



**Penalising the Victim:
Recent Israeli Measures to Deny Palestinian Civilians' Right to Reparation**

The Palestinian Centre for Human Rights (PCHR) has over 15 years of experience in pursuing victims' right to reparation before Israeli courts. Following the 2008-2009 Israeli offensive on the Gaza Strip ('Operation Cast Lead'), PCHR filed 1,046 civil complaints (or "damage applications"), on behalf of 1,046 victims, to the Compensation Officer in the Israeli Ministry of Defence. These damage applications sought compensation for victims following alleged violations of international law committed by Israeli forces. Because the Israeli authorities did not act upon these damage applications, between June 2010 and January 2011 PCHR filed 100 civil cases before Israeli courts, seeking compensation for 620 victims.¹ Through these compensation cases, PCHR endeavours to ensure the fulfilment of the customary international law principles which recognize each individual victim's right to reparation: any State that violates international humanitarian law (IHL) is required to make full reparation for the loss or injury caused to the victims.²

However, the Israeli legislature and judiciary, through their legislative amendments and recent decisions, have imposed various legal and procedural obstacles for the achievement of justice for victims. Significantly, these decisions result in a situation whereby victims are penalised for having pursued their legitimate right to access to justice by filing civil cases before the courts. This results in considerable financial hardships and denial of individual victims' legitimate right to an effective remedy. Such practices violate Israel's obligations under customary international law.

In light of these developments, which fundamentally undermine the rule of law, PCHR is evaluating and assessing all possible options.

The policies and measures preventing Palestinian victims from exercising their legitimate right to an effective remedy are as follows:

¹ It should be noted that from 2012 onwards, cases arising from the Gaza Strip fall under the jurisdiction of Be'er Sheva Central Court in Israel, according to Amendment 8, *infra*, n. 5.

² Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, lays down that: "*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.*" This principle is affirmed in Article 91, Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, which states that: "*A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*" Moreover, the UN Commission on Human Rights adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law*, E/CN.4/2000/62, which aims to provide the victims of violations of human rights and IHL with a right to a remedy. Principle 11 includes the victims' right to access to justice, reparation for harm suffered and access to factual information regarding the violations. Also, the International Committee of the Red Cross has identified the victims' right to reparations for the violations of IHL as a principle of customary international law, see Rule 150, ICRC, *Customary International Humanitarian Law Volume I: Rules*, Cambridge University Press, Cambridge, 2005. Importantly, Article 148, of the 1949 Fourth Geneva Convention confirms that a State cannot be absolved of its liability in respect of grave breaches of IHL.



Financial obstacle: court guarantees

Before a civil case can proceed, each claimant is required to pay a ‘court guarantee’;³ if the case is lost, the court retains the entire guarantee to offset the costs of the State’s defense. In PCHR’s experience, court guarantees are set at an average of NIS 30,000 (USD 8,000). The guarantees were previously charged on a per-case basis. However, in June 2011 the Israeli Central Court in Nazareth issued a decision requiring each claimant to pay a guarantee. This per-claimant expense results in increased barriers to justice in cases involving multiple victims. For example, the case of the Samouni family involved 62 victims, requiring PCHR to pay a total of NIS 1,860,000 (USD 500,000), a sum which is impossible for the residents of the occupied territories to raise, in light of the difficult socio-economic situation here, especially in Gaza.⁴

These expenses imposed by the court guarantees have severely restricted PCHR’s ability to pursue victims’ right to reparation. To date, PCHR has paid court guarantees amounting to NIS 918,736 (approximately USD 247,000), with a further NIS 640,000 (approximately USD 172,000) due in the next three weeks. The Israeli courts dismissed 43 of the 100 civil cases mentioned above, as PCHR was unable to raise sufficient funds to pay the guarantees on behalf of all of the victims.

Legislative obstacle:

Amendment No. 8 to the Israeli Civil Tort Law (Liability of the State)⁵

Amendment 8 exempts the State of Israel from any liability arising from damages caused to a resident of an enemy territory during a “combat action”.⁶ This amendment widens the scope of “combat action” to any operations carried out by Israeli forces in response to terrorism, hostilities, or insurrections, if the operation is by nature a combat action. Qualification of a military operation as a combat action is dependent upon the overall circumstances, including the goal of the action, the geographic location, and the inherent threat to members of the Israeli forces who are involved in carrying out the action.

Amendment 8 disregards the vital question of the legality of attacks and ignores the damages caused to the victims, which can potentially constitute violations of international humanitarian law. By doing so, this amendment directly contravenes norms of customary international law, which establish that a State is responsible for all acts committed by persons who are operating as part of its armed forces, and must provide reparation in the event of a violation.⁷ The Be’er Sheva court’s disregard for these international norms is reflected in its reasoning for the dismissal of one of the cases: “*Even if international law provides for the*

³ Regulation 519 of the 1984 Civil Procedure Regulations, entitles the court to order the plaintiff to deposit a guarantee to set-off defense’s expenses.

⁴ See PCHR Press release, ‘Israel’s Disgraceful Decision to Close Samouni Case Makes Mockery of Victims’ Rights and International Law’, Ref: 51/2012, 2 May 2012, available at: <http://tinyurl.com/ckt35gh>.

⁵ On 16 July 2012, the Israeli Knesset accepted the Law and Explanatory Matters Bill, which was published in the Government Act Bill – 387 in May 2008, page 598. (Hereinafter: ‘Amendment 8’).

⁶ Since 2005, the Gaza Strip has been classified as a ‘hostile entity’. Israeli Ministry of Foreign Affairs, “Israel’s Security Cabinet declares Gaza hostile territory,” 19 September 2009.

⁷ *Supra* n. 2.



claimants to claim compensation for violations of international humanitarian law, the issue is not related to a reason for which a claim can be filed within a civil procedure.”⁸

The Retroactive Nature of Amendment 8

Amendment 8 applies retroactively from 2000 onwards and, with respect to immunity against claims by residents of the Gaza Strip in general, from 2005 onwards. As a result, the court can dismiss civil cases, which were brought before it after 2000, on the basis that such incidents fall under the new definition of “combat action”. PCHR is seriously concerned by the retroactive element of Amendment No. 8; this undermines years of effort invested by various civil society organisations in pursuing civil cases, and may also result in the loss of vast amounts of money which were paid in court guarantees. As noted below, a number of recent cases have been closed on this basis, and the court guarantees have not been returned to the victim

Procedural obstacle: invalidity of power of attorney

According to recently introduced procedural norms, through the order of the court,⁹ a power of attorney for a civil case arising from the Gaza Strip is considered valid only if it bears the signature and stamp of an Israeli diplomat. Compliance with this procedure is not possible because claimants from the Gaza Strip are prevented from travelling to Israel.

The situation before the courts: recent examples

Between 7 and 17 February 2013, the Israeli Southern Central Court in Be’er Sheva dismissed 14 civil cases filed by PCHR. These cases sought compensation and reparations for deaths, injuries, and material losses suffered by Palestinian civilians due to alleged violations of international humanitarian law committed during Israeli military attacks. The dismissal of these cases is a major setback to civilians’ right to remedy and access to justice. In dismissing 11 of these cases, the court relied upon Amendment 8. The court dismissed the remaining 3 cases by stating that they did not comply with the procedural norms relating to the power of attorney. When counsel for the victims counsel explained that compliance with this procedure (obtaining an Israeli diplomatic stamp) is not possible, the court replied that it was not clear whether counsel had applied to the concerned authorities, and suggested that it is possible for claimants to go to Egypt to obtain the Israeli diplomat’s signature.¹⁰

Moreover, the court charged the claimants with defence costs of NIS 220,000 (USD 60,000), because the claim did not reach the trial stage and, to this end, the court seized the entire sum of guarantees paid for these cases.

The aforementioned obstacles imposed by the Israeli legislative and judicial mechanisms fundamentally undermine victims’ ability to seek reparations from the Israeli courts. Such measures clearly indicate Israel’s unwillingness to fulfil its legal obligations towards the victims of its military operations through its domestic mechanisms. In effect, PCHR believe that the judicial system is being used to provide an illusion of justice, while systematically denying Palestinian civilians their right to an effective remedy.

⁸ Order of the Be’er Sheva Central Court on 14th February 2013 in Case no. 7458/01/11.

⁹ Order of the Be’er Sheva Central Court on 31st December 2012, in Case no. 7865/01/11.

¹⁰ Order of the Be’er Sheva Central Court on 14th February 2013 in Case no. 15084/03/11.