



September 2007

## Memorandum of the Civil Torts Law (Liability of the State)

### (Amendment No. 8), 5767-2007

#### Position Paper

### The Memorandum: A Re-Enactment of a Law Set Aside by the High Court of Justice

There is no escaping this statement already at the very outset: The memorandum of the law is an abomination. Its purpose is to overrule the judgment of the Supreme Court in H.C.J. 8276/05 *Adalah v. The Minister of Defense* (judgment dated 12 December 2006). To what end does the State seek to overrule the judgment? Is it to lend the executive authority and the security forces supra-statutory status, and to exempt them from the judicial review of the courts in Israel and from responsibility for their actions (so long as those were committed in the occupied territories or against anyone perceived as the “other”)? Or is it in order to cement an oppositional approach against the Court, to provoke it and to challenge its authority? These two objectives go hand in hand: What they share is the prevention of judicial review over human rights violations by the government.

The authors of the memorandum find it difficult to explain the need therefor. They completely avoid any attempt to explain how its provisions conform to the **Adalah** judgment. They write that the **Adalah** judgment and the disengagement created a “need” for renewed regulation of the subject matter. What need? That question remains in the dark.

The nature and limits of the relevant need have already been unequivocally determined in the **Adalah** judgment. In Section 40 of the judgment, the Court dismisses the State’s reasons regarding the need for Amendment No. 7. Even earlier, in Section 35, it points out that Amendment No. 4 is sufficient to meet the need to adjust the law of torts to the context of acts of war:

**This amendment [Amendment No. 4] is proportionate, and poses no constitutional difficulty. Thus will the object underlying Amendment**

**No. 7, which concerns the need to “adjust the law of torts to the special characteristics of the war with the Palestinians”, be fulfilled. [...] Amendment No. 7 reaches far beyond the aforesaid. It bars liability in torts for any damage caused by the security forces in a conflict zone, even due to acts performed other than through an act of war of the security forces. This expansion of the denial of State liability is unconstitutional... only belligerent acts justify, as sought by the object of Amendment No. 7, the exclusion of the arrangements from the realm of the ordinary law of torts. The exclusion of tort cases in which the security forces are involved, and which have no belligerent aspect, is not designed to achieve the proper purpose of adjusting the law of torts to belligerent situations. It is designed to achieve the improper purpose of releasing the State from any liability in torts in conflict zones, and certainly so in view of the retroactive nature of this provision.**

And what of the disengagement? This too was addressed by the Court:

**Of course, we make no determination about the legal status of the Gaza Strip after the disengagement. Even if Israel’s belligerent occupation thereof has ended, as the State claims, there is no justification for a sweeping exemption from its liability in torts (Section 36 of the judgment).**

The new memorandum seeks to reach (via different legal language), the same result that was sought to be attained by Amendment No. 7. Its substance is the same, its violation of human rights is the same, and the arguments in its justification are the same. Just as Amendment No. 7 was unanimously struck down by the nine Supreme Court justices – so should the proposed amendment; and it is difficult to shake the feeling that precisely this is the purpose of the memorandum: To pass a law in the Knesset whose illegality is conspicuous on its face, in order to stage a frontal challenge of the Supreme Court’s authority. Neither the Knesset nor the Court – and certainly not human rights in Israel – will benefit from such an adventure.

### **The Provisions of the Memorandum: A Sweeping Denial of State Liability**

A review of the provisions of the memorandum attests that its drafters seek to reach – by somewhat different legal tools – the same result which they sought to attain in Amendment No. 7: Lending sweeping immunity to the State for the army’s actions in the territories – and

to a large extent also inside Israel. In a series of matters, the provisions of the memorandum far exceed even the provisions of Amendment No. 7 which has been struck down.

Illegal, wrongful and even criminal acts will remain unanswered for. The victims of such acts – orphans and widows, disabled persons or persons rendered destitute by the destruction of their property – will be left without any remedy. Certain savings will be recorded on the books of the Ministry of Defense.

The importance of the right to compensation, under the law of torts, was pointed out by the Supreme Court in the **Adalah** judgment:

**The liability in torts protects several rights of the injured party, such as the right to life, to liberty, to dignity and to privacy. The law of torts is one of the main instruments via which the legal system protects such rights; it is the balance determined by the law between the rights of individuals, amongst themselves, and between the individual's right and the public interest. The denial or restriction of the liability in torts prejudices the protection of such rights. Thus are such constitutional rights prejudiced. Indeed:**

**“The basic right to compensation of a person who is injured by a civil wrong, is a constitutional right which arises from the protection of his life, body and property... Any restriction of the right to compensation for a civil wrong must meet the constitutional test of a proper purpose and proportionality” (Y. England, *Damages to Motor Accident Victims*, 3rd Ed. (5765), 9) (paragraph 25 of the judgment).**

One cannot overrate the importance of subjecting the State's actions to review by the Courts in Israel, if only in retrospect; of the courts being allowed to hear witnesses, examine evidence and decide – through Israeli judges and in accordance with the values of Israeli society – whether or not the security forces acted legally. This basic principle of government accountability was expressed by Prof. Ariel Porat, former Dean of the Law Faculty of Tel Aviv University and an expert on torts, at the hearing held on 15 June 2005 at the Constitution, Law and Justice Committee of the Knesset:

**A situation in which soldiers are legally allowed to do as they please without anyone paying the price, is a situation which, I think, if it will come to pass, each one of us should simply be ashamed of... This expansion means that it is permitted to engage in acts which are not fighting, not even fighting terror: A soldier is posted somewhere,**

**nothing happens for two weeks, he goes into a house and makes havoc – don't let anyone tell you that in other countries there is no liability in torts in such situations. It's not true... moreover, don't let anyone tell you that there is another law of this type anywhere else in the world. There is no such law anywhere in the world. We, as Israeli citizens – I as a citizen cannot accept that there will be a law allowing our soldiers, my children, to do anything they please without somebody paying the price for it. This is what's going to happen.**

International law harbors the well-established principle that an illegal act entails compensation, even if committed in a time of war in breach of the laws of war, and *a fortiori* if it is unrelated to the belligerent acts themselves. This principle was established in as early as the Hague Convention of 1907, and has been implemented in recent years via diverse mechanisms in respect of injuries caused to civilians in international disputes. The International Court of Justice has reiterated this principle only recently in its opinion on the separation wall. In that case, the Court ruled that dismantling the wall running through the occupied territories was not enough, and that Israel was required to fully compensate the persons injured by the wall on the basis of the reinstatement principle. The proceedings for the legislation of Amendment No. 4 and Amendment No. 7 were accompanied by the severe protest of human rights organizations not only in Israel, but also abroad. Legislation which will lend Israel immunity against suits before the Israeli courts, will not exempt Israel from the duty of compensation, but will create an incentive to shift the disputes to courts outside of Israel.

The **Adalah** judgment ruled that the provisions of Section 5C of Amendment No. 7, which denied the right of compensation and cancelled the State's accountability before its own courts, are null and void. The constitutionality of another part of the Amendment (Section 5B), was left for future reference. The current proposal seeks to return to the book of laws provisions parallel to those which had been revoked, and even to add further-reaching provisions thereto.

### **Section 1 – Amendment of the Definition of an “Act of War”**

According to the current law, the State is exempt from liability for acts of war. The current definition was adopted a mere five years ago, in Amendment No. 4 to the law. It, in itself, exceeds the original sense of an “act of war”, and also includes “any act of war against terror, acts of hostility or uprising, and any act for the prevention of terror, acts of hostility or uprising performed under circumstances of mortal or bodily danger”. The requirement in the latter part, that the act be performed under circumstances of mortal or bodily danger, was

designed to slightly mitigate the sweeping provision, and to adjust it somewhat to the reason for the exemption, as described in case law<sup>1</sup>. The proposal seeks to cancel the latter part (except in respect of acts performed inside Israel). The result is that virtually all of the I.D.F.'s actions in the territories will confer immunity upon the State against legal action, for any damage caused in the course thereof. This consequence is even further-reaching than that of Amendment No. 7, which limited the State's exemption only to those parts of the territories which had been declared as conflict zones. The statements of the Court in the **Adalah** affair (Section 36) are applicable here *a fortiori*:

**We must keep in mind that the areas of Judea and Samaria, and until August 2005 also the areas of the Gaza Strip, have been subject to belligerent occupation for close to forty years. In this framework, the Israeli security forces are present in these regions on a permanent basis and in a large scope. The residents of the region come into close, ongoing and daily contact with them, when coming and going, on their way to work and schools, at checkpoints, roadblocks inside the region and crossings to and from Israel. The security forces maintain a permanent and prolonged presence in the region. They are deployed and operate in the region in both fighting tasks, and in acts of a policing nature; in both areas in which hostile terror activity is conducted, and quite areas; in both periods of conflict, and periods of relative calm. Under these circumstances, immunity as sweeping as that rendered to the State by Section 5C of Amendment No. 7 spells the granting of an exemption to the State from liability in torts in respect of broad areas of activity which are not acts of war, not even according to the broad definition of this term. It means leaving many victims, who were neither involved in any hostile activity, nor injured incidentally to acts of the security forces which were designed to deal with hostile activity, stripped of any remedy for the violation of their lives, persons and property. Such a sweeping violation of rights is not required in order to fulfill the purposes underlying Section 5C of Amendment No. 7. The denial of the State's liability in Section 5C does not "adjust the law of torts to the state of war". It excludes from the realm of applicability of the law of torts many acts which are not acts of war. It does not conform to the duty of Israel, as holding Judea, Samaria and the Gaza Strip under belligerent occupation. Such**

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<sup>1</sup> C.A. 5964/92 *Bnei Uda v. The State of Israel*, *Piskei-Din* 56(4) 1 (2002).

**occupation imposes upon the State special duties under international humanitarian law, which are not consistent with a sweeping exemption from any liability in tort.**

## **Section 2: The Presumption of an Act of War**

Section 2 of the proposal is a re-enactment of Section 5C, which was annulled in the **Adalah** judgment.

According to the proposal, the Minister of Defense will be authorized to declare a certain area, at a certain time, as a region in which acts of war took place. In such a case, a rebuttable presumption will apply, whereby any damage caused in that area was caused by an act of war, and the State will be exempt from compensating therefor. This, in general terms, is the arrangement that existed under the annulled Section 5C: According to that unconstitutional section too, the Minister of Defense was authorized to declare a certain area, at a certain time, as a conflict zone, and insofar as such declaration was not rebutted, the State enjoyed an exemption due to any act committed in that area at that time.

A comparison of the proposed arrangement with the arrangement that was fixed in Amendment No. 7, reveals that the proposed arrangement is even broader than that revoked by the High Court of Justice: Thus, for instance, the authority to declare a conflict zone according to Amendment No. 7 applied only outside of Israel, whilst in the proposed amendment it applies also to areas inside Israel. According to Amendment No. 7, the authority applied only if there is, in the region, a “state of affairs in which an event or events of a military nature take place between the security forces and regular or irregular elements which are hostile to Israel, or a state of affairs in which hostile acts are performed by an organization hostile to Israel”. According to the current proposal, it is sufficient that acts were performed in the region to prevent an uprising, even such that were performed in the absence of any mortal or bodily danger. Amendment No. 7 contained provisions regarding the last date for the issuance of the declaration and the manner of its announcement – whilst no such restrictions may be found in the proposal. Needless to state, also a declaration under Amendment No. 7 created only a rebuttable presumption, challengeable in both the court hearing the suit itself and in the High Court of Justice<sup>2</sup>, such that no innovation is offered in this respect by the current proposal.

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<sup>2</sup> On the possibility of challenging a conflict zone declaration both directly and indirectly, see the statements of Adv. Tamar Kalhora of the Ministry of Justice and of MK Michael Eitan, then Chairman of the Constitution, Law and Justice Committee of the Knesset, at the Committee’s session on Amendment No. 7 of June 30, 2005. See also similar statements made by Adv. Miriam Rubinstein, Director of the Civil Department at the Office of the State Attorney, at the Committee’s session of July 20, 2005.

### **Section 3: Broadening of Section 5B**

Section 3 of the proposal seeks to exempt the State from liability for any damage caused to a resident of the Gaza Strip – regardless of whether he was in the Strip or in Israel, and of whether the damage was caused by the security forces or by another State body.

Section 5B is unconstitutional also in its present language. It denies the victim compensation absolutely and sweepingly, based on his identity and affiliation rather than on the circumstances of occurrence of the damage. Also when the victim is partly culpable for the occurrence of the damage, the existing rules of the law of torts should be followed, to determine the relative culpability of all parties involved. The **Adalah** judgment ruled that the entire provisions of Section 5B raise a constitutional question, which was left, in that case, for future reference. The Supreme Court ruled that the civil courts are authorized, in the context of specific tort claims, to hear arguments against the constitutionality of the section (Section 31 of the judgment). However, the Court explicitly ruled that there was no justification for granting the State a sweeping exemption from its liability for damage, which it either caused in the Gaza Strip or would cause after the disengagement (Section 36 of the judgment).

Mention should also be made of the position of the Ministry of Justice, which at the time asked the Constitution, Law and Justice Committee of the Knesset not to approve Section 5B in its current language. The Ministry of Justice put on the Committee's table a proposal by the Attorney General for alternative language, which conditioned the exemption upon a link between the act for which the exempting was given, and the individual's personal affiliation with a terrorist organization, for instance. In the **Adalah** judgment, the Court mentioned that the question of how the section would be implemented, and of whether such a link would be required, was meaningful with respect to the question of its constitutionality.

It is puzzling, therefore, that the proposed amendment does not include a modification of Section 5B in the spirit of the Ministry of Justice's amended proposal and in the spirit of the Court's comment.

### **Sections 4-5: Venue Restriction**

According to these sections, suits against the State for the security forces' actions in the West Bank would only be heard by the Courts in Jerusalem, whilst suits against the State for the I.D.F.'s actions in the Gaza Strip would only be heard by the Courts in Beer Sheva. Suits against anyone defined as an "enemy" or "activist in or member of a terrorist organization" would only be heard by the Courts in Jerusalem.

The restriction of the venue prejudices the constitutional right of access to the courts, and requires substantial justification, which meets the conditions of the restriction clause.

The official annotation offers the argument that the purpose of this provision is merely pragmatic: A dispersal of the litigation between various courts allegedly burdens the parties, and its consolidation in certain courts would lead to “specialization” and to the creation of “uniformity in the case law”. Another reason is the geographic proximity to the area where the damage occurred.

These arguments are unfounded on their face.

From the point of view of the convenience of the parties, this provision would significantly burden attorneys who are not from Jerusalem or the South, particularly those in the districts of Haifa and the North, some of whom have accumulated vast experience in cases of this type, in conducting the suits. The trouble and expenses involved in conducting the suits at distant courts would prejudice the ability of plaintiffs to seek representation from such attorneys, and they would be limited mainly to attorneys in the (relatively small) districts of Jerusalem and the South.

From the point of view of specialization – many suits of these types have been heard over the years by the Courts in Haifa, the North, Tel Aviv and the Center, and they already have the specialization.

From the point of view of efficiency, the new provision will only lead to inefficiency. Thus, for instance, the question of whether a certain person is a “member of a terrorist organization” is a clearly factual question, which the State may raise after the suit is filed. The significance of the new provision is that complex factual hearings, which pertain to the merits of the suit, will be conducted merely to determine the issue of territorial jurisdiction.

From the point of view of geographic proximity – First, with respect to many areas in the territories, it is actually the Courts of the Central and Northern districts which are closest. Second, with respect to the suit of an individual, whom the State deems an “enemy citizen” or an “activist in or member of a terrorist organization”, the cause of action of such a suit may be an event that took place in Israel – and not necessarily in Jerusalem. The provision would mandate the conduct of the suit far away from the place of occurrence of the damage. In any event, the witnesses for the State do not reside near the areas where the civil wrong was committed.

And finally, the rule in suits against the State is that they may be filed anywhere within the State. All of the arguments regarding “efficiency”, “specialization”, “convenience”, etc. are equally true – or untrue – with respect to other suits, which are filed against the State in other subject matters. The restriction of venue only for suits which are the subject matter of this memorandum calls for further investigation. When the reasons given for an amendment are unfounded on their face, it is necessary to look for other – irrelevant – reasons. It appears that

the irrelevant reason hiding behind the current proposal is the desire to “dispose” of certain judges in those districts, who did not favor the State in their judgments.

### **Section 6: Applicability Provisions**

Section 6 applies the proposed amendment retroactively to acts which occurred from 2000 (and with respect to immunity against claims by residents of Gaza in general – from 2005). In this respect too, the proposal follows Amendment No. 7, which was annulled by the Court. However, the proposal is even further reaching than Amendment No. 7: Further from the point of view of the period of time, which is taken up by the retroactive applicability (seven years versus five in Amendment No. 7); and further also from the point of view of the transitional provision: Whilst it was ruled with respect to Amendment No. 7 that the law would not apply in certain cases even if the hearing of witnesses had not yet commenced, but affidavits in lieu of direct testimony had been filed<sup>3</sup>, according to the proposed amendment, a suit would be excluded from the applicability of the law only if the hearing of witnesses had commenced.

The memorandum of the law is, therefore, defective from every perspective: From the perspective of its purpose, from the perspective of its object and from the perspective of its details. It is even more injurious than the provisions of the law which was struck down by the Supreme Court in the **Adalah** case. It violates basic principles of Israeli and international law. It is a proposal which, even if adopted, would in any event be null and void. The memorandum should be set aside already at this stage.

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<sup>3</sup> C.C. (Tel Aviv) 1409/02.