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## **Civil Wrongs (Liability of the State) (Amendment No. 8), 5768 – 2008**

### **1. Amendment to section 1**

In Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) [Civil Wrongs (Liability of the State) Law], 5712-1952<sup>1</sup> (hereinafter: **the principal law**), in section 1, under the definition “wartime action” the final clause, beginning with the words “and also an action” shall be deleted.

### **2. Amendment to section 5**

In section 5 of the principal law -

(1) The existing text shall be marked (A) and shall be followed by: “for this purpose, inasmuch as the action is carried out in the Area as defined in section 5A(1) or in an enemy state, actions carried out in order to combat terror, hostile actions or insurrection shall be considered wartime actions”;

(2) Subsection (A) shall be followed by:

(B) Inasmuch as the state argues it is not civilly liable since the action for which it is being sued is a wartime action, as stipulated in subsection (A), the court, if so requested by the attorney general or a person acting on his behalf, shall review such an argument immediately, before completion of the pre-trial hearing. Inasmuch as the court finds that the action constitutes a wartime action, it shall reject the claim.”

### **3. Amendment to section 5B**

In section 5B(a) of the principle law, in paragraph (1), the words “subject of a state that is an enemy” shall be followed by “or a resident of a territory outside Israel declared by government order as enemy territory.”

### **4. Addition of sections 5B 1 and 5B2**

Section 5B of the principle law shall be followed by:

Determination of compensation amount:

5B1. Inasmuch as the court finds that the provisions of sections 5 to 5B do not apply and that the state is civilly liable and the victim is not an Israeli citizen or an Israeli resident, the court shall determine the amount of compensation to be awarded to the victim in accordance with the victim’s place of residence.

The competent court in Jerusalem

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<sup>1</sup> Sefer ha-Huqqim 5712 [1952], p. 339; 5749 [1989], p. 16; Hazza’ot Hoq 5757 [1997], p. 493.

5B2. A claim, as stipulated in section 5A as well as a claim as stipulated in section 5B, including the types of claims and types of claimants as stipulated in the first annex, shall be heard by the competent court in Jerusalem.

#### **5. Revocation of section 5C**

Section 5C of the principal law is revoked.

#### **6. Applicability**

- A. The provisions of section 5B(A)(1) of the principal law, in the version appearing in section 3 of this law shall apply to actions that took place after 8 Elul 5765 (12 September 2005).
- B. The provisions of sections 1, 3, 5B1 and 5B2 of the principal law and the revocation of section 5C of the principal law as worded in sections 1, 2, 4 and 5 of this law shall apply to actions which occurred after 29 Elul 5760 (29 September 2000), with the exception of actions due to which a claim has been filed and the hearing of evidence therein began prior to the publication of this law; for this purpose: “hearing of evidence” – witnesses appearing to give oral testimony.

### **Explanatory Notes**

#### **Section 1**

The term “wartime action” is defined in section 1 of Hoq ha-Neziqin ha-Ezrahiyyim (Ahrayut ha-Medina) [Civil Wrongs (Liability of the State) Law], 5712-1952<sup>2</sup> (hereinafter: **the principal law**). The aforesaid definition includes “any action of combating terror, hostile actions or insurrection committed in circumstances of danger to life or limb.” Such wartime action may include a large variety of acts whose purpose and goal is combating terror, from gun battles to locating and arresting suspects.

When such acts take place outside the territory of the State of Israel, it is reasonable to think that they are an inherent part of the fight against terror. To clarify this situation, it is proposed to set a separate definition for “wartime action” inasmuch as it relates to acts taking place in the Area and in the territory of enemy states, as detailed in the explanatory notes for section 2 of the proposed law.

A situation whereby an act is carried out inside the State of Israel may be different. On the one hand, there may be situations where acts designed to prevent terrorism will be an inherent part of the acts designed to combat terrorism. In these cases, the pre-emptive act shall come under the terms of “wartime action”. On the other hand, there may be cases in which pre-emptive acts that take place inside the country are acts of policing and enforcement by their nature. Thus, pre-emptive actions which take place inside the country require individual examination. The classification of such actions as policing-enforcement or combating terror will depend on the circumstances.

For this reason, it is proposed to delete the final clause of the definition of “wartime action” as formulated today with reference to pre-emptive actions, regarding actions that take place inside the country, and to have such actions examined according to the individual circumstances of each case.

#### **Section 2**

##### **Paragraph (1)**

Section 5 of the law limits the state’s civil liability for actions which are wartime actions. It is proposed to amend said section and establish a separate definition for the term “wartime

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<sup>2</sup> Sefer ha-Huqqim 5712 [1952], p. 339; 5749 [1989], p. 16; Hazza’ot Hoq 5757 [1997], p. 493.

action” when the action is carried out in the Area as defined in section 5A(1) of the law, or in an enemy state, and explicitly establish, to remove all doubt, that a wartime action for this purpose will not be restricted to actions of combating terror, hostilities or insurrection, but will also include actions carried out to prevent such deeds, whether or not they were carried out in circumstances of danger to life and limb; the reason being that in the Area, or in an enemy state, the assumption is that actions of preventing terror are inherent to the fight against terrorism and naturally involve danger to life and limb.

### **Paragraph (2)**

It is proposed to determine that in circumstances where the state argues an action carried out by the Israel Defense Forces is a wartime action as stipulated in sections 1 and 5(A) in the proposed wording, the court will review the argument immediately, namely, as a preliminary argument and prior to any other issue. Such review will take place at the state’s request, to be submitted by the attorney general or a person acting on his behalf, provided that the state presents this argument before the pre-trial hearing of the complaint has been completed. A “wartime action” argument is essentially an argument which limits the state’s civil liability and should duly be reviewed as a preliminary argument rather than being deferred to the end of the proceeding, since acceptance of this argument obviates the need to review the claim on its merits and examine whether the actions of the security forces were negligent or disproportionate in the circumstances of the matter.

It is also proposed to determine that the attorney general or a person acting on his behalf will be permitted to request the court to have the argument reviewed immediately and prior to any other argument, so long as the pre-trial stage of the claim has not been completed. This, since it may be that as a result of the pre-trial proceedings the state will come to possess evidence which it did not previously have which would establish the argument that the action which is the subject matter of the suit is a “wartime action”. In this case, it would be justified to allow a review of the argument even after preliminary proceedings have begun, but so long as the pre-trial stage has not been completed.

It is also proposed to clarify that if the court finds that the action due to which the state was sued is indeed a wartime action, it shall reject the claim against the state.

### **Sections 3 and 6A**

Paragraph (1) of section 5B(A) of the law, as phrased today, stipulates that the state is not civilly liable for damages caused to a subject of an enemy state. Section 3 of the amendment bill proposes to expand this provision such that it applies also to residents of a territory outside Israel which the government declared, by order, enemy territory.

### **Section 4**

Section 5B1, the suggested addition to the law, proposes to establish that where the state has been found to be responsible when the provisions of sections 5 to 5B of the law are inapplicable and when the victim is not an Israeli citizen or resident, the amount of compensation awarded the victim will be determined in accordance with his place of residence.

The suggested added section 5B2 proposes to determine that the competent courts in Jerusalem shall review claims regarding damages caused by the Israel Defense Forces in the Area, as stipulated in section 5A of the law (for instance – to subjects of enemy states or activists or members of a terrorist organization), including in their claims under the exclusion stipulated in the first annex, this for reasons of efficiency and in order to preserve case law uniformity.

### **Section 5**

Section 5C of the current version of the law stipulates as follows:

- 5C. Claims in a zone of conflict
- (a) Notwithstanding the provisions of any law, the state is not civilly liable for damages sustained in a zone of conflict as a result of an act that was carried out by the security forces except for injury that is sustained in the kinds of claims or to the kinds of claimants set forth in the second annex.
- (b) (1) The Minister of Defense shall appoint a committee, which shall be authorized to approve, beyond the letter of the law, in special circumstances, payment to a claimant as to whom subsection (a) applies and to set the amount of the payment (in this subsection – **the Committee**);
- (2) The members of the Committee shall be:
- (1) An attorney qualified to be appointed district court judge, who shall be the chairperson; the Minister of Defense shall appoint the chairperson upon consultation with the Minister of Justice;
  - (2) A representative of the Ministry of Defense;
  - (3) A representative of the Ministry of Justice;
- (3) The Minister of Defense, upon consultation with the Minister of Justice, and with the approval of the Knesset's Constitution, Law and Justice Committee, shall establish the preliminary conditions for applying to the Committee, the manner in which the application shall be made, the Committee's work procedures, and the criteria for payment beyond the letter of the law.
- (c) The Minister of Defense may declare a territory a zone of conflict; where the minister so declared, the declaration shall establish the borders of the zone of conflict and the period for which the declaration applies; announcement of the declaration shall be published in *Reshumot*.
- (d) Where a written notice was given pursuant to Section 5A(2) (in this section – **written notice**), the following provisions shall apply:
- (1) Where the Minister of Defense declared the area in which the damages were sustained a zone of conflict – a notification of the declaration shall be provided to the person who submitted the written notice within 30 days from the day the written notice was received at the Ministry of Defense;
  - (2) Where the Minister of Defense did not declare the area in which the damages were sustained a zone of conflict – he may, within 90 days from the day the written notice was received, declare the area a zone of conflict; where such a declaration is made, he shall so inform the person who submitted the written notice within the said 90-day period; where the Minister of Defense declared the area as aforesaid following the expiration of the said 90-day period, the court may, for special reasons that it shall record, accept the claim that the damages that are the subject of the written notice were sustained in a zone of conflict;
  - (3) Failure to inform a person who gave written notice that the area has been declared a zone of conflict, as stated in paragraphs (1) and (2), shall not affect the validity of the declaration pursuant to subsection (c);
  - (4) The Minister of Defense, upon consultation with the Minister of Justice, shall establish the manner of informing a person who gave written notice that an area has been declared a zone of conflict.

(e) In this section –

“**Zone of Conflict**” means an area outside the territory of the State of Israel which the Minister of Defense declared a zone of conflict, as set forth in subsection (c), where security forces were active or remained in the zone in the framework of the conflict.

“**The State**” includes an authority, body, or person acting on its behalf;

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

In HCJ 8276/05 **Adalah – The Legal Center for Arab Minority Rights in Israel v. Minister of Defense**, TakSC 2006(4), 3675, the court declared section 5C of the law null and void for being disproportionate. It is therefore proposed to delete section 5C from the law.

#### **Section 6(B)**

It is proposed to stipulate that the provisions of sections 1, 5, 5B1 and 5B2 of the law and the revocation of section 5C of the law as worded in sections 1, 2, 4 and 5 of the amendment bill shall apply to acts which occurred after 29 Elul 5760 (29 September 2000), which is the day the conflict between Israel and the Palestinian Authority erupted, unless the hearing of evidence in a claim began prior to the publication of the proposed law. This provision resembles the applicability provision set in Civil Wrongs (Liability of the State) Law (Amendment No. 7), 5765-2005 (68, 5765, p. 953) in the framework of which sections 5B and 5C were added to the law.

It is also proposed to explicitly clarify that the term “the hearing of evidence” signifies witnesses on behalf of the plaintiff appearing to give oral testimony, including cross examination regarding their affidavits, if the principal testimony was submitted in an affidavit; this, in order to distinguish from submission of a principal testimony affidavit.