

The Policy of the Military Attorney General: The “Intifada Factor”

During the Intifada, the MAG sought to create the impression that it operated according to two basic principles, as described by the Military Advocate General during 1986-1991, Brigadier Amnon Strashnov, in his book *Justice Under Fire*.¹ The first was “to provide the IDF and the security forces the widest range and quality of legal tools in order to allow them to fulfill their difficult task of suppressing the uprising.”² The second was “to protect the rights of the region’s population. This principle was expressed, among other ways, in the consistent and vigorous struggle of the MAG’s office and the entire judicial system to combat exceptional incidents that occurred in the conduct of soldiers, and in the protection of the rights of the individual through the strict prohibition of violating these rights unless this was according to the law...”³

When examining offenses by soldiers, Strashnov claimed that the judicial system applied a concept that was defined as the “Intifada Factor.” Due to the difficulties faced by the troops during that period, Strashnov writes, “we established lenient standards relative to previous periods. This frequently expressed itself in the charges we used against the soldiers, the severity of the punishment the military prosecutors demanded, and especially in the considerations that guided us when deciding between placing a soldier on military trial, or opting for a disciplinary court or administrative measures.”⁴ Strashnov continues: “We were quite often satisfied with a less serious charge, even if the evidence would have allowed us to bring a more severe one. Even after the charge-sheets were submitted, our position was to accept a guilty plea on a lesser charge, if the defendant was willing, so as to avoid pursuing the matter to the fullest extent of the law, both in terms of the charges and the punishment.”⁵ In other words, the law enforcement policy vis-à-vis the soldiers was supposed to take into account “the soldiers’ difficult position, given the provocations and the difficult tasks they were assigned, to which they were untrained and unfamiliar.”⁶

The leniency in considering who should be brought to trial was not the only aspect of the “Intifada Factor” policy. An analysis of the cases in this report (and others), shows that the

¹ Strashnov, Amnon, *Justice Under Fire – The Judicial System During the Intifada*, Yediot Aharonot Publishers, 1994, Tel Aviv.

² *Ibid.*, p. 11.

³ *Ibid.*

⁴ *Ibid.*, p. 158.

⁵ *Ibid.*, p. 161.

⁶ *Ibid.*, p. 158.

principles behind the policy permeated down from the MAG himself to the military prosecutors of each regional command, from there to the MPI investigators, and then on to every last soldier, passing through each of the chains of command.

The MPI investigators could not have continued to conduct improper investigations unless they had received de facto authorization from the MAG's office. Only in rare occasions did the military prosecution send incomplete investigations back for completion; in most cases the prosecution accepted the MPI investigation results as final, and in the absence of suitable evidence closed the case without taking action.

The widespread implementation of the "Intifada Factor" illustrates a simple fact. The cases covered in this report are from the years 1988-1994. Despite substantial changes in the Intifada and in the political developments in relations between Israel and the Palestinians, there has been no visible change in the policy. The same patterns in the investigations and decisions to not prosecute are apparent throughout the period under discussion, and remain so even today.

In September 1997, HaMoked filed a High Court of Justice (HCJ) petition on behalf of five Palestinians, in which the Central Command Attorney General is asked to allow HaMoked to view the contents of certain investigation files already complete. The investigations were undertaken in response to complaints made by the Palestinians. In its petition, HaMoked argued that the delay in handing over the files is in violation of the law, which demands that the CCAG operate within a reasonable time frame. HaMoked further argued that the investigation material is necessary to determine if lawsuits should be filed against the State and the soldiers involved, and therefore if the material is not forwarded, the plaintiffs cannot receive any compensation for their damages. The case is pending.

The Law for Denying Compensation to Palestinian Victims of the Security Forces

The long-standing “Intifada Factor” policy has not been confined to ensuring that soldiers do not stand trial for crimes committed against Palestinians. It also hampers or prevents the Palestinian victims from suing for compensation for destruction of property or physical and mental harm. The compensation lawsuits require the plaintiff to establish the responsibility of the State for the damage that was caused. Since in many cases there are no army records regarding the incident or the units involved, while in other cases the investigation was sloppy and incomplete, or the files were lost, the injured party was denied the ability to demand compensation.

In some of the cases, plaintiffs chose to pursue their claims through HaMoked. Some chose to submit their claim to the Staff Officer for Claims in the Ministry of Defense, while others preferred to file a lawsuit in Israeli courts. The defendants were the State of Israel and the IDF, and occasionally individual soldiers actually involved in the incident. In other cases the plaintiffs chose to use private attorneys, or not to sue for damages at all.

Surprisingly, the State of Israel has tended to agree to compromise agreements with the plaintiffs, even in cases where HaMoked did not have conclusive proof regarding the identity of those responsible for causing the damage. The amounts that the State agreed to pay in these settlements were not high, however, and on occasions ludicrously small given the kind of injustice for which they were meant to compensate; but the willingness to pay some amount shows that the State of Israel is well aware of its responsibility. The policy of reaching compromises also shows that the State prefers to reach settlements quietly rather than have cases resolved in open court, with the public and media interest this arouses.

Adding insult to injury

The present government intends to prevent the possibility of Palestinians receiving compensation by means of a law entitled “The Law for Processing Lawsuits Against the Security Forces Operations in Judea, Samaria, and Gaza Strip, 1997” (see Appendix B). The proposed law is a serious perversion of justice, contradicts tort law in Israel and the civilized world, and is completely inconsistent with the standards of international law.

The main justification that the State offers for seeking to pass the law is that the Palestinian claims against the State constitute a considerable financial burden. The State notes that as of April 1997, over 4,000 lawsuits have been filed (700 of which are still being processed by the courts. In the past year alone, 600 lawsuits were filed. If one takes into account the

number of dead and wounded during the Intifada (approximately 1,000 Palestinians killed and 18,000 injured – then the State will indeed be obliged to pay a considerable amount of money.

Secondly, it is argued in the explanatory comments in the law that “in some cases, the State has no way of examining the claims regarding the involvement of the security forces in specific instances, either in terms of responsibility for the incident or in terms of the extent of the damages. During the Intifada the State had difficulty in reaching the claimants’ residence in the territories, to determine the circumstances of the injury being claimed and the extent of the damages. The process of investigating the claim was in itself life-threatening, and was frequently avoided for that reason.” In addition, “difficulties are also encountered in locating witnesses for the State from among the security forces and bringing them to court. Part of the difficulty in locating them stems from the rapid turnover of personnel in the field. It is also very difficult to retroactively locate soldiers involved in some local field activity, sometimes years after the event occurred.” This report shows how Israel’s “Intifada Factor” policy is now going under the name of “difficulties” that are being used to justify the State’s attempt to evade its responsibility to pay compensation.

Lastly, the State is trying to use an argument relating to its administrative authority. “Another difficulty in the same context,” claims the proposed law’s preface, “is that the medical care given to the injured was carried out in medical facilities that are not in Israel, and to which there is no access today for the State. This fact creates difficulties in verifying the accuracy of the medical reports.” This is not true, however: the hospitals in the territories, private as well as government, were subject to the Civil Administration’s supervision. Therefore, in the framework of investigating an injury or death, there was no difficulty in locating the hospital, the responsible physicians and nurses, and the medical documentation (which met the standards of the Civil Administration).

The following are the main points of the proposed law:

- The High Court has defined “warlike activities” (for which the State is exempt from liability to pay compensation) as actual acts of war, such as “gathering the battle forces, military offensives, exchanges of fire, explosions, etc.”¹ The proposed law attempts to expand this definition so that the exemption from compensation will cover “any operational activity of the Israel Defense Forces whose purpose is to combat or prevent terror, and any other action to maintain the peace and preventing hostile actions and revolt in circumstances of danger to life or limb of the Israel Defense Forces.” In other words, almost any action carried out by IDF troops during or after the Intifada will be covered under the new definition, excluding the possibility that the State will have to compensate for damages caused by its security services (even if the victim is innocent of any hostile activity, and even if the damage was a result of IDF negligence or misbehavior). Whether the law’s sponsors intended it or not, this blanket exemption will also cover instances of Israelis

¹ Chief Justice Meir Shamgar, in CA 623/83, *Levy vs. The State of Israel*, Piskei Din 40(1) 477, 479

harmful as a result of IDF activity in the territories. These include public bus drivers, phone and electric company technicians, journalists, lawyers, and of course all those Israelis who reside permanently in the territories. None of these people will be able to sue the State for damages.

The only exception is when an IDF soldier has been convicted of causing damage maliciously. However, in most cases, as seen clearly in this report, not only are soldiers not convicted, they are rarely even brought to trial.

- Anyone who in the past was convicted of terrorist activities against the IDF or civilian population will not be eligible to claim compensation – even if the incident which led to the demand for compensation is completely unconnected to the claimant's previous conviction. This constitutes double and retroactive punishment.
- The statutory time limit in which claims can be filed has been shortened from seven years – the normal period for tort claims – to only one year. If the State is unable to receive information from the Palestinian Authority that will help its case vis-à-vis the plaintiff, the victim will pay the price: the State will then be permitted to reject the claim.
- The amount of monetary compensation victims will be eligible for is to be limited, in contrast to the legal principle that compensation is determined by the actual damage. In addition, if the victim was crippled, he/she will receive a one time lump sum based on payment until the age of 65, rather than the usual method of providing a monthly stipend based on the severity of the handicap. Anyone whose injury resulted in a handicap of less than 10% will not be compensated at all.
- The law will not only affect claims based on injuries after the law's passage, but also on claims filed in the future for injuries that have already taken place.

If passed, the law will turn standard judicial procedure, morality, and civilized standards upside down. If until today there was still some measure of compensation for Palestinian victims, the moment the bill becomes law – if not before – they will be left without any right to sue for damages. Even without the passage of the law, Palestinians were deprived of many rights, and their lives, property, and well being were often violated. This situation is now in the process of being legalized, sanctifying arbitrary rule in the guise of a legal and democratic process.

What about human dignity and liberty?

Four months before the bill passed its first reading in the Knesset (March 20, 1997), its initial draft was sent to various interested parties, such as human rights organizations – HaMoked among them. In a statement issued on April 10, 1997, the human rights community vigorously opposed the content and ethos of the law, and the changes it would bring were it to be passed.

The human rights community's statement noted that "the proposed law retroactively impairs many basic human rights, and removes necessary checks on the security forces. These checks are in place to protect respect for life and personal safety. The law completely fails to meet

the standards set by Basic Law: Human Dignity and Liberty.² It contradicts basic principles of the legal system in Israel in general, and the principles of tort law in particular. It is contrary to the rule of law.” (See Appendix C).

Following the harsh criticism from Israeli and international human rights organizations and jurists, the bill was revised. Its guiding principle however, the granting of immunity to the State in cases where it is being sued for damages by Palestinian victims, remains. The bill passed its first reading in the Knesset and will be brought for the second and third readings in the current Knesset session, which began on November 2, 1997.

HaMoked demands that the proposed law be withdrawn and discarded, to prevent the irreparable damage to Israeli legal system. Human dignity, the sanctity of life, and the right to personal safety are among the underlying values of the State of Israel. The role of the law is to defend those values. If the law denies compensation to a child crippled by IDF soldiers who acted negligently; if the law determines that IDF troops do not have to be careful to avoid harming that child; if the law does not grant that child the means of recovery and rehabilitation; then the words of the Basic Law regarding the “universal and Jewish values of the sanctity of life and human dignity” become meaningless.

² While Israel has no written constitution, the Knesset has passed a series of “Basic Laws” that enjoy quasi-constitutional status.

Appendix B: Proposed Law for the Handling of Claims

RESHUMOTH PROPOSED LAWS

July 1997

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Proposed Law for the Handling of Claims arising from Activities of Security Forces in Judea and Samaria and the Gaza Strip, 5757-1997

A proposed law is hereby published on behalf of the Government:

Introduction

The need for the Handling of Claims arising from Activities of the Security Forces in Judea and Samaria and the Gaza Strip Law, 5757-1997, hereby proposed, results from the uniqueness of the tort claims filed against the State in recent years. These claims resulted from events that occurred during the "intifada" in Judea and Samaria and the Gaza Strip (hereafter - the areas), and contend that the Israel Defense Force and other security forces caused bodily and property damage to the claimants, residents of the areas.

Since the Six-Day War, Israel has administered the areas by means of "belligerent occupation." It established a Civil Administration, headed by a military commander, in each area. The military commander's authority derived from the rules of public international law dealing with belligerent occupation. Under international law, the military commander has the task of maintaining security and order in the area, and of protecting the well-being and security of the IDF forces and civilians there.

In December 1987, widescale riots and disturbances, which were termed "the intifada," began. They were organized in various frameworks by commands located within and outside the areas, which coordinated and directed the activities in the field. The intifada was characterized by mass demonstrations, which included burning of tires at road intersections and along thoroughfares in order to prevent access to towns and villages, strikes, throwing of stones and Molotov cocktails at IDF forces and Israeli civilians, stabbings and use of other non-firearm weapons, and use of firearms.

The intifada had a dual nature: violent attacks on Israeli civilians, soldiers, and other security

* Translated by B'Tselem

personnel, and as propagandist activity, such as dissemination of circulars, hanging of flags, slogan-writing, and the like. The common denominator uniting the intifada's various manifestations is the denial of the legitimacy of Israel's, and its security forces', control in the areas. The intifada was, therefore, a violent expression of a collective struggle with political ends, whose purpose was to hinder Israel's control in the areas, in order to cause it to withdraw from them.

The aforementioned reality with which the security forces were confronted was complex: the activity of the residents was not paramount to an organized army, but it was organized. Sometimes the activity involved large numbers of persons, and sometimes it was conducted in small groups; sometimes it bore a demonstration-like character, and sometimes it had the character of a pinpointed, violent, and designated action, such as firing at soldiers or their vehicles, throwing Molotov cocktails where soldiers were concentrated, throwing concrete blocks from roofs in order to seriously injure particular soldiers. Sometimes, these kinds of actions were combined with one another, and were difficult to identify as an action of a certain type, some of the civilians taking part in the violent acts and some not, and there was never a guarantee that an event that began as a demonstration might not end in a violent activity. This situation created special hardships and risks for the soldiers.

Already at the beginning of the intifada, residents of the areas began to submit tort claims against the State for compensation for bodily and property damage caused by the security forces. At first, claims were submitted infrequently, and then, as the years passed, at an increasing pace. In addition to the claims filed with the courts, many compensation claims are pending before the Defense Ministry, in preparation for the filing of suit.

To date, more than 4,000 tort claims have been filed against the State, of which more than 700 are currently being heard in courts throughout the country. In the past year alone, more than 600 suits have been filed. Other claims are in the initial stage of review at the Defense Ministry, and others have been settled or a court judgment given. According to IDF records, during the intifada, some 1,000 Palestinians were killed and some 18,000 wounded.

Under section 5 of the Torts (State Liability) Law, 5712-1952, the State is exempt from liability for damages resulting from "combatant activity of the Israel Defense Forces."

The Supreme Court interprets the "combatant activity" exemption narrowly, covering only activity where war is clearly involved (see, e.g., Civ. App. 623/83 Asher Levy v. State of Israel, Piskei Din 40(1) 477).

The Supreme Court has not yet ruled on whether section 5 of the law applies to activity of security forces during the intifada. A number of appeals on this question and related matters are currently pending before the Supreme Court. The President of the Supreme Court consolidated the various cases, and ordered that the hearing take place before a nine-judge

panel. In a preliminary hearing held several months ago, the court expressed its opinion that it is preferable that the legislature resolve the question of compensation of residents of the areas for injuries caused by the security forces during the intifada.

The intifada was, as previously stated, a violent, planned, and organized struggle, at least in part, in the context of a conflict between nations. This conflict included intentional injury to soldiers and civilians. The security forces, called upon to impose order and to protect the security of the areas, operated under difficult conditions and faced actual risk of death and bodily injury to an extent justifying those activities to be included within "combatant activity."

The State is not liable for damages resulting from such activity. War is a violent struggle between nations, conducted in numerous and varied ways. War wears many faces. Sometimes it is full-blown, and sometimes it is conducted in a different manner of violent activity. The proposed law is intended to clarify and stipulate that the exemption for "combatant activity" also applies to activities of security forces in the areas, where the activities were conducted in the context of the struggle against terrorism and to prevent insurrection and hostile acts against security forces and civilians.

The claims described above create numerous procedural and evidentiary problems for the State, with which it frequently is unable to cope using existing legal tools. In some of the cases, the State lacks even the smallest lead to check the claims regarding the involvement of security forces in the relevant incident, both as regards responsibility for the event and as to the extent of the damages. During the intifada, the State had difficulty reaching the area in which the claimant, a resident of the Territories, lived, in order to investigate the circumstances in which the injury occurred and the extent of the damages. The investigation itself involved danger to life, and often could not be conducted for this reason. Upon IDF redeployment in the areas where the Palestinian Authority has established control, the State, in practice, has no access to the area where the alleged injuries occurred.

An additional difficulty in the same context is that injured parties were treated in medical facilities outside of Israel, to which the government also has no access, making it difficult to investigate the reliability of the injured party's medical reports. The body-snatching, from hospitals, of Palestinians killed precluded clarification of whether they had been injured by IDF soldiers; the soldiers were unaware of some of the injuries, and such cases were not, therefore, investigated. Local hospitals have only partial records, and even these records do not necessarily help in identifying who caused the injury. Even if the IDF possesses relevant records, in most cases the records are not sufficiently clear to conclusively describe the nature of the incident or its consequences.

There is also a difficulty in locating, and bringing to court, witnesses on behalf of the State. Locating witnesses is difficult because there was a very high turnover of forces in the field,

and it is extremely difficult to locate, sometimes many years after the event, the soldiers who participated in a specific activity. Even if the soldiers are located, when their testimony is requested, they usually are no longer soldiers, some of them are abroad, and it is difficult to bring them to court to give testimony. Even if they are located, and even if they appear to give testimony, because they participated in many similar events within a short period of time, they often are unable to remember properly a given event. Because a large segment of the suits were filed long after they occurred, the difficulty of remembering the incident is even more problematic.

Under this state of affairs, the State is unable to defend against these claims. Furthermore, the current situation encourages fictitious and fraudulent claims against which the State lacks the tools to distinguish between such claims and legitimate claims.

In addition to the aforementioned considerations, the agreements with the PLO, which provide for mutual recognition and the obligation to stop violent acts between the parties, are also relevant. In the framework of the agreements, the IDF forces withdrew from the Palestinian town and population centers, and Israel transferred to the Palestinian Authority all the powers concerning the Palestinian population.

During a period of armed struggle between nations, every side must bear its damages and care for its injured. Israelis injured during the intifada clearly have no practical possibility of claiming compensation for damages from those responsible, and the State compensates them insofar as they are victims of terrorist acts. When the agreements with the Palestinians were signed, an entirely new and different political climate was created between the State of Israel and the Palestinians in the areas, which climate also justifies turning over a new leaf in the matter under discussion.

Justice Ministry's Statement of Background and Explanation of Proposed Law for the Handling of Claims arising from Activities of Security Forces in Judea and Samaria and the Gaza Strip, 5757-1997

Definitions

1. In this law –

"region" – each of the following: Judea, Samaria, and the Gaza Strip;

"court" – a court hearing a claim pursuant to section 2;

"the Council," "the Agreement" – as defined in the Law Extending the Validity of the Emergency Regulations (Judea and Samaria and the Gaza Strip – Adjudication of Crimes and Legal Assistance), 5728-1967;

"the State" – the State of Israel, including the Israel Defense Forces;

"act" – includes omission;

"injured person" – a person who suffered damage as a result of an act committed in the region by the Israel Defense Forces;

"Israel Defense Forces" – including other security forces of the State that acted or act in the region including all those who act on their behalf;

"minor" – a person under eighteen years old.

Claim against the State

2. (a) A claim for damages against the State for damages suffered as a result of an act performed in the region by the Israel Defense Forces (hereafter – "claim") will be heard in accordance with the provisions of this law.

(b) The provisions of this law shall not apply to a claim to which Chapter 4 of the Law Implementing the Agreement concerning the West Bank and Gaza Strip (Judicial Powers and other Provisions) (Legislative Amendments), 5756-1996, applies, or to a claim for a road accident within the meaning of the Compensation of Persons Injured in Road Accidents Law, 5735-1975, in which a motor vehicle of the Israel Defense Forces,

Explanatory Comments

Section 1: The definitions section. The term "Israel Defense Forces" includes all of Israel's security forces who operated or operate in the areas, including the Israel Police Force and the General Security Service, and those who operate on their behalf, i.e., also security forces personnel, insofar as they are sued individually.

Section 2: The proposed law stipulates that tort claims against the State resulting from activity of security forces in Judea and Samaria and the Gaza Strip shall be heard in accordance with the special provisions of this law concerning such claims.

The law does not apply to claims to which chapter 4 of the Implementing the Agreement concerning the West Bank and Gaza Strip (Judicial Powers and other Provisions) (Legislative Amendments) Law, 5756-1996, applies, i.e., claims resulting from activity of the civil administration in the areas within the domains of responsibility transferred to the Palestinian Authority in accordance with the Interim Agreement, such as claims for medical malpractice, as regards which the aforementioned law stipulates that courts shall not hear.

whose registration number or identity of its driver at the time of the accident is known, unless the accident occurred incidental to hostile activity of the injured person against the Israel Defense Forces or civilians.

Combatant activity

3. As regards the applicability of section 5 of the Torts (State Liability) Law, 5712-1952, in claims under this law, any operational activity performed by the Israel Defense Forces intended to combat or prevent terrorism, and any other activity by the Israel Defense Forces to safeguard security and prevent hostile acts and insurrection, in circumstances entailing risk of death or personal injury, shall be considered "combatant activity," unless a person was convicted for malicious infliction of the injury that is the subject of the claim.

Denial of claim 4. The court may, for reasons it shall record, deny a claim, wholly or in part, if it is proven that –

Explanatory Comments

The law also does not apply to a claim resulting from a road accident in which a motor vehicle of the security forces whose registration number or identity of its driver is known, unless the accident occurred incidental to hostile activity of the injured person against the Israel Defense Forces or civilians.

Section 3: The intifada was, as previously stated, a violent, planned, and organized struggle, at least in part, in the context of a conflict between nations. This conflict included intentional injury to soldiers and civilians. The security forces, called upon to impose order and to protect the security of the areas, operated under difficult conditions and faced actual risk of death and bodily injury, to an extent justifying those activities to be included within "combatant activity." The State is not liable for damages resulting from such activity. War is a violent struggle between nations, conducted in numerous and varied ways. War wears many faces. Sometimes it is full-blown, and sometimes it is conducted in a different manner of violent activity.

The proposed law is intended to clarify and stipulate that, as regards claims under this law, the exemption for "combatant activity," mentioned in section 5 of the Torts (State Liability) Law, 5712-1952, applies to activities of security forces in the areas, where the activities were conducted at the risk to life or bodily injury in the context of the struggle against terrorism and to prevent insurrection and hostile acts against security forces and civilians. This definition includes, inter alia, the activity of security forces to quell riots and disturbances and to disperse demonstrations that entailed stone-throwing, throwing of Molotov cocktails, and also occasional gunfire, where the security forces risked death or bodily injury. The defense granted by this section does not apply to a member of the security forces who has been convicted of maliciously causing the injury that is the subject of the claim.

As the Jerusalem District Court recently held in a tort action of the type being discussed, which was brought by a resident of the areas who had been injured by security forces: "One of the objectives lying at the foundation of the defense for combatant activity is to prevent restricting the discretion of the decision-maker in the field... These decisions must be made under circumstances of extreme pressure, characteristic of war. In such circumstances, the legislature prefers releasing the decision-maker from the regular rules of tort liability in order to enable attainment of the objectives of military activity." (Civ. Compl. 0209/93, Matar Mahmud Shaban v. State of Israel (judgment dated 1 July 1997, not yet published).

Section 4: The court may, for reasons it shall record, deny a claim, wholly or in part, if the injury

(a) The injury occurred incidental to serious hostile activity committed by the injured person against the Israel Defense Forces or civilians.

(b) The injured person was convicted of committing a serious terrorist act against the Israel Defense Forces or civilians.

Payment for humanitarian reasons

5. The court may, for reasons it shall record, order payment of compensation to the injured person in an amount that shall not exceed the amount set in section 10, even where the exemption under section 3 applies, if it is proven that, under the circumstances of the incident, humanitarian reasons justify such compensation.

Requirement of notice

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

(b) The notice shall be provided within sixty days from the date the act occurred; however, where, because of the health of the injured person or his or her guardian, or other justifiable circumstances, the injured person was unable to provide the notice within the time mentioned above, the notice shall be given within thirty days from the date in which the preventive cause was removed.

Explanatory Comments

occurred incidental to serious hostile activity committed by the injured person against the security forces or civilians, or if the injured person was convicted of committing a serious terrorist act against the security forces or civilians. The reason for such denial is that the State does not consider itself liable for injuries suffered by a person who perpetrated a severe hostile or terrorist act against security forces or civilians.

Section 5: The court is granted discretionary power to order compensation of injured persons even in cases where the "combatant activity" exemption under section 3 applies. The compensation is to be granted where the court is convinced that special humanitarian reasons justify the payment of compensation. The exemption under section 3, as a general norm, is liable to apply also in cases where the denial of compensation is found to be unjust. The purpose of granting this power to the court is to prevent injustice in those instances where the court is of the opinion, for reasons it shall record, that special humanitarian circumstances exist. The amount of compensation the court is empowered to grant may not exceed, in any case, the compensation amount mentioned in section 10.

Section 6: The law requires that the injured person, or a person on his or her behalf, forward written notice, in a manner and at the times mentioned in the law, concerning the act that is the subject of the claim. The purpose of this requirement is to enable the security forces to investigate, at a time close to the events, the circumstances in which the incident and the alleged injuries occurred, and to prevent allegations of injuries caused by security forces being raised long after the alleged event occurred. This provision does not apply, for obvious reasons, to a claim whose cause of action is an act that occurred prior to the date of commencement of the law, as set forth in section 12(b) of the law.

(c) Where the injured person dies and notice had not been given during the deceased's lifetime, and the time for providing the notice under sub-section (b) has not yet passed, the notice shall be provided by the deceased's dependants or his or her estate or by another on his or her behalf within sixty days of the deceased's death.

(d) Notwithstanding the provisions of this section, the court may, for special reasons that it shall state, hear a claim concerning an act notice of which was not timely provided.

Limitation of actions

7. The court shall not hear a claim filed more than a year after the date upon which the cause of action of the claim arose; 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 the claim earlier.

Lack of possibility to defend

8. If it is proven to the court that the State has been denied a fair opportunity to defend the claim because the Palestinian Council does not comply with the provisions concerning legal assistance as set forth in Article IV of Annex IV of the Agreement, the court may deny the claim.

Rules of evidence

9. (a) The provisions of sections 38 and 41 of the Torts Ordinance shall not apply in the hearing of a claim under this law.

(b) In reaching a decision on a claim, the court shall consider, inter alia, the support or lack of support for the injured person's version of the

Explanatory Comments

Section 7: The proposed law stipulates a one-year statute of limitations, the court being empowered to extend this period for an additional year where it is convinced that the plaintiff did not have a reasonable opportunity to file the claim on time. The purpose of this provision is to collect and complete handling of these claims as soon as possible, and to enable the relevant State authorities to prepare for investigating the contentions set forth in the claims within the shortest possible time. The requirement of providing notice under section 6 of the law does not apply, as previously mentioned, to a claim whose cause of action is an act that occurred prior to the date of commencement of the law.

Section 8: In accordance with Article IV of Annex IV of the Interim Agreement, entitled "Legal Assistance in Civil Matters," the two parties to the agreement agreed to assist the other in matters related to legal assistance, such as issuing court documents, including orders to appear and give testimony. Legal assistance arrangements are often necessary to enable the State to defend claims of the kind under discussion. It is proposed, therefore, to empower the court to deny a claim where it is convinced that the State has been denied a fair opportunity to defend the claim because the Palestinian Authority does not comply with the agreement's provisions concerning legal assistance.

Section 9: Subsection (a) – in claims of the kind under discussion, courts often switch the burden of proof by applying section 41 of the Torts Ordinance ("res ipsa loquitur"), and at times pursuant to section 38 of the Ordinance ("dangerous implement"). Transferring the burden of proof under the aforementioned section 41 is intended to facilitate the plaintiff's proof of his or her case in circumstances where the plaintiff

circumstances of the incident by one or more of the following:

- (1) Inclusion of the injured person in the lists of injured persons prepared, at the time of the incident, by the security forces or the Civil Administration in the region;
- (2) Record of a complaint filed with the security forces or the Civil Administration;
- (3) Decision given in a judicial or disciplinary proceeding relating to the same incident;
- (4) Any testimony or other official document of the security forces.

*Compensation
for personal
injuries*

10. (a) Compensation for personal injuries in a claim under this law shall be awarded in a judgment ordering a one-time payment.

(b) The judgment for compensation shall be made in accordance with the degree of permanent functional disability of the injured person following the injury suffered at the rate of one percent of the average salary for each percent of the aforementioned degree of disability, multiplied by the number of months the injured person would have earned an income from the time of the incident until he or she reaches the age of sixty-five; where the injured person is a minor – from the age of eighteen until he or she reaches the age of sixty-five.

Explanatory Comments

does not know, and is incapable of knowing, the circumstances causing the injury. In such a case, if the burden of proof is not switched, the plaintiff is liable to be unable to provide sufficient evidence, even though the complaint may be totally justified. The situation in the cases under discussion is different. It is inappropriate to assume that the State routinely has information concerning the circumstances in which the injury occurred; the opposite is true, since the State generally has inferior evidence, and the plaintiff most often knows the circumstances of the events. Switching the burden of proof in such cases is dispositive in many instances, resulting in the State's being found liable.

Application of section 38 to claims of the kind under discussion is unjustified, since it is applicable where the "dangerous implement" (weapon) caused the injury where it was held by another or has been abandoned, and not where it was held by the person who had been given control of it (Civ. App. 751/68, Ra'ad v. State of Israel, Piskei Din 25(1) 197, 208). These are not the circumstances of the events involved in the complaints under discussion.

As regards subsection (b) – the proposed law instructs the court that, in determining the relevant facts of the case being heard, it must consider, inter alia, the support or lack of support for the injured person's version of the circumstances of the incident in the following: inclusion of the injured person in the lists of injured persons prepared, at the time of the incident, by the security forces or the civil administration in the areas; a record of a complaint was filed with the security forces or the civil administration; a decision had been given in a judicial or disciplinary proceeding relating to the incident; and any testimony or other document of the security forces or the civil administration.

Section 10: The proposed law stipulates that the payment to entitled injured persons or dependents is to be made by a one-time, capitalized payment in accordance with the calculation set forth in the section. The amount of compensation will mainly be determined in accordance with the regular rules of personal-injury

In this section, "the average salary" means the average salary in the area in which the injured person lived at the time of the commencement of this law, as the Finance Minister shall determine by order. The amounts in the order shall be revised on the first of January and the first of July of each year, according to the increase in the consumer price index.

(c) In addition to the compensation under sub-section (b), the court may order a one-time payment in favor of the injured person for pain and suffering and for medical and rehabilitation expenses, taking into consideration the customary medical and rehabilitation services in the region and their cost.

(d) Where the injured person died, the compensation paid to the dependants shall be calculated according to the provisions of this section, with the necessary changes.

(e) Where the injured person died and did not leave dependants, his or her estate shall be entitled to compensation in an amount that shall not exceed the amount determined by the Finance Minister and the Defense Minister, upon consultation with the Justice Minister and approval of the Constitution, Law, and Justice Committee of the Knesset.

(f) Compensation will not be ordered under this section if the degree of permanent medical disability does not exceed ten percent, unless the court finds a special reason to justify compensation.

Preservation of provisions

11. (a) The provisions of this law shall not detract from any defense or exemption relating to liability of the State or any of its agencies or any person who acted pursuant to law.

(b) The provisions of this law shall not detract from the provisions of law and defense enactments in the region concerning claims for damages suffered as a result of an act of the Israel Defense Forces in the region.

Explanatory Comments

tort claims, with the necessary changes resulting from the uniqueness of the kind of claims under discussion, such as the practical inability to investigate and set the actual loss of income of the specific plaintiff, and in a manner intended to establish a simpler and more efficient mechanism for awarding compensation.

The proposed law emphasizes that the compensation will be set according to the average wages in the area in which the injured person lived and in accordance with the medical and rehabilitation services in the areas, and their cost there.

Section 11: The proposed law does not detract from any defense or exemption relating to liability of the State pursuant to any other law, and is not intended to detract from the provisions of law and defense enactments in the areas concerning the handling of claims of the kind under discussion.

*Applicability
and transitional
provisions*

12. (a) This law shall also apply to claims whose cause of action is an act that occurred prior to the date of commencement of this law, whether suit was initiated prior or subsequent to its commencement, except as regards claims for which judgment was given prior to commencement of the law.

(b) The provisions of section 6 shall not apply to a claim whose cause of action is an act that occurred prior to the commencement of this law.

(c) As regards section 7, a claim whose cause of action is an act that occurred prior to the commencement of this law and the period for the filing of suit has not yet expired, the times set forth in the aforementioned section shall be counted from the date of the commencement of this law, provided that the period in which the suit must be filed would not be extended were it not for the provisions of the aforementioned section.

*Implementation
and regulations*

13. The Defense Minister is responsible for implementation of this law, and may, upon consultation with the Justice Minister, enact regulations relating to its implementation.

Explanatory Comments

Section 12: As regards subsection (a) – Since the objective of the law is to arrange the handling of claims arising from events most of which occurred during the "intifada," the proposed law also applies to claims whose cause of action relate to incidents that occurred prior to the commencement of the law, regardless of whether a claim has been filed with the court prior to commencement of the law, except for a claim where judgment has been given prior to commencement of the law, even if the judgement is under appeal.

As regards subsection (b) – The provisions of section 6, which concern the duty to provide notice, shall not apply, for understandable reasons, to a claim whose cause of action occurred prior to the commencement of the law.

As regards subsection (c) – A claim whose cause of action is an act that occurred prior to the commencement of this law and the period for the filing of suit has not yet expired, the new statute of limitation periods of section 7 will be counted from the date of the commencement of this law. However, the law does extend the normal period within which the suit must be filed, such as where less than one year remains until the end of the period within which suit must be filed were it not for the provisions of the aforementioned section.

Section 13: The Defense Minister, being in charge of the security forces in the areas, is responsible for implementation of the proposed law, and may, upon consultation with the Justice Minister, enact regulations relating to its implementation.

Appendix C: Response of Human Rights Organizations to the Draft Law

Response of Human Rights Organizations to the Draft Law Denying Residents of the Occupied Territories the Right to Claim Compensation

On 20 July 1997, the Israeli government endorsed the draft law entitled Handling Claims arising from Activities of the Security Forces in Judea and Samaria and the Gaza Strip, 5757-1997.

We, The Association for Civil Rights in Israel, B'Tselem: the Israeli Information Center for Human Rights in the Occupied Territories, DCI – Defence for Children International, HaMoked: Center for the Defence of the Individual, Physicians for Human Rights, Rabbis for Human Rights, and the Public Committee against Torture in Israel, object to the proposed legislation because it seriously violates human rights and the basic values of the State of Israel. The draft law grants the IDF and other security forces complete exemption from liability for unlawfully caused injuries and damages.

1. The draft law artificially expands the definition of "combatant activity", and exempts the state from tort liability for the vast majority of the activities of the security forces in the Occupied Territories. This exemption contradicts prior rulings of Israeli courts.
2. The draft law's only exception to this exemption for "combatant activity" is when a member of the security forces was convicted "for malicious infliction of the injury that is the subject of the claim". The failure to indict, in the past and in the future, members of the security forces will, therefore, exempt the state from paying compensation.
3. The draft law enables the court to deny an injured party convicted in the past of "committing a serious terrorist act," the right to compensation, even if there is no connection between the conviction and the injury that is the basis of the claim. This contradicts basic principles of penal law which state that a person may not be punished more than once for the same act.
4. The draft law limits the period of time in which a suit for damages may be filed to one year, instead of the seven years under existing law. Because of the extensive duration of investigations by the investigations unit of the military police, and the delay in submitting their conclusions to the attorneys of the injured parties, this article will, in many cases, prevent the filing of claims. In addition, this article nullifies the exception to the draft law's exemption from liability, as legal proceedings against the relevant soldier are almost never concluded within a year. The result is intolerable: a long delay in the investigation or prosecution, both within the control of the state, exempts the state from liability.

5. In proposing the draft law, the government seeks to place the burden of proof always on the plaintiff, even where the facts are not at his disposal, such as the type of weapons fired, or the directives given to the soldier that fired. This article creates a negative incentive for the security forces, and will make negligent investigations expedient, for without the detailed findings of an investigation, the facts will not be available to the plaintiff.

6. The draft law stipulates that a person whose degree of permanent medical disability does not exceed ten percent is not entitled to compensation. The compensation available to a person whose degree of permanent medical disability exceeds ten percent shall be based on the average salary in the area of residence of the injured person, and thus will be significantly lower than that available today, when compensation is based on actual figures.

Granting the state a sweeping exemption, by excessively expanding the term "combatant activity," effectively nullifies the security forces' duty of caution vis-a-vis the civilian population in the Occupation Territories. The state thus seeks to relieve itself of one of the principal duties that the legislature imposed on the security forces, which was intended to protect a person's basic human rights to bodily integrity and to protection of his or her life and property.