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Declaration of the Gaza Strip as "Enemy Territory" according to the Civil Wrongs (State Liability) Law, 5712-1952

Proposed Resolution

R e s o l v e d,

Following decision B/34 of the Ministerial Committee on National Security Affairs concerning "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)" dated September 19, 2007, in the context of which the ministerial committee determined that the Gaza Strip was an "Enemy Territory":

1. To declare by order of Gaza Strip as "Enemy Territory" for the purpose of section 5B(a)(1) of the Civil Wrongs (State Liability) Law, 5712-1952.
2. The effective date of the declaration is Tamuz 9, 5774 (July 7, 2014).

Explanatory Notes

General Background

In June 2007, the terrorist organization Hamas forcefully took control over the Gaza Strip and turned the territory of the Strip into a basis for terror activities directed against the state of Israel. Consequently, on September 19, 2007, decision B/34 was adopted by the Ministerial Committee on National Security Affairs (the Political-Security Cabinet) entitled "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)" according to which the Gaza Strip constituted an "Enemy Territory".

As specified in the state's notice to the Supreme Court in HCJ 9132/07 **Al-Bassiouni** (a petition which concerned the government resolution to reduce the supply of fuel and electricity to the Gaza Strip following the above cabinet resolution), the ramifications of the declaration of the Gaza Strip as "Enemy Territory" are almost identical, from all relevant aspects, to that of an enemy state with which a state of war exists.

The main legal ramification of the declaration of Gaza Strip as an "Enemy Territory" was entrenched in the cabinet resolution B/34 itself, according to which severe limitations were imposed on civil matters, including on the transfer of goods, reduction of fuel and services supply, limitations on travel of individuals as well as additional civil limitations pertaining to areas of liability of other governmental ministries.

The purpose of the current decision is to give an additional legal expression to the above status of the Gaza Strip according to the Civil Wrongs (State Liability) Law, 5712-1952 (hereinafter: the **Civil Wrongs Law**). It should be emphasized that the decision does not apply to other laws regulating the relations between the state of Israel and enemy states, such as the Commerce with the Enemy Ordinance -1939.

Section 5B(a)(1) of the Civil Wrongs Law stipulates that the state will not be liable in torts for damages caused to a non Israeli resident residing in a territory located outside Israel which was declared by a government order as Enemy Territory, unless he resides lawfully in Israel.

The above provision does not apply to a suit for damages caused to such an individual while held in the custody of the state of Israel as a detainee or prisoner, who did not resume membership or activity in a terror organization or acted on behalf of such organization or as an agent thereof after having been released from custody.

It is therefore proposed that the declaration shall be in effect from the commencement of the "Protective Edge" operation, namely, as of July 7, 2014. Hence, the declaration shall not apply to suits for damages caused before the commencement of the operation.

It is important to emphasize that the declaration of the Gaza Strip as an "Enemy Territory" for the purpose of the Civil Wrongs Law does not affect the obligation of the State of Israel to examine claims concerning violations of the armed conflict laws which were ostensibly committed by its armed forces in the framework of combat activities in the Gaza Strip, and to the extent necessary, to investigate them as well. The declaration does not derogate in any way or manner whatsoever from the above obligation to examine and investigate.

Economic data and the effect on state economy

The decision will significantly reduce the required resources for handling claims which may be filed as a result of damages caused in the framework of "Protective Edge" operation, as well as for future IDF actions in the Gaza Strip.

Budget

There are no ramifications, with the exception of the saving of costs associated with the handling of claims.

Ramifications of the proposal on manpower

No ramifications.

Position of other Ministers that the proposal relates to areas under their responsibility

Not relevant.

Previous Government Resolutions on this Issue

Decision 34/B of the Ministerial Committee on National Security Affairs (the Political-Security Cabinet) "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)" dated September 19, 2007.

Position of the Legal Advisor of the Ministry which initiated the proposal

Attached is the opinion of the legal advisor of the Defense Ministry.

Classifications

Primary 06 formal

Secondary 01 –Foreign Affairs and Defense

Submitted by the Minister of Defense

Av 11, 5774
August 7, 2014

State of Israel

Unclassified

Legal Advisor to the Defense Ministry

Date: Av 9, 5774

August 5, 2014

Ancillary Legal Opinion to the proposed resolution for the Government and the Ministerial Committees

Subject Matter of the Proposed Resolution:

Declaration by order of Gaza Strip as "Enemy Territory" for the purpose of section 5B(a)(1) of the Civil Wrongs (State Liability) Law, 5712-1952, following decision B/34 of the Ministerial Committee on National Security Affairs (the Political-Security Cabinet) "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)" dated September 19, 2007, in the framework of which the Gaza Strip was declared an "Enemy Territory" by the ministerial committee. The declaration will apply as of the beginning of the "Protective Edge" operation, on July 7, 2014.

Summary of the Proposal's Legal Aspects:

The Civil Wrongs (State Liability) Law, 5712-1952 (hereinafter: the **Civil Wrongs Law**), as amended in 2012 (Amendment No. 8), provides, *inter alia*, that the state is not liable in torts for damages caused to a resident of a territory located outside the state of Israel which was declared by government order an "Enemy Territory". Said amendment entered into effect as of September 12, 2005, namely, from the completion of the disengagement from the Gaza Strip. The above provision reflects a broad legal approach which is expressed in the rule according to which "a suit of the enemy should not be adhered to", as adapted to the special circumstances of the Gaza Strip.

In June 2007, the terrorist organization Hamas forcefully took control over the Gaza Strip and turned the territory of the Strip into a basis for terror activities directed against the state of Israel. Consequently, on September 19, 2007, decision B/34 was adopted by the Ministerial Committee on National Security Affairs (the Political-Security Cabinet) entitled "The Policy of Israel *vis-a-vis* Gaza (Military and Civil)" according to which the Gaza Strip constituted an "Enemy Territory". As specified in the state's notice to the Supreme Court in H CJ 9132/07 **Al-Bassiouni** (a petition which concerned the government resolution to reduce the supply of fuel and electricity to the Gaza Strip following the above cabinet resolution), the ramifications of the declaration of the Gaza Strip as an "Enemy Territory" are almost identical, from all relevant aspects, to that of an enemy state with which a state of war exists.

The main legal ramification of the declaration of the Gaza Strip as an "Enemy Territory" was entrenched in the cabinet resolution B/34 itself, according to which severe limitations were imposed on civil matters, including on the transfer of goods, reduction of fuel and services supply, limitations on travel of individuals as well as additional civil limitations pertaining to areas of liability of other government ministries. The purpose of the current decision is to give an additional legal expression to the above status of the Gaza Strip according to the Civil Wrongs (State Liability) Law, 5712-1952 (hereinafter: the **Civil Wrongs Law**), by declaring the Gaza Strip an "Enemy Territory" for the purpose of section 5B(a)(1) of the Civil Wrongs

Law, as described above. As indicated in the explanatory notes, the proposed decision does not apply to other laws regulating the relations between the state of Israel and enemy states, such as the Commerce with the Enemy Ordinance -1939.

The legal possibility to block suits of Gaza Strip residents by virtue of the principle according to which "enemy suits should not be adhered to" is found in several judgments of the Beer Sheva District Court (CC 5193/08 **Masri Gabon Company Ltd. et al., v. State of Israel** (Judgment dated April 15, 2012, reported in Nevo); CC 25511-01-11 **State of Israel v. The Estate of the late Azz-al-Din Wahid Mussa** (Decision dated November 16, 2011, reported in Nevo). A similar approach also arises from the judgment of the president of the Supreme Court, Justice Asher Grunis, in HCJ 8276/05 **Adalah et al., v. Minister of Defence et al.** (judgment dated December 12, 2006, reported in Nevo).

It is important to emphasize that according to the provisions of the Civil Wrongs Law, the declaration of the Gaza Strip as an "Enemy Territory" does not prevent a Gaza Strip resident lawfully residing in Israel from filing a suit, nor does it prevent a suit for damages which were caused to a Gaza Strip resident while held in the custody of the state of Israel as a detainee or prisoner (provided he did not resume membership or activity in a terror organization or acted on behalf of or as an agent thereof after having been released from custody). It should be noted further that according to the proposed decision, the declaration shall enter into effect from the commencement of the "Protective Edge" operation, namely, as of July 7, 2014. Hence, the declaration shall not apply to suits for damages caused before the commencement of the operation, including suits which were filed following IDF actions in the "Cast Lead" operation and in the "Pillar of Defense" operation.

It should be noted that even in the absence of a declaration according to which Gaza Strip constitutes an "Enemy Territory", tort claims of Gaza Strip residents which are based on wartime actions carried out by the state of Israel in the Strip are denied in the vast majority of the cases in view of the wartime action exception, established in section 5 of the Civil Wrongs Law. Accordingly, recently the Supreme Court denied a suit which concerned the death of civilians in the Gaza Strip during the "Cast Lead" operation as a result of an aerial attack of a residential home which was mistakenly identified as a storage house of weapons (CA 8279/12 **The Estate of the late Faiz Mesbah Hashem Al-Dia and 22 others v. State of Israel – Ministry of Defense**, judgment dated June 29, 2014, reported in Nevo). However, under the current circumstances, prior to the adoption of the proposed resolution, the State Attorney's Office is required to prove in each and every case that indeed a wartime action is concerned, and for this purpose extensive efforts must be invested in the location of evidence and witnesses in connection with the events which occurred in the heat of combat. This involves significant difficulties in view of the fact that in many cases, the description of the event in the suit is partial and even manipulative, while the vast majority of wartime actions, particularly ground activities, are not recorded in real time. In addition, many of the witnesses no longer serve in the army while the suit is heard, and it is difficult to obtain their cooperation, *inter alia*, in view of their reluctance to be exposed as having taken part in combat activities in the Gaza Strip, due to de-legitimization activities taken by organizations throughout the world in an attempt to indict IDF soldiers and officers who participated in combat activities.

The declaration of the Gaza Strip as an "Enemy Territory" under the Civil Wrongs Law will therefore cause a considerable saving of resources and will enable the State Attorney's Office to overcome the difficulties which characterize the handling of such suits, most of which are anyway denied being wartime actions, by having the suits denied based on the mere residency of the plaintiffs in the Gaza Strip. In this context it should be noted that a significant part of the damages caused to the residents of the Gaza Strip as a result of IDF actions derive from Hamas' combat method which places its headquarters, weapons storage houses and rockets launch sites in the midst of urban areas in the Strip, while hiding behind innocent civilians who are even

prevented from leaving their homes, and behind sensitive sites (Mosques, schools, medical institutions, UN facilities).

At the same time, as specified in the explanatory notes, the declaration of the Gaza Strip as an "Enemy Territory" for the purpose of the Civil Wrongs Law does not derogate from the obligation of the state of Israel to examine claims concerning ostensible violations of the armed conflict laws, and to the extent necessary, to investigate them as well.

Legal Difficulties, if any, and the Ways to solve them:

The above legal analysis indicates that the declaration of the Gaza Strip as an "Enemy Territory" reconciles with the cabinet's declaration of the Gaza Strip as an "Enemy Territory" in the context of decision B/34 dated September 19, 2007, and realizes the objective for which this possibility was established in section 5B of the Law, in the context of amendment 8 to the Civil Wrongs Law.

In this context it should be noted that the judgment in HCJ 8276/05 **Adalah et al., v. Minister of Defense et al.**, which revoked section 5C of the Civil Wrongs Law (State Liability), refrained from resolving the issue of the constitutionality of section 5B. At the same time, amendment No. 8 which entrenches the option that was used in the case at hand, namely, declaring a certain territory as an "Enemy Territory" was enacted after the judgment was given. In other words, the legislative procedure took into consideration the rule which was established in HCJ 8276/05, which defines the constitutional conditions for the limitation of tort claims against the state of Israel. As aforesaid, the approach underlying the possibility to declare the Gaza Strip as an "Enemy Territory" was recognized in the judgment of the Beer Sheva District Court and also arises from the judgment of the president of the Supreme Court, Justice Asher Grunis in HCJ 8276/05 **Adalah et al. v. Minister of Defense et al.**

It should be noted that the proposed resolution includes a certain retroactive aspect, in the sense that the declaration is about to enter into effect as of the commencement of the "Protective Edge" operation, namely, from July 7, 2014. However, according to amendment No. 8 of the Civil Wrongs Law the retroactive application of the declaration could have extended over a longer period (from the completion of the disengagement plan from the Gaza Strip in 2005), and it therefore reconciles with the provisions of the Law.

Another possible difficulty is the concern that the declaration of the Gaza Strip as an "Enemy Territory" will be interpreted by different parties as also applying to other statutes which concern enemy states, and particularly, the Commerce with the Enemy Ordinance – 1939. This is solved by the explanatory notes of the proposed resolution which clarify that the declaration applies solely to the Civil Wrongs Law.

Finally, a difficulty exists on the international level, in that the declaration may be mistakenly interpreted as an attempt of the state of Israel to avoid its obligation to examine claims concerning violations of the laws of armed conflict, and to the extent necessary to even investigate such claims. In this context too, the solution to the said difficulty is found in the explanatory notes which clarify that it is not the intention of the proposed resolution.

The positions of the legal advisors of other ministries that the proposed resolution concerns them:

As far as the legal advisor to the Prime Minister's Office is concerned, there is no legal preclusion for the adoption of the resolution.

The position of the legal advisor of the ministry which is headed by the minister who submitted the proposal:

There is no legal preclusion for the adoption of the resolution.

Very truly yours,

(Signed)
Ahaz Ben Ari
Legal Advisor