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Gilat J. Bachar
Stanford Law School

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ACCESS DENIED—USING PROCEDURE TO RESTRICT TORT LITIGATION: THE ISRAELI-PALESTINIAN EXPERIENCE

GILAT J. BACHAR*

I. INTRODUCTION

In April 2008, as a Palestinian mother and six of her children were having breakfast in their Beit-Hannoun home in the Gaza Strip, a missile fired from an Israeli aircraft killed the mother and four of the children, and injured the remaining two. After the military decided against investigating the incident,¹ surviving members of the Abu Me'tiq family filed a civil action in an Israeli court alleging the commission of various torts by the State of Israel.² Upon a motion made by the State, the plaintiffs were ordered to provide a bond in the amount of 12,000 NIS (approximately \$3000) as a pre-condition for the litigation.³ In its opinion, the court considered the lawsuit's slim chances and the State's potential difficulty in enforcing a judgment that levies litigation expenses on the plaintiffs, but it did not consider the plaintiffs' limited financial ability.⁴ The case was dismissed without ever reaching the merits.⁵

Procedural restrictions that limit individuals' ability to bring lawsuits—like conditioning litigation upon the provision of a bond—are a

* J.S.D. Candidate, Stanford Law School; Fellow, Stanford Center for International Conflict and Negotiation (SCICN); Israel Institute Doctoral Fellow. I wish to thank Nora Freeman Engstrom, Deborah Hensler, Robert MacCoun, Jason Solomon, Bernadette Atuahene, Sandy Kedar, Itay Ravid, Renana Keydar, and the participants of the IIT Chicago-Kent College of Law Symposium on Dignity Takings and Dignity Restoration and the J.S.D. Colloquium at Stanford Law School. Valuable support for this research was provided by the Richard S. Goldsmith Grant for Research in Conflict Resolution and the Taube Center for Jewish Studies. This Article is Winner, Goldsmith Writing Prize for Best Paper in Dispute Resolution (2017).

1. See Press Release, B'Tselem, B'Tselem Demands a Criminal Investigation into the Killing of Five Members of the Abu Me'tiq family in Gaza (Apr. 30, 2008), http://www.btselem.org/press_releases/20080430 [<https://perma.cc/CZ2Y-ZHYD>].

2. CC (Magistrate Court, Herzlia) 16517-04-10 State of Israel v. Abu Me'tiq (unpublished, Oct.18, 2011) (Isr.).

3. *Id.*

4. In Israel, the loser pays the litigation expenses of the successful party. If the trial court doubts the plaintiff's ability to pay the defendant's expenses should the latter prevail, then, under Rule 519 of the Civil Law Procedure Regulations, the court can order the plaintiff to provide a security bond guaranteeing the payment. Civil Law Procedure Regulations, 5744–1984, Rule 519 (2014) (Isr.). On Palestinians' low standard of living, see *infra* note 59.

5. CC (BS) 16517-04-10 The State of Israel v. Abu Me'tiq (2012) (Isr.).



subtle way to reduce the volume of civil litigation, particularly because of their ostensibly neutral facade.⁶ The use of such procedural doctrines, especially those that already exist on the books, allows legislatures to avoid debating the substance and appropriate scope of legal rights.⁷ This Article explores this phenomenon through the uncharted context of the Israeli-Palestinian Conflict (“the Conflict”). On the books, a unique procedural mechanism enables non-Israeli citizen Palestinians of the West Bank and, until recently, Gaza,⁸ to bring civil actions for damages against Israel in Israeli civil courts for injuries sustained because of Israel’s security forces’ actions in these areas (“the Claims”). Yet, since the early 2000s, Israel has used a host of procedural obstacles to restrict Palestinians’ access to its civil courts, effectively precluding their ability to bring Claims.

This account is based on fifty-five in-depth, semi-structured interviews⁹ I conducted with plaintiffs’ lawyers, government lawyers and other key stakeholders¹⁰ involved in the Claims.¹¹ I also rely on statutes, bills, parliamentary protocols, case law, reports by human rights organizations, and responses to Freedom of Information Act (“FOIA”) queries.¹²

6. See Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1698–1700 (2016); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1861–67 (2014) (describing developments such as greater tendency to grant summary judgments, greater emphasis on settlement over litigation, and difficulty to bring cases to trial); SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF RETRENCHMENT 1–8 (2015) (explaining the turn against the courts in the U.S.); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1587–99 (2014) (demonstrating procedural reforms emanating from the Supreme Court in recent decades).

7. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265–66 (2005).

8. I refer to non-Israeli citizen Palestinians, who reside in the West Bank and Gaza Strip, as opposed to Israel’s Arab citizens who are a minority group residing within Israel. Foreign nationals (like Rachel Corrie mentioned below) are also entitled to bring Claims, but since these are the exception, and for brevity, I refer to plaintiffs hereinafter as Palestinians.

9. When interviewees consented, I recorded and transcribed the interviews. When they did not, I sent them my notes, which several interviewees reviewed and modified.

10. These include plaintiffs, retired judges and representatives of human rights NGOs.

11. Interviews were conducted during four trips to Israel between June 2014 and July 2016, and in phone or Skype calls during periods spent at Stanford. Interview transcripts were originally in Hebrew (or rarely in English) and were analyzed using the mixed methods application “Dedoose.” Interviews with lawyers were anonymized. Government lawyers (“GL”) include three sub-groups: lawyers from the Tel-Aviv District Attorney’s Office (“DA”) who represent the State in court; lawyers from the Israeli Ministry of Justice (“MOJ”) involved in policy making regarding the Claims; and lawyers from the legal department at the Israeli Ministry of Defense (“MOD”), the defendant in the Claims. Plaintiffs are represented by private lawyers (“PL”) or human rights NGO lawyers (“NGOL”) licensed to practice in Israel.

12. I use a top-down—rather than a bottom-up—approach, examining the intentions of those responsible for the restrictions. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 812 (2016).

Based on these data, I argue first that the use of procedure to encroach on an injured person's right to compensation can be considered a taking of property.¹³ However, I also contend that such an analysis fails to fully capture the harm caused to these individuals. Exploring this deprivation through the role that civil litigation plays on the individual level reveals that procedural restrictions blocking access to the courts also deny Palestinians of their right to participate in the *process* of civil litigation.¹⁴ I thus suggest that by focusing solely on a property-oriented analysis, a key component of the harm—relating to the right to the litigation process—is overlooked.

This Article proceeds in three parts. Part I provides background on Palestinians' civil litigation against the Israeli government to lay out the context for the case study. Part II explains the procedural barriers restricting Palestinians' access to Israel's civil courts. Part III then uses two alternative lenses—property and process—to evaluate the specific harm resulting from these restrictions.

II. BACKGROUND—PALESTINIANS' CLAIMS FOR DAMAGES AGAINST ISRAEL

The complex reality of the Conflict creates frequent confrontations between Israel's security forces, particularly the Israeli military ("IDF"),¹⁵ on the one hand, and Palestinian residents of the West Bank and Gaza (the Occupied Palestinian Territories, or "the Territories") on the other hand.¹⁶ These encounters, at times, lead to property damage, personal injury, and the death of Palestinian civilians, at least some of whom were not involved in any hostilities. Events range from accidental explosions of land mines, to the use of riot control techniques during protests, drone attacks, and large-

13. As conceptualized through Atuahene's dignity taking framework. *Id.* at 813–16; *see also* Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 LAW & SOC. INQUIRY 902, 909–10 (2014); BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 23–34 (2014); Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016).

14. *See* discussion *infra* Section III.C.

15. Israel's security forces include IDF, police forces (typically Border Police Unit ("BPU")), and the General Security Service. Ministry of Defense data cited below refer only to IDF incidents (including BPU), while the other authorities do not maintain independent records regarding the Claims.

16. Importantly, Israel has a very different relationship with the West Bank and Gaza. While in the former Israel still controls both civil life and security to various degrees, in the latter, since 2005, Israeli involvement has significantly diminished. *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2d ed. 2012).

scale military operations.¹⁷ These events prompt the politically-charged question of whether Israel should be held civilly liable for injuries sustained by Palestinian civilians due to IDF activities in the Territories. While Israeli tort law answers this question in the affirmative, the evolution of the legal regime as explained below provides a different answer.

Since the beginning of Israel's occupation, Palestinians have been allowed to petition Israel's courts to challenge actions of the military regime.¹⁸ As such, the Israeli case presents a rare exception to typical bars on bringing claims against the injuring state in armed conflicts.¹⁹ This exception stems from the special status of the Territories as occupied²⁰ and the lack of alternative recourse for Palestinians in their home forum.²¹ As for suing the State, according to the Civil Wrongs (Liability of the State) Law ("the Act"), Israel is not immune from civil liability. However, the State is not liable for an act performed through "Combat Action,"²² a term which has been significantly expanded over the years.²³

There are two main, albeit limited, alternatives to the mechanism set forth by the Act.²⁴ First, claimants can submit an application to an *ex-gratia* committee, which has discretion to award small amounts of compensation

17. One example is Operation Cast Lead, also known as the Gaza War: a three-week armed conflict between Gaza Palestinians and Israel during 2008–2009.

18. As part of this policy, bars of jurisdiction, justiciability, and standing do not apply to the Claims. See generally Michael Karayanni, *Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs*, 5 J. PRIV. INT'L L. 1 (2009). For a discussion on the history of this policy, see DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* 19–25 (2002).

19. Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflections During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181, 217 (2009) (noting that an individual lawsuit mechanism, like Israel's, is rare in armed conflict settings). This mechanism differs, for example, from the U.S. military system, which uses military commissions and nominal "condolence payments." See John F. Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1463 (2007).

20. According to international law, Israeli control in the Territories is defined as a "military occupation" and treated as temporary until a just and lasting peace in the Middle East will allow a withdrawal of Israel's armed forces. Consequently, Israeli activity in the Territories is constantly criticized by the international community. For more on the Territories' status, see generally BENVENISTI, *supra* note 16.

21. Palestinians are barred from bringing claims against Israel before Palestinian courts. See MICHAEL KARAYANNI, *CONFLICTS IN A CONFLICT* 239 (2014) (discussing Palestinians' lack of access to justice, which stems among other things from this restriction).

22. Civil Wrongs (Liability of the State) Law, 5712–1952, § 2, 5 (as amended) (Isr.) [hereinafter Act], <https://www.adalah.org/uploads/oldfiles/features/compensation/law-e.pdf> [https://perma.cc/T5WD-3U5D]

23. Gilat J. Bachar, *The Occupation of the Law: Judiciary-Legislature Power Dynamics in Palestinians' Tort Claims against Israel*, 38 U. PA. J. INT'L L. 577 (2017).

24. These apply to *Palestinian* victims of IDF actions. By comparison, when it comes to *Israeli* victims of terrorism, the Victims of Hostile Action (Pensions) Law, 5730–1970, 24 LSI 131 (1969–70) (Isr.), provides compensation for bodily injuries suffered in terrorist attacks and to family members of deceased victims, and the Property Tax and Compensation Fund Law, 5721–1961, 15 LSI 101 (1960–61) (as amended) (Isr.) provides compensation for terrorism-caused property damage.

to victims of IDF activity based on either independent requests or a court's recommendation. The cases under the committee's mandate are "irregular and unique humanitarian instances" in which the State was not liable under the law.²⁵ Second, a Claims Headquarters Officer ("Kamat Tov'anot") at the Israeli Ministry of Defense ("MOD") also has the authority to compensate Palestinian claimants due to damage caused by military actions.²⁶ But per MOD officials, this function is rarely used.²⁷

Given the limited scope of these alternatives, civil courts remain the main path for Palestinians seeking compensation. Alongside the civil proceeding, IDF sometimes opens a criminal investigation when a suspicion arises of soldier misconduct. Since such investigations rarely result in an indictment,²⁸ the civil proceeding is often used as an alternative course of action to the dead-end criminal liability path.²⁹ The litigation process has several key characteristics. Claims represent individual cases—rather than a class action—and are based on injuries resulting from differing circumstances. Cases are first litigated in magistrate or district courts, depending on plaintiffs' estimates of their damages.³⁰ Only a small fraction make it to the Supreme Court on appeal,³¹ and even those cases are rarely covered by

25. Working Procedure and Guidelines for the Committee Acting Under the MOD Concerning *Ex-Gratia* Payments (2011) (Isr.) (on file with author). Per MOD data, between 2004 and 2014, the total amount awarded by the Committee was 575,895NIS (approximately \$156,000), in 42 cases (20 cases were dismissed). Data are unavailable prior to 2004. Reports in Response to MOD FOIA Query (Aug. 3, 2015), <http://bit.ly/2a982nf> [<https://perma.cc/BP7B-SJFH>] (in Hebrew); Reports in Response to MOD FOIA Query (Nov. 13, 2016) (on file with author) [hereinafter FOIA Reports].

26. This authority is based on the Order Concerning Claims (Judea and Samaria) (No. 271) 1968 (Isr.). See *Claims and Appeals by Force of the Claims Order*, IDF MAG FORCE, <http://www.law.idf.il/602-6942-en/Patzar.aspx> [<https://perma.cc/ASN5-XYDE>].

27. Confidential Interview with GL7 (MOD) (Jan. 3, 2016)*; Confidential Interview with GL8 (MOD) (Dec. 13, 2015)*.

28. See *Alleged Investigation: The Failure of Investigations into Offenses Committed by IDF Soldiers Against Palestinians*, YESH DIN (Dec. 7, 2011), <http://www.yesh-din.org/en/alleged-investigation-the-failure-of-investigations-into-offenses-committed-by-idf-soldiers-against-palestinians/> [<https://perma.cc/4FSN-ZDTL>]; see also *Exceptions: Trying IDF Soldiers Since the Second Intifada and After, 2000–2007*, YESH DIN (Dec. 25, 2008), <http://www.yesh-din.org/en/exceptions-trying-idf-soldiers-since-the-second-intifada-and-after-2000-2007/> [<https://perma.cc/6FBY-KLY7>].

29. Confidential Interview with NGOL2 (Aug. 12, 2014)*; Confidential Interview with PL1 (July 14, 2015)*; Confidential Interview with PL3 (July 28, 2015)*; Confidential Interview with KS3 (Mar. 10, 2016)*. For instance, in the case of *Estate of Aramin v. Ministry of Defense*, while the criminal investigation against soldiers involved was closed due to lack of evidence, in the civil case the claimants successfully recovered. CC (Jer) 9334/07 Estate of Aramin v. Ministry of Defense (2010) (Isr.).

30. The current threshold for bringing a case before the district courts is 2,500,000NIS (approximately \$600,000). See Courts Law (Consolidated Version), 5744–1984, § 51(a)(2), 38 LSI 271 (1983–84) (Isr.).

31. Decisions in cases that were first litigated in magistrate courts are appealed before the district court. The Supreme Court considers cases on appeal from district courts. The Supreme Court rarely grants a right to appeal, for the second time, a magistrate court decision. See *id.* § 40(3); Basic Law: The Judiciary, 5748–1984, § 15, SH No. II 10 p. 78 (Isr.), <http://knesset.gov.il/laws/special/eng/BasicLawTheJudiciary.pdf> [<https://perma.cc/BT94-RMCZ>].

the media.³² Finally, prior to the Second Intifada, a violent Palestinian-Israeli confrontation that started in September 2000, most successful Claims ended with a settlement.³³ The tendency to settle during those years relates to the evidentiary challenges that both plaintiffs and the State face in the Claims.³⁴ On the plaintiffs' side, Palestinians typically do not maintain records of their property, particularly when it comes to individual farmers and shepherds, which in turn makes property damage caused by Israeli soldiers difficult to prove.³⁵ On the State's side, soldiers released from duty are often difficult to reach, do not remember the specifics of a chaotic situation,³⁶ or are reluctant to take part in the trial.³⁷ Moreover, in previous years, the IDF did not always maintain records of its use of force incidents.³⁸ These challenges thus encouraged settlements in the pre-Second Intifada era.

Yet, beginning in the Second Intifada,³⁹ the Claims have gone through significant changes. While this Article focuses on the obstacles in *bringing* cases, regardless of the chances of *winning* them, it is important to also note that even if Palestinians overcome these barriers, it is highly unlikely they will prevail. Between 1992 and 2002, Palestinian plaintiffs were successful in thirty-nine percent of the Claims adjudicated by the courts. In the

32. Confidential Interview with NGOL9 (Mar. 14, 2016).^{*} High-profile cases are typically those related to foreign nationals, and the attention given to those cases often prompts the State to settle them. Confidential Interview with GL8 (MOD) (Dec. 13, 2015)^{*}; Confidential Interview with PL9 (Sept. 30, 2015)^{*}; Confidential Interview with GL7 (Jan. 3, 2016).^{*}

33. FOIA Reports, *supra* note 25. According to plaintiffs' lawyers, settlements accounted for ninety-nine percent of their successful Claims. Confidential Interview with PL2 (Sept. 16, 2014)^{*}; Data on cases represented by PL2's firm in the Claims, March 2015 (on file with author). One rare exception was PL14, who noted that most of his cases ended with a court decision. Confidential Interview with PL14 (Mar. 15, 2016).^{*}

34. According to plaintiffs' lawyers, changes in the nature of the Conflict, from a popular uprising during the First Intifada, to a full-fledged armed conflict in the Second Intifada, exacerbated these challenges as a result of the use of fire arms by both sides. Confidential Interview with PL2 (Sept. 16, 2014)^{*}; Confidential Interview with PL3 (July 28, 2015).^{*}

35. Confidential Interview with PL4 (Mar. 3, 2015)^{*}; Confidential Interview with PL2 (Sept. 16, 2014)^{*}; Confidential Interview No. 2 with PL7 (Aug. 11, 2014).^{*}

36. Confidential Interview with GL4 (DA) (Aug. 18, 2014)^{*}; Confidential Interview with GL7 (MOD) (Jan. 3, 2016)^{*}; Confidential Interview with GL8 (MOD) (Dec. 13, 2015) (noting the use of polygraph as one way to handle evidentiary gaps).^{*}

37. Confidential Interview with GL11 (DA) (Mar. 9, 2016).^{*}

38. Confidential Interview with GL5 (DA) (Aug. 13, 2015)^{*}; Confidential Interview with PL3 (July 28, 2015).^{*}

39. Since the outburst of the Second Intifada, the Conflict had generally been on a path of deterioration, with attacks from, and casualties on, both sides. See Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, 34 J. PALESTINE STUD. 85 (2005) (giving a detailed account of the events of the Second Intifada); Johannes Haushofer et al., *Both Sides Retaliate in the Israeli-Palestinian Conflict*, 107 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 17927, 17927-28 (2010) (analyzing the Conflict's escalation as a result of mutual retaliation).

decade between 2002 and 2012, this percentage significantly decreased to only seventeen percent.⁴⁰ And it dropped even further over the last several years.⁴¹ This dramatic decrease was closely tied to an amendment to the Act promulgated in 2002.

Until 2002, the Act did not include a definition of “Combat Action,” which exempts the State from liability. For over a decade, the Israeli legislature, the Knesset, discussed adding a definition. But it failed to legislate,⁴² leaving it to courts to interpret the term.⁴³ As Assaf Jacob explains, the courts’ interpretations of “Combat Action” varied and ranged from expansive to restrictive.⁴⁴ Meanwhile, in 2000, the Second Intifada erupted, resulting in physical injuries and property damages to many Palestinians and a high volume of Claims. Due to these events, and since the Knesset was dissatisfied with the courts’ interpretation of “Combat Action,”⁴⁵ it renewed legislative proceedings, resulting in Amendment No. 4 (“the 2002 Amendment”). Under the 2002 Amendment, and alongside a host of procedural arrangements detailed below, the Knesset added a broad definition of the “Combat Action” immunity to include “any action conducted to combat terrorism . . . and any action whose stated aim is to prevent terrorism, hostile actions, or insurrection committed in circumstances of danger to life or limb.”⁴⁶

But the Knesset did not stop at the 2002 Amendment. It sought a more comprehensive way of limiting Israel’s civil liability for harm caused to Palestinians. In 2005, the Knesset enacted Amendment No. 7 (“the 2005 Amendment”), which granted total immunity to the State for actions undertaken on its behalf, even retroactively, in what is defined as a “conflict

40. Bachar, *supra* note 23.

41. FOIA Reports, *supra* note 25; YAEL STEIN, B’TSELEM, GETTING OFF SCOTT-FREE: ISRAEL’S REFUSAL TO COMPENSATE PALESTINIANS FOR DAMAGES CAUSED BY ITS SECURITY FORCES 48 (2017), http://www.btselem.org/sites/default/files/201703_getting_off_scot_free_eng.pdf [<https://perma.cc/D3HL-DPTG>] (citing data showing that in recent years there are fewer Claims filed and less compensation paid to Palestinians by Israel).

42. See *e.g.*, HAMOKED: CTR. FOR THE DEF. OF THE INDIVIDUAL, ACTIVITY REPORT 2005 (2005) (in Hebrew); HAMOKED: CTR. FOR THE DEF. OF THE INDIVIDUAL, ACTIVITY REPORT 2006 (2006) (in Hebrew).

43. On the legal regime under the previous version of the Act, see generally Assaf Jacob, *Immunity Under Fire: State Immunity for Damage Caused by Combat Action*, 33 MISHPATIM L. REV. 107 (2003) (in Hebrew); Bachar, *supra* note 23.

44. See Jacob, *supra* note 43, at 159–63.

45. The binding precedent at the time was the interpretation given to the term “Combat Action” by the Supreme Court in CA 5964/92 Beni Uda v. State of Israel 56(4) PD 1 (2002) (Isr.). See also Protocols of the Knesset’s Constitution, Law, and Justice Committee of Dec. 25, 2001, June 24, 2002, June 26, 2002 (in Hebrew).

46. Act, *supra* note 22, § 1; Bachar, *supra* note 23.

zone.”⁴⁷ The Amendment’s supporters argued that since both parties are in the midst of an armed conflict, each party should be responsible for its own damages: Israel bears the cost of damages to its citizens, and the Palestinian National Authority should pay for those incurred by Palestinians.⁴⁸

Human rights non-governmental organizations (“NGOs”) challenged the 2005 Amendment before the Israeli High Court of Justice (“HCJ”).⁴⁹ The HCJ, in a rare decision, invalidated part of the Amendment, holding that it disproportionately violated the right of Palestinians to compensation outside the scope of “Combat Action.”⁵⁰ However, as explained below, the policy that ensued essentially reinstated the 2005 Amendment through the back door by using procedural obstacles to limit Palestinians’ access to Israeli civil courts. While the right to bring Claims remains on the books, it is now almost impossible to vindicate.

III. PROCEDURAL BARRIERS BLOCKING PALESTINIANS’ CLAIMS

This section examines obstacles that curtail Palestinians’ access to Israel’s civil courts and focuses on barriers that restrict *access* to courts rather than rules that limit the *scope* of Israel’s liability (e.g. through “Combat Action” immunity). These procedural obstacles merit special scrutiny precisely due to their tendency to operate “under the radar,” as ostensibly neutral rules.

As of 2014, according to the Civil Tort Ordinance (Liability of the State) (Declaration of Enemy Territory—the Gaza Strip), Gaza residents are

47. Additionally, Article 5B provided that the State is not liable for injury sustained by an enemy state national. Act, *supra* note 22, § 5B. Article 5B survived judicial review in *Adalah v. Government of Israel*. HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 352, 378 (2006) (Isr.).

48. See Protocol of the Knesset’s Constitution, Law, and Justice Committee of June 30, 2005 (in Hebrew). A senior MOD lawyer noted that it was not the financial burden imposed by the Claims that pushed the State to limit the scope of liability, but rather the sense that Israel is engaged in an armed conflict with the Palestinians and tort law is incompatible with military operations. Confidential Interview with GL7 (MOD) (Jan. 3, 2016).* See also Confidential Interview with GL9 (IDF) (Dec. 22, 2016) (noting the IDF “checked what is happening in other countries and we saw that in many countries the road [for suing] is blocked . . . so we said why not block it too?”)*; Confidential Interview with GL12 (MOJ) (Mar. 15, 2016)*; Confidential Interview with GL5 (DA) (Aug. 13, 2015).* That said, there was opposition to the 2005 Amendment within the MOD (general counsel) and MOJ (head of Civil Department in the State Attorney’s Office). Opponents thought the territorial exemption was overly sweeping. Confidential Interview with GL13 (MOD) (July 3, 2016)*; Confidential Interview with GL5 (DA) (Aug. 13, 2015)*; Confidential Interview with GL3 (MOJ) (July 22, 2015).*

49. The Israeli Supreme Court has two major functions: *appellate court*, and *High Court of Justice*. In the latter capacity, it rules as a court of first instance in matters regarding the legality of decisions of State authorities. Basic Law: The Judiciary, 5748–1984, § 15(b), (c), SH No. II 10 p. 78 (Isr.).

50. While the Court acknowledged that tort law is ill-suited for situations of combat, it did not accept the sweeping exemption that the State sought for combat *and* non-combat activities in the Territories. HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 352, 373 (2006) (Isr.).

no longer eligible to bring Claims against the State because the Ordinance declares Gaza “enemy territory.” Though passed in October 2014, the Ordinance applies retroactively to render it effective as of July 2014.⁵¹ Yet, even prior to this ban, significant hurdles have been placed on Palestinians’ Claims, which still apply to pending proceedings by Gaza plaintiffs. The barriers, identified based on my interview data, case law, and publicly available sources, are divided below into three main categories: financial, physical, and time/space-related.

The first barrier is *financial*, and involves conditioning litigation upon the provision of a bond that secures payment of litigation expenses to the State should it prevail. The default rule in Israeli civil procedure does not require plaintiffs to deposit a bond when initiating a civil proceeding, precisely because such a requirement might hinder plaintiffs’ access to justice.⁵² However, there is an exception to this rule, typically applied to foreign plaintiffs. Courts can order such plaintiffs to provide a bond guaranteeing payment of the defendant’s litigation expenses based on a potential difficulty in recovering these expenses should the defendant win.⁵³

In the early 2000s, it became common practice to treat Palestinian plaintiffs as foreigners, conditioning adjudication of their civil claims upon deposit of a bond, especially in Claims arising from IDF activity.⁵⁴ When a Claim is brought, the State regularly seeks an order from the court requiring the plaintiffs to deposit a bond,⁵⁵ arguing that the same logic that refers to foreigners should apply to Palestinians.⁵⁶ However, Palestinians are dif-

51. 7431–2014 (2014) (Isr.). This Ordinance has recently been challenged in a lawsuit for damages brought in the case of *N. CC (BS) 45043-05-16 John Doe v. State of Israel* (unpublished, interim decision June 7, 2017) (Isr.). The Be’er-Sheva District Court has yet to rule on it.

52. DUDI SCHWARTZ ET AL., *CIVIL PROCEDURE: DEVELOPMENTS, PROCESSES, AND TRENDS* 112 (2007) (in Hebrew). Cf. John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 ST. JOHN’S L. REV. 953 (2000); Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 768 (1982) (discussing the implications of filing fees and bonds for access to courts in the U.S.).

53. See KARAYANNI, *supra* note 21, at 231–41 (explaining some of the difficulties that Palestinians who bring claims for damages against Israel encounter, including bonds).

54. *Id.*

55. This security is separate from court fees, which are mandatory and typically calculated as 2.5% of the damages. This requires substantial funds in cases of severe injuries, which at times are unavailable to Palestinian plaintiffs. Confidential Interview No. 1 with PL7 (Jan. 12, 2013)*. There are also other significant litigation costs. Respondents noted that even though most tort lawsuits require medical opinions, those needed for the Claims are particularly complex as they often require a ballistic analysis of the injury and doctors rarely give such opinions without payment. Confidential Interview with NGOL4 (Aug. 3, 2014)*; Confidential Interview with NGOL7 (Mar. 9, 2016)*; Confidential Interview with PL9 (Sept. 30, 2015)*; Confidential Interview No. 2 with PL6 (Aug. 12, 2014)*.

56. The State also argues that when there are several plaintiffs, each should deposit a separate security, and courts adhere to this approach. See, e.g., CC (Nz) 35192-08-10 Estate of Samur v. State of Israel (unpublished, Sept. 26, 2011) (Isr.).

ferent from other foreign plaintiffs, both because they are not allowed to bring Claims against Israel before Palestinian courts,⁵⁷ and because their personal economic ability is often quite limited.⁵⁸ Palestinians' low standard of living⁵⁹ is typically overlooked by the courts, which have set bond amounts at increasingly high rates in recent years.⁶⁰ Per one District Attorney's Office ("DA") lawyer, the average bond is 20,000 NIS (approximately \$5200) per plaintiff.⁶¹ Yet, there are cases in which the bonds were set at even higher amounts. In *Abu Halima*, for example, the overall bond was set at 1.2 million NIS (approximately \$400,000). Attempts to appeal this amount were unsuccessful.⁶²

When plaintiffs fail to deposit a bond, the Claim is suspended or dismissed.⁶³ According to government lawyers, the bonds allow the State to "filter" Claims and make sure only "serious" cases reach the merits; in other words, the bonds represent a "*put your money where your mouth is*" mantra.⁶⁴ As a retired government lawyer observed, "X [government lawyer] formed a platoon of attorneys and trained them to use the tactic of bonds. We managed to eliminate numerous claims this way. It was an excellent filter."⁶⁵ And an MOD interviewee noted, "I don't have an execution office in the Territories, and it is so easy to file a lawsuit and get the

57. As stipulated in the Oslo Accords between Israel and the Palestinian Authority, Article III of Annex IV of the Interim Agreement. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. Isr.-Palestine Liberation Auth., Annex IV, art. III, §3, Sept. 28, 1995, 36 I.L.M. 551.

58. See KARAYANNI, *supra* note 21, at 235-36. The binding precedent is PCA 2146/04 State of Israel v. Ibrahim, 58(5) PD 865 (2004). In *Ibrahim*, the bond was set at 9000NIS (approximately \$2400), yet security amounts have soared since.

59. For comparison, one survey indicates that the average monthly income of a Palestinian family is 1771NIS (approximately \$460). See DEMOCRACY & WORKERS' RIGHTS CTR., OVERVIEW OF CURRENT ECONOMIC CONDITIONS IN PALESTINE (2006); KARAYANNI, *supra* note 21, at 234 n. 81 (citing DEMOCRACY & WORKERS' RIGHTS CTR., *supra*).

60. For a review of bond amounts, see KARAYANNI, *supra* note 21, at 233-34.

61. Confidential Interview with GL10 (DA) (Mar. 7, 2016).*

62. PCA 9148/11 *Abu Halima v. State of Israel* (unpublished, July 5, 2012) (Isr.). Plaintiffs' lawyers mentioned other cases—particularly those related to Operation Cast Lead—in which security amounts skyrocketed, leading to the dismissal of Claims due to failure to deposit the bond. Confidential Interview with NGOL1 (July 27, 2014)*; Confidential Interview with NGOL6 (Aug. 4, 2015).*

63. For example, in *Assi v. State of Israel*, the plaintiff failed to deposit a bond and requested the case to be dismissed without prejudice, while the State argued for dismissal with prejudice. The Court accepted the plaintiff's argument but imposed litigation expenses on the plaintiff: CC (Nz) 6907/07 *Assi v. State of Israel* (unpublished, Jan. 11, 2009) (Isr.); see also CC (Hi) 4527/08 *Barhum v. State of Israel* (unpublished, Oct. 5, 2009) (Isr.). For further examples, see ADALAH, ADALAH'S REPORT TO: THE UNITED NATIONS INDEPENDENT COMMISSION OF INQUIRY ON THE 2014 GAZA CONFLICT 21-22 (2015), <http://www.adalah.org/uploads/Adalah-Submission-UN-COI-Gaza-2015.pdf> [<https://perma.cc/VZE6-5BU5>], and Confidential Interview No. 2 with PL6 (Aug. 12, 2015).*

64. Confidential Interview with GL4 (DA) (Aug. 18, 2014)*; see also Confidential Interview with GL5 (DA) (Aug. 13, 2015).*

65. Confidential Interview with GL5 (DA) (Aug. 13, 2015).*

State [authorities] running around. So, we said let's demand the deposit of a bond, it's a move that saves lots of headache."⁶⁶

However efficient from the State's perspective, the bonds create a heavy burden on the plaintiffs' side.⁶⁷ As one plaintiffs' lawyer noted:

I once represented 11 estates and 4 amputees injured by a military action in Gaza The judge decided in a preliminary hearing that a 75,000 NIS [approximately \$20,000] bond needs to be deposited. I called the plaintiffs and they said they were out of food in the house and started eating from the animal feed. Eventually the lawsuit was denied because they couldn't raise the money for the bond.⁶⁸

Judges' ever-growing tendency in recent years to levy litigation expenses on losing Palestinian plaintiffs raises the stakes of litigation even for those claimants that manage to deposit the bond, given the tangible risk of losing it.⁶⁹ For instance, one plaintiffs' lawyer noted a case in which an Israeli missile hit a Palestinian family's living room, killing two family members. The State was reimbursed through the deposited bond when plaintiffs lost.⁷⁰

A second major barrier relates to *physical* access. Bringing and managing a Claim requires entrance to Israel, first and foremost to testify in

66. Confidential Interview with GL7 (MOD) (Jan. 3, 2016).* See also Confidential Interview with GL8 (MOD) (Dec. 13, 2015).*

67. Plaintiffs' lawyers confirmed this trend and the major barrier it constitutes for plaintiffs. As one noted, "[p]ractically speaking the door is closed nowadays, and when it is not formally closed, it is blocked by requiring the deposit of bonds in amounts reaching 50 and even 100 thousand NIS [approximately \$14K and \$28K respectively], which no plaintiff can raise, not even with the assistance of an organization." Confidential Interview with PL16 (Mar. 16, 2016).* See also Confidential Interview with PL13 (Mar. 16, 2016)*; Confidential Interview with PL8 (July 12, 2015)*; Confidential Interview with PL12 (Dec. 13, 2015)*; Confidential Interview with PL1 (July 14, 2014)*; Confidential Interview with PL5 (Aug. 14, 2014) (noting that the bonds represent tremendous, unattainable amounts for Palestinians).*

68. Confidential Interview No. 2 with PL6 (Aug. 12, 2015).*

69. Confidential Interview with PL5 (Aug. 14, 2014)*; Confidential Interview No. 2 with PL7 (Aug. 11, 2014)*; Confidential Interview with PL1 (July 14, 2014) (noting a client who changed his mind about filing an appeal because of the high bond (40,000NIS) and his concern of having to pay the State's litigation expenses should he lose).* While in the past plaintiffs were sometimes able to raise funds for bonds through Palestinian human rights organizations, such as the Palestinian Center for Human Rights (PCHR), through the Palestinian National Authority, or through private parties, these options are no longer available as amounts increase. Confidential Interview with PL8 (July 12, 2015)*; Confidential Interview with NGOL6 (Aug. 4, 2015)*; Confidential Interview No. 2 with PL7 (Aug. 11, 2014)*; Confidential Interview with PL4 (Mar. 3, 2015).*

70. Confidential Interview with PL9 (Sept. 30, 2015).* Other plaintiff-side lawyers noted a greater tendency to impose litigation expenses on losing plaintiffs in recent years. Confidential Interview with NGOL5 (July 26, 2015)*; Confidential Interview with PL1 (July 14, 2014).* Data provided by HaMoked confirm this trend, showing that whereas in the past courts tended to avoid imposing litigation expenses on losing plaintiffs, they now increasingly impose such expenses, and in increasingly high amounts. HAMOKED: CTR FOR THE DEFENCE OF THE INDIVIDUAL (unpublished report) (on file with author).

court, but also to meet with legal counsel, undergo examinations by medical experts,⁷¹ sign documents to be filed in court, and other legal purposes.⁷² Yet, the State conditions Palestinians' entrance to Israel for legal needs upon obtaining a permit, which can be withheld for security reasons.

When it comes to West Bank plaintiffs, the burden stems mostly from the significant time and resources required to obtain a permit through the District Coordination and Liaison in the Territories.⁷³ Changing rules and hours of operation,⁷⁴ long wait times,⁷⁵ requirements for additional documents,⁷⁶ and degrading treatment by Israeli soldiers at checkpoints all complicate the bureaucratic process.⁷⁷ Moreover, the State sometimes requires that security guards accompany plaintiffs or their witnesses when traveling from the Territories to the Israeli court, yet litigants are expected to incur the costs of hiring a private security company themselves.⁷⁸ Furthermore, the State seems to be in a conflict of interests when handling entry requests, given that denying entry adversely affects lawsuits brought against it. Since State authorities hold both the (often confidential) information on which authorities base their security prevention decisions and the discretion to decide who gets to enter, there exists a risk of selectively using that information.⁷⁹ While one can challenge the State's decision in a

71. By plaintiff-side, State-side or court-appointed experts. Confidential Interview with NGOL4 (Aug. 3, 2014)*; Confidential Interview with PL16 (Mar. 16, 2016).*

72. Plaintiff-side witnesses need to enter Israel to testify before the court too. Confidential Interview with PL15 (Mar. 9, 2016)*; Confidential Interview with PL9 (Sept. 30, 2015).*

73. Confidential Interview with NGOL9 (Mar. 14, 2016)*; Confidential Interview with PL2 (Sept. 16, 2014)*; Confidential Interview with NGOL4 (Aug. 3, 2014) (mentioning physical access as the main obstacle for bringing Claims).* As of October 2014, entrance to Israel for West Bank plaintiffs is governed by a procedure published by Coordination of Government Activities in the Territories ("COGAT"). Per the procedure, entry permits are granted for legal needs and are not automatically denied for security reasons but rather referred to "individual diagnosis." See COGAT, PROCEDURE FOR CONSIDERING APPLICATIONS FOR LEGAL NEEDS, CIVIL ADMINISTRATION IN JUDEA AND SAMARIA (2014),

<http://www.cogat.mod.gov.il/he/services/Procedure/נוהל%20ליפול%20תורת%20בבקים%20לצרכים%20לשפטיים>.pdf. [https://perma.cc/T7UX-CRQ8] (in Hebrew).

74. Confidential Interview with KS2 (Mar. 15, 2016).*

75. Confidential Interview with PL5 (Aug. 14, 2014).*

76. Confidential Interview with PL8 (July 12, 2015).*

77. Confidential Interview with PL4 (Mar. 3, 2015) (noting the tangible risk of losing the case just because the plaintiff could not attend the hearing)*; Confidential Interview with PL2 (Sept. 16, 2014).*

78. This is subject to the discretion of the Israeli Civil Administration in the Territories. Confidential Interview with PL2 (Sept. 16, 2014)*; Confidential Interview with KS2 (Mar. 15, 2016).* The costs of hiring a security company can reach 5000NIS (approximately \$1300). Confidential Interview with PL5 (Aug. 14, 2014).* For a recent example, see Amira Hess, *The State Compensated a Palestinian Photographer for Soldiers' Violence*, HA'ARETZ (Jan. 16, 2015), <http://www.haaretz.co.il/news/politics/.premium-1.2540778> [https://perma.cc/Y7NN-5MVF].

79. One plaintiffs' lawyer mentioned that his client was treated in a Jerusalem hospital for months following a severe head injury caused by IDF, yet when a civil action was launched against IDF due to

petition before an administrative court, this is yet another lengthy process.⁸⁰ Petitioners also have slim chances of succeeding, as judges are often too risk-averse to reverse the State's determination of security prevention.⁸¹

Notwithstanding the serious physical access difficulties for West Bank plaintiffs, Gaza plaintiffs face nearly insurmountable challenges in this context. Since 2007, Israel has blocked its border crossings with Gaza. As part of the enforcement of the blockade, Israel prevents the entry of Israelis into Gaza, and likewise, the entry of Gaza residents into Israel, with the narrowly-understood exception of matters of humanitarian urgency.⁸² As a result of this policy, requests for Gaza residents' entrance to Israel for legal needs are routinely denied, preventing Gaza plaintiffs from participating in their civil proceedings.⁸³ NGOs challenged this policy twice before the HCJ in 2010 and in 2012.⁸⁴ While these challenges yielded a procedure aimed at allowing Gaza plaintiffs to enter Israel for legal needs,⁸⁵ in actuality, little has changed. The procedure requires plaintiffs to prove to Israeli authorities not only the existence of a legal proceeding, but also that denying their request may adversely affect the proceeding and that exceptional humanitarian circumstances apply. Among other documents, a statement

the injury, the State argued that there are security reasons to deny entry. Confidential Interview with PL10 (Dec. 14, 2015).* Other respondents shared similar stories. Confidential Interview with KS2 (Mar. 15, 2016)*; Confidential Interview with NGOL6 (Aug. 4, 2015).*

80. One respondent noted such a petition is still pending after three years. Confidential Interview with KS3 (Mar. 10, 2016).* *See also* Confidential Interview with PL12 (Dec. 13, 2016)*; Confidential Interview with PL5 (Aug. 14, 2014).*

81. Confidential Interview with PL11 (Dec. 16, 2015).*

82. For Israel's policy regarding Israel-Gaza crossing, see OFFICE OF THE SPOKESMAN, COGAT, [http://www.hamoked.org.il/files/2012/115400\(1\).pdf](http://www.hamoked.org.il/files/2012/115400(1).pdf) [<https://perma.cc/TW63-EVXX>] (in Hebrew); COGAT, UNCLASSIFIED STATUS OF PALESTINIANS' AUTHORIZATIONS OF ENTRY INTO ISRAEL, THEIR PASSAGE BETWEEN JUDEA AND SAMARIA AND THE GAZA STRIP AND THEIR TRAVEL ABROAD, (2016), *translated in Procedures and Protocols*, GISHA, www.gisha.org/UserFiles/File/LegalDocuments/procedures/general/50en.pdf [<https://perma.cc/8AYD-R6ZG>].

83. Likewise, this policy prevents Israeli lawyers who represent Gaza residents from entering Gaza, and prevents Gaza witnesses from entering Israel to testify.

84. HCJ 9408/10 Palestinian Center for Human Rights Ltd. v. Attorney General of Israel (2013) (Isr.) This case dealt with the State's practice of raising a statute of limitations argument in Claims brought by Gaza plaintiffs. The petition was dismissed but the HCJ instructed the Attorney General to ensure "procedural fairness" for Gaza plaintiffs.; HCJ 7042/12 Abu Daka v. Ministry of Interior (2014) (Isr.) This case dealt with the policy of allowing entrance for Gaza residents only in urgent humanitarian matters. The HCJ acknowledged Gaza residents' right to sue for damages in Israel, and the conflict resulting from the State—as a defendant—deciding who gets to enter, but decided not to interfere with the State's policy for the time being.

85. *See* COGAT, PROCEDURES FOR CONSIDERING GAZA RESIDENTS' APPLICATIONS FOR ENTRY PERMITS FOR REASONS RELATING TO LEGAL PROCEEDINGS IN ISRAEL (2013), *translated in Procedures and Protocols*, GISHA, http://gisha.org/userfiles/file/LegalDocuments/procedures/entering_and_exiting_gaza/44en.pdf [<https://perma.cc/8Vfy-CJGM>].

regarding the plaintiff's financial status needs to support the application.⁸⁶ These burdensome requirements are manifested in the fact that, as of February 2016, only nine out of fifty-seven (sixteen percent) applications filed under the new procedure were successful.⁸⁷

Alongside denying entrance, the State is reluctant to consider alternative solutions which would allow Gaza plaintiffs to manage their Claims. For instance, the State is unwilling to allow Gaza witnesses to testify via video conference,⁸⁸ and insists on original power-of-attorney documents in Claims by Gaza plaintiffs.⁸⁹ Courts adhere to this position, suggesting plaintiffs should meet with counsel on neutral territory like Cyprus.⁹⁰ The consequences of these hurdles range from hindering plaintiffs' ability to follow through with a Claim,⁹¹ to cases dragging on for years, to court

86. Confidential Interview with PL8 (July 12, 2015).* See also the petitioners' arguments in the *Abu Daka* case, *supra* note 84.

87. Applications at times refer to several plaintiffs jointly. Also, at least two of these applications referred to other legal proceedings that are not Claims-related (in thirty applications, the type of legal proceeding in question was not mentioned; fourteen requested entrance for meetings with counsel). See OFFICE OF THE SPOKESMAN, COGAT (Nov. 24, 2014), http://gisha.org/UserFiles/File/LegalDocuments/freedomOfInformation_4_9_14/answer_24_11_14.pdf [<https://perma.cc/XPP6-GA9G>] (in Hebrew) (data provided by COGAT in response to Gisha FOIA queries); OFFICE OF THE SPOKESMAN, COGAT (Sept. 9, 2015) (on file with author) (data provided by COGAT in response to Gisha FOIA queries); OFFICE OF THE SPOKESMAN, COGAT (Sept. 30, 2015) (on file with author) (data provided by COGAT in response to Gisha FOIA queries).

88. PCA (Nz) 35950-04-11 Ministry of Defense v. Farage (2011) (Isr.) The Nazareth district court granted the State's appeal on a magistrate court's decision to allow Gaza witnesses to testify via video conference, holding that such an arrangement would not guarantee a proper trial.

89. Confidential Interview with GL4 (DA) (Aug. 18, 2014) (noting that government lawyers purposefully demand an original power-of-attorney ("PoA") because they know it is difficult to obtain, especially for Gaza plaintiffs).*

90. Confidential Interview with PL8 (July 12, 2015)*; Confidential Interview with NGOL10 (July 6, 2016)*; Confidential Interview with NGOL3 (June 29, 2015)*; Confidential Interview with GL10 (DA) (Mar. 7, 2016) (noting that the State insists on original PoAs to confirm the identity of those behind the Claims).* In a recent case, Gaza plaintiffs, represented by Gisha, filed an administrative petition against COGAT to allow them to meet with their attorney at Erez Crossing (the main crossing point between Gaza and Israel) to sign PoA documents. Following the Be'er-Sheva District judge's comments at the hearing, COGAT agreed to allow six members of the Gaza family to meet with their Israeli lawyers at Erez Crossing. See AdminC (BS) 56769-07-15 Abu Said v. COGAT (unpublished, Sept. 16, 2015) (Isr.). For more on the *Abu Said* case, see *With Gisha's Assistance, Five Family Members from Gaza Manage to Meet their Israeli Lawyer at Erez Crossing for the Purpose of Engaging in Legal Proceedings in Israel*, GISHA, <http://gisha.org/legal/4723> [<https://perma.cc/P6AV-PMLE>].

91. For example, in *Badrasawi*, a Claim was filed due to the death of a seventeen-month-old who climbed onto the roof of his home in Khan-Yunis, and was fatally wounded by a shot allegedly fired by IDF. The boy's family filed a petition to allow the boy's father to enter Israel to testify, which the administrative court eventually granted with the State's consent. AdminC (BS) 11636/06/11 Badrasawi v. Ministry of Defense (2012) (Isr.). Other witnesses' entrance was left pending the State's approval. See *Inquiry into the Shooting Death of a Toddler in Khan Yunis: The Case of MA*, HAMOKED: CTR. FOR THE DEFENCE OF THE INDIVIDUAL, <http://www.hamoked.org/Case.aspx?cID=Cases0055> [<https://perma.cc/4U8G-T4F9>]. In some Gaza Claims, parties reach a procedural agreement that allows courts to decide the case based on written materials, which also hinders plaintiffs' ability to prove their case. Such an arrangement was reached, for example, in *Alhadi v. State of Israel*, but the Claim was

judgments dismissing Claims.⁹² Dismissal can be due to a plaintiff's failure to produce evidence⁹³ or the running of an applicable statute of limitations.⁹⁴

The third barrier category relates to *time and space* restrictions that apply only to Palestinians' Claims.⁹⁵ As for *time*, starting in 2002, the statute of limitations period on Claims was reduced from the regular seven years to only two years.⁹⁶ This provision prioritizes the State's interest in overcoming evidentiary challenges over a plaintiff's interest in recourse.⁹⁷ Plaintiffs' lawyers noted the difficulty of putting together a case in the tight timeframe imposed by the short limitations period, especially given the delay in seeking legal counsel following an injury or the loss of a family member.⁹⁸ Furthermore, the shortened limitations period created a backlog of cases that needed to be filed immediately, causing an impossible workload for plaintiff-side lawyers.⁹⁹ Courts have been unwilling to relax the confines of the limitations period, even when faced with tragic circumstances.¹⁰⁰

eventually dismissed without prejudice. CC (TA) 51179/04 Alhadi v. State of Israel (unpublished, Sept. 2, 2013) (Isr.); *see also* Confidential Interview with NGOL4 (Aug. 3, 2014) (noting the difficulty to weigh a written testimony, especially by a non-Hebrew speaker).*

92. Confidential Interview with PL8 (July 12, 2015) (describing the constant struggle of PoA signing, permit applications and extension requests)*; Confidential Interview with PL5 (Aug. 14, 2014) (mentioning the impact of physical access on dragging of proceedings).*

93. *See, e.g.*, CC (Nz) 5175/04 Abu-Susein v. State of Israel (2010) (Isr.) (case dismissed due to difficulties in summoning the plaintiff's witnesses); CC (Hi) 1325/98 Ramadan v. Military Commander in Judea & Samaria (2010) (Isr.) (case dismissed due to "Combat Action" immunity after extending for over a decade). For numerous other examples, see petition filed in HCJ 7042/12 Abu Daka v. Ministry of Interior, *supra* note 84 (on file with author).

94. Confidential Interview with NGOL4 (Aug. 3, 2014)*; Confidential Interview No. 2 with PL6 (Aug. 12, 2015)*; Confidential Interview with PL4 (Mar. 3, 2015).* For examples of such cases, see CC (BS) 22786-12-11 Ajarmi v. State of Israel (2013) (Isr.); CA (Jer) 25571-05-11 State of Israel v. Hatib (2012) (Isr.) (latter case was first dismissed because of the Gaza plaintiff's inability to enter Israel, and then for the second time because at the date of that filing, the statute of limitations period had run).

95. Given the limited scope of the Article, these are merely examples of key limitations.

96. Act, *supra* note 22, § 5A(3) ("The court shall not hear a claim filed more than two years from the day of the act that is the subject of the claim . . .").

97. As explained by GLs: Confidential Interview with GL2 (DA) (Aug. 6, 2014)*; Confidential Interview with GL6 (MOD) (Mar. 1, 2015).*

98. Confidential Interview with PL12 (Dec. 13, 2015)*; Confidential Interview with PL11 (Dec. 16, 2015)*; Confidential Interview with PL15 (Mar. 9, 2016)*; Confidential Interview with PL5 (Aug. 14, 2014).*

99. As a result, the only human rights organization taking Claims—HaMoked—began outsourcing them to plaintiffs' lawyers. Confidential Interview with KS3 (Mar. 10, 2016)*; Confidential Interview with NGOL4 (Aug. 3, 2014).*

100. In *Estate of Taleb v. State of Israel*, filed due to the death of a Gaza resident by an Israeli aircraft in June 2006, the Claim was dismissed as the statute of limitations period had run, even though plaintiffs originally filed the Claim before the period had passed and were advised by the court to withdraw and re-submit. CA (TA) 2667/08 Estate of Taleb v. State of Israel (2010) (Isr.); *see also* CA

Another requirement is submitting a written notice¹⁰¹ to the Israeli authorities within sixty days of the incident that caused the injury.¹⁰² Claimants unaware of this requirement may easily miss the sixty-day deadline in the turmoil following the incident.¹⁰³ Yet, both the State and the courts have been unsympathetic to such cases.¹⁰⁴ Moreover, this requirement binds claimants to a description of the circumstances that led to their injury,¹⁰⁵ which may not yet be fully known to them at the time of filing the notice. It also allows MOD officials to ask claimants follow-up questions regarding the content of their notice at this initial stage, before launching an official proceeding.¹⁰⁶

More recently, the Israeli legislature added a *space*, or *geographic*, limitation on Palestinians' Claims. As of 2012, Claims are adjudicated only in the courts of the Jerusalem and Southern districts.¹⁰⁷ While this Amendment was justified by citing efficiency and the need for judges' specialization,¹⁰⁸ the motivation behind it seems to have been that courts in other parts of Israel, particularly in the Nazareth and Haifa districts, were known

5250/08 Hashan v. State of Israel (2014) (Isr.) (in which a majority of Supreme Court justices embodies this strict approach).

101. As set forth in the Act, *supra* note 22, § 5A(2)(a) (requiring written notice of damages).

102. Additionally, the 2002 Amendment stated that rules which shift the *burden of proof* to the defendant—when the object that caused the injury was dangerous or when there exists factual vagueness regarding the events leading to the tort—will not apply to the Claims. Tort Ordinance (New Version), 5729-1968 §§ 38, 41 (1968) (as amended) (Isr.), *translated in* WORLD INTELLECTUAL PROP. ORG. LEX, http://www.wipo.int/wipolex/en/text.jsp?file_id=345894#a8 [https://perma.cc/YQ8N-N6MZ]; Act, *supra* note 22, § 5A(4) (2002).

103. Confidential Interview with KS2 (Mar. 15, 2016)*; Confidential Interview with NGOL6 (Aug. 4, 2015)*.

104. Courts have strictly enforced this requirement, even in the face of parents who had lost their child. *See* CC (Magistrate Court, Kiryat Gat) 208/07 Estate of Sana v. State of Israel (2010) (Isr.); *see also* CC (Magistrate Court, Hadera) 8157-08-08 Abu-Elhassan v. State of Israel (2009) (Isr.) (dismissing a case due to a late notice).

105. The notice form can be found on the Ministry of Defense website in Hebrew: http://www.mod.gov.il/Citizen_Service/clalim/nezikin/Pages/claims.aspx [https://perma.cc/H6FM-7AE3]. According to the Civil Wrongs (Liability of the State) Regulations (Written Notice of Damage), 5763-2003, § 1, (2003) (Isr.), *translated in* HAMOKED: CTR. FOR THE DEFENCE OF THE INDIVIDUAL, http://www.hamoked.org/files/2012/312_eng.pdf [https://perma.cc/RVW6-QRRQ], the form should also be available in Arabic, but this version could not be found on the Ministry of Defense website.

106. Confidential Interview with PL4 (Mar. 3, 2015)*.

107. Amendment (No. 8) also requires courts to decide on “Combat Action” immunity as a preliminary plea and expands the exemption of Article 5B to apply to residents of enemy territory (which now includes Gaza). Act, *supra* note 22, § 5B.

108. *See* HAMOKED: CTR. FOR THE DEFENCE OF THE INDIVIDUAL, MEMORANDUM OF THE CIVIL TORTS LAW (LIABILITY OF THE STATE) (AMENDMENT NO.8), 5767-2007 POSITION PAPER 7–9 (2007), http://www.hamoked.org/items/9081_eng.pdf [https://perma.cc/LTX6-L8ZW]. Yet, this limitation also restricts the range of judicial viewpoints, confining it to the few judges adjudicating Claims in designated courts. Confidential Interview with PL5 (Aug. 14, 2014)*; Confidential Interview with PL4 (Mar. 3, 2015)*.

to be more sympathetic towards Palestinian plaintiffs.¹⁰⁹ As one DA lawyer mentioned, government lawyers nicknamed the Haifa courts after a terrorist organization due to this sympathy.¹¹⁰ Per that lawyer, amassing Claims in designated courts was an “*amazing*” development.¹¹¹

An important consequence of these hurdles is the reluctance of plaintiffs’ lawyers to accept representation in Claims due to the slim chances of successfully overcoming these difficulties.¹¹² Even when claimants find counsel, it is extremely difficult to maintain a lawyer-client relationship under entry barriers precluding face-to-face meetings and the gathering of on-the-ground evidence.¹¹³ This is yet another hindrance on Palestinians’ access to civil justice.¹¹⁴ The impact of these restrictions is also evident in the dramatic decrease in the volume of settlements, as procedural hurdles now help DA lawyers win cases without having to settle.¹¹⁵

The data show that the State’s efforts to restrict Palestinians’ Claims, both through procedural means and through the “Combat Action” immunity, bore fruit. In recent years, the number of Claims have steadily declined.¹¹⁶ As one DA lawyer noted, “During Operation Cast Lead I had shelves full of cases, and nowadays it’s maybe three *Most of the Cast Lead claims never reached the merits, due to failure to deposit a bond or*

109. Confidential Interview with GL5 (DA) (Aug. 13, 2015) (noting that plaintiffs often preferred to bring claims in the northern courts because there were Arab judges there).^{*} Same with plaintiff-side lawyers. Confidential Interview with PL9 (Sept. 30, 2015)^{*}; Confidential Interview with PL11 (Dec. 16, 2015)^{*}; Confidential Interview with NGOL3 (June 29, 2015).^{*} This assertion is also supported by a quantitative content analysis of court decisions in the Claims, showing more Claims were successful in the Haifa and Nazareth courts (on file with author).

110. Confidential Interview with GL4 (DA) (Aug. 18, 2014).^{*}

111. *Id.*

112. Confidential Interview No. 1 with PL6 (Dec. 17, 2012)^{*}; Confidential Interview with PL12 (Dec. 13, 2015)^{*}; Confidential Interview with PL10 (Dec. 14, 2015)^{*}; Confidential Interview with NGOL6 (Aug. 4, 2015)^{*}; Confidential Interview with PL2 (Sept. 16, 2014)^{*}; Confidential Interview with PL5 (Aug. 14, 2014).^{*} This problem is exacerbated because currently there are no lawyers bringing Claims on a non-profit/ pro bono basis. For more on lawyers in the Claims, see generally Gilat J. Bachar, *When Lawyers Go to War: A Study of Plaintiffs’ Lawyers in Social Justice Tort Litigation* (Sept. 2017) [hereinafter Bachar, *When Lawyers Go to War*] (unpublished manuscript) (on file with author).

113. Confidential Interview with PL9 (Sept. 30, 2015)^{*}; Confidential Interview with NGOL4 (Aug. 3, 2014)^{*}; Confidential Interview with PL14 (Mar. 15, 2016)^{*}; Confidential Interview No. 2 with PL6 (Aug. 12, 2014). The latter jokingly added that it is sometimes easier to only be able to converse with clients via phone; this way he does not need to look into their eyes when sharing constant bad news.^{*}

114. See Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 344 (2008) (reviewing top-down access to justice research which looks at the availability of legal counsel as a measure).

115. FOIA Reports, *supra* note 25; Bachar, *When Lawyers Go to War*, *supra* note 112, at 13–14.

116. The data also show a decline in the number of successful Claims. FOIA Reports, *supra* note 25; STEIN, *supra* note 41, at 48.

submit an appropriate PoA or because of Combat Action.”¹¹⁷ And another government lawyer summarized:

The number of claims dramatically declined, nowadays it’s several dozens versus thousands in the past. *Our determination in the war against these cases paid off*. . . . The insight was that if we would be determined and fight with full force—without paying anything—at some point the other side will realize that it doesn’t pay off to bring these cases.¹¹⁸

With this in mind, I now turn to explore the nature of the deprivation caused to Palestinians as a result of the abovementioned procedural restrictions.

IV. PALESTINIANS’ ACCESS TO CIVIL JUSTICE – BETWEEN PROCEDURE AND SUBSTANCE

How should we think about the harm to Palestinians resulting from imposing procedural hurdles in their path to bring civil claims? In what sense has the State, by creating these hurdles, curtailed Palestinians’ access to justice? And what are the consequences of this curtailment? To conceptualize the precise harm caused to injured Palestinians, in this Section I decompose the right to access to civil justice to its various parts.

A. Procedure as Means of Restricting Access to Civil Justice

Access to justice has long been recognized as a fundamental human right.¹¹⁹ It has been viewed to include the *procedural capacity* to turn to the courts to gain a *fair trial*, which would result in a *remedy*. A violation of each of these three components would constitute an infringement on the right.¹²⁰ Whereas the right to access to justice can be explained in terms of

117. Confidential Interview with GL10 (DA) (Mar. 7, 2016) (emphasis added).*

118. Confidential Interview with GL4 (DA) (Aug. 18, 2014) (emphasis added).* One DA lawyer expressed a different view, noting he still believes that “the existing opening is wide enough to allow people that view themselves—and I emphasize view themselves—as injured and also wide enough for us as representatives of the State to allow them to exhaust their rights with dignity and honor.” Confidential Interview with GL11 (DA) (Mar. 9, 2016).* Considering the data, though, it is hard not to view this statement as the result of self-serving bias.

119. After World War II, access to justice rights gained international recognition and since became a basic concept in the law of procedure. See MAURO Cappelletti, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 237–38 (1989). For major works on the right to access to justice, see generally ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007); DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004); ACCESS TO JUSTICE AND THE WELFARE STATE (Mauro Cappelletti ed., 1981); Liav Orgad & Yoram Rabin, *Access to Courts for Enemy Aliens*, 29 MECHKAREI MISHPAT 469, 472–74 (2014) (in Hebrew).

120. Aharon Barak, *The Right to Access the Judicial System*, in SHLOMO LEVIN BOOK 31, 32 (Grunis et al. eds., 2013) (in Hebrew). Relatedly, a well-known legal maxim holds that “[t]he law will . . . presume no wrong where is has provided no remedy.” 1 WILLIAM BLACKSTONE,

the *judiciary's* ability to fulfill its function as a branch of government,¹²¹ I focus in this Article on the function this right serves for *individuals* exercising it.

How can “procedural,” as opposed to “substantive,” rules preclude individuals from vindicating their right to access to justice? Challenging the traditional view that procedure is no more than a neutral mechanism for judicial administration, scholars have shown that, much like substantive law, procedure is value- and purpose-based and has a far-reaching influence on substantive rights. Its impact is brought to bear both as a mechanism for guiding human behavior and as a way to shape the scope of, and the ability to vindicate, substantive rights.¹²² Legal requirements, such as jurisdictional limitations and burdens of proof, tend to operate under a veil of neutrality. However, they end up playing an increasingly prominent role in policing entrance to the legal space, reflecting “cultural values and consolidations of power.”¹²³ In particular, intricate legal tools can serve as instruments in defining and altering laws that apply to the rights of vulnerable groups like minorities and natives.¹²⁴ As Alexandre Kedar notes, “[p]rocedural rules and obstacles, such as time limits, and questions of jurisdiction and standing . . . have the effect of dispossessing indigenous populations without even admitting the dispossession.”¹²⁵

COMMENTARIES *246, n.5. However, courts do not always adhere to this rule. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

121. *See, e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172 (1973); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 597 (1984); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1799 (2001).

122. *See, e.g.*, Issachar Rosen-Zvi, *Procedure and Substance: A Fresh Look at Old Categories*, in LAW, SOCIETY AND CULTURE: PROCEDURES 45 (Talia Fisher & Issachar Rosen-Zvi eds., 2014) (in Hebrew) (suggesting that instead of focusing on the distinction between procedure and substance, the focus should be on a value-based, case-by-case discussion regarding the substantive rights at stake).

123. Melinda Harm Benson, *Rules of Engagement: The Spatiality of Judicial Review*, in THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 215, 216 (I. Braverman et al. eds., 2014).

124. *See* Alexandre (Sandy) Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda*, 5 CURRENT LEGAL ISSUES 401, 415–16 (2003) (explaining the use of procedure to dispossess indigenous peoples in ethnocratic settler states); Ilan Saban, *The Legal Status of Minorities in Deeply Divided Societies: The Arab Minority in Israel and the Francophone Minority in Canada* (2000) (unpublished Ph.D. Dissertation, Hebrew University of Jerusalem) (in Hebrew) (reviewing legal and administrative techniques used in the context of the Arab minority in Israel).

125. Kedar, *supra* note 124, at 415–16; *see also* Martha Minow, *Politics and Procedure*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 79 (David Kairys ed., 3d ed. 1998) (explaining the use of injunctions in altering the course of the labor movement in the U.S.); Austin Sarat & Thomas Kearns, *Editorial Introduction*, in THE RHETORIC OF LAW 1, 12 (Austin Sarat & Thomas R. Kearns eds., 1994) (“[C]onventions and rules enable, and, at the same time, constrain the opportunities for voice. This is, for example, the case with respect to the rules of evidence.”); Guadelupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford*, 53 U. MIAMI L. REV. 691, 706 (1999) (describing the mechanism that enabled the dispossession of Chicanos in the Southwest, arguing

The host of procedural hurdles described above point to a systematic “discouragement” policy on the part of the State, aimed at reducing the volume of Claims brought against it.¹²⁶ This discouragement policy differs from other policies launched in the United States, such as the tort reform movement. As explained below, while we may identify corporate interests supporting the policy—namely saving money for the State, these interests do not fully explain the motivation behind the policy. Rather, it seems to have been driven by the notion that since Palestinians are the enemy, they should not be given a right to sue before Israeli courts. In other words, the policy represents disparate treatment towards a specific class of plaintiffs.

Though the State failed to transform the Claims mechanism through a comprehensive legislative change—i.e., the invalidated 2005 Amendment—it continued to pursue its goals through the procedural limitations described above. According to one DA lawyer, the public treasury was actually better off because of the 2005 Amendment’s invalidation, as so few cases are now successfully brought.¹²⁷ The fact that the change is carried out through procedural tools also obviates another legislative battle. As another government lawyer noted, “In principle, the right to access the courts does not change. Fine . . . I don’t think there is room to change the law.”¹²⁸ And as a government lawyer involved in advancing the restrictive policy mentioned: “We needed to draw the courts’ attention to the changes, to teach them, and it worked well. I think it has been years now since the last case of this type was brought . . .”¹²⁹

The policy of prescribing special procedural arrangements for the Claims creates a gap between the existence of the Claims mechanism on the books and the actual lack of access. This gap simultaneously raises plaintiffs’ expectations and fails to meet them. As Alexandra Lahav puts it, substantive rights whose vindication is denied through procedure “remind

that “a number of arbitrary key rulings varied the standard of proof in claims of ownership status depending on whether the grantee was a non-Chicana/o”).

126. The process of restricting Palestinians’ ability to successfully bring tort claims is akin to what Thomas Burke dubs *discouragement policies*; policies that aim to restrict or discourage litigation by making it harder or less rewarding to bring lawsuits (for instance, capping the amount of money a plaintiff can win for pain-and-suffering damages). These policies do not stop litigation altogether but can reduce the volume and intensity of claims to become negligible. Discouragement campaigns, particularly the tort reform movement, have become the most prominent of all anti-litigation efforts in the U.S. See THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 9–18 (2002).

127. He added that “[t]he procedural tools were the most meaningful.” Confidential Interview with GL4 (DA) (Aug. 18, 2014).*

128. Confidential Interview with GL7 (MOD) (Jan. 3, 2016).* A similar approach was articulated by another government lawyer. Confidential Interview with GL6 (MOD) (Mar. 1, 2015).*

129. Confidential Interview with GL12 (MOJ) (Mar. 15, 2016).*



one of old facades preserved along a streetscape, the buildings for which they were once an entrance having long ago been abandoned.”¹³⁰ Plaintiff-side lawyers observed this frustrating duality of having a right to sue on paper while facing overwhelming hurdles that block Claims in practice.¹³¹ As one lawyer mentioned: “Nowadays there is barely a single case that can cross these hurdles. In practice, we reach the same result as the [2005] amendment It is kind of a mantle of ‘T’fadalul [go ahead, Arabic], bring a lawsuit, see where that gets you.”¹³²

As we have seen, courts generally avoid criticizing the State for its use of procedure against Palestinians who bring Claims. In this sense, the courts allow these procedural hurdles to restrict Palestinians’ access to civil justice vis-à-vis the State.¹³³ I thus argue that the State’s use of procedural barriers to restrict injured Palestinians’ Claims infringes on their right to access to justice. Importantly, this analysis is not intended to downplay Palestinians’ primary injuries, i.e. bodily injuries or property damages. It simply highlights a different aspect of the harm, which results from restricting the right to turn to the courts following such losses. I offer two lenses to conceptualize this harm. First, a property-centered approach of a “dignity taking,” and second, a process-centered approach of the denial of the litigation process. While these approaches are not mutually exclusive, I argue that using only the former lens but not the latter would give an inevitably incomplete picture of the full extent of the harms.

B. Restricting Access to Civil Justice as a “Dignity Taking”

Per Bernadette Atuahene’s revised definition, a dignity taking involves involuntary property loss accompanied by dehumanization or infantilization.¹³⁴ Following John Locke, Atuahene highlights the deep-seated consequences of state sanctioned property confiscation, tying the taking of property under certain circumstances with a grave dignitary harm.¹³⁵ Dignity takings have mostly been associated with narrowly defined events—such

130. Lahav, *supra* note 6, at 1701.

131. Confidential Interview with NGOL1 (July 27, 2014)*; Confidential Interview with PL16 (Mar. 16, 2016) (noting the discrimination between Israeli and Palestinian plaintiffs in the application of the law of torts).*

132. Confidential Interview with PL5 (Aug. 14, 2014).*

133. See Carol M. Rose, *Racially Restrictive Covenants—Were They Dignity Takings?*, 41 LAW & SOC. INQUIRY 939, 948 (2016) (arguing that public bodies—both courts and agencies—participated in making racially restrictive covenants so pervasive in the mid-twentieth century).

134. Atuahene, *supra* note 12, at 796, 804. Dignity Restoration merits its own discussion, which exceeds the scope of this Article.

135. *Id.* at 799.

as the Rwandan genocide—and have not yet been expanded to broader contexts.¹³⁶ Does restricting access to justice constitute a taking of property? Does it involve an affront, adding insult to injury? I argue below that an individual’s right to compensation accorded by the law of torts can be understood as both a property right and an attribute of human dignity. As I explain, Israeli case law has used a similar construct to afford the right of access to justice a constitutional status, even though Israel lacks a formal constitution.¹³⁷

1. Property Taking

Tort liability protects several rights of the injured party, such as the right to life, liberty, dignity, and privacy. The law of torts is one of the main tools whereby the legal system protects these rights, reflecting a balance both between private rights themselves and between the right of the individual and the public interest.¹³⁸ Therefore, the accepted approach in most countries where property is given a constitutional status has been that the constitutional concept of property includes both a right in rem and a right in personam.¹³⁹ In Israel, Article 3 to Basic Law: Human Dignity and Liberty (“the Basic Law”)—“a person’s property should not be harmed”—has been understood to extend to a person’s property rights, including the right of an injured party under the law of torts.¹⁴⁰ Moreover, the Basic Law encompasses injured individuals’ right to compensation, intended to “make them whole,” as part of these individuals’ property rights.¹⁴¹ Chief Justice Barak’s holding in *Adalah*, that the right in torts given to injured parties (or their heirs or dependents) is part of their right to property, reflects this understanding.¹⁴² As a result, preventing vindication of this right may well be considered a taking of property.¹⁴³

136. See *infra* Section B.2.

137. See KARAYANNI, *supra* note 21, at 229–30.

138. See IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 125–34 (1993) (in Hebrew); IZHAK ENGLARD, *COMPENSATION FOR ROAD ACCIDENT VICTIMS* 9 (3d ed. 2005) (in Hebrew).

139. Yehoshua Weisman, *Constitutional Protection of Property*, 42 HA’PRAKLIT 258, 266–67 (1995) (in Hebrew); A.J. VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* 21 (1999); John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 561 (2005).

140. 5752–1992, SH No. 1391 (Isr.), <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf> [<https://perma.cc/7ED3-FLE3>]; see CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221, 494 (1995) (Isr.); HCJ 7957/04 Mara’be v. Prime Minister of Israel 60(2) PD 477 (2005) (citing HCJ 1661/05 Gaza Coast Local Council v. Knesset 59(2) PD 1 (2005) (Isr.)).

141. ELIEZER RIVLIN, *THE ROAD ACCIDENT—APPLICABILITY OF THE LAW, PROCEDURE AND CALCULATION OF DAMAGES* 911 (4th ed. 2011) (in Hebrew); see also HCJ 8276/05 *Adalah* v. Government of Israel 62(1) PD 352, 374 (2006) (Isr.); HCJ 2390/96 *Karasik* v. State of Israel 55(2) PD 625 (2001) (Isr.).

142. HCJ 8276/05 *Adalah* v. Government of Israel 62(1) PD 352, 373–75.

2. Dignitary Affront

Atuahene argues that a dignity taking involves an intentional or unintentional “dehumanization” or “infantilization” of the dispossessed.¹⁴⁴ Does restricting Palestinians’ access to civil justice result in an affront at the level described by Atuahene?

My investigation focused on the intentions of the State in imposing procedural restrictions on Palestinians’ Claims, rather than on how the loss is perceived by Palestinians who suffered it. Based on the data, I did not find evidence for dehumanization or infantilization of Palestinians by Israeli government lawyers, policymakers, and legislators. Arguably, denying Palestinians access to civil justice may be infantilizing in and of itself—treating them as children who would not benefit from the litigation process. However, I posit that such an interpretation would overly expand the scope of the term “infantilization” and erode the need for empirical data to make a case for a dignity taking.¹⁴⁵

In contrast, I argue that the data reflect a discrimination of Palestinians as a group, which infringes on their dignity.¹⁴⁶ As Atuahene notes, some cases fall in “the middle of the takings spectrum,” i.e. property confiscations that occur due to humiliation, degradation, radical othering, unequal status, or discriminatory actions that do not rise to the level of dehumanization or infantilization.¹⁴⁷ The analysis I offer regarding the dignitary harm caused by the discrimination of Palestinians provides a lead towards better defining this “middle-of-the-spectrum” category.

The right to dignity enshrined in Israel’s Basic Law has been understood to include a right not to be discriminated against, deprived, or humil-

In his concurring opinion in *Adalah*, Justice Grunis raised questions regarding the applicability of the Basic Law to events occurring in the Territories. *Id.* at 390, 392–93. Since the State did not provide a satisfactory answer to this question, he decided to join the majority. *Id.* at 390.

143. Examining whether racially restrictive covenants qualify as dignity takings, Carol Rose argues that these covenants “did not so much take a ‘thing’ as they took an *opportunity* to acquire a thing.” Rose, *supra* note 133, at 950. Yet, the right in torts given to the injured party is more specific than an opportunity to acquire property or use land. Furthermore, I tend to agree with Kedar that the notion of a taking should be broadly understood, to include the opportunity to acquire property. In his words, “the taking of dignity should be explicated within this context, which also includes the opportunity or lack of opportunity to acquire land.” Alexandre (Sandy) Kedar, *Dignity Takings and Dispossession in Israel*, 41 LAW & SOC. INQUIRY 866, 869 (2016). Therefore, unlike Rose, I conclude that in our case a taking of property *has* taken place.

144. Atuahene, *supra* note 12, at 800–01.

145. *Id.* at 811–12 (“The presence or absence of the dehumanization or infantilization that forms the basis of a dignity taking is most appropriately determined through empirical interrogation.”).

146. Atuahene defines “dignity” as “the notion that people have equal worth, which gives them the right to live as autonomous beings not under the authority of another.” *Id.* at 800.

147. See also Kedar, *supra* note 143, at 870 (suggesting that such othering may apply to a population perceived as an enemy or a threat to security).

iated.¹⁴⁸ While the principle of equality itself is not embodied in the Basic Law, the idea that a discrimination against a group might be considered a violation of the human dignity has gotten traction in Israeli scholarship and case law. Under this approach, the Basic Law seeks to protect against humiliation, and while not all violations of equality would cause humiliation, certain types of *group* discrimination would.¹⁴⁹

The restriction of Palestinians' access to civil justice is based on such group discrimination. It singles out and delegitimizes Palestinians as enemies of Israel, who do not merit the same treatment as Israeli citizens. In a similar context, Kedar argues that the Arab minority in Israel is conceived as "a security threat and an impediment to the Judaization of the Land of Israel, but this does not necessarily require that they be perceived as child-like or inferiors, or be referred to as animals."¹⁵⁰ I argue that this perception also applies to non-Israeli citizen Palestinians, who are even easier to frame as "others." Consequently, politicians, government lawyers, and judges are far more prone to associating Palestinians with terrorist groups and portraying them as security threats to the Israeli public.

The records documenting the restrictive policy described above and my interviews with the lawyers involved show that the State advanced a narrative which characterized Palestinians as an enemy group. Per that narrative, Palestinians, whether or not they actually pose a threat to Israel's security, do not deserve compensation for injuries caused in the course of the Conflict.¹⁵¹ For instance, discussing one of the restrictive amendments, MK Yosef Lapid noted:

we are faced with a society that normatively views it as a command to lie to the occupying Jews and to extort the maximum amount of money from them This gap between the norms of Palestinian society towards Israelis, towards the Israeli administration, their complete liberty to bring ten lying witnesses, doesn't it justify changing the norms¹⁵²

148. See Haim Cohen, *The Values of a Jewish and Democratic State: Studies in Basic Law: Human Dignity and Liberty*, in HA'PRAKLIT—JUBILEE BOOK 9, 32 (1993) (in Hebrew).

149. See, e.g., the approach expressed by Justice Dorner in HCJ 4541/94 Alice Miller v. Minister of Defense 49(4) PD 94, 131–33 (1995) (Isr.); HCJ 4513/96 Abu-Arar v. Minister of Interior 52(4) PD 26, 46–47 (1998) (Isr.). See also Michal Tamir (Itzhaki), *The Right to Equality of Homosexuals and Lesbians*, 45 HA'PRAKLIT 94 (2000) (in Hebrew), and Hila Keren, *Equality within Contract Law: A Feminist Reading*, 31 MISHPATIM L. REV. 269 (2000) (in Hebrew), for two papers that suggest a similar interpretation to the Basic Law in the context of LGBT people, and women, respectively.

150. Kedar, *supra* note 143, at 883.

151. See, e.g., Confidential Interview with GL7 (MOD) (Jan. 3, 2016)*; Confidential Interview with GL5 (DA) (Aug. 13, 2015)*; see also *supra* notes 45, 48 and accompanying text for a discussion on the Knesset Protocols.

152. Protocol of the Knesset's Constitution, Law, and Justice Committee of June 24, 2002 (emphasis added) (in Hebrew).



This resonates with a tendency to ignore differences between terrorist organizations and the rest of Palestinian society, including innocent bystanders, in order to promote the new policy.¹⁵³ The words of MK Gid'on Sa'ar during the 2012 Amendment deliberations are illustrative; the Claims turn Israel into “an ATM for the terror attacks launched against the State and its citizens.”¹⁵⁴

A similar narrative was used by government lawyers to justify restrictions imposed on Palestinian claimants, portraying the Claims as futile. As one government lawyer noted, “Nowadays . . . they need to deposit a bond so they have something to lose and so they choose their cases carefully instead of overwhelming the courts with heaps of lawsuits which would just be denied and are only burdening the system.”¹⁵⁵ Another government lawyer was even blunter about the role of the Claims: “I think tort claims against [Israel’s] security forces are a battering ram at the hands of the State of Israel in the regional struggle we are facing.”¹⁵⁶ And a Palestinian human rights activist involved in bringing Claims observed: “The perception is that any Palestinian is more dangerous [than an Israeli], no matter what he does.”¹⁵⁷

Based on these data, I argue that imposing procedural restrictions on Claims represents discrimination against Palestinians as a group.¹⁵⁸ In this sense, while not a full-fledged dignity taking, the restrictions may well fall in the middle-of-the-spectrum category. Indeed, this category is an appealing resort considering the narrow dignity taking framing associated with extreme cases like Kristallnacht (“Night of Broken Glass”)¹⁵⁹ or the Rwandan genocide.¹⁶⁰ However, this middle-ground category demands more

153. See, e.g., the argument between then Minister of Justice Meir Shitrit and MK Taleb Alsana during one of the discussions regarding the 2002 Amendment. Protocol of the Knesset’s Constitution, Law, and Justice Committee of Dec. 25, 2001 (in Hebrew).

154. Protocol of the Knesset’s Plenum, First Reading of Amendment (No. 8), June 10, 2008 (in Hebrew).

155. Confidential Interview with GL1 (DA) (Aug. 17, 2015).* Another DA lawyer echoed the sense that Palestinians bring Claims because they have nothing to lose. Confidential Interview with GL11 (DA) (Mar. 9, 2016).*

156. Confidential Interview with GL4 (DA) (Aug. 18, 2014).* It should be noted that government lawyers tended to resort to military language during interviews, using phrases like “joining forces,” “platoon,” and “war of attrition” in the context of the Claims.

157. Confidential Interview with KS2 (Mar. 15, 2016).* It has been argued that despite the HCJ’s landmark ruling in *Adalah v. Government of Israel*, this portrayal of Palestinians also permeates the Supreme Court. See Ofer Shinar Levanon, *The Ethos of the Israeli-Palestinian Conflict as Reflected by the Judgments of the Israeli Supreme Court 1948–2006*, at 83–86 (Sept. 2015) (unpublished Ph.D. dissertation, Hebrew University of Jerusalem) (in Hebrew) (suggesting that the Court advances a discourse which depicts Palestinians as potential security threats).

158. Atuahene, *supra* note 12, at 799.

159. See Rose, *supra* note 133, at 944.

160. Atuahene, *supra* note 12, at 799–800.

elaborate discussion on both the dignitary harm required to meet its criteria and the remedy it merits. The analysis above, based on dignity and discrimination in Israeli law, offered a first step towards better defining this category.

As for remedy, Atuahene rightfully acknowledges the need to recognize one's equal human worth following a dignity taking, which cannot be satisfied merely through reparations.¹⁶¹ Nevertheless, while Atuahene notes that "dignity restoration can also be a remedy for involuntary property loss that does not involve dehumanization or infantilization,"¹⁶² she does not specify under which circumstances such restoration would be deemed necessary. And her proposition remains contingent upon how we label the "taking" in question. Though the dignity taking analysis recognizes the injury to one's dignity that a taking may involve, this framework inevitably revolves around property loss as the core deprivation. I challenge this concentration below.

C. Restricting Access to Civil Justice as Denial of the Litigation Process

The analysis thus far suggests that restricting Palestinians' access to civil justice infringes on their property rights, and that this infringement involves group discrimination. However, this analysis centers on the property aspect of the Claims—the prospects of receiving monetary remedy for one's loss. As such, it overlooks a significant aspect of the harm potentially caused by restricting access to civil justice: the denial of the *process* by which Claims are decided. As outlined below, focusing only on the *outcome* of tort litigation ignores a host of equally important purposes it serves.¹⁶³

The traditional account of torts tended to emphasize compensation, viewing tort litigation as an avenue to identify and provide redress for injurious wrongs committed by one individual against another.¹⁶⁴ Over the years, however, other theories have considered various purposes that the tort system fulfills. According to civil recourse theory,¹⁶⁵ once an individual has behaved tortiously, the state empowers private parties—victims and

161. *Id.* at 796.

162. *Id.* at 815.

163. For a review of the various objectives of tort law, see JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 2–5 (2016).

164. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 516–17 (2003).

165. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L.J.* 695, 754 (2003) (noting that the theory seeks to strengthen the explanatory power of corrective justice theory while retaining its notion that tort law was a matter of "private wrongs").

potential plaintiffs—with a *right of action* that they can choose to bring to obtain a remedy against the tortfeasor, thus entitling such victims to hold their tortfeasors accountable.¹⁶⁶ Moreover, civil litigation provides participants with an official form of governmental recognition. Even if a party loses her case, the fact that she can assert her claim and require both a government official and the person who has wronged her to respond is a significant form of recognition of her dignity.¹⁶⁷ Such recognition may be particularly essential for Palestinians—people under Israeli occupation without any forum of their own to resort to.¹⁶⁸ An acknowledgment of their dignity and autonomy from those in power is of crucial importance,¹⁶⁹ as is the opportunity to demand answers and to stand on equal footing with their state perpetrators.¹⁷⁰

Relatedly, research has identified injured individuals' need to receive a "day in court" as a mechanism to experience control over what happened to them.¹⁷¹ As Tom Tyler, E. Allan Lind and their colleagues showed, decision-making procedures, including civil litigation, not only deliver outcomes; they also convey important information about our relationship with the group and its authorities.¹⁷² Individuals are especially attuned to the procedure's neutrality, the trustworthiness of the third party, and signals that convey social standing, such as having a voice in the process.¹⁷³ Indeed, these aspects of legal proceedings build on people's understanding of themselves as members of a political community, and, as such, may not apply to individuals that do not identify with the superordinate group. As a result, Palestinians may be more instrumental—namely compensation-oriented—and less concerned with the process elements of civil litigation.

166. See generally Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1784–85 (2007); Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 245 (2011).

167. See Goldberg, *supra* note 139, at 626.

168. I refer to the lack of recourse to *Palestinian* civil courts, rather than international tribunals, which are significantly less efficient in providing civil recourse. See Gilat J. Bachar, *Damages for Collateral Damage: Monetary Compensation for Civilians in Asymmetric Conflict* 3 (Sept. 2017) (unpublished manuscript) (on file with author).

169. In explaining the key roles of litigation, including recognition, Lahav relies on Hannah Arendt's "right to have rights": "the ability to assert that one is entitled to respect as a moral agent . . . a foundational form of recognition from the state." Lahav, *supra* note 6, at 1668.

170. See Jason M. Solomon, *What is Civil Justice*, 44 LOY. L.A. L. REV. 317, 336 (2010) (relating the civil recourse aspects of tort law to concepts of democratic equality).

171. For an excellent review, see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. SCI. 171 (2005).

172. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65–88 (Joseph Sanders & V. Lee Hamilton eds., 2001); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 236 (1988).

173. Tyler & Lind, *supra* note 172, at 65–88; LIND & TYLER, *supra* note 172, at 236.

tion.¹⁷⁴ However, causality may also run the other way: instrumentalism can result from unfair treatment by those in power.¹⁷⁵

An emphasis on process also characterizes theories explaining the value of tort litigation in terms of transparency, which is key in Palestinians' Claims. As Alexandra Lahav notes, the litigation process can reveal information important to the litigants involved.¹⁷⁶ "[The process] can combine the facts and the law to produce narratives and explanations of past events, frameworks for addressing hurtful events that are ongoing, and opportunities for healing . . ."¹⁷⁷ And "[e]ven when these narratives are not fully satisfactory . . . they help participants come to terms with the past."¹⁷⁸ An illustration can be found in the Rachel Corrie case.¹⁷⁹ Rachel, an American human rights activist, participated in a Gaza protest in 2003. During the protest, under contested circumstances, Rachel was killed by an IDF bulldozer. In the wake of Rachel's death, after a military investigation determined her death was an accident, Rachel's family brought a wrongful death Claim against Israel. The family lost the case,¹⁸⁰ but as they expressed in the conversations we had, the process was nevertheless significant for them.¹⁸¹ It allowed them to receive information about what happened to Rachel and hear from those perceived as responsible for her death, especially since other courses of action, such as criminal charges against the bulldozer driver, were blocked.¹⁸² As Sarah, Rachel's sister, put it: "I'm sorry this is how things worked out but I'm not sorry we [brought the

174. While procedural justice findings are robust across ethnicities and ideologies, "[p]eople who identify predominantly with a subgroup may focus on instrumental issues when evaluating a superordinate-group authority, and conflicts with that authority may escalate if those people do not receive favorable outcomes." Yuen J. Huo et al., *Superordinate Identification, Subgroup Identification, and Justice Concerns: Is Separatism the Problem; Is Assimilation the Answer?* 7 PSYCHOL. SCI. 40 (1996); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 15–16 (2002).

175. Huo et al., *supra* note 174, at 45. This hypothesis requires further empirical investigation. It is interesting to mention, though, as one way to explain the Israeli government's approach towards the Claims, that people are often less concerned about justice when dealing with people who are outside of their own ethnic or social group. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117, 123 (2000).

176. Lahav, *supra* note 6, at 1683.

177. *Id.*

178. *Id.* at 1683–84. See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012), and Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67 (2013), for other functions of court-enabled transparency.

179. CA 6982/12 Estate of Rachel Corrie v. State of Israel, Ministry of Defense (2015) (Isr.).

180. *Id.*

181. Confidential Interview with the Corrie Family (July 29, 2015).*

182. *Id.*



Claim]. There were so many little details we learned It was almost like a little investigation of our own.”¹⁸³

Sarah’s words underscore the severity of the harm that can result from denying injured individuals access to civil justice, which deprives them not only of the right to seek monetary redress, but also of the right to the various functions of the litigation process. These key roles of the tort process—the opportunity to vindicate a right of action, hold tortfeasors accountable, receive recognition for their plea, have a voice, and produce a narrative—were denied to Palestinians for whom access to civil justice has been blocked. The right to the litigation process itself, regardless of whether it would result in a remedy, should therefore be separate from the property right to compensation provided by the law of torts. A dignity taking analysis fails to capture this additional deprivation, and is thus incomplete in our case.¹⁸⁴ Indeed, both analyses may result in a similar conclusion—that a fair, just procedure should be put in place to afford recognition to injured individuals. However, per Atuahene, such a process will only be set in motion having first established that the taking involved—be it a dignity taking or a “middle-of-the-spectrum” taking—merits a restoration process. I suggest that rather than only looking at the deprivation of monetary compensation as a “taking,” we should consider the denial of the litigation process as another form of deprivation outside the dignity taking framework.

V. CONCLUSION

The systematic restriction of Palestinians’ Claims before Israeli civil courts, through intricate procedural rules, encroaches on their access to justice. One may certainly consider this restriction through the prism of a dignity taking. It involves infringement on injured Palestinians’ property rights, which include their right to compensation afforded by the law of torts, and an affront that stems from discriminating against Palestinians as a group. While the latter does not fit squarely into Atuahene’s definition, it may well fall into the middle-of-the-takings-spectrum, an under-theorized category which demands a better definition of its scope and the remedy it merits. Yet, a key component of the harm is overlooked by emphasizing only the “end game” of tort litigation: the right to compensation. As the theories presented in this Article explain, even when plaintiffs lose, participation in the litigation process carries value. I argued that the various func-

183. *Id.*

184. As Atuahene acknowledges, this framework “does not preclude the creation of other theoretical frameworks for thinking about dignity deprivations unrelated to property confiscation.” Atuahene, *supra* note 12, at 821.



tions tort litigation serves—including accountability, transparency, and recognition—are all the more important when it comes to plaintiffs belonging to a group as vulnerable as Palestinians—people under occupation without institutions of their own to turn to.

We should bear in mind that the analysis presented in this Article focused primarily on state actors' intentions in imposing the procedural restrictions, relying on interviews with lawyers and policymakers, as well as documents exhibiting legislative intent. Another central aspect to assessing the nature of the harm, though, is claimants' perceptions.¹⁸⁵ Future research should systematically gather accounts of Palestinians injured by IDF, who either filed a Claim or did not do so, to study their subjective evaluations of their injuries.¹⁸⁶ Towards such future research, this Article suggests that when conceptualizing the restriction of access to civil justice, we must look beyond the taking of the property right to tort compensation. Only then will we see the “taking” of the right to the litigation process itself.

185. On the need for such data to establish a dignity taking, see *id.* at 818.

186. Future research may also use experiments to test the harm of an intentional and/or unintentional denial of process and compensation of various victims. See Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713 (2008) (suggesting, based on two experiments, that subjective attachment to property is more significant than other factors in determining the perceived justice of an eminent domain taking).

