

Politics and the 2005 Gaza and North West Bank Compensation and Assistance Facility

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I. INTRODUCTION

In the summer of 2005, thirty-eight years after it gained control over the Gaza Strip, Israel left the sandy Mediterranean region.¹ The Disengagement Plan, as the withdrawal was called by the Israeli government, was intended to benefit the state of Israel by finally defining its southern border, helping to secure a Jewish majority within its newly consolidated borders, and allowing Israel to take the lead in a moment of stalemate in the peace process. The plan was further intended to benefit the 1.3 million Palestinians who resided in Gaza by ending foreign control over their lives.² One group, however, did not stand to gain from the move, for the Israeli rollback included not

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1. Israel gained control of the Gaza Strip on the first day of the Six Day War. For a detailed description and analysis of the war including operations in Gaza, see MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* (2002). The weighty issues of the status of Gaza and the northern West-Bank between the years 1967-2005 and role of the settlement project (and the position of international law on the subject) are outside the confines of this piece.

2. See Ehud Eiran, *Lords of the Earth? The 2005 Disengagement Plan and the Israeli Settlement Project*, in *POPULATION RESETTLEMENT IN INTERNATIONAL CONFLICTS: A COMPARATIVE STUDY* 165 (Arie M. Kacowicz & Pawel Lutomski eds., 2007); NADIR TZUR, *DISENGAGING FROM THE STRIP* (2006) (Hebrew); NURIT KLIOT, *DECISION*

only the withdrawal of Israeli armed forces, but also the removal of some 9,000 Israeli settlers, some of whom had resided in their communities for three decades.³

This paper explores and analyzes the claims and assistance facility created by Israel in order to compensate and aid these relocated settlers, and makes two contributions. First, it investigates the structural features of the claims and assistance facility. Second, it explores the effect of politics on the development, construction, and implementation of the facility. Rather than creating, as in most facilities, a mechanism to redress an injury already suffered, the Israeli government developed a compensation mechanism for a future injury that the government itself was about to cause. This situation contributed to the politicization of the facility and put the settlers in the impossible position of wanting to prevent the injury in the first place, while still having adequate compensation should the injury be unstoppable. Conversely, this situation allowed the government to use the facility as part of its effort to legitimize the injury. The compensation facility, therefore, had itself become part of the debate and not simply part of the solution.

Specifically, politicization had a number of effects: first, it eroded the facility's "single case" transactional logic as stakeholders viewed the facility as part of a broader conflict. Second, politicization introduced power-based considerations in a facility that was intended to employ an interest-based logic. Third, politicization expanded the number of stakeholders and created disincentives for the injured party to assist in the development of the claims facility. The result was greater inefficiencies: the injured party's interests were not fully met, and the government deployed more resources than originally planned. Finally, the politicized facility created significant personal challenges for both the government's and the injured party's agents.

By exploring politicization and its effects, this paper bridges two approaches to analyzing dispute systems: functional/institutional and context sensitive. Typological, comparative, and some case-based analysis has created a body of knowledge that illuminates the functional logic of claims facilities and reviews their main features. Ury, Brett, and Goldberg's groundbreaking work, for example, offered a

MAKING ON SETTLEMENT EVACUATION IN ISRAEL: COMPENSATION AND RESETTLEMENT: SINAI 1982; GAZA REGION AND NORTHERN SAMARIA 2005 (2005) (Hebrew); YAACOV BAR-SIMAN-TOV, *THE DISEGAGEMENT PLAN: AND IDEA AND ITS DEMISE* (2009) (Hebrew).

3. Israel also dismantled four settlements on the northern edge of the West Bank, although it left the small region, in effect, under the control of its military forces.

“practical method for achieving savings and gains” in resolving a recurrent conflict in an organization or in a relationship. Their six principles were intended to lead to “designing an effective dispute resolution system” with an emphasis on “cutting the costs and achieving the potential gains of a conflict” through utilizing interest-based, power-based, and norms-based approaches to conflict resolution.⁴ Other work that falls into the functional/institutional category has addressed issues such as the elements that constitute facilities, the typologies of various facilities,⁵ the legal principles and compensation models that govern their design,⁶ and the workings of specific cases.⁷

The second approach departs from the functional perspective and offers a perspective that is both narrower and broader. This work is largely based on detailed analysis of specific cases, but one that sets out to explain constitutive questions such as the reasons that a facility is created in some cases and not others, the role facilities play in broader social policies, and the relationship between a facility and other legal frameworks.⁸ Bringing in this perspective shows that a claims facility is not simply an entity that “process[es] and resolve[s] claims made against a potential funding source,”⁹ but rather a social institution that is both shaped and operated to advance a set of policy goals that extends beyond the potential claim.

This paper continues in three sections. In Section II, I present the injuries inflicted on the settlers as a result of their removal. Then I review the core aspects of the claims facility and describe its evolution and implementation. In section III I demonstrate the effect of politics on the shaping and implementation of the facility. In Section IV I conclude by discussing my main findings, their significance and their potential contribution for scholars and practitioners.

4. *Id.* at 170–71.

5. See, e.g., Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005) (defining “claims resolution facilities” and suggesting strategies for their design).

6. See, e.g., Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627 (2003) (suggesting how to design compensation programs post-September 11, 2001); Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133 (2003) (suggesting how conflict management prescriptions can be purposefully used to design institutions).

7. See, e.g., Christopher S. Gibson, *Mass Claims Processing: Techniques for Processing Over 400,000 Claims for Individual Loss at the United Nations Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION 155, 155–86 (Richard B. Lillich ed., 1995).

8. See, e.g., Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003).

9. McGovern, *supra* note 5, at 1361.

II. INJURY, INJURED, AND THE GAZA FACILITY

A. *The Relocation of Gaza and Northern West Bank Settlers*

In the summer of 2005, Israeli security forces removed some 9,000 settlers from their homes in twenty-four settlements¹⁰ in the Gaza Strip and from four settlements in the northern West Bank.¹¹ Shortly afterwards, Israel demolished most of the properties¹² as well as large parts of the infrastructure. Most other traces of Israeli settlements, such as businesses, schools, and cemeteries, were relocated back to territorial Israel or shut down. All property rights held by Israeli entities in the Gaza Strip and northern West Bank were annulled.¹³ The actual removal of the settlers was harsh: While a small number of settlers left their homes prior to the summer of 2005, the majority were physically removed from their homes by Israeli security forces¹⁴ and bused to temporary housing within territorial Israel.

Settlers lost their homes, property rights, communities, and sources of employment. Recovery has not been easy. A year after the relocation, 42% of working-age settlers were still unemployed. Relocated settlers that were employed suffered, on average, a five percent decline in their income. Farmers were the most severely hit. Out of 450 owners of agricultural plots, only forty to fifty were able to resume farming.¹⁵ Housing solutions are also far from resolved. Two years after the relocation, most of the former settlers were still residing in interim housing as permanent solutions were still being developed.¹⁶

10. Twenty-one settlements were recognized as such by the government. Three others were considered unauthorized outposts—that is, settlements that were not approved and recognized by the government, although they did, in effect, enjoy some services provided by the government.

11. Settlers were urged to leave before the summer. Most chose not to leave and were finally removed in August 2005.

12. Some properties, mostly those that served public or agricultural purposes, were left intact.

13. The Disengagement Plan Implementation Law, 2005, S.H 1982, §28(A).151 [hereinafter *Disengagement Plan*]. The annulment refers only to rights in land that were managed by the Israeli authorities. In effect, however, these included all the land on which settlements were erected.

14. Anticipating resistance, Israel deployed some 50,000 security personnel from five separate organizations: the armed forces, police, border guard police, internal security service, and the department of corrections.

15. Prior to the relocation, only 160 farmers were actually operating their Gaza Strip farms. Additionally, some working-age settlers chose not to work even prior to relocation.

16. KNESSET RESEARCH AND INFORMATION CENTER, TWO YEARS AFTER THE DISENGAGEMENT: A REVIEW (2007) (Hebrew); State Controller Committee, Israeli Knesset, Protocol 110, July 10, 2007 (Hebrew).

The injury was not limited to the removal from a geographical locale and the loss of livelihood. As some scholars have observed, for the Gaza settlers, residing there had become a “cor[e] source of identity formation”—a place where they were able to recreate themselves in a economic, social, class, and communal sense.¹⁷ Originating from relatively marginal groups in Israeli society, the world they had formed in the periphery, a frontier of sorts, allowed the Gaza settlers to develop a new social identity that placed them (at least in their own eyes) at the vanguard of Israeli-Jewish society.¹⁸ It is no wonder, then, that many of the settlers faced a severe personal crisis upon being relocated. In 2007, two years after leaving their homes, 41% of relocated settlers reported that they had visited a mental health professional within the last year.¹⁹

The relocated settlements were originally part of Israel’s settlement project in the areas it controlled since the 1967 war. The Gaza settlement project was launched in 1970 and expanded in the early 1980s following Israel’s withdrawal from the nearby Sinai Peninsula. The Israeli government’s rationale for launching and maintaining the Gaza settlements changed over time. In 1970, the settlements were meant to support social control over the local Palestinian population following the latter’s armed resistance to Israel between 1969 and 1971.²⁰ These early settlements were further a reflection of Israel’s desire to formally annex the region.²¹ While aspects of these early goals remained, the project’s expansion in the 1980s was meant to advance two other objectives following Israel’s handing back the Sinai Peninsula to Egypt. First, the settlements were perceived as creating important strategic barriers. Namely, they separated the local Palestinian population from the Egyptian Sinai and created a buffer between territorial Israel and Gaza, which had been a traditional

17. Izhak Schnell & Shaul Mishal, *Place as a Source of Identity in Colonizing Societies: Israeli Settlements in Gaza*, 98 *GEOGRAPHICAL REV.* 242, 257 (2008); see also Robert H. Mnookin & Ehud Eiran, *Discord “Behind the Table”: The Internal Conflict Among Israeli Jews Concerning the Future of Settlements in the West Bank and Gaza*, 1 *J. DISP. RESOL.* 11, 28–29 (2005).

18. See generally, Schnell & Mishal, *supra* note 17.

19. Figure includes trained psychologists, psychiatrists, and social workers. See Nadav Shragai, *A Quarter of Gaza Settlers Suffered from Depression*, HAARETZ, July 10, 2007, available at <http://news.walla.co.il/?w=/1134535>.

20. HAGAI HUBERMAN, *NETZARIM 11* (Hebrew); GERSHOM GORENBERG, *THE ACCIDENTAL EMPIRE: ISREAL AND THE BIRTH OF THE SETTLEMENTS 1967-1977* (2006); IDITH ZERTAL AND AKIVA ELДАР, *LORDS OF THE LAND, THE WAR FOR ISRAEL’S SETTLEMENTS 1967-2007* (2007).

21. See REUVEN PEDATZUR, *THE TRIUMPH OF EMBARRASSMENT: ISRAEL AND THE TERRITORIES AFTER THE SIX DAY WAR 253–55* (1996) (Hebrew).

route for Egyptian penetration into Israel. Second, expanding the Gaza project in the early 1980s allowed the ruling *Likud* government to demonstrate its commitment to a vision of Israeli territorial expansion, despite having returned the Sinai to Egypt. Some of the new settlements in Gaza were indeed created by settlers relocated from the Sinai.

B. *Compensation and Assistance*

The compensation scheme for the relocated settlers included three elements: (1) monetary compensation for a variety of losses, (2) non-monetary assistance including both immediate relief as well as long-term help, and (3) the creation of a specialized government agency in the Prime Minister's office to implement the facility. The primary source of authority for all three elements was legislation in a *Knesset* (Israel's Parliament) Act, the Disengagement Plan Implementation Act - 2005. The law was drafted in the Ministry of Justice by a large team of lawyers under the leadership of Director General Aharon Abramovich. It was then voted on in the *Knesset*, revised by its committees, and voted on again (three times in total) before it became law on February 16, 2005.

1. *Monetary Compensation*

The act included compensation for the following losses: real estate ownership rights, residence,²² livelihood, and business ownership. The law also included separate payments based on seniority in a settlement and number of children.²³ According to the law, claimants could choose a set formula track or a personal assessment track to obtain compensation for their losses. The state further provided financial assistance to cover the costs of the actual move and incentives to relocate to certain areas in territorial Israel. Persons eligible for such compensation included real estate owners, residents of settlements, and owners of businesses in the small *Erez* industrial zone that operated in the Gaza Strip. The law did not compensate non-Israelis (mostly Palestinians and Thais) that worked in the settlements, but some of them were compensated after suing in an Israeli labor court.²⁴ The compensation scheme follows a tort logic of making

22. Initially, only settlers who rented government-owned public housing were compensated. The law was later changed to include all renters.

23. *Disengagement Plan*, *supra* note 13, § 46 at 155.

24. *See, e.g.*, AV 2146/06 Isam Muhamd Ashkanta v. Az-Rom Mifalei Matehet (2008), available at <http://www.lawguide.co.il/ShowNews.asp?id=3166&t1=4&t2=2&t3=1> (Hebrew).

people whole again after their loss. However, the properties did not have an obvious market value because there was no market for them: Israel planned to demolish them and hand the land to the Palestinians. The drafters of the legislation solved this problem by comparing these Gaza and northern West Bank assets to similar assets in peripheral towns in Israel that offer a comparable quality of life.

2. *Non-Monetary Assistance*

The 2005 *Knesset* act states that one of its goals is to assist the settlers in the “process of removal and in their transition to new housing and employment.”²⁵ Accordingly, the relocation agency (see above) was awarded the authority to provide the relocated settlers “special assistance and counseling in all aspects related to their removal, including mental health and social assistance, during all the period of preparing for, and readjusting to their new residences and employment.”²⁶ The law further authorized the relocation agency to arrange the removal of the settlers’ personal property from their homes and to assist in communal relocation in new sites in territorial Israel.

Three years later, the *Knesset* added two new laws aimed at compensating and assisting the relocated settlers. The first law, The Advancement of Resettling of Persons Relocated from the Katif Block, Gaza Region, and Northern Samaria Act - 2008,²⁷ was intended to ease communal resettling of relocated settlers, mainly through special planning and zoning arrangements. The second law, The Center for Commemoration of Gush Katif and Northern Samaria Act - 2008, reflected an intangible form of compensation, by authorizing the creation of a national center that would commemorate the relocated settlements.²⁸

3. *Relocation and Compensation Agency (SELA)*

The relocation and compensation agency (SELA,²⁹) drew its initial authority from its the June 6, 2004 decision to relocate the settlers from Gaza and northern West Bank. The ensuing legislation from February 16, 2005 codified and expanded the authority of SELA

25. *Disengagement Plan*, *supra* note 13, § 1(4) at 142.

26. *Disengagement Plan*, *supra* note 13, §4(9) at 145.

27. Advancement of Resettling of Persons Relocated from the Katif Block, Gaza Region, and Northern Samaria Act, 2008, S.H 2145, 410.

28. The Center for Commemoration of Gush Katif and Northern Samaria Act, 2008, S.H 2180, 846.

29. SELA is the Hebrew acronym for “Assistance to Gaza Settlers.”

and stipulated four separate areas of responsibility, reflected in twelve different functions for the agency. First, the agency was authorized to obtain and verify information to determine eligibility and level of compensation. Specifically, the agency was granted the power to initiate assessment of property values, to enter any premises in the settlements to collect data, and to enter into agreements with settlers with respect to compensation. Second, the agency was awarded the authority to distribute the compensation. Third, the agency was awarded the authority to take an active part in the removal of the settlers' property, including the power to gain possession of settlers' homes after they were removed (and before Israel completed its withdrawal from the region), to remove the property settlers left behind, and to "guide"³⁰ all other state agencies (except for security forces) in their conduct in the Gaza and northern West Bank settlements, with special emphasis on the removal of property from the area. Finally, the agency was awarded powers to assist the relocated settlers once they were in territorial Israel as described above. Two other stipulations in the law were meant to further strengthen the agency. Section 4(12) of the law awarded the agency residual authority to "undertake all actions set by the government to carry out the implementation of the law."³¹ Perhaps more importantly was the agency's bureaucratic location, which signaled its power. It was to be established in the Prime Minister's office, with its director personally appointed by the Prime Minister.³²

4. *Implementation*

a. *Monetary Compensation*

By the summer of 2007, the agency received 2,006 claims for loss of property rights, almost all of which were processed (99%) and paid (98%) to the total sum of NIS billion 1.72.³³ The average settler family that owned property (the majority of settlers)³⁴ was awarded some NIS million 1.5³⁵ and the average family that rented property was paid NIS 160,000.³⁶ Business owners from the *Erez* industrial zone

30. The verb "guide," as used in the law, is ambiguous regarding the specific content of directing other agencies. It is clear, however, that the relocation agency did not have authority over other agencies.

31. *Disengagement Plan*, *supra* 13, § 4(12) at 145.

32. *Disengagement Plan*, *supra* 13, §§ 4(1) and 5(1) at 144–45.

33. This was equivalent to USD 407,072,651 on July 10, 2007.

34. The agency suggested that an average settler family had a household of 5.3 persons and lived on 156 sq. meters (about 1500 sq feet).

35. This was equivalent to USD 355,055 on July 10, 2007.

36. This was equivalent to USD 37,867 on July 10, 2007.

submitted 143 claims, and in 92% of the claims some payment was received, totaling NIS million 305.³⁷ A “special committee” that allowed for claims for cases that did not clearly fall within set compensation criteria received about 1,000 claims, 82% of which were fully processed and paid. The government authorized a ten-year extension for the special committee to act and allocated some NIS million 640³⁸ to pay the additional claims.³⁹ Monetary compensation grew over time. During the original legislative process, the *Knesset* sub-committee that drafted the law enhanced the compensation beyond the executive branch’s original request⁴⁰ and the Supreme Court expanded the law even further. The trend continued after the relocation, as the *Knesset* approved further expansions of compensation.⁴¹

b. *Non-Monetary Compensation*

Non-monetary compensation and assistance continue to lag behind financial compensation. By the summer of 2008, most relocated settlers were still in temporary housing. Some 1,250 families (out of approximately 1,800) were based in the sixteen locations that the government had set up as interim solutions. Unemployment rates were high, with roughly 20 % of relocated settlers not working. Over time, relief efforts had transformed, shifting from primarily providing financial aid to developing housing solutions. While the compensation legislation allowed for such government support in the form of assistance to communal relocation,⁴² the level of government assistance in this area exceeded all plans.

III. THE GAZA FACILITY: POLITICIZATION AND ITS EFFECTS

A. *A Politicized Facility*

The Israeli claims and assistance facility assumed, for designers and claimants alike, a meaning greater than simply a compensation processing mechanism. Many stakeholders perceived the facility as an asset that could be used in the internal political conflict over the

37. This was equivalent to USD 72,184,394 on July 10, 2007.

38. This was equivalent to USD US 151,468,893 on July 10, 2007.

39. REPORT TO THE KNESSET COMMITTEE (July 10, 2007).

40. The total budget allocated for compensation was expanded by the legislatures from NIS 3 billion to NIS 4.3 billion. See Nurit Kliot, DECISION-MAKING ON SETTLEMENT EVACUATION IN ISRAEL, COMPENSATION AND RESETTLEMENT: SINAI 1982 VS. GAZA REGION AND NORTH SAMARIA 27 (2005) (Hebrew).

41. Expansions included providing compensation for settlers who originally were not entitled to compensation such as those who resided in unauthorized outposts and those who rented property from individuals (as opposed to the government).

42. *Disengagement Plan*, *supra* note 13, § 85 at 170–71.

injury—the relocation of Israeli settlers from the Gaza Strip. In turn, the conflict over Gaza became part of the broad internal conflict between Israelis regarding the future of the much larger Israeli settlement project in the West Bank.⁴³ The removal from Gaza was perceived by both parties to the conflict as a precedent that could affect the ability of the government to relocate the West Bank settlers.

In this context, the executive branch, under the assertive Prime Minister Sharon, used the facility as one of the tools it employed in trying to secure support for a policy that faced fierce opposition. In turn, some settlers and their supporters tried to obstruct the development and implementation of the facility. Although it was designed to benefit them, many settlers believed that by hindering the development of the facility they might be able to thwart the disengagement altogether, or at least extract a high cost for it in order to prevent future settler relocations.⁴⁴

Prime Minister Sharon's plan to leave Gaza was opposed by significant sectors of the Jewish-Israeli body politic on religious, ideological, social, and strategic grounds. The way in which Sharon introduced and advanced the plan fueled opposition even further. The first circle of opposition came from the Gaza settlers, who were about to lose, as noted above, their communities, property rights, livelihood, and their very way of life. More broadly, Israel's expansionist right wing wanted to maintain control over the region as part of its "Greater Israel" vision, and feared that a withdrawal and settlement removal could create a precedent that would be replicated later in broader sectors of the West Bank.⁴⁵ By 2005, most of the support for Greater Israel came from the national religious sector, who believed that a Greater Israel is a religious entitlement that is to be fulfilled through human action. According to this view, territorial expansion is the first step toward a messianic era of worldly redemption.⁴⁶

Israel's liberal left was also far from enthusiastic. While it had traditionally supported territorial contraction and an end to Israeli

43. For more information concerning the internal conflict and how it was tied to the internal conflict about Israel's identity and borders, see Mnookin & Eiran, *supra* note 17.

44. Nadav Shragai, *The Goal: Create a "National Trauma" and Prevent a Future Relocation*, HAARETZ February 21, 2005.

45. Their fears proved to be warranted. In 2006, Sharon declared that Israel would advance further withdrawals in the West Bank. However, although Sharon's new party, *Kadima*, won the election on this platform, Prime Minister Olmert (who replaced the ill Sharon shortly before the election) was unable to carry out the plan.

46. Gideon Aran, *From Religious-Zionism to a Zionist Religion (1987)* (unpublished Ph.D. dissertation, Hebrew University, Israel), ARYE NAOR, GREATER ISRAEL: POLICY AND IDEOLOGY (2001) (Hebrew)

control over the Palestinians, the left advocated for a transactional withdrawal in which territory would be exchanged for peace with the Palestinians. Prime Minister Sharon's plan did not share the left's notion that the Palestinians were partners. Instead, Sharon saw them as a burden to be disposed of, hence the unilateral nature of the move. To the left, disengagement reflected resignation that a lasting peace agreement with the Palestinians was not possible. Short of a territorial transaction that would lead to peace, the left felt frustrated with Sharon's limited level of dialogue and coordination with the Palestinians.

Vocal opposition also came from Israel's security establishment, traditionally a leading player not only in implementing foreign and security policy, but also in shaping it.⁴⁷ The security elites opposed a withdrawal because they feared that the region would become a base for attacks on Israel (as indeed happened), and also because they were concerned about the signal it would send to the Palestinians. The military's Chief of Staff, General Moshe Ye'elon, told Prime Minister Sharon that "If Israel withdraws under fire, the Palestinian lesson would be that violence pays."⁴⁸ The military's open opposition further undermined the legitimacy of Sharon's plan in the public's view.

In addition, Prime Minister Sharon's own conduct left many Israelis feeling uncomfortable regarding the plan. Sharon had been a vocal supporter of the settlement movement since its early days and the most important policy actor in advancing it for over three decades. As an Army General in charge of Gaza, he had masterminded the settlement project there in 1970, and as a Minister in most Israeli governments since 1977, he had initiated both broad regional plans to expand the settlement project and personally pursued the creation of many specific settlements. Moreover, Sharon's most recent election campaign was based on his commitment to the settlement project in Gaza rejecting. Ironically, his main opponent's plan was to withdraw from Gaza and dismantle all settlements there.

With the disengagement, Sharon broke with his past convictions with no explanation. His personal circumstances added further complications. By the time Sharon proposed the plan, he was under two criminal investigations, and the plan's opponents claimed that Sharon was advancing it in order to placate the prosecution and the

47. Traditionally, military elites were an overrepresented sector in the Israeli decision making process on territorial issues. See YORAM PERI, *GENERAL IN THE CABINET ROOM: HOW THE MILITARY SHAPES ISRAELI POLICY* (2006).

48. MOSHEH YA'ALON, *LONGER SHORTER WAY* 160 (2008) (Hebrew).

media who were deemed largely supportive of the move. The media's response to Sharon's plan served as proof. Shortly after the plan was proposed, some sectors of the Israeli punditry goaded their colleagues not to stop confronting the Prime Minister over his legal problems because he now served a crucial national function. The political conflict filtered into the political institutions that needed to approve it. Prime Minister Sharon was able to secure approval for the plan only after firing cabinet Ministers, conducting an internal party referendum, reneging on his commitment to abide by its results, and reshuffling his coalition. Sharon had to turn to these tactics not only due to the substantial opposition to the relocation plan, but also because of significant institutional challenges. Settlers and their supporters were overrepresented in both the Israeli Parliament and his own party. Moreover, two parties that represented the settlers' interests, *National Religious Party* and *National Union*, were key members of the Prime Minister's coalition government. Sharon, therefore, searched for another forum that would allow him to legitimize his plan. Initially he considered turning to the Israeli public and presenting the plan for approval by a national referendum. Another version of that proposal was to conduct an "advisory referendum" by which Israelis would vote, but their decision would not have been binding. However, once Attorney General Meni Mazuz determined that no referendum could be conducted without authorizing legislation, Sharon gave up the idea.⁴⁹ He then declared that he would bring the proposal to a referendum among his *Likud* party membership. Sharon made clear he would abide by the forum's decision, but when he lost on May 2, 2004, he made minor changes to the plan and submitted it to his cabinet for approval. Realizing that he still did not command a majority amongst his Ministers, Sharon simply changed the institutional setting. First, he fired two Ministers (both settlers) from his cabinet to ensure a majority. He then changed the composition of his coalition, recruiting the *Labor Party* following the departure of the two pro-settler parties.

On June 6, 2004, Sharon's cabinet approved the relocation, and on October 26, 2004, the *Knesset* approved it in principle. On February 16, 2005, the Israeli Parliament adopted legislation that authorized the relocation and compensation, the Disengagement Implementation Act - 2005. On March 29, 2005, Sharon deflected the last serious institutional hurdle to the plan's approval when the

49. DAN LAHAV, THE KNESSET RESEARCH AND INFORMATION CTR., A REFERENDUM – BACKGROUND: CONSIDERATIONS AND ASPECTS IN SHAPING LEGISLATION FOR A REFERENDUM 3 (2005) (Hebrew).

Knesset passed his budget proposal. A failure to pass would have led, under Israeli law, to the cabinet's resignation. A day earlier, the opposition's proposal to create a new forum for authorizing the plan, a national referendum, was defeated. Finally, the legislation withstood judicial review in the Supreme Court on June 9, 2005. The political tensions led to great concern that the debate would not be conducted only through legitimate channels, as there were numerous calls for the use of violence. A leading settler and former senior official in the Netanyahu Government, Uri Elitzur, stated on June 18, 2004, that settler relocation is "illegal . . . and justifies the use of violence."⁵⁰ Minister of Justice Lapid warned on October 21, 2004 that "Israel may deteriorate to a civil war, like in Spain."⁵¹

The fierce political conflict politicized the claims and assistance facility due to institutional and temporal reasons, as well as strategic calculations, pertaining to the possibility of a future relocation of settlers from the West Bank. Institutionally, the Israeli executive branch's multiple roles in the Gaza relocation created the opportunity for it to use the facility as a political instrument. The executive branch, after all, was simultaneously the entity that: (1) instigated the injury and the political conflict that surrounded it, (2) had a stake in its outcome, (3) designed the facility, and (4) was entrusted with its implementation. The fact that the executive branch was led by a determined, assertive, and politically seasoned chief, Prime Minister Sharon, who had staked his legacy on the contentious removal of settlers, meant that the this structural opportunity would not be missed.

Some settlers and their supporters believed that by hindering the facility's creation, they might be able to prevent the injury from occurring altogether, or at least create a national trauma that would prevent a future relocation. Other settlers simply wanted to protest by not cooperating with the government.⁵² The sequencing of the injury and the claims facility further explains the politicization of the compensation and assistance facility. Remedy and injury were advanced in parallel,⁵³ unlike the more common case in which only after an injury occurs is a remedy developed. This juxtaposition created

50. Nadav Shragai, *Elitzur: Settlement Removal Justifies Disobedience and Violence*, HAARETZ, June 18, 2004 (Hebrew).

51. Yuval Yoez, *Lapid: Israel May Deteriorate to a Civil War, like in Spain*, HAARETZ, Oct. 21, 2004 (Hebrew).

52. Shragai, *supra*, note 44.

53. In fact, the legal source for the relocation and the compensation is the same piece of legislation, the Disengagement Implementation Act - 2005. The law contributed even further to the politicization of the facility when it placed the identification of the claims facility with the political actor that had created the injury.

a further opportunity for both the government and settlers to use the process of remedy development to advance their diametrically opposed goals with respect to the injury. When the settler removal was completed, the sequence structure changed, and indeed the claims and facility effort lost most of its political overtones.

Finally, the broader implications of the disengagement for Israel's far larger settlement project in the West Bank further contributed to the politicization of the claims facility. The leaders of the national-religious sector of settlers in the West Bank feared that a withdrawal from Gaza and the removal of settlers would create a precedent that might make it easier for the Israeli government to remove them as well. Their interest was therefore to prevent it from occurring or at least to extract a high cost for disengagement, which would, in theory, prevent the Israeli government from further settler relocations. A journalist that followed the process, Zvi Barel, commented in February 2005 that a "national trauma has a dual purpose: to stop at any price the war that the government is waging against a divine decree, and most of all, to create a historical barrier against a future withdrawal from the territories."⁵⁴

B. *The Effects of Politicization*

1. *Eroding the Transactional Nature of the Facility*

The politicization of the claims and assistance facility eroded, to an extent, its basic transactional logic. The Israeli government created the facility to compensate for a single injury: one that was clearly defined in space, time, number of potential claimants, and the duration of its operation. Indeed, all formal representations made by the government, most of all, the Disengagement Plan Implementation Act - 2005, reflected an intent to respond mostly through a single transaction—payment of compensation—for the specific damage inflicted on relocated settlers from Gaza. Yet both right wing stakeholders (supporters of a Greater Israel vision) and some of the facility's designers believed that the facility might be employed again in case the government decided to relocate Israeli settlers from the West Bank. The "possibility of a future relocation from the West Bank was on our minds the whole time," admitted one of the facility's designers.⁵⁵ Israeli Finance Ministry officials argued in internal discussions for lower compensation for Gaza settlers, in part because of

54. Zvi Barel, *Give us a National Trauma*, HAARETZ, Feb. 20 2005 (Hebrew).

55. Interview with former official (April 14, 2009) (on record with the author).

the far larger cost for the state should West Bank settlers be relocated. Similarly, when the Israeli government decided not to tax settlers who refused to leave on the original date (as it had previously announced), a number of officials argued that this move would diminish the government's credibility in case it introduced similar measures for a West Bank withdrawal.

2. *Moving From an Interest and Rights Based Facility, to a One Affected By Power Considerations*

In line with the famous prescription by Ury et al., the facility's designers at the Israeli Ministry of Justice tried to develop a facility that would balance the interests of the potential claimants against those of the government. The Ministry's officials sought to ameliorate the settlers' coming injury mostly through a trot based perspective, making them whole again. Therefore, the designers placed a special emphasis on protecting the financial compensation. For example, the law awarded special protection to future claimants against debtors who may lay claim to funds awarded as compensation. A secondary interest the designers sought to address was communal relocation. However, as I detail below, not much attention was given to this possibility. Finally, the government's immediate interest to secure an orderly removal of settlers was reflected in a financial incentive awarded only to settlers who left before a certain date.

Yet, due to the conflict over the disengagement plan, power considerations were used by both designers and claimants in the process of shaping the facility. At one point, a personal emissary of the Prime Minister offered settler representatives significantly larger compensation if the *national religious* party, which largely represented settler interests, would agree to support the government in a crucial vote.⁵⁶ Settler interests were compromised when some of their supporters in the *Knesset* preferred to signal their opposition to the disengagement by creating hurdles for the development of the facility. For example, a significant number of *Likud* party members who opposed settler relocation blocked an October 2004 request by the government to appropriate funding for an inter-agency committee that oversaw the development of the Disengagement Plan, including early

56. Interview with Eliezer Ya'acov (Feb. 27, 2007).

drafting of the law.⁵⁷ Work on the draft continued despite this setback, but once the law was brought in front of the committee for further drafting, *Likud* members simply avoided taking part in the process.⁵⁸

Power considerations affected also the timing the executive chose to share information about the facility with the Israeli public. At least twice, in July and September 2004, the government presented, or leaked, crucial aspects of the compensation in order to counter effective moves by actors that opposed the settler removal.⁵⁹

3. *A Larger Number of Stakeholders*

Politicization of the claims and assistance facility expanded the number of stakeholders. Beyond the two immediate parties, the designers and the potential claimants, the process of developing the facility attracted the involvement of right wing civil society groups, who opposed the disengagement, and environmental activists, who opposed the appropriation of preserved land for the creation of new communities for the relocated settlers.

The jurists' forum for Eretz-Yisrael was perhaps the most vocal civil society group that joined the process. It was launched by a group of volunteer lawyers who asked, and were invited, to take part in the legislative process, as they claimed to represent the settlers. The forum's members advocated vigorously for unattainable levels of compensation for the settlers, which participants in the policy process saw as politically motivated and part of an opposition to the removal of settlers altogether.⁶⁰

57. Tzvi Zarchaya, *A Further Setback for Sharon*, HAARETZ, Oct. 13, 2004 (Hebrew).

58. Tzvi Lavi, *Esek Bish*, GLOBS, Jan. 20, 2005, 6–7 (Hebrew).

59. A day after a 150,00 people strong "human chain" from Jerusalem to Gaza on July 25, 2004, the government published the set of principles that would guide the designers of the facility, and invited the media to attend the first meeting of a compensation board. Similarly, a day after Prime Minister Sharon's rival in the Likud, Benjamin Netanyahu, declared his support for a national referendum, on the Gaza withdrawal, the Israeli media published the full text of the proposed legislation of the relocation and compensation legislation. See: ANAT ROT, *THE SECRET OF ITS STRENGTH: THE YESHA COUNCIL AND ITS CAMPAIGN AGAINST THE SECURITY FENCE AND THE DISGAMMANT PLAN 195*, 208 (2005) (Hebrew)

60. Lavi, *supra* note 58.

From the other end of the spectrum, Israeli environmental groups attempted to hinder the compensation facility and opposed various government suggestions that settlers be allowed to develop new communities on land previously allocated for a nature reserve.⁶¹

4. *Limited Stakeholder Participation*

Perhaps the most significant effect of the politics that surrounded the claims and assistance facility was the disincentives it created for settler participation. The settler leadership viewed settler communication with the government regarding the claims facility as a potential threat to its goal of preventing the actual disengagement. The settler leaders were concerned that participation in the process would signal to the government that the settlers had given up the political fight, weaken their ranks as individual settlers would focus on their personal future rather than on the collective goal, and harm their public image.

The leadership took active steps. In the summer of 2004, a small group of settlers, including the CFO of the Gaza regional council, Eliever Ya'acov, began secret talks with the government in an effort to affect the shape of the claims facility. Ya'acov was joined by two other settlers from Gaza to conduct the talks, realizing that "it will be very hard to change the law, once passed." However, after a few months of constructive talks, discussions were halted when the Gaza settlers' political leadership terminated communications by notifying the government that Ya'acov and his friends do not represent the settlers.⁶²

In the spring of 2005, the Gaza settler action committee, created to prevent the relocation, committed 92% of the settlers to sign an oath of allegiance whereby they promised "not to take any compensation." The committee's chairman, Rafi Seri, declared in June 2005 that because the government might try to "tempt" the settlers through compensation, it was important to state clearly that "bribery and payment will not convince us to leave our homes."⁶³

Limited settler participation in shaping the claims facility hurt their interests and created inefficiencies in the government's resource allocation. The settlers' refusal to work with the government limited their input in developing post-injury remedies, contributed to a delay

61. Liat Ezer, *An Emergency Meeting Regarding Nitzanim*, NRG, Apr. 7, 2004, available at <http://www.nrg.co.il/online/35/ART/918/648.html> (Hebrew).

62. Ya'acov, *supra* note 56.

63. Nadav Shragai, *92% of the settlers: we will not take compensation*, HAARETZ, June 7, 2004, available at <http://news.walla.co.il/?w=/1/553118> (Hebrew).

in the delivery of assistance and compensation, and may have reduced the level of compensation awarded to them Nisan Solomianski, a member of the Knesset and a settler leader, admitted shortly before the relocation that the government was “9-12 months behind” in developing solutions to compensate the settlers’ loss, suggesting that the delay was a result of the government’s hesitation in developing the facility without settler input.⁶⁴ Ezra Sadan, an economic consultant who worked on compensation models for Sinai, Gaza, and Golan Heights settlers, argued that in the case of Gaza “the settlers shot themselves in the foot [by refusing to take part in developing the claims facility for ideological reasons] and the government used it.”⁶⁵

Looking back, both settlers and government officials reflected a similar sentiment. The head of the SELA agency, Yonatan Basi, said a few months after the relocation that “had we enjoyed cooperation [from the settlers] and prepared with them beforehand, we would have arrived to where we are now [in terms of assistance to the settlers] three or four months earlier.”⁶⁶ A settler interviewed after the relocation about his experiences, argued that the politicized refusal by settler leaders to fully collaborate with the government harmed the settlers’ interests: “I know for sure that if those who led [us] would have gone to the government and talk to the government. . .we would have gotten more.” Another relocated settler said that “we have to complain against our own leaders, that were not more involved in determining the conditions offered to those relocated.”⁶⁷

Lack of settler participation further hindered any government effort to respond to the intangible damage the settlers were about to suffer. While the designers were fully aware of the need to develop some compensation for this aspect of the injury. However, as a former official noted, “without settler input, we could not include any intangibles in the facility.”⁶⁸ Only in 2008 did the government address this aspect by supporting legislation that allowed for the creation of a memorial to the relocated communities.

The limited nature of settler participation in the design of the facility created a number of costly inefficiencies. For example, the

64. ISRAELI DEMOCRACY INST., ROUND TABLE: SOCIAL AND ECONOMIC CONSEQUENCES OF THE DISENGAGEMENT, June 22, 2005, *available at* http://www.idi.org.il/events1/RoundTableDiscussion/Pages/Events_RT_Forum_71.aspx (Hebrew).

65. Itai Rom, *The Level of Compensation*, GLOBS, May 29, 2008 (Hebrew).

66. KEREN TAMIR AND YAACOV BAR-SIMAN-TOV, *THE DISEGAMANGT FROM THE GAZA STRIP AND NORTHEN SAMARIA: EVACUATIION, COMEPNSATIOOPN, AND LEGITIMIZATION* 69 (2007).

67. *Id.* at 74.

68. Interview with former official (April 14, 2009) (on record with the author).

government was under the wrong impression that settlers were not interested in communal resettling. This belief was a result of inaccurate information provided by the small group of settlers who were willing to talk to the government and were not interested in such a solution. While the facility's designers included a section in the law that allowed for communal relocation, due to this inaccurate data and settler unwillingness to provide accurate information, the government made little progress in communal relocation. Once the relocation was concluded, the government learned that in fact most settlers preferred communal relocation. This circumstance forced the government to keep the relocated settlers in temporary housing, which cost the government far more than it had originally budgeted for. As noted, only in 2008 did the government secure legislation intended to develop faster processes in order to advance communal relocation. These inefficiencies explain, at least in part, the drastic increase in the cost of the compensation and assistance facility, from NIS 3 billion to NIS 4.3 billion.⁶⁹

5. *Challenges for Individual Agents*

Finally, political conflict effected some individual agents that represented both the state and the settlers. The settlers' agents, such as their leaders in Gaza as well as their representatives in the *Knesset*, faced a tension between their two roles. On one hand, the elected supporters of the settlers sought to secure the personal well being of the settlers mostly through enhancing the monetary aspects of the compensation package in case they had to be relocated. On the other hand, these agents were committed to the settlement project and fiercely resisted the relocation from Gaza; thus, they tried to sabotage the process of developing a claims facility.⁷⁰

Individual agents that represented the government also operated in a complicated reality. Prime Minister Sharon appointed Yonatan Basi, a national-religious Jew (albeit not a settler) to head the relocation agency. Basi was vilified in pamphlets and in the pro-settler media,⁷¹ and faced significant social pressure in his private surroundings. Due to relentless criticism, just a few months after the

69. Klot *supra* note 2, at 3. This was equivalent to a USD 710,000,000 to USD 1,010,000,000 on July 10, 2007.

70. Shragai, *supra* note 63.

71. In a letter that was made public a right wing activist, Nadya Matar suggested that Mr. Basi's actions are similar to actions of Jews that liasoned between the Nazis and Jewish communities under occupation. See: Efrat Weis, *Matar to Basi: You are a Modern Version of the Judenrat*, YNET, 11 Nov. 2004 (Hebrew).

removal of the settlers, he was, in effect, forced out from his community, Kibbutz Tirat Tzvi.⁷²

IV. CONCLUSION AND FUTURE RESEARCH

The Gaza claims and assistance facility belongs to the small class of cases where a government developed a compensation mechanism in order to redress a future injury that the government itself was about to cause. Other cases that fall into this class include, for example, population resettlement for development purposes, or compensation offered to sectors in a national economy that are about to lose as a result of an international trade agreement. In the case of the Gaza facility, the fact that the hand that was about to inflict the injury was also the hand that developed the claims facility, and that both actions were done in parallel, dragged the claims facility into a politicized space. It put the settlers in an impossible situation of wanting to prevent the injury in the first place while still receiving adequate compensation should the injury be unstoppable. Conversely, this situation allowed the government to use the facility as part of its effort to secure legitimacy for the injury, itself a highly contested public policy. The compensation facility, therefore, had become a part of the debate about the injury, and not simply a mechanism for delivering goods to those affected by it. Politicization had a profound effect on the Gaza facility. First, it eroded the transactional, “single case” nature of the facility. In part, stakeholders made calculations that went beyond the specific dispute and did not view the facility as a single transaction but as part of an ongoing process. Second, it introduced power-based considerations in a facility that was intended to employ an interest-based rationale. Third, it expanded the number of stakeholders and created disincentives for the injured party to assist in the development of the claims facility. The result was greater inefficiencies: the injured party’s interests were not fully met, while the government deployed more resources than it had originally planned. Finally, the politicized facility created significant personal challenges for agents of both the government and the injured party.

While politicization was a result of an authentic clash over a contested government policy, it was intensified by a set of institutional, strategic, and temporal conditions. Therefore, future designers could—by shaping these conditions—diminish the negative effects of politicization on a claims facility. One possibility would be to insist on

72. Hagai Huberman, *Basi to Relocate to Temporary Housing*, ARUTZ 7, Jan. 8, 2007, available at <http://www.inn.co.il/News/News.aspx/158211> (Hebrew).

greater institutional separation between injury instigator and compensator—a separation that will signal clearly that trying to manipulate the facility will have no effect on the anticipated injury. A future designer could circumvent the sequencing problem by launching the design process only after an injury has occurred. There is a political cost for such an approach in terms of legitimacy, but as the Gaza case shows, it may lead to greater efficiency in delivering compensation.

Designers should also strive to separate a current injury and its remedy from the prospect of a future one. The shadow of a future West Bank relocation hung over the Gaza relocation and informed the responses of some of the settlers to the claims. Had the Israeli government made clear that the injury they were about to inflict was a contained, single act, that will not be repeated, settler leaders would have had less of an incentive to hinder the creation and implementation of the claims facility.

Yet, even if all the suggestions above have no effect, and politicizing does affect a facility, future designers can mitigate some of the consequences. Governments can obtain information regarding injured parties' needs, even if the latter groups prefer not to communicate with the government. Governments can use third parties to gain a better understanding of an injured party's needs. Technology can also be used to allow potential injured individuals to share their perspectives directly with designers in order to avoid peer pressure against doing so. The Israeli government did indeed offer an online option for settlers to comment on the draft legislation, but such efforts should be enhanced in a highly politicized environment. Finally, both designers and injured parties should recognize the high personal toll inflicted on the individuals they elect to work on shaping a politicized facility. Governments should find ways to limit such personal costs by selecting individuals that are not as vulnerable, or at least find ways to compensate them for the personal cost incurred. Short of that, compensators and injured parties, may face serious difficulties in recreating agents on their behalf.

For scholars, the politicization of a claims facility expands the research agenda of scholars. The view from the Gaza facility suggests that a politicized claims facility is no longer, as Francis McGovern suggests, simply an entity that processes a "claim against a funding source,"⁷³ but rather a social institution that is established to serve a number of different tasks beyond compensation.

73. McGovern, *supra* note 5, at 1361.

More work is needed in order to identify the specific mechanisms by which political considerations affect claims facilities. Moreover, we need to assess the effect of politics, as compared to other "external" variables, such as precedent,⁷⁴ in the shaping and implementation of claims facilities. Are the two contradictory or complementary in their effect on claims facilities? What are the specific mechanisms in which they together, and by themselves, affect claims facilities? Can politics constrain, or enhance, the use of precedent? Which injuries are more prone to lead to a precedent-led facility and which to a politics-driven one?

Like many claims facilities, the Gaza compensation and assistance scheme is a legal response to human pain; and the relocation of thousands of settlers is a tragedy for those who were affected by it regardless of where one stands with respect to the morality and legality of the Israeli settlement project. Gaining a better understating of what affects the creation of a claims facility is perhaps the little we can do, as scholars, to contribute to the alleviation of human suffering. In the specific case of the Israeli settlements, the connection between settlement removal and the feasibility of a two state solution to the decades long Israeli-Palestinian conflict, gives an even greater significance for identifying the politics behind the policy.

74. See e.g., David J. Bederman, *Historic Analogies of the UN Compensation Commission*, in THE UNITED NATIONS COMPENSATION COMMISSION 257 (Richard B. Lillich ed., 1995); Charles N. Brower, *The Lessons of the Iran-U.S. Claims Tribunal Applied to Claims Against Iraq*, in THE UNITED NATIONS COMPENSATION COMMISSION 15, 15 (Richard B. Lillich ed., 1995).