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Center for the Defence of the Individual

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## The Right to Compensation for the Violation of Human Rights

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Over the years of Israeli occupation in the Territories, Israel has caused damages to Palestinians on a massive scale. In violation of its duties as an occupying power, Israel subjected the Palestinian economy to the interests of its own economy causing Palestinians to depend on Israeli products and jobs on one hand and preventing them from developing an independent and sustainable economy on the other. Israel has plundered resources from Palestinians such as water and land and damaged their subsistence environment. The Israeli military kills, injures and abuses Palestinians and the Israeli Security Agency tortures them to the point of permanent mental damage. Demolition of houses and destruction of agricultural crops, false arrests, violation of freedom of movement, separation of families – all these and others add up to an ever increasing debt Israeli society owes to Palestinians as a public and as individuals.

### Fundamental Rights and the Right to Compensation for their Violation

According to the liberal world view, respect for human rights also means providing relief when they are violated. The right to receive compensation for the violation of fundamental rights derives from the rights that were violated. It is, in fact, intrinsic to them. Thus, for example, a person's right over her body means, *inter-alia*, that it is forbidden to attack or injure her without justification. However, the right over one's body also entails the right to receive compensation in case of an unjustified attack in order to give the injured person the necessary tools to recover physically and mentally, or at least, to provide her with the treatments and accessories needed for achieving a quality of life which most closely resembles that which she would have had if it were not for the injury. A person who has been blinded will never again see a sunset; a person who was unlawfully imprisoned for five years will never regain her youth or the experiences she missed, a person whose family had been torn apart will never relive the family life which is no more. The monetary payment is both acknowledgement of the violated right and its importance and a rough attempt to compensate for the damage. Sometimes, the very acknowledgement of the harm and its severity provides some relief.

Putting human rights at the foundation of the rules of governance stems from the fact that they are **valuable** for human beings. Freedom of movement and speech, the freedom to demonstrate, personal autonomy, human dignity which is possible in an egalitarian society are just a few examples of rights without which human existence becomes wretched. These rights are not commodities with a fixed market value which are transferred from one hand to another, but they are no less necessary for our quality of life than those assets normally valued in monetary terms. Examining society from an economic perspective which does not take these values into account would lead to

skewed calculations which do not reflect society's real needs. It would result in preferring interests which are normally assessed monetarily over the most fundamental needs of human beings. In fact, most human beings have very little capital – financial or other, and they are, in any case, invulnerable to property damage of this kind. However, rights such as the right to dignity, liberty and taking part in the life and resources of society – these are universal rights. A legal system which compensates financial damages more than harm to human dignity, for example, is a system which has an inherent bias toward the wealthy and large corporations and disfavors the majority of society. An economic analysis of the law would require, for this reason also, meaningful compensation for the violation of human rights. Poor compensation thereof would lead to a situation where it is financially feasible to infringe such rights in order to promote other goals which society considers less important.

Compensation for the violation of human rights is essential not only in order to bring the injured individual to a state which most closely resembles the one in which he would have been if it were not for the infringement, it is also essential to ensure that human rights will not become empty letters. A right whose violation has no consequence will quickly lose any real substance. Therefore, violation of human rights must yield rapid and effective consequences on two levels: the criminal-locating those responsible and bringing them to trial; and the civil - compensating the victim. A society which does not bring to trial those who violate human rights and does not compensate their victims is a society without accountability and one which implicitly permits abuse of the weak.

### **The Duty to Compensate in Israeli and international law**

The principle that unlawful infringement of human rights requires compensation is well established in both Israeli and international law. The right to relief and compensation for victims of human rights violations is enshrined in the International Convention for Civil and Political Rights and in the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The same principle applies during armed conflicts. War leaves in its wake destruction on an enormous scale. It is not legally required to provide compensation for all of this damage. Yet damage that was caused in the course of a violation of the laws of war (or occupation) does require compensation. Thus for example, article 3 of the 1907 Hague Convention stipulates that parties which violate the provisions of the convention must pay compensation and that each party is responsible for the acts of its soldiers. Article 29 of the Fourth Geneva Convention and article 91 of the First Protocol Additional to the Geneva Conventions repeat this principle. ICRC research regarding international humanitarian law yielded that this is a customary standard. Despite commentary trends that compensation is intended for the state rather than the individual victim of a violation, today more and more commentators claim that the principle of compensation relates to the individual victim. This was determined, for example, in the general principles regarding the right to remedy and compensation for victims of grave violations of international human rights law and international

humanitarian law adopted by the UN General Assembly in 2005.<sup>1</sup> It was according to the principle of individual compensation that Israeli citizens received compensation from Iraq for damages they incurred following the firing of Iraqi missiles on Israel during the first Gulf War. The International Commission of Inquiry on Darfur cited the provisions of article 3 of the Hague Convention when establishing that grave violations of international humanitarian law and international human rights law confer a duty on the violating state toward the victim. But why go as far as Darfour? The International Court of Justice has only recently ruled that one of the ramifications of the illegality of the separation wall is that Israel must compensate everyone who has suffered damages as a result of it.

In Israeli domestic law compensation for the violation of human rights is enshrined mainly in the damages ordinance whose provisions were developed and interpreted through the years in case law. However, Israeli law stipulates that no compensation be given under the damages ordinance for damages caused by the Israeli military in an act of war. This provision does not contradict the obligation to compensate itself. The Israeli Supreme Court has ruled that the purpose of this provision is not to deny compensation but rather that it stems from the view that ordinary tort laws are not suitable for the kind and scale of damage that occurs during wars. Compensation for damages of a warlike nature should be determined by other mechanisms.

### **Obstructions to Compensation for Human Rights Violations in the Occupied Territories**

Considering the wholesale nature of Israeli violations of the human rights of Palestinians and the extraordinary scale of the damage it has caused Palestinians, it is surprising that Israel has thus far managed to evade paying its dues. A number of factors have contributed to Israel's success in this.

One factor which historically contributed to Israel's success was the objection to receiving compensation from Israel among Palestinians. This objection may be rooted in the perception that harm is part of the price a person pays in a national struggle. Receiving compensation for the damage, when, for example, it is a relative who has been killed, carries with it the emotional baggage of receiving blood money or hush money, as if one sold the enemy all one holds dear while the occupier bought "absolution". In accordance with this sentiment, as long as the conflict goes on, it is distasteful to arrive at partial arrangements with the enemy which relieve him of some of the responsibility. The taboo on receiving compensation from Israel was weakened somewhat during the 1990's when the peace process was taking place. It may be that the atmosphere of reconciliation was a contributing factor: the collective discussion of a just solution for the conflict legitimized individual discussions to finalize Israeli debt owed to individual Palestinian victims. The deteriorating economic situation in the Territories probably also contributed to the willingness to claim compensation

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<sup>1</sup> General Assembly resolution 60/147: **Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**. 16.12.2005.

from Israel. Only on one issue did the taboo on receiving compensation remain in full: payment for land confiscation was perceived as legitimizing the confiscation and maybe even as tantamount to selling the land to Israel. However, once Israel evacuated Palestinian lands in the northern West Bank as part of the disengagement plan, the owners sought compensation for the years of occupancy. Once the land had been returned to its owners, receiving compensation could no longer be seen as selling the land and became legitimate.

It was not only the Palestinians who have not insisted on demanding that Israel compensate them for the damages it caused unlawfully. The international community has also absorbed the damages incurred by Israel. Israel often harms projects established in the Territories by foreign countries. The latter do not always demand compensation for the damage (an exception was the compensation Israel paid the UK for damage to a British cemetery in the Gaza Strip). Donor countries also systematically absorb the damages Israel causes Palestinians. Rather than paying for the destruction it wreaks, Israel turns to the world to fix what it had destroyed and to help – at the expense of their taxpayers – ease the humanitarian crisis Israel is causing.

Another factor which diminishes the amount of compensation Palestinians receive from Israel is the absence of an appropriate mechanism for examining Palestinian claims. The major mechanism which exists today is the Israeli courts, which are, by definition, biased in Israel's favor. They form part of the Israeli regime and the judges presiding in them are Israeli citizens who naturally identify with Israeli interests, have often served in the Israeli military and even personally participated in high ranking positions in the Israeli control apparatus in the Territories. It is easier for these judges to empathize with Israeli witnesses who speak their language. They have been brought up to have faith in the military system. They tend to be skeptical about harsh accusations against "their" military's soldiers. It is difficult for judges, on the other hand, to try to put themselves in the place of Palestinian litigants. They do not normally speak Arabic, much less sensitive to the subtleties of the language and culture. All this places Palestinian witnesses appearing before them at a disadvantage from stage one. Despite the liberal ethos of the judicial system, it is not free of the de-humanization of the other, especially when this other is also an "enemy". The Israeli judicial system is intrinsically not an objective mechanism for resolving disputes between Palestinians and Israel.

A great difficulty with which Palestinian plaintiffs must deal is that of presenting evidence of the exact circumstances in which they incurred the damage. In a properly functioning world, most of the evidence is supposed to be gathered by professional investigative bodies in the course of a criminal investigation of the event. The investigating bodies are supposed to document the scene, collect scientific evidence, back up testimonies from eyewitnesses in real time, identify potential suspects and investigate them in a manner that decreases the chance of coordinating testimonies. In claims brought by residents of the Territories, such evidence is often not available

owing to Israel's cover up system as far as offences committed by security forces against residents of the Territories are concerned.

The cumbersome nature of the civil procedure also hinders the resolution of all the claims in the Israeli judicial system. In certain areas (such as road accidents and industrial accidents) Israeli law has erected fairly simple mechanisms for compensating the injured parties. This is not the case when it comes to claims by residents of the Territories which are carried out to the full, minutest, extent of the law. The result is lengthy and expensive proceedings which are not feasible when the damage is relatively small or when the chances of succeeding are any less than very good. There are not enough able lawyers to bring all the claims to final resolution. Most plaintiffs are unable to afford the financial guarantees required in order to ensure coverage of the State's expenses if the case is lost. Israeli plaintiffs are not required to deposit such a guarantee, but the courts demand it from Palestinian plaintiffs since they are "foreigners" from whom collecting legal fees, if so ruled, may prove difficult. Palestinian plaintiffs also find it difficult to come up with the money to pay for medical opinions by Israeli experts. Restrictions on freedom of movement also make communications between plaintiffs and their lawyers as well as bringing witnesses before the courts difficult. Under these circumstances, there is a strong incentive to settle even when the sum of money offered is extremely low considering the real damage.

Israeli courts are obviously not the only mechanism available for determining the compensation to which Palestinian victims are entitled. Following an opinion by the International Court of Justice in the Hague regarding the separation wall, the UN established an apparatus for collecting data on the damages that the separation wall is causing to Palestinians. This apparatus could be the beginning of an international body for reviewing claims by Palestinians against Israel.

Domestic courts abroad may undertake the role of reviewing financial claims by Palestinians against Israel or Israeli citizens who are personally responsible in at least some areas of infringement of fundamental human rights. The willingness of foreign courts to take on this role is expected to increase as the apparatus for resolving claims inside Israel grows less accessible. Absurdly, this is exactly where Israel is headed.

### **Israeli Initiatives to Deny Compensation for Palestinians**

As noted, the Oslo process encouraged Palestinians to file claims against Israel. Seeing justice done in individual cases was considered part and parcel to the reconciliation process. Israel's view was absurdly the opposite: as far as Israel is concerned, peace means turning over a new leaf and erasing all past debts. Israel did not see these claims as a golden opportunity to heal the wounds of the past. Its response to Palestinian claims was not to increase supervision of the military to prevent events that may give rise to future claims. Israel also did not take steps to improve the investigations conducted by the Military Police Investigative Unit and by the Internal Affairs Department of the Police in an effort to design tools for effective

resolution of disputes. Rather, Israel took steps to fend off the claims by removing them from its courts without their being reviewed on their merits.

In stage one, the State attempted to claim, in the courts, that the actions of the Israeli military in the Territories were generally "acts of war" for which the state enjoys immunity. The courts refused to accept this interpretation: the military's actions to suppress the first intifada were mostly actions to enforce military law which were not substantially different from police actions and which did not rise to the level of "acts of war". This diagnosis was later affirmed (after a delay of many years) by the Supreme Court.

The State's next move was to change the law so that it would extend its immunity. The move toward changing the law, which began in the mid-1990's was delayed thanks to extreme pressure from human rights organizations and legal scholars as well as international pressure. Over those years, several versions of amendments to the law came up. **The version** that was finally passed extended the definition of "act of war" and added procedural limitations on Palestinians' ability to file claims against Israel.<sup>2</sup> Amongst others, the period of limitation on such claims was reduced from seven years (the ordinary period of limitations in Israel) to just two,<sup>3</sup> and it was determined that claims could not be filed if the plaintiff had not submitted a notice of damage to the Israeli Defense Ministry – in a preset format and within two months from the time the damage was incurred.<sup>4</sup> The purpose of this provision is ostensibly to allow Israel to carry out a thorough investigation of incidents for which it may be sued. In practice, the cover-up policy has only worsened. The only function of the procedural provisions that were introduced was to block Palestinian plaintiffs' access to the courts.

At the very same time the amendment intended to make it difficult for Palestinians to file claims against Israel was passed, the State presented a new, even further reaching **amendment**<sup>5</sup> The amendment, which quickly became **law**, prevented the courts from hearing claims stemming from actions by security forces in "conflict zones" which were so proclaimed by the Defense Minister – whether it was an act of war or not, whether the action was connected to the conflict or not and no matter how vile the action might have been.<sup>6</sup> The Defense Minister retroactively proclaimed vast segments of the Territories as "**conflict zones**" for extended periods of time since the beginning of the second intifada. Major cities were proclaimed "conflict zones" for several consecutive years.<sup>7</sup> The proclamation system was such that any incident that might give rise to a cause of action (such as an arrest) became a reason to proclaim an

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<sup>2</sup> Civil Wrongs (Liability of the State) (Amendment – Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip), 2001

<sup>3</sup> Ibid, section 3.

<sup>4</sup> Ibid, section 2.

<sup>5</sup> Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or Resident of a Zone of Conflict) Law, 2002

<sup>6</sup> Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 2005

<sup>7</sup> Proclamation of Conflict Zone in Accordance with Civil Wrongs (Liability of the State) Law, 2005, 9 February, 2006.

extremely vast area as a conflict zone on the day of the incident and adjacent days. Thus, in a circular way, a potential cause of action became a cause for state immunity.

Another provision included in the amendment gave the state immunity in claims submitted by subjects of enemy states and members of "terrorist organizations."<sup>8</sup> In this case also, how the person was harmed, how vile the deed done to him was, what the connection between what the victim is accused of (if at all) and the harm done to him are all irrelevant. Immunity applies also when the person involved was acting on behalf of an enemy state or "terrorist organization." Here at least, the immunity is limited only to harm done whilst the victim was acting on behalf of the enemy state or the organization, yet still – there is no relevance to the severity of the harm or the connection between it and the person's action. In effect, the amendment places anyone connected to the Palestinian resistance organizations as well as others outside the law. Thus, for example, the compensation law denies paying damages to the estate of an Israeli citizen who was shot to death by the police while spraying Popular Liberation Front graffiti in Haifa. An Israeli citizen who was enlisted to the Fatah might not receive compensation if he suffered a disability as a result of negligent treatment by a government hospital: he would be better off receiving medical care in a private hospital which does not enjoy the same immunity as the state...

While the first amendment has never been constitutionally examined, the second was challenged in several **petitions** submitted to the High Court by various human rights organizations and Palestinians whose claims were at risk of being deleted in light of the amendment.<sup>9</sup> In one of his **final judgments**, Supreme Court President Aharon Barak ruled, with the unanimous agreement of an additional eight justices, that the amendment was not constitutional. The possibility of blanket immunity to the state for actions taken in "conflict zones" was cancelled. The provision which awards immunity from claims by enemy subjects and members of "terrorist organizations" was left for future reference and it was suggested that in order to comply with the Basic Laws, the provisions must be narrowly interpreted.<sup>10</sup>

The HCJ ruling did not put an end to the State's ridiculous attempts to evade responsibility for the damages it has unlawfully caused Palestinians in the Territories. The Justice Ministry in Olmert's government sent out a **memorandum** intended to reinstate (with slight changes) the arrangement which had been abolished by the HCJ and extend the state's immunity still further than the provisions which had been cancelled.<sup>11</sup> Thus, for example, the memorandum includes a suggestion to further extend the definition of an "act of war" in such a way that it includes actions during which soldiers faced no danger whatsoever. It also includes a suggestion to reinstate immunity on the basis of where the incident took place – and extending it to areas inside Israel. Further still, according to the memorandum, Israel would be fully

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<sup>8</sup> See supranote 5, section 5b.

<sup>9</sup> See for example, HCJ 8276/05, **Adalah et. al v. Minister of Defense et. al**, (12 December 2006)

<sup>10</sup> HCJ 8276/05, **Adalah et. al v. Minister of Defense et. al**, ruling 12 December 2006.

<sup>11</sup> Memorandum of the Civil Torts Law (Liability of the State) (Amendment No. 8), 2007

exempt from paying compensation to residents of the Gaza Strip, no matter the issue. And the new invention: transferring claims from the Territories and claims by "enemies" and "members of terrorist organizations" to the courts in Jerusalem and Beer Sheva. This provision is, so it seems, intended to stop the involvement of Arab judges in Haifa and Nazareth in such cases and make it difficult for Arab lawyers from the North to represent their clients. The proposed bill, if accepted, will of course, harm Palestinian victims but its main purpose is to challenge the constitutional authority of the Supreme Court and the independence of the judicial system in general.

### **The Limits and Importance of Civil Claims**

The victory in the Supreme Court has left open the narrow and insufficient avenue of filing claims with Israeli courts. This avenue allows for some justice to be done in individual cases. It also facilitates the exposure of the occupation's mechanisms of injustice. Documents and information of a grave nature regarding the military's conduct are often revealed in the course of conducting these claims. Sometimes, the first and only time soldiers and officers of the Israeli military are forced to be truly accountable for their actions is when they are examined as witnesses in the court in the framework of civil claims. Judgments in claims constitutes, even if only retroactively, judicial review of the conduct of the security authorities.

In the end of 2007 a **claim**<sup>12</sup> filed by HaMoked ended in a **compromise**.<sup>13</sup> The Plaintiff, who had been held in disgraceful conditions at the Ofer Camp during the Israeli invasion of Palestinian cities in 2002, received 105,000 NIS in compensation. Thousands of Palestinian civilians were held with the Plaintiff at the time under the same conditions. These myriad of people did not file civil claims – because of the procedural hurdles, the costs and the trivialization of human rights violations. If one were to derive from the sum on which Israel agreed to compromise in this case, then the Palestinians hold a promissory note worth hundreds of millions of shekels over Israel only for the holding conditions of detainees in April 2002. This debt, as well as the one for decades of Israeli rule has not been redeemed. History teaches that such debts do not simply disappear. Hundreds of years after the fact, the descendants of those who have been the victims of historical injustice rise up and demand compensation from the countries that harmed their ancestors.

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<sup>12</sup> CC (Jerusalem) 8967/04, **D'ibs v. The State of Israel** (4 February 2008) for the Statement of Defense (in Hebrew) please see <http://hamoked.org.il/items/6801.pdf>.

<sup>13</sup> CC (Jerusalem) 8967/04, **D'ibs v. The State of Israel** (4 February 2008) for the Statement of Defense, Judgment, 4 February 2008.