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ISRAEL

LEGISLATING IMPUNITY
The Draft Law to Halt Palestinian Tort Claims

INTRODUCTION

Israel's Ministry of Justice has drafted a law that would exempt the State of Israel and its security forces from tort liability for the wrongful bodily injury and killing of Palestinians during the period of the intifada. Human Rights Watch calls for the withdrawal of the draft because it would drastically curtail the right of victims of human rights abuses committed by state agents to seek and obtain compensation. And by stripping Israeli civil courts of jurisdiction over these complaints, it would weaken one of the few existing mechanisms for accountability for the conduct of Israeli security forces toward Palestinians, and remove a deterrent against the commission of abuses in the future.

The draft *Law Concerning Handling of Suits Arising from Security Force Activities in Judea, Samaria and the Gaza Strip (Exemption from Liability and Granting of Payment), 1997* was presented for public comment by the Ministry of Justice in March. The government now intends to submit the draft law for approval by the Knesset, Israel's parliament, before the end of the current session, which ends August 2, according to the June 26 issue of the Israeli daily *Haaretz.*

This report touches on only some of the problematic areas of the draft legislation. More thorough critiques, on which this report draws heavily, have been prepared by the Israeli human rights organizations B'Tselem/Israeli Information Center for Human Rights in the Occupied Territories and HaMoked/Center for the Defence of the Individual.[1] The excerpts below of the draft law and the accompanying Ministry of Justice memorandum are taken from the English-language translations contained in the critique prepared by B'Tselem.

If the law is adopted, West Bank and Gaza Palestinians would no longer be able to seek in Israeli courts compensation from Israeli security forces or from the State for bodily damage or death that occurred between December 8, 1987, when the intifada broke out, and September 13, 1993, the date of the signing of the Israeli-PLO Declaration of Principles.[2] For incidents during that period, plaintiffs would have to re-direct their search for compensation to a new committee whose members are to be appointed by the Minister of Defense (Article 4.A). The committee would be authorized to grant, "out of humanitarian considerations," monetary payment to an injured party or his dependents, or to the survivors of someone wrongfully killed (Article 3). Granting compensation would thus become a largely discretionary form of charity, rather than fulfillment of the state's obligation as specified in international law.

This procedure would apply both to new claimants as well as to plaintiffs whose suits are already pending before Israeli courts. In other words, cases currently being heard would be halted (Article 13); it would then be the plaintiff's responsibility to file an application for compensation before the new committee.

Some 1,000 Palestinians were killed, and approximately 18,000 were injured by Israeli security forces during the intifada, according to Israeli army records cited in the Ministry of Justice memorandum; human rights organizations say that the figures are higher, especially with regard to the number of injuries.
The committee would be entitled to deny compensation to plaintiffs in a wide range of circumstances. When paid, compensation amounts would be predetermined by a table appended to the law. The table specifies amounts that are less than the amounts the Israeli courts are currently awarding in settlements, and in some cases, less than the medical bills the victim can be expected to have incurred. For example, an unmarried twenty-two-year-old with a 50 percent permanent disability would receive a lump sum payment of 111,000 New Israeli Shekels (US $31,429 at current rates). Compensation for the wrongful death of a married person between the ages of eighteen and forty is to be 153,000 NIS

[1] The undated critique that was prepared by HaMoked and co-signed by six Israeli human rights organizations can be obtained from HaMoked at 4 Abu Obeida Street, Jerusalem 97200, fax 972(2)627-6317. A critique prepared by B'Tselem can be obtained from B'Tselem at 43 Emek Refaim St. (Second floor), Jerusalem 93141, fax 972(2)561-0756, e-mail Btselem@actcom.co.il.

[2] The essence of the draft law is contained in Article 2.a: "The State is not liable in tort for bodily damage caused as result of an act carried out in the region by the security forces during the proscribed period." The same article exempts state agents from tort liability. In Article 1, bodily damage is defined as "death, sickness, injury or a physical, mental or psychological defect." An exception is made for suits for automobile accidents, "except if the accident occurred in connection to a hostile activity by the injured party against the security forces or against the civilian population" (Article 2.B).

(US $43,714), with an additional 1,100 NIS ($314) for each child annually until the child reaches the age of eighteen, "so long as the amount of the addition for children does not exceed 38,000 NIS ($10,857)."

BROAD IMMUNITY FOR INTIFADA-ERA ABUSES

The proposed bill should be abandoned because it violates international human rights standards in several ways. First, it undermines the basic right of victims of human rights abuses to seek fair compensation, a right that is enshrined in various instruments. The International Covenant on Civil and Political Rights, which Israel ratified in 1991, requires States Parties to ensure that victims of human rights abuses have "an effective remedy" (Article 2.3.a). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Israel in 1991, states in Article 14, that, under all circumstances,

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

According to the general principles proposed by the U.N. Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

> 1. Under international law, the violation of any right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include...summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment....
>
> 2. Every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms....
>
> 3. Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.
>
> 4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[3]

[3] Final report of Theo Van Boven, Special Rapporteur of the U.N. Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8, 2 July 1993.

The proposed law is blatantly discriminatory in that it applies to Palestinians but not to Israeli citizens or permanent residents or tourists (Article 2.C). Thus, if two bystanders at a demonstration, one a foreign tourist and the other a West Bank Palestinian, were wounded by reckless fire by an Israeli soldier, the foreign tourist could sue for damages in an Israeli court while the Palestinian could, at best, apply for discretionary compensation from the new committee. Such a distinction violates the prohibition on discrimination in international human rights law.[4]

The proposed law disqualifies potential damage claims by Palestinians in several ways. It authorizes the committee to exclude any claimant who was at any time convicted of "terrorist activity" or against whom there exists "evidence" of such activity (Article 5.B.2). The law would thus retroactively add a punishment to those with prior convictions, stripping them of their right to redress for state abuses. The International Covenant on Civil and Political Rights, in Article 15.1, forbids punishment that is retroactive: "Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed." In the case of persons who have not been convicted but against whom "evidence" allegedly exists of "terrorist activity," the proposed law would punish them on the basis of "evidence" that presumably would remain secret and that they would be unable to challenge in court. In either case, the alleged "terrorist activity" need not bear any connection to the incident in which the would-be plaintiff suffered harm and for which he or she should be entitled to seek compensation.

The proposed law would also narrow the range of acts for which compensation may be sought so as to disqualify many victims of wrongful injury from seeking damages. Under its terms, the claimant would be required to prove either that (1) the damage was caused outside of operational activity in fighting or preventing terror, or other activity in which the security forces faced a risk of death or bodily injury; or (2) the damage resulted from an act that was both "in substantial deviation and knowingly" from the instructions applicable to the security forces (Article 5.A.1 and 5.A.2).

The burden of proof that these conditions impose on many victims is extremely high. Soldiers can plausibly argue that they were at some degree of risk of bodily injury during most actions they initiated. As B'Tselem has pointed out, an innocent passerby who was injured by indiscriminate gunfire during a demonstration would be ineligible for compensation if the security forces could show that they faced some risk of injury—unless the injured party can prove he or she was injured as a result of an act that was "in substantial deviation and knowingly" from the instructions applicable to the security forces.

The "substantial deviation and knowingly" standard also subtly absolves the government for accountability for authorized abuse by limiting the right to seek compensation to situations in which a soldier substantially and knowingly deviated from his instructions. That is, the law would seem to exclude from compensation acts that were wrongful but not explicitly prohibited, or where instructions were not clear and specific (the deviation must be "substantial"), or where training and discipline of soldiers were inadequate so that instructions were violated but not "knowingly." Thus the proposed legislation would reward the security forces for laxness in the discipline and training of troops, and would remove an incentive not to issue overtly abusive instructions.

If the claimant successfully proves that one of the above conditions were met, the committee may still deny compensation if the victim was injured in the course of conducting "hostile activity against the security forces or against the civilian population" (Article 5.B.1). "Hostile activity" is not defined in the draft law, but the Ministry of Justice's memorandum suggests that it refers to any action "against the security forces or against a civilian population." The memorandum continues:

> The reason for this is that eligibility for compensation can be justified for a person who had no part in the very occurrence of the event of the damage. A person who acted against IDF [Israel Defense Force] forces or against a civilian population and was thereby injured, loses his right, based, as stated, in humanitarian reasons, to eligibility for payment.

[4] See, e.g., the International Covenant on Civil and Political Rights, Articles 2 and 26.

Thus, the provision on "hostile activity" in the draft law erases the duty of proportionality in the use of force.[5] The committee may deny compensation to an adolescent who helped to set up a stone barricade on a street and who was wounded by live ammunition, even if his being shot is determined to have been a vastly disproportionate response to his act.

The proposed law defines security forces as "the Israeli Defense Forces, Israel Police, or other State security forces, including anyone who acted on their behalf." This would appear to include the General Security Service, or Shin Bet, the agency most involved in the mistreatment and torture of security suspects under interrogation.[6] However, the draft law, while rendering convicted and suspected "terrorists" ineligible for compensation, makes an exception for persons who, at the time of injury, were in legal custody (Article 5.B.2). However, such persons would still have to prove that the injury meets the conditions stipulated in Article 5.A.1 and 2 (see above). At press time, it was unclear whether the draft law would exclude from tort claims injuries inflicted during interrogation.

Payment will not be granted, under the draft law, unless the injury caused a permanent functional disability of at least 25 percent (Article 5.C). This cutoff violates the principle that all victims of human rights abuses ─ and not just those whose injury exceeds a certain level ─ are entitled to compensation. According to the general principles proposed by the U.N. Special Rapporteur, "Under international law, the violation of *any* right gives rise to a right of reparation for the victim....Reparation....shall be proportionate to the gravity of the violations and the resulting harm...."[7] [Emphasis added]

REDEFINING "COMBATANT ACTIVITY" TO SHIELD SECURITY FORCES FROM LIABILITY

Under the proposed law, claimants would still have recourse to Israeli courts for incidents that occurred *after* September 13, 1993. However, the law would revise and broaden the definition of "combatant activity" to carve out from tort liability a broad range of incidents in which security forces unlawfully killed or injured Palestinians. Under Article 5 of the Civil Torts Law of 1952, the state is exempt from liability for damages due to "combatant activity of the Israeli Defense Forces."

[5] The companion principles of proportionality and necessity underlie the written open-fire orders issued to Israeli soldiers in the West Bank and Gaza Strip (see below), and are codified in international standards. The preeminent codification is the 1979 U.N. Code of Conduct for Law Enforcement Officials. Article 3 provides: "Law enforcement officials may use force only when strictly necessary to the extent required for the performance of their duty." The official commentary to the Code elaborates: "The use of firearms is considered an extreme measure....In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender."

[6] Human Rights Watch/Middle East, *Torture and Ill-Treatment: Israel's Interrogation of Palestinians from the Occupied Territories* (New York: Human Rights Watch, 1994).

[7] E/CN.4/Sub.2/1993/8, 2 July 1993.

The draft law proposes to classify as combatant activity, for the purposes of Article 5 of the Civil Torts Law, "any operational activity of fighting against terror, and any other operational activity undertaken by the security forces in circumstances entailing risk of death or bodily injury by the security forces...unless a person was convicted at law of causing the injury which is the subject of the suit" (Article 11).[8] In so doing, the law rejects a series of Israeli court decisions that place intifada-related incidents within the paradigm of police law-enforcement activity rather than of armed combat. It also goes against public statements by Israeli officials concerning the applicable paradigm of Israeli security force operations when confronting intifada-like situations. For example, then-deputy IDF Judge Advocate General Col. David Yahav was quoted in *The New York Times* as saying, "Our open-fire regulations follow the same legal principles that govern the police in Israel and in Western countries where there is no war."[9] In an affidavit submitted to the Israeli Supreme Court, then-Deputy Chief-of-Staff Gen. Ehud Barak stated that the rules of engagement were based on the view that "opening fire shall be justified according to the general principles of the Penal Law."[10] Under the orders issued to soldiers patrolling in the Gaza Strip and West Bank, firearms are not to be used except to avert a life-threatening danger to a person or, under restricted circumstances, at the legs of a fleeing suspect who has ignored warnings to halt.

Israel's Supreme Court has ruled that "combatant activity" should be interpreted narrowly for the purpose of exemptions from liability: "Only genuine combatant activity, in its narrow and simple sense, such as engaging forces in battle, military attack, exchange of fire, explosions and the like, in which is manifested the special nature with its risks, and particularly the implications with its results ─ it is to these that Article 5 refer."[11] Israeli civil courts hearing suits for compensation have affirmed this definition, rejecting arguments that the government was not liable on the grounds that the incident in question was an act of war. For example, in 1992, Judge Gideon Ginat rejected the "act of war" defense when he awarded damages to a Palestinian who was disabled and to the survivors of another man who was killed, when Israeli soldiers shot at them during a chase in 1988 (civil case 273/89 and 334/89). Judge Ginat wrote, "The body of evidence suggests that we are speaking about an act that is akin to a police operation, not an act of war. I am not oblivious to the circumstances, well known to all, under which the security forces operate in Samaria [the northern West Bank]....Yet keeping these circumstances in mind, I cannot rule that any attempt by the security forces to arrest suspects in the area [the occupied territories] is an act of war. Even the actions of the security authorities with respect to suspects from the area after they are arrested (i.e., the fact that they are interrogated and then brought to face criminal charges) indicates that my conclusion is in fact the correct one."

The government, if it is successful in legislating a more encompassing definition of combat for the purpose of tort claims, would effectively reverse those court rulings and, both henceforth and retroactively, strip the right of Palestinians to seek compensation for injuries that occurred in a wide range of conflictual situations.

THE GOVERNMENT'S JUSTIFICATIONS FOR CURTAILING TORT LIABILITY

The draft law was accompanied an explanatory note from the Ministry of Justice that offers four basic arguments for adopting what it termed "legislation intervention to protect the State from these claims":

[8] That is, the act will be protected as combat activity unless it resulted in the criminal prosecution and conviction of the state agents responsible for carrying it out.

[9] Joel Greenberg, "Israelis Debate Army's Rights Record in Uprising," *The New York Times*, May 24, 1993.

[10] *Yoav Hass v. Minister of Defense et al.*, HCJ 873/89.

[11] Civil Petition 623/83, *Asher Levi v. State of Israel*, P.D. 40(7) 477.

(1) *Civil damage suits filed by Palestinians are crowding the court dockets.* The Ministry of Justice memorandum notes that more than 4,000 suits have so far been filed against the State, of which 700 are pending before the courts.

(2) *The state is expected to be obligated to pay large sums as a result of this type of tort suit.*[12] The memorandum notes, "The proposed law will bring about a significant reduction in the compensation sums which the State will be required to pay out in the context of tort claims of Palestinian residents of the areas."

(3) *The courts face difficulty in locating evidence that would enable them to adjudicate the claims*. The memorandum states, "In some of the cases, the State does not have even the 'smallest lead' to examine the claims concerning its involvement in the alleged damage." For example, the memorandum continues, "The body-snatching from hospitals of Palestinian killed precluded the possibility of clarifying whether they were injured by IDF soldiers; some of the injuries were unbeknownst to the soldiers, and were therefore not investigated at all. In local hospitals, only partial records existed, and even those that do, they are not necessarily instructive as to the identity of the perpetrator. Even if the IDF possesses records regarding the event for which claims are brought, in most cases the records are not sufficient to be instructive in a conclusive fashion regarding the character of the event and its results."

(4) *The agreements signed by Israel and the PLO justify "turning over a new leaf" with regard to paying compensation*. "During a period of armed struggle between nations, every side must bear its damages and care for its injured," the memorandum states.

The reasons provided in the Ministry of Justice memorandum are well rebutted in the critique prepared by the Israeli organization HaMoked. After showing that the volume of civil suits is actually quite limited in comparison with the number of incidents that might have given rise to damage claims, HaMoked argues that "a financial liability, falling on the State according to the law," cannot provide the basis for retroactively negating fundamental rights.

[12] See, e.g., Amy Dockser Marcus, "Lawsuits Related to Intifada Get Costly for Israel's Government," *The Wall Street Journal*, May 18, 1993.

HaMoked then points out that the paucity of pertinent evidence relating to adjudicating many of the complaints is in large part the result of the State's disregard of its duty to investigate possible human rights abuses promptly after they were committed by its forces. This problem was flagged early in the intifada by various human rights organizations, including Human Rights Watch/Middle East (then Middle East Watch).[13] IDF regulations required investigations into fatalities, but not generally into incidents in which Palestinians were injured. By requiring the adjudicators to "consider, inter alia, the presence or absence" of official records such as complaints, disciplinary hearings, or lists of the injured (Article 5.D), the draft law would reward the state for negligent record-keeping and its failure to investigate incidents of violence.

The fourth argument, by stating that during a war each side "must bear its damages and care for its wounded," again draws on the combatant paradigm that Israeli courts have rejected thus far. Furthermore, the suggestion to transfer liability to the Palestinian Authority for Palestinians wrongfully injured or killed by Israeli forces has no basis in the agreements reached between Israel and the PLO, but rather is a unilateral move by Israel that would deprive Palestinians of their right to seek compensation.

NO EXPLICIT RIGHT FOR THE CLAIMANT TO TESTIFY, PRODUCE WITNESSES, OR APPEAL THE DECISION

The proposed legislation states that the committee will determine the procedures of its work and hearings, to the extent that they have not been determined in this law or in related regulations (Article 4.D). The law is silent on the question of whether claimants have a right to testify in person before the committee, produce witnesses, or appeal the committee's decision. It does make clear that if the committee appoints an expert witness on its behalf in order to clarify a matter on which a ruling depends, the claimant will then require the committee's approval to present another expert witness on the same subject (Article 7.A).

The rights to testify in person, call witnesses, and appeal a decision, which Palestinians enjoy when they file suits before Israeli civil courts, are essential to obtaining a fair hearing of their claim and thus to having an "effective remedy," as provided by Article 2(3) of the International Covenant on Civil and Political Rights. Furthermore, the claimant cannot receive compensation unless he or she signs a statement that he or she "does not and will not have any other claim against the State or against one who acted on its behalf for this act" (Article 9).

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Human Rights Watch believes that the very essence of the draft *Law Concerning Handling of Suits Arising from Security Force Activities* is to deprive victims of human rights abuses their right to seek fair compensation. Even if its more egregious provisions are dropped or revised, this draft cannot serve as the basis for sound law. We urge the government to abandon this proposed law; failing that, we urge Knesset members to defeat it.

Interested parties should convey their concerns about the draft law to:

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[13] Middle East Watch, *The Israeli Army and the Intifada: Policies that Contribute to the Killings* (New York: Human Rights Watch, 1989).

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