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ISRAEL AND THE OCCUPIED PALESTINIAN TERRITORIES: THE RIGHT TO A REMEDY AND REPARATION

Introduction

1. This submission to the 4th cycle of the UPR of Israel concerns the right to an effective remedy and reparation for violations of rights, including in the Occupied Palestinian Territory (OPT), and the analysis and recommendations below are limited to that subject. It was prepared in August 2022 by Dr Haim Abraham* of University College London, Dr Gilat Bachar* of Temple University School of Law and staff of Ceasefire Centre for Civilian Rights. It is based on an examination of practice before the Israeli courts of claims in tort for civilian harm and of Israeli administrative mechanisms for compensating or addressing civilian harm. Base data includes over 300 tort claims between 1952 and 2021, sourced from Israel's online legal databases, as well as physical court records. The cases overwhelmingly refer to Palestinian claimants.

2. The Universal Declaration grounds the right to an effective remedy by the competent national authorities for violations of fundamental rights granted by the constitution or by law (Art. 8), as well as the prohibition on discrimination (Art. 7). Remedies for gross violations of international human rights law and serious violations of international humanitarian law (IHL) include the victim's right to: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; access to relevant information concerning violations and reparation mechanisms.¹

3. Palestinians have frequently brought claims in the Israeli courts for civilian harm including death, injury and property damage.

4. The incidence of civilian harm has recently increased. For example, presenting two annual reports on the OPT to the 49 session of the Human Rights Council in March 2022 the High Commissioner for Human Rights noted that between 1 November 2020 and 31 October 2021 Israel demolished 967 Palestinian-owned structures in the West Bank including East Jerusalem, the highest number since the UN started recording this data, displacing 1,190 Palestinians including 656 children, and that the number of Palestinians killed by Israeli security forces in law enforcement incidents more than tripled, compared with the previous reporting period.²

5. Between 1988 and 2014, Israel paid approximately USD 94 million in compensation for losses inflicted through its security forces on the Palestinian population in the West Bank and Gaza.³ However, in the latter part of that period, and progressively since, the right to a remedy

*Authors writing in their personal capacity.

¹ [UN Basic Principles and Guidelines on the Right to a Remedy and Reparation](#), para.11.

² This does not include fatalities in the May 2021 Gaza hostilities, when 261 Palestinians and 10 Israeli citizens and residents were killed. Michelle Bachelet, [UN High Commissioner for Human Rights statement to the Human Rights Council](#), 49th session, 25 March 2022.

³ Shay Lev, 'Request of Information in Accordance with The Freedom of Information Act 1998' (3 August 2015).

has been severely constrained through a number of factors including: the widening of the definition of the combatant activities exception in the law of tort; the designation of Gaza as enemy territory; and the combined effect of procedural obstacles, high court fees and securities, and denial of entry permits limiting access to court. While Jewish Israeli citizens who are residents of the Occupied Palestinian Territories have a right to claim compensation for losses they sustain from the operations of Israel's security forces, non-Jewish residents have no corresponding right.

II. Scope of International Obligations

6. Israel is party to most of the core international human rights treaties and is bound by their provisions on the right to a remedy and reparation, including Article 2 of the International Covenant on Civil and Political Rights (ICCPR), and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Israel is also party to the four Geneva Conventions of 1949. It should be noted, however, that Israel has historically disputed that it is bound by international human rights law with respect to its conduct in the OPT and disputed that it is an occupying power under the terms of the Fourth Geneva Convention.

7. Israel is not a party to certain other international instruments with provisions on the right to reparation including the 1907 Hague Convention IV on the Laws and Customs of War on Land and Additional Protocol I to the Geneva Conventions, although it accepts that many of their provisions reflect customary international law.⁴ Israel is not party to the Rome Statute of the International Criminal Court.

8. In the UPR third cycle, a number of recommendations were made on the theme of a right to a remedy in the OPT, including recommendations 118.150, 118.156, 118.85, 119.3, 119.5 and 119.8. For example, 118.156 recommended that Israel 'Ensure the existence and operation of an effective accountability system to address possible violations of international humanitarian law and human rights in the Occupied Palestinian Territories, among other means, facilitating the effective access to justice for victims and guaranteeing the effective investigation of complaints, as well as the lawful work of human rights defenders (Spain)'. Israel did not accept any of these recommendations.⁵

9. After the review of Israel in the last UPR cycle, a follow up letter from the then High Commissioner to the Foreign Minister of Israel highlighted a number of issues for improvement in time for the 4th cycle review, including that Israel:

'Pay particular attention and consider action to ensure that all persons under Israel's jurisdiction, regardless of nationality and origin, in particular in the West Bank, are treated equally before the courts; including by not trying civilians in military courts;

⁴ Eg., Israel Ministry of Foreign Affairs, [The 2014 Gaza Conflict: Factual and Legal Aspects](#), para 234, footnote 397.

⁵ Thematic List of Recommendations, UPR of Israel, 3rd Cycle – 29th Session.

‘Remove barriers and facilitate effective access to justice for possible violations of international humanitarian law and human rights in the Occupied Palestinian Territory.’⁶

III. Claims in Israel’s Civilian Courts

10. Residents of the OPT, whether they are Jewish Israeli citizens or not, are able to bring claims in tort to Israeli civilian courts. Only one year after establishing the military rule over the occupied territories in June 1967, Meir Shamgar was appointed to the position of Israel’s State Attorney. In his new capacity, he instructed all government attorneys not to oppose claims brought by individuals in the occupied territories to the Israeli Court.⁷ And indeed, Palestinians’ claims are common in Israeli courts.

11. Between 1988 and 2014, Israel paid approximately ILS 305 million (equivalent to roughly USD 94 million) in compensation for losses inflicted through its security forces on the Palestinian population in the West Bank and Gaza Strip, either as the result of courts holding the state liable or due to settlement agreements.⁸ That said, Palestinians’ ability to bring claims against Israel for losses Israel inflicted on them in the OPT has been limited significantly since 2000. This effect was achieved in a dual process, aimed at minimizing Palestinians’ ability to bring claims in tort against Israel.⁹

12. First, the scope of Israel’s immunity from tort liability expanded. Israel amended the definition of the combatant activities exception to the tortious liability of the State to include not only combat activities in their narrow sense, but also policing activities and other activities that are done by the Civil Administration that can support combat/security goals.¹⁰

13. The effects of the expansion of the combatant activities exception are clear. Until the Second Intifada in late 2000, Israeli courts found the exception to be applicable in 30% of the cases in which a tort claim was brought against Israel for the losses it inflicted on civilians in the OPT. This number grew during the Second Intifada and following Amendment 4 in 2002 to 61%, and in the years following Amendment 7 in 2005 81% of all tort claims in which a final ruling was handed down held that the combatant activities exception applies, and therefore the claim for compensation should be rejected. After Amendment 8 was passed in 2012, the

⁶ [Letter from the Office of the High Commissioner to Israel on Implementation in the 3rd Cycle.](#)

⁷ HCJ 302/72 *Sheikh Abu-Kbilu v. Israel*, PD 27(2) 169, 179 (1973); ACA 5698/11 *Israel v. Dirani* (Nevo, January 15, 2015), paragraph 10 of Deputy Chief Justice Rubinstein opinion. Note, the Supreme Court agreed to hear cases relating to the West Bank in an earlier case, though it did not mention the position taken by the State Attorney there [HCJ 337/71 *Christian Society for the Holy Places v. Minister of Defence* (1972) 26(1) PD 574].

⁸ Shay Lev, ‘Request of Information in Accordance with The Freedom of Information Act 1998’ (3 August 2015).

⁹ Haim Abraham, ‘Tort Liability, Combatant Activities, and the Question of Over-Deterrence’ (2022) 47 *Law & Social Inquiry* 885.

¹⁰ Section 5 of the Civil Wrongs (Liability of the State) Act 1952.

exception was found to be applicable in 87% of these cases.¹¹

14. Second, in addition to the expanded definition of combatant activities, plaintiffs are required to overcome a variety of procedural hurdles.

- Plaintiffs have to submit notice on their intent to file a claim within 60 days of the loss they incurred.¹²
- There is an absolute limitation period (as opposed to the ordinary seven year limitation period); this is ordinarily two years, extendable by a further year at the discretion of the court.¹³
- Non-Israeli citizens who are subject of enemy states or territories are barred from filing tort claims against Israel, rendering potential plaintiffs from the Gaza Strip without a right to a remedy given the designation of the Gaza Strip as an enemy territory.
- High court securities and fees are also a barrier to litigation that deters potential plaintiffs from filing claims, or pursuing claims they have already filed.¹⁴

15. Additionally, Israel made it very challenging for Palestinian plaintiffs and their witnesses to obtain entry permits to testify, and so their ability to support their claims is partially, and at times entirely, frustrated. The Supreme Court of Israel denied a petition against the State Attorney's directive that prohibits granting entry permits to Palestinians who are residents of the Gaza Strip, except when an exceptional humanitarian need arises.¹⁵

16. Consequently, most tort claims of Palestinians against Israel are either rejected on substantive grounds, dismissed on procedural grounds, or not pursued for lack of resources.¹⁶

17. Furthermore, all losses sustained by Palestinians who are residents of the Gaza Strip cannot ground a claim in tort, as they are considered enemy civilians and as such Israel advanced blanket immunity from liability.¹⁷

18. In contrast, Israel has repeatedly expanded the scope of liability to which the Palestinian Authority is exposed to, by allowing tort claims to be brought against it for losses inflicted on Jewish citizens through terrorist activities – even when the terrorist activities were conducted by

¹¹ According to an empirical research Abraham conducted which reviews 292 courts cases in Israel in which the applicability for the combatant activities exception was analyzed [Abraham, 'Tort Liability, Combatant Activities, and the Question of Over-Deterrence' (n 8) 904].

¹² Section 5A(2)(b) of the Civil Wrongs (Liability of the State) Act.

¹³ *ibid*, Section 5A(3).

¹⁴ Gilat Bachar, 'Access Denied—Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience' 92 *Chicago-Kent Law Review* 841, 849–51 (2017).

¹⁵ *HCJ 7042/12 Abu Dakab v Minister of Interior* (Nevo, December 16, 2014); Bachar (n 13) 852–3.

¹⁶ See Gilat Bachar, 'The Occupation of the Law: Judiciary-Legislature Power Dynamics in Palestinians' Tort Claims against Israel' 38 *University of Pennsylvania Journal of International Law* 577, 603 (2016) (finding that between 2002 and 2012 only 17% of cases were decided in favour of Palestinian plaintiffs); Gilat Bachar, 'Money for Justice: Plaintiffs' Lawyers and Social Justice Tort Litigation' 41 *Cardozo Law Review* 2617, 2630-33 (2020) (describing barriers which Palestinian plaintiffs face in bringing claims against the Israeli government).

¹⁷ *CA 993-19 Ploni v Israel* (Nevo, July 05, 2022).

other Palestinian organizations and independent individuals.¹⁸

19. While Israeli politicians have argued for the near blanket immunity from tort liability provided by the combatant activities exception, tort law can support an imposition of liability for wrongs inflicted during combat, and the academic literature has warned of the risks of a blanket immunity regime that would infringe the right to effective remedy.¹⁹

IV. Administrative mechanisms for civilian harm claims

State-Operated 'Insurance' Schemes

20. Israeli Citizens, who have sustained a loss due to combat-related or terrorist activities, can access payment benefits through one of two main mechanisms.

21. Israel provides payments to its citizens and residents, who sustained body or property losses during war or terror activities, through national insurance and a statutory entitlement scheme.²⁰ Claims are submitted either to the National Insurance, in cases of bodily injuries,²¹ or the Tax Authority in cases of property damage.

22. There is no prohibition on pursuing compensation through tort law against the state. Yet, in only few cases have the State been sued by Israeli citizens for the losses it inflicted on them during combat, and instead redress is often sought and provided through the above-mentioned 'insurance' schemes.

Ordinance Regarding Claims (1968)

23. In 1968, and following Israel's belligerent occupation of the West Bank, an ordinance was issued by Brigadier-General Rafael Vardi, which established the legal authority for

¹⁸ Haim Abraham, 'Discrimination in the Fight Against Terror: Israeli Court Applies Jewish Nation-State Law' (*Just Security*, 21 September 2018) <<https://www.justsecurity.org/60803/discrimination-fight-terror/>> accessed 12 April 2020; Haim Abraham, 'Israel: Supreme Court's Double Standard on Liability Is Unfair to Palestinians' (*The Conversation*) <<http://theconversation.com/israel-supreme-courts-double-standard-on-liability-is-unfair-to-palestinians-181969>> accessed 11 August 2022.

¹⁹ Ibid; Abraham, 'Tort Liability, Combatant Activities, and the Question of Over-Deterrence' (n 8); Haim Abraham, 'Tort Liability for Belligerent Wrongs' (2019) 39 *Oxford Journal of Legal Studies* 808; Yaël Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict' (2009) 42 *Vanderbilt Journal of Transnational Law* 181; Yuval Shany and Amichai Cohen, 'Moving Toward Blanket Immunity: Israeli Supreme Court Blocks Gaza Tort Cases' (*Lanfare*, 26 July 2022) <<https://www.lawfareblog.com/moving-toward-blanket-immunity-israeli-supreme-court-blocks-gaza-tort-cases>> accessed 13 September 2022.

²⁰ Property Tax for Compensating War Losses Act 1951 3; Property Tax and Compensation Fund Act 1961 35–6; Compensation for Victims of Hostile Activities Act 1970 4. The total amount paid by the National Insurance between 2000-2006 was 2,048,927,000 ILS, which includes both payments and services provided by it: Shuli Baer, 'Recipients of Hostile Action Benefits' 8–10 <https://www.btl.gov.il/Publications/survey/Documents/seker_212.pdf> accessed 10 June 2019, 30-1. As for payments made by the tax authority, data from a Freedom of Information letter shows that following the Israel-Gaza War in 2014, 25,706 individuals and businesses submitted claims for payments, and 1,521,024,159 ILS were paid [[Israel Tax Authority, 'Request of Information in Accordance with The Freedom of Information Act 1998' \(23 October 2018\) 2, accessed 10 June 2019](#)].

²¹ However, in terrorist activities or violent conflicts in which there are mass-casualties, the National Insurance is proactive and seeks out individuals who could be benefactors of this benefit scheme: Baer (n 19) 3.

designated officers of the IDF to award *ex gratia* payments to residents of the West Bank, who were injured by the IDF or the Civil Administration.²²

24. The right to submit and obtain payments is qualified, as losses that are inflicted during a military activity that was pursued for a military purpose are excluded.²³ In addition, claims of individuals who are subjects of enemy states, members of illegal organizations, or their agents, as well as claims for insured losses, are also excluded.²⁴

25. Designated officers have full discretion to decide whether to accept or reject claims, and the payable amounts,²⁵ and their decisions could be appealed to a special Claims Appeals Committee within 30 days.²⁶

26. This mechanism for redress seems to be used solely by Palestinians, although it is technically available to Jewish Israeli citizens. It could be slow to operate, and offer fairly low sums, although in one recent case, the Appeals Tribunal awarded Palestinian claimants seven million ILS in compensation.²⁷ Nevertheless, this ruling is exceptional, and most losses either fall outside the scope of this Ordinance, or do not result in substantial awards.

Special Inter-Ministerial Committee for *Ex Gratia* Payment Arising from Settlers

27. Another redress mechanism that seems to be geared particularly towards Palestinians is a special inter-ministerial committee that decides on payments for losses Israeli settlers wrongfully inflicted on Palestinians in the West Bank.

28. However, there is no available data on its operation, eligibility criteria, or past and outstanding payments.

Vaadat Lam'e'd (The *Ex Gratia* Committee)

29. Not to be confused with the special inter-ministerial *ex gratia* committee relating to settlers-originated losses, Vaadat Lam'e'd (literally translated to the *ex gratia* committee) was established in 2000, and began accepting applications for *ex gratia* payments from civilians who were injured by the Israeli forces, and are not citizens or residents of Israel.²⁸ The committee is composed of three representatives: two legal advisors from the Ministry of Defense, and one

²² Section 2(a) of the Ordinance Regarding Claims (1968).

²³ Section 2(c), Israel Defense Forces, 'Decree No. 271 Regarding Claims' <bit.ly/3DqmODo> accessed 13 September 2022. This exclusion did not exist in the original wording of the Ordinance. However, in 1970 the Ordinance was amended to exclude losses that were inflicted in an area that was deemed as a theater of battle, and in 1984 this exclusion was amended again to include all military operations done in pursuit of a military objective.

²⁴ Sections 2B, 5, *ibid*.

²⁵ Section 7(a), *ibid*.

²⁶ Sections 8, 9(a), *ibid*. Note, according to an empirical study that was conducted by Gilat Bachar, this mechanism is rarely used: Bachar (n 13) 845.

²⁷ Hagar Shezaf, 'Military Judges Order Millions in Compensation to Palestinians Whose Greenhouses were Destroyed' *Haaretz* (13 January 2020) <<https://www.haaretz.co.il/news/politics/1.8383266>> accessed 24 November 2021.

²⁸ Dina Poliak, 'Request of Information in Accordance with The Freedom of Information Act 1998' (30 May 2016) 2; The State Comptroller, '55A Yearly Report' (2004) 55A 5.

member of the Ministry's finance department.²⁹

30. The committee's work is not grounded in any legislation or decree. Rather, it is acting in accordance with guidelines set by the Ministry of Defense and the Attorney General.³⁰

31. The committee only considers cases with extraordinary circumstances, and it distinguishes between Palestinians from the Gaza Strip and the West Bank, and all other potential applicants.

32. For Palestinian applicants, the committee will only discuss possible payment for injuries to life and body, and only if these injuries led to an extreme medical or financial distress that amounts to an urgent humanitarian need.³¹ Property damage will not be considered, unless it caused significant financial distress and there are political or security considerations that justify a consideration of payment.³²

33. For non-Palestinians, payments will be considered if there are political or security considerations, with the following reservation: individuals can only apply for injury to life and body, whereas states and other entities can apply for property damage.³³

34. The committee's discretion is unlimited, and it can take into account any consideration it sees as relevant, from the applicant's medical and financial records to the Ministry's own budgetary considerations.³⁴ Payment to the applicant will only be done if she signs a waiver of any liability she might have against the Ministry in regards to her injuries.³⁵ All of the committee's decisions are final, and there is no option of appeal.³⁶

35. Other information on the committee's work is rather vague. The Ministry has no detailed account of the number of applications submitted every year, but they estimate that between 2 to 4 applications are made.³⁷ Furthermore, while there are no clear caps for payments, only severe losses that either amount to an urgent humanitarian need or present a clear political or security justifications are eligible for payment.

²⁹ Section 8 of the 'Work Guidelines and Details of the Criteria Guiding the Ministry of Defense' Committee Regarding Ex Gratia Payments'.

³⁰ Poliak (n 27) 1.

³¹ Section 2(a)(1) of the 'Work Guidelines and Details of the Criteria Guiding the Ministry of Defense' Committee Regarding Ex Gratia Payments' (n 28).

³² Section 2(b) *ibid.*

³³ Section 2(c) *ibid.*

³⁴ Section 7(b) *ibid.*

³⁵ Section 12 *ibid.*

³⁶ Poliak (n 27) 2.

³⁷ *ibid.* 1.

36. Between 2006-2014 the Ministry of Defense accepted 58 applications.³⁸ Apart from one application of a British National, in which over 5 million ILS have been paid, and payment still continues, in most cases the average sum of payment is merely 33,000 ILS.³⁹

V. Recommendations

37. It is recommended that Israel should:

38. Remove the combatant activities exception in the law of tort (or clarify that the exception does not extend to law enforcement operations to enable claims for civilian harm from non-combatant operations of Israeli security forces to be heard before the Israeli courts);

39. Remove or ease procedural obstacles limiting the ability to exercise of the right to remedy including special limitations periods and unnecessarily tight deadlines for submitting notice to file a claim;

40. Review court fees and financial securities required to make a claim in order to prevent unnecessary restriction of the right of access to court;

41. Grant entry permits and ease freedom of movement restrictions to enable Palestinians to have unfettered access to courts, administrative compensation mechanisms and legal representatives;

42. Ensure that the right to claim compensation for losses sustained from the operations of Israel's security forces is available to Palestinians and non-Jewish people in the OPT on an equal basis to Jewish residents of the OPT;

43. Ground the work of the *ex gratia* compensation committees in law, provide Palestinians in the OPT with information in Arabic about their operations and eligibility criteria, and create an appeals mechanism for the committees' decisions.

44. Accept the application in the OPT of international human rights treaties and international humanitarian law, including their relevant provisions on the right to a remedy and reparation.

³⁸ *ibid.*

³⁹ *ibid.*