

RIGHTS WITHOUT REMEDIES: ISRAEL'S COMPENSATION LAW

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Preface

Al-Haq presents its new report, *Rights Without Remedies*, as a legal commentary on Israel's recently-amended *Civil Wrongs (Liability of the State) Law 5712-1952* (the Compensation Law), legislation which raises a number of concerns in regards to its compliance with international law. The amendments to this law, which narrow the eligibility of Palestinians to submit claims for compensation as a result of illegal actions carried out by the Israeli military (including acts of negligence), were overwhelmingly passed by the Israeli Knesset (parliament) in July 2005. The Compensation Law seeks to preempt the Palestinians' right to a remedy, in this case compensation, a right which is deemed customary under international law. Further, it is a blatant example of discrimination formalised into law, as in effect, it will deny compensation to Arabs in general, and Palestinians in particular.

Al-Haq appreciates that a sound legal system must have a law pertaining to compensation in order to address any acts or omissions which may be carried out by state agents. Such a law is in fact an important element in ensuring that a right to remedy is realised. However, a law which in practice blocks the ability of the victim to obtain relief, and which does so in a discriminatory manner, only serves to deny this right, rather than to realise it.

As an organisation which has worked in the Occupied Palestinian Territories (OPT) since 1979, Al-Haq has documented thousands of incidents of gross violations of international human rights and humanitarian law by the Israeli forces. The vast majority of the victims of these violations have gone without remedy. The passage of the amended Compensation Law ensures that this pattern will continue. As a result of the law, those Palestinians who have already been subjected to a violation of a fundamental right (such as that to life or to not be subjected to torture) now find that violation compounded by the denial of the right to a remedy. In short, whilst the right may be upheld in international law, it is being systematically undermined in Israeli law.

Randa Siniora
General Director
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Overview

On 27 July 2005, the Israeli Knesset (parliament) passed the amended *Civil Wrongs (Liability of the State) Law* (the Compensation Law)¹ by a 54-15 vote. This law proclaims that the State of Israel “is not civilly liable for an act done in the course of a war operation” of the Israeli military. Individual state agents are also protected from such liability. The amended law narrows the eligibility of Palestinians to submit claims for compensation as a result of illegal actions carried out by Israeli forces, including acts of negligence. As outlined in Article 5B(a), the first exclusion relates to claims filed by specific groups of *individuals*:

Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained by any person included in paragraphs (1), (2) or (3), with the exception of damage caused in the types of claims or to the types of claimants set forth in the First Annex.

- (1) A citizen of an enemy state, unless he is legally in Israel;
- (2) An activist or member of a terrorist organisation;
- (3) Anyone who incurred damage while acting as an agent for or on behalf of a citizen of an enemy state, or an activist or member of a terrorist organisation.

In addition to limiting which claimants are eligible to file for compensation, it also restricts claims coming from certain *areas*. Article 5C states that claims regarding incidents which took place in a declared conflict zone (an area outside Israeli territory which has been defined as such by the Minister of Defence) and in which Israeli forces acted or were present in the context of a conflict, are also prohibited:

Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained in a conflict zone due to an act performed by the security forces, with the exception of damage caused in the types of claims or to the types of claimants set forth in the Second Annex.

The Israeli Minister of Defence may declare that an area is a conflict zone retroactively: such a determination may be made within 90 days of receipt of a claim. If it is made after that period, the court may, “for special reasons,” accept the argument that the incident in question took place in a conflict zone.

¹ See Appendix I for full text. Translation by Adalah: The Legal Center for Arab Minority Rights in Israel. The law is also sometimes called the Tort Law; a tort is an illegal act which has civil (as opposed to criminal) legal consequences. Civil wrongs may also entail separate criminal consequences.

If the area in question is deemed a conflict zone, the Minister must notify claimants of its status as such in writing within 30 days of the receipt of the claim, or within the 90-day period if the determination is made retroactively. However, the law then adds that failure to do so does not adversely affect the area's determination as such.

The ability to make such determinations retroactively is exacerbated by the application of the law to any act which took place on or since 29 September 2000, i.e., since the outbreak of the current *intifada*. Further, the Minister of Defence may, within the first six months of the passage of the amended law, deem any area a conflict zone with regard to the period between 29 September 2000 and the date the law was published. The extension of the law's application both territorially and temporally is no accident: in the first four years of the *intifada*, Israeli occupying forces have killed 3,044 Palestinians and totally demolished 5,479 houses, clear evidence of the need for Palestinians to have access to a remedy.

It should be noted that three exceptions are provided for in the law. One exception is made for instances in which a detainee/prisoner is harmed whilst in the custody of an Israeli agent, provided that the detainee/prisoner does not later become a member of or an agent for a "terrorist organisation." Secondly, claims resulting from bodily or property harm resulting from a traffic accident involving a member of the Israeli security forces will be considered eligible for compensation. Lastly, claims will be considered in instances in which the member of the security forces responsible for the resulting damages has been convicted by an Israeli court of an offence pertaining to the incident causing harm. However, investigations into violations by Israeli security forces against Palestinians have thus far been infrequent at best, and were described by one international human rights organisation as characterised by "inaction and cover-up."² The Israeli human rights organisation B'Tselem documented that from the beginning of the *intifada* to June 2005, there were only 108 investigations into instances of Palestinians killed by Israeli forces. Of those, only 19 indictments were issued, and two convictions handed down.³ The narrowness of the scope of these exceptions is such as to render them virtually meaningless in practice. Further, the idea that compensation for past incidents may be contingent upon one's future actions is a blatant rejection of the tenet of responsibility for unlawful acts. Regardless of what actions may take place in the future, Israel remains responsible for the unlawful actions of its agents and must remain accountable for them.

² Human Rights Watch, *Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing*, June 2005, p.1.

³ B'Tselem, "Background - Whitewash and Failure to Investigate the Killing of Civilians in the Occupied Territories," 27 June 2005.

In addition, the Compensation Law provides for the establishment of a committee which is authorised to propose payment to claimants. The Minister of Defence is responsible for determining the composition and powers of the committee. However the extent of the committee's responsibility is reflected in Article 5C(b)(1), as it states that an *ex gratia* payment (i.e., one made without admitting liability) to a claimant may be made under "special circumstances." It is evident that the intention of the drafters is that such payments not be the norm: indeed, in the debate on the law in the Knesset, the provision of such payments was repeatedly termed "exceptional." Moreover, such payments are not deemed to arise out of Israel's legal obligations (corresponding to the right to a remedy of the victim), but are rather considered discretionary in nature.

Under this law, the vast majority of Palestinians in the Occupied Palestinian Territories (OPT) who are directly harmed by the Israeli military or other security forces will be precluded from receiving compensation for the resulting injury. Arguably, the law tacitly acknowledges that Israeli state agents have breached the law (otherwise there would be no need for compensation), but having done so, then formalises the denial of a key form of reparation for these breaches. In short, the Compensation Law serves as a means of legalisation of international law violations. This stands in stark contrast to domestic legal systems around the globe where compensation is an essential component of civil litigation.

Finally, the underlying efforts to discourage Palestinians from obtaining compensation sit in stark contrast to the decision to provide compensation to thousands of Israeli settlers affected by Israel's unilateral withdrawal (the Disengagement Plan) from the Gaza Strip and four small settlements in the West Bank, although their presence in the OPT is unquestionably illegal under international law. The difference between the provision of compensation to those participating in illegal actions and to those who are the victims of illegal actions speaks volumes.

The Legal History of the Compensation Law

As noted above, this law is not a new one; rather, it is an amendment to one passed by the Israeli Knesset in 1952. While other states have laws asserting that there is no right to compensation for acts committed in armed conflict, the breadth of the scope of the Compensation Law raises serious concerns under international law. The Knesset amended the law previously in 2002, defining war operations as,

any action of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror and hostile acts and insurrection committed in circumstances of danger to life or limb.⁴

The 2002 amendment also outlined a complicated mechanism detailing the parameters within which Palestinians could attempt to obtain compensation.⁵ The current amendment builds on this foundation, further limiting the ability of Palestinians to obtain compensation, thereby denying their fundamental right to an effective remedy.

The amendment is particularly problematic when considered in tandem with provisions of the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II). Article III of Annex IV of this agreement states that Palestinian courts and judicial authorities do not have jurisdiction regarding actions by the State of Israel, its organ, agents, or statutory entities, a provision which arguably places the burden for judicial review of such matters on the Israeli courts. However, as a result of the amended Compensation Law, Palestinians will have no judicial recourse in either Palestinian or Israeli courts in order to address civil wrongs committed by Israeli forces in the OPT.

The Need for Legal Remedies in the Occupied Palestinian Territories

The situation in the OPT, in particular during the current *intifada*, has been characterised by gross violations of international law by the Israeli forces. The former legal advisor of the Israeli military in the West Bank, Shlomo Politis, has stated that the attitude of the Israeli authorities in regards to the OPT is that in the Wild West, anything goes.⁶

Certainly this attitude is reflected in the extent of harm done to individuals. As noted above, during the first four years of the current *intifada*, 3,044 Palestinians were killed by members of the Israeli military. This included 489 children and 179 women. The Palestine Red Crescent Society estimates that approximately 27,770 Palestinians were injured by Israeli forces during this same period.⁷ In short, on average, two Palestinians are killed and another 19 injured every day by members of the Israeli military.

Damages caused by Israeli forces are not limited to individuals - property is also harmed. The first four years of the *intifada* saw a series of Israeli incursions which resulted in the total destruction of some 5,105 houses and

⁴ Translation by B'Tselem at <http://www.btselem.org/Download/2002_Comp_Draft_Law_Eng.doc>, accessed 1 August 2005.

⁵ For further discussion of the previous amendments, see *supra* note 2.

⁶ Akiva Eldar, "So Legal, This Jungle," *Ha'aretz* (English edition), 29 July 2005.

⁷ PRCS, "Four Year Conflict Related Statistics," at <http://www.palestinercs.org/the_fourth_year_intifada_statistics.htm>, accessed December 2004.

the partial destruction of 43,483 more. During this same period, 374 houses in the West Bank were totally demolished for punitive reasons, and another 24 partially demolished, impacting 2,647 Palestinians. Other forms of property, such as agricultural facilities, governmental structures, schools, hospitals, and even agricultural crops have also been destroyed.

One of the most pernicious violations which Palestinians face on a daily basis is that of movement restrictions in such forms as checkpoints, roadblocks, metal gates, earth mounds, and barriers around and between individual cities, towns and villages. The UN Office for the Coordination of Humanitarian Affairs (OCHA) estimated that as of 12 April 2005, there are 605 such restrictions in the West Bank alone.⁸ Such internal closures are themselves a breach of international law, but more problematically, enable other violations such as illegal restrictions on the right to health. Unfortunately, situations in which Palestinians are unable to obtain essential medical treatment as a result of such restrictions are all too common. A World Health Organisation study indicated that during two periods ranging from May 2002 to February 2003, between 43.3 and 63.9 percent of Palestinians in need of kidney dialysis treatment were unable to access such treatment. Similarly, between 29 and 65 percent of Palestinians were unable to obtain needed chemotherapy. The study indicated that the main reason for lack of access was movement restrictions.⁹

Such incidents are not isolated; they take place in the larger context of Israeli incursions which occur daily in the OPT. The magnitude of Israeli violations has proven so extensive as to overburden local human rights organisations, international human rights organisations, and inter-governmental organisations alike, all of whom face difficulties in documenting the breadth of violations faced by Palestinians in the OPT. In short, the attitude that “anything goes” is certainly reflected in the prevalence of violations of international law that occur daily in the OPT. It is evident that the right to a remedy is not merely a theoretical one in the OPT, but rather one that has a substantial impact on people’s lives.

The Right to a Remedy in International Law

At its simplest, a remedy is “the means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.”¹⁰ It is a right that results from a violation of another right. The right to a remedy is upheld in such varied international legal standards as the Universal Declaration of Human Rights (UDHR), the Fourth Hague Convention Concerning the Laws and Customs

⁸ OCHA, “West Bank Closure and Access - April 2005,” p. 1.

⁹ Johns Hopkins University, *et al.*, “Health Sector Bi-Weekly Report,” Number 10, 26 March 2003, pp. 9-12.

¹⁰ “Remedy,” *Black’s Law Dictionary*, 7th edition, West Group, St. Paul, Minnesota, 1999, p. 1296.

of War, and the Statute of the International Criminal Court. Article 8 of the UDHR states,

[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

While this right is deemed customary in nature, it is also upheld in numerous treaties to which Israel is a State Party, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

This right includes both the broad right to a remedy (the procedural means by which a right is enforced) as well as that to reparation (the substance of the relief afforded). Recently, the rights to remedy and reparation were further codified in the authoritative Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles), adopted by the UN Commission of Human Rights following 15 years of consultation and research.

The right to a remedy is founded on the principle of state responsibility for wrongful acts. Article 1 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts says that "every internationally wrongful act of a State entails the international responsibility of that State." As noted in Article 4, this includes the conduct of any State organ, i.e., any person or entity which has that status in accordance with the internal law of the State. The principle was clearly stated by the Permanent Court of International Justice (the predecessor to the International Court of Justice) in the *Chorzów Factory* case, in which the PCIJ found,

It is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation [...] Reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.¹¹

Once the initial violation has taken place, the applicability of the right to reparation is triggered. As succinctly noted by one jurist, "[t]he *consequence* of state responsibility is the liability to make reparation."¹²

¹¹ PCIJ, *Chorzów Factory*, 13 September 1928, (Series A, No. 17, p. 29).

¹² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994), p. 162 (emphasis in original). This point was also upheld by the International Court of Justice (ICJ) in the case concerning US diplomatic and consular staff in Tehran. See ICJ, *USA v. Iran*, *ICJ Reports* (1980) 3, at para. 90.

It may be argued that the Compensation Law does in fact provide for a remedy to some victims through the committee established under Article 5C(b). However, the discretionary rather than obligatory nature of the payment of compensation, combined with the denial of access to a judicial body, serve in effect to block access to a legal remedy. Further, although international law does not require that the only permissible form of a remedy is one that is judicial in nature, the Basic Principles state clearly that in instances of *gross* violation of international human rights law or *serious* violation of international humanitarian law, the victims thereof “shall have equal access to an effective judicial remedy as provided for under international law.”¹³ The UN Human Rights Committee has also held that in instances of severe human rights violations - notably extrajudicial executions, disappearances or torture - the remedy in question must be judicial.¹⁴ Victims of such violations must therefore be given access to a judicial remedy.

In the event that the violation is of a less severe nature, any means to provide a remedy must be adequate, effective, and prompt, and must respect the right to a remedy, whether it be judicial or administrative in nature. Until such time as an administrative body can meet such criteria, Palestinians must be given access to a judicial body.

Types of Legal Remedies

Remedies as defined under international law take many forms. In accordance with the right to a remedy, the Basic Principles state that victims should be afforded:

- (1) equal and effective access to justice.
- (2) adequate, effective and prompt reparation for harm suffered.
- (3) access to relevant information concerning violations and reparations mechanisms.

Arguably, the amended Compensation Law violates more than one of these provisions, but it is a particular breach of the right to reparation for harm suffered. Full and effective reparation takes several key forms: restitution, rehabilitation, satisfaction, guarantees of non-repetition, and compensation.¹⁵

¹³ Basic Principles, Article 12.

¹⁴ Decision on Admissibility, Communication No 778/1997: Colombia, *Case of Coronel, et al.*, CCPR/C/70/D/778/1997, 13 October 2000, para. 6.4.

¹⁵ Basic Principles, “IX. Reparation for Harm Suffered,” particularly Articles 18 - 23.

The Right to Compensation in International Law

The obligation to provide compensation for breaches of international law has a solid foundation in international law. The Basic Principles note that compensation for any economically assessable damage should be provided in the case of gross violations of international human rights law and serious violations of international humanitarian law. Such damage includes,

- (1) physical or mental harm.
- (2) lost opportunities, including employment, education and social benefits.
- (3) material damages and loss of earnings, including loss of earning potential.
- (4) moral damage.
- (5) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹⁶

Moreover, the compensation provided must be appropriate and proportional to the gravity of the violation and the circumstances of each case. Such compensation is not merely conferred on states, but is clearly applicable to those who individually or collectively suffered harm. Within this framework, immediate family members and/or dependents are also included.¹⁷ While the Basic Principles address specifically *gross* violations of international human rights law and *serious* violations of international humanitarian law, many of Israel's actions in the OPT, such as extrajudicial executions, house demolitions, and torture, meet this legal standard.

The Draft Articles also provide for the requirement of compensation in Article 36, which states,

- (1) The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
- (2) The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Furthermore, there is a clear legal precedent for the provision of compensation for breaches of international law taking place in the context of belligerent occupation and armed conflict. Following the Iraqi invasion and occupation of Kuwait in 1990, the UN Security Council passed Resolution 674 reminding

¹⁶ *Ibid*, Article 20.

¹⁷ *Ibid*, Article 8.

Iraq that it was liable for any loss, damage or injury resulting from its invasion and illegal occupation. The resolution went on to invite states to gather information regarding their claims for financial compensation by Iraq, “with a view to such arrangements as may be established in accordance with international law.” Under the auspices of the Security Council, and in accordance with Resolution 687, the UN Compensation Commission (UNCC) was duly established.

Compensation is an essential means of providing a remedy to the victims, a point which is emphasised in regional and international law alike.¹⁸ However, as noted above, compensation is only one form of reparation. It is, however, a particularly important form, as it is a key factor in balancing out the harm done by the initial violation through such means as providing financial support to the family whose primary breadwinner has been harmed, or to individuals whose home or property has been destroyed. By seeking to re-establish the balance, the risk of further suffering beyond the initial harm has been notably reduced.

International Human Rights Law

The most substantive reference to the right to compensation in international human rights law is found in the ICCPR. In accordance with Article 2(3), States Party are obligated:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Although this article does not explicitly reference compensation, the UN Human Rights Committee, in its authoritative commentary, notes that “[...]”

¹⁸ See *inter alia*, Inter-American Court of Human Rights, *Velasquez-Rodriguez v Honduras*, 29 July 1988, paras. 166 and 174 and European Court of Human Rights, *Loizidou v Turkey*, 28 July 1998, para. 26.

the Committee considers that the Covenant generally entails appropriate compensation.”¹⁹ The Committee also noted that the right to compensation is further addressed under Articles 9 and 14 of the ICCPR (addressing unlawful arrest or detention and wrongful convictions respectively). Its position is not merely theoretical: in 1998, it raised particular concern with Israeli authorities about an earlier version of the Compensation Law.²⁰

In the event that Israeli acts in the OPT constitute torture, Article 14(1) of CAT also provides for a remedy, specifically including compensation:

- (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

International Humanitarian Law

The right to compensation is clearly outlined in the Fourth Hague Convention, stating in Article 3 that those parties responsible for violating the provisions of the annexed regulations,

[...] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Although Israel is not a party to the Convention, its provisions have been deemed as customary in nature, including by the Israeli High Court of Justice. Indeed, the International Committee of the Red Cross (ICRC) observed that a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.²¹ The ICRC then added that the form of reparations, as outlined in the Draft Articles, shall take the form of restitution, compensation or satisfaction, either singly or in combination, noting that the obligation to provide compensation is a long-standing rule of customary international law.²²

In the event that the violations in question constitute grave breaches under international humanitarian law, Israel has not only the above-referenced positive duty to provide reparation, but also a negative duty not to absolve itself

¹⁹ Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,” CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 16.

²⁰ Human Rights Committee, “Concluding Observations of the Human Rights Committee: Israel. 18/08 98,” CCPR/C/79/Add.93, 18 August 1998, para. 18.

²¹ “Rule 150,” in ICRC, *Customary International Humanitarian Law - Volume I: Rules*, (Cambridge Cambridge University Press, 2005), p. 537.

²² *Ibid*, pp. 538-539.

of any liability in respect of the commission of such breaches. This provision is reflected in all four Geneva Conventions.²³ The passage of a law which seeks to eliminate its liability for grave breaches thereof is unquestionably in contravention of this provision.

In sum, it is evident that Israel's Compensation Law is a serious breach of its obligations under international law.

Discrimination Through Legislation

The Compensation Law is a breach of Israeli obligations not merely in regard to the right to a remedy, it is also a violation of the broader principle of Israel's duty not to discriminate. The Law denies compensation to those considered citizens of an enemy state and activists or members of "terrorist organisations." In effect, this restricts Palestinians in particular (and Arabs more generally) from obtaining a remedy for Israeli violations of international law. "Terrorists" and "terrorist organisations" are so broadly defined by Israeli authorities as to include not merely those who carry out armed attacks against Israeli civilian targets, but those who non-violently support the struggle for the Palestinian right to self-determination and the end of Israel's occupation of the OPT.

The right to be free from discrimination is a cornerstone of international law, first cited in the UN Charter, and subsequently reiterated in many international human rights treaties, including the UDHR, the ICCPR, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The prohibition of discrimination is not just limited to racial discrimination, but also includes discrimination on the grounds of national origin and political or other opinion. It is important to note that these grounds are explicitly referenced in Article 26 of the ICCPR, which guarantees all people equality before the law and states that they are entitled to equal protection of the law. The specific exclusion of claims from individuals based on their nationality or opinion is a grave violation of this fundamental tenet of international law.

The Israeli Position

In their efforts to defend the legality of the Compensation Law, Israeli authorities have raised a range of points which are purported to be based on international law. However, a legal analysis of these points makes evident that they are not only without merit, but in contravention of international legal norms.

²³ Article 51, First Geneva Convention; Article 52, Second Geneva Convention; Article 131, Third Geneva Convention; and Article 148, Fourth Geneva Convention.

‘Each Side Should Take Care of Its Own Injuries’

The position of the Ministry of Justice during Knesset debates on the (then) draft Compensation Law on 31 May 2005 was that ‘each side should take care of its own injuries,’ a point which was also reflected in the Ministry’s position paper submitted to the Knesset. Indeed, this was in fact described as the aim of the amendment. However, this neglects the clear legal principle that a wrongful act carried out by state agents invokes state responsibility for that act. Even in times of armed conflict, individuals acting on behalf of a state must follow certain legal norms; in the event that they fail to do so, they - and the state - can be held accountable.

Additionally, the Ministry has neglected to mention that Israeli nationals have in fact sought compensation from the Palestinian National Authority (PNA) for acts committed by Palestinian armed groups, a point which seems to undermine the claim that each side should take care of its own. Such cases have in fact been filed both before Israeli and international courts.²⁴

Compensation Is Only Due at the End of a Conflict

Israeli authorities have also claimed that the individual damage claims must be addressed at the end of a conflict; such claims cannot be addressed whilst that conflict is ongoing. Indeed, this was the interpretation put forth by Colonel Pnina Sharvit-Baruch, head of the international law department of the Israeli military’s legal advisors office, during the Knesset debates. However, this position is not supported by international law. Article 3 of the Fourth Hague Convention is silent in regards to the time period in which compensation must be provided. Moreover, one jurist has noted that,

[...] the Article is unmistakably designed to enable these people to present their bills directly to the State, i.e. to its competent (military or other) authorities, either during or after the war.²⁵

Further, the position that the right to a remedy be deferred to the end of a conflict cannot be upheld under international human rights law. It seems that this position is based in part on the belief that the right to a remedy is derogable, and thus can be delayed to the end of the conflict. While it could be argued that Israel may derogate from its obligation to provide a remedy on the grounds of a public emergency, Article 4 of the ICCPR which provides for derogations states explicitly that such measures cannot be inconsistent

²⁴ See, *inter alia*, the legal claims filed by Shurat HaDin - Israel Law Center, against the PNA in Israeli, American and European courts which have sought not merely compensation, but also the continuation of Israel’s practices such as extrajudicial killings.

²⁵ Frits Kalshoven, “State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond,” *40 International and Comparative Law Quarterly* (1991), 827-858, pp. 835-826.

with their other obligations under international law and must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Further, in its General Comment on non-discrimination, the UN Human Rights Committee stated explicitly that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground, including national or social origin, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁶ As noted above, the Compensation Law is premised on discrimination, and thus cannot be considered a lawful derogation within the parameters of Article 4.

Additionally, the position that compensation be delayed to the end of the conflict blurs the lines between claims by affected individuals for specific acts or omissions, and a broader reparations programme. While many reparations programmes are established to address such concerns after a conflict, the matter of compensation for specific claims (together with other forms of reparation such as cessation of the violation, prevention, and guarantees of non-repetition) is not limited to a particular time period. Further, the provision of compensation does not imply the finality of the matter: the breach must come to an end, and other avenues of redress, notably restitution, can and should remain open.

More pragmatically, Israel’s claim regarding the deferral of compensation to the end of the conflict also rings rather hollow in the face of the decades-long nature of this conflict.

Compensation as a Matter Between States

A third issue which has been raised by Israeli officials is the matter of which party is eligible for compensation. As was reflected in the Ministry of Defence’s comments at the 31 May 2005 Knesset debates, they have taken the position that compensation is a state-to-state obligation, rather than a state-to-individual one. However, an examination of the records of the conference at which the Fourth Hague Convention was developed shows that,

The records of the conference that adopted the text, i.e. the Second Hague Peace Conference 1907, provide convincing evidence that the delegates sought not so much to lay down a rule relating to the international responsibility of one State *vis-à-vis* another, as one

²⁶ Human Rights Committee, “General Comment No. 18: Non-Discrimination,” HRI/GEN/1 Rev.6, 1994, para. 7.

relating to a State's liability to compensate the losses of individual persons incurred as a consequence of their direct (and harmful) contact with its armed forces.²⁷

In addition, the ICRC commentary states that in regards to Article 91 of the First Additional Protocol, those entitled to compensation may be parties to the conflict *or their nationals*. The ICRC also separately noted that there is "an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State."²⁸ This trend was seen in the deliberations of the UNCC, when it afforded compensation not merely to states, but also to individuals. The right of individuals to be direct beneficiaries of reparations is also reflected in the Trust Fund for Victims established for the International Criminal Court in accordance with Article 75 of its statute. Finally, the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Update Set of Principles) state in Principle 31,

[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.

Impact on the Judicial System

Israeli governmental representatives have also claimed that to permit such cases to go to court would serve to unduly overburden the judicial system. However, claims regarding the resulting burden placed on a branch of the government from violations committed by another branch of the government cannot serve as a ground for failure to give Palestinians access to Israeli courts. Further, as noted in a recent UN study on domestic implementation of the right to a remedy, as long as the judicial establishment in a country dealing with organised political violence fails to discharge its responsibilities, the situation gets worse.²⁹

Defenders of the law have stated that the courts are frequently an inappropriate body to consider such matters, as the events for which compensation is being sought are based on classified (i.e., secret) evidence. This claim flies in the face of the basic principles of administration of justice, denying the affected individual such fundamental human rights as that to a fair trial. To then deny the right to a remedy for a human rights violation on the basis of secret evidence is simply without merit under international law.

²⁷ See *supra* note 25, p. 830.

²⁸ See *supra* note 21, p. 541.

²⁹ Françoise Hampson, "Administration of Justice, Rule of Law and Democracy: Working Paper on the Implementation in Domestic Law of the Right to an Effective Remedy," E CN.4Sub.2/2005/15, 27 June 2005, para. 23

State of Emergency

Finally, Israeli authorities have held that they have been under a state of emergency since May 1948. Additionally, they typically characterise the conflict as one of an “armed conflict short of war,” although in its explanatory notes on the (then) draft bill, the Government characterised the conflict as an “ongoing conflict of a military character.” As such, their obligations under many international legal standards, notably those pertaining to human rights, may be subject to derogation. Moreover, they maintain that the environment of an armed conflict is not suitable for tort claims.

It should be emphasised that although the right to a remedy as upheld in the ICCPR is not specifically deemed to be non-derogable, the UN Human Rights Committee has stated that it “constitutes a treaty obligation inherent in the Covenant as a whole,” and that the substantive right of the provision is non-derogable.³⁰ As such, Israeli authorities may only introduce adjustments to the *practical functioning* of its procedures governing judicial or other remedies, and this only to the extent strictly required by the exigencies of the situation; it may not derogate from the fundamental obligation to provide an effective remedy. A wrongful act - whether committed in time of war or time of peace - must still be met with a remedy. Tort claims cannot be disregarded merely because the events have taken place during an armed conflict.

In addition to these legal points, the Israeli government has repeatedly stated that it is not willing to reward “terrorists” for their illegal acts. However, as noted earlier, the concept of “terrorism” has been so broadly defined by Israeli officials as to have no practical meaning - it becomes a catch-all expression to include any individual who is involved in the effort to end Israel’s occupation of the OPT.

Legal Implications of the Compensation Law

Israel’s Compensation Law breaches international law both directly and indirectly. Firstly, it serves to deny Palestinians in the OPT their right to an effective remedy, which as has been illustrated is a violation of both international human rights and humanitarian law, and which has a severe and disproportionate impact on Palestinians. Further, the denial of compensation enables a culture of *de facto* impunity in which Israeli authorities turn a blind eye to such grave violations as extrajudicial killings, property destruction, and torture. As noted in the Updated Set of Principles, impunity arises from

³⁰ Human Rights Committee, “General Comment No. 29: Article 4: Derogations during a State of Emergency,” CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.

a failure by states to meet their obligations to investigate violations and to take appropriate measures in respect of the perpetrators, including the provision of effective remedies. As a result of Israel's failures in regard to both investigations and the provision of effective remedies, violations in the OPT become multi-layered, as one breach exacerbates another, making it more difficult for Palestinian civil society and the international community to address such concerns.

Moreover, the Israeli authorities are in violation of their obligations under the Vienna Convention on the Law of Treaties, to which Israel is a state party. Article 26 is clear that states are bound by the treaties to which they are party and must uphold the obligations outlined therein in good faith. The blatant misinterpretation of obligations under public international law, including international human rights and humanitarian law, can in no way be considered to be in good faith.

Israeli officials will necessarily rely on the Compensation Law as grounds for denial of a remedy to Palestinians harmed by the Israeli military. However, such reliance is itself unlawful, as Article 27(1) of the Vienna Convention states, "[a] State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty." Such reliance on the Compensation Law to deny a remedy to Palestinians harmed by Israeli forces is in complete contradiction with its duties it has accepted under international law.

Israeli Obligations Under International Law

The Israeli authorities must immediately overturn this law. Ensuring that those individuals whose rights have been violated by Israeli state agents have access to an effective remedy would itself end a breach of international law. It might also have a "spillover" effect by deterring future violations which trigger the right to a remedy.

Moreover, as noted above, the Compensation Law is symptomatic of the larger problem of *de facto* impunity in regard to Israeli violations of Palestinian rights. Overturning the law is important, but must be done in tandem with other steps - including holding those responsible for violations criminally accountable - which will bring an end to the culture of impunity that has developed.

Unfortunately, a pragmatic assessment of the situation makes clear that Israeli authorities are not likely to overturn this law in the near future. As such, they will continue their multi-layered violations, placing the burden to bring an end to the illegal situation upon the international community.

Obligations of the International Community

International law does not stop at national borders - states have an interest in the respect for international law by other states. This is clearly reflected in common Article 1 of the four Geneva Conventions, which calls on High Contracting Parties thereto “to respect and to ensure respect for the present Convention in all circumstances.” This principle is also upheld in international human rights law: the UN Human Rights Committee has noted that every State Party has a legal interest in the performance by every other State Party of its obligations.³¹ This principle is also upheld in the UN Charter itself, which states in Article 55(c) that,

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

[...]

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The Charter then calls on all member states of the UN to take joint and separate action in cooperation with the UN for the achievement of these purposes. As such, member states of the international community must exercise diplomatic and other avenues in order to pressure Israeli authorities to overturn this law.

Unfortunately, even with such pressure, it is unlikely that the Israeli authorities will overturn the Compensation Law in the near future. Further, under Oslo II, Palestinians who have been harmed by Israeli state agents have been blocked from using the courts established by the Palestinian National Authority as a vehicle for obtaining a remedy. The options are further limited even in terms of the more general right to a remedy, as there is no regional human rights system to which Palestinians can appeal, and Israel has opted out of the quasi-judicial complaint mechanisms established under the UN human rights treaty system. As such, the remaining avenue available to Palestinians

³¹ See *supra* note 19, para. 2.

who are seeking compensation for Israeli violations is through third-party state judicial systems. In the absence of local remedies, the only legal recourse for Palestinians is to seek remedies in other states' courts.

A number of states have legislation which permits the pursuit of such claims in their courts. Examples of this type of legislation are the US Alien Tort Claim Act and provisions of the German Civil Code. It is unquestionable that attempting to use such legislation will meet with serious resistance by the Israeli authorities. Efforts by third-party states to pressure Israel to uphold its obligations under international law, including those to provide an effective remedy, are often dismissed by the Israeli authorities at best as interference, or more likely as an unfriendly act. However, as noted by the Human Rights Committee,

[t]o draw attention to possible breaches of Covenant obligations by other States parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.³²

Conclusion

In a number of instances, nothing can be done to fully undo the harm inflicted by many of Israel's violations in the OPT. As an organisation which daily works with the victims of these violations, Al-Haq does not purport that compensation will do so. Moreover, in the face of grave and persistent violations of international law, compensation should not serve as the only means of reparation - it must also be accompanied by other forms thereof, in particular guarantees of non-repetition. In addition, the provision of compensation for specific actionable claims does not eliminate the later need for a broader reparations programme that must be established once the Israeli-Palestinian conflict has ended.

However, Al-Haq believes that by passing a discriminatory law denying all access to compensation for the vast majority of Palestinians who are subjected to Israeli violations, Israeli authorities are rejecting not only the international human rights and humanitarian legal orders, but the international legal order as a whole. When compounded with other discriminatory legislation passed by the Israeli Knesset - such as the *Nationality and Entry Into Israel Law* - the effect is the pervasive denial of the Palestinian people's fundamental human rights. The international community must act on their legitimate community interest by protesting the legal formalisation of Israel's illegal practices, which only serve to further narrow the legal space for Palestinians to obtain effective remedy.

³² *Ibid.*

APPENDIX I - CIVIL WRONGS (LIABILITY OF THE STATE) LAW, 5712 - 1952

1. Interpretation

In this Law -

“the Ordinance” means the *Civil Wrongs Ordinance*, 1944;

“act” includes omission;

“civil liability” means liability under the Ordinance for an act done after the coming into force of this Law;

“war operation” includes any action combating terror, hostile acts, or insurrection, and also an action intended to prevent terror, hostile acts, or insurrection that is taken in a situation endangering life or limb;

other terms have the same meaning as in the Ordinance.

2. Civil liability of the State

For the purpose of civil liability, the State shall, save as hereinafter provided, be regarded as a corporate body.

3. Act done within the scope of lawful authority

The State is not civilly liable for an act done within the scope of lawful authority, or bona fide in the purported exercise of lawful authority; but it is liable for negligence in connection with such an act.

4. Defamation

The State is not civilly liable for defamation.

5. War operation

The State is not civilly liable for an act done in the course of a war operation of the Israel Defence Forces.

5A. Claims arising from activity of security forces in the region

A claim against the State or its agents for injuries arising from an act done in the region by the Israel Defence Forces (hereafter - claim) shall be heard in accordance with the provisions of this section:

(1) In this section -

“region” means each of the following: Judea, Samaria, and the Gaza Strip;

“Israel Defence Forces” includes other security forces of the State that operate in the region.

(2) (a) The court shall not hear a claim unless the injured person or his guardian or another person on his behalf gave written notice, in the manner that shall be set forth in regulations, of the act that is the subject of the claim;

(b) The notice shall be given within 60 days from the day of the act; however, if, as a result of the medical condition of the plaintiff or his guardian, or for other justifiable reasons, he was unable to give the notice within the said period, the notice shall be given within 30 days from the day in which the impediment was removed;

(c) Where the injured person died and did not give notice while alive, and the time for giving notice pursuant to subsection (b) has not expired, the notice shall be given by his dependents or by his estate or by another person on their behalf within 60 days from the day of his death;

(d) Notwithstanding the aforesaid in this section, the court may, for special reasons that it shall record, hear a claim regarding an act as to which notice was not delivered in a timely manner.

[Note: The provisions of paragraph (2) above commence on the day of the commencement of the regulations enacted as stated in paragraph (6) of this section; the provisions will apply to claims whose cause of action is an act that occurred on or after the day of commencement of the said regulations.]

(3) The court shall not hear a claim filed more than two years from the day of the act that is the subject of the claim; however, the court may extend this period for an additional period that shall not exceed one year if it is convinced that the plaintiff did not have a reasonable opportunity to file his claim earlier. Where the plaintiff is a minor on the day of the act, the said period of extension shall not exceed three years.

[Note: Notwithstanding the provisions of paragraph (3) above, a claim whose cause of action is an act that occurred prior to 1 August 2002 and the period of prescription has not expired, the times referred to in the paragraph shall be counted from that date, provided that in no event shall the period of prescription exceed the period of prescription that applied by virtue of the law on the day of the act.]

(4) The provisions of sections 38 and 41 of the *Civil Wrongs Ordinance [New Version]* shall not apply to the hearing of the claim; however, the court may rule that the provisions of these sections shall apply if it found that the circumstances of the matter so justify and for special reasons that it shall record.

[Note: The provisions of paragraph (4) above do not apply to a claim in which the hearing of evidence began prior to 1 August 2002.]

(5) If the court is convinced that the State has been denied a fair opportunity to defend the claim because the Palestinian Council did not comply with the provisions concerning legal assistance in accordance with the Agreement, it may, after giving the parties an opportunity to state their arguments on this matter, deny the claim; in this paragraph,

“the Agreement” has the same meaning as in the *Extension of the Validity of the Emergency Regulations (Judea and Samaria and the Gaza Strip - Adjudication of Offences and Legal Assistance) Law, 5728 - 1967*;

“the Palestinian Council” has the same meaning as “Council” in the said law;

(6) The Minister of Defence is responsible for implementation of this section, and may, upon consultation with the Minister of Justice, and with the approval of the Constitution, Law and Justice Committee of the Knesset, enact regulations relating to its implementation.

5B. Claims by an enemy, or an activist or member of a terrorist organisation ((Amendment No. 7) - 2005)

(a) Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained by any person included in paragraphs (1), (2) or (3), with the exception of damage caused in the types of claims or to the types of claimants set forth in the First Annex.

(1) A citizen of an enemy state, unless he is legally in Israel;

(2) An activist or member of a terrorist organisation;

(3) Anyone who incurred damage while acting as an agent for or on behalf of a citizen of an enemy state, or an activist or member of a terrorist organisation.

(b) In this section -

“enemy” and “terrorist organisation” - as defined in Section 91 of the *Penal Law, 5737 - 1977*,³³

The “State” - includes any authority, entity or person acting on its behalf.

5C. Claims in a conflict zone

(a) Notwithstanding any other provision of law, the State shall not be subject to liability under the law of torts for damage sustained in a conflict zone due to an act performed by the security forces, with the exception of damage caused in the types of claims or to the types of claimants set forth in the Second Annex.

(b) (1) The Minister of Defence shall appoint a committee, which shall be empowered to approve an *ex gratia* payment under special circumstances, to an applicant to whom subsection (a) applies, and to determine the amount thereof (in this subsection: the “Committee”);

(2) The members of the Committee shall be:

(1) An attorney who is qualified to be appointed as a District Judge, who shall be the Chair; the Minister of Defence shall appoint the Chair in consultation with the Minister of Justice;

(2) A representative of the Ministry of Defence;

(3) A representative of the Ministry of Justice.

(3) The Minister of Defence, in consultation with the Minister of Justice, and with the approval of the Constitution, Law and Justice Committee of the Knesset, shall determine the minimal conditions for filing an application to the Committee, the manner in which the application is to be filed, the working procedures of the Committee, and the criteria for an *ex gratia* payment.

(c) The Minister of Defence is entitled to declare an area as a conflict zone; should the Minister so declare, he shall set forth, in the declaration, the borders of the conflict zone and the period of time during which the declaration shall be in effect; a notice of the declaration shall be published in *Reshumot* [the Official Gazette].

³³ *Book of Laws 5737 - 1977*, p. 322.

(d) Should notice in writing have been given pursuant to Section 5A (2) (in this section: “notice in writing”), the following provisions shall apply:

(1) Should the Minister of Defence have declared the area in which the damage was caused as a conflict zone, the declaration shall be brought to the attention of the person who filed the notice in writing, within 30 days of the date on which the notice in writing was received by the Ministry of Defence.

(2) Should the Minister of Defence not have declared the area in which the damage was caused as a conflict zone, he shall be entitled, within 90 days of the date of receipt of the notice in writing, to declare the area as a conflict zone; should he have so declared, he shall bring the fact of the declaration to the attention of the person who filed the notice in writing within the aforesaid period of 90 days; should the Minister of Defence declare the area as set forth above following the expiry of the aforesaid period of 90 days, the Court shall be entitled, for special reasons which shall be recorded, to accept the argument that the damage which constitutes the object of the notice in writing took place in a conflict zone.

(3) Failure to bring the declaration of an area as a conflict zone to the attention of a person who filed a notice in writing, as set forth in paragraphs (1) and (2), does not and shall not adversely affect the validity of a declaration pursuant to subsection (c).

(4) The Minister of Defence, in consultation with the Minister of Justice, shall determine the manner in which the declaration of an area as a conflict zone is to be brought to the attention of a person who filed a notice in writing.

(e) In this section -

“conflict zone” - a zone outside the territory of the State of Israel, which the Minister of Defence has declared as set forth in subsection (c), in which the security forces acted or were present in the zone within the context of a conflict.

The “State” - includes any authority, entity or person acting on its behalf.

“Conflict” - a state of affairs in which an event or events of a military nature is or are taking place between the security forces and regular or irregular entities which are hostile to Israel, or a state of affairs in which operations of an aggressive nature by an organisation which is hostile to Israel are taking place.

5D. Amendment of Annexes by an order

The Minister of Defence, following consultation with the Minister of Justice, and with the approval of the Constitution, Law and Justice Committee of the Knesset, shall be entitled to amend the First Annex and the Second Annex by an Order.”

6. Injury sustained during military service

- (a) The State is not civilly liable for an injury sustained by, or illness or aggravation of illness caused to, a person during and in consequence of his military service.
- (b) In this section, “military service” has the same meaning as in the *Invalids (Pensions and Rehabilitation) Law, 5709 - 1949*.

7. Death caused during military service

- (a) The State is not civilly liable for the death of a person resulting from injury sustained by, or illness or aggravation of illness caused to, a person during and in consequence of his military service.
- (b) In this section, “military service” has the same meaning as in the *Invalids (Pensions and Rehabilitation) Law, 5709 - 1949*.

7A. Prescription with regard to Rehabilitation Laws

Where an action in tort has been filed against the State and has been dismissed by virtue of section 6 or 7, the period of prescription for the filing of an application for a gratuity or pension under the *Invalids (Pensions and Rehabilitation) Law, 5709 - 1949 (Consolidated Version)* or the *Fallen Soldiers' Families (Pensions and Rehabilitation) Law, 5712 - 1952*, shall terminate on the date fixed in such Law or at the expiration of six months from the day on which a judgment is delivered from which no further appeal lies, whichever is the later date, provided that the action was filed not later than one year after the expiration of the period of prescription fixed in such Law.

7B. Exception from civil liability for State agents

(a) In circumstances in which the State is not civilly liable by virtue of sections 5 to 7, the person because of whom the State would have been civilly liable but for the said sections shall also be exempt from liability as stated.

(b) This section shall apply also to an act or omission done prior to the day of commencement hereof, but shall not prejudice a final decision given prior to the said day.

7C. Right of State to indemnification

The provisions of section 7B shall not prejudice the right of the State for indemnification from any person who would have been liable therefore but for the said provisions.

8. Property vested in the State

The State is not civilly liable as the owner of property vested in it solely by operation of law, so long as it has not taken possession thereof.

9. Preservation of special provisions of law

Nothing in this Law shall affect any provision of any of the following enactments which establishes, limits or negates the liability of the State or of its institutions:

- (1) the *Land (Settlement of Title) Ordinance*;
- (2) the *Post Office Ordinance*;
- (3) the *Government Railways Ordinance*, 1936;
- (4) the *Absentees' Property Law*, 5710 - 1950;
- (5) the *German Property Law*, 5710 - 1950;
- (6) the *Postal Bank Law*, 5711 - 1951.

9A. Preservation of laws

The provisions of Sections 5B and 5C do not and shall not derogate from any protection, immunity or exemption given to the State of Israel under any law.

10. Repeal

Section 4(a) of the Ordinance is hereby repealed.

11. Amendment of *Crown Actions Ordinance*

The *Crown Actions Ordinance* shall be amended as follows:

In section 3, subsection (1) -

- (1) the full stop at the end of paragraph (c) shall be replaced by a comma and the word “or” shall be inserted thereafter;
- (2) there shall be added the following paragraph:
“(d) of civil wrongs.”

FIRST ANNEX

(Section 5B (a))

A claim the cause of action of which is damage that was caused to a person as set forth in Section 5B (a) while said person was in the custody of the State of Israel, as a detainee or as a prisoner, and provided that said person, after having been held in custody, did not again become an activist or member of a terrorist organisation and did not act on behalf of or as an agent for any such organisation.

(Section 5B (b))

A claim the cause of action of which is injury sustained by a person as stated in section 5B(b) at the time that he was in custody of the State of Israel as a detainee or prisoner;

SECOND ANNEX

(Section 5C (a))

1. A claim the cause of action of which is damage that was caused by an act performed by a person serving in the security forces, provided that said person was convicted of an offence with reference to the aforesaid act, in a final judgment handed down by a military court or any court in Israel; for the purpose of this subsection, an “offence,” is as defined in Section 22 of the *Penal Law, 5737 - 1977*,³⁴ excluding an offence that is of the kind of offences for which strict liability applies; in claims pursuant to this subsection, regarding the limitation period for presenting claims, as stated in Section 5A (3), the day of the act that is the subject of the claim shall be the day on which the judgment became final.

2. A claim the cause of action of which is damage that was caused in a conflict zone to a person who was in the custody of the State of Israel, as a detainee or as a prisoner, and provided that said person, after having been held in custody, did not again become an activist or member of a terrorist organisation and did not act on behalf of or as an agent for any such organisation.

3. A claim the cause of action of which is an act by the Civil Administration, as defined in the *Implementation of the Agreement Concerning the Gaza Strip and Jericho Area (Economic Arrangements and Miscellaneous Provisions) (Legislative Amendments) Law, 5755 - 1994*³⁵ or an act of the Government, Coordination and Liaison Administration, provided that the act was done outside the framework of conflict.

4. A traffic accident, as defined in the *Compensation of Victims of Traffic Accidents Law, 5735 - 1975*,³⁶ in which a vehicle of the security forces was involved, wherein the license number of said vehicle or the identity number of the person who drove it at the time it was involved in the accident is known, unless the accident took place as a result of operational activity by the vehicle or hostile activity by the injured person against the State or against a civilian population.

5. Property damage caused to a vehicle as a result of a traffic accident, as defined in the *Compensation of Victims of Traffic Accidents Law, 5735 - 1975*, even if bodily damage was not caused in said road accident, and provided that the remaining conditions set forth in Section 4 of this Supplement existed.

³⁴ *Book of Laws 5737 - 1977*, p. 322.

³⁵ *Book of Laws 5755 - 1994*, p. 326.

³⁶ *Book of Laws 5735 - 1975*, p. 234.

(Section 5C(b)(2))

1. A claim the cause of action of which is injury sustained by a resident of a zone of conflict as a result of an act done by a person serving in the security forces, provided that the said person was convicted of an offence for the said act by a final judgment in a tribunal or court in Israel; in this matter “offence” excludes an offence the definition of which states that negligence is the *mens rea* necessary for its existence, or an offence that is of the kind of offences for which strict liability applies [within the meaning of sections 21 and 22 of the *Penal Law, 5737 - 1977*³⁷];

2. A claim the cause of action of which is injury sustained by a resident of a zone of conflict at the time that he is in the custody of the State of Israel as a detainee or prisoner;

3. A claim the cause of action of which is the act of the Civil Administration or the Government, Coordination and Liaison Administration that is done outside the framework of conflict or as the result of conflict;

In this section -

“Civil Administration has the same meaning as in the *Implementation of the Agreement Concerning the Gaza Strip and the Jericho Area (Economic Arrangements and Miscellaneous Provisions) (Legislative Amendments) Law, 5795 - 1994*;³⁸

“Government, Coordination and Liaison Administration” has the same meaning as in the *Order Establishing the Government, Coordination and Liaison Administration (Gaza Strip Area) (No. 110), 5755 - 1994*;

4. A traffic accident has the same meaning as in the *Compensation of Victims of Traffic Accidents Law, 5735 - 1975*,³⁹ in which a vehicle of the security forces is involved, the registration number of which or the identity of the driver of the vehicle at the time of the accident is known, except where the accident occurred incidental to operations activity of the vehicle or to the hostile action of the injured person against the state or against a civilian population;

5. Property damage caused to a vehicle following a traffic accident has the same meaning as in the *Compensation of Victims of Traffic Accidents Law, 5735 - 1975*, even if bodily injury was not sustained in the said accident, provided that the other conditions set forth in section 3 are met.

³⁷ *Book of Laws 5737 - 1977*, p. 322.

³⁸ *Book of Laws 5755 - 1994*, p. 326.

³⁹ *Book of Laws 5735 - 1975*, p. 234.

The following provisions from the amending legislation provide, *inter alia*, that the amendments shall have retroactive effect:

Provisions concerning entry into force and applicability of Amendment No. 5 - 2005

(a) The provisions of Sections 5B to 5D of the Principal Law, in the wording set forth in Section 1 of this Law, shall apply to any act which took place on 29 September 2000 and thereafter, but with the exception of an act in respect of which a claim was filed and the hearing of evidence therein commenced prior to the date of publication of this Law.

(b) For a period of six months from the date of publication of this Law, the Minister of Defence shall be entitled, notwithstanding the provisions of Section 5C (d), to declare an area as a conflict zone with regard to the period between the 29 September 2000 and the date of publication of this Law.

Duty of appointment of a first committee and the initial enactment of regulations

(a) A first committee pursuant to Section 5C (b) of the Principal Law, in the wording set forth in Section 1 of this Law, shall be appointed within 60 days of the date of publication of this Law.

(b) Initial regulations pursuant to Section 5C (b) (3) of the Principal Law, in the wording set forth in Section 1 of this Law, shall be brought before the Constitution, Law and Justice Committee of the Knesset for approval within 60 days of the date of publication of this Law.