

# PROVIDING COMPENSATION FOR HARM CAUSED BY TERRORISM: LESSONS LEARNED IN THE ISRAELI EXPERIENCE

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## INTRODUCTION

Terrorism has existed in Israel in various manifestations and degrees for several decades now. This paper is being written as Israel is experiencing one of the most severe waves of terrorism in its history, killing hundreds of civilians, leaving behind thousands of wounded, and causing significant damage to much of the business community and to the economy.

Israel has devised comprehensive legislative responses<sup>1</sup> to two of the primary issues arising in the context of compensation for harm caused by terrorism. First, the Victims of Hostile Action (Pensions) Law, 1970 (“VHAPL”),<sup>2</sup> provides compensation for bodily injuries suffered in terrorist attacks, as well as compensation to family members of deceased victims. Second, the Property Tax and Compensation Fund Law, 1961,<sup>3</sup> provides compensation for property damage caused by terrorism.

The resulting Israeli system of compensation, following several major modifications, has now reached stability. It is, unfortunately, the product of significant experience in administration, both in terms of the time period involved and the number of events and victims involved.

The main difference between the compensation scheme devised in the United States following the events of September 11, 2001 (“9/11”) and the Israeli system is that the Israeli scheme is a permanent system, continually in place, the result of extensive and lengthy consultation, rather than an ad hoc quick fix arrived at under severe time constraints in the emotional aftermath of major terrorist attacks and causing multiple issues of inequity.

Yet, not all types of harm caused by terrorism are covered by these permanent legislative schemes. The loss of income suffered by businesses is

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1. One commentator analyzing all legislative measures (including criminal law and the effect of anti-terrorism laws on civil rights) in three countries affected by terrorism (Great Britain, Japan and Israel) described the Israeli legislation providing assistance to victims of terrorism as “[t]he most striking Israeli legislation.” Matthew H. James, *Keeping the Peace—British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 DICK. J. INT’L L. 405, 438 (1997).

2. 24 L.S.I. 131, (1969-70).

3. 15 L.S.I. 101, (1960-61).

generally not compensated, except in some cases involving ex post negotiations between the business community, the government, and regulators.

Part I of this paper describes and analyzes the compensation for bodily injuries and the compensation to family members of deceased victims offered by the Israeli government. Part II of the paper describes and analyzes the compensation for property damage caused by terrorism. In the first two sections, I have provided a rather comprehensive account of the Israeli compensation schemes, primarily in the footnotes, for those readers who may be interested in the details. Part III of the paper provides observations on the advantages and disadvantages of a permanent compensation scheme, such as the Israeli scheme, as compared with the compensation scheme devised in the United States for victims of the 9/11 tragedy.

## I. COMPENSATION FOR BODILY INJURIES AND DEATH

### A. *A Brief History of Israeli Compensation of Civilians for War and Terrorism Damage*<sup>4</sup>

Israel was born in a long independence war, followed by five wars in a period of forty-four years and frequent waves of terrorism. Both the wars and the terror acts have affected Israel's civilian population, and, in certain cases they could not be easily distinguishable from each other.<sup>5</sup> Since the early days of the state, the Israeli legal system provided for compensation to civilians who were wounded and to the families of those killed as a result of war or terrorist attack. The original legislative scheme was limited to compensation for harm caused by war. When terrorism emerged as a permanent feature of the Middle East conflict, compensation was extended to civilian victims of terrorism.

As an Israeli professor of social work has correctly observed, although most social welfare programs in Israel have been going through major financial cuts, the compensation schemes for victims of war and terrorism have been enlarged, adding more benefits for more recipients.<sup>6</sup>

On November 29, 1947, the United Nations (U.N.) decided to establish a Jewish state and an Arab state in the territory under a British mandate, and the state of Israel declared its independence on May 14, 1948, pursuant to the U.N. decision. Since Israel's Arab neighbors refused to accept the U.N. plan or to recognize the state, Israel started its existence with a lengthy independence war, terminating with an armistice in February 1949. With the Declaration of Independence, the interim government established the Ministry of War Victims,

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4. For a comprehensive historical analysis, see Uri Yanay, *Ha-siyua Le-ezrahim Nifgaey Peulot Eiva* [*The Assistance to Civilians Harmed by Hostile Acts*], 40 BITACHON SOCIALI 35 (1993).

5. At the present time, for example, several of the terrorist attacks on Israeli civilians were sponsored by semi-formal or formal organizations of the Palestinian Authority. The distinction between "war" and "terrorism" may also involve political views.

6. Yanay, *supra* note 4, at 36.

which operated under emergency legislation to assist war victims and refugees. In 1951, the first law providing compensation for property damage was enacted.<sup>7</sup>

After the final armistice was signed in 1949, there was hope that the state would be secure enough to develop normally. Within a few years, however, it became clear that this was not the case. The primary security problems were border raids by individuals and small groups who caused death, injury, and property damage in the border towns and villages. At first, the government provided compensation to some of the victims on a case-by-case basis and without any clear legislative criteria.<sup>8</sup> As a result of the increase in cross-border attacks,<sup>9</sup> in 1956 the government introduced legislation providing compensation to civilians residing in or employed in frontier areas.<sup>10</sup>

The main problem with the 1956 law was that it only applied to those injured in geographical proximity to the border. Following the Six-Day War in 1967, anti-Israeli terror expanded to the streets of centrally-located Israeli cities as well as to Israeli establishments abroad and to Israelis visiting abroad. As a direct result of the change in reality,<sup>11</sup> the government introduced the Victims of Hostile Actions (Pensions) Law, 1970,<sup>12</sup> a more comprehensive compensation scheme, which, as amended, remains the basis of current law.

During the Knesset's deliberation on VHAPL, it was decided to equate the benefits given to injured civilians and to the families of victims of war or terrorism with the benefits provided to injured soldiers and to the families of soldiers killed in action, respectively. With that law, as amended over the years,<sup>13</sup> a comprehensive scheme was enacted that provides compensation for security-related harm caused to civilians.

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7. War Damage Compensation Tax Law, 1951, 5 L.S.I. 33, (1950-51).

8. Statement of the Minister of Justice, Pinchas Rosen, when introducing the Border Victims (Benefits) Law, D.K. (1956) 32.

9. Between 1949 and 1956, 434 citizens were killed by cross-border attacks. Statement of Knesset's Labor Committee Chairman, M.K. Akiva Guvrin, D.K (1956) 440.

10. Border Victims (Benefits) Law, 1956, 11 L.S.I. 19, (1956-57).

11. "Existing law was fit to the security situation of that time, when hostile acts harmed mostly residents of border areas . . . but now, that frontier has widened to other areas of the country and it had even expanded beyond state borders." Statement of the Minister of Labor, Yossef Almogi, when introducing VHAPL, D.K. (1969) 284-85.

12. *See supra* note 2 and accompanying text.

13. Most amendments over the years served to further equate the benefits to civilian victims with those of injured soldiers and the families of soldiers killed in action. For example, a 2000 amendment provided reimbursement for money spent on maintenance of the grave of a victim of hostile act, since the graves of soldiers killed in action are maintained by the Ministry of Defense. Explanatory Notes, Draft bill amending VHAPL (no. 18) (Refund of Expenses for Maintenance of Grave), 2000 H.H., 314.

*B. The Rationale for Compensation by the Government*

When the first compensation was enacted in 1951,<sup>14</sup> the rationale behind it was clear. As put by the Knesset's (Israel's Parliament) Finance Committee Chairman, M.K. David Pinkas, "It is inconceivable that the damage from this war which we had to withstand will be borne by individuals and not by the whole public."<sup>15</sup>

Interestingly, the same principle had led then British Prime Minister Winston S. Churchill to determine, during the German Blitz against England in World War II, that it was "unfair for British society to place the entire burden of the destruction on those unlucky enough to be hit."<sup>16</sup> Churchill thus ordered:

that all damage from the fire of the enemy must be a charge upon the State and compensation be paid in full and at once. Thus the burden would not fall alone on those whose homes or business premises were hit, but would be borne evenly on the shoulders of the nation.<sup>17</sup>

The risk-spreading policy applicable to war holds true with respect to terrorism to an even greater degree. In most cases of war, the burden of casualties is borne by members of the military. Most countries provide benefits to the victims of their armed forces and their families.

Terrorism, however, is a type of war in which the enemy, the terrorist organization, selects random civilians as its target. In the war declared by terrorist organizations, civilians are drafted involuntarily by the cruel decision of the enemy. They are hurt solely for being citizens of a certain country or visitors to that country. The rationale of providing compensation to those civilians may be viewed as an extension of customary compensation of members of the armed forces.

A compensation scheme against terrorism damage may also be viewed as a result of the state's duty to protect its citizens against terrorism. If that duty is viewed as absolute, the state would have to compensate its citizens. Traditional economic analysis of tort law, which looks for ways by which the victim could have minimized the risk of losses, can be applied only in a limited way in terrorism cases. That analysis is hard to apply to innocent airline passengers or World Trade Center employees who were murdered on 9/11. Leon Klinghoffer, the disabled sixty-nine-year-old American who was brutally murdered by terrorists in 1985, merely took a cruise on the *Achille Lauro*, where he met his killers.

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14. See *supra* note 7.

15. D.K (1951) 983.

16. As described in *Green v. Smith & Nephew AHP, Inc*, 617 N.W.2d 881, 888 n.3 (Wis. Ct. App. 2000), *aff'd*, 629 N.W.2d 727 (Wis. 2001).

17. WINSTON S. CHURCHILL, *THEIR FINEST HOUR* 349 (1949). I am indebted to Marshall S. Shapo, who brought this Churchill quote to my attention in his paper published in this issue of the *INDIANA LAW REVIEW*. Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 36 *IND. L. REV.* 237 (2003).

In Israel, where every restaurant and bus has become a potential frontline in terror's war, the rationale of viewing the civilian victims of terrorism as involuntary soldiers has been taken even further. As mentioned above, under current law, the benefits provided to those wounded in terrorist attacks and the families of those killed in terrorist attacks have been equated to the benefits provided to injured soldiers and to the families of soldiers killed in action.

*C. What is Terrorism? (or: When in Doubt, It Must be Terrorism)*

Current Israeli law makes no distinction between civilians harmed by war and civilians harmed by terrorism. Both situations are now part of the definition of an "enemy-inflicted injury," the central term of VHAPL. An "enemy-inflicted injury" is defined by that law as any of the following:

- (1) [A]n injury caused through hostile action by military or semi-military or irregular forces of a state hostile to Israel, through hostile action by an organi[z]ation hostile to Israel or through hostile action carried out in aid of one of these or upon its instructions, on its behalf or to further its aims ([A]ll hereinafter referred to as "[E]nemy [F]orces");
- (2) [A]n injury inflicted by a person unintentionally in consequence of hostile action by [E]nemy [F]orces or an injury inflicted unintentionally under circumstances in which there were reasonable grounds for apprehending that hostile action as aforesaid would be carried out;
- (3) [A]n injury caused through arms which were intended for hostile action by [E]nemy [F]orces, or an injury caused through arms which were intended to counter such action [excluding an injury inflicted upon a person age 18 or older while committing a crime, or a felony involving willfulness or culpable negligence].<sup>18</sup>

The definition quoted above is quite far-reaching.<sup>19</sup> It encompasses not only harm inflicted by a terrorist act, but also harm caused by defensive measures aimed against terrorist aggression. "Friendly fire" is hence covered, as is the accidental explosion of ammunition stocked in anticipation of terrorist attacks.<sup>20</sup> The required nexus is defense from hostile acts in general, rather than a specific, clear, and present attack. The nexus needs to be a real one, though. The Israeli Supreme Court held that "arms used for military training are not intended, at that time, to counter hostile acts, whereas a mine laid near the border does serve that purpose."<sup>21</sup>

The determination as to whether an event constitutes a "hostile act" is made

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18. VHAPL, 24 L.S.I. 131, (1969-70).

19. For obvious reasons, the law does not apply to a person belonging to enemy forces, aiding them, or acting as their agent or on their behalf or in order to further their interests.

20. *See, e.g.*, H.C. 92/83, Nagar v. Nat'l Ins. Inst. ("NII"), 39(1) P.D. 341 (holding that children wounded by playing with ammunition found at a dumpster near a military compound were victims of a hostile act).

21. H.C. 294/89, NII v. Appeals Committee, 45(5) P.D. 445.

by an “approving authority” appointed by the Minister of Defense.<sup>22</sup> In many situations, the classification is not entirely clear, and an event may be viewed as either a criminal act or a terrorist act.<sup>23</sup> For example, a terrorist may decide to attack a person whom they know and with whom they have a previous relationship, such as an employer, a lover, or a co-criminal. The victim, or in case of death—his relatives, have a vested interest in having the event declared a “hostile act.” Not only would such classification provide significant monetary compensation,<sup>24</sup> it would also carry a deeper meaning: the victim will be viewed by friends, family, and society at large as an innocent victim of political aggression—a martyr—rather than a mere crime victim whose own actions may have led to the attack. It should be noted that the offender, if caught, may also obtain advantages by characterizing the event as terror-motivated, rather than criminal.<sup>25</sup>

The VHAPL provides the following rebuttable presumption: “Where a person has been injured under circumstances affording reasonable grounds for believing that he has sustained an enemy-inflicted injury, the injury shall be regarded as enemy-inflicted unless the contrary is proved.”<sup>26</sup>

The case of *Coca v. the Approving Authority*<sup>27</sup> may serve to illustrate the borderline situations. In *Coca*, the parents of a Jewish murder victim appealed the decision of the Authority to deny “hostile act” status of their son’s murder by a Palestinian male prostitute. The murderer had given conflicting reasons for the crime, ranging from criminal (theft) to nationalist. The Court held that the event was a hostile act based on the fact that the murderer took no money or valuables

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22. The decision may be appealed to an Appeals Committee (VHAPL, Article 11). Although the law attempted to provide that the decision of the Appeals Committee is final, the Supreme Court held that the decision was subject to judicial review by the court system. *Id.*

23. The classification problem is somewhat similar to the classification of hate-motivated crimes in the United States. *See, e.g.* Elizabeth A. Boyd et al., “*Motivated by Hatred or Prejudice*”: *Categorization of Hate-motivated Crimes in Two Police Divisions*, 30 LAW & SOC’Y REV. 819 (1996); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crime*, 93 MICH. L. REV. 320 (1994); James Morsch, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659 (1991).

24. Generally, victims of criminal action are not eligible for any state financial support. In March 2001, the Knesset (Israeli Parliament) enacted the country’s first legislation for crime victims, the Crime Victims’ Rights Act, 2001, S.H. 183, providing for very limited non-monetary rights of victims. For a summary of the new law (in English), see <http://www.victimology.nl/onlpub/national/il-lawyanay.doc>.

25. Such advantages may include financial support for the offender’s family by supporters of terrorism and the chance of being released as part of political agreements or hostage-taking situations. At least in the case of murder, there is no difference in the punishment of the offender, as Israeli law generally provides for a mandatory life sentence in any case of murder, regardless of whether the motive was criminal or terror.

26. VHAPL, 24 L.S.I. 131, (1969-70).

27. V.A. (T.A.) 4076/98, *Coca v. Approving Authority*, 32(10) Dinim-Dis. Ct. 485.

from the deceased's apartment, where the crime took place,<sup>28</sup> and on the cruelty of the murder.<sup>29</sup>

The *Coca* court encountered another legal hurdle: the assailant was not a member in any organized terrorist organization. The Court observes that under the law "[i]t is not enough that a person rises one clear morning [out of the blue] to kill another person out of nationalist motives to bring the murder within the framework of Hostile Action."<sup>30</sup>

The problem encountered by the court is that of the lone terrorist, who is not affiliated with any organization.<sup>31</sup> In order to overcome that hurdle, the court used a presumption, which appears to be stretching the law beyond its original intent. The Court first observed that one of the goals of terrorist organizations is the killing of Jews. Hence, the Court stated that, the murder of a Jew for a nationalist motive causes the promotion of the goals of terrorist organizations and may therefore be viewed as a hostile act.<sup>32</sup>

As demonstrated in the *Coca* case, courts are quite generous in expanding the definition of a hostile act. The courts' approach is in line with the legislative purpose and with the legislative language, creating a presumption which makes it easier to reach "hostile act" status. It should be noted, however, that this wide definition of a hostile act is very different from the narrow definition that the courts gave to the word "hostilities" appearing in exclusion clauses of insurance policies.<sup>33</sup>

The issue of Palestinian victims of Jewish terror<sup>34</sup> is relatively new.

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28. The assailant only stole the victim's car, which he used to escape, and a cellular phone.

29. The Court notes, to support this conclusion, only that the assailant stabbed the victim many times and caused deep wounds.

30. *Coca*, *supra* note 27, at 6.

31. The same problem gave rise to the differences between Israeli and American officials following the fatal shooting attack at the El-Al ticket counter at Los Angeles International Airport on the Fourth of July, 2002. Israeli officials immediately referred to the event as "terrorism" while the FBI, not finding a link between the shooter and a terrorist organization, suggested the incident may have been a "hate crime." See Mark Matthews, *Airport Shooting Sharpens Debate on Defining Terror*, BALT. SUN, July 6, 2002, at 1A.

32. An event that does not qualify as Hostile Act may still give rise to a personal injury or wrongful death claim against the government. See, e.g., C.A. 2352/97, *The State of Israel v. Astiti*, 55 Dinim-Sup. Ct. 145.

33. Jacob Potchebutzky, *Hamishim Shana—U'ma Nishtana? Al Pitsui Be-Gin Nizkey Milchama [Fifty Years—What Changed? (Compensation for War Damage)]*, 13(2) MISSIM A-1 (1999). Although the observation was made in connection with compensation for property damage, it applies here as well. Potchebutzky quotes, for example, the British case of *Atlantic Mutual Insurance Co. v. The King*, 1 Eng. Rep. 30 (K.B. 1919): "The word 'hostilities' . . . means hostile acts by persons acting as the agents of [s]overeign [p]owers, or of such organized and considerable forces as . . . mobs or rioters, and does not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action may be."

34. Palestinian victims of Palestinian terror are covered just like Israeli victims of Palestinian terror, provided they are Israeli residents or entered Israel legally.

Following a test-case law suit by a Palestinian attorney working with the Israeli Association for Civil Rights, the government chose to settle the case rather than have it decided by the court.<sup>35</sup> The settlement requires that a solution be devised for similar cases, and the Attorney General has ruled that Palestinian victims of Jewish terrorism deserve equal treatment even if the language of the law does not seem to address that issue.

#### *D. Who Is Covered*

Initially, the main purpose of the compensation schemes was to cover Israeli citizens and residents. Since Israelis have been the target of terrorist attacks outside Israel, they are covered both in Israel and while abroad.

The compensation schemes were extended to cover certain foreign nationals who may become victims by reason of their association with Israel or Israeli entities. Thus, the law covers all foreign nationals harmed by a hostile act while in Israel or in the Territories administered by Israel<sup>36</sup> provided that they entered Israel legally. That coverage extends, *inter alia*, to tourists, business travelers, and legal foreign workers.

Illegal foreign workers are generally not considered covered by the law, although a legislative glitch may have created a loophole.<sup>37</sup> The terror acts accompanying the Palestinian uprising, which started in September 2000, found Israel at a point during which tens of thousands of illegal foreign workers resided in the country. Since many terror attacks were directed at public transportation, illegal foreign workers were wounded on several occasions. They received medical treatment and humanitarian aid, but were not considered entitled to the full financial benefits under the law.<sup>38</sup>

Another class of foreign nationals exposed to anti-Israeli terrorist attacks are employees of Israeli entities abroad. Not all employees of Israeli companies are covered; only those employed by the state of Israel (embassies, consulates, and other formal delegations representing the state) or by an employer pre-approved for that purpose by the Minister of Labor. The Minister of Labor has to date approved thirty-three employers, consisting mainly of banks, Zionist organizations, airlines, media, and shipping companies.

An attempt to apply the same analysis to the United States may prove quite difficult. Anti-American sentiment often takes the form of attacking American-

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35. For a description of the test case and the ensuing settlement, see <http://www.phrmg.org/monitor2000/apr2000-toward.htm>.

36. The areas known as Judea, Samaria, and the Gaza Strip.

37. The law applies to a person “who *entered* Israel based on a visa or permit” (emphasis supplied) and does not provide that those who stay beyond the period permitted in their visa or those who enter under a tourist visa and accept employment are ineligible. VHAPL, 24 L.S.I. 131, (1969-70). Hence, the language of the law appears to cover foreign workers who entered the country on a valid visa but not to cover those who entered the country illegally.

38. In recent years, the NII has provided illegal foreign workers with all benefits under the law *ex gracia*.



owned fast-food restaurants overseas.<sup>39</sup> Would an attack on a McDonald's restaurant, certainly inspired by anti-American sentiment, qualify as terrorism?

The inclusion of foreign nationals provides a layer of protection, which, in many cases, acts to replace partially acts-of-war or terrorism exclusions under private insurance policies. Although the coverage under Israeli law does not overlap with the individualized privately acquired policies, it does provide a safety net for the cases where other means of compensation are excluded. It is unclear if the existence of government insurance would influence individuals considering visiting Israel.<sup>40</sup> It appears, however, that institutional tours (such as support groups by synagogues) are easier to organize when the inability to purchase commercial travel insurance is compensated for by the government insurance.

#### *E. Compensation for Injured Victims*

Victims who are injured by a hostile act are entitled to medical care and to a stipend while receiving medical care. Those who remain permanently disabled are entitled to disability benefits. All benefits under VHAPL are administered by the National Insurance Institute ("NIF"), which is the equivalent of the Social Security Administration in the United States.

*1. Medical Care.*—Injured victims are entitled to state-funded medical care. Medical care is defined widely to include hospitalization, clinic visits, dental care, medicines, medical devices, medical care-related travel expenses, medical rehabilitation and recuperation. Although Israel has a national medical insurance plan, the benefits provided under the law exceed the benefits under the national insurance.<sup>41</sup>

Foreign residents injured in a hostile act while in Israel and then returning to their own country may receive the necessary medical care at the expense of the Israeli government unless they receive the medical care from the country in

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39. See, e.g., <http://www.cnn.com/2001/WORLD/asiapcf/southeast/10/11/ret.indon.protests/>; see also <http://www.cnn.com/2000/WORLD/asiapcf/southeast/10/12/ret.indonesia.protests/index.html>.

40. While the Israeli governmental insurance company announced it was creating a special life insurance policy to cover business visitors, the head of a commercial insurance company said that his company continuously offered the coverage, but that there was very little demand for that special insurance ("Our feeling is that the insurance issue is just an excuse for those who are not interested to arrive to Israel"). Elazar Levin, *Clal Insurance: There is No Reason for the Cancellation of the Gertner Conference; Americans May be Insured in Israel*, GLOBES, Apr. 15, 2002, at 3; Shlomi Sheffer, *Inbal's CEO: The Tourist Insurance Plan Will Accommodate Business People*, HAARETZ, Apr. 15, 2002, at C7.

41. Examples of such wider coverage include covering dental expenses (not covered in the national medical insurance plan), and the waiver of all deductibles and co-payments provided for in the national medical insurance plan. The detailed description of the various benefits as described in footnotes 41-100 and accompanying text was compiled by the author from a variety of formal and mostly informal sources.

which they reside. The coverage will even include an increase in medical insurance premiums paid to the victim because of the deterioration of his health due to the hostile act.

2. *Living Stipend While Receiving Medical Care.*—An injured victim who is unable to work while receiving medical treatment is entitled to a stipend during that period, provided he is not collecting his salary,<sup>42</sup> or in the case of a self employed individual, if he stops working.

The stipend is based on the victim's pre-injury income,<sup>43</sup> subject to a limit set at a rate of five times the average salary in Israel.<sup>44</sup> Victims who are unemployed at the time of the injury receive a stipend based on the (relatively low) salaries of mid-level government employees, factoring in their age and family situation.<sup>45</sup>

The living stipend during medical treatment is provided for an unlimited amount of time as long as the victim is unable to work because of the medical treatment.

3. *Disability Compensation.*—An independent medical committee determines whether the victim is temporarily<sup>46</sup> or permanently disabled, and at what rate (expressed as a percentage of disability).<sup>47</sup>

Victims judged to be 20% or more disabled qualify for monthly disability benefits. The amount of compensation is calculated by multiplying the rate of disability by 105.1% of the salary of a low-level government employee. A 40% increase is paid to victims of specific and very severe types of disability.<sup>48</sup>

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42. Employers who continue to pay the victim's salary while the victim is unfit to work may be eligible for a refund of the wages paid by them.

43. The pre-injury income is determined by the average income of the victim for the three months preceding the injury.

44. The ceiling of five times the average wage is the same used for other social security benefits.

45. A single victim with no children under eighteen receives a stipend equal to 65.025% of the salary of the applicable government employee. A married victim with no children under the age of eighteen receives a stipend equal to 86.7% of the salary of the applicable government employee. Victims with one or more child under eighteen receive a stipend equal to 112.4% of the salary of the applicable government employee. The stipend for the unemployed also serves as the floor for determining the amount of the stipend to lower-income employees.

Children under fourteen years of age are not entitled to a stipend during the period of medical care but they are entitled to other benefits accorded to victims. Victims who are between the ages of fourteen to eighteen and who were not regularly employed before their injury are entitled to compensation at the rate of half the amount paid to an unemployed victim. Minors between the ages of fourteen to eighteen who were regularly employed receive compensation similar to that of employed adults.

46. Temporary determinations are made, where appropriate, for a period of no more than one year.

47. The detailed method of determining the level of disability is beyond the scope of this paper.

48. The increase applies to: a person completely paralyzed in the lower half of their body; a

Victims who are, or who become, fifty-five years old or older, are paid an age-based supplement.<sup>49</sup>

Victims rated between 10% and 19% permanently disabled are given a one-time disability grant rather than monthly benefits.<sup>50</sup> Disability benefits are paid regardless of any other sources of income the victim may have. There are, however, several categories of victims with little or no additional income, who may be eligible for additional benefits. Thus, some victims may be classified as “needy disabled”<sup>51</sup> and receive significantly higher benefits, based on their level of disability, family situation, and other sources of income.<sup>52</sup> Similar benefits are paid to victims who, because of the irreversible physical or mental disability suffered as a result of the hostile act, have permanently lost their ability to earn a living. In certain cases, a short-term unemployment supplement<sup>53</sup> and an early retirement supplement<sup>54</sup> are also available.

When a disabled person dies and the death is not considered to be as a result of the injury,<sup>55</sup> the NII continues to pay the disability benefits to the victims’

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person with two lower or upper amputated extremities; a person who is completely blind in both eyes; or a person suffering from extreme burns. The medical committee must approve the increase.

49. Men between fifty-five and sixty-five years old and women between fifty-five and sixty years old, who are at least 50% disabled, receive an age-based supplement ranging from 7% to 21% of the benefit paid to a 100% disabled victim. Men who reach the age of sixty-five and women who reach the age of sixty are eligible for a 10% increase, but may no longer apply for unemployment benefits. *See infra* note 53.

50. The amount of the one-time grant is calculated by multiplying (1) the level of disability by (2) 105.1% of the salary of a low-level government employee, and then by (3) the number of months the grant will cover ranging from 108 months for 10% disability to 215 months for 19% disability. Special provisions apply if the situation of the victim deteriorates and he is later considered disabled at a rate of 20% or more.

51. A “needy disabled” person is a person with a 50% or more level of disability whose income from all sources is below a set level of income (set at the rate of a disability benefit for a 100% disabled person).

52. A “needy disabled” victim with no children under twenty-one receives a benefit equal to 124.4% of the salary of a mid-level government employee. Victims with one child or more under the age of twenty-one receive a benefit equal to 138.2% of the salary of the applicable government employee. Victims with a 60% or more level of disability get a 5% to 20% increase based on their level of disability. Income from all sources earned by the recipient is deducted from the benefit. Eligibility for Needy Disabled status is reassessed annually.

53. The victim must meet an income test and prove that he has attempted to obtain employment and that he has not rejected any employment offers.

54. Early retirement supplement is given to victims with a 50% or more level of disability who are between the ages of fifty and sixty-four, who retire from their employment for medical reasons, are no longer suitable for employment, are limited in movement as a result of the injury, and meet a certain income test.

55. When the death is a result of the injury, the family members of the victim are entitled to benefits as relatives of a deceased victim. *See discussion infra*, Part I.F.

heirs for three additional years after the death,<sup>56</sup> and in certain cases, makes additional payment to dependents.<sup>57</sup>

4. *Additional Monetary Benefits.*—The law provides for a host of additional benefits, each with its own criteria and limitations. The most important among them are: the care-taking benefit;<sup>58</sup> home purchasing grants and loans;<sup>59</sup> financial assistance in the purchase of a medically necessary car;<sup>60</sup> monthly mobility payments;<sup>61</sup> appliances, special equipment and other household items to paraplegics<sup>62</sup> and the blind;<sup>63</sup> a yearly clothing allowance;<sup>64</sup> a heating or cooling

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56. The compensation payment is paid to the family member indicated in writing by the victim before his death, and where no such instruction was given, to the spouse, if there is one, or in the absence of a spouse, to another family member determined by the NII.

57. *E.g.*, the payment of the care-taking benefit, described in *infra* note 58, continues for three years after the death; a portion of the payment for Needy Disabled, described in *supra* note 51, is paid to a surviving spouse who has no independent income and as long as the spouse does not remarry; where the victim was not survived by a spouse but was survived by a child, the child will be paid the benefit paid to bereaved children until he reaches maturity, even though the death is not as a result of the injury.

58. Victims with a level of disability of 40% (25% for a woman with her own independent household) or more may be eligible. There is a complex point system for determining the payment for care taking based on the level of disability, family situation (a single victim is entitled to a higher payment than a married victim; a single parent of children less than fifteen years of age is entitled to increased payments; a victim who is or becomes pregnant receives an increase as of the sixth month of her pregnancy), and age (a married victim receives the higher payment given to single victims when his or her spouse reaches the age of forty).

59. The eligibility for this benefit is based on the type and severity of the injury and is granted to first-time homeowners and victims who need to replace their current apartment for a justified reason. The law also provides for real estate tax breaks.

60. Eligibility for this benefit is determined by the type and severity of the injury. The benefit includes a full waiver of the taxes on the car (in Israel, where cars are heavily taxed, that represents a discount of approximately 40% of the price), a grant in the amount of two-thirds of the pre-tax price of the car and a loan for the remaining one-third of the price, as well as a yearly allowance for insurance.

61. Eligibility for this benefit is determined by the type and severity of the injury. The mobility payments are intended to cover expenses involving rides to work, studies, sports practice or for any other reason. The amount of the benefit is based on the reimbursement paid to government employees for use of their private car.

62. These include a heating stove, refrigerator, two air conditioner units, and a remote system for opening the door. Depreciable assets include blankets, sheets, and sweats.

63. These include a Braille typewriter, a Braille watch, a cassette recorder, a stereo system, and two air conditioning units.

64. The eligibility for this benefit is based on the type and severity of the injury, as well as on the victim's gender.

grant;<sup>65</sup> yearly convalescence grants;<sup>66</sup> income tax<sup>67</sup> and national health tax breaks;<sup>68</sup> college education grants for children of the victim;<sup>69</sup> a marriage grant;<sup>70</sup> and telephone expenses.<sup>71</sup>

The immediate family members of the victim are entitled to reimbursement of their expenses<sup>72</sup> and loss of wages while the victim's medical situation requires the presence of a family member near his or her bed.

5. *Rehabilitation.*—Victims with no profession, or who need to change professions because of their injuries or because of other reasons, may be eligible for professional rehabilitation. Rehabilitation is given in one of three forms: vocational training, higher education, or rehabilitation in an independent business.

In vocational training and higher education, the victim's full tuition<sup>73</sup> will be paid. If the course of studies does not allow the victim to work during his studies, a subsistence allowance based on the victim's degree of disability and family situation is paid monthly.

Victims may opt to seek assistance for starting their own business. If they choose this route, they may be eligible for grants to purchase commercial equipment and loans in an amount that varies with the victim's degree of disability. The loan is conditional on the approval of a business plan that considers the victim's limitations.

#### *F. Compensation for Relatives of Deceased Victims*

VHAPL also provides benefits for families of victims killed as a result of

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65. The eligibility for this benefit is based on the type and severity of the injury, as well as on the climate at the victim's place of residence.

66. A convalescence grant is paid once a year in the range of three to fourteen days depending on the level of disability. In some cases, convalescence grants are also provided for a companion. The per diem amount is based on the equivalent payment to government employees in Israel.

67. The eligibility for this benefit is based on the severity of the injury. Victims who are 100% disabled or completely blind are exempt from income tax on actively earned income up to a fairly high ceiling, regardless of the cause of disability. Income Tax Ordinance (New Version), 1967, 1 L.S.I. 145, (1967).

68. This benefit is only available to severely harmed victims who are employed or in early retirement.

69. The grant covers 40% of the actual tuition paid, not to exceed 40% of the tuition at state universities. Victims who reside outside Israel may use the grant to pay for tuition abroad.

70. A one-time marriage grant is given to people who, after becoming disabled, get married or have a relationship with a common-law spouse formalized in a binding legal agreement. The amount of the grant is determined according to the level of disability. A victim who moves to an independent apartment but remains single is eligible to receive 70% of the marriage grant at that time and the remaining 30% if and when he gets married.

71. The eligibility for this benefit is based on the type and severity of the injury.

72. Covered expenses include travel expenses, lodging and meals.

73. Limited by the tuition paid in the state's universities.

Hostile Acts. The structure of benefits is based on the benefits paid to the families of soldiers who die during and as a result of active duty.<sup>74</sup>

1. *Monthly Benefits for a Widower/Widow, Bereaved Children and Bereaved Parents.*—Widowers, widows, bereaved children and bereaved parents of victims killed as a result of Hostile Acts are entitled to a regular monthly benefit. The amount of the benefit, expressed as a percentage of the salary of a low-level government employee, is determined according to the age of the widow/widower and whether he or she has children.<sup>75</sup> Since the amounts are linked to the wages of government employees, they are updated following labor agreements and the Israeli mandatory cost of living increases.

In some cases, the law provides for the State to pay the victim's divorcee the alimony she was entitled to receive from the deceased.<sup>76</sup> The issue of a widow (widower) remarrying received a significant amount of attention in recent years, given past policy that the widow would lose her benefits after remarriage.<sup>77</sup> Critics felt the regulation was preventing rehabilitation rather than encouraging it. Consequently, the law significantly shifted in favor of the widows to assure that the potential loss of benefits does not impede a widow from remarrying and building a new life. Therefore, under current law, although a widow who remarries is no longer entitled to the monthly benefits in her own right, she instead (1) receives a generous, non-refundable marriage grant;<sup>78</sup> (2) continues to receive benefits for her children until the children reach twenty-one;<sup>79</sup> and (3)

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74. VHAPL applies, *mutatis mutandis* the benefits provided in Fallen Soldiers Families Law (Pension and Rehabilitation), 1950, 4 L.S.I. 115, (1949-50).

75. A widow/widower with no children under twenty-one receives a benefit equal to 124.4% of the salary of a low-level government employee. A widow/widower with one child or more under the age of twenty-one receives a monthly benefit equal to 175.9% of the salary of the applicable government employee, and a supplement of 11% for each child under twenty-one beyond the first child. A widow/widower whose children are over the age of twenty-one receives a monthly benefit equal to 156.5% of the salary of the applicable government employee. Some of the benefit is phased out when the last child reaches twenty-four. A widow who is pregnant at the time of the decease receives a 33% increase during the last trimester of the pregnancy. A 10% increase is made when the widow/widower reaches the age of sixty.

76. This benefit applies only when the divorcee was older than forty years old at the time of death or when the divorcee is the mother of a bereaved child of the deceased. In addition, the amount of alimony must have been set either by written agreement or by a court order.

77. The public attention was focused on female widows of male soldiers killed in action, hence the female language in this paragraph. As explained above, widows or widowers of victims of hostile acts are linked to the benefit structure for relatives of soldiers killed in action. The law applies equally to widowers of victims.

78. The marriage grant is in an amount equal to sixty monthly payments. The grant is divided into two payments: the first at the time of the marriage, and the second after two years. The widow does not need to refund the grant if she divorces.

79. The monthly payment to the remarried widow with one eligible child is 91.4% of the salary of the applicable government employee, and for each additional eligible child, 24% of the salary of the applicable government employee.

may become re-entitled before the age of sixty-five years old to the same benefits she received before she remarried should she get divorced or widowed.

Bereaved parents are entitled to a regular monthly benefit, independently of whether or not there are a widow/widower and/or bereaved children. The amount of the benefit is expressed as a percentage of the salary of a low-level government employee and is determined according to the age and family situation of the bereaved parents.<sup>80</sup> A portion of the benefit is phased out if the bereaved parents have other income.<sup>81</sup> A bereaved child receives a marriage grant upon getting married or reaching the age of thirty without getting married.<sup>82</sup> A widow/widower who must reside in a nursing home or who wishes to live in an assisted living environment may receive partial or full funding of this arrangement in lieu of monthly benefits.<sup>83</sup>

Certain additional benefits are provided only to needy widow/widowers or bereaved parents, based on their income and the availability of other relatives to help.<sup>84</sup> Thus, the law serves as a safety net, under the assumption that the deceased son or spouse would have provided for these needs had he or she not died.

2. *Burial and Mourning Expenses.*—Burial expenses are reimbursed at cost (up to a ceiling) to the family member who paid for them. Burial expenses include death notices, transfer of the body, and a tombstone. Special provisions increase the reimbursements for a foreign citizen killed in Israel but buried abroad<sup>85</sup> or, alternatively, cover the expenses of bringing siblings, children, parents, widow or widower to participate in the funeral if the deceased is buried in Israel.<sup>86</sup>

A one-time grant for mourning expenses is paid to a widow/widower and

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80. The amount of benefit for a couple of bereaved parents with no income is 123.4% of the salary of the applicable government employee. Benefits for a single bereaved parent are equal to 99% of the salary of the applicable government employee. For each sibling of the deceased under the age of eighteen, an additional 10% is paid. Bereaved parents receive a 10% increase when one of them reaches the age of sixty-five (sixty for a bereaved mother with no spouse).

81. Certain social security benefits are excluded from the definition of income for that purpose.

82. The bereaved child may get an 80% advance of the marriage grant if he or purchases his or her own housing.

83. The rate of funding is determined by age and family situation.

84. This would include for example, expenses for caretaking for those requiring assistance due to a medical condition.

85. The additional expenses covered are as follows: transporting the body abroad, services rendered by the pathology institute, transporting the body to the airport, transporting the body by sea or air and the expenses associated with a person accompanying the body from the foreign country to the family's place of residence.

86. Covered expenses include round-trip travel and seven days in a four-star hotel. The NII may extend the length of the stay when the eligible party requests to be present at the placing of the tombstone or because of illness. Those staying with relatives or friends, rather than at a hotel, receive a per diem reimbursement at the same rate of those paid to civil servants in Israel.

bereaved parents. The grant is intended to help cover expenses involved in the mourning, but does not cover all expenses. Expenses associated with yearly memorial services at the cemetery, including transportation, are also reimbursed, as are expenses associated with acts intended to memorialize the deceased, such as a memorial book, memorial events, etc. Finally, the law provides a grant to allow a bereaved parent, widow or widower to purchase a grave site next to that of the victim.<sup>87</sup>

3. *Additional Monetary Benefits.*—The law provides a host of additional benefits, each with its own criteria and limitations. Among the most important are the funding of psychological assistance;<sup>88</sup> housing assistance;<sup>89</sup> financial assistance in the purchasing of a car;<sup>90</sup> yearly convalescence grants;<sup>91</sup> tax breaks;<sup>92</sup> school grants;<sup>93</sup> college grants;<sup>94</sup> grants and loans to start a business;<sup>95</sup> Bar-Mitzvah grants;<sup>96</sup> a variety of health-related expenses;<sup>97</sup> and telephone

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87. Under Israeli law, basic burial, including the grave site, is covered by social security. However, those who wish to choose or reserve their grave site must purchase it.

88. Those eligible include a widow/widower, bereaved children to age thirty, bereaved parents, and bereaved brothers to age of thirty. Eligibility is conditional on the assessment by the caseworker that such treatment may assist with the family member's emotional state or ability to function.

89. Bereaved parents and a widow/widower with children who are neither homeowners nor recipients of public housing may be entitled to financial assistance in renting an apartment for one year following the Hostile Act (extendable under certain conditions up to two additional years). Rental assistance for up to one year may also be given to those relocating for certain reasons, including emotional reasons.

90. Bereaved parents and widow/widower who has not remarried are eligible for this benefit provided they have a valid driver's license or, if they do not have a license, if there are special circumstances requiring the car and there is a family member who would drive the car for them. The benefit includes a yearly allowance for insurance. A widow/widower who is ineligible to purchase a car or who elects not to purchase one receives a special mobility payment instead.

91. A widow/widower and bereaved parents are entitled to an annual payment for eight days of convalescence based on the rate paid to civil servants in Israel. The per diem amount is based on the equivalent payment to government employees in Israel.

92. The benefit includes reimbursement of a portion of the national health tax and discounts or exemptions regarding certain real property taxes.

93. The benefit is paid from through the twelfth grade. In some cases, tutors are also funded.

94. The widow/widower is eligible for this benefit regardless of age. The children of the deceased are eligible provided they were not older than twenty-one on the day of the event and not older than thirty at the time of academic studies. The benefit can also be applied to vocational training. The benefit covers actual tuition paid, which may not exceed the tuition at state universities, and an additional sum for books.

95. The assistance may also be used to improve an existing business.

96. This grant is paid to bereaved children upon reaching the age of adulthood according to Jewish law, which is age twelve for girls and age thirteen for boys. The grant is paid regardless of religion.

97. For example, travel expenses to and from medical treatment, medical instruments and



expenses.<sup>98</sup>

*G. Choice (not Exclusivity) of Remedy: Towards a Liberal Approach*

A victim who has a claim under the VHAPL and who may have a separate personal injury claim for compensation under another law may choose between compensation and rights according to the VHAPL and compensation and rights according to the other law.<sup>99</sup> Hence, the law provides for a *choice* of remedy, rather than an *exclusivity* of remedy.<sup>100</sup>

Although at first glance the “carrot and stick” mechanism here is reminiscent of the one used in the U.S. Air Transportation Safety and System Stabilization Act,<sup>101</sup> there are major differences between the two schemes. First, under the U.S. scheme the barring of a personal injury lawsuit is limited only to the airlines and other specific defendants,<sup>102</sup> whereas the Israeli scheme prevents simultaneous recovery from any defendant.

Second, the choice under the Israeli scheme only applies to the actual *recovery* of damages under the two causes of action, rather than to the pursuing of both causes of action. The choice to accept state benefits under the VHAPL may be revoked by the victim, with the NII’s consent, in order to recover better compensation in the alternative lawsuit.<sup>103</sup>

Until recently, the NII adopted a stringent policy, under which it would not allow the victim to pursue the alternative lawsuit and return the state benefits, except in very limited cases. The NII position was based on paternalistic considerations, believing that a one-time payment under a personal injury lawsuit may be less advantageous than the very generous, and permanent, safety net created by the Law.<sup>104</sup> In order to deter victims from pursuing the alternative route, the NII adopted the position that its approval is needed prior to filing the alternative lawsuit, and that such action would require returning all benefits and stopping the payment of benefits before the alternative lawsuit is settled. In

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medicines not covered by the national health insurance, medical emergency bracelets, and 50% of dental expenses.

98. The benefit covers 50% of telephone expenses.

99. A legislative glitch allowed the simultaneous recovery if the other cause of action related to a car accident. That loophole was closed after six years of existence. C.A. 579/83, Malka v. Ararat, 42(3) P.D. 650.

100. This approach is common in many worker’s compensation statutes in the United States.

101. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

102. Originally the Act only limited lawsuits against the airlines, but later it was amended to include aircraft manufacturers, airport sponsors, persons with a property interest in the World Trade Center, and the city of New York. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

103. The victim then needs to refund the NII for all compensation payments, grants and other payments that he had received according to the law in present monetary terms.

104. See, e.g., H.C. 92/83, Nagar v. NII, 39(1) P.D. 341.

1999, however, the Supreme Court held that the NII position was unconstitutional. The Supreme Court held that the NII approval is only necessary after the alternative lawsuit is pursued, and that the NII should generally agree to the victim's decision to return the benefits in exchange for the right to collect on the personal injury lawsuit.<sup>105</sup>

One of the main reasons for the difference is, of course, the difference in the main purpose of the legislation. The U.S. scheme was primarily intended, as even its name attest, to defend the two major airlines involved in the 9/11 events from lawsuits by victims and their families.<sup>106</sup> The Israeli scheme was primarily intended to compensate the victims, and in most cases, there are no feasible legal ways under Israeli law to recover personal injury damages from the assailants or third parties.

From a policy standpoint, it makes sense to allow the victims to recover for full damages, including, where applicable, punitive damages. From a practical standpoint, it became more feasible for victims to attempt to recover damages from assets identified as belonging to terrorist groups<sup>107</sup> or even from states who sponsor terrorism.<sup>108</sup>

#### H. Procedural Aspects

The Law prescribes relatively short statute of limitations periods for filing

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105. C.A. 1162/96, *Weiss v. Mack*, 53(2) P.D. 79.

106. The media reports are also clear that airline bailout, rather than compensating the victims, was the main purpose. See, e.g., Lizette Alvarez, *A Nation Challenged: The Bailout; An Airline Bailout*, N.Y. TIMES, Sep. 22, 2001, at A1; James D. Tussing & Stewart B. Herman, *Government Acts to Bail Out U.S. Airlines*, 226 N.Y.L.J. (2001). For a detailed description of the U.S. legislation, see Raymond L. Mariani, *The September 11th Victim Compensation Fund of 2001 and the Protection of the Airline Industry: A Bill for the American People*, 67 J. AIR L. & COM. 141 (2002).

107. The United States had frozen hundreds of millions of dollars believed to belong to Osama Bin Laden or the Taliban. Cathy Booth Thomas, *Osama Will Pay. This Time in Cash*, TIME, Oct. 22, 2001, at 22.

108. In the United States, civil lawsuits against terror-sponsoring states were made possible by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). In *Estate of Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), the estate of a terror victim was awarded a judgment of more than \$227.5 million against the nation of Iran. In *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000), the estates of two terror victims were awarded a judgment of more than \$327 million against the nation of Iran. For an analysis of the efficacy and advisability of utilizing civil lawsuits in domestic courts as means to compensate victims of state-sponsored terrorism, see William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105 (2002). Recently, a large group of 9/11 victims' families sued a series of defendants allegedly related or supporting Osama Bin Laden's group in a \$16 trillion lawsuit. See CNN, *\$116 Trillion Lawsuit Filed by 9/11 Families* (Aug. 16, 2002), available at <http://www.cnn.com/2002/LAW/08/15/attacks.suit/index.html>.

claims for bodily harm and death and for appealing the decisions of the NII. The claim for a living stipend during medical care must be presented within one year from the date of injury. Appeals against the decisions of the Medical Committee must be filed within thirty days from the time the decision is communicated to the victim.<sup>109</sup> Appeals against the decisions of the NII must be filed with the Labor Tribunal<sup>110</sup> within six months from the date of the appealed decision.

Legal aid is provided, subject to significant exceptions and conditions, to applicants whose claim was rejected by the NII. A 1997 amendment to the law authorized the establishment of a representative organization of victims, funded by a deduction from the monthly benefits paid under the law.<sup>111</sup>

## II. COMPENSATION FOR PROPERTY DAMAGE

### *A. The Evolution of Compensation for Property Damaged by War and Terrorism: From Mutual Insurance to Government Benefits*

As with damage for personal injury, the compensation of victims of terror for property damage is an extension of the compensation to civilians for war damage. A brief history of that compensation is therefore in order.

Prior to the establishment of the State of Israel, the area now known as Israel was part of the British mandate, and deeply affected by British law. Great Britain was one of the first nations to legislate compensation and mandatory insurance for war property damage,<sup>112</sup> and it legislated a limited mandatory insurance in its Palestine (Israel) mandate.<sup>113</sup> The Jewish organizations preparing for the establishment of the State of Israel followed their lead. A few weeks before the Declaration of Independence took place, the Jewish Agency, together with several trade unions, organized a voluntary insurance scheme against damage caused by war to civilian property. The fund, which had no binding power, was created for a limited period of two years. The scope of events covered by insurance covered terrorist actions.<sup>114</sup>

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109. That extremely short time period may be extended only under special circumstances, with the consent of the NII, and for no more than an additional thirty days.

110. The Labor Tribunal has jurisdiction over virtually all disputes of claimants against the NII. Appeals may only be based on issues of law, and the Tribunal will not decide factual issues.

111. Although the deduction of dues is not mandatory, it is done automatically from the benefits of all members who have not expressly requested otherwise.

112. The first British legislation appears to be the War Risk Insurance Act, 1939, which was followed by the Landlord and Tenant (War and Damage) Act, 1939, the War Damage Act, 1941, and the War Damage Act, 1943 to 1964. The British legislation followed the refusal of major insurance companies to insure war damage. The War Damage Acts were repealed by Statute Law (Repeals) Act, 1981.

113. War Risks Insurance Ordinance (No. 32), 1941, 1139 O.J. App. 1 89.

114. "War . . . hostile actions, quasi-war actions (whether a war has or has not been declared), civil war . . . uprising . . . civil riots . . . vandalism caused by people acting maliciously on behalf or for a political union." Bylaws of the fund, *quoted in* Potchebutzky, *supra* note 33, at A-3.

Following the end of the War of Independence, the Knesset legislated the Law of Tax for War Damage, 1951.<sup>115</sup> That law levied a tax (in essence, a compulsory insurance) on all business property and real property which could be damaged by war, and provided for compensation of the same assets. The regulations promulgated under the law broadened the definition of covered events beyond acts of war by including damage due to “other hostile actions.”<sup>116</sup>

The main ideology behind the law was spreading the loss by means of compulsory insurance, since “the damage is not unique to a specific property owner who was unfortunate enough to be damaged by war or hostile acts.”<sup>117</sup> The insurance theory had significant practical importance when it caused the Court to reject a regulation providing for contributory negligence by the victim as unreasonable and *ultra vires*.<sup>118</sup>

In 1961, Israel adopted the Property Tax and Compensation Fund Law, 1961,<sup>119</sup> (the “Compensation Law”) consolidating and replacing several older laws. The law created a fund, originally funded by a corresponding property tax, to compensate victims of war or terrorist activities.<sup>120</sup> The Compensation Law and the regulations promulgated thereunder, are the basis of the current compensation system for property damage caused by war and terrorism.

Although the Compensation Law continued the practice of incorporating the compensation fund and property tax into the same law for the political purpose of justifying the tax as a type of insurance, only a small percentage of the property tax collected was actually used for the compensation fund. Over the years, and especially since 1981, the link between the assets subject to the property tax and the assets covered by the compensation provisions was completely detached, and the property tax was used, until repealed in 2001,<sup>121</sup> to achieve unrelated economic goals.<sup>122</sup> One interesting remaining result of the link between the tax and the compensation is that the compensation scheme is still administered by the income tax authorities, the equivalent of the U.S. Internal Revenue Service. Thus, the tax authorities take the role of helping hand, quite an unusual phenomenon.

Following Israel’s involuntary participation in the Gulf War,<sup>123</sup> the issue of

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115. War Damage Compensation Tax Law, 1951, 5 L.S.I. 33, (1950-51).

116. Regulations Regarding Payment of Compensation, 1952, K.T. 256, 694.

117. Statement of Finance Minister Eliezer Kaplan when introducing the law. D.K. (1950) 854.

118. T.A. 71/91, *Hassaot Perach Hamidbar v. Manager of Prop. Tax*, 53 P.M. 492.

119. Property Tax and Compensation Fund Law, 1961, 15 L.S.I. 101, (1960-61).

120. The law also covers certain agricultural damages caused by drought.

121. The property tax was repealed for administrative reasons unrelated to the compensation fund.

122. Property tax was levied only on undeveloped land, with the hope of encouraging development and preventing the holding of undeveloped land by investors waiting for a rise in demand.

123. During the Gulf War in 1991, Iraq fired missiles at Israeli cities, causing significant property damage.

harm to civilian property arose again, and the compensation scheme was expanded to increase the amounts paid. The main increase was in setting the compensation for damage to household items<sup>124</sup> at full replacement value rather than at the depreciated value of the assets affected. Since the Regulations set certain quantity, value and total compensation limitations on the covered assets,<sup>125</sup> citizens were allowed to voluntarily insure their household items with the government authority up to far higher amounts. The voluntary insurance scheme does not apply to business property. Hence, the compensation scheme gradually shifted from compulsory mutual insurance, aimed primarily to operate in the vacuum created by the insurance companies' refusal to act, to a social support system funded by the general taxpaying public.

### B. Damages Covered by the Compensation Law

The law covers "War Damage" (direct damage to property) and "Indirect Damage." Both terms are defined as to include terrorist acts as part of the expression "other hostile actions against Israel."<sup>126</sup>

Borderline situations, where it is hard to determine whether an event is a hostile event or a crime, exist in the case of property damage just as in the case of bodily injury, discussed above.<sup>127</sup> These have been the subject of much of the litigation surrounding the Compensation Act.<sup>128</sup> One difference, however, is that the Compensation Law does not provide a presumption similar to that of the VHAPL that borderline events would be considered as hostile acts.<sup>129</sup>

In 1998, the Israeli Supreme Court set some guidelines on what would constitute a hostile action in *Bekaot v. Manager of Property Tax*.<sup>130</sup> *Bekaot* involved the simple theft of an automobile from Israel into the Palestinian authority, where the car was "stripped" to be sold as car parts. It should be noted

124. Household items include furniture, appliances, electronics, books, and similar items. Jewelry, art, antiques and cash are not covered.

125. The Property Tax and Compensation Fund Regulations (Payment of Compensation) (Household Items), 1973, K.T. 3045, 1757 as amended, provide that compensation will be paid based on a replacement cost of the assets up to a prescribed maximum amount for each category of items of personal belongings (furniture, clothing, electronics, other domestic items).

126. War Damage is defined as "[d]amage caused to assets from actions of war by the enemy's regular army, or from other hostile actions against Israel, or from actions of war by the Israeli Army." Indirect Damage is defined as follows:

A loss, or the loss of earnings, as a result of war damage in a border settlement or from the inability to use assets located in border settlements as a result of actions of war by the enemy's regular army, or from other hostile actions against Israel, or from actions of war by the Israeli Army.

127. See *supra* notes 27-33 and accompanying text.

128. See Potchebutzky, *supra* note 33, at A-5; T.A. 381/97 *Gilad Spices Ltd. v. Manager of Property Tax*, 32(1) Dinim-Dis. Ct. 574.

129. See *supra* note 26 and accompanying text; see also VHAPL, 24 L.S.I. 131, (1969-70).

130. C.A. 6904/97, S.T.V. *Bekaot v. Manager of Prop. Tax*, 53(4) P.D. 1.

that, at the time, a very high percentage of all stolen cars in Israel were taken to Palestinian “car slaughterhouses.” Claimant, the corporation which owned the stolen car, produced a formal police document stating that Palestinian car thieves should be viewed as activists in the Palestinian anti-occupation “uprising,” and claimed that it was accordingly entitled to compensation for damage caused by a hostile act.

The Supreme Court held that theft may be considered property damage, but that is not enough to be compensated under the law. A claimant under the law must also prove a “motive of hostility,” in order for the hostility to be interpreted as against the State of Israel. The hostility can be the result of revenge for an act by the Israeli government, or an act with the goal of frightening the citizens of Israel, or an intent to affect Israel’s future actions. In all of these cases, the Supreme Court held that the claimant must prove that the Israeli identity or nexus was the justification for causing the damage to the property.<sup>131</sup> In this case, there was no such evidence, and the claim was rejected.

Direct damage to property is covered in accordance with the Property Tax and Compensation Fund Regulations (Payment of Compensation) (War Damage and Indirect Damage), 1973,<sup>132</sup> promulgated under the law. Under the regulations, the compensation is limited to the “Real Damage,” defined as the lower amount of: (i) the difference between the value of the asset before the damage occurred and the market value of the asset immediately after the damage occurred; or (ii) the cost of restoring the asset to its prior condition.<sup>133</sup> In addition, compensation will be paid for reasonable expenses incurred during the occurrence of the damage and aimed at mitigating the damage.<sup>134</sup>

Although the law calls for compensation to be made by way of reimbursement, the practice in terrorist acts affecting many victims (such as bombs exploding in commercial areas) has been for the Tax Authority to send loss adjusters and hire contractors to fix the damage of all the businesses involved. In other cases, the owner of the property hires contractors who are paid directly by the Tax Authority.

The system described significantly reduces the amount of time it takes for life to return to normal following a terrorist attack. In the absence of the compensation scheme, one may assume that some business owners would be insured (assuming insurance against terrorist acts is available) while others would not. One can also assume that estimators from different insurance carriers may disagree on their respective share and accordingly take their time in issuing compensation. Contractors working for different employers may also conflict with each other. As one of the goals of the Israeli government is to return life to normal as quickly as possible following a terrorist attack, it appears that the scheme provides a rather effective means to achieve that goal.

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131. *Id.*

132. K.T. 3039, 1682.

133. *Id.* § 1.

134. For example, the hiring of security guards to prevent looting would be covered in certain situations.

Indirect damage, including business interruption and loss of earnings, is usually not compensated, except for those damages sustained by businesses in border settlements.<sup>135</sup> Where applicable, indirect loss is computed in accordance with a detailed set of rules that attempt to cover the real economic loss.<sup>136</sup>

In 2001, with the beginning of the current wave of hostilities, the Compensation Law was amended to allow the government to compensate for indirect damages caused by hostile acts. Compensation is now available provided that: (I) the damage was caused by actions which the Minister of Defense declared as hostile actions; and, (ii) the damage occurred in a location which the Minister of Finance, with the approval of the Knesset's Finance Committee, declared as an area damaged by hostile actions. When both conditions are met, the law authorizes the payment of compensation for damage to assets, loss of earnings, or the inability to use assets located in the affected area.

Until now, no appropriate declarations were made, nor were new regulations issued under the amended law. The Compensation Law thus remains, for now, a legal tool enabling the Government, if it elects to do so, to compensate for indirect damage under the existing scheme. Special rules apply to compensation for damage to Israeli-owned assets located out of Israel<sup>137</sup> and to Israeli-owned oil tankers.<sup>138</sup>

The Regulations provide that in the event an owner of property is entitled to receive compensation for the damage from the Tax Authority as well as another source, such as an insurance company, the compensation paid by the Tax Authority will only cover the difference between the amount received from the other source and the amount of damage.

### *C. Economic Losses Not Covered by Any Compensation Scheme*

Although Israel has one of the most generous terror-compensation schemes in the world, terror causes economic harm that is currently not compensated by the government, or for that matter, by any other entity. The economic damage to the Israeli GNP resulting from terror events between September 2000 and March 2002 has been estimated by the Israeli government at NIS 24 billion

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135. The Finance Minister may declare towns as "border settlements," with the approval of the Knesset's Finance Committee. The Finance Minister has issued a list of towns and villages considered border settlements, and which is updated from time to time. Since the classification as border settlement carries potential economic benefits, the inclusion in the list may be the subject of political decision-making.

136. Property Tax and Compensation Fund Regulations (Payment of Compensation) (War Damage and Indirect Damage), 1973, *supra* note 132.

137. Property Tax and Compensation Fund Regulations (Payment of Compensation) (Israeli Foreign Assets), 1982, K.T. 4338, 882.

138. Property Tax and Compensation Fund Regulations (Payment of Compensation for War Damage) (Tankers), 1970, K.T. 2639, 209.

(approximately \$5.1 billion U.S. dollars).<sup>139</sup> A survey by Israel's leading business daily found that 46% of respondents were affected economically by the recent unrest.<sup>140</sup> The endless wave of suicide bombers in 2001-2002 reduced business in main urban shopping areas by as much as 80%,<sup>141</sup> while at the same time increasing the business' expenses.<sup>142</sup> The highly developed tourism industry suffered substantial damage as a result of tourists' fear of terror.

Currently, the significant economic damage previously described is not covered under any compensation scheme. Although trade unions are pressuring the government to compensate business owners for these losses, thus far a general compensation scheme has not been devised.<sup>143</sup>

The lack of a unified compensation policy means that regulated industries may obtain concessions from their regulators only on a case-by-case basis. A striking example is that of the operators of commercial television, which in Israel is a heavily regulated industry subject to stringent requirements in producing expensive Hebrew language programming. As those operators have lost millions by being forced to abort regular programming in order to broadcast breaking news of terrorist attacks and because the operators could not broadcast commercials during the news broadcasts,<sup>144</sup> the regulators are now considering significant reductions based on the operators' commitment for original production of television, thus reducing the operators' expenses and ensuing losses.<sup>145</sup>

If the regulatory concessions go forward, unlike most other business entities the television operators would not only be able to fully recoup all of their losses from the recent waves of terrorism, but they would in essence, simply pass the burden to the actors, directors, and producers who are supposed to benefit from the mandatory requirements to invest in local television production. The fairness of such measure is questionable, but in the absence of a general compensation scheme, each business is left to fend for itself and can be expected to pull every string with the regulators.

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139. Zeev Klein, *Treasury Conducts Discussions on Damages From Conflict: Loss of GNP so Far – NIS 24 Billion*, GLOBES, Mar. 6, 2002, at 2.

140. Eliyahu Hassin, *46%—Terror Has Hurt Me Economically*, GLOBES, Mar. 17, 2002, available at <http://www.schwarufglaw.georgetown.edu>.

141. Sapir Peretz, *Ghost Street*, GLOBES, Jan. 28, 2002, at 3.

142. For example, most restaurants in Israel have employed, since 2001, armed guards. See Sapir Peretz, *Retailers: Financing Security Staff Will Worsen Our Situation*, GLOBES, Apr. 1, 2002, at 3.

143. See, e.g., Sharon Kedmi, *Chamber of Self Employed Organizations: Subsidize Anti-Terror Defense Measures*, GLOBES, Mar. 18, 2002, at 31.

144. Commercials are not broadcast either because of regulation prohibiting commercial breaks during such broadcasts (in most cases) or because of advertisers pulling their commercials out of tragic television programming.

145. See, e.g., Ori Ayalon, *Channel 2 Licensees Ask that the Expenses of Covering Terrorism Attacks be Recognized as Broadcasting Expenses*, HA'ARETZ, Apr. 11, 2002, available at <http://www.haaretz.co.il>.



### III. THE ADVANTAGES AND DISADVANTAGES OF A PERMANENT COMPENSATION SYSTEM

#### *A. Comparing the Incomparable*

The United States had not provided federal support for compensation to victims of terrorism until the tragedy of September 11, 2001. As noted above,<sup>146</sup> the compensation scheme put in place after 9/11 was primarily aimed to protect the airlines involved in the attacks from potentially-devastating law suits. The scheme was specifically designed as an ad hoc action and does not appear likely, at least at the time of this paper, to turn into a permanent federal compensation scheme for victims of terrorism.

One may assume, however, that the issue of compensation will reappear, at least on an ad hoc basis, if and when terror strikes the United States again. According to one commentator, "Congress passes terrorism legislation in response to individual episodes of terrorism. Lawmakers working to pass legislation in the emotional aftermath of a terrorist event are not necessarily concerned with how, or even whether these laws coordinate with other similar laws."<sup>147</sup>

This part of the paper attempts to provide an analysis of a permanent system of compensation, such as the Israeli system described, and the ad hoc approach taken so far by the United States.

Two main differences should be noted before any comparison is even attempted. First, Israel has experienced significant waves of hostile actions over an extended period of time, while the United States civilian population has, to date, been the target of far fewer terrorist attacks. Sadly, the number of casualties in the United States has been extremely high in some of the events and the effect on certain segments of the economy, such as the airline industry, has been significant.<sup>148</sup> Yet, those were isolated events. Unlike Israel, the United States has not had to deal with frequent terrorist attacks which disrupt every aspect of daily life and significantly threaten all parts of the population for extended periods of time. The difference in frequency and spread of the risks associated with terror is quite significant. An American does not ask herself daily whether or not it is safe to go the mall or to a restaurant; an Israeli does.

Second, a permanent system aimed at compensating terror victims must be viewed in the context of the general welfare policy of the society involved. Israel

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146. See *supra* note 106 and accompanying text.

147. Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 BRANDEIS L.J. 83, 83 (2001).

148. Examples include the thousands killed in the September 11, 2001 events, the bombing of Pan-Am Flight 103 in 1988 (270 were killed), see Theresa Agovino, *Pan Am 103: The Next Step*, at <http://www.lexisone.com/news/nlibrary/b021401F.html>, and the Oklahoma City attack in 1995 (168 victims were killed), see Lois Romano, *Oklahoma City Unveils Design for Memorial to Bomb Victims*, WASH. POST, July 2, 1997, at 1.

has an extensive welfare system, providing generous state support (many people would say too generous) to large populations that would not otherwise receive the same benefits in the United States.<sup>149</sup> Clearly the willingness of the government to provide financial support and the public opinion as to the “entitlement” of terror victims to public support must be evaluated against that yardstick.

### *B. Advantages of a Permanent System*

*1. Equity Considerations.*—The first and most intriguing problem in the American scheme of case-by-case legislation is the evident inequality between victims similarly situated. The issue has been raised regarding the compensation fund set by the U.S. Air Transportation and Safety and System Stabilization Act to compensate the 9/11 victims. While that compensation scheme provided an average award of \$1.65 million to families of those killed on 9/11,<sup>150</sup> the families of victims of past terrorist attacks have received nothing.

The generous 9/11 victim compensation fund was made possible for two main reasons, those being the desire to bail the airlines out<sup>151</sup> and the horrible magnitude of the events. The public was much more open to the idea of a compensation fund for thousands of victims than it was when terrorism hit only a small number of victims.

If we are to accept a rationale that the society, rather than the individual innocent victim, should bear some of the cost of the terrorist attack, this rationale should apply to all victims of terrorism, regardless of the number of victims in a specific attack, and regardless of the external motive to bail out the airline industry.

In 1993, terrorists tried to blow up the World Trade Center (WTC) using a truck full of explosives. The attack failed to blow up the buildings, but killed eight victims. As the number of casualties was small, and there were no airlines to defend, no compensation scheme was devised for the victims’ families.

From an equity standpoint, it is very difficult to explain why a 2001 WTC victim should receive millions in government compensation while a 1993 victim should receive none.<sup>152</sup> Attempts in the U.S. Senate to broaden the victim base

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149. Examples include significant support for those choosing to engage in religious study rather than work, grants to Holocaust Survivors, righteous Gentiles (those who helped to save Jews during the Holocaust), and Prisoners of Zion (those who suffered jail, deportation and injury for being Jewish abroad), a significant monthly children’s allowance, income support grants to persons with low or no income, twelve-week state-paid maternity leave.

150. See <http://abcnews.go.com/sections/us/DailyNews/terrorvictims020103.html>. This average amount does not include additional uncapped tax benefits under the Victims of Terrorism Tax Relief Act of 2001. See *infra* notes 154-55 and accompanying text.

151. See *supra* note 106 and accompanying text.

152. See, e.g., Lucette Lagnado, *Terrorism’s Forgotten Victims: Survivors of Past Terror Attacks Say They Deserve Money, Too*, WALL ST. J., Mar. 11, 2002, at B1; Jim Morris, *Families of Pan Am Bomb Victims Feel Numb After Sept. 11 Attacks*, DALLAS MORNING NEWS, Dec. 23, 2001,

eligible for compensation were also very limited in nature, applying to victims of specific past terrorist events.<sup>153</sup>

The inequity can be even better demonstrated by the Victims of Terrorism Tax Relief Act of 2001.<sup>154</sup> That law provides substantial tax benefits<sup>155</sup> to the victims of three terrorist events: the 9/11 attacks, the Oklahoma City bombing, and the terrorist attacks involving anthrax which occurred shortly after September 11, 2001.

What is notable about this law is that, first, the Oklahoma City victims were not deemed worthy of tax concessions in the six years between the time of their tragedy and the larger tragedy of 9/11. Second, the inclusion of the anthrax victims is significant given the fact that the perpetrators of that crime have not been caught. Therefore, the question of whether these acts qualify as terrorism (or qualify as terrorism to a greater extent than the victims of “Unabomber” Theodore Kaczynski, for example, who were not included in the law) is quite uncertain. Clearly, the only reason that the anthrax victims were included was the timing of the anthrax attacks, which occurred shortly after the 9/11 attacks and thus raised the assumption (or speculation) that they were related. Third, the victims of the 1993 WTC bombing were not included in the new law and neither were many other victims of acts that were clearly terrorist, although smaller and less dramatic in nature.<sup>156</sup>

What is even more striking, in an analysis of equity, is that the victims of September 11 received not only the largest compensation ever paid by the U.S. government, but also the benefit of a charitable response that was “extraordinary

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at 4A.

153. See Raymond Hernandez, *Traces Of Terror: Changes to Sept. 11 Fund Would Extend Aid to Victims of Past Terror Bombings*, N.Y. TIMES, May 24, 2002, at A22.

154. Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (2002).

155. The law would, *inter alia*, exempt affected taxpayers from income taxes for the year of death and at least one prior year and provide a minimum benefit of \$10,000 to each victim. The amount of benefit depends on the deceased taxable income and appears to be unlimited. It would also exclude from taxation certain death benefits; shield \$8.5 million in assets from federal estate tax for 2001; make it clear that payments by charitable organizations will be treated as exempt payments; provide an exclusion for certain cancellations of indebtedness; exclude workers' compensation benefits, death benefits, and payments from government retirement plans for taxation; provide tax-free treatment of death benefits paid by an employer to an employee who died as a result of a terrorist attack; exclude from income disability benefits for all persons injured in a terrorist attack; reduce the taxation of disability trusts; and increase the exemption amount for disability trusts. Terrence Chorvat & Elizabeth Chorvat, *Income Tax as Implicit Insurance Against Losses from Terrorism*, 36 IND. L. REV. 425 (2003).

156. Certain tax benefits were provided to victims of the 1988 downing of Pan Am flight 103 and to certain military personnel and U.S. government employees harmed by specific attack of terrorism. For a complete (and rather short) list of tax concessions related to military or terror events, see JOINT COMMITTEE ON TAXATION, TECHNICAL EXPLANATION OF THE VICTIMS OF TERRORISM TAX RELIEF ACT OF 2001 (JCX-93-01), 2-4 (2001).

in breadth and nature,<sup>157</sup> probably due to the magnitude of the 9/11 attacks. Hence, the government aid in an ad-hoc system is more likely to be given to those who might not be the most needy.

2. *Acceptance of Value Judgments by the Victims.*—As was widely publicized, Kenneth Feinberg, who is overseeing the 9/11 Victim Compensation Fund, has had to make every possible value-based decision when deciding how to divide the funds among the victims' families.<sup>158</sup> Many of Feinberg's decisions have proven controversial, and the Justice Department has received thousands of comments on the rules as proposed, and then promulgated, by Mr. Feinberg.<sup>159</sup>

A permanent system would hopefully have long-term and well-thought equality superior to that of an ad hoc system created under daily pressure from interested parties. Value-based judgments should be made after due deliberation. Furthermore, value judgments expressed in permanent rules may be more acceptable to the victims and to the general public than the decisions of a person with final and uncontestable<sup>160</sup> authority in order to split a given budget more equitably and fairly. It would be much easier to accept long-established rules legislated by Congress than what appears to be arbitrary decisions made by one person.

3. *Efficiency.*—The discussion of efficiency addresses two separate issues. First, I will argue that a permanent system would achieve better allocative efficiency. This is so because the level of compensation is more likely to be set at its optimal level in a permanent system than by an ad hoc system. Second, the cost of administration (which in this case is the main part of a productive efficiency analysis) will be considered. The efficiency of administering a permanent system will be examined against the administration of ad hoc compensation scheme. As such, I will argue that an efficient solution depends on the number of compensable events and victims eligible for compensation and make a specific proposal adaptable to the United States, should it chose to adopt a permanent compensation system.

a. *Allocative efficiency.*—As discussed previously, the 9/11 Victim Compensation Fund, by far the most generous terror compensation scheme in U.S. history, was created primarily to protect the airline industry from countless law suits, as claimants who choose to receive the compensation forgo any right

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157. See Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251 (2003).

158. See, e.g., Eli Kintisch, *The Right Man for a Job No One Could Have Wanted*, THE FORWARD, Jan. 4, 2002, available at [www.forward.com/issues/2002/02.01.04/news10.html](http://www.forward.com/issues/2002/02.01.04/news10.html); Milo Geyelin, *Criticism of Sept. 11 Victims' Fund Sparks Backlash*, WALL ST. J., Jan. 23, 2002, at B1. See also Shapo, *supra* note 17, at 241-42.

159. See U.S. DEPARTMENT OF JUSTICE, SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001, at [http://www.usdoj.gov/victimcompensation/civil\\_03.htm](http://www.usdoj.gov/victimcompensation/civil_03.htm) (last visited Sept. 14, 2002). The Interim Final Rule has received 2687 timely comments and 628 additional comments that were filed after the date set for such comments. The final rule received 2953 comments.

160. The decisions of the Special Master administering the Fund are not subject to appeal.

to sue the airlines and certain other parties.<sup>161</sup> In that respect, at least some of the money budgeted for the fund may be viewed as part of the subsidy that the government decided to give the airline industry following the traumatic events of September 11.<sup>162</sup>

Although it was possible not to compensate victims of past attacks while the 9/11 victims were compensated, I assume that it would be very difficult politically not to compensate the victims of a high-casualty terror attack should it unfortunately occur in the near future. I also believe that the amount set for the 9/11 victims is likely to serve as precedent, or at least as a starting point, for the unfortunate victims of future similar-size attacks, should they occur. However, that precedential amount has been set at a level significantly higher than the public, through its representatives, would have set it had it been done so without the influence of the desire to protect the airlines.

Put differently, the allocation of federal resources to the Victim Compensation Fund partially reflects the sum of (i) compassionate feelings towards the victims' families and (ii) amounts which are part of the airline bailout. The amount provided to help secure the assistance to the airlines is the excess by which the level of compensation exceeds the optimal level.

Setting a compensation standard by public and congressional opinion, created by just one event, could also lead to under-compensation, if the defining event is one that causes public opinion to act only half-heartedly to provide the compensation.

Finally, if the level of compensation that differs from one terrorist attack to another is based on external factors such as the involvement of the airlines or a change in the economic climate, the inefficient result will also demonstrate the inequality between victims of different attacks.

*b. Cost of administration.*—As mentioned previously, Israel administers victims benefits through its NII, the equivalent of the Social Security Administration in the United States. The NII, which administers many of the social welfare plans in the non-federal Israeli state, has a permanent department administering the claims and the benefits.

By contrast, the United States had to create a special office within the Department of Justice to administer the Victim Compensation Fund. The same government unit, headed by Kenneth Feinberg, makes the rules and administers the claims. Since the U.S. system is based on a one-time payment to the victims' families, the office administering the fund is expected to wind down within a few years. Should the need arise, a similar office will have to be created anew in the future.

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161. *See supra* note 106 and accompanying text.

162. The Air Transportation Safety and System Stabilization Act, in § 101(a)(2) and § 101(a)(1) respectively, also provided the airlines with \$5 billion to compensate them for losses resulting from the federal order to stop all air traffic following 9/11 and authorized up to \$10 billion in federal loans or loan guarantees to the airlines. Pub. L. No. 107-42, 115 Stat. 230 (2001). For an analysis of the assistance to the airlines, see Margaret M. Blair, *The Economics of Post-September 11 Financial Aid to Airlines*, 36 IND. L. REV. 367 (2003).

Whether it may be more efficient to have a permanent set of rules consistently applied and administered by a professional, permanent agency rather than having to create an ad hoc administration every time the need may arise depends heavily on the scope and frequency of compensable terrorist attacks. It is quite possible that the extended time between major terrorist events in the United States does not justify, at this time, the creation of a permanent agency. The United States may, however, have an existing agency which could potentially administer the benefits with very little additional cost. My proposal is to consider the administration of a permanent program by the Veterans' Administration.

As noted above, the Israeli system is based on a rationale which equates the benefits of civilian victims to those of military personnel injured or killed in action. If a similar rationale was to be adopted in the United States, for the reasons explained above,<sup>163</sup> it could provide an efficient means to administer the benefits at relatively low cost through the existing Veterans Administration.

4. *Psychological Effect.*—Terror is a tool of intimidation and is generally intended to have a damaging effect far greater than the actual physical damage caused.<sup>164</sup> In a country hit hard by terrorism, the knowledge that there is a fairly comprehensive safety net provided to victims is somewhat comforting.

By contrast, a country where there is no compensation system adds a significant specific economic fear to the general fear caused by terrorism. That economic uncertainty is significantly increased at a time when insurance companies hurry to exclude terrorist acts from their coverage or charge a significant premium to cover that risk.

### C. *Disadvantages of a Permanent System*

1. *Cost of Operation.*—Permanent systems generally require a bureaucracy, which may be costly. This consideration has been discussed under *Efficiency* in the discussion of advantages of a permanent system.<sup>165</sup> As previously noted, the issue is really one of fact, depending mainly on the number of harmful terrorist attacks and how far apart those attacks are.

2. *Untouchable Rights.*—One drawback of a permanent system is that it appears to be causing the gradual increase in benefits over time. Once a permanent system is in place, it is very hard, politically, to reduce the benefits provided. If the Israeli experience is any precedent, the very existence of a permanent scheme creates frequent and successful demands to increase those included under the scheme and their respective benefits.

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163. See *supra* Part I.B.

164. See, e.g., ROBERT H. KUPPERMAN & DARRELL M. TRENT, *TERRORISM: THREAT, REALITY, RESPONSE* 279-83 (1979).

165. See *supra* Part III.B.3.

## CONCLUSION

At the end of the day, the main issue that remains was raised by the Israeli Finance Minister when introducing the first Compensation Law in 1951:<sup>166</sup> Who should bear the brunt of terrorism, the individuals who happened to be in the wrong place at the wrong time, or the general taxpaying public? The Israeli answer to that question is unequivocal, if not entirely efficient.

The U.S. answer to the same question has yet to be determined. Although the September 11 Victim Compensation Fund provided generous support to many of the victims' families, the general U.S. position regarding the right of victims to government compensation has remained open, perhaps with the hope that it will remain an academic topic.

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166. *See supra* notes 14-15 and accompanying text.