UNFOLDING COMPENSATION AND ACCOUNTABILITY MECHANISMS IN ASYMMETRIC CONFLICT

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MAY 2018

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ABSTRACT

This dissertation is at the intersection of tort law, civil procedure, international law and professional responsibility, exploring mechanisms that provide monetary compensation for victims in asymmetric conflicts, by which I mean conflicts between belligerents whose relative military power or strategy differ significantly. There is currently a dearth of empirical knowledge on the workings of conflict-related compensation mechanisms. To begin closing this gap, this dissertation provides an on-the-ground account of the role tort law plays in one asymmetric conflict, using the politically-charged tort litigation of the Israeli-Palestinian Conflict as a case study. In Israel, a court-based system enables Palestinian residents of the West Bank and—until recently—the Gaza Strip to bring individual claims for damages before Israeli civil courts for injuries caused by Israeli security forces' actions ("the Claims"). Through this case study, which has not been explored to date, I conceptualize the function of tort litigation in the conflict from three angles, each constituting a separate paper. The research builds primarily on 55 in-depth, semi-structured interviews I conducted with the various types of lawyers involved in the Claims, as well as other key stakeholders such as plaintiffs, retired judges, and representatives of human rights organizations. In addition, I performed a content analysis of 300 court decisions, a census of the decisions rendered at first instance in the Claims between 1975 and 2015, coding for the lawyers involved in the Claims and their affiliation. Finally, I rely on several secondary sources, including Israel's Civil Tort Act (Liability of the State) and its various amendments, Parliament protocols, news articles on Claims, NGO reports, and information from Israeli Ministry of Defense Freedom of Information Act (FOIA) requests.

The first paper, entitled: "Money for Justice: Plaintiffs' Lawyers and Social Justice Tort Litigation," focuses on the impact of plaintiff-side lawyers on the use of tort litigation in the Israeli-Palestinian Conflict. Through the conceptual framework of cause lawyering as developed by Sarat, Scheingold, McCann, Erichson, and others, I offer insight into the characteristics, practices and motivations of lawyers who operate in this field. In the context of the case study, I expose how profit-oriented plaintiffs' lawyers stepped into a void left by Israeli human rights organizations. While these private lawyers, whom I call "de facto" cause lawyers, have notched achievements on the individual client level, their involvement has shaped the litigation as a stream of particularized claims rather than a systematic struggle for social change. It also inadvertently—and ironically—supported the State's legislative initiatives to discourage anti-government tort claims. Through this analysis, I show that categorizing lawyers as cause lawyers matters for our conceptualization of where social change comes from. I also demonstrate the impact for-profit lawyers had on the capacity of tort litigation to induce change in the context of the case study.

The second paper, entitled: "Access Denied – Using Procedure to Restrict Tort Litigation: the Israeli-Palestinian Experience," looks at the role of the injuring state in conflict-related tort litigation, particularly the use of procedure to curtail politically-charged tort lawsuits and limit claimants' access to civil justice. I show how starting in the early 2000s, Israel began using a host of procedural obstacles to restrict Palestinians' access to its civil courts, effectively precluding their ability to bring claims arising from Israeli military actions. I then use the lens of the literature on procedural justice and access to justice, as well as Atuahene's framework of dignity taking and dignity

restoration, to argue that while the use of procedure to encroach on an injured person's right to compensation may be considered a taking of property, such an analysis overlooks a key component of the harm. Procedural restrictions that block access to the courts also deny Palestinians of their right to participate in the litigation *process*, which provides benefits such as accountability, transparency, and recognition. These benefits, I argue, are particularly important when it comes to plaintiffs from vulnerable, disadvantaged groups.

The third paper, entitled: "Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict," builds on the first two papers to provide a more holistic view of the function tort law may assume in asymmetric conflicts. I offer an analysis of the institutional design of domestic compensation mechanisms in such conflicts, comparing the compensation paradigm applied in Israel to the model implemented by the U.S. in Iraq and Afghanistan—a military-run program governed by the Foreign Claims Act and condolence payments. I draw on tort theory, social psychology literature, and socio-legal studies and utilize, in addition to the data described above, data from legislative materials, NGO reports, and Freedom of Information Act requests pertaining to the American compensation regime. Through these sources, and by comparing the two models, I suggest that—alongside providing adequate compensation—addressing both government accountability and victims' needs is crucial for designing programs to effectively address the harm modern-day conflict causes to civilians. I subsequently offer concrete guidelines for policy-makers designing such programs, to help shape a more just compensation regime in asymmetric conflicts.

By exploring the unique Israeli-Palestinian experience in this context, this dissertation both promotes a deeper understanding of the role tort litigation plays in the Israeli-Palestinian Conflict itself and suggests broader lessons to be learned from this case study towards coming up with better accountability and compensation regimes in other asymmetric conflict settings.

To my parents, Tovi and Aviva Bachar,
To my partner, Itay Ravid,
To my daughters Naomi and Ayala,
All my love.

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Lastly, I wish to thank my loving parents, Tovi and Aviva, my siblings, and their beautiful families for their never-ending support and encouragement and for making me feel I can conquer whichever goal I set my mind on; my beloved partner, Itay Ravid, my strongest critic and most enthusiastic supporter, without whom this dissertation would never have been written and the journey of writing it wouldn't have been worthwhile; and my daughters, Naomi and Ayala, who were born in the course of writing this dissertation, for putting a smile on my face in difficult moments and for always knowing how to put things in perspective.

Gilat Bachar
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MONEY FOR JUSTICE: PLAINTIFFS' LAWYERS AND SOCIAL JUSTICE TORT LITIGATION

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Tort lawsuits allow individuals to seek both monetary redress and government accountability for social injustice. Yet, an understudied component of such lawsuits is the legal actors that lead them. Traditionally, these are nonprofit or career human rights lawyers, widely recognized as "cause lawyers." But occasionally entrepreneurial plaintiffs' lawyers pursue social justice tort litigation too. Can the latter be considered cause lawyers? And how does their involvement shape the capacity of tort law to bring about social change? Using a case study on civil actions for damages filed by Palestinians against the Israeli government, the Article offers insight into the motivations and practices of lawyers in this field. Through 55 in-depth, semi-structured interviews with the various types of lawyers involved in the litigation, alongside quantitative analysis of an original dataset of 300 court opinions, this Article allows us to rethink the cause lawyering framework and its role in conceptualizing where social change comes from. The Article reveals how in the context of the case study, profit-oriented plaintiffs' lawyers stepped into a void left by human rights organizations—well-versed in impact litigation, but less so in tort lawsuits. While these lawyers, whom the Article calls "de facto" cause lawyers, have notched achievements on the individual client level, their involvement has shaped the litigation as a stream of particularized claims rather than a systematic struggle for social change. It also inadvertently—and ironically—supported legislative initiatives to discourage anti-government tort claims. Through this previously uncharted case study, the Article argues that there are serious implications to whether we include plaintiffs' lawyers in the confines of cause lawyering, given their limited capacity to challenge the status-quo. Yet, in the current political climate, when civil society organizations are under constant attack and social justice is an ever-waning resource, plaintiffs' lawyers and traditional cause lawyers can and should collaborate to mobilize civil society and leverage tort litigation to bring about social change.

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INTRODUCTION

In the United States and abroad, civil litigation has emerged as a way for individuals to seek government accountability for social injustice. From families of African-American victims of police violence demanding redress through civil rights litigation,[1] to foreign victims of torture bringing lawsuits in U.S. courts,[2] civil litigation is utilized for social justice purposes domestically and internationally. This untraditional role of civil litigation has gained traction over the last decades,[3] allowing victims to function as private enforcers when state bureaucracies impede criminal charges against perpetrators. Civil lawsuits aimed at recovering money damages[4] offer a promising alternative in such cases, not only as a mode of pursuing individual rehabilitation,[5] but also for seeking accountability for abuses, creating enforceable expectations of behavior, and denouncing violations.[6] At the same time, heated public debate around such lawsuits denotes a discomfort with placing a price-tag on human suffering and a distaste for costly discovery procedures and fraudulent claims.[7]

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[1] *See e.g.*, "Michael Brown's family mulls lawsuit against Darren Wilson, Ferguson PD" RT (January 23, 2015), *available at*: http://rt.com/usa/225755-brown-family-considers-lawsuits/ (last visited Jan. 2, 2018).

[2] On the use of civil litigation for promoting human rights, see Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305 (2004).

[3] *See generally*, GEORGE FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES (2008) (arguing for the relevance of tort law in the fight against human rights abuses); TSACHI KERE-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE (2007) (arguing, for the incorporation of an egalitarian sensitivity into tort law).

[4] I use the terms "tort litigation" and "civil litigation" interchangeably. Though they do not overlap completely, they are sufficiently akin to one another for the purposes of this essay. *See* Jason M. Solomon, *What is Civil Justice*, 44 LOY. L.A. L. REV. 317 (2010).

[5] These lawsuits also present an opportunity to overcome power imbalances by placing citizen—even alien—and state on equal footing. *See* Solomon, *supra* note 4 (relating the civil recourse aspects of tort law to concepts of democratic equality).

[6] These roles that civil litigation can play are particularly significant in the context of armed conflict, in which the use of tort actions against state perpetrators allows victims of conflict to initiate and control the litigation. *See and compare*: Van Schaack, *supra* note 2.

[7] In the U.S., attacks on the volume, costs and other features of civil litigation have been abundant, inspiring the rise of the tort reform movement. *See generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002). Yet, there is little good empirical evidence on how much litigation actually costs. There are indications that trials are costly and that this cost sometimes outweighs the likely return. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517–18 (2004). In contrast, studies of discovery costs (based on lawyer surveys) indicate that these costs—often thought to be very high—are generally proportional to the case's value. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 28, 43 (2009).

An important, underexplored feature of social justice civil litigation struggles are the legal actors that lead them. Typically, these are lawyers who work for legal nonprofits or private public interest law firms. Yet, civil litigation aimed at recovering money damages from the state also generates incentives for profit-oriented legal entrepreneurs to get involved. Such "private attorney generals" that work on contingency fees may be willing to take cases brought by low income clients if they stand a good chance of winning. However, while professional ethics strives to align lawyer and client interests in civil litigation, centering on the best deal for the client may compromise the promotion of broader social justice goals. The use of civil litigation for social justice purposes thus raises the question: is civil justice better delivered by attorneys who aspire to promote a social cause through the courts, or by profit-oriented lawyers who focus on maximizing the individual client's (and their own) financial gains?

This Article confronts this puzzle, analyzing it through the lens of cause lawyering, defined as "the set of social, professional, political, and cultural practices engaged in by lawyers and other social actors to mobilize the law to promote or resist social change."[8] The conventional view is that cause lawyers practice law for low pay and with a strong, visible ideological commitment.[9] But in recent years scholars have argued that typical fee-for-service lawyers pursuing cases in the public interest may be considered cause lawyers too.[10] The question of whether profit-oriented lawyers can be thought of as cause lawyers thus remains contested. In this Article, I expose challenges that arise when profit-oriented, private lawyers penetrate "cause lawyering territory,"

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[8] Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. SOC. SCI. 301, 302 (2014).

[9] This view was espoused by original cause lawyering scholars Austin Sarat, Stuart Scheingold and their colleagues. *See* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: an Introduction*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998) (noting that "cause lawyering exists where the "morally activist lawyer . . . 'shares and aims to share with her client responsibility for the ends she is promoting in her representation."'); Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in* CAUSE LAWYERING, *id*, at 31 (acknowledging the value and drawbacks of this definition, which situates cause lawyers within the political or social agenda). *See also* Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1994) (examining the lawyers of the Civil Rights movement in light of legal traditionalism).

[10] *See* Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 96 (Austin Sarat & Stuart Scheingold eds., 2001); Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CAL. L. REV. 574 (2006).

given their limited capacity to challenge the status quo, particularly when it comes to civil litigation for social justice.

The vehicle I use in this exploration is civil claims for damages filed by Palestinians against the Israeli government in the context of the Israeli-Palestinian Conflict ("the Conflict"). This unique mechanism, which has escaped scholarly attention, enables Palestinian residents of the West Bank and—until recently—the Gaza Strip[11] to bring claims for damages against Israel's security forces before Israeli civil courts ("the Claims").[12] The Claims would seem like a classic domain for cause lawyering, as they have a clear social justice aspect. That said, since the lawyers who represent Palestinians in the Claims are typically profit-oriented, the study examines whether these lawyers should indeed be considered cause lawyers. It explores the way lawyers litigating the Claims perceive themselves and their colleagues—their motivations, their practice settings, their strategies, and the legal system as a whole—and the way these lawyers shape the capacity of individual tort lawsuits to affect social change.

Using a combination of qualitative and quantitative data, I offer insight into the characteristics of the lawyers who operate in this field.[13] First, I conducted 55[14] in-depth,

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[11] Claims may also be brought by foreign nationals. However, since most Claims were filed by Palestinians, and for brevity, I refer to both groups jointly as Palestinians. As of July 2014, Gaza Strip residents are no longer eligible to bring Claims against the State, as Gaza was declared "enemy territory" by the Israeli Prime Minister. Civil Tort Ordinance (Liability of the State) (Declaration of Enemy Territory – the Gaza Strip), 7431-2014.

[12] There are typically many obstacles to bringing individual claims for damages before domestic courts in armed conflict settings. In courts of the targeted state and in courts of third states whose nationals were injured, state immunity often blocks the claim, and claimants are unlikely to have access to the courts of the injuring state. The Israeli case presents a rare exception to this rule. Another mechanism for individual claims can be found in the European Court of Human Rights and the Inter-American Commission and Court of Human Rights, which have limited mandates. *See* Yael Ronen, *Avoid or Compensate-Liability for Incidental Injury to Civilians Inflections during Armed Conflict*, 42 VAND. J. TRANSNAT'L L., 181 (2009). These compensation mechanisms differ from other payment systems put in place to compensate victims of conflict, such as the U.S.'s military payments under the Foreign Claims Act and ad-hoc "condolence payments." *See* John F. Witt, *Form and substance in the law of counterinsurgency damages*, 41 LOY. L. REV. 1455 (2007); Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, 15 HUM. RTS. BR. 16-57 (2007).

[13] In addition to these primary sources, I also rely on several secondary sources, including the Civil Tort Act (Liability of the State) and its amendments, Parliament committees' protocols, news articles reporting cases, NGO reports, and information from Israeli Ministry of Defense (MOD) Freedom of Information Act (FOIA) requests.

[14] I conducted interviews until reaching saturation; that is, the impression that I am not learning new things or identifying new themes from each interview. *See* Greg Guest, Arwen Bunce & Laura Johnson, *How many interviews are enough? An experiment with data saturation and variability*, 18 (1) FIELD METHODS 59 (2006).

semi-structured interviews[15] with the various types of lawyers involved in the Claims,[16] as well as other key stakeholders,[17] between June 2014 and July 2016.[18] Second, I performed a content analysis of 300 court decisions, a census of the decisions rendered at first instance in the Claims between 1975 and 2015, coding for, among other criteria, the lawyers involved in the Claims and their affiliation. The latter are used for two purposes: as an independent source for identifying trends regarding lawyers representing Palestinians in the Claims, and to support my interview sampling strategy.[19]

The research reveals how, in the political climate of the Conflict, plaintiffs' lawyers who practice on a contingency basis stepped into a void left by human rights NGOs—well-versed in impact litigation before the Israeli High Court of Justice, but less so in civil litigation. These plaintiffs' lawyers maintained their usual practices, focusing their commitment on the individual client and occasionally slipping into the perils of entrepreneurial tort litigation. The Article suggests that these lawyers have notched achievements on the individual client level, whose interests were often more closely aligned with private lawyers than they were with human rights NGOs. Yet, the involvement of these lawyers may have also played a role in the ultimate demise of the Claims as a mechanism for state accountability. The fact that cases were typically

[15] Interviews lasted between 45 and 120 minutes. When interviewees consented, I recorded and transcribed their interviews. When they did not consent, I offered to send them my notes for approval, which several interviewees accepted and responded to.

[16] In Israeli civil courts, plaintiffs must be represented by lawyers that are licensed to practice in Israel. As elaborated below, these lawyers are typically plaintiffs' attorneys practicing law in the field of tort law, or, rarely, lawyers who work for NGOs specializing in human rights. The State of Israel is represented by government lawyers from a special department within the Tel-Aviv District Attorney's Office.

[17] These include plaintiffs, retired judges, journalists, and representatives of Israeli human rights NGOs.

[18] I conducted the interviews in person, during four trips to Israel in 2014-16, and in phone or Skype calls during periods spent at Stanford. Interviews were conducted in Hebrew. I have translated into English the quotes used in this Article. Interview data were analyzed using the online mixed methods application "Dedoose."

[19] As for the latter, I initially identified interviewees through personal connections, and used a "snowball approach" to enlarge my sample. I compiled a list of plaintiffs' lawyers whose names were repeatedly mentioned in interviews and approached them. Then, to ensure I was not documenting a sub-culture, I compiled information regarding plaintiffs' lawyers in 300 court decisions rendered in the Claims between 1975 and 2015. Based on these data, I identified the most active lawyers in the field, those that represented plaintiffs in at least three cases. I then cross-referenced these data with my original list. Overall, I was able to speak with over 25% of the lawyers in the database, including some of the most influential layers in the field. I also identified and interviewed several lawyers that were active in the field but did not appear in the database. While my interview sample is not necessarily representative, it includes plaintiffs' lawyers with different characteristics (purposive sampling): both Jewish Israelis and Palestinian Citizens of Israel; both men and women; both plaintiffs' lawyers and NGO lawyers, etc. I also sampled based on categories that emerged from the data, such as human rights lawyers and personal injury lawyers.

brought by plaintiffs' lawyers has shaped the litigation as a stream of particularized, individual claims, failing to leverage the litigation to challenge the status quo. Additionally, the involvement of profit-oriented lawyers has facilitated the State's efforts to reduce the volume of the litigation by diminishing financial incentives to bring Claims.

Through this case study, the Article helps us rethink the concept of cause lawyering more generally, suggesting that categorizing lawyers as cause lawyers matters for our conceptualization of which instruments can be used in social justice struggles. In particular, despite tort law's capacity to affect change through a significant volume of claims, it cannot live up to its potential without a strategic plan on when and how to bring claims. Such over-arching agenda is less likely when cases are brought scatteredly by profit-oriented lawyers. The compartmentalization of lawyers should thus matter not only to scholars of cause lawyering, but also to policy makers, civil society organizations, and anyone who cares about challenging social injustice. Furthermore, the Article shows that since different legal actors perceive themselves as either cause lawyers or not, and act accordingly, their behavior influences the way cases are litigated. Judges, clients, other lawyers, and the public also perceive lawyers in cause lawyering terms, having different expectations from, and treating differently, cases brought by cause lawyers. These perceptions not only influence the outcomes of specific cases, but also the litigation as a whole.

The Article proceeds in three parts. Part I describes the litigation and the lawyers involved in it. Part II draws on cause lawyering literature to explore plaintiffs' lawyers' role in the Claims. Part III then explains how these lawyers challenge conventional cause lawyering concepts and offers a counterfactual to their involvement in the Claims.

I. Background – Palestinians' claims for damages against Israel

In January 2007, in a Palestinian village north of Jerusalem, Abir Aramin, a ten-year-old Palestinian girl, was on her way home from school. She was fatally wounded by a dull object, allegedly a rubber bullet shot by Israeli military forces controlling a volatile protest in Abir's village. While the investigation of Abir's death did not result in any criminal charges brought against the soldiers involved, Abir's parents filed a civil lawsuit against the Israeli Ministry of Defense before the Jerusalem District Court, alleging the commission of various torts by the Israeli soldiers. In August 2010, the Court ruled in

favor of Abir's parents, and subsequently awarded them $430,000 in damages for their daughter's wrongful death.

A. Litigation/ Conflict: Legal Framework and Characteristics

The Conflict creates frequent confrontations between Israeli military and Palestinians, which often cause property and physical harm to Palestinians like Abir Aramin. Abir's family made use of a unique mechanism which enables Palestinian residents of the West Bank and the Gaza Strip (the Occupied Palestinian Territories, "OPT") to bring tort claims for damages against the State of Israel before ordinary Israeli civil courts.[20] Generally, as stipulated in the Civil Wrongs (Liability of the State) Act of 1952 ("the Act"),[21] the Israeli State is not immune to tortious liability, and since the outset of the Israeli occupation, Palestinians have been allowed to sue Israel based on this legislation.[22]

The first known case of a Palestinian bringing a tort claim due to Israeli military (Israel Defense Forces, "IDF") activity in the OPT traces back to 1974.[23] Since then, and especially since the First Intifada erupted in 1987, thousands of Claims have been brought, seeking monetary damages for loss of property, bodily harm, or wrongful death. Claims are brought for events ranging from accidental explosions of land mines, to use of riot control techniques like rubber bullets during protest, to large-scale military operations, such as Operation "Protective Edge" which took place in 2014 in the Gaza Strip.

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[20] This exception is related to the special status of the Palestinian Territories—the West Bank and the Gaza Strip—as occupied under International Law since 1967. Unofficially, Israel has made no final decision regarding the political status of the OPT and its relationship with them. According to international law, the Israeli control in these 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 West Bank (and in the Gaza Strip until 2005) is constantly criticized and scrutinized by the international community. For more on the status of the OPT, see EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2012).

[21] Civil Tort Act (Liability of the State) 5712–1952 (Isr.). Per Article 2, state liability in torts should be equivalent to the liability of any other corporate body.

[22] Yoav Dotan, *Cause Lawyers Crossing the Lines: Patterns of Fragmentation and Cooperation between State and Civil Rights Lawyers in Israel*, 5(2) INT'L J. LEGAL PROF. 193, 194 (1998) (noting the long-standing tradition of Palestinians petitioning Israel's courts to challenge the military regime). However, as explained below, the Act excludes liability for damage caused in combat. Per Article 5, "[T]he State is not Liable in Tort for an act performed through a combat action of the Israel Defense Forces." This provision has constituted a main barrier for Palestinians successfully recovering damages.

[23] CC 18/74 Atalla v. The State of Israel, PD 2 (1974).

According to data provided by the Israeli Ministry of Defense ("MOD"), during the years 1990-2015 the MOD has paid over $87M in damages to Palestinians for IDF actions, in over 1,700 different cases, both in and out of court.[24] Claims are litigated at first instance in lower civil courts—either magistrate or district courts, according to plaintiffs' estimate of their damages.[25] The typical cause of action is negligence, although Claims may also identify a breach of statutory duty or an intentional tort.[26] Importantly, most cases are not decided in trial.[27] I have identified only 300 publicly available court decisions rendered in the Claims on the *trial* level between 1975 and 2015.[28] Claims that do go to trial tend to drag on for years, at times even over a decade.[29] Some cases make it to the Supreme Court on appeal,[30] yet the bulk of the litigation takes place in the lower courts. This may be the reason why Claims are generally low-profile and rarely covered by the media, except for cases of particular interest.[31]

Like other tort cases, Claims represent individual cases rather than a class action. That is, even though the Claims share a common political context, they are based on

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[24] These are approximations made by the MOD. Report in Response to a Freedom of Information (FOIA) Query to the MOD, Aug. 3, 2015, *available at* (in Hebrew): http://bit.ly/2a982nf; Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author). The data refer to Claims resulting from security forces which operate under the auspices of the MOD, primarily the IDF and the Border Police Unit. Israel's security forces also include other police forces operating in the OPT, and the General Security Service. However, the latter do not maintain independent records regarding the Claims.

[25] The threshold for bringing a case before district courts is 2,500,000NIS (~$600,000).

[26] *See* 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).

[27] Since Israel does not have a jury system, cases decided in trial are adjudicated by a single judge or a three-judge panel.

[28] The court opinions were published in the commercial database "Nevo". "Nevo" was chosen as it is used by the Israeli Supreme Court, most leading law firms and the Israeli MOJ (comparable to "Lexis Nexis"). To control for errors that may exist in this database, and to ensure that all published cases are examined, I conducted searches in two other commercial databases ("Takdin" and "Pad'or"), used to a lesser degree. Cases were retrieved from both the magistrate and the district courts dockets. The database excluded cases adjudicated on the appellate level and does not include unpublished decisions.

[29] An extreme example was provided by one of the plaintiffs' lawyers, noting a case filed in 1996 and decided in 2016. Interview with PL (Private Lawyer) 16, Mar. 2016.

[30] The Supreme Court considers appeals on decisions made by the district courts. Decisions in cases first litigated in a magistrate court are appealed before the district court. However, in rare cases, the Supreme Court may grant a right to appeal, for the second time, a decision made by a magistrate court. *See* Courts Law (Consolidated Text) 5744-1984.

[31] Interview with NGOL (NGO Lawyer) 9, Mar. 2016. High-profile cases were those related to foreign nationals. The attention given to those cases may have prompted the State to settle them. Interview with GL (Government Lawyer) 8, Dec. 2015; Second interview with PL9, Dec. 2015; Interview with GL7, Jan. 2016. *See, e.g.* Jacky Houri, *The Supreme Court Denied an Appeal Brought by the Parents of Peace Activist Rachel Corrie against the State*, HA'ARETZ (Feb. 2, 2015). On social media, the Claims get more visibility, particularly among left-wing activists. Interview with PL4, Mar. 2015.

injuries which resulted from different incidents which are not sufficiently similar to form a class.[32] Alongside the civil proceeding, IDF sometimes opens a criminal investigation when a suspicion arises for soldier misconduct. Since such investigations rarely result in an indictment,[33] the civil proceeding is often used as an alternative course of action to the dead-end criminal path; a way to pursue accountability and receive information about the incident.[34]

Only a minority of these Claims succeed—and in recent years, plaintiffs have faced even longer odds. In the decade between 1992 and 2002, Palestinian plaintiffs were successful in 39 percent of the Claims decided by the courts. Between 2002 and 2012, only 17 percent of the decisions found for the plaintiffs.[35] This percentage has further decreased over the last few years.[36] Yet, according to MOD data,[37] many Claims settle outside the court doors, either before a court proceeding is initiated or in the course of such proceedings.[38] Plaintiffs' lawyers repeatedly noted that most of their successful Claims ended with a settlement.[39] According to a prominent lawyer in the field during

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[32] *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, U. CHI. LEGAL F. 519 (2003) (exploring the role of lawyers representing a mass of similarly situated individual clients that share group interests, in non-class action litigation).

[33] *See* reports published by Israeli human rights NGO Yesh Din in this context: "Alleged Investigation: The failure of investigations into offenses committed by IDF soldiers against Palestinians," Report published by Yesh Din (Dec. 2011), *available at*: http://www.yesh-din.org/en/alleged-investigation-the-failure-of-investigations-into-offenses-committed-by-idf-soldiers-against-palestinians/; "Exceptions: Trying IDF soldiers since the second intifada and after, 2000-2007," Report published by Yesh Din (Dec. 2008), *available at*: http://www.yesh-din.org/en/exceptions-trying-idf-soldiers-since-the-second-intifada-and-after-2000-2007/.

[34] Interview with NGOL2, Aug. 2014; Interview with PL1, Jul. 2015; Interview with PL3, Jul. 2015; Interview with KS (Key Stakeholder) 3, Mar. 2016; Interview with PL4, Mar. 2015.

[35] Bachar, *supra* note 26. Differences were statistically significant ($p < .001$).

[36] This assessment is based on data on Claims court decisions from the years 2012-16, as well as the accounts of interviewees on the plaintiffs' side and on the government's side.

[37] According to the data, the vast majority of the Claims over the years was settled. Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author).

[38] Out of court settlements are a common feature of tort cases. On the prevalence of settlements in tort litigation, and the challenges they present, see Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986) (analyzing 1649 cases in five federal judicial districts and seven state courts and examining how they were resolved); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46(6) STAN. L. REV. 1339 (1994) (questioning the assertion that settlements are better than trial); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (arguing that while high-volume personal injury firms that she calls "settlement mills" are accomplishing many of the goals of no-fault mechanisms, they do so out of the light of day, which creates many ethical issues).

[39] This was one way to explain the gap between the MOD numbers (over 1,700 cases in 15 years) and the volume of court decisions (only 300 over four decades).

the 1990s, settlements accounted for 99 percent of his successful Claims.[40] During those days, the State was often willing to offer settlements, particularly in cases in which Assistant State Attorneys ("ASAs") had a "weak case" due to lack of evidence, or evidence showing alleged soldier misconduct.[41] As explained below, the State's willingness to settle has diminished beginning in the early 2000s.[42]

Plaintiffs face several challenges in bringing Claims.[43] *First*, the Claims entail particularly high litigation *costs*, beyond typical costs for discovery, medical opinions,[44] court fees,[45] and payment to lawyers and paralegals. Importantly, in the last decade, it became common practice to condition the adjudication of civil claims filed by Palestinians upon plaintiffs' deposit of a bond, especially in Claims arising from IDF

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[40] Interview with PL2, Sep. 2014; Data regarding cases represented by PL2's firm in the Claims, March 2015 (data provided by PL2, on file with author). While not all interviewees provided such detailed accounts, their impression was generally similar. One rare exception was PL14, who noted that most of his cases ended with a court decision rather than a settlement. Interview with PL14, Mar. 2016.

[41] Interview with GL2, Aug. 2014; Interview with GL4, Aug. 2014; Interview with GL1, Aug. 2015.

[42] There are two main alternatives to the court-based mechanism set forth by the Act. *First*, claimants can submit an application to an *Ex-gratia* Committee, which has discretion to award small amounts of compensation to victims either based on independent requests or following 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. Working Procedure and Guidelines for the Committee Acting under the MOD concerning Ex-gratia Payments (2011) (on file with author). Per MOD data, between 2004 and 2014 the total amount awarded by the Committee was 575,895NIS (~$156,000), in 42 cases (20 were dismissed). Data are unavailable prior to 2004. Reports in Response to MOD FOIA Query, Aug. 3, 2015, available at (Hebrew): http://bit.ly/2a982nf; Nov. 13, 2016 (on file with author). *See also* Bachar, *supra* note 26. *Second*, a Claims Headquarters Officer ('Kamat Tov'anot') at the Israeli MOD also has the authority to compensate Palestinian claimants due to damage caused by military actions. This authority is based on the Order Concerning Claims (Judea and Samaria) (no. 271), 1968. *See* information posted on the IDF MAG Force website, *available at*: http://www.law.idf.il/602-6942-en/Patzar.aspx (in English). While initially the Officer operated as a separate position under the Israeli Civil Administration in the OPT, over the years this role was consolidated with the MOD department that specializes in the Claims. According to MOD respondents, this function was rarely ever used. Interview with GL7, Jan. 2016; Interview with GL8, Dec. 2015. Given the limited scope of these alternatives, the main path for Palestinians seeking compensation remains the civil courts.

[43] For a detailed account, see Gilat J. Bachar, *Access Denied – Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience*, 92 CHIC.-KENT L. REV. 841 (2018) (exploring various barriers Palestinians face in bringing tort claims against the Israeli government).

[44] One plaintiffs' lawyer noted that while all tort lawsuits require medical opinions, the Claims require particularly complex opinions as they often call for ballistic analysis. He also noted that doctors rarely offer such opinions without payment. Interview with GL9, Sep. 2015. *See also*: Second interview with PL6, Aug. 2014.

[45] These are usually calculated as a percentage (2.5%) of the damages, which may require substantial funds from Palestinian plaintiffs in cases of severe injuries. This may prompt plaintiffs to underestimate their damages in order to pay lower court fees; First interview with PL7, Jan. 2013. According to some respondents, though, these costs are negligible compared to other litigation costs. Interview with NGOL4, Aug. 2014.

activity. If plaintiffs lose, the State can collect its litigation expenses directly from the deposit.[46] As an MOD respondent noted:

> *"I don't have an execution office in the Territories and it is so easy to file a lawsuit and get the State running around. So we said let's demand the deposit of a security, it's a move that saves lots of headache."*[47]

Courts increasingly tend to grant such petitions, and to set the amount of the bond at increasingly high rates.[48] This discourages claimants—and their lawyers—from bringing Claims, particularly given the tangible risk of losing.[49] Another special cost that Claims entail is the cost of travel from the OPT to Israel. It is sometimes required that plaintiffs be accompanied by security guards when traveling from their homes to the Israeli court, and litigants are expected to incur the costs of hiring such guards themselves.[50]

A *second* challenge is *evidence*. Both plaintiffs and the State often face difficulties in locating relevant witnesses and establishing a clear factual picture of the case. On the plaintiffs' side, OPT plaintiffs, particularly farmers and shepherds, do not tend to maintain their records in an organized fashion. As a result, there is often no evidence to prove property damage.[51] Yet, evidentiary difficulties are not limited to the plaintiffs' side. On the State's side, soldiers that were released from duty are often hard to get a hold of. Even when eyewitnesses are located, they may not remember exactly

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[46] Israel is a costs jurisdiction, where the loser in legal proceedings must pay the legal costs of the successful party. In the Claims, the State regularly applies for an order that obliges plaintiffs to deposit a bond for the expenses the State incurs during the proceeding, based on a potential difficulty to collect costs post-litigation insofar as plaintiffs lose. MICHAEL KARAYANNI, CONFLICTS IN A CONFLICT 231-41 (2014) (explaining difficulties faced by Palestinians who bring civil claims before Israeli courts, including bonds).

[47] Interview with GL7, Jan. 2016. *See also*: Interview with GL8, Dec. 2015

[48] Of 30,000 NIS (~8,000 USD) and higher. Bachar, *Access Denied*, *supra* note 43.

[49] Interview with PL5, Aug. 2014; Second interview with PL7, Aug. 2014. Where claimants have failed to deposit a security, this could lead to suspension or dismissal of the case. *See, for example*, CC (Nazareth) 6907/07 Assi v. The State of Israel [2009] (unpublished decision) (Isr.); *See also* CC (Haifa) 4527/08 Barhum v. The State of Israel [2009] (unpublished decision) (Isr.). *See also* First interview with PL6, Dec., 2012.

[50] This had been a common practice regarding litigants traveling from Gaza through Erez Crossing, located in the northern end of the Gaza Strip. It had been applied to other cases too, subject to the discretion of the Israeli Civil Administration. Interview with PL2, Sep. 2014; Interview with KS2, Mar. 2016. Alongside these financial burdens, Palestinian plaintiffs also face significant physical access barriers in receiving entry permits to participate in legal proceedings. *See* Bachar, *Access Denied*, *supra* note 43.

[51] Interview with PL4, Mar. 2015; Interview with PL2, Sep. 2014; Second interview with PL7, Aug. 2014.

what happened during a chaotic military situation,[52] or may be reluctant to take part in the legal proceeding.[53] Moreover, in the pre-Second Intifada era, the IDF did not always maintain records of its use of force incidents.[54]

A *third* challenge is *fewer settlement offers*. In the last decade, settlement offers from the State have become fewer and far between.[55] This stems from changes in the legislation governing the Claims, as elaborated below, which led to ASAs current stance that they are likely to win under almost any circumstances.[56] In the rare cases in which ASAs do offer to settle, it is because IDF soldiers acted in a patently unjust fashion.[57] Even then, the State will often propose no more than symbolic compensation for the loss.[58] An additional set of cases which may prompt the State to settle are those with an extra-legal, political reason supporting a settlement, such as cases in which victims were foreign nationals from ally countries like the U.S. or the U.K. rather than Palestinians.[59]

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[52] Interview with GL4, Aug. 2014; Interview with GL7, Jan. 2016; Interview with GL8, Dec. 2015 (noting the use of polygraph as a way to handle evidentiary gaps).
[53] Interview with GL11, Mar. 2016.
[54] Interview with PL8, Aug. 2015; Interview with PL3, Jul. 2015.
[55] MOD data regarding the volume of out-of-court settlements between 1988 and 2015 suggest that while settlements were prevalent throughout this period, their volume was larger in the pre-Second Intifada era (taking into account that in recent years there are also fewer Claims). Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author). More specifically, based on MOD data for the years 2007-2009, during those years a total of 151 claims were settled outside the court, which accounted for 30 percent of the Claims filed in those years. This contrasts with these lawyers' accounts, mentioning settlement rates of well over 50 percent. Interestingly, these data pointed to a greater tendency of the State to settle in property damage cases compared to cases of bodily harm. In 94 percent of property damage claims where the State paid damages, these were paid through settlement. Report in Response to "Yesh Din" Freedom of Information Query to the MOD, Aug. 4, 2010 (on file with author). This tendency resonates with the perceptions of plaintiffs' lawyers, who noted that settlements are often offered in "clear-cut" cases such as theft or looting by IDF soldiers, or cases in which it is relatively easy to trace back damage to property to IDF actions. Interview with NGOL1, Jul. 2014; Interview with NGOL4, Aug. 2014. However, according to PL13, this is not the case when it comes to his clients - corporations and commercial entities. Interview with PL13, Mar. 2016.
[56] Interview with GL1, Aug. 2015; Interview with GL4, Aug. 2014. This approach is supported by empirical data. In the last decade, the percentage of cases decided in favor of Palestinians decreased substantially and most cases do not reach the merits. Bachar, *supra* note 26. *See also* Yossi Wolfson, *The Double-edged Sword of the Combat Action Rule*, 16 HA'MISHPAT BA'RESHET 3, 5 (2013) (in Hebrew) (arguing that courts now rely on combat immunity to dismiss Claims more than they did before).
[57] GL1 noted, at my request to give an example for such incidents, a case in which a ceasefire was announced and the soldiers, who did not know about it, shot an innocent civilian. Interview with GL1, Aug. 2015. GL4 referred more generally to cases where the combatant "screwed up"; Interview with GL4, Aug. 2014. A concrete example of the latter cases was offered by PL7. During Operation Defensive Shield the IDF destroyed a radio station owned by Palestinians. Although the State could have successfully argued for combat immunity, it preferred to settle. First interview with PL7, Jan. 2013.
[58] First interview with PL6, Dec., 2012; First interview with PL7, Jan. 2013.
[59] Interview with PL9, Sep. 2015. However, in the Rachel Corrie case, the fact that the victim was American did not prompt the State to settle. Interview with CF, Jul. 2015.

As reflected by the decrease in out-of-court settlements, the Claims have undergone significant changes over the years. Cases became more difficult to bring and more challenging for plaintiffs to win. Several intertwined developments are at the backdrop of these changes.

First, the *formal legal regime* governing the Claims has changed significantly during the last decade. In particular, the combat exclusion established in the Act, which exempts the state from liability in cases deemed "Combat Action," was expanded.[60] As one of the lawyers noted:

> *"…the Act itself was the primary cause for this field's demise. The expansion of the territory of 'combat action'…"*[61]

In addition, a host of procedural arrangements specific for Claims were added, including shortening the statute of limitations period on Claims from seven to two years and adding a requirement to submit a written notice of damage to Israeli authorities within 60 days of the incident.[62] Furthermore, as noted, ASAs developed the practice of filing a motion for a bond, thus raising the financial bar for bringing Claims. According to government lawyers involved in the Claims, these moves were part of a systematic

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[60] In the past, the Act did not include a definition of the term "Combat Action," leaving it to courts to interpret the term according to the circumstances of each case. On the regime under the previous version of the Act, see Assaf Jacob, *Immunity under Fire: State Immunity for Damage Caused by Combat Action*, 33 MISHPATIM L. REV. 107 (2003) (in Hebrew). However, in 2002, Amendment (no. 4), commonly dubbed "the Intifada Act," was enacted. Under the Amendment, a broad definition of "Combat Action" was added. A Combat Action now encompasses actions against terrorism, including: "...any action whose stated aim is to prevent terrorism, hostile actions, or insurrection committed in circumstances of danger to life or limb." *See* Bachar, *supra* note 26.

[61] Interview with NGOL2, Aug. 2014.

[62] Additional important changes relate to the standard of proof in the Claims. The Amendment stated that rules which shift the burden of proof to the defendant – in cases where the object which caused the injury was dangerous or when there is factual vagueness regarding the circumstances that led to the injury (*See* Tort Ordinance (New Version), 1968, sections 38, 41) – will not apply to Claims. *See* Bachar, *Access Denied*, *supra* note 43. Subsequent amendments to the Act further restricted Palestinians' ability to successfully bring Claims. In 2005, the Israeli Parliament enacted Amendment (No. 7), which added two new articles. Article 5B provided that the State is not liable for injury sustained by an enemy state national, by a person who is an active member of a terrorist organization, or by a person injured while acting as an agent of these entities. Article 5C dealt with claims filed by residents of "conflict zones," *i.e.,* areas designated by the Israeli MOD as hosting active combat, and provided that the State is not liable for any action taken by IDF in such zones. While in 2006, in a rare decision, nine HCJ justices unanimously declared article 5C as unconstitutional, this was followed by a political backlash. Amendment (No. 8), enacted in 2012, overrides this ruling, albeit in a narrower scope. It requires courts to decide on "Combat Action" immunity as a preliminary plea; expands the exemption of article 5B; and restricts the adjudication of the Claims to the Jerusalem and Southern districts. *See* Bachar, *supra* note 26.

"discouragement policy" on the part of the State,[63] aimed at reducing the volume of Claims filed against Israeli security forces.[64]

The *political climate* within the Israeli Parliament which enabled the legislative changes were closely tied to a nationalist public opinion. The outburst of the Second Intifada in September 2000 and subsequent deterioration of the Conflict[65] have led to a wave of lawsuits brought by Palestinians before Israeli courts.[66] Changes in the intensity and nature of the Conflict, from a popular uprising using stone throwing, tire burning, and the like during the First Intifada, to a full-fledged armed conflict beginning in the Second Intifada, have thus affected the Claims in two ways.[67] On the one hand, more suits were brought on account of greater losses, which prompted Israel to try and stop the tide. On the other hand, public opinion has become increasingly opposed to payments to Palestinians. While such opposition existed prior to the Second Intifada, it did not gain sufficient political traction to pass previous bills.[68] The Second Intifada has made the Claims more salient, allowing lawmakers opposed to the scope of this mechanism to push for re-defining its confines.[69]

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[63] The process of restricting Palestinians' ability to bring and win tort claims is akin to what Burke refers to as discouragement policies, that is, 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). These policies do not stop litigation altogether but, as was the case here, can reduce the volume and intensity of claims. Discouragement campaigns, particularly the tort reform movement, have become the most prominent of all anti-litigation efforts in the U.S. *See* BURKE, *supra* note 7.

[64] *See* Interview with GL12 (MOJ), Mar. 2016; Interview with GL7 (MOD), Jan. 2016.

[65] *See* Michele K. Esposito, *The al-Aqsa Intifada: Military Operations, Suicide Attacks, Assassinations, and Losses in the First Four Years*, 34(2) J. PALESTINE STUD. 85 (2005) (giving a detailed account of the events of the Second Intifada); Johannes Haushofer, Anat Biletzki & Nancy Kanwisher, *Both sides retaliate in the Israeli–Palestinian conflict***,** 107 (42) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 17927 (2010) (analyzing the escalation of the Conflict in the past decade as a result of mutual retaliation.)

[66] *See* Protocols of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, 6/24/2002, 6/26/2002, *available at* (in Hebrew): http://www.knesset.gov.il/protocols/heb/protocol_search.aspx

[67] According to plaintiffs' lawyers, these changes have also had an effect on litigating the Claims as the use of fire arms by Palestinians as well as Israeli forces gave rise to evidentiary challenges. Interview with PL2, Sep. 2014; Interview with PL3, Jul. 2015.

[68] Back in 1997, a bill aimed at limiting the scope of the Claims was advanced in the Israeli Parliament, with support from the government. However, opposition to the bill from both sides of the political map stopped that initiative until 2002. *See* Hamoked – Activity Report for the Period between 1.1.1998 and 12.31.1998, pp. 25-6, *available at*: http://www.hamoked.org.il/ReportsHamoked.aspx?pageID=hamokedReports.

[69] The main argument put forward in the legislative proceedings was that since both sides are amid an armed conflict, each party should be responsible for its own damages: Israel bears the costs of damages sustained by its citizens, and the Palestinian National Authority should carry the burden for those incurred by Palestinians. *See* Protocols of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, 6/24/2002, 6/26/2002, *available at* (in Hebrew):

In this context, a senior MOD lawyer noted that it was not the financial burden imposed by the Claims that pushed the State to put a cap on Claims. It was, rather, the sense that Israel is amidst an armed conflict with the Palestinians, and tort law is incompatible for handling the consequences of war-like military operations.[70] This was a common posture among many respondents.[71] As one plaintiffs' lawyer opined:

> *"Nowadays I no longer practice in this field, things are hopeless. I think it has less to do with the procedural amendments […]. The military is generally more careful and when conflict does occur – it's full-fledged, like the recent conflict with Gaza…"*[72]

Side by side with these developments, there was also a shift in the *judicial approach* towards Claims. Respondents mentioned that judges became significantly less receptive towards the Claims. While plaintiffs' lawyers who were involved in the Claims in the First Intifada era, such as PL2, noted that judges generally tended to treat these cases like any other tort case,[73] others who still practice in the field painted a different picture:

> *"…you go to court and see the judges' body language and realize you are standing in front of a solid wall that you cannot penetrate. You feel there is a call for duty to set aside legal principles – this is war and we are not in an ivory tower."*[74]

The situation was summarized by one lawyer in the following words:

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http://www.knesset.gov.il/protocols/heb/protocol_search.aspx. In later proceedings, this argument was introduced again as "the paradox of compensating those who are fighting against Israel." *See* Protocol of the Knesset's Constitution, Law, and Justice Committee of 6/30/2005, *id*.

[70] Interview with GL7 (MOD), Jan. 2016.

[71] This approach was famously expressed by Chief Justice Aharon Barak in HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 1 [2006] (Isr.), when it decaled article 5C unconstitutional (*supra* note 62). This approach was shared by government lawyers (Interview with GL9 (IDF), Dec. 2016; Interview with GL12 (MOJ), Mar. 2016), plaintiffs' lawyers (Interview with PL12, Dec. 2016; Interview with PL2, Sep. 2014; Interview with PL3, Jul. 2015), and one retired judge (Interview with KS1, Mar. 2016).

[72] Interview with PL2, Sep. 2014. *See also* Interview with PL3, Jul. 2015.

[73] Interview with PL2, Sep. 2014. Unsurprisingly, a retired judge who adjudicated a significant volume of the Claims in that era shared this sentiment of impartiality and a matter-of-fact approach towards the Claims. Interview with KS1, Mar. 2016.

[74] Second interview with PL6, Aug. 2014. Another prominent plaintiffs' lawyer, litigating many of the current Claims, noted: "Judges that get a case like that are discontent – they don't want to mess with this political hot potato." Interview with PL4, Mar. 2015.

"Recent case law has become more and more extreme – the State's liability is almost a theoretical concept now, and it takes some kind of a miracle for a lawsuit to succeed."[75]

Were the legal regime, the political climate, and the courts' attitude the only reasons for this field's demise or did elements related to the actors bringing Claims have an impact on this process too? My empirical findings below suggest that the State's discouragement policy, which focused on diminishing incentives to bring Claims, was in many ways enabled by the motivations and practices of the lawyers involved on the plaintiffs' side.

B. Advocates/ Adversaries: Lawyers on Both Sides

This section offers a typology of the lawyers in the field. While I focus on plaintiffs' side lawyers, it is important to consider those representing the Israeli government too. Israel is represented in the Claims by ASAs from a designated department within the Tel-Aviv District Attorney's Office, which specializes in civil claims for damages against Israel's security forces or its agents ("the Department").[76] ASAs from the Department represent the state in Claims adjudicated all over the country,[77] accumulating much knowledge and experience regarding this litigation.[78] The Department works in collaboration with the MOD legal department, which oversees lawsuits and insurance claims filed against the MOD and/ or IDF.[79] A section within the MOD legal department focuses specifically on Claims, and includes the head of the section—a lawyer—and two administrative staff workers.[80] Lawyers on the State's side

[75] Interview with PL3, Jul. 2015.
[76] Between 10 and 20 employees work at the Department, including lawyers, interns, and administrative staff and it is headed by a department manager who supervises cases. The number of employees varies according to the Department's workload. Interview with GL1, Aug. 2015; Interview with GL5, Aug. 2015; Interview with GL4, Aug. 2014.
[77] There is also a department within the Jerusalem District Attorney's office which litigates Claims against police and military police in the Jerusalem area (for incidents occurring in check points, demonstrations, etc.). This department handles a significantly lower volume of Claims, deemed outside the scope of the Department, and litigates only in the Jerusalem courts. Interview with GL2, Aug. 2014; Interview with GL10, Mar. 2016.
[78] Interview with GL4, Aug. 2014; Interview with GL10, Mar. 2016; Interview with GL11, Mar. 2016.
[79] Such claims include, in addition to the Claims (commonly dubbed "Intifada Cases"), cases such as IDF civilian workers suing for damages due to work-related harm (*e.g.* exposure to dangerous materials). Interview with GL5, Aug. 2015.
[80] In the past, another lawyer worked under the Claims section at the MOD. According to GL7, the number of employees in the section "varies according to need." Interview with GL7, Jan. 2016.

thus include the ASAs—litigators from the Ministry of Justice—alongside MOD and IDF lawyers who are government representatives, *i.e.* the defendant in the Claims. The latter handle cases before they reach the courts as well as support adjudicated cases by, for instance, participating in discussions on settlement offers and providing evidence.[81]

On the plaintiffs' side, cases are litigated primarily by private attorneys, from solo practices or small law firms. This account is based on a combination of my interview data—in which interviewees both described their own practice and discussed the involvement of NGOs and plaintiffs' lawyers in the field—and a content analysis of court decisions (N=300) rendered in the Claims between 1975 and 2015.[82] According to the dataset, plaintiffs' lawyers are generally either Jewish Israelis or Palestinian citizens of Israel.[83] For some, their practice includes—either primarily or as one area of specialization—personal injury torts ("personal injury lawyers").[84] In contrast, some

[81] Interview with GL7, Jan. 2016; Interview with GL8, Dec. 2015; Interview with GL6, Mar. 2015; Interview with GL5, Aug. 2015. These departments occasionally work in collaboration with additional government lawyers from the MOJ when it comes to the policy surrounding the Claims. For instance, when one of the Amendments to the Act was challenged before the High Court of Justice, the lawyers representing the State were from the Constitutional and Administrative Department at the MOJ. Furthermore, lawyers from the MOJ Consultation and Legislation Department were involved in drafting the various Amendments and participating in Parliament discussions about them.

[82] 220 decisions included the name of the plaintiff's lawyer. These added up to a total of 84 lawyers representing plaintiffs in the Claims. Based on these data, I looked up the names of the lawyers both in a general search through Google and in the Israeli bar website lawyer database, in order to locate their affiliation – either with an NGO or a private law firm. Information was publicly available for 59 of these 84 lawyers (70%). For the existing data, 56 of the lawyers (95%) were from the private sector, as opposed to only 3 NGO lawyers (5%). Several caveats are in order about these data. First, as noted, at least in previous years many of the Claims were settled and many cases nowadays end without a judgment due to procedural hurdles. Second, not all decisions are publicly available. Yet, these publicly available data account for a significant volume of the Claims and give us a sense of the lawyers operating in this field.

[83] In the decisions database, 30 of the lawyers were Jewish Israeli (36%) and 46 were Palestinian citizens of Israel (55%). For the remainder (N=8) their ethnicity was other (such as Druze or Bedouin) or it could not be determined. For the sake of comparison, in 2005, Palestinian citizens of Israel accounted for 8.8% of the lawyers in Israel (a much smaller percentage than their proportion of the Israeli population, which was 19.7% that year). Data from "Lawyers in Israel: Characteristics and Employment in the Last Decade," Israel Ministry of Industry, Trade and Labor, Jul. 3 2005, *available at*: http://www.moital.gov.il/NR/rdonlyres/D404E25B-257D-4845-BE8A-DAAF67C46487/0/X6532.doc. Within my interview sample, which includes the most active and prominent lawyers in the field, Palestinian citizens of Israel represented almost two-thirds (N=15) of the plaintiffs' lawyers (N=25). It is interesting to compare this account to Bisharat's account of the types of lawyers representing Palestinians in Israeli military courts. *See* George E. Bisharat, *Courting justice? Legitimation in Lawyering under Israeli Occupation*, 20(2) LAW & SOC. INQ. 349, 355 (1995).

[84] Such as PL10, PL5, PL11, and PL12. For some of the plaintiffs' lawyers, this categorization is not as clear-cut. While some focus their practice on private law areas, others also take representation in administrative cases with a public interest aspect and are at times affiliated with human rights NGOs. This is the case, for instance, with PL6.

plaintiffs' lawyers are career human rights lawyers that typically take criminal, administrative or constitutional cases related to the Israeli-Palestinian Conflict, and are critical of the Israeli occupation, much like Palestinians ("human rights lawyers").[85] As elaborated below, this distinction between the two types of plaintiffs' lawyers—personal injury lawyers and human rights lawyers—is key to explaining the motivations and practices of plaintiffs' lawyers in this field.

Importantly, these two groups of plaintiffs' lawyers are not monolithic either. I identified a rather heterogeneous group that differed on various dimensions: lawyers of different ages and levels of experience; some financially secure, others with modest incomes; some are public figures, others are not. While some lawyers specialize in personal injury torts, others have additional areas of practice such as labor, property, administrative, and criminal law.[86] Furthermore, while some lawyers have dedicated considerable time to this practice,[87] others have represented clients only in a handful of cases, and the Claims were marginal in their overall practice.[88] And, while most personal injury lawyers noted that they tend to take only cases in which substantial damages are at stake, the lawyers also differed in their choice of clients. Whereas some described their clients as mostly male and educated, or corporate,[89] others noted low socio-economic status as a main characteristic,[90] and still others struggled to identify their clientele's characteristics.[91]

As this diversity indicates, it is difficult to discern a pattern of plaintiffs' lawyers representing Palestinians in the Claims. It may be useful, however, to note several

[85] Such as PL9, PL3, PL4, and PL7.
[86] This is based both on interview data (Interview with PL14, Mar. 2016; Interview with PL13, Mar. 2016; Interview with PL16, Mar. 2016; Interview with PL15, Mar. 2016; Interview with PL10, Dec. 2015), and on data collected through online searches regarding the lawyers, including their firms' websites and the Israeli Bar Association database. It is interesting to compare the diverse practices of plaintiffs' lawyers to the intensive specialization of the ASAs, who focus solely on tort lawsuits against Israel's security forces. The rich experience ASAs have also leads to their familiarity with the judges. *See, e.g.*, Interview with GL10, Mar. 2016; Interview with GL11, Mar. 2016.
[87] For instance, PL16 and PL2.
[88] For instance, PL9 and PL13.
[89] For instance, PL16, PL13, PL17.
[90] For instance, PL12, PL11, PL14.
[91] For instance, PL17, PL10.

examples of such lawyers from the main two groups noted above.[92] From the *personal injury lawyers*, PL13 is a high-end, expert, extremely experienced lawyer. A Palestinian from Jerusalem, his law firm is in one of the most prestigious areas of the city and his clients are typically corporations. The Claims have never been a significant part of his practice; he has taken only a handful, typically those related to clients he represented on corporate issues.[93] PL14, in contrast, is a "crossover" between municipal work, civil society and private practice. Well-known for his uncompromising approach towards corruption and injustice in the public sector, he is well-versed in representing underserved communities in their struggles against state actors.[94] Finally, PL16 is one of the most experienced plaintiffs' lawyers in this field, with dozens—perhaps even a hundred, according to his account—of cases under his belt.[95] He has his own practice in downtown Jerusalem, employs several associates, and works on social justice-related cases, mostly in administrative law.

As for the *human rights lawyers*, PL9 is a reputed, publicly visible Jewish Israeli lawyer who has his own small practice. Most of his cases are constitutional or administrative but he occasionally takes a civil claim, as second chair, in high profile cases or when he handles other proceedings for the same client.[96] PL3, another prominent human rights lawyer, used to take Palestinians' Claims every now and again, even though his main expertise is in administrative law, as he views the Claims as "*part of human rights litigation – trying to obtain compensation for those unlawfully injured by military forces*."[97] In the current state of affairs, he no longer takes Claims. A final note-worthy example is PL4, an energetic young lawyer who is currently one of the more active human rights lawyers in the field. PL4 is an observant Jew, who wears a knitted Kippah which is typically identified with religious Zionists, and with right-wing political

[92] Some of the interviewees resist even this basic categorization, as their work features both personal injury and human rights aspects. I chose several fairly characteristic cases as examples to help illustrate the differences between the groups.
[93] Interview with PL13, Mar. 2016.
[94] Interview with PL14, Mar. 2016.
[95] Interview with PL16, Mar. 2016. Other respondents noted PL16 as one plaintiffs' lawyer that turned the Claims into a business. *See, e.g.*, Interview with NGOL7, Mar. 2016; Interview with PL14, Mar. 2016.
[96] Interview with PL9, Sep. 2015. At other times, according to plaintiff interviewees, PL9 chooses not to take on representation himself and refers cases to other human rights lawyers, such as PL7 or PL6. Interview with BA, Jul. 2015; Interview with CF, Jul. 2015.
[97] Interview with PL3, Jul. 2015.

orientation. He is therefore something of a rare breed in the realm of lawyers advocating for Palestinians' rights. According to his account, this fact serves an advantage as IDF personnel and ASAs are initially off-guard around him, thinking he is "one of their own."[98]

Importantly, lawyers appearing before Israeli courts are required to be members of the Israeli bar. Palestinian lawyers from the OPT have thus been institutionally barred from bringing Claims.[99] To the extent that such lawyers are involved in this practice, they are limited to identifying clients, referring cases to Israeli lawyers (often, Palestinian citizens of Israel with whom they maintain a close working relationship), and at times supporting case preparation or serving as middlemen between Israeli lawyers and Palestinian clients.[100] Some respondents noted that Palestinian human rights NGOs[101] have also been involved in funding Claims,[102] an assertion that was also appeared in court decisions on Gaza cases.[103]

Plaintiffs' lawyers' involvement in the Claims over the years has not been steady. When it became increasingly challenging for Palestinians to win Claims, many lawyers abandoned this practice. Plaintiffs' lawyers mentioned the struggle of keeping at this practice given the slim chances of earning a profit and the overwhelming challenges.[104] This phenomenon was observed by government lawyers too. As one ASA noted:

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[98] Interview with PL4, Mar. 2015. EM is also openly gay, another characteristic which makes him stand out within the observant Jews community.

[99] Palestinian lawyers that reside in the annexed portions of Jerusalem are entitled to membership in the Israeli bar. Such lawyers have represented Palestinians in Claims and constitute part of my sample (for instance, PL5 and PL12). Interestingly, lawyers in East Jerusalem have begun exercising their right to become members of the bar only in the early 90's. As Bisharat notes, "[t]he lawyers' long reticence reflected their concern that joining the Israeli bar would acknowledge the permanency, if not the legitimacy, of the annexation of Jerusalem." *See* Bisharat, *supra* note 83, at 364 and text accompanying footnote 64.

[100] *E.g.*, the case of Plaintiff AS. Interview with AS, Aug. 2015.

[101] Including the Palestinian Center for Human Rights (PCHR); Al Haq; and Al Mizan.

[102] Interview with PL8, Jul. 2015; Second interview with PL7, Aug. 2014; Interview with PL2, Sep. 2014. PL2 provided a different account of the involvement of Palestinian Human Rights NGOs in funding Claims, asserting that there has been no such involvement. Several plaintiffs confirmed that Palestinian NGOs have provided financial assistance. Interview with MJ, Aug. 2015; Interview with AS, Aug. 2015 (the latter was critical of the role a Palestinian NGO played in his Claim, settling the case behind his back.)

[103] *E.g.* CC (Be'er Sheba) 32960-10-12 Alastal v. The State of Israel (5.2.2013) (Isr.)

[104] Interview with PL2, Sep. 2014; Interview with PL3, Jul. 2015; Interview with PL12, Dec. 2015; Interview with PL16, Mar. 2016.

> *"As our determination grew stronger, an interesting phenomenon started – lawyers that we used to speak to once a day began dropping out of the practice. It no longer paid off for them to manage these cases."*[105]

Another, final group of lawyers was historically involved in the Claims. While most Palestinians' Claims were litigated by plaintiffs' lawyers, one Israeli human rights NGO that seeks to protect the rights of OPT Palestinians has also brought Claims. "*Hamoked Le'haganat Haprat*"—Center for the Defense of the Individual ("the Center")[106]—began taking such cases in the early 1990s, hiring several lawyers that specialized in torts.[107] The Center typically accompanied Claims from the initial complaint stage, when claimants called the Center's hotline or came to its offices to report an aggravating incident.[108] At that early stage, the Center would usually focus on getting the Israeli authorities to open a criminal investigation or exhaust one already underway. The civil action would come later. According to NGOL4, a former Center lawyer:

> *"Starting at around 1994 the line of filing a civil suit began. Here we were the ones to control the proceedings rather than depending on the authorities, as a kind of alternative to the criminal or disciplinary proceeding. It was an attempt to take control of the process but it didn't work."*[109]

The wave of Claims following the outburst of the Second Intifada, alongside shortening the limitations period on Claims from seven to two years, created an overwhelming workload for the Center's small number of lawyers trained in personal injury cases. This led the Center to begin outsourcing Claims to plaintiffs' lawyers.[110] At first, outsourced Claims were those with more severe injuries, since, in such cases,

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[105] Interview with GL4, Aug. 2014.
[106] *See* the Center's website: http://www.hamoked.org/home.aspx
[107] Interview with NGOL7, Mar. 2016; Interview with NGOL9, Mar. 2016.
[108] Interview with NGOL4, Aug. 2014; Interview with NGOL1, Jul. 2014; Interview with NGOL2, Aug. 2014.
[109] Interview with NGOL4, Aug. 2014.
[110] Interview with KS3, Mar. 2016; Center for the Defense of the Individual Activity Reports, 1995-2012, *available at*: http://www.hamoked.org.il/hamoked-reports.aspx

plaintiffs' lawyers would have a greater incentive to take on representation via contingency fees.[111] Often in such occasions, the Center would stay behind the scenes, offering financial support and professional advice.[112] But gradually the Center's personal injury lawyers began leaving the organization, and new lawyers were not hired to replace them. The branch of the Center that dealt with plaintiffs' initial complaints on violence and property damages was also shuttered, and only one lawyer was left to handle existing cases part-time.[113] Based on my conversations with the Center's past and present employees, there were several reasons for this process. First, the Center's disappointment with the changes to the legal regime governing Claims, particularly procedural arrangements which resulted in hindering claimants' ability to bring Claims, like the bond requirement. For some, there was a sense of disillusionment with the Center's ability to bring about social change through the Claims, and even a concern that legislative amendments were a backlash to their efforts.[114] Second, difficulty supervising Claims outsourced to plaintiffs' lawyers and a discontent with the way some plaintiffs' lawyers handled the cases.[115]

II. Palestinians' Plaintiffs' Lawyers as "De Facto" Cause Lawyers

While the Center had a key role in litigating Claims, from the outset of the litigation, Claims were brought mostly by plaintiffs' lawyers. Can these lawyers be considered cause lawyers? What are the challenges and opportunities arising from their heavy involvement in the litigation? This case study serves as analytical leverage to explore these questions and complicate the debate on tort law's capacity to bring about social change.

A. What is Cause Lawyering?

Marc Galanter famously argued that law and legal institutions are the domains of the powerful, where repeat players make the rules and have the resources to enforce those

[111] Interview with NGOL4, Aug. 2014; Interview with NGOL1, Jul. 2014. A similar account was provided by one of the government lawyers: Interview with GL2, Aug. 2014.
[112] Interview with PL5, Aug. 2014.
[113] Interview with NGOL1, Jul. 2014.
[114] Interview with KS2, Mat. 2016; Interview with NGOL2, Aug. 2014; Interview with NGOL9, Mar. 2016; Interview with KS3, Mar. 2016.
[115] Interview with NGOL1, Jul. 2014; Interview with NGOL4, Aug. 2014; Interview with KS3, Mar. 2016.

rules in their favor.[116] Yet, marginalized groups continue to draw upon the law to resist injustice.[117] This inherent complexity turns cause lawyers into key players in the dynamics between law and social change.[118] Considering their important role, an abundant scholarship has attempted to solve the puzzle: why would lawyers pursue social change in a profession largely committed to neutrality, independence, and preserving the status quo?[119]

This literature has left much ambiguity as to who precisely cause lawyers are. Must they work for non-profit organizations in poor communities, or can they also work in large law firms? Can they work within the state? Can they stumble into activism coincidently, through involvement with cases of wider political significance?[120] Trying to provide a broad enough definition to encompass all these activities, Anna-Maria Marshall and Daniel Crocker Hale define cause lawyering as "the set of social, professional, political, and cultural practices engaged in by lawyers and other social actors to mobilize the law to promote or resist social change."[121] I adopt their definition because of the

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[116] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, LAW & SOC'Y REV. 95 (1974). Later research has shown that in American political culture, law is so pervasive that it has come to dominate the way ordinary people think about their problems and the choices they make about resolving those problems. In this way, law preserves the privileges of repeat players not just through court decisions but also through the beliefs and practices of ordinary people. *See* Susan S. Silbey, *After legal consciousness*, 1 ANN. REV. LAW SOC. SCI. 323 (2005).

[117] Galanter, *id.*; *see also* Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28(3) LAW & SOC. INQ. 659 (2003) (arguing that beyond social movements, legal categories may motivate ordinary people to resist injustice in their own lives). A related debate regards the role of rights in promoting social change. While Sceingold talks about 'the myth of rights,' Hunt suggests that it's possible to advance a positive evaluation of rights within progressive politics without succumbing to illusions about their function. *See* Sarat & Scheingold, *supra* note 9; Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17(3) J. L. & SOC. 309 (1990).

[118] Marshall & Hale, *supra* note 8, at 302. *See also* Galanter, *supra* note 116; Silbey, *supra* note 116 (noting the crucial role of lawyers in the evolution of legal consciousness).

[119] Key examples of this literature include Thomas M. Hilbink, *You Know the Type...: Categories of Cause Lawyering*, LAW & SOC. INQ. 657 (2004); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurement": A Relational Analysis of Social Movement Lawyers in the United States, in* CAUSE LAWYERING, *supra* note 9, at 261; Menkel-Meadow, *supra* note 9; Sarat & Scheingold, *supra* note 9; STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); Anne Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, *in* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 83, 85-6 (Austin Sarat & Stuart Scheingold eds., 2005) (arguing that cause lawyering entails "[a] self-conscious commitment to the cause").

[120] Marshall & Hale, *id*; Hilbink, *id*, at 659-60 (the latter offers an influential typology of cause lawyers, largely focused on lawyers themselves, including their motivations).

[121] Marshall & Hale, *id.*

emphasis it puts on both *motivations* and *practices*.[122] I argue that Palestinians' Claims against Israel may well be considered "cause lawyering territory." The Claims are part of the legal controversies between the Palestinian population and the Israeli military regime, which include, for example, administrative detentions and Palestinians' freedom of movement.[123] In this sense, while Claims represent individual personal injury lawsuits, they relate to a broader plea of a disadvantaged people, featuring public interest characteristics.[124]

B. Private, Fee-for-service Lawyers as Cause Lawyers

Does the fact that the Claims are part of the realm of cause lawyering necessarily mean that lawyers litigating them are cause lawyers? The classic academic discussion of the legal profession distinguishes between two models of lawyers. The *first* is the conventional model espoused by value-neutral "hired guns" providing their services to those able to buy them. These are the typical fee-for-service lawyers who, whether they identify with their client, are geared towards pursuing the optimal deal for her. The *second* is the political or "cause" model of lawyers who commit themselves and their legal skills to further a vision of a good society. While the former trumpet neutrality as an invaluable trait in their line of work, the latter do the opposite, situating themselves within the political or social agenda and sympathizing with their clients' ideology.[125] Moreover, cause lawyers are typically distinguished from other lawyers by their

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[122] *See also* Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 84, 92 (Austin Sarat & Stuart A. Scheingold eds., 2006) ("Cause lawyering generally involves participating in *practices* that aim to change the law in ways that restructure dominant social configurations that marginalize or oppress certain groups" (emphasis added)).

[123] *See, e.g.*, Dotan, *Cause Lawyers Crossing the Lines*, *supra* note 22 (noting various ways in which Israeli legal institutions are involved in the rights and liberties of Palestinians). Furthermore, international humanitarian law norms which require compensation for civilian conflict victims provide a human rights context to Claims. Though such norms were never officially adopted by Israeli law (except through customary law), they are regularly cited by human rights NGOs. *See* Wolfson, *supra* note 56.

[124] In a similar context, though without providing an explicit explanation to this categorization, Lisa Hajjar analyzes the lawyers representing Palestinians in military courts as cause lawyers. Lisa Hajjar, *Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine*, 31.3 LAW & SOC'Y REV. 473 (1997).

[125] Menkel-Meadow, *supra* note 9; Sarat & Scheingold, *supra* note 9; Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5(2/3) INT. J. LEG. PROF. 209 (1998) (arguing that cause lawyering, in which clients are more means to ends than ends in themselves, can be seen as reversing the priorities of conventional lawyering.)

willingness to elevate the interests of the cause over the immediate demands of a client.[126] This makes lawyers who work for ideologically-driven civil society organizations a comfortable fit to this category. But can typical private, fee-for-service lawyers be considered cause lawyers too?[127]

The scholarship on cause lawyers fails to provide a clear, coherent answer. Scholars argue that cause lawyers are motivated by a complex set of factors: some combination of self-interest, altruism, politics and ideology, reputational concerns, and emotional commitments.[128] Furthermore, several studies have demonstrated that cause lawyering can occur in routine legal practices, including fee-for-service lawyering.[129] The literature has thus recognized that, like other attorneys, cause lawyers sometimes earn a profit. Particularly in areas such as consumer rights, employment discrimination, and products liability, cause lawyering can even be lucrative.[130] Anne Bloom looked at a Texas personal injury firm pursuing litigation against multinational corporations.[131] She found that while personal injury lawyers are undoubtedly drawn to the litigation by the lure of a potentially large fee, they can still be characterized as cause lawyers.[132]

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[126] Sarat & Scheingold, *supra* note 9. *Compare* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 1 (1998) (arguing that lawyers involved in either the representation of private rights or the public interest should be zealous advocates of justice, rather than their clients' interests.)

[127] For various perspectives surrounding this question, see, *e.g.*, SIMON, *id*; Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., 2009) (exploring lawyers who work for private public interest law firms, a form of practice which attempts to marry profit and principle in organizations built around the public good); W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L. Q. 113 (2000) (arguing that the ends served by the practice of lawyering are fundamentally diverse, generating a plurality of moral norms which frequently stand in opposition and cannot be compared).

[128] Menkel-Meadow, *supra* note 9; Hilbink, *supra* note 119. This represents a tendency in research on cause lawyers to focus on lawyers' motivations, which to me is insufficient.

[129] For instance, Louise Trubek has identified cause lawyers in law firms pursuing civil rights and discrimination cases. Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996). In a related context, George Bisharat and Lisa Hajjar studied private lawyers who represented Palestinians in Israeli *military* courts, situating them in the cause lawyering realm. George Bisharat, *Attorneys for the People, Attorneys for the Land: the Emergence of Cause Lawyering in the Israeli-occupied Territories*, *in* CAUSE LAWYERING, *supra* note 9, at 453; Hajjar, *supra* note 124.

[130] *See, for example*, Bloom, *supra* note 10; Scheingold & Bloom, *supra* note 125. However, the prevailing view in the scholarship, and among society, generally remains that fee-for-service lawyers are less committed to the cause than are cause lawyers, as their pecuniary interest in the litigation "muddies their motives." Bloom, *id*, at 105; Marshall & Hale, *supra* note 8, at 305; Hilbink, *supra* note 119, at 661 (noting that he read Bloom's piece "with a raised eyebrow" as to whether he would call this cause lawyering.)

[131] Bloom, *supra* note 10, at 116.

[132] *Id*, at 104; *Compare*: Menkel-Meadow, *supra* note 9.

Similarly, Howard Erichson explored mass tort lawyers and found that their mixed motivations, combining monetary and policy goals, do not necessarily remove them from the realm of public interest lawyering.[133] Erichson further concluded that a mix of monetary and policy motivations may actually reduce lawyer-client conflicts of interests.[134]

These studies suggest that other forces besides altruism, political commitments, or a desire to change the status quo motivate cause lawyers, including pecuniary or professional self-interests.[135] But does this mean all lawyering which involves a public interest aspect is cause lawyering? Not to me. In this Article, I conceptualize cause lawyering in relation to lawyers' practices, the cause, and the clients, rather than only looking at their motivations. I chose this analysis not only because of the methodological challenges associated with discerning motivations, but since it allows me to better assess lawyers' role in context. As Marshall and Hale argue, the literature is missing an emphasis on lawyer-client relationships and the political environment surrounding cause lawyers.[136] They join Michael McCann and Helena Silverstein, who argue that the social and cultural practices in which cause lawyers participate should be explored, rather than only their ideological motivations.[137] Yet, this gap in the literature largely remains.

This Article begins filling this void. By exploring the lawyers involved in the Claims through their practices, the political climate, and their relationships with clients, rather than only focusing on motivations, I offer a richer, more accurate portrayal of these lawyers. My analysis strengthens the cause lawyering framework, as it shows that

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[133] Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087 (2004).
[134] *Id*.
[135] *See, e.g.*, Hilbink, *supra* note 119, at 670 (asserting that the presence of professional or pecuniary self-interest as a motivating factor is no longer considered to remove one's work from the category of cause lawyering). Shamir and Chinski go a step further, arguing that private lawyers may have a stronger commitment to both client and cause. Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, *in* CAUSE LAWYERING, *supra* note 9, at 227, 229.
[136] *See* Marshall & Hale, *supra* note 8, at 302 (reviewing the literature on cause lawyering and suggesting these issues have been given substantively less attention.)
[137] McCann & Silverstein, *supra* note 119, at 278. *See also* Steven Boutcher, *Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society*, 18(2) MOBIL.: INT. Q. 179 (2013) (looking at the potential for cause lawyering to occur in the context of private practice lawyers engaging in pro bono work); Joshua C. Wilson, *It Takes All Kinds: Observations from an Event-centered Approach to Cause Lawyering*, 50 STUD. L. POL. & SOC'Y 169 (2009) (examining cause lawyering qualities in the context of their practice, in this case- anti-abortion protest regulation cases).

studying lawyers' behavior through this lens is consequential to understanding social change processes. Since legal actors perceive themselves as either cause lawyers or not, and act accordingly, their behavior influences the way cases are litigated. For instance, if lawyers systematically prefer confidential settlements to principled court decisions, this affects the prospects of achieving accountability through tort cases. Moreover, judges, clients, other lawyers, and the public also perceive lawyers in cause lawyering terms, treating differently cases brought by cause lawyers and typical lawyers. These differing perceptions not only impact the outcomes of specific cases—as judges may decide differently a case brought by someone they perceive as a cause lawyer and a case brought by a profit-oriented lawyer—these perceptions also impact the view of the litigation in the eyes of the public at large and its efficacy as a strategy to induce social change.

C. Mixed Motivations

At least when it was still a (relatively) lucrative practice, pecuniary interests were central to driving plaintiffs' lawyers to pursue Claims. Plaintiffs' lawyers identified the prospects for profit and began developing this practice. As a senior lawyer in the field in previous years put it:

> *"For me as a lawyer these cases paid off – they brought in a nice income. I think this was the case for other lawyers in the field too."*[138]

Financial motivations were also key to plaintiffs' lawyers' decision to stop accepting new cases in recent years. As mentioned, when it became increasingly challenging for Palestinians to win Claims over the past decade, plaintiffs' lawyers began abandoning this practice. Some respondents explicitly articulated financial considerations at the backdrop of this decision. As one lawyer put it:

> *"In the past there were successful cases that yielded considerable amounts and balanced out the other [unsuccessful] cases. But nowadays we take very few cases because it just doesn't pay off anymore."*[139]

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[138] Interview with PL2, Sep. 2014. *See also*: Interview with NGOL1, Jul. 2014; Interview with PL5, Aug. 2014; Interview with PL10, Dec. 2015; Interview with PL12, Dec. 2015.

[139] Second interview with PL7, Aug. 2014. According to PL7, these few cases are taken either because the firm believes that they stand a chance in court or because the human rights violation is too gross to avoid litigation. *See also*: Interview with PL5, Aug. 2014; Second interview with PL6, Aug. 2014. A similar

Yet, human rights consciousness or an ideological belief in Palestinians' right to be compensated were key motivations too, at least in the lawyers' rhetoric.[140] This was especially prominent with regard to the human rights lawyers, but also appeared in the language of personal injury lawyers. As one of the latter noted: "*Despite the fact that we come from pursuing the financial motivation, you need to believe in what you do*."[141] Several respondents named specific motivations beyond the financial incentive which can be characterized as ideological, such as promoting state accountability: "*I'm interested not only in seeking compensation but also in demanding accountability from the State, making it deal with what's happening*."[142] Other ideological motivations noted were victim empowerment[143] and truth seeking.[144]

While private lawyers' ideological motivations are often discarded as lawyers trying to "sell" their practice as more than just a money-driven enterprise, several findings indicate that a genuine ideology underlies the work of at least some plaintiffs' lawyers. This finds support, first, in the accounts of ASAs, who emphasized ideology, particularly a political agenda, as a key motivation for plaintiffs' lawyers. As one ASA noted:

> *"Plaintiffs' lawyers are often filled with the same sense of mission as plaintiffs themselves, striving for a deterrent, ideological message, sometimes even seeking punitive sanctions."*[145]

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impression was gathered by one of the ASAs, who noted that plaintiffs' lawyers started to abandon the field as "[i]t no longer paid off for them to manage these cases." Interview with GL4, Aug. 2014.

[140] This is an obvious drawback of the interview approach, given the fact that, as MacCoun notes, "talk is cheap." Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. LAW SOC. SCI. 171, 177 (2005). This may be particularly the case for litigators, who actually talk for a living. For this reason, I looked for additional indicators that attest to lawyers' motivations. I also put an emphasis on their practices as they describe them as a way to learn about their characteristics. Despite the need for such data triangulation, I believe the interview approach provides rich context which is essential to better understanding cause lawyering.

[141] Interview with PL1, Jul. 2015. *See also*: Second interview with PL6, Aug. 2014; Interview with PL5, Aug. 2014; Interview with PL12, Dec. 2015.

[142] Interview with PL4, Mar. 2015. *See also*: Second interview with PL6, Aug. 2014; Interview with PL13, Mar. 2016.

[143] Interview with PL5, Aug. 2014; Interview with PL4, Mar. 2015.

[144] Interview with PL14, Mar. 2016.

[145] Interview with GL11, Mar. 2016. *See also* Interview with GL10, Mar. 2016. The latter noted that lawyers are often more zealous about the ideological motivations than their clients, who are mostly after the money.

Further indication to this ideological drive is the fact that some personal injury lawyers have not abandoned the field despite the overwhelming challenges posed by the new regime governing the Claims and the slim chances of winning cases.[146]

Final confirmation for these observations is found in the steep price these lawyers pay for taking on representation in the Claims. Representing Palestinians is a controversial practice, which entails a certain stigma on the lawyers involved in it.[147] Such reputational price is difficult to ignore. As one of the most prominent plaintiffs' lawyers in the field mentioned:

> *"It cannot be just business because these are cases that make you confront the State and the attorney general and not all judges were sympathetic to these cases and it is not easy but they [the plaintiffs] deserve it."*[148]

The plaintiffs' lawyers' sentiment that engaging in this practice stigmatizes them was corroborated by the legal community's perception of them. For example, an ASA noted how it was always the same lawyers bringing these cases,[149] and a retired judge mentioned:

> *"There were several very specific lawyers—such as X [human rights lawyer] and the Arab lawyers. The typical personal injury lawyers would not represent clients in such cases. The sense was that it's treason to file a lawsuit like that. So it was very clear that only lawyers associated with the Arab side filed these claims. There was also a concern that it would create a stigma—X already had such a stigma and she accepted it."*[150]

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[146] For instance, PL7 noted that she still agrees to take cases where the human rights violation is too gross to avoid litigation. Second interview with PL7, Aug. 2014.
[147] *See* Shamir & Chinski, *supra* note 135, at 237 (citing one of their lawyer interviewees who noted: "Practically speaking, an ordinary lawyer would not assume a Bedouin case because it is bad business…").
[148] Interview with PL16, Mar. 2016. *See also*: Interview with PL14, Mar. 2016.
[149] Interview with GL10, Mar. 2016. GL11 expressed a different view, arguing that while plaintiffs' lawyers often make an effort to distinguish themselves from other lawyers to avoid the stigma, he treats each case on the merits and does not "hold it against the lawyers" if they previously brought a frivolous case. Interview with GL11, Mar. 2016.
[150] Interview with Judge (ret.) KS1, Mar. 2016.

Plaintiffs' lawyers need to be willing to pay the heavy professional—indeed, even personal—price which taking on such cases involves.[151] This means that these lawyers either care about the cause they are pursuing or believe this price is worthwhile for the financial gain.[152] Returning to the initial observation of diversity, while some seem to engage in a simple cost-benefit analysis when deciding to bring a Claim, others may care enough about helping their clients recover compensation to be less concerned about the stigma this may entail. The latter, can be thought of, at the very least, as having mixed motivations.

Importantly, money and ideology were not the only motivations that arose from interviews. As Herbert Kritzer argues, professional considerations such as reputation may drive personal injury lawyers, as their future success depends on client satisfaction.[153] As one lawyer noted, when a lawyer successfully represents a Palestinian in a Claim, the word spreads. This can translate into more cases, especially among close-knit Palestinian communities.[154] Some lawyers also noted the desire to have a significant impact on the development of the legal landscape with regard to this area of law, mentioning that they believe they have had such an impact.[155]

Thus, similar to Erichson's finding on mass torts lawyers, at least some of the plaintiffs' lawyers who bring Claims are driven by mixed motivations, with varying degrees of ideological motives and pecuniary interests. If we accept a broad approach to cause lawyering, one that does not demand a lack of financial stakes in the litigation,

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[151] This account can be compared to lawyers representing people accused of communist subversion during the Cold War. As Auerbach notes, "[t]he professional elite.., attempted to purge the profession of lawyers whose political and professional commitments deviated from Cold War orthodoxy," and the ABA was often vigorous in condemning lawyers who represented "undesirables." JEROLD S. AUERBACH, UNEQUAL JUSTICE 233 (1976). While in the Israeli-Palestinian case there was no explicit public condemnation, the professional toll of engaging in representing Palestinians is significant nevertheless.

[152] In recent years, when it has become increasingly hard for Palestinians' lawyers to earn a profit, plaintiffs' lawyers who continue to take such cases may be functioning solely based on an ideological belief in their clients' right to have their day in court. A good example is PL4 who still takes such cases, with the exception of "clear-cut" combat action cases that according to him are a waste of his and his clients' time. Interview with PL4, Mar. 2015. A similar approach for taking on Claims in recent years was expressed by PL7 (Second interview with PL7, Aug. 2014), and by PL12 (Interview with PL12, Dec. 2015).

[153] Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23(4) LAW & SOC. INQ. 795 (1998) (arguing that reputation may also serve as a check on conflicts of interests arising from the contingency fee structure).

[154] Interview with PL12, Dec. 2015.

[155] Interview with PL16, Mar. 2016; Interview with PL15, Mar. 2016.

plaintiffs' lawyers litigating Claims—at least those that consider themselves partially or exclusively ideologically driven—may be viewed as cause lawyers. Yet, as explained below, the practices of plaintiffs' lawyers, even when such lawyers are ideologically driven, challenge this categorization. These practices inhibit the pursuit of a cause which transcends each specific case.

D. Plaintiffs' Lawyers' Practices

Like other areas of legal work, plaintiffs' lawyers are characterized by certain practices that define how they represent clients. Such practices include, for example, the contingency fee system and frequent use of out-of-court settlements.[156] Archetypical cause lawyers have professional practices too. To what extent do the practices of plaintiffs' lawyers representing Palestinians in the Claims overlap with or contradict those of typical cause lawyers? As detailed below, once we examine the plaintiffs' lawyers' practices, especially vis-à-vis those of NGO lawyers, categorizing them as cause lawyers raises difficulties.

1. Commitment to the individual client

Arguably, the combination of monetary and ideological goals can create lawyer-client conflicts of interest.[157] If the plaintiff's lawyer is driven partly by social change objectives and not solely by maximizing her client's recovery, and if different strategies would serve each goal, should that raise concern as a potential conflict of interest between the lawyer and her client, to the extent that they do not share such broader goals? Indeed, the data revealed stark differences between plaintiffs' lawyers and NGO lawyers on how they perceive their duty towards their clients. While both types of lawyers offered a similar impression of how their Palestinian clients perceived them, noting that as a cultural matter Palestinians tend to respect and defer to their lawyers,[158] respondents from the two groups exhibited disparate views of the nature of their relationship with clients and their representation practices. These impressions allow us to evaluate the prevalence of conflicts of interests among each group.

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[156] *See generally* Kritzer, *supra* note 153.
[157] Erichson, *supra* note 133, at 2091.
[158] *See, e.g.*, Interview with NGOL4, Aug. 2014; Interview with PL4, Mar. 2015.

First, plaintiffs' lawyers emphasized the importance of maintaining a close relationship with their clients, by giving them frequent, detailed updates about the case, even when it was impossible to meet in person.[159] Plaintiffs' lawyers noted they express their commitment by listening to their clients' stories.[160] As one lawyer put it: "*I gave them a green light because I listened to them, even though it was clear to them that I was after the money*."[161] In contrast, while NGO lawyers have made an effort to meet with clients at the initial stage of launching a claim,[162] it seemed unnecessary to them to keep clients up to date on every step of the litigation. Such a relationship was often unfeasible too, given the difficulty to travel to the OPT as an Israeli lawyer.[163] As one NGO lawyer noted, the challenge was also connected to differences between Jewish Israeli lawyers and Palestinian plaintiffs. In her words: "*Palestinian plaintiffs are difficult clients because managing the case is difficult.* […] *There are also cultural difficulties – it's hard to represent people from a different culture*."[164]

Second, most plaintiffs' lawyers articulated a preference for out-of-court settlements over court decisions. Many of them stated that, when the State offers a settlement, they advise their clients to take it even if they stand a chance of winning in court, since, as one lawyer noted:

> *"[l]ater there will be appeals that will cost a fortune and will take years and the public effect of the case will be lost. People will no longer remember what the case was about anyway."*[165]

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[159] This is based on a well-established ethical norm for lawyers to keep their clients informed during the legal process. Interview with PL5, Aug. 2014; Second interview with PL7, Aug. 2014; Interview with PL4, Mar. 2015 (the latter noted that he prefers meeting with clients in person to updates over the phone). Several plaintiff respondents confirmed this impression, noting the strong relationship that they had with their plaintiffs' lawyers and their overall satisfaction of the representation, even in cases in which they ultimately lost. *See, e.g.*, Interview with CF, Jul. 2015; Interview with BA, Jul. 2015. In contrast, plaintiffs that have only been in contact with a Palestinian NGO were significantly less involved in the litigation process, which for some created frustration and even anger towards the NGO. Interview with AS, Aug. 2015. I was unable to reach any plaintiffs represented by the Center to compare their impressions with clients of plaintiffs' lawyers.

[160] Interview with PL1, Jul. 2015; Interview with PL4, Mar. 2015.

[161] Interview with PL14, Mar. 2016.

[162] Interview with NGOL9, Mar. 2016.

[163] Interview with NGOL4, Aug. 2014. According to his perception, this was the case for plaintiffs' lawyers too, yet the latter reported a different relationship with their clients.

[164] Interview with NGOL1, Jul. 2014.

[165] Interview with PL4, Mar. 2015. *See also*: Interview with PL1, Jul. 2015 (noting the critical issue of time). However, PL4's approach had its limits. For instance, he was unwilling to take part in proceedings

The more experienced plaintiffs' lawyers justified this preference based on the fairness and efficiency of settlements.[166] While they did not refer to their own financial gain, it was clear that the interest in saving time and calculating risks was theirs too. Furthermore, the lawyers' emphasis on the benefit of a specific client (and their own)—as opposed to the best interest of the plaintiffs' class—is reflected in the tendency to keep settlements *secret*.[167] Many plaintiffs' lawyers noted that the State typically insisted on confidentiality, to avoid negative publicity, and they were generally inclined to adhere to this requirement.[168]

Meanwhile, NGO lawyers had a more complicated relationship with settlements. NGO lawyers highlighted the challenge that settlements pose when striving for a cause such as accountability or affecting change. Given this dilemma, one NGO lawyer mentioned that he was often less inclined to settle than were his clients:

> *"When it comes to settlements, we are much more zealous than our clients [in pursuing a court decision]; when we did consult them, labor intensive cases that were about to be decided in court ended up yielding a less-than-impressive settlement."*[169]

Similarly, another NGO lawyer noted the constant tension between furthering the organization's goals and helping plaintiffs recover. He remembered vividly a case in which he stood before a three-judge panel that questioned his professional ethics for

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for ex-gratia compensation due to his perception of these proceedings as demeaning. *See also*: Interview with PL2, Sep. 2014.

[166] Interview with PL16, Mar. 2016; Interview with PL12, Dec. 2015; Interview with PL11, Dec. 2015; Interview with PL10, Dec. 2015.

[167] For context on secret settlements, see Richard Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INSTITUTE STUD. LEGAL ETHICS 115 (1999) (making the case for amending the ABA model rules to address the harm caused to the public as a result of secrecy in settlements); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105(5) MICH. L. REV. 867 (2007) (offering an economic analysis of bans on secret settlements).

[168] Interview with PL16, Mar. 2016; Interview with PL12, Dec. 2015; Interview with PL11, Dec. 2015; Interview with PL10, Dec. 2015; Interview with PL1, Jul. 2015. One exception is PL13, who noted that he often insisted on a court decision even when judges were pushing him to settle, so that things will go on the record and "history is not a matter of one or two years." Interview with PL13, Mar. 2016. One plaintiffs' lawyer suggested that confidentiality is in the best interest of the client too, as it helps avoid unnecessary attention to the financial gain attained by the settlement. The lawyer mentioned a tragic case in which a Palestinian plaintiff who won a case was later murdered, presumably by relatives who were after her money. Interview with PL17, Feb. 2016.

[169] Interview with NGOL4, Aug. 2014.

insisting on a principled court decision instead of agreeing to a settlement.[170] Another NGO lawyer described a case where the judge pushed for a settlement that would mean accepting more lenient military rules of engagement in the OPT, and he refused to cave in, despite the prospects of speedy recovery for his client.[171]

These articulations of the client/cause dilemma were to some extent shared by human rights lawyers, as they too care about the collective cause.[172] Yet, for the human rights lawyers, like the personal injury lawyers, the specific client was forever at the center, suggesting that a lawyer retained on a commercial basis typically has a higher level of commitment towards clients than a non-profit lawyer handling numerous cases without financial stakes in each individual case.[173] Looking closely at the examples above, plaintiffs' lawyers were often "better" than NGO lawyers in avoiding conflicts of interests, as their interests were more closely aligned with those of *individual* plaintiffs. This observation distances the plaintiffs' lawyers from the category of cause lawyers, who are distinguished from other lawyers by their willingness to elevate the cause over the immediate demands of a client.[174]

However, this focus on the individual client comes at a price. The particularization of an individual legal subject works against general claims that Palestinians may have raised against Israel's security forces through the Claims, such as requiring change of IDF rules of engagement, more rigorous post-incident investigations, and public access to information. Whereas changing the status quo requires a collective grievance—however embodied in each individual case—the plaintiffs' lawyers' strategy of settling each case separately and confidentially diffuses the cause,[175] perpetuating the

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[170] In that case, according to the lawyer, the client did not want to settle either. Interview with PL13, Mar. 2016.
[171] Interview with NGOL2, Aug. 2014.
[172] *See, e.g.*, Interview with PL4, Mar. 2015; Second interview with PL9, Dec. 2015; Interview with NGOL5, Jan. 2016. PL4 noted that in the cases he brought, clients were not suing for substantial damages and so it was difficult to decide whether to let the State "get away with it" for relatively small amounts.
[173] *Compare* Shamir & Chinski, *supra* note 135, at 255.
[174] Sarat & Scheingold, *supra* note 9.
[175] As Shamir and Chinski note in connection with the Bedouin plight, the systemic pressure of the legal field to isolate cases manifests itself in the professional responsibility to one's client, a responsibility which creates a series of dilemmas like those noted above. Shamir & Chinski, *supra* note 135, at 239. *See also* Dotan, *Crossing the Lines*, *supra* note 22, at 204 (arguing that in litigation concerning minority rights, arguments based on individualistic claims proved to be more successful than those based on collective appeals.)

superiority of a single case over the general cause. This particularization of cases—at the expense of promoting a social agenda—is also at the backdrop of some of the ethical dilemmas explored below.

2. Financial stakes vs. professional responsibility

Conflicts arise, too, when we consider plaintiffs' lawyers' financial practices. Plaintiffs' lawyers representing Palestinians in Claims typically use a contingent fee structure.[176] This practice contrasts with the fee arrangement the Center employed, in which the Center funds the litigation and the Center's lawyers have no direct financial stakes in the Claims, as employees retained on a fixed salary.[177] These different practices had a significant impact on lawyer-client relationships in the Claims.

First, the practice of plaintiffs' lawyers lending money to their Palestinian clients,[178] in violation of the Israeli Bar Association Rules (Professional Ethics) ("the Ethics Rules").[179] One plaintiffs' lawyer who admitted to having engaged in this practice called it "*borderline ethical*,"[180] while, in fact, it is strictly forbidden. Another plaintiffs' lawyer mentioned she had regretted using this practice, not for ethical reasons but due to her sense that she invested too much of her own resources—both time and money—in the Claims.[181] This practice speaks to lawyers' commitment towards their clients and their desire to help clients bring a Claims despite their limited resources. However, it may also be the result of overly-zealous entrepreneurial lawyers willing to compromise their ethics to be retained. While this practice helps financially disadvantaged clients bring Claims,

[176] This was the typical arrangement according to my private sector respondents, with slight variation as to the way it was practiced. One plaintiffs' lawyer respondent got extremely nervous when I asked him regarding fee structure and began questioning me about where this was leading. Interview with PL12, Dec. 2015.
[177] Interview with KS3, Mar. 2016; Interview with NGOL4, Aug. 2014; Interview with NGOL1, Jul. 2014.
[178] Second interview with PL7, Aug. 2014; Second interview with PL6, Aug. 2014.
[179] *See* section 44 of the Bar Association Rules (Professional Ethics), 5746-1986. Lawyers in Israel are subject to disciplinary proceedings for any violation of the Ethics Rules. The process for launching a complaint against a lawyer for a violation, as well as the procedure for handling complaints, is detailed on the Israeli Bar Association website (*at*: http://www.israelbar.org.il/article_inner.asp?pgId=91294&catId=3319). The information is in Hebrew and English, but not Arabic, thus less accessible to Palestinians.
[180] Interview with PL14, Mar. 2016.
[181] Interview with PL15, Mar. 2016.

the risk, especially under a contingent fee system, is giving rise to beholden clients who are unable to exercise independent judgement over how best to resolve the case.[182]

Second, the practice of using paid middlemen in the OPT to broker Claims and recruit potential clients.[183] According to a senior ASA,

> *"[i]n previous years, when there were many lawsuits, the same plaintiff would be represented by three different lawyers, without documents or power-of-attorney, it was a complete mess. […] Lawyers used to work with a middleman—an attorney from Gaza or Judea and Samaria [West Bank] who probably gave cases to several lawyers to increase payoff."*[184]

NGO and plaintiffs' lawyers confirmed this was a common practice.[185] One plaintiffs' lawyer reported that his first case was referred to him by a Jewish-Israeli client who married a Palestinian and moved to the OPT. That former client then continued to refer Palestinian clients to him for a small fee.[186] This practice, while not specifically prohibited by the Ethics Rules,[187] has undoubtedly contributed to the negative perception of plaintiffs' lawyers amongst government and NGO lawyers.[188]

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[182] It is interesting to note that while lawyer loans are forbidden in the U.S. (ABA Model Rule of Professional Conduct 1.8(E)), the scholarly discussion seems to be generally in favor of amending the ethics rules to allow loans. *See, e.g.*, Rudy Santore, & Alan D. Viard. *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44(2) J. L. & ECON. 549 (2001) (providing a political economy explanation to restrictions on attorneys purchasing the rights to their clients' claims); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014) (arguing that the rule should be amended so as to allow attorneys to provide existing clients financial assistance for basic life necessities during litigation); Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39 (2015) (arguing that the rule is at odds with the legal profession's goal of facilitating access to justice, at least as it pertains to non-contingent fee cases).

[183] However, this is not the only strategy that plaintiffs' lawyers use in order to recruit new clients. Other practices include word of mouth through previous clients represented in Claims or through clients represented in other contexts, such as labor cases (e.g., Interview with PL16, Mar. 2016; Interview with PL10, Dec. 2015), and, rarely, cross-selling services to the same clients, particularly corporate clients (Interview with PL13, Mar. 2016).

[184] Interview with GL1, Aug. 2015. The middlemen were dubbed "Ma'cherim" by ASAs and NGO lawyers. This is a Yidish term referring (negatively) to middlemen who offer their services to provide shortcuts in bureaucratic systems, often aimed at getting illegal benefits in exchange to bribe.

[185] *E.g.*, Interview with NGOL4, Aug. 2014 ("plaintiffs' lawyers settled cases without fee agreements, giving a few pennies to the middleman that brought them the case").

[186] Interview with PL14, Mar. 2016.

[187] The Ethics Rules specifically refer to the referral of cases from one lawyer to another and the fee arrangements in such cases but do not govern the referral of cases by non-lawyer middlemen. *See* section 30 of the Bar Association rules, *supra* note 179.

[188] However, this negative perception held by government representatives may reflect powerful defendants' eagerness to cast the Claims as "dirty." For the NGO lawyers, it may well be part of their condescending

Third, even more serious accusations were raised against plaintiffs' lawyers about their pursuit of wealth through the Claims. These included accusations of greed, malpractice, and deception of clients. For instance, one NGO lawyer noted:

> *"…plaintiffs' lawyers took these cases in wholesale, irresponsibly, often deceiving their clients. They pursued poor settlements behind their clients' backs, without them knowing what's going on and what has been agreed on. They also raked in funds dishonestly without establishing fee agreements…"*[189]

That NGO lawyer gave an example of a case in which a Palestinian child was severely injured by an unexploded ordnance (UXO) in an IDF training area. The Center handled the case, but the family also retained a plaintiffs' lawyer that pursued an extremely poor settlement without the Center's knowledge. The Center learned of this development through the ASA assigned to the case, after it launched a lawsuit on behalf of the child. The NGO lawyer noted that the plaintiffs' lawyer handling the case reaped most of the settlement money, and the child, that was left permanently and severely disabled, got close to nothing.[190]

Another NGO lawyer observed that some of the plaintiffs' lawyers acted out of greed, trying to extract as much profit as possible at the expense of their clients' best interest and the Center's funds. According to that lawyer's account, for some, such behavior reached the point of malpractice.[191] One ASA supported that impression,

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approach towards profit-oriented lawyers in this field (unlike NGO lawyers themselves, who are not in it for the money). For a more nuanced understanding of the role ethics rules play in maintaining professional hierarchies, see AUERBACH, supra note 151.

[189] Interview with NGOL4, Aug. 2014. A similar view was articulated by another NGO lawyer who did not litigate Claims but was involved in them on the policy side. He noted that some lawyers were less professional and settled for smaller amounts than appropriate. Interview with NGOL8, Mar. 2016.

[190] According to that NGO lawyer, "[t]his was not a single case." Interview with NGOL4, Aug. 2014. However, this allegation is difficult to substantiate with data.

[191] Interview with NGOL1, Jul. 2014. The lawyer also named one of the plaintiffs' lawyers but asked to keep it off the record. A similar view was expressed by another former NGO lawyer, who noted that there were many lawyers from the North of Israel who came to Jerusalem to make money off these claims and there was an argument heard from the military system that they were "claims wholesalers" who did not thoroughly check the facts of the cases and did not have adequate power of attorney. He noted he believes there is some truth to these arguments. Interview with NGOL7, Mar. 2016.

mentioning that plaintiffs' lawyers representing Palestinians submitted heaps of poorly drafted lawsuits.[192] A similar view was provided by one plaintiffs' lawyer:

> *"[m]any human rights cases faded away this way. Lawyers from "the sector" [Palestinian Citizens of Israel] who did not know how to handle these cases and did not invest the time and resources they required and they failed."*[193]

Furthermore, respondents raised the very tangible possibility that some of the Claims were fraudulent. In some cases, this resulted from claimants faking their injuries or telling inaccurate stories to their attorneys to "try their luck" at receiving money damages. Plaintiffs' lawyers shared their feeling that they lacked the tools to distinguish truthful from deceitful clients.[194] As one ASA noted, plaintiffs' lawyers are sometimes taken by surprise by facts revealed by their clients on the witness stand and this causes them embarrassment.[195] But on other occasions, this phenomenon may have resulted from greedy plaintiffs' lawyers determined to bring Claims.[196] It is also possible that plaintiffs' lawyers could have taken more precautions to prevent fraudulent claims.[197]

Thus, plaintiffs' lawyers' pecuniary interests in the Claims have also been responsible, at least in part, for some of the market pathologies pervasive in the Claims and for developing a negative view of this practice in the eyes of both NGO lawyers and ASAs. In this sense, this practice is similar to other personal injury torts, in which phenomena such as fraudulent claims and ethical misconduct exist side by side with devoted lawyers who care about their clients' pleas. Are these phenomena worse when it

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[192] Interview with GL4, Aug. 2014.
[193] Interview with PL1, Jul. 2015. Interestingly, PL1 himself belongs to "the sector" but perceives himself as better and more professional than the typical Arab-Israeli lawyer.
[194] Second interview with PL6, Aug. 2014; Interview with PL9, Sep. 2015; Interview with PL2, Sep. 2014; Interview with PL16, Mar. 2016; Interview with PL14, Mar. 2016. This phenomenon is not unique to the Claims. Though it is difficult to assess its actual scope, the phenomenon of fraudulent claims has been identified in various personal injury cases, such as automobile accidents, and insurance companies often hire private investigators to combat it. *See e.g.* Richard A. Derrig, *Insurance Fraud*, 69(3) J. RISK & INSURANCE 271 (2002); Moshe Bar-am, *Fraudulent Civil Proceedings*, 6 ALEI MISHPAT 135 (2006) (in Hebrew); Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639 (2017) (discussing lack of empirical data on the scope of fraudulent claims in U.S. tort litigation).
[195] Interview with GL11 (MOJ), Mar. 2016. *See also* Interview with GL10 (MOJ), Mar. 2016.
[196] Interview with GL3 (MOJ), Jul. 2015; Interview with PL3, Jul. 2015
[197] *See, e.g.,* Interview with NGOL7, Mar. 2016 (noting that plaintiffs' lawyers often failed to check all the facts before submitting a lawsuit, mentioning one lawyer by name).

comes to Claims? While government lawyers would argue they are, plaintiffs' lawyers beg to differ, and these arguments are difficult to support with data.[198] Whatever the actual scope and root causes of these phenomena, the State did not hesitate to use in its favor them when pushing to restrict the Claims. For instance, the then Minister of Justice, Meir Sheetrit, treated fraudulent claims as one justification to limit Claims:

> *"This Bill is aimed at preventing* ***fraudulent*** *claims against Israel. There is almost no other country in the world that during an armed conflict… pays compensation or even opens the door to those people that may be injured in such a conflict to bring claims against it."*[199] *[Emphasis added]*

Later in the discussion, General Finkelstein gave an example of a fraudulent claim identified by a private investigator retained by IDF.[200] In this sense, the existence of this phenomenon, for which plaintiffs' lawyers are at least partially to blame, helped make the case for restricting Claims.

III. Palestinians' Tort Litigation Challenging Cause Lawyering Traditions

Given both the opportunities and perils associated with the involvement of plaintiffs' lawyers in the Claims, this case study serves as a vehicle to explore questions regarding the significance of the cause lawyering framework and its relationship with tort litigation's efficacy as a social change strategy. The impact cause lawyers may have also raises questions as to the limited involvement of human rights NGOs in the Claims, which I explore below too.

A. Cause Lawyers or Not – Why Does It Matter?

Using cause lawyering as a framework to study the Claims' plaintiff-side lawyers raises the question: does it matter whether a particular group of lawyers is classified as cause lawyers? For three reasons, I argue it does. *First*, as lawyers are often a key component of social justice struggles, it helps us conceptualize where social change

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[198] *See* Freeman Engstrom, *Retaliatory RICO*, *supra* note 194.
[199] *See* Protocol of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, *available at*: http://www.knesset.gov.il/protocols/heb/protocol_search.aspx
[200] *Id. See also* remarks by Adv. Dani Gueta from the Prime Minister's office in a previous discussion, noting that Palestinians use the lack of factual clarity to bring claims under false pretense. Protocol of the Knesset's Constitution, Law, and Justice Committee of 7/20/1998, *available at*: http://www.knesset.gov.il/protocols/heb/protocol_search.aspx

comes from and which instruments can be used to challenge the status-quo. A significant part of studying the capacity of tort litigation to bring about social change is through the legal actors involved in such litigation. *Second*, it matters since legal actors perceive themselves as either cause lawyers or not, and act accordingly. Lawyers are aware of others' expectations of them and for the most part live up (or "down") to these expectations, and this affects the type of legal representation they give to clients. *Third*, it matters because of the different sets of expectations different types of lawyers invoke among judges, clients, policy makers, and the public. These expectations impact the way in which cases play out. For instance, judges may decide differently a case brought by a lawyer they perceive as a cause lawyer. And clients may opt for retaining a lawyer based on whether s/he is perceived as a cause lawyer. As a result, differences in legal representation also affect the capacity of tort litigation to challenge social injustice.

Despite the significance of the cause lawyering label, we must resist the urge to stretch it indefinitely. Indeed, the rationale for a more inclusive definition of cause lawyering—one which extends to lawyers with both pecuniary and public good motivations—is that including such lawyers would strengthen the commitment they feel to a cause they believe in, and encourage them to take a more active role in struggles for social change.[201] While pecuniary interests alone should not exclude lawyers from the realm of cause lawyering, blurring the distinction between cause lawyers and other lawyers strikes me as problematic. Not only would an overly broad definition of cause lawyering dilute its meaning; it would not necessarily change the way lawyers perceive themselves nor would it encourage private, for-profit lawyers to consider their role as professionals in contributing to the public good. As Erichson notes, "[g]iven the strength of self-serving bias as a cognitive matter, combined with lawyers' extraordinary ability to take refuge in the adversary system and the principle of moral nonaccountability, lawyers are likely to see the public good in their own work and unlikely to rethink basic

[201] Russel Pearce argues in this context that distinguishing between two sectors of the legal profession—defined largely by level of financial compensation—may signal to lawyers with more lucrative practices that they need not concern themselves with the social good because this is not their role. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 418 (2001). *See also* ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE, 27-8 (2013) (discussing various scenarios that may potentially be considered cause lawyering, and raising the question of whether an overbroad definition can turn cause lawyering into "the exception that swallows the rule").

commitments."[202] Instead of expanding the definition, I argue, cause lawyers and "typical" lawyers should collaborate, tapping into the latter's edge on issues such as client recruitment and formulating better tools for social justice advocacy.

B. Personal Injury Lawyers as (No) Cause Lawyers

The case of plaintiffs' lawyers litigating Palestinians' Claims complicates our traditional understanding of cause lawyering. On the one hand, as the data reveal, pecuniary interests drove plaintiffs' lawyers into representing Palestinians in the Claims, thus allowing this field to exist for a while, given the scarcity of "traditional" cause lawyers taking on Claims. This enabled a significant number of plaintiffs to recover damages.[203] Moreover, on the individual client's level, plaintiffs' lawyers' interests were more closely aligned with their clients' than were NGO lawyers' interests. On the other hand, financial considerations, and the practices used by plaintiffs' lawyers, have also given rise to market pathologies associated with personal injury lawyering permeating the Claims. More importantly, while achievements have been notched on the individual client's level, there was no over-arching agenda attempting to further a collective cause through the Claims, such as government accountability or IDF change of practices.

Treating each case individually has not only played a role in the particularization of the issues raised by the litigation, it also fostered Israel's strategy of systematically discouraging Claims by increasing litigation costs and imposing procedural obstacles that decrease plaintiffs' likelihood of winning. Moreover, the State was quick to use the abovementioned pathologies, such as fraudulent claims, when pushing for limiting the Claims. The involvement of plaintiffs' lawyers has thus both supported the State's strategy of discouraging Claims through diminishing financial incentives to bring them and gave the State "ammunition" in its fight against the Claims, which ultimately led to the Claims' demise.

Considering this context, how should we think about these plaintiffs' lawyers? It is clear that these lawyers, especially the personal injury lawyers, are no typical cause

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[202] Erichson, *supra* note 133.

[203] As noted, according to MOD FOIA data, during the years 1990-2014 the MOD had paid approx. 310M NIS (~$86M) in damages to Palestinians for harm caused by Israel's security forces, in approx. 1,700 different cases. At least some of these achievements can be attributed to the work of plaintiffs' lawyers. Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author).

lawyers. Even if they operate in "cause lawyering territory" when representing Palestinians, they do not consciously orient their professional lives toward promoting an ideological cause, nor do they elevate that cause, to the extent they possess one, above the particularities of the case at hand. Their practices—for better or worse—do not match what we would expect from cause lawyers.

Much of the conceptual challenge of treating these lawyers as cause lawyers lies in the characteristics of personal injury law. Plaintiffs' lawyers operate in a highly uncertain market. Individual consumers often do not recognize the need for their services and personal injury lawyers and consumers are largely unknown to one another. The one-shot nature of this practice also means that client relationships are not enduring, making it difficult to maintain and grow a practice.[204] While large-firm corporate lawyers can cross-sell legal services to existing clients, the plaintiffs' personal injury bar, comprised primarily of solo and small firm practitioners, struggles to recruit new business.[205] Furthermore, because personal injury lawyers usually take cases on a contingency basis, a great deal of risk is associated with accepting a case.[206] The plaintiffs' personal injury bar also ranks low among lawyers in professional prestige.[207] Within the plaintiffs' personal injury bar, at the top-end are personal injury lawyers who handle coveted high-value cases, while at the bottom-end are those handling the routine, lower-value auto accident and "slip-and-fall" cases.[208]

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[204] JEROME CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO 145-49 (1962). In their 1995 study of the Chicago bar, John Heinz et al. found that plaintiffs' personal injury lawyers serve an average of 142 different clients per year. By contrast, general corporate lawyers serve an average of 32 clients per year. *See* JOHN HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005); *See also* Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L SCH. L. REV. 243 (2006).

[205] Parikh, *id*, at 247.

[206] *Id*.

[207] Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor*, 66 AM. SOC. REV. 382, 386–87 (2001).

[208] Whereas those in the low-end tend to handle a high volume of smaller value cases, and are more likely to be solo practitioners or to practice in smaller firms with just two to three attorneys per firm, high-end and elite practitioners tend to handle a smaller volume of high-value cases and often concentrate in medical malpractice cases and other more complex disputes. Parikh, *supra* note 204, at 247-48. For similar patterns observed in New York and Wisconsin, *see*, respectively, Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 LAW & SOC. INQ. 87, 92-108 (1988) and Herbert M. Kritzer, *The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers*, 8 INT'L J. LEGAL PROF. 225, 225-50 (2001).

These characteristics make personal injury law an uncomfortable fit to the cause lawyering framework. The constant need to recruit new clients and persistent income uncertainty driven by contingency fees focus lawyers' attention on daily financial concerns and make it difficult to pursue more abstract, ideological causes.[209] Furthermore, the public image that characterizes these professionals does not allow them to be viewed as ideologically driven. High-profile, successful personal injury lawyers may even be looked down on as "ambulance chasers" or, for our purposes, "tank chasers." This denies personal injury lawyers who represent Palestinians the reputational benefits of cause lawyering in the eyes of their colleagues, the courts, and the public. As I showed above, NGO lawyers continue to "look down" on plaintiffs' lawyers, even when the latter are pursuing cases that may be considered in the public interest.

I thus consider these plaintiffs' lawyers "de facto" cause lawyers who, while engaging in various professional practices, take on representation of underserved clients and occasionally succeed in helping them recover compensation. Some of these lawyers may only be vaguely aware of realizing such a role or shy away from asserting it, viewing the litigation as "just business." Others attempt to construct a distinct identity in the legal field by using the cause as a professional resource and viewing themselves as ideologically driven. Rather than offering yet another "ultimate" definition for cause lawyers based on this diverse, heterogenous group of lawyers, I chose to propose a new label which to me best captures the hybrid nature of these lawyers' practice. This labeling helps convey the multitude of clients' motivations too. Indeed, while some clients are mostly concerned with recovering compensation—particularly those who face financial hardships, others care more about pursuing a collective Palestinian cause.[210] These different clients may well seek different types of legal representation by either "de facto" or traditional cause lawyers. The "de facto" label thus complicates our understanding of the diverse roles lawyers assume in politically-complex settings.

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[209] On the flip side, one may argue that because external incentives are weak, ideology may strengthen plaintiffs' lawyers' motivation to pursue financially non-viable cases.

[210] For an account of Palestinian claimants' motivations to pursue Claims, see Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict* (working paper, April 2018), at pp. 33-34.

My observations also call upon judges, lawyers and the public to adopt a more nuanced perception of lawyers, rather than labeling them solely based on affiliation. The view of plaintiffs' lawyers as "typical"—rather than cause—lawyers, forms a set of expectations from them, which these lawyers tend to follow, perceiving themselves in the same way they are viewed. This perception resonates with the emergence of the litigation as a series of isolated cases. While these lawyers' work at times advances the interests of specific underserved clients, it is ill-suited to altering the status-quo. The remaining question, explored below, is whether an opportunity was missed to employ the Claims towards affecting such broader social change.

C. From De-facto Cause Lawyers to Traditional Cause Lawyers

The trends associated with plaintiffs' lawyers representing Palestinians in the Claims, and especially the particularization of the Claims and their failure to challenge the status-quo, raise questions as to the almost complete absence of the "traditional" cause lawyers from this practice. In the Israeli-Palestinian context, the "traditional cause lawyers" would mean those that work for legal non-profits, primarily human rights NGOs. Would more significant involvement of such NGOs have made a difference in the litigation? Would NGOs somehow do better than plaintiffs' lawyers, if not on the individual client's level then on a broader social change level?

As noted, the Claims are part of the landscape of legal controversies between Palestinians and the Israeli military regime regarding Palestinians' rights. These individual lawsuits relate to a broader plea of an underserved, marginalized people, as reflected in the Israeli government's efforts to restrict these lawsuits. The Claims thus feature clear public interest characteristics, which should have made them appealing for NGOs, as a means to pursue government accountability and prevent impunity.

In the U.S., legal non-profits, alongside private public interest law firms, frequently engage in direct client advocacy in tort litigation launched as part of social justice struggles.[211] Though tort law and public interest litigation are not always the most

[211] *See, e.g.,* Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis, in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 85 (Burton A. Weisbrod et al. eds., 1978); Van Schaack, *With All Deliberate Speed*, *supra* note 2; Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421 (2005); Bloom, *supra* note 10; Trubek, *supra* note 129; Krishnan, *supra* note 10. Tort cases may also be a source of income for NGOs struggling to cover their operation costs.

natural allies,[212] civil and human rights lawyers have acknowledged that torts can be a powerful tool to advocate for their clients and promote social justice through the cumulative effect of a significant volume of cases. Tort litigation is thus viewed as an increasingly important component of social justice struggles.[213]

1. Where are the traditional cause lawyers?

The role played by legal non-profits in similar U.S. contexts thus begs the question: why haven't more Israeli human rights NGOs[214] taken such a role in the Claims? As one personal injury lawyer proudly mentioned, the work of promoting this field was done primarily by plaintiffs' lawyers, as opposed to the lack of involvement by human rights NGOs; in his own words, "*[y]ou can forget about the NGOs*." He further noted, referring to *Adalah*—a well-established human rights NGO which operates to promote Arab-Palestinians' rights in Israel—that it:

> *"receives donations and people there care about their positions and their paychecks but the real job – establishing norms in court – was done by us [the plaintiffs' lawyers]."*[215]

Indeed, most human rights NGOs in Israel refrained from taking on representation in the Claims, and the one NGO that did venture into this practice eventually abandoned

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[212] Scholars have addressed the various dilemmas stemming from marrying torts and social justice. *See* Abel, *id*; Martha Chamallas, *Discrimination and Outrage: The Migration From Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007)(discussing the use of torts to combat discrimination and harassment in the workplace); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1918-27 (2007) (discussing the limitations of constitutional litigation aimed at money damages based on section 1983).

[213] Alongside civil rights litigation, based on section 1983 or the law of torts, the Alien Tort Statute and other transnational torts have also been used in recent years by legal non-profits aimed at promoting human rights, such as the Center for Justice and Accountability (CJA). *See, e.g.*, Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38(4) LAW & SOC'Y REV. 635 (2004) (arguing that Alien Tort Claims should be understood as part of broader competing strategies for regulating corporate obligations); Van Schaack, *With All Deliberate Speed*, *supra* note 2; Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165 (2001) (noting various ways in which tort law has been used to compensate victims of human rights abuses in the U.S.).

[214] By using this term, I refer specifically to several Israeli human rights NGOs that deal with the rights of Palestinians—both citizens and non-citizens. These include, apart from the Center, the Association for Civil Rights in Israel (ACRI), Adalah, the Public Committee against Torture in Israel, Yesh Din, Physicians for Human Rights, Shomrey Mishpat – Rabbis for Human Rights, Gisha-Legal Center for Freedom of Movement, and B'Tselem (the latter is involved more on the documentation side).

[215] Interview with PL1, Jul. 2015.

it.[216] What accounts for this decision? According to Neta Ziv, the cause lawyering space in Israel is comprised of two major fields of work: direct legal aid, mostly in the criminal field; and actions oriented towards changing general norms.[217] These non-profits are often funded by international foundations, rely on a limited number of employed activists and expert advisers, and are marked by overrepresentation of lawyers. Israeli human rights NGOs focused on the Conflict belong in the latter category.[218] The characteristics of these organizations profoundly impact their practices by limiting their foundation of legitimate power and prospective courses of action. It is perhaps not surprising, then, that given this structure these organizations focus much of their efforts on turning on a regular basis to the High Court of Justice to advance their social and political causes. Such course of action does not require a broad basis of public support and relies on the hope that HCJ justices will support their goals, or at least that this forum could be used for attracting media attention to the issue.[219]

In contrast, human rights NGOs in Israel rarely engage in civil litigation.[220] The first explanation to their absence, then, is related to *expertise*. Traditionally, social justice work in general and human rights work in particular was conducted in Israel vis-à-vis the

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[216] This refers to representation of individual claimants, as opposed to taking part in the more principled issues related to the Claims, such as the constitutional challenge in the High Court of Justice to 2005 Amendment and discussions in the Israeli Parliament regarding the Act. In both these areas, human rights NGOs were very active.

[217] In the latter, lawyers in non-profits advance legislation; initiate and submit lawsuits and petitions of principle; join pending proceedings as 'Amicus Curiae;' and at times manage to impact the creation, interpretation and implementation of norms. *See* Neta Ziv, *Two Decades of Cause Lawyering in Israel: Where Do We Go from Here?* 1 MA'ASEI MISHPAT 19, 24 (2008) (in Hebrew). According to Ziv and Shamir, in Israel there are two forms of organizations advocating for social change. One is premised on popular mobilization or social movements with a wide social basis. The other is based upon "private" initiatives and the activities of issue-specific professional organizations. They argue that the so-called awakening in Israeli civil society is characterized by social activism of the latter type rather than broad popular action. Neta Ziv & Ronen Shamir, *State-Oriented and Community-Oriented Lawyering For A Cause: A Tale of Two Strategies*, *in* CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA 287, 291 (A. Sarat and S. Scheingold, eds., 2001).

[218] *Id*.

[219] *See* Dotan, *Cause Lawyers Crossing the Lines*, *supra* note 22; Ravid, *supra* note 251 (arguing that government lawyers too rely on such strategy to affect social change).

[220] There is no ethical rule barring Israeli NGOs from representing clients in tort cases, or even collecting fees from clients, so long as these are not charged for profit purposes. In general, the rules governing legal representation by non-profit organizations in Israel are quite slim, with only one rule (section 11B to the Ethics Rules) governing their activity and the rest established in case law. In practice, the Center did not charge fees for its services and only used a percentage of the damages (if awarded) to cover litigation costs.

State, in administrative, constitutional or, rarely, criminal proceedings.[221] Much of the practice of these NGOs is focused on high profile, "impact" litigation against the State at the Supreme Court level, rather than direct client advocacy in lower courts.[222] A senior lawyer at the Association for Civil Rights in Israel (ACRI), the almost official cause lawyering organization of Israel, supported this view.[223] NGOL8 noted that, in general, ACRI does not engage in tort cases. It tries to impact policy setting in Israel, using both public advocacy and legal tools, and focuses on issues that affect broad change rather than change the situation for a specific individual. As a result, ACRI often prefers impact litigation to direct client advocacy.[224]

This strategic focus also stems from the *structure* of these organizations, being ill-quipped to handle the intricacies of complex tort litigation.[225] As NGOL8 mentioned, "*we have limited resources… We do not have the expertise and resources needed to handle all of the preliminary proceedings in tort cases*."[226] And NGOL3, senior lawyer at Adalah, noted: "*Adalah is not a legal aid organization, we do not deal with direct client advocacy but rather with constitutional aspects of barriers to litigation.*"[227] Human rights lawyers in Israel are typically trained in administrative, constitutional or criminal law rather than tort law,[228] and the legal departments in which they work are built to handle fast-pace,

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[221] Ziv, *Two Decades of Cause Lawyering in Israel, supra* note 217, at 22-23. Ziv notes in this context that in recent years there has been a growing trend of adopting additional strategies for achieving social justice through law, including acting vis-à-vis corporations and providers of public services rather than focusing only on the State.

[222] *See, e.g.,* Yoav Dotan & Menachem Hofnung, *Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements*, 23.1 LAW & POL'Y 1 (2001). A similar impression was expressed by some of the respondents: Interview with PL2, Sep. 2014; Interview with PL9, Sep. 2015.

[223] This position may also be related to the mandate NGOs receive from their donors, some of which are international organizations and foreign governments. When a donor is interested in a particular legal activity to be pursued with its donation, this constrains the NGO's agenda. Interview with NGOL1, Jul. 2014.

[224] Interview with NGOL8, Mar. 2016.

[225] *See generally* Yifat Bitton, *Women and Torts: Between Discrimination and Suspension: Thoughts Following CC (Bet-Shemesh) 41269-02-13 Phillip vs. Abutbul*, 41 MIVZAK HE'ARAT PSIKA 4, 5-10 (2015) (in Hebrew). Similar thoughts were articulated by interviewees: Interview with NGOL2, Aug. 2014; Interview with PL9, Sep. 2015.

[226] Interview with NGOL8, Mar. 2016 (noting further that none of the other human rights NGOs, except the Center, had taken direct client advocacy in such cases).

[227] Interview with NGOL3 (Adalah), Jun. 2015.

[228] This is a result of the traditional courses of action taken by human rights NGOs in Israel. *See* Ziv, *Two Decades of Cause Lawyering in Israel, supra* note 217, at 22-3; Bitton, *Women and Torts, supra* note 225. *See also* Interview with PL9, Sep. 2015. While private human rights lawyers generally fit this description too, some of them tentatively ventured into the practice of the Claims, viewing it as human rights litigation.

simple legal procedures, like those of the High Court of Justice, as opposed to complicated civil proceedings.[229] As a result, such organizations, including ACRI and Adalah, *did* take part in the more principled aspects of the Claims, like a constitutional challenge and discussions in the Israeli Parliament regarding amendments to the Act.[230] Personal injury lawyers, conversely, typically work on a case-by-case, contingency basis, prefer settlements to principled court decisions, and often litigate in lower courts.[231] This made the practice of Palestinians' tort claims appealing to these lawyers, particularly when substantial damages were sought.

A final explanation for human rights NGOs' reluctance to take on direct client advocacy in the Claims is even more intuitive: their *inclination*. According to interviewees, there was a general disdain towards dealing with money-related lawsuits among these organizations, and a preference for symbolic or declaratory remedies. As one respondent noted, referring to the reaction to the Center's decision to take on Claims:

> *"Even prior to the disaster of shortening the limitations period, the human rights community was grimacing at us because 'we are not about the money, we are only about human rights' and in this sense, they did not like the Center's willingness to do the dirty work, meaning to do the work."*[232]

What is the source of Israeli human rights NGOs' disdain towards tort claims? The answer is related to the way these organizations perceive their role. It is the flip side of the financial appeal the Claims had in the eyes of plaintiffs' lawyers: handling cases aimed at recovering money damages seems "dirty" to these organizations. Unlike those "other" lawyers, they prefer to focus on matters of principle.[233]

See, for instance, Interview with PL3, Jul. 2015; Interview with PL9, Sep. 2015. One of these lawyers even hired a personal injury lawyer, PL7, to manage claims in her practice.

[229] *See* Bitton, *Women and Torts, id*. My interviewees expressed similar points: Interview with NGOL2, Aug. 2014; Interview with PL4, Mar. 2015 (noting that frequent personnel turnover also makes NGOs better suited for shorter, less complex proceedings).

[230] *See* Bachar, *supra* note 26; Interview with NGOL8 (ACRI), Mar. 2016.

[231] For an analysis of the impact of personal injury, contingent fee lawyers and their relationship with their clients on the civil justice system, see Kritzer, *Contingent-Fee Lawyers and Their Clients, supra* note 153.

[232] Interview with KS3, Mar. 2016.

[233] Interview with PL9, Sep. 2015.

The view of monetary damages as morally reprehensible is not new, nor is it unique to Israeli NGOs. As Michele Dauber notes in connection with the 9/11 compensation fund that conferred monetary relief to victims of the attack, "[b]eing deserving of aid demands a moral innocence born of blameless victimization; yet anticipating or receiving compensation implies a moral stain, a self-regard that properly requires policing and skepticism."[234] According to Dauber, compensation turned victims into recipients of public funds, which immediately triggers suspicion.[235] Similarly, tort litigation demands the type of cost-benefit analysis that tends to make people uncomfortable, especially in issues of human suffering.[236] The reluctance of high-minded human rights NGOs to get involved in the Claims may be a manifestation of these very phenomena. As a key respondent from the Center put it:

> *"It was unworthy to them [the other NGOs]. Like passing by a stinky trashcan. It was plain and simple a perception that money is improper, that we are handling things that are of far greater importance, human rights, and the fact of the matter is that we remained isolated [in this area of practice]."*[237]

The NGOs' approach towards the Claims may also portray a skepticism towards the capacity of tort lawsuits to affect social change. As noted, bringing about institutional change by using individual tort lawsuits, like the Claims, is a highly contested endeavor. NGO lawyers questioned the deterrence effect of such litigation, especially when the

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[234] Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 291 (2003). *See also* DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY – WHY WE DON'T SUE 12-14 (2016) (discussing Americans' ambivalent view of tort law, due to the placing a price-tag on human injuries.)

[235] *Id*.

[236] This phenomenon is described in social-psychology as "Taboo Trade-offs." Developed by Alan Page Fiske and Philip Tetlok, the theory suggests that "[c]ost-benefit analysis ignores and usually does violence to normative distinctions that people value as ends in themselves." Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 294 (1997). *See also* Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52(6) STAN. L. REV. 1821, 1825-27 (2000). This relates to the argument on money being an imperfect substitute to human pain. *See* John F. Witt, *Two Humanitarianisms* (working paper presented at Stanford Law School faculty seminar, Mar. 2015); VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); VIVIANA ZELIZER, THE SOCIAL MEANING OF MONEY (1994); MARTHA CHAMALLAS & JENNIFER B. WRIGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010).

[237] Interview with KS3, Mar. 2016.

State can pay relatively little and avoid liability. They also described the Claims as a personal matter—for individuals to receive compensation away from public attention.[238] As one NGO lawyer noted:

> *"I doubt it if [Claims] really have an effect on changing behavior, I do not know to what extent lessons were learned from things that were uncovered through these lawsuits. There is the aspect of individual compensation but that doesn't mean changing the behavior on the ground… Why? […] It is unclear whether the lawsuits had this potential in the first place."*[239]

Nevertheless, more recently, several Israeli human rights NGOs have begun pursuing tort litigation, within the confines of their budgetary constraints and lack of expertise. This suggests that disdain towards this practice may be subsiding, at least when it comes to serving other underserved clients besides Palestinians.[240] Israeli human rights NGOs are perhaps starting to acknowledge the value such lawsuits can bring to social justice struggles.[241]

Two important challenges lie ahead: *first*, the lack of established norms of ethical conduct for non-profit organizations engaging in tort litigation. As Ziv notes, NGOs who provide legal services as part of their social justice work raise a host of ethical dilemmas that are unique to their line of work, at the intersection of legal counsel and public service.[242] Their special characteristics merit a separate model of professional ethics which addresses these dilemmas. *Second*, following the U.S. trend,[243] Israeli public

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[238] Interview with NGOL5, Jan. 2016; Interview with NGOL8, Mar. 2016; Interview with NGOL3, Jun. 2015; Interview with NGOL9, Mar. 2016.
[239] Interview with NGOL8, Mar. 2016.
[240] *Id*; Interview with KS3, Mar. 2016; Interview with NGOL2, Aug. 2014.
[241] Interview with NGOL8, Mar. 2016; Interview with KS3, Mar. 2016; Second interview with PL9, Dec. 2015; Interview with NGOL2, Aug. 2014.
[242] Neta Ziv, *Lawyering for the Public Interest - Who is the Public? What is the Interest? Professional Dilemmas in Representing Minority Groups in Israel*, 6 LAW AND GOVERNANCE 129 (2001) (in Hebrew).
[243] For a discussion and critique on the tort system in the U.S., see BURKE, *supra* note 63, at 22-59; ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 126-59 (2003). A recent study by the American Bar Foundation, led by Stephen Daniels, looks at U.S. public opinion regarding the civil justice system. For preliminary findings, see: http://www.americanbarfoundation.org/research/project/22.

opinion is showing signs of skepticism towards the justice system in general,[244] and civil justice in particular.[245] This skepticism naturally seeps into public perception of lawyers engaging in this practice.[246] A more informed and nuanced understanding of torts, their value and pitfalls,[247] may contribute to altering public perceptions of the Israeli tort system and strengthening its role as a mechanism for pursuing social justice.

2. The counterfactual: would NGOs have made a difference?

A final question remains: what is the counterfactual? To the extent that more human rights NGOs have been involved in the litigation of the Claims, would that have made any difference? Would clients have been better off represented by NGO lawyers than by plaintiffs' lawyers? Would the legislative backlash had been avoided? Such questions resist definitive answers. We can, however, raise hypotheses about the differences NGOs would have made based on what we know about their practice and culture.

On the one hand, NGOs may have been able to get better results. As repeat players in human rights litigation,[248] they may have gained a similar status in the civil courts adjudicating the Claims. Their aggregated experience in litigating Claims[249] may have contributed to building a strategic plan around the Claims—considering, for instance, which cases are better to bring first or take all the way to the Supreme Court to build a precedent on[250]—and gaining leverage vis-à-vis repeat players on the government's side.[251] Israeli human rights NGOs also have networks of field personnel in

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[244] In a general survey conducted in 2015, only 30% of the public expressed full trust in the Israeli justice system. Hen Ma'anit, "Survey: all time low in the public trust in the legal system, the parliament and the police." GLOBES (Oct. 26, 2015), *available at*: http://www.globes.co.il/news/article.aspx?did=1001076264.
[245] *See, e.g.*, Hen Shalita, "It is a phenomenon: the frivolous lawsuits Israelis bring." GLOBES (May 16, 2015), *available at*: http://www.globes.co.il/news/docview.aspx?did=1001036001. The view of the Claims is also influenced by how Palestinians are viewed. *See* Bachar, *Access Denied*, *supra* note 48.
[246] For this view of lawyers in the U.S. civil justice system, see Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1993).
[247] *See* Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?* 16(2) THE JUSTICE SYSTEM JOURNAL 139 (1993) (noting the need for further research on litigation behavior and outcomes in the civil justice system).
[248] Dotan, *Cause Lawyers Crossing the Lines*, *supra* note 22, at 195.
[249] On aggregated dispute settlement and the role of repeat players in the American tort system, see Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 4 (2004).
[250] *See* Van Schaack, *With All Deliberate Speed*, *supra* note 2.
[251] However, a law cannot be challenged directly through tort litigation. *See* Itay Ravid, *Sleeping with the Enemy: On Government Lawyers and Their Role in Promoting Social Change: The Israeli Example*, 50 STAN. J. INT'L L. 185 (2014) (discussing ways in which lawyers bring about social change in Israel).

the OPT that can both raise awareness about the Claims and collect evidence in a timely fashion, particularly given a shorter limitations period on Claims.[252] In addition, NGOs' experience in handling the bureaucratic aspects of the Israeli occupation, such as obtaining entry permits into Israel for Palestinian plaintiffs and their witnesses, would have been instrumental for the Claims.[253] NGOs would have also been able to provide financial support to claimants in need,[254] avoiding ethical misconduct of lending money to clients. Furthermore, NGOs could have continued to bring cases under the current restrictive legal regime. As noted, when it became increasingly challenging for Palestinians to win Claims, plaintiffs' lawyers started to abandon this practice. This is one of the reasons that Claims are now gradually disappearing.[255] In this setting—of "litigating against all odds"—NGOs may have been able to endure, at the very least with a strategy of documenting incidents of human rights violations, if not attempting to alter the current policy.[256]

On the other hand, as this Article has shown, representation by NGO lawyers also has its disadvantages, as manifested by the client/cause dilemma. This challenge is even greater in tort litigation, which typically centers on a specific dispute and parties. Furthermore, it is far from clear that heavier NGO involvement would have changed the trajectory of the legislative proceedings aimed at discouraging the Claims. If anything, it

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[252] Interview with PL9, Sep. 2015; Interview with NGOL9, Mar. 2016; Interview with NGOL4, Aug. 2014.
[253] In this area the Center had a clear advantage over plaintiffs' lawyers. Interview with NGOL4, Aug. 2014. A similar impression arose from my conversation with GS who worked at the Center for 6 years. A Palestinian, she described her work vis-à-vis claimants and the Civil Administration in gathering evidence and aiding the Center's personal injury lawyers in building cases. Interview with KS2, Mar. 2016. *See also* Interview with NGOL10 (Gisha), Jul. 2016 (noting Gisha's experience with obtaining permits and the unfortunate lack of collaboration between the organization and plaintiffs' lawyers).
[254] Interview with NGOL4, Aug. 2014; Interview with NGOL7, Mar. 2016; Interview with NGOL9, Mar. 2016; Interview with PL17, Feb. 2016; Interview with KS3, Mar. 2016.
[255] MOD data on Claims filed between 2000 and 2013 show a sharp decrease in the number of Claims submitted per year starting in 2008. Report in Response to Freedom of Information Query to the MOD, Jan. 30, 2014 (provided by GL8 (MOD), on file with author); *see also* B'Tselem, *Getting Off Scott-Free: Israel's Refusal to Compensate Palestinian for Damages Caused by Its Security Forces*, 48 (Mar. 2017), *available at*: http://www.btselem.org/sites/default/files2/201703_getting_off_scot_free_eng.pdf (citing data showing that in recent years fewer Claims are filed and less compensation paid).
[256] *See* Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering against Capital Punishment*, *in* CAUSE LAWYERING, *supra* note 9, at 317 (describing the case of death penalty lawyers who continue to vigorously represent defendants in capital cases, even when they know that the chances of less-severe sentences—let alone acquittal—are remote. According to Sarat, these lawyers view their work as documenting the arbitrariness of the death penalty for some future political environment that will be more amenable to their claims).

seems more likely that high-profile human rights NGOs would have drawn media and public attention to a low-profile field, which may have led to putting a cap on the litigation at an even earlier stage.[257] This would have prevented a substantial number of Palestinian claimants from successfully recovering damages from the State.[258]

Given these competing hypotheses, it is difficult to assess the actual impact more NGO involvement would have generated. That said, several takeaways can be discerned from this analysis. First, NGO policies refraining from using tort litigation to affect social change should be revisited, and discussion held on the potential advantages such a strategy may bring. Removing taboos from NGOs' portfolios should be the first step. Second, Israeli NGO lawyers should consider specializing in personal injury torts, to increase their capacity to serve as a tool in social justice struggles. Finally, there is a desperate need for more collaboration between NGOs and private lawyers working in the same space. The experience on human rights matters and institutional advantage that NGOs bring, alongside private lawyers' expertise in private law and client recruitment skills, could form a stronger team to pursue social justice goals.

Conclusion

The literature on cause lawyers has acknowledged the various types of lawyering that can fit into this framework and has chosen different ways to define the scope of the term and its components. This Article chose a definition which looks at both the motivations and the practices of the lawyers, in order to explore cause lawyers in relation to the cause they are pursuing, the clients they represent, and the political context in which they operate. Choosing this path allowed for a deeper look at the lawyers in question, not only asking whether these lawyers are cause lawyers but also engaging with the implications of the answer. Through this examination, the Article complicated our understanding of cause lawyering and when and where it takes place. It also highlighted

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[257] This is supported both by the hypothesis made by KS3, key stakeholder at the Center, that the Center's involvement was partially responsible to the legislative amendments (Interview with KS3, Mar. 2016), and by recent developments in Israeli politics which reflect a trend of an increasingly close scrutiny of human rights NGOs activity and funding. *See, e.g.* Barak Ravid, *Merkel to Netanyahu: Worried about Effect of 'NGO Bill' on Israeli Civil Society*, HAARETZ (Feb. 17, 2016), *available at*: http://www.haaretz.com/israel-news/.premium-1.703825.

[258] *See* data on scope of compensation noted in part 1(i).

the importance of carefully and responsibly categorizing lawyers as cause lawyers for better understanding social change processes.

The Article revealed how in the Israeli-Palestinian political climate, contingency fee plaintiffs' lawyers assumed the role traditionally reserved for NGO lawyers, acting as what I called "de facto" cause lawyers. In so doing, these lawyers filled a void left by Israeli human rights NGOs that, for various reasons, shied away from using this unique tort mechanism. These "de facto" cause lawyers were able to help a significant number of claimants recover compensation for their losses. However, not only did the involvement of these lawyers shape the litigation as a stream of diffused cases rather than a collective struggle, but it may have inadvertently supported the State's discouragement policy towards the Claims.

This Article provided an intriguing, provocative setting to rethink the role of lawyers in social justice civil litigation, turning the spotlight to lawyers' characteristics, motivations, and practices that affect the use of tort actions as a tool for social and political struggles. Further to examining a unique, previously unexplored case study, the Article challenged the cause lawyering literature by highlighting the challenges that arise when profit-oriented lawyers penetrate "cause lawyering territory." It raised a consequential issue for policy makers and civil society organizations: how does the involvement of plaintiffs' lawyers shape litigation processes they participate in? According to the findings of this Article, not only is the answer context-dependent, it also may well vary between sub-cultures of legal actors. Importantly, various types of lawyers perceive themselves in "cause lawyering" terms. Their behavior, as well as the expectations others have from them, shape both specific cases and broader litigation processes. This renewed understanding of the cause lawyering framework amplifies its significance for studying court-centered social change struggles in general, and social justice tort litigation in particular.

Indeed, the unique characteristics of the Israeli-Palestinian context undoubtedly affect the findings of this study, including, for example, Israel's democratic regime, the special status of Palestinian plaintiffs as people under occupation, and Israel's ethnic composition, comprised, among other ethnicities, of Jewish Israelis and Palestinian citizens of Israel. However, on a more abstract level, the analysis offered in this Article

regarding the impact of legal actors on the efficacy of tort litigation as a tool for social change may apply to other settings. Such an analysis should emphasize the practices of the lawyers involved and the political context in which they operate, as demonstrated in this case study, rather than focus solely on lawyers' motivations. Future research could expand this examination to other contexts of social justice tort litigation. Internationally, the research could be replicated to NGOs and private plaintiffs' lawyers representing foreign victims of government-inflicted human rights violations suing for damages in the U.S. Domestically, it could be expanded to civil rights litigation on behalf of minority victims of police brutality. Such subsequent projects would help build a body of research on the complex role lawyers play in tort litigation aimed at social justice, which in turn would allow for a more well-founded theory on the impact lawyers have on social change processes.

Beyond shedding a new light on the pivotal role lawyers hold in highly politicized court-centered social justice struggles and their impact on the evolution of the legal regime, the Article constituted a first step towards conceptualizing tort litigation as a tool for promoting social justice.[259] Understanding the various actors involved in tort litigation marks the beginning of an important process of designing more effective strategies to combat rights violations around the globe.[260]

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[259] On patterns of interaction between international and national courts, see Jenny S. Martinez, *Towards an International Judicial System*, 56(2) STAN. L. REV. 429 (2003).

[260] In this context, see the model suggested by Maya Steinitz for an International Court of Civil Justice which would have jurisdiction to adjudicate transnational corporations' human rights abuses. *See* Maya Steinitz, *Back to Basics: Public Adjudication of Corporate Atrocities Mass Torts*, HARV. INT'L L.J. (2016).

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

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Procedural barriers which limit individuals' ability to bring lawsuits—like conditioning litigation upon the provision of a bond—are a subtle way to reduce the volume of tort litigation. The use of such procedural doctrines often spares legislatures from the need to debate the substance of legal rights, especially when those rights are politically controversial. This Article presents a case study of this phenomenon which has escaped scholarly attention, in the intriguing context of the Israeli-Palestinian Conflict. On the books, a unique mechanism enables non-Israeli citizen Palestinians of the West Bank and Gaza Strip to bring civil actions for damages against Israel before Israeli civil courts. Yet, since the early 2000s, Israel began using a host of procedural obstacles to restrict Palestinians' access to its civil courts, effectively precluding their ability to bring claims arising from Israeli military actions. Through fifty-five in-depth interviews with lawyers, policy makers, plaintiffs, and other key stakeholders, alongside a host of secondary sources such as parliamentary protocols and NGO reports, this Article considers the impact this process has on Palestinians' access to justice. While the use of procedure to encroach on an injured person's right to compensation may be considered a taking of property, and thus, conceptualized as a dignity taking, such an analysis overlooks a key component of the harm caused to these individuals. Procedural restrictions that block access to the courts also deny Palestinians of their right to participate in the litigation process. Focusing only on property rights—the "end game" of the litigation—ignores benefits derived from the litigation process, including accountability, transparency, and recognition, which may be particularly important when it comes to plaintiffs from vulnerable, disadvantaged groups.

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,[261] surviving members of the Abu

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Me'tiq family filed a civil action in an Israeli court alleging the commission of various torts by the State of Israel.[262] Upon a motion made by the State, the plaintiffs were ordered to provide a bond in the amount of 12,000 NIS (approximately $3,000) as a pre-condition for the litigation.[263] 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.[264] The case was dismissed without ever reaching the merits.[265]

Procedural restrictions that limit individuals' ability to bring lawsuits—like conditioning litigation upon the provision of a bond—are a subtle way to reduce the volume of civil litigation, particularly because of their ostensibly neutral facade.[266] 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.[267] 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,[268] to bring civil

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[261] *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].

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

[263] *Id*.

[264] 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 319.

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

[266] *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).

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

[268] 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

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 interviews[269] I conducted with plaintiffs' lawyers, government lawyers and other key stakeholders[270] involved in the Claims.[271] I also rely on statutes, bills, parliamentary protocols, case law, reports by human rights organizations, and responses to Freedom of Information Act ("FOIA") queries.[272]

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.[273] 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.[274] 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.

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mentioned below) are also entitled to bring Claims, but since these are the exception, and for brevity, I refer to plaintiffs hereinafter as Palestinians.

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

[270] These include plaintiffs, retired judges and representatives of human rights NGOs.

[271] 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.

[272] 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 L. & SOC. INQ. 796, 812 (2016).

[273] 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 L. & SOC. INQ. 902, 909–10 (2014); BERNADETTE ATUAHENE, WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM 23–34 (2014).

[274] See discussion *infra* Section III.C.

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.

I. 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"),[275] on the one hand, and Palestinian residents of the West Bank and Gaza (the Occupied Palestinian Territories, or "the Territories") on the other hand.[276] 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-scale military operations.[277] 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.[278] As such, the Israeli case presents a rare exception to typical bars on bringing claims against the injuring state

[275] 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.

[276] 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).

[277] 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.

[278] 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).

in armed conflicts.[279] This exception stems from the special status of the Territories as occupied[280] and the lack of alternative recourse for Palestinians in their home forum.[281] 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,"[282] a term which has been significantly expanded over the years.[283]

There are two main, albeit limited, alternatives to the mechanism set forth by the Act.[284] First, claimants can submit an application to an *ex-gratia* committee, which has discretion to award small amounts of compensation 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.[285] Second, a Claims Headquarters Officer ("Kamat Tov'anot") at the Israeli Ministry of Defense ("MOD") also has the authority to

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[279] 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).

[280] 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 549.

[281] 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).

[282] 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]

[283] 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).

[284] 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.

[285] 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].

compensate Palestinian claimants due to damage caused by military actions.[286] But per MOD officials, this function is rarely used.[287]

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,[288] the civil proceeding is often used as an alternative course of action to the dead-end criminal liability path.[289] 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.[290] Only a small fraction make it to the Supreme Court on appeal,[291] and even those cases are rarely covered by the media.[292] Finally, prior to the Second Intifada, a violent Palestinian-Israeli confrontation that started in September 2000, most successful Claims ended with a settlement.[293] The tendency to settle during those years relates to the

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[286] 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] (last visited Oct. 2, 2017).

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

[288] *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 Aft*er, *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**].

[289] 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.).

[290] 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.).

[291] 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].

[292] 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).*

[293] FOIA Reports, *supra* note 574. According to plaintiffs' lawyers, settlements accounted for 99 percent of their successful Claims. Confidential Interview with PL2 (Sept. 16, 2014)*; Data on cases represented by

evidentiary challenges that both plaintiffs and the State face in the Claims.[294] 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.[295] On the State's side, soldiers released from duty are often difficult to reach, do not remember the specifics of a chaotic situation,[296] or are reluctant to take part in the trial.[297] Moreover, in previous years, the IDF did not always maintain records of its use of force incidents.[298] These challenges thus encouraged settlements in the pre-Second Intifada era.

Yet, beginning in the Second Intifada,[299] 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 decade between 2002 and 2012, this percentage significantly decreased to only seventeen percent.[300] And it dropped even further over the last several years.[301] This dramatic decrease was closely tied to an amendment to the Act promulgated in 2002.

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).*

[294] 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).*

[295] Confidential Interview with PL4 (Mar. 3, 2015)*; Confidential Interview with PL2 (Sept. 16, 2014)*; Confidential Interview No. 2 with PL7 (Aug. 11, 2014).*

[296] 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).*

[297] Confidential Interview with GL11 (DA) (Mar. 9, 2016).*

[298] Confidential Interview with GL5 (DA) (Aug. 13, 2015)*; Confidential Interview with PL3 (July 28, 2015).*

[299] 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).

[300] Bachar, *supra* note 556.

[301] FOIA Reports, supra note 574; 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/files2/201703_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).

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,[302] leaving it to courts to interpret the term.[303] As Assaf Jacob explains, the courts' interpretations of "Combat Action" varied and ranged from expansive to restrictive.[304] 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,"[305] 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*."[306]

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 zone."[307] 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.[308]

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[302] *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).

[303] 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 556.

[304] *See* Jacob, *supra* note 303, at 159–63.

[305] 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).

[306] Act, *supra* note 282, § 1; Bachar, *supra* note 556.

[307] Additionally, Article 5B provided that the State is not liable for injury sustained by an enemy state national. Act, *supra* note 282, § 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.).

[308] *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

Human rights non-governmental organizations ("NGOs") challenged the 2005 Amendment before the Israeli High Court of Justice ("HCJ").[309] 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."[310] 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.

II. 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 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.[311] Yet, even prior to this ban, significant hurdles have been placed on Palestinians' Claims, which still apply to pending proceedings by Gaza plaintiffs. The

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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).*

[309] 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.).

[310] 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.).

[311] 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.

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.[312] 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.[313]

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.[314] When a Claim is brought, the State regularly seeks an order from the court requiring the plaintiffs to deposit a bond,[315] arguing that the same logic that refers to foreigners should apply to Palestinians.[316] However, Palestinians are different from other foreign plaintiffs, both because they are not allowed to bring Claims against Israel before Palestinian courts,[317] and because their

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[312] DUDI SCHWARTZ ET AL., CIVIL PROCEDURE: DEVELOPMENTS, PROCESSES, AND TRENDS 112 (2007) (Hebrew). *Compare* 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.).

[313] *See* KARAYANNI, *supra* note 281, at 231–41 (explaining some of the difficulties that Palestinians who bring claims for damages against Israel encounter, including bonds).

[314] *Id.*

[315] 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).*

[316] 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.).

[317] 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.

personal economic ability is often quite limited.[318] Palestinians' low standard of living[319] is typically overlooked by the courts, which have set bond amounts at increasingly high rates in recent years.[320] Per one District Attorney's Office ("DA") lawyer, the average bond is 20,000 NIS (approximately $5,200) per plaintiff.[321] 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.[322]

When plaintiffs fail to deposit a bond, the Claim is suspended or dismissed.[323] 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.[324] 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*."[325] 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 State [authorities] running around. So, we said let's demand the deposit of a bond, it's a move that saves lots of headache*."[326]

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[318] *See* KARAYANNI, *supra* note 281, 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 9,000NIS (approximately $2,400), yet security amounts have soared since.

[319] For comparison, one survey indicates that the average monthly income of a Palestinian family is 1,771NIS (approximately $460). *See* DEMOCRACY & WORKERS' RIGHTS CTR., OVERVIEW OF CURRENT ECONOMIC CONDITIONS IN PALESTINE (2006); KARAYANNI, *supra* note 281, at 234 n. 81 (citing DEMOCRACY & WORKERS' RIGHTS CTR., *supra*).

[320] For a review of bond amounts, see KARAYANNI, *supra* note 281, at 233–34.

[321] Confidential Interview with GL10 (DA) (Mar. 7, 2016).*

[322] 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).*

[323] 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).*

[324] Confidential Interview with GL4 (DA) (Aug. 18, 2014).* *See also* Confidential Interview with GL5 (DA) (Aug. 13, 2015).*

[325] Confidential Interview with GL5 (DA) (Aug. 13, 2015).*

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

However efficient from the State's perspective, the bonds create a heavy burden on the plaintiffs' side.[327] 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."*[328]

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.[329] 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.[330]

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

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[327] 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).*

[328] Confidential Interview No. 2 with PL6 (Aug. 12, 2015).*

[329] 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).*

[330] 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).

legal counsel, undergo examinations by medical experts,[331] sign documents to be filed in court, and other legal purposes.[332] 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.[333] Changing rules and hours of operation,[334] long wait times,[335] requirements for additional documents,[336] and degrading treatment by Israeli soldiers at checkpoints all complicate the bureaucratic process.[337] 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.[338] 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

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

[332] 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).*

[333] 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%20טיפול%20בבקשות%20לצרכים%20משפטיים.pdf. [https://perma.cc/T7UX-CRQ8] (in Hebrew).

[334] Confidential Interview with KS2 (Mar. 15, 2016).*

[335] Confidential Interview with PL5 (Aug. 14, 2014).*

[336] Confidential Interview with PL8 (July 12, 2015).*

[337] 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).*

[338] 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 5,000NIS (approximately $1,300). 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].

using that information.[339] While one can challenge the State's decision in a petition before an administrative court, this is yet another lengthy process.[340] Petitioners also have slim chances of succeeding, as judges are often too risk-averse to reverse the State's determination of security prevention.[341]

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.[342] 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.[343] NGOs challenged this policy twice before the HCJ in 2010 and in 2012.[344] While these challenges yielded a procedure aimed at allowing Gaza plaintiffs to enter Israel for legal needs,[345] in actuality, little has changed. The procedure requires

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[339] 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 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).*

[340] One respondent noted such a petition is still pending after 3 years. Confidential Interview with KS3 (Mar. 10, 2016).* *See also* Confidential Interview with PL12 (Dec. 13, 2016)*; Confidential Interview with PL5 (Aug. 14, 2014).*

[341] Confidential Interview with PL11 (Dec. 16, 2015).*

[342] For Israel's policy regarding Israel–Gaza crossing, see OFFICE OF THE SPOKESMAN, COGAT, 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] (last visited Oct. 3, 2016).

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

[344] 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.).

[345] *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*,

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 regarding the plaintiff's financial status needs to support the application.[346] 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.[347] 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,[348] and insists on original power-of-attorney documents in Claims by Gaza plaintiffs.[349] Courts adhere to this position, suggesting plaintiffs should meet with counsel on neutral territory like Cyprus.[350] The consequences of these hurdles range from hindering plaintiffs' ability to follow through

GISHA, http://gisha.org/userfiles/file/LegalDocuments/procedures/entering_and_exiting_gaza/44en.pdf [https://perma.cc/8VFY-CJGM] (last visited May 23, 2017).

[346] Confidential Interview with PL8 (July 12, 2015).* *See also* the petitioners' arguments in the *Abu Daka* case, *supra* note 344.

[347] Applications at times refer to several plaintiffs jointly. Also, at least 2 of these applications referred to other legal proceedings that are not Claims-related (in 30 applications, the type of legal proceeding in question was not mentioned; 14 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).

[348] 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.).

[349] 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).*

[350] 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] (last visited Oct. 3, 2017).**

with a Claim,[351] to cases dragging on for years, to court judgments dismissing Claims.[352] Dismissal can be due to a plaintiff's failure to produce evidence[353] or the running of an applicable statute of limitations.[354]

The third barrier category relates to *time and space* restrictions that apply only to Palestinians' Claims.[355] As for *time*, starting in 2002, the statute of limitations period on Claims was reduced from the regular seven years to only two years.[356] This provision prioritizes the State's interest in overcoming evidentiary challenges over a plaintiff's interest in recourse.[357] 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.[358] Furthermore, the shortened limitations period created a backlog of cases that needed to be filed

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[351] For example, in *Badrasawi*, a Claim was filed due to the death of a 17-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**] (last visited Oct. 3, 2017). 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 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).*

[352] 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).*

[353] *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 344 (on file with author).

[354] 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).

[355] Given the limited scope of the Article, these are merely examples of key limitations.

[356] Act, *supra* note 282, § 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 . . . .").

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

[358] 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).*

immediately, causing an impossible workload for plaintiff-side lawyers.[359] Courts have been unwilling to relax the confines of the limitations period, even when faced with tragic circumstances.[360]

Another requirement is submitting a written notice[361] to the Israeli authorities within sixty days of the incident that caused the injury.[362] Claimants unaware of this requirement may easily miss the sixty-day deadline in the turmoil following the incident.[363] Yet, both the State and the courts have been unsympathetic to such cases.[364] Moreover, this requirement binds claimants to a description of the circumstances that led to their injury,[365] 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.[366] 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

[359] 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).*

[360] 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 5250/08 Hashan v. State of Israel (2014) (Isr.) (in which a majority of Supreme Court justices embodies this strict approach).

[361] As set forth in the Act, *supra* note 282, § 5A(2)(a) (requiring written notice of damages).

[362] 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 282, § 5A(4) (2002).

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

[364] 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).

[365] 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] (last visited Oct. 3, 2017), the form should also be available in Arabic, but this version could not be found on the Ministry of Defense website.

[366] Confidential Interview with PL4 (Mar. 3, 2015).*

Jerusalem and Southern districts.[367] While this Amendment was justified by citing efficiency and the need for judges' specialization,[368] the motivation behind it seems to have been that courts in other parts of Israel, particularly in the Nazareth and Haifa districts, were known to be more sympathetic towards Palestinian plaintiffs.[369] As one DA lawyer mentioned, government lawyers nicknamed the Haifa courts after a terrorist organization due to this sympathy.[370] Per that lawyer, amassing Claims in designated courts was an "*amazing*" development.[371]

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.[372] 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.[373] This is yet another hindrance on Palestinians' access to civil justice.[374] The impact of these restrictions is also evident

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[367] 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). The Act, *supra* note 282, § 5B.

[368] *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).*

[369] 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 (unpublished manuscript) (on file with author).

[370] Confidential Interview with GL4 (DA) (Aug. 18, 2014).**

[371] *Id.*

[372] 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).

[373] 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).*

[374] *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).

in the dramatic decrease in the volume of settlements, as procedural hurdles now help DA lawyers win cases without having to settle.[375]

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.[376] 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 submit an appropriate PoA* or because of Combat Action."[377] 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."*[378]

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.

III. 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.

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[375] FOIA Reports, *supra* note 574; Bachar, *When Lawyers Go to War*, *supra* note 372, at 13–14.
[376] The data also show a decline in the number of successful Claims. FOIA Reports, *supra* note 574; STEIN, *supra* note 301, at 48.
[377] Confidential Interview with GL10 (DA) (Mar. 7, 2016) (emphasis added).*
[378] 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.

A. Procedure as Means of Restricting Access to Civil Justice

Access to justice has long been recognized as a fundamental human right.[379] 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.[380] Whereas the right to access to justice can be explained in terms of the *judiciary*'s ability to fulfill its function as a branch of government,[381] 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.[382] 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."[383] In particular, intricate legal tools can serve as instruments in defining and altering laws that apply to the rights of

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[379] 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).

[380] 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, 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).

[381] *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).

[382] *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).

[383] 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).

vulnerable groups like minorities and natives.[384] 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."[385]

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.[386] 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

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[384] *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).

[385] Kedar, *supra* note 384, 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 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").

[386] 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).

invalidation, as so few cases are now successfully brought.[387] 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*."[388] 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 . . . .*"[389]

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 one of old facades preserved along a streetscape, the buildings for which they were once an entrance having long ago been abandoned."[390] Plaintiff-side lawyers observed this frustrating duality of having a right to sue on paper while facing overwhelming hurdles that block Claims in practice.[391] 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'fadalu [go ahead, Arabic], bring a lawsuit, see where that gets you.'"*[392]

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.[393] 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

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

[388] 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).*

[389] Confidential Interview with GL12 (MOJ) (Mar. 15, 2016).*

[390] Lahav, *supra* note 266, at 1701.

[391] 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).*

[392] Confidential Interview with PL5 (Aug. 14, 2014).*

[393] *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).

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.[394] 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.[395] Dignity takings have mostly been associated with narrowly defined events—such as the Rwandan genocide—and have not yet been expanded to broader contexts.[396] 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.[397]

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.[398] Therefore, the accepted approach in most countries where property is given a constitutional status has been that

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[394] Atuahene, *supra* note 272, at 796, 804. Dignity Restoration merits its own discussion, which exceeds the scope of this Article.
[395] *Id.* at 799.
[396] *See infra* Section B.2.
[397] *See* KARAYANNI, *supra* note 281, at 229–30.
[398] *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).

the constitutional concept of property includes both a right *in rem* and a right *in personam*.[399] 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.[400] Moreover, the Basic Law encompasses injured individuals' right to compensation, intended to "make them whole," as part of these individuals' property rights.[401] 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.[402] As a result, preventing vindication of this right may well be considered a taking of property.[403]

2. Dignitary Affront

Atuahene argues that a dignity taking involves an intentional or unintentional "dehumanization" or "infantilization" of the dispossessed.[404] 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,

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[399] 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).

[400] 5752–1992, SH No. 1391 (Isr.), http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf. *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.)).

[401] 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.).

[402] HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 352, 373–75.
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, 392–393. Since the State did not provide a satisfactory answer to this question, he decided to join the majority. *Id.* at 390.

[403] 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 393, 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.

[404] Atuahene, *supra* note 272, at 800–01.

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.[405]

In contrast, I argue that the data reflect a discrimination of Palestinians as a group, which infringes on their dignity.[406] 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.[407] 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 humiliated.[408] 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.[409]

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

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[405] *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.").
[406] 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.
[407] *See also* Kedar, *supra* note 403, at 870 (suggesting that such othering may apply to a population perceived as an enemy or a threat to security).
[408] *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).
[409] *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.

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 childlike or inferiors, or be referred to as animals."[410] 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.[411] 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 norms . . . ."*[412]

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.[413] 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*."[414]

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[410] Kedar, *supra* note 403, at 883.
[411] *See, e.g.*, Confidential Interview with GL7 (MOD) (Jan. 3, 2016)*; Confidential Interview with GL5 (DA) (Aug. 13, 2015).* *See also supra* notes 305, 308 and accompanying text for a discussion on the Knesset Protocols.
[412] Protocol of the Knesset's Constitution, Law, and Justice Committee of June 24, 2002 (emphasis added) (in Hebrew).
[413] *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).
[414] Protocol of the Knesset's Plenum, First Reading of Amendment (No. 8), June 10, 2008 (in Hebrew).

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*."[415] 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*."[416] 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*."[417]

Based on these data, I argue that imposing procedural restrictions on Claims represents discrimination against Palestinians as a group.[418] 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")[419] or the Rwandan genocide.[420] However, this middle-ground category demands more 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

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[415] 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).*

[416] 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.

[417] 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 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).

[418] Atuahene, *supra* note 272, at 799.

[419] *See* Rose, *supra* note 393, at 944.

[420] Atuahene, *supra* note 272, at 799–800.

reparations.[421] Nevertheless, while Atuahene notes that "dignity restoration can also be a remedy for involuntary property loss that does not involve dehumanization or infantilization,"[422] 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.[423]

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.[424] Over the years, however, other theories have considered various purposes the tort system fulfills. According to civil recourse theory,[425] once an individual has behaved tortiously, the state empowers private parties—victims and 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.[426] 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

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[421] *Id*. at 796.
[422] *Id*. at 815.
[423] For a review of the various objectives of tort law, see JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 2–5 (2016).
[424] John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516–17 (2003).
[425] 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").
[426] *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).

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.[427] Such recognition may be particularly essential for Palestinians—people under Israeli occupation without any forum of their own to resort to.[428] An acknowledgment of their dignity and autonomy from those in power is of crucial importance,[429] as is the opportunity to demand answers and to stand on equal footing with their state perpetrators.[430]

Relatedly, research has identified injured individuals' need to receive a "day in court" as a mechanism to experience control over what happened to them.[431] 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.[432] 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.[433] 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

[427] *See* Goldberg, *supra* note 399, at 626.
[428] 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).
[429] 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 266, at 1668.
[430] *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).
[431] 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).
[432] 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).
[433] Tyler & Lind, *supra* note 432, at 65–88; LIND & TYLER, *supra* note 432, at 236.

litigation.[434] However, causality may also run the other way: instrumentalism can result from unfair treatment by those in power.[435]

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.[436] "[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 . . . ."[437] And "[e]ven when these narratives are not fully satisfactory . . . they help participants come to terms with the past."[438] An illustration can be found in the Rachel Corrie case.[439] 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,[440] but as they expressed in the conversations we had, the process was nevertheless significant for them.[441] 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.[442] As Sarah, Rachel's sister, put it "*I'm sorry this is how things worked out but I'm not sorry we [brought the Claim]*.

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[434] 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).

[435] Huo et al., *supra* note 434, 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).

[436] Lahav, *supra* note 266, at 1683.

[437] *Id.*

[438] *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.

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

[440] *Id.*

[441] Confidential Interview with the Corrie Family (July 29, 2015).*

[442] *Id.*

There were so many little details we learned . . . . It was almost like a little investigation of our own."[443]

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.[444] 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.

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

[443] *Id.*

[444] 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 272, at 821.

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 functions 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.[445] 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.[446] 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.

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

[446] 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).

COLLATERAL DAMAGES: DOMESTIC MONETARY COMPENSATION FOR CIVILIANS IN ASYMMETRIC CONFLICT

Gilat J. Bachar[*]

The armed conflicts of the twenty-first century, which often take place among civilian populations rather than on traditional battlefields, push states to acknowledge and rectify the resulting harm to foreign civilians. In particular, asymmetric conflicts, which involve confronting non-state actors within civilian populations, tend to cause more of what has come to be known as 'collateral damage.' Such harm to civilians can be inflicted, for instance, in a car accident caused by security forces, drone attack, or riot control efforts. How should these losses be addressed? This Article examines two competing models. The U.S. military provides compensation to civilians injured by its activity in Iraq and Afghanistan through a military-run program, governed by the Foreign Claims Act and condolence payments. In contrast, Israel enables non-citizen Palestinians injured by Israeli military actions to bring tort lawsuits before Israeli civil courts. Notwithstanding differences between these two conflicts, both entail military forces engaging with civilians while assuming quasi-military or policing roles. Yet, scholars have not yet juxtaposed the distinct compensation mechanisms applied in each conflict, vis-à-vis the goals of monetary damages under tort law. This Article seeks to fill this gap. Drawing on tort theory, social psychology, and socio-legal studies, the Article examines the structure of domestic conflict compensation programs. It utilizes data from public records, interviews with relevant stakeholders, NGO reports, and Freedom of Information Act requests to compare the American and Israeli compensation paradigms. Through this analysis, the Article offers guidelines for designing compensation programs which address both government accountability and victims' needs, to effectively redress the harm modern-day conflict causes to civilians.

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"Services: Death of Wife / Qty: 1 / Unit Price: $2,500"

U.S. Government Purchase Order-Invoice-Voucher, Afghanistan, June 2005[447]

"*The death of any innocent person, let alone a young boy, is a terrible tragedy ... but this does not justify imposing liability on the State and on the soldiers*."

CC (Haifa) 14685/94 *Estate of Abu Hatla v. The State of Israel* (2004)[448]

INTRODUCTION

Twenty-first century armed conflicts often target non-state actors rather than another nation-state's army. In particular, asymmetric conflicts—by which I mean conflicts between belligerents whose relative military power or strategy differ significantly[449]—tend to move away from traditional battlefields and into heavily populated areas, causing more "collateral damage" to non-combatant civilians.[450] Security forces may negligently cause incidental bodily injuries and property damages to civilians, for instance, in checkpoint shootings, drone attacks, riot control efforts, and even car accidents. This changing military landscape presses states to address the losses such warfare inflicts upon innocent civilians.[451] This Article examines two civilian compensation models used in asymmetric conflicts—Israel/Palestine and U.S./Iraq and Afghanistan. Notwithstanding differences between the two conflicts, both share the characteristic of confronting non-state actors that operate from within civilian populations, often using them as a human shield.[452] Furthermore, both involve military

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[447] U.S. Government Purchase Order-Invoice-Voucher (May 16, 2005), *available at*: http://www.aclu.org/natsec/foia/pdf/Army0205_0207.pdf.

[448] CC (Haifa) 14685/94 The Estate of Abu Hatla v. The State of Israel (2004) (Isr.).

[449] There are various types of asymmetric conflicts. In this Article, I discuss two types of such conflicts, both of which involve confrontation between military forces and non-state actors: prolonged military occupation and counterinsurgency operations (sometimes called "wars on terror"). *See* MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 13-20 (2010); BRAD ROBERTS, INST. FOR DEF. ANALYSES, DEFENSE THREAT REDUCTION AGENCY: ASYMMETRIC CONFLICT 2010 (2000) (noting the growing share of asymmetric conflicts in armed conflicts around the world).

[450] *See generally* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008); RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2007); H. R. McMaster, *On War: Lessons to Be Learned*, 50 SURVIVAL 19 (2008).

[451] At least those that respect the rule of law.

[452] Emanuel Gross, *Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism*, 16 EMORY INT'L L. REV. 445 (2002) (discussing the moral dilemmas of democratic states fighting terrorist organizations that both target and hide amongst innocent civilians).

forces performing policing and quasi-military—rather than strictly military—roles, such as controlling volatile riots. By comparing the compensation paradigms applied in each conflict, I offer guidelines for designing programs to effectively address the harm modern-day conflict causes to civilians.

Traditionally, scholars examined compensation for armed conflict victims either through International Humanitarian Law (IHL) and Human Rights Law (HRL) in ongoing conflict,[453] or through Transitional Justice in the aftermath of conflict.[454] These international law frameworks are called upon since states typically fail to address this issue themselves. However, IHL norms of armed conflict do not challenge civilian harm as long as there were reasonable attempts to ensure that the 'distinction' between civilians and soldiers was upheld, so that civilians are not deliberately targeted, and as long as civilian harm, when it does occur, is deemed 'proportional' to military objectives.[455] And, HRL tends to target intentional, gross human rights violations, such as torture, rather than *negligent* acts, which are the focus of this Article. Because of the limitations of IHL and HRL in protecting civilians, the overall weakness of international tribunals in a world still committed to state sovereignty,[456] and the general focus of transitional justice on *post-* (rather than *amid-*) conflict,[457] there is a gap in current

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[453] For a review of IHL norms that govern compensation for victims of armed conflict, see Yossi Wolfson, *The Double-edged Sword of the Combat Action Rule*, 16 HA'MISHPAT BA'RESHET 3, 5 (2013) (Hebrew); B'Tselem, *Getting Off Scott-Free: Israel's Refusal to Compensate Palestinian for Damages Caused by Its Security Forces*, 7-8 (Mar. 2017), *available at*: http://www.btselem.org/sites/default/files2/201703_getting_off_scot_free_eng.pdf

[454] *See, e.g.*, Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157 (2003); Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51 (2007).

[455] *See, e.g.*, DAVID KENNEDY, OF WAR AND LAW (2006); EYAL WEIZMAN, THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA (2011).

[456] Yael Ronen, *Avoid or Compensate-Liability for Incidental Injury to Civilians Inflections during Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181 (2009) (discussing the failure of IHL and HRL to ensure compensation for civilians injured during lawful military operations, and the limited ability of international tribunals to offer compensation to victims); Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1795 (2009) (noting that there is no provision in IHL for the compensation of civilian victims – except when there are violations of the rules of lawful combat, for example in cases of genocide or rape).

[457] In recent years there have been voices in TJ literature arguing that it should be applied to ongoing conflicts, but this area of scholarship is still nascent. *See, e.g.*, Cyanne E. Loyle, *Transitional Justice During Armed Conflict* (Mar. 2017), OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS, Retrieved Nov. 14, 2017, from http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-218; Par Engstrom, *Transitional Justice and Ongoing Conflict*, *in* TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS (Chandra Lekha Sriram, Jemima García-Godos, Johanna Herman & Olga Martin-Ortega eds.) (2013) (discussing ways in which TJ

international law scholarship regarding government accountability for *negligent* acts conducted in *ongoing* asymmetric conflicts. This Article thus explores the role of existing domestic compensation tools, such as military payments and tort lawsuits, in promoting accountability in asymmetric conflicts between democratic, rule-of-law-adhering states and non-state actors.

In the U.S., the military provides compensation to civilians injured in its operations in Iraq and Afghanistan in two ways: through an administrative program, governed by the Foreign Claims Act (FCA), and through solatia/ condolence payments ("condolence payments"). The FCA provides the U.S. military its primary tool to compensate local civilians for losses unrelated to combat operations, like car accidents caused by security forces. Claims according to the FCA are evaluated by Foreign Claims Commissions, composed of military officers, in a standardized bureaucratic process. Since 2003, the average payment according to the FCA for loss of life is $4,200.[458] Alongside the FCA regime, the military also grants condolence payments: symbolic, *ex gratia* payments offered in claims deemed related to combat, in amounts typically no higher than $2,500 per person killed.[459] In contrast, in the Israeli-Palestinian Conflict, a unique mechanism enables non-Israeli citizen Palestinians of the West Bank and—until recently—the Gaza Strip (the Palestinian Territories; "the Territories"), to bring civil lawsuits for damages against the State of Israel before Israeli civil courts, for injuries resulting from Israel's security forces actions in the Territories.[460]

While the U.S.'s military engagement in Iraq and Afghanistan is a (relatively) short-term counterinsurgency operation conducted miles away from its territory and citizens, Israel's presence in the adjacent Territories has continued, with changes in degree and scope, over the last fifty years, with no end in sight. Arguably, the Israeli occupation imposes on Israel a different set of obligations towards Palestinians compared

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is increasingly embedded in conflict resolution efforts and evaluating the recent trend towards judicial intervention in ongoing conflicts).

[458] *See* Center for Civilians in Conflict, *US Military Claims System for Civilians* (2008), *available at*: http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf

[459] Smaller amounts are allocated for bodily injury and property damage. Part II.B. *infra*.

[460] I refer to non-citizen Palestinians, as opposed to Israel's Arab minority. Foreign nationals are also entitled to bring claims, but since these are less common, and for brevity, I refer to plaintiffs as Palestinians.

to those owed by the U.S. to Iraqi and Afghan civilians.[461] Despite these differences, it is fruitful to compare the compensation models each conflict represents and examine them vis-à-vis the goals of monetary compensation under tort doctrine and the unique characteristics of conflict settings.[462] Not only will this comparison illustrate the dilemmas involved in designing victim compensation programs in asymmetric conflict, it will also illuminate the motivations underlying such programs. The U.S. Army trumpets damages payments as one way to win the hearts and minds of civilians in war zones.[463] But do these payments actually help achieve this goal? And should such a goal even underlie victim compensation programs? Israel, conversely, does not purport to win Palestinians' hearts and minds, but rather describes Palestinians' access to its courts as an unparalleled, generous standing given to them as parties to an armed conflict.[464]

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[461] In this sense, while Israelis see themselves as the ingroup and Palestinians as the outgroup, in the U.S./ Iraq and Afghanistan relationships both sides seem to be outgroups. This categorization may affect decision-making in various contexts, including compensation. Cf. Lawrence A. Messe, Robert W. Hymes, & Robert J. MacCoun, *Group Categorization and Distributive Justice Decisions*, *In* JUSTICE IN SOCIAL RELATIONS 227 (1986) (exploring how group categorization processes can mediate the perceived applicability of one's sense of justice to reward distribution decisions).

[462] While other countries offer payments to injured civilians, including the UK, Australia, Canada, Germany, and the Netherlands, less information is available concerning these mechanisms. With respect to Canada, for example, evidence of payments was leaked out by way of a report to the Receiver General in 2010, which revealed that C$650,000 was distributed in Afghanistan between 2008 and 2009. However, further information has been difficult to acquire. *See* Center for Civilians in Conflict, *Monetary Payments for Civilian Harm in International and National Practice* (Oct. 2013), *available at*: http://civiliansinconflict.org/uploads/files/publications/Valuation_Final_Oct_2013pdf.pdf; Tristana Moore, *Anger Mounts in Germany Over Its Afghan Air Strike*, TIME (Dec. 10, 2009), *available at*: http://content.time.com/time/world/article/0,8599,1946644,00.html. The U.K.'s system is similar to the U.S.'s. Like the U.S., the British used in Iraq and Afghanistan a 'table of standard injury and death payments to guide them. It includes suggested awards of $200 for minor injuries, $240 for the loss of a toe, $1,000 for the loss of an eye and $7,000 for the amputation of both feet.' *See* Crina Boros et al., *A Few Thousand Dollars: The Price of Life for Civilians Killed in War Zones*, THOMSON REUTERS FOUNDATION (Jul. 16, 2014), *available at*: http://news.trust.org//item/20140716123155-r35zd/?source=jt; *Iraq War Compensation Total at £9m*, THE GUARDIAN (Jun. 16, 2010). While the Israeli model is rare, its basic structure bears similarities to claims brought in the U.S. under statutes like the Alien Tort Claims Act, the Torture Victim Protection Act, the Anti-Terrorism Act, and the Foreign Sovereign Immunity Act.

[463] U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 1-2 (2007) (presenting damages payments as an important tool in asymmetric conflicts). This tool is used alongside development strategies such as economic reconstruction. *See* Eli Berman, Jacob N. Shapiro & Joseph H. Felter, *Can Hearts and Minds Be Bought? The Economics of Counterinsurgency in Iraq*, 119(4) JOURNAL OF POLITICAL ECONOMY 766 (2011) (discussing reconstruction spending in Iraq as part of a "winning hearts and minds" strategy).

[464] *See* Position paper by the Chief Military Prosecutor, submitted on 19 December 2010 to the Public Commission for Examining the Maritime Incident of May 31, 2010 headed by former Supreme Court Justice Jacob Turkel, 75-77, *available at* (Hebrew): http://www.mag.idf.il/sip_storage//FILES/9/949.pdf (*see also* Turkel Commission website: http://www.turkel-committee.gov.il/files/wordocs/niar_emda_eng.pdf); Interview with GL9 (IDF), Dec. 2016 (noting that it is impossible for the Israeli military to win the hearts and minds of the Palestinian population through money damages given the long-standing animosity between the two peoples).

However, Israel has significantly restricted Palestinians' access to civil justice over the last fifteen years.[465]

The Article draws upon originally collected and publicly available data, including interviews with relevant stakeholders;[466] Freedom of Information Act (FOIA) requests; reports by non-governmental organizations; and legislative materials to evaluate each of the models. In so doing, the Article demonstrates that, while both compensation models have significant problems, Israel's tort-based model promises to better promote the threefold goal of adequate compensation, government accountability, and victim participation. Not only does the Article help grapple with the consequences of simmering, intractable asymmetric conflicts, it also explores the role of domestic tools on issues often left to the international legal system.

The Article proceeds in four parts. Part I examines the benefits and flaws of tort-based and no-fault compensation, both in general and as applied to asymmetric conflicts. Part II provides background on Israel's and the U.S.'s compensation programs. Part III compares these two models. Finally, Part IV offers guidelines for designing compensation programs based on the tort system, while acknowledging its limitations and allowing an opt-out option for victims who prefer an administrative compensation program. The conclusion puts forward final recommendations, suggesting that we need more empirical data on victims' needs in conflict settings to better shape our compensation and accountability regimes.

I. Tort Litigation vs. No-Fault Mechanisms in Asymmetric Conflict

What are the promises and perils of tort law and how do the unique characteristics of asymmetric conflict affect these objectives? To what extent do alternative

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[465] *See* Gilat J. Bachar, *Access Denied – Using Procedure to Restrict Tort Litigation: Lessons from the Israeli-Palestinian Experience*, 92 CHIC.-KENT L. REV. 841 (2018) (exploring various barriers Palestinians face in bringing claims against the Israeli government). Even prior to introducing these restrictions on Palestinians' access to civil justice, most successful claims ended with confidential out-of-court settlements.

[466] Originally collected interviews refer to the Israeli-Palestinian case. I conducted the interviews during 4 trips to Israel between June 2014 and July 2016, and in phone or Skype calls. I analyzed and anonymized the interview transcripts, which were originally in Hebrew (rarely in English), using the mixed methods application "Dedoose." Government lawyers ("GL") include three sub-groups: lawyers from the District Attorney's Office ("DA") who represent the State in court; lawyers from the Israeli Ministry of Justice ("MOJ") involved in legislation proceedings; and lawyers from 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.

compensation models better respond to victims' needs? This Part addresses these questions.

A. The Objectives and Benefits of Tort Law

Tort law has a variety of aims, including deterring harmful behavior, offering a mechanism for remedying wrongs, allocating the costs of injuries, and providing compensation to those who are injured.[467] Traditional accounts of tort law focus on its result-oriented objectives. Some scholars mark deterrence as the primary objective, namely creating incentives for desirable behavior and disincentives for unacceptable behavior,[468] while others theorize that the primary goal is to accomplish corrective justice: restore moral balance between parties and communicate a message about the wrong that was done.[469]

These traditional objectives—much like economics, behaviorist psychology, and public choice theories—emphasize the *outcomes* of tort litigation. The mass media and the legal literature perpetuate this view that monetary outcomes drive legal behavior,

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[467] For a summary of the various objectives of tort law, see JENNIFER K. ROBBENNOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW 2-5 (2016). For an analysis of alternative compensation regimes outside the tort model, see Elizaneth Rolph, *Framing the Compensation Inquiry*, 13 CARDOZO L. REV. 2011 (1991).

[468] Under an economic model focused on deterrence, tort liability aims to minimize the combined cost of accidents and accident prevention by forcing actors to take into account the consequences of their decisions to act or not to act, through requiring them to pay compensation to injured victims. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 189-90(6th ed. 2012); GUIDO CALABRESI, THE COST OF ACCIDENTS (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); STEVEN SHAVELL, THE ECONOMIC ANALYSIS OF ACCIDENT LAW (1989); Howard A. Latin, *Problem Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985).

[469] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM Sec. 6 cmt. d (2010) (articulating rationale for tort liability based on "corrective justice; imposing liability remedies an injustice done by the defendant to the plaintiff"); *see generally* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 INDIANA L.J. 349 (1992). This marks a key difference between deterrence and corrective justice theories: while the former typically do not emphasize the link between plaintiff and defendant (*see* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 627 (2002) (giving examples to the decoupling of compensation and liability)), the latter do, and argue that restoring the balance entails allocating plaintiffs' losses to defendants (*see, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 48 MICH. L. REV. 2348 (1990); Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessment of Compensatory and Punitive Damages*, 23 LAW & HUM. BAHAV. 313 (1999)). Yet, deterrence and corrective justice theorists have in common their emphasis on other goals apart from compensation, *i.e.*, making the plaintiff whole through money damages. *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's Demise*, 61 DEPAUL L. REV. 303, 355-56 (2011) (explaining that one of the reasons for the demise of no-fault compensation was the rise of deterrence and corrective justice theories – compensation was no longer "king").

judgments, and evaluations of the legal system.[470] But a major drawback of this analysis is its tendency to ignore procedural, *process*-related considerations.[471] Contrary to these outcome-driven theories, I underscore in this Article objectives derived from the process of tort litigation. As explained below, I view these as particularly important in asymmetric conflict settings, where monetary compensation on its own often does not suffice to provide complete redress for victims. For instance, *civil recourse* theorists distinguish the idea of corrective justice, which emphasizes restoring the equilibrium between injurer and injured, from the notion of tort law as a vehicle for civil recourse: "In permitting and empowering plaintiffs to act against those who have wronged them, the state is … relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor...".[472]

Additionally, the process of claiming reveals and transmits information about hazards and injuries.[473] Plaintiffs often recite the desire for information about what happened to them as a reason for filing a lawsuit.[474] As Alexandra Lahav notes, the litigation 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. Even when these narratives are not fully satisfactory, they

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[470] Dale T. Miller, *The Norm of Self-interest*, 54.12 AMERICAN PSYCHOLOGIST 1053 (1999). *See also* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. SOC. 171, 181 (2005).

[471] MacCoun, *id.*, at 182. For a review of the extensive social-psychological research on distributive justice, see Karen A. Hegtvedt & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & Lee Hamilton eds., 2000). *See also* MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE (1985).

[472] Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003). *See also* John C. P. Goldberg & Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998); Zipursky, id., 754-55; Jason M. Solomon, *Equal Accountability through Tort Law*, 103 NW. U. L. REV. 1765, 1777 (2009) (explaining 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").

[473] Wendy Wagner, *When All Else Fails: Regulatory Risky Products through Tort Litigation*, 95 GEO. L.J. 693 (2007) (discussing the information forcing function of tort litigation in the context of product liability); Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, _ WAKE FOREST L. REV. _ (2018) (discussing similar roles for the tort system in auto accidents).

[474] *See, e.g.*, Charles Vincent, Magi Young & Angella Phillips, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609 (1994); Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse*: *Experiences with the 9/11 Victim Compensation Fund*, 42(3) L. & SOC. REV. 645 (2008).

may help participants come to terms with the past.[475] The tort system also provides a forum in which plaintiffs and defendants can tell their stories, have their "day in court," which is an important part of procedural justice.[476] Moreover, tort 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 and autonomy.[477] The opportunity to stand on equal footing with injurers is of crucial importance too.[478]

These goals and benefits,[479] apart from being process- rather than outcome-related, are also characterized by a mixture of private and public orientations. Despite tort law's traditional focus on relationships between individuals,[480] its roles can be expanded to the public realm, including the enlistment of tort litigation towards social change.[481] The tort

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[475] Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65(6) EMORY L. J. 102, 128 (2016). For other functions of court-enabled transparency, see Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012); Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOC. 67(2013); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that there are reasons to expect that the imposition of constitutional tort damage awards against individual officers or their municipal employers has a deterrent effect on governmental actors and entities).

[476] Tyler, Lind and their colleagues showed that decision-making procedures, including civil litigation, not only deliver outcomes; they also convey information about our relationship with the group and its authorities. Individuals are especially attuned to the procedure's neutrality, third parties' trustworthiness, and signals of social standing, such as having a voice in the process. Tom R. Tyler & E. Allan Lind, *Procedural Justice, in* HANDBOOK OF JUSTICE RESEARCH IN LAW (Joseph Sanders & Lee Hamilton eds., 2000); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230 (1988).

[477] *See* 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 (2005). Relatedly, 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 475, at 112-3.

[478] *See* Jason M. Solomon, *What is Civil Justice*, 44 LOY. L.A. L. REV. 317 (2010) (relating the civil recourse aspects of tort law to concepts of democratic equality). In the words of Attorney Rhon Jones, a lawyer representing claimants eschewing the Gulf Coast Claims Facility following the Deepwater Horizon oil spill: "There's only one place where a waitress or a shrimper can be on equal footing with a company the size of BP, and that's a courtroom." Debbie Elliot, *BP's Oil Slick Set to Spill into Courtroom*, NPR, MORNING EDITION, Feb. 16, 2012.

[479] For a discussion of these and other benefits of the tort system, including the tort system's role as a public space for society to debate how tort obligations should be defined, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003).

[480] Goldberg, *id.*, at 516-20 (discussing the traditional account of tort law which described tort actions as personal to the victims, and money damages as personal redress to victims).

[481] *See, e.g.*, TSACHI KERE-PAZ, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE (2007) (arguing, from a normative perspective, for the incorporation of an egalitarian sensitivity into tort law and private law more generally); Yifat Bitton, *Women and Torts: Between Discrimination and Suspension: Thoughts*

lawsuit, in this sense, can be part of a broader political campaign, raising awareness of an issue and encouraging policy-makers to deliberate on it.[482] This argument applies, perhaps with greater force, to torts brought against governments, which are the focus of this Article. Given tort law's deterrent effect, tort lawsuits can induce change of practices in cases where fundamental rights are at stake.[483] Imposing liability on the state through an individual lawsuit may incentivize the state to change its practices to avoid paying tax revenues as damages to individuals.[484] While the issue of government liability also raises significant practical and theoretical difficulties,[485] civil society organizations in the U.S. and elsewhere manage to leverage tort litigation towards social change struggles.[486]

I thus argue that given its benefits—in particular, the combination of monetary compensation on the one hand and process on the other—tort litigation should have a significant role in promoting government accountability and victim rehabilitation in

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Following CC (Bet-Shemesh) 41269-02-13 Phillip vs. Abutbul, 41 MIVZAK HE'ARAT PSIKA 4, 5-10 (2015) (Hebrew) (discussing the benefits, and complexities, of using torts as a vehicle to achieve social change). As John Goldberg explains, *social justice theory* conceives of tort as a device for rectifying imbalance in political power, which corrects for pathologies of interest-group politics. By arming citizens with the power to sue corporations and other powerful actors for misconduct outside of the legislative and regulatory process, tort law permits judges and juries to hold such actors accountable. Goldberg, *supra* note 479, at 560-62. *See also* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 9 (2001); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533 (1999) (arguing that judges better represent the interests of the people than legislatures and regulators).

[482] PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 151-52 (1997).

[483] For justifications for using torts to promote social justice, see, e.g., Gregory Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000); Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness* 16 CAN. J. L. JURIS. 91 (2003).

[484] Bitton, *supra* note 481, at 7-8 and references there.

[485] Bitton, *supra* note 481, at 8. Social justice theory has also been criticized, both for its lack of descriptive power and for treating the political process as systematically skewed against plaintiffs. *See* Goldberg, *supra* note 479, at 562. Moreover, P.S. Atiyah in his critique of English tort law notes that, though the tort lawsuit is ostensibly conducted between a particular plaintiff and defendant, in practice the public pays for the damages (through insurance premiums when the defendant is a private individual or corporation, and through taxes when it is a public body), and plaintiffs are "in effect jumping the queue" by determining which topics are given political salience. P. S. ATIYAH, THE DAMAGES LOTTERY 171, 114-16 (1997).

[486] *See, e.g.*, Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38(4) LAW & SOC'Y REV. 635 (2004) (arguing that Alien Tort Claims should be understood as part of broader competing strategies for regulating corporate obligations); Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421 (2005) (arguing that civil rights and torts are powerful allies); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (discussing the use of torts to combat discrimination and harassment in the workplace). *And see* Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913, 1918-27 (2007) (discussing limitations of Section 1983 constitutional litigation for money damages).

asymmetric conflicts. That said, below I highlight criticism of torts and apply it to asymmetric conflicts.

B. At the Intersection of Tort Litigation and Asymmetric Conflict

1. Characteristics of asymmetric conflict and their implications for civilian compensation

How do the various objectives and benefits of tort law play out in the context of asymmetric conflict? Are some goals more important in tort claims brought by victims of such conflicts? As noted, this Article focuses on situations in which security forces (*i.e.*, military or police forces) are operating within civilian populations to combat non-state actors or otherwise manage a military occupation. In these conflicts, injuring states perceive their opponents as a mixture of potential allies and enemy insurgents, and often maintain a visible presence among civilian population,[487] assuming both military and police-like roles. Such situations are particularly prone to causing property damage and bodily harm to uninvolved civilians. These consequences are related, at least in part, to the difficulty distinguishing combatants and non-combatants in asymmetric conflict, where insurgents operate from within civilian areas and where civilians sometimes assume combatant-like roles.[488]

Another common complexity in these scenarios is the increasingly difficult distinction between combat and non-combat *actions* performed by security forces. This distinction is key since, as explained below, each type of action prompts a different victim compensation regime. Civilians in asymmetric conflicts may be injured in a broad range of incidents, which result from either full-fledged military, quasi-military or even police-like activities performed by security forces, including a car accident caused by military vehicles, a (failed or successful) drone attack, riot control efforts, or a pursuit which does not place security forces in danger.[489] As illustrated below through the two models, the salience of borderline combat/ non-combat scenarios involving civilians enhances the need for a compensation regime which has objective fact-examining

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[487] In Afghanistan, for example, the U.S.'s objectives have been broader than merely military counterinsurgency and include nation- and state-building and reconstruction. Ronen, *supra* note 456, at 215-16.

[488] GROSS, *supra* note 449, at 13.

[489] In the *Beni Uda* case in Israel, the Court ruled that a pursuit by military forces which does not place the soldiers in danger was not combat-related. However, the legislator's dissatisfaction with this interpretation later led to revising the definition of "Combat Action." *See* CA 5964/92 Beni Uda v. The State of Israel 56(4) PD 1 (2002) (Isr.); Part II.A, *infra*.

capabilities and can account for these complexities in asymmetric conflicts. I argue that a court-based process would do a better job in this respect than a no-fault, administrative compensation program.

It should be noted that compensation to individual conflict victims is rare under the international legal system. First, as Yael Ronen notes, international tribunals for individual claims are quite limited. The European Court of Human Rights and the Inter-American Commission and Court of Human Rights have narrow mandates, circumscribed by their constitutive documents,[490] and it is unclear whether the laws of armed conflict can be applied within these mandates.[491] Moreover, while the International Criminal Court's Rome Statute creates a compensation fund for victims, entitlement depends on individual responsibility under the Statute, which requires intentional harm (rather than merely negligence, as discussed here).[492] Second, under international law the right to compensation would normally attach to the targeted state, so that any compensation would belong to the state itself rather than to injured individuals. As a result, state claims do not guarantee that injured individuals will receive compensation.[493] In this sense, domestic mechanisms remain an important tool for government accountability and victim compensation, especially when it comes to democratic, law-abiding states involved in asymmetric conflicts.

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[490] These constitutive documents for the European Court of Human Rights include the Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Europ. T.S. No. 5, *available at* http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG, and its protocols. For the Inter-American Commission and Court of Human Rights, these include the American Convention on Human Rights, art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; the Charter of the Organization of American States, art. 106, Apr. 30, 1948, 119 U.N.T.S. 3; and the Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979).

[491] *See* Ronen, *supra* note 456, at 218.

[492] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, art. 79, UN doc. A/CONF. 183/9 (July 17, 1998). It should be noted that the UNCC offers relief to large numbers of individual claimants through comparatively simple and expeditious administrative procedures, which may suggest such a fund can be successful. *See* John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144, 145 (1993).

[493] This is particularly risky when it comes to an ethnic minority. Further, claims would not apply to victims that are not residents of the targeted state. Ronen, *supra* note 456, at 220.

2. Benefits of tort litigation in asymmetric conflict

Domestic civil litigation has emerged as a prominent means for the promotion of international human rights norms,[494] particularly in countries such as the U.S.[495] Though human rights abuses represent more extreme misconducts than those addressed in this Article, as they typically involve *intentional* rather than merely *negligent* or otherwise *wrongful* acts, this analogy sheds light on the issue before us. In particular, scholars have studied the benefits of tort litigation for addressing human rights violations conducted against the backdrop of internal or external conflict. Beth Van Schaack and Beth Stephens have both noted the potential of tort litigation to restore and promote a sense of agency—the impression that we exercise some control over the processes and events that affect us—especially when that sense was destroyed by the conduct that is the subject of the suit.[496] Since such abuses often involve denial of dignity, liberty, choice, and autonomy, the mere act of re-conceptualizing oneself as a holder of rights can offer a sense of empowerment.[497] It can provide victims with "an exercise in self-determination"[498] inverting the victim/ perpetrator status.

In addition, as noted, tort litigation provides victims with access to a "narrative forum"[499] that enables them to name their experience and situate it within a larger policy

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[494] *See generally*, GEORGE FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES (2008) (arguing for the relevance of tort law in fighting against human rights abuses); JASON NE VARUHAS, DAMAGES AND HUMAN RIGHTS (2016) (exploring the principles governing and the theoretical foundations of damage awards for breaches of human rights).

[495] *See* Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 2 (2002) (discussing reasons for prominence of human rights civil litigation in the U.S.); Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165 (2001) (noting various ways in which tort law has been used to compensate victims of human rights abuses in the U.S.).

[496] *See* Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2318 (2004) (discussing the profound impact civil cases in U.S. courts can have on victims of human rights violations and their communities); Stephens, *id.*, at 45, 52 (noting plaintiffs' general control over tort litigation as opposed to criminal prosecutions, with some exceptions).

[497] Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661-62 (1987-88); *see also* Jan Gorecki, *Human Rights: Explaining the Power of a Moral and Legal Idea*, 32 AM. J. JURIS. 153, 154-55 (1987) (conceptualizing the driving power of rights).

[498] Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. 49, 50 (2004).

[499] Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.L.-C.R. L. REV. 353, 356 (1996). ("Narrative provides a link between the daily reality of violence in which law traffics and the normative ideal - justice - to which law aspires.").

or practice.[500] Tort rhetoric invites the attribution of legal responsibility and moral blameworthiness, thus contributing to the alleviation of victims' feelings of guilt. These discursive processes of "naming, blaming, and claiming"[501] are important features of civil litigation, as compared with criminal prosecutions.[502]

I find these processes are crucial especially where the responsible government has denied a remedy. Indeed, the effectiveness of criminal remedies depends upon state discretion, and the government with criminal jurisdiction over the offender may be unwilling to prosecute for evidentiary or political reasons.[503] Further, even when criminal prosecutions are brought, civil suits provide an effective complement to such proceedings as they "offer victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system."[504] Unlike criminal proceedings, civil cases also involve the victim directly in the legal process. The victim chooses to initiate the proceeding and then plays a central role throughout, which can be empowering and restore a sense of justice.[505] In comparison to a criminal suit, a civil suit may better preserve a collective memory and "permit a more thorough airing of victims' stories … along with an expression of judicial solicitude."[506] In this regard, a criminal proceeding is focused on the culpability of the perpetrator at the expense of the harm suffered by the victim, which is key to the civil process.[507] In my view, this makes the civil proceeding not only a second-tier, complementary replacement when criminal remedies are unavailable, but rather a meaningful option on its own right.

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[500] Cynthia G. Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 628 (1996) (discussing the creation of a "self-authored" life story through litigation); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2152-62 (1989) (identifying local and political narratives and the "confluence" of the two in a legal judgment).

[501] William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1980).

[502] Stephens, *supra* note 495, at 18-21 (comparing criminal and civil procedures in human rights litigation); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 156-59, 195 (2001) (noting different role of victims in civil and criminal processes).

[503] Van Schaack, *id.*, at 156.

[504] Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 581 (1997).

[505] Van Schaack, *supra* note 502, at 156.

[506] Jose E. Alvarez, *Rosh to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2102 (1998) (noting the psychological benefits of civil suits to victims).

[507] However, tort law, even in its corrective form, may be limited in providing victims with a sense of retribution, which, as observed below, is key to some victims' motivations.

Furthermore, being accorded fair procedures before a neutral and respectful decision-maker may provide a surrogate for apology and repentance from responsible parties.[508] The very process of a court determining the validity of a claim forces an examination of the historical record,[509] even if the outcome is ultimately not successful.[510] Where it is successful, tort litigation also offers the promise of a reordering of one's worldview of good and evil that ascribes new meaning to a traumatic experience. Thus, litigation can generate a form of collective memory, particularly in the face of counternarratives that would deny violations or portray victims as blameworthy.[511] Finally, in most personal injury suits, the enforcement of the applicable legal right is achieved through a money judgment quantifying the harm. A damage award as a medium of social meaning marks a "spiritual victory,"[512] recognizes concrete damage to individuals, and is symbolic of a plaintiff's loss. Where an award can be enforced, money damages provide economic support to enable rehabilitation and reintegration into society and confer social standing on plaintiffs.

Violent asymmetric conflicts—particularly those marked by a racial, ethnic, or religious divide—bear similarities to the situations discussed above from both the victims' and the perpetrators' perspectives. They are often characterized by chaotic situations, commonly leaving victims with lack of information about what happened to

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[508] Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the 9/11 Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 381 (2003).

[509] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987). In the slavery reparations case, for example, plaintiffs sought to compel the production of relevant documents in order to create an accurate historical record of economic relationships underlying the institution of slavery. *In re* African-American Slave Descendants' Litig., MDL No. 1491, Lead Case No. 02 C 7764, 2004 U.S. Dist. LEXIS 872, at *30-31 (N.D. Ill. Jan. 26, 2004) (discussing accounting cause of action); *In re* African-American Slave Descendants' Litig., MDL No. 1491, Lead Case No. 02 C 7764, 2003 U.S. Dist. LEXIS 12016, at *5 (N.D. Ill. July 14, 2003).

[510] *See generally* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003) (discussing the impact of failed cases on processes of social change). This judicial record can then enhance and further focus the fact finding and reporting efforts of human rights documentation groups. Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 197 (2002) ("The often thorough and well-documented human rights reporting that is occurring today will finally have a specific context for assisting in the enforcement of human rights norms.").

[511] Sarat, *supra* note 499, at 366 ("[T]he litigated case can be used to create a record, and the court can become the archive in which the record services as the materialization of memory."); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 209-39 (2001) (discussing the role of law—particularly of trials involving state abuses—in forging collective memory).

[512] LOBEL, *supra* note 510, at 8.

them or their loved ones. Such conflicts sometimes involve concerns and frustrations resulting from grievances which transcend the specific dispute at hand. In this sense, though victims' claims are individual, they are part of a larger dispute, similar in some ways to a class action,[513] and resolving the dispute may require responding to such underlying concerns.

Thus, while some of the benefits of the tort system do not apply to asymmetric conflict settings more generally as they do to human rights abuses, many of them might. For instance, the opportunity to receive information about the events that transpired and stand on equal footing and confront a much more powerful other side,[514] may be key in both. In addition, the need for official recognition, through an apology or money damages, may well apply to civilians injured by another country's security forces, particularly against the backdrop of deep racial, ethnic or religious divides. In this sense, I argue, the tort system provides three key benefits in asymmetric conflict settings, flowing from both its outcome and process: compensation (potential outcome), victim participation, and government accountability (process). However, as discussed below, these situations are also prone to the same problems tort systems typically raise.

3. Flaws of tort litigation in asymmetric conflict

For all their benefits, tort systems also suffer from many flaws, which may make the process of bringing a civil lawsuit particularly frustrating and unsatisfying for conflict victims, and difficult to navigate from the injuring state's perspective. Lawsuits tend to drag on for years, during which victims do not receive any form of remedy for their

[513] *See* Van Schaack, *supra* note 496, at 2323-24 ("while individual suits involve the allegations of only the named plaintiffs,
such suits often manifest a representational quality and as such are capable of accommodating a more contextual and comprehensive consideration of repression beyond that suffered by the body and to that suffered by the body politic.") However, oftentimes claims are not sufficiently similar in their fact patterns to justify consolidating them into an actual class action. On the Israeli case, see Part II.A. *infra*.

[514] As Jason Solomon puts it, this is not an aspiration for "an eye for an eye"-style justice, but rather "eye to eye justice." Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1747, 1822 (2007).

injuries.[515] Litigation is costly too.[516] Parties to a civil suit are also constrained by procedural and evidentiary rules and the imposed order of other judicial rituals, and plaintiffs may find conforming their testimony to justiciable legal claims and admissibility rules to be limiting and alienating. In particular, plaintiffs may not be allowed to reenact their whole story or emphasize aspects that are important to them but "irrelevant" from the perspective of the legal process.[517]

In addition, there is a potential for litigation to retraumatize victims, especially considering power differences between plaintiffs and defendants which are common in asymmetric conflicts.[518] Since litigation is inherently adversarial, defendants are entitled to defend against the accusations leveled at them. In practice, defendants' line of defense may involve attempts to discount a plaintiff's account through rigorous cross-examination and the presentation of contrary or impeaching evidence.[519] Where victims do not relate the memories of their experiences in a consistent sequential manner, which is often the case with conflict victims, a defendant's aggressive cross-examination on credibility and accuracy can do real damage.[520] As Jamie O'Connell explains in the context of human rights violations, "[l]ots of survivors compartmentalize the issues and

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[515] For critiques regarding the slow pace, unpredictability and other aspects of the tort system, see THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); Nora Freeman Engstrom, *Exit, Adversarialism and the Stubborn Persistence of Tort*, 6 J. TORT LAW 75 (2015); STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 38, 40 (1989); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 126-159 (2003).

[516] Litigation is particularly costly when it comes to negligence. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 181 (7th ed. 2007). There are indications that trials are very costly and that this cost sometimes outweighs the likely return. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517–18 (2004). However, studies of discovery costs (based on lawyer surveys) indicate that these costs—often thought to be very high—are generally proportional to the value of the case. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 28, 43 (2009).

[517] *See* Van Schaack, *supra* note 496, at 2320.

[518] *See* Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?* 46(2) HARV. INT'L L. J. 295, 323-26, 331-32 (2005) (noting the potential for a legal proceeding—both civil and criminal—to adversely affect victims by resurrecting psychological difficulties which they were already able to set aside).

[519] *See* Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 540 (1995) (noting the potential in the human rights context for "the experience of public testimony... [to be] personally degrading rather than empowering.").

[520] *See generally* Jane Herlihy et al., *Discrepancies in Autobiographical Memories—Implications for the Assessment of Asylum Seekers: Repeated Interviews Study*, 324 BRIT. MED. J. 324, 324 (2002) (presenting research showing that discrepancies in accounts by victims of extreme trauma is not necessarily indicative of a lack of credibility).

retrieve the memories in disjointed fashion to protect themselves from being overwhelmed by the whole memory of their trauma. For them, explaining meticulously what happened would require putting these pieces together and could bring the whole memory flooding back."[521]

Furthermore, the plaintiff must be prepared to lose her case, regardless of the harm suffered, which can create deep anxiety over the course of the suit and upon the announcement of a negative verdict.[522] Although some measure of anonymity may be available, civil litigation also forces plaintiffs into the public eye, which can render them and their loved ones vulnerable to social sanctions.[523] Such ramifications may occur within plaintiffs' own society, as suing for money damages could be considered legitimizing foreign involvement.[524] Another key issue is settlements reached in the shadow of the tort system, which, as discussed below, was common under the Israeli compensation regime during the 1990s.[525] Out-of-court settlements are a prevalent feature of civil litigation,[526] which presents a barrier to leveraging tort lawsuits towards public goals. As Laura Beth Nielsen and her colleagues note regarding labor cases, secret settlements under the adversarial system often prevent plaintiffs from vindicating their rights and from experiencing litigation as a tool to restore their dignity.[527] Further, as

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[521] *See* O'Connell, *supra* note 518, at 333 (citing an interview with clinical psychologist Mary Fabri).
[522] *See* examples provided by Van Schaack, *supra* note 496, at 2321.
[523] In the Israeli-Palestinian context, one plaintiffs' lawyer noted a tragic case in which a Palestinian plaintiff who won a case was later murdered, presumably by relatives who were after her money. Interview with PL17, Feb. 2016. *See* Van Schaack, *id*.
[524] This concern has been voiced in the Israeli-Palestinian context. *See* George E. Bisharat, *Courting justice? Legitimation in Lawyering under Israeli Occupation*, 20(2) LAW & SOC. INQ. 349, 364 (1995) (noting lawyers' concern that joining the Israeli bar would acknowledge the permanency, if not the legitimacy, of Israeli occupation).
[525] *See* Part II.A., *infra*.
[526] On the prevalence of settlements in tort litigation, and the challenges they present, see Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46(6) STAN. L. REV. 1339 (1994) (questioning the assertion that settlements are better than trial); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) (arguing that while high-volume personal injury firms are accomplishing many of the goals of no-fault mechanisms, they do so out of the light of day, which creates ethical issues); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986) (analyzing 1649 cases in five federal judicial districts and seven state courts and examining how they were resolved).
[527] LAURA BETH NIELSEN, ROBERT L. NELSON & ELLEN C. BERREY, RIGHTS ON TRIAL: EMPLOYMENT CIVIL RIGHTS LITIGATION IN THE UNITED STATES (Forthcoming – 2017). Relatedly, when discussing the U.S. Army's compensation mechanism for injured civilians in Iraq and Afghanistan, John Witt notes the use of "grids and tables that provide guidance on the way to resolve the kinds of cases that recur again and again" (*see* John F. Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L REV. 1455, 1477 (2007) and the references there). This analogy speaks to the similarities between a no-fault and

indicated by the term "asymmetric," these conflicts entail an inherent power imbalance between the parties—military forces facing individual, often disempowered plaintiffs—which, some argue, compromise the deterrent effect of torts in government-related contexts.[528]

Finally, a common argument against the use of tort law in conflict settings is that the tort system is ill-quipped to handle the unique set of risks involved in combat.[529] Critics contend that the risks in times of war are greater in scope and more diverse in kind than in times of peace, and that there are significant difficulties obtaining evidence in cases concerning war damage.[530] Tort law also envisages a dispute between two individuals, while military activity typically generates mass claims, and involves governmental policy and budgetary considerations which are difficult to adjudicate.[531] As John Witt notes, from the state's perspective, there is an inherent difficulty to reconciling the goals of tort law with strategic war goals.[532] However, the combat exclusion, included in many countries' tort legislation, may be sufficient to adapt the law of torts to conflict situations and release the state from liability only for those claims arising from full-fledged warfare, as opposed to a variety of other incidents which occur in low-intensity, simmering asymmetric conflicts.[533] In other words, I argue that the diverse incidents that can cause civilian injury in asymmetric conflicts, such as car accidents, checkpoint

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a tort-based mechanism which relies heavily on out-of-court settlements. This issue is further discussed in Part IV, *infra*.

[528] *See generally* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284-86 (1988) (discussing the inadequacy of tort remedies in the context of constitutional violations by law enforcement officials).

[529] *See, e.g.*, the view expressed by Chief Justice Aharon Barak in HCJ 8276/05 Adalah v. Government of Israel 62(1) PD 1 [2006] (Isr.), and Justice Amit in CA 1459/11 The Estate of Hardan v. The State of Israel – Ministry of Defense [2013] (Isr.). *See also* Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 517–18 (2006) (arguing that tort law is an inappropriate tool for dealing with damage caused by military activity).

[530] *See* the respondent's arguments in *Adalah*, *id.* Further, since military activity is routinely hazardous, the presumption of ultra-hazardous activity is inapplicable, as are other evidentiary rules of tort law. Ronen, *supra* note 456, at 219. In this context, a case that merits mentioning is Johnson v. Eisentrager, 339 U.S. 763 (1950). In this World War II case, the U.S. Supreme Court expressed deep skepticism about allowing claims against military officials during wartime because the Court was concerned that such claims would interfere with the military's ability to conduct the war effectively. The case was later cited in many of the "war on terror" cases that were litigated in the U.S. between about 2002 and 2008.

[531] Ronen, *id*, at 220.

[532] Witt, *supra* note 527, at 1467.

[533] *See* the Court's opinion in *Adalah*, *supra* note 529, para. 41.

abuses, and use of riot control techniques, do not justify a blanket denial of liability for all conflict-related situations.

C. No-Fault as an Alternative

That said, these disadvantages of the tort system may suggest that a more streamlined process, such as a claim facility or compensation fund, are better suited for this setting.[534] A "no-fault" mechanism, which does not require showing fault or negligence on the part of security forces involved, promises to be less costly and much faster than tort litigation.[535] A no-fault system would potentially reduce variability between tort lawsuits, promoting horizontal equality and eliminating windfall awards and the combative, adversarial nature of the tort system.[536] However, such a no-fault system typically would not provide information to claimants, nor would it allow them to have their "day in court" or experience empowerment through the legal process. It thus gives precedence to efficiency and economy over values such as participation, accountability, and transparency.[537] Arguably, the latter need to be balanced by military considerations.[538] But is this trade-off worthwhile?

While studies of victim compensation regimes in other contexts often focus on monetary interests as the main objectives for victims,[539] multiple other incentives may

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[534] As discussed below, such payments are considered "*ex gratia*" (out of kindness) as there is no proof of liability. Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 AM. J. INT'L L. 319, 319-24 (1989); Harold G. Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325, 325-32 (1989) (discussing compensation offered by states for mistakenly targeting civilians).

[535] *See* Rolph, *supra* note 467. However, such programs often do not deliver. *See* critique offered by Freeman Engstrom, *infra* note 538.

[536] *See generally* critiques on the tort system, *supra* note 515.

[537] Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far,* 71 LA. L. REV. 819 (2011). However, at times, such mechanisms do allow victim participation through meetings with the Special Master (in the 9/11 case, victims were given this opportunity, which many seized - Feinberg apparently met with nearly 1000 families; Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005)) or a town-hall format (in the Gulf Coast Claims Facility for the BP oil spill; Mullenix, *id.*).

[538] However, according to Nora Freeman Engstrom, the promises of no-fault mechanisms often go unfulfilled, as was the case with the VICP and auto no-fault regimes in the U.S. *See A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631 (2015); *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012).

[539] This was a common approach towards the Victim Compensation Fund (VCF), for those who were injured or lost a family member in the September 11, 2001 terrorist attacks. Following the 9/11 tragedy, victims were faced with a choice between cash payment available through VCF and the (limited) pursuit of tort litigation. Viewing this choice in the expected value terms which are standard in legal scholarship and the economic analysis of litigation (see Robert D. Cooter & Daniel L Rubinfeld, *Economic Analysis of*

drive victims. Conflict-related wrongs, in particular, often involve not just wrongful injury to material worth—harm that can be relatively easily quantified by a no-fault mechanism—but also injuries deserving of nonmonetary responses, such as acknowledgment and apology.[540] Furthermore, NGOs representing victims may wish to instrumentally use tort litigation to expose wrongs on a political—rather than only personal—level. A no-fault mechanism, especially when it fails to include other process-related features offered by the tort system, would not support such needs.[541]

Legal Disputes and Their Resolution, 27 J. ECONOMIC LIT. 1067 (1989), and Part II.A., *supra*), Kenneth Feinberg, who served as Special Master for VCF, saw it as "a classic trade-off between administrative speed and efficiency and rolling the dice in court and going for the proverbial pot of gold." Diana B. Henriques & David Barstow, *Victims' Fund Likely to Pay Average of $1.6 Million*, NEW YORK TIMES, (Dec. 21, 2001), cited in Hadfield, *supra* note 474, at 646. *See also*: KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2005) (discussing his experiences as Special Master). Similarly, a study conducted by the RAND Institute assessed the extent to which the amounts calculated by VCF accurately captured the dollar value of the losses associated with injury or death. Lloyd Dixon & Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks*, RAND INSTITUTE FOR CIVIL JUSTICE (2004). Other studies have also focused on the amounts awarded by VCF as the criterion for assessing its fairness or success as an alternative to tort litigation. *See, e.g.*, Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DE PAUL L. REV. 769 (2003); Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003). One exception is this context is Deborah Hensler's work, which discusses the non-monetary goals plaintiffs might have had in the context of VCF, including accountability. Deborah Hensler, *Money Talks: Searching for Justice through Compensation for Personal Injury and Death*, 53 DEPAUL L. REV. 417, 427 (2003).

[540] *See* Van Schaack, *supra* note 496, at 2322-3; Tyler & Thorisdottir, *supra* note 508, at 361, 367-68; (noting the rejection of compensation for moral wrongs); Hensler, *id.*, at 432-37 (discussing the relationship between harm and money for 9/11 victims). Of course, plaintiffs may resent the "commodification" of their experience when forced to quantify the harm caused to them or their loved ones, which is necessary in tort litigation too. *See* Richard L. Abel, *Torts*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 445 (David Kairys ed., 3d ed. 1998) (noting that tort damages perpetuate the fiction that money is equivalent to harm, equate money with human dignity and integrity, and assume that for every pain suffered, there will be an amount that will compensate).

[541] Gillian Hadfield's work on VCF empirically supports this argument. From surveys of and interviews with claimants that chose to litigate following injuries caused by the 9/11 attacks, who constituted only 3% of claimants, several interesting findings arise. First, in listing the reasons that led them to litigate, respondents did not mention the potential for obtaining a higher payout. Instead, they recited considerations such as punishing those responsible, wanting to find out more about what happened, and a desire to promote change and prevent similar events from reoccurring. Hadfield, *supra* note 474, at 661-62. Furthermore, litigating respondents perceived the money from VCF as "hush money." *Id.* at 662. The reasons to file with VCF emerged as capitulation to immediate financial need; capitulation to age (*i.e.*, litigation would take years); being skeptical of litigation's ability to achieve its desired goals—especially given the caps and limits Congress had imposed; and difficulties obtaining legal representation. *Id.* at 666-69. Hadfield's findings imply, then, that claimants *were* interested in accountability and information, yet most were forced to succumb to more mundane considerations. In this view, civil litigation serves a variety of functions for plaintiffs that exceeds its capacity to offer compensation. Of course, the 9/11 case differs significantly from the context of protracted, asymmetric conflict, representing different power relations between victims and government. However, it is illustrative of victims' needs and motivations following a traumatic event.

Lastly, when considering the alternative of no-fault vis-à-vis tort litigation in asymmetric conflicts, it is also important to examine the potential impact on *defendants*. Indeed, a trial provides the ultimate vehicle for *individual* accountability.[542] Defendants' lives are disrupted while they are forced to either defend their actions, often at considerable cost, or accept a default judgment.[543] Moreover, a plaintiff's verdict in the civil context assigns legal and moral responsibility, even where the judgment remains unexecuted.[544] In addition, as mentioned, tort litigation can have broader effects. It requires defendants to expose evidence, answer questionnaires, and often testify in open court, which carries positive externalities in the sense of "sunlight is… the best of disinfectants."[545] When defendants are security forces, discovery and evidentiary requirements push for greater accountability than payments provided on a no-fault basis and may encourage change of practices on the part of units that are repeatedly implicated.[546]

With this in mind, I now turn to examining two examples representing different types of asymmetric conflicts, with injuring states choosing to handle compensation to civilians in two different ways: Israel's tort-based mechanism for compensating Palestinian civilians injured as a result of Israel's actions in the Territories, and the U.S.'s FCA and condolence payments, used to compensate local civilians for losses suffered by U.S. military actions in Iraq and Afghanistan.

II. Civilian Compensation in Asymmetric Conflict by Israel and the U.S.

A. Israel/ Palestine

On January 16, 2007, in Anata, a Palestinian village north of Jerusalem, Abir Aramin, a 10-year-old Palestinian girl, was walking home from school. She was then fatally wounded by a dull object, allegedly a rubber bullet shot by Israeli soldiers

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[542] *See* Jonathan Bush, *Book Review Essay: Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2066 (1993) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992)).
[543] In this context, it is important to bear in mind that a key motivation for VCF was the desire to protect airlines from going bankrupt. *See* Mullenix, *supra* note 537. This may differ when suing a state.
[544] *See* Van Schaack, *supra* note 496, at 2330-31.
[545] As famously put by Justice Brandeis in LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1913).
[546] *See* Schwartz, *supra* note 475 (discussing information gathered by police departments through civil proceedings and how it is used in performance-improvement efforts).

controlling a volatile protest in her village. While Israeli authorities decided not to bring criminal charges against the soldiers involved, Abir's parents filed a civil lawsuit against the Israeli Ministry of Defense. The Jerusalem District Court awarded the family $430,000 in damages for their daughter's wrongful death.[547]

Abir's family utilized a unique mechanism that enables non-Israeli citizen Palestinians to bring civil actions for damages against the State of Israel before Israeli civil courts, for property damage, bodily injury or wrongful death resulting from the actions of security forces[548] in the Territories ("the Claims").[549] Claims are brought for incidents ranging from use of riot control techniques during protest, to military counterinsurgency actions, checkpoint shootings, drone attacks and full-fledged military operations.[550] Indeed, the Claims are part of a broader Israeli policy originating in 1967 to allow Palestinians to petition Israel's courts to challenge actions of the military regime.[551] As such, the Israeli case presents a rare exception to typical bars on bringing claims against the injuring state in armed conflicts,[552] including in the U.S.[553] As for suing the State in torts, according to the Civil Wrongs (Liability of the State) Law ("the

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[547] *Israel to pay family compensation over killing of Palestinian girl*, THE GUARDIAN (Sep. 26, 2011), *available at*: http://www.theguardian.com/world/2011/sep/26/israel-pay-family-compensation-palestinian-girl

[548] Israel's security forces include the Israeli military ("IDF"), police forces (typically Border Police Unit), and the General Security Service. MOD data cited below refer only to IDF incidents (including BPU), while the other authorities do not maintain independent records regarding tort lawsuits by Palestinians.

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

[550] Such as Operation Cast Lead—also known as the Gaza War—a three-week armed conflict between Gaza Palestinians and Israel during 2008-9.

[551] Thus, bars of jurisdiction, justiciability, and standing do not apply to the Claims. Michael Karayanni, *Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs*, *5* **J. PRIVATE INT'L L.** *1 (2009). For the history of this policy, see* **DAVID KRETZMER, THE OCCUPATION OF JUSTICE** *19-25 (2002).*

[552] Ronen, *supra* note 456, at 217 (2009) (noting that an individual lawsuit mechanism—like Israel's—is rare in armed conflict settings). This exception stems, among other reasons, from the special status of the Territories as occupied and the lack of alternative recourse to Palestinians' home forum. 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 BENVENISTI, *supra* note 549. Palestinians are barred from bringing claims against Israel before Palestinian courts. MICHAEL KARAYANNI, CONFLICTS IN A CONFLICT 239 (2014) (discussing Palestinians' lack of access to justice).

[553] *See* note 578, *infra*.

Act"), Israel is not immune to civil liability.[554] However, the State is not liable for an act performed through *Combat Action*,[555] an exclusion which has been significantly expanded over the past fifteen years.[556]

The Claims have several key characteristics. They represent individual cases—rather than a class action—and are based on injuries which resulted from different circumstances, much like typical personal injury lawsuits.[557] The common cause of action is negligence, though Claims can also be brought for violation of statutory duty or assault. Claims are litigated at first instance in either magistrate or district courts, depending on the plaintiffs' estimate of their damages.[558] Only few make it to the Supreme Court on appeal,[559] and they are rarely covered by the media.[560] Damage awards range from approx. $1,000 in the smallest, property-related cases, to approximately $500,000 in the largest, personal injury cases.[561] Finally, prior to the Second Intifada—a violent Palestinian-Israeli confrontation which started in September 2000—most successful Claims ended with an out-of-court settlement.[562] The tendency to

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[554] It should be noted that alongside the civil proceeding, IDF sometimes opens a criminal investigation when a suspicion arises for soldier misconduct. Such investigations rarely result in an indictment. *See* "Alleged Investigation: The failure of investigations into offenses committed by IDF soldiers against Palestinians," Report by Yesh Din (Dec. 2011), *available at*: http://www.yesh-din.org/en/alleged-investigation-the-failure-of-investigations-into-offenses-committed-by-idf-soldiers-against-palestinians/; "Exceptions: Trying IDF soldiers since the second intifada and after, 2000-2007," Report by Yesh Din (Dec. 2008), *available at*: http://www.yesh-din.org/en/exceptions-trying-idf-soldiers-since-the-second-intifada-and-after-2000-2007/.

[555] 5712-1952, § 2, 5 (as amended) (Isr.) [hereinafter "the Act"], https://www.adalah.org/uploads/oldfiles/features/compensation/law-e.pdf.

[556] Gilat J. Bachar, *The Occupation of the Law: Judiciary-Legislature Power Dynamics in Palestinians' Tort Claims against Israel*, 38(2) U. PA. J. INT'L L. 577 (2017) (finding, through a quantitative and qualitative content analysis, significant changes in the State of Israel's liability following a legislative change expanding the combat exclusion).

[557] Furthermore, when the fact patterns for a large group of cases are sufficiently similar to justify consolidating them into a class action, the cases are likely to fall under the combat exclusion discussed below.

[558] The current threshold for bringing a case before district courts is 2,500,000NIS (~$600,000).

[559] The Supreme Court considers cases on appeal on decisions made by district courts. Decisions in cases that were first litigated in magistrate courts are appealed before the district court. The Court rarely grants a right to appeal, for the second time, a magistrate court decision. Courts Law (Consolidated Text) 5744-1984.

[560] Interview with NGOL9, Mar. 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. Interview with GL8 (MOD), Dec. 2015; Interview with PL9, Dec. 2015; Interview with GL7 (MOD), Jan. 2016.

[561] Data are based on a content analysis I conducted of court decisions in the Claims towards a previous paper. *See* Bachar, *The Occupation of the Law*, *supra* note 556.

[562] Report in Response to MOD FOIA Query, Nov. 13, 2016 (on file with author). According to plaintiffs' lawyers, settlements accounted for 99 percent of their successful Claims. Interview with PL2, Sep. 2014;

settle Claims during those years is related to evidentiary challenges that both plaintiffs and the State face in the Claims,[563] but also to the State's desire to prevent public embarrassment by keeping incidents of security forces misconduct under a veil of confidentiality.[564]

Beginning in the Second Intifada,[565] though, the regime governing the Claims has changed dramatically. As one indication of these changes, while between 1992 and 2002 Palestinian plaintiffs were successful in 39 percent of the Claims adjudicated by the courts, between 2002 and 2012 this percentage decreased to only 17 percent.[566] This figure dropped even further over the last several years.[567] This change resulted from two main developments. First, the combat exclusion was expanded by the Israeli legislator.[568]

Data regarding 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. Interview with PL14, Mar. 2016.

[563] For instance, Palestinians typically do not maintain records of their property, rendering property damage caused by Israeli soldiers difficult to prove. Interview with PL4, Mar. 2015; Interview with PL2, Sep. 2014; Second interview with PL7, Aug. 2014. 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, given the use of fire arms by both sides. Interview with PL2, Sep. 2014; Interview with PL3, Jul. 2015.

[564] Interview with PL1, Jul. 2014 (noting that 95% of his cases ended with a settlement, as it's cheaper, saves time, safer, and prevents public embarrassment); Interview with GL5 (DA), Aug. 2015 (mentioning the State's tendency to settle cases during the First Intifada era - 70% of the Claims according to her estimate were settled – which stemmed, among other things, from a desire to protect national security).

[565] 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(2) J. PALESTINE STUD. 85 (2005) (giving a detailed account of the events of the Second Intifada); Johannes Haushofer, Anat Biletzki & Nancy Kanwisher, *Both Sides Retaliate in the Israeli–Palestinian Conflict***,** 107(42) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 17927 (2010) (analyzing the Conflict's escalation as a result of mutual retaliation).

[566] Bachar, *supra* note 556.

[567] FOIA Reports, *supra* note 562; *Getting Off Scott-Free*, *supra* note 453, at 48 (showing that in recent years there are fewer Claims filed and less compensation paid to Palestinians by Israel).

[568] Until 2002, the Act did not include a definition of 'Combat Action,' for which the State is exempt from liability. The Israeli legislature ("Knesset") had discussed adding a definition for over a decade, but failed to legislate, leaving it to courts to interpret the term. *See* Hamoked-Center for the Defense of the Individual, Activity Reports for the Years 2005, 2006, *available at*: http://www.hamoked.org/hamoked-reports.aspx (On the legal regime under the previous version of the Act, see Assaf Jacob, *Immunity under Fire: State Immunity for Damage Caused by Combat Action***,** 33 MISHPATIM L. REV. 107 (2003) (Hebrew); Bachar, *supra* note 556). Yet, the Knesset was discontent with the interpretation given to 'Combat Action' by the courts. *See* Protocols of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, 6/24/2002, 6/26/2002, *available at* (Hebrew): http://www.knesset.gov.il/protocols/heb/protocol_search.aspx. Consequently, after the Second Intifada erupted in 2000, resulting in massive harm to Palestinians and a high volume of Claims, Amendment (no. 4) was enacted. Under the Amendment, the Israeli legislature added a broad definition of 'Combat Action,' "including 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." Pursuant

Second, following a failed attempt to replace the Claims' mechanism with a blanket immunity to the state for actions undertaken on its behalf in what is defined, even retroactively, as a "conflict zone," which was stuck down by the High Court of Justice,[569] the state introduced numerous procedural requirements which limit Palestinians' access to Israeli civil courts.[570] As a result of these changes, in current days it is nearly impossible for Palestinians to successfully seek redress for injuries caused by Israeli security forces in the Territories through the courts. Two alternatives to the court-based mechanism set forth by the Act remain.[571] *First*, claimants can submit an application to a committee which comprised of three Ministry of Defense ("MOD") employees ("the Ex Gratia Committee"). The Ex Gratia Committee has discretion to recommend awarding small amounts of compensation to Palestinians and foreign nationals injured by Israeli

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to this Amendment, then, the pool of events considered combat-related—and thus exempt from liability—increased significantly. *See* Bachar, *supra* note 556.

[569] In 2005, the legislature sought a more comprehensive way of curtailing the Claims. It enacted Amendment (No. 7) ("the 2005 Amendment"), which granted a blanket immunity to the state for actions undertaken on its behalf in what is defined, even retroactively, as a "conflict zone." According to the 2005 Amendment's supporters, since both sides are in the midst of an armed conflict, each party should be responsible for its own damages. *See* Protocol of the Knesset's Constitution, Law, and Justice Committee of 6/30/2005, *available at* (Hebrew): http://www.knesset.gov.il/protocols/heb/protocol_search.aspx. Rather than the financial burden the Claims imposed, the motivation for the Amendment was the sense that Israel is engaged in an armed conflict with the Palestinians, a context with which tort law is incompatible. Interview with GL7 (MOD), Jan. 2016. *See also*: Interview with GL9 (IDF), Dec. 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?"); Interview with GL12 (MOJ), Mar. 2016; Interview with GL5 (DA), Aug. 2015. Eventually, though, the High Court of Justice ("HCJ") declared the 2005 Amendment unconstitutional for violating Palestinians' constitutional right to property. While the HCJ acknowledged that tort law "is not suited to dealing with damage caused in a time of war," it did not accept the exemption that the State sought for combat *and* non-combat activities in the Territories, holding that "case by case examination should not be replaced by a sweeping exemption from liability." *Adalah*, *supra* note 529, at 379, 383.

[570] The policy that ensued the HCJ's decision essentially recreated the 2005 Amendment by using procedural obstacles, including shortening the statute of limitations period on Claims and requiring the deposit of bonds as a pre-condition for litigation. For a detailed account of these procedural requirements, see Bachar, *Access Denied*, *supra* note 465 (describing the barriers Palestinians face in bringing claims against the Israeli government). Most recently, as of 2014, Gaza residents are no longer eligible to bring Claims, as Gaza was declared "enemy territory." Civil Tort Ordinance (Liability of the State) (Declaration of Enemy Territory–the Gaza Strip), 7431-2014. Passed in October 2014, the Ordinance applies retroactively, starting in July 2014. This Ordinance has been challenged in a lawsuit brought in the case of *Nabahin* (CC (Be'er-Sheva) 45043-05-16). The District Court has yet to rule on it.

[571] These apply to *Palestinian* victims of Israeli military actions. When it comes to *Israeli* victims of terrorism, compensation is provided through the Victims of Hostile Action (Pensions) Law [24 L.S.I. 131 (1969/70)] for bodily injuries and families of deceased victims, and through the Property Tax and Compensation Fund Law [15 L.S.I. 101 (1960/61)] for property damage.

security forces,[572] either based on independent appeals to the Ex Gratia Committee or following a court's recommendation.[573] The cases under the Ex Gratia Committee's mandate are defined as "irregular and unique humanitarian instances" in which the State was not liable under the law.[574] *Second*, a Claims Headquarters Officer ('Kamat Tov'anot') at the MOD also has the authority to compensate Palestinian claimants due to damage caused by military actions.[575] Per MOD officials, though, this function is rarely ever invoked.[576] Given the limited scope of these alternatives, they do not suffice to provide redress for injured Palestinians.

In sum, while the Israeli tort system managed to compensate injured Palestinians during the 1990s, mostly through confidential out-of-court settlements, over the last fifteen years, due to significant expansion of the combat exclusion and procedural restrictions applied to Claims, it has become extremely limited. The data I collected emphasized the politicization of these cases as a key explanation to their demise. Since, as explained, alternative paths for compensation are also quite limited, Palestinians are left nowadays without any real prospects for redress.

B. U.S./ Iraq and Afghanistan

On May 29, 2006, on a steep road leading down from Bagram Air Force Base into Kabul, the brakes of a twenty-ton armored truck in an American convoy failed. The truck crashed into the city, killing at least one person and injuring dozens of others. An angry crowd gathered at the scene and a riot began. In the crossfire, bullets that the Pentagon later traced to American weapons killed at least six young Afghan men,

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[572] As a rule, the Committee only reviews cases of bodily harm. It pays compensation for property damage only in rare instances that resulted in "extreme financial distress," and as long as it finds that "considerations of security or diplomatic relations" warrant the compensation. *See Getting Off Scott-Free, supra* note 453.

[573] For instance, in one case, the Court noted: "I won't deny that I find the outcome I've reached difficult. The law tries to do justice yet law and justice are like two only partially overlapping circles… The State would do right if despite the outcome of this judgment it would find a way to compensate the plaintiffs as a tribute of ex gratia." CC (Acre) 3055/97 Husun v. The Ministry of Defense (2001) (Isr.).

[574] Working Procedure and Guidelines for the Committee Acting under the MOD concerning Ex Gratia Payments (2011) (on file with author). Per MOD data, between 2004 and 2014 the total amount awarded by the Committee was 575,895NIS (~$156,000), in 42 cases (20 cases were dismissed). Data are unavailable prior to 2004. Report in Response to MOD FOIA Query, Aug. 3, 2015, *available at* (Hebrew): http://bit.ly/2a982nf; *supra* note 562.

[575] This authority is based on Order Concerning Claims (Judea and Samaria) (no. 271), 1968. *See* information on IDF MAG Force website: http://www.law.idf.il/602-6942-en/Patzar.aspx.

[576] Interview with GL7 (MOD), Jan. 2016; Interview with GL8 (MOD), Dec. 2015.

including a 13-year-old boy selling pizzas on the street.[577] Since, contrary to the Israeli model, it is nearly impossible for foreign nationals to bring a tort lawsuit against U.S. military forces before U.S. courts,[578] military claims commissioners paid damages to the families of the six men under a different mechanism—the Foreign Claims Act,[579] which provides the U.S. military its main tool to compensate local civilians for losses unrelated to combat operations.[580]

1. Foreign Claims Act (FCA)

Offering monetary payments to foreign civilians harmed by U.S. military operations is a long-established practice, conceived of as a way to build the good will of the local population and help the military achieve its objectives.[581] Civilian claims for harm became a part of military operations when Congress passed the Indemnity Act (American Forces Abroad) in 1918, which allowed U.S. military forces to provide monetary payments to civilians injured by U.S. military vehicles in France.[582] Due to the geographical limitations of the 1918 Act, which focused on remunerating citizens of *allied* countries, Congress passed the Armed Forces Damages Settlement Act in 1942, later adjusted to become the FCA in 1956.[583] The revised version made the Act available

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[577] ACLU, Claims Filed Under the Foreign Claims Act by Civilians in Afghanistan and Iraq, Army Bates No. 18–22, 30–51, (Released by the ACLU Apr. 12, 2007), http://www.aclu.org/natsec/foia/log.html (hereinafter: "ACLU FOIA Report").

[578] Due to a host of limitations, including a justiciability limitation on political questions and a broad immunity enjoyed by the U.S. government and service members. *See* Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation*, 58 LAW & CONTEMPORARY PROBLEMS 139, 145-153 (1995) (discussing the various limitations on U.S. liability for harm caused to foreign civilians). For a recent, rare example of a successful case, see "On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on behalf of Three Torture Victims" (Aug. 17, 2017), *available at*: https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit (last visited Nov. 9, 2017). Another historical exception is the Abandoned and Captured Property Act. This federal statute authorized individuals to file claims against the U.S. to obtain compensation for property seized during the Civil War. *See* Elizabeth Lee Thompson, *Reconstructing the Practice: The Effects of Expanded Federal Judicial Power on Postbellum Lawyers*, 43 AM. J. LEGAL HIST. 306 (1999) (discussing the Act and its impact on lawyers and courts). The Court of Claims decided more than 1500 cases arising under this statute between 1868 and 1875. *Id. See also* James G. Randall, *Captured and Abandoned Property During the Civil War*, 19 AM. HIST. REV. 65 (1913); THOMAS H. LEE & DAVID L. SLOSS, INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 131-32 (Sloss, Ramsey, Dodge eds. 2011).

[579] Foreign Claims Act, ch. 645, 55 Stat. 880 (1942).

[580] Witt, *supra* note 527, at 1456.

[581] *Id.*

[582] *Id.* at 1458.

[583] *Monetary Payments for Civilian Harm*, *supra* note 462, at 29. Under the 1942 Foreign Claims Act a maximum of $1,000 could be awarded to a successful claim. However, when that amount proved too small to fulfill the law's purpose, the War Department (which in 1947 split into the Department of the Army,

to any civilian who might be considered 'friendly' to U.S. interests. This change was especially important during the Vietnam War, when the FCA was mobilized to support non-insurgents.[584]

The purpose of the FCA is to "promote and maintain friendly relations through the prompt payment of meritorious claims."[585] It only allows payments to civilians harmed by "*negligent or wrongful act[s]*"[586] committed by uniformed personnel or civilian employees of the Department of Defense, not including contract employees.[587] While the FCA applies all over the world, including in active combat zones, much like the Israeli Act it forbids payments for harm resulting directly or indirectly from combat, known as the "combat exclusion."[588] Furthermore, the FCA is an *ex gratia* program, as payments are not distributed based on any legal obligation.[589]

FCA claims may be filed for damage to real or personal property, personal injury or death incurred by acts carried out by U.S. military forces.[590] The claims-making process is fairly standardized. When harm to civilians occurs as a result of military actions, soldiers are instructed to provide victims with information on how to seek a claim. Such information is sometimes distributed as a card containing instructions in English and the local language. Victims then need to complete a claims form, which can be obtained in Government Information Centers and includes date, name, age, citizenship, place of residence and employment details for victims as well as details

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Department of the Navy and Department of the Air Force) offered support for a change to the legislation, and successfully convinced Congress to amend the FCA. *Id.*

[584] Foreign claims offices became so important in Vietnam that when payments were delayed in 1970, a riot broke out. Witt, *supra* note 527, at 1468. Importantly, the FCA should be distinguished from the Federal Tort Claims Act (FTCA), 28 USC Sec. 2671 et seq. The FTCA is the principal mechanism for individuals to bring tort claims against the U.S. government for torts committed by federal agents. 28 USC Sec. 2680 includes a set of exceptions, including the "combatant activities" exception and the "foreign country" exception. For more on the FTCA, see generally GREGORY SISK, LITIGATION WITH THE FEDERAL GOVERNMENT (2016).

[585] 10 U.S.C. § 2734.

[586] US Dep't of Army, Reg. 27-20, Claims, Feb. 8, 2008, ¶ 10-3(a).

[587] Jonathan Tracy, *I am Sorry For Your Loss, and I Wish You Well in a Free Iraq*, Carr Center for Human Rights Policy and the Campaign for Innocent Victims in Conflict, Compensating Civilian Casualties, *available at*: http://www.hks.harvard.edu/cchrp/Tracy%20Report%20Nov%203%202008.pdf. For the compensation regime in Iraq regarding private contractors, see Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259 (2008).

[588] *See* Center for Civilians in Conflict, *US Military Claims System for Civilians* (2008), *available at*: http:// http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf.

[589] Tracy, *supra* note 587.

[590] *US Military Claims System*, *supra* note 588.

regarding the incident itself.[591] At times, sworn affidavits by soldiers at the scene are included. Most important to the claims process are the written significant act reports (or spot reports filed by phone) that U.S. soldiers are mandated to complete whenever an incident involving harm to civilians occurs, since more credence is placed on evidence provided by the U.S. military.[592] Once a claim has been submitted, it is reviewed by a Department of Defense attorney to determine whether it meets the necessary criteria, which requires, in addition to the non-combat condition, that the claimant would not be an enemy of the U.S. or provide aid to an enemy.[593] Claims are evaluated by Foreign Claims Commissions (FCCs), composed of one to three officers, usually judge advocates.[594] Claims up to $10,000 may be approved by an officer or employee appointed by the secretary concerned (*i.e.* the Secretary of the Army, Navy, Air Force or Marines). Claims above that amount require a higher approval through the chain of command. In general, claims are capped at $100,000. However, if the Secretary concerned believes that a claim exceeding that amount is meritorious, the amount in excess can be reported to the Secretary of the Treasury for payment.[595]

Since 2003, the average payment for loss of life under the FCA is $4,200.[596] In Iraq and Afghanistan, $30-35 million have been awarded under the FCA between 2001 and 2007.[597] Of the 490 claims made between 2005 and 2006 in these countries, 404 were denied.[598] This considerable figure may be related to problems applying the FCA standards in a consistent fashion.[599] Not only is the 'friendliness' of a victim difficult to

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[591] A separate victim report may also be sought, with interpreters called upon to facilitate. Government Accountability Office (GAO), *Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan* (2007), *available at*: http://www.gao.gov/products/GAO-07–699, at 34; Emily Gilbert, *The Gift of War: Cash, Counterinsurgency and 'Collateral Damage,'* 1(19) SECURITY DIALOGUE 1, 3 (2015).

[592] Tracy, *supra* note 587, at 56. Other documents that may be included in an FCA claim are journal entries, maps or hand-drawn diagrams of the scene, and photographs, of damaged vehicles and sometimes victims. Gilbert, *id.*, at 4.

[593] Also, the claim must be filed within two years of the date the harm was incurred, similarly to the Israeli limitation. Tracy, *supra* note 587.

[594] The Department of Defense designates one branch of the military to adjudicate claims for a particular location. 10 USC § 2734.

[595] *Monetary Payments for Civilian Harm*, *supra* note 462, at 29.

[596] *US Military Claims System*, *supra* note 588.

[597] *US Military Claims System*, *id.*; Paul von Zeilbauer, Confusion and Discord in U.S. Compensation to Civilian Victims of War, NEW YORK TIMES, Apr. 12, 2007, *available at* http://www.nytimes.com/2007/04/12/world/americas/12iht-abuse.1.5246758.html?_r=0.

[598] Witt, *supra* note 527, at 1471.

[599] *US Military Claims System*, *supra* note 588.

determine—especially in a counterinsurgency context, where the differentiation is often blurred—but so are the boundaries of the combat exclusion, which is a common basis for denying claims.[600] For instance, damages arising out of terrorist assassinations—which are clearly excluded by the FCA—may be denied in one case, but compensated in another.[601] While some checkpoint shootings are treated as combat exclusion cases, others are resolved on the merits as either negligent or not negligent shootings.[602] As Jonathan Tracy concludes, these inconsistencies create the distinct sense of arbitrariness in the application of the FCA.[603]

2. Condolence payments

Since the Korean War, the U.S. has also maintained the ability to pay for civilian damages in incidents deemed combat-related through an alternative tool, called "solatia" or "condolence" payments.[604] The main difference between solatia and condolence is that solatia payments are funded by a unit's Operations and Maintenance fund,[605] while condolence payments come from the Commanders Emergency Response Program fund.[606] Both types of payments are given to civilians as an expression of sympathy for the harm they suffered.[607] Each time the U.S. goes to war, a decision is made as to whether payments to victims or their families are appropriate in that country.[608] At the

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[600] Gilbert, *supra* note 591, at 4. As stated in one rejected claim, '[t]he U.S. cannot pay your claim because your brother's death was incident to combat. I am sorry for your loss, and I wish you well in a Free Iraq.' Tracy, *supra* note 587, at 1. *See also* Major Michael D. Jones, *Consistency and Equality: A Framework for Analyzing the "Combat Activities Exclusion" of the Foreign Claims Act*, 204 MILITARY L. REV. 144 (2010) (offering a critique, based on the author's experience as a Chief of Clients Services in Iraq in 2006, on the way the FCA is applied, and suggesting a framework for analyzing claims involving the combat exclusion).

[601] *See* ACLU FOIA Report, *supra* note 577, at Army Bates No. 732–33.

[602] Compare *id.* at Army Bates No. 785–86, with *id.* at Army Bates No. 762. In at least one case, army claims personnel stated that there is a presumption of combat exclusion when U.S. soldiers fire weapons. *Id.* at Army Bates No. 656–59. And yet, other claims
for shooting deaths and injuries were compensated without mentioning such a presumption. *Id.* at Army Bates No. 385–88.

[603] CIVIC, ADDING INSULT TO INJURY: US MILITARY CLAIMS SYSTEMS FOR CIVILIANS 3 (2007), cited in Witt, *supra* note 527, at 1473 (noting that "The FCA 'combat exclusion' appears to be applied arbitrarily").

[604] 10 U.S.C. § 2736 (2004).

[605] Army regulations provide the authority for payments: "Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands." U.S. Dep't of Army, Reg. 27-20, Claims, Jul. 1, 2003, ¶ 10-10.

[606] Tracy, *supra* note 587.

[607] These payments were also customary in Vietnam, when the 'going rate for adult lives was $33. Children merited just half that.' Cited in Gilbert, *supra* note 591, at 5.

[608] Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOTIATION J. 219, 224-25 (2007).

beginning of both the Afghan and Iraq wars, U.S. Central Command declined to authorize the payments, leaving no claims system outside the FCA regime.[609] Later on, though, the Department of Defense determined that payments *are* customary in both countries.[610] After that determination, until 2007, U.S. armed forces paid approximately $30 million in condolence payments to Iraqi and Afghan civilians.[611] In Iraq, maximum individual payments are $2,500 for a death, $1,000 for a serious injury, and $500 for property loss or damage.[612]

Like FCA payments, condolence payments are considered a gesture of *ex gratia*, intended to ease civilian suffering, rather than provide formal reparation, legal compensation, or admission of fault or negligence.[613] The individual or unit involved in the damage has no legal obligation to grant these payments, and, in fact, the soldiers or Marines who were present at the time of the aggrieving incident do not participate in the process at all.[614] In comparison with an FCA claim, there is a lower evidentiary threshold for condolence payments, and payments can also be made when an FCA claim was denied.[615] However, even once condolence payments were introduced in Iraq and Afghanistan, the U.S. army has referred only a small fraction of the combat-excluded cases for condolence payments.[616] Payments are distributed shortly after an aggrieving

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[609] *Monetary Payments for Civilian Harm*, *supra* note 462, at 14.
[610] In September 2003, the highest level of Command in Iraq (Combined Joint Task Force-7) authorized what it called "solatia-like" payments. In November 2005, condolence payments were approved for use in Afghanistan. *Id.* While a November 2004 memo by the Defense Department authorizes condolence payments in Afghanistan and Iraq, other sources suggest that the army began making condolence payments in Iraq in September 2003, five months after the invasion. Witt, *supra* note 527, at 1463.
[611] Witt, *id.*; GAO, *supra* note 591. Exact data are unavailable for later dates. Nick Turse, *Blood Money: Afghanistan's Reparations Files*, THE NATION (Sep. 19, 2013), *available at* https://www.thenation.com/article/blood-money-afghanistans-reparations-files/.
[612] U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCHOOL, OPERATIONAL LAW HANDBOOK 270 (2007), *available at* http://www.fas.org/irp/doddir/army/law2007.pdf; Witt, *id.*, at 1463. Payments may be authorized up to $10,000 by a higher command. *Monetary Payments for Civilian Harm*, *supra* note 462, at 15.
[613] Condolence payments are described as 'symbolic gestures.' U.S. Army, *Money as a Weapon System Afghanistan*, USFOR-A PUB 1–06 (Feb. 2011). *See also* Center for Civilians in Conflict, *Backgrounder: US "Condolence" Payments* (2011), *available at* http://civiliansinconflict.org/resources/pub/backgrounder-us-condolence-payments.
[614] Joseph, *supra* note 608, at 244.
[615] Gilbert, *supra* note 591, at 5; Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, 2004 ARMY LAW. 39, 43 (2004).
[616] Army judge advocates appear to have granted condolence payments in only 70 of the 233 combat-excluded claims in the ACLU FOIA request files from 2005 and 2006. Witt, *supra* note 527, at 1472.

incident occurred, are generally nominal,[617] and are paid either in cash or as in-kind expressions of sympathy through goods and services.[618]

There are many examples of inconsistencies with respect to condolence payments.[619] A condolence payment is viewed as precluding a subsequent FCA claim in one case but not in the next, though the FCA seems to support the latter approach.[620] In one case, when a U.S. forces car killed two members of the same family, a maximum of $7,500 should have been claimable.[621] But, extraordinary circumstances were found, and a total of $10,000 was awarded, for unknown reasons.[622] As Ganesh Sitaraman concludes, "because the condolence process is discretionary and decentralized to the level of particular commanders, the procedures and application have been inconsistent and largely ad hoc."[623] As a result, much like the FCA regime, the condolence process is highly uneven in application.

III. Promises and Perils in Civilian Compensation: Evaluating the Models

How should we think about these two distinct models for civilian compensation, against the backdrop of the goals and benefits of tort law on the one hand, and its limitations on the other? Which model provides more effective remedies? Which one better responds to victims' needs and motivations and to the unique difficulties asymmetric conflict settings entail? And how does each do in terms of promoting government accountability? Through the two models, I consider the role monetary compensation assumes in asymmetric conflict, offering implications for designing programs that address the harm such conflicts cause to civilians.

As explained above, the Israeli model has gone through significant changes, resulting in a much more restrictive compensation policy. In many ways, the changes this mechanism underwent are related to its susceptibility to public opinion, as a

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[617] Joseph, *supra* note 608, at 224.
[618] Witt, *supra* note 527, at 1463.
[619] Witt, *id.* at 1472-76. According to Witt, the differential values attributed to death and injury appear to be the result of an 'arbitrariness' of accounting. *Id.*, at 1472.
[620] ACLU FOIA Report, *supra* note 577, at Army Bates No. 546-49.
[621] GAO, *supra* note 591, at 25.
[622] Gilbert, *supra* note 591, at 7.
[623] Sitaraman, *supra* note 456, at 1794. Geographical location or the kind of incident – night raid or airstrike, for example – can also impact the access to soldiers to make a claim, providing yet another reason for inconsistency. Gilbert, *id.*

transparent claiming system exposed to political pressures. This susceptibility may be considered in and of itself a flaw of this model—a side-effect of the injuring state judging its own actions during an ongoing conflict. Yet, it is also an inevitable feature of any system rooted in democratic values. In this Part, though, I reflect—from a normative perspective—on the values and problems that mechanism has evoked when it was still functional, during the pre-Second Intifada era. I seek to conduct this reflection behind a veil of ignorance as to the eventual demise of this model in the Israeli context.

First, I examine the potential benefits derived from the Israeli model in its original form. These benefits can be ascertained through Palestinian plaintiffs' motivations to pursue tort litigation in Israeli courts. My interviews with such plaintiffs and their lawyers suggest that a variety of motivations undergirded their decision to pursue such litigation. First, acknowledgement of wrongdoing on the part of the State of Israel.[624] As one lawyer put it, "even when the State doesn't pay, it's a process of taking responsibility, acknowledging wrongdoing."[625] Second, information seeking; the hope that through the legal proceeding, particularly its discovery process, plaintiffs will learn more about what happened to them or their loved ones.[626] In the words of one lawyer, "there is the issue of knowing what exactly happened. It's not that [the plaintiffs] don't know what happened but still the legal process allows lots of information they don't have to become available and that means a lot to people who have lost their loved ones or that were injured themselves."[627] Third, vindication of rights; the opportunity to stand on equal footing with state representatives, those they view as responsible for the event.[628] This is also related to victims' desire to act upon a perceived injustice, and the realization that other courses of action are unavailable.[629] Finally, compensation itself, particularly in situations in which the victim was the breadwinner or when plaintiffs lack other resources to recover from the incident. As one plaintiff explained, "[i]t was never my intention to

[624] Interview with GB (Plaintiff), Jul. 2015; Interview with PL9, Dec. 2015; Interview with PL16, Mar. 2016.
[625] Interview with PL4, Mar. 2015.
[626] Interview with CF (Plaintiffs), Jul. 2015.
[627] Interview with PL9, Dec. 2015.
[628] Interview with BA (Plaintiff), Jul. 2015; Interview with PL2, Sep. 2014.
[629] PL9 noted that some people direct their frustration towards violence, while others seek legitimate, non-violent ways to cope with it. Interview with PL9, Dec. 2015.

file except my husband was the breadwinner."[630] Though the Israeli tort system did not always deliver on all these promises, its capacity to do so encouraged plaintiffs to resort to the courts.

Another benefit of the Israeli model is its potential to promote accountability for military actions in the Territories and in some case even a change of practices. Plaintiffs' lawyers emphasized the significant role tort litigation plays in this regard, particularly since criminal charges are rarely ever brought against soldiers.[631] Senior lawyers in the field noted the gradual change in the military's approach towards maintaining records of actions in the Territories, which became more rigorous. The lawyers noted further that the military introduced more careful rules of engagement and supervision of soldiers' conduct as a result of these lawsuits. They attributed this change, at least in part, to the wave of lawsuits brought against the military following the First Intifada.[632] The role of the Claims in inducing this change was acknowledged by government lawyers too.[633] One government lawyer provided a concrete example. She mentioned that, in the 1990s, there were many checkpoint-related aggrieving incidents between Border Police Unit soldiers and Palestinians. Soldiers humiliated individuals during physical searches, cursed and spat. The Claims raised the DA's awareness of these incidents which resulted in pressure on the Unit to revise procedures and increase soldier supervision. According to that lawyer, these incidents did wane in later years.[634]

Yet, lawyers on the State's side have also noted the difficulties associated with managing a tort case under the circumstances of conflict. A senior MOD lawyer mentioned the severe lack of information on the defendant's side; not being able to verify the reliability of medical records provided by plaintiffs. As he put it, "I'm often fighting with my hands tied."[635] These difficulties are exacerbated by soldiers' lack of cooperation: either they are hard to get a hold of after being released from duty, do not

[630] Interview with MJ (Plaintiff), Aug. 2015.
[631] Interview with PL4, Mar. 2015; Interview with PL2, Sep. 2014; Interview with NGOL2, Aug. 2014.
[632] Interview with NGOL7, Mar. 2016; Interview with PL17, Feb. 2016; Interview with PL2, Sep. 2014; Interview with PL3, Jul. 2015.
[633] Interview with GL5 (DA), Aug. 2015.
[634] Interview with GL2 (DA), Aug. 2014. GL2 mentioned that the lawsuits may have even resulted in several cases of disciplinary proceedings to soldiers due to such incidents.
[635] Interview with GL7 (MOD), Jan. 2016. *See also*: Interview with GL9(IDF), Dec. 2016.

remember what happened during a chaotic situation,[636] or are reluctant to take part in the legal proceeding.[637] Finally, the State often experiences difficulties getting to the scene of the incident to investigate the case, as this may involve mortal danger.[638] These evidentiary problems, the State argued during legislative proceedings, give rise to "situations of practical inability to defend against lawsuits, as well as false claims and plaintiffs' attempts at fraud, while the state lacks the means to expose falsehoods and distinguish them from claims that are based on facts that did occur."[639]

As discussed above, these difficulties in applying tort litigation to conflict-related settings prompt the competing no-fault model, used by the U.S. military.[640] This model does not require elaborate discovery, soldiers' oral testimonies, nor damages calculation. Like insurance, these payments are bureaucratic – based on information recorded on standardized forms and administrators' decision-making.[641] Yet, here too, there are drawbacks, which I argue are even more troublesome. There is no recognition of responsibility on the part of security forces in appropriate cases, nor is there an opportunity for victims to articulate their stories, experience empowerment, or solicit information from the other side. The amounts allocated are ordinarily limited in size, and may be perceived as unsatisfactory, even insulting, when compared to the scope of injury.[642]

It should not come as a surprise, then, that not all victims welcome these payments. For instance, in response to a massacre conducted in 2012 by a U.S. soldier in

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[636] Interview with GL4 (DA), Aug. 2014; Interview with GL7 (MOD), Jan. 2016; Interview with GL8 (MOD), Dec. 2015 (noting the use of polygraph as one of the ways to handle evidentiary gaps).
[637] Interview with GL11, Mar. 2016. When soldiers do testify in trial, this creates another set of problems given the need to keep their identities confidential. Interview with KS1, Mar. 2016; Interview with GL11 (DA), Mar. 2016.
[638] Cited in *Getting Off Scott-Free*, *supra* note 453, at 43.
[639] Draft bill for Addressing Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip (Exemption from Liability and Paying Compensation), 5757-1997. Later, the State began using the services of private investigators to expose such false claims. Interview with GL4 (DA), Aug. 2014.
[640] These challenges reportedly led the State to push for a sweeping *ex gratia* mechanism to replace the tort-based system in the 2005 Amendment. See Part II.A *supra*. Unlike the existing Ex Gratia Committee which typically discusses non-combat incidents (Working Procedure, *supra* note 574; Interview with GL7 (MOD), Jan. 2016; *Getting Off Scott-Free*, *supra* note 453, at 15), the 2005 Amendment purported to expand its use for both combat and non-combat incidents. Ronen, *supra* note 456, at 218.
[641] Paul Langley, *Uncertain Subjects of Anglo-American Financialization*, 65(1) CULTURAL CRITIQUE 67 (2007).
[642] As Ronen notes, the practice of *ex gratia* payments "demonstrates that even when payment is voluntary and entirely at the discretion of the states, they do not exhibit great benevolence." *Supra* note 456, at 216.

the Panjwai district, near U.S. military Camp Belambay in Afghanistan, the brother of one of the victims was recorded as stating: "I don't want any compensation. I don't want money, I don't want a trip to Mecca, I don't want a house. I want nothing. But what I absolutely want is the punishment of the Americans. This is my demand, my demand, my demand and my demand."[643] In another incident in Helmand province, Habibirrahman Ibrahimi reports that one of his Afghan interviewees, Ismail, was 'enraged' by monetary payments offered by the military. In his words, "Afghans must seem like animals to the Americans if they can put prices on them … If someone killed an American and offered to pay $10,000, would they accept it?"[644]

These statements, speak to victims' desire of retribution, the lack of accountability attached to the U.S. model, and the payments' small size compared to the severity of the injury. In this sense, since money can and does indicate an acknowledgement of responsibility, symbolic amounts can be perceived as an insult to victims; an attempt on the injurer's side to trivialize the extent of the injury. Worse yet, monetary payments can constitute a "license to injure" of sorts, allowing states to risk causing harm to civilians so long as they subsequently "buy out" their injuries. Paired with the lack of evaluation of the cause undergirding the claim, these payments can be viewed almost as a "cost of doing business," precluding any real potential for accountability. These concerns also relate to the identity of the decision-maker deciding who to compensate and in what amount. No matter the quality of training provided to military officers in charge of distributing payments, it is still the case that those responsible for the harm inflicted are being tasked with making decisions regarding how that harm should be valued and who should pay for it. There are no mechanisms in place

[643] Mirwais Harooni & Rob Taylor, Afghanistan's Karzai slams US over massacre, REUTERS (Mar. 17, 2012), *available at*: http://www.reuters.com/article/us-afghanistan-idUSBRE82F0PV20120317.
[644] Habibirrahman Ibrahimi, *Afghan anger at US casualty payments* (Apr. 9, 2010), *available at*: https://iwpr.net/global-voices/afghan-anger-us-casualty-payments. Relatedly, recalling his experiences as a military judge advocate in Iraq from January 2002 to April 2005, Jonathan Tracy noted that 'every Iraqi I spoke with on the issue expressed shock and disbelief I could only offer $2,500 for the death of a human being. Not one Iraqi ever said the amount made sense, or was equitable.' Tracy later became an advocate at the Campaign for Innocent Victims in Conflict. See his 2009 testimony before the U.S. Senate Committee on Appropriations Subcommittee on State and Foreign Relations: http://www.gpo.gov/fdsys/pkg/CHRG-111shrg49742/html/CHRG-111shrg49742.htm

for review or monitoring,[645] and, as noted, little transparency is provided regarding the process of allocating payments.[646] These characteristics cast doubt on the extent to which such a mechanism can effectively promote accountability. In the absence of serious post-event assessment of liability as a check on soldiers' behavior, a concern arises for moral hazard; *i.e.*, that soldiers will not take all necessary precautions to avoid anticipated harm and may venture unwarranted risks.

Furthermore, the process by which military payments are paid does not allow victims to experience the aforementioned benefits. As Jeremy Joseph notes, since condolence payments are handed out with minimal interaction between soldiers and victims, there is no process of reconciliation.[647] In this context, a comparison to the practice of *diya* payments in Islamic legal doctrine (*fiqh*) is informative.[648] Rather than turn to the death penalty in the event of a murder, victims can choose to accept *diya*: fixed but generous monetary values determined based on a sliding scale, similar to that used with condolence payments.[649] Yet, military payments differ considerably from *diya* with respect to process, as the latter is used to express forgiveness.[650] Not only does the perpetrator acknowledge responsibility for the harm caused, but the decision to accept payment is determined in consultation with victims.[651] This attention to victims' perspective is absent from the military payments system.

The lack of victim participation is closely tied to the goals behind these payments, which are not conceived of as an obligation but rather as an expression of sympathy, humanity, and goodwill, aimed at supporting the military objective of 'winning the hearts and minds' of the local population.[652] The target audience of the payments is thus not the

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[645] As the FCA stipulates, '[b]y accepting payment, claimant releases the U.S. government, and its employees and contractors, from future liability or claims.' GAO, *supra* note 591, at 51.
[646] Gilbert, *supra* note 591, at 8.
[647] Joseph, *supra* note 608, at 224.
[648] The doctrine incorporates an 'underlying and fundamental concept of compensation for life, limb and property.' WAEL B. HALLAQ, SHARĪ`A: THEORY, PRACTICE, TRANSFORMATIONS 309 (2009).
[649] Gilbert, *supra* note 591, at 5. On solatia and diya payments in Iraq, see Keith Brown, *"All They Understand Is Force": Debating Culture in Operation Iraqi Freedom*, 110(4) AMERICAN ANTHROPOLOGIST 443 (2008).
[650] Hisham M. Ramadan, *On Islamic Punishment*, *In* UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 43 (Hisham M. Ramadan ed., 2006). A requirement is that 'fair compensation' is negotiated so that victim's honor is restored. HALLAQ, *supra* note 613, at 320.
[651] Gilbert, *supra* note 591, at 5.
[652] In a report from 2010, the Campaign for Innocent Victims in Conflict noted that 'in Iraq and Afghanistan, the United States has found that monetary payments made to civilians harmed express

direct victim, but rather the Afghani or Iraqi public in general. The term frequently used to describe these payments – '*ex gratia*' – is Latin for 'out of kindness,' denoting the lack of legal duty attached to them. Resentment towards this approach to victim compensation is expressed in the perceptions of Israeli plaintiffs' lawyers towards the Ex Gratia Committee discussed above, which is used as an alternative to the Israeli court-based mechanism.[653] According to several lawyers, these proceedings are perceived as demeaning, as they reflect the view that victims can be dismissed with no more than symbolic payments which do not give consideration to the full extent of their suffering.[654] Some plaintiffs' lawyers doubted the objectivity of the Committee,[655] and expressed concern that it allows the State to 'have the cake and eat it too,'[656] in the sense that it projects so-called consciousness to victims' suffering without constituting a meaningful check on military decision-making. As Israeli MOD officials themselves acknowledged, it is also problematic from the victims' perspective that their claims are decided by military personnel, whom they view as part of the system responsible for their injury.[657] Given these views, it is not surprising that this mechanism is rarely used.[658] These

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sympathy, dignify losses, and track with US principles of humanity and compassion.' *See* Campaign for Innocent Victims in Conflict, *United States Military Compensation to Civilians in Armed Conflict* (2010), *available at*: http://civiliansinconflict.org/resources/pub/united-states-military-compensation-to-civilians-in-armed-conflict. This is made explicit in the guidelines for military payments for Afghanistan, which state that 'condolence payments can be paid to express sympathy and to provide urgent humanitarian relief to individual Afghans and/or the Afghan people in general.' U.S. Army, *supra* note 613, at 125.

[653] *See* Part II.A *supra*.

[654] Interview with PL4, Mar. 2015 (noting he refuses to take part in these proceedings); Interview with PL12, Dec. 2015 (noting that he is unwilling to participate in this 'ugly game' and that he views the concept as 'condescending.'); Interview with PL7, Aug. 2014. The latter mentioned a case in which the State was unwilling to offer an *ex gratia* payment in a case which received much public attention, apparently due to its concern that it would imply accepting responsibility for the incident. PL13, who typically represents Palestinian corporations, noted that the small amounts paid by the Committee would not assist in restoring the damage caused to his clients. Interview with PL13, Mar. 2016.

[655] Interview with PL10, Dec. 2015.

[656] Interview with NGOL9, Mar. 2016; Interview with PL9, Dec. 2015 (noting that the Committee does not grant victims any acknowledgment of the State's wrongdoing as there is no admission of guilt on the part of the State).

[657] *See* remarks by GL7 with regard to the military function of 'Kamat Tov'anot' noted in Part III.A., *supra*. Interview with GL7 (MOD), Jan. 2016. *See also* Interview with GL8 (MOD), Dec. 2015.

[658] Interview with GL7 (MOD), Jan. 2016; Interview with GL8 (MOD), Dec. 2015 (also noting the scarcity of information available on the Committee); *supra* note 574. Interestingly, my conversation with a senior MOD lawyer revealed that the State believes Palestinians are avoiding the use of the *ex gratia* mechanism because they have other sources of compensation. Interview with GL7 (MOD), Jan. 2016. A noteworthy example of a case in which the Committee did operate is that of a 3-year-old girl, Maria Amman, who was severely injured and lost her family in a targeted killing attempt in Gaza. She received status in Israel, a substantial monthly stipend from the Israeli MOD, and full coverage of her extensive medical treatment in Israel. *See* Interview with PL17, Feb. 2016; Jacky Huri, *HCJ: The Palestinian Girl Maria Amman Remains*

perceptions of *ex gratia* compensation highlight this model's ineffectiveness from the victims' perspective and its inability to promote government accountability.

Table 1 below summarizes the differences between the two models, highlighting the advantages and drawbacks of each model:

Table 1: Outcome- and Process-related Features of the Two Models

Process/ Criteria		Adjudicatory Model (fault-based): Israel	Administrative Model (no-fault): U.S.
Process Variables	Legal Representation	+	-
	Claimants' Voice and Participation	+	-
	Transaction Costs	-	+
	Process Lengthiness	-	+
	Transparency	+-*	-
	Third Party Neutral	+	-
	Susceptibility to Political Pressures	-	+
Outcome Variables	Liability/ Blame-Placing	+	-
	Adequate Compensation	+	-

+ = process ranks better on the criterion

* considering confidential out-of-court settlements, which are not transparent

As evident in Table 1, the administrative, no-fault model prioritizes efficiency and durability over process and outcome fairness. The adjudicatory model lies at the opposite side of this trade-off. The next Part discusses a potential path forward considering the drawbacks of both models.

in Temporary Status for Two More Years, HA'ARETZ (Mar. 25, 2015), *available at*: http://www.haaretz.co.il/news/education/.premium-1.2600222. This case attests to the exceptional cases in which the Committee tends to intervene.

IV. Path Forward: Designing Effective Victim Compensation Programs in Asymmetric Conflict

Arising from these tensions is the question: Which system better responds to the complexity of asymmetric conflicts? I contend that a compensation program, apart from effectively providing compensation, needs to balance government accountability and transparency with victims' other needs and motivations, including recognition, information, voice, and control. My analysis suggests that there is real merit to a tort-based system, despite its flaws, given its capacity for fact-finding, addressing victims' needs, and prioritizing transparency and accountability. As argued above, tort law's process-related objectives and benefits are just as important as—if not more important than—its outcome-oriented goals of monetary compensation, particularly in asymmetric conflict settings.[659] In some cases, tort lawsuits can even promote a change in military practices. These significant benefits make the tort model, as a normative matter, more attractive for the settings in question. While I do not purport to suggest an elaborated, "one-size-fits-all" model to address civilian harm in asymmetric conflict, nor do I believe such a uniform model is desired, I offer below several guidelines policy makers ought to follow when designing compensation programs in such settings. Importantly, these process-related recommendations should be adopted alongside the guiding principle of providing adequate compensation to injured civilians when there was fault in security forces' actions.

Recommendation 1: Incorporating Victim Participation

The process must incorporate some form of victim participation, the exact scope of which should be context-dependent. Indeed, tort litigation provides a platform for injured, disempowered individuals to use their voice—even if they do not ultimately prevail at trial. Forcing a court to seriously and publicly consider a plaintiff's position is in and of itself a dignifying experience for the aggrieved. Furthermore, as civil recourse theory teaches us, plaintiffs are empowered through the opportunity to stand on equal footing with and confront their injurers. Therefore, when designing compensation programs in asymmetric conflicts, policy makers should include a process for victim

[659] *See also* Bachar, *Access Denied*, *supra* note 465 (arguing that a key component of the right to access to justice is the right to the litigation *process*, rather than only its *outcome*).

participation, allowing victims to appear before the decision-maker, share their stories, and hear from government representatives.[660]

Recommendation 2: Requiring Information Sharing

Litigation is also a platform for conducting factual and legal analyses of military activity in the course of ongoing asymmetric conflict, activity which is often only quasi-military or even police-like in nature, and thus does not fall into the combat exclusion. Policy makers should thus include in the process an opportunity for plaintiffs to receive information about what happened to them or their loved ones during conflict incidents. On the flip side, government representatives should be required to expose such information except when deemed by a third-party neutral as confidential. Even in the latter case, there might be an alternative of exposing partial information through redacted documents. This requirement will promote transparency, accountability, and may even lead to change of practices in appropriate cases.

Recommendation 3: Assuring the Neutrality of Third-Party Neutrals

It is crucial for policy makers to carefully consider the identity of third-party neutrals given potential impediments to their objectivity. In particular, further research is needed to assess the capability of judges from the injuring state to successfully fulfill this role, and the conditions under which domestic civil courts can assume this function. Taking into account political pressures which may be in play, there is also a need for constitutional checks on states' ability to erode a tort-based compensation mechanism through procedural limitations, as was done in Israel. The failure of the Israeli mechanism should serve as a cautionary tale, emphasizing the need to carefully adapt the

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[660] Granted, victim participation can also be achieved through alternative dispute resolution (ADR) procedures, like mediation. A mediation process may help obtain an apology from an official state representative more effectively than a litigation, and this may be very significant to some victims. A story shared by an Israeli plaintiffs' lawyer suggests the value of mediation in this respect. He mentioned a case of a foreign human rights activist, killed by an Israeli military sniper in Gaza. The case was referred by the court to mediation, and following a mediation session, the government lawyer turned to the victim's mother to say that he is awfully sorry about what happened to her son, who seems to have been an amazing person. In response, the mother bursted into tears and said that she has been waiting to hear those words for six years, since the legal proceeding was initiated. The case was eventually settled, like many other similar cases in the pre-Second Intifada era. Interview with PL9, Dec. 2015. Yet, as explained below (*infra* note 667), such procedures would have other significant drawbacks in asymmetric conflicts. Finally, victim participation can also be incorporated into *criminal* accountability mechanisms. *See, e.g.*, Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J. L. & POL'Y 229 (2005) (discussing the trend of victim involvement in the U.S. criminal justice system). However, since the focus of this Article is on civil accountability, the latter exceed its scope.

tort system to the reality of asymmetric conflict. One option for such adaptation would be a panel of decision-makers which includes a representative of the injuring state, a representative of the injured individual/s, and a third-party neutral. Granting the decision-making power, at least partially, to an objective third party, rather than keeping it exclusively in the hands of the injuring state's security forces, can deemphasize the state's power to wield discretionary decision-making over harm that it has itself inflicted.

Recommendation 4: Devising an Opt-out Option

Despite the deficiencies of the no-fault system, the program design should offer an opt-out option to turn to no-fault compensation.[661] Such an opt-out option will allow victims who value efficiency and speed more than they care about the process elements of the program, such as participation and information, to choose the no-fault route.

A persisting concern, though, is the prevalence of out-of-court settlements in the shadow of the tort system.[662] Under a settlement, similarly to a no-fault model, while money is being disbursed which might be interpreted as an acknowledgement of wrongdoing, there is no explicit admission of guilt on the part of security forces, nor is there an assessment of cause or intent.[663] That said, before a case is settled under the tort system, the stronger party—the state—is still 'dragged' into court by much weaker plaintiffs.[664] This suggests that even considering out-of-court settlements, the existence of an objective decision-maker still differs from a no-fault model, both in holding security forces accountable, and in addressing victims' needs. A tort-based process which

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[661] The opting-out process should be carefully considered, though, given the 9/11 VCF experience noted above, where plaintiffs had the opposite opportunity—to opt-out of the no-fault fund and bring a tort lawsuit (under significant limitations)—and scarcely made use of this option. *See* Hadfield's findings, *supra* note 541.

[662] As Witt points out, the decision-making in the U.S.'s military payments system is actually similar to "personal injury lawyers and insurance company claims adjusters: using cash to settle civilian claims against the armed forces." Witt's analogy to lawyers and insurers is made in an earlier version of his 2008 article (*supra* note 527), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096587. *See also* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 232–34 (1980); Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1602-06 (2004)

[663] In this sense, payment is "unconditional and contractual, no longer based on the notion of one party's responsibility." Daniel Defert, *Popular Life and Insurance Technology*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 211 (1991).

[664] *See* Interview with PL4, Mar. 2015 (noting benefits of the Israeli system, even when cases are eventually settled); Interview with NGOL9, Mar. 2016; Interview with PL9, Dec. 2015 (noting the process leading up to the settlement of some claims before the Second Intifada era, which included the State acknowledging its wrongdoing towards Palestinians).

includes some form of negotiation and compromise also better ensures that compensation is not projected as an act of generosity as under a no-fault model, but as redress owed to victims in cases where there was fault in the state's conduct.[665]

Several vexing questions remain. *First* is the issue of confidentiality. As we have seen through the Israeli model, confidentiality is often a requirement in out-of-court settlements involving security forces, as it allows the state to avoid public embarrassment in cases of misconduct.[666] But should the state be allowed to demand confidentiality as a pre-condition for compensation? Obviously, confidentiality compromises accountability. In this sense, informal negotiations and alternative dispute resolution (ADR) proceedings such as mediation—conducted behind closed doors—would risk disadvantaging weaker parties.[667] That said, confidentiality may allow authorities to admit guilt and acknowledge wrongdoing in private in appropriate cases, which may be more important to some victims. Future research should thus examine conflict victims' perceptions of confidential out-of-court settlements to better assess this tool. *Second*, what should be the composition of the panel adjudicating claims? Who should these third-party neutrals be and how should they be selected? Can the courts of the injuring state successfully serve?[668] As noted, more research is required to evaluate the adjudicatory body's

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[665] From a theoretical perspective, as civil recourse theory argues, since tort law confers individuals a power to pursue a legal claim alleging that they have suffered an injury flowing from a legal wrong to them by another, it is a matter for the injured individuals to decide how they pursue their claim. This can be done either through trial or through negotiation of settlement. Goldberg, *The Constitutional Status of Tort Law*, *supra* note 477, at 604-05.

[666] *See* discussion in Part III *supra*.

[667] Indeed, using an ADR-based model would raise a host of concerns in this respect. As Owen Fiss notes in his famous critique of ADR, these procedures often involve a good deal of coercion, much like a civil analogue of plea bargaining (*see* Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075 (1984) (critiquing the ADR movement for its pressure towards reaching a settlement)), and tend to disadvantage weaker parties, particularly ethnic and racial minorities subjected to negative biases (*See* Richard Delgado, Chris Dunn, Pamela Brown & Helena Lee, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, WIS. L. REV. 1359 (1985) (arguing that because ADR procedures frequently incorporate features that social science research has identified as facilitating prejudice, the procedures would produce biased outcomes); and more recently, Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817 (2017) (reviewing empirical research testing Delgado et al.'s hypothesis and arguing that, "[i]n an era of increasing economic inequality and ever louder expressions of racial, ethnic, and gender prejudice, we have a responsibility to learn more about how public policies that continue to favor alternative dispute resolution are affecting less powerful groups in U.S. society.")).

[668] A related fundamental psychological question, which is beyond the scope of this Article, is whether societies (Israelis, Americans) can really judge themselves amidst an ongoing conflict in which each side is entrenched in its own victimhood.

impartiality in such contexts. *Finally*, various practical and procedural issues need to be addressed, including legal counsel, translation services, the nature and scope of victims' participation, and an appropriate physical environment to conduct meetings between parties. The availability of legal counsel, in particular, can help bridge some of the inherent power imbalances pervading asymmetric conflicts.

Importantly, my recommendations should be applied based on the specific conflict's characteristics. A key feature to be considered is the purpose of compensation, which, in turn, depends on the relationship between the injuring state and the civilian population in question—be it a prolonged occupation like in the Israeli-Palestinian case or a short-term military engagement. By examining the defining features of the conflict and avoiding "one-size-fits-all" solutions, we can improve the design of victim compensation programs to effectively address the implications of asymmetric conflicts worldwide.[669]

Conclusion

The complex reality of asymmetric conflicts, taking place outside the traditional battlefields and amongst civilian populations, prompts us to reconsider adequate paths for coming to grips with harm to civilians. This Article compared two archetypical models used by Israel and the U.S. to compensate civilian victims in the context of such conflicts, bearing in mind the differences between the type of military engagement in each case: a prolonged military occupation of adjacent territories versus a short-term operation, miles away from the country. On the one hand, as Witt maintains, "[t]ort law was hardly designed with the functional imperatives of the military in mind."[670] The incompatibility between tort law and military strategy raises difficulties in applying conventional tort principles to claims arising from conflict settings. In the Israeli case, this argument was used to justify curtailing tort lawsuits by Palestinians through both procedural limitations and expansion of the combat exclusion, demonstrating this model's susceptibility to popular pressures. Moreover, even assuming we could reconcile the basic tenants of tort

[669] For an alternative, see the model suggested by Maya Steinitz for an International Court of Civil Justice which would have jurisdiction to adjudicate transnational corporations' human rights abuses. *See* Maya Steinitz, *Back to Basics: Public Adjudication of Corporate Atrocities Mass Torts*, HARV. INT'L L.J. (forthcoming - 2017).
[670] Witt, *supra* note 527, at 1467.

law and the reality of twenty-first century conflicts, tort law often struggles to achieve its goals even in areas where it is expected to do best.[671]

On the other hand, the competing no-fault model raises even more significant problems, in particular lack of accountability and transparency and disregard towards victims' role in the process. Though aimed at providing more horizontal equality than torts, such programs are also characterized by inconsistency,[672] both in application of the rules governing eligibility and in damages allocation, leaving massive discretion to the military representatives charged with decision-making. Further intricacy to this comparison is added by the introduction of confidential out-of-court settlements between military representatives and conflict victims under the tort system, which bear resemblance to a no-fault system in their lack of transparency and failure to promote accountability.

This complexity necessitates more empirical research surveying and interviewing asymmetric conflict victims to evaluate their legal needs and motivations. Studies emerging from the legal consciousness and dispute processing traditions[673] provide initial insights into such an evaluation. Gillian Hadfield's findings on the 9/11 Victim Compensation Fund, for example, indicate that litigating respondents were searching for recourse more than they were keen on having their voice heard in court or on a higher payout.[674] Yet, these findings require testing in an asymmetric conflict setting which would allow evaluating victims' motivations to pursue tort litigation, their perceptions of a no-fault program, and additional aspects such as how victims conceive of their losses, who (or what) they blame, and how they perceive the legal process they encounter in terms of fairness and justice.[675] Moreover, future research should assess the ability of the

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[671] *Id.*, referencing E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (surveying domestic litigants' (dis)satisfaction with the tort system). *See also* critiques on the tort system, *supra* note 515.
[672] *See* Freeman Engstrom, *Lessons from the VICP*, *supra* note 538 (arguing that no-fault regimes are no panacea, as evident in the VICP case which failed to ensure predictability and speedier redress as it has promised).
[673] *See, for instance*, HAZEL GENN, PATHS TO JUSTICE – WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW (1999); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990).
[674] *See* Part II.C, *supra*.
[675] Lind et al., *supra* note 671.

injuring state's courts to successfully serve as decision-makers in conflict-related claims, vis-à-vis other potential third-party neutrals.[676]

I argued in this Article that, despite the flaws of the tort system, tort law is valuable for asymmetric conflicts, due to its capacity to promote, in addition to monetary compensation, both government accountability and victim participation. Based on this finding, the Article offered several recommendations that policy makers ought to follow when designing compensation mechanisms in asymmetric conflicts.

Importantly, we must replace the ethos of providing compensation as a tribute of *ex gratia*, with an entitlement owed to victims by states involved in asymmetric conflicts in cases where there was fault on security forces' part. Notwithstanding the difficulty to reconcile tort law with the reality of the battlefield, states involved in such conflicts should remember that prudent military strategy does not align with lawlessness and lack of accountability. Indeed, the traditional norms of protecting civilians in armed conflict as expressed in IHL and HRL were not designed with the characteristics of twenty-first century warfare in mind, a reality which entails mundane, quasi-military and even police-like contact with civilians. Addressing the needs of civilian victims and the imperative of government accountability should thus be an inseparable part of confronting the challenges of modern warfare.

[676] It is possible that more data would encourage us to consider other forms of third party neutral-led processes rather than courts. Such processes would still be costlier than a no-fault system, perhaps to the extent of serving as a deterrent from unnecessary military harm.