At the Supreme Court

CivLA 3675/09

Before:	**Honorable Vice President Justice E. Rivlin** **Honorable Justice E. Arbel** **Honorable Justice H. Melcer**
The Petitioner :	**The State of Israel – Ministry of Defense**
	v.
The Respondents:	**1. Muhamad Mahmoud Salah Daud** **2. Kaid Abd al-Karim 'Ali 'Ata** **3. Mu'in Abd al-Karim 'Ali 'Ata**
	Motion for leave to appeal from the judgment of the District Court in Tel-Aviv-Jaffa dated March 26, 2009 in CC 1409/02 rendered by Honorable Judge D. Kareth Meyer
Session Date:	1 Adar 5770 (February 15, 2010)
Representing the Petitioner:	Att. A. Gal
Representing the Respondents:	Att. D. Arad-Eylon; Att. S. Danieli

Judgment

Vice President E. Rivlin:

1. Before us is a motion for leave to appeal from the judgment of the District Court in Tel-Aviv-Jaffa (Honorable Judge D. Kareth Meyer), in which the issue of liability in a civil claim filed by the Respondents against the State of Israel, the Petitioner herein, was resolved. The claim was filed for damages allegedly suffered by the Respondents as a result of a land clearing operation carried out by the state in 2000 in land owned by the Respondents. During the operation, greenhouses which were located on this land, were destroyed.

2. The District Court found that the land clearing operation was not a "wartime action" and therefore the state was not exempt from liability under Section 5 of the Civil Wrongs (Liability of the State) Law 5712-1952 (hereinafter: the **Civil Wrongs Law**). The District Court further found that the Respondents established the elements of the tort of negligence in this case and consequently held the state liable for the damage sustained by Respondents. Nevertheless, the District Court held that the Respondents had a contributory fault at the rate of 40%.

3. The District Court's finding that the land clearing operation was not a "wartime action" was based on the interpretation of this term by the Supreme Court in the Bani 'Odeh case (CA 5964/92 **Bani 'Odeh v. the State of Israel**, IsrSC 56(4) 1 (2002)). At the time the Bani 'Odeh judgment was rendered, a definition of the term "wartime action" was not included in the Civil Wrongs Law. The Civil Wrongs Law was amended in 2002 and only then the definition of the term "wartime action" was added thereto (Civil Wrongs Law (Liability of the State)(Amendment No. 4), 5792-2002 LB 1862 (hereinafter: **Amendment No. 4**)). The court held that amendment No. 4 did not apply to Respondents' claim due to the fact that the events with respect of which such claim was filed took place in 2000. The court further held that the purpose of Amendment No. 4 was to change law in force concerning "wartime action" rather than clarify it. Therefore, the District Court held that the term "wartime action" should be interpreted in the same way it was interpreted in judgments preceding Amendment No. 4.

   Firstly, the District Court rejected the argument that the land clearing operation should be classified as a "wartime action" only because it was carried out during the "second intifada", which has already been recognized by the courts as a state of combat. The District Court stated that it has already been held that "For the purpose of Section 5 above, the nature of the period during which the tort was carried out is not a factor, i.e., the fact that it is wartime, and it is not enough that at such time an action is being carried out by the army. Even during wartime, many actions taken by the army do not justify exemption under Section 5" (CA 623/83 **Levy v. the State of Israel**, IsrSC 40(1) 477 (1986)).

4. Hence, the District Court continued to classify the operation in accordance with its particular characteristics. The District Court held that the land clearing operation was required due to a military-operational need and that it was intended to prevent, or at least, to reduce, hostile terrorist activity which was carried out from or under the cover of the greenhouses and was aimed at the road adjacent to the greenhouses. It was further held that the land clearing

operation put the operating forces at risk, risk which actually materialized when the forces that carried out the land clearing operation came under fire. On the other hand, it was held that the force that carried out the land clearing operation was a combined force of the army and the civil administration. In addition, the District Court held that in spite of the military-operational purpose of the operation, it did not have the nature of active combat or an "real time" operation, as the commander of the battalion of the area stated in his testimony. The process of deliberation and consultation which preceded the operation also served as an indication of its above nature. In view of all of the above, the court concluded that the land clearing operation was not a "wartime action", and therefore proceeded to the next stage in which it examined whether the elements of the tort of negligence existed in this case.

5. The District Court held, based on the judgment rendered in HCJ 24/91 **Timraz v. the Commander of IDF Forces in the Gaza Strip**, IsrSC 45(2) 325 (1991) (hereinafter: **Timraz**), that the authority of the state to carry out the land clearing operation stemmed from international law, which allows the destruction of private property where there is a military-operational need to do so and where a reasonable correlation exists between the military objective and the action taken. However, the court also ruled that in addition to the authority afforded to the state by international law, it is also subject to the principles of Israeli administrative law, as stated in HCJ 2056/04 **Beit Surik Village Council v. State of Israel**, IsrSC 58(5) 807 (2004). These principles – the court held – were not fully followed. It was held that the state should have officially notified the Plaintiffs, in writing, of its intention to carry out the land clearing operation. It was further held that the oral warnings given to the Plaintiffs that the army would have to destroy the greenhouses if the hostile terrorist activity carried out from within them did not stop, were not sufficient. The District Court rejected the state's claim that any prior notification of the land clearing operation would have put the operating forces at risk of an ambush or booby traps. The court held that a general notification of the intention to carry out the land clearing operation, without giving any details concerning the specific date set for the operation, could have been given. The District Court also held that Respondents' right to have a hearing was not properly fulfilled. It was held that although the right to have a hearing could not have been fully fulfilled in view of the risk that the date of the clearing operation would be revealed to hostile entitites, a short hearing could have been held before the military commander who arrived at the scene during a preliminary visit to the lcoation. It was held that the state could not rely on previous discussions held with the Respondents as those were held before the decision to carry out the operation was made. Finally, it was held that the land clearing operation was not the "less damaging measure" which could have been taken for the purpose of stopping the hostile terrorist activity. It was held that the most significant factor in putting an end to such terrorist activity was a military post which was built in the area, the erection of which did not require clearing the area surrounding it. In view of these administrative flaws, the court found that the state acted negligently in carrying out the land clearing operation.

6. The District Court also found that there was a causal connection between the negligence and the damage due to the fact that the execution of the land clearing operation without giving prior written notification and without a hearing "frustrated to a large extent Plaintiffs' ability to take action in an attempt to have the fateful decision withdrawn, or at least to reduce its scope". Therefore, the state was held liable for Respondents' damages.

   The District Court also held, beyond need, that the state may be held liable for damages under international law as well. This finding was based on the fact that in certain cases, the state does compensate, *ex gratia*, parties injured as a result of military actions. The District Court added that in **Timraz** it was held, with respect to cases of seizure and demolition, that:

> Article 53 of the Fourth Geneva Convention does not stipulate a duty to compensate. However, IDF authorities commonly compensate injured parties in the spirit of Article 52 of the Hague Regulations (whether under the Order concerning Claims (the Gaza Strip Area) (No. 425), 5732-1972, as amended, or *ex gratia* (**Timraz**, page 335).

   The District Court found that in this case "seizure and demolition" took place (rather than demolition only) and therefore the state had an obligation to compensate the Respondents for their damages in accordance with international law as well.

   Finally, the District Court held that a contributory fault at the rate of 40% should be attributed to Respondents due to the fact that although they were aware of the possibility that a land clearing operation would be carried out, they did not prepare themselves in advance for such occurrence and did nothing to mitigate their damages, by locating alternative land for the greenhouse, for instance, or by making the proper arrangements for transferring equipment away from the greenhouse.

   The Parties' Arguments

7. The state's arguments revolve around two main intersections: the classification of the operation as an activity which is not a "wartime action"; and the finding that the land clearing operation was affected by administrative flaws.

   The state claims that the objective of the operation – the prevention of shooting or other hostile terrorist activity – indicates that the operation was a "wartime action". The state further emphasizes the risk involved in the land clearing operation, a risk which, as mentioned above, materialized when the operating forces came under fire. The state claims that the mere fact that the operation was planned in advance and that legal consultation was obtained – do not nullify the "wartime" nature of the operation and that legal consultation and assistance obtained in the course of an operational activity, when possible, is required in order to uphold the proportionality principle. The state further claims that the definition of the term "wartime action" as it appears in Amendment No. 4 should have been applied by way of analogy, and it wishes

to rely, in that matter, on the judgment in CA 9561/05 **Hatib v. the State of Israel** (not reported, November 4, 2008) (hereinafter: **Hatib**).

As to the argument that the land clearing operation was not affected by administrative flaws, the state argues that the District Court deviated from the rule that the court does not replace the discretion of the competent authority – in this case the army - with its own discretion. According to the state, providing Respondents with written notice and holding a hearing could have put the operating forces at risk or postponed the operation which was urgent due to the prolonged hostile terrorist activity which was carried out from the area. The state claims that the army's position was formulated after having exercised its professional discretion. It is also argued that the finding that the military post should have been built first and the land clearing operation should have been carried out only later, if required, was not properly established. The state points out that the District Court found that the hostile terrorist activity in the area of the greenhouses was stopped as a result of a combination of several actions, including the erection of the military post and the land clearing operation. The state claims that in view of this finding it cannot be stated that the land clearing operation was not necessary. The state further claims that if and to the extent that the Respondents were of the opinion that the state's actions were affected by administrative flaws, they should have exhausted the administrative course of action, for which they had two days, after being given a specific oral warning in that regard. Finally, the state wishes to appeal the court's finding that it was liable under international law. According to the state, the fact that in certain cases it compensates injured parties *ex gratia*, does not entitle the Respondents to receive compensation under the law.

8. The Respondents, on their part, object to the granting of leave to appeal and are of the opinion that the state did not show real cause why a final judgment should not be rendered, following which both parties will have the right to file an appeal. On the merits, the Respondents claim that the state undertook, within the framework of another legal proceeding (HCJ 1075/97) to give the Respondents at least 30 days' advance written notice should a decision be made to demolish the greenhouses. It should be noted that according to the state, said proceeding pertained to an administrative demolition of the greenhouses, which, as the state claims, were built without a permit, and therefore its undertaking did not apply to demolition resulting from an operational need. As to the classification of the land clearing operation as an action which does not fall within the definition of a "wartime action", the Respondents rely upon the reasoning of the District Court and emphasize that according to the **Bani 'Odeh** precedent, the all the characteristics of the operation should be examined, and the fact that it had a military objective is not sufficient in order to classify it as a "wartime action". The Respondents also claim that Amendment No. 4 to the Civil Wrongs Law does not apply to events which took place prior to its enactment, including the case at hand, because the objective of the amendment was to expand the limited interpretation the courts had given in the past to the definition of "wartime action". The Respondents also note that Amendment No. 7 to the Civil Wrongs Law (which was partially struck down in HCJ 8276/05 **Adalah – The**

Legal Center for Arab Minority Rights in Israel v. the Minister of Defense (published in Nevo, December 12, 2006) provides that it may also be applied retroactively (as of a date stipulated by the Minister of Defense) and therefore, the legislator's silence in Amendment No. 4 indicates that its intention was that the amendment would apply only from here on in.

As to the state's negligence, the Respondents rely upon the findings of the District Court.

The Respondents further claim that during the short period of time they had available to them after having received a notification regarding the state's intention to demolish the greenhouses, their attorney contacted the state attorney's office both orally and in writing, but before these measures were exhausted. the greenhouses were demolished. Therefore, the Respondents claim that they did not have the chance to turn to the court in order to exhaust the "administrative course of action". Finally, the Respondents request that Regulation 410 of the Civil Procedure Regulations, 5744-1984 (allowing to discuss the motion as if it was the appeal itself) shall not be implemented so that instructions may be given to narrow the scope of issues to be discussed in the appeal and in order to enable the Respondents to file a counter-appeal.

9. We have resolved to discuss the motion as if leave to appeal were granted and as if an appeal were filed pursuant to the leave granted. The appeal is accepted. In view of this outcome, there is no longer any relevance to the findings of the District Court concerning contributory fault, and therefore we did not find that discussing the motion as if it were the appeal itself would have a detrimental effect on the Respondents' procedural rights. Furthermore, we did not find that the state's motion was undefined in a manner that would infringe upon Respondents' ability to respond to the arguments raised therein.

The Negligence Issue

10. The District Court based its finding of the state's negligence towards the Respondents on three main foci: the failure to provide written notice of the intention to demolish the greenhouses; the failure to hold a hearing before the commander on site and the use of an unnecessary injurious measure (in view of the availability of another, less injurious measure). The examination of these three foci leads to the conclusion that the finding concerning the state's negligence cannot be upheld.

    As to the first two foci – the failure to provide written notice and the failure to hold a hearing – even if we assume that the state was negligent (an assumption which is not clear of doubt) – there is no factual causal connection between this negligence and the damage caused to Respondents, i.e., the damage resulting from the demolition of the greenhouses. In order for a factual causal connection to exist, it is not enough that the alleged negligence of the state prevented the plaintiffs to take certain courses of action, the exercise of which *might* have prevented or reduced their damages. A factual causal connection exists only where it is established, on the balance of probabilities, that the courses of action the Respondents were denied, would have actually prevented

the damage or at least a part thereof. A vague chance to prevent the damage does not establish a causal connection. As held in **Malul** (CivFH 4693/05 **Carmel-Haifa Hospital v. Malul**, published in Nevo, August 29, 2010) it cannot even establish the right to relative compensation, on the probability that the damage would have been prevented had the Respondents been given written notification or a hearing before the commander on site. However, the Respondents did not raise any argument concerning probable compensation and therefore we shall not discuss this option at length.

In this case, it was not proven that had the Respondents been given written notification – after they were already given oral notices of the possibility that the state would have to demolish the greenhouses due to the terrorist activity which was taking place under their cover – they would have taken a different course of action. Furthermore, it was not proven that a different course of action would have brought a different result. The same applies to a hearing before the commander on site. The District Court accepted the state's argument that a "full" hearing could not be held before making a decision to carry out the land clearing operation. However, it was held that the Respondents should have been granted the opportunity to present their arguments to the commander on site *after* the decision to carry out the land clearing operation was made. It seems that the chances to succeed in an *ex post facto* hearing, during a visit held on site or after the arrival of the forces in charge of the demolition, are low. This does not mean that such a hearing is worthless, and indeed, the courts have held that where a "full" hearing may not be held, a hearing in a narrower format should be granted. However, the administrative flaw of denying a hearing, even in a narrow format, does not necessarily establish the right to be compensated in tort. The right to be compensated depends, at a minimum, on the existence of an adequate causal connection between the negligent act and the damage. The chances that a hearing held in the format that was available at the case at hand would have brought different results is not high enough to establish liability in tort. In any event, the burden of proving the existence of a causal connection lies on the Respondents – and they have not met it.

11. As to the third focus – selecting an unnecessary measure – the District Court held that "a combined system of measures caused the effectiveness of the damage to decrease (page 61 of the judgment). These measures included, *inter alia*, the erection of a military post. The District Court held, as aforesaid, that the erection of the military post did not require the clearing of the area surrounding it. The District Court based this finding on the testimony of the sector brigade commander, who testified that:

> It is preferable to have a completely clear area, but we live with a population and we do not want to destroy (things) for them. That is, the erection of the military post, at least as far as I am concerned, does not mean an immediate land clearing, which means complete destruction" (page 118 of the protocol).

In view of the above, the District Court held that an attempt should have been made to build the military position without demolishing the greenhouses.

However, a distinction should be drawn between the question whether the land clearing operation was required in order to build the military position – which was answered in the negative by the sector brigade commander in his testimony – and a completely different question, which is, whether the land clearing operation was required in order to prevent the hostile terrorist activity which was carried out under the cover of the greenhouses, as a complementary measure to the erection of the military post. With respect to this latter question, the sector brigade commander was asked in his cross-examination:

> So why did you not start with the erection of the military post following which you could have decided whether land clearing was required?"

The answer of the sector brigade commander was:

> Due to various operational considerations. In fact, it took many days to carry out the land clearing operation and many days to build the military post. It did not happen in one day.

After this answer, the sector brigade commander was no longer asked about the nature of the operational considerations he mentioned. It should be added that the sector brigade commander further said in his cross examination that the land clearing "did not fully solve [the shooting problem – E. R.], it held the shooting into Qalqiliya) page 115 of the protocol) and that a "significant decrease" in the shooting was caused "the land clearing, the military post, and a high observation point, arrests and so on, all put together". The sector brigade commander confirmed that out of all these measures the "most significant measure was the erection of the military post" and that the post had "a significant contribution within this combination", but he also clearly stated that "there is no one action, as good as it may be, that can stop the shooting. It is a combination of several things" (page 116 of the protocol).

An examination of all of the above does not support a finding that the hostile terrorist activity carried out under the cover of the greenhouses could have been prevented without the land clearing operation. The only fact that was established was that the erection of the military post *per se* did not require land clearing; This does not mean that land clearing was not required as an additional complementary measure in order to stop the terrorist activity. In fact, the sector brigade commander emphasized in his testimony that none of the measures mentioned was sufficient in and of itself to stop the shooting. In addition, the sector brigade commander pointed out in his testimony that a significant period of time was required for the erection of the military post as well as for the execution of the land clearing operation. It should also be taken into account that through-out that period, the hostile terrorist activity which was carried out under the cover of the greenhouses continued and put human life at an actual risk. In view of the above, it cannot be held, based on the above testimony of the sector brigade commander, that the erection of the military post alone, without carrying out land clearing, would have achieved the objective of the operation to the same extent.

12. We cannot deny that the answer given by the sector brigade commander to the question why the effectiveness of the military post alone was not examined before the decision to carry out the land clearing operation was made – "due to various operational considerations" – is somewhat vague. However, it was Respondents' attorney who chose not to further examine the sector brigade commander on this issue. In addition, the answer given by the sector brigade commander indicates that "such operational considerations" included the consideration that examining the effectiveness of the military post over a prolonged period of time could have extended the period during which human life would have been put at risk. In any event, in view of the fact that the sector brigade commander unequivocally testified that a combination of measures was required in order to cope with the shooting which was carried out under the cover of the greenhouses, it cannot be held, based on his testimony, that the land clearing was not necessary.

    Note: the burden of proving this argument – the argument of negligence – lies on the Respondents. The alleged negligence of the state – the failure to take a less injurious measure – gives rise to an administrative cause of action as well. However, this does not shift the burden imposed upon the plaintiff *in a damages claim* to establish the elements of the tort on the balance of probabilities.

    Finally, it should be pointed out that the District Court did not consider the question of whether or not the state owed a duty of care to Respondents, and more specifically – the question of whether or not a breach of an administrative duty that is incumbent upon the authority necessarily entails a breach of the duty of care incumbent upon it. As we have concluded that other elements of the tort of negligence were not established – negligence and causal connection – there is no need to discuss this complex issue.

Definition of "wartime action" and Amendment No. 4

13. In view of our finding that not all the elements of the tort of negligence existed in the state's action, it is no longer necessary to discuss the question whether this action was a "wartime action" providing the state immunity from liability. However, we shall briefly discuss the state's argument that Amendment No. 4 applies retroactively.

    The definition of the term "wartime action" underwent various changes (for a review see HCJ 8276/05 **Adalah – The Legal Center for Arab Minority Rights in Israel v. the Minister of Defense**, (IsrLR [2002] (2), 352, (hereinafter: **Adalah**) paragraphs 1-6 of the judgment of President A. Barak. In **Adalah** it was held that:

> Against the background of these events [the events of the second Intifadah, E.R.], and in view of the interpretation given to the expression “combatant activity” [wartime action, translator’s note] by the Supreme Court in *Bani Ouda v. State of Israel* [1], which in the opinion of the Knesset was too narrow, there was a further attempt to regulate in statute the question of the state’s liability for damage

> caused during the Intifadeh. The government-sponsored draft law that was formulated in 1997 was once again tabled in the Knesset. This time the legislative attempt was successful, and the Knesset adopted (on 24 July 2002) the *Torts (State Liability) Law (Amendment no. 4), 5762-2002* (**Adalah**, paragraph 6 of the judgment of President Barak; all emphases appear in the original).

Amendment No. 4 was similarly interpreted in later judgments and it was held that Amendment No. 4 should not be applied retroactively to events which occurred prior to its enactment. Thus, for instance, in CA 8384/05 **Salem v. the State of Israel** (published in Nevo, October 7, 2008) it was stipulated that "the court does not apply in this case Amendment No. 4 to the Civil Wrongs Law 5762, which has expanded the definition of the term 'wartime action' and has significantly narrowed the liability of the security forces acting within the framework of the confrontation with the Palestinians" (paragraph 3 of the judgment). In LA 10482/07 **Alauna v. the State of Israel** (published in Nevo, March 17, 2010) it was stipulated that "the Civil Wrongs Law, in its original version, did not include a definition of the term '"wartime action'. In 2002, the law was amended in order to clarify the term… the case before us occurred in 1992, and therefore this broad definition cannot assist us" (paragraph 8 of the judgment)(and see also LA 8484/06 **Nitzan v. the State of Israel** (published in Nevo, June 10, 2007).

14. The state requests, as aforesaid, to refer to the statements made in the aforementioned matter of **Hatib** in order to support its argument. In that matter it was held that the District Court used the definition of "wartime action" which was added in the framework of Amendment No. 4 "by way of analogy – *inter alia*, based on the assumption that it does not change the existing situation." (See paragraph 24 of the judgment). However, the state is not of the opinion that Amendment No. 4 did not change the definition set by the court in **Bani 'Odeh**. The state claims that the definition which was added to the Civil Wrongs Law within the framework of Amendment No. 4 should apply to this case just because it is broader than the definition used by the courts before Amendment No. 4. aas enacted Therefore, the statements made in **Hatib** do not support the state's position. Furthermore, in **Hatib**, it is precisely because the District Court assumed that Amendment No. 4 did not change the existing situation that it held that, "the applicability of the exemption provision was examined – by the two instances – in accordance with the relevant precedents (mainly **Bani 'Odeh).** Therefore, the claim that Amendment No. 4 applies to our case is rejected.

Liability under International Law

15. The District Court held, as foresaid, that the Respondents have a cause of action against the state under international law as well. This argument cannot be accepted within the framework of the proceeding before us. A civil action is not the adequate proceeding for examining the argument that the state breached the duties imposed upon it under international law, including the duty to pay compensation in certain cases. There is no dispute that the

Respondents, by themselves and as individuals, may claim their rights under the Hague Convention which was incorporated into the Israeli legal system as customary international law (see HCJ 606/78 **Ayoub v. The Minister of Defense** IsrSC 33(2) 113, 119-121(1979)). However, the claim that the state exceeded the powers vested in it under international law (for instance, because it did not comply with its duty to pay compensation for land expropriation) should be brought within the framework of an administrative proceeding, in accordance with security legislation enacted by the military governor in charge of Respondent's area, or within the framework of a petition filed with the Supreme Court sitting as the High Court of Justice (subject to the regular rules applicable to this proceeding).

Even if we assume that as far as a civil claim is concerned, the authority is not exempt from its liability only because the individual did not exhaust the administrative proceedings (although this may bear on the existence of contributory fault) – the situation is different when the individual wishes to use a non-tortuous cause of action, but rather an administrative or constitutional one. Therefore, Respondents' right to be compensated cannot be directly based on the breach of the state's duties under international law - at least within the framework of this proceeding.

Therefore, the appeal is allowed and the judgment of the District Court is abolished. Under the circumstance an order for costs is not rendered.

Vice President

Justice E. Arbel

I join the judgment of my colleague Vice President E. Rivlin.

The issue of the state's liability for a "wartime action" which grants the state immunity from liability underwent various changes (see, inter alia, HCJ 8276/05 **Adalah – The Legal Center for Arab Minority Rights in Israel v. the Minister of Defense**, (IsrLR [2002] (2), 352. The Knesset was of the opinion that the Supreme Court's interpretation of the term "wartime action" was too narrow, and on July 24, 2002 the **Civil Wrongs Law (Liability of the State)(Amendment No. 4) 5762-2002** LB 1862 was passed (hereinafter: **Amendment No. 4**), and the definition of the term "wartime action" was added.

Indeed, Amendment No. 4 does not apply to events which occurred before its enactment, as was also held in previous judgments of this court, referenced by my colleague in his opinion. The case at hand occurred in 1992, and therefore the broad definition of the term "wartime action" as it appears in Amendment No. 4 does not apply thereto (CA 5964/92 **Bani 'Odeh v. the State of Israel**, IsrSC 56(4) 1 (2002); CA 9561/05 **Hatib v. the State of Israel** (not reported, November 4, 2008)).

I agree with my colleague the Vice Presdient, that the finding of the District Court concerning the state's negligence cannot be upheld. It was not proven, before the District Court, that the failure to provide written notice to the plaintiffs of the intention to carry out the land clearing operation, the failure to hold a hearing before the commander on site, as well as the use of an unnecessary injurious measure, caused the damage incurred in the demolition of greenhouses. Causal connection between the negligence and the damage was not proven. The Respondents failed to meet the burden placed upon them.

I therefore concur with and join the conclusion of my colleague that the examination of the entire circumstances of the case does not enable us to hold that the prevention of the hostile terrorist activity which was achieved by the demolition of the greenhouses could have been achieved without the land clearing operation, even if it was established that land clearing was not required in order to build the military post.

As aforesaid, like my colleague, I am of the opinion that the appeal should be allowed and the judgment of the District Court should be abolished.

Justice

Justice H. Melcer:

I agree with and join the judgment of my colleague, Vice President **E. Rivlin**.

I am also of the opinion that the Respondents do not have a cause of action in tort against the state, but it seems to me that it would be adequate to consider – taking into account the entire circumstances of the case – to somehow compensate the Respondents in accordance with security legislation enacted by the military governor in charge of their area, or *ex gratia* (see: HCJ 24/91 **Timraz v. the Commander of IDF Forces in the Gaza Strip**, IsrSC 45(2) 325 (1991)).

Justice

Held as specified in the judgment of the Vice President E. Rivlin.

Rendered today, 11 Av 5771 (August 11, 2011).

Vice President Justice Justice