At the Supreme Court in Jerusalem **HCJ 8276/05**
Sitting as the High Court of Justice

In the matter of:

1. **Adalah – The Legal Center for Arab Minority Rights in Israel**
2. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger (Reg. Assoc.)**
3. **The Association for Civil Rights in Israel**
4. **Al-Haq – The West Bank**
5. **The Palestinian Center for Human Rights - Gaza**
6. **B'Tselem – The Israeli Information Center for Human Rights in the Occupied Territories**
7. **Physicians for Human Rights**
8. **The Public Committee against Torture in Israel**
9. ***Shomrey Mishpat* – Rabbis for Human Rights**

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The Petitioners

v.

1. **Minister of Defence**
2. **The State of Israel**

both represented by the State's Attorney's Office
Ministry of Justice, Jerusalem

The Respondents

Petition for Order Nisi and Temporary Injunction

A petition is hereby filed for an Order Nisi directed to the Respondents and ordering them to appear and show cause why it should not be held that Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) (Tiqqun Mispar 7) [Civil Wrongs (Liability of the State) (Amendment No. 7) Law], 5765 – 2005, is void.

Application for Temporary Injunction

An application is hereby filed for a temporary injunction, in which the Honorable Court is requested to order that the validity of the Civil Wrongs (Liability of State) (Amendment No. 7) Law, 5765 – 2005 (hereinafter: the Amending Law or the Law), until a final judgment on this petition is given.

alternatively, the Honorable Court is requested to issue an order enjoining the Respondents as follows:

1. To refrain from submitting a conflict area certificate in pending suits;

2. To refrain from raising a claim of prescription regarding the period from the day that the Law takes effect until the giving of the final judgment in this petition regarding every case of damage to which the Amending Law applies, and for which suit has not yet been filed.

The grounds for the application are as follows:

1. This petition, with all its parts and arguments, constitutes an integral part of this application.

2. The Amending Law flagrantly breaches the principles regarding the applicability of humanitarian law in the Occupied Territories, and violates fundamental rights as set forth in the limitations clause of Hoq Yesod: Kevod ha-Adam we-Heruto [Basic Law: Human Dignity and Liberty]. This petition is based on common law, international law and comparative law, pursuant to which the provisions of the Law are illegal.

3. The failure to issue a temporary injunction will gravely violate fundamental rights of many injured persons and will cause them irreversible damages, in particular because of the extreme sweeping nature of the Law. The damages that will be sustained by individual persons as a result of the failure to issue a temporary injunction are far, far greater than the damages that will be sustained, if any will be sustained, by the Respondents, particularly in light of the fact that the requested order will preserve, for the time being, the legal situation that existed prior to enactment of the law that is the subject of this petition.

4. The balance of convenience in this matter clearly favors the issue of a temporary injunction. The comments of Justice Beinisch in *Sakal Brothers Ltd.* are appropriate:

> **In deciding on an application for a temporary injunction, the court must examine two fundamental matters. The one is "the balance of convenience," in which the court compares the damages that the applicant will sustain in the event that the temporary injunction is not issued with the damages that the Respondent will sustain if the requested order is given; and the other, the likelihood that the petition will be granted. In considering the balance of convenience, the court will examine, among its considerations, whether the granting of the order will frustrate the hearing of the primary proceeding, and will also examine the need to preserve the existing situation, as opposed to creating a new situation before the substantive matters of the proceeding are heard. The primary issue to be considered is the balance of convenience…**

AdmAR 301/03, *Sakal Brothers Ltd. et al. v. Airports Authority et al., Taqdin Elyon* 2003 (1) 279, 281.

See also:

AdmAR 5756/03, *Halaf et al. v. Ohayon et al., Taqdin Elyon* 2003 (3) 770;

AdmAR 1557/02, *Magmart Sport Equipment Ltd. v. The State of Israel, Taqdin Elyon* 2002 (2) 1807;

AdmAR 10812/02, Hen ha-Maqom *v. Israel Aircraft Industries Ltd.*, *Taqdin Elyon* 2003 (1) 650;

HCJR, 2598/95, *Adam, Teva v'Din v. National Planning Council, Taqdin Elyon* 95 (2) 147, 148.

5. alternatively, the Honorable Court is requested to issue an order staying retroactive implementation of the Law, both as regards pending suits and causes of action that arose prior to enactment of the Law.

6. Regarding suits that were filed before the Amending Law was enacted – the plaintiffs invested effort and money, including payment of the filing fee, deposit of guarantees, payment to experts, payment of professional fees, lost days of work, and expended other sums. They incurred these expenses in reliance on the legal situation that

existed prior to enactment of the Law. Therefore, the failure to issue the temporary injunction will violate their procedural rights and their reliance and expectations.

7. As regards an incident as to which suit has not yet been filed – the short period of two years for filing the action, as set forth in Amendment No. 4 of the Law, is liable to result in a situation which, even if the petition is accepted, it would not have any practical effect in most of the cases, in that the Law professes to apply to them, and will thus result in irreversible impingement of the injured persons' fundamental rights.

8. In addition, the failure to issue a temporary injunction will impair legal stability as regards all the material involved in the civil actions being heard in the courts and to which the Law relates. It will impair judicial independence and public trust.

9. The common law in this Honorable Court has been consistent and clear regarding retroactivity the application of which violates the principle of reliance. The Honorable Court recently held, in *Ganis,* that new legislation will not apply retroactively to a person who relied, prior to its enactment, on the existing legal situation and developed proper expectations as a result. Similarly, this Honorable Court has voided legislation that touches on the transition provisions in *Investment Managers Association*, because the legislation harmed the reliance interest of the investment managers, who had relied on the legal situation existing at the time the transition provisions were enacted, and also, because the damage they would sustain if they could not take the examinations prevails over the benefit to society resulting from application of the transition provisions. In *Talmi,* the court discussed the effect of retroactive legislation on legal proceedings that had begun and on the infringement of "vested rights." Justice (as his title was at the time) Cheshin stated the rule prohibiting new legislation from harming expectations, which consolidated in the rule of "vested rights" on the eve of the statute, and noted that:

> **A wrong that was done will not cease to be a wrong even if the said tort classification is subsequently voided, and the opposite: an act that did not amount to a wrong at the time it was done, will not subsequently become a wrong even if after the act the legislator states that the act constitutes a cause of action; and so on and so forth.**

CrimA 4912/91 *Yaron Talmi v. The State of Israel, Piskei Din* 48 (1) 581, 621;

HCJ 9098/01, *Yelena Ganis v. Ministry of Construction and Housing, Taqdin Elyon* 2004 (4), 1390, Paragraphs 22-23 of the judgment;

HCJ 1715/97, *Israel Investment Managers Association et al. v. Minister of Finance et al., Piskei Din* 51 (1) 367.

10. Therefore, retroactive application of the Law is clearly contrary to law, and will obviously cause the plaintiffs severe damages. Therefore, the balance of convenience in the present case leans in favor of granting the requested order.

Contents

The grounds for the petition are as follows:

Preface

1. On 27 July 2005, the Knesset approved on second and third reading the Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 5765 – 2005 (hereinafter: the Amending Law or the Law). The purpose of the Amending Law is to deny residents of the Occupied Territories, citizens of "enemy states," and activists in "terrorist organizations" the right to compensation for damages caused them as a result of the actions of security forces, even when not done in the framework of wartime actions, other than for extremely minor exceptions. Also, the Amending Law empowers the Minister of Defence to declare any area outside the borders of the State of Israel a "zone of conflict," even if no hostilities were taking place there. Where the Minister of Defence declares a certain area a zone of conflict, any person who is injured in the area is denied the right to file a claim for damages in court. The Amending Law applies retroactively to injuries that were sustained after 29 September 2000, and to suits that are presently pending in court.

   A copy of the Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 5765 – 2005 [*Sefer ha-Huqqim* 2020, 10 August 2005], is attached hereto as Appendix P/1.

2. The point of departure of modern tort law is that the personal autonomy of a person, in all aspects (life, bodily integrity, dignity, liberty, property, and the like) is an important value, which requires protection against unjustified injury. Thus, protecting persons from injury is a matter for the law. The Amending Law conveys a grave and extreme message, to the effect that the lives and rights of these injured persons are without value, that the court will not grant them relief, and that the perpetrator of the act will be freed of all liability. Thus, the Law is immoral and racist.

3. Penal law, which developed, in part, on the basis of tort law, holds that injuring a person is not a matter that relates only to the person, but is of interest to the community or society. Consequently, it is legitimate for the state to prosecute persons responsible for injuring a person. The social value of the tort laws is no different; and because the Amending Law does not recognize the right in tort of Palestinians who have sustained injury, and denies this right because of their national identity, it negates the rationale of the tort laws and impairs deterrence of acts that injure Palestinians. In doing so, the Amending Law provides that, in the kinds of injury and damages to which it applies in the Occupied Territories, there is neither law nor judges.

4. The provisions of the Amending Law remove, in effect, control over the army's actions in the Occupied Territories. They encourage the failure to investigate cases and to prosecute persons responsible for killing and wounding resulting from negligent or deliberate gunfire, for maltreatment and torture, for looting and destruction of civilian property. Prof. Ariel Porat, rector of the Faculty of Law, Tel Aviv University, and an expert in tort law, related to these consequences of the Amending Law in a hearing held by the Knesset's Constitution, Law and Justice Committee on 15 June 2005:

> **A situation in which soldiers are permitted, by law, to do whatever they wish without anyone having to pay the price, is a situation that, I think, if it exists, should simply make every one of us ashamed… This expansion means that it is permitted to deal with non-combat actions, not even combat against terrorism: a soldier is stationed at a place, nothing has happened for two weeks, and he goes into a house and goes wild – don't let anyone say that in other countries there is no tort liability in such cases. That is not true… Moreover, don't let anyone tell you that there is such a law anywhere else in the world. There is no law of this kind anywhere. We, as citizens of Israel – I cannot, as an Israeli citizen, accept the fact that there will be a law that will allow our soldiers, my children, do whatever they wish without anyone having to pay the price. That is what will occur.**

For the protocol of the hearing held on 15 June 2005, see http://www.knesset.gov.il/protocols/data/rtf/huka/2005-06-15.rtf

5. One of the principal contentions of the initiators of the Amending Law justifying the need for its enactment is that each side bears its own damages. That is, Israel bears the damages sustained by its citizens, and the Palestinian side bears the damages sustained by its people. Not only is there no such sweeping principle in international humanitarian law, it is based on the assumption that the balance of forces and control between Israelis and Palestinians is equal, and that two independent states are involved, or at least that two political entities are involved, which are equal in power, without a dominant-subordinate relationship between them. This logic ignores the clear and known fact whereby relations between the two groups are that of an occupying power and a group of persons whose land is occupied, and that the

occupying state is bound by the rules of international humanitarian law. In the words of President Barak:

> **Judea, Samaria, and the Gaza Region are not a state and are not democratic. Israeli control over them is by belligerent occupation. Israeli control did not arise from the choice of the local residents, but as the result of combat actions.**

Aharon Barak, *Shofet be-Hevra Demoqratit* [*A Judge in a Democratic Society*] (University of Haifa Press, Keter, Nevo, 2004), 147.

6. The Amending Law severely infringes the fundamental rights to life and limb, equality and dignity, to property, and the constitutional right to access the courts. This infringement is particularly grave because it denies, in a sweeping manner, remedy or relief for the infringement of fundamental rights. Denial of relief for infringement of a fundamental right is like denial of the right itself.

7. The Amending Law also fails to meet the conditions of the limitations clause. It is contrary to the first condition, which requires that violation be "by a law," in that it is vague, unclear, applies retroactively, and grants the Respondent absolute discretion. Thus, it is contrary to the fundamental concepts of law, which were reinforced following enactment of the Basic Laws.

HCJ 113/52, *Zaks v. Minister of Trade and Industry, Piskei Din* 6 696, 702.

8. The Amending Law applies retroactively to every legal proceeding that is pending before the courts, unless the taking of evidence has begun. In effect, it directs that courts shall not carry out their function in providing judicial review of governmental acts; that these acts are not justiciable; that the judicial branch ceases also its handling of pending suits in these matters; and that the cessation of the proceeding be done by declaration of the Minister of Defence. Therefore, the Amending Law not only frustrates the right of access to the courts, but it enables the executive branch from interfering in the independent judgment of the judges handling these cases. Therefore, the Amending Law is not befitting the values of a democratic state, in that it thoroughly breaches the principle of the separation of the branches of government, judicial independence, and the stability of the law.

9. In the chapter discussing the question of proper purpose, we shall delve into the subjective purpose of the Amending Law, as it appears in the explanatory notes of the proposed amendment of the law, and from the supporting documents that were

submitted on behalf of the Ministry of Justice to the legislator. Also, we shall prove that the objective purpose of the Amending Law, as appears from its wording and content, and the subjective purpose are identical and are not proper. There being no purpose for the Amending Law, even at the theoretical level, it should be voided, and the tests of proportionality need not be considered.

The Petitioners

10. The Petitioners are Israeli and Palestinian human rights organizations that engage, *inter alia*, in the protection of human rights in the Occupied Territories.

The constitutional history

11. Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) [Civil Wrongs (Liability of the State) Law], 5712 – 1952 (hereinafter: the Principal Law), was enacted with the purpose of arranging the status of the state as a litigant in civil proceedings. The fundamental principle of the Principal Law is that, *"**With respect to Liability in Tort, the state shall be deemed as any incorporated body**"* (Article 2 of the Principal Law). The Principal Law states a number of exceptions to this fundamental principal, in which the state is not liable in tort.

12. One of the exceptions included in the Principal Law is the "wartime action" exception. This exception states that, "***The state is not Liable in Tort for an Act performed through a Wartime Action of the Israel Defence Forces.**"* The rationale behind this exception is as follows:

> **It seems that the approach is that wartime actions that cause damage to a person do not have to be decided by the ordinary tort law. The reason is that wartime actions create special dangers that should be handled outside the confines of ordinary tort liability.**

CA 5964/92, *Bani 'Uda et al. v. The State of Israel, Piskei Din* 56 (4) 1, 5.

13. In *Bani 'Uda*, the Supreme Court, in a nine-judge panel, held that the state will be liable for damages caused by soldiers in the Occupied Territories, including during the first Intifada, unless the wartime action exception is proven. The court held that, in the Intifada as well, the security forces carried out actions in which the danger was ordinary, and it is proper to examine them in the framework of the ordinary tort law.

14. The state was not happy that it is being sued for damages that the army caused to Palestinians, that it has to mount a defence against the suits, that it does not receive

automatic immunity, and for a decade it has been acting in different ways to eliminate any liability for the acts of its soldiers in the Occupied Territories.

15. As far back as 1997, the Ministry of Justice drafted a Memorandum of Proposed Law, the provisions of which are amazingly similar to that of the Amending Law. According to the memorandum, "The state is not civilly liable for bodily injuries sustained as a result of an act carried out in the region by security forces during the determining period." "The region" is "Judea and Samaria and the Gaza Region" and "the determining period" is "the period from 9 December 1987 to 13 December 1993." The memorandum further states that the immunity shall not apply to a "suit by a person who is registered in the population registry in Israel or a tourist in Israel." That is, the immunity is granted on a personal and territorial basis, the purpose being to block suits of residents of the Occupied Territories for any injury that is sustained in the area of the Occupied Territories during the period of the first Intifada, in an amazingly similar mechanism to that set forth in the Amending Law.

    A copy of the Memorandum of Proposed Law of 20 March 1997 is attached hereto as Appendix P/2.

16. Prior to the bill being laid on the table of the Knesset, the Respondents understood that provisions of this kind are unconstitutional. They neglected the conception of immunity on a territorial-personal basis, and replaced it with a bill that expands the scope of immunity for a "wartime action," together with procedural and evidentiary provisions that favor the state in suits relating to acts of the security forces in the Occupied Territories. This bill, which was laid on the table of the Knesset on 23 July 1997, was intended to thwart suits that were filed by persons injured during the first Intifada, much like the law that is the subject of the present petition. Already then, the Respondents used the same arguments that that are using today: "To date, more than 4,000 tort claims have been filed against the state," "in Supreme Court case law, the exception for wartime action was narrowly construed," "the state has no chance to examine the claims alleging security forces' involvement in an incident," "fallacious suits and fraudulent actions by the plaintiffs," and the like.

    A copy of the proposed Hoq le-Tippul bi-Tevi'ot shel Pe'ullot Kohot ha-Bittahon bi-Yehuda, Shomeron we-Hevel Azza [Handling of Claims of Acts of Security Forces in Judea and Samaria and Gaza Region Law], 5757 – 1997 (Hazza'ot Hoq 2645, 23 July 1997) is attached hereto as Appendix P/3.

    Compare the proposed Amending Law, Appendix P/12 below.

17. The bill of 1997, which sought to grant sweeping immunity to every operational act carried out in a dangerous situation in the Occupied Territories, to shorten the prescription period in which Palestinian had to file suit, and to enforce this retroactively to every act that took place before the commencement of the law, raised a wave of opposition in Israel and abroad, and was also condemned by the UN Commission on Human Rights. The domestic and international pressure ultimately led to the freezing of the enactment process. One of the opponents of the bill was the chair of the Knesset's Constitution, Law and Justice Committee, Hanan Porat, who thought that the bill, which denies the right to compensation of a person who is not involved in the Intifada, was immoral and non-Jewish.

Copies of two relevant articles in *Ha'aretz,* of 20 July 1998 and 1 July 1998, are attached hereto as Appendixes P/4 and P/5, respectively.

18. On 16 July 2001, the Ministerial Committee for Legislation decided to request that the rule of continuity be applied to the bill from 1997. Simultaneously, as reported in the media, the defence establishment decided to refrain from compensating persons injured in the second Intifada, unless a claim was filed and the court required it to make payment. These decisions were presented as an attempt "to curb" the "wave of suits" and to prevent the filing of fallacious claims.

Copies of two articles from *Ha'aretz,* of 24 July 2001 and 9 August 2001, are attached hereto as Appendixes P/6 and P/7, respectively.

19. On 22 October 2001, the Knesset applied, at the government's request, the rule of continuity to the bill from 1997, and on 25 December 2001, the Constitution, Law and Justice Committee began hearings on the bill (hereinafter: Amendment No. 4). In its new version, the bill appreciably broadened the definition of "wartime action," retroactively shortened the period of prescription from seven years to two years, required that the injured persons give notice of injury within two months from the day of the incident, and more. The Committee's hearings were suspended until the Supreme Court gave its judgment in *Bani 'Uda*, in which the State Attorney's Office requested the court to recognize every incident in the first Intifada as a "wartime action." On 20 March 2002, the court delivered its decision in *Bani 'Uda*. The Supreme Court, in a nine-judge panel, rejected the State Attorney's Office's arguments, and held that also in an Intifada, *the act and not the war is to be examined:*

> **The army carries out in the areas of Judea, Samaria, and Gaza various "actions," which create different kinds of**

> **danger. Not all these actions are "wartime." For example, if the injured person sustained injuries as a result of an assault by a soldier because of his refusal to obey an order to wipe away slogans written on the wall, this act of assault is not a "wartime action," in that the danger created in this action is an ordinary danger resulting from an act of law enforcement.**

CA 5964/92, *Bani 'Uda et al. v. The State of Israel, Piskei Din* 56 (4) 1, 8.

20. When the principal argument of the State Attorney's Office was rejected in *Bani 'Uda,* action was taken to advance the bill, which recently ripened into enactment of the Amending Law. At the same time, effort was made to advance the proposed Amendment No. 4, which the Committee discussed at the same time.

A copy of an article from *Ha'aretz* of 26 March 2002 is attached hereto as Appendix P/8.

21. The proposed bill of Amendment No. 4, which was sharply criticized, including by senior academics and all human rights organizations, was approved by the Constitution Committee on 27 June 2002 following great effort by the Justice Minister, and on 24 July 2002 passed its second and third reading in the Knesset.

A copy of the letter of Prof. David Kretzmer of 24 June 2002 is attached hereto as Appendix P/9.

A copy of the letter of Prof. Ariel Porat of 23 June 2002 is attached hereto as Appendix P/10.

A copy of the Civil Wrongs (Liability of the State) (Amendment No. 4) Law, 5762 – 2002 [*Sefer ha-Huqqim* 1862, 1 August 2002], is attached hereto as Appendix P/11.

22. Amendment No. 4 greatly expanded the Respondent's ability to defend against civil suits filed against it by Palestinians who were injured by army troops in the Occupied Territories. First, the amendment gave an extremely broad definition of "wartime action," so as to include within it almost every action that the army carries out in the Occupied Territories:

> **"wartime action" – including any action of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror and hostile actions and insurrection committed in circumstances of danger to life or limb.**

23. Amendment No. 4. added to the Principal Law Article 5A, which sets forth special arrangements for injuries, caused in the Occupied Territories by all security forces, not only the army, and includes:

A. **The duty to give notice of injury within sixty days** (see also Taqqanot ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) (Hoda'a bi-Ketav al Nezeq)[Civil Wrongs (Liability of the State) Regulations (Notice of Damage in Writing)], 5762 – 2002);

B. **Shortening of the period of prescription** for Palestinian claims, including claims to minors, **to two years;**

C. **The non-applicability of the rule switching the burden of proof** for negligence regarding a dangerous instrumentality (Article 38 of Pequddat ha-Neziqin [Torts Ordinance]) and where the facts speak for themselves (Article 41 of the Ordinance);

D. **Power to deny claims** in a case in which the Palestinian Authority fails to cooperate in arranging legal assistance.

24. Before the process of enacting Amendment No. 4 was completed, the government laid before the Knesset, on 15 July 2002, the proposed amendment of the Amending Law (hereinafter: Amendment No. 5). This bill, which is an offshoot of the original bill of 1997, as expressed in the Memorandum of Proposed Law, passed its first reading in the Knesset plenum on 16 July 2002. After the Fifteenth Knesset was dissolved and new elections were held, hearings on the bill were not heard until the end of 2004, when the Knesset's plenum approved the government's announcement that it intended to apply the rule of continuity to the bill.

A copy of the proposed Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or a Resident of a Zone of Conflict), 5762 – 2002 (Hazza'ot Hoq 3173, 15 July 2002), is attached hereto as Appendix P/12.

25. On 31 May 2005, the Constitution Committee held hearings on the amendment to the law, which raised a wave of harsh responses. Human rights organizations in Israel and abroad and legal experts argued strongly that the proposed amendment to the law was unconstitutional.

A copy of the position paper prepared by the Petitioners is attached hereto as Appendix P/13.

A copy of the position paper prepared by the International Public Law Committee of the Israel Bar Association is attached hereto as Appendix P/14.

A copy of a letter that Amnesty International sent to the Knesset is attached hereto as Appendix P/15.

A copy of a letter that Human Rights Watch sent to the Knesset is attached hereto as Appendix P/16.

26. During the hearings on the proposed amendment to the law, experts from academia appeared before the Constitution Committee, and most of them strongly opposed the very concept of the proposed amendment. These experts included Prof. Ariel Porat, Prof. Mordechai Kremnitzer, and Dr. Yuval Shani, and Dr. Nitza Shapira-Libai, chair of the Public International Law Committee of the Israel Bar Association. Prof. Daphne Barak Erez, an expert on public law, appeared before the Committee on 15 June 2005 and said the following:

> **What is a "wartime action"? Does the definition in the law do the job or not? Most of the persons sitting around this table think that it is proper to make an exception for a wartime action, but there are those who contend that the law provides enough, and there are those who contend that it is not sufficient. If this is the problem, if most of us agree that this is the problem, this is the question that has to be discussed, as some of those who preceded me said. There is no need to talk about anything else. There is no need to take a proposed law that turns all tort laws and human rights laws on their head, just to solve a problem in wording. The law must conform itself to reality. Assume there is a problem regarding a wartime action, I am not sure that I am convinced [that there is], but if so – let's handle this definition. Maybe three years ago we did not have a sufficiently good perspective, and we need to improve the definition. But for this we don't have to turn all of law on its head. When there is a [broken] tile in the house and it has to be fixed, we don't tear down the house. We can use the same simple logic here… Even if we are convinced of the need to broaden the definition of wartime action also to cover some act of a conflict, and I said that this is arguable, why is**

additional immunity needed in a zone of conflict, that is, on a territorial basis? As Prof. Gil'ad said, it tends to be personal even though it is not defined as such.

For the protocol of the hearing held on 15 June 2005, see http://www.knesset.gov.il/protocols/data/rtf/huka/2005-06-15.rtf

For protocols of other hearings that the Committee held, see:

The protocol of the hearing held on 31 May 2005: http://www.knesset.gov.il/protocols/data/html/huka/2005-05-31-02.html

The protocol of the hearing held on 23 June 2005: http://www.knesset.gov.il/protocols/data/rtf/huka/2005-06-23-02.rtf

The protocol of the hearing held on 30 June 2005: http://www.knesset.gov.il/protocols/data/html/huka/2005-06-30.html

The protocol of the hearing held on 14 July 2005: http://www.knesset.gov.il/protocols/data/html/huka/2005-07-14.html

The protocol of the hearing held on 20 July 2005: http://www.knesset.gov.il/protocols/data/html/huka/2005-07-20-01.html

The protocol of the hearing held on 25 July 2005: http://www.knesset.gov.il/protocols/data/html/huka/2005-07-25-02.rtf

27. On 25 July 2005, the Committee approved the proposed amendment to the law after making a number of minor changes, and on 27 July 2005, the Knesset approved the amendment to the law on second and third readings, which changed in the meantime from Amendment No. 5 to Amendment No. 7. On 10 August 2005, the Amending Law was published in *Reshumot* and went into effect.

Analysis of the provisions of the Amending Law and their practical significance

28. Article 1 of the Amending Law adds to the Principal Law Article 5B, which grants immunity against claims of an enemy [citizen] and an activist in or member of a terrorist organizations, and Article 5C, the heart of the Amending Law, which grants immunity against claims in a zone of conflict. Below we shall separately discuss each of these Articles and their significance.

Provisions of Article 5B

29. Article 5B states as follows:

(a) Notwithstanding the provisions of any law, the State is not civilly liable for damages caused to the persons set forth in paragraphs (1), (2) or (3), except for an injury sustained in the kinds of claims or to the kinds of claimants set forth in the First Annex -

(1) a subject of a state that is an enemy, unless the person is staying lawfully in Israel;

(2) a person who is active in, or a member of, a terrorist organization;

(3) a person who was injured while acting as an agent or on behalf of a subject of an enemy state, a member of a terrorist organization, or a person active therein.

(b) In this article –

"*enemy*" and "*terrorist organization*" have the same meaning as in article 91 of Hoq ha-Oneshin [Penal Law], 5737–1977.

"*the State*" includes an authority, body, or person acting on its behalf.

The provision of the First Annex that is relevant to Article 5B states:

> **A claim the cause of which is injury sustained to a person as stated in article 5B(a) while he was in custody of the State of Israel as a detainee or prisoner and who, after being in custody, did not return to be active in, or a member of, a terrorist organization or to act on behalf of such or as an agent thereof.**

30. In this article, the state is immune without the existence of any causal connection between the cause of the injury and the person sustaining the injury being a "subject of an enemy state" or a member of a "terrorist organization," that is, the citizenship of the plaintiff and his "activity" or "membership" in a "terrorist organization" are sufficient to grant the state absolute immunity. It should be noted that the Amending Law does not define the terms "enemy state" or "terrorist organization," but refers to definitions set forth in Article 91 of Hoq ha-Onashin [the Penal Law], 5737 – 1977, which states:

"enemy" means anyone who is or declares himself to be a belligerent party or maintaining a state of war against Israel, whether or not war has been declared, whether or not armed hostilities are in progress, and it also means a terrorist organization;

"terrorist organization" means an organization aiming at or working for the downfall of the State or the impairment of its security or that of its inhabitants or the infliction of harm on Jews in other countries.

31. The provisions of Article 5B also apply to incidents that occurred in Israel, and the immunity pursuant to Article 5B(a)(2)-(3) applies also when the person is a citizen of Israel whose center of life is in Israel and is subject to various kinds of injury by the state – from traffic accidents in which a government vehicle is involved, medical malpractice in a government hospital, or an accident at work where the employer is the state or a person acting on its behalf, to negligence of one kind or another by administrative authorities.

32. The immunity from liability for claims filed by injured persons, pursuant to Article 5B, is not limited to injuries sustained by persons when they are on an illegal mission on behalf of the organization or enemy state, but also when no such connection exists. For example, a Lebanese woman, married to a resident of the Occupied Territories and living with him in the Occupied Territories after having obtained the legal permits to do so, is not allowed to sue the state for compensation, regardless of the circumstances in which she was injured. The state will be immune from compensating a person solely because he is a Fatah activist, if he is injured in a car accident involving a government vehicle, when he was in Israel for the sake of conducting political negotiations with state authorities. As regards a Palestinian from East Jerusalem who is brutally beaten by police officers, in Israeli territory, it is enough if he is a member of Fatah to thwart his claim. Similarly, the right to compensation of an Israeli citizen who spied on behalf of an enemy country, and was injured in a work accident unrelated to his spying, will be categorized based on his employer – whether it was governmental or not governmental.

33. Beyond the harsh consequences in cases in which there is no connection between the identity of the person injured and the injury he sustains, absolute immunity granted on a personal basis is unjust also when such a connection exists. It prevents the court

from applying a flexible standard, which takes into account the significance of the illegal activity of the plaintiff, as the courts presently do.

34. There are two exceptions to Article 5B. The first is when the injury is sustained by a subject of an enemy state who is lawfully in Israel (such as members of the former South Lebanon Army). The second is when the injury is sustained by a person in prison or detention. However, in this situation, too, the state will be immune if the person "did not return to be active in, or a member of, a terrorist organization or to act on behalf of such", regardless of the injury he sustained during interrogation, detention, or imprisonment, the degree of negligence of the authorities, or even if he was a victim of a felony. This includes physical and mental injury from torture. As such, the Amending Law negates one of the only mechanisms intended to deter interrogators, police offices, and prison guards from harming persons at high risk when in custody. The irrationality of this exception is extreme. It is sweeping, retroactive, and bears no casual relationship with the event that caused the injury.

35. To understand the scope of the immunity granted in the Amending Law, it should be recalled that organizations in the Occupied Territories whom Israel deems "terrorist organizations" all have civilian wings alongside the military wings, and the law applies in blanket fashion to everyone who is a member or activist in these organizations.

36. Indeed, following the meeting of the Constitution Committee, in which the proposed bill was sharply criticized by scholars, a meeting was held in the attorney general's office. The attorney general requested the Committee, after the meeting had been held, to change the bill: to remove the immunity on personal grounds and to condition it on the injury being sustained in an enemy state or in connection with an action taken on behalf of the enemy or the terrorist organization. A change in the wording as proposed by the attorney general was not accepted.

    A copy of the text that the attorney general placed before the Constitution Committee on 14 July 2005 is attached hereto as Appendix P/17.

Provisions of Article 5C

37. Article 5C allows the Minister of Defence to declare an area outside the territory of the State of Israel a zone of conflict, and in this zone, the state, including an authority, body, or person acting on its behalf, is granted sweeping immunity for damages caused by security forces. This article states as follows:

    5C. Claims in a zone of conflict

(a) Notwithstanding the provisions of any law, the State is not civilly liable for damages sustained in a zone of conflict as a result of an act that was carried out by the security forces except for injury that is sustained in the kinds of claims or to the kinds of claimants set forth in the Second Annex.

…

(c) The Minister of Defence may declare a territory a zone of conflict; where the minister so declared, the declaration shall establish the borders of the zone of conflict and the period for which the declaration applies; announcement of the declaration shall be published in *Reshumot*.

…

(e) In this article –

"*zone of conflict*" means an area outside the territory of the State of Israel which the Minister of Defence declared a zone of conflict, as set forth in sub-article (c), where security forces were active or remained in the zone in the framework of the conflict.

"*the State*" includes an authority, body, or person acting on its behalf;

"*conflict*" means a situation in which an act or acts of a military nature are taking place between the security forces and regular or irregular entities hostile to Israel, or a situation in which enemy acts carried out by an organization hostile to Israel are taking place.

38. According to the provisions of this article, it would suffice to contend that a "conflict" exists in Jenin to declare every area in the northern part of the West Bank a "zone of conflict," for, as the state will surely argue, all army actions in that area are intended to thwart terror emanating in Jenin from reaching Israel. Actually, no action of the security forces in the Occupied Territories cannot fall in the concept "in a zone of conflict," including checkpoints, construction of the separation fence, dispersing

demonstrators, and so on. This article grants the state sweeping immunity from the claims, for example, of a woman in labor who is delayed at a checkpoint, as a result of which her newborn dies, of a child who is run over by a patrol jeep that was checking the smudge road of the settlement, of a farmer whose trees and livelihood are destroyed in the framework of building the wall or carrying out a "clearing" operation, and the parents of a youth who is killed following excessive use of force in ending a demonstration.

39. Below we present a number of judgments that relate to incidents from the first Intifada which are similar to those that took place in the second Intifada, and which reflect the situation and the dangers that existed at the time. We do this because the civil claims that were filed in the second Intifada have not yet been decided. If the Amending Law had applied to the cases described in these examples, the state would have been immune from civil liability:

In *Zahir,* the Supreme Court ruled that the state was liable for the severe head wound sustained by the plaintiff, which resulted from the negligent and uncontrolled shooting of rubber bullets. The court's decision was also based on severe negligence in investigating the plaintiff's contentions. Vice-President Mazza held that:

> **The classification of the activity of three or four soldiers, who were assigned to disperse the rioting of civilians who were burning tires and hurling stones, as a "wartime action," seems an exaggeration**

CA 361/00, *Zahir et al. v. Captain Yoav et al., Taqdin Elyon* 2005 (1) 1253, 1266.

In *'Abd al-Rahman,* the court held that the state must compensate the injured party, stating:

> **On the night of 9 July 1988, an extremely grave incident occurred that requires moral stock-taking: In the village of 'Arura, Ramallah District, a number of IDF troops entered the house of the plaintiff, a resident of the village, woke him up, beat him severely all over his body, took him into the street while beating him, put a shackle around his neck and threw him onto the ground. One of the troops struck his head with a stone. He lost consciousness and was rushed to hospital in Ramallah, still unconscious. The CT indicated that the plaintiff had suffered a head fracture, and as a result… became permanently disabled.**

CApp (Jerusalem District) 709/95, *'Abd al-Rahman v. The State of Israel, Taqdin Mehozi* 99 (3) 10882.

See also:

CApp (Jerusalem District) 371/94, *Falah Salim Muhammad v. The State of Israel, Taqdin Mehozi* 96 (3) 931, where the court ordered the payment of compensation to a resident of Rantis who became sterile after being hit by soldiers' unjustified shooting at stone-throwers.

CApp (Jerusalem District) 1200/95, *Bisharat et al. v. The State of Israel,* judgment of 14 January 1998, where the court ordered the payment of compensation to a child who was injured by an explosive object left by the army in an open area, populated with civilians, near Nablus.

CA (Jerusalem District) 2163/01, *Abu Rian v. The State of Israel,* judgment of 8 July 2002, where the court ordered the payment of compensation to a young man who was wounded by the illegal gunfire of a soldier who chased him and opened fire when he thought that the man had previously been involved in throwing stones.

CApp (Nazareth Magistrates) 4386/02, *'Alawna v. The State of Israel,* partial judgment of 26 May 2005, where the court held that the state was responsible for the death of a woman and for the wounding of her daughters. The court held that the state was negligent in ordering the woman and her daughters to leave the house, and opened live fire at them when they went outside.

The provisions of Article 5C(b) – the Committee

40. Article 5C(b) states:

> **(1) The Minister of Defence shall appoint a committee, which shall be authorized to approve, beyond the letter of the law, in special circumstances, payment to a claimant as to whom sub-article (a) applies and to set the amount of the payment (in this sub-article – *the Committee*);**
>
> **(2) The members of the Committee shall be:**
>
> **(1) an attorney qualified to be appointed district court judge, who shall be the chairperson; the Minister of Defence shall**

appoint the chairperson upon consultation with the Minister of Justice;

(2) a representative of the Ministry of Defence;

(3) a representative of the Ministry of Justice;

(3) The Minister of Defence, upon consultation with the Minister of Justice, and with the approval of the Knesset's Constitution, Law and Justice Committee, shall establish the preliminary conditions for applying to the Committee, the manner in which the application shall be made, the Committee's work procedures, and the criteria for payment beyond the letter of the law.

41. This article establishes a committee that is empowered to approve payment "beyond the letter of the law" when there are "special circumstances." The article explains that the Committee's door is not open to everyone – the preliminary conditions for filing a request to the Committee will be set by the Minister of Defence and the Minister of Justice, with the approval of the Constitution Committee. That is, there will be someone to block access both to the courts and to the Committee. Even if the injured person meets the preliminary conditions, the Committee is empowered to accept his application only in special circumstances, i.e., in ordinary circumstances, the Committee will reject the injured person's application. An injured person who meets all the above requirements will receive, at the most, payment "not required by the strict letter of the law," not in accordance with one of the categories customarily applying in tort law.

The exceptions to Article 5C – the Second Annex

42. Article 5D states:

The Minister of Defence, after consulting with the Minister of Justice, and with the approval of the Knesset's Constitution, Law and Justice Committee, may change by order the First Annex and the Second Annex.

43. The Second Annex includes a limited number of exceptions, in which the state loses its immunity. These exceptions, which constitute the most minimal protection of human rights, are subject to being voided by order of the Minister of Defence.

44. The first exception, set forth in Article 1 of the Second Annex of the Amending Law, states:

> **A claim the cause of action of which is injury sustained as a result of an act done by a person serving in the security forces, provided that the said person was convicted of an offense for the said act by a conclusive judgment in a military tribunal or court in Israel; in this matter "offense" excludes an offense that is of the kind of offenses for which strict liability applies (within the meaning of articles 22 of the Penal Law, 5737-1977; in claims pursuant to this sub-article, regarding the period of limitation for filing a claim, as stated in article 5A(3), the day of the act that is the subject of the claim is the day on which the judgment is rendered final.**

45. Thus, we see that, according to this article, all the cumulative conditions set forth in the article must be met for the exception to apply. That is, a soldier who commits looting in a "zone of conflict" and is found guilty in a disciplinary tribunal conducted by his commander will be immune from compensating the victim of the looting. A soldier who beat and humiliated a passer-by at a checkpoint in a "zone of conflict," and is prosecuted on criminal charges, but is acquitted because of the existence of doubt or defects in the conduct of the prosecution, will be exempt from compensating his victim. A soldier who was grossly negligent and killed an infant, and was not prosecuted in the light of the policy to prosecute soldiers only for deliberate offenses, will benefit, in addition to the benevolence he was shown, the mercy of not having to pay compensation, and thus also benefit from the policy of immunity. The connection created by this provision linking the conviction of a soldier and the civil liability of the state creates an intolerable situation, in which the state has an incentive not to prosecute soldiers out of fear that they be will be convicted and the state will then have to pay compensation.

46. The second exception, set forth in Article 2 of the Second Annex of the Amending Law, states:

> **A claim the cause of action of which is injury sustained in a zone of conflict by a person who was in the custody of the State of Israel as a detainee or prisoner and who, after being in custody, did not return to be active in, or a member of, a**

terrorist organization or to act on behalf of such or as an agent thereof.

This exception involves injury sustained by a prisoner or detainee in Israel's custody. This exception states, in effect, the obvious, for most prisoners and detainees are as a matter of course held in detention facilities in Israeli territory, but it does not include other kinds of Israeli custody, such as delay at a checkpoint or seizing control of a house and imprisoning the family in one of the rooms. A person who is handcuffed at a checkpoint in a "zone of conflict," a person who is beaten or is forced to sit for a long time under the sun and is injured as a result, although he was helpless in the face of the soldiers rifle barrels, would not be compensated.

47. In addition, the exception depends on acts committed by the prisoner after he was released. Regardless of what happened to the person during his detention – faulty medical treatment that left him permanently disabled; torture that left him physically or mentally impaired; theft of objects belonging to him; violation of his fundamental rights – the state is exempt from paying the price for all these acts, if the person again became a "member" in a terrorist organization (it should be recalled that most political organizations in the Occupied Territories are perceived by Israel as terrorist). In this framework, too, the legislator abandons the principles of the law of torts and of law in general, that is, every incident must be considered on it own, rights are not eliminated retroactively, even the offender has rights, and a person is not to be punished other than in accordance with the penal laws and by a punishment set forth in statute.

48. The third exception, set forth in Article 3 of the Second Annex of the Amending Law, states:

A claim the cause of action of which is the act of the Civil Administration within its meaning in Hoq Yissum ha-Heskem bidvar Rezu'at Azza we-Ezor Yeriho (Hesderim Kalkaliyyim we-Hora'ot Shonot) (Tiqqune Haqiqa) [the Implementation of the Agreement on the Gaza Strip and the Jericho Area (Economic Arrangements and Miscellaneous Provisions) (Legislative Amendments) Law], 5795 - 1994 ;or an act of the Government, Coordination and Liaison Administration provided it is done outside the framework of conflict.

49. The exception removes the immunity for damages caused by actions of the Civil Administration and the District Coordinating Office, provided that they are "done outside a conflict framework." The actions of these civilian bodies are mostly done in air-conditioned offices. The actions include issuing visitor's permits, building permits, movement permits, coordination and liaison, and the handling of various requests. In effect, the very existence of the exception indicates the sweeping nature of the immunity granted the state, for it is hard to conceive a situation in which it is justifiable to grant immunity to a District Coordinating Office for damage that it caused. What does a conflict situation have to do with negligence in handling civil requests?!

50. The fourth exception, set forth in Article 4 of the Second Annex of the Amending Law, states:

> **A traffic accident within its meaning as in Hoq ha-Pizzuyim le-Nifge'e Te'unot Derakhim [the Compensation of Victims of Traffic Accidents Law], 5735 – 1975 , in which a vehicle of the security forces is involved, the registration number of which or the identity of the driver of the vehicle at the time of the accident is known, except where the accident occurred incidental to operational activity of the vehicle or to the hostile action of the injured person against the state or against the civilian population.**
>
> **Property damages caused to a vehicle following a traffic accident within its meaning as in the Compensation of Victims of Traffic Accidents Law, 5735 – 1975, even if bodily injury was not sustained in the said accident, provided that the other conditions set forth in article 4 in this annex are met.**

51. This exception removes the sweeping immunity of the state for bodily injuries and property damage (see also the fifth exception of the Second Annex of the Amending Law) that are caused in a "zone of conflict" following a traffic accident. The immunity is removed only if all the conditions of the article are met, including that the damage is caused "incidental to operations activity of the vehicle," that is, that the exception will not arise at all, for army vehicles traveling in the Occupied Territories will always be considered an "operations activity" or "incidental to an operations activity."

52. Particularly irksome is the requirement that the injured person provide the license number or details identifying the driver. This means that a child who is injured when being struck by an army vehicle being operated in a grossly negligent manner, at excessive speed and without lights, and the child does not record the license number of the vehicle, he will not be able to be compensated for his damages. Even if there are many witnesses, but none of them managed to record the license number, the state would still be exempt from paying compensation. This requirement gives an incentive for hit-and-run accidents. The message that this requirement sends to every soldier is this: if you hit a Palestinian child, it is better that you disappear from the scene before being identified, otherwise you will have to compensate the child as anybody else would have to.

The provisions of Article 3 of the Amending Law - commencement and applicability

53. Article 3 of the Amending Law states:

> **(a) The provisions of articles 5B to 5D of the principal law, in their wording in article 1 in this law, shall apply to an act that took place on 29 Elul 5760 (29 September 2000) and thereafter, except for an act as to which a claim was filed and the hearing of evidence thereon began prior to the time of publication of this law.**
>
> **(b) For a period of six months from the day of publication of this law, the Minister of Defence may, notwithstanding the provisions of article 5C(d), declare an area a zone of conflict for the period from 29 Elul 5760 (29 September 2000) until the publication of this law.**

54. This article states that the Amending Law applies retroactively to every act that took place over the past five years, including incidents as to which a claim has been filed. The only transition provision is that a claim in which the taking of evidence has begun will continue to be heard in accordance with existing law. Thus, many suits that were filed in reliance on the law at the time the suit was filed will be lost forever under the new law, causing enormous loss to the plaintiffs and their attorneys, who invested so much time, work and resources in these suits, including payment of the filing fee, deposit of a guarantee, payment to experts, professional fees, and days of work. The plaintiffs also relied on their good chances to win the suit, based on the

law that existed at the time of filing, when they invested their savings in medical treatment in the Occupied Territories and abroad, in nursing the injured person, in purchasing medical devices, and the like.

55. In this context, it should be mentioned that, in light of the short prescription period set in Amendment No. 4, in most incidents of the Intifada in which the filing of tort claims was appropriate, suit has already been filed. The only transition provision stated in the Amending Law is that a claim that reached the hearing-of-evidence stage will continue under existing law. However, this provision is a mockery, for most claims have not yet reached that stage, the main reason being that the Tel Aviv District Attorney's Office has dragged its feet in these cases, filing many applications to postpone the date for filing an answer. In the past year, it has also filed a standard, comprehensive application in every file for an extension of at least six months to file the answer. The applications are signed by the head of the civil claims department, and not the attorney handling the file, and the application for postponement is not treated on an individual basis.

Copies of several examples of the many standard applications for an extension of time in filing an answer, which were filed in CApp (Jerusalem Magistrates) 8967/04, CApp (Jerusalem Magistrates) 9168/04, CApp (Jerusalem Magistrates) 9190/04, are attached hereto as Appendixes P/18-P/20, respectively.

A copy of the response to the standard application for extension of time filed in CApp (Jerusalem Magistrates) 8967/04 is attached hereto as Appendix P/21.

Summary

56. Therefore, in sweeping fashion, the Law denies residents of the Occupied Territories, persons who are subjects of an "enemy state" and persons who are "active in or member of a terrorist organization," the right to compensation for injuries they sustained at the hands of the state even if a wartime action is not involved, and the denial also applies retroactively.

The Amending Law breaches humanitarian law

57. The Amending Law breaches humanitarian law, which applies in the Occupied Territories. This Honorable Court has held that humanitarian law applies in the Occupied Territories in a line of decisions. The point of departure is that occupied territory is involved, and thus humanitarian law applies to them, including the law of occupation and the law of war. It goes without saying that the common law is that,

also during the course of hostilities, the state must protect and comply with humanitarian law.

HCJ 1661/05, *Hof Azza Regional Council et al. v. The Knesset et al.* (not yet published), Paragraph 77 of the judgment (hereinafter: *Hof Azza*);

HCJ 4764/04, *Physicians for Human Rights et al. v. Commander of the IDF Forces in Gaza, Piskei Din* 58 (5) 385;

HCJ 2056/04, *Beit Sourik Village Council et al. v. The Government of Israel et al.* (not yet published) *Taqdin Elyon* 2004 (2) 3035, Paragraph 23;

HCJ 3239/02, *Mar'ab v. IDF Commander in the West Bank, Piskei Din* 57 (2) 349;

HCJ 7015/02, *Ajuri v. IDF Commander, Piskei Din* 56 (6) 352, Paragraph 13;

HCJ 3451/02, *Al-Madani et al. v. Minister of Defence, Piskei Din* 56 (3) 30, 34-35;

HCJ 3114/02, *Member of Knesset Barakeh v. Minister of Defence* (not published);

HCJ 615/85, *Abu Satiha v. Commander of the IDF Forces* (not published), *Taqdin Elyon* 85 (4) 10, 13*;*

HCJ 102/82. *Tsemel et al. v. Minister of Defence et al., Piskei Din* 37 (3) 365, 374-375, Paragraph 7.

58. In its decision of 9 July 2004 regarding the wall, the International Court of Justice held that humanitarian law applies in the Occupied Territories. See Paragraphs 89 and 101 of the decision in

http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm

Obligation of paying compensation in humanitarian law

59. The obligation of the occupying power to compensate for injuries sustained by protected persons results directly from the fundamental rule of humanitarian law, which constitutes customary law, that the occupying power has the duty to protect the population under occupation, who is called, for good reason, "protected". The duty to protect the said population is not limited to a negative duty – to refrain from harming protected persons. The state also has a positive duty, which is to prevent injury to protected persons and to ensure their welfare and safety. This rule is enshrining in Articles 43 and 46 of the Hague Regulations of 1907, and in Article 27 of the Fourth Geneva Convention, and a similar statement of the duty appears in Articles 48, 51, 57, and 58 of the First Additional Protocol to the Geneva Conventions, of 1977, which are customary law.

60. Humanitarian law includes express provisions on the duty of the occupying state to compensate for damages it causes to protected persons. Article 3 of the Hague Convention of 1907 states:

> **A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.**

On the intention of this provision to apply to individual persons, see:

Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV to Article 91 of Additional Protocol I of 1977 and Beyond," 40 *International and Comparative Law Quarterly* (1991), 827-858, 830.

A copy of the article is attached as Appendix P/22.

61. The responsibility of the occupying power is also stipulated in Article 29 of the Fourth Geneva Convention, as follows:

> **The Party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred.**

Similarly, Article 91 of the First Additional Protocol to the Geneva Conventions, which constitutes customary law, states:

> **A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.**

See, also, Rules 149 and 150 of the Red Cross, which are part of customary law.

62. In the hearing held on 23 June 2005 by the Constitution, Law and Justice Committee on the proposed bill, Dr. Yuval Shani, an expert in international law, related to this issue, stating:

> **The historical conception that it is really impossible to file suit inside the state is increasingly seen as being anachronistic, and we have more and more precedents holding that the obligations in human rights law also**

impose, require, effective relief at the internal-state level, and if there was a question whether this also applies to breaches of the laws of war, the opinion of the separation fence comes and states unequivocally – one can accept the opinion or not – but the spirit of the times is that states, when they breach humanitarian law must provide a remedy to the injured person. In my opinion, the proposed bill opposes the spirit of the times… in that we are moving, moving forward and granting the state more immunity than what is currently acceptable in the international arena, we are in effect directing criticism and international attention to what is happening today. It has to be said that what is happening today is more or less what is happening in other places. For example, if we look at the British judgment in *BICI* of a year ago, it makes the very same distinction that we are making in our law between combat actions and non-combat actions, which is exactly what they are doing. There, they held that British soldiers must compensate civilians of Kosovo in Kosovo for shooting carried out by British peacekeeping forces, because it was not a situation of active combat, and this is exactly the situation that is being heard in the High Court… This amendment flies in the face of the trend, this amendment endangers what is happening today. I agree with Prof. Kremnitzer that the existing law provides all the tools that the state needs to cope with a combat situation…

http://www.knesset.gov.il/protocols/data/rtf/huka/2005-06 -23.rtf

The Amending Law breaches international human rights law

63. International human rights law, too, recognizes the obligation of the state to compensate for breach of protected rights. Thus, Article 2(3) of the International Covenant on Civil and Political Rights states:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation

has been committed by persons acting in an official capacity.

This article is interpreted in Paragraph 16 of General Comment 31 of the UN Human Rights Committee, which constitutes the official interpretation of the International Covenant on Civil and Political Rights, as follows:

> **Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.**

http://www.ohchr.org/english/bodies/treaty/comments.htm

64. The International Convention against Torture and Cruel, Inhuman, or Degrading Treatment or Punishment, of 1984, explicitly sets forth, in Article 14, the right of the victim to compensation, and the relevant obligation of the state, as follows:

> **1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.**
>
> **2. Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.**

65. It should also be mentioned that the International Court of Justice has held more than once that any breach of an obligation establishes the obligation to pay compensation, and that this rule is a principle of international law. Thus, in *Chorzow,* the court held:

> **It is a principle of international law and even a general conception of 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.**

Permanent Court of International Justice, *Chorzow Factory Case*, 13 September 1928, (Series A, No. 17, p. 29).

http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf

66. It goes without saying that the Amending Law breaches the provisions of international human rights law also in Israel, both in Article 5B of the Amending Law, which applies in Israel, and in Article 5C of the Amending Law, which prevents a court in Israel to give relief. Note, international human rights law, particularly the provisions of the international conventions, to which Israel is party and has also ratified, apply in Israel and Israel has the legal obligation to respect and comply with them.

HCJ 69/81, *Abu Ita v. Commander of the Region of Judea and Samaria, Piskei Din* 37 (2) 197, 234;

Eyal Benvenisti, "The Influence of International Human Rights Law on the Israeli Legal System: Present and Future," 28 *Israel Law Review* 137 (1994);

Yoram Dinstein, *Ha-Mishpat ha-Benle'ummi weha-Medina* [*International Law and the State*] (Schocken Publishing, 1971), 146.

67. The ICJ decision, cited above, discussed the question of the application of international human rights law, the judges holding explicitly that the International Covenant on Political and Civil Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Rights of the Child, apply in the Occupied Territories:

> **111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights**

is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. … For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over thirty-seven years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction..." That Convention is therefore applicable within the Occupied Palestinian Territory.

68. This holding is consistent with the conclusions of the UN Human Rights Committee, of August 2003 and August 1998, and also with the conclusions of the UN Committee on the Elimination of Racial Discrimination, of March 1998.

Concluding observations of the Human Rights Committee: Israel, UN Doc.CCPR/CO/78/ISR, at 11. 21 August 2003.

http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?Opendocument

Concluding observations of the Human Rights Committee: Israel, UN Doc.CCCPR/C/79/Add, at 10. 18 August 1998.

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http://www.unhchr.ch/tbs/doc.nsf/0/2d7b93508a831869802565d90058c005?Opendocument

Applicability of Basic Law: Human Dignity and Liberty in the present case

69. Ostensibly, in examining the legality of the Amending Law, it is necessary to decide whether the Basic Law: Human Dignity and Liberty applies extra-territorially in the Occupied Territories. In *Hof Azza*, the court held that the Basic Law applies extra-territorially personally on Israelis who settled in the Occupied Territories, but left open the question of whether the law applies territorially in the Occupied Territories (Paragraphs 79-80 of the judgment). However, in our case, even if the infringement of fundamental rights, as to which the Amending Law denies relief, occurred in the Occupied Territories, the sinister harm of the Amending Law is the denial of the right to sue in Israel itself, by means of its court system.

70. If the Honorable Court addresses this question, it is requested to hold that the Basic Law applies also to Palestinians in the Occupied Territories, for the following reasons: First, unlike the Basic Law: Freedom of Occupation, which applies to every citizen and resident, the Basic Law: Human Dignity and Liberty applies to every person. When the legislator sought to enact the Basic Law to limit its applicability, it was explicit (see Article 6(b) of the law regarding the right of a citizen to enter Israel). Second, the Amending Law expressly applies to every governmental authority, and orders them to respect the rights set forth in the Basic Law (Article 11). Every soldier carries in his kit bag not only the principles of Israeli administrative law, but also the Basic Law, and is required to respect the rights enshrined therein. Therefore, the Basic Law applies any time that a governmental authority infringes the fundamental right of every person as such. At the least, the Amending Law applies in every area under the control of the State of Israel.

71. This conclusion is stronger regarding an area held in belligerent occupation, in which reside protected persons lacking rights and political power, and thus require greater protection of their rights, while, at the same time, the occupying army has a special obligation to safeguard the rights of the civilian population.

72. Any other conclusion would lead to the intolerable creation of a constitutional apartheid regime, whereby an Israeli in the Occupied Territories is entitled to the protection of his fundamental rights while a Palestinian is denied such protection.

The rights infringed

73. The fundamental rights infringed by the Amending Law are the right to life and limb, the right of property, the right to equality and dignity, and the right of access to the courts.

74. The Amending Law severely infringes the right to life and limb and the right of property, as follows: a person who, as a result of an act by security forces, loses his life or sustains bodily injuries or property damage in the circumstances set forth in the Law, is denied any relief for the said harm.

75. The rule of paying compensation for the injuries sustained, the purpose of which is to return the situation to the way it was previously, is a fundamental principle of our system of law. In cases in which compensation of this kind is not possible (such as an injury to life or limb), the purpose of compensation is "to place the injured person, in financial terms, close to the situation in which he was at the time of the infringement of the right had the harm not been done."

Hof Azza, Paragraph 138.

76. In the period following enactment of the Basic Law, the remedy follows the right – where there is a right, there is a remedy. "When a constitutional right is infringed, a constitutional remedy derived from it must be recognized" (*Hof Azza,* Paragraph 136). In our case, the subject is especially grave, for the infringement of the enshrined rights is done by denying an existing remedy for their breach. Denial of a remedy for infringement of a fundamental right is comparable to denial of the right itself. The law of torts is one of the principal means to guarantee the rights set forth in the Basic Law:

> **Israeli private law, in general, and the law of torts, in particular, are the primary source for granting remedy for (physical) breach of a protected human right… The Torts Ordinance is the source for the remedy, while the right is enshrined in the Basic Laws.**

Aharon Barak, *Parshanut ba-Mishpat* [Interpretation in Law], Part 3, (Nevo, 1994), 785.

77. The harm to property is, first and foremost, the harm caused to a person whose property is damaged by an act of the security forces, and he is denied any remedy for the harm done to him. But he suffers an additional harm – denial of his right to file suit. The right of property is interpreted broadly, to include any interest of monetary value.

CA 3145/99, *Bank Leumi l'Israel Ltd. v. Hazzan, Piskei Din* 57 (5) 385, 398, and the references cited there.

78. The Amending Law infringes the right to equality, in that the Law applies only to Palestinians, in particular, and to all non-Israelis, in general. This appears from the use of the terms "enemy state" and "terrorist organization" in the provision in Article 5B, from the explanatory notes to the proposed bill, which state that "the intention, as clarified when the bill was approved by the government, is that the area defined as a zone of conflict will not include areas of Israeli settlement", and from the comments of the representative of the Ministry of Justice at the hearing of the Constitution, Law and Justice Committee on 20 July 2005:

> **True, our conception has been all along that the law is not intended to deny a cause of action by Israelis. According to the status of the law today – regarding Israeli citizens in general, regardless of where they live, in the territory of the State of Israel or in the territories – they have a cause of action as does every citizen… In the original version, it said "resident of a zone of conflict," and the intention was that, by defining zone of conflicts, it would not apply to Israeli citizens. But because we deleted the personal connection, and said that it applies to an act that is done in a zone of conflict, this surely will apply also to foreign citizens. Still, the intention is that it will not apply to Israeli citizens. The purpose of the law did not change.**

It should be mentioned that, at that hearing, Ms. Sarit Dana stated a different position.

http://www.knesset.gov.il/protocols/data/html/huka/2005-07-20-01.html

79. All the above shows that the Minister of Defence will not declare as a "zone of conflict" an area in which settlements are located, and no declaration will be made in a case in which an Israeli files a civil action for injuries he sustained at the hands of security forces in the Occupied Territories.

80. This means that the Law is racist, applying on a personal basis to Palestinians and not to Israelis.

Compare the issue of selective enforcement, HCJ 6396/96, *Zakin v. Mayor of Be'er Sheva, Piskei Din* 53 (3) 289, 304-309.

81. The right to equality is now enshrined in the Basic Law: Human Dignity and Liberty, equality being an integral part of the right to dignity.

HCJ 5394/92, *Huppert v. Yad Vashem, Piskei Din* 48 (3) 353, 362-363;

HCJ 453/94, *Israel Women's Network v. Government of Israel, Piskei Din* 48 (5) 501, 526;

HCJ 721/94, *El Al Israel Airlines Ltd. v. Danielowitz, Piskei Din* 48 (5) 749, 760;

HCJ 4541/94, *Miller v. Minister of Defence, Piskei Din* 49 (4) 94, 133;

HCJ 5688/92, *Weichselbaum v. Minister of Defence, Piskei Din* 47 (2) 812, 830;

HCJ 1113/99, *Adalah v. Minister for Religious Affairs et al., Piskei Din* 54 (2) 164, 186-187.

82. Special severity is attached to discrimination on the basis of race or nationality, which contradicts the basic values of the State of Israel.

HCJ 6698/95, *Qa'dan v. Israel Land Administration, Piskei Din* 54 (1) 258, 282.

83. The Law also discriminates on grounds of citizenship and place of residence. These are arbitrary distinctions, which are degrading because they relate to the group to which the individual person belongs.

Compare LCA 5817/95, *Rosenberg v. Minister of Construction and Housing et al., Piskei Din* 50 (1) 221, 231-235 (discrimination on grounds of place of residence, Justice (as his title was at the time) Cheshin in a minority opinion).

The right of access to the courts

84. Denial of the right of Palestinians to access to the courts severely infringes the basic right of many injured persons to obtain relief given by the judiciary. Especially grave is the retroactive denial of access to the courts of persons who were injured by security forces and filed claims or began the procedure for filing suit in Israeli courts.

85. The right of access to the courts is an independent right, and a fundamental right in Israeli law.

CA 3833/93, *Levin v. Levin et al., Piskei Din* 48 (2) 862, 874;

CA 733/95, *Arpel Aluminum Ltd. v. Kalil Industries Ltd., Piskei Din* 51 (3) 577, 595;

CA 197/89, *Histadderut Aguddat Yisra'el be-Erez Yisra'el v. Schwartz, Piskei Din* 45 (3) 320, 327;

CA 579/90, *Rosen v.Bin Nun, Piskei Din* 46 (3) 738, 742;

CA 4980/01, *Cohen et al. v. Glam et al., Piskei Din* 58 (5) 625, 629;

LCA 9572/01, *Dadon v. Weisberg, Piskei Din* 56 (6) 918, 921;

LCA 7608/99, *Lokey Project Execution v. Mizpe Kinneret, Piskei Din* 56 (5) 156, 163.

86. Upon enactment of Basic Law: Human Dignity and Liberty, the status of the right of access to the courts increased, and it was recognized as part of the right to dignity, liberty, and property. The comments of President Barak well express the constitutional status of the right of access to the courts:

> **True, the right to turn to the courts is a constitutional right. In the past, it was one of the rights at law. Now it is derived from the Basic Laws themselves. It has a superior-constitutional status (see LCA 7608/99, cited above [8]; Rabin in his above-cited treatise [53], at p. 148; S. Levin, "Basic Law: Human Dignity and Liberty and the Rules of Civil Procedure" [59], at p. 453. Compare also *Minister of the Interior v. Harris* (1952) [51]. The power to turn to the courts is derived from this superior-constitutional right.**

CA 6805/99, *General Talmud Tora and Yeshiva v. Local Committee, Piskei Din* 57 (5) 433, 460.

See further *Hof Azza,* Paragraph 174.

87. Furthermore, the accepted approach is that the right of access to the courts is the foundation of the judicial branch and the rule of law, and that it is this right which enables the protection of a person's substantive rights:

> **The right of access to court is not a fundamental right in the ordinary sense of the term fundamental right… Its existence is a necessary and vital condition of the other fundamental rights.**

CA 733/95, *Arpel Aluminum Ltd. v. Kalil Industries Ltd., Piskei Din* 51 (3) 577, 629.

88. As described above, the right to a relief is an integral part of the substantive right; therefore, frustrating the possibility to obtain relief is similar to an infringement of a constitutional fundamental right. On this point, the words of President Barak are appropriate:

> **The Basic Laws would be a fraud if the constitutional rights do not generate appropriate remedy. The recognition of a constitutional human right brings with it the recognition of a proper remedy if the right is breached; the existence of the right requires a remedy.**

Aharon Barak, *Interpretation in Law,* Part Three, (Nevo, 1994), 703-704.

89. In light of the above, the Amending Law's denial of relief and blocking persons from filing claims for injuries they sustained, infringes their substantive rights to dignity, equality, life, limb, and property. More grievous and harsh are the infringement of substantive fundamental rights and the reliance interest of injured persons who have already filed suit in Israeli courts or have taken steps to file their claims.

90. In our case, the infringement of the fundamental rights is more severe because the injured persons are not offered any alternate relief. In an exceptional (and, it is believed, unprecedented in Israeli legislation) measure, the Amending Law establishes a committee "though the law does not so require" that will be empowered to grant compensation in special circumstances, the reasons for which are not explained in the Law itself. This is a paradox – a committee not required by law is enshrined in law. This is simply a case of the Respondents themselves having feelings of moral guilt regarding the enactment of the Amending Law, and sought a way to ease, if only slightly, the severity of its consequences by establishing this committee. Or perhaps they wanted to embellish it with a fig leaf, which fails to conceal the shame inherent in the Law.

91. On this point, compare the detailed arrangement set forth in Hoq Yissum Tokhnit ha-Hitnattequt [the Implementation of the Disengagement Plan Law], 5765 – 2005, regarding the entitlements committee and the special committee, their powers, the hearings, and appeal by right to the Magistrates Court and the District Court, and appeal by permission to the Supreme Court (*Hof Azza*, Paragraphs 155-174, 178-184). Contrary to our case, in that matter, parallel to a hearing before the committee, the council evacuated is given the right to file an action in court. Despite all this, the High Court voided the provision of the law that required the evacuees from choosing in advance which track they preferred in making their claim (Ibid., Paragraph 193).

The limitations clause

92. The Amending Law does not meet the four conditions of the limitations clause, set forth in Article 8 of Basic Law: Human Dignity and Liberty.

The first condition: the violation of the right must be prescribed by law

93. The Amending Law does not meet the first condition of the limitations clause, whereby the violation of the right must be done "by a law." The substance and components of this condition were stated by Professor Aharon Barak:

> **The component "by a law" or "prescribed by law" reflects the principle of the rule of law in its formal aspect and its narrow-substantive aspect. In its formal aspect, the rule of law means "lawful"… Therefore, the executive branch is not permitted to violate a fundamental right of a person unless it is empowered "by a law" or "prescribed by law." The rule of law in its substantive, narrow aspect relates to all those elements that are necessary for the implementation of a law as a (directing) norm guiding conduct in the legal system.**

Aharon Barak, *Interpretation in Law,* Part Three, (Nevo, 1994), 490.

94. As explained below, the Amending Law is unconstitutional because it applies retroactively, fails to establish the initial arrangements for its application, and in part is vague and incomprehensible.

Retroactive application of the Amending Law

95. As stated, Article 3 of the Amending Law states that the Law applies retroactively to an act that took place after 29 September 2000, except for an act as to which suit has been filed and the hearing-of-evidence stage in court began prior to publication of the Law. Also, the Amending Law empowers the minister to declare at any time an area to be a zone of conflict, including an area in which the act took place prior to the declaration.

96. A retroactive law impairs, *inter alia*, the principle of certainty and stability, and therefore fails to meet the first condition of the limitations clause. As Justice (as his title was at the time) Barak stated:

> **Retroactive or retrospective legislation opposes "accepted concepts of justice"… The rule of law requires certainty and confidence in interpersonal relations. Retroactive legislation is flawed in both regards… It does not enable conduct to be planned in advance…**

PPA 1613/91, *Arbiv v. The State of Israel, Piskei Din* 46 (2) 765, 776-777.

97. According to Supreme Court case law, a retroactive law is not allowed to infringe vested rights, the reliance interest, and the appropriate expectations of the injured person.

HCJ 9098/01, *Yelena Ganis, v. Ministry of Construction and Housing, Taqdin Elyon* 2004 (4) 1390, Paragraph 16 of the judgment;

CA 10/55, *El-Al Ltd. v. Tel Aviv –Yafo Municipality et al., Piskei Din* 10, 1586, 1589;

CA 27/64, *Bader v. Israel Bar Association, Piskei Din* 18 (1) 295, 300.

98. This Honorable Court recently held in *Ganis*, cited above, that new legislation will not apply retroactively to a person who relied on the legal situation on the eve of enactment of the legislation, which led to the making of appropriate expectations. That case involved the enactment of a statute that canceled an economic benefit (housing assistance) also in the case of persons who had relied on that benefit. It should be noted that there was no disagreement among the justices on the question of voiding the retroactive provision as to persons who had relied on the prior situation. The disagreement revolved about the relevant remedy – whether to void the newly enacted statute or to interpret it as not applying to a person who actually relied on the situation as it stood prior to enactment of the statute. Justice (his title at the time) Cheshin, writing for the majority, stated, *inter alia*, the principle that was not in dispute among the justices on the panel:

> **Retroactive application of Article 20 of Hoq ha-Hesderim [the Arrangements Law] is not essentially intended to – we almost said: it cannot – apply to any person who relied on the promise given by the legislator and changed his situation completely… The legislator will not do injustice to a person and will not ignore a person who followed it and relied on the promises it made and the obligations that it made…**

Ganis, Paragraphs 22-23 of the judgment.

99. Similarly, this Honorable Court has voided legislation, regarding the transition provisions, in *Investment Managers Association,* because the legislation impaired the reliance interest of investment managers, who relied on the status of the law prior to enactment of the transition provisions. The transition provisions created new conditions, such as seniority and examinations, which would apply to persons who

were engaged in investment management prior to the legislation, but failed to meet the conditions of the transition provisions. The court held that the investment managers relied strongly on the pre-existing legal situation, and that the injury they would sustain, if they failed to pass the tests, was greater than the benefit to society resulting from the transition provisions.

HCJ 1715/97, *Israel Investment Managers Association et al. v. Minister of Finance et al., Piskei Din* 51 (1) 367.

100. The rule, set forth in *Ganis* and in *Investment Managers Association*, should apply to the Amending Law, the subject of this petition. As this Honorable Court refused, and rightly so, in *Ganis* to apply the legislation retroactively to persons who relied on the prior legislation, which granted them housing assistance, and as it refused in *Investment Managers Association* to retroactively impair the economic-business interest of investment managers, it should reach a similar decision regarding the Amending Law. If those cases warranted voiding the retroactive application of the legislation, the same result is especially warranted in the present case: the Amending Law infringes the right to life and limb, the right to equality, and the right to dignity, which hold a higher place in the hierarchy of constitutional rights than those breached in *Ganis* and *Investment Managers Association.*

101. In *Talmi,* the court discussed the effect of retroactive legislation on existing legal proceedings and the violation of "vested rights." Justice (as his title was at the time) Cheshin held that it was necessary to consider and examine the harm of the new legislation to the expectations that had been formed as regards the "vested rights" on the eve of the enactment, and that heed should be given to the expectations that had not been formed prior to enactment for those "vested rights," but which could be categorized as rights deserving of protection:

> **The principle of "vested rights" is a helpful device in the life of the law, and usually gives legal expression to the intuitive feeling of the expert-jurist, and to our sense of fairness; even more so in that these are consistent with public order and legal certainty. A contract that is entered into and is binding according to the law in effect at the time it was made will bind the parties even if afterwards the law was changed and with it the pre-conditions to the making of the contract were changed; *a wrong that is done will not cease to be a wrong even though after it was done the tort category was***

eliminated, and the opposite: an act that was not a wrong when it was done, will not become a wrong if after it was done, the legislator determined that such an act is a wrong; and so on and so forth. (emphasis added)

CrimA 4912/91, *Talmi v. The State of Israel, Piskei Din* 48 (1) 581, 621.

See also:

CA 975/97, *Illabun Local Council v. Mekorot Water Company Ltd., Piskei Din* 54 (2) 433, 450;

CA 4452/00, *T.T. Advance Technology Ltd. v. Tirat Hacarmel Municipality, Piskei Din* 56 (2) 773;

HCJFH 9411/00*, Arko Electric Industries Ltd. v. Mayor of Rishon* le-Ziyyon*, Piskei Din* 57 (5) 673.

102. The law under review is void because it retroactively infringes constitutional rights, infringes vested rights, and impairs the legitimate expectations of persons who were injured, and whose cause of action arose on the grounds of a tort action, which existed at the time of the incident or on the eve of the enactment of the Amending Law. In addition, the Law violates the legitimate reliance interest of persons who filed their claims and expected that the legal proceeding in their matter would be completed without disturbance by an external factor. The Law arbitrarily harms those persons who filed their suits, but the proceedings have not yet reached the evidence-taking stage, at no fault of their own, and discriminates against them, in comparison with those whose proceedings have ended.

The harm to the rule of law because the Amending Law is vague and incomprehensible

103. According to the Amending Law, the Minister of Defence is empowered to declare, at his sole discretion, in advance or retroactively, an area outside of the borders of Israel as a zone of conflict. The only limitations placed on this discretion relate to the definition of the term "conflict" and "zone of conflict." Except for the fact that the area must be outside the territory of Israel, these definitions do not provide any substantive limitation on the minister. Therefore, these definitions are broad (in the sense of over-breadth), and lack minimal specificity (in the sense of sufficient precision).

104. To what does this refer? The statue books contain other cases in which a law gives professionals power to declare a certain area an area in which fundamental rights may be denied temporarily. For example, Pequddat Mahalot Ba'ale Hayyim [the

Livestock Diseases Ordinance (New Version)], 5745 – 1985, grants the director of veterinary services the power to declare an area as disease-infected. The declaration is made only regarding the area in which a "disease" (defined in detailed manner in the ordinance and in an annex to the law) is found, and the declaration mentions the precise location of the infected area (Articles 1 and 18 of the ordinance). Hoq Gannim Le'ummiyyim, Shemurot Teva, Atarim Le'ummiyyim we-Atre Hanzaha, [the National Parks, Nature Reserves, National Sites and Memorial Sites Law], 5758 – 1998, empowers the Minister of the Interior to declare an area a nature reserve subject to the approval of an outline plan, the right to voice objections, the duty to consult, and in accordance with the detailed definition of the term "nature reserve" (Articles 1 and 22 of the law). Note well: these principles are clearly not complied with in the matter of the Amending Law. The Defence Minister's declaration is based entirely on the amorphous statement that "security forces were active or stayed in the zone in the framework of the conflict," and "conflict" is defined broadly, and also applies to an isolated incident, and to "a situation in which enemy acts carried out by an organization hostile to Israel are taking place."

105. The absence of clear and explicit criteria ostensibly makes it impossible to conduct judicial review of the declaration, and in effect gives the minister unlimited discretion. A person who is harmed by the declaration of an area as a nature reserve can seek to prove that the area does not possess protected nature values. What will a person do who is harmed by the declaration of a zone of conflict? He must prove, prima facie, that security forces were in the zone for reasons unrelated to their military activity "in the framework of the conflict" (information that is, naturally, known only to the Respondents), that no action of a military nature took place in the alleged zone of conflict, and that no hostile acts against Israel took place.

106. The Law is ostensibly subject to the broad discretion of the minister. He is free to apply the Law or not to apply it, in violation of the rule of law, and the obligation that the violation be prescribed *explicitly in a law.* This point is especially problematic in light of the fact that the Respondents, who have the sole power to apply the Law, are also the defendant in the suit.

107. In addition, the possibility of effectuating the cause of action and obtaining a remedy depends, ostensibly, completely on the Respondents, who at any stage of the suit can claim that the plaintiff is, for example, a member of a terrorist organization. They can do this even the day before judgment is given. In effect, the Law grants the Respondent broad power to apply the provisions of the Law in the various stages of the suit and to thwart, as they wish, the suits filed against them.

108. Therefore, the lack of certainty resulting from the Amending Law is found not only in the determination of the place in which it applies, but also regarding the time the discretion is exercised. Thus, it follows that the Amending Law produces a lack of information and a lack of certainty regarding creation of the cause of action and effectuating it.

109. Parenthetically, it should be mentioned that the lack of certainty created by the Amending Law is also likely to affect the decisions of many injured persons not to retain an attorney at the beginning and not to generate expenses in filing suit, because it is unclear to them what the minister will decide at some time in the future regarding the "zone" in which they were injured (thus having a chilling effect).

110. It is worth mentioning that the above comments relating to the lack of certainty and the broad discretion given the Minister of Defence, are relevant, even more so, to the committee, which the Law authorizes the Minister of Defence to establish and which is empowered to grant, in special circumstances, payment beyond the letter of the law. On this point, the comments of the Honorable Court in *Hof Azza* are instructive, by analogy, because of the enormous disparity between the powers of the committee to order compensation beyond that which is set forth in the Implementation of the Disengagement Plan Law, and the limited powers of the committee that is set up in the law that is the subject of this petition:

> **As a rule, the model of compensation for damages based on standard criteria ("tariff schedules") is liable to comply with the constitutional criteria. This, where against the infringement of the right of the injured person because of the nature of the compensation tariff lies the broad responsibility of the party causing the damage and other arrangements benefiting the injured person… What, then, is the balancing factor in the Implementation of the Disengagement Law, in which are met the constitutional demands in the limitations clause regarding those injured persons who ultimately will received compensation according to the law in an amount that is less than fair and proper? The state responds to these questions by referring to the provisions of the law, which are based on individual arrangements. These provisions lessen, of course, the gap. Nevertheless, we had difficulty with the question as to whether they eliminate it. The answer depends on the**

> **manner of implementation of these provisions and the interpretation given them. We are not presently able to give a comprehensive answer in this matter. It is necessary, therefore, to establish another balancing factor, which will overcome the gap between a fair and proper compensation and amounts of compensation that will be received in accordance with the Implementation of the Disengagement Law. In our opinion, this balancing factor is the power of an Israeli evacuee who is of the opinion that the compensation given him is less than the full and fair compensation, to turn outside the [implementation] law, to the general law, and seek there the proper compensation in his case. This is in addition to the amendments to the law that we shall discuss below.**

Hof Azza, Paragraph 141 of the judgment.

111. Thus, the Amending Law does not meet the conditions of the limitations clause, which demand that the violation be "in a law" or "prescribed by law" and which requires protection of the principle of the **rule of law in its narrow-substantive aspect***:* the law must be accessible, give direction to future, clear, and certain conduct. In the words of Professor Aharon Barak:

> **The rule of law in its substantive, narrow aspect relates to all those elements that are necessary for the implementation of a statute as a (directing) norm guiding conduct in the legal system. For example, a condition of the rule of law is that the statute be general, public, known and published, and that it be clear, certain, and understandable in the sense that the public can act in accordance therewith… [The element] "in a law" does not mean other than that a law enacted by the Knesset includes the limitation. The demand is not only intended to point to the need of a formal source of law to limit a human right…… In my opinion, it goes further and states that this formal source must meet additional requirements that are natural and significant in maintaining law as a factor that directs human conduct… Legislation stating that human rights will be restricted at the discretion of a certain person does not meet the**

minimum requirement of the limitation "in a law" in our jurisprudence. According to this approach, the demand that the limitation on the human right be "in a law" is of great importance. It is not only a formal requirement (formal rule of law), it also comprises a substantive requirement… The substantive nature is examined in the context of the role of the law as a system to guide and direct human conduct. A similar approach to the purpose of the limitations clause was taken by the European Court of Human Rights and Canadian courts.

Aharon Barak, *Interpretation in Law,* Part Three, (Nevo, 1994), 490-491.

See also the references and the judgments of comparative law on the voiding of statutes that did not meet the "in a law" requirement, at Pages 491-507.

112. Justice (as his title was at the time) Cheshin pointed out the importance of the rule of law both as providing information and giving prior warning to the public, and as a means to clearly guide conduct, as follows:

We are full of praise for the principle of the rule of law, and in doing so we have placed the rule of law against the rule of man. The law rules over us – the law and not man … The rule of man: arbitrary in its substance and arbitrary in its timing … Such is the rule of man – against which is the rule of law. Law, too, is a creation of man's spirit, but in being law – to distinguish it from man – it must by definition be given and known in advance … In this way, one is warned in advance of the norms that bind one, and can thus direct one's actions in accordance with those norms that have been established and brought to one's attention in advance.

LCrimA 1127/93, *The State of Israel v. Klein et al., Piskei Din* 48 (3) 485, 515.

113. In another place, President Shamgar related to this issue, as follows:

The main expression of the rule of law is that it is not the rule of people - in accord with their unrestrained decisions, considerations and aspirations - but rests on the provisions of stable norms that are applied and binding in equal fashion.

EA 2/84, *Neiman v. Chairman of the Central Elections Committee for the Tenth Knesset, Piskei Din* 39 (2) 225, 261.

114. The European Court of Human Rights held that legislation that grants broad discretion to the executive branch without setting clear limitations in the law fails to meet the condition, set forth in the European Convention on Human Rights, that require that the violation of fundamental rights be *prescribed by law*. See, for example, the court's holding in *Sunday Times:*

> **In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.**

Sunday Times v. United Kingdom 6538/74 [1979] ECHR 1 (judgment of 26 April 1979).

115. A Canadian court held similarly, in its interpretation of "law" in the Canadian Charter, regarding legislation that limits the freedom of expression by granting broad discretion to the film censor board:

> **In our view, although there has certainly been a legislative grant of power to the board to censor… it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal… that kind of regulation cannot be considered as "law." It is accepted that law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.**

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors 45 O.R. (2d) 80 ; 1984 Ont. Rep.

116. Therefore, the law involved in the present petition violates the principle of the rule of law in its narrow-substantive aspect, in that it does not meet the first condition of the limitations law, "in a law," which directs that the law must inform the public in advance as to its future application, that it be accessible, clear, and certain.

The second condition: the Amending Law does not befit democratic values

117. The Amending Law does not befit democratic values, as required by the Basic Law: Human Dignity and Liberty, in addition to the reasons mentioned above, also because it violates the principle of separation of powers, judicial independence, the stability of the law, the rule of law, and the principles of international law.

118. The Amending Law directs that the courts shall not carry out their function of conducting judicial review of the government's acts of the kind referred to in the Law; that these acts are not justiciable, that the judicial branch cease its handling of pending cases in these matters, and that the proceedings terminate pursuant to the declaration of the Minister of Defence, who is in charge of the defendants in these suits.

119. Regarding the relationship between democratic values and the principle of separation of powers and access to the courts, Justice (as his title was at the time) Cheshin held in *Arpel:*

> **The purpose of the Basic Laws is to incorporate, to establish, to implant among us the values of the state; these are values that exist apart from the Basic Law… These are "values befitting Israel as a Jewish and democratic state." The concept democracy attests to – even cries out for – the existence of a judicial branch. The brain of democracy has three lobes: the legislative lobe, the executive lobe, and the judicial lobe. The brain – with the three lobes – controls the body, gives life to the body, and shapes its life. Silence one of these three lobes, and democracy disappears and is no longer. The conclusion must be that the existence of the judicial branch – as a vital strength in the body of the democratic state – attests by itself that it is forbidden to block the flow of blood leading to it, the prohibition on blocking the access of a person to court. A proper**

> **arrangement for going to court – yes; blocking the way – directly or indirectly – certainly not. On what is a "proper arrangement" and what is "blocking the way –directly or indirectly," we shall speak when the time comes.**

CA 733/95, *Arpel Aluminum Ltd. v. Kalil Industries Ltd., Piskei Din* 51 (3) 577, 629-630.

120. Prior to enactment of the Basic Laws, this Honorable Court made clear rulings indicating that judicial independence and the separation of powers are pillars of democratic regimes:

> **As we know, the courts do not look kindly on limitation of this power, not because of concern to increase its power and expand its importance, but from the clear knowledge and profound belief that the judicial power and the courts' review of governmental acts is an integral part of a true democratic regime, and undermining it is liable to weaken one of the pillars of the state.**

HCJ 222/68, *National Groups Registered Society et al. v. Minister of Police, Piskei Din* 18 (4) 249,172 [sic].

121. Therefore, the law under review removes from the judicial branch a power intended for it, to decide controversies and to carry out judicial review of governmental acts. Impairment of this power is unconstitutional. As President Barak has said:

> **Legislation or an administrative act that is contrary to the separation of powers is unconstitutional, and may be declared void. For example, if the legislator enacts a law whereby decision on the question of whether a law is constitutional is left to the legislator itself, and is no longer subject to the courts, such a law would be unconstitutional. It takes from the judicial branch the powers given it in the constitution… This example is not hypothetical. It occurred in South Africa. The racial segregation underlying apartheid was carried out pursuant to statute. The Supreme Court of South Africa held that the law was unconstitutional, in that it was contrary to legislation holding a higher normative standard.**

Aharon Barak, *A Judge in a Democratic Society* (University of Haifa Press, Keter, Nevo, 2004), 112.

122. *Wallner* involved the legality of the coalition agreement between the Labor Party and Shas, which included an article stating that, in the event the status quo in religious matters is breached, the parties undertake to rectify the breach by appropriate legislation. Justice (as his title was at the time) Barak related (in a minority opinion) to the article, and held:

> **It violates the principle of separation of powers. In my opinion, this is not merely an improper decision. It is wrongful, for it profoundly breaches the fundamental conception of our constitutional regime. It opposes our constitutional public policy.**

HCJ 5364/94, *Wallner v. Chair, The Israel Labor Party, Piskei Din* 49 (1) 758, 791.

123. Even before enactment of the Basic Laws, this Honorable Court held in a line of decisions that, despite the explicit legislative provisions, the decisions of the other branches are never final. This is so from the legal aspect, in that the power of judicial review by the courts of the acts of the other branches is not to be denied. For example, Justice Berinson held:

> **Indeed, according to the consistent case law of this court, this "finality" is not so final. It is final only at the governmental level, in the sense that there is no legal right to examine the decision by another, higher, branch. For this court, however, which is charged with maintaining the legality of the acts of governmental bodies and officials, the matter is not final at all…**

HCJ 222/68, *National Groups Registered Society et al. v. Minister of Police, Piskei Din* 18 (4) 172, 249 [sic].

HCJ 294/89, *National Insurance Institute v. Appeals Committee, Piskei Din* 45 (5) 445.

124. Article 5C(b), which transfers the power of the judicial branch to decide disputes between individuals and the authorities to the committee to determine payment beyond the letter of the law and in special circumstances, is grievously unconstitutional, and this for a number of reasons: the Law does not establish known criteria; it denies access to the courts in respect of all claims, except for those in

which the taking of evidence has begun; according to the Law, the Minister of Defence's instructions will apply to every judicial proceeding encompassed by the Law, and will set the time that the proceeding ends, even if the parties are engaged in advanced negotiations toward reaching a settlement, or a time has been set for the taking of evidence, or interim decisions have been made that require one of the parties to provide temporary relief, or some other judicial directive has been given. The Minister of Defence's directive will interfere with a pending judicial proceeding, will prevail over interim decisions that have been made, and will terminate the proceedings even if the delay in reaching the taking-of-evidence stage was accidental and not a result of the parties' actions (or was caused because of the Respondents). That is, the legislative branch empowers the executive branch to interfere in the independent judgment of the judicial branch.

125. The negative evaluative message that appears from the Law's contents and its legislative history is this: the judicial branch is not fit to be trusted to decide in these cases. This public message will automatically also have repercussions on the handling of pending suits; certainly it will affect the status of the courts in the public's eye. On this point, the remarks of President Shamgar are appropriate:

> **A fundamental pillar of democracy is an independent judicial branch that does justice according to law, and has the public's trust. Because of this trust, the judicial branch is able to carry out its tasks, at the center of which lies decision-making in individual cases and in development of the law, to fulfil the basic values of the system… The need for public trust in the judiciary is the need of all litigants for an independent and autonomous judicial branch, and the need of the democratic regime in its entirety for a strong, objective judicial branch that safeguards the rule of law, both formally and substantively…**

HCJ 506/89, *Be'eri v. Head, Claims Division, Piskei Din* 44 (1) 604, 609.

126. The legislative history, which indicates the rationale behind the Law, as shall be described in detail below, can easily justify any violation of the principle of the separation of powers. A rational explanation can be found to deny by law the power of the court to hear and give relief in every matter in which the executive branch is an interested party and prefers not to face litigation. This is the Amending Law's grievous breach of the rule of law.

127. Moreover, the flagrant interference in the judicial proceedings, resulting from the sweeping immunity, violates the principle of the rule of law. Removing all responsibility of security forces for their acts (even if in the extreme cases the criminal law will be brought into play) will diminish the rule of law, lead to repeated breaches of the law, and encourage negligent and irresponsible conduct. The army's policy of very limited application of the criminal law in regard to actions by the army in the Occupied Territories is known, as is the declared policy not to investigate suspected offenses, except in extreme cases. Add the sweeping immunity for other wrongs, including looting, maltreatment, and negligent use of firearms, and the army and the police operating in the Occupied Territories have no fear of the law, knowing that they will not have to pay the price for their actions, even for completely immoral acts. If this is insufficient, the Law also makes a special effort not to investigate suspected criminal offenses, for the reason that conviction is liable to remove the state's immunity. This applies even more so to acts of negligence, for in these cases suit will not be filed because of the state's sweeping immunity, and in the absence of a need to explain their acts in court, the authorities will cease to investigate these cases.

128. Thus, a situation is created in which there is neither law nor judges. The comments of Justice (as his title was at the time) Cheshin relate directly and substantively to this point:

> **The right of access to the court is the lifeblood of the court… Consequently, we know that blocking the way to court – directly or indirectly – even if in part, undermines the *raison d'être* of the judicial branch. Impeding the judicial branch impairs the democratic underpinning of the state. Without a judicial branch, without review of the acts carried out by individuals and the government, the people will run wild and the state will collapse. Without judicial review the rule of law will be lost and fundamental rights will disappear. In blocking the way to the court, judges will cease to exist, and without judges, the law itself will vanish.**

CA 733/95, *Arpel Aluminum Ltd. V. Kalil Industries Ltd., Piskei Din* 51 (3) 577, 628-629.

129. The breach of the principle of the rule of law is comprehensive, so much so that it violates its three aspects: the formal, the theoretical, and the substantive, as stated by President Barak:

> **A fundamental principle of democracy is that of the rule of law (or more correctly the rule of Judication) … The rule of law, with its three aspects, is the fundamental principle of our democracy. Every judge must fulfill it; every judge must save it from being violated. Consequently, the doors of the court are open to a Petitioner who seeks to protect the rule of law, for without a judge, there is no justice. Consequently, the need exists for judicial review of governmental actions. This is the rule of law of governmental bodies. Derived from this is judicial review of the constitutionality of a statute, which preserves "the rule of law on the legislator." This also provides the justification for judicial review of the legality of secondary legislation and other actions of public administration.**

Aharon Barak, *A Judge in a Democratic Society* (University of Haifa Press, Keter, Nevo, 2004), 116-117.

130. The Amending Law significantly violates the fundamental principles of international law, as described above. The violation of the fundamental norms of international law contradicts democratic values. The essence of these norms, particularly those that lay at the core of human rights, was formulated on the backdrop of the peoples' history. Thus, their universal scope and application. These statements apply even more so in the global era of human rights. The relationship between the norms of international law and democratic values was stated by President Barak, as follows:

> **International customary law is part of the law of the land. Customary law includes also the rules of law regarding human rights. For example, the accepted thinking is that the prohibition on slavery and the prohibition on racial discrimination are part of international customary law. It may also be that international customary law regarding human rights includes also the prohibition on arbitrary detention, cruel and inhuman punishment, torture during interrogation, and infringement of human rights.**

> **International treaty-based law is not part of Israeli law, unless it is incorporated in it. However, even where it is not incorporated, international treaty-based law regarding human rights is important for interpretation… The belief is that the protection of human rights on the international level must give interpretative inspiration to understanding rights in Israel. This is so regarding each right separately, and regarding the overall purpose, which relies, *inter alia*, also on the State of Israel being a democratic state. *The values of a democratic state can be learned from the general and particular conceptions of the international human rights conventions*… It is assumed that the purpose of domestic legislation is to bring international law to fruition and not to contradict it.** (emphasis added)

Aharon Barak, *Interpretation in Law,* Part Three, (Nevo, 1994), 353-354.

131. Therefore, the law under review violates democratic values – it violates Israel's international obligations, breaches the principle of separation of powers and the rule of law. It states, regarding substantive rights, that there is neither judge nor justice.

The third condition: the purpose of the Amending Law is improper

132. Legislation that violates fundamental human rights must be intended for a proper purpose, as set forth in the limitations clause of the Basic Law: Human Dignity and Liberty. According to the common law, a proper purpose:

> **[…] is intended to protect human rights, including by establishing a reasonable and fair balance between the rights of individuals holding conflicting interests in a manner that leads to a reasonable compromise in granting the optimal rights to each and every person. Furthermore, a purpose will be considered proper if it serves important public purposes for the state and society so as to establish a foundation for communal life and a social framework that seeks to protect and advance human rights.**

HCJ 4769/95, *Menahem et al. v. Minister of Transportation et al., Piskei Din* 57 (1) 235, 264.

133. In *Levy,* the Honorable Court held that:

> **The question whether a purpose is proper is examined at two levels. One, at the level of the purpose's content; and two, at the level of the need for its realization. At the first level, a purpose is proper if it maintains the proper balance between the public interest and human rights. As we have seen, in our case, this balance exists if the violation of human rights is intended to prevent the near certain occurrence of severe, serious, and grave harm to security and public safety. At the second level, the purpose is proper if the need for its fulfillment is important for the values of society and the state. Not every proper purpose is likely to justify the violation of fundamental rights. It may be that the violation of especially important human rights is justifiable only if society's need that is sought by causing the harm is especially vital. The degree of importance of the need required to justify the violation will likely change depending on the nature of the right that is harmed. On this point, we have adopted a number of times – without deciding – a strict criterion. According to the criterion, the purpose is proper if it is intended to attain a "vital purpose, or a pressing social need, or a substantial social matter" (*Horev,* p. 53; see also *Hof Azza,* Paragraph 98 of the majority's opinion).**

HCJ 6893/05, *MK Yitzhak Levy et al. v. Government of Israel et al*., (not yet published), given on 3 August 2005.

See, also, *Hof Azza,* Paragraphs 62-64 of the judgment and the case law cited there.

134. As described above, the Amending Law severely violates fundamental rights of extremely great normative importance, among them the right to life and limb, the right to equality as regards ethnicity, and the right to human dignity. Therefore, a particularly strict and rigorous examination of its purpose must be made.

135. First, we shall discuss the subjective purpose of the Amending Law, which we learn from the explanatory notes attached to the proposed bill, from the documents submitted by the Ministry of Justice to the Constitution, Law and Justice Committee, and the remarks made by the Respondent's representatives at Committee hearings.

136. The above indicates that the subjective purpose of the Amending Law is to deny residents of the Occupied Territories, subjects of "enemy states," and activists in "terrorist organizations" the right to compensation for injuries they sustain at the hands of the security forces, even if they do not result from a wartime action.

137. In that the state and its branches have already been granted immunity pursuant to Article 5 of the Principal Law, as regards a wartime action, and in that the definition of "wartime action" is defined broadly in Article 5A of the Law, an article that eases the procedural and evidentiary requirements that the state must meet in civil claims filed against it by residents of the Occupied Territories, it is apparent that the subjective purpose of the Amending Law is to deny residents of the Occupied Territories, subjects of "enemy states," and activists in "terrorist organizations" the right to compensation for injuries they sustained at the hands of the security forces, *even if not sustained in the context of a wartime action.*

138. The subjective purpose of the Amending Law is composed of four sub-purposes, which we shall discuss separately.

<u>The first sub-purpose: the desire to incorporate in law the principle that "each side bears its injuries and cares for its injured"</u>

139. This purpose was set forth already in the explanatory notes to the proposed amendment to the law: "The accepted rule is that, during armed conflict between nations, each side bears its injuries and cares for its injured." However, the principle that the Amending Law seeks to incorporate does not exist in international law; rather, it only appears, if at all, in certain situations that fall within the wartime action framework where the provisions of international law are met. In practice, international law, as described above, requires the occupier to protect protected persons, and this also applies in the case of an uprising against the armed forces, and to compensate the protected persons for damages that did not result directly from a wartime action that complies with the rules of international law. Thus, the purpose of incorporating this principle is to void provisions of humanitarian law and provisions of international human rights law, which apply to the Occupied Territories. This sub-purpose is extremely improper.

See Appendix P/12 - the explanatory notes to the proposed bill, p. 892, the fourth paragraph of the preface.

140. Another difficulty lies in the basic assumption of this sub-purpose, whereby the conflict in the Occupied Territories is a conflict between two states, the state of Israel and the Palestinian Authority. However, this is not the factual or legal situation. The

Palestinian Authority is not a state, and the transfer of some powers to it did not change Israel's effective control in the Occupied Territories. Israel has never related to the Occupied Territories as one state relates to another state, but as an occupier relates to occupied territory.

141. In seeking to justify this purpose, the Respondents contended that a balance needed to be created: just as Israelis cannot sue the Palestinian Authority, Palestinians should not be allowed to sue Israel. This contention is far from correct. Regarding the second Intifada, Israelis have filed more than a few suits in Israel and abroad against the Palestinian Authority. The courts have even attached large sums of money of the Palestinian Authority.

142. This sub-purpose seeks to release Israel from its obligation, imposed on it as an occupying power, to enable the protected persons to file tort claims in the courts. Humanitarian law expressly prohibits denying protected persons access to the courts. On this point, see Article 23 of the Hague Regulations of 1907, which states:

> **In addition to the prohibitions provided by special Conventions, it is especially forbidden:**
>
> **…**
>
> **(h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.**

143. In the framework of this sub-purpose and its impropriety, appropriate are the remarks of the British High Court regarding the tort liability of the British army when operating outside the country's borders, and the dangerous significance of granting immunity:

> **Soldiers are human; from time to time mistakes are inevitable… The Queen's uniform is not a licence to commit wrongdoing, and it has never been suggested that it should be. The Army should be held accountable for such shortcomings… A proper system of justice requires no less.**

Bici and Another v. Ministry of Defence [2004] EWHC 786 (QB), hearing date 7 April 2004).

<u>The second sub-purpose: the desire to exempt the state from the financial costs entailed in paying the compensation</u>

144. This purpose, the discussion of which is mentioned in a document that the Ministry of Justice submitted to the Constitution, Law and Justice Committee, is common to all the proceedings since suits involving the first Intifada began to be filed. Time and again, the Ministry of Defence has warned that a "wave" of suits for "millions" [of shekels] threatens the state treasury.

145. A document prepared by the Tel Aviv District Attorney's Office and submitted by the Ministry of Justice to the Constitution Committee, mentioned that 384 claims, for NIS 621,920,264, had been filed relating to the second Intifada. This sum is based on the amounts sued for in the claims (including bodily-injury claims filed in the Magistrates Court, in which a specific monetary demand is not stated and the District Attorney's Office apparently used the sum that is the maximum amount of claim permitted in that court) and not the amounts that were set forth in the judgments in favor of the plaintiffs. The document stated that, among twelve claims that are no longer pending, three were settled, and the others were rejected or dismissed. That is, only one-quarter of the claims ended in the payment of compensation. The claims that were dismissed amounted to 35 million shekels. The state paid NIS 60,000, which represents 0.17 percent of the total amount of the claims. The figures in the documents relate, then, to a theoretical situation, in which the plaintiffs win their claims and are compensated in the full amount. Clearly, this is not the case in these claims, or regarding claims in general.

A copy of the document that was prepared by the Tel Aviv District Attorney's Office is attached hereto as Appendix P/23.

146. Even if we assume that the state will have to pay the entire amount demanded, this fact does not make the second sub-purpose legitimate. The common law is that financial cost, in particular, and considerations of administrative efficiency and convenience, in general, are not a proper purpose for violating human rights. In *Hof Azza,* the Honorable Court voided the provisions of Article 37(e) of the Implementation of the Disengagement Plan Law, 5765 – 2005, holding that it is unconstitutional because its purpose in achieving administrative efficiency and budget savings cannot justify the denial of fair and proper compensation, and that the protection of human rights prevails over it:

> **Do these reasons, based on considerations of administrative efficiency, justify an arrangement that denies the Track A and Track B entitled persons the statutory compensation that the legislator enacted for these tracks – "fair and**

proper compensation" – which are a condition for the proportionality of the impingement of their property rights? In our opinion, in a democratic state in which human rights have a senior constitutional status, the answer to this question is obvious. A. Barak asserted in this regard: "a system of law that protects human rights and gives them constitutional status is not willing to allow impingement of these rights for reasons of pure administrative convenience or financial savings" (A. Barak, *Interpretation in Law* 527 (Part Three, 1994); see also *Miller*. In this spirit, it was held that a proper purpose is not to be found in "monetary savings in and of itself" (HCJ 5578/02, *Manor v. Minister of Finance* (not yet published), paragraph 13 of the judgment). Study of comparative law teaches that this approach, whereby the need to protect constitutional rights prevails over considerations of efficiency and administrative convenience, has consistently been adopted in a large number of states.

Hof Azza, Paragraphs 235-236 of the judgment.

See also:

HCJ 7081/93, *Bozer v. Makkabim-Re'ut Local Council, Piskei Din* 50 (1) 19, 27-28;

HCJ 4541/94, *Miller v. Minister of Defence et al., Piskei Din* 49 (4) 94, 113.

147. Therefore, the factual basis of this purpose is extremely weak, and does not meet the requirements of a proper purpose. Even if a factual basis exists, it does not contain the normative basis required for a proper purpose in violating human rights.

The third sub-purpose: the desire to ease the burden resulting from claims filed by a person who was injured by actions performed by the state in the Occupied Territories

148. In the explanatory notes to the proposed bill and in the document that the Ministry of Justice submitted by the Constitution, Law and Justice Committee, the Respondents pointed out the purpose of easing the budgetary and logistics burden placed on the State Attorney's Office, on the soldiers who are called to testify, and on the courts, resulting from the suits filed by persons injured by the state's actions in the Occupied Territories.

149. The document prepared by the Tel Aviv District Attorney's Office and submitted to the Committee by the Ministry of Justice, which provided statistics on the suits that have been filed, indeed ostensibly indicates an increase in the number of claims in 2004 and 2005. However, the primary reason for the increase is the shortened prescription period, from seven years to two years, set forth in Amendment No. 4, which led to the sharp increase in the number of claims in 2004. This amendment compelled all persons who were injured between 1997 and 2003 to file their suits prior to a common deadline, even though the facts had not been thoroughly examined because of the failures and delay of the relevant law enforcement authorities. Another factor is the decision of the Ministry of Defence not to compensate injured persons at all, unless forced to by the court, a decision that compelled the filing of suits also by persons who in the past would have been compensated shortly after sustaining the injury without having to file suit.

A copy of the document submitted by the Ministry of the Justice to the Constitution, Law and Justice Committee is attached hereto as Appendix P/24.

See, also, Appendix P/23, pp. 3-4.

150. It should also be noted that the drastic restrictions placed on potential plaintiffs by Amendment No. 4 were not accompanied by appropriate organizational activity by the state – swift and thorough investigations were not made, even though notices of injury were submitted to the Ministry of Defence within at least two months from the time of the incident, the State Attorney's Office did not increase its work force, and the documentation of military activity was not improved. Rather than invest resources in examining complaints and hearing them in the courts, effort was made to amend the Principal Law and give the state sweeping immunity. The words of President Barak are appropriate in this regard:

> **A society which desires both security and individual liberty must pay the price. The mere lack of investigators cannot justify neglecting to investigate.**

HCJ 3239/02, *Mar'ab v. IDF Commander in the West Bank, Piskei Din* 57 (2) 349, 384.

151. Even if we accept that there is a large number of claims, and that they place a logistical and budgetary burden on the State Attorney's Office and the courts, this fact does not make this purpose proper. The function of the State Attorney's Office is to represent the state in suits that are filed, which includes claims for damages caused by the state, and it is the function of the courts to hear the claims and decide. The

same is true for soldiers called to testify. The common law is that budgetary and logistical problems are not a proper purpose for violating human rights, and the same is true regarding the burden placed on the courts. In *Hof Azza,* the Honorable Court discussed the burden on the court system and held:

> **We are aware that our decision regarding the unconstitutionality of the arrangements in the matter of choice of action and its realization – so long as the law is not changed by the legislator (see paragraph 479 below) – is liable to place a burden on the courts. There are those who argue that this will flood the courts with suits under the general law. This argument has some force. However, it is unclear if this will be the result. In many cases in which the floodgate argument was raised, the flood did not actually occur. In any event, this contention is not decisive. The English House of Lords related to the matter:**
>
> > **[I]t could not be right to allow 'floodgates' arguments of this nature to stand in the way of claims which, as a matter of ordinary legal principle, are well founded (*Malik v Bank of Credit and Commerce International SA (in liquidation*) [1997] 3 All ER 1).**

Hof Azza, Paragraph 194 of the judgment.

See also*:*

HCJ 4541/94, *Miller v. Minister of Defence et al., Piskei Din* 49 (4) 94, 113;

PPA 4463/94, *Golan v. Prisons Service, Piskei Din* 50 (4) 136, 170;

HCJ 6055/95, *Tzemach et al. v. Minister of Defence et al., Piskei Din* 53 (5) 241, 281.

152. Similarly, the Supreme Court of Canada rejected the argument that a hearing before a quasi-judicial tribunal does not have to be held for every person who reaches the shores of Canada and claims to be a refugee, on the grounds that there are thousands of cases a year and doing so would create a financial and logistical burden on the authorities. The court held that considering the burden and cost in holding hearings is not a proper purpose for preventing the right to be heard:

> **I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie [counsel for**

> **the Attorney General of Canada] can constitute a justification for a limitation on the rights set out in the Charter. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s. 1, it seems to me that the basis of the justification for the limitation of rights under s. 7 must be more compelling than any advanced in these appeals.**

Singh v. M.E.L., 1 Can.S.C.R. 177 (1985).

153. Thus, the third sub-purpose is not a proper purpose.

<u>The fourth sub-purpose: the desire to overcome the "mistaken" interpretation of the court in defining the term "wartime action"</u>

154. The Ministry of Justice expressly pointed out in the document submitted to the Constitution, Law and Justice Committee that, "**the court interpreted the article** ["wartime action"] **very narrowly, so that one can say that it has removed all content from it, thus raising the need for the proposed bill**".

See Appendix P/24, p. 2.

155. Apparently, the criticism is directed at the judgment in *Bani 'Uda,* which involved a tort that was committed in the course of the first Intifada. However, this criticism of the court is baseless, in that the judgment was given prior to the enactment of Amendment No. 4, in which the definition of "wartime action" was substantially expanded. Furthermore, since the enactment of Amendment No. 4, to the best of the Petitioners' knowledge, not one judgment was given in the Magistrates Court, the District Court, or the Supreme Court, that interpreted the term "wartime action" as newly defined. Moreover, the bill proposing Amendment No. 5 (the amendment that

is the subject of the petition herein, as it was called at the time) was submitted to the Knesset prior to the enactment of Amendment No. 4, so it was impossible to know how the courts would interpret Amendment No. 4. Thus, the presentation made by representatives of the Ministry of Justice before the Constitution Committee, as if the narrow interpretation given by the courts created a situation calling for drastic legislation, is misleading.

156. Similarly, the state's contention regarding the evidentiary "difficulty" that it faces is especially peculiar. First, the plaintiff, and not the defendant, initially has the burden of proof, so that the difficulty in making the objective proofs falls also and primarily on the shoulders of the plaintiffs. Second, the provisions of Amendment No. 4 give the state many substantial tools to cope with the alleged difficulties, among them the unswitching of the burden of proof (Articles 38-41 of the Torts Ordinance (New Version)), requiring the Palestinian plaintiffs to submit notice of injury within sixty days from the time of the incident, and the shortening of the period of prescription to two years. These special arrangements are precisely intended to prevent a situation in which the state shall claim that it is unable to defend against claims filed years after the wrong was committed.

157. Possibly, the persistence in expanding the application of the Law in a way that enables declaration of extensive areas as zone of conflicts also results from the army's clear policy not to investigate and document its actions in the Occupied Territories, whether or not a conflict exists, and whether or nor there are difficulties in investigating the incident. In circumstances in which nobody investigates and nobody documents the incidents, it is clear that sweeping immunity is the best way to defend against claims. At the present time, investigation of soldiers' acts primarily occurs when claims have been filed or when there is fear that a claim will be filed. The need of the Ministry of Defence to investigate complaints so as to defend against tort claims counters the army's clear policy not to investigate and not to prosecute. The Respondent solved this conflict by granting sweeping immunity from claims – this is the real purpose of the Amending Law.

158. In that the fourth sub-purpose regarding information is mistaken and misleading, it is baseless and cannot serve as a proper purpose.

Conclusion regarding the purpose of the Amending Law

159. The purpose of the Amending Law is not to grant the state immunity for a wartime action, which it already has, but to expand its immunity over that provided in Article 5 of the Principal Law and in the changes made in the framework of Amendment No.

4. Thus, the objective purpose of the Amending Law, as appears from the language of the Law, and its subjective purpose, as described above, are identical – to give the state immunity for damages that do not occur in the framework of a wartime action, and to negate the court's power to determine if a wartime action is involved.

160. From the above, it is clear that the purpose of the Amending Law, in all regards, is improper. It is intended to deny, on ethnic grounds, fundamental rights, to eliminate the court's jurisdiction, to overcome the provisions of international human rights law and of humanitarian law that apply to the Occupied Territories, and to deny fundamental rights for financial reasons and for administrative convenience. Each of these reasons is sufficient to conclude that the purpose of the Amending Law is improper.

Instead of a conclusion: lack of proportionality

161. As described above, the subjective purpose of the Amending Law, as appears from the explanatory notes of the proposed bill and from the Knesset hearings, is identical to the objective purpose, as appears from the language and provisions of the Amending Law. These purposes are wrongful and improper. Furthermore, the Amending Law has no proper purpose, not even at the theoretical-potential level, that can test its conformity to the means chosen. Thus, examination of the constitutionality of the Law according to the test of proportionality is irrelevant to this petition.

162. Furthermore, the rights violated by enactment of the Amending Law, particularly the right to life and bodily integrity, and to the prohibition against discrimination, are among the most fundamental rights. This fact requires that extremely stringent tests be applied in examining whether the purpose of the Amending Law is proper. These tests are of the kind that courts use to check if an administrative decision is discriminatory or violates one of the most important rights, such as the right of expression. Adopting these tests renders superfluous the examination of the proportionality of the Amending Law, in that this test by its nature is not fit for examination of the constitutionality of discriminatory or racist legislation, if only for the reason that the right to the prohibition against discrimination on questionable grounds, for example, is an absolute right, and cannot be proportionate, for there is no "reasonable discrimination." The same is true regarding the right to bodily integrity, from which is derived, *inter alia*, the prohibition on torture of any kind. The supremacy of this right, by its nature, cannot be examined by means of the test of proportionality, for there is no "reasonable torture" or "moderate torture."

On this point, see the article of Prof. Ariel Bendor, "Bi-Genut ha-Yahasiyyut shel Zekhuyyot ha-Yesod [Against the relativity of the Basic Rights]," *Mishpat u-Mimshal* 4 (1998): 343.

163. In *Mizrahi Bank,* Justice (as his title was at the time) Barak described the stringent tests in comparative law that apply in examining the constitutionality of a law that infringes a fundamental right, when its purpose is under discussion. Study of these tests reveals that, in cases such as the one presently before the court, the test of proportionality is inappropriate because of the examination standard that it sets.

CA 6821/93, *United Mizrahi Bank Ltd. v. Midgal Cooperative Village, Piskei Din* 49 (4) 221, 434-435.

See also:

Ido Porat, "The Dual Model of Balancing,"
http://law.mscc.huji.ac.il/law1/newsite/segel/enoch/Iddo%20Porat.pdf

164. In the alternative, and for purposes of caution only, the Petitionersshall claim that the Amending Law does not meet the test of proportionality, and the arguments set forth above constitute an integral part of this argument.

1 September 2005

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