

مركز الميزان لحقوق الإنسان

Al Mezan Center for Human Rights



# BARRIERS IN ACCESS TO JUSTICE II

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LEGAL FACT SHEET  
The Case of  
Attiya Fathi Al Nabaheen

GAZA 2020



## مركز الميزان لحقوق الإنسان AL MEZAN CENTER FOR HUMAN RIGHTS

Al Mezan Center for Human Rights is an independent, non-partisan, non-governmental human rights organization based in the Gaza Strip. Al Mezan was established in 1999 and holds UN ECOSOC Consultative Status. With a mandate to protect and advance the respect of human rights, especially economic, social and cultural rights, Al Mezan supports victims of violations of international human rights law and international humanitarian law. The Center also works to enhance democracy, community and citizen participation, and respect for the rule of law in Gaza, as part of the occupied Palestinian territory.

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## **Introduction**

This fact sheet addresses obstacles that Israel places, by means of legislation, in the way of Palestinian victims seeking reparation and remedy for violations of Israel's duties under international humanitarian and human rights law. The fact sheet highlights Amendment No. 8 of the Israeli Civil Wrongs (Liability of the State) of 1952 as one of these obstacles, and underscores the implications of this legislative amendment on Palestinians' right to effective remedies. The amendment, enacted in 2012 with retroactive application to 2005, broadens the State of Israel's exemption from liability for damages inflicted on residents of the Gaza Strip in the course of Israel's military operations, particularly after designating the Gaza Strip an 'enemy territory' under the Israeli Civil Wrongs Law in 2014—a heightened status following the Israeli Cabinet's 2007 declaration of Gaza as a 'hostile territory'.

The fact sheet, further, provides examples of compensation cases brought by Al Mezan Center for Human Rights (hereby Al Mezan) before Israeli courts, highlighting in particular the case of Attiya Fathi Al Nabaheen, in which the exemption to State liability relating to 'enemy territory' pursuant to Amendment No. 8 was cited for the first time.

In November 2018, Israel's Beersheba District Court rejected the case filed by Al Mezan on behalf of the Al Nabaheen family against the Israeli military for the shooting and wounding of the child. The court ruled that the state was not liable for damages because Palestinians in Gaza are not entitled to seek compensation from Israel as they live in 'enemy territory'.

## **Attiya Al Nabaheen's Shooting**

On Sunday, 16 November 2014, Israeli military forces shot Attiya Fathi Al Nabaheen, on his fifteenth birthday, as he neared the perimeter fence adjacent to his family's property in Bureij Camp in the Middle Gaza district. The child suffered a perforating gunshot wound to the neck and was transferred by the Israeli military to Soroka University Medical Center in Beersheba, Israel. The shooting left him a quadriplegic and confined to a wheelchair for the rest of his life.

Earlier that year, the Israeli forces initiated a large-scale military operation in the Gaza Strip. During that operation, which Israel codenamed 'Operation Protective Edge', Al Nabaheen's family home was partially destroyed, prompting the family to move to a rental house.

## **Legal Action**

Seeking redress and reparation for the damage that the unwarranted shooting inflicted on their son, Al Nabaheen's family, represented by Al Mezan, initiated legal proceedings before Israeli courts. Meanwhile, Physicians for Human Rights



lodged a compensation claim with the Israeli Ministry of Defence; yet on 11 February 2015, the Israeli authorities rejected the claim and any liability for the incident or medical expenses arising from the injury inflicted on Al Nabaheen.

Israel's Civil Wrongs (Liability of the State) Law of 1952 and its amendments stipulate that any non-Israeli victim suffering damages as a result of the Israeli military operations in the West Bank and the Gaza Strip must submit a notice to the Israeli Ministry of Defense within 60 days of the incident. In Al Nabaheen's case, Al Mezan managed to submit a civil compensation notice within the required, restrictive timeframe to the compensation office at the Israeli Ministry of Defense. However, the office has neither acknowledged receipt nor given a response.

Al Mezan proceeded to file a compensation suit before Israel's Beersheba District Court in accordance with the provisions of the torts law and its amendments.

### **The Court's Verdict**

Nearly two years later, on 14 November 2018, Beersheba District Court dismissed the case and ruled the following:

“According to Article 5/B-1 of Amendment No. 8 of Israel's Civil Wrongs (Liability of the State) Law of 1952, which was enacted in 2012, residents of a territory declared by the Israeli government as “enemy territory” are not eligible to seek compensation from Israel for any reason.”

### **Obstacles in Access to Justice**

The pursuit of civil compensation claims before Israeli courts on behalf of Palestinian claimants continues to be severely restricted due to procedural, financial and judicial barriers,<sup>1</sup> primarily the exemptions to State liability relating to ‘combat action’ and ‘enemy territory’ as stated in amendment No. 8 to the Civil Wrongs (Liability of the State) Law of 1952.

The amendment, approved by the Israeli Knesset on 16 July 2012, with retroactive application to 12 September 2005, introduces insurmountable obstacles to justice and redress for Palestinian civilians who incurred damages during Israeli military operations.

For instance, the amendment redefines the term “act of war” by excluding a previous paragraph that stated that an imminent danger to the lives of Israeli soldiers must be present when the military operation leading to the damages

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<sup>1</sup> See Al Mezan's report No Reparation in Israel for Palestinians. Available at: <http://www.mezan.org/en/post/20954>



occurred. Instead, it provides that an “act of war” should be considered in terms of its nature, including its purpose, location, or the inherent danger the operation presents to the lives of Israeli soldiers.

The amendment also gives courts the power to dismiss cases, without hearing witnesses or considering evidence, at the preliminary stage if the incident occurred during a military operation, and designates the courts in Beersheba and Jerusalem as the only courts with the authority to preside over relevant cases. Fundamentally, it blocks liability for damages vis-à-vis persons who are not citizens or residents of Israel and are residents of a territory outside Israel that has been declared an enemy territory.

By enabling the State of Israel to evade its obligation under international law to provide reparation and remedy for damages resulting from its operations in the occupied Palestinian territory, the amendment deprives many Palestinian victims from access to justice and are denied their right to compensation guaranteed under international law.

Another notable, related case is that of the Abu Is’ayid family. On 11 July 2012, Al Mezan filed a compensation claim on behalf of the Abu Is’ayid family against the State of Israel in the Beersheba District Court, asking for compensation for damages arising from two Israeli military attacks on the family’s property near the perimeter fence in Gaza. The State’s defense lawyers argued that the incident occurred during “combat action”, which according to Amendment No. 8 to the Civil Wrongs (Liability of the State) Law, exempts the State of Israel of any legal liability.<sup>2</sup> The defense therefore asked the court to consider the case inadmissible. On 20 November 2017, the court dismissed the case citing Amendment No. 8. Therefore, Al Mezan appealed the decision to the Israeli Supreme Court, but the Court rejected the appeal and upheld the ruling of the Court of First Instance, depriving the victims from their right to remedies and further emboldening Israel’s impunity.

Similarly, in the case brought by Al Mezan on 22 May 2014 concerning Al Nabaheen, the Beersheba District Court dismissed the case on 4 November 2018 on the basis that the petitioners, being residents of Gaza, were not eligible for compensation under the ‘enemy territory’ exception. Al Mezan appealed this ruling to the Israeli Supreme Court. The case is still pending.

The Israeli court judge had noted that the amendment infringes upon the right to litigation and equality before the law. In addition, in an incident deemed the first of its kind, he requested an advisory opinion from the Knesset, to which the Knesset’s legal advisor replied that Article 5(b) of the Civil Wrongs (Liability of the State) Law passed the constitutional requirements, and there were no

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<sup>2</sup> See Al Mezan’s legal fact sheet, A Story of Barriers in Access to Justice. Available at: <https://mezan.org/en/post/18468>



constitutional impediments to applying it in the present case. The case was accordingly dismissed in the Beersheba Court.

## **The Right to Reparations**

The fulfilment of a state's obligation to provide a remedy and reparation for human rights violations is essential not only because these measures directly address the situation of the victims, acknowledge their suffering, and offer some form of compensation, but also because they contribute to deterring such violations, particularly if employed alongside other justice measures. In addition, they constitute one of the judicial system's basic tools to guarantee both the protection of human rights and hold the state accountable. Unlawful exemptions from providing remedy and reparation prejudice the victim's human and constitutional rights.

Restitution is one of the formal categories of reparations and refers to measures that serve to restore the victim's original situation before the gross violations occurred. Although it is a viable principle in Israel's judicial system, Amendment No. 8 directly contradicts it, as the amendment adds exemption from reparations to "persons who are not citizens or residents of Israel, and are residents of a territory outside Israel that has been declared an 'enemy territory' in a governmental decree, thus reflecting flagrant bias and discrimination against non-Israelis.

## **The Right to an Effective Remedy in International Law**

The right to an effective remedy is provided under international treaty and customary law and appears in numerous international instruments, in particular Article 8 of the Universal Declaration of Human Rights,<sup>3</sup> and Article 2 of the International Covenant on Civil and Political Rights.<sup>4</sup>

On 19 April 2005, the UN Commission on Human Rights adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which were also adopted and proclaimed by the UN General Assembly on 16 December 2005.<sup>5</sup> The Basic Principles and Guidelines

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<sup>3</sup> Article 8 of the Universal Declaration of Human Rights: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

<sup>4</sup> Article 2(3) of the International Covenant on Civil and Political Rights: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>5</sup> General Assembly resolution 60/147 of 16 December 2005.



call on states to ensure that their domestic law is consistent with their international human rights obligations by, inter alia, “incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system [and] adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.”

Thus, states are obliged to pay compensation for every unlawful act, be it in time of hostilities or not. Liability to pay compensation for human rights violations is further stressed in Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907.<sup>6</sup>

Asserting the same principle, on 9 July 2004, the International Court of Justice delivered its advisory opinion on Israel’s construction of the wall, stressing Israel’s obligation to cease its unlawful construction of the wall, dismantle it, and make reparation for the damage caused to all persons affected by the Wall.

## **Conclusion**

Israel’s Amendment No. 8 and other obstacles that Israel places in front of Palestinians seeking compensation and reparation for damages inflicted on them through Israeli military operations clearly violate Israel’s obligations to uphold and fulfill the rights of Palestinians living in the Gaza Strip. In Al Nabaheen’s case, the District Court’s ruling, which deprived Al Nabaheen from access to justice and denied his right to compensation and legal remedy.

Al Mezan hereby reaffirms that the Israeli Supreme Court is obliged to review the current amendment’s legality, especially since it contradicts the Court’s previous position on tort law relevant to Palestinian victims.

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<sup>6</sup> Article 3: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”



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