

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

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Tort lawsuits brought in response to social injustice occasionally generate incentives for entrepreneurial plaintiffs' lawyers to get involved in the litigation. What ethical responsibilities do such lawyers navigate in this space? And to what extent are they interested in, and well-positioned to produce, social change? The Article addresses these questions using a previously uncharted case study on civil actions for damages filed by Palestinians against the Israeli government. Through fifty-five in-depth, semi-structured interviews with the various types of lawyers involved in the litigation, alongside quantitative analysis of an original dataset of 300 judicial opinions, the Article reveals how fee-for-service plaintiffs' lawyers stepped into a void left by human rights organizations—well-versed in impact litigation, but less so in tort lawsuits. While these plaintiffs' lawyers notched achievements on the individual client level, their involvement shaped the litigation as a stream of particularized claims rather than a systematic struggle to alter the status quo. It also inadvertently—and ironically—supported lawmakers' initiatives to discourage anti-government tort litigation. Through this case study, the Article allows us to rethink the cause lawyering

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framework—defined as the set of practices engaged in by lawyers to mobilize the law to promote or resist social change—and its role in conceptualizing where social change comes from. Questioning conventional scholarly focus on lawyers’ motivations, the Article shows that plaintiffs’ lawyers’ practices—such as using confidential settlements and the contingent fee structure—are just as important as motivations in determining their function as agents of change. It also argues that personal injury lawyers should not generally be considered “cause lawyers,” given their practice’s 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 should join hands to mobilize civil society and leverage tort litigation to effect change.

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INTRODUCTION

In the United States and abroad, tort litigation has emerged as a way to seek accountability for social injustice, whether individually, or, when a systemic pattern of wrongs can be identified, through a class action.¹ Civil lawsuits aimed at recovering money damages² offer a particularly promising avenue in cases of government use of force against individuals. From families of African-American victims of police violence demanding redress through section 1983 constitutional litigation,³ to foreign victims of torture bringing tort lawsuits in U.S. courts,⁴ such litigation is utilized for social justice purposes domestically and internationally. This role of civil litigation has gained traction over the last several decades,⁵ allowing victims to function as “private attorneys general,” particularly when the

¹ On the use of class actions in the context of mass torts, including some pushbacks, see generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 (1989); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1065 (2012).

² 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, 323 (2010).

³ See, e.g., *Michael Brown’s Family Mulls Lawsuit Against Darren Wilson, Ferguson PD*, RT (Jan. 23, 2015, 10:29 PM), <http://rt.com/usa/225755-brown-family-considers-lawsuits> [<https://perma.cc/RC6M-ZM6X>]. For more on constitutional litigation (emanating from police brutality or other violations), see 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 § 1983); Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875 (2010) (addressing the Supreme Court’s narrowing of § 1983 constitutional litigation concerning police-civilian encounters).

⁴ 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); GEORGE P. FLETCHER, *TORT LIABILITY FOR HUMAN RIGHTS ABUSES* (2008) (arguing for the relevance of tort law in the fight against human rights abuses).

⁵ See generally 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); TSACHI KEREN-PAZ, *TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE* (2007) (arguing for the incorporation of an egalitarian sensitivity into tort law); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000) (arguing for redefining the law of qualified immunity for different types of constitutional torts).

government itself fails to prosecute.⁶ Not only can such lawsuits be used as a mode of pursuing personal rehabilitation,⁷ but also for seeking accountability for abuses, creating enforceable expectations of behavior, and denouncing violations.⁸ At the same time, heated public debate around such lawsuits denotes concern over issues such as placing a price tag on human suffering, costly court procedures, and fraudulent claims.⁹

An important, underexplored feature of civil litigation with social justice goals is the legal actors that lead them. Typically, these are lawyers who work for legal nonprofits or private public interest law firms.¹⁰ Yet, civil litigation against public officials and governments also generates

⁶ An abundant literature has addressed the role of individual plaintiffs as rights enforcers, who vindicate important public policies such as ensuring government compliance with constitutional norms. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004); Bryant Garth, Ilene H. Nagel & S. Jay Plager, *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988). Recently, there has been a similar debate around the California Private Attorneys General Act, known as "PAGA," which authorizes individual employees to sue for Labor Code violations on behalf of all their co-workers.

⁷ These lawsuits also present an opportunity to overcome power imbalances by placing citizen—even alien—and state on equal footing. See Solomon, *supra* note 2, at 330 (relating the civil recourse aspects of tort law to concepts of democratic equality).

⁸ Van Schaack, *supra* note 4, at 2317. As I explain elsewhere, these roles of civil litigation are particularly significant in asymmetric armed conflict, in which the use of tort actions against state perpetrators allows victims to initiate and control the litigation. The alternative in such settings is often a no-fault compensation mechanism; a compensation scheme which does not require proving fault against the opposite party. See generally Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375 (2019). For a discussion of no-fault compensation mechanisms versus other forms of compensation, particularly tort litigation, see Elizabeth Rolph, *Framing the Compensation Inquiry*, 13 CARDOZO L. REV. 2011 (1992); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012).

⁹ In the United States, 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. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 517 (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).

¹⁰ See discussion *infra* Section III.C.

incentives for private legal entrepreneurs to get involved.¹¹ Such plaintiffs' lawyers who work on contingency fees may be willing to take cases brought by low-income clients if they stand a good chance of winning.¹² 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 without regard to damages collected, or by private lawyers who also 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."¹³ The conventional view is that cause lawyers practice law for low pay and with a strong, visible ideological commitment.¹⁴ But in recent years scholars have

¹¹ While the lawsuits discussed in this Article are not class actions, we can draw parallels between the ethical implications these two instruments raise. See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006) (arguing that the so-called "agency cost" problem of entrepreneurial plaintiffs' lawyers in class actions is mostly a mirage, and that there is no economic reason to fret that such lawyers are being overcompensated); cf. Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 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).

¹² For a critical view of the function of plaintiffs' lawyers as "private attorneys general," see Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J. (Jan. 12, 2000, 12:01 AM), <https://www.wsj.com/articles/SB947635315729229622> [<https://perma.cc/K5KL-BT7V>].

¹³ Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 303 (2014).

¹⁴ 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, *supra*, 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 (1995) (examining the lawyers of the Civil Rights movement in light of legal traditionalism).

argued that typical fee-for-service lawyers pursuing cases in the public interest may be considered cause lawyers too.¹⁵ The question of whether private, fee-for-service lawyers can be thought of as cause lawyers remains contested. In this Article, I engage with this question in a new context, to expose challenges that arise when fee-for-service lawyers penetrate cause lawyering territory, given their limited capacity to challenge the status quo.

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 Strip¹⁶ to bring claims for damages against Israel's security forces before Israeli civil courts (the Claims).¹⁷ 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 fee-for-service lawyers, the study examines whether these lawyers should indeed be considered

¹⁵ 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* 97 (Austin Sarat & Stuart Scheingold eds., 2001) (arguing that personal injury plaintiffs' lawyers may be considered cause lawyers under some circumstances); Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575, 586 (2006) (discussing, among other types of cause lawyers, those who work for small law firms and balance financial concerns with ideological commitments).

¹⁶ 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." Civil Tort Ordinance (Liability of the State), Declaration of Enemy Territory—the Gaza Strip, 7431–2014 (Isr.) (translated from Hebrew by author).

¹⁷ 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 Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L., 181, 217–18 (2009). These compensation mechanisms differ from other payment systems put in place to compensate victims of conflict, such as the United States' military payments under the Foreign Claims Act and ad-hoc "condolence payments." See John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1461–67 (2008); Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, 15 HUM. RTS. BRIEF 16 (2007); Bachar, *supra* note 8.

cause lawyers. It explores, in addition to their motivations, a three-pronged framework: (a) the way lawyers litigating the Claims practice law, (b) the political climate they operate in, and (c) their relationships with their clients. It does so by looking at the way these lawyers perceive themselves and their colleagues—their practice settings, their strategies, and the legal system as a whole—and the way all these factors shape the capacity of individual tort lawsuits to effect systemic change.

Using a combination of qualitative and quantitative data, I offer insight into the characteristics of the lawyers who operate in this field.¹⁸ First, I conducted fifty-five¹⁹ in-depth, semi-structured interviews²⁰ with the various types of lawyers involved in the Claims,²¹ as well as other key stakeholders,²² between June 2014 and July 2016.²³ 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, name and sector affiliation of plaintiff-side lawyers. The quantitative data are used for two purposes: as an independent source for identifying trends regarding lawyers' affiliation, and as a support tool for my interview sampling strategy.²⁴

¹⁸ In addition to these main sources, I also rely on several additional sources, including the Civil Tort Act (Liability of the State) and its amendments, Parliament committees' protocols, news articles reporting cases, NPO reports, and information from Israeli Ministry of Defense (MOD) Freedom of Information Act (FOIA) requests.

¹⁹ 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 *FIELD METHODS* 59 (2006).

²⁰ Interviews lasted between 45 and 120 minutes. When respondents consented, I recorded and transcribed their interviews. When they did not consent, I offered to send them my notes for approval, which several respondents accepted and responded to.

²¹ In Israeli civil courts, plaintiffs must be represented by lawyers who 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 NPOs 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.

²² These include plaintiffs, retired judges, journalists, and representatives of Israeli human rights NPOs.

²³ I conducted the interviews in person, during four trips to Israel in 2014–16, and on phone or Skype calls during periods spent at Stanford. With a few exceptions, 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."

²⁴ As for the latter, I initially identified respondents through personal connections, and used a "snowball approach" to enlarge my sample. I compiled a list of plaintiffs' lawyers whose names were

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 organizations—well-versed in impact litigation before the Israeli High Court of Justice (HCJ), but less so in civil litigation. These plaintiffs' lawyers maintained their usual practices, committing to 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 at times more closely aligned with private lawyers than they were with human rights organizations. Yet, the involvement of these lawyers may have also played a role in the ultimate demise of the Claims as a mechanism for government accountability. The fact that cases were typically brought by plaintiffs' lawyers has shaped the litigation as a stream of individual actions that fail to challenge the status quo.²⁵ Additionally, the Article suggests that the involvement of private, fee-for-service lawyers has facilitated the State's efforts to reduce the volume of the litigation by diminishing financial incentives to bring Claims.²⁶ The

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 twenty-five percent of the lawyers in the database, including some of the most influential lawyers in the field. I also identified and interviewed several lawyers who 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 NPO lawyers, etc. I also sampled based on categories that emerged from the data, such as human rights lawyers and personal injury lawyers. Elsewhere, I conducted a comprehensive quantitative content analysis of the dataset of judicial opinions in Claims, using descriptive statistics to address the relationship between lawmakers designing the legislation around and judges adjudicating Claims. 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).

²⁵ Cf. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 13 (2007) (highlighting the important consequences of lawyers' strategic litigation choices about which cases to pursue and which to avoid, in the context of the fight for civil rights in the United States).

²⁶ As I explain elsewhere, since the early 2000s, Israel has used a host of procedural obstacles—like conditioning litigation upon the provision of a bond—to restrict Palestinians' access to its civil courts, thus reducing the volume of Claims. See Gilat J. Bachar, *Access Denied—Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience*, 92 CHI.-KENT L. REV. 841 (2018) (arguing that such mechanisms are a subtle way to reduce the volume of civil litigation, particularly because of their ostensibly neutral façade). On the use of procedural tools to discourage litigation

Article thus demonstrates that plaintiffs' lawyers' practices—such as the use of confidential settlements and contingency fee structure—are just as important as their motivations in determining lawyers' function as agents of change. In so observing, it questions traditional scholarship's tendency to focus on lawyers' motivations.

Through this case study, the Article also helps us rethink the cause lawyering concept more broadly. It suggests 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 potential capacity to effect change through a significant volume of successful claims, it cannot be leveraged to this end without a strategic plan on which, when, and how claims are brought. Such overarching agenda is less likely when fee-for-service lawyers bring cases scatteredly. The compartmentalization of lawyers should thus matter not only to scholars of cause lawyering, but also to policymakers, 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 perceive lawyers in cause lawyering terms too, having different expectations from, and treating differently, cases brought by cause lawyers, much like lawyers who bring class actions are perceived differently than those who bring slip-and-fall personal injury claims. Not only do these perceptions influence the outcomes of specific cases, but they also affect the litigation as a whole. Given these complexities on the one hand, and the pressing need to develop strategies to pursue social justice on the other, the Article concludes by suggesting a private-nonprofit partnership for social justice civil litigation.

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.

in the United States, see, e.g., Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1698–1700 (2016); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265–66 (2005).

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 (MOD) 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.²⁷ Generally, as stipulated in the Civil Wrongs (Liability of the State) Act of 1952 (the Act),²⁸ 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.²⁹

²⁷ 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, though as of this writing it is actively pursuing annexation. For now, 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* 203 (2d ed. 2012).

²⁸ See 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. *Id.*

²⁹ See Yoav Dotan, *Cause Lawyers Crossing the Lines: Patterns of Fragmentation and Cooperation Between State and Civil Rights Lawyers in Israel*, 5 INT'L J. LEGAL PROF. 193, 194 (1998)

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 1974.³⁰ 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.³¹

According to data provided by the MOD, during the years 1990–2015, the MOD has paid over eighty-seven million dollars in damages to Palestinians for IDF actions, in over 1,700 different cases, both in and out of court.³² Claims are litigated at first instance in lower civil courts—either magistrate or district courts, according to plaintiffs’ estimate of their damages.³³ The typical cause of action is negligence, although Claims may also identify a breach of statutory duty or an intentional tort.³⁴ Importantly, most cases are not decided at trial.³⁵ I have identified only 300 publicly available court decisions rendered in the Claims at the

(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, “the State is not Liable in Tort for an act performed through a combat action of the Israel Defense Forces.” Civil Tort Act (Liability of the State), 5712–1952 (Isr.) (translated from Hebrew by author). As explained below, this provision is one of the main barriers preventing Palestinians from successfully recovering damages. Furthermore, as of 2014, Israel is immune from suits brought by Gaza Palestinians. *See supra* note 16. As a result, this provision remains in place for West Bank residents only.

³⁰ *See* CC 18/74 Atalla v. State of Israel, PD 2 (1974).

³¹ Bachar, *supra* note 24, at 582–83.

³² These are approximations made by the MOD. ISR. MINISTRY OF DEF., REPORT IN RESPONSE TO A FREEDOM OF INFORMATION (FOIA) QUERY TO THE MOD (2015), <http://bit.ly/2a982nf> [<https://perma.cc/GTM6-YE34>] (in Hebrew); ISR. MINISTRY OF DEF., REPORT IN RESPONSE TO MOD FOIA QUERY (2016) (on file with author). The data refer to Claims resulting from the actions of 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.

³³ The threshold for bringing a case before district courts is 2,500,000 NIS (~\$600,000).

³⁴ *See* Bachar, *supra* note 24, at 583.

³⁵ Since Israel does not have a jury system, cases decided at trial are adjudicated by a single judge or a three-judge panel.

trial level between 1975 and 2015.³⁶ Claims that do go to trial tend to drag on for years, at times even over a decade.³⁷ Some cases make it to the supreme court on appeal,³⁸ 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.³⁹

Like most typical 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 injuries which resulted from different incidents which are not sufficiently similar to form a class.⁴⁰ Alongside the civil proceeding, the IDF sometimes opens a criminal investigation when a suspicion arises for soldier misconduct. Since such investigations rarely result in an indictment,⁴¹ the civil proceeding is often used as an

³⁶ 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 Ministry of Justice (MOJ) (comparable to “Lexis Nexis” or “Westlaw”). 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”). 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.

³⁷ An extreme example was provided by one of the plaintiffs’ lawyers, noting a case filed in 1996 and decided in 2016. Interview with PL1, Private Lawyer (Mar. 16, 2016).

³⁸ 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 (Isr.).

³⁹ Interview with NPOL9, NPO Lawyer (Mar. 9, 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 GL8, Gov’t Lawyer (Dec. 8, 2015); Interview with PL9, Private Lawyer (Dec. 9, 2015); Interview with GL7, Gov’t Lawyer (Jan. 7, 2016); see, e.g., JTA, *Rachel Corrie’s Family Loses Appeal to Israel’s Supreme Court*, HAARETZ (Feb. 12, 2015), <https://www.haaretz.com/rachel-corrie-s-family-loses-supreme-court-appeal-1.5305976> [<https://perma.cc/4XPH-JS9M>]. On social media, the Claims get more visibility, particularly among left-wing activists. Interview with PL4, Private Lawyer (Mar. 4, 2015).

⁴⁰ See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 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).

⁴¹ See YESH DIN, ALLEGED INVESTIGATION: THE FAILURE OF INVESTIGATIONS INTO OFFENSES COMMITTED BY IDF SOLDIERS AGAINST PALESTINIANS (2011), <http://www.yesh-din.org/en/alleged-investigation-the-failure-of-investigations-into-offenses-committed-by-idf-soldiers-against-palestinians> [<https://perma.cc/7GRM-5BQL>]; YESH DIN, EXCEPTIONS: TRYING IDF SOLDIERS SINCE THE SECOND INTIFADA AND AFTER, 2000–2007 (2008), <http://www.yesh-din.org/>

alternative course of action to the dead-end criminal path; a way to pursue accountability and receive information about the incident.⁴²

Only a minority of these Claims succeed—and in recent years, plaintiffs have faced even longer odds compared to other civil claims in Israel. Before 2002, Palestinian plaintiffs were successful in thirty-nine percent of the Claims decided by the courts. However, between 2002 and 2012, only seventeen percent of decisions found for the plaintiffs,⁴³ and this percentage has further decreased over the last few years.⁴⁴ Yet, according to MOD data,⁴⁵ many Claims settle outside the court doors, either before a court proceeding is initiated or in the course of such proceedings.⁴⁶ Plaintiffs' lawyers repeatedly noted that most of their successful Claims ended with a settlement.⁴⁷ According to a prominent lawyer in the field during the 1990s, settlements accounted for ninety-nine percent of his successful Claims.⁴⁸ During those days, the State was often willing to offer settlements, particularly in cases in which Assistant

en/exceptions-trying-idf-soldiers-since-the-second-intifada-and-after-2000-2007
[<https://perma.cc/6RWW-AYTP>].

⁴² Interview with NPOL2, NPO Lawyer (Aug. 12, 2014); Interview with PL1, Private Lawyer (July 1, 2014); Interview with PL3, Private Lawyer (July 3, 2015); Interview with KS3, Key Stakeholder (Mar. 3, 2016); Interview with PL4, Private Lawyer (Mar. 4, 2015).

⁴³ Bachar, *supra* note 24, at 600. Differences were statistically significant ($p < .001$).

⁴⁴ This assessment is based on data on Claims court decisions from the years 2012–16, as well as the accounts of both plaintiff-side and government-side respondents.

⁴⁵ According to the data, the vast majority of the Claims over the years was settled. REPORT IN RESPONSE TO MOD FOIA QUERY, *supra* note 32.

⁴⁶ 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 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 ethical issues).

⁴⁷ This is one way to explain the gap between the MOD numbers (over 1700 cases in fifteen years) and the volume of court decisions (only 300 over four decades). See *supra* note 45; *infra* note 48.

⁴⁸ Interview with PL2, Private Lawyer (Sept. 16, 2014); Overview of Claims Brought by PL2's Firm (Mar. 2015) (data provided by PL2, on file with author). While not all respondents provided such detailed accounts, their impressions were 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, Private Lawyer (Mar. 15, 2016).

State Attorneys (ASAs) had a “weak case” due to lack of evidence, or evidence showing alleged soldier misconduct.⁴⁹ As explained below, the State’s willingness to settle has diminished beginning in the early 2000s.⁵⁰

Plaintiffs face several challenges in bringing Claims.⁵¹ *First*, the Claims entail particularly high litigation *costs*, beyond typical costs for discovery, medical opinions,⁵² court fees,⁵³ 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 activity. If plaintiffs lose, the State can collect its litigation expenses

⁴⁹ Interview with GL2, Gov’t Lawyer (DA) (Aug. 6, 2014); Interview with GL4, Gov’t Lawyer (DA) (Aug. 18, 2014); Interview with GL1, Gov’t Lawyer (Aug. 17, 2015).

⁵⁰ 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) (translated from Hebrew by author) (on file with author). Per MOD data, between 2004 and 2014 the total amount awarded by the committee was 575,895 NIS (~\$156,000) in forty-two cases (twenty were dismissed). Data are unavailable prior to 2004. Ministry of Defense of Israel, *Bakasha Lekabalat Meida Lefi “Chok Chofesh HaMeida, HaTaShNaCh—1998” [Request for Information Pursuant to “Freedom of Information Law of 1998”]* (Aug. 3, 2015), <http://bit.ly/2a982nf> [<https://perma.cc/P8F6-J2SD>]; see also Bachar, *supra* note 24. Second, a Claims Headquarters Officer (Kamat Tov’annot) at the Israeli MOD also has the authority to compensate Palestinian claimants due to damage caused by military actions. See Order Regarding Security Provisions (Judea and Samaria) (No. 1651) 182(A) (2009) (Isr.), http://www.hamoked.org/files/2017/1055_eng.pdf [<https://perma.cc/Z7K3-3YZZ>]. 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, Gov’t Lawyer (MOD) (Jan. 3, 2016); Interview with GL8, Gov’t Lawyer (MOD) (Dec. 13, 2015). Given the limited scope of these alternatives, the main path for Palestinians seeking compensation remains the civil courts.

⁵¹ For a detailed account, see Bachar, *supra* note 26 (exploring various barriers Palestinians face in bringing tort claims against the Israeli government).

⁵² 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, Gov’t Lawyer (IDF) (Dec. 22, 2016); Second Interview with PL6, Private Lawyer (Aug. 12, 2014).

⁵³ 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. Interview with PL7, Private Lawyer (Jan. 2013). According to some respondents, though, these costs are negligible compared to other litigation costs. Interview with NPOL4, NPO Lawyer (Aug. 3, 2014).

directly from the deposit.⁵⁴ As a 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.”⁵⁵

Courts increasingly tend to grant such petitions, and to set the amount of the bond at increasingly high rates.⁵⁶ This discourages claimants—and their lawyers—from bringing Claims, particularly given the tangible risk of losing.⁵⁷ 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 bear the costs of hiring such guards themselves.⁵⁸

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.⁵⁹ Yet, evidentiary difficulties are not limited to the

⁵⁴ 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: A CONFLICT OF LAWS CASE STUDY ON ISRAEL AND THE PALESTINIAN TERRITORIES* 231–41 (2014) (explaining difficulties faced by Palestinians who bring civil claims before Israeli courts, including bonds).

⁵⁵ Interview with GL7, Gov’t Lawyer (Jan. 3, 2016); Interview with GL8, Gov’t Lawyer (Dec. 13, 2015).

⁵⁶ Of 30,000 NIS (~\$8,000) and higher. Bachar, *supra* note 26, at 850.

⁵⁷ Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL7, Private Lawyer (Aug. 11, 2014). Where claimants have failed to deposit a security, this could lead to a stay of proceedings or dismissal of the case, with or without prejudice. *See, e.g.*, CC (Nazareth) 6907/07 Assi v. State of Israel (2009) (Isr.) (unpublished decision); *see also* CC (Haifa) 4527/08 Barhum v. State of Israel (2009) (Isr.) (unpublished decision); First Interview with PL6, Private Lawyer (Dec. 17, 2012).

⁵⁸ 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, Private Lawyer (Sept. 16, 2014); Interview with KS2, Key Stakeholder (Mar. 15, 2016). Alongside these financial burdens, Palestinian plaintiffs also face significant physical access barriers in receiving entry permits to participate in legal proceedings. *See* Bachar, *supra* note 26.

⁵⁹ Interview with PL4, Private Lawyer (Mar. 4, 2015); Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL7, Private Lawyer (Aug. 11, 2014).

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 what happened during a chaotic military situation,⁶⁰ or may be reluctant to take part in the legal proceeding.⁶¹ Moreover, in the pre-Second Intifada era, the IDF did not always maintain records of its use of force incidents.⁶²

A *third* challenge is *fewer settlement offers*. In the last decade, settlement offers from the State have become fewer and far between.⁶³ 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.⁶⁴ In the rare cases in which ASAs do offer to settle, it is because IDF soldiers acted in a patently unjust

⁶⁰ Interview with GL4, Gov't Lawyer (DA) (Aug. 18, 2014); Interview with GL7, Gov't Lawyer (Jan. 3, 2016); Interview with GL8, Gov't Lawyer (Dec. 13, 2015) (noting the use of polygraph to handle evidentiary gaps).

⁶¹ Interview with GL11, Gov't Lawyer (DA) (Mar. 9, 2016).

⁶² Interview with PL8, Private Lawyer (July 12, 2015); Interview with PL3, Private Lawyer (July 28, 2015).

⁶³ MOD data regarding the volume of out-of-court settlements between 1988 and 2015 suggests 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, *supra* note 32. More specifically, based on MOD data for the years 2007–2009, during those years a total of 151 claims was settled outside the court, which accounted for thirty percent of the Claims filed in those years. This contrasts with these lawyers' accounts, mentioning settlement rates of well over fifty percent. Interestingly, this data pointed to a greater tendency of the State to settle in property damage cases compared to cases of bodily harm. In ninety-four percent of property damage claims where the State paid damages, these were paid through settlement. ISR. MINISTRY OF DEF., REPORT IN RESPONSE TO "YESH DIN" FREEDOM OF INFORMATION QUERY TO THE MOD (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 in cases in which it is easy to trace back damage to property to IDF actions. Interview with NPOL1, NPO Lawyer (July 27, 2014); Interview with NPOL4, NPO Lawyer (Aug. 3, 2014). However, according to PL13, this is not the case when it comes to his clients: corporations and commercial entities. Interview with PL13, Private Lawyer (Mar. 16, 2016).

⁶⁴ Interview with GL1, Gov't Lawyer (DA) (Aug. 17, 2015); Interview with GL4, Gov't Lawyer (DA) (Aug. 18, 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 did not reach the merits. Bachar, *supra* note 24; 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).

fashion.⁶⁵ Even then, the State will often propose no more than symbolic compensation for the loss.⁶⁶ 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 United States or the United Kingdom, rather than Palestinians.⁶⁷

As reflected by the decrease in out-of-court settlements and aforementioned statistics, the Claims have undergone significant changes over the years. Cases have become 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.⁶⁸ As one of the lawyers noted: “[T]he Act itself was the primary cause for this field’s demise. The expansion of the territory of combat action”⁶⁹

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

⁶⁵ 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, Gov’t Lawyer (Aug. 17, 2015). GL4 referred more generally to cases where the combatant “screwed up.” Interview with GL4, Gov’t Lawyer (DA) (Aug. 18, 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. Interview with PL7, Private Lawyer (Jan. 12, 2013).

⁶⁶ Interview with PL6, Private Lawyer (Dec. 17, 2012); Interview with PL7, Private Lawyer (Jan. 12, 2013).

⁶⁷ Interview with PL9, Private Lawyer (Sept. 30, 2015). However, in the Rachel Corrie case, the fact that the victim was American did not prompt the State to settle. Interview with CF, Plaintiffs (July 29, 2015).

⁶⁸ 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. Assaf Jacob, *Immunity Under Fire: State Immunity for Damage Caused by Combat Action*, 33 MISHPATIM L. REV. 107 (2003) (in Hebrew) (describing the regime under the old Act). However, in 2002, Amendment (No. 4)—commonly termed “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: “[A]ny action intended to prevent terrorism, hostile acts, or insurrection that is taken in a situation endangering life or limb.” See Bachar, *supra* note 24, at 585.

⁶⁹ Interview with NPOL2, NPO Lawyer (Aug. 12, 2014).

written notice of damage to Israeli authorities within sixty days of the incident.⁷⁰ 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 “discouragement policy” on the part of the State,⁷¹ aimed at reducing the volume of Claims filed against Israeli security forces.⁷²

The *political climate* within the Israeli Parliament which enabled the legislative changes was closely tied to a nationalist public opinion. The outburst of the Second Intifada in September 2000 and subsequent deterioration of the Conflict⁷³ have led to a wave of lawsuits brought by

⁷⁰ 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—will not apply to Claims. See Torts Ordinance, 38, 41 (1968) (Isr.), http://www.wipo.int/wipolex/en/text.jsp?file_id=345894 [https://perma.cc/NV5L-YMAB]; Bachar, *supra* note 26, at 856. 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 24, at 586–87.

⁷¹ 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 antilittigation efforts” in the United States. See BURKE, *supra* note 9, at 18.

⁷² See Interview with GL12, Gov’t Lawyer (MOJ) (Mar. 15, 2016); Interview with GL7, Gov’t Lawyer (MOD) (Jan. 3, 2016).

⁷³ 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) (providing 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 PROC. NAT’L ACAD. SCI. U.S.17927 (2010) (analyzing the escalation of the Conflict in the past decade as a result of mutual retaliation).

Palestinians before Israeli courts.⁷⁴ 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.⁷⁵ On the one hand, more suits were brought on account of greater losses, which prompted Israel to stem the tide.⁷⁶ 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.⁷⁷ The Second Intifada has made the Claims more salient, allowing lawmakers opposed to the scope of this mechanism to push for redefining its confines.⁷⁸

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.⁷⁹ This was a common posture among many respondents.⁸⁰ As one plaintiffs' lawyer opined:

⁷⁴ See Protocols of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, 6/24/2002, 6/26/2002 (Isr.), <https://main.knesset.gov.il/Activity/committees/huka/Pages/CommitteeProtocols.aspx> [<https://perma.cc/R37L-SVWF>] (citing the wave of lawsuits brought against Israel in the wake of the Second Intifada as a rationale to limit the Claims mechanism).

⁷⁵ According to plaintiffs' lawyers, these changes have also had an effect on litigating the Claims because the use of firearms by Palestinians as well as Israeli forces gave rise to evidentiary challenges. Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL3, Private Lawyer (July 28, 2015).

⁷⁶ See Protocols of the Knesset's Constitution, Law, and Justice Committee of 12/25/2001, 6/24/2002, 6/26/2002, *supra* note 74.

⁷⁷ 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 *Activity Report for the Period Between Jan. 1, 1998 and Dec. 31, 1998*, HAMOKED 25–26, <http://www.hamoked.org.il/items/11600.pdf> [<https://perma.cc/AC9A-NCA8>].

⁷⁸ 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, *supra* note 74. In later proceedings, this argument was reintroduced as “the paradox of compensating those who are fighting against Israel.” See *id.*

⁷⁹ Interview with GL7, Gov't Lawyer (MOD) (Jan. 3, 2016).

⁸⁰ This approach was famously expressed by Chief Justice Aharon Barak in *Adalah v. Government of Israel*, HCJ 8276/50 (2006) (Isr.), when it declared article 5C unconstitutional. See

“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”⁸¹

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,⁸² others who still practice in the field as of this writing painted a different picture: “[Y]ou 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.”⁸³

The situation was summarized by one lawyer in the following words: “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.”⁸⁴

Were the legal regime, the political climate, and the courts’ attitude the only reasons for this field’s demise, or did 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.

supra note 70. The same approach was shared by government lawyers, Interview with GL9, Gov’t Lawyer (IDF) (Dec. 22, 2016); Interview with GL12, Gov’t Lawyer (MOJ) (Mar. 15, 2016); plaintiffs’ lawyers, Interview with PL12, Private Lawyer (Dec. 13, 2015); Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL3, Private Lawyer (July 28, 2015); and one retired judge, Interview with KS1, Key Stakeholder (Mar. 14, 2016).

⁸¹ Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL3, Private Lawyer (July 28, 2015).

⁸² Interview with PL2, Private Lawyer (Sept. 16, 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, Key Stakeholder (Mar. 14, 2016).

⁸³ Interview with PL6, Private Lawyer (Aug. 12, 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, Private Lawyer (Mar. 4, 2015).

⁸⁴ Interview with PL3, Private Lawyer (July 28, 2015).

B. *Advocates/Adversaries: Lawyers on Both Sides*

This Section offers a typology of the lawyers in the field. Before delving into the discussion on plaintiff-side lawyers, a word about government lawyers. Israel is represented in the Claims by ASAs from a designated department (the Department) within the Tel-Aviv District Attorney's Office, which specializes in civil claims for damages against Israel's security forces or its agents.⁸⁵ ASAs from the Department represent the State in Claims adjudicated all over the country,⁸⁶ working in collaboration with the MOD legal department, which oversees lawsuits and insurance claims filed against the MOD, and IDF lawyers.⁸⁷ Lawyers on the State's side thus include the ASAs—that is, Ministry of Justice (MOJ) litigators—alongside MOD and IDF lawyers who are government representatives, i.e., the defendant in the Claims.⁸⁸

⁸⁵ Between ten and twenty 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, Gov't Lawyer (DA) (Aug. 17, 2015); Interview with GL5, Gov't Lawyer (DA) (Aug. 13, 2015); Interview with GL4, Gov't Lawyer (DA) (Aug. 18, 2014).

⁸⁶ 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, Gov't Lawyer (DA) (Aug. 6, 2014); Interview with GL10, Gov't Lawyer (DA) (Mar. 7, 2016). The Department lawyers are repeat players, with much knowledge and experience regarding this litigation. Interview with GL4, Gov't Lawyer (DA) (Aug. 18, 2014); Interview with GL10, Gov't Lawyer (DA) (Mar. 7, 2016); Interview with GL11, Gov't Lawyer (DA) (Mar. 9, 2016).

⁸⁷ 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, Gov't Lawyer (DA) (Aug. 13, 2015). 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. The number of employees in the Claims section at the MOD "varies according to need." Interview with GL7, Gov't Lawyer (MOD) (Jan. 3, 2016).

⁸⁸ The latter handle cases before they reach the courts and support adjudicated cases by, for instance, participating in discussions on settlement offers and providing evidence. Interview with GL5, Gov't Lawyer (DA) (Aug. 13, 2015); Interview with GL6, Gov't Lawyer (MOD) (Mar. 1, 2015); Interview with GL7, Gov't Lawyer (MOD) (Jan. 3, 2016); Interview with GL8, Gov't Lawyer (MOD) (Dec. 13, 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 HCJ, 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 and participating in Parliament discussions about the various amendments. *Id.*

On the plaintiffs' side, private attorneys from solo practices or small law firms primarily litigate cases. This account is based on my interview data—in which respondents both described their own practice and discussed the involvement of nonprofit organizations (NPOs) and plaintiffs' lawyers in the field—as well as a content analysis of court decisions (N=300) rendered in the Claims between 1975 and 2015.⁸⁹ According to the dataset, plaintiffs' lawyers are generally either Jewish Israelis or Palestinian citizens of Israel.⁹⁰ For some, their practice includes—either primarily or as one area of specialization—personal injury torts (“personal injury lawyers”).⁹¹ In contrast, some plaintiffs' lawyers are career human rights lawyers who typically take criminal, administrative, or constitutional cases related to the Israeli-Palestinian

⁸⁹ To begin the content analysis and determine the affiliations (NPO or private law firm) of plaintiff-side attorneys in the Claims, I first compiled 220 decisions which included the name of the plaintiff-side lawyer. These names indicated a total of eighty-four lawyers representing plaintiffs in the Claims. I then researched each of these names through a general Google search and a search of the Israeli Bar website's lawyer database. Information on affiliation was publicly available for fifty-nine of these eighty-four lawyers (seventy percent). Fifty-six of the lawyers (ninety-five percent) were from the private sector and three lawyers worked at NPOs (five percent). There are several caveats to these statistics. As noted, in previous years, many of the Claims were settled and many current cases end without a judgment due to procedural hurdles. Additionally, not all decisions are made publicly available. Still, these publicly available statistics account for a significant volume of the Claims and provide a basic understanding of the institutional affiliations of lawyers operating in this field.

⁹⁰ In the decisions database, thirty of the lawyers were Jewish Israeli (thirty-six percent) and forty-six were Palestinian citizens of Israel (fifty-five percent). 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 8.87% of the lawyers in Israel (a much smaller percentage than their proportion of the Israeli population, which was 19.7% that year). ISR. MINISTRY OF INDUS., TRADE AND LABOR, LAWYERS IN ISRAEL: CHARACTERISTICS AND EMPLOYMENT IN THE LAST DECADE (2005), <http://employment.molsa.gov.il/Research/Documents/X6532.doc> [<https://perma.cc/P9MG-RHXL>]. 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 George 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 LAW & SOC. INQUIRY 349, 355 (1995).

⁹¹ Such as PL10, PL5, PL11, and PL12. Interview with PL10, Private Lawyer (Dec. 14, 2015); Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL11, Private Lawyer (Dec. 16, 2015); Interview with PL12, Private Lawyer (Dec. 13, 2015). 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 on representation in administrative cases with a public interest aspect and are at times affiliated with human rights NPOs. This is the case, for instance, with PL6.

Conflict, and are critical of the Israeli occupation, much like Palestinians (“human rights lawyers”).⁹²

Importantly, these two groups of plaintiffs’ lawyers are not monolithic. 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.⁹³ Furthermore, while some lawyers have dedicated considerable time to representing clients in the Claims,⁹⁴ others have represented clients only in a handful of cases, and the Claims were marginal in their overall practice.⁹⁵ 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,⁹⁶ others noted low socioeconomic status as a main characteristic,⁹⁷ and still others struggled to identify their clientele’s characteristics.⁹⁸

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 examples of lawyers from the main two groups noted above.⁹⁹ From the *personal injury lawyers*, PL13 is a high-

⁹² Such as PL9, PL3, PL4, and PL7.

⁹³ This is based both on interview data, Interview with PL14, Private Lawyer (Mar. 9, 2016); Interview with PL13, Private Lawyer (Mar. 16, 2016); Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL15, Private Lawyer (Mar. 9, 2016); Interview with PL10, Private Lawyer (Dec. 14, 2015), and on data collected through online searches regarding the lawyers in this dataset, including their firms’ websites and the Israeli Bar Association database. The diverse practices of plaintiffs’ lawyers stand in contrast 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 adjudicating Claims. Interview with GL10, Gov’t Lawyer (DA) (Mar. 7, 2016); Interview with GL11, Gov’t Lawyer (DA) (Mar. 9, 2016).

⁹⁴ For instance, PL16 and PL2.

⁹⁵ For instance, PL9 and PL13.

⁹⁶ For instance, PL16, PL13, PL17.

⁹⁷ For instance, PL12, PL11, PL14.

⁹⁸ For instance, PL17, PL10.

⁹⁹ Some respondents resist categorization based on personal injury and human rights work because their legal representation features aspects of both practice areas. I chose several characteristic cases as examples to help illustrate the differences between the groups.

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.¹⁰⁰ PL14, in contrast, is a “crossover” between local governance work, social justice, 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.¹⁰¹ Finally, PL16 is one of the most experienced plaintiffs’ lawyers in this field, with dozens—perhaps even a hundred, according to his account—of Claims under his belt.¹⁰² He has his own practice in downtown Jerusalem, employs several associates, and often 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.¹⁰³ 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.”¹⁰⁴ In the current state of affairs, he no longer takes Claims. A final noteworthy 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 orientation. He is therefore something of a rare breed in the realm of lawyers advocating for Palestinians’ rights. According to his

¹⁰⁰ Interview with PL13, Private Lawyer (Mar. 16, 2016).

¹⁰¹ Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁰² Interview with PL16, Private Lawyer (Mar. 16, 2016). Other respondents noted PL16 as one plaintiffs’ lawyer that turned the Claims into a business. See, e.g., Interview with NPOL7, NPO Lawyer (Mar. 9, 2016); Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁰³ Interview with PL9, Private Lawyer (Sept. 30, 2015). At other times, according to plaintiff respondents, PL9 chooses not to take on representation himself and refers cases to other human rights lawyers, such as PL7 or PL6. Interview with BA, Plaintiff (July 26, 2015); Interview with CF, Plaintiffs (July 29, 2015).

¹⁰⁴ Interview with PL3, Private Lawyer (July 28, 2015).

account, this fact serves an advantage as IDF personnel and ASAs are off-guard around him, thinking he is “one of their own.”¹⁰⁵

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.¹⁰⁶ 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 liaisons between Israeli lawyers and Palestinian clients.¹⁰⁷ Some respondents noted that Palestinian human rights NPOs¹⁰⁸ have also been involved in funding Claims,¹⁰⁹ an assertion that has also appeared in court decisions on Gaza cases.¹¹⁰

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 continuing this practice given the slim chances of earning a profit and the overwhelming challenges.¹¹¹ This phenomenon was observed by government lawyers too. As one ASA noted: “As our determination grew stronger, an interesting phenomenon

¹⁰⁵ Interview with PL4, Private Lawyer (Mar. 4, 2015). PL4 is also openly gay, another characteristic which makes him stand out within the observant Jews community. *Id.*

¹⁰⁶ “Palestinian lawyers who reside in the annexed portions of Jerusalem are entitled to membership in the Israeli bar.” Bisharat, *supra* note 90, at 364 n.64. Such lawyers have represented Palestinians in Claims and constitute part of my sample (for instance, PL5 and PL12). Interestingly, lawyers in East Jerusalem began exercising their right to become members of the bar only in the early 90s. 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.” *Id.*

¹⁰⁷ The case of Plaintiff AS is an example of this. Interview with AS, Plaintiff (Aug. 29, 2015).

¹⁰⁸ These include the Palestinian Center for Human Rights (PCHR), Al-Haq, and Al-Mizan.

¹⁰⁹ Interview with PL8, Private Lawyer (July 12, 2015); Interview with PL7, Private Lawyer (Aug. 11, 2014); Interview with PL2, Private Lawyer (Sept. 16, 2014). PL2 provided a different account of the involvement of Palestinian human rights NPOs in funding Claims, asserting that there has been no such involvement. Several plaintiffs confirmed that Palestinian NPOs have provided financial assistance. Interview with MJ, Plaintiff (Aug. 16, 2015); Interview with AS, Plaintiff (Aug. 29, 2015) (criticizing the role a Palestinian NPO played in his Claim by settling the case behind his back).

¹¹⁰ *See, e.g.*, CC (Be’er Sheva) 32960-10-12 Alastal v. State of Israel (2013) (Isr.).

¹¹¹ Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL3, Private Lawyer (July 28, 2015); Interview with PL12, Private Lawyer (Dec. 13, 2015); Interview with PL16, Private Lawyer (Mar. 16, 2016).

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.”¹¹²

Another, final group of lawyers was historically involved in the Claims. While most Palestinians’ Claims were litigated by plaintiffs’ lawyers, one Israeli nonprofit 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)¹¹³—began taking such cases in the early 1990s, hiring several lawyers who specialized in torts.¹¹⁴ 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.¹¹⁵ 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 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.¹¹⁶

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.¹¹⁷ But gradually many of the

¹¹² Interview with GL4, Gov’t Lawyer (DA) (Aug. 18, 2014).

¹¹³ See *Hamoked: Center for the Defense of the Individual*, HAMOKED, <http://www.hamoked.org/home.aspx> [<https://perma.cc/GSX6-W42Q>].

¹¹⁴ Interview with NPOL7, NPO Lawyer (Mar. 9, 2016); Interview with NPOL9, NPO Lawyer (Mar. 14, 2016).

¹¹⁵ Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with NPOL1, NPO Lawyer (July 27, 2014); Interview with NPOL2, NPO Lawyer (Aug. 12, 2014).

¹¹⁶ Interview with NPOL4, NPO Lawyer (Aug. 3, 2014).

¹¹⁷ Interview with KS3, Key Stakeholder (Mar. 10, 2016); *Activity Reports, 1995–2012*, HAMOKED: CENTER FOR THE DEFENCE OF THE INDIVIDUAL, <http://www.hamoked.org.il/hamoked-reports.aspx> [<https://perma.cc/8HBF-3LCF>]. At first, outsourced Claims were those with more severe injuries, since, in such cases, plaintiffs’ lawyers would have a greater incentive to take on representation via contingency fees. Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with NPOL1, NPO Lawyer (July 27, 2014). A similar account was provided by one of the government lawyers. Interview with GL2, Gov’t Lawyer (DA) (Aug. 6, 2014). Often on such

Center's Claims-expert lawyers left the organization, and new lawyers were not hired to replace them.¹¹⁸ 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. Second, 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.¹¹⁹ Third, difficulty supervising Claims outsourced to plaintiffs' lawyers and a discontent with the way some plaintiffs' lawyers handled the cases.¹²⁰ The next Section addresses the role of plaintiffs' lawyers in this process.

II. PLAINTIFFS' LAWYERS AS "DE-FACTO" CAUSE LAWYERS

While one human rights organization (the Center) had a key role in litigating Claims, Claims were typically brought 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 inform 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

occasions, the Center would stay behind the scenes, offering financial support and professional advice. Interview with PL5, Private Lawyer (Aug. 14, 2014).

¹¹⁸ 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 Claims part-time. Interview with NPOL1, NPO Lawyer (July 27, 2014).

¹¹⁹ Interview with KS2, Key Stakeholder (Mar. 15, 2016); Interview with NPOL2, NPO Lawyer (Aug. 12, 2014); Interview with NPOL9, NPO Lawyer (Mar. 14, 2016); Interview with KS3, Key Stakeholder (Mar. 10, 2016).

¹²⁰ Interview with NPOL1, NPO Lawyer (July 27, 2014); Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with KS3, Key Stakeholder (Mar. 10, 2016).

have the resources to enforce those rules in their favor.¹²¹ Yet, individuals continue to draw upon the law to resist injustice.¹²² This inherent complexity turns cause lawyers into key players in the dynamics between law and social change.¹²³ 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?¹²⁴

This literature has left much ambiguity as to who precisely cause lawyers are. Must they work for nonprofit organizations in poor communities, or can they also work in large law firms? Can they work within the state? Can they stumble into activism coincidentally, through

¹²¹ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 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. L. & SOC. SCI. 323 (2005).

¹²² Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 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 Scheingold 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 STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 6-7 (2d ed., Univ. of Mich. 2004) (1974) ("The direct linking of rights, remedies, and change that characterizes the *myth of rights* must, in sum, be exchanged for a more complex framework, the *politics of rights*, which takes into account the contingent character of rights in the American system."); Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC'Y 309 (1990).

¹²³ Marshall & Hale, *supra* note 13, at 302; see also Galanter, *supra* note 121, at 149-51 (discussing the role of lawyers in legal systems' reform); Silbey, *supra* note 121, at 345 (noting the crucial role of lawyers in the evolution of legal consciousness).

¹²⁴ Key examples of this literature include Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 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 14, at 261; Menkel-Meadow, *supra* note 14; Sarat & Scheingold, *supra* note 14; STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); Ann Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, in THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE 83, 85-86 (Austin Sarat & Stuart Scheingold eds., 2005) (arguing that cause lawyering entails "[a] self-conscious commitment to the cause").

involvement with cases of wider political significance?¹²⁵ 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.”¹²⁶ As explained below, I adopt their definition because of the emphasis it puts on both *motivations* and *practices*.¹²⁷ 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.¹²⁸ In this sense, while Claims represent individual personal injury lawsuits, they relate to a broader plea of a disadvantaged people, featuring public interest characteristics.¹²⁹

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

¹²⁵ Marshall & Hale, *supra* note 13; Hilbink, *supra* note 124, at 659–60 (offering an influential typology of cause lawyers, largely focused on lawyers themselves, including their motivations).

¹²⁶ Marshall & Hale, *supra* note 13, at 303.

¹²⁷ See also Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 89, 92 (Austin Sarat & Stuart A. Scheingold eds., 2006) (“Generally, cause lawyering 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).

¹²⁸ See, e.g., Dotan, *supra* note 29 (noting various ways in which Israeli legal institutions are involved in the rights and liberties of Palestinians). Furthermore, international humanitarian law norms, which require compensating 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 NPOs. See Wolfson, *supra* note 64.

¹²⁹ 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 LAW & SOC’Y REV. 473 (1997).

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.¹³⁰ Moreover, cause lawyers are typically distinguished from other lawyers by their willingness to elevate the interests of the cause over the immediate demands of a client.¹³¹ 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?¹³²

Scholars looking at whether private lawyers are cause lawyers have traditionally focused on lawyers’ motivations,¹³³ arguing that cause lawyers are motivated by a complex set of factors: some combination of self-interest (including the desire to earn a profit), altruism, politics and

¹³⁰ Menkel-Meadow, *supra* note 14, at 37; Sarat & Scheingold, *supra* note 14; Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL 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).

¹³¹ Sarat & Scheingold, *supra* note 14; *cf.* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 1, 9–11 (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).

¹³² For various perspectives surrounding this question, see, e.g., SIMON, *supra* note 131, at 10–11; 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 183–84 (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. REV. 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).

¹³³ Several of these studies have argued that cause lawyering can occur in routine legal practices, including fee-for-service lawyering. 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 14, at 453; Hajjar, *supra* note 129.

ideology, reputational concerns, and emotional commitments.¹³⁴ Though some have alluded that a broader perspective should be used when categorizing lawyers as cause lawyers,¹³⁵ none have applied it to private, fee-for-service lawyers, and this gap in the literature remains. This Article begins filling the void.

For example, Anne Bloom looked at a Texas personal injury firm pursuing litigation against multinational corporations.¹³⁶ 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 due to the ultimate goals of the litigation, and given that the case she analyzed would not have otherwise been brought.¹³⁷ 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.¹³⁸ These studies argue that other forces besides altruism, political commitments, or a desire to change the status quo may motivate some cause lawyers, including pecuniary or professional self-interests.¹³⁹ But does this mean

¹³⁴ Menkel-Meadow, *supra* note 14, at 38; Hilbink, *supra* note 124, at 670. According to Marshall & Hale, particularly in areas such as consumer rights, employment discrimination, and product liability, cause lawyering can even be lucrative. Marshall & Hale, *supra* note 13, at 305. However, the prevailing view in the scholarship, and among society, remains that fee-for-service lawyers are less committed to the cause than are cause lawyers, due to their pecuniary interest in the litigation. Bloom, *supra* note 15, at 105; Marshall & Hale, *supra* note 13, at 305; Hilbink, *supra* note 124, at 661 (noting that he read Bloom's piece "with a raised eyebrow" as to whether he would call this cause lawyering.)

¹³⁵ See Marshall & Hale, *supra* note 13, at 302 (arguing that the literature is missing an emphasis on lawyer-client relationships and the political environment surrounding cause lawyers); McCann & Silverstein, *supra* note 124, at 278 (arguing that the social and cultural practices in which cause lawyers participate should be explored, rather than only their ideological motivations); see also Steven Boutcher, *Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society*, 18 MOBILIZATION: INT'L 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 anti-abortion protest regulation cases).

¹³⁶ Bloom, *supra* note 15, at 96–97.

¹³⁷ *Id.* at 104; cf. Menkel-Meadow, *supra* note 14, at 38.

¹³⁸ Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2119–20 (2004). Erichson further concluded that a mix of monetary and policy motivations may actually reduce lawyer-client conflicts of interests. *Id.* at 2092–93.

¹³⁹ See, e.g., Hilbink, *supra* note 124, 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

all lawyering which involves a public interest aspect is cause lawyering? Not to me. In this Article, rather than only looking at lawyers' motivations, I conceptualize cause lawyering in relation to a three-pronged framework: (a) lawyers' practices, (b) lawyers' relationships with their clients, and (c) the political climate.

I developed this framework not only because of the methodological challenges associated with discerning motivations, but since it allows me to better assess lawyers' role in context. 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 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 fee-for-service 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

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 14, at 229.

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.”¹⁴⁰

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 as the reason for 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.”¹⁴¹

Yet, human rights consciousness or an ideological belief in Palestinians’ right to be compensated were key motivations too, at least in the lawyers’ rhetoric.¹⁴² This was especially prominent with regard to the human rights lawyers, but also appeared in the language of some 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.”¹⁴³ Several respondents named specific motivations 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

¹⁴⁰ Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with NPOL1, NPO Lawyer (July 27, 2014); Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL10, Private Lawyer (Dec. 14, 2015); Interview with PL12, Private Lawyer (Dec. 13, 2015).

¹⁴¹ Interview with PL7, Private Lawyer (Aug. 11, 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. *Id.*; see also Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL6, Private Lawyer (Aug. 12, 2014). A similar 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, Gov’t Lawyer (DA) (Aug. 18, 2014).

¹⁴² 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. L. & 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 more objective source of data 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.

¹⁴³ Interview with PL1, Private Lawyer (July 14, 2015); see also Interview with PL6, Private Lawyer (Aug. 12, 2014); Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL12, Private Lawyer (Dec. 13, 2015).

happening.”¹⁴⁴ Other ideological motivations noted were victim empowerment¹⁴⁵ and truth seeking.¹⁴⁶

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 to punish [tortfeasors].”¹⁴⁷

A *second* 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.¹⁴⁸

Third and final confirmation 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 stigma on the lawyers involved in it.¹⁴⁹ 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 [the plaintiffs] deserve it.”¹⁵⁰

The plaintiffs’ lawyers’ sentiment that engaging in this practice stigmatizes them was corroborated by the legal community’s perception

¹⁴⁴ Interview with PL4, Private Lawyer (Mar. 4, 2015); *see also* Interview with PL6, Private Lawyer (Aug. 12, 2014); Interview with PL13, Private Lawyer (Mar. 16, 2016).

¹⁴⁵ Interview with PL5, Private Lawyer (Aug. 14, 2014); Interview with PL4, Private Lawyer (Mar. 4, 2015).

¹⁴⁶ Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁴⁷ Interview with GL11, Gov’t Lawyer (DA) (Mar. 9, 2016); *see also* Interview with GL10, Gov’t Lawyer (DA) (Mar. 7, 2016). The latter noted that lawyers are often more zealous about the ideological motivations than their clients, who are mostly after the money.

¹⁴⁸ For instance, PL7 noted that she still agrees to take cases where the human rights violation is too gross to avoid litigation. Interview with PL7, Private Lawyer (Aug. 11, 2014).

¹⁴⁹ *See* Shamir & Chinski, *supra* note 139, at 237 (citing one of their lawyer respondents who noted: “Practically speaking, an ordinary lawyer would not assume a Bedouin case because it is bad business”).

¹⁵⁰ Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL14, Private Lawyer (Mar. 15, 2016).

of them. For example, an ASA noted how it was always the same fringe lawyers bringing these cases,¹⁵¹ 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.¹⁵²

Plaintiffs' lawyers need to be willing to pay the heavy professional—indeed, even personal—price that taking on such cases involves.¹⁵³ This means that these lawyers either care about the cause they are pursuing, or believe this price is worthwhile for the financial gain.¹⁵⁴ 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.

¹⁵¹ Interview with GL10, Gov't Lawyer (DA) (Mar. 7, 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, Gov't Lawyer (DA) (Mar. 9, 2016).

¹⁵² Interview with KS1, Key Stakeholder (Mar. 14, 2016).

¹⁵³ This account can be compared to lawyers representing people accused of communist subversion during the Cold War. As Jerold 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 American Bar Association was often vigorous in condemning lawyers who represented "undesirables." JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 233 (1976). While in the Israeli-Palestinian case there is no explicit public condemnation, the professional toll of engaging in representing Palestinians is significant nonetheless.

¹⁵⁴ 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, Private Lawyer (Mar. 4, 2015). Similar approaches for taking on claims in recent years were expressed by PL7 and by PL12. *See* Interview with PL7, Private Lawyer (Aug. 11, 2014); Interview with PL12, Private Lawyer (Dec. 13, 2015).

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 because their future success depends on client satisfaction.¹⁵⁵ 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.¹⁵⁶ Some lawyers also noted the desire to have a significant impact on the development of this area of law, mentioning that they believe they have had such an impact.¹⁵⁷

Thus, similar to Erichson's finding on mass tort 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, 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 that 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 contingent fee system and frequent use of out-of-court settlements.¹⁵⁸ Archetypical cause lawyers have professional practices too.¹⁵⁹ These include, for example, developing media strategies, applying case selection and sequencing methods to build the case law, and

¹⁵⁵ Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795 (1998) (arguing that reputation may also serve as a check on conflicts of interests arising from the contingency fee structure).

¹⁵⁶ Interview with PL12, Private Lawyer (Dec. 13, 2015).

¹⁵⁷ Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL15, Private Lawyer (Mar. 9, 2016).

¹⁵⁸ See generally Kritzer, *supra* note 155.

¹⁵⁹ See McCann & Silverstein, *supra* note 124, at 278 (discussing the social and cultural practices in which cause lawyers participate over time).

seeking injunctive relief in addition to or in lieu of damages. 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 NPO 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.¹⁶⁰ If a 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 NPO 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,¹⁶¹ respondents from the two groups exhibited disparate views of the nature of their relationship with clients. These impressions allow us to evaluate the prevalence of conflicts of interests among each group.

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.¹⁶²

¹⁶⁰ Erichson, *supra* note 138, at 2091.

¹⁶¹ See, e.g., Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with PL4, Private Lawyer (Mar. 3, 2015).

¹⁶² This is based on a well-established ethical norm for lawyers to keep their clients informed during the legal process. Interview with PL5, Private Lawyer (Aug. 14, 2014); Second Interview with PL7, Private Lawyer (Aug. 11, 2014); Interview with PL4, Private Lawyer (Mar. 4, 2015). PL4 noted that he prefers meeting with clients in person to updates over the phone. *Id.* 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, Plaintiffs (July 29, 2015); Interview with BA, Plaintiff (July 26, 2015). In contrast, plaintiffs that have only been in contact with a Palestinian NPO were significantly less involved in the litigation process, which for some created frustration and even anger towards the NPO. Interview with AS, Plaintiff (Aug. 29, 2015). I was unable to get in touch

Plaintiffs' lawyers noted that they express their commitment by listening to their clients' stories.¹⁶³ 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."¹⁶⁴ In contrast, while NPO lawyers have made an effort to meet with clients at the initial stage of launching a claim,¹⁶⁵ 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.¹⁶⁶ As one NPO 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."¹⁶⁷

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: "Later 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."¹⁶⁸

The more experienced plaintiffs' lawyers justified this preference based on the fairness and efficiency of settlements.¹⁶⁹ 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'

with any plaintiffs represented by the Center to compare their impressions with clients of plaintiffs' lawyers.

¹⁶³ Interview with PL1, Private Lawyer (July 14, 2015); Interview with PL4, Private Lawyer (Mar. 4, 2015).

¹⁶⁴ Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁶⁵ Interview with NPOL9, NPO Lawyer (Mar. 14, 2016).

¹⁶⁶ Interview with NPOL4, NPO Lawyer (Aug. 3, 2014). According to his perception, this was the case for plaintiffs' lawyers too, yet the latter reported a different relationship with their clients.

¹⁶⁷ Interview with NPOL1, NPO Lawyer (July 27, 2014).

¹⁶⁸ Interview with PL4, Private Lawyer (Mar. 4, 2015); *see also* Interview with PL1, Private Lawyer (July 14, 2015) (noting the critical issue of time). However, PL4's approach had its limits. For instance, he was unwilling to take part in proceedings for ex-gratia compensation due to his perception of these proceedings as demeaning. Interview with PL2, Private Lawyer (Sept. 16, 2014).

¹⁶⁹ Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL12, Private Lawyer (Dec. 13, 2015); Interview with PL11, Private Lawyer (Dec. 16, 2015); Interview with PL10, Private Lawyer (Dec. 14, 2015).

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*.¹⁷⁰ 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. This approach was also manifested in plaintiffs’ lawyers’ choice of remedies; their tendency to pursue damages rather than injunctive relief.¹⁷¹

Meanwhile, NPO lawyers had a more complicated relationship with settlements. NPO lawyers highlighted the challenge that settlements pose when striving for a cause such as accountability or effecting change. Given this dilemma, one NPO 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.”¹⁷²

Similarly, another NPO 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 insisting on a principled court decision instead of agreeing to a settlement.¹⁷³ Another NPO 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

¹⁷⁰ For context on secret settlements, see Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don’t Know Can Hurt You)*, 2 J. INST. STUDY LEGAL ETHICS 115 (1999) (making the case for amending the ABA Model Rules of Professional Conduct 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 MICH. L. REV. 867 (2007) (offering an economic analysis of bans on secret settlements).

¹⁷¹ Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL12, Private Lawyer (Dec. 13, 2015); Interview with PL11, Private Lawyer (Dec. 16, 2015); Interview with PL10, Private Lawyer (Dec. 14, 2015); Interview with PL1, Private Lawyer (July 14, 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 would go on the record. In his words, “history is not a matter of one or two years.” Interview with PL13, Private Lawyer (Mar. 16, 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, Private Lawyer (Feb. 29, 2016).

¹⁷² Interview with NPOL4, NPO Lawyer (Aug. 3, 2014).

¹⁷³ In that case, according to the lawyer, the client did not want to settle either. Interview with PL13, Private Lawyer (Mar. 16, 2016).

refused to cave in, despite the prospects of speedy recovery for his client.¹⁷⁴

These articulations of the client/cause dilemma were to some extent shared by human rights lawyers, as they too care about the collective cause.¹⁷⁵ 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 nonprofit lawyer handling numerous cases without financial stakes in each individual case.¹⁷⁶ Looking closely at the examples above, plaintiffs' lawyers were often "better" than NPO 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.¹⁷⁷

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,¹⁷⁸ perpetuating the superiority of a single case over the general cause. This particularization of cases—at the expense of

¹⁷⁴ Interview with NPOL2, NPO Lawyer (Aug. 12, 2014).

¹⁷⁵ See, e.g., Interview with PL4, Private Lawyer (Mar. 4, 2015); Interview with PL9, Private Lawyer (Sept. 30, 2015); Interview with NPOL5, NPO Lawyer (Jan. 26, 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. Interview with PL4, Private Lawyer (Mar. 4, 2015).

¹⁷⁶ See Shamir & Chinski, *supra* note 139, at 255–56.

¹⁷⁷ Sarat & Scheingold, *supra* note 14.

¹⁷⁸ 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 139, at 239; see also Dotan, *supra* note 29, 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).

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.¹⁷⁹ This practice contrasts with the fee arrangement the Center employs in which it funds the litigation and the Center's lawyers have no direct financial stake in the Claims, as employees retained on a fixed salary.¹⁸⁰ 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 clients¹⁸¹ in violation of the Israeli Bar Association Rules (Professional Ethics) (the Ethics Rules).¹⁸² One plaintiffs' lawyer who admitted to having engaged in this practice called it “borderline ethical,”¹⁸³ while, in fact, it is strictly forbidden. Another plaintiff's 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.¹⁸⁴ This practice speaks to lawyers' commitment towards their clients and their desire to help clients bring

¹⁷⁹ 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 a question regarding fee structure and began questioning me about where this was leading. Interview with PL12, Private Lawyer (Dec. 13, 2015).

¹⁸⁰ Interview with KS3, Key Stakeholder (Mar. 10, 2016); Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with NPOL1, NPO Lawyer (July 27, 2014).

¹⁸¹ Interview with PL7, Private Lawyer (Aug. 11, 2014); Interview with PL6, Private Lawyer (Aug. 12, 2014).

¹⁸² See Bar Association Rules (Professional Ethics), 5746–1986, r. 44 (Isr.), http://www.israelbar.org.il/uploadfiles/Bar_Association_Rules_Professional_Ethics__nov_2008.pdf [https://perma.cc/KLD4-B74E]. 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. NAT'L ETHICS COMM., FILING COMPLAINTS AND DISCIPLINARY PROCEEDINGS, ISR. BAR ASS'N (2018), http://www.israelbar.org.il/article_inner.asp?pgId=91294&catId=3319 [https://perma.cc/A8JC-CWAR]. It is noteworthy that the information is provided in Hebrew and English, but not Arabic, thus less accessible to Palestinians.

¹⁸³ Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁸⁴ Interview with PL15, Private Lawyer (Mar. 9, 2016).

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, 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.¹⁸⁵

Second, the practice of using paid liaisons in the OPT to broker Claims and recruit potential clients.¹⁸⁶ 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 liaison—an attorney from Gaza or Judea and Samaria [the West Bank] who probably gave cases to several lawyers to increase payoff.¹⁸⁷

NPO and plaintiffs' lawyers confirmed this was a common practice.¹⁸⁸ One plaintiffs' lawyer reported that his first case was referred to him by a Jewish-Israeli client who married a Palestinian and moved to

¹⁸⁵ It is interesting to note that while lawyer loans are forbidden in the United States, MODEL RULES OF PROF'L CONDUCT r. 1.8(e) (AM. BAR ASS'N 2018), 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 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).

¹⁸⁶ 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, Private Lawyer (Mar. 16, 2016); Interview with PL10, Private Lawyer (Dec. 14, 2015)), and, rarely, cross-selling services to the same clients, particularly corporate clients (Interview with PL13, Private Lawyer (Mar. 16, 2016)).

¹⁸⁷ Interview with GL1, Gov't Lawyer (DA) (Aug. 17, 2015). The liaisons were dubbed "Ma'cherim" by ASAs and NPO lawyers. This is a Yiddish term referring (negatively) to middlemen who offer their services to provide shortcuts in bureaucratic systems, often aimed at getting illegal benefits in exchange for bribes.

¹⁸⁸ *See, e.g.*, Interview with NPOL4, NPO Lawyer (Aug. 3, 2014) ("[P]laintiffs' lawyers settled cases without fee agreements, giving a few pennies to the liaisons that brought them the case.").

the OPT. That former client then continued to refer Palestinian clients to him for a small fee.¹⁸⁹ This practice, while not specifically prohibited by the Ethics Rules,¹⁹⁰ has undoubtedly contributed to the negative perception of plaintiffs' lawyers amongst government and NPO lawyers.¹⁹¹

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 NPO lawyer noted: "[P]laintiffs' 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"¹⁹²

The same NPO 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 who pursued an extremely poor settlement without the Center's knowledge. The Center learned of this development through the ASA assigned to the case, after the Center launched a lawsuit on behalf of the child. The NPO lawyer noted that the plaintiffs' lawyer handling the case reaped most of the settlement money, while the child, who was left permanently and severely disabled, got practically nothing.¹⁹³

Another NPO lawyer observed that some of the plaintiffs' lawyers acted out of greed, trying to extract as much profit as possible at the

¹⁸⁹ Interview with PL14, Private Lawyer (Mar. 15, 2016).

¹⁹⁰ 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 liaisons. See Bar Association Rules, *supra* note 182, r. 30.

¹⁹¹ However, this negative perception held by government representatives may reflect powerful defendants' eagerness to cast the Claims as "dirty." For the NPO lawyers, it may well be part of their condescending approach towards fee-for-service lawyers in this field (unlike NPO 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 generally AUERBACH, *supra* note 153.

¹⁹² Interview with NPOL4, NPO Lawyer (Aug. 3, 2014). A similar view was articulated by another NPO lawyer who did not litigate Claims but was involved with them on the policy side. He noted that some lawyers were less professional and settled for smaller amounts than appropriate. Interview with NPOL8, NPO Lawyer (Mar. 7, 2016).

¹⁹³ According to that NPO lawyer, "[t]his was not a single case." Interview with NPOL4, NPO Lawyer (Aug. 3, 2014). However, this allegation is difficult to substantiate with data.

expense of their clients' best interest and the Center's funds.¹⁹⁴ According to that lawyer's account, for some, such behavior reached the point of malpractice.¹⁹⁵ One ASA supported that impression, mentioning that plaintiffs' lawyers representing Palestinians submitted heaps of poorly drafted lawsuits.¹⁹⁶ A similar view was provided by one plaintiff's lawyer: "Many 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."¹⁹⁷

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 frustration that they lacked the tools to distinguish truthful from deceitful clients.¹⁹⁸ As one ASA noted, plaintiffs' lawyers are sometimes taken by surprise by facts revealed by their clients on the witness stand and this embarrasses them.¹⁹⁹ But on other occasions, this phenomenon may have resulted from greedy plaintiffs' lawyers who were

¹⁹⁴ Interview with NPOL1, NPO Lawyer (July 27, 2014).

¹⁹⁵ *Id.* 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 NPO lawyer, who noted that there were many lawyers from the North of Israel who came to Jerusalem to make money off these claims. According to his account, 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 NPOL7, NPO Lawyer (Mar. 9, 2016).

¹⁹⁶ Interview with GL4, Gov't Lawyer (DA) (Aug. 18, 2014).

¹⁹⁷ Interview with PL1, Private Lawyer (July 14, 2015). Interestingly, PL1 himself belongs to "the sector" but perceives himself as better and more professional than the typical Arab-Israeli lawyer. *Id.*

¹⁹⁸ Interview with PL6, Private Lawyer (Aug. 12, 2014); Interview with PL9, Private Lawyer (Sept. 30, 2015); Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL16, Private Lawyer (Mar. 16, 2016); Interview with PL14, Private Lawyer (Mar. 15, 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.,* Moshe Bar-am, *Mala Process in Civil Procedure*, 6 ALEI MISHPAT 135 (2007) (Isr.); Richard A. Derrig, *Insurance Fraud*, 69 J. RISK & INS. 271 (2002); 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).

¹⁹⁹ Interview with GL11, Gov't Lawyer (DA) (Mar. 9, 2016); *see also* Interview with GL10, Gov't Lawyer (DA) (Mar. 7, 2016).

determined to bring Claims.²⁰⁰ It is also possible that plaintiffs' lawyers could have taken more precautions to prevent fraudulent claims.²⁰¹

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 NPO 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 comes to Claims? While government lawyers argue they are, plaintiffs' lawyers beg to differ, and these arguments are difficult to support with data.²⁰² Whatever the actual scope and root causes of these phenomena, the State did not hesitate to use them in its favor when pushing to restrict the Claims. For instance, the then-Minister of Justice, Meir Sheerit, 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.²⁰³

Later in the discussion, General Finkelstein gave an example of a fraudulent claim identified by a private investigator retained by IDF.²⁰⁴ In this sense, the existence of this phenomenon, for which plaintiffs' lawyers are partially to blame, helped make the case for restricting Claims.

²⁰⁰ Interview with GL3, Gov't Lawyer (MOJ) (July 22, 2015); Interview with PL3, Private Lawyer (July 28, 2015).

²⁰¹ See, e.g., Interview with NPOL7, NPO Lawyer (Mar. 9, 2016) (noting that plaintiffs' lawyers often failed to check all the facts before submitting a lawsuit, and mentioning one lawyer by name).

²⁰² See Engstrom, *supra* note 198.

²⁰³ Protocol No. 405 of the Knesset's Constitution, Law, and Justice Committee, DK (2001) 4242, 4248 (Isr.), <https://main.knesset.gov.il/Activity/committees/huka/Pages/CommitteeProtocols.aspx> [<https://perma.cc/WWR7-MJD5>] (emphasis added) (translated from Hebrew by author).

²⁰⁴ *Id.*; see also Protocol No. 228 of the Knesset's Constitution, Law, and Justice Committee, DK (1998) 3687 (Isr.), https://fs.knesset.gov.il/14/Committees/14_ptv_485698.pdf [<https://perma.cc/6LB6-DGK9>] (remarks by Dani Gueta, a government lawyer from the Prime Minister's office, noting that Palestinians take advantage of the lack of factual clarity to bring claims under false pretense).

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 NPOs 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 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. The expectations in turn affect the type of legal representation they give to clients. *Third*, it matters because of how lawyers are perceived by judges, clients, policymakers, and the public. These perceptions impact the way in which cases play out. For instance, judges may decide a case differently if it is brought by a lawyer they perceive as a cause lawyer. And clients may opt for retaining lawyers based on whether they are perceived as cause lawyers. 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. Russell Pearce argues 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.²⁰⁵ 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. An overly broad definition of cause lawyering would dilute its meaning, and yet it would not necessarily change the way lawyers perceive themselves nor would it encourage private, fee-for-service 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 moral 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 commitments.”²⁰⁶ 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.²⁰⁷ Moreover, on the individual client’s level, plaintiffs’ lawyers’

²⁰⁵ See 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 27–28 (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”).

²⁰⁶ Erichson, *supra* note 138, at 2092.

²⁰⁷ As noted, according to MOD FOIA data, during the years 1990–2014 the MOD had paid approximately 310M NIS (~\$86M) in damages to Palestinians for harm caused by Israel’s security

interests were often more closely aligned with their clients' than were NPO lawyers' interests. On the other hand, the practices used by plaintiffs' lawyers have also allowed market pathologies associated with personal injury lawyering to permeate the Claims. More importantly, while achievements have been notched on the individual client's level, there was no overarching 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 has also fostered Israel's strategy of systematically discouraging Claims. The State has furthered this policy, among other ways, 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 by 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 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.²⁰⁸ While large-firm

forces, in approximately 1700 different cases. At least some of these achievements can be attributed to the work of plaintiffs' lawyers. REPORT IN RESPONSE TO MOD FOIA QUERY, *supra* note 32.

²⁰⁸ JEROME E. 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

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.²⁰⁹ Furthermore, because personal injury lawyers usually take cases on a contingency basis, a great deal of risk is associated with accepting a case.²¹⁰ The plaintiffs' personal injury bar also ranks low among lawyers in professional prestige.²¹¹ 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.²¹²

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.²¹³ 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,

plaintiffs' personal injury lawyers serve an average of 142 different clients per year. By contrast, general corporate lawyers serve an average of thirty-two clients per year. See JOHN P. 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, 247 (2006).

²⁰⁹ Parikh, *supra* note 208, at 247.

²¹⁰ *Id.*

²¹¹ Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor*, 66 AM. SOC. REV. 382, 386–87 (2001).

²¹² 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, typically medical malpractice and other more complex disputes. Parikh, *supra* note 208, 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. INQUIRY 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).

²¹³ 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.

NPO lawyers continue to “look down” on plaintiffs’ lawyers, even when the latter are pursuing cases that may promote the public good.

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, having applied the three-pronged examination of *practices, relationship with clients, and political climate*. 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.²¹⁴ These different clients may well seek different types of legal representation by either “de facto” or traditional cause lawyers.

The de-facto label, paired with the three-pronged framework, help advance our understanding of the diverse roles that lawyers assume in politically complex settings, as well as their impact on the capacity of civil litigation to promote social change. While these de-facto cause lawyers’ work at times advanced the interests of specific underserved clients, it contributed to the emergence of the litigation as a series of isolated cases and was ill-suited to advancing collective legal mobilization. The remaining question, explored below, is whether an opportunity was missed to employ the Claims towards effecting 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

²¹⁴ For an account of Palestinian claimants’ motivations to pursue Claims, see Bachar, *supra* note 8, at 409–10.

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 who work for legal nonprofits, primarily human rights NPOs. Would more significant involvement of such NPOs have made a difference in the litigation? Would NPOs 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 NPOs, as a means to pursue government accountability and prevent impunity.

In the United States, legal nonprofits, alongside private public interest law firms, engage in direct client advocacy in tort litigation launched as part of social justice struggles.²¹⁵ Though tort law and public interest litigation are not always the most natural allies,²¹⁶ 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.²¹⁷

²¹⁵ 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, *supra* note 4; Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421 (2005); Bloom, *supra* note 15; Trubek, *supra* note 133. Tort cases may also be a source of income for NPOs struggling to cover their operation costs.

²¹⁶ Scholars have addressed the various dilemmas stemming from marrying torts and social justice. See Abel, *supra* note 215; 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).

²¹⁷ 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 nonprofits 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*

1. Where Are the Traditional Cause Lawyers?

The role played by legal nonprofits in similar U.S. contexts thus begs the question: Why haven't more Israeli human rights NPOs²¹⁸ 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 NPOs; in his own words, "[y]ou can forget about the NPOs." He further noted, referring to Adalah—a well-established human rights NPO 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 [the plaintiffs' lawyers]."²¹⁹

Indeed, most human rights NPOs in Israel refrained from taking on representation in the Claims, and the one NPO that did venture into this practice eventually abandoned it.²²⁰ 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.²²¹ These NPOs

Corporate Social Responsibility, 38 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, *supra* note 4; 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 United States).

²¹⁸ By using this term, I refer specifically to several Israeli human rights NPOs that deal with the rights of Palestinians—both citizens and non-citizens. These include, in addition to 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 primarily in documenting violations).

²¹⁹ Interview with PL1, Private Lawyer (July 14, 2015).

²²⁰ 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 to the 2005 amendment and discussions in the Israeli Parliament regarding the Act. In both these areas, human rights NPOs were very active.

²²¹ In the latter, lawyers in nonprofits 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, 26 (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

“are often funded by international foundations and rely on a limited number of employed activists and expert advisers,” and are “marked by overrepresentation of lawyers.”²²² Israeli human rights NPOs focused on the Conflict belong in the latter category. 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 HCJ 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.²²³

In contrast, human rights NPOs in Israel rarely engage in civil litigation.²²⁴ The first explanation of 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 State, in administrative, constitutional or, rarely, criminal proceedings.²²⁵ Much of the practice of these NPOs is focused on high-profile “impact” litigation against the State at the supreme court level, rather than direct

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. See Ronen Shamir & Neta Ziv, *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 (Austin Sarat & Stuart Scheingold eds., 2001).

²²² Shamir & Ziv, *supra* note 221, at 291.

²²³ See Dotan, *supra* note 29; 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) (arguing that Israeli government lawyers also rely on this strategy to effect social change).

²²⁴ Interview with NPOL8, NPO Lawyer (ACRI) (Mar. 7, 2016); Interview with KS3, Key Stakeholder (Mar. 10, 2016). There is no ethical rule barring Israeli NPOs 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 NPOs in Israel are quite slim, with only one rule governing their activity, see section 11B to the Ethics Rules, and the rest established in case law. See 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 & GOVERNANCE* 129, 144 (2001) (Hebrew). 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.

²²⁵ See Ziv, *supra* note 221, 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. *Id.*

client advocacy in lower courts.²²⁶ A senior lawyer at the Association for Civil Rights in Israel (ACRI), the almost-official cause lawyering organization of Israel, supported this view.²²⁷ NPOL8 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 effect broad change rather than change the situation for a specific individual. As a result, ACRI often prefers impact litigation to direct client advocacy.²²⁸

This strategic focus also stems from the *structure* of these organizations, being ill-equipped to handle the intricacies of complex tort litigation.²²⁹ As NPOL8 mentioned, “we have limited resources We do not have the expertise and resources needed to handle all of the preliminary proceedings in tort cases.”²³⁰ And NPOL3, 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.”²³¹ Human rights lawyers in Israel are typically trained in administrative, constitutional, or criminal law rather than tort law,²³² and the legal departments in which they work are built to handle fast-paced,

²²⁶ 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 LAW & POL’Y 1 (2001). A similar impression was expressed by some respondents. Interview with PL2, Private Lawyer (Sept. 16, 2014); Interview with PL9, Private Lawyer (Sept. 30, 2015).

²²⁷ This position may also be related to the mandate that NPOs receive from their donors, some of which are international organizations and foreign governments. When a donor is interested in having a particular legal activity pursued with their donation money, this constrains the NPO’s agenda. Interview with NPOL1, NPO Lawyer (July 27, 2014).

²²⁸ Interview with NPOL8, NPO Lawyer (Mar. 7, 2016).

²²⁹ 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 respondents. Interview with NPOL2, NPO Lawyer (Aug. 12, 2014); Interview with PL9, Private Lawyer (Sept. 30, 2015).

²³⁰ Interview with NPOL8, NPO Lawyer (Mar. 7, 2016) (noting further that none of the other human rights NPOs, except the Center, had taken direct client advocacy in such cases).

²³¹ Interview with NPOL3, NPO Lawyer (Adalah) (June 29, 2015).

²³² This is a result of the traditional courses of action taken by human rights NPOs in Israel. See Ziv, *supra* note 221, at 22–23; Bitton, *supra* note 229; see also Interview with PL9, Private Lawyer (Sept. 30, 2015). While private human rights lawyers generally fit this description too, some of them tentatively ventured into the Claims practice, viewing it as human rights litigation. See, e.g., Interview with PL3, Private Lawyer (July 28, 2015); Interview with PL9, Private Lawyer (Sept. 30, 2015). One of these lawyers even hired a personal injury lawyer, PL7, to manage Claims in her practice. Interview with PL7, Private Lawyer (Aug. 11, 2014).

simple legal procedures, like those of the HCJ, as opposed to complicated civil proceedings.²³³ 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.²³⁴ 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.²³⁵ This made the practice of Palestinians' tort claims appealing to these lawyers, particularly when substantial damages were sought.

A final explanation for human rights NPOs' reluctance to take on direct client advocacy in the Claims is even more intuitive: their *inclination*. Respondents reported 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.²³⁶

What is the source of Israeli human rights NPOs' 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 that drew in the 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.²³⁷

The view of monetary damages as morally reprehensible is not new, nor is it unique to Israeli NPOs. As Michele Dauber notes in connection with the 9/11 compensation fund that conferred monetary relief to

²³³ See Bitton, *supra* note 229. My respondents expressed similar points: Interview with NPOL2, NPO Lawyer (Aug. 12, 2014); Interview with PL4, Private Lawyer (Mar. 4, 2015) (noting that frequent personnel turnover also makes NPOs better suited for shorter, less complex proceedings).

²³⁴ See Bachar, *supra* note 26, at 848 (discussing the petition brought by human rights NPOs to challenge an amendment to the Act); Interview with NPOL8, NPO Lawyer (ACRI) (Mar. 7, 2016).

²³⁵ 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, *supra* note 155.

²³⁶ Interview with KS3, Key Stakeholder (Mar. 10, 2016).

²³⁷ Interview with PL9, Private Lawyer (Sept. 30, 2015).

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.”²³⁸ According to Dauber, compensation turned victims into recipients of public funds, which immediately triggers suspicion.²³⁹ Similarly, tort litigation demands the type of cost-benefit analysis that tends to make people uncomfortable, especially in issues of human suffering.²⁴⁰ The reluctance of high-minded human rights NPOs 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 [the other NPOs]. 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].²⁴¹

The NPOs’ approach towards the Claims may also portray a skepticism towards the capacity of tort lawsuits to effect social change. Indeed, bringing about institutional change by using individual tort lawsuits, like the Claims, is a highly contested endeavor. NPO lawyers questioned the deterrence effect of such litigation, especially when the State can pay relatively little and avoid liability. They also described the

²³⁸ 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 of price tags on human injuries).

²³⁹ Dauber, *supra* note 238, at 291.

²⁴⁰ This phenomenon is described in social psychology as “Taboo Trade-offs.” Developed by Alan Page Fiske and Philip Tetlock, 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 STAN. L. REV. 1821, 1825–27 (2000). This relates to the argument on money being an imperfect substitute to human pain. See John Fabian Witt, *Two Humanitarianisms* (Mar. 18, 2015) (unpublished working paper presented at Stanford Law School Faculty Workshop); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, POOR RELIEF, AND OTHER CURRENCIES (1994); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010).

²⁴¹ Interview with KS3, Key Stakeholder (Mar. 10, 2016).

Claims as a personal matter—for individuals to receive compensation away from public attention.²⁴² As one NPO 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.²⁴³

Nevertheless, more recently, several Israeli human rights NPOs 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 non-Palestinian clients.²⁴⁴ Israeli human rights NPOs are perhaps starting to acknowledge the value such lawsuits can bring to social justice struggles.²⁴⁵

Two important challenges lie ahead: *first*, the lack of established norms of ethical conduct for NPOs engaging in tort litigation. As Ziv notes, NPOs 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.²⁴⁶ Their special characteristics merit a separate model of professional ethics which addresses these dilemmas. *Second*, following the U.S. trend,²⁴⁷ Israeli public opinion is showing signs of skepticism towards the justice system

²⁴² Interview with NPOL5, NPO Lawyer (July 26, 2015); Interview with NPOL8, NPO Lawyer (Mar. 7, 2016); Interview with NPOL3, NPO Lawyer (June 29, 2015); Interview with NPOL9, NPO Lawyer (Mar. 14, 2016).

²⁴³ Interview with NPOL8, NPO Lawyer (Mar. 7, 2016).

²⁴⁴ *Id.*; Interview with KS3, Key Stakeholder (Mar. 10, 2016); Interview with NPOL2, NPO Lawyer (Aug. 12, 2014).

²⁴⁵ Interview with NPOL8, NPO Lawyer (Mar. 7, 2016); Interview with KS3, Key Stakeholder (Mar. 10, 2016); Interview with PL9, Private Lawyer (Sept. 30, 2015); Interview with NPOL2, NPO Lawyer (Aug. 12, 2014).

²⁴⁶ Ziv, *supra* note 224.

²⁴⁷ For a discussion and critique of the tort system in the United States, see BURKE, *supra* note 9, at 22–59; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 126–59 (Harvard Univ. Press 2003).

in general,²⁴⁸ and civil justice in particular.²⁴⁹ This skepticism naturally seeps into public perception of lawyers engaging in this practice.²⁵⁰ A more informed and nuanced understanding of torts, their value and pitfalls,²⁵¹ 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 Nonprofit Organizations Have Made a Difference?

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

On the one hand, NPOs may have been able to get better results. As repeat players in human rights litigation,²⁵² they may have gained a similar status in the civil courts adjudicating the Claims. Their aggregated experience in litigating Claims²⁵³ may have contributed to building a strategic plan around the Claims—considering, for instance, case

²⁴⁸ In a general survey conducted in 2015, only thirty percent 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, 6:44 PM), <http://www.globes.co.il/news/article.aspx?did=1001076264> [https://perma.cc/Q4YP-D87D].

²⁴⁹ See, e.g., Hen Shalita, *It Is a Phenomenon: The Frivolous Lawsuits Israelis Bring*, GLOBES (May 16, 2015), <http://www.globes.co.il/news/docview.aspx?did=1001036001> [https://perma.cc/VME8-8H35]. The view of the Claims is also influenced by how Palestinians are perceived. See Bachar, *supra* note 26.

²⁵⁰ 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).

²⁵¹ See Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going On in the Civil Liability System?*, 16 JUST. SYS. J. 139 (1993) (noting the need for further research on litigation behavior and outcomes in the civil justice system).

²⁵² Dotan, *supra* note 29, at 195.

²⁵³ On aggregated dispute settlement and the role of repeat players in the American tort system, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

selection and case sequencing²⁵⁴—and gaining leverage vis-à-vis repeat players on the government’s side.²⁵⁵ Israeli human rights NPOs also have networks of field personnel in 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.²⁵⁶ In addition, NPOs’ 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 litigating Claims.²⁵⁷ NPOs would have also been able to provide financial support to claimants in need,²⁵⁸ avoiding ethical misconduct of lending money to clients. Furthermore, NPOs 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 why Claims are now gradually disappearing.²⁵⁹ In this setting—of litigating-against-all-odds—NPOs may have been able to endure, at the very least, with a strategy of

²⁵⁴ See Van Schaack, *supra* note 4; cf. GOLUBOFF, *supra* note 25, at 13 (highlighting the important consequences of lawyers’ strategic litigation choices about which cases to pursue and which to avoid, in the context of the fight for civil rights in the United States).

²⁵⁵ However, a law cannot be challenged directly through tort litigation. See Ravid, *supra* note 223 (discussing ways in which lawyers bring about social change in Israel).

²⁵⁶ Interview with PL9, Private Lawyer (Sept. 30, 2015); Interview with NPOL9, NPO Lawyer (Mar. 14, 2016); Interview with NPOL4, NPO Lawyer (Aug. 3, 2014).

²⁵⁷ The Center had a clear advantage over plaintiffs’ lawyers in this area. Interview with NPOL4, NPO Lawyer (Aug. 3, 2014). A similar impression arose from my conversation with GS who worked at the Center for six 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, Key Stakeholder (Mar. 15, 2016); see also Interview with NPOL10, NPO Lawyer (Gisha) (July 6, 2016) (noting Gisha’s experience with obtaining permits and the unfortunate lack of collaboration between the organization and plaintiffs’ lawyers).

²⁵⁸ Interview with NPOL4, NPO Lawyer (Aug. 3, 2014); Interview with NPOL7, NPO Lawyer (Mar. 9, 2016); Interview with NPOL9, NPO Lawyer (Mar. 14, 2016); Interview with PL17, Private Lawyer (Feb. 29, 2016); Interview with KS3, Key Stakeholder (Mar. 10, 2016).

²⁵⁹ 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 MOD FOIA QUERY, *supra* note 32; see also Yael Stein, B’TSELEM, GETTING OFF SCOT-FREE: ISRAEL’S REFUSAL TO COMPENSATE PALESTINIANS FOR DAMAGES CAUSED BY ITS SECURITY FORCES 48 (Shuli Wilkansky ed., Michelle Bubis trans. 2017), http://www.btselem.org/sites/default/files2/201703_getting_off_scot_free_eng.pdf [<https://perma.cc/7BJH-BDEV>] (citing data showing that in recent years fewer Claims are filed and less compensation paid).

documenting incidents of human rights violations, if not attempting to alter the current policy.²⁶⁰

On the other hand, as this Article has shown, representation by NPO 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 specific parties. Furthermore, it is far from clear that heavier NPO involvement would have changed the trajectory of the legislative proceedings aimed at discouraging the Claims. If anything, it seems more likely that high-profile human rights NPOs would have drawn media and public attention to a low-profile field, which may have led to a cap on the litigation at an even earlier stage.²⁶¹ This would have prevented a substantial number of Palestinian claimants from successfully recovering damages from the State.²⁶²

Given these competing hypotheses, it is difficult to assess the actual impact more NPO involvement would have generated. That said, several takeaways can be discerned from this analysis. First, NPO policies refraining from using tort litigation to effect social change should be revisited, and discussions should be held on the potential merit of such a strategy. Removing taboos from NPOs' portfolios should be the first step. Second, there is a desperate need for more collaboration between NPOs and private lawyers working in the same space. The experience in human rights issues and the institutional advantage that NPOs bring, along with private lawyers' expertise in private law and client recruitment, could form a stronger team to pursue social justice goals. Such collaboration is especially crucial in the current political climate, when social change is needed more than ever.

²⁶⁰ See Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice: Lawyering Against Capital Punishment*, in *CAUSE LAWYERING*, *supra* note 14, 317, 335–37 (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).

²⁶¹ This is supported both by the hypothesis made by KS3 that the Center's involvement was partially responsible for the legislative amendments, Interview with KS3, Key Stakeholder (Mar. 10, 2016), and by recent developments in Israeli politics which reflect a trend of an increasingly close scrutiny of human rights NPOs 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, 4:05 AM) <http://www.haaretz.com/israel-news/.premium-1.703825> [<https://perma.cc/4MRY-8299>].

²⁶² See *supra* Section I.A. for data on the scope of compensation.

CONCLUSION

The literature on cause lawyers has acknowledged 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 looked beyond the motivations of the lawyers, exploring cause lawyers in relation to their *practices*, their *relationships with their clients*, and *the political climate* 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 for their capacity to use the law to promote social change. Through this examination, the Article complicated our understanding of cause lawyering and when and where it takes place. It also highlighted 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 nonprofit lawyers. In so doing, these lawyers filled a void left by Israeli human rights organizations 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 disparate cases rather than a collective struggle for accountability and security forces' change of practices, but it has also inadvertently supported the State's discouragement policy towards the Claims.

This Article provided an intriguing, provocative setting to rethink the cause lawyering framework, turning the spotlight to lawyers' practices that affect the use of tort actions as a tool to promote social justice. Further to examining a unique, previously unexplored case study, the Article challenged the cause lawyering literature by highlighting the challenges that arise when fee-for-service lawyers penetrate cause lawyering territory. It raised a consequential issue for policymakers and civil society organizations: How does the involvement of plaintiffs' lawyers shape litigation processes they participate in? According to the findings of this Article, the answer may well vary between sub-cultures of legal actors. In particular, the case study helped expose the challenge of labeling personal injury lawyers as cause lawyers. Importantly, various

types of lawyers perceive themselves in cause lawyering terms. Their choice of legal strategies, as well as the expectations others have of them, shape both specific cases and broader litigation processes. This renewed understanding of the cause-lawyering framework—as well as its relationship with lawyers' ethical commitments—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. Such characteristics include, 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. The three-pronged framework offered here, which addresses lawyers' practices, lawyers' relationships with their clients, and the political climate, may well be replicated to other contexts of social justice civil litigation. Internationally, the research could be applied to human rights organizations and private plaintiffs' lawyers representing foreign victims of government-inflicted human rights violations suing for damages. Domestically, it could be expanded to civil rights litigation on behalf of minority victims of police misconduct. Such subsequent projects would help build a body of research on the complex role lawyers play in civil 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 play in highly politicized court-centered social justice struggles and their influence on the evolution of the legal regime, the Article contributed to conceptualizing tort litigation as a tool for promoting social justice.²⁶³ Understanding the various actors involved in tort litigation is part of a broader process of designing more effective strategies to combat social injustice around the globe.²⁶⁴

²⁶³ On patterns of interaction between international and national courts, see Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003).

²⁶⁴ 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 the Basics: Public Adjudication of Corporate Atrocities Torts*, 57 HARV. INT'L L.J. 70 (2016).