HCJ 8276/05

Adalah Legal Centre for Arab Minority Rights in Israel and others
v.
1. Minister of Defence
2. State of Israel

HCJ 8338/05

Estate of the late Shadan Abed Elkadar Abu Hajla and others
v.
1. Minister of Defence
2. Minister of Justice
3. Attorney-General

HCJ 11426/05

Estate of the late Iman Alhamatz and others
v.
1. Minister of Defence
2. State of Israel

The Supreme Court sitting as the High Court of Justice
[12 December 2006]
Before President Emeritus A. Barak, President D. Beinisch and Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, S. Joubran, E. Hayut, D. Cheshin

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: In 2005, an amendment was made to the law of torts with regard to the liability of the State of Israel arising from the activities of its security forces in the territories of Judaea, Samaria and the Gaza Strip. Section 5C of the Torts (State Liability) Law, 5712-1952, which was introduced by the amendment, increased the scope of the state's exemption from liability, which was previously limited to

combatant activities, to any activity (subject to some exceptions) taking place in a 'conflict zone,' and the Minister of Defence was authorized to determine which areas would constitute 'conflict zones.' He exercised this power on a large-scale basis. The petitioners attacked the constitutionality of this amendment.

Held: Section 5C of the Torts (State Liability) Law, which was introduced by the 2005 amendment, is unconstitutional. It releases the state from liability for tortious acts that are in no way related to 'combatant activities,' no matter how broadly the term is defined. The proper approach is to consider each claim on a case by case basis, in order to determine whether the damage is the result of combatant activities or not.

Petition granted.

Legislation cited:

Basic Law: Human Dignity and Liberty, s. 3.

Torts Ordinance [New Version], ss. 38, 41.

Torts (State Liability) Law, 5712-1952, ss. 1, 2, 5, 5A, 5A(2), 5A(3), 5A(4), 5C(b), 5C(b)(1), 5C(b)(3), 9A.

Torts (State Liability) Law (Amendment no. 4), 5762-2002.

Torts (State Liability) Law (Amendment no. 7), 5765-2005.

Israeli Supreme Court cases cited:

[1] CA 5964/92 *Bani Ouda v. State of Israel* [2002] IsrSC 56(4) 1.

[2] CA 623/83 *Levy v. State of Israel* [1986] IsrSC 40(1) 477.

[3] HCJ 7957/04 *Marabeh v. Prime Minister of Israel* **[2005] (2) IsrLR 106**.

[4] HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [2005] IsrSC 59(2) 481.

[5] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[6] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.

[7] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.

[8] HCJ 1030/99 *Oron v. Knesset Speaker* [2002] IsrSC 56(3) 640.

[9] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (not yet reported).

[10] HCJ 4593/05 *United Mizrahi Bank Ltd v. Prime Minister* (not yet reported).

[11] HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.

[12] HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* **[2005] (2) IsrLR 335**.
[13] HCJ 2334/02 *Stanger v. Knesset Speaker* [2004] IsrSC 58(1) 786.
[14] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* **[2005] (1) IsrLR 340**.
[15] HCJ 450/97 *Tenufa Manpower and Maintenance Services Ltd v. Minister of Labour and Social Affairs* [1998] IsrSC 52(2) 433.
[16] HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [2004] IsrSC 58(1) 529.
[17] HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [2003] IsrSC 57(3) 31.
[18] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[19] CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [2005] IsrSC 59(1) 345.
[20] CA 6521/98 *Bawatna v. State of Israel* (unreported).
[21] CA 6790/99 *Abu Samra v. State of Israel* [2002] IsrSC 56(6) 185.
[22] CA 1354/97 *Akasha v. State of Israel* [2005] IsrSC 59(3) 193.
[23] CFH 1332/02 *Raanana Local Planning and Building Committee v. Horowitz* (not yet reported).
[24] HCJ 2390/96 *Karasik v. State of Israel* [2001] IsrSC 55(2) 625.
[25] CA 2781/93 *Daaka v. Carmel Hospital* [1999] IsrSC 53(4) 526; **[1998-9] IsrLR 409**.
[26] HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* **[2006] (1) IsrLR 443**.
[27] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[28] HCJ 5016/96 *Horev v. Minister of Transport* [1997] IsrSC 51(4) 1; **[1997] IsrLR 149**.
[29] LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [2003] IsrSC 57(5) 385.
[30] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[31] AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [2004] IsrSC 58(3) 782.
[32] HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [2002] IsrSC 56(6) 352; **[2002-3] IsrLR 83**.
[33] CFH 9524/04 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* (unreported).
[34] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.

American cases cited:

[35] *Koohi v. United States*, 976 F. 2d 1328 (1992).
[36] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

English cases cited:
[37] *Mulcahy v. Ministry of Defence* [1996] 2 All ER 758.
[38] *Bici v. Ministry of Defence* [2004] EWHC 786.

For the petitioners in HCJ 8276/05 — H. Jabareen, O. Kohn, D. Yakir, Y. Wolfson.
For the petitioners in HCJ 8338/05 — H. Abuhussein, R. Masarwa.
For the petitioners in HCJ 11426/05 — O. Saadi, A. Yassin, L. Tsemel, G. Hliehel.
For the respondents — A. Licht, S. Nitzan.

JUDGMENT

President Emeritus A. Barak

The Torts (State Liability) Law (Amendment no. 7), 5765-2005, provides that the state shall not be liable in torts for damage that occurred in a conflict zone as a result of an act carried out by the security forces. There are several provisos to this rule. Is the law constitutional? This is the question that needs to be decided in the petitions before us.

A. Factual and normative background

1. The first Intifadeh began at the end of 1987. It was characterized by demonstrations, tyre-burning, the throwing of stones and Molotov cocktails at the security forces and Israeli citizens in Judaea, Samaria and the Gaza Strip, stabbings and the use of firearms and other weapons (see CA 5964/92 *Bani Ouda v. State of Israel* [1], at p. 4). The security forces operated in the territories in order to maintain order and security there. In the course of these operations, they used weapons and ammunition. This resulted on more than one occasion in injuries to persons and damage to property that was suffered by inhabitants of the territories, whether they were involved in the disturbances and hostile acts or not. In consequence, actions for damages were filed in the courts in Israel against the state by inhabitants of the territories who claimed that the state was liable under the law of torts for damage that they suffered as a result of what they alleged were negligent or

deliberate actions of the security forces. From figures submitted by the respondents it can be seen that thousands of claims of this kind were filed in the various courts in Israel.

2. These actions were tried in the courts in Israel in accordance with the Israeli law of torts. Under Israeli law, the state's liability in torts is governed by the Torts (State Liability) Law, 5712-1952 (hereafter — the Torts Law). The fundamental principle enshrined in s. 2 of the law is that 'For the purpose of liability in torts, the state is like any incorporated body.' There are several provisos to this principle. The relevant proviso for our purposes concerns 'combatant activity,' which states (in s. 5):

> 'The state is not liable in torts for an act that was caused as a result of combatant activity of the Israel Defence Forces.'

The Intifadeh claims gave rise to the question of how the term 'combatant activity' should be interpreted. Judgements that were given in these claims by the District Courts varied, on this question, between a 'broad outlook' and a 'narrow outlook' (see A. Yaakov, 'Immunity under Fire: State Immunity for Damage caused as a result of "Combatant Activity",' 33(1) *Hebrew Univ. L. Rev. (Mishpatim)* 107 (2003), at pp. 158-172). The two approaches held that the activity of the security forces to maintain order and security in the territories during the First Intifadeh might be protected by this immunity. The broad approach tended to regard most of the operational activity of the security forces, which was intended to maintain order and security, as combatant activity. The narrow approach distinguished policing activities from combatant activities and sought to examine the circumstances of each activity in order to determine whether it was a combatant activity or not.

3. This question of interpretation came before the Supreme Court at the beginning of the 1990s in *Bani Ouda v. State of Israel* [1]. During the hearing in that appeal, the respondents said that they intended to regulate the question of the state's liability for damage caused in the Intifadeh by means of Knesset legislation. This led to the publication of the government-sponsored draft Treatment of Defence Forces Claims in Judaea, Samaria and Gaza Strip Law, 5757-1997 (*Draft Laws* 2645, at p. 497). The draft law sought to give the term 'combatant activity' a broad interpretation. It was proposed that 'any operational activity of the Israel Defence Forces whose purpose was to combat or prevent terrorism, and any other action of protecting security and preventing a hostile act or an uprising that was carried out in circumstances of risk to life or body…' should be regarded as combatant activity. But the legislative process was unsuccessful, and the draft law did not become

statute. In these circumstances, the Supreme Court was required to make a decision in *Bani Ouda v. State of Israel* [1].

4. The question that arose in *Bani Ouda v. State of Israel* [1] was whether shooting by the IDF in the direction of wanted persons who were in flight, without there being any danger to the lives of the soldiers, fell within the scope of combatant activity. For the purpose of the definition of combatant activity, it was held that:

> 'The activity is a combatant one if it is an act of combat or a military-operational act of the army. The act does not need to be carried out against the army of a state. Acts against terrorist organizations may also be combatant activities' (*ibid*. [1], at p. 7).

Notwithstanding, it was held that not all activity of the security forces should be considered combatant activity:

> '"Only genuine combatant activities within the narrow and simple meaning of this term… in which the special character of combat with its risks, and especially its ramifications and consequences, finds expression, are those that are intended by the wording of s. 5" (*per* Justice Shamgar in CA 623/83 *Levy v. State of Israel* [2], at p. 479)… The army carries out various "activities" in the territories of Judaea, Samaria and the Gaza Strip, which create risks of various kinds. Not all of its activities are "combatant" ones. Thus, for example, if the injured party is harmed by an assault of a soldier because of his refusal to comply with an order to erase slogans that are written on a wall, the act of assault should not be regarded as a "combatant activity," since the risk that this act created is an ordinary risk of an act of law enforcement. This is not the case if an army patrol in a village or town finds itself in a situation of danger to life or serious physical risk because of shooting or the throwing of stones or Molotov cocktails, and in order to extricate itself it fires and injures someone. The act of shooting is a "combatant activity," since the risk in this activity is a special risk. Between these two extreme cases there may be intermediate positions' (*ibid.* [1], at p. 8).
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> It was therefore held that:
>
> 'When answering the question whether an activity is a "combatant" one, all the circumstances of the incident should be

> examined. The following should be considered: the purpose of the act, the place where it occurred, the duration of the activity, the identity of the military force that is operating, the threat that preceded it and is anticipated from it, the strength of the military force that is operating and the duration of the incident' (*ibid*. [1], at p. 9).

5. Meanwhile the second Intifadeh broke out in September 2000. A fierce barrage of terrorism befell Israel and the Israelis in the territories. Thousands of terror attacks, which were mainly directed at civilians, were committed inside Israel and in the territories. More than a thousand Israelis lost their lives in the years 2000-2005. Approximately two hundred of these were in Judaea and Samaria. More than seven thousand Israeli citizens were injured. Approximately eight hundred of these were in Judaea and Samaria. Many of the injured became seriously disabled (see HCJ 7957/04 *Marabeh v. Prime Minister of Israel* [3], at para. 1 of my opinion). The terrorist organizations and terror operatives employed many different methods in their war against Israel. Frequently they operated from among the civilian population inside the territories. The security forces required special deployments and special operations in order to contend with the terrorism and its perpetrators. Sometimes they were compelled to fight in densely populated areas. Between 2000 and 2005 thousands of Palestinians living in the territories were injured as a result of the activity of the security forces. Some of these took part in the hostilities; others did not. As a result of these injuries, once again many claims were filed against the state for damage that was sustained, according to the plaintiffs, as a result of negligent or deliberate activity of the security forces.

6. Against the background of these events, and in view of the interpretation given to the expression 'combatant activity' by the Supreme Court in *Bani Ouda v. State of Israel* [1], which in the opinion of the Knesset was too narrow, there was a further attempt to regulate in statute the question of the state's liability for damage caused during the Intifadeh. The government-sponsored draft law that was formulated in 1997 was once again tabled in the Knesset. This time the legislative attempt was successful, and the Knesset adopted (on 24 July 2002) the Torts (State Liability) Law (Amendment no. 4), 5762-2002 (hereafter — 'amendment 4'). This amendment added to s. 1 of the Torts Law a definition of the expression 'combatant activity,' which said the following:

> '"Combatant activity" — including any act of combating terror, hostilities or an uprising, as well as an act for the prevention of terrorism, hostilities or an uprising that was carried out in circumstances of risk to life or body.'

In addition, amendment 4 added s. 5A to the Torts Law, which provides special arrangements for claims that would be filed after its enactment for damage that was caused as a result of the activity of the security forces in the territories. *Inter alia*, s. 5A provides that notice should be given of damage within 60 days as a condition for filing a claim (s. 5A(2)); the limitations period for these claims is reduced to two years instead of seven (s. 5A(3)); and the rule concerning the transfer of the burden of proof in negligence with regard to dangerous items that is provided in s. 38 of the Torts Ordinance [New Version] and the rule of *res ipsa loquitur* provided in s. 41 of the Ordinance shall not apply (s. 5A(4)). The law allows the court to depart from these rules for special reasons that should be recorded. Obviously these restrictions apply in cases of claimants who have shown that their damage does *not* derive from 'combatant activity,' according to the new definition in the law, since otherwise the state would have immunity under s. 5 of the law.

B. Amendment no. 7

7. The legislature was not satisfied with this. On 27 July 2005, the Knesset amended the Torts Law once again in a manner that restricted even further the state's liability for tortious acts that occurred in the territories. It passed the Torts (State Liability) Law (Amendment no. 7), 5765-2005 (hereafter — 'amendment 7'). This amendment is the focus of the petitions before us. The essence of the amendment was the addition of ss. 5B and 5C of the Torts Law, which state:

'Claims of an enemy or an operative or member of a terrorist organization

> 5B. (a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused to anyone stipulated in paragraphs (1), (2) or (3), except for damage that is caused in the types of claims or to the types of claimants as stated in the first schedule —
>
> (1) A national of an enemy state, unless he is lawfully present in Israel;
>
> (2) An operative or a member of a terrorist organization;

(3) Anyone who is injured when he is acting on behalf of or for a national of an enemy state or a member or an operative of a terrorist organization.

(b) In this section —

'enemy' and 'terrorist organization' — as defined in section 91 of the Penal Law, 5737-1977;

'the state' — including an authority, body or person acting on its behalf.

Claims in a conflict zone

5C. (a) Notwithstanding what is stated in any law, the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces, except for damage that is caused in the types of claims or to the types of claimants as stated in the second schedule —

(b) (1) The Minister of Defence shall appoint a committee that shall be competent to approve, beyond the letter of the law, in special circumstances, a payment to an applicant to whom subsection (a) applies and to determine the amount thereof…

…

(c) The Minister of Defence may declare an area to be a conflict zone; if the minister makes such a declaration, he shall determine in the declaration the borders of the conflict zone and the period for which the declaration shall apply; notice of the declaration shall be published in *Reshumot*.'

The first schedule provides that state immunity under s. 5B shall not apply to damage that is suffered by someone who is held in custody by the State of Israel. The second schedule provides that state immunity under s. 5C shall not apply to damage that is caused by a criminal offence, damage that is

suffered by someone who is held in custody by the State of Israel, damage that is suffered as a result of an act of the civil administration that was done without reference to the conflict and damage that is suffered as a result of a road accident in which a vehicle of the security forces is involved when it is not being used for security operations.

8. Section 3(b) of amendment 7 authorizes the Minister of Defence to declare areas conflict zones retroactively for the period from the beginning of the conflict (29 September 2000) until six months from the date of publication of amendment 7. The significance of this declaration is that tortious claims that were filed in the years 2000-2005 cannot be tried if the Minister of Defence has declared that they concern events that occurred in a conflict zone. The Minister of Defence made use of his power under this section and on 9 February 2006 and 12 February 2006 he declared (in *Yalkut Pirsumim* 5942 and 5943 respectively) various areas to be conflict zones for periods that preceded the enactment of the amendment. The territory of Judaea and Samaria was divided into 88 districts and an additional 22 crossing points. Some of these districts were declared conflict zones during a part of the period under discussion. Thus, for example, the Hebron district was declared a conflict zone during 100% of the period from September 2000 until the end of that year; during approximately 90% of the years 2002 and 2003, and during approximately 80% of the time in the years 2001, 2004 and 2005. The Greater Tulkarm district was declared a conflict zone during approximately 88% of the time in the years 2002 and 2003, and during approximately 82% of the time in 2004. The Greater Ramallah district was declared a conflict area during approximately 75% of the time in the years 2001-2003. District 64, which includes villages to the north of Jerusalem, was declared a conflict area during approximately half of the time since the Second Intifadeh broke out until the date of publishing the declaration. The territory of the Gaza Strip was divided into four districts and seven crossing-points. The southern district of the Gaza Strip was declared a conflict zone throughout the period. The central district of the Gaza Strip was declared a conflict zone during approximately 86% of the time. The northern district of the Gaza Strip was declared a conflict zone during approximately 95% of the time. Since 12 September 2005, when the IDF forces withdrew from the Gaza Strip, the whole of the Gaza Strip has been declared a conflict zone.

9. The Minister of Defence exercised his power under s. 5C(b)(3) of the Torts Law and on 13 June 2006 enacted regulations that govern the activity of the committee for paying compensation beyond the letter of the law, which was established under s. 5C(b) of the law. In the regulations, it was held that

the committee is competent to make payments to family members of anyone who was killed in a conflict zone, and to anyone who was seriously injured, on the conditions prescribed in the regulations. *Inter alia*, the committee should consider the seriousness of the injury and its circumstances, the family status of the injured person and to what extent making the payment will contribute towards the rehabilitation of the injured person. The committee is also authorized to make payments, for personal injury and property damage that are not insignificant, to anyone who is injured as a result of a criminal act, even if no one has been convicted of that act.

C. The contentions of the parties

10. The petitioners in HCJ 8276/05 are human rights organizations. The petitioners in HCJ 8338/05 are the estate and surviving relatives of the late Shadan Abed Elkadar Abu Hajla. According to them, on 11 October 2002 in the evening the deceased was sitting with her husband and their son on the balcony of their house at Rafidia in Shechem. Two IDF jeeps stopped on the road that passes by the house. Several shots were fired from the vehicle in the direction of the windows of the house. As a result of the shooting, the deceased was killed instantly and her husband and son were wounded. In December 2004, the Chief Military Advocate gave instructions to begin an army investigation to establish the circumstances of the deceased's death. Before the investigation was completed, the petitioners filed a claim in torts against the state in the Nazareth Magistrates Court. After the enactment of amendment 7, and before the claim was tried, the state filed an application to dismiss the claim *in limine*. In its application the state said that the Minister of Defence had declared the Shechem district a conflict zone during the whole period from June 2002 until the end of March 2003. For this reason the court was requested to dismiss the claim *in limine*. In HCJ 11426/05 the petitioners include two separate groups. Each group filed a claim in torts against the state with regard to deaths or serious injuries that were caused, according to them, as a result of negligent and even deliberate activity of the security forces in the territories. All of the events took place between 2001 and 2004. After the enactment of amendment 7, these claims cannot be heard, if the districts in which the events took place are declared conflict zones.

11. The petitioners' position is that amendment 7, and especially ss. 5B and 5C, are unconstitutional and therefore should be set aside. According to them, the Basic Laws apply to the violations of rights that arise from amendment 7, for four reasons. *First*, the Basic Laws apply to the violations of rights that arise from the amendment, because the amendment denies

rights in Israel itself and in its courts; *second*, because the amendment applies, according to its wording, both to Israelis and to Palestinians; *third*, the Basic Laws apply in the territories because these laws apply to all the organs of government, and therefore every soldier carries in his knapsack not only the principles of administrative law but also the Basic Laws; *fourth*, because the Basic Laws give rights to Palestinians who are inhabitants of the territories, by virtue of their being protected persons who are present in an area that is subject to Israel's belligerent occupation.

12. The petitioners argue that several constitutional rights have been violated. *First*, amendment 7 violates the constitutional right to life and physical integrity, in that it denies someone who has lost his life or suffered personal injury as a result of a deliberate or negligent act any relief for this injury. *Second*, the amendment violates property rights, in that it denies someone whose property has been damaged as a result of a deliberate or negligent act any relief. *Third*, the amendment violates the constitutional right to apply to the courts. *Fourth*, the amendment violates the constitutional right to equality, since it is intended to apply mainly to claims of Palestinians. Especially serious, according to the petitioners, is the fact that all of these violations include a retroactive violation of the rights of those persons who were harmed by negligent acts of the security forces and who filed a claim in the years preceding the enactment of the amendment. According to them, the violations are particularly grave when we consider the application of the law *de facto*. In this regard, the petitioners say that the Minister of Defence has declared extensive areas of the West Bank and the Gaza Strip conflict zones for long periods of time. Thereby he has denied the right of many persons to obtain relief for their damage. The petitioners discuss how Israel holds the territories under belligerent occupation. It maintains strict urban control in most of the towns and villages of the West Bank. This control of the towns and villages, streets and crossings, involves close daily contact between soldiers and civilians. This contact is really a form of police work. Notwithstanding, it sometimes involves harm to civilians, whether negligent or deliberate. The result of amendment 7 is that the law exempts the security forces from liability for all the consequences of their acts in the territories that have been declared conflict zones. It justifies, *inter alia*, shooting injuries and physical injuries in the course of regular checks at roadblocks, property damage in the course of searches, and looting in the course of patrols and arrests. In all of these cases, the injured parties cannot obtain any relief. This results in contempt for the lives of the Palestinians who live in the territories, and contempt for their rights to physical integrity and their property rights.

13. The petitioners' position is that the violations of the constitutional rights do not satisfy the conditions of the limitations clause. *First*, legislation that violates rights retroactively cannot be said to satisfy the condition that the violation should be made in 'statute.' *Second*, amendment 7 was not intended for a proper purpose, nor does it befit the values of the State of Israel. The purpose of the legislation is to prevent Palestinians who live in the territories from applying to the courts in Israel. This is a purpose that is improper. It undermines the status of the judiciary. It also violates the rule of law. Another purpose underlying the law is to exempt the state from the financial cost involved in paying compensation. Considerations of economic cost and administrative efficiency do not constitute a proper purpose for a violation of human rights. An additional purpose that underlies the law is to provide a solution to the special difficulties of evidence that confront the state when it seeks to defend itself against tort claims that are related to combat incidents. The petitioners' position is that the state has not made clear what is special about these difficulties, especially in view of the fact that the burden of proof in claims of this kind rests in any case with the plaintiffs, and therefore the objective difficulties of proof fall mainly on the shoulders of the plaintiffs. *Third*, even if we say that the purpose is a proper one, the measures adopted in amendment 7 are disproportionate. The state and its agents have already been granted immunity from claims concerning damage that is caused during combatant activity under the provisions of s. 5 of the Torts Law. The definition of 'combatant activity' was even expanded in amendment 4. That amendment also introduced additional substantial and procedural advantages for the state in tort claims. All of these are sufficient in order to achieve the proper purpose, which is to protect the state from tort claims that arise from combatant activity.

14. The petitioners further argue that amendment 7 also violates the rules of humanitarian law that apply in territories that are under belligerent occupation, as well as the provisions of international human rights law. The petitioners say that Israel's control of the territories is a belligerent occupation. The military commander is responsible not only for security interests but also for the safety, security and rights of the protected inhabitants in the territories. *Inter alia*, the military commander has the duty to compensate protected inhabitants who are harmed as a result of the negligent actions of the security forces. The amendment denies this obligation of the military commander and therefore it is contrary to the provisions of humanitarian law and the provisions of international human rights law.

D. The respondents' arguments

15. The respondents discuss at length the security background to the enactment of amendment 7. Their position is that the second Intifadeh is a 'war in the common meaning of the word' (para. 1 of the respondents' reply of 6 July 2006) that is being waged in the streets of Israel as well as in the territories of Judaea, Samaria and the Gaza Strip. The scope of the security activity whose purpose is to contend with the threats of terrorism in the second Intifadeh is very great. The conflict has a special character, because the terrorist organizations operate frequently from within residential areas. This requires activity of the security forces inside those residential areas. This activity is intended to target terrorists, but unfortunately inhabitants who are not involved in terrorist activity are also sometimes harmed. These inhabitants file thousands of tort claims against the state for personal injury and damage to property that they allegedly suffer as a result of the activity of the security forces. But the law of torts was not designed to deal with a situation of this kind. *Inter alia*, this is because the risks in times of war are greater in scope and of more diverse kinds than in times of peace and because of the difficulties of obtaining evidence in cases concerning war damage. Moreover, it is intolerable that the State of Israel should be liable to compensate not only its citizens who are injured by the armed conflict, but also the inhabitants of the Palestinian Authority. The principle that should be followed is that each party to the armed conflict should be liable for its own damage. The Palestinian Authority has mechanisms that are designed to compensate persons who are injured by the armed conflict for their damage. In addition, the Palestinians receive aid from international organizations. For these reasons, there is no basis for applying the law of torts to damage resulting from the armed conflict between the State of Israel and the Palestinians who inhabit the territories. The law of torts should be adapted to the new reality that has been created. Amendment 7 was intended to achieve this goal. The provisions of s. 5B enshrine in the law the principle that is accepted in international law, in English common law and also in Israeli common law, according to which a state is not liable for damage sustained by an enemy alien.

16. The respondents' position is that it is doubtful whether amendment 7 violates constitutional rights, since it is doubtful whether the Basic Laws give constitutional rights to inhabitants of the territories. Notwithstanding, in view of their position that, even if there is a violation of constitutional rights, it satisfies the conditions of the limitations clause, the respondents focused their arguments on the conditions of the limitations clause. The respondents'

position is that the purposes underlying the amendment are proper ones. The main purpose of the amendment is, as aforesaid, to adapt the law of torts to the special characteristics of the armed conflict with the Palestinians. The amendment was not intended to undermine the status of the judiciary, but to limit the scope of the state's liability in torts. Therefore the amendment does not conflict with the principle of the separation of powers. The law also does not contain any approval for or consent to negligent or unlawful activity of the security forces. The absence of any liability in torts does not prevent scrutiny of the conduct of the security forces within the context of the criminal law and disciplinary proceedings. It cannot therefore be said that the amendment undermines the rule of law. In addition, the amendment seeks to avoid an undesirable and unjust result, whereby Israel is responsible both for damage to Palestinian inhabitants and for the burden of the considerable damage suffered by Israel and Israelis. The respondents discuss how this purpose, which does indeed involve an economic element, reflects a proper ethical purpose. Finally, in so far as enemy aliens and members of terrorist organizations are concerned, amendment 7 seeks to restrict their claims in order not to aid the enemy in its war against Israel.

17. The respondents' position is that the violations of rights in amendment 7 satisfy the requirements of proportionality. *First*, the arrangements in the amendment make it possible to overcome the ethical and practical difficulties of implementing the law of torts in the course of an armed conflict. The amendment also realizes the principle that each party in a war is liable for its damage. This satisfies the rational connection test between the purpose of the amendment and the arrangements provided in it. *Second*, the arrangements in the amendment satisfy the *second* test of proportionality (the least harmful measure test). The amendment does not provide an arrangement that amounts to a sweeping denial of the right to compensation. The application of the amendment is conditional upon a declaration that a certain district is a conflict zone. These declarations are limited in time and place and they are made only after a careful examination of the conditions in the area. Admittedly, because of the large scale of the war, large parts of the territories of Judaea, Samaria and the Gaza Strip have been declared conflict zones for lengthy periods. But this is not a sweeping and general declaration, merely a declaration that is based on a careful and precise analysis. Moreover, the broad principle ruling out liability in torts is accompanied in the second schedule by exceptions to the rule. These exceptions reduce the intensity of the violation. Furthermore, the Minister of Defence may add to the list of exceptions. Finally, the law provides a further 'exceptions mechanism' that

allows compensation to be paid beyond the letter of the law. On the basis of all of these, the respondents' position is that amendment 7 reflects an arrangement that satisfies the requirements of proportionality. The respondents' position is that amendment 4 cannot be regarded as an arrangement that violates rights to a lesser degree. There are several reasons for this. According to them, amendment 4 was prepared after the first Intifadeh, and it does not provide a solution to the unique nature of the current armed conflict. Moreover, amendment 4 does not reflect the ethical purpose that each party in an armed conflict should be liable for its losses. Finally, amendment 4 does not address the claims of enemy aliens and members of terrorist organizations. Therefore for this reason also it is insufficient. *Third*, the respondents' position is that amendment 7 satisfies the *third* condition of proportionality (the test of proportionality in the narrow sense). The benefit of the amendment is very great. It adapts the law of torts to the unique circumstances of the armed conflict. It enshrines ethical standards and solves practical problems in implementing the existing law. The amendment also prevents an abuse of Israeli law for the purpose of obtaining money that may be used to wage war against Israel. On the other hand, the harm caused by the amendment is not as serious as the petitioners claim. The respondents discuss how even according to the law that prevailed before the amendment was enacted, the state had immunity against a claim for combatant activity. Many claims arising from events that occurred in the territories since September 2000 may be dismissed on this ground alone. Moreover, some of the claims can be addressed within the framework of the exceptions to the rule or by the committee that is authorized to pay compensation beyond the letter of the law. Finally, it should be remembered that the plaintiffs have an alternative relief of receiving compensation from the Palestinian Authority. In view of all this, the respondents' position is that the amendment to the Torts Law satisfies the *third* requirement of proportionality.

18. The respondents' position is that the amendment does not violate the provisions of international humanitarian law or international human rights law, since both of these sets of laws restrict the right of claim of enemy aliens and recognize the immunity of the state against claims arising from combatant activities during an armed conflict. The respondents point out that exceptions to the state's liability for claims in torts that derive from combatant activities are recognized in the law of many countries such as the United States, England, Canada, Italy, Japan and Germany.

E. The proceeding

19. The petitions in HCJ 8276/05 and HCJ 8338/05 were filed at the beginning of September 2005. The petition in HCJ 11426/05 was filed in December 2005. The hearing of the petitions was deferred twice (in March 2006 and April 2006), with the consent of the parties, until regulations were enacted with regard to the committee for paying compensation beyond the letter of the law. The first hearing of the petitions took place on 13 July 2006 before a panel of three justices. At the end of this, an order *nisi* was made. On 17 July 2006 it was decided that the petitions would be heard before an expanded panel of nine justices. According to an agreed statement filed by the parties, an interim order was made on 30 July 2006, according to which the hearing of pending claims that the state contended were subject to amendment 7 was suspended. The hearing of the petitions on their merits took place before the expanded panel on 30 August 2006.

F. The questions that arise

20. The petitions challenge the constitutionality of amendment 7. A claim of this kind should focus on one of the Basic Laws. In our case, this is the Basic Law: Human Dignity and Liberty. Claims that amendment 7 violates human rights that are recognized in Israel under Israeli common law, international human rights law or international humanitarian law cannot — according to the constitutional structure of the State of Israel — lead to the unconstitutionality of a statute. The Supreme Court discussed this in HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [4], where it held:

> 'It is not sufficient to find that the Israeli settlers in the area being vacated enjoy human rights that are enshrined in Israeli common law. It is not sufficient to find that they enjoy human rights that are recognized by public international law. Such recognition — and on this we are adopting no position — while important, cannot give rise to a constitutional problem in Israel. The reason for this is that when the violation of a right that arises in common law or public international law conflicts with an express provision of a statute of the Knesset, the statute of the Knesset prevails, and no constitutional problem arises. Indeed, a constitutional problem arises in Israel only if the right of the Israeli settlers is enshrined in a constitutional super-legislative normative provision, i.e., in a Basic Law. Moreover, it is insufficient that the Disengagement Implementation Law violates a right enshrined in a Basic Law. A constitutional

> problem arises only if the Disengagement Implementation Law violates the right unlawfully. When these conditions are satisfied, we say that the law is unconstitutional and we consider the question of the relief for the violation of the Basic Law' (*Gaza Coast Local Council v. Knesset* [4], at p. 544).

This is the position in our case. We should examine whether amendment 7 unlawfully violates the Basic Law: Human Dignity and Liberty. This examination, according to our accepted practice, is done in three stages (see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5]; HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [6]; HCJ 6055/95 *Tzemah v. Minister of Defence* [7]; HCJ 1030/99 *Oron v. Knesset Speaker* [8]; *Gaza Coast Local Council v. Knesset* [4], at p. 544; HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [9]; HCJ 4593/05 *United Mizrahi Bank Ltd v. Prime Minister* [10]). The *first* stage examines whether the law — in our case, amendment 7 — violates a human right that is enshrined and protected in a Basic Law. If the answer is no, the constitutional scrutiny ends (see HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [11]; HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [12]). If the answer is yes, the constitutional scrutiny passes to the *second* stage. In this stage, we consider the question whether the law containing the violation, in whole or in part, satisfies the requirements of the limitations clause. Indeed, our basic constitutional outlook is that not every violation of a constitutional human right is an unlawful violation. We recognize lawful violations of constitutional human rights. These are those violations that satisfy the conditions of the limitations clause (see HCJ 2334/02 *Stanger v. Knesset Speaker* [13]; HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14]). If the violation of the constitutional human right is lawful, the constitutional scrutiny ends. If the violation does not satisfy one of the conditions of the limitations clause, the violations is unlawful. In such a case, we pass on to the *third* stage of the scrutiny, which concerns the consequences of the unconstitutionality. This is the relief stage. I discussed the importance of this division of the constitutional scrutiny into three stages in *Movement for Quality Government in Israel v. Knesset* [9], where I said:

> 'This division into three stages is important. It is of assistance in the legal analysis. It is intended "to clarify the analysis and focus the thinking" (HCJ 450/97 *Tenufa Manpower and Maintenance*

> *Services Ltd v. Minister of Labour and Social Affairs* [15], at p. 440; …). It clarifies the basic distinction, which runs like a golden thread through human rights law, between the scope of the right and the degree of protection afforded to it and its *de facto* realization (see A. Barak, *A Judge in a Democracy* (2004), at p. 135; …). It serves as a basis for the distinction between the horizontal balance (in the first stage) and the vertical balance (in the second stage), between human rights *inter se* and between human rights and social values and interests (see HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [16], at p. 537); it is of assistance in outlining the distinction between the role of the court in the interpretation of the rights in the Basic Law (in the first stage) and its role in the constitutional scrutiny of the violation of these rights in legislation (in the second stage). It is of assistance in examining arrangements in the law, such as affirmative action, while examining the question whether this falls within the scope of the right to equality (the first stage), or whether is constitutes a violation of equality that satisfies the requirements of the limitations clause (the second stage) (see HCJ 10026/01 *Adalah Legal Centre for Arab Minority Rights in Israel v. Prime Minister* [17], at p. 40; …). It clarifies disagreements on the question of the burden of proof' (*Movement for Quality Government in Israel v. Knesset* [9], at para. 21 of my opinion).

Let us now turn to the required constitutional scrutiny.

G. First stage: the violation of the constitutional right

(1) Presentation of the problem

21. The *first* stage of the constitutional scrutiny examines whether the statute of the Knesset — in our case, amendment 7 — violates a human right that is protected in the Basic Law: Human Dignity and Liberty. This stage is comprised in our case of two separate questions. The *first* of these is whether the Basic Law: Human Dignity and Liberty applies in the petitioners' case, since the damage was caused to them outside Israel. This is a question that arises specifically with regard to amendment 7. If the answer to this question is yes, then the *second* question arises. This question arises in all the cases where a constitutional contention is raised. The question is whether a human right that is enshrined in a Basic Law has indeed been violated. As we have seen, it is insufficient that a law violates a human right. The constitutional

question arises only if the human right is enshrined in a Basic Law. For our purposes, this is the Basic Law: Human Dignity and Liberty. It is also customary to consider at this stage whether the violation is not merely a trivial one (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at p. 431; HCJ 3434/96 *Hoffnung v. Knesset Speaker* [18], at p. 57). Let us turn to the first of these two questions.

(2) The first question: does the Basic Law apply?

22. In general, Israeli legislation has territorial application. When a law is intended to apply to persons or acts outside Israel, this needs to be stated in statute (expressly or by implication). Indeed, there is a presumption that the laws of Israel apply to legal relationships in Israel, and they are not intended to regulate legal relationships outside Israel. This is the case with criminal legislation in Israel; it is also the case with legislation in other spheres. This presumption is rebuttable (see A. Barak, *Legal Interpretation: Statutory Interpretation* (vol. 2, 1993), at p. 578). This rule also applies to Israeli legislation in the territories. Judaea, Samaria and the Gaza Strip are not a part of the State of Israel; no declaration has been made that they are subject to the 'law and jurisdiction and administration of the state.' There is a presumption that Israeli legislation applies in Israel and not in the territories, unless it is stated in legislation (expressly or by implication) that it applies in the territories (*ibid*., at p. 579). A similar rule applies also to the Basic Laws. There is therefore a presumption that the various Basic Laws apply to acts done in Israel. As we have seen, this presumption may be rebutted (either expressly or by implication). Can it be said that this presumption is rebutted when the Basic Law concerns human rights? Should the need to enforce human rights against the state not lead to a conclusion that the Israeli organs of government are obliged 'to uphold the rights under this Basic Law' everywhere? Should it not be said that any Israel official carries in his knapsack the Basic Law: Human Dignity and Liberty? Should it not be said that wherever the official goes, the Basic Law goes with him? Should it not be said that this approach is particularly appropriate when the act of the official is done in a place that is subject to Israel's belligerent occupation (see A. Barak, *Legal Interpretation: Constitutional Interpretation* (vol. 3, 1994), at p. 460)? These questions are good ones. We considered some of them in *Gaza Coast Local Council v. Knesset* [4] (at p. 560). We held in that case that the Basic Laws concerning human rights 'give rights to every Israeli settler in the area being vacated. This application is personal. It derives from the fact that the State of Israel controls the area being vacated' (*ibid*. [4]). We left unanswered the question whether the Basic Laws concerning human rights

also give rights to persons in the territories who are not Israelis. Should we not say that with regard to 'protected inhabitants' international human rights law replaces Israeli internal law in this regard? There is no simple answer to these questions. Indeed, in its reply the State does not devote much attention to this question, since in its opinion amendment 7, even if it violates rights that are enshrined in the Basic Law: Human Dignity and Liberty, does so lawfully. It is also our opinion that there is no reason to consider the question of the territorial application of the Basic Law: Human Dignity and Liberty, since the rights that amendment 7 violates are rights in Israel, not rights outside Israel.

Let me explain.

23. Section 5B of amendment 7 applies, according to its wording, to tortious acts done in Israel. The question of the application of the Basic Law therefore does not arise at all in this context. By contrast, s. 5C of amendment 7 provides that 'the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces.' A 'conflict zone' is outside Israel. Does the question of the application of the Basic Law: Human Dignity and Liberty outside Israel arise with regard to this provision? My answer is no. The rights of the residents of the territories which are violated by amendment 7 are rights that are given to them in Israel. They are their rights under Israeli private international law, according to which, when the appropriate circumstances occur, it is possible to sue in Israel, under the Israeli law of torts, even for a tort that was committed outside Israel. Indeed, since the Six Day War, and especially since the first Intifadeh, the courts in Israel have heard claims in torts filed by Palestinian inhabitants of the territories who were injured in the territories by Israeli tortfeasors in general (see, for example, CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]), and by the activities of the security forces in the territories in particular (see, for example, *Bani Ouda v. State of Israel* [1]; CA 6521/98 *Bawatna v. State of Israel* [20]; CA 6790/99 *Abu Samra v. State of Israel* [21]; CA 1354/97 *Akasha v. State of Israel* [22]). This situation is consistent with the principles of the conflict of laws in torts that prevail in our legal system (for an extensive survey, see *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]). Even the state made no claims against this application of the Israel law of torts. During the oral pleadings in the petitions before us, we asked the state's representatives whether they had any contention under Israeli private international law with regard to the application of Israeli tort law to the Intifadeh claims. The reply of the state's representatives was no. It follows that amendment 7 violates the rights given

in Israel to inhabitants of the territories who are harmed by tortious acts of the security forces in the territories. This was the position before amendment 7. This position was changed by s. 5C of amendment 7. The rights in Israel under the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel. The denial of these rights is subject in principle to the Basic Law: Human Dignity and Liberty. This application is not extra-territorial. It is territorial. Of course, this still leaves us with the second question of whether amendment 7 violates one of the rights prescribed in the Basic Law: Human Dignity and Liberty. Let us now turn to consider this question.

(3) The second question: has a right enshrined in the Basic Law: Human Dignity and Liberty been violated?

24. Amendment 7 provides that the state is not liable in torts when the conditions set out therein are satisfied. Does this denial of liability for torts violate rights that are enshrined in the Basic Law: Human Dignity and Liberty? The answer is yes. There are two main reasons for this. *First*, the right in torts that is given to the injured party (or to his heirs or dependants) and that was denied by amendment 7 is a part of the injured party's constitutional right to property. Indeed, the word 'property' in s. 3 of the Basic Law: Human Dignity and Liberty — 'A person's property should not be harmed' — means a person's property rights. In *Gaza Coast Local Council v. Knesset* [4] it was held with regard to the word 'property' in the Basic Law: Human Dignity and Liberty:

> '"Property" in this provision includes every property right. The Basic Law protects against any harm to a person's property rights. It follows that the protection of property extends not only to "property" rights such as ownership, a lease and an easement, but also to "obligatory" rights that have a property value' (*ibid.* [4], at p. 583; see also *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at pp. 431, 572).

In *United Mizrahi Bank Ltd v. Prime Minister* [10] I added:

> 'The question "what is property?" has arisen in several judgments. The answer to this is not at all simple. The difficulty arises from the complexity of the theoretical concept of "property" and the lack of a consensus as to the reasons underlying it… It would appear that everyone agrees that

> property in the Basic Law extends to all the various kinds of property rights according to their meaning in private law. Everyone also agrees that property in the Basic Law is not limited merely to property rights. Indeed, property in its constitutional sense is not the same as property in its private law sense… Therefore the constitutional concept of property also includes the right of possession and obligatory rights… In one case it was held that the word property in the Basic Law includes a pension… Against this background it has been held that property in its constitutional sense means a property right, whether it is a right *in rem* or a right *in personam*' (*ibid*. [10], at para. 9).

This approach to the constitutional concept of property is accepted in most countries where property is given a constitutional status (see Y. Weisman, 'Constitutional Protection of Property,' 42 *HaPraklit* (1995) 258; see also A.J. van der Walt, *Constitutional Property Clauses* (1999), at p. 22). This leads to the conclusion that the right of an injured party under the law of torts is a part of his property rights and therefore part of his 'property.' Moreover, the right of a person to compensation for a violation of his right against the state is also a part of his 'property.' Indeed, 'the right to compensation that is intended to restore the injured party to his original position… is a property right according to its meaning in the Basic Law' (E. Rivlin, *Road Accidents — Procedure and Calculation of Damages* (New Extended Edition, 2000), at p. 932). The violation of the right to compensation is also a violation of property rights (see *Gaza Coast Local Council v. Knesset* [4], at p. 589; CFH 1332/02 *Raanana Local Planning and Building Committee v. Horowitz* [23]; HCJ 2390/96 *Karasik v. State of Israel* [24]; CA 2781/93 *Daaka v. Carmel Hospital* [25]).

25. *Second*, liability in torts protects several rights of the injured party, such as the right to life, liberty, dignity and privacy. The law of torts is one of the main tools whereby the legal system protects these rights; it reflects the balance that the law strikes between private rights *inter se* and between the right of the individual and the public interest. Denying or restricting liability in torts undermines the protection of these rights. Thereby these constitutional rights are violated. Indeed:

> 'The basic right of a person, who has been injured by a tortious act, to compensation is a constitutional right that derives from the protection afforded to his life, person and property… Any

> restriction of the right to compensation for a tortious act needs to satisfy the constitutional test of having a proper purpose and not being excessive' (I. Englard, *Compensation for Road Accident Victims* (third edition, 2005), at p. 9).

Other legal systems that afford constitutional protection to human rights are also familiar with the approach that the law of torts is subject to constitutional restrictions, and changes to it require constitutional scrutiny (I. Englard, *The Philosophy of Tort Law* (1993), at pp. 125-134).

H. Second stage: Is the violation of the constitutional rights lawful?

(1) The limitations clause

26. The second stage of the constitutional scrutiny considers the limitations clause in the Basic Law: Human Dignity and Liberty, which states:

> 'Violation of rights
>
> 8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.'

This provision plays a central role in our constitutional system. It has two aspects. *On the one hand* it protects the human rights that are set out in the Basic Law; *on the other hand* it determines the conditions for violating the basic right (see HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 54 of my opinion). The limitations clause is based on the outlook that in addition to human rights there are also human obligations; that the human being is a part of society; that the interests of society may justify a violation of human rights; that human rights are not absolute, but relative. The limitations clause reflects the approach that human rights may be restricted, but there are limits to such restrictions (see *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [14], at para. 11; *Movement for Quality Government in Israel v. Knesset* [9], at paras. 45 and 46 of my opinion). Indeed, human rights are not afforded the protection of the law to the fullest extent; the constitutional system does not allow the realization of human rights in their entirety.

27. The limitations clause is based on two main elements. The *first* element concerns the purpose of the legislation. The limitations clause

provides that a statute that violates a constitutional human right should satisfy the requirement that it '… befits the values of the State of Israel, is intended for a proper purpose…'. The *second* element concerns the means used to achieve the purpose. The limitations clause provides that the means adopted by the statute to realize the purpose should violate the constitutional human rights 'to an extent that is not excessive.' There is a close relationship between these two elements. The means are intended to realize the purpose. Therefore we should examine whether the purpose is constitutional. When this has been determined, we should examine whether the means for realizing that purpose are constitutional.

28. The question of purpose is complex. In our case, it is sufficient if we determine that the purpose that should be considered is the main purpose of the statute (see HCJ 4769/95 *Menahem v. Minister of Transport* [27], at p. 264). This purpose should be a 'proper' one in the context of a violation of human rights (see *Gaza Coast Local Council v. Knesset* [4], at p. 548; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 61 of my opinion). The characteristics of the proper purpose are that it 'is intended to realize social purposes that are consistent with the values of the state as a whole, and that display sensitivity to the place of human rights in the overall social system' (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 62 of my opinion). From the viewpoint of the need to realize the purpose, the law is that this need varies according to the nature of the right and the degree of the violation thereof (see *Tzemah v. Minister of Defence* [7], at p. 273; *Menahem v. Minister of Transport* [27], at p. 258; HCJ 5016/96 *Horev v. Minister of Transport* [28], at p. 52 {206}). When a central right — such as life, liberty, human dignity, property, privacy — is violated, the purpose should realize a significant social goal or an urgent social need (*Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 62 of my opinion).

29. In addition to the proper purpose, there are the proportionate means. It is insufficient that the purpose of the statute is a proper one. The means that are adopted to realize it should be proper ones. The means are proper is they are proportionate. The principle of proportionality is based on the outlook that 'the end does not justify the means' (*per* Justice T. Or in *Oron v. Knesset Speaker* [8], at p. 465); see also *Movement for Quality Government in Israel v. Knesset* [9], at para. 47 of my opinion). In a host of cases, this court has consistently held that proportionality is determined by three subtests (see A. Barak, *A Judge in a Democracy* (2004), at p. 346). The use of the subtests is

affected by the nature of the right being violated, the degree of the violation thereof and the importance of the values and interests that the violation is intended to realize. The *first* subtest is the rational connection test or the suitability test. The means that the statute adopts should be suited to realizing the purpose that the statute seeks to realize. The *second* subtest is the least harmful measure test or the necessity test. It demands that the statute that violates a constitutional right should not violate it to a greater degree than is necessary in order to achieve the proper purpose. 'The legislative measure can be compared to a ladder, which the legislator climbs in order to achieve the legislative purpose. The legislator must stop at the rung on which the legislative purpose is achieved and on which the violation of the human right is the least' (*Israel Investment Managers Association v. Minister of Finance* [6], at p. 385; LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [29], at p. 405; HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [30], at p. 840 {297-298}). The *third* subtest is the proportionate result test or the test of proportionality in the narrow sense. The benefit arising from achieving the proper purpose should be commensurate with the harm caused by the violation of the constitutional right (see *Beit Sourik Village Council v. Government of Israel* [30], at p. 850 {309-310}; *Marabeh v. Prime Minister of Israel* [3], at para. 116 of my opinion). This is an ethical test (see the opinion of Vice-President M. Cheshin in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 107). It focuses on the outcome of the legislation, and the effect that it has on the constitutional human right. It is a balancing principle.

30. With regard to the three subtests of proportionality, we should point out the following: *first*, there is a major difference between the first and second subtests and the third subtest. The first two subtests — the rational connection and the least harmful measure — focus on the means of realizing the purpose. If it transpires, according to these, that there is a rational connection between realizing the purpose and the legislative measure that was chosen, and that there is no legislative measure that is less harmful, the violation of the human right — no matter how great — satisfies the subtests. The third subtest is of a different kind. It does not focus merely on the means used to achieve the purpose. It focuses on the violation of the human right that is caused as a result of realizing the proper purpose. It recognizes that not all means that have a rational connection and are the least harmful justify the realization of the purpose. This subtest seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy

cannot pass, even if the purpose that is being sought is a proper one. *Second*, the three subtests do not always lead to the same outcome. On more than one occasion there is a margin of possibilities that satisfy the proportionality tests to a greater or lesser degree. The fundamental approach is that any possibility that the legislature chooses is constitutional, if it falls within the margin of proportionality. This is the constitutional margin of appreciation given to the legislature within the limits of the margin of proportionality (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [5], at p. 438; *Menahem v. Minister of Transport* [27], at p. 280; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [31], at p. 815; *Gaza Coast Local Council v. Knesset* [4], at pp. 550, 812; *Movement for Quality Government in Israel v. Knesset* [9], at para. 61 of my opinion; *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 77 of my opinion).

(2) The constitutionality of section 5B of amendment 7

31. The question of the constitutionality of s. 5B of amendment 7 arose before us in a marginal manner only. The parties focused their main arguments on the provisions of s. 5C. They did not discuss s. 5B at length. We were not presented with any cases in which the question of its application arose. All of this reflects upon the question of the constitutional of the section. In these circumstances, as long as these questions have not been properly addressed, the time has not come to decide the constitutionality of s. 5B. Much depends on the manner in which it is implemented and the interpretation that is given to the provisions of the section. Thus, for example, we have heard no argument on the question whether the correct interpretation of the section includes a causal relationship between the activity and the membership of the terrorist organization or what was done on its behalf and the damage suffered by the injured parties. Naturally the parties have the right to raise their arguments concerning the constitutionality of s. 5B in so far as it will arise in specific cases. The civil courts are competent, in specific tort cases, to examine arguments concerning the constitutionality of the section. In the circumstances of this case, we see no reason to decide the question of the constitutionality of s. 5B of amendment 7.

(3) The constitutionality of s. 5C of amendment 7

32. Section 5C of amendment 7 provides that the state is not liable in torts for damage that is caused in a conflict zone as a result of an act done by the security forces. This rule has several exceptions. The exclusion of liability does not depend on the identity of the injured party but on the fact that the

damage occurred in a conflict zone. The purpose underlying this provision was addressed by the respondents before us:

> 'The main purpose of the amendment, which justifies a restriction of claims that are filed for damage caused in a conflict zone, is to adapt the law of torts to the special characteristics of the war with the Palestinians. Within this framework, the amendment also seeks to prevent an improper and unjust outcome that Israel should be liable for the damage of Palestinian inhabitants, in addition to being liable for the huge damage caused to the Israeli side' (para. 275 of the respondents' reply of 6 July 2006).

The respondents' position is that the law of torts was designed to regulate 'risk management for harmful acts in ordinary life within a given society' (para. 26). It is not suited to dealing with damage caused in a time of war. There are several reasons for this:

> 'First, the risks in times of war are different from those in times of peace. We are speaking of risks to the soldiers and risks to the state if they fail in their operations… Second, in war the scale of the damage is greater, and sometimes it is caused during a short period… Third, in times of war many soldiers and citizens are harmed… Fourth, war is, as a rule, a confrontation between states, or between a state and organizations, who operate from within the territory of another state… Fifth, litigating a claim in torts is not completely practical with regard to damage that is caused in war, or it encounters many difficulties… Sixth, the law of torts naturally examines a given incident on the basis of a specific and particular set of facts… Therefore, for all of the aforesaid reasons, there is no basis for applying the law of torts to war damage' (para. 33 of the respondents' reply of 6 July 2006).

This background gives rise to the question whether the provisions of s. 5C of amendment 7 are constitutional. As we have seen, they violate the rights of a Palestinian who was injured in a conflict zone by a tortious act of the security forces. Before amendment 7 was enacted, the state was liable to Palestinians in conflict zones if the tortious act was caused by a non-combatant activity of the security forces. Now the law provides that the state is not liable in torts for damage caused in a conflict zone as a result of an act carried out by the security forces, irrespective of the question whether the

tortious act was caused by a 'combatant activity' or a non-combatant activity. This restriction of the state's liability has violated the constitutional right of the Palestinian (or his heirs or estate) who was injured by a tortious act that was caused by a non-combatant activity. Does this violation of the constitutional right satisfy the provisions of the limitations clause?

33. Is the purpose underlying the provisions of s. 5C of amendment 7 a proper purpose? In my opinion, the answer to this question is yes. Indeed, the ordinary law of torts was not designed to contend with tortious acts that are caused during the combatant activities of the security forces outside Israel in an armed conflict. Excluding liability in torts in situations of 'combatant activity' is also accepted in other legal systems (for a survey, see Yaakov, 'Immunity under Fire: State Immunity for Damage caused as a result of "Combatant Activity",' *supra*, at pp. 115-125). An arrangement whose purpose is to adapt the law of torts to the special circumstances that prevail during the combatant activity of the security forces is an arrangement that is intended for a proper purpose. I discussed this in *Bani Ouda v. State of Israel* [1]:

> 'Combatant activities that cause harm to the individual should not be tried according to the ordinary law of torts. The reason for this is that combatant activities create special risks which should be addressed outside the framework of ordinary tort liability… Combatant activities create, by their very nature, risks that the "ordinary" law of torts was not designed to address. The purposes underlying the ordinary law of torts do not apply when the damage derives from combatant activity that the state is waging against its enemies… It should be noted that the approach is not that "combatant activity" is beyond the reach of the law. The approach is that the problem of civil liability for combatant activities should be determined outside the scope of the classical law of torts' (*ibid*. [1], at p. 6).

34. Is s. 5C of amendment 7 proportionate? The *first* subtest, which concerns a rational connection between the proper purpose and the provisions of s. 5C, is satisfied. The exclusion of liability in torts provided by s. 5C of amendment 7 removes the damage caused by the security forces in a conflict zone from the scope of the ordinary law of torts. This realizes the proper purpose that amendment 7 sought to achieve.

35. Does s. 5C of amendment 7 satisfy the *second* subtest of proportionality? According to this test, the statute should adopt the measure

that is least harmful. Does s. 5C satisfy this constitutional requirement? My answer is that it does not. In order to realize the purpose underlying s. 5C of amendment 7, it is sufficient to provide legal arrangements that the state is exempt from liability for combat activities. The ordinary law of torts is not suited to addressing liability for tortious acts in the course of combat. Arrangements of this kind were provided in s. 5 of the original Torts Law, which determined that the state is not liable in torts for an act done in the course of the combatant activity of the Israel Defence Forces. Amendment 4 extended the definition of 'combatant activity' beyond the scope that was given to it in decisions of the courts. It was provided in amendment 4 that combatant activity includes 'any act of combating terror, hostilities or an uprising, as well as an act for the prevention of terrorism, hostilities or an uprising that was carried out in circumstances of risk to life or body.' It further provided that notice of the damage must be given within sixty days; it shortened the prescription period and it ruled out the application of laws that transfer the burden of proof to the state. This amendment is proportionate, and it does not give rise to any constitutional difficulty. It realized the purpose underlying amendment 7, which is the need 'to adapt the law of torts to the special characteristics of the war with the Palestinians' (para. 27 of the respondents' reply of 6 July 2006). Amendment 7 goes far beyond this. It excludes liability in torts for all damage that is caused in a conflict zone by the security forces, even as a result of acts that were not done in the course of the combatant activity of the security forces. This amplification of the state's exemption from liability is unconstitutional. It does not adopt the least harmful measure that achieves an exemption from liability for combatant activities. It releases the state from liability for tortious acts that are in no way related to combatant activities, no matter how broadly the term is defined. Nothing in the ordinary activities of law enforcement that are carried out by the security forces in a territory controlled by them justifies an exclusion from the ordinary law of torts. This is certainly the case when the tortious act is totally unrelated to security activity. Only combat activities justify, as the purpose of amendment 7 indicates, an exclusion of the arrangements in the ordinary law of torts. Excluding tortious acts in which the security forces are involved but which have no combatant aspect does not realize the proper purpose of adapting the law of torts to combat situations. It seeks to realize an improper purpose of exempting the state from all liability for torts in conflict zones. This is certainly the case in view of the retroactive nature of this provision.

36. Section 5C of amendment 7 rules out any liability in torts on the part of the state with regard to any claim in torts that was filed with regard to an incident that occurred in a 'conflict zone.' From the respondents' statement it appears that after the enactment of amendment 7, large areas of the territories of Judaea, Samaria and the Gaza Strip were declared conflict zones for lengthy periods. The territories were divided into several large districts. Sometimes one district encompasses whole cities or several villages and towns. According to the criteria that were determined in this regard, it was sufficient for one terrorist incident to occur in one part of a certain district in order to declare the whole district a conflict zone for several days. In these circumstances, the exclusion of the state's liability under s. 5C causes a major violation of constitutional human rights. We should remember that the territories of Judaea and Samaria, and until August 2005 also the territory of the Gaza Strip, have been subject to a belligerent occupation for almost forty years. Thus the Israeli security forces are present in the territories on a constant basis and in large numbers. The inhabitants of the territories come into close contact with them on a regular and daily basis, on their way to and from work and school, at checkpoints and roadblocks inside the territories and at crossings into and out of Israel. The security forces have a fixed and permanent presence in the territories. They are deployed and operate in the territories both in combatant activities and in activities that have the character of law enforcement, both in areas where there is terrorist activity and in quiet areas, both in times of conflict and in times of relative calm. In these circumstances, a sweeping immunity of the kind given to the state by s. 5C of amendment 7 means that the state is given an exemption from liability in torts with regard to many kinds of operations that are not combatant activities even according to the broad definition of this term. This means that many injured persons, who were not involved in any hostilities whatsoever and who were injured by operations of the security forces that were not intended to contend with any hostile act, are left without any relief for the injury to their lives, persons and property. This sweeping violation of rights is not required in order to realize the purposes underlying s. 5C of amendment 7. Exempting the state from liability under s. 5C does not 'adapt the law of torts to the state of war.' It excludes from the scope of the law of torts many acts that are not combatant ones. It is inconsistent with Israel's duty that arises from its belligerent occupation in Judaea, Samaria and the Gaza Strip. This occupation imposes on the state special duties under international humanitarian law, which are inconsistent with a sweeping immunity from all liability in torts. We are not adopting any position — since the matter did not

arise before us — with regard to changes that may arise from the Oslo accords (see *Gaza Coast Local Council v. Knesset* [4], at pp. 523-524; HCJ 7015/02 *Ajuri v. IDF Commander in West Bank* [32], at p. 364 {96}). Obviously we are making no determination with regard to the legal status of the Gaza Strip after the disengagement. Even if Israel's belligerent occupation there has ended, as the state claims, there is no justification for a sweeping exemption from liability in torts.

37. Indeed, the proportionate approach is to examine each incident on a case by case basis. This examination should consider whether the case falls within the scope of 'combatant activity,' however this is defined. It is possible to extend this definition, but this case by case examination should not be replaced by a sweeping exemption from liability. I discussed this in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]:

> 'The need to adopt the least harmful measure often prevents the use of a blanket prohibition. The reason for this is that in many cases the use of a criterion of an individual examination achieves the proper purpose while using a measure whose violation of the human right is less. This principle is accepted in the case law of the Supreme Court… A blanket prohibition of a right, which is not based on an individual check, is a measure that raises a suspicion of being disproportionate. This is the case in our law. It is also the case in comparative law' (ibid. [26], at paras. 69-70 of my opinion).

This approach was accepted by additional justices in that case. The vice-president (Justice M. Cheshin) said that the question is whether it is possible to create 'a mechanism of an individual check for every resident of the territories who is a spouse or parent of an Israeli citizen, instead of imposing a blanket prohibition on all the residents of the territories who are of certain ages' (*ibid*. [26], at para. 105 of his opinion). Justice D. Beinisch said that 'Not carrying out an individual check and determining a blanket prohibition gives too wide a margin to the value of security without properly confronting it with the values and rights that conflict with it' (*ibid*. [26], at para. 11 of her opinion). Similarly, Justice E. Hayut said that:

> '… security needs, no matter how important, cannot justify blanket collective prohibitions that are deaf to the individual… there is certainly a basis for a presumption of dangerousness that the respondents wish to impose in this matter of family

> reunifications between Arab citizens of Israel and residents of the territories. Notwithstanding, in order that the fear of terror does not mislead us into overstepping our democratic limits, it is proper that this presumption should be rebuttable within the framework of an individual and specific check that should be allowed in every case…' (*ibid.* [26], at paras. 4-5 of her opinion).

Justice A. Procaccia emphasized in her opinion that:

> 'We should beware of the lurking danger that is inherent in a sweeping violation of the rights of persons who belong to a particular group by labelling them as a risk without discrimination… we should protect our security by means of individual scrutiny measures even if this imposes on us an additional burden…' (*ibid.* [26], at para. 21 of her opinion).

Justice M. Naor said that '… I do not dispute the importance of making an individual check, where this is possible… As a rule I accept that a violation of a basic right will be suspected of being disproportionate if it is made on a sweeping basis rather than on the basis of an individual check' (*ibid.* [26], at para. 20 of her opinion). Justice E. Rivlin also emphasized the importance of the individual check, but he thought in that case that such a check would not realize the purpose of the law. Justice E. Levy emphasized in his opinion that '… in the final analysis there will be no alternative to replacing the blanket prohibition in the law with an arrangement based on an individual check…' (*ibid.* [26], at para. 9 of his opinion). The case before us is different from *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]. Notwithstanding, there are similarities between the two. In both cases very important human rights were violated. Amendment 7 denies the right to compensation, and thereby it is likely to result in the injured person or his family becoming destitute. In both cases, the state chose a sweeping denial ('the state is not liable in torts') to an individual check on a case by case basis to discover whether 'combatant activity' is involved. In *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26] it was argued that it was not possible to realize the purpose of the statute by means of an individual check. This argument cannot be made in the case before us. The individual check is capable of realizing the purpose of the statute.

38. The state addressed extensively in its written pleadings the arrangements that prevail in comparative law in this matter. A study of the state's claims shows that in the countries surveyed by the state in its

pleadings, the arrangements prescribed with regard to the liability of the state in torts are similar to the arrangement provided in amendment 4, whereas the sweeping arrangement provided in amendment 7 is unprecedented. Thus, for example, in American law, the Federal Tort Claims Act recognizes, alongside the general liability of the Federal government in torts, an exception that releases the state from liability in torts for combatant activities. But this exception is limited to acts of the security forces in a time of war (section 2680(j)). Admittedly this section has been interpreted broadly. It has been held that a 'state of war' prevails even in a period of significant hostilities between the United States army and other military forces, and that 'combatant activities' include both the actual combat operations and activities that are directly related to them (*Koohi v. United States* [35]). But even with its broad interpretation, this section provides arrangements that are similar in essence to the arrangement provided in amendment 4, and not the sweeping immunity provided in amendment 7. The same is true in English law, which recognizes the immunity of the state with regard to tort claims arising from combatant activities (combat immunity). In the words of Sir Iain Glidewell, '… during the course of hostilities, no duty of care is owed by a member of the armed forces to civilians or their property…' (*Mulcahy v. Ministry of Defence* [37]). Even this immunity from liability has been interpreted broadly, but without resorting to a sweeping exemption:

> '[Combat immunity] must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement. But the real distinction does exist between active operations against the enemy and other activities of the combatant services in time of war' (*Bici v. Ministry of Defence* [38]).

That case (in 2004) concerned a claim in torts of Albanians living in Kosovo who were injured by gunfire from British troops who were in Kosovo as part of the NATO force sent there. The court held that the soldiers were negligent in that they violated the rules of engagement, and in the circumstances of the case, it rejected the state's contention that it should enjoy combat immunity. Thus we see that the arrangement in English law is also similar in essence to the arrangement provided in amendment 4. State immunity from liability for combatant activities is the broadest in Canadian law. Section 8 of the Crown Liability and Proceedings Act provides that:

> '… nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or

> authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.'

This clause excludes the liability of the state in tort claims that arise from actions of the Canadian army that are done in order to defend Canada, whether in time of peace or of war, and whether it is actually a combatant activity or training for it. But even this broad arrangement does not give the state a sweeping immunity, and the state needs to show that the activity of the security forces that caused the damage was done in the defence of Canada. By contrast, in Israel the state is released from any burden of proof, and it is sufficient for it to show that the damage was caused in a conflict zone.

39. Section 5C has several exceptions. The second schedule of amendment 7 provides that the state's immunity under s. 5C shall not apply to damage that is caused as a result of a criminal act, damage that is caused to someone who is held by the State of Israel in custody, damage that is caused as a result of an act of the civil administration that was not done within the framework of the conflict, and damage that is caused as a result of a road accident in which a vehicle of the security forces is involved but not in the course of operational activities. Do these exceptions to the general arrangement, which are stipulated in s. 5C, save it from being disproportionate? Are they capable of changing the conclusion with regard to the *second* subtest? My answer to this question is no. These provisos and exceptions cannot constitute a less harmful measure to human rights. On the contrary, if the immunity from liability that is provided in amendment 7 does not apply to these cases, why does it apply in other cases of torts that do not derive from 'combatant activities'? If the liability for a 'road accident' in which a military vehicle is involved does not fall within the scope of the state's immunity from liability, why in other accidents that are not road accidents is liability excluded in a sweeping manner without allowing an individual check? It is true that there are difficulties in producing evidence. But the way to overcome this is not to exclude liability, but to make individual checks and determine burdens of proof and shorter limitation periods.

40. Does s. 5C of amendment 7 satisfy the *third* subtest of proportionality, the test of proportionality in the narrow sense? Is the benefit to the public interest from excluding the state's liability for the damage caused in a conflict zone commensurate with the loss caused to individuals who are injured as a result of tortious acts of the security forces? It should be noted that the

question of proportionality in the narrow sense does not arise in all those cases where it transpires in the trial that no tortious act was committed at all, whether because there is no (conceptual or concrete) duty or because there is no carelessness or because there is no causal link or for any other reason (with regard to other torts). Moreover, the question of proportionality (in the narrow sense) does not arise at all with regard to a tortious act that was done as a result of 'combatant activities' of the security forces. The state is not liable in torts for this tortious act under the law that was in force before amendment 7. It follows that the question that we should ask ourselves is the following: is the benefit to the public interest that is afforded by excluding the state's liability for a tort that was not caused by 'combatant activities' commensurate with the damage that is caused to someone who is injured as a result of this tort? We asked the respondents once again what public benefit is realized by amendment 7 that was not realized under the law of torts that preceded it, including amendment 4. We sought to ascertain in what *additional* circumstances does amendment 7 give the state immunity from liability, as compared with the legal position that preceded the amendment, and how do these realize the legislative purpose and the public interest. The following was the answer that we were given:

> 'First, amendment 4 is an amendment that was prepared against the background of the Intifadeh that broke out in 1987. The draft of amendment 4 was tabled before the armed conflict broke out in the year 2000, and it was not intended at all to provide a solution to the unique nature of the armed conflict with the Palestinians. Indeed, amendment 4 also does not provide a solution to the armed conflict *de facto*. This is reflected in the fact that amendment 4 is a limited amendment. It deals mainly with the technical-procedural aspect of claims that arise in the territories. This amendment looks at the damage from within the law of torts. By contrast, amendment 7 is a substantial amendment.
>
> The purpose of amendment 7 is different from the purpose of amendment 4. The amendment seeks to exclude war damage from the scope of the law of torts, and not to adapt the law of torts to war damage. The purpose of the amendment is mainly ethical. It is completely different from the purpose of amendment 4. Therefore amendment 4 on its own is insufficient.

> Second, amendment 4 does not address claims of enemy aliens and claims of members of a terrorist organization at all, and therefore for this reason also amendment 4 is insufficient.'

In my opinion, these reasons are unconvincing. *First*, it was not made clear how the date of preparing the legislation is relevant to the question of the public benefit that the legislation realizes and why amendment 4 does not also provide a legal solution to the conflict that broke out in the year 2000. *Second*, the assertion that amendment 4 is technical-procedural is unacceptable. Amendment 4 made a major change to the definition of the term 'combatant activity.' The definition greatly broadened the interpretation given to this term in case law, and thereby significantly restricted the liability of the security forces operating in the conflict with the Palestinians. *Third*, we received no explanation of the significance of the distinction between 'excluding war damage from the scope of the law of torts' and adapting 'the law of torts to war damage.' With regard to the second reason given by the state, this relates solely to s. 5B of amendment 7.

41. The respondents also discussed the general benefit of amendment 7:

> 'The amendment restores the balance in the law of torts, and adapts it to the new circumstances of war. It enshrines ethical principles and solves practical difficulties in implementing the existing law. It enshrines the principle that in times of conflict each side is liable for its own damage, and it prevents the outcome, which currently exists, in which Israel is compelled to bear a double burden of claims for war damage suffered both by its own citizens and also by the inhabitants of the Palestinian Authority.'

These remarks also do not answer the question as to how exempting the state from liability for committing tortious acts that do not fall within the scope of 'combatant activities,' as defined in amendment 4, realizes a public benefit from an ethical viewpoint. *Prima facie*, the immunity from liability for 'combatant activities' in its broad sense is sufficient in order to adapt the law of torts to a situation of war and in order to release the state from the burden of liability for claims arising from war damage. It would appear that the main benefit does not lie in realizing these purposes, but in releasing the state from conducting legal proceedings in order to determine the question of whether there were 'combatant activities.' Indeed, giving the state a sweeping immunity makes it unnecessary to conduct many proceedings in which the state is required to prove that the damage for which it is being sued was

caused by combatant activities. But this benefit to the public interest — a benefit that lies mainly in a savings of administrative resources — is disproportionate in comparison to the damage to the various individuals, which was caused by non-combatant activities. This damage often involves great suffering. Injured parties suffer major injuries; they become seriously disabled; their ability to earn a livelihood is significantly impaired. All of these — and of course the loss of life — are far greater than the limited benefit that arises from releasing the state from liability and from the need to defend its position in court, both when the damage is caused by combatant activities and when it is caused by non-combatant activities.

42. Amendment 7 established a committee that was authorized '… to approve, beyond the letter of the law, in special circumstances, a payment to an applicant to whom subsection (a) applies and to determine the amount thereof…' (s. 5C(b)(1)). It was also provided that 'The Minister of Defence, in consultation with the Minister of Justice and with the approval of the Constitution, Law and Justice Committee of the Knesset, shall determine the preconditions for submitting an application to the committee, the manner of submitting the application, the work procedures of the committee and the criteria for making payments beyond the letter of the law' (s. 5C(b)(3)). Do the existence of this committee and its payments of compensation make the arrangements in s. 5C of amendment 7 proportionate? My answer is no. Naturally, where the disproportionality is based on the absence of a 'beyond the letter of the law' arrangement, the provision of such an arrangement can remove the disproportionality. But where the disproportionality in an arrangement arises from a disproportionate violation of human rights — and certainly when the rights that are violated are fundamental and important ones and the violation thereof is serious and painful — the violation does not become proportionate by means of a payment beyond the letter of the law. Someone who has been injured by a non-combatant activity of the security forces is entitled to compensation by law, and not to compensation beyond the letter of the law. We should give him justice, not charity. Of course, the state would act meritoriously if it considered making payments beyond the letter of the law to someone who is seriously injured as a result of 'combatant activities' of the security forces, in circumstances where the state thinks that a charitable payment is justified (cf. the remarks of Vice-President M. Cheshin in *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26], at para. 126 of his opinion).

The result is that we deny the petitions in so far as the constitutionality of s. 5B of amendment 7 is concerned. We grant the petitions and make the

order *nisi* absolute, in so far as the constitutionally of s. 5C of amendment 7 is concerned. This section is void.

President D. Beinisch

I agree with the opinion of President Emeritus A. Barak.

Justice A. Procaccia

I agree with the opinion of my colleague, President Emeritus A. Barak.

Justice E.E. Levy

I agree with the opinion of the honourable President Emeritus A. Barak.

Justice M. Naor

I agree with the opinion of my colleague, President Emeritus Barak.

Justice S. Joubran

I agree with the opinion of my colleague, President Emeritus A. Barak.

Justice E. Hayut

I agree with the opinion of my colleague, President Emeritus A. Barak.

Justice D. Cheshin

I agree with the opinion of my colleague, President Emeritus Barak.

Justice A. Grunis

1. I agree with the outcome in the opinion of my colleague, President Emeritus A. Barak. My agreement with the outcome derives mainly from the fact that the respondents did not address, and certainly did not address satisfactorily, two main questions: first, what — under the rules of private international law — is the substantive law that governs claims filed in Israel against the state and its agencies for acts outside Israel? Second, do the Basic Laws have extra-territorial application? It should be noted that the respondents raised certain arguments that my colleague, President Emeritus A. Barak, did not address, even though I am of the opinion that they should be mentioned with regard to these two questions. I am referring to various

arrangements in English and American law, which I shall address below, that apply to factual situations that are relevant to our case and that may prevent the courts from giving relief.

2. One of the first questions that are relevant to an action filed in an Israeli court with regard to an incident that occurred outside the borders of Israel concerns the substantive law that should be applied. This question also arises in every case of a tort action that is brought before an Israeli court with regard to an incident that occurred in Judaea and Samaria. The cases under discussion can be of many different kinds. Thus it is possible that an Israeli citizen who works for an Israeli employer in an Israeli settlement in Samaria is injured in a work accident and files an action on account of this in the court in Israel. A small change in the facts presents a case in which the worker who is injured is a Palestinian. Another possibility, which brings us closer to the cases addressed in the petitions, concerns a claim filed by a Palestinian resident of Samaria on the grounds that he was injured by the gunfire of IDF soldiers. In each of these examples, the court is supposed to consider the question of which law will apply to the claim under the rules of private international law. My colleague, the president emeritus, says that under the conflict of law rules that are practised in Israeli law, the Israeli law of torts applies to actions of the security forces in the territory of Judaea and Samaria. In my opinion, the answer to this question is not so clear. CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19] (an application for a further hearing was denied: CFH 9524/04 *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [33]) comprehensively considered the position of Israeli private international law with regard to a tortious act that took place in the aforesaid territory. It was held that the rule is that the law of the place where the tort was committed (*lex loci delicti commissi*) applies. Therefore in principle Jordanian law should apply. The aforesaid rule is subject to a rare exception, according to which the court should apply the law of the country that has the closest connection with the tort (*Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19], at pp. 374-375, 377). *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19] concerned an action of a Palestinian woman that was filed in a court in Israel. The plaintiff was injured in a work accident, while working at a plant of an Israeli company that was situated in an Israeli town in Samaria. The Israeli aspects of the case — an Israeli employer, an Israeli plant that was situated in an Israeli town in the territories — led the court to say that 'the exception begs to be applied' (*ibid*. [19], at p. 378). Therefore in that case it was held that the Israeli law of torts would apply, rather than the Jordanian

law. Indeed, as my colleague President Emeritus A. Barak says, claims of Palestinians against the state for alleged tortious acts of the security forces have been tried for years under Israeli law. It is to be wondered why in those cases the state did not raise the argument that the substantive law that should apply, under the conflict of law rules, is the law of the place where the tort was committed. This argument was also not raised in the petitions before us. It is possible that a determination that Jordanian law applies would make it unnecessary to consider the constitutional question. This would be the case if Jordanian law does not give rise to a cause of action in the situations that we are considering, as a result, for example, of an 'act of state' doctrine (paras. 6-7 below). If there was no right of action until amendment 7 of the Torts (State Liability) Law, 5712-1952 (hereafter — the Torts Law), under the law of the place where the tort was committed, it would not be possible to argue that the amendment denied an existing right and therefore no constitutional question would arise. Nonetheless, we should note that it would appear that the premise for changing the Torts Law in amendment 4 and amendment 7 was that the law of torts that applies with regard to claims concerning the activities of IDF soldiers in the territories is the Israeli law.

3. The other main question that should be considered is the question of the application of the Basic Laws — in this case the Basic Law: Human Dignity and Liberty — to events that occur outside the borders of Israel. According to the approach of my colleague President Emeritus A. Barak, there is no need to consider the aforesaid question. According to his position, the rights of Palestinians who are inhabitants of the territories 'are rights that are granted to them in Israel' and amendment 7 of the Torts Law violates those rights. And why are these rights that are granted to them in Israel? It is because under Israeli private international law they may, in certain circumstances, sue in Israel under the Israeli law of torts for tortious acts that were committed outside Israel (para. 23 of the opinion). We have already seen (para. 2 *supra*) that the conflict of law rules in Israel provide that the law of the place where the tort was committed should apply. When we are dealing with the territory of Judaea and Samaria, the significance of this is that we should refer to Jordanian law. Indeed, the aforesaid rule is subject to an exception, as was indeed held in *Yinon Food Products Manufacture and Marketing Ltd v. Kara'an* [19]. For the purpose of considering this question I am prepared to assume that the conflict of law rules in Israel lead to the application of the Israeli law of torts with regard to an incident in which a Palestinian is injured as a result of shooting by IDF soldiers. According to the approach of my colleague the president emeritus, 'The rights in Israel under

the law of torts were taken away from the inhabitants of the territories for tortious acts done by the security forces in a conflict zone. The effect of amendment 7 is therefore in Israel. It violates rights that the injured parties from the territories had in Israel' (para. 23 of his opinion). This leads my colleague to conclude that there is no need to consider the question of the application of the Basic Law outside the borders of Israel. I cannot agree with this.

Let us remember that we are dealing with events that took place outside the borders of Israel. Even if according to the conflict of law rules the Israeli law of torts applies to those events, this does not change the place where the tort was committed. Applying the Israeli law of torts does not create a fiction whereby the event occurred in Israel. The mere fact that the matter is tried before an Israeli court, under Israeli law, cannot lead to the conclusion that the rights are given to the injured parties in Israel. If you say this, then you arrive at a far-reaching conclusion that the Basic Laws apply to every proceeding that takes place in an Israeli court where the conflict of law rules determine that Israeli law applies. No connection should be made between the rules of Israeli private international law and the scope of application of the Basic Laws. Therefore it would appear that we need first to decide the question of the extraterritorial application of the Basic Law: Human Dignity and Liberty. However, since the respondents stated that in their opinion no decision on this question is required, there is no reason to address it in the present case. It would appear that it will be necessary to address the issue in the future, if an argument is presented before the courts.

4. Ultimately we are determining that s. 5C of the Torts Law is unconstitutional. By contrast, we are not deciding the question of the constitutionality of s. 5B of the law. It can be assumed that this question will be brought before the courts again. In the opinion of my colleague President Emeritus A. Barak, section 5B of the Torts Law applies, 'according to its wording, to tortious acts done in Israel.' This leads to his conclusion that the question of the application of the Basic Law does not arise. I would point out that a careful reading of section 5B shows that it is indeed possible that it will also apply to tortious acts committed by the state and those acting on its behalf outside Israel. Therefore it is possible that in the future it will be necessary to consider the question of the application of the Basic Laws with regard to the aforesaid section as well.

5. In consequence of the finding that the Basic Law applies in this case, my colleague goes on to consider the question whether amendment 7 of the

Torts Law violates a right that is included in the Basic Law. His conclusion is that such a violation does indeed exist with regard to the right to life, liberty, dignity, privacy and property. My colleague adds that 'Denying or restricting liability in torts undermines the protection of these rights' (para. 25). I am prepared to agree that in the present case a basic right has been violated. This is because of the broad application of s. 5C of the Torts Law. Notwithstanding, I cannot agree that any restriction or denial of liability in torts will constitute a violation of a constitutional right, just as I cannot accept that every new criminal norm or stricter penalty constitutes a violation of a constitutional right (CrimA 4424/98 *Silgado v. State of Israel* [34], at pp. 553-561 (*per* Justice T. Strasberg-Cohen); see also para. 2 of my opinion in HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Ministry of Interior* [26]).

6. The respondents mentioned in their arguments arrangements that exist in foreign law, even though they did not go so far as to claim that those arrangements constitute in themselves a response to the petitions. Thus the respondents raised an important doctrine that exists in English law, the act of state doctrine. According to this doctrine, certain acts of the state and its agents may not be tried in the English courts, if they were committed outside the borders of the state with regard to persons who are not British nationals. These also include acts of a violent nature that are committed by the state and its agents (see H.W.R. Wade & C.F. Forsyth, *Administrative Law* (ninth edition, 2004), at pp. 838-840; O. Hood Phillips & Jackson, *Constitutional & Administrative Law* (eighth edition, 2001), at pp. 320-326; Halsbury's Laws of England, vol. 18(2) (fourth edition, 2000), at pp. 452-455; see also CA 5964/92 *Bani Ouda v. State of Israel* [1], at p. 7, and A. Yaakov, 'Immunity under Fire: State Immunity for Damage Caused as a Result of "Combatant Activity",' 33(1) *Hebrew Univ. L. Rev. (Mishpatim)* 107 (2003), at pp. 124-125 and the references cited there). The scope of the doctrine's application is unclear. It also appears that there is now a trend to limit its application (Yaakov, 'Immunity under Fire,' *supra*, at p. 194). In American law there is a similar rule to that of an act of state, by virtue of a specific provision of statute. Section 2680(k) of the Federal Tort Claims Act provides that the government of the United States shall not be liable 'for any claim arising in a foreign country.' The American rule, like the English doctrine, is not limited to acts carried out by military forces nor is it limited to combatant activities. Thus the United States Supreme Court has held that it is not possible to file a claim in torts in an American court against the United States government and agents of the Drug Enforcement Administration with regard to their liability

for the abduction of a Mexican citizen from Mexico to the United States (*Sosa v. Alvarez-Machain* [36]).

7. The act of state doctrine is part of English common law. Therefore it was *prima facie* incorporated into Israeli law. One might argue that even if it was incorporated, it was abolished by the enactment of the Torts Law. It is well known that this law was intended to replace the common law rule that the state has immunity in torts. It would appear, without making a firm determination, that the enactment of the law did not abolish the act of state doctrine, just as that doctrine was not abolished in England by the Crown Proceedings Act 1947. It should be remembered that the doctrine applies to acts that are carried out outside the jurisdiction of the state. Indeed, s. 5A of the Torts Law expressly addresses the territories, i.e., Judaea, Samaria and the Gaza Strip, and therefore it seems that the aforesaid doctrine does not apply in the territories. We should point out, in passing, that the aforesaid s. 5A was adopted when Israel was in control of Gaza. It may be asked whether there is any need today for the aforesaid provision following the withdrawal from Gaza, if the act of state doctrine applies to that area. In any case, it is possible that the doctrine will apply in other places outside the state, as for example with regard to the combat activities that took place last summer in Lebanon or acts of Israel's secret services outside the state. It should also be noted that it is possible that a hint of the act of state doctrine may be found in the provisions of s. 9A of the Torts Law, which was adopted in amendment 7. The section provides that 'Nothing in the provisions of sections 5B and 5C shall derogate from any defence, immunity or exemption given to the State of Israel under any law.' We should add that the act of state doctrine may apply in addition to the statutory rule that exempts the state from liability in torts 'for an act that was done by a combatant activity of the Israel Defence Forces' (s. 5 of the Torts Law). Even if the act of state doctrine has no relevance to the matters that arose in the petitions, it is possible that it will be important in future cases.

8. Since the respondents did not address central questions, and since in practice they agreed, if only by implication, that the tort actions under discussion are subject to Israeli law and that there is no need to consider in this case the extraterritorial application of the Basic Law, I can only agree with the outcome proposed by my colleague President Emeritus A. Barak. It would appear that the time will come for deciding the aforesaid questions.

Petition granted.

21 Kislev 5767.
12 December 2006.