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ISRAEL: COMPENSATION FOR VICTIMS OF TERRORISM

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ISRAEL

COMPENSATION FOR VICTIMS OF TERRORISM

Executive Summary

Victims of terrorist acts may be eligible for compensation for bodily harm, as well as for property damages from public funds. Compensation for the former may be made through the National Insurance funds and for the latter from a special fund established through a property tax special allocation. Application for state compensation does not result in the elimination of the right to bring a tort action against persons who are responsible for the damage, whether or not their identities are known at the time of filing the claim. Israel's Supreme Court has recently ruled that the question of whether acts of terrorism could be covered by sovereign immunity depends on the circumstances of each case and can be addressed only after a determination of the State's recognition of an entity as sovereign.

I. Introduction

As a result of its long exposure to terrorist attacks, Israel has developed a comprehensive body of law regarding rehabilitation, treatment, and compensation of victims of terrorism. Under Israeli law, victims of terrorist attacks may be compensated for both physical and property damages. Compensation is provided from state funds specifically designed for such events. Application for state compensation does not result in the elimination of the right to bring a tort action against persons who are responsible for the damage, whether or not their identities are known at the time of filing the claim.

There are two major pieces of legislation in this area: First, the Victims of Hostile Action (Pensions) Law, 5730-1970,¹ *as amended*, (hereafter, the Law) in combination with various other laws, provides for special pensions for victims or their families to be paid by the Social Security Agency. Regulations issued under the Law provide for compensation for medical treatment, professional rehabilitation, burial, and living expenses.² Second, the Property Tax and Compensation Fund Law, 5721-1961,³ *as amended*, provides for compensation for "war damage," including terrorist actions, from a special fund derived from property taxes. Damages include direct and indirect damages, such as the loss of profits.

¹ Victims of Hostile Action (Pensions) Law, 5730-1970,¹ as amended, 24 Laws of the State of Israel (hereafter LSI) 131 (5730-1969/70).

² For general information on eligibility and benefits see *Victims of Hostile Actions*, THE NATIONAL INSURANCE INSTITUTE OF ISRAEL website, in Hebrew, <http://www.btl.gov.il/NR/exeres/59828DD7-3C72-4C8E-BFDE-2A4330AC995E.htm> (last visited Oct. 30, 2007).

³ Property Tax and Compensation Fund Law, 5721-1961, as amended, 15 LSI 101 (5721-1960/61).

II. Compensation from Public Funds

A. Compensation for Bodily Harm

1. Eligibility Criteria for State Pensions Under the Law

To be eligible for benefits, a person is generally an Israeli citizen, resident, or legal alien and has to have sustained “an injury from a hostile action” in Israel, the West Bank, or the Gaza Strip.⁴ “An injury from a hostile action” is defined as an injury caused through hostile actions by military, semi-military, and irregular forces of hostile states or organizations, or in the course of assisting any of them, acting as their agents or on their behalf or in order to promote their interests. In accordance with a 2007 amendment an injury that occurred outside Israel, the West Bank, or Gaza may also give rise to eligibility for state pensions as long as its objective was harm to Israel.⁵ An earlier amendment from 2005 extended eligibility deriving from hostile actions also to Israeli residents harmed by a hostile action directed against the Jewish people, as long as its main objective is to harm the Jewish people. The law specifies, however, that the amount owed to an Israeli resident so harmed outside Israel under foreign law or by the foreign country will be deducted from the amount of compensation he or she is owed under Israeli law.⁶ The addition of violent crimes, motivated by anti-Semitism, perpetrated on Israeli residents outside Israel was meant to apply to the increased rate of anti-Semitic actions outside of Israel following the *Al-Aqsa Intifada*, the Palestinian uprising that commenced on October 1, 2000.⁷

In addition to intentional injuries deriving from hostile actions, an injury received negligently as a consequence of hostile actions or through arms intended to counter such actions may be also recognized as “an injury from a hostile action”.⁸

A 2006 amendment added to the definition of hostile actions that may give rise to an entitlement under the law any harm resulting from an act of violence for which the primary objective is harming a person because of his national-ethnic origin, as long as it is derived from the Arab-Israeli conflict.⁹ The amendment was designed to extend the previously limited ground for qualification from actions by or on behalf of states or organizations hostile to Israel to all actions of violence based on nationalistic or ethnic motives that derive from the Arab-Israeli conflict. According to the Bill’s explanatory notes the extension was added following the murder of four Israeli citizens of Arab descent by a Jewish man. In the absence of entitlement under the pre 2006 law, relatives of the victims obtained special ad-hoc compensation but did not qualify for a status of “victim of hostile actions.”¹⁰ The amendment thus has equated the rights of victims of hostile actions perpetrated either by Jewish or Arab terrorists.

⁴ Victims of Hostile Action (Pensions) Law, 5730-1970,⁴ as amended, §1(1), 24 LSI 131 (5730-1969/70).

⁵ *Id.*, read in conjunction with Social Security Law [Consolidated Version] 5755-1995 § 378, SEFER HA-HUKIM [Book of Laws, official gazette, hereafter S.H.] No. 1522 p. 210 (5755-1995). See State Economy Arrangements (Amendments Designed to achieve the budget goals and the economic policy for fiscal year 2007), 5767-2007 S.H. No. 2077 p. 52 (5767-2007). The bill and explanatory notes are available on the Knesset (parliament) website, www.knesset.gov.il (last visited Oct. 30, 2007).

⁶ Victims of Hostile Action (Pensions) Law, 5730-1970 as amended, §18a, 24 LSI 131 (5730-1969/70). Amendment passed on December 7, 2005, Victims of Hostile Action (Pensions, Amendment No. 22) Law, S.H. No. 2040 p. 94 (5766-2005).

⁷ Victims of Hostile Action (Pensions) (Amendment No. 22) Law, S.H. No. 2040 p. 93 (5766-2005) and Knesset Bill No. 90, the Knesset website www.knesset.gov.il; for information on the Palestinian uprising see *AL-AQSA INTIFADA*, GlobalSecurity.Org, <http://www.globalsecurity.org/military/world/war/intifada2.htm> (last visited Oct. 30, 2005).

⁸ Victims of Hostile Action (Pensions) Law, 5730-1970, as amended, §1(2-3), 24 LSI 131 (5730-1969/70).

⁹ *Id.* § 1(4), based on Compensation for harm resulting from an act of violence deriving from the Israeli-Arab conflict (Amendments), 5766-2006, S.H. No. 2062 p. 387 (5766-2006).

¹⁰ Compensation for harm resulting from an act of violence deriving from the Israeli-Arab conflict (Amendments) Bill, 5766-2005, Government Bill No. 212 p. 138 (5766-2005).

When an injury from a hostile action has caused the death of the victim, certain family members, as defined by law, become entitled to pensions. The law establishes a presumption that when an injury has been sustained by a person under circumstances affording reasonable grounds for believing that he has sustained such an injury, the injury shall be regarded as enemy-inflicted unless the contrary is proved.¹¹

2. Scope and Types of State Services and Pensions

A precondition to any claim under the law is a certificate from the certifying authority, which is composed of the Minister of Defense in consultation with the Minister of Labor, or from the Appeals Committee, that the injury was caused by a hostile action.¹² Injuries may qualify for entitlements under the law if they occurred in Israel, in areas held by the Israeli Defense Forces,¹³ or outside Israel by persons employed by the State of Israel or its designee and during such employment.¹⁴ Persons belonging to hostile powers, supporting them, or acting as their agents in order to further their goals are not entitled to benefits prescribed by law.¹⁵ A person who has sustained a certified hostile action injury will be addressed here as the victim.

3. Victims' Entitlements

Once the injury is certified, the victim is entitled to medical treatment as well as occupational rehabilitation. Medical treatment includes hospitalization, receipt of medications, and the supply, repair, or replacement of orthopedic and therapeutic equipment. Entitlement for the above benefits also includes transportation or reimbursement for treatment costs.¹⁶ Occupational rehabilitation benefits include professional training in institutions for higher education.¹⁷

In addition to medical and rehabilitation services, the victim is entitled to pensions in accordance with the degree of disability that was recognized by the doctor or the medical committee appointed for this purpose, in accordance with the National Insurance Law (Consolidated Version) 5755-1995.¹⁸ The victim is further entitled to a state participation in payment of premiums to life insurance.

4. Relatives' Entitlements

If an enemy-inflicted injury has caused the death of the victim, the family members are entitled to various pensions. Widows are entitled to monthly pensions, the size of which depends whether there are orphans left and whether they have special needs. Widows are also entitled to higher retirement pensions. Parents of victims, children orphaned from both parents, and grandparents who were dependent on the

¹¹ Victims of Hostile Action (Pensions) Law, 5730-1970, 24 LSI 131 (5730-1969/70) as amended, § 2.

¹² *Id.* § 12.

¹³ Victims of Hostile Action (Determination of an Area held by the Israeli Defense Forces), 5731-1971, Kovets Hatakanot (Subsidiary Legislation, hereinafter KT) 163 (5731-1971), as amended.

¹⁴ Victims of Hostile Action (Grant of Pensions to a Foreign Resident) Regulations, 5734-1974, KT 566 (5734-1974), *as amended*.

¹⁵ *Id.* § 19b.

¹⁶ National Insurance Law (Consolidated Version), 5755-1995, ch. E, part c, S.H. 210 (5755-1995), *as amended*, applicable in accordance with the Victims of Hostile Action (Pensions) Law, 5730-1970, 24 LSI 131 (5730-1969/70) as amended § 3.

¹⁷ *See* Victims of Hostile Action Pensions (Application of Regulations Regarding Professional training, Guarantees and Medical Insurance) Regulations, (5732-1971), KT 110 (5732-1971).

¹⁸ S.H. 5755 No. 1522, p. 210 (May 15, 1995).

victim are also entitled to pensions. Parents and widows get yearly paid vacations.¹⁹ Relatives of victims may also qualify for financial warranties for such costs as higher education and housing.²⁰

Family members of the deceased victim are also entitled to burial expenses and to additional expenditures for maintenance of the burial place and the tomb. Family members of victims who died outside Israel or those who died in Israel but reside abroad are entitled to reimbursement for transfer expenditures of the corpse to Israel or to a foreign country. Such expenditures include payment for services provided by an institute of pathology, and transfer of the corpse to and from an airport or seaport, as well as its transfer by public transportation and the round-trip ticket for one accompanying party.

On May 21, 2007, the Knesset (Israel's Parliament) passed an amendment to the Social Security Law. The provisions of the amendment became effective on June 1, 2007. According to the law in force prior to that date, no monetary benefits were paid to a person if the event establishing a right to such benefits occurred in the process of the person's commission or attempt to commit a crime or as a result of or in connection with such actions. The amendment further disqualifies single parents whose spouses died in the process of perpetrating a crime of terrorism from receiving single-parent education grants for their children. The amendment also nullifies the eligibility of persons convicted of murder for nationalistic motives (i.e., terrorism) for financial benefits based on old age after release from prison.²¹

5. Choice of Compensation from Pension Fund or Through a Tort Action

In accordance with section 17 (b) of the Law, as amended, a person entitled to a pension under this law, as well as compensation under the Civil Wrongs Ordinance (New Version), will be subject to the conditions enumerated in the Invalids (Pensions and Rehabilitation) Law, 5719-1959 (Consolidated Version) (hereafter the Invalids Law)²² *mutatis mutandis*. Accordingly, the victim may take legal action in order to obtain compensation under both laws but cannot get compensation from both sources. If the victim was paid by the State, the State has a right to be reimbursed for its payments from the person who committed the tort giving rise to the entitlement. The victim may, but is not obligated, to return payments received from the State.

6. Leading Case Interpreting the Victim's Right of Choice

A 1999 decision of the Israeli Supreme Court in the matter of *Hilla Wise et al. v. Mack et al.*²³ determined that a handicapped person who is qualified to receive payments from the Social Security Agency (SSA), based on being recognized as a victim of a hostile action, should not be prevented from instituting a tort action against the tortfeasor. The State has an independent right of indemnity, rather than that of subrogation against the tortfeasor.

The Court held that the acceptable interpretation, at the time of the writing of this decision, was that by receiving compensation from the State fund, the victim forfeited the right to full compensation (which may be in excess of the payment made by the State) based on a tort action. The court determined that this interpretation violated the victim's right to physical integrity and property, guaranteed under Basic Law: Human Dignity and Freedom. Therefore, the status of the victim, who is entitled beforehand

¹⁹ Victims of Hostile Action (Pensions) Law, 5730-1970,¹⁹ as amended §1, 24 LSI 131 (5730-1969/70). §§ 7 and 16a. See also Fallen Soldiers' Families (Pensions and Rehabilitation) Law, No. 49 (5710-1950), 4 LSI 115 (5710-1950), some provisions of which apply *mutatis mutandis*.

²⁰ See Victims of Hostile Action Pensions (Application of Regulations Regarding Professional Training, Guarantees and Medical Insurance) Regulations, (5732-1971), KT 110 (5732-1971).

²¹ Social Security Law (Amendment No. 95), S.H. No. 2096 p. 317 (May 30, 2007); see also related 2004 bill, at Hataot Hok (Bills) No. 56 p. 23 (November 15, 2004).

²² THE INVALIDS LAW § 36, 13 LSI 315 (5719-1958/59).

²³ 53(2) Piske Din (Decisions of the Supreme Court, hereafter PD) 79 (5759-1999).

to lodge the two actions, one against the SSA, and second against the tortfeasor, does not change with the receipt of a pension from the SSA.

The Court rejected the claim that the plaintiff had to receive prior permission from the SSA, and required the victim to return pension payments before lodging the tort action. Such a requirement would effectively void the option of the plaintiff to get compensation either from the SSA or from the tortfeasor. Most victims could not return the money before being compensated by the tortfeasor. In addition, if by lodging the tort action against the tortfeasor, the victim forfeits his right to the pension, it is unlikely that any victim would dare to be a party to a tort trial when success is not guaranteed. Such an arrangement, therefore, was deemed by the Court to be unreasonable because it realistically negated the choice by the victim in obtaining compensation. Instead, the Court held that the right of the victim to receive the SSA pension remains valid until the time when the tort action has been resolved.

B. Compensation for Property Damages

Persons incurring property damages as a consequence of terrorist actions may be compensated for such damages by the State through a special compensation fund established under the Property Tax and Compensation Fund Law, 5721-1961.²⁴ According to the law, property tax is collected from owners of property in respect of any tax year or portion thereof on the property that they have in that year. Ten percent of property tax (and fifteen percent of property appreciation tax) will be directed to a special compensation fund.²⁵ Amendments to the law have resulted in exempting unused land from taxation.²⁶

The law specifically authorizes the Minister of Finance with the approval of the Finance Committee of the Knesset (Israel's parliament) to pass regulations for the distribution of compensation for damages caused by hostile actions. The latter are defined by the law as actual damage to property (including house wares available at damaged residences) and loss incurred by prevention of profit or lack of ability to use the property.²⁷ According to regulations issued under the law,²⁸ compensation for indirect damages may be paid during a reasonable time period necessary for repair of the property. If the damage was caused to residential property, the resident may be entitled to either permanent (in the case of full destruction) or temporary replacement (in the case of partial destruction). The regulations further provide that when the real damage (the difference between the value of the property before and after the occupancy of the damage) exceeds the amount received from an insurance company or from another person, the victim is entitled to the balance. Any amount of tax owed will be deducted from the award paid to the victim. Contributory negligence in securing property may negate entitlement for compensation.

III. Suits against Sovereigns and Quasi-Sovereigns by Victims of Terrorism

Israel recognizes the rule of state immunity in its restricted form. Leading or supporting terrorism in any way is not recognized as a state function that entitles a foreign state or a quasi-state to sovereign immunity from law suits in Israeli courts.

²⁴ 15 LSI 101 (5721-1960/61).

²⁵ *Id.* ch. 2.

²⁶ *Id.* § 12.

²⁷ *Id.* §§ 36(c) and 38(b).

²⁸ Property Tax and Compensation Fund (Payment of Compensation) (War and Indirect Damages), 5733-1973 KT 1682 (5733-1973), *as amended*.

A. The Doctrine of State Immunity

A 1997 decision by the Supreme Court defines the validity and scope of application of the doctrine of sovereign immunity in Israeli law.²⁹ The case involved a request for a declaratory judgment that a rental contract between the petitioners and the Government of Canada had expired and that the latter should leave the property and return it to the petitioners. The Government of Canada rejected the authority of the Israeli court by claiming full sovereign immunity. In a comprehensive decision, analyzing Israeli law as well as recent relevant treaties, the laws of the civil countries, the United Kingdom, the United States, and Canada, the Court rejected the respondent's sovereign immunity claim.

Supreme Court President Barak held that there was no special legislation in Israel on the subject of sovereign immunity. The law on sovereign immunity, therefore, derives from customary international law. Based on earlier decisions, customary international law forms part of the law of the State as long as it does not contradict Israeli domestic legislation.

Traditionally, customary international law recognized foreign state immunity for all state actions; the scope of such immunity, however, has changed from full immunity to restrictive immunity. At the essence of this change is, among other things, the evolution in the activities of states from exclusively sovereign activities to sovereign as well as commercial activities. The accepted approach in customary international law is that a distinction should be made between those which are actions of the foreign state as a sovereign (*acta jure imperii*) and those which are not. Examples of sovereign actions by the foreign state include confiscation of property for national needs or a cancellation of a license for reasons of the public welfare. Non-sovereign actions include a contract for sale of foreign government bonds to a government company. In evaluating which actions are sovereign actions and which are not, the court should balance several conflicting considerations. On the one hand, the court should consider the individual's rights, the principle of equality before the law, and the rule of law. On the other hand, the court should consider the interest of the foreign state in realizing its political goals without judicial review in another country. The common, even if not uniform, view in customary international law is that the test of which activity is sovereign and which is not is based on examination of the nature and not the purpose of the state activity.

In applying the above tests to controversies related to the purchase or rent of property to foreign embassies, President Barak held that the rental contract is a contract subject to application of private law. Every person, not only a state, may engage in such a contract. The execution of such a contract does not involve governing considerations. There is no difference between a contract for a purchase of property for use by an embassy and a contract for purchase of food for use by the ambassador. The ambassador needs both, and neither reflects the sovereign character of the foreign state.

The Court held that the rental transaction in the case at hand was a transaction based on private law and did not involve any application of statutory authority by Canada. Therefore, it was not subject to the application of the rule of foreign state immunity.

B. Suits against the Palestinian Authority (PA) by Victims of Terrorism

A 2003 decision of the Jerusalem district court³⁰ combined fifteen lawsuits for monetary and physical damages caused by terrorist actions during the second *Intifada*. The fifteen cases were combined because they raised identical questions regarding the legal status of the PA and its alleged entitlement for state immunity.

Among the terrorist actions that gave rise to the law suits were the kidnapping and killing of two Israelis in a restaurant in Tul Karem, the lynching of two Israeli reservists in Ramalla, the bombing of a

²⁹ Her Majesty the Queen in Right of Canada v. Sheldon Edelson et al., 51 PD 625 (1997).

³⁰ Civil case 2538/00 Irena Litvak Nuritz et al. v. the PA and Yasser Arafat (Mar. 30, 2003), available at the Nevo legal database at www.nevo.co.il (by subscription).

bus for children in Kfar Darom, the suicide bombing on bus no. 5 in Tel Aviv, as well as the kidnapping and the killing of a sixteen-year-old from Jerusalem in Ramalla. Additional suits for monetary losses include a law suit by the Menora Insurance Company for damages caused by the PA's encouragement and lack of prevention of numerous car thefts from Israel to the PA-governed territories, and a law suit by an oil company for breach of commercial agreements.

After the district court ruled for the plaintiffs the PA petitioned to the Supreme Court for a right of appeal. The PA argued that the nature of its actions that were the subject of the various tort actions against it was governmental and therefore subject to sovereign immunity.

In a unanimous opinion by Deputy President Rivlin rendered on July 17, 2007, the Supreme Court rejected a request for appeal on the 2003 district court decision.³¹ Deputy President Rivlin noted that the district court had opined in an *obiter dictum* that the character of the tort actions which were subject of the suit lacked any governmental character, and therefore could not be covered by sovereign immunity. She determined, however, that deciding on this issue at this stage was premature. This is because the adjudication of each action would require a separate recognition of the legal status of the PA by the executive branch and not by the court. As noted by the district court, recognition of the State of Israel in the legal status of the PA, or of any other legal entity, can be proved by a certificate signed by the Minister of Foreign Affairs. The request for appeal in this case completely disregarded the issue of whether the PA is entitled to sovereign immunity in the first place and, instead, centered on the scope of such potential immunity, if it applied. The question of whether the scope covers the torts actions that were the subject of the suit is only relevant if the PA is entitled to such immunity, an issue that will be determined, if necessary, in continuing litigation.³²

IV. Concluding Remarks

Having been subjected to numerous terrorist attacks throughout its almost sixty years of existence Israel has established an elaborate scheme of compensating civilians who were harmed either physically or financially. Special grants and subsidies were established for victims and their families who were found eligible for compensation. Application for compensation by state funds does not negate the right of the victim and his family to sue the perpetrator in a tort action. The State, however, has a right of indemnity from the money paid to the victim by the tortfeasor.

In a recent July 2007 case the Supreme Court held that sovereign immunity, when recognized by the State, only provides relative and limited immunity specifically for clearly distinguished cases where the dominant basis in the activity of the other State that is subject of the immunity claim is of a governmental nature. The Court determined that the question of whether the actions which were the subject of multiple tort suits against the Palestinian Authority qualify as sovereign actions cannot be

³¹ Request for Civil Appeal 4060/03 The Palestinian Authority v. Eliyahu Dayan et al., *available at* the State of Israel: The Judicial Authority website, http://elyon1.court.gov.il/heb/verdict/search/verdict_by_misc_rslt.aspx?judge_name=&side_nm=%E4%F8%F9%E5%FA+%E4%F4%EC%F1%E8%E9%F0%E9%FA&lawyer_nm=&mador_nm=&verdict_pages=0&verdict_dt_from=2007-6-29&verdict_dt_from_yr=2007&verdict_dt_from_mon=6&verdict_dt_from_day=29&verdict_dt_to=2007-10-29&verdict_dt_to_yr=2007&verdict_dt_to_mon=10&verdict_dt_to_day=29&fullText=&cmd=AND&fullText2= (July 7, 2007).

³² See also THE SUPREME COURT: TORT ACTIONS AGAINST THE PA WILL BE EXAMINED SEPARATELY, YEDIOT ACHARONOT ONLINE, <http://www.ynet.co.il/articles/0,7340,L-3426298,00.html> (last visited July 17, 2007) (in Hebrew).

addressed until a determination is made as to whether the State of Israel recognizes the PA as a sovereign authority at the time each separate tort suit is reviewed by the courts. Such recognition is made by the executive branch in Israel based on factual and political considerations, and not by the judicial branch.

Prepared by Ruth Levush
Senior Foreign Law Specialist
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