



# Getting Off Scot-Free:

**Israel's Refusal to Compensate Palestinians  
for Damages Caused by Its Security Forces**

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**Israel's Refusal to Compensate Palestinians for Damages  
Caused by Its Security Forces**

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## Introduction

In May 2016 B'Tselem published a document explaining its decision to stop filing complaints with Israel's military law enforcement system. The decision was based on information that B'Tselem had gathered over the course of more than 25 years, including hundreds of complaints it filed, dozens of investigations by the Military Police Investigation Unit (MPIU) that were closed with no charges pressed, and numerous meetings with officials.

This accumulated experience led B'Tselem to conclude that the military law enforcement system functions primarily as a whitewash mechanism, and does not work to uncover the truth or hold perpetrators of human rights violations accountable.<sup>1</sup> Meanwhile, government officials are shielded from responsibility, with no state body supervising their actions. Consequently, in the vast majority of cases, no one is held accountable when the human rights of Palestinians in the Occupied Territories are violated.

The present report analyzes civil accountability, which primarily takes the form of paying damages to victims and their families for violation of their rights by Israeli security forces. The obligation to provide compensation is enshrined in international law and derives directly from every person's right to life, security and property. This is no theoretical matter: paying damages makes infringement of these rights tangible, as money paid to the injured parties and their loved ones enables them to pay for treatment, medication, or equipment they need to achieve physical and mental rehabilitation.

In the 1990s, during the first intifada and in its aftermath, residents of the Occupied Territories filed thousands of suits with Israeli courts, seeking compensation for injury caused them by

Israeli security forces. The complaints addressed damage resulting from a variety of sources, such as instances of unlawful gunfire (including those involving fatalities or injuries), extreme violence, torture during interrogations by the Israel Security Agency (ISA), destruction of property, and incidents in which ammunition or duds left behind in the field by the military later exploded. Suing for damages was a costly process for Palestinians, dragged out for many years and imposed a series of bureaucratic hurdles that plaintiffs had to surmount if they wanted to see the lawsuits through. As a result, Palestinians often chose to settle for lower sums that did not reflect the extent of harm inflicted.

In the mid-1990s, to avoid paying even these sums of money, the State of Israel began employing various measures to ensure immunity from liability for damages that security forces caused Palestinians in the Occupied Territories. These efforts were stepped up after the second intifada broke out in 2000. Over the years, the Knesset amended legislation several times; and, on their own initiative, the courts broadened the state's exemption from paying compensation. These changes almost completely eliminated the possibility of Palestinians receiving compensation for injury caused them by Israeli security forces.

Israel's argument never addressed harm caused during combat as the law relieves the state a priori of responsibility in that context. What the state wanted – and ultimately secured – was an exemption from paying compensation for damage caused in incidents entirely unrelated to combat: looting, physical violence or damage caused during activities that are unmistakably policing in nature, such as staffing checkpoints and making routine arrests.

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1. For further information, see B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, May 2016 (hereafter: B'Tselem, *The Occupation's Fig Leaf*).

This report examines the legal status in Israel, up to the early 2000s, of paying financial compensation to Palestinians harmed by Israeli security forces in the Occupied Territories. The report then reviews legislative amendments and changes in court rulings which make it difficult for Palestinians to get compensation for this type of harm, and describes the justifications provided by the state for these changes. This is followed by personal

accounts by and about Palestinians wounded by military gunfire who were not compensated for their injuries. The accounts describe the severe difficulties these people now face in their daily lives. In conclusion, we explain why the state's arguments are unjustified, and provide figures which indicate how the legislative amendments impacted Palestinians' prospects of receiving compensation for harm suffered.



## The obligation to provide compensation under international law<sup>2</sup>

International human rights law obliges the state to compensate individuals harmed by human rights violations. The Permanent Court of International Justice ruled that this holds true regardless of whether it is explicitly stated in every convention, as the legal code would be rendered meaningless otherwise:

*It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation ... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.*<sup>3</sup>

Under the Convention Against Torture, the state must ensure that victims of torture can obtain redress through its legal system and that they have an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible.<sup>4</sup> According to the International Covenant on Civil and Political Rights, when the state violates the rights of an individual, that person “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. The Covenant further stipulates that the state must

enable any such person to receive judicial remedy, and that, if granted, the authorities must ensure the remedy is provided.<sup>5</sup> The interpretation by the United Nations Human Rights Committee establishes that this article is an obligation binding all states party to the Covenant and that they must ensure that individuals whose rights have been violated have accessible and effective remedies, including reparations; without appropriate compensation, the obligation under this article to provide an effective remedy is not discharged.<sup>6</sup>

International Humanitarian Law (IHL) requires an occupying state to protect the residents of the occupied territory, who are considered protected persons, and to ensure their safety and wellbeing.<sup>7</sup> This includes the obligation to compensate protected persons for damage caused them by a breach of law.<sup>8</sup>

The obligation to compensate persons for violations of international law is now considered customary law that is binding to all states, even if they are not signatories of the conventions enshrining this obligation. A study by the International Committee of the Red Cross reports that, unlike past practice whereby only states could

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2. For further information, see paras. 57-68 of petition for *order nisi* and temporary injunction in HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.* See also paras. 45-66 in the petitioners’ main arguments in HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.*

3. *Chorzów Factory Case* (Permanent Court of International Justice, 13 September 1928), p. 21.

4. Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

5. Article 2(3) of the International Covenant on Civil and Political Rights.

6. Article 16 of the Human Rights Committee, General comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, Adopted on 29 March 2004.

7. Article 27 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) and Regulation 43 of the Regulations Concerning the Laws and Customs of War on Land, The Hague, [1907].

8. Regulation 3 of the Regulations Concerning the Laws and Customs of War on Land, The Hague, [1907] and Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) [1977].

seek reparation for their citizens who were harmed, there is an increasing trend in favor of enabling individual victims to sue the state responsible for the violation.<sup>9</sup>

Evidence for this approach can be found in the 2004 ruling by the International Court of Justice concerning the Separation Barrier, which found that Israel must compensate the persons harmed by its construction:

*Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable*

*property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.*<sup>10</sup>

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9. ICRC, Customary IHL Database, Rule 150, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_ruL\\_rule150](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_ruL_rule150)

10. "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion" (International Court of Justice, 9 July 2004), para. 153.

## The state of affairs in Israel before the legislative changes

Israel's Torts Law (State Liability) defines the state's status in civil proceedings. It specifies that, in terms of liability for damages, "the state shall be deemed as any incorporated body, except as provided in this law".<sup>11</sup> Under the law, the state cannot be held liable for damage caused by a lawful act performed "in good faith while making apparent use of lawful authorization", but it is liable if the act was carried out negligently.<sup>12</sup>

Article 5 of the law exempts the state from paying compensation for acts performed during "warfare activity". This exemption is based on the assumption that warfare entails risk and damages that are substantially different than those encountered during everyday circumstances. As combat necessarily involves pressure and uncertainty, tort law is not suited to incidents arising from combat. As Supreme Court Justice Isaac Amit explained:

*"The rules of the game" in war and combat situations are not compatible with the rules, norms, and standards of caution in peacetime, and do not accord with the classic purposes of tort law. Therefore, applying traditional tort law to situations of warfare activity may result in distortion of the law, and may also expose the state to paying massive compensation for damages to property and persons.*<sup>13</sup>

The law does not establish the precise meaning of "warfare activity", leaving interpretation to the courts. In an early ruling that addressed the meaning of this phrase, Justice Haim Cohn wrote that in order to determine whether a particular incident falls within the boundaries of this exception, "one must examine

the action, not the war". Justice Cohn stated that the exemption is limited to "those acts that are both acts of warfare by their nature and whose place and occurrence are known only during combat". He added that the exemption afforded by the law must be construed narrowly, "so as not to deny the remedy unless the legislature unequivocally requires it".<sup>14</sup>

Years later, then Chief Supreme Court Justice Meir Shamgar expressed a similar view when addressing damage caused to infrastructure in Haifa by the deployment of soldiers in the 1973 Yom Kippur War. He reaffirmed that the fact of the damage being caused during wartime was irrelevant, and that the state's exemption from liability must be narrowly interpreted: *Even in wartime, the military carries out many acts that do not qualify for an exemption under Article 5. Only real warfare activity in its narrow and simple sense, such as marshaling troops for battle, carrying out an offensive, exchanges of fire, explosions and the like, in which the special nature of combat, including its risks and especially its implications and consequences, are evident, are the subject of Article 5 [...] The said interpretation is reasonable and even desirable when the issue at hand is immunity from liability for an act that is, by its nature and under normal circumstances, an injustice.*<sup>15</sup>

In rulings handed down during the first intifada, the lower courts were not in agreement as to the precise meaning of "warfare activity". Over the years, the judges steered clear of establishing definitive criteria and each case was decided on the basis of an examination of its particular circumstances and

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11. Article 2 of Israel's Torts Law (State Liability) 5712-1952.

12. Ibid., Article 3.

13. CA 1459/11, *Estate of the Late Muhammad (Nabil) Hardan v. The Minister of Defense*.

14. CA 311/59, *Tractor Station Operations Ltd. v. Yoram Ben-Yosef Khayat and three others*.

15. CA 623/83, *Asher Levy v. The Minister of Defense*.

left to the judges' discretion.<sup>16</sup> Following several such decisions, the state appealed to the Supreme Court. At the appeals hearings, the state announced that it planned to settle the matter through legislation, but did not then follow through in implementing this stated intention.

Eventually, the Supreme Court ruled on one of the appeals. In March 2002, an unusually large panel of nine justices handed down judgment in the case of Bani 'Odeh, and their ruling addressed the meaning of "warfare activity". The case before the court concerned an incident in which undercover soldiers were in pursuit of several Palestinians in order to arrest them. While in pursuit, the soldiers fired at the Palestinians, killing one and injuring another. Aharon Barak, then Chief Supreme Court Justice, determined that the operation did not constitute warfare activity but rather ordinary police suspect apprehension activity, as "the danger posed by gunfire under the circumstances was an ordinary risk that is adequately addressed in tort law". Therefore, the state must pay damages in this case.

In the ruling, Chief Justice Barak reiterated the principle that determining whether an action constitutes warfare activity is based on an examination

of the act itself, not of the overall war:

*The military carries out various "activities" in Judea, Samaria, and Gaza, which create different kinds of risks. Not all its activities are "warfare". For example, if the injured party was harmed by a soldier attacking him for refusing to comply with an order to remove slogans painted on a wall, the attack cannot be viewed as "warfare activity", since the risk that it created was the ordinary one of law enforcement activity. This would not be the case if a military patrol in a village or a city found itself in mortal danger or in peril of serious injury as the object of live gunfire or stones or Molotov cocktails, and in order to extricate itself would fire and injure someone. The act of gunfire is "warfare activity" because it involves unusual risk. In between these two extremes, there may be intermediate situations [...].*

*In determining whether an action constitutes "warfare", the full circumstances of the incident must be examined. One must consider the objective of the operation, the location of the incident, the duration of action, the identity of the acting military force, the threat that preceded the action and was anticipated from it, the strength and size of the acting military force, and the duration of the incident. All these shed light on the nature of the particular wartime risk caused by the action.*<sup>17</sup>

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16. For further discussion of this controversy, see Assaf Jacob, "Immunity Under Fire: State Immunity for Damage Caused by Warfare Activity", *Mishpatim* [The Hebrew University's Law Journal] Vol. 33(1), (2003), see pp. 158-163, (Hebrew).

17. CA 5964/92, *Bani 'Odeh et al. v. State of Israel*, Judgment, para. 10.

# How the state secured sweeping immunity from paying compensation

Even before the ruling in the Bani 'Odeh case, the state tried to establish a sweeping exemption from paying compensation to Palestinians injured by Israeli security forces. Its attempts began in the late 1990s, redoubled after the 2002 ruling, and came to a close in July 2012, when the law was most recently amended. The state focused both on expanding the immunity from liability already enshrined in law and on establishing procedural and evidentiary rules that would impede Palestinians in filing lawsuits and carrying out the litigation. These efforts bore fruit, and residents of the Occupied Territories who wish to sue the state for damages now face almost insurmountable obstacles. The rare cases in which claimants do manage to file a lawsuit stand virtually no chance of winning. The amendments to the law aimed at broadening the state's immunity from liability are reviewed in Section 1 below. The aspects relating to the imposition of stricter procedural and evidentiary rules are discussed in Section 2.

## 1. Expanding the state's immunity under the law

To secure exemption from paying compensation, Israel pursued two major avenues: (A) Adding a broad definition of "warfare activity" to Israel's Torts Law (State Liability), to replace the courts' interpretation of this term; and (B) Enshrining an explicit exemption in law that defines certain areas or persons as not subject to the Torts Law.

### First draft bill: Granting the state sweeping immunity

On 20 March 1997, the Israeli Ministry of Justice issued an initial draft bill concerning this matter.<sup>18</sup> The draft, signed by Att. Yehoshua Shofman, then Deputy Attorney General for Legislative Affairs, proposed new

legislation that would relieve the state of the duty to pay compensation for any incident that occurred in the Occupied Territories from the day that the first intifada began (9 December 1987) to the day that Israel and the PLO signed the Declaration of Principles (13 September 1993).

As an alternative mechanism for dealing with claims by Palestinians, the draft bill proposed a special three-member committee that would have the power to grant compensation – on humanitarian grounds – to claimants who could prove that the damage was caused by Israeli security forces "not in the course of operational activity to fight or prevent terrorism, or in the course of other activities by the security forces which were conducted in the face of danger to life or limb", or should it be proven that the act was carried out "in real, conscious breach" of directives. The bill relieved the state of the duty to pay compensation even if the claimant did manage to prove he met one of these criteria if "he had been convicted of terrorist activity or if there is evidence of his involvement in such activity"; no link between such activity and the injury underlying the claim was required.

The draft also proposed that the Torts Law (State Liability) be amended to include an "interpretive clarification" regarding the term "warfare activity" that would apply to incidents that occurred after 13 September 1993, which would define such an act as "any operational activity to combat terrorism and any other operational activity by security forces carried out in the face of danger to life or limb, unless a person was convicted of causing the damage that is the subject of the claim".

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18. Draft bill for Addressing Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip (Exemption from Liability and Paying Compensation), 5757- 1997.

#### **Amendment No. 4: Adding a broad definition to “warfare activity”**

The bill was shelved and replaced by a more modest one, proposing to add to the Torts Law a broad definition of the term “warfare activity”, which would exempt the state from paying compensation in cases in which the courts previously held it liable for such payment. A new bill brought before the Knesset on 23 July 1997 incorporated the broadened definition as well as procedural and evidentiary rules meant to impede Palestinian plaintiffs and improve the state’s footing.<sup>19</sup>

The bill was sharply criticized in Israel and abroad, and consideration of the bill was suspended. It would be resumed only in October 2001, more than four years later. In March 2002, with the bill under discussion at the Knesset’s Constitution, Law and Justice Committee, the Israeli Supreme Court issued its ruling in the Bani ‘Odeh case.<sup>20</sup> The state recognized that the courts would not grant it the immunity from liability it sought and, consequently, began working on two fronts:

On one level, the state vigorously promoted Amendment No. 4. Four months later, on 24 July 2002, the bill passed its second and third reading at the Knesset. As a result, “warfare activity” in the Torts Law (State Liability) was now expanded to constitute “any act of fighting terrorism, hostilities or uprisings,

and any act taken to prevent terrorism, hostilities or uprisings in the face of danger to life or limb”.<sup>21</sup>

The courts ruled that the new definition would not be applied retroactively to incidents that took place prior to July 2002, and the justices continued, for the most part, to try them based on the definition established in the Bani ‘Odeh ruling.<sup>22</sup> As for incidents that took place subsequent to that date, the justices readily adopted the amendment, notwithstanding that it contradicted prior case law. Then Chief Supreme Court Justice Aharon Barak stated that the new legal definition “greatly broadened the interpretation given to this term in case law and, thereby, significantly narrowed the liability of the security forces operating in the conflict with the Palestinians”. Nonetheless, he went on to say that “the amendment is proportionate and does not give rise to any constitutional problem”.<sup>23</sup>

The second level consisted of adding another amendment (No. 7) to the Torts Law (State Liability). It was designed – much like the shelved first draft bill – to guarantee the state absolute immunity from liability for damages caused during the second intifada. The first draft of this amendment was brought before the Knesset on 15 July 2002, even before legislation of Amendment No. 4 was completed and before its implications and significance could be fully understood. Three years later, on 27 July 2005, the bill passed its second and third reading at the Knesset.<sup>24</sup>

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19. Bill: Addressing Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip, 5757-1997.

20. See above, p. 10.

21. Civil Wrongs (Liability of the State) (Amendment No 4 – Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip), 5762-2002.

22. See, for example, LCA 3675/09, *State of Israel v. Muhammad Mahmoud Saleh Daoud et al.*; LCA 8484/06, *Nitzan v. the State of Israel*; CA 8384/05, *Masri Munir Salem v. State of Israel*.

23. HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.* See also Justice Arbel’s statement in CA 1864/09, *Estate of the Late Ahmad Skafi v. State of Israel*.

24. This amendment began as Amendment No. 5 and eventually became Amendment No. 7.

## Amendment No. 7: Back to sweeping immunity

Amendment No. 7 was meant to prevent court consideration of the particular circumstances of each individual case by granting the state complete exemption from paying compensation for damages caused by its security forces in the Occupied Territories. The amendment did not address damages caused during “warfare activity”, as the state was already relieved of liability on that account.

The amendment consisted of two sections. One exempted the state from liability for damage caused to enemy nationals (unless they were being held in custody or had entered Israel legally). This exemption applied regardless of the circumstances in which the injury occurred, and was granted even if the damage was unrelated to the nationality or action of the injured person.

The second section relieved the state of torts liability “for damage caused in a conflict zone as a result of an act by the security forces”, with rare exceptions as specified in the law. The law grants the Minister of Defense almost full discretion to declare any area beyond the state’s border a conflict zone. Shaul Mofaz, who was Minister of Defense at the time, used this section to declare most of the West Bank a conflict zone for the better part of the second intifada. The entire Gaza Strip was declared a conflict zone after Israel completed its civilian and military withdrawal from it in September 2005.<sup>25</sup>

That month, nine human rights organizations petitioned Israel’s High Court of Justice against the amendment. In December 2006, an expanded nine-

justice panel accepted the petition in part. Regarding the first section which addressed immunity from liability for damage caused to enemy nationals and operatives in “terror organizations”, then Chief Supreme Court Justice Aharon Barak stated that “the time has not yet come to decide its constitutionality [...] Much depends on the manner in which it will be implemented and the interpretation that is given to the provisions of the section”.<sup>26</sup>

As for the exemption from paying for damages caused in “conflict zones”, Chief Justice Barak found the section to be unconstitutional and therefore null and void. According to Barak, by waiving the liability in law, the section “releases the state from liability for tortious acts that are in no way related to warfare activity, no matter how broadly defined”. He further stated that the amendment “seeks to realize an improper purpose of exempting the state from all liability for torts in conflict zones”, and made it clear that the state must bear liability for some of the damages it has caused Palestinians in the Occupied Territories:

*Judaea and Samaria, and until August 2005 also the Gaza Strip, have been subject to a belligerent occupation for nearly forty years. It is in that context that Israeli security forces are present in those areas on a regular and extensive basis. The residents of this area come into close contact with the security forces on a close, daily basis, coming and going, on their way to and from work and school, at checkpoints and roadblocks inside the territories and at crossings into and out of Israel. The security forces maintain a fixed and permanent presence in the area. They are deployed and operate within the area both in combat missions and in activities*

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25. Paras. 10-30 of the petitioners’ main arguments in HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.* See also Yuval Yoaz, “Law Exploited to Exempt IDF from Paying Compensation in Territories”, *Haaretz*, 4 May 2006 (Hebrew).

26. HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.*, para. 31.



*of a law enforcement nature; both in areas where there is hostile terrorist activity and in quiet areas; during times of conflict and in times of relative calm. Under these circumstances, a sweeping immunity of the kind granted to the state under Article 5C of Amendment No. 7 means that the state is given an exemption from liability in torts with respect to broad spheres of operation that do not constitute warfare activity even under the broad definition of this term. It means that many harmed individuals, who were not involved in any hostilities whatsoever and were injured in the course of operations by the security forces not intended to handle any hostile activity, are left without any redress for harm caused to their lives, persons and property.<sup>27</sup>*

Pursuant to the ruling, the section regarding exemption from liability for tortious acts by security forces in conflict zones was rescinded. Consequently, with the exception of harm to “enemy nationals” and “members of terrorist organizations”, the state was still required to pay compensation for damages caused during non-warfare activity, subject to the broad definition of “warfare activity” provided in Amendment No. 4.

### **Amendment No. 8: Broadened immunity in the West Bank, full immunity in Gaza**

The state was not content with this state of affairs. In June 2008, another bill to amend the Torts Law (Amendment No. 8) was brought before the Knesset. Four years later, on 16 July 2012, the amendment passed its second and third reading, becoming law. Amendment No. 8 was more comprehensive than Amendment No. 7, which the High Court had voided and, in effect, circumvented the Court’s decision. It further expanded the definition of “warfare activity” in Amendment No. 4, withdrawing the condition that

the act be carried out “in the face of danger to life or limb”. Instead, Amendment No. 8 defines such an act as “an action of combative nature, taking into account the entirety of its circumstances, including the purpose of the operation, its geographic location, or the threat facing the force carrying it out”. This definition effectively encompasses any action by Israeli security forces in the Occupied Territories. The bill provided the following explanation for the need to broaden the definition:

*In this context, warfare activity will include not only actions undertaken to combat terrorism, hostilities or uprisings, but also any act undertaken to prevent terrorism, hostilities or uprisings, whether or not carried out in circumstances posing danger to life or limb, given that in the area or in the enemy country, the premise is that actions to prevent terrorism are integral to the fight against terrorism, and naturally involve risk to life and limb.<sup>28</sup>*

Amendment No. 8 also established that the sweeping immunity previously granted in Amendment No. 7 as to liability for damage to enemy nationals – which the High Court did not invalidate – would also apply to “residents of areas outside Israel declared enemy territory by government decree”. The law added that this section would apply as of 12 September 2005 – the day Israel completed its withdrawal and disengagement from Gaza. The government declared Gaza “enemy territory” once the amendment was passed, thereby granting the state immunity from liability for any tortious acts committed by security forces throughout the Gaza Strip, including cases completely unrelated to even the broadest definition of “warfare activity”.

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27. Ibid., paras. 35-36.

28. Bill: Israel’s Torts Law (State Liability)(Amendment No. 8), 5768-2008.



## The Committee for Ex Gratia Payment at the Ministry of Defense

The Committee for Ex Gratia Payment which operates under Israel's Ministry of Defense consists of three members, all ministry employees, and has the power to recommend payment to Palestinians harmed by Israeli security forces. The committee cannot serve as a substitute for legal proceedings, especially as its underlying premise is that it is granting charity to victims rather than fulfilling an explicit obligation of the state.

The committee has a mandate to consider "exceptional, special humanitarian cases" pertaining to residents of the West Bank and Gaza (or their dependents) who suffered injury due to military actions that caused them "extreme medical or financial distress". As a rule, the committee only reviews cases of bodily harm. It pays compensation for property damage only in rare instances that resulted in "extreme financial distress", and as long as it finds that "considerations of security or diplomatic relations" warrant the compensation. The committee's rules and regulations state that requests must be submitted within a year from the time of the incident. If victims file for damages with the court, the request may be filed up to 90 days from the date of the final verdict.

Much like the amendments to Israel's Torts Law, the committee is empowered to reject outright a request by a person of whom "there is reasonable

cause to believe" that he or a person dependent on him "is an operative in a terror organization or was an operative or a member of such an organization, even if this membership does not pertain to the incident at hand", or if the person "was harmed in the course of his duties as a member of the Palestinian security forces or its governmental authorities". The committee may also automatically reject requests "pertaining to an incident that took place as part of a largescale military operation" regardless of the individual circumstances and consequences of the incident.<sup>29</sup>

When B'Tselem requested information on the sums of money that the committee paid Palestinians over the years, it was told that the data could not be extracted from the computerized system.<sup>30</sup> Israeli human rights NGO HaMoked – Center for the Defence of the Individual received figures based on a manual compilation of the figures. The information they received indicates that from 2004 to 2014 ten requests were filed by residents of the Gaza Strip, all of them denied. Another 52 requests were filed by residents of the West Bank. Of these, ten were denied and in the remaining 42 cases, a total of NIS 575,895 (Approx. USD 151,500) was paid out in compensation. In seven of the 42 cases, compensation was paid after the court dismissed lawsuits filed, on the grounds that the plaintiffs' injuries were sustained in "warfare activity".<sup>31</sup>

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29. The procedure was sent by the Claims and Insurance Department of the Office of the Defense Establishment's Legal Adviser to HaMoked – Center for the Defence of the Individual.

For the procedure in full, see: <http://www.hamoked.org.il/files/2016/1160480.pdf> [in Hebrew].

30. Letter to B'Tselem from the Freedom of Information Commissioner, the Ministry of Defense, dated 18 January 2017.

31. Letter from the Freedom of Information Commissioner at the Ministry of Defense to HaMoked – Center for the Defence of the Individual, dated 3 August 2015.

## 2. Procedural and evidentiary limitations<sup>32</sup>

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While civil proceedings in Israel's judicial system are cumbersome, lengthy and expensive for anyone, when the plaintiff is a non-Israeli Palestinian seeking to bring a suit regarding damages caused by Israeli security forces, these difficulties make litigation virtually impossible. In addition to the language barrier, cultural differences, and the state's attempts to broaden its exemption from liability, as described above, the state and courts have taken steps to institute a series of procedural and evidentiary limitations that make it very difficult for Palestinians to file for damages in this type of case.

Some of these rules were legislated as part of Amendment No. 4 to the Torts Law (State Liability), in response to the state's complaint of difficulty in contesting the facts asserted in lawsuits because some are filed years after the incident. Supreme Court Justice Elyakim Rubinstein justified converting these rules into law on the grounds that their goal is to achieve a balance "between not precluding injured persons' option to file claims and the many evidentiary difficulties that the state faces in such suits, formidable hurdles that increase as time goes by".<sup>33</sup>

Amendment No. 4 sets out three rules:

**1. Shortening the statute of limitations:** The timeframe for filing a claim was shortened to just

two years, (compared to the seven years the law designated for other tort suits in Israel). In cases of bodily harm, the extent of the damage is often not yet known within this short period, so the plaintiff can only sue for part of the injury. The court may extend this period by one year, or by three if the claimant is a minor, "if the Court is convinced that the plaintiff had no reasonable opportunity" to file the claim sooner.<sup>34</sup>

**2. Notice of injury:** Residents of the West Bank or Gaza cannot claim damages for harm suffered if they do not inform the Ministry of Defense in writing within 60 days of the incident, even if the authorities are aware of the incident or if verbal notice was given. However, if the claimant's medical condition, or other justified reasons, kept him from giving the notice within the said period, it must be given within 30 days from the day in which the impediment was removed. The law states that "the court may, for special reasons that shall be recorded, hear a claim regarding an act of which notice was not delivered within the stipulated time period".<sup>35</sup>

**3. Shifting the burden of proof:** Israel's Torts Law (State Liability) allows for the burden of proof to be reversed if the plaintiff does not know, or has no means of knowing, in what circumstances the damage was caused. Amendment No. 4 stipulates that in damage claims by Palestinians the court cannot reverse the burden of proof.<sup>36</sup> The state justified this rule on the grounds that:

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32. For further discussion, see Adalah, *Obstacles for Palestinians in Seeking Civil Remedies for Damages before Israeli Courts*, Attorney Fatmeh EL-'Ajou, Briefing Paper, May 2013 (hereafter: Adalah).

33. CA 5250/08, *Mazen Sa'id Ahmad Khashan v. State of Israel*.

34. Article 5A(3) of Israel's Torts Law (State Liability), 5712-1952.

35. Ibid., Article 5A(2)(C).

36. Ibid., Article 5A(4).

*The basic premise that the state routinely possesses knowledge of the circumstances in which the injury was caused does not stand the test of reality: in fact, the state is usually in an evidentially inferior position, while the plaintiff often holds information concerning the circumstances of the incident. In this state of affairs, shifting the burden of proof often decides the fate of the claim, and the state is held liable for the incident.*<sup>37</sup>

Amendment No. 8 imposed procedural restrictions on top of those set out in Amendment No. 4. First, it stated that the courts will hear “warfare activity” as a peremptory plea. According to the state, this rule is justified as “the argument obviates the need to hear the lawsuit itself and to examine whether security forces acted negligently in this matter or whether the action was proportionate.”<sup>38</sup> Second, the amendment stated that “in the interest of efficiency and maintaining consistency in case law”, such claims will be filed only in the courts in Jerusalem and Beersheba.<sup>39</sup>

Palestinians who seek to file damage claims in courts in Israel face two major challenges in addition to the provisions of the law. First, they are required to deposit high filing fees as guarantees. In compliance with the state’s request, and to ensure that the state’s expenses are covered, the courts impose on Palestinian plaintiffs the

payment of guarantees amounting to tens of thousands of shekels (USD 1 = Approx. NIS 3.8).<sup>40</sup> If several plaintiffs bring a single lawsuit together, each is required to pay the guarantee separately, notwithstanding that the factual and legal foundation is the same. As a result, guarantees in a single case can come to hundreds of thousands of shekels. In cases in which the plaintiffs do not, or cannot, pay the high guarantee imposed, the lawsuit is dismissed.<sup>41</sup>

Justice Asher Grunis stated that “the rationale underlying the power to impose a guarantee is to prevent frivolous litigation and, primarily, ensure payment of the defendant’s expenses, especially when the chances of the suit succeeding seem slim”. According to Justice Grunis, it is common practice to impose guarantees upon plaintiffs who live outside Israel’s borders, “and this practice has also been applied to residents of the Palestinian Authority, who are considered in this context a plaintiff who lives abroad.” In the same ruling, he stated that “the court must, on the one hand, bear in mind the objectives of the regulation – ensuring that the expenses of the defendant in a dismissed claim be paid, and to reduce the chances of frivolous litigation being brought before the court; and on the other hand, to enable access to the courts in order to afford protection of rights.”<sup>42</sup>

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37. Explanations to the bill for Addressing Claims Arising from Activity of Security Forces in Judea and Samaria and the Gaza Strip, 5757-1997.

38. Explanations to bill for Israel’s Torts Law (State Liability) (Amendment No. 8), 5768-2008.

39. Ibid.

40. The guarantees are imposed under Regulation 519(a) of Israel’s Civil Procedure Regulations, 5744-1984.

41. For further information, see Adalah, *supra* note 32.

42. LCA 2146/04, *State of Israel v. Estate of the Late Basel Na’im Ibrahim*. See also LCA 6590/10, *Estate of the Late Fu’ad Eshtiyeh et al. v. State of Israel–The Ministry of Defense*.

A second obstacle to Palestinians' lawsuits is the matter of entering Israel to attend court hearings, meet with legal counsel, or undergo medical examinations. Residents of the West Bank must file a special application for a permit to enter Israel for these purposes. Obtaining the permit involves a lengthy and arbitrary bureaucratic process that does not necessarily ensure a successful outcome. Residents of the Gaza Strip are even worse off. Ever since Israel imposed a blockade on Gaza in 2007, residents have been forbidden to enter Israel, barring exceptions or cases defined as humanitarian. Entering Israel for legal proceedings is not classified as such an exception. Moreover, Israeli citizens can only enter Gaza with a special permit – which is not issued to lawyers who wish to file for damages. Therefore, plaintiffs' legal counsel cannot visit the scene of the incident, meet with witnesses, or obtain victims'

signatures on the necessary legal paperwork and documents.

Three human rights organizations petitioned Israel's High Court of Justice against this policy, demanding that residents of Gaza be allowed to enter Israel for the purpose of litigating proceedings against the state. The petition led to the publication of a "Procedure for Examining Entry Requests of Palestinian Residents of Gaza for the Purpose of Legal Proceedings against Israel", which states that permits will be issued only as long as several conditions are met – including "exceptional humanitarian circumstances". After the procedure was issued, the state asked that the petition be denied. Justice Elyakim Rubinstein accepted the request and said that implementation of the procedure must be given time before being examined.<sup>43</sup>

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43. HCJ 7042/12, *Maher Ismail Abu Daqah, et al. v. The Minister of the Interior et al.*

## Testimonies

Palestinians who have suffered harm due to the actions of Israeli security forces need the financial compensation to enable them to try and rehabilitate their lives. These funds are also necessary for purchasing medication and receiving medical treatments, including some unavailable in the West Bank or in Gaza, where health services are less developed than those offered in Israel and elsewhere in the West. Other victims need the money to adapt their homes to the daily physical challenges they face.

Following are six personal accounts by and about Palestinians who were shot and injured by Israeli security forces. They describe the daily hardships they have had to contend with and the upheaval to their lives engendered by the injury. The accounts are provided nearly verbatim, with minor abridgements.

## **Basmah Muhammad Taleb Mansur<sup>44</sup>**

**A 48-year-old married mother of ten who lives in Nablus, she was shot in the face on 12 February 2004**

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On Thursday, 12 February 2004, at around 12:30 P.M. – I was at home with my daughters. A few of them were playing out in the yard and I was cooking and setting the table for lunch. I heard gunfire, and my daughter Nivin – who is now 25 and was 13 at the time – told me there were soldiers outside. I headed to the living room window, which overlooks the yard. When I was about a meter away from the window, I felt a sharp pain on the right side of my face and fell down. Nivin sat down on the floor, covered her ears, and started screaming and crying. My son 'Alaa – who is now 27 and was 14 at the time – came in with a relative of ours who was building a second story to our house and came downstairs when he heard the commotion.

There were many soldiers outside and they demanded that we all get out of the house. Our relative helped me outside and the soldiers laid me down on the ground and tried to give me first aid. My bleeding wouldn't stop and the soldiers couldn't help me. Finally, they put me on a stretcher and carried me about 200 meters to where a Palestinian ambulance was waiting. That was more than an hour after I was shot.

I blacked out in the ambulance. I regained consciousness more than two weeks later in the ICU of Rafidia Hospital in Nablus. I was in intensive care for forty days, during which time I suffered several cardiac arrests. The doctors weren't hopeful about my chances of survival. I lay in bed like a log. I heard everything but couldn't do a thing. I couldn't see, talk, or move. My palate was fractured, there were tears in the major nerve in my face, and I had fragments lodged in my neck and head. I was unable to eat and was fed intravenously. I also had temporary amnesia. I couldn't even remember my children. Sometimes I remembered only some of them. I also forgot the Quran verses I knew.

After forty days in ICU, I was transferred to the gynecology ward and from there, about twenty days later, to hospital in Beit Jala for physiotherapy and rehabilitation. I was in a wheelchair but couldn't operate it or get into it unaided. I was completely paralyzed and had to have everything done for me – to be put in the chair, to be wheeled around, to be fed. I even wore diapers because I couldn't make it to the bathroom independently. In Beit Jala, my condition improved a bit. When I was discharged about six months later, I could even take some steps, but just barely. I got out of bed only to go to the bathroom. During my time in hospital at Beit Jala, I went home for a few days a month. Every time

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44. Testimony given to Salma a-Deb'i on 23 August 2016.



I was home, my condition deteriorated because I was so frustrated by not being able to help my children. They needed me but I couldn't lift a finger for them. I couldn't feed them, change their clothes, bathe them. Nothing. I couldn't stop crying.

When I got to Beit Jala I started eating, but for the first few months I could only manage gruels because of the tears and fractures in my palate. I had also lost several teeth and part of my tongue. My tongue was very badly injured, and to this day I can't speak properly. I can't walk well, either, so I need help getting around the house. I can't shower or change independently. I can't even put on my head scarf alone. Nothing in my body works properly – not my legs, my hands, my mouth, or my eyes. I can see a little but not clearly, and I often stumble and fall. I also still have bad headaches because of the fragments that stayed lodged in my head.

When the treatment at Beit Jala ended, I returned home. That was more than a year after I was injured. My eldest son, Diaa', who was 17 at the time, was taken into custody with his father the day I was shot, and they were still being held. Everything that happened to me was because they wanted to arrest my husband. He was tried and sentenced to four years in prison. My son was sentenced to three.

The biggest problem for me once I got home was the mornings. My older children would go to school and I'd stay home with the little ones – Ibrahim, 5, 'Afifah, 4, and Mustafa, 3. All I could do was watch them until one of my neighbors came by and made them breakfast, fed me, and helped with the chores. That's how it's been ever since. If one of the neighbors doesn't come by, we're stuck without food until the girls get home from school. What has changed is that my girls have grown up. It's been 12 years since that terrible incident. Two of my daughters have since married, leaving 'Afifah, 17, who's now in the eleventh grade. She does most of the housework, and her two married sisters come over almost every day to help her and to bathe and dress me.

Thank God that a few years before I was injured, my husband married his brother's widow so he could raise his orphaned nephews. He spends most of his time in the other house, with his second wife. Why should he stay home with a totally handicapped woman who can't even enjoy a cup of coffee with her husband? I really miss sitting down to coffee with him, but I can't even make myself a cup of coffee or drink it. When I try to drink tea or coffee, I often spill it on myself. The same happens with food, because I can't control my hands. They keep shaking.

The soldiers ruined my life and made it a living hell. I pray for death a hundred times a day. When I got back from physiotherapy in Beit Jala, my kids said, "You're not our mother, they switched you with someone else". When I spoke, they couldn't understand what I was trying to say. I had fits of rage and tears. They were young and couldn't understand what had happened to me. I feel like there's a fire burning inside me when I see that my children need me and I can't help them and support them. Instead, they have to support me and help me with everything. It's an incredibly cruel and tough situation.

What can I do? It's fate. Before I was injured, I loved to cut my children's hair. I didn't send them to hairdressers. I would style my daughters' hair when they went to special events and even for school. I also loved sewing, embroidery, and beading. I made my children beautiful clothes that I showed off to my family and neighbors. But those are all memories from a past that will never return. I have nothing left but those memories. I loved doing everything by myself, without anyone's help or support. Now I rely on other people for everything. That's what hurts the most.

My dream was to have a large, vibrant, happy family, with children jumping and running around the house and an energetic mother following them about, playing with them, picking one up, whispering in the ear of another, and making delicious food and sweets to please her children. I did give birth to ten children, three girls and seven sons. But when they were at the ages when they needed me most, I became dependent on them.





## **Maryam Ikhmeis Mash'al Nassar<sup>45</sup>**

**A 51-year-old married mother of nine who lives in al-Fawwar Refugee Camp, Hebron District, her son Ya'qub was shot in the stomach by a Border Police officer on 8 January 2009, when he was 12**

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I live with my husband, Fayege Nassar, 55. He has diabetes and high blood pressure. We have nine children. Ya'qub, now 20, is my eldest son.

On Thursday, 8 January 2009, Ya'qub was hit by a bullet fired by a Border Police officer. The bullet went through his abdomen and broke four vertebrae in his spine. Ya'qub was left a paraplegic for life at the age of 12. He was a mischievous and restless boy. That day, he left school after handing in his final exam paper and went to a demonstration that was being held at the northern edge of the refugee camp.

Ya'qub was badly injured. He was treated in al-Ahli Hospital in Hebron for ten days, and then transferred to Jordan for treatment. His situation was critical for about 70 days. He survived but remained paralyzed from the waist down.

I have no words to describe the shock I felt when I saw my son sitting motionless, crippled. I felt helpless and couldn't go on functioning as a mother and wife. From the very beginning, I had to adjust to a whole new lifestyle. It was a huge calamity for our family. I was so sad when I realized that Ya'qub would live out his life as a cripple, paralyzed in a wheelchair, just like a little child who needs special help with bandages, that I have to care for him like a baby. Since he was injured I have had to bathe him and dress him, and I stay with him most of the time. I sleep in his room. I don't know if I'll be able to keep this up, because I also have to care for my sick husband and my other children.

Ya'qub couldn't come to terms with what happened to him. For a long time, he wouldn't leave the house. I'd talk him into going outside in the wheelchair. He would go out and come back very depressed. His sadness made the rest of the family sad. Over time, Ya'qub grew and put on a lot of weight. Now it's hard for me to care for him by myself, and I need his brothers and sisters to help me carry him to the bathroom or lay him in bed. As he grew older, he increasingly realized the magnitude of the calamity that had befallen him. Recently he's become very irritable and hardly ever goes out. He says he can't stand the way people look at him and pity him.

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45. Testimony given to Musa Abu Hashhash on 19 December 2016.



About six months ago, his buttocks became infected from sitting for so long in the wheelchair. The infection spread to his pelvic bone and we had to hospitalize him. I've stayed beside him ever since. I go to the hospital every morning and come home at night, exhausted and sad. His brothers and sisters stay with him at night. I worry that his health will deteriorate. I can barely take care of my other children. I'm so tired, and Ya'qub's latest illness made the calamity our family suffered even worse.

Ya'qub's medical treatment was lengthy and very expensive for a poor family such as ours. When his father and I travelled to Jordan with him, it cost us more than 4,000 Jordanian dinars (approx. USD 5,600). Ya'qub receives 1,400 shekels (approx. USD 370) a month from a Palestinian Authority foundation. That's not even enough to cover the cost of his medication, bandages, and transportation between the hospitals where he receives treatment.

After Ya'qub was injured, we hired a lawyer from Jerusalem to handle his case and make sure we get compensation to help us pay for his treatment and secure his future. There were several court hearings, but a few months ago, to our surprise, the lawyer told us that our suit had been denied. He refuses to continue working on the case and we're considering handing it over to another lawyer, but I don't know if that will work.



## **'Ata Muhammad 'Ata Sabah<sup>46</sup>**

**A 16-year-old resident of al-Jalazun Refugee Camp, Ramallah District, he was shot in the chest by a soldier on 20 May 2013, when he was 12**

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I was only twelve years old when I was injured. I didn't know anything about the military or about demonstrations. I was afraid of soldiers and too scared to take part in demonstrations.

My school is on the Ramallah-Nablus road, about 200 meters west of the fence around the Beit El settlement. On the day before I was injured, 19 May 2013, I was playing with a classmate in the schoolyard. I tossed my school bag to him and he threw his to me. We tossed the bags back and forth like a ball. In the meantime, there were clashes between some students from the school and the soldiers guarding the settlement. We heard them on the other side of the school fence.

While we were playing, my friend threw my school bag very high in the air and it landed on the other side of the fence. I went to fetch it and saw four soldiers had it. The other children warned me not to go get it because the soldiers might arrest me or beat me. I went to the vice principal and told him what had happened. He went over to the soldiers, but they wouldn't give the bag back and told him to tell me to come get it myself the next day. I was afraid my parents would beat me if I came home without the bag. Also, all my school books were in it and I needed them to study for an English exam the next day, so I decided to hang around and wait for a chance to get it back.

A few minutes later, I heard one of the soldiers calling my name. I guess he saw it written on my notebooks and books. The older kids suggested that we send over a nine-year-old boy who would say he was 'Ata, because a soldier wouldn't hit a little kid or arrest him. But the soldier didn't believe him and said he wanted me to come over. I started walking towards him but the other kids stopped me, because they were afraid the soldiers would beat or arrest me.

In the end, I had no choice but to go home without the bag. I asked my friend not to tell my parents what had happened, but my mother found out, I don't know how. She said she'd call the principal and ask him to go get the bag. In the meantime, I borrowed the English books from my cousin and studied for the exam. When I took the test the next day, 20 May, I knew all the answers. I was a good student and had good grades. After the exam, at noon, I went home, had lunch and sat down to rest. At 2:00 P.M., some kids came by and said the soldiers had left my bag in one of the fields behind the school. I went there with a classmate, Muhammad. We stopped to buy a coke at

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46. Testimony given to Iyad Hadad on 20 November 2016.

the grocery store near the school. Everything was peaceful. I went into the closest field, where demonstrators sometimes gather and clash with the soldiers guarding the settlement. I took only a few steps into the field to see if there were any soldiers there, and looked towards the settlement. I didn't see any soldiers or protesters.

Suddenly, I felt something hit my chest. I didn't hear the shot. I felt nauseous and fell over. I felt something warm trickling down my body and realized my back was bleeding. I called out to Muhammad, who was behind me, but he couldn't lift me so he ran back to the grocery store to get help. A 17-year-old kid came and picked me up. When he picked me up, I saw two soldiers standing by the corner of the school, outside it. I guess they were the ones who shot me. They had helmets on and their faces were smeared with black paint, so I can't describe them.

I was taken to hospital in Ramallah, and from there to another hospital. I was hooked up to oxygen and then I blacked out. I woke up the next afternoon in ICU at Hadassah Hospital in Jerusalem. I was hooked up to some machines and both my parents were there. They told me I'd undergone complicated surgery in Ramallah to fix the ruptures that the bullet made in my stomach, spleen, pancreas, and spine. I was transferred to Hadassah because I was in such bad shape.

When I woke up in Hadassah, my legs felt heavy and I couldn't move them, not even my toes. I saw that they were hooked up to some contraptions and asked my mother who had put those heavy things on my legs. I asked her to take them off. My mother said it only felt that way because of the injury and that I shouldn't be afraid. Every day, I asked her why I couldn't move my legs. Every day, my legs were examined. When I looked at them, I'd try to move them but couldn't. I kept asking that those contraptions be taken off my legs, and every time my parents would say: Slowly, slowly, be patient. You'll be able to move your legs again the way you used to, and even better.

After 19 days, the devices were taken off and I hoped I'd be able to move my legs. But I couldn't. Nothing had changed. I couldn't even feel my legs, apart from a sense of heaviness. After about two weeks, I was transferred to the Reuth Medical and Rehabilitation Center in Tel Aviv. It was only when I got there that the doctor told me the bullet had paralyzed the lower half of my body and that I was in a bad way. He said there wasn't much hope but that because I was young, maybe willpower and

persevering with treatment would ultimately help me walk again. The doctor also said that the injury had twisted my spine and that my arms had lost some function and were very weak.

When I realized what happened to me and that I was paralyzed, I couldn't take it. As soon as I was brought back to my room, I locked myself in and started throwing and smashing whatever came to hand. I cried and shouted: "God, why?! Where are my legs? Why did this happen?! What did I do to deserve this?!". The hospital staff climbed in through the balcony. They grabbed me and gave me a sedative.

Three months later, on 29 August 2013, I returned home. I was depressed and in shock because my legs hadn't improved at all. My hands were doing better. I left the Reuth Center in a wheelchair donated by a German company. At first I found it hard to operate, but I had gotten used to it by the time I left the center.

When I got home, relatives, neighbors and friends came to visit. At first I felt sad and upset whenever people came over. I didn't want to see anyone and wanted to stay alone in my room, sleeping or playing on the computer. I kept to the house and didn't want to go outside, because I was ashamed to be seen in my condition. It was especially hard when the school year started. I learned that the school had given me a pass to start eighth grade because of my end-of-semester grades. I refused to go to school. I thought: How can I go in a wheelchair? How will I get around? How will I sit in class? How will I play?

For a week I refused to go to school, until my friends started coming over every day and encouraging me. My father gave me pep talks every day. In the end, I came around and agreed to go back to school after my father enrolled me in a boys' school in Bir Zeit which is more accessible for me in my condition. Over time I got used to the school and grew to like it, because there's a lot of understanding and cooperation between the teachers and the students.

It was hard to get to and from school, because it's five kilometers away and we don't have a car. I had to take a taxi there and back, which costs my father 130 shekels (approx. USD 35) a day. Although things are very tight financially, the whole family pitched in to help me. I have three brothers who were also working and they helped me.

When I left the Reuth Center, I was supposed to continue doing physiotherapy at the Abu Raya Center in Ramallah to be paid for by the Palestinian Authority. But I didn't go



because it clashed with my classes. Because I neglected the treatment and didn't do the exercises, my spine got twisted again. The doctors decided that I needed another operation, which I underwent in Hebron in December 2013. I went back to school about two weeks later.

For a whole year I was on tranquilizers because I couldn't come to terms with being paralyzed. I was depressed and started psychological therapy after I got home. I just couldn't bear my situation and wished I was dead. Whenever I was in pain, I was overwhelmed with despair and lost all hope. Before the injury, I wanted to be a veterinarian because I really love animals, and especially pigeons and other birds. But that hope was crushed. I asked my father to sell my birds, because I couldn't feed or take care of them any more. I had 14 finches and four domestic pigeons that I kept on the roof. But during my time in hospital, the pigeons flew away and didn't come back, and most of the finches died. There were only two left, plus one chick. My father refused to sell them and recently I bought new pigeons. They bred and now I have 18 birds that are an inseparable part of my life.

In June 2014 I went back to the Reuth Center for two months and got more physiotherapy, which was funded by the Palestinian Authority. I felt a major improvement, especially since my body had weakened after my back surgery. The treatment I got at Reuth also helped straighten my spine.

Gradually, I began to adjust to my new life and come to terms with my new reality. I worked harder at school and my grades improved. In 2014 I entered ninth grade and felt better in class. A year later I started high school, which is in a more accessible building. My classroom is on the ground floor and I don't have to go up any stairs. My grades are now back to what they were before the injury and my grade point average in tenth grade was 82. I'm in the eleventh grade now.

Over the past year I managed to overcome my frustration and depression thanks to the support of my parents and friends. My father enrolled me in the al-Majd Club for handicapped basketball players and in a Palestinian youth council center. I started going to both centers. I'm part of the team and I play in matches. I don't feel any different from healthy people. I can play and pursue hobbies like anyone else. I started going to matches with the team in other districts. Yesterday I took part in a Defense for Children International conference in Hebron, along with the Minister of Education and the Minister of Health. Taking part in these activities helps me stay socially involved and improves my mood. I'm also learning new things. For instance, I used to not know

anything about human rights and the rights of handicapped people, but now I know how to handle every case and where to refer it.

The biggest difficulty for me was getting into the house and accessing my room. We used to live on the second floor of my grandfather's house, and my father would carry me down every morning. When my brother got back from work he would carry me upstairs, or sometimes my cousin who lived next door would do it. My brother and cousin were often late, and I would be stuck in the street waiting for someone to carry me inside. It was hard carrying me up and sometimes it hurt, because the stairs were too narrow.

To solve the problem, my father switched apartments with my uncle, who lives in the same neighborhood. His apartment is roomier and its design enables putting in an elevator. I wanted to live in the attic so I could be close to my birdcages. At first I still depended on other people to carry me up and down, but about a year and a half after we moved there – just a month ago – we had an elevator put in. It took time because we had to raise enough money – 40,000 shekels (approx. USD 10,500). My father raised two thirds of this, and the other third was donated by a humanitarian organization. This change has made me so happy. I feel free because I can go downstairs by myself whenever I want to. It's an indescribable feeling. I'm optimistic and full of hope.

My last check-up was in April and I was told that my spine wasn't getting twisted again. I recognize the value of exercising now, and I bought some weights to lift so I can stay in shape. I take much less medication on a regular basis, only two kinds – but they cost 1,000 shekels (approx. USD 260) a month. My father pays for them himself, because the ones subsidized by the government aren't good enough. I was told I'd have to take these medicines for the rest of my life.

Recovering physically, adjusting to school, being back with my family and friends, and being socially involved has restored my self-confidence. Now I dream and hope again of building a normal life just like anyone else. I'm thinking of studying to become a lawyer, so I can defend Palestinians from the exploitation and violation of their rights by Israelis. I want to represent them.



My dream of being a vet is buried. It was destroyed by the Israeli sniper who paralyzed me. With my physical limitations, I can't treat animals. My deepest fear is that I won't be able to start my own family and have children. But I trust in God and hope to grow up and find a good woman, get married, and have children. In the meantime, I'm focusing on my studies.



## Hiyam Muhammad Mahmoud Sarhaneh<sup>47</sup>

**A 39-year-old married mother of seven who lives in al-Fawwar Refugee Camp, Hebron District, her son Mus'ab was hit in the eye by a rubber-coated metal bullet on 27 September 2013, when he was six**

On 27 September 2013, my son Mu'sab was hit in the right eye by a rubber-coated metal bullet. He was six years old and he lost the eye. That day, we were walking over to his uncle's house near the main entrance to the refugee camp. When we were near the entrance, we saw soldiers who had come into the camp and were deployed along the houses closest to the entrance. They were firing tear gas and rubber-coated bullets at children who were throwing stones at them and demonstrating there. The clash had begun before we got there.

We stopped by the side of the road and waited for the firing to stop and then tried to keep on walking along the edge of the road. I was holding Mus'ab's hand and we were walking along when suddenly, one of the soldiers started firing rubber-coated metal bullets again. One of the bullets hit Mus'ab in the right eye and he started bleeding. At first I didn't understand what had happened. It was a real fright to see my son bleeding from his eye and I started screaming in the middle of the street.

Mus'ab was quickly taken to the government hospital in Yatta, then to 'Aliyah Government Hospital in Hebron, and from there to the ophthalmological hospital in a-Sheikh Jarrah in Jerusalem. He got there at night, after a complicated process of coordination with Israel.

At first, my husband and relatives tried to shield me from the truth, but I pressed my husband until he told me that Mus'ab had completely lost his right eye. At first I just wouldn't accept it. I couldn't stop crying and felt guilty for taking him with me on the visit, on that day of all days. I was sorry the bullet hadn't hit me instead. Everyone tried to calm me down and make things easy for me, but I couldn't calm down. I couldn't believe that my little boy would live the rest of his life with only one eye. I still don't want to believe it. He was only six years old and had just begun school. He had no idea what was going at the entrance to the camp and why the soldiers were firing tear gas at children.

Mus'ab stayed at the eye hospital for two weeks, until the wound healed. He had to wait for an artificial eye implant. I stayed with him the whole time, crying and worrying that he couldn't see me with his left eye.

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47. Testimony given to Musa Abu Hashhash on 19 December 2016.

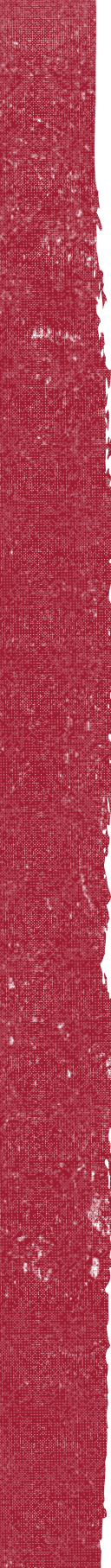
Mus'ab underwent plastic surgery and a glass ball was inserted in his eye socket. Meanwhile, I neglected my other children. All I could think about was Mus'ab getting an eye implant and looking normal again, so we could forget for a moment that he'd lost an eye. A year later, he had his first artificial eye implant. It took a long time and cost us more than 10,000 shekels (approx. USD 2,600), because we didn't want the cheaper eye that the Palestinian Authority provided for free. It's not good quality, you have to take it out before you go to sleep, and you can't shower or swim with it. We wanted a better quality eye and paid for one ourselves. It has to be replaced every two years because Mus'ab is still growing so it needs to be adjusted to his size. A year ago, he had a new eye implanted and we also paid for that one ourselves.

Mus'ab is in the fourth grade now and he's doing well at school. His father and I, along with his brothers and sisters, do everything we can to make him feel that he's like everyone else and not think that he's limited in any way. We try to comply with every little request and make an effort to help him feel like a normal boy. I'm always sad but I try to look as natural as I can. I encourage him with schoolwork and ask what he wants to study after he graduates. He says he wants to be an ophthalmologist so he can help people who have lost their eyes. I don't know whether that's even possible, whether he can be a doctor with only one eye. A lot of professions require two eyes.

It makes me sad to see that Mus'ab understands exactly what happened to him, even though he was so young. I know he can't see as well as others and that his poor sight puts him in danger, especially at night. In the past few weeks he stumbled and fell twice while he was outside in the dark. He broke his right arm and it's in a cast. I try to keep him inside once it gets dark and to watch him all the time.

A few days ago, Mus'ab came home in tears. He told me that a neighbor's kid called him "one-eye". I completely lost it and went right over to the kid's house. I warned them that this better not happen again. Such things can scar him emotionally.

Mus'ab gets psychological therapy through Doctors Without Borders. I think I may also need help to finally put this behind me and go back to being the way I was, like other



mothers. My son was robbed of a happy childhood and I was robbed as a mother. I'm so sad for him and can't get over my feelings of guilt and helplessness.

After Mus'ab was injured, we hired a lawyer to file a lawsuit and get compensation that will hopefully provide for his future. I hope the lawyer manages to get Mus'ab some compensation, even though I know that all the money in the world can't make up for a lost eye.



## **Yunes Mahmoud Ahmad 'Udwan<sup>48</sup>**

**A 20-year-old resident of 'Azzun, Qalqiliyah District, he was shot in the back on 8 August 2014, when he was 18**

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On Friday, 8 August 2014, after the Friday prayers, a protest march began in the village, heading towards the eastern part of 'Azzun, where there's a closed metal gate. Near the gate, clashes began with soldiers. One group of soldiers was lying in wait in the olive groves. Suddenly I saw them about ten meters away from me. I only managed to turn around so I could flee back into the village, and then I was shot in the back. Some of the guys picked me up and carried me about 200 meters to a car that took me to the village doctor.

The doctor called the Red Crescent for an ambulance, which took about half an hour to arrive. I was taken to hospital in Qalqiliyah, where I began to feel severe lower back pain. The doctors decided to transfer me to hospital in Nablus because my condition was so bad. In Nablus they ran some tests and found that the gunshot wound had paralyzed the lower part of my body and that I had to undergo surgery. I was transferred for surgery to al-Makassed Hospital, where the doctors put platinum implants in my vertebrae to set my spine. After 11 days I was sent back to the hospital in Qalqiliyah to receive further treatment and get antibiotics.

Then I went back home and the daily agony began. My home isn't suited to a person who can't walk. For two months I lay at home and couldn't move. Luckily, I have a twin brother who cared for me and did everything for me.

After two months of being stuck inside, the governor of Qalqiliyah District visited me and I asked him to help me get into the Abu Raya physiotherapy center for treatment. It happened and I was treated there for six months. They taught me how to walk with a walker and keep my balance.

Then I went back home to 'Azzun. My life now is very different from what it was before the injury. I need constant care and can't look after myself. I was suffering so much that I was forced to take painkillers, which I still take. My lower back and legs still ache. In the two years since I was shot, I've spent more than 5,000 shekels (approx. USD 1,300) on painkillers and medication.

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48. Testimony given to Abdulkarim Sadi on 14 November 2016.

Before the injury I was planning to start university, but because of what happened I had to put it off for a year. In the summer of 2015 I signed up for English studies at the Open University in Qalqiliyah. I managed to attend classes for two weeks and then had to stop because the university isn't handicapped accessible. There's no elevator and I couldn't reach the classrooms on the fourth floor. For two weeks my brother Yusef helped me up the stairs, but it hurt a lot and I couldn't keep it up. That was the end of my dream to get a B.A. in English. I still hope to study in an accessible university. My family struggles financially and can't afford to send me to a private university.

My father is a simple farmer and we don't have enough money to supply all our needs. We live in a simple house that can't be adapted for a handicapped person. It's very old and can't be renovated. Some non-profit organizations helped us put in a special rail that I use to go up and down the stairs.

My life has changed dramatically. Before the injury, I was strong and good-looking. Now I have to rely on others for help. I used to love sports and hanging out with friends at places we liked. Now I'm bedridden, stuck between four walls. Some days, I don't see any daylight. My twin brother Yusef helps me with everything. He bathes me and helps me go to the toilet. He sits with me and stays by my side like a shadow. It pains me that I can't help provide for my family and instead am an added burden. I will keep trying to rebuild my life. Maybe one day I'll be able to fulfill my dreams.





## **Jawaher Hamuda Yusef a-Zaghlul<sup>49</sup>**

**A 50-year-old married mother of seven who lives in a-Nuseirat Refugee Camp, the Gaza Strip, her son Hassan was shot in the leg on 13 October 2015, when he was 22**

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My son Hassan dropped out of school when he was in junior high and started working as a peddler. Sometimes he sold simple things such as parsley and green herbs or clothespins at a market stall. At other times he would help his father sell flip-flops. He and his father would go up and down the streets of the camp with a cart all day. They made very little, barely enough to cover expenses. Sometimes municipality officials wouldn't allow them to sell. Our family is large and we're very badly off financially. My husband is unemployed and we have no money to invest in a business.

It was very tough on Hassan. He started going to protests against Israel held along the border. On 30 March 2012, he was shot in the left leg near Erez Checkpoint. We were visiting my brother-in-law when my husband got the news that Hassan had been hit. I went home right away and my husband went looking for him in hospitals throughout northern Gaza. I was very worried until my husband called and told me Hassan was all right. He was kept in hospital for three days.

On Tuesday, 13 October 2015, I was at home and Hassan was at work, selling things at the market. He came home at midday and we had lunch together. Then some young men came over and told me that my son Muhammad, then 13, had gone to participate in a demonstration near the fence, east of al-Bureij. Hassan said he was going to get his brother, but he never came back. During the muezzin's call for evening prayers, some young men came to our house and told me that Hassan had been badly injured. Their hands were covered in blood. When I saw that, I sank to the floor. I felt like my legs couldn't support me. My daughters immediately phoned my husband and told him that Hassan was hurt.

We went to Shuhada al-Aqsa Hospital in Deir al-Balah and the doctors told us that Hassan had been hit in the left thigh by two bullets. They said he was in critical condition because they couldn't stop the bleeding. When I saw Hassan I became hysterical, and my husband started screaming too. Hassan was then taken by ambulance to a-Shifa Hospital in Gaza City. He was unconscious. They operated on him there for four hours. I waited in the corridor, exhausted and frantic. Every time I saw a doctor or nurse, I asked them if they knew how Hassan was.

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49. Testimony given to Khaled al-'Azayzeh on 3 January 2017.



After the surgery, Hassan stayed in hospital for over a month. My husband stayed at his bedside the whole time. I left home at ten o'clock every morning and stayed until evening. Our daughters did all the housework. It was one of the hardest periods of my life. We spent a lot of money during that time, on medication for Hassan that the hospital didn't provide and on transportation costs to and from the hospital for my husband and me.

The doctors couldn't restore Hassan's leg to health. We managed to get a referral to al-Makassed Hospital in Jerusalem and a permit to leave Gaza. On 31 December 2015, I went to Jerusalem with him. In February 2016, Hassan went to Jerusalem again, this time with his father. They stayed at the hospital for a week. In March 2016, they went again, this time for ten days. All these trips cost us a lot of money. My husband has borrowed money from his brothers – sometimes 1,000 shekels (approx. USD 260), sometimes more.

Hassan still suffers extreme pain in his left leg and cannot control his foot because the nerves were severed. The pain is worse when it's cold, and he cries out at night. He shouts so much that we can't sleep. There's no electricity, so we can't get him a heater. Our house is small and roofed with asbestos. I cover him with more than nine blankets to keep him warm. He needs daily care, antibiotics and painkillers in order to sleep. The bandages on his leg have to be changed every day. We pay for the medication out of our own pocket. We buy it on credit from the pharmacy, and when my husband gets some work we pay off the debt. We also have to pay specialists for his medical examinations.

About a year ago, Doctors Without Borders put a brace mechanism on Hassan's leg. But about eight months later the device malfunctioned and made his leg swell up, so Hassan stopped using it. He now needs medical shoes that cost about 300 shekels (approx. USD 80), which we don't have.

Ever since Hassan was injured, he hasn't received any financial compensation. Almost all of my husband's meagre income goes towards medication and doctors, instead of food and household expenses. Hassan can't work and if some day he'll want to get married, he won't be able to save up enough to pay a bride price. Even if we do manage to scrape together the bride price, how can he support a family? I feel like his future has been ruined.





## The state's justifications for the exemption – refuted

By means of legislation and case law, the state guaranteed itself a sweeping exemption from paying compensation to Palestinians. The exemption is given even in cases that have nothing to do with combat or warfare – such as clear-cut policing activity, cases of looting, and violence. When Palestinians nevertheless wish to seek compensation and file for damages in the Israeli courts, they find themselves up against almost insurmountable procedural and evidentiary obstacles, as detailed above, causing many to opt out of the process at the very outset.

Paying compensation to persons who have suffered injury to themselves or to their property is not an act of charity – it is the state's obligation under international law. Not compensating Palestinian victims severely infringes upon their human rights, as they are denied redress for violation of the basic rights to life, physical integrity and property. Denying the right to receive compensation is tantamount to a violation of the right in itself: the significance of human rights is not limited to merely having them entrenched in some law or international covenant. If no sanctions are enforced when human rights are breached, the rights become moot and the perpetrators have no incentive to institute a change in their policy.

In the reasoning the state gave for the proposed amendments to the Torts Law and in its response to the High Court petition against the constitutionality of Amendment No. 7, Israel reiterated three major justifications for granting it the exemption it felt it deserved. In the following, we refute each of these reasons and explain why they cannot justify denying compensation to Palestinians harmed by Israeli security personnel in the Occupied Territories.

### A. Is the exemption on the grounds of “warfare activity” really too narrow?

The state has argued that the immunity from liability for “warfare activity” provided by law – as the courts interpret it – is too narrow. It argues that while the events of the first and second intifada may not constitute “actual war”, the exemption must be applied to them and the state must not be required to pay compensation for damage caused during these periods.

For example, this is how Deputy State Attorney Yehoshua Shofman addressed the circumstances of the first intifada in the first draft bill on the matter: *Some of the incidents, in their specific context, clearly constitute warfare. However, the overall situation described above does not come entirely under the definition of “war” in its traditional sense. Therefore, there is cause for concern that many actions taken by the security forces during the first intifada will not be exempted as “warfare activity”.*

*The intifada was a violent struggle, planned and organized, at least in part, due to a conflict between nations. This struggle included deliberate harm to soldiers and civilians. The security forces charged with restoring order and ensuring safety in these areas operated under difficult conditions, at real risk to life and limb, to an extent that justifies considering these actions as “warfare activity”, for whose damages the state must not be held liable.<sup>50</sup>*

Similar arguments were made in the state's response to the petition filed with the High Court of Justice against Amendment No. 7. According to the state, the narrow construal of the term “warfare activity” was relevant to the period before the first intifada

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50. Article 5 of the draft bill, *supra* note 18.

and “relied on a state of affairs entirely different from that which existed during the intifada”.<sup>51</sup> In its response, the state also criticized the case law established in the Bani ‘Odeh ruling whereby every incident must be examined in itself “even within the context of a largescale uprising that involves terrorism”. The state argued that this “does not take into account the broader context of the conflict, and all the interests of those involved in it”.<sup>52</sup>

Regarding the second intifada, the state described it as “a unique war that is unprecedented in the annals of Israel’s wars”, in which “it is no longer possible to refer to the IDF’s actions in Palestinian Authority territories as policing activities”. As part of this war, “the IDF has to operate in densely populated areas” and employ weapons that it had not previously used in the Occupied Territories such as tanks, bulldozers, and fighter jets. As a result, the state argued, many Palestinians were injured. The military also had to “take preventive actions, which are not ostensibly classic acts of warfare, such as clearing land or staffing checkpoints. However, these are military operations to all intents and purposes”. The upshot of it all is that the “IDF operates in the [Occupied] Territories in many ways as in war. The forces it is facing, whether organized or not, are generally speaking an enemy in any sense of the word.”<sup>53</sup>

First, the state is mistaken in portraying judicial construal of the term “warfare activity” as narrow. While the courts did make it clear that every incident must be examined individually and on that basis a determination made if it constituted “warfare activity”, gradually – even before Amendment No. 8 was passed – the judges included more and more types of incidents in this definition. Whereas in 2004 Justice Mazza found that “classifying the activity of three or four soldiers ordered to disperse a disturbance by civilians torching tires and throwing stones as ‘warfare activity’ seems far-fetched to me”,<sup>54</sup> in later years, the courts considered similar incidents as “warfare activity”.<sup>55</sup>

Moreover, as a consequence of the Bani ‘Odeh ruling, case law began to distinguish between two kinds of “warfare activity”. The first is policing actions “which may devolve into warfare activity if the troops end up facing severe peril or even mortal danger”.<sup>56</sup> Accordingly, “the kind of danger that the force is facing at the time of injury is highly important, as the Court must examine this risk and determine whether it grew in nature and scope to such an extent that it altered the very nature of the activity”.<sup>57</sup> In such cases, the relevant question is what level of risk the force was facing at the time that it caused injury to the plaintiffs.

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51. Para. 52 of HCJ 8276/05, *Adalah – The Legal Center for Arab Minority Rights in Israel et al. v. The Minister of Defense et al.*, Respondents’ Response (hereafter: The State’s Response to the Petition).

52. *Ibid.*, para. 56.

53. *Ibid.*, paras. 73 and 74.

54. CA 1354/97, *Akashah v. State of Israel*.

55. For example, see CA 8599/02, *‘Abd al-Qadr Muhammad Hazimah v. The Military Commander in Judea and Samaria*, CA 8384/05, *Masri Munir Salem v. State of Israel*.

56. Para. 21 of CA 1459/11, *Estate of the Late Muhammad (Nabil) Nafe’ Hardan v. State of Israel – The Ministry of Defense*.

57. Para. 18 of LCA 3866/07, *State of Israel v. ‘Atef Naif al-Maqusi*.



The second type of “warfare activity” is an operation that is defined as such from the outset, “such as an ambush or targeted assassination, in which case there is no need to prove risk to the force”.<sup>58</sup> In these cases, the level of risk is not even examined: *There are cases that prima facie constitute warfare activity, so that there is no need to examine the particulars of the incident or distinctions of one kind or another. These are actions taken as part of war in its “classic” sense, or during a largescale military operation, such as the Second Lebanon War, Operation Cast Lead, or Operation Pillar of Defense. The nature of the forces involved, the weapons and means they use, the context for the operation, the objectives and targets of the attack, the danger posed to the force carrying out the operation, the area in which it is held, whether the region in which the activity takes place is under effective control of the State of Israel – these accumulated components, whether all or in part, indicate that we are dealing with “pure” warfare activity, which falls within the boundaries of the clear cases that afford the state immunity.*<sup>59</sup>

In cases that come under this definition, the courts do not examine the circumstances in which the incident took place, including whether the soldiers were indeed in danger. Instead, they exempt the state from liability due to the nature of the operation and its a priori classification, regardless of the actual circumstances on the ground. In doing so, the courts have significantly expanded the definition of “warfare activity” – even without the later amendments to the law.

Second, the state’s attempt to represent all the events of the first and second intifada as a “war” that justifies exemptions from paying compensation is absurd and lacks any factual or legal basis. Some incidents that occurred during these periods unarguably constitute combat; however, this is not enough to determine that all actions that were undertaken by the security forces – or are currently being carried out – in the Occupied Territories meet the definition.

Much of what Israel’s security forces do in the Occupied Territories is straightforward policing activity: staffing checkpoints, making arrests, imposing and enforcing curfews, dispersing demonstrations, and so on. Many Palestinians have been injured in the course of this type of activity, not in combat situations. Needless to say, security forces sometimes do face danger in carrying out these duties – but so do police officers within Israel, who put their lives on the line and sometimes are even injured on the job, in the course of ordinary police work. This does not, of course, mean that the Israel Police is engaged in warfare activities. As Dr. Guy Lurie, Prof. Yuval Shany and Prof. Mordechai Kremnitzer put it:

*The premise that any action to prevent terrorism carried out in the Occupied Territories constitutes “warfare activity” or life-endangering combat activity is erroneous. The security forces control vast sections of the area, and many of their actions there were, and still are, clearly a matter of law enforcement. These actions engender the usual risks associated with law enforcement, for which the Torts Law provides efficient and just solutions.*<sup>60</sup>

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58. Para. 21 of CA 1459/11, *Estate of the Late Muhammad (Nabil) Nafe’ Hardan v. The Minister of Defense*.

59. Ibid. For examples of such rulings, see CA 9561/05, *’Aouni ’Abd al-Rahim Hatib v. State of Israel*, CA 4471/08, *George Sa’dah v. State of Israel – The Ministry of Defense*, CA 1864/09, *Estate of the Late Ahmad Skafi v. State of Israel*, CA 6982/12, *Estate of the Late Rachel Corrie v. State of Israel – The Ministry of Defense*.

60. Guy Lurie, Yuval Shany and Mordechai Kremnitzer, “The State’s Civil Liability for Acts to Prevent Terrorism”, The Israel Democracy Institute, 7 September 2009.



## B. Are there really “evidentiary difficulties”?

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Ever since the state began trying to amend the law it has argued that it cannot fact-check the claims made by Palestinian plaintiffs and that, in some cases, it has absolutely no way to mount a defense, as the existing legal tools were created for regular torts claims that are substantially different from those relating to incidents that took place during the first and second intifadas. The state cited a variety of difficulties that this supposedly creates, including:<sup>61</sup>

- Getting to the scene: Accessing the areas in which the incidents took place – in order to examine the claims made by the plaintiffs and carry out independent investigations – entails mortal danger. Ever since the Palestinian Authority was established, the state has no way of reaching some of these places.
- Verifying reliability of medical documents: The plaintiffs received medical care outside Israel proper, in facilities that the state cannot access. Palestinian hospitals keep only partial records and, in any case, these do not shed light on the injuring party or the nature of the incident.
- Locating witnesses and bringing them to court: Due to the high turnover of forces in the field and the sheer number of incidents, the state is hard pressed to identify the forces who took part in a particular activity and to locate the soldiers years after the incident. Even if they are identified, these

individuals have often already finished their military service and it is difficult to get them to testify in court. Moreover, these former soldiers often find it difficult to recall the details of a particular incident out of the many activities in which they took part over the years. In some cases, the information is classified intelligence they are not allowed to divulge.

According to the state, these impediments create an “imbalance” between the state and the plaintiffs “that has almost always worked against the state”. The state argues that the “expectation that there be detailed, meticulous documentation of the chain of events for every incident was not applicable to a reality of ongoing fighting in which soldiers were in constant danger. Therefore, it was impossible to meet this requirement, which was supposed to prevent evidentiary harm to both plaintiff and state”.<sup>62</sup>

The state went on to argue that its inability to address such claims would enable Palestinians to file false claims. The first draft bill noted that “this state of affairs gives rise to situations of practical inability to defend against lawsuits, as well as false claims and plaintiffs’ attempts at fraud, while the state lacks the means to expose falsehoods and distinguish them from claims that are based on facts that did occur”.<sup>63</sup> In its response to the petition to the High Court of Justice, the state even proposed that this increases the risk of “false claims being filed as part of the fight against Israel”.<sup>64</sup>

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61. See: Article 6 of the draft bill, *supra* note 18; para. 281 of the State’s Response to the Petition, *supra* note 51; explanations to the bill for Israel’s Torts Law (State Liability) (Amendment No. 5) (Filing Claims Against the State by a National of an Enemy State or Resident of a Conflict Zone), 5768-2002 (hereafter: Explanations to Amendment No. 5).

62. Para. 53 of the State’s Response to the Petition, *supra* note 51.

63. Article 6 of the draft bill, *supra* note 18.

64. Para. 281 of the State’s Response to the Petition, *supra* note 51.

Yet evidentiary problems of the kind cited by the state do not justify a broad exemption from paying compensation to Palestinians, who themselves face considerable difficulties in proving their claims. Israeli court proceedings are lengthy, complex, and humiliating for many Palestinians. Dealing with the Israeli legal system is difficult for them: it is inherently biased in favor of the state; Palestinian plaintiffs and witnesses must overcome a language barrier and cultural differences, which make it difficult for them to follow all the courtroom proceedings; and naturally, the judges – who are Israeli citizens – identify with the soldiers and the State Attorney representatives, and find it harder to accept allegations brought against them.

Moreover, in 2002 the state incorporated in Amendment No. 4 a series of procedural and evidentiary rules that work significantly in its favor and make it extremely difficult for Palestinians to file damage claims against the state. The shortened statute of limitations forced many claimants to file suits regarding only part of the damage, as the full extent of the injury could not be discerned within the brief period of time since the incident. This gave the state a major advantage that it does not have in cases relating to damage that occurred within Israel proper, and is certainly not afforded to non-state defendants. The courts dutifully applied these rules, rejecting claimants' requests to extend the short statute of limitations specified in the law.<sup>65</sup>

Amendment No. 4 also prohibited shifting the burden of proof to the state. As a result, plaintiffs are required to prove things they have absolutely no way of knowing, such as what orders the soldiers were given or what weapons they used. Palestinians who wish to file for damages face an even greater

hurdle in this context in that no Israeli authority – including the military – carries out effective criminal investigations of incidents that occur in the Occupied Territories. Most incidents are not investigated at all, and the rare cases that do involve superficial investigations that are unreasonably protracted. Consequently, the claimants cannot rely on any forensic evidence, eye witnesses, or statements by soldiers involved in the incident.<sup>66</sup>

While the amendments to Israel's Torts Law were supposed to resolve the difficulties cited by the state, it nevertheless continued to refer to the same difficulties even after these amendments were enacted. Then, even before the results of the amendments could be assessed in terms of the state's ability to respond to claims, the state rushed ahead to introduce another amendment that included a blanket exemption from compensating Palestinians for any of its actions in the Occupied Territories. It appears, therefore, that the state's arguments concerning evidentiary difficulties served primarily as an excuse for justifying the principle that it should not be held liable for paying compensation for harm to Palestinians.

In addition to the changes enacted by Amendment No. 4, residents of the Occupied Territories who wish to file for damages encounter further obstacles: The courts impose costly guarantees amounting to tens of thousands of shekels, which many cannot afford; difficulty in getting into Israel from the West Bank or from Gaza greatly impedes their ability to litigate their suits; and the fact that Amendment No. 8 limited hearings to courts in Jerusalem or Beersheba reduced the number of attorneys willing and able to take on such cases. Given all the above, it would seem that the state's argument

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<sup>65</sup> See, for example, CA 5250/08, *Mazen Sa'id Ahmad Khashan v. State of Israel*, LCA 5165/10, *Estate of the Late Da'ud Hassan Taleb v. State of Israel*, LCA 8592/10, *State of Israel v. Nabili*.

<sup>66</sup> Regarding MPIU investigations, see B'Tselem, *The Occupation's Fig Leaf*, *supra* note 1, pp. 12-13.

that Palestinians might file “false claims...as part of the fight against Israel” seems to have no basis in reality, and therefore the state did not bring any data or evidence that such claims were in fact filed.

Furthermore, the state’s argument that it cannot properly address the claims made against it in torts suits contradicts the position stated explicitly in other contexts, namely that Israel in fact diligently and successfully carries out effective criminal investigations in similar incidents in which soldiers are suspected of acting in contravention of the law. Although criminal investigations are far more complicated than the process of establishing facts in torts – and the criminal burden of proof much higher – the state boasts its military law enforcement system carries out serious MPIU investigations that meet the standards and benchmarks laid out in international law.

In a position paper submitted to the Turkel Commission, which examined Israel’s law enforcement system, then-Military Advocate General (and now Attorney General) Avichai Mandelblit stated that “these investigations present military CID with complex, numerous and varied challenges”. In the paper, the former Military Advocate General (MAG) detailed difficulties that are essentially similar to those cited by the state as reasons to exempt it from compensating Palestinians for damages. Yet unlike the state’s conclusion regarding the torts lawsuits, the MAG did not find that these difficulties kept the military from investigating. On the contrary, he explained that *[o]ver the years the Military CID adopted various techniques that allow the investigators to overcome many of the difficulties. Thus a strong tie exists between Military CID and human rights organizations*

*that represent Palestinian complainants, and through them said complainants and additional witnesses are invited to provide their version with regards to the events. Making use of human rights organizations allows investigators to overcome the apprehension of the Palestinian residents over an encounter with IDF bodies. Additionally, sometimes the organizations have photographic documentation of the event itself or of the site where it took place.*

*In order to effectively interrogate the Palestinian witnesses and complainants and check the documents submitted by them (such as medical reports) Military CID is assisted by Arabic speaking interpreters. Likewise, Military CID investigators are helped by professional experts, for example from the area of weaponry, for the purpose of analyzing the evidence in their possession that sometimes can consist of fragments from the incident scene or pictures of injuries. Another means of overcoming the aforesaid difficulties is to learn the entire battle picture and the locations of the forces that were active in the fighting from Operations Branch personnel, in a way that enables the investigators to locate the units that operated at the arena and at the time when the alleged incident took place.<sup>67</sup>*

State Attorney Shai Nitzan, then Deputy State Attorney (Special Prosecutions), stated in his submission to the Turkel Commission that all the positions presented in the MAG’s paper “are accepted by the Attorney General”. Nitzan added that “the State of Israel has an advanced legal and institutional system – one of the most modern in the world – for investigating claims of violations of martial law. This system was founded and operates from the State’s commitment to morality and the Purity of Arms which has been an integral part of

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67. Position paper by the Chief Military Prosecutor, submitted on 19 December 2010 to the Public Commission for Examining the Maritime Incident of May 31, 2010 headed by former Supreme Court Justice Jacob Turkel, p.4 [See Turkel Commission website: [http://www.turkel-committee.gov.il/files/wordocs/niar\\_emda\\_eng.pdf](http://www.turkel-committee.gov.il/files/wordocs/niar_emda_eng.pdf)].

it since its formation, as well as to the principles of international law”.<sup>68</sup>

B’Tselem disagrees with these statements regarding Israel’s military law enforcement system. In May 2016 B’Tselem announced that it would stop referring Palestinians’ complaints to the military, as by doing so it indirectly facilitates whitewashing by the system.<sup>69</sup> The passages are quoted above in order to demonstrate the state’s self-serving maneuvering. When it feels it is in its best interests to do so, the state boasts of the professionalism of its military law enforcement that effectively investigates incidents of injury to Palestinians by security forces; when it feels it advantageous to argue otherwise, it says that it cannot carry out the selfsame task.

### **C. Is it true that “each party must assume its own damages”?**

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The state has argued that in armed conflict, “each party must assume the damage it incurs”; accordingly, it has established a compensation mechanism for Israeli victims, and there is no reason for it to pay for harm suffered by Palestinians. As the state reasoned in its explanations to Amendment No. 5:

*It is accepted, as a rule, that during armed conflict between nations, every party must shoulder its own damage and care for its casualties. Israeli citizens who have been harmed since the confrontation began obviously have no viable avenue for suing the responsible party for damages, and they are*

*compensated by the state as victims of hostile actions, while residents of the area under dispute are currently permitted to sue the state for damages. Thus, the state bears responsibility both for damage caused to its own citizens and for damage caused to the people living in the area where the confrontation was. This situation, in which the state bears the burden of injury to its citizens, yet also shoulders the burden of damage caused when upholding its duty to safeguard them and to prevent injury or harm by hostile elements – including attendant damages – is not right. Some of the most developed countries in the world have taken measures to prevent such situations from arising.”<sup>70</sup>*

Israel has also argued that “the result is that Israel is held liable for damages caused by a war that it did not start, and in which it is in a defensive position against an onslaught of terrorism. Israel bears the burden both of injury to its own citizens and of torts suits by the Palestinian side.”<sup>71</sup> Elsewhere, the state stressed that “this is not merely a financial consideration, but is primarily a question of principle. It is not right for the party under attack to be held liable for all damages created by the war.”<sup>72</sup>

The state further claimed that the Palestinian Authority must bear responsibility for compensating Palestinian victims, and notes that it does partially do so, complemented by international organizations, Arab countries and Islamic charities. According to Israel, the Palestinian Authority does not constitute a state – yet when it comes to paying compensation, Israel considers it as such: “It has

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68. Letter from Shai Nitzan, Deputy State Attorney (Special Prosecutions), to Adv. Hoshea Gottlieb, Turkel Commission Coordinator, dated 6 April 2011, p. 2. (See Turkel Commission website: [www.turkel-committee.gov.il/files/worddocs/Letter\\_to\\_Joshua\\_Gottlieb.pdf](http://www.turkel-committee.gov.il/files/worddocs/Letter_to_Joshua_Gottlieb.pdf)).

69. B’Tselem, *The Occupation’s Fig Leaf*, *supra* note 1.

70. Article 8 of the draft bill, *supra* note 18. See also Explanations to Amendment No. 5, *supra* note 61.

71. Para. 79 of the State’s Response to the Petition, *supra* note 51.

72. *Ibid.*, para. 281.

legislative, executive, and judiciary branches. There is nothing to prevent the establishment of a social care system for victims of the war, such as Israel created for its citizens.”<sup>73</sup> Therefore, “the Palestinian Authority, like any other state entity with powers, ought to rise to the occasion and care for its residents, as Israel does.”<sup>74</sup>

In this argument, the state considers Palestinians as citizens of another state that has the ability to compensate them and agree upon reparations with Israel. In its response to the High Court petition against Amendment No. 7, the state even referred to reparation agreements reached between various countries throughout history, once the state of war between them ended.

Yet the Israeli-Palestinian reality is different: The situation at hand is not that of two equal parties at war, but rather a state of occupation. Even after the Oslo Accords Israel remains the occupying power in the West Bank. Consequently, Palestinians who live in the West Bank – including in East Jerusalem, which Israel officially annexed – are considered protected persons. Similarly, Israel still controls many aspects of daily life in the Gaza Strip even after the disengagement, and repeatedly wages military operations there. In view of these circumstances, Israel cannot reassign responsibility for the injuries it caused and act as though the Palestinian Authority were a sovereign state.

The Palestinian Authority is not an autonomous state that can make independent arrangements with other states regarding compensation to victims. Although it was given certain limited powers following the Oslo Accords, any decisions

it makes – even trivial ones – require tacit or explicit Israeli consent. Areas A and B, which were transferred to the Palestinian Authority’s full or partial control, are not a contiguous bloc, but rather consist of 165 “islands” entirely surrounded by areas under Israeli control. Most of the land reserves needed to develop Palestinian communities are in Area C; any use of these reserves, even for the benefit of residents in Areas A and B, requires permits from Israel – which usually denies them.

Israel still directly controls the lives of all residents of the West Bank, even those living in areas officially transferred to the Palestinian Authority. Nearly all Palestinian travel in the West Bank requires going through checkpoints and coming into contact with Israeli security forces. Israeli soldiers and police officers regularly enter Areas A and B to carry out arrests and gather intelligence. Israel also still maintains a military court system, in which thousands of Palestinians are tried every year – most of whom live in areas ostensibly under control of the Palestinian Authority.<sup>75</sup>

Once again, this is a case of the state picking and choosing arguments to suit its purposes. Israel is well aware of the reality of occupation which it created and continues to maintain; as a rule, this reality is in keeping with state interests. However, to justify evading payment of compensation, the state is willing to change its tune and declare the Palestinian Authority has state-like status – all the while changing nothing in its actual treatment of the Palestinian Authority or its residents.

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73. Ibid., para. 83.

74. Ibid., para. 281.

75. For further analysis, see B’Tselem, *Reality Check: Almost Fifty Years of Occupation*, June 2016.

## Conclusions

From September 2000 – when the second intifada broke out – through February 2017, Israeli security forces killed 4,868 Palestinians who were not taking part in hostilities. About a third of them (1,793) were under the age of 18.<sup>76</sup> Thousands of others were wounded, thousands of homes were demolished, and vast tracts of farmland devastated.

Israel guaranteed itself a nearly blanket exemption from the obligation to pay compensation for this harm. The state does not offer Palestinians harmed by its security forces a genuine opportunity to file for damages in Israeli courts, offering them no more than the illusion of being able to do so. By broadening the legal definition of what constitutes “warfare activity” and inclusive construal of this term by the courts, on the one hand, and introducing a series of procedural and evidentiary restrictions set out in legislation and case law, on the other, Israel has rendered virtually nonexistent the chances of Palestinian plaintiffs getting compensation for the harm they suffered.

This policy reflects Israel’s profound contempt for the life, safety and property of Palestinians in the Occupied Territories. The state has also made it clear that, for its part, it bears no responsibility for the consequences of its control over the Palestinian population, both as the occupying power in the West Bank and as an external entity exerting control over the Gaza Strip. Israel’s powers as ruler, which it is quick to enforce when it serves its own purposes, vanish into thin air when it faces accountability for its actions.

The effects of the changes in legislation and in case law are evident in the figures concerning

compensation suits filed against the state by Palestinians from the West Bank and the Gaza Strip. The Ministry of Defense sent the figures to B’Tselem per its request.<sup>77</sup> Since this type of lawsuit can take years to be resolved, the state is still occasionally required to pay damages for claims filed before the rules were changed. Therefore, the full impact of the changes is not yet fully apparent. That said, two clear trends are already in evidence: First, far fewer claims are being filed with the courts. For example, 2002 to 2006 saw an annual average of 300 new lawsuits (this figure includes the years 2004 and 2005 when the number of suits filed went up slightly as a result of the shortening of the statute of limitations which forced potential plaintiffs to quickly file their claims). In contrast, 2012 to 2016 saw an annual average of 18 claims – a mere 6% of the average a decade earlier.

Second, Israel is paying less compensation to Palestinians. From 1997 to 2001, the state paid an annual average of 21.6 million shekels (approx. USD 5.7 million) – in settlements or pursuant to a court verdict. In contrast, from 2012 to 2016, the state paid an average of about 3.8 million shekels (approx. USD 1 million) – a decline of more than 80% in comparison to the sums paid a decade earlier. The reduction in amounts paid to residents of Gaza during those periods is especially significant – from an average of 8.7 million shekels (approx. USD 2.3 million) a year to an average of about 280,000 shekels (approx. USD 74,000) a year, nearly 97% less. (In comparison, compensation for West Bank claimants dropped from an average of about 12.7 million shekels (approx. USD 3.3 million) to an average of about 3.5 million shekels (approx. USD 900,000) a year – approximately 72% less.)

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76. For an explanation of the figures and B’Tselem’s classification method, see: <http://www.btselem.org/statistics>.

77. Letter to B’Tselem from the Freedom of Information Commissioner, the Ministry of Defense, dated 18 January 2017.



The state has attempted to play down the significance of these undeniable figures which demonstrate the impact the amendments to Israel's Torts Law have had, even taking into account fewer casualties and less damage once the second intifada was over. The state argues that these changes do not inhibit critique and review of the actions of the security forces, as this is still available via criminal and administrative proceedings. In its response to a High Court petition against one of the amendments, the state wrote:

*It would be wrong to say that limiting torts liability will eliminate the incentive of soldiers and state authorities to conduct themselves appropriately. This is the case because the remaining legal tools – criminal, disciplinary and administrative – prevent such conduct and impose various sanctions upon those who violate their conditions.*<sup>78</sup>

Yet these other proceedings that the state boasts of quite simply do not exist. In practice, the military law enforcement system, which is in charge of criminal and disciplinary proceedings, functions as a whitewashing mechanism. The purpose of this system was restricted from the outset: It has the power to investigate only isolated incidents in which soldiers are suspected of disobeying orders, but not the responsibility of policy makers or those who formulated the orders. Yet even within this limited purview, the military law enforcement system fails to carry out its purported mission, with the vast majority of cases ending with no measures taken. Indictments are rarely filed, and even then the charges brought are only against low-ranking soldiers.

This outcome is no accident; it is the direct result of the way in which the system operates. MPIU

investigations are sloppy, with no real attempt made to get at the truth and almost always without gathering evidence – other than statements from soldiers, and in some cases also from Palestinians. In many cases, statements are given months after the incident, and the investigators do not bother to resolve contradicting accounts or press the witnesses, who are usually soldiers implicated in the incident. The MAG Corps orders many cases closed on grounds of “absence of guilt”, almost always adopting the soldiers’ versions of events. Many other cases are closed on grounds of “lack of evidence”, based on the partial MPIU investigation carried out under the MAG Corps’ supervision.

Despite its inherent flaws, Israel's military law enforcement system has created an illusion of a functioning, effective system. This allows officials to reject criticism concerning harm to Palestinians by security forces, on the grounds that the military investigates any suspected breach of law. Moreover, this façade with its mechanisms that allegedly take action in case of “a few rotten apples” has gained Israel legitimacy, both at home and abroad, to continue the occupation.

Administrative review of the Israeli authorities’ actions in the Occupied Territories is primarily in the hands of Israel's Supreme Court. However, scant comfort can be found in the judgments handed down by its justices. While the High Court of Justice has allowed residents of the Occupied Territories to file petitions against state authorities, the vast majority of these petitions has been denied. Over the years, the High Court has sanctioned almost every human rights violation that the state wished to carry out in the Occupied Territories: punitive home demolition, administrative detention, restricting freedom of

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78. Para. 268 of the State's Response to the Petition, *supra* note 51.

movement, expelling Palestinians from the West Bank, building the Separation Barrier, imposing a blockade on Gaza, taking over land, removing entire communities from their land, separating families – to name but a few.

This reality allows Israel to exercise its powers in the West Bank and in the Gaza Strip with no authority or body to hold it accountable for its actions: The military law enforcement system whitewashes offenses, the High Court gives a legal seal of approval for violating Palestinians' human rights, and the state has guaranteed itself an all but absolute exemption from paying compensation to Palestinians injured by its security forces. In the absence of mechanisms that act to deter and regulate the state, the road to harsh violations of human rights lies wide open. One of the justifications the state cites for refusing to pay damages to Palestinians is that reparations are a matter that should be resolved as part of mutual arrangements to be reached once the conflict is over:

*Once the war is over, the state can make arrangements for reparation with the enemy, by means of voluntary arrangements or by compelling the losing side to pay compensation... As part of these agreements, the state can choose to waive its demand for compensation for diplomatic reasons, such as the desire "to turn over a new leaf" and help rehabilitate the losing side. In any case, hearing individual tort claims nullifies the state's ability to reach such agreements and obstructs discretion.*<sup>79</sup>

These statements offer no more than bitter irony. The argument might have been valid had the situation been one of conflict between two countries at war. Yet this year, 2017, marks fifty years since Israel began its occupation of the West Bank and the Gaza Strip. Israel is doing all in its power to prevent the end of the occupation and to establish

facts on the ground that will prevent reaching any agreement with the Palestinians. Proposing that the tens of thousands of people injured during this half century wait for the occupation to end and for "negotiations" to be concluded is tantamount to guaranteeing that they will never receive any compensation.

Israeli officials prefer not to make this explicit. After all, instead of using the avenue of legislation to ensure an exemption from compensating Palestinians, the state could simply have flatly refused to pay for damage caused by its troops. Similarly, the state could have declared that it has no intention of carrying out criminal investigations of suspected harm to Palestinians. Instead, Israel elected to maintain a vast, expensive faux system, while making a show of a functioning system.

There are few kinds of injustice that cannot be codified in law, and it is possible to establish systems that offer no more than a pretense of law enforcement. Yet it is impossible to fully conceal the reality of the occupation, including the measures that Israel takes to evade responsibility and ensure a sweeping exemption – with no legal, administrative, or civilian accountability – for violent harm to the Palestinians who live under its control.

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79. Ibid., para. 33.



