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In the Supreme Court, sitting as a Court of Civil Appeals

Civil Appeal 6982/12

Permission for Civil Appeal 6968/12

Before: Honorable President M. Naor
Honorable Justice E. Hayut
Honorable Justice Z. Zilberthal

The appellants in Civil Appeal 6982/12 and the
petitioners in Permission for Civil Appeal 6968/12:

1. The estate of the late Rachel Aliene Corrie of blessed memory
2. Craig R. Corrie
3. Cynthia A. Corrie
4. Christopher R. Corrie
5. Sarah E. Simpson

– VERSUS –

The respondent in Civil Appeal 6982/12:

State of Israel, Ministry of Defense

The respondents in Permission for Civil Appeal 6968/12:

1. Professor Yehuda Hiss
2. State of Israel – Ministry of Health
3. Rishon Lezion Magistrate's Court

Appeal of the Haifa District Court's ruling of August 28, 2012 in Civil Lawsuit 371/05 handed down by the Honorable Judge O. Gershon and the request for permission to appeal the Nazareth District Court's ruling of July 4, 2012 in Permission for Civil Appeal 42765-03-12, handed down by the Honorable Vice President A. Avraham.

Date of session: 21 Iyar 5774 (May 21, 2014)

On behalf of the appellants in Civil Appeal 6982/12 and the
petitioners in Permission for Civil Appeal 6968/12:

Attorney Hussein Abu Hussein; Attorney Jamil Dakwar;
Attorney Muhammed Labeeb; Attorney Reem Masarwa;
Attorney Anas Abu Hussein

On behalf of the respondent in Civil Appeal 6982/12 and the
respondents in Permission for Civil Appeal 6968/12:

Attorney Irit Kalman-Brom; Attorney Nir Gancharsky

Verdict

Justice E. Hayut:

The late Rachel Corrie (hereinafter: *Rachel* or the *deceased*) was killed during a ground-clearing operation IDF forces conducted in March 2003 on the Philadelphi Route in the Gaza Strip. In Civil Appeal 6982/12, the question arises of whether, as the district court in Haifa ruled, the State of Israel is exempt from tort liability for Rachel's death because this was a war action. In Permission for Civil Appeal 6968/12, whose discussion was combined with the aforementioned appeal, the question to be adjudicated is whether the district court in Nazareth was correct in ruling that an additional claim filed by Rachel's family in regard to the circumstances of her autopsy should be summarily dismissed due to "duplication of claims."

Factual background

1. Rachel was born in 1979 in the state of Washington in the United States and was an activist in the International Solidarity Movement (ISM) (hereinafter: the organization), which was established in 2001 to assist and reinforce the popular resistance of the Palestinian population. This, according to what it declared, by engaging in non-violent protest activity and direct action, which the organization defined as activity including:

Participation in non-violent demonstrations, creatively disrupting activity by the Israeli occupation forces, accompanying farmers to their fields and residing with or near families whose homes are threatened with eviction, demolition or harassment by settlers.

(<http://palsolidarity.org/about>) in regard to the nature of the organization's activities and the potential consequence of assistance to terrorist organizations, see: the opinion of the Intelligence and Terrorism Information Center, exhibit MemShin/15, pp. 40-56)

On January 25, 2003, after completing her college studies, Rachel arrived in Israel and reported to the organization's offices in Beit Sahour, east of Bethlehem, where she underwent training. Soon afterwards, on January 27, 2003, she was sent to the Gaza Strip. Rachel entered the Strip with a friend via the Erez crossing, arrived at the organization's offices in Rafah and started to participate in the organization's activities in this area.

2. On March 16, 2003 (hereinafter: *the day of the incident*), IDF forces conducted ground-clearing operations in the area of the Philadelphi Route, which is located about 50 meters from the border with Egypt. The activity was conducted with two D9R bulldozers, protected by a *nagmachon* (an armored personnel carrier with an armored underbelly), with the aim of uncovering bombs and destroying hiding places for terrorists at the site. A group of the organization's activists, including Rachel, tried to disrupt the bulldozers' activity, and consequently, the IDF force changed its location during the course of the day and headed southward. Around 17:00, Rachel walked toward one of the bulldozers, stood at a distance of about 10 to 20 meters from it, and kneeled. At some point, the bulldozer turned around and moved in Rachel's direction at a speed of 1 kilometer per hour, while carrying a pile of dirt in its blade.

Rachel climbed up the pile of dirt but got stuck in it and fell and as a result, part of her body was covered with dirt. Rachel's friends began to run toward the bulldozer and signaled with their hands for its operator to stop. When the bulldozer operator and his commander, who was also in the bulldozer, saw them, they stopped the bulldozer. But much of Rachel's body was already covered with dirt and at the Al-Najar Hospital in Rafah, where she was evacuated, she was declared dead after about 20 minutes. Rachel's body was transferred to the Institute for Forensic Medicine at Abu Kabir (hereinafter: *the institute*), where an autopsy was conducted by Professor Yehuda Hiss, the director of the institute at the time (hereinafter: *Prof. Hiss*). This stage of the affair also generated claims by Rachel's family, which we will address below.

3. Rachel's estate, her parents, brother and sister (appellants 1-5, respectively) filed a tort claim against the state in Haifa District Court in which it asked for compensation on several grounds, including the tort of assault and the tort of negligence, as well as grounds that rely on international humanitarian law and Basic Law: Human Dignity and Liberty. The appellants argued that in the circumstances of the case the state does not have immunity from tort liability under Article 5 of the Civil Torts (Liability of the State) Law, 5712-1952 (hereinafter: *Civil Torts Law*), because the activity the IDF forces conducted was not a war activity. The appellants also argued that they suffered evidentiary damage due to the unserious and biased way, they allege, in which the military police conducted the investigation of the incident. Finally, the appellants argued that the military police investigators and the employees of the Forensic Institute violated a court order in that they enabled the autopsy of Rachel without the presence of a representative of the United States Embassy on site.

Verdict of the Haifa District Court (Civil Lawsuit 371-05)

4. The district court in Haifa rejected the lawsuit and ruled that the military activity in which Rachel was killed was a "war activity" as defined in the Civil Torts Law, and as such and under Article 5 of this law, the state does not bear liability for damages caused to the appellants as a result of the activity. The court also determined, based on the evidence presented to it, that the Philadelphi Route, where this incident occurred, was used at that time for the movement of IDF forces assigned to secure the border with Egypt and that they worked to prevent terror attacks and the infiltration of terrorists into the territory of the State of Israel, as well as preventing smuggling, including the smuggling of weaponry, via the border. The court ruled that the Philadelphi Route was one of the focal points of terrorist activity in the Gaza Strip, and that during a period of about two and a half years prior to the day of the incident, thousands of grenades were tossed at IDF forces in the vicinity of the route; terrorists conducted about 1,400 shootings and sniping attempts, [and] planted about 150 roadside bombs; [and] hundreds of anti-tank missiles and tens of mortar bombs were fired, which caused many fatalities. It was also determined that between 2001 and the day of the incident, dozens of tunnels were discovered in the area, on both the Israeli side and the Egyptian side, which were used as tunnels for smuggling weaponry or as offensive tunnels, and car bombs were detonated against IDF forces operating in the area. The court also determined that the Philadelphi Route was one of the dangerous routes in the Gaza Strip and that the

terrorism directed against IDF forces took advantage of the topographical structure of the route, which enabled the terrorists to find hiding places on it and to organize themselves for their terrorist activity. In regard to the activity of the IDF forces on the route on the day of the incident, the court found that the mission of the two bulldozers was to clear the ground, and that this is operational activity accompanied by appropriate combat procedure and that the members of the organization who came to the Philadelphia Route that day acted in violation of the directives of the GOC [Southern] Command's order that declared the area a "closed military zone." The district court determined, therefore, that the activity during which Rachel was killed was a "war activity," and as such, it ruled, the state is accorded immunity from tort liability for harming Rachel.

Going above and beyond its duty and, despite having rejected their claim on the aforementioned grounds, the district court went on to address the specific arguments the appellants raised and determined that based on the evidence it heard, including expert opinions submitted on behalf of both sides, that none of the combat soldiers who were involved in the incident that day saw Rachel when she was standing in front of the bulldozer and this was because she was standing in a "blind spot" from the perspective of those sitting in the bulldozer. Therefore, it found, there are no grounds for accusing the IDF combat soldiers of intentionally harming Rachel. Thus, even in the absence of the immunity accorded to the state, there is no foundation for the tort of assault in the circumstances of this case. The district court went on to determine that the investigation by the military police was conducted with great professionalism and in a comprehensive and exhaustive way, and that there were no obstructions of the investigation during the collection of evidence from those involved in the incident. The court rejected the appellants' argument about mishandling the tape from the "Paskal" – a camera that documented the area of incident – and also rejected the arguments raised about the conduct of the Institute of Forensic Medicine. In light of the rejection of these arguments raised by the appellants, the district court ruled that they did not meet the burden of proof that they had suffered evidentiary damage that harmed their ability to prove their arguments, or that the state caused the alleged evidentiary damage as a result of a negligent failure. In regard to the tort of negligence, the court found that the IDF force acted on the day of the incident in a reasonable and cautious way in view of the danger the combat soldiers faced, and there are no grounds for attributing to it any violation of the duty of care. Nonetheless, the court rejected the state's argument about applying the "willful self-endangerment" argument and went on to note that there is no room to conduct a discussion on the question of the "contributing blame," which should be conducted during the stage of arguments of damage and not during the stage in which the question of liability is discussed, and that in light of the conclusions it reached, the need to discuss this question is superfluous in any event. Finally, the district court ruled that there are no grounds for granting compensation to the appellants for a constitutional tort based on Basic Law: Human Dignity and Liberty because in the circumstances of the case, the state did not violate Rachel's right to life.

The proceeding in Permission for Civil Appeal 6968/12

5. About five years after the proceeding in Haifa District Court was initiated, the appellants filed a lawsuit in the magistrate's court in Nazareth on March 18, 2010 (Civil Lawsuit 32966-10-03) against Prof. Hiss, against the Ministry of Health and against the magistrate's court in Rishon Lezion. (They are respondents 1-3, respectively, in Permission for Civil Appeal 6986 [sic]/12 and will be referred to below as: *the respondents*). This lawsuit was amended about a year after it was filed and in [the amendment] the appellants appealed to receive compensation of NIS 1 million for pain and suffering, mental anguish and violation of Rachel's dignity and the dignity of her relatives. (This lawsuit will be referred to below as: *the claim in the magistrate's court*). According to the appellants, they discovered during the course of Prof. Hiss' testimony in the proceeding in Haifa District Court that at the time of Rachel's autopsy organs and tissues were taken from her without reporting this to the family and it is not known what happened to them and, in any case, the family was not given the possibility of receiving and burying them. It was also argued that Prof. Hiss and the military police personnel assigned to investigate the circumstances of Rachel's death did not present the autopsy report to the magistrate's court in Rishon Lezion, which had earlier acceded to the request from the military police and ordered that a proceeding be initiated to investigate the cause of death (Investigation of Cause of Death 3/1009) (hereinafter: *proceeding of cause of death investigation*). The appellants also argued that Prof. Hiss and the Ministry of Health were negligent in all matters related to Rachel's autopsy and thus caused them damages. It was also argued that in the circumstances of the case, the evidentiary doctrine of "the thing speaks for itself" [*res ipsa loquitur*] applies and the burden of proof should be transferred to the respondents. The appellants also argued that the respondents are responsible toward them for torts of violating a statutory duty and negligence, and that the magistrate's court in Rishon Lezion was negligent in that it did not monitor the proceeding of cause of death investigation and did not fulfill its professional obligation as a reasonable judicial authority and thus caused them evidentiary damage.
6. In response, the respondents submitted a request to summarily dismiss the claim in the magistrate's court and argued for duplication of claims, the statute of limitations and judicial immunity. Most of this request was rejected by the magistrate's court in Nazareth (Honorable Judge *Ihsan Kana'an*), except for the ruling that the claim against the Rishon Letzion Magistrate's Court should be summarily dismissed due to judicial immunity. The state submitted a request for permission to appeal this decision to the Nazareth District Court (Permission for Civil Appeal (Nazareth District) 42765-03-12; Honorable Judge *A. Avraham*), which accepted the request and ordered that the entire lawsuit be summarily dismissed due to duplication of claims. In its ruling, the district court in Nazareth noted that despite the advanced stage of the proceeding in Haifa District Court, the court there accepted the appellants' request and allowed them to amend the statement of claim, to add the Institute of Forensic Medicine as a defendant and to add a remedy of compensation in its framework. Nonetheless, the court stated, only a few days after amending the statement of claim, the appellants filed the lawsuit in the magistrate's court. Nazareth District Court ruled that the lawsuit being adjudicated in Haifa District Court and the one filed in Nazareth Magistrate's Court deal with the same cause of action in the broad sense, that it deals with the same matter on which Haifa District Court heard many witnesses, and that the appellants received their

day in Haifa District Court and fully made their argument. Therefore, as noted, the district court in Nazareth ordered that the claim in the magistrate's court be summarily dismissed.

To round out the picture, it should be noted that the appellants also appealed the decision of Nazareth Magistrate's Court to summarily dismiss the lawsuit against Rishon Lezion Magistrate's Court (Civil Appeal 22130-04-12), but this appeal became superfluous and was summarily dismissed on November 12, 2012 (Honorable Registrar Y. Ben Hamo) in the wake of the Nazareth District Court's ruling, which, as noted, summarily dismissed the entire lawsuit.

7. The appeal proceedings that are before us revolve around the Haifa District Court's ruling, which, as noted, rejected the main lawsuit because it involved "war activity" (Civil Appeal 6982/12), as well as the Nazareth District Court's ruling, which accepted the respondents' appeal and ordered to summarily dismiss the lawsuit against them (Permission for Civil Appeal 6968/12).

Although the discussion in the aforementioned appeals proceedings was unified, in order to rule on these appeals proceedings and for the purpose of clarifying the decision, we will separately present the arguments of the sides in each of the proceedings, as well as the discussion and ruling in them.

Arguments of the sides in Civil Appeal 6982/12.

8. The appellants argue that the military activity in which Rachel died was not a war activity. In their view, even if the state's claim that it was a sector with a history of bomb planting is accepted, the specific mission of clearing the land was not preceded by intelligence reports about special dangers, and the fact that the route is dangerous and that sometimes shooting occurs there does not turn the clearing activity into a war activity. The appellants add that the state did not argue and did not prove that at any stage the IDF soldiers were in danger, and [the appellants argue] that the clearing activity was a routine activity, initiated [by the IDF], which the IDF conducted several times a week with engineering forces. According to the appellants, this activity did not develop into a war activity and the fact that the combat soldiers operated under pressure or were under life-threatening danger is not sufficient to ascribe a character of war activity. In the appellants' view, the nature of the route as a dangerous route is one circumstance of many circumstances, and Rachel was harmed as a result of negligence by the bulldozer operator and his commander. The appellants also argue that the district court erred in determining that the combat soldiers did not notice Rachel, and [argue] that it was reasonable to accept the claim of the experts [who testified] on their behalf that the combat soldiers in the bulldozer were able to see her from a distance of 20 meters. Alternatively, the appellants argue that the question of whether the bulldozer operator saw Rachel is meaningless because the body of evidence presented to the court indicates that the foundations of the tort of negligence existed in this case. The appellants also believe that the bulldozer operator should have refused to continue the clearing activity, despite the explicit order he received, because in their view it was a blatantly illegal order and at the very least a negligent one, which led to Rachel's death. The appellants add that it was not proven that an order was issued by the GOC [Southern] Command prohibiting entry to the Philadelphi Route, and that it was also not proven that proceedings

were initiated against foreigners in the area, so it cannot be said that the presence of Rachel and her friends in the area was illegal.

In regard to the “Paskal” tape and the military police investigation, the appellants reiterate their arguments, adding that the state deleted from the “Paskal” recording the moments in which Rachel was hurt, and that there was no reason to conduct operational debriefings before the military police investigation began. In addition, they argue that the state did not present evidence of a clearing procedure and that this should be held against it. The appellants also point to a series of circumstances that indicate, in their view, problems in the military police investigation, including problematic behavior of soldiers of the desert reconnaissance battalion, some of whose combat soldiers were involved in the incident; the failure to consult with an expert on accidents and safety, and the failure to obtain pictures from the scene of the incident. It was also argued that there was no cause to reject the appellants’ arguments regarding the tort of negligence and the constitutional tort, and that the state should compensate the appellants for Rachel’s death based on the directives of international law.

9. The state, on its part, supports the district court’s ruling and argues that the appeal centers almost entirely on clear factual determinations based on an in-depth analysis of the testimonies and documents presented to the court during 16 evidentiary hearings, during which 21 witnesses were heard, expert opinions were submitted and a range of additional evidence. The state also argues that the clearing activity on the Philadelphi Route was a war activity in every way, and as proven in district court, a real war was being waged on the Philadelphi Route during that period, which exposed the combat soldiers to life-threatening danger. The state lists a number of signs indicating, in its view, that it was a war activity, including: the nature of the mission, its execution with war vehicles, the identity of the military force, and the life-threatening danger posed to the force. In addition, the state argues that the fact that the clearing activity was repeated a number of times does not make it a routine activity and this is in light of the aforementioned characteristics and the danger to which the combat soldiers were exposed during the activity. The state notes that the essentiality and characteristics of the activity can also be learned, *inter alia*, from the fact that about two weeks after the day of the incident, an IDF tank was damaged by a bomb about 100 meters from the spot where Rachel was killed.

The state also argues that it was proven that the organization conducts illegitimate and violent activities, contrary to its declared objectives, that it systematically and deliberately sends its people to dangerous war zones, in violation of the law, and personally endangering them, *inter alia* by barricading themselves in the homes of terrorists, and that it never tried to operate in accordance with the rules that regulate the presence of international organizations and foreign nationals in war zones. The state adds that it met the burden of proof to show that at the time of the incident there was a GOC [Southern] Command order in effect that prohibited entry to the Philadelphi Route. It was also proven that the United States government had issued a travel advisory for this area at that time. In regard to the tort of negligence, the state argues that the foundations of this tort did not exist in the circumstances of this case and that the existence of damage does not in itself indicate a violation of a directive or negligence. The state also

argues that the district court's findings in regard to the military police investigation and "Paskal" tape should be adopted, and notes that the appellants were the ones who refused to enter the full investigation file into evidence. In addition, the state argues in this context that at the time the incident occurred the "Paskal" camera was not aimed at the place where it occurred, and it was turned toward [the site] only when the announcement was received on the two-way radio network. The state adds that the appellants examined the armored vehicles involved in the incident and were assisted by a safety expert on their behalf. According to the state, the appellants received all of the necessary assistance from the IDF, which even conducted a reenactment of the incident, and it [the state] emphasizes that the experts on behalf of both sides actually reached the conclusion that the bulldozer operator's field of vision at the time of the incident was limited.

Discussion and ruling in Civil Appeal 6982/12

10. As we noted at the beginning of the verdict, the central question that arises in this appeal is – Was the clearing activity in which Rachel died a war activity, and is the state consequently accorded immunity from liability for damages related to it?

The Torts Ordinance [New Version] in the original wording (Civil Wrongs Ordinance, 1944) granted the state full immunity from damage claims, inspired by the rule of common law, according to which "*The king can do no wrong*" (see: Civil Appeal 5964/92 *Bani Ouda v. State of Israel*, Piskei Din 56(4) 1, 5 (2002) (hereinafter: the *Bani Ouda case*)). A few years after the establishment of the state, the Knesset enacted the Civil Torts Law that restricted the absolute immunity accorded to the state from damage claims. However, according to Article 5 of this law, the state retains its immunity where "war activity" is involved, as stipulated in this article:

5. The state is not liable for damages from an act caused by war activity of the Israel Defense Forces.

This limitation of the state's tort liability stems from the recognition that war activities conducted by the state and on its behalf, and which derive from security needs, are inherently unsuitable for "the tort field" of law, due to the special dangers entailed in activity of this sort and due to the fact that, from the outset, the character and consequences of these operations are incompatible with the basic principles and perceptions of tort law (for elaboration, see: Assaf Yaakov "Immunity Under Fire: State Immunity For Damage Caused By Combat Action" *Mishpatim* 33(1) 107, 125-135 (2003) (hereinafter: *Assaf Yaakov*); the *Bani Ouda case*, p. 7; H CJ 8276/05 *Adalah v. Minister of Defense*, paragraph 33 of the ruling by President A. Barak (December 12, 2006) (hereinafter: *the Adalah case*); Civil Appeal 1459/11 *Khardan v. State of Israel*, paragraph 14 of the ruling by Justice Y. Amit (June 16, 2013) (hereinafter: *the Khardan case*)). A similar approach is practiced in other law systems for the same reasons (for a survey of comparative law, see *Assaf Yaakov*, pp. 115-125; the *Adalah case*, paragraph 389; the remarks of Judge Reinhardt in: *Koohi v. United States* 976 F. 2d 1328, 1334-1335 (9th Cir.) (1992) (hereinafter: the *Koohi case*). In the United States, this view is anchored in federal law (28 U.S. Code § 2680 (j)), which accords the state immunity from tort liability for "combatant activities" conducted "during time of war."

And the courts in the United States interpreted the phrase “during time of war” in a broad way and ruled that no official declaration of war is needed in order to apply immunity. The American courts also ruled that a war activity is any essential activity that is directly related to hostile activity and not only activity involving the exercise of physical violence (the *Koohi* case, pp. 1334-1336; the *Bani Ouda* case, p. 7; see also: *Saleh Ibrahim v. United States*, 556; *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); *F.Supp.2d 1 (D.D.C. 2007) v. Titan Corp.* 580 F.3d 1, 7 (D.C. Cir. 2009).

11. Over the years, the Israeli court has had to interpret the term “war activity” and to implement it in various cases that came before it. Back in 1960, this court ruled that in order to decide on the question of whether or not an activity is a war [activity] “the activity must be examined and not the war” (Civil Appeal 311/59 *Tractor Stations Factory v. Hayat*, Piskei Din 14 1609, 1613 (1960); for a review of the development of jurisprudence on this subject, see: the *Adalah* case, paragraphs 1-4 of the ruling by President A. Barak; *Assaf Yaakov*, pp. 1522-169; the *Khardan* case, paragraphs 13-22). In the case of *Bani Ouda* from 2002, this court again ruled in an expanded panel that when examining the question of whether any activity is a “war activity,” the characteristics of the activity should be examined separately from the question of whether it was conducted in the midst of war. It was also determined in the same case that activities directed against terrorist organizations, and not only activities directed against a regular army, may be considered war activities in regard to the immunity granted to the state under Article 5 of the Civil Torts Law, and in the words of President A. Barak:

The combat nature of the activity directed against an enemy (whether it be an organized army or terrorist entities) who seeks to harm soldiers is what is liable to generate the special danger that justifies granting immunity to the state. [...] Thus, in responding to the question of whether an activity is “warlike,” all of the circumstances of the incident should be examined. The objective of the activity should be examined, the place of the activity, the duration of the activity, the identity of the military force that is operating, the threat preceding it and anticipated from it, the strength of the military force that is operating, and the scope and duration of the incident. All these shed light on the nature of the special war danger the activity induced (the *Bani Ouda* case, pp. 7-9).

The understanding that fighting against terrorist entities should also be included in the purview of “war activity” seems to be penetrating the consciousness of the entire world in recent years in light of the growing need in many states, and not only in Israel, to adopt such war activities against severe acts of violence that terrorist entities conduct against soldiers and against civilians. Indeed, modern warfare is changing face. To a large extent, it no longer entails a war waged by the army of one state against the army of another state, but rather a war, sometimes a daily one, against new threats that we did not know in the past, created by various terrorist entities in the local Israeli arena and in the international arena. (On the need to reshape and update the rules of war in order to adapt them to the new reality, see: H CJ 8091/14 *Hamoked Center for the Defense of the Individual v. Minister of Defense*, paragraph 2 of my opinion (December 31, 2014); also see on the same case: Additional Civil Hearing 5698/11 *State of Israel v. Dirani*, paragraphs 46-49 of the ruling of President A. Grunis; paragraph 8 of the opinion of Justice N. Handel; paragraph A of the opinion of Justice A. Rubinstein (January 15, 2015).)

12. In the wake of the ruling in the *Bani Ouda* case, the Knesset enacted the Civil Torts (Liability of the State) (Amendment No. 4) Law, 5762-2002 (hereinafter: *Amendment No. 4*). This amendment, which entered effect on August 1, 2002, added a definition of the term “war activity” to the law. This definition was later amended in the Civil Torts (Liability of the State) (Amendment No. 8) Law, 5772-2012 (hereinafter: *Amendment No. 8*), but at the date relevant to the incident that is the subject of this appeal, the definition in Amendment No. 4 was in effect. Therefore, it should be presented as written. And thus Amendment No. 4 defines the term “war activity”:

‘War Activity’ – including any activity of combating terrorism, hostile acts or revolt, as well as activity aimed at preventing terrorism, hostile acts or revolt that was conducted in circumstances of danger to life or limb.

Thus, this definition explains in detail and reiterates that any activity of combating terrorism, hostile acts or revolt, as well as activity to prevent these, which was conducted in circumstances of danger to life or limb, constitutes a war activity that accords the state immunity from tort liability (the *Adalah* case, paragraph 35 and paragraph 40; Civil Appeal 8384/05 *Salam v. State of Israel*, paragraph 3 (October 7, 2008); Permission for Civil Appeal 8484/06 *Nitzan v. State of Israel*, paragraph 3 (June 10, 2007)). As noted, the definition of the term “war activity” was amended in Amendment No 8 of the law, replacing the words “conducted in circumstances of danger to life and limb” with the words “which is an activity of a combat nature, considering all of its circumstances, including the objective of the activity, its geographical location or the threat posed to the force conducting it.” But in our case, as noted, the definition in Amendment No. 4 applies, and the incident that is the subject of this appeal should be examined in accordance with it.

In order to interpret the term “war activity” this court has been required from time to time to distinguish between different types of military activities, and in doing so it shaped the content of this term as it is defined, inter alia, in Amendment No. 4. Thus, the court determined in Civil Appeal 8384/05 *Salam v. State of Israel* (October 7, 2008) (hereinafter: the *Salam* case) that a routine patrol of a military force – classified as policing activity – became a war activity following a change in circumstances and when, during the patrol, the force found itself in a situation of distress and real danger to the lives and safety of the soldiers. In this context, it is not superfluous to emphasize, however, that when we are dealing with a war activity from the outset (and not a policing activity that turned into a war [activity] as in the *Salam* case), the question of the danger to the forces should not be seen as the determining factor (see: Permission for Civil Appeal 3866/07 *State of Israel v. Almakusi*); the *Khardan* case, paragraph 21). For the classification of various other cases that arose in the jurisprudence, see also: Permission for Civil Appeal 10482/07 *Alouna v. State of Israel* (March 17, 2010); the *Almakusi* case, paragraphs 17-19; the *Khardan* case, paragraphs 17-18.

From the general to the specific

13. The activity during which Rachel died was, as noted, a clearing activity conducted by a military force. The force included combat soldiers who operated two armored bulldozers and was accompanied by an

armored personnel carrier with an armored underbelly (nagmachon). The district court determined as a factual finding that this activity was intended to expose hiding places on the Philadelphi Route that were used by terrorists for terrorist activity, including sneaking up and planting bombs designed to harm IDF combat soldiers. It was also determined that the activity could not be postponed due to the danger posed to the forces in the area and in light of the operational need to enable army lookouts to detect terrorists hiding on the route and thwart their activities. These findings of the district court are based on the testimonies it heard, including the testimony of Col. (ret.) Pinhas Zoaretz, the commander of the Southern Brigade of the Gaza Division (hereinafter: *Zoaretz*) and the testimonies of commanders and combat soldiers involved in conducting the activity (see for example paragraphs 8 and 10 of Zoaretz's affidavit; and the testimonies of Zoaretz, pp. 1186-1187 of the hearing protocol; [and] the testimony of S. R., the company commander of the force that conducted the clearing in the area, p. 890 of the protocol). The district court also made its decision based on evidence presented to it that the activity was accompanied by great danger to the forces conducting [it] from terrorists who sought to harm them via sniper fire, missiles and detonating bombs, and that due to this danger it was absolutely prohibited to exit the armored vehicles, not even to go to the bathroom. The court found support for this in the operations log, which indicated that a live grenade was tossed at the combat forces shortly prior to the incident in which Rachel died.

The appellants' main criticism regarding the classification of the clearing activity is directed against the element of danger posed to the combat soldiers who operated in the field. In their view, the forces were not endangered at any stage by the foreign nationals who were present at the site or by the Palestinian families living adjacent to the route. In this context, the appellants argue, inter alia, that the tossing of the grenade mentioned in the operations log was not the tossing of a grenade by terrorists on the route at IDF forces, but rather the tossing of a smoke grenade by the forces at the Palestinians. There is no basis for the arguments raised by the appellants in this context. The district court's finding that the Philadelphi Route was a focal point for thousands of incidents of sniper fire, missile fire and the planting of bombs against IDF forces, in which many soldiers were harmed, before and after the incident that is the subject of the appeal – is a firmly established finding that is well-anchored in the evidentiary material presented to [the court] and there are no grounds for intervening in [this finding]. These findings clearly illustrate that it was a route that became an arena of ongoing warfare between IDF forces and the terrorist organizations. Consequently, even if we accept the argument that the forces did not face any threat from Rachel and her friends from the organization, this in no way neutralizes the danger posed to [the forces], in the circumstances described, from the terrorists who constantly operated on the route. The lower court drew this conclusion – and rightfully so – relying upon, inter alia, the battalion operations log that was presented, which portrayed a picture of an active operational combat sector (for the evidentiary weight of the operations log in tort claims against the state, see: the *Salam* case, paragraph 6 of the ruling; the *Almakusi* case, paragraph 29 of the ruling). The district court also relied in this context on the words of the brigade commander, Zoaretz, and it is not superfluous to cite them again:

We are speaking here about territory where there is fighting every day. It is not a question of when or whether they will shoot at you. They shoot every day there. Every day they set off bombs there, every day they try to abduct soldiers in that area, it is a territory of war!
(Zoaretz's testimony, p. 1186 of the protocol)

In light of these clear findings regarding the nature of the area in which the clearing activity was conducted and regarding the war activity that occurred there during the relevant period, I believe that the question of whether or not a grenade was tossed at the forces shortly prior to the incident in which Rachel died cannot change the conclusion that the clearing activity was, in the circumstances of the case, a war activity. And the same applies in regard to the additional argument the appellants raised – that it was not proven that a GOC [Southern] Commander order was issued declaring the area as a closed military area. I will go further than required to note, however, that an examination of the operations log (page 14 at the hour of 16:18) indicates that according to a simple reading of what is written, [and] as the district court found, it indeed involved the tossing of a grenade at the forces in area 22A, shortly prior to the incident in which Rachel died, and not the tossing of a grenade by the forces as the appellants tried to claim (see and compare another description of the tossing of a grenade the next day on page 23 at the hour of 10:31). In regard to the order from the GOC, even though the order was not presented because it was claimed that it could not be located, Zoaretz testified to this and the court accepted his testimony (the cross-examination of Zoaretz on pp. 1182-1185 of the protocol of the hearing on July 10, 2011). Moreover, given the occurrences on the Philadelphi Route as described above, it seems that even without presenting the order, it is a logical and apparent finding.

14. Thus, the clearing activity in which Rachel was hurt meets all of the criteria defined in the jurisprudence for classifying the activity as a war activity, including: the site of the incident, the fighting force, the objective of the mission and the danger to the forces. In this respect, the case before us is fundamentally different than the clearing activity discussed in Permission for Civil Appeal 3675/09 *State of Israel – Ministry of Defense v. Daoud* (August 11, 2011), which the sides cited in their arguments. In that case, the district court ruled that it was not war activity and, consequently, assigned the state responsibility for negligence by those who conducted the clearing activity (Civil Lawsuit 1409/02 *Daoud v. Minister of Defense* (May 26, 2009)). In the request for permission to appeal discussed in this court, it was determined that the state was not negligent in the circumstances of the case and thus it became unnecessary to decide on the question of whether it was a war activity, and this court did not rule on it. Going beyond what is required, it will be noted that an examination of the relevant data in this context indicates that the *Daoud* case, in contrast to our case, involved an incident that occurred in an area used for hothouses that was not an area of active combat; that the vehicles involved were not armored military vehicles, but regular work vehicles of the Civil Administration; those conducting the activity were Civil Administration employees and not combat forces; and the objective of the activity was to demolish the hothouses and not to uncover bombs and hiding places of terrorists.

Once the activity is classified as a war activity, the state is accorded the immunity defined in Article 5 of the Civil Torts Law, and it cannot be assigned liability for the incident in which Rachel died.

15. The conclusion we reached makes it unnecessary to discuss the arguments the appellants raised insofar as they pertain to the torts they claim. Nonetheless, I will also note that in this case we agree with the factual findings and legal conclusions the lower court reached, and according to which the state should not be assigned tort liability because the foundations did not exist for any of the alleged torts in this case, and not even the constitutional tort upon which the appellants sought to impose liability on the state. I will also add and note – and this is also beyond what is required – that I did not find substance in an additional argument the appellants raised in this context regarding evidentiary damage caused to them, ostensibly, because of the way in which the military police conducted the investigation of the incident and due to the way in which Rachel’s autopsy was conducted, and regarding the damage they suffered, ostensibly due to this evidentiary damage, in their ability to prove the foundations of the torts they claimed.
16. As ruled more than once, evidentiary damage is expressed in a plaintiff’s inability to prove a particular component in his lawsuit due to a deficiency of relevant evidence caused by the defendant. In cases in which it is proven that there is evidentiary damage caused by the defendant, as stated, the burden of proof pertaining to that factual component will be shifted to the shoulders of the defendant (see: Civil Appeal 6991/09 *Plony [John Doe] v. State of Israel*, paragraph 8 (October 24, 2011); Guy Shani, *Presumption of Negligence – Transfer of the Burden of Proof in Tort Law* 303-304 (2011)). The question that arises, therefore, is which factual components in the appellants’ lawsuit suffered evidentiary damage in their view, and assuming that such damage was indeed incurred, whether it stemmed from an action or omission of the state. The appellants’ main criticism in this context, it seems, focuses on the “Paskal” tape and their claim that “apparently [someone] made sure to delete from it the critical moments of the deceased being run over.” This claim by the appellants was not proven in any way and remains only a theory. On the other hand, the state argued – and its argument is supported in the affidavits of Sh. R., the deputy commander of the relevant battalion, and in the remarks of Zoaretz and Oded, who was a member of the military police investigation team – that the “Paskal” cameras that were new in the sector at that time, were intended to survey the territory in order to identify threats against IDF forces and that at the moment of the incident, it was not aimed toward the site of the incident. It was also explained that recording with this instrument is only conducted when an incident occurs, and it does not record continuously (section 17 of the affidavit of Sh. R.; section 11 of Zoaretz’s affidavit; section 8 of Oded’s affidavit). Watching the “Paskal” tape (exhibit 18 of the state’s exhibits), supports this argument and indicates that the camera was indeed not aimed at the site of the incident when it was reported on the two-way radio. The appellants also point to the fact that at a certain stage an Arabic speaker is heard saying on the two-way radio “did you kill him?” and was answered with the words “Allah have mercy on him.” The combat soldiers in the bulldozers testified that they did not say these words and that they are not Arabic speakers, and listening to the soundtrack of the video from the “Paskal” camera indeed supports the fact that these were the voices of other speakers on the two-way radio. In any case, it is not clear how the appellants’ argument in this context supports their claim of evidentiary damage.

Moreover, all of the sources of information that were available to the military police investigators were also available to the appellants: Rachel's friends who witnessed the incident; the IDF combat soldiers and their commanders who were involved in the incident; the operations log; the Paskal tape; audio tapes of the two-way radio network; the opinions of the experts; the reenactment of the incident and the autopsy report. Therefore, even if we assume for the sake of the discussion – and it should be emphasized that we do not accept this argument – that the police investigators did not conduct an in-depth investigation and did not exhaust everything they could have in investigating the incident, no evidentiary damage was caused to the appellants as a result of this. In this context, it is not superfluous to note that the army conducted a reenactment of the incident, supervised by the head of the IDF's Combat Doctrine, Weaponry and Readiness Department, with the participation of the combat soldiers involved. In addition, a simulation of the incident was produced (exhibit 19 of the respondent's exhibits). It should also be mentioned that the expert *on behalf of the appellants* came to a base in the Golan Heights where IDF D9 bulldozers were made available for him to examine, and he also reached the conclusion that "in the position in which the nagmachon and the two D9s, the two bulldozers, stood, they could not have seen the deceased, if the deceased was behind the mound of dirt" (paragraph 194 of the appellants' summary in the proceeding in the lower court – the opinion was not attached to the appeal). Finally, it should be noted that *the appellants* opposed submitting the investigation file in its entirety and to summoning relevant witnesses (see for example pages 386, 949, 1453-1454 and 1820-1822 of the protocol of the hearing), and this conduct is also inconsistent with the claim of evidentiary damage they ostensibly suffered.

In regard to the autopsy. In this context, the appellants argued that the autopsy was conducted in violation of the judicial order in the cause of death investigation proceeding due to the absence of a representative on behalf of the American Embassy and also because the tape of the autopsy was not saved. The appellants did not explain how these arguments, even if they are correct, caused them evidentiary damage [to evidence] needed to prove the torts they claimed. However, in any case, it should be noted that in regard to the absence of a representative of the American Embassy, it became clear that this argument is not correct when it was submitted during the testimony of Prof. Hiss that he received a fax from the American Embassy (T/6) explaining that Rachel's family approved conducting the autopsy, and this was after he had turned to them to clarify whether they planned to send a representative on their behalf (see: testimony of Prof. Hiss, pp. 304-306 and 329 of the protocol of the hearing). In regard to documenting the course of the autopsy, Prof. Hiss testified, and his testimony was not contradicted, that according to the practice at that time, the autopsy was recorded (because it was not possible to type during the autopsy), and that afterwards the findings were copied and the tapes were recycled due to budgetary considerations (pp. 329-330 of the protocol of the hearing). Without expressing an opinion on the soundness of these procedures (the arguments the appellants raised in the framework of Permission for Civil Appeal 6968/12 in regard to the conduct of the autopsy will be discussed separately below), no basis can be found in the appellants' position for the claim that due to the aforementioned recording procedure they suffered evidentiary damage in proving any of the foundations of the torts they claimed.

In this context, it is not superfluous to note that the appellants did not raise arguments pertaining to the comprehensive opinion submitted by the Institute of Forensic Medicine in regard to the circumstances of the death.

17. Finally, another argument raised by the appellants should be dismissed – that the state should compensate them for Rachel’s death under international human rights law and international humanitarian law. Without expressing a stance regarding the specific arguments raised in this context, the rule is, as we know, “an explicit legislative directive of the Knesset takes precedence over directives of international law” (Criminal Appeal 6659/06 *Plony [John Doe] v. State of Israel*, paragraph 9 of the ruling by President D. Beinisch (June 11, 2006)). The directives of the Civil Torts Law in this case are clear, as noted, and in light of the state’s immunity from tort liability, there are no grounds for ordering it to pay compensation under international law.

Due to all of the reasons explained above, I believe that the appeal (Civil Appeal 6982/12) should be rejected. Now I will turn to discuss the arguments the sides raised in Permission for Civil Appeal 6968/12 and in this matter, as explained below, my conclusion is different.

Arguments of the sides in Permission for Civil Appeal 6968/12

18. In this request, the appellants argue that during the discussion of the primary case in the district court in Haifa, and in the wake of Prof. Hiss’ testimony, they discovered that tissues or organs had been taken from Rachel’s corpse for various tests and that no one knew what became of them. The appellants emphasize that these facts are the basis for the additional claim they filed in Nazareth Magistrate’s Court, and that the district court in Nazareth erred in determining that this was a duplication of claims and the same cause that served as the foundation for the primary lawsuit conducted in Haifa District Court. The appellants emphasize that the amendment they were permitted to make in the primary statement of claim filed in the district court in Haifa addressed the arguments about evidentiary damage – which we discussed above – they claim to have suffered as a result of the autopsy being conducted without the presence of a representative of the American Embassy and due to the failure to save the recording that documented the autopsy. They argue that their ability to prove the circumstances of the incident in which Rachel died was harmed due to this evidentiary damage, and these arguments were indeed added to the primary lawsuit after amending the statement of claim in 2008. But, the appellants emphasize, these arguments have nothing to do with the additional argument about taking tissues or organs during the autopsy, which they discovered only in 2010, following the testimony of Prof. Hiss, as noted. Thus, according to the appellants, Nazareth District Court erred in combining their arguments in this matter with the arguments raised in the primary lawsuit, and in determining that it entails the same cause. The appellants also argue that the summary dismissal of a lawsuit is an extreme measure and for the reasons detailed above, there was no justification for ordering this in their case.
19. The state argues, on the other hand, that the request does not meet the conditions defined in the jurisprudence for granting permission to appeal in a third instance, and in regard to the essence of the

matter, the state argues that the term “cause of action” is broadly interpreted by the courts for the purpose of the rule of “claim preclusion” [*res judicata*] and according to this broad interpretation, as Nazareth District Court ruled, the cause in the primary lawsuit filed in Haifa District Court is the same cause as in the lawsuit filed in Nazareth Magistrate’s Court. The identical cause, the state argues, can be learned from the fact that in both lawsuits the appellants were referring to violation of the dignity of the dead, because the lawsuit in Haifa District Court included, inter alia, arguments about the autopsy being performed against the family’s wishes. The state also argues that in both lawsuits arguments are raised that are anchored in similar and complementary interests – the interest in protecting the dignity of the dead and the interest of protecting the integrity of the body – and that when the primary lawsuit was amended and the cause of action against the Institute of Forensic Medicine was added, which pertains to an unauthorized autopsy or an autopsy that deviates from the authorization, the appellants should have included all of the arguments in this matter in a single lawsuit. In addition, the state argues that if the appellants believed that the cause of action in the proceeding in the district court in Haifa did not include all of the details that were discovered or the full scope of the remedy demanded, they should have requested an additional amendment of the statement of claim in that proceeding or to expand the discussion there, but there is no room for allowing an additional proceeding to be initiated in these circumstances directed against the same litigants and which would even require hearing the same witnesses who were heard in the framework of the primary lawsuit.

20. After I examined the sides’ arguments, I believe the request should be discussed as if permission for appeal were granted and [as if] an appeal were submitted based on the permission granted, and I also believe that [this court] should accept the appeal, overturn the Nazareth District Court’s decision to summarily dismiss the lawsuit the appellants filed in Nazareth Magistrate’s Court, restore the decision of the magistrate’s court of February 16, 2011 – according to which the causes are different (subject to erasing the lawsuit against the magistrate’s court in Rishon Lezion, as stated in that decision), and return its discussion to the magistrate’s court [in Nazareth].

The rule pertaining to claim preclusion [*res judicata*] states, inter alia, that if a lawsuit is heard and adjudicated, the court will not consider another lawsuit between the same sides or their substitutes, as long as it is based on an identical cause, and in such cases, there is “issue preclusion” that blocks the additional lawsuit (Civil Appeal 1545/08 *Moscona v. Solel Boneh Ltd.*, paragraph 7 (March 4, 2010) and the references there (hereinafter: *the Moscona case*)). As ruled on more than one occasion, the examination of causes is not a process of “mathematical” comparison. It goes beyond the individual examination of two statements of claim and focuses on the question of whether, from a substantive perspective, the matter entails two litigations that pertain to the very same issue and whether the right or protected interest the two lawsuits address – are identical. For this purpose, [the court] should also examine, inter alia, the extent of similarity in the factual foundation underlying the two proceedings (the *Moscona* case, *ibid.*; Civil Appeal 1650/00 *Zisser v. Ministry of Construction and Housing*, Piskei Din 57(5) 166, 181 (2003); Uri Goren *Civil Procedure Issues* 176-177 (11th edition, 2013)).

21. An examination of our case in accordance with these criteria leads, in my view, to the conclusion that the district court in Nazareth erred in ruling that the cause argued in the lawsuit filed in Nazareth Magistrate's Court is identical to one of the causes litigated in the Haifa District Court in the primary lawsuit. *First*, and as Nazareth Magistrate's Court rightly noted in its decision of February 16, 2011, the fact that the Institute of Forensic Medicine was sued in each of these lawsuits is not sufficient in itself to connect the two causes in one bundle. *Secondly*, from a substantive perspective, they are not the same causes because they are not identical in the overwhelming majority of the factual and legal foundations that constitute each of these causes. An examination of the amended statement of claim the appellants submitted to Haifa District Court on July 3, 2008 indicates that the lawsuit in Haifa District Court focuses on the circumstances of Rachel's death and *in this context*, it is argued that the military police investigators and employees of the National Center of Forensic Medicine violated a judicial order in allowing the autopsy of her corpse without the presence of a representative of the American Embassy (section 27.1 of the amended statement of claim) and that the representatives or agents of the National Center of Forensic Medicine "destroyed and/or blurred a tape that documented the autopsy of the deceased" and thus caused evidentiary damage to the appellants in a way that diminished evidence and findings that might have been able to support their version vis-à-vis the *circumstances of the incident* in which Rachel died (section 31.1 of the amended statement of claim). Due to the conduct attributed to these defendants, the district court in Haifa was asked, inter alia, to impose punitive damages against the state and against its agents. On the other hand, the statement of claim submitted to the magistrate's court in Nazareth focuses on the circumstances of Rachel's autopsy *and not* the circumstances of the incident in which she died. Thus, for example, it was argued that the appellants consented to the autopsy without having received an explanation of the various options for the autopsy and without agreeing to a comprehensive autopsy that was unnecessary, in their view, in the circumstances of the case (section 19 of the amended statement of claim). The appellants also argued that Prof. Hiss – who was also personally sued in this claim – testified during the proceeding in Haifa District Court that he took tissues or organs from the corpse of the deceased for various tests and does not know what happened to them since. Therefore, the causes on which the statement of claim submitted to Nazareth Magistrate's Court is based are limited to the autopsy proceeding only, and the remedies the appellants are entitled to because of the torts committed in [this proceeding], according to their allegation. This is unrelated to the circumstances that led to Rachel's death, which, as noted, are the focus of the proceeding before the district court in Haifa. In these circumstances, the district court in Nazareth erred in determining that the primary proceeding conducted in Haifa District Court entailed "the same story, the same affair, in whose framework an abundance of testimonies were heard" and that the appellants "received their day in the district court [and] exhausted their cause."

In order to dispel any doubt, I will emphasize, however, that the conclusion I reached in regard to the lack of identicalness of causes litigated in the two proceedings does not preclude the possibility of raising arguments about "estoppel by record," inasmuch as particular issues were discussed and ruled

upon in the primary lawsuit whose verdict became peremptory when an appeal of the ruling was dismissed. In this aspect of the rule of “claim preclusion,” the sides are fully entitled to their arguments.

22. In summary – I suggest to my colleagues to dismiss the appeal in Civil Appeal 6982/12 and to accept the appeal in Permission for Civil Appeal 6968/12, which is discussed according to permission granted in the sense that it overrules the Nazareth District Court’s decision to summarily dismiss the lawsuit in Civil Lawsuit 32966-03-10 before the magistrate’s court in Nazareth, and it will be adjudicated in turn.

In light of the results I reached in the two proceedings, I will add and suggest to my colleagues not to issue an order for expenses.

President M. Naor:

I concur.

Justice Z. Zilberthal:

I concur.

It was decided as stated in the ruling of Justice E. Hayut.

Issued today, 23 Shvat 5775 (February 12, 2015)