March 2012

ISRAEL

Beer Sheba District Court

February 13, 2011

Civil File 5006-08

Before: Judge Ya'akov Shefser

Plaintiffs:
1. **Edward Yosepov**
2. **Albina Iverjimov**
3. **Raya Tamarov**
4. **Purim Yakobov**
5. **Solomon Yakobov**
6. **Hannuka Yakobov**
7. **Amir Ragolsky**
8. **Perla Galkovich**
9. **Natan Galkovich**
10. **Sharon Galkovich**
11. **Orine Galkovich**
12. **Ruth Zehavi**
13. **Michael Slutzka**
14. **Natalya Slutzka**
15. **Igor Slutzka**
16. **Yochanan Abucasis**
17. **Sima Abucasis**
18. **Ran Abucasis**
19. **Ya'akov Tamir Abucasis**
20. **Shlomit Abucasis**
21. **Keren Abucasis**
22. **Yochanan Cohen**
23. **Adir Moshe Basad**
24. **Matan Cohen**

All represented by counsel, N. Darshan-Leitner, attorney at law and R. Kochavi, attorney at law

[stamp]
Ministry of Justice
Office of the State Attorney
Civil Southern District
Government Complex
Beer Sheba
February 16, 2011
Signature of recipient
Iluz, Inbal

v.

Defendant: **The Arab Republic of Egypt**
Represented by counsel, A. Sa'adi, attorney at law and E. Yassin, attorney at law

JUDGMENT

The immunity of the Arab Republic of Egypt, as a foreign sovereign, against adjudication in this action in Israel, under the rules of international customary law and under the Immunity Law, is the essence of the dispute to be decided in this judgment.

Background

1. The motion of the Applicant – the Defendant, the Arab Republic of Egypt, to strike *in limine* the action against it based on its non-justiciability , or that it does not establish a cause of action, and since it is granted procedural immunity against adjudication, as the action pertains to state and government matters of the Applicant, to international relations between the Applicant and the State of Israel and to political agreements.

   Alternatively, the Applicant is petitioning to dismiss the action here and transfer the adjudication to the competent court in the Arab Republic of Egypt, which is the appropriate forum for hearing the action.

   Alternatively, the Applicant is petitioning to apply the law applicable in Egypt to adjudication of the action.

2. The background of the motion is a claim in tort in the amount of NIS 260,000,000 filed by 24 plaintiffs for the deaths of their loved ones and personal injuries caused to them resulting from Kassam rockets that were fired into the territory of Israel from the Gaza Strip.

   A summary of the claims against the Applicant is that the Applicant did not prevent, but even supported and encouraged the smuggling and supply of weapons and materiels for terrorism, wanted persons, monies and experts in terrorism from within its territory, including the border areas held by it and under its responsibility, including the Philadelphia Corridor to the Gaza Strip The Applicant applied a systematic and consistent policy in its territory that enabled the above acts to occur and even be supported, thereby encouraging and assisting the commission of acts of terrorism from within the Gaza Strip, including those that led to the harm, which is the subject of this action.

   The Plaintiffs claim the Applicant committed tortious assault and tortious negligence against them. They attribute to such acts of malicious and willful conduct to be evidenced by the full cooperation of the Egyptian security forces with the terrorist organizations and their provision of clear, active and systematic logistical support to the terrorist organizations. In view of the above , they are petitioning for compensation to reflect both the damage caused to the Plaintiffs and the abhorrence of the Applicant's actions, which will also include a punitive and deterrent element.

3. By the power vested in him under section 1 of the Procedures Law (Appearance of the Attorney General) [New Version], the Attorney General gave notice of his appearance in this proceeding and gave his position on the motion for dismissal, including the question of immunity.

After receiving the Attorney General's position, the Applicant gave notice that, in view of his position on the question of immunity, it was petitioning for dismissal of the action against it.

The answer of the Plaintiffs (the Respondents in the motion) to the position of the Attorney General and to the motion to dismiss *in limine* was requested and received.

Summary of the Applicant's arguments

4. The Applicant argues in brief as follows:

a. The requested decision pertains to the policy ascribed to a foreign sovereign political entity at a purely governmental and public level, namely the claims against Egypt's policy are related to enforcing public law and order in its territory, the security policy that it employs and its obligations under political and international agreements. A hearing and a decision on these matters in an Israeli court, pursuant to Israeli law in general and tort law (private law) in particular are liable to cause undesirable results, both at the internal judicial level of the State of Israel and at the level of its international relations. In this framework, there should be no judicial intervention in the political processes and international relations of the State of Israel, nor should the public's trust in the judicial system be diminished. Such adjudication contradicts the rules of domestic law in Israel and also conflicts with public international law.

b. The actions and behavior attributed to the Applicant cannot belong to the private-commercial realm of the law and, therefore, they are granted immunity

c. The acts attributed to the applicant were committed within its sovereign territory and, therefore, the exception to the offenses in tort is also inapplicable.

d. The non-justiciability also stems from the doctrine regarding an "Act of State." The act of terrorism in question is essentially non justiciable, being an "act of war" under the provisions of section 5 of the Civil Torts (Liability of the State) Law, 5712-1952.

Summary of the Attorney General's position

5. As stated above, the Attorney General expressed his position on the motion, the practical significance of which is him joining the motion. Below is a summary:

a. The Applicant has immunity against adjudication in this action, the subject of which involves purely political-governmental issues of sovereignty, security matters and foreign relations. Recognition of the Applicant's immunity in this case, which involves undermining the policy and the conduct of the Applicant is in fact also consistent with the rationale that underlies the issue of the immunity of a foreign sovereign under international customary law. This rationale has also been anchored recently in explicit legislation, in the Immunity of Foreign Countries Law, 5769-2008 (hereinafter: the Immunity Law" or the "Law").

b. The tort exception set forth in section 5 of the Law, which denies immunity to a foreign state, does not apply in this matter. This is based on an approach, which requires that damage must be caused by an act or omission committed within the forum state. It is not sufficient that only the damage occurred in the forum state.

c. This case is clearly one in which it is proper and advisable to recognize the role of immunity of the foreign sovereign, and the tort exception was certainly not intended to apply to such cases. Adjudication in the courts on a claim in tort which deals with examining the actions of a foreign country in its own sovereign territory is liable to lead to the interference of the court on questions of policy, in which the courts generally refrain from intervening. Naturally, conducting such a proceeding, with all the ramificationsthereof, is liable to lead to a serious violation of the Applicant's sovereignty and to strain the foreign relations between the two countries. It is further liable to expose the State of Israel to actions in the courts of the Applicant's country and other countries.

d. There is equally no place for claims alleging a breach of undertakings made in international agreements, in view of the established case law whereby such a breach is not liable to constitute a cause of action for an individual.

Summary of the Respondent's arguments

6. Below is a summary of the Respondents' arguments:

a. Adjudication in this action and the position of the Attorney General in this matter is based on political, extra-judicial considerations that should not be recognized by the court and have no legal validity.

b. The Immunity Law does not apply to the action in this matter, because the Law came into effect after the date on which the motion for dismissal was submitted and the commencement of this hearing , and it cannot be applied retroactively.

c. Under international customary law , the state has no immunity because of the offense in tort for which it is liable, including, and particularly because they are

acts of terrorism. Support for all of the above can be found in the trend to limit the application of the sovereign's immunity, particularly when it pertains to its involvement in acts of terrorism.

d. The supply of weapons and monies from the Applicant's territory to the Gaza Strip and the transfer of wanted persons through its territory reflect the Applicant's systematic policy, which is designed to cause damage to the State of Israel and its citizens. Accordingly, its actions are tantamount to crimes against humanity, war crimes and genocide, and/or aiding and abetting of the above. . For these acts of supporting terrorism, the Plaintiffs are entitled to file a civil suit against the terrorist entities, including against a sovereign entity, and it does not have immunity in this respect .

e. The acts and omissions of the Applicants are a violation of *jus cogens*, from the standpoint of grave violations of human rights that reach the level of international crimes and the rules of *jus cogens* supersede the right to immunity.

f. To determine the scope of the tort exception outlined in section 5 of the Immunity Law, we may not refer to the rules of international customary law because the Immunity Law is a local and original Israeli creation aimed at creating a new and different legal scenario relative to the situation that preceded it.

g. It is inappropriate to claim *forum non conveniens*, both in light of the general trend to reduce the significance of this doctrine, and in light of the gamut of expectations and interests inherent in this matter.

Discussion

The normative framework

7. The normative roots of the main question to be deliberated in the framework of this motion, i.e., the question of the Applicant's immunity against adjudication in the action, are embedded in both the rules of immunity in international customary law and in the Immunity Law.

Although the Respondents are divided on the Attorney General's position regarding theImmunity Law's lack of retroactive application to the case in question, it appears to me, after having studied the pleadings, and under the relevant legal umbrella, that the Respondent [sic] does, indeed, have immunity against adjudication in this proceeding. As discussed below, the Respondent has this immunity, either by virtue of the Immunity Law or by virtue of the rules of immunity in international law and, therefore, no determination is in fact required of this question.

It should be emphasized that this conclusion is reached, independent of the deep empathy of the Court for the suffering and grief the Respondents and their families

have endured and are surely still enduring, as a result of the terrible events described in this action. Nevertheless, the necessary conclusion, as explained below, is that this proceeding is not the appropriate framework for compensating the Respondents for their damages.

Notwithstanding the lack of need for a decision as stated above, and so as not to leave the record "blank," I would like to note that, contrary to the Respondents claim, in my view there is no real certainty that the Immunity Law could not apply retroactively in this case.

The applicability of the Immunity Law is established in section 24 , which also applies expressly to proceedings filed with the court before its enactment, **"provided that the hearing thereof had not yet commenced."**.

The Respondents refer to interpretation of the term "the start of the proceedings" given by the Jerusalem Regional Labor Court in Regional Labor File (Jerusalem) 1145/07 *Azam Hassan Kik v. United States* (dated September 6, 2010, not yet published). In this case, it was interpreted by the Court that in the absence of a definition in the Law, the Law should be interpreted in a manner that limits the proceedings to which the Law applies. Accordingly, it was established that the from the time the defendant's pleadings were filed, the hearing in the proceedings had indeed commenced.

This interpretation was accepted by the Labor Court in light of its conclusion that there would surely be a determination in the Law on matters in which ambiguity existed with regard to the Law in international customary law Thus, the possibility of a conflict between the provisions of the Law and the existing arrangements in international customary law cannot be ruled out. This is in fact what is intended by the position that limitsthe retroactive applicability of the Law, along with minimizing the expectations and infringement of the vested rights of the litigants.

Thus, the court notes in its judgment that:

> **If the Law is not intended to create a substantive change in the immunity laws applicable in Israel (in any case) as part of international customary law, why restrict the retroactive application to proceedings in which the hearing has not yet commenced?**
> (section 24 of the judgment).

However, this position is not compatible with the foundations of the Immunity Law, and it may even erode somewhat the object of its retroactive application because the purpose of enacting the law is, by definition, the anchoring of the rules of international customary law on the issue of immunity, whereas **"the concept of immunity reflects, as stated, international customary norms which, even**

without legislation, constitute part of the law of the land" (see the explanation to section 24 in the Immunity Bill, Government Bill 5768, 357 at 344 [*sic*]).

The explanation further stated:

> **The Bill anchors the substantive rules the court should apply in these cases, – rules that reflect established procedure in most countries. Accordingly there is no impediment to applying the provisions of the proposed Law to a cause of action that accrued before it came into effect.**

The retroactive application of the Law is therefore understandable against the above background, in which the Law does nothing more than to anchor those same existing rules within a piece of legislation as an integral part of Israel's legislative codex, as, indeed, befits a sovereign state and consonant with the longstanding practice of many countries around the world.

Hence, until the actual start of the hearing in the proceeding, which warrants the requisite preparation by the parties, no real violation of the protected interests of any of the litigants is expected from the retroactive application of the Law.

However, as stated above, by virtue of the accepted conclusions in each of the two legal channels, I am not required to decide on this question and I will leave it, for now, for subsequent discussion .

8. The rationale underlying the doctrine of immunity is that the state, as a foreign sovereign is non justiciable, for matters of policy, in the local courts of another country.

Hence, we can appreciate the tendency over the years to limit the applicability of sovereign immunity, whereby immunity is confined to foreign governmental actions in the realm of public law. Nevertheless, sovereign immunity does not apply in cases where the foreign country acts in the private-commercial realm like other private persons. .

The source of the purpose of granting immunity stems from the concept of equality between sovereigns, which draws its power and status, *ab initio*, from the immunity of the local sovereign. This concept also includes the desire of the forum state to achieve reciprocity with other foreign sovereigns concerning its governmental actions.

(In this matter, see **"The Public Committee for Preparing the Foreign Countries Immunity Law, 5765-2005,"** the committee documents published by the Ministry of Justice and the Ministry of Foreign Affairs, at 15)

Accordingly, the doctrine of immunity draws on declared and legitimate purposes and is not merely about preserving inappropriate extra-judicial political interests. If such purposes did not exist, there may not have been any need for the existence of the sovereign immunity doctrine from the standpoint that everything and everyone is justiciable.

The point of departure, therefore, is the existence of immunity, i.e., the rule that takes precedence is that a country cannot be forced to settle disputes in which it is involved in one forum or another, without its consent. There are, of course, exceptions to this rule, exceptions to the rule of immunity, which are anchored in both international customary norms and in the Immunity Law.

See the general explanations to the Bill, *ibid.*, at 334:

> **The object of the Bill, which is hereby published, is to grant procedural immunity to foreign countries from the jurisdiction of Israeli courts and to grant immunity to their assets against collection proceedings in Israel…**
>
> **The history of the immunity of a foreign country reflects the development in two parallel legal channels, which also continued in the first decades of the 20th century. The common law countries claimed that this immunity is absolute immunity that applies every time a foreign country is sued in a court, irrespective of the cause of action. Conversely , the approach of the European continent was that immunity is limited and applies only to the acts of the foreign country in the framework of its government functions (*acta jure imperii*), as distinguished from cases in which the country conducts private commercial transactions (*acta jure gestionis*).**
>
> **In the middle of the 20th century, the common law countries began to move closer to the countries of the continent. Apparently, the main factor in this change was the fact that many countries had begun to conduct commercial business in the realm of private law. Immunity gave those countries an unfair advantage in their commercial relations.**

9. In this matter, there can be no disputing that the acts and/or omissions attributed to the Applicant pursuant to the complaint itself are in the realm of "Egyptian policy" and the determination of "policy in principle" in its territory. Accordingly, they constitute actions within the purview of its governmental functions, and certainly no private-commercial aspect can be ascribed to them (for a definition of the acts as actions in policy, see, e.g., sections 12, 27 and 82 of the complaint).

The recognition of procedural immunity in this case is entirely compatible with the rationale for granting immunity from the outset. It is also consistent with the principle of relative immunity which has historically eclipsed the application of absolute immunity, as stated above, from the need to avoid giving an unfair advantage to a country that engages, as any private person, in a commercial transaction (or causes damage, as with any other person, by a tortious act), i.e., by an action from private law. Nevertheless, it was surely intended to still maintain immunity for acts that do not fall within the realm of private law, and for those which constitute the exercise of governmental powers in public law.

Even under the contrary and more stringent approach (which is not the common one), whereby a foreign country is assumed to be subject to jurisdiction just as any private person subject to limited immunity exceptions , immunity will still only arise in cases where the state exercised sovereign powers within its own territory.

See the basic position of the Public Committee for Preparing the Foreign Countries Immunity Law, at p. 5 of the committee's documents.:

> **The Law is designed to formalize the position of a foreign sovereign before the legal authorities in Israel. The first question placed before the committee was whether to adopt the basic principle whereby immunity would only apply in a few cases, or the basic principle whereby there would be immunity except for a few cases. As stated, the Supreme Court expressed the position that it would be advisable to revoke immunity entirely and adopt the position that immunity is granted only in limited cases. The learned Sinclair also thought this way, and espoused the principle that a foreign country is subject to jurisdiction like any person (and later on, in the footnotes: "He further states: '<u>except in cases in which it exercises its sovereign powers within its territory.</u>' His premise was that a country may not exercise sovereign powers outside its territory and does not merit immunity for such actions, and that it also does not have immunity with regard to actions within its territory that are not sovereign actions'). However, the most widespread approach around the world is that the wording starts with the concept of immunity that is limited, and not from the concept of subordination that has exceptions.**

This is also the case in the leading judgment on this issue, *Leave for Civil Appeal 7092/94 Her Majesty The Queen in Right of Canada v. Sheldon* (June 3, 1997, unpublished). Notwithstanding the position expressed in that framework, of limiting the applicability of immunity, the case clearly indicates that this position draws its power from the substantive change, which occurred in everything pertaining to the involvement of states in the private-business sector, and that it makes a clear distinction between private actions and government actions under public law, before deciding on the question of the existence of immunity.

See that stated in section 16 of the judgment:

> **Underlying this change in international custom is, among other things , the change that occurred in state activities. The state undertook more and more activities that were not of a governmental nature, but rather of a commercial one. The modern state began to behave, in various matters, as private individual actors. Against this backdrop, there was a need – both in common law states and in continental law states – to limit the immunity of the state and to relegate it solely to the governmental sphere…**
>
> **Indeed, a foreign country that enters into the "market" of private law, must be subject to the rules of the "market." A foreign country that wishes to negotiate with people must uphold the law that applies to those negotiations and to their results.**

And later, in section 24 of the judgment:

> **The accepted approach – regarding the immunity of the foreign country – in international customary law is the one that distinguishes between two types of activity on the part of the foreign country. The first type is the action of the foreign country as a government (*acta jure imperii*)…in the matter of these actions, the foreign country enjoys immunity. The second type of action involves "private" actions of the foreign country… with regard to those actions, the foreign country does not enjoy immunity. The problem is, of course, in drawing the line between these two categories. This line must be determined by the proper balance between two sets of competing considerations. One set involves the right of the individual, the principle of equality before the law, and the principle of the rule of law. <u>The other consideration involves the interests of the foreign country in fulfilling its political purposes without judicial review conducted in a foreign country.</u>**

And further, beginning with section 26 of the judgment:

> **The conventional opinion – even if not the uniform one – in the international customary law is that the decisive test – even if not the only one – is a test of the quality and nature of the country's action and not the test of the purpose of the action…**
>
> **We must formulate a distinction that will take into account our important basic values – including human rights, equality before the law, and the rule of law – <u>but we will also enable the foreign</u>**

> **country to fulfill its governmental purposes without it being subjected to a judicial test in a court located in a foreign country…**
>
> **Only in clear and unambiguous cases should the country's immunity be recognized. The hallmark of such cases is that the country's immunity is intended to avert adjudication in the court of a foreign country on the actions of another country, in which the dominant basis is of a governmental nature…**
> (All emphases added – Y.S.)

10. The conclusion in this case is that which is ascribed to the Applicant falls within the realm of exercising its policy within its sovereign territory. Still, we must remember that the actual firing was not attributed to the Applicant as there is no doubt that it occurred from within the Gaza Strip, which is not part of the Applicant's sovereign territory.

The tort exception

11. By virtue of the fact that claims in the courts constitute an independent exception to the rule of immunity, both in international customary law and in the framework of the Law, the question of immunity will also be examined from this standpoint.

The tort exception is established in section 5 of the Immunity Law in the following words:

> **A foreign country shall not have immunity against jurisdiction in an action in tort due to which personal injury or tangible property damage was caused, provided that the tort was committed in Israel.**

There is a dispute between the parties with regard to the question of the strength of the required territorial connection, and it is also relevant when we come to examine the question of the application of the tort exception under international customary law.

The issue of the territorial connection is relevant to the discussion, which is the subject of this case, in the two legal channels discussed above. This is, in light of the fact that the provisions of the Immunity Law on claims in tort draw its power from the rules of international law, and its interpretation relies on the provisions of the immunity laws in countries around the world.

In order to determine whether or not the immunity exception applies in this case, we must examine the interpretation of the provisions of the Law on this matter in accordance with its intent, the purpose of granting immunity in general and the rationale underlying it. We must do this in a manner that will fulfill the normative

rule in content , and by giving it an interpretation that fulfills the above stated purposes rather than rendering it null and void.

Such an examination leads to the conclusion that the tort exception is not intended to apply to this case, as its application is directed toward offenses in tort which, while caused by a foreign sovereign entity, belong to the private legal realm and not the state-governmental level.

12. The tort exception includes in its definition the type of claim (bodily injury or tangible property damage, and not other claims, such as claims for defamation, claims for financial damage, and so forth), and the required territorial connection, without addressing the question of the nature of the action, as private or public. However, such a definition only stems from the different nature of the tortious acts (as opposed to commercial transactions, for example), and the very delineation of the definition into classes of claims is designed to preserve the boundaries of the exception to immunity within the boundaries of its primary and basic purpose, so as not to render it null and void.

We can also see in the clear position of the Public Committee for Preparing the Immunity of Foreign Countries Law, on page 95 of the committee documents:

> **Justification can also be given to the approach whereby claims that do not meet the conditions set forth above** (the type of claim and the territorial connection – Y.S.) **are not that important, or they encompass greater risks for the intervention of the local courts in issues of international politics. Thus, for example, it could be argued that claims for compensation for financial damage are less important and it is doubtful whether they justify the "political risk" that often accompany lawsuits against foreign countries. The same is true with regard to "cross-border" claims in tort (for example, cross-border pollution), the adjudication of which is liable to lead courts into adjudicating the economic or social policy of other countries…**
>
> **The condition that a tortious act must occur within the territory of the forum state is the factor which is actually the most limiting for applying the jurisdiction of local courts to foreign countries committing tortious acts. It is clear that the requirement that the tortious act be "committed within" the forum state can be interpreted in several ways. It is also clear that giving different interpretations on the strength of the required territorial connection between the tortious act and state is liable to significantly narrowing or broadening the scope of the sovereign entity's immunity in this field. The most difficult question in this matter naturally pertains to cross-border tortious acts: cases in which the actions of the foreign government were committed**

within its own sovereign territory, but which caused damage in the territory of the forum state.

An examination of the laws of the countries and the international documents shows three main patterns on this issue : 1) Laws requiring that the damage be caused by an act or omission within the country. That is the law in Britain… 2) International documents which explicitly require that the perpetrator of the damage be in the territory of the forum state at the time the damage is incurred. This is in the European Charter and also in the draft of the international law committee… 3) The law of the United States provides that the damage must occur within the United States…

However, it should be noted that the courts in the U.S. have somewhat limited the application of the rule and they refused, for example, to apply their jurisdiction to indirect damage. Two judgments rendered by appellate courts ruled that the plaintiff must also prove – in addition to the fact that the damage occurred in the U.S. – that certain actions (implemented by the defendant state) occurred within the U.S.…

It appears that the application of the American approach, and conferring authority on Israeli courts to settle international claims in tort will lead the courts into great intervention on questions of policy (economic, social and political) of a foreign country. It seems that this is undesirable. Therefore, it is advisable to adopt the European approach. However, even if the European approach is endorsed, the courts can still be left with certain scope by adopting wording similar to that of the British law (and the laws that were formulated in its wake), which does not explicitly provide that the perpetrator of the damaging action must be present in the country at the time of damage.
(Emphases added – Y.S.)

There is no doubt that the requirements described above for applying the tort exception can satisfy the rationale which constitutes the basis for the existence of the doctrine of immunity and also constitutes the countries' acceptance of its continued existence, notwithstanding the trend towards limiting the immunity as result of the increasing globalization.

In this matter, there can be no disputing that the deeds attributed to the Applicant, which are the subject of the action, are clearly the acts of a foreign government, which were ostensibly committed within its own sovereign territory, but caused the damage, as claimed, in the territory of the forum state.

It was actions such as these that the tort exception was clearly intended to exclude, a conclusion that is based on the rationale of granting the immunity – to preclude the intervention of the local courts of the forum state on questions of a foreign country's policies. Any other interpretation would lead to thwarting the purpose of the immunity, with all the ensuing ramifications and even to render the conditions of the tort exception devoid of content.

Additional support for the intended application of the tort exception to the tortious acts of a state in its guise as a "private tortfeasor" can be found in the explanation of section 5 of the Bill:

> **In countries which legislatively addresss the issue of foreign state immunity, there is almost unanimity on the matter of withdrawing immunity from a foreign country in tort claims where the following conditions are met:**
> **(1) It involves claims for monetary compensation due to bodily injury or tangible property damage…**
> **(2) The tortious act was committed in the territory of the forum state.**
>
> **This Bill also requires these conditions and, pursuant to what it outlines the foreign country will not enjoy immunity when they are fulfilled. <u>In these cases, there is usually an insurance arrangement, and the insurer should not be deemed an entity worthy of immunity under the proposed law.</u>**
> (Emphasis added – Y.S.)

13. As a marginal remark to the above analysis of the tort exception, it should be noted that even according to the American law, an exception to the exception is applied in any claim which is based on the exercise of discretion by the defendant state, or on the failure to exercise it - a "discretionary exception". The implementation of one policy or another by a state is certainly a matter of exercising discretion.

In this matter, see section 48 of the judgment in *Leave for Civil Appeal 7484/05 The United States of America v. the late Yosef Shochat et al*. (rendered on August 3, 2010, not yet published):

> **The appellant wished to rely on the discretionary exception established in the American law… which constitutes an exception to the tort exception, and restores the state's immunity.**
>
> **I will briefly state that I do not see the connection between this exception and the matter at hand. The transfer of the soldiers of the fleet from the Saratoga to the shore and back, on the ship Altovia and, in the words of the appellant "the decision about how to transport the soldiers," falls into the realm of exercising clear**

operational authority, <u>as distinguished from a matter of policy, which is subject to the discretionary exception in American law.</u>"
(Emphasis added – Y.S.)

<u>Acts of terrorism</u>

14. Everything recently stated on the increasing threat of terrorism is true, and it is a threat that has propelled the international community to take various measures to suppress it, including, primarily, political-economic measures. There is also no dispute about the gravity of terrorist acts in general and the shooting of Kassam rockets, which are the subject of this action, in particular.

    Against this backdrop, the general trend towards recognizing terrorist events as establishing a tortious cause of action for their victims, is understandable.

    Nevertheless, the international community has justifiably not resorted to blatant intervention in the policy of a sovereign state through a private tort lawsuit filed in a local court of another sovereign state, subject to the fact that this state <u>is not</u> identified by the community as a state which supports terrorism.

    Clearly, commencing an action in the above constellation of circumstances is unthinkable, otherwise every state suspected by an individual of implementing policy that might support terrorist actions, would be exposed to review by another sovereign entity – due to the policy it is applying. In this light, the role of immunity and its purpose would be devoid of content.

    As previously stated, no-one disputes the grave nature of the attacks as acts of terrorism, even without delving into the question of which of the definitions in the Respondents' pleadings are the most suitable. Rather, the question of the existence of immunity is not determined according to the result of the actions, no matter how grave they may be. Similarly, it cannot be said that revoking a state's immunity because of a civil proceeding relating to rent and vacating a rented premises is the result of the trivial nature of the acts or the fact that they are not serious but, rather, it stems from their commercial nature which, per se, do not justify granting immunity.

15. In view of the above , and out of the need to balance competing interests, i.e., on the one hand allowing claims in tort from countries that are involved in acts of terrorism and, on the other hand, preserving the doctrine of immunity in everything pertaining to the policies of a foreign state, there is a marked trend in these cases to withdraw immunity from countries that are **by definition countries that support terrorism**, and which have been declared as such by the international community or at least by the forum state.

    Prof. **Beth Van Schaack,** in her article **Finding the Tort of Terrorism in International Law** (2008) The University of Texas School of Law (*28 Rev. Litig.*

381) discusses the possibility of U.S. citizens filing civil actions against terrorist entities, including states, under explicit American legislation, while there is uncertainty about the possibility with regard to people who are not its citizens.

In her article, Van Schaack refers to the American Foreign Sovereign Immunity Act, under which a claim against a state will be recognized for acts of terrorism (and immunity will not apply), if one of two conditions are fulfilled: the state was declared by the U.S. Department of State to be one that supports terrorism, or if one of the exceptions to the immunity rule applies, as specified in the law.

> **U.S. victims and claimants may also sue states and state agents implicated in acts of terrorism under the Foreign Sovereign Immunity Act (FSIA, so long as the state itself has been specifically designated as a "sponsor of terrorism" by the Department of State or where the circumstances otherwise satisfy one of the codified exceptions to foreign sovereign immunity.**
>
> **Largely in response to the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, Congress amended the FSIA to create an additional exception to immunity for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). The exception is only applicable to states designated by the State Department as sponsors of terrorism, effectively re-politicizing certain determinations of foreign sovereign immunity.**
> (p. 383-395 of the article. Emphases added – Y.S.)

16. Aside from the above rule established in American law (which is also qualified as stated) the legislation of other countries around the world has not adopted the option of filing claims in tort against sovereign states for alleged acts of terrorism.

In this matter, see the text by Dr. Robbie Sable, **"International Law"** (second ed., 5770-2010, published by the Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, Faculty of Law) at 297:

> **A tangential issue touches on granting immunity to a state with regard to acts of terrorism that it sponsors. Under these circumstances, should immunity be denied? The American legislator responded to this question in the affirmative. In 1996, the United States amended the American law on the immunity of foreign states in order to enable a civil proceeding in the United States against a foreign country for its acts of terrorism, provided, among other things , that the foreign country was on a list (distributed by the United States Government) of states that**

sponsor terrorism. However, the other countries of the world did not adopt a similar exception and, therefore, the American exception has not yet achieved the status of international customary norm, as this is expressed, even implicitly, in the case law of the British House of Lords, and in Israeli case law.

17. Even Israeli case law, when it examines the moral aspects of actions of this type, refers to countries **that espouse policies of killing and terrorism, countries that encourage and/or are partners in committing acts of terrorism.**

    See, for example, the words of the honorable Judge D. Ganot in Misc. Civil Motions (Tel Aviv) 9767/08, ***The Palestinian Authority v. Peled*** (December 25, 2008, unpublished). In this case, although the claim of immunity for the Palestinian Authority was denied because it has not been recognized as a sovereign entity or state, general support was expressed for filing claims against states that encourage and/or are partners in the perpetration of acts of terrorism.In that case, the Palestine Liberation Organization (PLO), which is closely connected both practically and legally to the Palestinian Authority, had been declared a terrorist organization under the Prevention of Terrorism Ordinance, 5718-1948, and also in the American legislation.

18. In view of everything stated above, and since the matter in this case involves a state for which, not only has there been no such declaration, but even maintains peaceful relations with the State of Israel and with the rest of the world, a lawsuit cannot be allowed against it which is directed at the exercise of its policy within its sovereign territory, based on the claim of intervention in acts of terrorism.

Summary

19. In summary, the claim of immunity is upheld and, accordingly, I rule that the Applicant, the Arab Republic of Egypt, has immunity against adjudication in this action.

    Naturally, in view of this result, the need to hear the alternative arguments in the Applicant's motion to dismiss the action is unnecessary.

    The claim is denied.

    Under the unique circumstances underlying this judgment, I did not see fit to grant an order for costs.

    An appeal can be submitted to the Supreme Court within 45 days from the date on which this decision is rendered.

The court clerk is requested to issue a copy of the judgment to counsel for the parties.

Given this day, 9 Adar A 5771, February 13, 2011, in the absence of the parties.

[stamp] [signature]
Beer Sheba District Court Ya'akov Shefser, Judge

[stamp]
Beer Sheba District Court
[illegible]
February 14, 2011 [signature]
Date Head Clerk