subjects. The Israeli courts have upheld this exception and dismissed claims filed by Palestinians from the Gaza Strip pursuant to this provision of the Act.

145. The Section sets forth as follows:

> **5B (a) Notwithstanding the provisions of any law, the State is not civilly liable for damage caused to the persons set forth in paragraphs (1), (2) or (3), except for injury sustained in the types of claims or to the types of claimants set forth in the First Annex -**
>
> **(1) A subject of a state that is an enemy, or person who is not an Israeli citizen and is a resident of a territory outside Israel which the government has declared, by order, as enemy territory, unless lawfully present in Israel;**
>
> **(2) A person who is active in, or a member of, a terrorist organization;**
>
> **(3) A person who was injured while acting as an agent or on behalf of a subject of an enemy state, a member of a terrorist organization, or a person active in a terrorist organization.**
>
> **(b) In this section –**
>
> **"Enemy" and "Terrorist Organization" have the same meaning as in Section 91 of The Penal Law 1977;**
>
> **"The State" includes an authority, body, or person acting on its behalf.**

146. The state relies on this provision in claims filed by Palestinians from the Gaza Strip, and, as stated, the courts have deliberated on this issue, ruling that ever since Hamas rose to power in 2006, the Gaza Strip has been at war with Israel and Gaza residents are subjects of an enemy entity.

147. The *al-Bassiouni* judgment was given in a High Court petition filed by several human rights organizations against the government decision to reduce or restrict the supply of fuel and electricity to the Gaza Strip. In their petition for relief from the court, the petitioners noted mainly the need for different types of fuels, gasoline and diesel for the routine operation of hospitals, as well as water and sewage pumps. The petitioners also noted the need for electricity to be supplied either through power lines from Israel or through the supply of industrial diesel to run Gaza's power station.

148. The High Court of Justice accepted the state's contention that it follows the rules of international law, respects the humanitarian obligations it has under the laws of war, as

derived from the state of war between the State of Israel and the Hamas organization which is in control of the Gaza Strip, and the need to avoid harming the civilian population. The state maintains that Israel has had no effective control over what transpires in the Gaza Strip since September 2005. HCJ 9132/07 *al-Bassiouni v. Prime Minister* [Reported in Nevo] (January 30, 2008) (hereinafter: *al-Bassiouni*), dated January 30, 2008.

149. In the aforesaid "chicken coop" case, the Beersheba District Court relied on the "wartime action" exception to dismiss a claim for compensation for chicken coops belonging to companies registered with the Palestinian Authority that were destroyed as a result of an aerial bombing and/or ground activity by the military on July 16, 2006. The court did note, however, that they could also have availed itself of the liability exception with regard to 'enemy claims' under Section 6b of *The Civil Torts Act*:

> For these purposes, 'enemy subjects' may be innocents who had the misfortune of being counted among the subjects of an 'enemy state'. In general, an 'enemy' is '**anyone who is or declares himself to be a belligerent or maintains or declares himself to be maintaining a state of war against Israel, whether or not war has been declared and whether or not armed hostilities are in progress...**' [ibid, including the reference to the definition of 'enemy' in Section 91 of the ***Penal Law 1977*.**
>
> The Claimants are companies registered with the Palestinian Authority. The companies, their shareholders and directors are located in the Gaza Strip. This area, at all times relevant to this claim was and remains under the control of Hamas, which is defined as a terrorist organization and engaged in hostilities with the State of Israel [HCJ 9132/07 *Jaber al-Bassiouni Ahmed v. Prime Minister* [Reported in Nevo] dated January 30, 2008 (hereinafter: *al-Bassiouni*), delivered by President Beinisch, paragraphs 12 and 22. The Claimants, therefore, are subjects of a 'state that is an enemy state' or of a hostile entity, which, according to a purposive interpretation of the aforesaid definition is tantamount to a 'state that is an enemy state' [Yoram Dinstein, **Laws of War**, 1983, pp. 208-209 (Hebrew edition)]. Given the foregoing, the identity of the Claimants suffices, prima facie, to invoke the liability exception in favour of the Defendant in relation to the damage that is the subject of the claim in question. (CC 5193-08 *Masri Gabon LTD. et al. v. State of Israel*, paragraphs 67-68).

150. The court further ruled: "Had this thesis been raised and accepted, it might have led to the early dismissal of the claim, obviating the need to hear evidence and saving public resources and judicial time" (ibid, paragraph 69).

151. In *A. v. State of Israel*, the Beersheba District Court dismissed a claim brought by a resident of the Gaza Strip who alleged that on November 16, 2014, when he was 15, he was injured by military fire. The court accepted the state's motion for dismissal based on the argument that the claimant's place of residence had been declared "**enemy territory**" by the Government of

Israel in an order dated October 7, 2014[37]. **The Prime Minister, acting on behalf of the Government of Israel and pursuant to the powers vested in it under Section 5B(a)(1) of *The Civil Torts Act (Liability of the State)*, had declared the Gaza Strip "enemy territory for purposes of the Law" in *The Torts Order (Liability of the State) (Declaration of Enemy Territory - Gaza Strip) 2014*.**

***The Torts Order (Liability of the State) (Declaration of Enemy Territory - Gaza Strip) 2014*:**

152. *The Order* in question went into effect on October 7, 2014, with the Prime Minister making the following declaration pursuant to the powers vested in him under Section 5B(a)(1) of *The Civil Torts Act (Liability of the State) 1952*:

> By virtue of the power vested in it under section 5B(a)(1) of *The Civil Torts Act (Liability of the State) 1952* (hereinafter: The Act) the Government hereby orders:
>
> 1. The Gaza Strip is enemy territory for the purpose of this Act.
>
> 2. The effective date of this Order is July 7, 2014.

153. In addition to the direct legal effect of this declaration on banning civil claims, it has far-reaching practical implications stretching over every aspect of life in Gaza, among these, the inability to make bank transfers between the Gaza Strip and Israel. Given this new reality, no money can be transferred from Gaza to Israel in any form, be it cash or bank transfer, including for the purpose of depositing a court-ordered monetary guarantee. In some cases, Gaza residents improvise ways to deliver guarantees they were ordered to deposit in actions they brought in Israel, such as transfers through banks in the West Bank, and from there to Israel, or via Egyptian banks.

Denial of right to file claim due to "act of state" defence:

154. The state occasionally claims an exemption from civil liability for acts it contends are "acts of state". Justice Grunis described the term as follows in *Adalah* (paragraph 6):

> "[A]n important doctrine that exists in English law, the act of state doctrine. According to this doctrine, certain acts of the state and its agents may not be tried in the English courts, if they were committed outside the borders of the state with regard to persons who are not British nationals. These also include acts of a violent nature that are committed by the state and its agents".

[37] For more information, see the translated Explanatory Notes of the order http://www.hamoked.org/files/2015/1159681_eng.pdf

Concluding remarks on trends in jurisprudence in civil claims:

155. A reading of the jurisprudence produced by all court instances with respect to incidents occurring in Gaza subsequent to the string of amendments clearly shows the courts recognize exemption from liability under three disclaimers: wartime action, act of state and enemy subject.

156. This line of jurisprudence tends to be accepted a self-evident when the incidents the claims centre around took place during a wide-scale military operation or more localized operations, even when an operational error occurs, and the victims are civilians and the harm they sustained is excessive and/or patently disproportionate.

157. In most instances, the courts accept claims for exemption from civil liability, mainly on grounds of the wartime action exception. The **test used to assess the element of risk is subjective**, i.e., the soldiers' perception, or at most, a softened objective assessment of risk.

158. In their Incidental Conclusion Concerning Competence, the s cited the judgment given in *Abu Samra* as an example illustrating the legal situation pertaining to state civil liability and the state's obligation to compensate Palestinians who have were during war.

159. With regards to that judgment, we wish to make several observations: First, for the sake of transparency, the undersigned note that they acted as legal counsel for the claimants in that case. Second, the incident occurred on May 5, 2002, during Operation Defensive Shield, on the outskirts of the West Bank city of Jenin. The case concerned a Palestinian family of farmers, parents who took their three young children with them to pick vine leaves. A tank driving on the next street began firing shells at the family, after its commander wrongly thought he had hit a landmine, when in fact, the tank track had dislodged due to faulty steering. The mother and two young children were killed in the incident. The Haifa District Court, which had heard the testimonies, found, as fact, that while the incident had taken place during a military operation, the tank that fired the shells and the soldiers inside it were on an ordinary patrol and faced no danger. Third, the state's appeal was dismissed in light of the factual findings of the lower court in its judgment dated March 20, 2009, which addressed the legal situation as it was prior to *Amendment No. 4*, since, as aforesaid, the incident took place in May of 2002. Fourth, this judgment remains an exception, in that both instances adopted an objective test to assess risk, while extensive subsequent jurisdiction adopted the subjective test of the soldiers' perception, or, at best, a softened objective test.

160. It is worth noting that many of the judgments appear formulaic in terms of both phrasing and substance, consisting of two pages in which the claim is dismissed due to the "wartime action" argument with minimal details about the incident, amounting to two lines: "From the description in the Statement of Claim itself, Paragraph [ ], it appears that 'On December 27,

2008... military forces fired shells.... in Gaza City....'". These are followed by remarks along the following lines: "There is no dispute that the incident took place as part of Operation Cast Lead, a large-scale military operation in the Gaza Strip between December 27, 2008, and January 18, 2009, for the purpose of combating terrorism; and that the aforesaid action was carried out deep within a territory under hostile control",[38] which are then followed by ruling that the action was a wartime action and could not be considered a policing task.

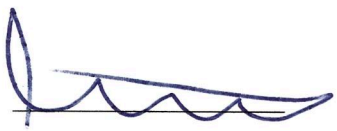
161. Palestinian residents of the Gaza Strip have effectively stopped bringing claims against the state for bodily harm in light of the amendments to the Act which expanded the definition of "wartime action" and the court's consistent dismissal of such claims. Moreover, as shown above, Gaza residents hurt by military action face many barriers to filing and litigating claims, another factor in the sharp decline in the number of claims.

162. Human rights organizations argue that the Israeli court system is not equipped to handle claims by Palestinians due to its bias. According to a B'Tselem report: "Israeli court proceedings are lengthy, complex, and humiliating for many Palestinians. Dealing with the Israeli legal system is difficult for them: it is inherently biased in favour of the state; Palestinian claimants and witnesses must overcome a language barrier and cultural differences, which make it difficult for them to follow all the courtroom proceedings; and naturally, the judges – who are Israeli citizens – identify with the soldiers and the State Attorney representatives, and find it harder to accept allegations brought against them".[39]

Final word

According to what we have detailed before, and in accordance with our professional experience over the years, the legal situation and the prevailing practice make it almost impossible to accept a civil claim against The State of Israel and/or the Israeli Army on the basis of harm caused to Palestinians. With regard to the Palestinians living in the Gaza Strip, the situation is even worse, due to complicated procedures and legal barriers but basically due to section 5B and the declaration of Gaza Strip as an enemy territory.

Hussein Abu Hussein, Adv.



Reem Masarwa, Adv.

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[38] CC 40563-12-10 *Estate of Muhammad Kharf et al. v. State of Israel*, dated February 14, 2013; see also CC 14833-11-12 *Estate of al-Mughrabi et al. v. State of Israel*, CC 37687-10-12 *Estate of Mustafa Munib Sarsur, Deceased et 40 al. v. State of Israel*; CC 35484-08-10 *Abu Halimah et 12 al. v. State of Israel – Ministry of Defense*; CC 34232-08-10 *Estate of 'Abd al-Dayam et al. v. State of Israel*.

[39] B'Tselem, **Getting Off Scott-Free: Israel's Refusal to Compensate Palestinians for Damages Caused by Its Security Forces**, February 2017, p. 46.