

A person wearing a red jumpsuit and using crutches is walking away from the camera down a long, brightly lit hallway. The hallway has white walls and a polished floor that reflects the light. The person is centered in the frame, and the perspective leads the eye towards a bright light at the end of the hallway.

Getting Off Scot-Free:

**Israel's Refusal to Compensate Palestinians
for Damages Caused by Its Security Forces**

בִּיִּזְעָם
B'TSELEM
بتسيلم

– Executive Summary –

From September 2000 – when the second intifada broke out – through February 2017, Israeli security forces killed 4,868 Palestinians who were not taking part in hostilities. About a third of them (1,793) were under the age of 18. Thousands of others were wounded, thousands of homes were demolished, and vast tracts of farmland devastated. Faced with this reality, Israel guaranteed itself a nearly blanket exemption from the obligation to pay compensation for all this harm. The state does not offer Palestinians harmed by its security forces a genuine opportunity to file for damages in Israeli courts, offering them no more than the illusion of being able to do so. By broadening the legal definition of what constitutes “warfare activity” and inclusive construal of this term by the courts, on the one hand, and introducing a series of procedural and evidentiary restrictions in legislation and

case law, on the other, Israel has rendered virtually nonexistent the chances of Palestinian plaintiffs getting compensation for the harm they suffered.

Paying compensation to persons who have suffered injury to themselves or their property is not an act of charity – it is the state’s obligation under international law. Not compensating Palestinian victims severely infringes upon their human rights as they are denied redress for violation of the basic rights to life, physical integrity and property. Denying the right to receive compensation is tantamount to a violation of the right in itself: the significance of human rights is not limited to merely having them entrenched in some law or international covenant. If no sanctions are enforced when human rights are breached, the rights become moot and the perpetrators have no incentive to institute a change in policy.

Background

The law stipulates that the state is liable for damages that are a result of negligence, but it exempts the state from paying compensation for acts performed during “warfare activity”. This exemption is based on the assumption that warfare entails risk and damages that are substantially different than those of everyday circumstances. As combat necessarily involves pressure and uncertainty, tort law is not suited to incidents that take place during war.

In the 1990s, during the first intifada and in its aftermath, residents of the Occupied Territories filed thousands of suits with Israeli courts, seeking compensation for damages caused them by Israeli security forces in circumstances that were not “warfare activity”. The complaints addressed damage resulting from a variety of sources, such as instances of unlawful gunfire (including those involving fatalities or injuries), destruction of property, extreme violence, torture during interrogations by the Israel Security Agency (ISA), and incidents in which ammunition or duds left behind in the field by the

military later exploded. Suing for damages was a costly process for Palestinians, dragged out for many years and imposed a series of bureaucratic hurdles. As a result, Palestinians often chose to settle for lower sums that did not reflect the extent of harm they suffered.

In the mid-1990s, to avoid paying even these sums of money, the State of Israel began employing various measures to broaden the exemption from liability for damage its security forces caused Palestinians in the Occupied Territories. These efforts were stepped up after the second intifada broke out in 2000. Over the years, the Knesset amended legislation several times; and, on their own initiative, the courts broadened the state’s exemption from paying compensation. These changes almost eliminated the possibility of Palestinians receiving compensation for injury caused them by Israeli security forces, even in incidents entirely unrelated to combat, such as clear-cut policing activities, instances of looting or physical violence.

The state’s justifications for the exemption – refuted

The state cited three major justifications for its refusal to pay compensation to Palestinians harmed by Israeli security forces: that the immunity from liability for “warfare activity” as provided by law and implemented by the courts is too narrow and did not take into account the nature of the first and second intifadas, and that as a result the state was obliged to pay compensation in cases which did not merit doing so; that it cannot fact-check the claims made by Palestinian plaintiffs and, in some cases, has absolutely no way to mount a defense; and that it is customary in armed conflict for “each party to assume the damage it incurs”; accordingly, the Palestinian Authority, like any other state, must shoulder the payment for damages sustained by Palestinians.

These arguments are unfounded. First the exemption in law regarding “warfare activity” had been broadened over the years by the courts, even before legislative amendments were completed. Gradually, judges included more and more types of incidents under this definition, and in some instances chose in advance not to examine the circumstances in which the incident took place, not even the question of whether the soldiers were indeed in physical or mortal danger. Moreover, a good part of the actions of Israel’s security forces in the Occupied Territories has been – including during the first and second intifadas – straightforward policing activity such as staffing checkpoints, making arrests, imposing and enforcing curfews, and dispersing demonstrations. Many Palestinians have

been injured in the course of such activities, which are not combat actions. Therefore, there is no justification for exempting the state from paying damages for harm sustained during these activities.

Secondly, some of the amendments enacted over the years and some of the court rulings were meant, ostensibly, to resolve the difficulties cited by the state. Nevertheless, the state continued to refer to the same difficulties even after these amendments were enacted. Yet the main flaw in this argument is that it contradicts the position stated explicitly in other contexts, namely that Israel in fact diligently and successfully carries out effective criminal investigations in similar incidents in which soldiers are suspected of acting in contravention to the law. This is the state's position notwithstanding that criminal investigations are far more complicated than the process of establishing facts in torts and that the criminal burden of proof is much higher. With regard to these investigations the state boasts that it has managed to overcome those very difficulties. B'Tselem does not agree that such investigations are in fact conducted, yet it underscores the extent to which the state's arguments are self-serving. When Israel feels it to be in its best interests, it boasts of having an efficient military law enforcement system with effective investigative abilities for handling cases in which Palestinians were harmed by security forces in the Occupied Territories. Yet, when it finds it expedient, the state argues it cannot

carry out this self-same task.

Thirdly, Palestinians cannot be considered citizens of another state capable of compensating them and agreeing upon reparations with Israel. The situation at hand is not that of two equal parties at war, but rather a state of occupation. Even after the Oslo Accords Israel remains the occupying power in the West Bank. Consequently, Palestinians who live in the West Bank – including in East Jerusalem, which Israel officially annexed – are considered protected persons. Similarly, Israel still controls many aspects of daily life in the Gaza Strip even after the disengagement, and repeatedly wages military operations there. In view of these circumstances, Israel cannot reassign responsibility for the injuries it causes and act as though the Palestinian Authority were a sovereign state. The powers Israel handed over to the Palestinian Authority under the Oslo Accords are very limited; any decision by the Palestinian Authority – even on trivial matters – require tacit or explicit Israeli consent. Once again, this is a case of the state picking and choosing arguments to suit its purposes. Israel is well aware of the reality of occupation which it created and continues to maintain; as a rule, this reality is in keeping with state interests. However, to justify evading payment of compensation, the state is willing to change its tune and declare the Palestinian Authority has state-like status – all the while changing nothing in its actual treatment of the Palestinian Authority or its residents.

The implications of denying compensation

Israel's policy on paying compensation to Palestinians who suffered harm reflects its profound contempt for the life, safety, and property of Palestinians in the Occupied Territories. The state has also made it clear that, for its part, it bears no responsibility for the consequences of its control over the Palestinian population, both as the occupying power in the West Bank and as an external entity exerting control over the Gaza Strip. Israel's powers as ruler, which it is quick to enforce when it serves its own purposes, vanish into thin air when it faces accountability for its actions.

The effects of the changes in legislation and in case law are evident in the figures the Ministry of Defense provided B'Tselem concerning compensation suits filed against the state by Palestinians from the West Bank and Gaza. The figures indicate two clear trends: First, fewer new claims are being filed with the courts. For example, 2002 to 2006 saw an annual average of 300 new lawsuits. In contrast, 2012 to 2016 saw an annual average of 18 claims – a mere 6% of the average a decade earlier.

The second trend is of Israel paying less compensation to Palestinians. From 1997 to 2001, the state paid an annual average of 21.6 million shekels (approx. USD 5.7 million) – in settlements or pursuant to a court verdict. In contrast,

from 2012 to 2016, Israel paid an average of about 3.8 million shekels (approx. USD 1 million) – a decline of more than 80% in comparison to the sums paid a decade earlier. The reduction in amounts paid to residents of Gaza during those periods is especially significant – from an average of 8.7 million shekels (approx. USD 2.3 million) a year to an average of about 280,000 shekels (approx. USD 74,000) a year, nearly 97% less. (In comparison, compensation for West Bank claimants dropped from an average of about 12.7 million shekels (approx. USD 3.3 million) to an average of about 3.5 million shekels (approx. USD 900,000) a year – approximately 72% less.)

The state has attempted to play down the significance of these undeniable figures which demonstrate the impact the amendments to Israel's Torts Law have had, even taking into account fewer casualties and less damage once the second intifada was over. In its response to a High Court petition against one of the amendments, the state argued that the limits placed on Palestinians' ability to get compensation for harm they sustained does not inhibit critique and review of the actions of the security forces, which are still available via criminal and administrative proceedings.

Yet these other proceedings that the state boasts of quite simply do not exist. In terms of criminal proceedings, in

the vast majority of cases, no one is held accountable when the human rights of Palestinians in the Occupied Territories are violated. Government officials are shielded from responsibility a priori, with no state body supervising their actions. The military law enforcement system, which is in charge of criminal and disciplinary proceedings within the military, functions as a whitewashing mechanism. The vast majority of cases it handles – most of which, to begin with, address only the liability of lower ranking soldiers in the field and minor offenses – are closed without filing charges or any other measures taken.

This outcome is no accident; it is the direct result of the way in which the military law enforcement system operates. MPIU (Military Police Investigation Unit) investigations are sloppy, with no real attempt made to get at the truth and almost always without gathering evidence – other than statements from soldiers, and in some cases also from Palestinians. In many cases, statements are given months after the incident, and investigators do not bother to resolve contradicting accounts or press the witnesses, who are usually soldiers implicated in the incident. The MAG (Military Advocate General) Corps orders many cases closed on grounds of “absence of guilt”, almost always adopting the soldiers’ versions of events. Many other cases are closed on grounds of “lack of evidence”, based on the partial MPIU investigation carried out under the MAG Corps’ supervision.

Administrative review of the Israeli authorities’ actions in the Occupied Territories is primarily in the hands of Israel’s Supreme Court. However, scant comfort can be found in the judgments handed down by its justices. While the High Court of Justice has allowed residents of the Occupied Territories to file petitions against state authorities, the vast majority of these petitions has been denied. Over the years, the High Court has sanctioned almost every human rights violation that the state wished to carry out in the Occupied Territories: punitive home demolition, administrative detention, restricting freedom of movement, expelling Palestinians from the West Bank, building the Separation Barrier, imposing a blockade on Gaza, taking over land, removing entire communities from their land, separating families – to name but a few.

This reality enables Israel to exercise its powers in the West Bank and in the Gaza Strip, and there is no authority in place to hold it accountable for its actions: The military law enforcement system whitewashes offenses, the High Court gives a legal seal of approval for violating Palestinians’ human rights, and the state has guaranteed itself an all but absolute exemption from paying compensation to Palestinians injured by its security forces. In the absence of mechanisms that act to deter and regulate the state, the road to harsh violations of human rights lies wide open.

One of the justifications Israel cites for refusing to pay damages to Palestinians is that it is a matter that should be resolved as part of mutual arrangements to be reached once the conflict is ended. This argument offers no more than bitter irony. It might have been valid had the situation been one of conflict between two countries at war. Yet this year, 2017, marks fifty years since Israel began its occupation of the West Bank and the Gaza Strip. Israel is doing all in its power to prevent the end of the occupation and to establish facts on the ground that will prevent reaching any agreement with the Palestinians. Proposing that the tens of thousands of people injured during this half century wait for the occupation to end and for “negotiations” to be concluded is tantamount to assuring that they will never receive any compensation.

Israeli officials prefer not to make this explicit. After all, instead of using the avenue of legislation to ensure an exemption from compensating Palestinians, the state could simply have flatly refused to pay for damage caused by its troops. Similarly, the state could have declared that it has no intention of carrying out criminal investigations of suspected harm to Palestinians. Instead, Israel elected to maintain a vast, expensive faux system, while making a show of a functioning system.

There are few kinds of injustice that cannot be codified in law, and it is possible to establish systems that offer no more than a pretense of law enforcement. Yet it is impossible to fully conceal the reality of the occupation, including the measures that Israel takes to evade responsibility and ensure a sweeping exemption – with no legal, administrative, or civilian accountability – for violent harm to the Palestinians who live under its control.