



Al Mezan Center for Human Rights

A Story of Barriers in Access to Justice

Abu Is'ayid Legal Fact Sheet

The Abu Is'ayid Family



On a July evening in 2010, the Abu Is'ayid family suffered a deadly attack¹ by Israeli forces on their home in Gaza's access restricted area (ARA) near the border between the Gaza Strip and Israel. The family, who work in agriculture and have lived on and farmed the land for generations, underwent a second devastating attack by Israeli forces just over one year later.

Seeking justice and accountability for the attacks on their home that resulted in the death of mother of five, Ne'ma Yousif Abu Is'ayid, and the destruction of the family home, the Abu Is'ayid family initiated the legal process before the Israeli District Court in Beersheba, Israel, and with Israel's military investigative mechanisms.

Israeli Attacks Against the Abu Is'ayid Family

First Attack in July 2010

The first attack took place on Tuesday, 13 July 2010, at approximately 8:45pm, while the situation in the area was calm. Members of the Abu Is'ayid family were sitting in front of their house watching television when Israeli fire hit 40 meters southwest of the home, injuring two family members. The family retreated inside their home with the two casualties and contacted an ambulance in order to evacuate the injured from the site; Israeli authorities prevented the ambulances from doing so for over an hour and half.²

The now deceased, Ne'ma, who exited her home to look for her son, Jaber, was hit by gunfire/flechette shell that dispersed metal darts around the site of its strike – causing her instant death. Damage was also caused to the front of the house from metal darts. The other injuries include Naser's sister-in-law, Sanaa, who was injured in both legs, his sister, Ameera, who was hit in the right shoulder, and an elderly family member, Jaber Abu Is'ayid, who suffered injuries to his right thigh.

Second Attack in April 2011

The second attack took place on the evening of Thursday, 28 April 2011. The children had just finished their school work and most of the family members were gathered watching television together. At 9:00 pm, at least five missiles suddenly fell on the house and in its vicinity.



Naser's daughter, Maysa, and son, Bahaa', were later pulled from the rubble of their home having sustained bruises due to the falling of debris. Naser's son, Alaa, sustained shrapnel in the stomach and neck. Naser's brother, Mohamed, was hit with shrapnel above his right eye. Naser's sister-in-law, Sanaa, sustained shrapnel in her left leg. Naser's home on the upper level of the house was completely destroyed. The ground floor sustained moderate damages.

Ambulances were called immediately and were given permission from Israeli authorities to enter the area after approximately one hour.

¹ See http://www.mezan.org/en/details.php?id=18470&ddname=buffer%20zone&id2=7&id_dept=22&p=center

² Before entering border areas – ie. areas within one kilometer from the border - Palestinian ambulances are required to first receive permission from Israeli authorities by coordinating through the International Committee of the Red Cross.

Legal Action and Obstacles in Access to Justice

Following each attack on the home the Abu Is'ayid family requested of the Israeli Military Advocate General (MAG) the opening of criminal investigations into the actions resulting in the two attacks on the family home. Just under two years on from the initial attack on the home, the Abu Is'ayid family decided to initiate legal proceedings against the State of Israel to bring long awaited justice to the family. On 11 July 2012, the Abu Is'ayid family initiated the legal process before the Israeli District Court in Beersheba, Israel, asking for compensation for the damages suffered by the family as a result of the first (2010) incident. No evidence or witnesses have been heard on the case to date.

Legal Action and Obstacles in Access to Justice:

Victims of human rights violations within the ARA must be granted access to Israeli courts to pursue effective remedy in civil and criminal claims. The conducting of criminal investigations by the Israeli authorities is rare and existing criminal investigations into alleged violations of international law lack the independence, impartiality, thoroughness and promptness required to ensure accountability. Criminal complaints filed before the Israeli MAG rarely receive a response and, even when an examination is undertaken, the investigation is not carried out by an independent body and the results are not public.

The pursuit of civil compensation claims before Israeli courts on behalf of Palestinian claimants continues to be severely restricted due to often prohibitive procedural, financial and judicial barriers.³

The primary legal obstacle currently faced by Palestinian victims in occupied Palestine is Amendment 8 to the Torts (State Liability) Law. Amendment No. 8 was approved by the Israeli Knesset on 16 July 2012, with retroactive application to 12 September 2005, and gives courts the power to dismiss cases, without hearing witnesses or considering evidence, at the preliminary stage if the incident occurred during a military operation.⁴ This amendment to the law expands the definition of a "combat action" to any operations carried out by Israeli forces and involving a resident of an "enemy territory." Amendment No. 8 enables the State of Israel and its military to evade its obligation under international law to provide reparation and compensation for damages resulting from its operations in occupied Palestine. Consequently, many Palestinian victims are deprived from access to justice and are denied their right to compensation guaranteed under international law.

The procedural obstacles include a burdensome and strict statute of limitations, substantial financial guarantees, onerous questionnaires, and the prevention of claimants and witnesses from Gaza from appearing before Israeli courts or meeting with their lawyers. Israeli courts have dismissed numerous cases due to witness and claimant absence in court after Israeli authorities denied requests to travel. Consequently, Palestinian victims are deprived of access to justice and are denied their right to an effective remedy, which is guaranteed under international law.

Very short Statute of Limitations:

In accordance with the Israeli Tort of Civil Damages (Liabilities) Law, any non-Israeli victim suffering damages as a result of the Israeli military operations in occupied Palestine must submit a complaint to the Israeli Ministry of Defense within 60 days of the incident to reserve the right to file a civil claim within two years. Importantly, the period of limitation of most other civil claims submitted to the Israeli courts is seven years. The Abu Is'ayid family managed to submit the complaint within the required, restrictive timeframe.

Unresolved Investigations by the Israeli authorities:

Two letters were sent to the Military Advocate General (MAG) requesting criminal investigations be conducted into both incidents. Initial military investigations were opened into both incidents. The final outcome of the investigation into the 2010 incident is pending, while the MAG stated that technical difficulties were the reason

³http://www.globalprotectioncluster.org/assets/files/field_protection_clusters/Occupied_Palestinian/files/oPt_PC_Update_Accountability_Reported_IL_Violations_05.2013_EN.pdf

⁴ The Torts (State Liability) Law (8th Amendment) of 2012 amends paragraph 5 (B) of the original law to read: The state is able to invoke the no liability defense when damages occur as a result of a military operation. Courts should now consider this argument and have the power to dismiss cases on this preliminary ground, even without hearing witnesses or considering evidence.

for the 2011 incident as Israeli forces saw a suspicious person approaching the fence; the case was concluded hastily and closed without a criminal investigation.

No Physical Access to Israeli Courts Due to the Closure:

On 11 July 2012, the Abu Is'ayid family initiated the legal process before the Israeli District Court in Beersheba. Since filing the case, the client has not been called to court to give testimony or evidence and due to the strict closure of the Gaza Strip by Israeli authorities, the client has not been able to meet the attorney on the case.

Excessive Israeli Court Fees:

On 4 February 2013, the court issued a decision for the claimants, the Abu Is'ayid family, to pay a court guarantee of ILS 20,000 (equal to USD 5,600) before the civil case could precede, an amount that exceeded the financial capabilities of the victims. The family's lawyer asked the court to exempt his clients from paying the court guarantees due to his clients' financial situation; the court rejected the request. Al Mezan exceptionally decided to pay the court guarantees to allow for the legal proceedings to continue.

Burden is on the Palestinian victim: Amendment No. 8 in the Naser Abu Is'ayid case

On 11 July 2012, before the elapse of the two-year statute of limitations but without yet having heard a response from the MAG, the Abu Is'ayid family initiated the legal process before the Israeli District Court in Beersheba. Hussein Abu Hussein, the lawyer appointed by Al Mezan filed a suit in the Beersheba district court asking for reparation for the damages suffered by the family as a result of the first incident which took place on the 13 of July 2010. The defense lawyers for the State submitted a statement that the incident took place during "combat action", which according to the amendment no. 8 to the Israeli civil Tort Law (Liability of the State), exempts the State of Israel of any legal liability; the defense lawyer therefore asked the court to consider the case inadmissible.⁵

During the court session of 8 April 2013, the defense lawyers for the State of Israel repeated their position on combat action, asking the court to drop the case in accordance with Amendment 8. The claimant's lawyer objected and contested that there are no indications that the incident took place during combat action and asked the court to examine the evidence and witnesses provided by both parties. He also requested the court to grant him more time to prepare the case, pointing out the anticipated difficulties of conducting meetings with the victims and the witnesses in Gaza. The court asked both parties to provide their requests and appeals in detail in writing.

On 5 May 2013, the court approved a plea by the claimants to grant them an additional four months to present their argument and set its next hearing for 7 January 2014.⁶ This hearing did not take place as the State Attorney was unable to attend; the date has been reset for 19 March 2014.

Burdensome and impractical required questionnaires

An additional procedural obstacle came in the form of an 87-question questionnaire, with sub-questions amounting to a total of approximately 500 points for each claimant to answer: a task that is burdensome and impractical, given the physical barriers between the claimants and their lawyer in Israel, the language barriers as the questionnaire is in Hebrew, and the size of the family involved as claimants.

Israel's obligations under International Law

Israel, as the occupying power, bears the responsibility for the safety and security of the civilian population under its control, according to Article 29 of the Fourth Geneva Convention of 1949. If this obligation is breached, Israel must provide restitution for the violation of the rights of protected persons. This duty is enshrined in Article 91 of Additional Protocol I to the Geneva Conventions, which states that a party to the

⁵ In accordance with Amendment No. 8 to the Israeli Civil Tort Law (Liability of the State) which exempts the State of Israel of any liability arising from damages caused to a resident of an enemy territory during a "combat action". Approved and accepted by the Israeli Knesset on the 16 of July 2012. For more details see Adalah Center and others position paper at: <http://adalah.org/features/compensation/positionpaper-e.pdf>, last viewed 8 November 2013

⁶ According to the documents received by NRC from Lawyer Hussien Abu Hussien, and an interview with Al Mezan Center for Human rights on 6 November 2013.

conflict is liable to pay compensation for the damages resulting from acts committed by its armed forces in violation of humanitarian law. According to the commentary of the International Committee of the Red Cross, “Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations.” Indeed, Rule 150 of the International Customary Humanitarian Law states that: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” The Israeli Amendment No. 8 and other obstacles which Israel places by means of legislation in the way of Palestinians seeking compensation for violations of Israel’s duties under international humanitarian law clearly violate Israel’s obligations to protect the rights of Palestinians living in the Gaza Strip and provide reparation for the violation of their rights.

Palestinian right to an effective remedy:

The right to an effective remedy is also provided under international human rights law appears in numerous international instruments, in particular Article 8 of the Universal Declaration of Human Rights⁷ and Article 2 of the International Covenant on Civil and Political Rights.⁸

On 19 April 2005, the UN Commission on Human Rights adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which were also adopted and proclaimed by the UN General Assembly on 16 December 2005.⁹ The Basic Principles and Guidelines call on states to ensure that their domestic law is consistent with their international human rights obligations by, *inter alia*, “[i]ncorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system [and a]dopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.”¹⁰ The scope of the obligation was defined as following:

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described [in the Basic Principles and Guidelines].¹¹

The demand in Israeli law that any non-Israeli victim suffering damages as a result of the Israeli military operations in occupied Palestine must submit a complaint to the Israeli Ministry of Defence within 60 days of the incident and a civil claim within two years also violates specific provisions of international law. The Basic Principles and Guidelines state:

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

⁷ Article 8 of the Universal Declaration of Human Rights states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

⁸ Article 2(3) states: “3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

⁹ UN General Assembly resolution 60/147 of 16 December 2005.

¹⁰ Article 2 of the Basic Principles and Guidelines.

¹¹ *Id.*, Article 3.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

In practice, victims of violations of international law face formidable hurdles when trying to bring forward complaints or civil claims relating to violations of their rights. A family devastated by the loss of their loved ones and the destruction of their home requires a long time to process the events before its members are ready to come forward to officials and explain what happened. Often there are immediate financial or security issues that they will need to address first, and the demand to submit a complaint within 60 days and a civil case within two years sets undue restrictions on victims in their most vulnerable hour. Of note, under Rule 160 of Customary International Humanitarian Law, statutes of limitation may not apply to war crimes.

RECOMMENDATIONS TO REMOVE BARRIERS FACING PALESTINIANS IN ACCESS TO JUSTICE

To the Israeli government:

- Israel should conduct a timely and effective investigation to international standards of independence, impartiality, thoroughness, promptness, effectiveness and transparency, into each case where there is reason to suspect the commission of a war crime.
- Israel must remove the financial, procedural and judicial barriers that prevent Palestinians in Gaza from accessing an effective remedy in the Israeli civil court system. Critically, the Israeli Tort Law should be amended to ensure that victims of violations can seek redress for harm suffered during the course of ‘combat action’.
- Additionally, Israel should lift the access and movement restrictions on Palestinians in Gaza, and allow witnesses and victims to meet with legal representatives inside Israel, to fulfill court requirements such as medical tests, and to attend court hearings.
- Israel should amend court requirements of court guarantees that are continually and prohibitively set beyond the financial capabilities of the client and act as a barrier for people from occupied Palestine to bring civil cases within Israeli courts.

To the International Community:

- The international community is encouraged to attend court hearings in the Abu Is’ayid family case and maintain international presence during court proceedings.
- The international community, by virtue of their third state responsibility to respect and ensure the respect of international law, use legal means to pressure Israel to comply with its legal obligations. In particular, for Israel to cease breaching international norms resulting from its operations in the Gaza Strip.
- The international community to pressure Israel to revoke Amendment No. 8 to the Israeli Civil Tort Law and provide fair compensation and reparation to Palestinian victims for its violations.
- The international community to urge Israel to remove all procedural and substantive barriers to Palestinian civilians from Gaza in accessing Israeli courts.