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ARTICLE

When the Cannons Roar, Tort Laws Are Silent? A Re-examination of Section 5B of the Civil Wrongs (Liability of the State) Law

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Abstract

This article tackles the question of the legality of section 5B of the Civil Wrongs (Liability of the State) Law, which precludes the Palestinian residents of the Gaza Strip, members of terrorist organisations and their agents from obtaining compensation for injuries suffered as a result of the negligent conduct of Israeli security forces. The question is examined through the lens of Israel's tort law, comparative law, the law of occupation, and international human rights law.

A special focus is given to the amendments made in the said section and its interpretation by Israeli courts, while addressing the state's tort liability towards nationals of enemy states and members of terrorist organisations. In order to emphasise the legal difficulties arising from the Law and the need for its re-examination, the 2018 protests near the Israel-Gaza border are used as a case study. The article concludes by offering to revoke the legal identification as enemy state nationals of Gaza's residents for the purposes of applying state liability in tort. In addition, it recommends the adoption of an individual examination mechanism in relation to members of terrorist organisations. These suggestions are expected to better fulfil the purposes underlying the state's tort liability exemptions, while increasing Israel's compliance with its legal obligations.

Keywords: state liability law; tort liability; state immunity; nationals of enemy state; terrorist organisations

1. Introduction

As a general rule, the State of Israel is liable in tort for negligent acts performed by its agents, apart from a few exceptions listed in the Civil Wrongs (Liability of the State) Law (State Liability Law).[1] One such exception is stipulated in section 5 of the Law. The section exempts the state from tort liability for actions taken by its agents in the context of a 'combat action'. Section 5B of the Law, which stands at the centre of our focus, exempts Israel from tort liability for loss and damage caused to enemy state nationals, and provides that Israel does not assume tort liability for claimants who are considered members of terrorist organisations or their agents.

This article seeks to review the legality of the state immunities enshrined in section 5B, while considering Israel's domestic tort law, comparative law, and international legal obligations. Through a doctrinal analysis of Israeli legislation and judgments, and a tortious analysis of the 2018 protests near Gaza's border, the article sheds light on the difficulties arising when applying section 5B of the Law in the Israeli-Palestinian context. It vividly invokes the question of whether the state should be exempted from tort liability in relation to Gaza residents based on their classification as enemy state nationals. In addition, the specific composition of those who participated in the protests poses additional queries as to the definition of 'membership' of a terrorist organisation, which may unjustly preclude the right of deserving victims of negligent conduct committed by Israeli security forces to file a tort claim against the state. The article calls for a re-examination of section 5B and suggests an outline of an alternative liability regime, based on the individual examination of claimants.

On completion of writing this article, the Israeli High Court of Justice (HCJ) judgment in the case of *Nabahin*, which considered the constitutionality of section 5B(a)(1), was released.[2] Therefore, some segments of the original article have been revised and added in order to address some of the claims made in the judgment, and evaluate its findings and reasoning.

The course of our discussion is as follows. Section 2 reviews the rationales for exempting the state from tort liability in respect of claims made by nationals of enemy states or members of terrorist organisations. Section 3 presents the legislative history of section 5 of the State Liability Law. In this vein, the application and legal interpretation of the section by Israeli courts is addressed, along with the legal regime applicable to nationals of enemy states in other legal systems, namely the United Kingdom (UK) and the United States (US). Section 4 explores the 2018 Gaza border protests with the aim of illustrating the legal hurdles which arise, from a tortious perspective, when applying section 5B of the State Liability Law in the region. Special attention will be given, in this respect, to the status of Gaza under international law and to the obligations this status entails. Part of this section will also be devoted to a discussion of the definition of 'membership' of a terrorist organisation and its legal and normative implications. The article concludes in Section 5 by

[1] Civil Wrongs (Liability of the State) Law, 1952 (Israel), https://www.nevo.co.il/law_html/law150/laws%20of%20the%20state%20of%20israel-6.pdf (official translation).

[2] CivA 993/19 *Nabahin v State of Israel v Ministry of Defense* (5 July 2022).

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arguing that section 5B of the State Liability Law should be adapted to the regional reality by shifting its focus from a blanket exemption to an individual examination model. As I contend, the latter would better fulfil the purposes underlying the adoption of state tort liability exemptions for claims originating during war, while increasing Israel's compliance with its obligations under international law and other fundamental principles of tort law.

2. The State Liability Law: Legal reasoning and rationales

The overriding purpose of tort law is to compensate injured parties for loss and damage wrongfully caused to them, in an attempt to restore them to their original condition. As a general rule, tort law requires compensation to be awarded only for damage caused to protected interests of an individual, and not for any type of damage.[3] Tort law is also intended to guide the behaviour of individuals or corporations, and deter them from imposing an unreasonable risk of injury on others, on the assumption that assigning them with responsibility to bear the cost of their harm will incentivise them to consider their steps carefully and take reasonable precautions.[4] Tort law, and the obligations it sets in terms of monetary compensation, is also based on the element of corporate or individual culpability for which responsibility should be carried.[5]

In the past, the position of the common law regarding loss and damage caused by the state or its agents was that the state should be granted full immunity from tort liability. This approach was based on the English doctrine according to which 'the king can do no wrong'.[6] According to this principle, the king should not be personally prosecuted in courts, as he is their source of authority and power; therefore, his servants or agents cannot harm the states' citizens.[7] In the spirit of this principle, claims involving civil damage caused by state agents who acted in the course of their official capacity were not adjudicated.[8] Over the years, this perception changed, and many states that relied on this deeply rooted principle have amended their tort laws and placed limitations on the tort liability immunity granted to the state.

Israel followed in their footsteps. The Israeli State Liability Law was enacted in 1952. It states generally that '[w]ith respect to civil liability, the state shall be deemed as any incorporated body, except as provided in this law'.[9] One of

[3] Aharon Barak, Mishael Cheshin and Itzhak Englard, *The Law of Civil Wrongs: The General Part* (Gad Tedeschi (ed), Magnes Press 1976) 25 (in Hebrew); Mark Geistfeld, 'Negligence, Compensation, and the Coherence of Tort Law' (2003) 91 *Georgetown Law Journal* 585, 590–97.

[4] G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press 1980) 146–47, 178; Mark A Geistfeld, 'The Coherence of Compensation-Deterrence Theory in Tort Law' (2012) 61 *DePaul Law Review* 383.

[5] Tort Ordinance (New Version), 1968 (as amended) (Israel), art 64.

[6] Crown Proceedings Act 1947 (UK); Herbert Barry, 'The King Can Do No Wrong' (1925) 11 *Virginia Law Review* 349; Victor E Schwartz, Kathryn Kelly and David F Partlett, *Prosser, Wade, and Schwartz's Torts* (10th edn, Foundation Press 2000) 638–39.

[7] ibid.

[8] Elazar Globus, 'Studies in the Civil Torts Law' (1950) 7 *Hapraklit* 267, 274 (in Hebrew).

[9] State Liability Law (n 1) s 2.

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the main exceptions to this provision, to which a central part of our discussion will be dedicated, is the exception related to combat action enshrined in section 5 of the Law. The section states that '[t]he state is not civilly liable for an act performed through a Combat Action of the Israel Defense Forces'.[10] It instructs that damage caused during combat will not be compensated for under tort law.[11] The main reasoning behind this enactment – which is also relevant to the exemption concerning the dismissal of claims filed by enemy state nationals – lies in the fact that tort law is ill-suited for regulating claims in respect of damage arising in time of war. The justification for this is that tort law is intended predominantly to regulate risks with regard to harmful acts conducted in daily life; acts of a warlike nature create a special kind of risk to life, body and property, which is inappropriate to regulate within the traditional framework of tort law,[12] as where there are mutual and equitable risks between two parties, tort law should not be employed.[13] While tort law doctrines typically assign liability to the creators of dangerous circumstances, in times of war both parties cause hazardous situations.[14] Therefore, it is common to see an armed conflict, where each party deliberately poses risks in order to harm its opponent, as such a balanced mutual risk.[15]

Many other reasons can be provided in support of the exceptions provided in section 5 of the State Liability Law, such as the importance of taking risks in combat;[16] the use of 'dangerous subjects', which normally shifts the burden of proof in tort claims,[17] as a rule during war – and not an irregularity;[18] and the difficulty in assigning individual tortious culpability during combat,[19] as causing damage is a built-in premeditated characteristic of fighting against the enemy.[20]

[10] ibid s 5.

[11] In this respect it is important to note that s 5 of the State Liability Law does not distinguish between bodily injury and property damage, or between victims who are citizens of the state and other victims.

[12] CivA 5964/92 *Bani Udda v State of Israel* 2002 PD 56(4) 1, paras 5, 10.

[13] Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499; George P Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85 *Harvard Law Review* 538.

[14] David Luban, 'Risk Taking and Force Protection', 2011, Georgetown Public Law and Legal Theory Research Paper No. 11-72, 24–26.

[15] N CC (Beer Sheba) 45043-05-16 *A v State of Israel* (4 November 2018), opinion of Justice Friedlander, para 75; Yaël Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted during Armed Conflict' (2009) 42 *Vanderbilt Journal of Transnational Law* 181, 220; *Bani Udda* (n 12) opinion of Chief Justice Barak, para 9. For an overview of the justifications provided for the said exemption see Assaf Jacob, 'Immunity under Fire: State Immunity for Damage Caused by Combat Action' (2003) 33 *Mishpatim* 107, 138 (in Hebrew).

[16] ibid.

[17] Tort Ordinance (n 5) art 38.

[18] For these reasons the Israeli legislature decided that shifting the burden of proof because of the use of a 'dangerous subject' is not adapted to hearing individual claims for damages caused in time of war; see CivA 1071/96 *Estate of El Abed v State of Israel* 2006 PD 60(4) 337, opinion of Justice Rivlin, para 16; Tort Ordinance (n 5) art 38; Jacob (n 15) 138.

[19] Jacob (n 15) 119.

[20] *A* (n 15) opinion of Justice Friedlander, para 75; HCJ 8276/05 *Adalah v Government of Israel* 2006 PD 62(1) 352, State Respondent's written replies.

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Practical considerations are also significant in this respect, as the acceptable *punctum saliens* is that managing a tort lawsuit relating to damage caused during war raises many problems of application in respect of investigation and litigation. One such difficulty concerns the institutional burden that hearing such claims can generate, as after the cessation of hostilities the state could potentially be forced to conduct a large number of proceedings simultaneously.[21] In addition, the nature of war – described by Prussian General Carl von Clausewitz as the 'kingdom of uncertainty'[22] – makes it particularly challenging to conduct an effective legal defence in the light of the inferior ability of states to present a coherent factual structure in court, as not every event can be meticulously traced. This is especially true in large-scale armed conflicts that involve multiple concurrent incidents.[23] Furthermore, managing tort claims relating to war incidents may require the state to publicly disclose confidential intelligence details, such as combat methods, decision-making procedures of senior ranks, identities of the combatant soldiers, and more. Such exposure can endanger the state and its agents, as well as offer an advantage to its enemies in future conflicts. Alternatively, refraining from disclosing these details can cost the state in losing the case and hinder the justice system's search for truth.[24] Hence, individual scrutiny of warlike events of great magnitude under the traditional lens of tort proceedings is assumed to be lacking in efficiency and in ability to grasp the full legal picture.[25]

Notably, the exception to the state's tort liability in cases concerning nationals of an enemy state or members of a terrorist organisation applies also to loss and damage caused in incidents that are not directly linked to combat actions. This exception stems from two types of reasoning, the first and most important of which is the denial of economic benefit to the enemy. States wish to avoid granting possible benefits to nationals of enemy states in time of war, on the assumption that accepting their legal claims will profit the economy of the enemy state in which the claimant resides.[26] In Israeli case law, as will be demonstrated later, the same logic applies to the denial of a court hearing of a tort claim filed by an enemy state national or a terrorist organisation member or operative. This denial is based on the perception that offering an economic benefit to a terrorist organisation by the state through the use of legal proceedings must be prevented, as it might hamper the state's war effort and assist the enemy in its fighting.[27] The second purpose of dismissing claims made by nationals of enemy states is to prevent promotion of the enemy state's propaganda, via media coverage or other profile-raising means, in the event that the legal claim is accepted.[28]

[21] *Adalah* (n 20) State Respondent's written replies, 12.

[22] Carl von Clausewitz, *On War* (Princeton University Press 1989) 101.

[23] *Adalah* (n 20) State Respondent's written replies, 12.

[24] ibid.

[25] ibid; for additional justifications for the immunity see Haim Abraham, 'Tort Liability for Belligerent Wrongs' (2019) 39 *Oxford Journal of Legal Studies* 808, 830–31.

[26] *Adalah* (n 20) State Respondent's written replies, 81–82.

[27] CivFH 5698/11 *State of Israel v Dirani* (15 January 2015), opinion of Chief Justice Grunis, paras 16, 64; opinion of Justice Joubran, para 17.

[28] ibid, opinion of Chief Justice Grunis, para 73; opinion of Justice Joubran, para 17.

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Some of the rationales underlying this specific exemption are also practical in nature, similar to the rationales provided for the combat action exception. Tort claims filed by enemy state nationals can be more difficult to investigate.[29] In addition, legal sanctions designed to prevent miscarriage of justice, such as imposing penalties on false witnesses, are somewhat ineffective in these proceedings. For instance, since the claimant and his witnesses are nationals of an enemy state, it can be assumed that they will not be expected to incur penalties for perjury.[30] These considerations explain the need to avoid the inherent legal flaws that may arise when adjudicating lawsuits brought by enemy state nationals.[31]

Consequently, traditional tort law procedures and rationales are not generally applied in wartime situations. Different states shape various mechanisms for the purpose of compensating war victims, which differ from traditional tort law mechanisms. Markedly, after the cessation of hostilities, historically states have reached various kinds of interstate compensation agreement with their enemies in combat, be they voluntary arrangements or arrangements imposed on the losing party.[32] Such arrangements can even benefit the state's own victims because of their potential to be speedier and more efficient in relation to individual claims, while also saving litigation costs for the parties involved.[33]

This section has presented the rationales that form the basis of the state tort liability exemptions relating to combat actions and lawsuits filed by enemy state nationals or members of terrorist organisations, specified in section 5 of the State Liability Law. The pertinence of these exemptions and their

[29] These examples also illustrate how the hearing of such cases may clash with other legal principles. For instance, in this example the prosecution witness called to testify on behalf of the litigant is, if we use the language of the law of evidence, 'a person who is interested in the outcome of the trial in favour of the litigant who called him to testify'; see Evidence Ordinance (New Version), 1971 (Israel), s 54.

[30] *A* (n 15) opinion of Justice Friedlander, para 78.

[31] ibid para 87.

[32] See Linda Taylor, 'The United Nations Compensation Commission' in Carla Ferstman and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making* (Nijhoff 2009) 198, 214; Lesley Wexler and Jennifer K Robbennolt, 'Designing Amends for Lawful Civilian Casualties' (2016) 42 *The Yale Journal of International Law* 121, 130–35; Richard M Buxbaum, 'A Legal History of International Reparations' (2005) 23 *Berkeley Journal of International Law* 314 (concerning the post-Second World War formulation of a reparations policy); Ruth L Cove, 'State Responsibility for Constructive Wrongful Expulsion of Foreign Nationals' (1987) 11 *Fordham International Law Journal* 802 (relating to the Iran-US Claims Tribunal); Michael E Schneider, 'How Fair and Efficient is the UNCC System?' (1998) 15(1) *Journal of International Arbitration* 15 (addressing the UN Compensation Commission established following the Iraqi invasion and occupation of Kuwait). An interesting example in this respect is the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, established by the Agreement on Refugees and Displaced Persons annexed to the Dayton Peace Accords of 14 December 1995. Older examples include the Potsdam Conference (1945) and the Paris Peace Treaties (1947), addressing war compensation awards that Germany and the Axis Powers had to grant to the Soviet Union; Reparations Agreement between Israel and the Federal Republic of Germany (entered into force 27 March 1953) concerning the Holocaust reparations awarded by West Germany to Israel.

[33] Jacob (n 15) 138–40.

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justifications are studied in the next section by introducing related Israeli legislation and case law. These rationales are then evaluated in comparison with other, at times conflicting, legal norms to which Israel is bound.

3. The State Liability Law: Legislative history

This section reviews the legislative changes that section 5 of the State Liability Law has undergone, the manner in which these changes were interpreted in Israeli case law, and their implementation over the years. This informative background will serve us in identifying the unique complexities of the state tort immunities specified in section 5B of the State Liability Law.

Since the Six Day War, Israeli courts have been open to hear tort claims filed by Palestinians living in the West Bank and in Gaza who were injured by Israeli security forces at their places of residence.[34] A significant portion of these claims involved loss and damage caused to Palestinians as a result of security forces operations conducted in the area.[35] This individual tort claims mechanism was considered relatively rare in situations of armed conflict, and it supposedly originated from the status of the said territories as occupied territories – a matter that is addressed more elaborately in subsequent sections.[36]

Notwithstanding, section 5 of the State Liability Law specifies that the state will be exempt from liability for damages where the harm caused is the result of a combat action conducted by Israeli security forces.[37] The definition of the term 'combat action' and the type of event that constitutes such an action have been debated more than once in the courts, and stood at the centre of several legislative amendments.

The Israeli legislature, for many years, avoided providing a clear legal definition of 'combat action' and left its interpretation to judicial discretion. Generally, the courts examined each contested case separately,[38] based on the frequency and customary nature of the security forces' commission of the action in question during wartime.[39] A later ruling asserted that only acts of war 'in the narrow and simple sense of this term' would be considered 'combat actions'.[40] Acts of war were defined as acts in which 'the special nature

[34] As defined by State Liability Law (n 1) s 5A(1); see, eg, CivA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd v Kara'an* 2004 PD 59(1) 345; *Adalah* (n 20) opinion of Chief Justice Barak, paras 22–23; Ronen (n 15) 217.

[35] The term 'Israeli security forces' refers mainly to the Israel Defense Forces (IDF), but also to its policing Border Police Unit (BPU) and the General Security Service; see, eg, *Bani Udda* (n 12); CivA 6790/99 *Abu Samra v State of Israel* 2002 PD 56(6) 185; CivA 1354/97 *Akasha v State of Israel* 2004 PD 59(3) 193.

[36] Ronen (n 15) 217; Gilat J Bachar, 'Money for Justice: Plaintiffs' Lawyers and Social Justice Tort Litigation' (2020) 41 *Cardozo Law Review* 2617, 2627.

[37] State Liability Law (n 1) s 5A.

[38] CivA 311/59 *Tractor Station Factory v Hayat* 1960 PD 14 1609.

[39] ibid 1613; CivA 542/75 *Atalla v State of Israel* 1977 PD 31 552.

[40] *Bani Udda* (n 12) opinion of Chief Justice Barak, para 10 (citing CivA 623/83 *Levi v State of Israel* 1986 PD 40(1) 477, 479).

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of warfare with its risks, and in particular its implications and results, is expressed'.[41] Accordingly, it was decided that not every activity carried out by the security forces in the West Bank and in Gaza can be considered a combat action, as a significant part of the activities carried out in the area can be classified as law enforcement activities, which are characterised with ordinary risks which do not surpass the kind of risk that tort law typically regulates.[42] In order to distinguish between policing operations of the security forces in the area and combat actions, it was determined that all circumstances surrounding the operation under review must be taken into account: its purpose, duration, location, identity of the forces operating in it, the type of threat that preceded it and arose from it, and the extent and scope of military use of force during the incident.[43]

Because of the judicial interpretation of 'combat action', which Knesset members perceived to be too narrow, the State Liability Law was amended in 2002.[44] The amendment clarified the term by providing a definition to be added to the Law.[45] It also introduced section 5A, which established special procedural and evidentiary restrictions regarding a claim for damage caused as a result of the activities of the security forces in Gaza and the West Bank that did not form part of a combat action.[46]

[41] ibid; see also *Abu Samra* (n 35) 188.

[42] *Bani Udda* (n 12) opinion of Chief Justice Barak, para 8.

[43] ibid para 10.

[44] Civil Wrongs (Liability of the State) Law (Amendment No 4), 2002 (Israel).

[45] 'Combat Action – including any action of combating terror, hostile actions, or insurrection, and also an action as stated that is intended to prevent terror, hostile actions, or insurrection committed in circumstances of danger to life or limb': ibid s 1.

[46] These arrangements include a duty to provide written notice within 60 days as a condition of filing a claim; shortening the period of limitation for filing a claim to two years instead of seven years; repealing the rule regarding the transfer of the burden of proof by negligence in respect of 'dangerous subjects' set out in s 38 of the Tort Ordinance (n 5) (discussed above), and repealing the rule according to which the burden of proof shifts to the defendant in a case where the claimant had no knowledge or ability to know the circumstances that caused the damage: State Liability Law (n 1) s 5A(2)–(4); Tort Ordinance (n 5) art 38. The transfer of the burden of proof under art 41 of the Tort Ordinance (n 5) is designed to assist a claimant in proving her case in circumstances in which the claimant does not know and has no possibility of knowing the circumstances that caused the damage. In this situation, without reversing the burden of proof, a claimant may find herself unable to prove her claim because of evidentiary inferiority, even if the claim is justified. This rule cannot be deployed in tort claims falling under the State Liability Law, the reason being that the premise that the state has knowledge of the circumstances in which the damage was caused does not stand the test of reality. It was argued that the state is usually at a disadvantage in terms of its ability to provide evidence in such cases. Hence, shifting the burden of proof in cases that the State Liability Law was intended to regulate may determine the fate of the prosecution in such a way that the state will almost always bear liability for the events in question. In addition, the amendment endowed courts with the power to dismiss a claim if it was found that the state had been denied a fair opportunity to defend itself against appeal because of lack of cooperation by the Palestinian Authority (PA). It should be noted that in exceptional cases the amendment allows the court to deviate from these provisions for reasons to be documented: ibid s 5A(d).

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3.1. Legal arrangements in relation to enemy nationals and members of a terrorist organisation

Amendment No. 7 added section 5B to the State Liability Law, relating to enemy state nationals and members and affiliates of terrorist organisations. The amendment was passed in July 2005 after a lengthy legislative process. It was enacted as a result of a change of circumstances following the events of the Second Intifada, which changed the patterns of activity of the Israel Defence Forces (IDF) in the West Bank and Gaza; the level of confrontations between the Israeli security forces and the Palestinian population, and the extent and intensity of fighting in the area.[47] Amendment No. 7, therefore, was based on the premise that almost all of the activities of the Israeli security forces in these territories endangered Israeli forces to a much greater extent in the aftermath of the Second Intifada. As a continuation of this line of thought, it was determined that it is no longer possible to classify the Israeli security forces' activities in the West Bank and in Gaza as 'policing activities'.[48] As a result, Amendment No. 7 further reduced the state's liability for damage caused in the West Bank and Gaza under the State Liability Law.

Section 5B states:[49]

> 5B. (a) Notwithstanding the provisions of any law, the State is not civilly liable for damage caused to the persons set forth in paragraphs (1), (2) or (3), except for an injury sustained in the kinds of claims or to the kinds of claimants set forth in the First Annex – (1) A subject of a state that is an enemy, unless the person is staying lawfully in Israel; (2) A person who is active in, or a member of, a terrorist organisation; (3) A person who was injured while acting as an agent or on behalf of a subject of an enemy state, a member of a terrorist organisation, or a person active therein.

The section distinguishes between claims made by nationals of an enemy state, a member of a terrorist organisation or someone acting on its behalf, and other tort claims filed by residents of the West Bank and Gaza.[50] Section 5B, in effect, denies nationals of enemy states and terrorist operatives the right to access Israeli courts in order to realise their rights for compensation for loss and damage caused to them by Israeli security forces, even those not linked to combat actions. This denial is absolute, other than a few minor exceptions. These enumerated exceptions arise when the damage was caused to a citizen of an enemy state lawfully residing in Israel (such as former South Lebanon Army fighters who moved to Israel), or when the damage was caused to a person in the custody of the State of Israel.[51] However, the law stipulates

[47] Explanatory Notes to the Proposed Civil Wrongs (Liability of the State) (Amendment No. 5) (Filing of Claims against the State by a Subject of an Enemy State or Resident of a Zone of Conflict) Law, 2002 (Israel).

[48] ibid; *Adalah* (n 20) State Respondent's written replies, 26.

[49] State Liability Law (n 1) s 5B.

[50] *Adalah* (n 20) State Respondent's written replies, 30–32.

[51] State Liability Law (n 1) First and Second Annex.

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that the immunity will not be withdrawn in cases where the claimant who was injured while in custody resumed taking part in terrorist activities after his release.[52]

Admittedly, under section 5B, state immunity applies without the need to prove any causal link between infliction of the damage and the fact that the injured party is a national of an enemy state or a member of a terrorist organisation. Thus, the claimant's citizenship, activity in or membership of a terrorist organisation, in itself, is sufficient to grant the state complete tort liability immunity. It should also be borne in mind that section 5B applies to incidents that took place on Israel's borders, and to members of a terrorist organisation or its agents who are Israeli citizens living in Israel – and thereby exposed to various potential injuries inflicted by its agents.

Amendment No. 7 essentially was intended to address situations in which an incident would not be defined as a combat action. The Amendment established that even in those cases the state will still enjoy tort immunity if the claimant is a national of an enemy state, a resident of a conflict zone, a member of a terrorist organisation or someone acting on its behalf. The dismissal of an injured party's right to file a tort claim under Amendment No. 7, therefore, is personal, in the sense that it is concerned with the national identity of the claimant, or their affiliation with a terrorist organisation.

Amendment No. 7 also introduced section 5C, which was far-reaching in its scope, as it conferred immunity to the state from any kind of tort claim made by residents of a conflict zone,[53] regardless of whether the claimant's damage occurred as part of a combat action, let alone the exceptions set out in the Second Annex to the Law.[54]

[52] ibid. The First Annex states: 'A claim the cause of which is injury sustained to a person as stated in section 5B(a) while he was in the custody of the State of Israel as a detainee or prisoner and who, after being in custody, did not return to be active in, or a member of, a terrorist organization or to act on behalf of such or as an agent thereof'.

[53] The State Liability Law (n 1) s 5C(e) defines a 'conflict zone' as follows: 'an area outside the territory of the State of Israel which the Minister of Defense declared a zone of conflict, as set forth in subsection (c), where security forces were active or remained in the zone in the framework of the conflict'; according to the provisions of the amendment, the declaration of the Minister of Defense must be limited to a certain geographical scope and restricted to a certain time frame. The declaration may be issued before filing a tort claim and following receipt of notice of an intent to file such a claim.

[54] Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 2005 (Israel), s 5C states: '5C. (A) Notwithstanding the provisions of any law, the State is not civilly liable for damages sustained in a zone of conflict as a result of an act that was carried out by the security forces except for injury that is sustained in the kinds of claims or to the kinds of claimants set forth in the Second Annex; (B)(1). The Minister of Defense shall appoint a committee, which shall be authorised to approve, beyond the letter of the law, in special circumstances, payment to a claimant as to whom subsection (a) applies and to set the amount of the payment (in this subsection – the Committee) ...; (C). The Minister of Defense may declare a territory a zone of conflict; where the minister so declared, the declaration shall establish the borders of the zone of conflict and the period for which the declaration applies; announcement of the declaration shall be published in Reshumot; The Annex stipulates that the state will not have immunity regarding damage caused as a result of an offence, provided that the said person was convicted for an offence for the said act: ibid Second Annex. The Law states that 'offense' excludes an offence that is of the kind for which strict

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3.2. The Adalah *case: Invalidating Section 5C of the State Liability Law*

Following the enactment of Amendment No. 7 to the State Liability Law in 2005, a number of petitions were filed before the HCJ by human rights organisations and Palestinian victims. These petitions were consolidated into a single petition heard by an extended panel of nine judges. The judgment held that section 5C establishes a sweeping rule of state immunity, which applies even in the absence of a causal link to the circumstances that existed at the time the damage arose. This diminution of state liability under the State Liability Law following the Amendment, as was decided, infringes the rights of the residents of the conflict zone in cases where their harm was not caused as a result of a combat action. Chief Justice Aharon Barak, who wrote the majority opinion, criticised the purpose of the law when he examined it, considering the constitutional tests stated in the limitation clause of Basic Law: Human Dignity and Liberty,[55] and reasoned that:[56]

> The removal of tort cases involving the security forces, which have no combat aspect, does not fulfill the proper purpose of adapting tort law to combat situations. It comes to fulfill an improper purpose of releasing the state from any liability for damages in the Conflict Zone.

The Court further added that in order to fulfil the purposes underlying the enactment of section 5C – to avoid a flood of lawsuits that the state struggles to defend because of the fighting conditions surrounding the events in question[57] – the exemption of the state from tortious liability with regard to combat actions currently in place is sufficient.[58] In addition, it held that the benefit to the public interest arising from the denial of state liability committed outside the context of a combat action is not weighed against the damage caused to the injured person and their rights. Therefore, in the light of its failure to meet the tests of the said limitation clause, it was ruled that section 5C is unconstitutional.[59] However, unlike the critical attitude portrayed in the

liability applies (within the meaning of section 22 of the Penal Law, 1977). The state will also have liability in tort in cases where damage was caused to a person in the custody of the State of Israel; by an act of the Civil Administration that was undertaken outside the framework of the confrontation, and for damage caused as a result of a car accident in which a security forces' vehicle was involved outside the operational activity. The Amendment also added an *ex gratia* payment mechanism, for 'special cases' in which a committee may review a claim and award compensation in suitable cases. However, clear criteria were not provided for the classification of such cases; see *Adalah* (n 20) opinion of Chief Justice Barak, paras 6–7, 14; State Respondent's written replies, 9; Amendment No. 7 (n 54) s 5C; Working Procedure and Guidelines for the Committee Acting under the Ministry of Defence concerning Ex Gratia Payments, 2011. It should be mentioned that these restrictions are repeated in other civil orders that apply to the residents of the West Bank and Gaza; see, eg, Order concerning Claims (Judea and Samaria) (No 271), 1968.

[55] Basic Law: Human Dignity and Liberty (Israel), s 8.

[56] *Adalah* (n 20) opinion of Chief Justice Barak, para 35.

[57] Explanatory Notes to Amendment No. 5 (n 47).

[58] *Adalah* (n 20) opinion of Chief Justice Barak, para 37.

[59] ibid para 42.

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judgment in relation to section 5C, with reference to section 5B Chief Justice Barak only noted:[60]

> The question of the constitutionality of Article 5B of Amendment No. 7 arose before us only marginally … Much depends on how it is implemented and what interpretation will be given to the provisions of the section. For example, we have not heard any arguments as to whether the correct meaning of the section includes a causal link between the activities and membership in the terrorist organisation or its mission and the damage caused to the victims. Of course, the parties reserve the right to raise their arguments regarding the constitutionality of Article 5B in so far as it arises in the context of specific cases … In the circumstances of the case, we did not see room to decide on the question of its constitutionality.

This remark, concerning the inability to examine the constitutionality of section 5B, is rather puzzling, as it seems that the principles mentioned in relation to section 5C should apply also to section 5B. The judgment criticised the application of a sweeping state immunity that does not examine each case on its own merits in the context of lawsuits filed under the State Liability Law. This stance is relevant, in more than one sense, to section 5B of the State Liability Law as well. Like section 5C, section 5B sweepingly denies legal protection of the right for reparation where the injured party is a national of an enemy state or related to a terrorist organisation. Even if relevant differences can be identified, the resemblance between the legal challenges raised by these two sections invites similar scrutiny. It should be noted in this regard that in the 2015 *Dirani* case (discussed in greater detail below), Supreme Court Justice Neal Hendel hinted that the constitutionality of Amendment No. 7 in respect of claims made by nationals of an enemy state is likely to be examined by the Court in the future, although in his opinion there was no need to determine its constitutionality in the above-mentioned case.[61]

3.3. The declaration of Gaza residents as enemy state nationals

In the state respondent's written replies in the *Adalah* case, submitted to the HCJ in 2006, it was argued that a need arose to regulate the unique status of Palestinian Authority (PA) residents under the State Liability Law, as the PA is not considered an enemy state; hence the arrangement stipulated in section 5B of the State Liability Law does not apply to its case.[62] Conversely, as what seems to be a response to the invalidation of section 5C of the State Liability Law by the HCJ, in 2008, Amendment No. 8 to the Law was enacted. The Amendment added to section 5B(a)(1) – which starts with the words '[a] subject of a state that is an enemy' – the sentence: 'or person who is not an Israeli

[60] ibid para 31.

[61] *Dirani* (n 27) opinion of Justice Hendel, para 16.

[62] Apart from cases in which PA residents are members of a terrorist organisation or acting on its behalf, as stated. *Adalah* (n 20) State Respondent's written replies, 8.

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citizen and is a resident of a territory outside Israel which the government has declared, by order, as enemy territory, unless lawfully present in Israel'.[63] The Explanatory Notes to the Amendment did not refer explicitly to this addition,[64] but at a meeting of the Constitution, Law and Justice Committee where Amendment No. 8 was deliberated, it was mentioned that:[65]

> The section looks to the future and it foresees a situation where the Israeli government will come to the conclusion that the territories of the area – the Gaza Strip and possibly Judea and Samaria – have become enemy territory and it will be declared as such. The section states that if the state has declared such an area as enemy territory, it could be the entire territory of Gaza Strip and Judea and Samaria or parts of it, depending on the state's considerations, then in the matter of liability for damages residents of that area will be lawfully considered as citizens of an enemy state.

Hence, the addition to the wording of section 5B(a)(1) of the State Liability Law is intended to clarify that the law applicable to residents of a territory declared to be enemy territory, even if the said territory is not considered part of a state, shall be the law which applies to nationals of an enemy state.[66]

In the *Adalah* case, deliberated before the declaration of the Gaza Strip as enemy territory, the state argued that it is justified to apply the rules applicable to nationals of an enemy state to the residents of Gaza, at least in certain circumstances, to limit their ability to sue the State of Israel for damages.[67] In line with this statement, an ordinance which orders just that was indeed issued.[68] In 2014, the Israeli government declared the Gaza Strip to be 'enemy territory', in accordance with its statutory definition in the Penal Code,[69] to which section 5B of the State Liability Law refers.[70] Admittedly, the Gaza Strip was treated as enemy territory by the HCJ on several occasions, prior to the entry into force of the formal declaration.[71] The justification for this labelling is that although the Gaza Strip is not recognised as a state, the rationale for preventing adjudication of a claim made by an enemy state national applies to it, seeing that it is an area under the control of a terrorist organisation which conducts ongoing fighting against the State of Israel.[72] The

[63] State Liability Law (n 1) s 5B(a)(1).

[64] See Explanatory Notes to the Proposed Civil Wrongs (Liability of the State) (Amendment No. 8), 2008 (Israel).

[65] Protocols of the Knesset's Constitution, Law and Justice Committee, 14 September 2009, 16 (in Hebrew).

[66] *A* (n 15) opinion of Justice Friedlander, para 49.

[67] *Adalah* (n 20) State Respondent's written replies, 8.

[68] Civil Wrongs Order (State Liability) (Declaration of Enemy Territory – Gaza Strip), 2014 (Israel).

[69] ibid; see also Penal Law 1977 (Israel), art 91.

[70] State Liability Law (n 1) s 5B(b).

[71] See, eg, HCJ 9132/07 *Al Bassiouni v The Prime Minister* (30 January 2008), opinion of Chief Justice Beinisch, paras 12, 22.

[72] *Nabahin* (n 2) opinion of Justice Sohlberg, paras 20–21.

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main significance of the ordinance is that since its entry into force, the residents of Gaza are officially barred from filing their tort claims in Israeli courts, be it for damage caused as a result of ongoing hostilities or damage otherwise generated, owing to their labelling as nationals of an enemy state.[73]

Section 5B of the State Liability Law and the order declaring Gaza residents to be 'enemy nationals' should be viewed as part of a set of legislation and court rulings that concerns the entitlement of nationals of enemy states to compensation. One of the main legal arrangements behind this set of rules is the principle originating from the common law tradition, according to which trade relations with an enemy state should not exist. This principle is expressed clearly in the Trading with the Enemy Ordinance of 1939.[74] Past Israeli rulings regulated other aspects of the legal treatment afforded to nationals of enemy states. In *Hakim*, the HCJ discussed a petition filed by a resident of Israel who petitioned on behalf of her son. Her son went to study in Beirut and after the establishment of the State of Israel in 1948 was not allowed to return.[75] His request for return was denied. Supreme Court Justice Shneur Zalman Cheshin, in his ruling, reiterated the principle set out in the Trading with the Enemy Ordinance, according to which commercial relations with an enemy state must not take place. He asserted that the state must prohibit any interaction with an enemy state which could assist it in its fighting.[76] Therefore, in his view, the cessation of civil trade between fighting states is mandatory.[77]

The right of an enemy state national to bring a lawsuit before Israeli courts was subsequently discussed at length in the *Dirani* case. This was a tort claim filed against the state by a member of a terrorist organisation living in Lebanon, claiming that during the time he spent in Israeli custody his guards abused him.[78] The discussion of the case had several phases, ending with the ruling of the additional hearing of the case.[79] Dirani's petition for compensation was rejected based on the common law rule of thumb incorporated into Israeli law, which concludes that an enemy claim should not be investigated[80] during the existence of the hostile relationship.[81] This principle serves as a

[73] *A* (n 15); see the additional review of the legal amendments to the State Liability Law in Gilat J Bachar, 'The Occupation of the Law: Judiciary-Legislature Power Dynamics in Palestinians' Tort Claims against Israel' (2017) 38 *University of Pennsylvania Journal of International Law* 577, 582–88. Notably, the ordinance was set to apply retroactively, as it was deemed to be effective four months prior to its enactment, dating back to Operation Protective Edge, a seven-week armed conflict between Israel and Gaza; see the Declaration of Enemy Territory – Gaza Strip (n 68).

[74] Trading with the Enemy Ordinance, 1939 (Israel), art 3(1) stipulates that any trader or anyone attempting to trade with an enemy state national within the meaning of the Ordinance shall be guilty of the offence of trading with the enemy.

[75] HCJ 24/52 *Hakim v Minister of the Interior* 1952 PD 6 638.

[76] ibid opinion of Justice Cheshin, para 8.

[77] ibid. The constitutionality of s 5B(a)(1) of the State Liability Law was not discussed in the ruling, as the date on which the alleged tortious act was performed preceded the date of application of the section.

[78] CivC 1461/00 (Tel Aviv District Court) *State of Israel v Dirani* (19 December 2005).

[79] *Dirani* (n 27).

[80] ibid.

[81] ibid opinion of Chief Justice Grunis, paras 102–03.

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temporary procedural block and does not constitute an absolute denial of the right to be awarded compensation, as the state respondent emphasised during the proceedings. It further noted that the temporary denial of the claims of an enemy state national during the existence of hostilities applies also to activists of terrorist organisations, and is not legally unabridged, as it does not apply to administrative, international, criminal and disciplinary proceedings which are known to have a role in overseeing military conduct, and by which various remedies may be granted.[82]

In 2017, the ordinance declaring Gaza residents to be nationals of an enemy state, which prevents them from bringing their civil tort cases before Israeli courts, was challenged in the Be'er-Sheva District Court.[83] District Court Justice Shlomo Friedlander, who wrote the judgment, ruled that Israel, like other states, does not adjudicate personal claims of enemy nationals stemming from military operations in enemy territory. Drawing from this argument, he noted that there is no constitutional fault in the declaration of Gaza as enemy territory and its ramifications, as the purpose of defending the state from the abuse of personal tort claims filed by nationals of enemy states is valid and proportionate.[84]

The claimants later filed an appeal with the HCJ, heard by a panel of three justices.[85] In the 92-page judgment, published in July 2022, it was eventually ruled that section 5B(a)(1) of the Law is constitutional, and the appeal was dismissed.[86] The ruling determined that the legal arrangement enshrined in the said section does not contradict international law, and is even in line with parallel legal practice in the rest of the world. It was further stated that the said arrangement is based on legitimate purposes and meets the various existing constitutional tests. Nonetheless, Justice Ofer Grosskopf, supported by Deputy Chief Justice Hendel, raised doubts as to the constitutionality of the section in cases where the alleged damage 'is not closely related to the conflict'.[87] In the words of Justice Grosskopf:[88]

> There is a significant difficulty in my view in blocking the possibility for a resident of the Gaza Strip to file a tort claim against the State of Israel for an injustice committed against him by the state, when this injustice is not

[82] *A* (n 15) opinion of Justice Friedlander, para 13.

[83] ibid.

[84] ibid paras 137–43.

[85] *Nabahin* (n 2).

[86] It should be stated that other significant questions, beyond the thorough constitutional examination of s 5B(a)(1), were discussed at length in the appeal. These include the question of whether it is possible to challenge the constitutionality of a Law through 'collateral attack' as opposed to 'direct attack'; whether a right arising from international law is likely to affect the constitutional examination; and whether Israel's Basic Laws apply to Palestinians residing in the Gaza Strip. While the reasoning provided by the Supreme Court for these questions is significant to this article, a broader discussion exceeds its scope.

[87] *Nabahin* (n 2) opinion of Justice Grosskopf, paras 19–23; opinion of Deputy Chief Justice Hendel.

[88] ibid opinion of Justice Grosskopf, para 19.

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closely related to the state of conflict between the State of Israel and the Gaza Strip.

In any case, it was stated that the issue does not arise in the specific case, and therefore that it is not necessary to rule on the matter in the framework of the procedure.[89] Moreover, while the constitutionality of preventing a resident of the Gaza Strip from filing a tort claim for an injustice committed against him by the state when this injustice is not 'closely related to hostilities' was questioned in the *Nabahin* case,[90] it is unclear what framework will be used to determine this classification, and if it is wider, identical or narrower than the legal understanding of the term 'combat action'.[91]

As in other countries affected by the common law tradition, the well-established rule according to which claims of enemy state nationals will not be heard has been incorporated into Israeli law,[92] and, as we have seen, was also enshrined in section 5B of the State Liability Law. The arrangement set out in this section can certainly be seen as complementing the above-mentioned normative framework,[93] and as expressing the Israeli legislator's desire to avoid awarding tort compensation in times of war[94] – a purpose deemed proper and legitimate in the *Adalah* judgment and in the subsequent *Nabahin* judgment.[95]

After examining the rationales underlying the state's exemption from tort liability in combat, as well as the rule according to which tort claims filed by enemy nationals will not be heard, the legislative amendments made to section 5 of the State Liability Law were outlined. Specific emphasis was placed on the enactment of section 5B of the Law, and on its legislative history and objectives. Upon reviewing Israel's legal policy with regard to tort cases filed by enemy state nationals, it is important to state that the reluctance to adjudicate such cases is a prevalent procedural block accepted among other democracies as well, as was also mentioned in the *Nabahin* ruling.[96] In the UK, for example,

[89] ibid para 22.

[90] ibid paras 19–22.

[91] For instance, Justice Grosskopf mentioned that demonstrations in Gaza against Israel are acts that justify the preclusion of tortious remedies, without addressing the variety of circumstances that these may include. An example provided in the ruling, for a situation unrelated to combat action, is a claim for damage caused by the state to a real estate property located in northern Israel, which belongs to a resident of the Gaza Strip.

[92] *Dirani* (n 27) opinion of Chief Justice Grunis, para 42.

[93] *Adalah* (n 20) State Respondent's written replies, 81. Nonetheless, in practice Israeli courts have often exercised judicial review of the administrative authority's discretion, even when a petition was filed by an enemy state national or during combat situations. See, eg, in relation to claims of enemy state nationals: HCJ 102/82 *Tzemel v Minister of Defense* 1983 PD 37(3) 365; HCJ 574/82 *El Nawar v Minister of Defense* 1985 PD 39(3) 449; HCJ 6314/17 *Sami Namnam v Government of Israel* (4 June 2019). With regard to exercising judicial review over administrative claims made against the state arising during combat, see HCJ 7015/02 *Ajuri v Commander of the IDF Forces* 2002 PD 56(4) 352. This judicial policy can be explained by the distinction drawn between civil claims and administrative claims in this respect, also addressed in *Dirani* (n 27) para 41; see also Ronen (n 15) 217.

[94] *A* (n 15) opinion of Justice Friedlander, para 54.

[95] *Adalah* (n 20) para 34; *Nabahin* (n 2)

[96] *Nabahin* (n 2) opinion of Justice Sohlberg, paras 8–9, 39, 101.

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the state has general immunity from lawsuits filed by foreign nationals, including nationals of enemy states, in respect of acts that occurred outside its borders, under the 'act of state' doctrine.[97] The considerations underlying this immunity are similarly based on preventing nationals of enemy states from obtaining resources belonging to the country with which their country is fighting by using legal means.[98]

Similarly, even though US law dictates that the state is generally liable in tort, the 'foreign country' exception establishes state immunity from tort liability in respect of '[a]ny claim arising in a foreign country'.[99] This relatively broad exception does not allow lawsuits to be filed against the United States for incidents that occur outside its territory,[100] including territory that is under the effective control of the US, but is located outside its sovereign territory.[101] The exception, although not unique to military operations, can apply to a state of war in cases where the hostilities are taking place on foreign land. The primary purpose of the exception is to avoid a situation in which the United States would be liable to pay damages to a foreign state in accordance with its laws, so as to not be exposed to excessive liability under the laws of a foreign country.[102] The situation is no different in the case of nationals of enemy states, as they do not have a right of standing in the United States.[103] Notwithstanding these policies, the United States, notably, runs a

[97] Michael Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice' (1981) 75 *American Journal of International Law* 283; *Adalah* (n 20) State Respondent's written replies, 40. This rule is used as a defence claim, which denies the jurisdiction of UK courts to investigate these claims.

[98] Singer (n 97) 283. However, under UK law, if the injury caused to the foreign national occurred on UK territory, the 'act of state' protection will apply only if the claimant is a national of an enemy state. A foreigner who is not an enemy state national, then, will enjoy the legal protection given to UK citizens. The guiding judgment on the matter of the claims of enemy state nationals is the *Porter* case. Its ruling held that a national of an enemy state is defined as such by virtue of his place of residence and is precluded from bringing his claims before a UK court unless he is in UK territory: *Porter v Freudenberg* [1915] 1 KB 857, 869. In a more recent ruling the UK Supreme Court reiterated the act of state doctrine and dismissed a case filed by claimants who argued that they had been wrongfully detained by UK and US forces in Iraq and Afghanistan. The Court adopted the UK government position according to which, because of the 'act of state' doctrine, the actions in question are inadmissible. The Court found that these actions were acts of state for which the UK government could not be liable in tort, as they were conducted while exercising sovereign power, inherently governmental in nature, outside the UK and with prior authority of the Crown: *Rahmatullah v Ministry of Defence* [2017] UKSC 1, [72].

[99] Federal Tort Claims Act, 28 USC s 2680(k) (US).

[100] *Sosa v Alvarez-Machain* 542 US 692 (Sup Ct 2004).

[101] *Smith v US* 507 US 197 (9th Cir 1993); *US v Spelar* 338 US 217 (Sup Ct 1949); *Brunell v United States* 77 F Supp 68 (1948). The foreign country exception is wide-ranging and is not intended specifically to regulate situations of war. It applies to all types of claimant and all types of claim; see KA Kemper, 'What Constitutes "Claim Arising in a Foreign Country" under 28 U.S.C.A. §2680(k), Excluding Such Claims from Federal Tort Claims Act' (1999) 158 *American Law Reports Federal* 137.

[102] *Spelar* (n 101) 217–20; *Nurse v United States* 226 F 3d 996, 1003 (9th Cir 2000).

[103] *Johnson v Eisentrager* 339 US 763 (Sup Ct 1949) 763, 776: 'A nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts'. This rule applies only to citizens of an enemy state residing in the enemy state, and only in time of war between the states; see *Ex parte Kumezo Kawato* 317 US 69 (Sup Ct 1942); David Cole,

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mechanism for payment of administrative compensation, *ex gratia*, to foreign residents who have been injured as a result of US military operations on foreign soil.[104] In addition, the US military also provides symbolic condolence payments for harm caused to civilians during combat, which is typically awarded in small amounts.[105]

These examples exhibit a narrow approach to the scope of the circle of victims entitled to compensation in the framework of actions conducted by security forces outside the state. Accordingly, various scholars around the world, who sided with positions that call for recognition of claims made by foreign nationals injured during combat, admitted that their approach does not reflect the prevailing laws and practice of states.[106] Be that as it may, contemporary scholarship supports the notion of the applicability of tort law or other types of monetary reparations mechanism following international humanitarian law (IHL) breaches or international human rights law (IHRL) norms for injuries generated during war.[107] The above-mentioned broad state immunities clearly

'Enemy Aliens' (2002) 54 *Stanford Law Review* 953, 984. A key ruling on this matter is the *Johnson* case, in which a German prisoner of war's petition for habeas corpus was denied on the ground that enemy aliens have no right of standing in US courts: *Johnson*, ibid; Trading with the Enemy Act, 50 USC Appendix (1917) (US) ss 2, 7, 10; see also Alien Enemy Act, 50 USC s21 (1798) (US).

[104] This arrangement is set out in the Foreign Claims Act, 10 USC §2734 (1942) (US); see also 10 USC §2736 (2004) (US). As part of the arrangement proposed by the law, special US committees (Foreign Claims Commission (FCC)) examine civilians' claims for damages arising from non-military actions conducted by US forces who operated on foreign soil. Such committees were established, inter alia, in Iraq and Afghanistan: Karin Tackaberry, 'Judge Advocates Play a Major Role in Rebuilding Iraq' (2004) *Army Law* 39; Marian Nash Leich, 'Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis' (1989) 83 *American Journal of International Law* 319–24; see also Frederic L Borch, *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti* (CreateSpace Independent Publishing Platform 2001) 212. This means that compensation payments are also granted to foreign citizens of countries who are not considered to be the state's allies. Importantly, the decision of whether to award compensation under the FCC regime depends on the discretion of its committee members, who are usually employees of the armed forces; see Wexler and Robbennolt (n 32) 140; John Fabian Witt, 'Form and Substance in the Law of Counterinsurgency Damages' (2008) 41 *Loyola of Los Angeles Law Review* 1455, 1466–68.

[105] Gilat J Bachar, 'Collateral Damages: Monetary Compensation for Civilians in Asymmetric Conflict' (2009) 19 *Chicago Journal of International Law* 375, 379; Witt (n 104) 1456; Wexler and Robbennolt (n 32) 143–45. The state enjoys additional immunity regarding damage caused during wartime, even in its own territory; see in general Kenneth Bullock, 'United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation' (1995) 58 *Law and Contemporary Problems* 139.

[106] Elke Schwager, 'The Right to Compensation for Victims of an Armed Conflict' (2005) 4 *Chinese Journal of International Law* 417, 424; Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 529, 535–39.

[107] The types of reasoning on which each of these scholars rely vary; while some are based on economic perspectives, others place greater emphasis on corrective justice duties and other considerations: Abraham (n 25); Ronen (n 15); Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapons' (2016) 164 *University of Pennsylvania Law Review* 1347; Marcus Schulzke and Amanda Carroll, 'Corrective Justice for the Civilian Victim of War: Compensation and the Right to Life' (2015) 21 *Journal of International Relations and Development* 372–95; Gillard (n 106); Dieter Fleck, 'Individual and State Responsibility for Violations of the Ius in Bello: An Imperfect

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stand in opposition to these global trends.[108] Moreover, although legal arrangements made by other nations allow us to expand our view of the issue and examine different courses of legal action, Israel's tort liability in relation to Palestinians residing in the West Bank and Gaza is a unique matter of contention, to a large extent incomparable with others. This is mainly because of the distinctive status of the West Bank and Gaza. Thus, the difficulties arising from applying the state's tort immunities should be understood through a 'local lens', which considers the unusual conditions of the region. Drawing from this conclusion, the following sections will be dedicated to examining the legality of section 5B in the light of the 2018 Gaza border protests, which will serve as a case study for the purposes of this investigation.

4. The difficulties in applying Section 5B of the State Liability Law in the Israeli-Palestinian context: The 2018 Gaza border protests as a case study

Earlier we discussed the legal arrangements which allow for denial of the right to tort compensation in Israel of nationals of enemy states and members of terrorist organisations. After addressing the purposes of these legal arrangements and their application in Israel and other states, it is necessary to examine the legality of section 5B of the State Liability Law considering Israel's specific obligations under IHL – in particular, the laws regulating belligerent occupation – and IHRL. This is achieved, inter alia, by using the 2018 Gaza border protests and the *Yesh Din* case as a case study.[109] The section begins by briefly presenting the background that led to the protests and sets out their context. The protests are then observed in a tortious perspective. Special emphasis is given to the legal status of the West Bank and Gaza in order to demonstrate the clash between the laws governing a state of occupation and the exceptions stipulated in section 5 of the State Liability Law. An analysis of the over-inclusive definition of 'membership' of a terrorist organisation or affiliate thereof, and its implications, is also provided.

4.1. The 2018 Gaza border protests: Factual background and the Yesh Din *case*

The Gaza border protests, which won the title 'The Great March of Return' on the Palestinian side, were structured around the call for the return of Palestinian refugees to their ancestors' homes in Israel. The protests began in March 2018, the day that Palestinians mark as 'Land Day',[110] and continued

Balance' in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer 2007) 180.

[108] While these trends are not discussed at length in the article because of its focus on Israeli legislation and regional challenges, it can certainly be seen as aligning with recent scholarship which advocates making greater use in tort law of monetary compensation mechanisms in armed conflicts.

[109] HCJ 3003/18 *Yesh Din – Volunteers for Human Rights and Others v IDF Chief of Staff and Others* (24 May 2018).

[110] Land Day is commemorated on 30 March. It is designated to protest against the confiscation of Arab lands by the State of Israel.

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throughout the following months with varying intensity.[111] Tens of thousands of Palestinians participated in these protests each week.[112] The protests involved violent clashes between the Israeli security forces and Palestinian protestors, and were centred along the fence that separates the Gaza Strip from Israel.[113] The fence is made of basic iron, which can be cut relatively easily, despite the electronic warning detectors installed on it and the barbed wire that surrounds it.[114] It is intended to protect Israeli citizens from threats of Palestinian intrusion into Israeli territory, and is located just a few hundred metres from Israeli neighbourhoods.[115]

The protests generated violent, deliberate and significant friction with Israeli security forces, and were organised and overseen by a body known as the Return Committee, which comprised representatives of various political and civil organisations operating in the Gaza Strip, including Hamas representatives.[116] The Return Committee encouraged Gaza residents to come to the area of the clashes and join the protests. During the protests, several protestors actively tried to damage infrastructure designed to secure Israel from potential attacks, and infiltrate Israel's territory, and were engaged in committing violent acts against Israeli forces. These included burning tyres, trying to hit the border fence and infiltrate Israel, throwing stones and Molotov cocktails and the deployment of other explosive devices.[117] As a result of the violent incidents that took place during the protests, a few dozen Palestinians present in the area were shot by Israeli sniper fire, which was used, according to Israeli officials, in an attempt to restrain the rioters[118] and to prevent the realisation of the risk that a Palestinian mass would cross the fence, infiltrate Israeli territory and threaten the security of Israeli citizens.[119] Against this background it is important to note that the protests also incorporated a large number of civilian participants who were not taking a direct part in any kind of hostile activity.[120]

[111] *Yesh Din* (n 109) para 6.

[112] For instance, on 30 March 2008 there were 41,000 demonstrators; 6 April 2018, 29,000 demonstrators; 13 April 2008, 15,000 demonstrators; 20 April 2018, 13,000 demonstrators; 27 April 2018, 13,800 demonstrators; 15 May 2018, 45,000 demonstrators; see *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 14.

[113] ibid opinion of Deputy Chief Justice Melcer, paras 1–6.

[114] ibid para 7.

[115] ibid para 8.

[116] Hamas is a terrorist organisation which retains (some) control over the Gaza Strip; see in general Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (Yale University Press 2006); Human Rights Council, Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory (25 February 2019), UN Doc A/HRC/40/74, para 24.

[117] See, eg, ibid para 48.

[118] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 12.

[119] ibid para 16.

[120] Human Rights Council (n 116); B'tselem and the Palestinian Centre for Human Rights, 'Unwilling and Unable: Israel's Whitewashed Investigations of the Great March of Return Protests', December 2021, 6; Yaniv Kubovich, '"Shoot Anyone Breaching the Fence": Israeli Army Gears Up for Gaza Mass Protest', *Haaretz*, 29 March 2018, https://www.haaretz.com/israel-news/.premium-israeli-army-gears-up-for-gaza-mass-protest-1.5957896.

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In April 2018, a petition was filed in the HCJ by six human rights organisations, which argued that the Israeli security forces' use of live ammunition during the protests contradicted Israeli and international law, according to which the use of lethal force cannot come to pass when it is not required to thwart an immediate and serious risk to human life.[121] The petitioners also stressed that the protests are civil in nature, and therefore that the laws of war do not apply to them.[122] They further argued that the law enforcement paradigm, which suits the nature of police operations and is designed to maintain public order and security, is the appropriate legal framework in the light of which the legality of the use of live ammunition during the protests should be examined.[123]

In contrast, the state respondent argued that the IDF regulations for opening fire align with Israeli and international law, and that the above-mentioned incidents occurred as part of the armed conflict between Hamas, a Palestinian Sunni-Islamic fundamentalist organisation, and Israel.[124] The state respondent's official stance was that the appropriate legal framework governing the events and the use of force by Israeli security forces are the laws of armed conflict (LOAC), which apply to situations of violent confrontation and are designed to deal particularly with the legality of attacking targets and the deployment and use of various weapons.[125]

The HCJ ruled that despite the civilian appearance of the protests, they were clearly violent and carried the potential to harm the lives of Israeli citizens. In the words of Justice Hendel, '[t]he voice is the voice of protest, yet the hands are the hands of terror'.[126] In line with this view, it was determined that the use of lethal force for the purpose of dispersing a mass disorder that poses a danger to the life or bodily integrity of Israeli citizens is permissible, subject to the principles of proportionality and necessity.[127] It was further stated that a distinction must be drawn between direct participants carrying out hostile activities, towards which lethal force can be directed, and between protestors who do not carry out such activities.[128] Additionally, despite the Court's acknowledgement of the difficulty in classifying events which simultaneously involve terrorist and civilian acts,[129] it was stressed that in order to know which paradigm to apply – the law enforcement paradigm or the LOAC paradigm – the specific set of circumstances in which force was used must be examined.[130]

[121] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 15.

[122] These include Yesh Din – Volunteers for Human Rights; Association for Civil Rights in Israel; Gisha – Center for the Preservation of the Right to Move; HaMoked; Adalah – Legal Center for the Rights of the Arab Minority in Israel; Al-Mizan Center for Human Rights in Gaza.

[123] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 20. This debate resonates with Chief Justice Barak's remark in the *Bani Udda* case regarding the difficulty of classifying incidents that include both belligerent and civilian actions, made in the context of distinguishing between acts of war and regular policing activity; see *Bani Udda* (n 12) opinion of Chief Justice Barak, para 12.

[124] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 20.

[125] ibid opinion of Deputy Chief Justice Melcer, para 3.

[126] ibid opinion of Justice Hendel, para 3.

[127] ibid opinion of Deputy Chief Justice Melcer, para 46.

[128] ibid opinion of Chief Justice Hayut, para 11.

[129] ibid; *Bani Udda* (n 12) opinion of Chief Justice Barak, para 12.

[130] *Yesh Din* (n 109) para 7.

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4.2. Analysing the protests in a tortious perspective

This section intends to scrutinise critically section 5B of the State Liability Law, by using the example of the 2018 Gaza border protests and some of the statements made in the HCJ ruling in the *Yesh Din* case. Notably, *Yesh Din*, which addressed these protests, did not address the specific question of state liability in tort but, as mentioned, rather revolved around the legality of the use of lethal force to suppress the protests. Hence, no evidence was presented in relation to the IDF activities being negligent, and no findings positively found the military use of force to be unreasonable. Considering the foregoing, the discussion of the protests and the *Yesh Din* case is intended specifically to illustrate both the problematic nature of the determination that the residents of Gaza are nationals of an enemy state, and the complexity of applying to Gaza residents the definition of members of a terrorist organisation and their agents in the current state of affairs.

In order to examine the protests in accordance with principles of tort law, three main questions must be considered:

(1) Does the attempt by the Israeli security forces to restrain the protests meet the definition of a 'combat action'?
(2) Is it legal under international law to apply to the residents of Gaza the tort liability exemption in relation to nationals of enemy states?
(3) Can all protesters be classified as members of a terrorist organisation or, alternatively, as their agents?

While the 'combat action' exemption enshrined in section 5A of the State Liability Law does not stand at the centre of our discussion, a preliminary question arises when examining the 2018 protests in a tortious perspective. The question concerns the possibility of declaring the protests to be an act of war that triggers the application of the 'combat action' exemption. As the question is of relevance to our query, it will be briefly considered. The two tort exemptions specified under section 5B are then addressed. Initially, we assess the legality of the labelling of Gaza residents as nationals of an enemy state in view of Israel's obligations to such residents under international law. The section then offers a critique of the State Liability Law's definition of the term 'membership' of a terrorist organisation with regard to its ambiguity and the difficulty in applying it in the context of the protests.

4.2.1. Does the restraining of the protests meet the definition of a 'combat action'?

As previously noted, over the years Israeli courts have often been required to set the criteria by which to determine whether a particular incident is considered a 'combat action', which prompts the state's exemption from tort liability.[131] When considering the events surrounding the protests, similar cases can be traced in which an action that began as a typical policing activity

[131] *Bani Udda* (n 12); CivA 1459/11 *Hardan v State of Israel* (16 June 2013), opinion of Justice Amit, paras 17–18.

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became belligerent owing to a complex situation or because of an unexpected change of circumstances.[132] For instance, the *Khatib* case involved a lawsuit filed by a Gaza resident who was hit by a rubber bullet fired from an IDF post, which left him with a severe disability.[133] This injury was caused in the midst of a riot of hundreds of Palestinian residents, aimed at an Israeli outpost to facilitate an attempt to infiltrate Israel's border into Israeli territory. Given the number of rioters, the location of the soldiers and the anticipated danger arising from the event, the Court ruled that the soldiers, in defending themselves from a mass riot, were acting in a situation of combat, and that their conduct met the conditions defining a combat action.

When comparing the scenario described in *Khatib* with the 2018 protests, one may argue that the potential risk that the Palestinian rioters posed before the IDF soldiers in the two incidents differs in its gravity, as the 2018 Gaza border protests were relatively remote from the Israeli forces, thus posing a smaller risk.[134] Nevertheless, the two cases still share much analogous factual basis. In the *Khatib* case, the classification of the events as 'combat actions' subsequently prevented the claimant from being awarded compensation by the state for the harm he suffered.[135] In the event that the HCJ had to rule on the proper classification of the 2018 Gaza border protests in the context of the State Liability Law, it would not have come as a surprise if the Court would have similarly decided that the riot control actions of the Israeli security forces amounted to combat actions.

According to the test set out in the *Bani Udda* case, the circumstances of an incident; its purpose, location and duration; identity of the military force involved; and the threat it poses must all be examined, on a case-by-case basis, in order to rule on the nature of the events.[136] An analysis of the circumstances of the 2018 Gaza border protests, in considering the interpretation of the term 'combat action' and the *Khatib* case, discloses that – as the protests included violent incidents; took place at a time when the frequency of the fierce clashes indicated increased fighting in the area; occurred at the border between Israel and the Gaza Strip, and included the use of live fire by both the Palestinian protesters and the Israeli security forces – the protests can be classified as hostile belligerent actions, the response to which is covered under the 'combat action' exception. This conclusion, as stated, is true even under the

[132] See, eg, CivA 8384/05 *Salem v State of Israel* (7 October 2008); CivA 3038/05 *Zidane v The Military Commander in the Judea and Samaria Area* (9 August 2006); CivA 8599/02 *Hazima v The Military Commander in the Judea and Samaria Area* (26 February 2006); CivA 361/00 *Daher v Yoav* 2005 PD 59(4) 310; CivA 5604/94 *Hemed v State of Israel* 2004 PD 58(2) 498; CivA 2176/94 *State of Israel v Tabanja* 2003 PD 57(3) 693.

[133] CivA 9561/05 *Khatib v State of Israel* (4 November 2008), opinion of Justice Rubinstein, para 2.

[134] In the Human Rights Council Report (n 116) para 34, it noted in this respect that '[f]or a threat to life to be regarded as imminent, an attacker should have no remaining preparatory steps and be in sufficient geographic proximity for the attack to succeed. An imminent or immediate threat should be understood to mean a matter of seconds, not hours (A/HRC/26/36, para. 59)'.

[135] *Khatib* (n 133) opinion of Justice Rubinstein, para 2.

[136] *Bani Udda* (n 12).

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former and narrow characterisation of the term given in the *Bani Udda* case, which predated the amendment that broadened the exception.

This classification is also in line with the current legal definition of the exemption provided in the State Liability Law, which emphasises that action taken in order to combat terror, hostile actions and insurrection, or committed in circumstances of danger to life or limb, will be classified as a combat action.[137] In addition, the 2018 protests carried the risks of attempted infiltration of Israeli territory, which could thereby endanger both the Israeli security forces and Israeli civilians.[138] These circumstances seem to extend beyond the normal range of risks that are inherent in policing activities, as '[w]e are not talking about the pursuit of rioters, but about a self-protective force'.[139]

Henceforth, the examination of the definition of 'combat action' and past rulings show that the Palestinian victims of the protests who were not taking a direct part in hostilities and were negligently harmed by Israeli security forces would probably not have been entitled to receive compensation from the state based on the classification of the events as combat actions, even if they were not considered nationals of an enemy state because of their place of residency. However, as Chief Justice Esther Hayut noted in *Yesh Din*:[140]

> The war on terrorism and terrorist organisations presents before Israel – and in recent years, to other countries in the world – no simple challenges in dealing with complex scenarios that do not clearly fall into either of the two categories mentioned above – 'armed conflict' or 'law enforcement.'

The binary categories presented in the State Liability Law, of policing activities vis-à-vis combat actions (essentially categories equivalent to the 'armed conflict' or 'law enforcement' classification of Chief Justice Esther Hayut), do not offer appropriate tools for the classification of these types of mixed situation; for, despite the transformation of certain protests into centres of violence where live ammunition was used, the majority of the protestors were civilians who took no direct part in terrorist activities during the protests.[141] Owing to this vagueness, Chief Justice Esther Hayut also noted:[142]

> These are in fact events that are a mixture of characteristics of each of the two paradigms – the armed conflict paradigm and the law enforcement paradigm. Therefore, as stated, the Israeli security forces are faced with a very complex task. They must act intermittently and during the same

[137] State Liability Law (n 1) s 1.

[138] Judah Ari Gross, 'IDF Gears Up for Mass Gaza Riots, Warns that Hamas Plans to "Massacre" Israelis', *Times of Israel*, 13 May 2018, https://www.timesofisrael.com/idf-gears-up-for-mass-gaza-riots-warning-hamas-plans-to-massacre-israelis.

[139] *Estate of El Abed* (n 18) opinion of Justice Rivlin, para 11.

[140] *Yesh Din* (n 109) opinion of Chief Justice Hayut, para 4.

[141] Human Rights Council (n 116) para 32; United Nations Relief and Works Agency (UNRWA) for Palestine Refugees in the Near East, 'Gaza's "Great March of Return" One Year On: Impact on Palestine Refugees and UNRWA Services', 2019, 6.

[142] ibid.

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event itself according to the different rules that apply in each of the two paradigms.

This ruling can be criticised, both in relation to the degree in which it reflects the basic principles of international law[143] and in respect of practical considerations, as it imposes on the commanders in the field a responsibility to carry out complex legal 'twists and turns' in deciding how to treat each demonstrator in accordance with the relevant legal paradigm appropriate for the situation. Although the ruling did not refer specifically to the distinction between combat action and policing activity made under section 5 of the State Liability Law,[144] it also illustrates the difficulty inherent in the inflexible decisions that must be made within the framework of the Law. Even though the *Yesh Din* ruling could potentially indicate a certain change in Israeli law, suggesting that two legal frameworks could apply simultaneously to the same scenario, it is currently not possible to receive full or partial tort compensation when the event can be classified as both civilian and military. Therefore, the Court's final classification of a situation when probing a tort claim has enormous significance for the injured individual, as it has the power to award compensation for her injury or send her home empty-handed.

As a result of the binary classification options that the State Liability Law offers, courts may only classify an event either as a 'combat action' or as civilian in nature. This classification conversely affects the liability of the state to award compensation to injured claimants. Drawing from this legal footing, it appears that the Court would have had to classify the 2018 protests as a combat action governed by section 5 of the State Liability Law. Nonetheless, as mentioned, the judgment in the *Yesh Din* case recognises that a situation may have mixed civilian and combatant characteristics. In turn, it requires an assessment of the legality of the use of lethal force on an individual personal basis.[145] This approach may also shed new light on the possibility of adopting mixed classifications under the framework of the State Liability Law. However, despite the significance of this possibility, a discussion that focuses on the question of whether these statements can and should be applied in relation to tort claims, and if such application is in accordance with the rationales of the existing law, goes beyond our present discussion.

Remarkably, in his ruling in the *Nabahin* case, Justice Grosskopf mentioned that, in his view, if a demonstration against Israel took place in the West Bank during which one of the participants was harmed, it would be appropriate to demand that the state allow a detailed investigation of the circumstances of the case in a tort claim, given the policing nature of such demonstrations; the ability of security forces to gather information about the incident; and

[143] Yahli Shereshevsky, 'HCJ 3003/18 Yesh Din – Volunteers for Human Rights v Chief of General Staff, Israel Defense Forces (IDF)' (2019) 113 *American Journal of International Law* 361, 367–68.

[144] But rather to the question of which legal paradigm should apply to the situation – the law enforcement paradigm or the LOAC paradigm – affecting the analysis of the legality of the use of lethal force against demonstrators.

[145] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 63.

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the limited fear that the prosecution would contribute to the war effort against Israel. On the other hand, he mentioned that if such a demonstration were to take place inside the Gaza Strip, it would probably be led by terrorist elements that control the Gaza Strip. Therefore, even if it is an alleged civilian demonstration, it should be viewed as part of the confrontation between the State of Israel and the Gaza Strip. These characteristics arguably justify not allowing Gaza residents to file a tort claim in Israel for its consequences.[146] Regardless of the classification of these types of demonstration, it seems that this short review reflects the incompatibility of section 5 of the State Liability Law, and its failure to address fully the nuanced and multifaceted reality that characterises Israel's interaction with Palestinian residents of the West Bank and Gaza.

4.2.2. Residents of Gaza as nationals of an enemy state

This subsection seeks to address the question of whether defining Gaza residents as nationals of an enemy state, and consequently denying their ability to obtain compensation for harm in cases where state agents have negligently injured them, is consistent with Israel's obligations under international law. To this end, I will outline the legal status of the Gaza Strip under international law, as well as the tort law obligations that this status imposes on Israel. As I will try to show, despite Israel's withdrawal from Gaza, it can still be held accountable for some legal requirements of an occupier, including payment of compensation for negligent actions performed by its agents in the region.

In the *Adalah* case, after introducing the reasoning behind the constitutional invalidation of section 5C, the judgment stated:[147]

> Obviously we are making no determination with regard to the legal status of the Gaza Strip after the disengagement. Even if Israel's belligerent occupation there has ended, as the state claims, there is no justification for a sweeping exemption from liability in torts.

However, it was also mentioned that the unilateral withdrawal of Israeli forces from the region in 2005 (the 'disengagement') amounts to a substantial change in the territory's legal status. The question whether there is justification for distinguishing between a claimant who is a national of an enemy state and a claimant living in an area under belligerent occupation of the State of Israel was left unanswered by Chief Justice Grunis in the *Dirani* case. However, he did acknowledge that this was a complicated issue.[148] That being said, it seems that a distinction should be drawn between tort claims made by claimants under the status of 'protected persons' – as international law refers to civilians who 'find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not national'[149] – and

[146] *Nabahin* (n 2) opinion of Justice Grosskopf, para 18.
[147] *Adalah* (n 20) opinion of Chief Justice Barak, para 36.
[148] *Dirani* (n 27) opinion of Chief Justice Grunis, para 58.
[149] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 4.

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claimants who are nationals of enemy states, given that the legal obligations of Israel towards each type of claimant differs, as is clarified below.

The accepted starting point for the status of the territories of the West Bank is that they are territories held under Israeli belligerent occupation. It follows that IHL applies to them, including the laws of belligerent occupation. Under Article 42 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land,[150] which is recognised as customary law,[151] a territory is considered occupied once the three conditions of the 'effective control' test are met.[152]

This definition raises a number of hurdles in terms of the ability to view Gaza as an occupied territory since Israel's withdrawal from the territory in 2005. Of those listed, the condition that most significantly challenges the application of the laws of occupation to Gaza is the foreign military presence (also known as the 'boots on the ground' requirement).[153] Another condition for the establishment of occupation is concerned with the inability of the previous sovereign to fulfil governmental functions. Although the Palestinian government, led by Hamas, has exercised a certain level of governmental authority in Gaza since 2007 (and subject to the doubt relating to the identity of the former legal sovereign in Gaza), it is clear that by virtue of the special circumstances of the area and the Israeli involvement with and control of its affairs (described below), Hamas's control over Gaza is partial and crippled.[154]

In his analysis of the different set of rights that Israel is obliged to award to the residents of the Gaza Strip, Justice Sohlberg, who wrote the majority opinion in the *Nabahin* case, clung to the perception that Israel does not carry out civilian operations in Gaza and that the extent of its influence on the management of these matters is almost non-existent.[155] Drawing from this line of thought, he continually emphasised that the residents of Gaza are nationals of an enemy state or residents of enemy territory, and therefore are not considered 'protected persons'.[156] However, the reality in the area seems to tell a different story.

[150] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461, Annex, s 42.

[151] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment [2005] ICJ Rep 168, [172] (*Congo v Uganda*).

[152] These conditions are: (i) the presence of foreign forces in the territory without consent, (ii) the ability of the foreign forces to exercise authority over the territory, and (iii) the inability of the former sovereign to do so: International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC and Cambridge University Press 2016), para 303.

[153] ibid para 309; ECtHR, *Sargsyan v Azerbaijan*, App no 40167/06, 16 June 2015, para 94. However, some legal scholars argue that, for the purpose of fulfilling this condition, the extent of the ability to manage the area by other means, as well as the ability to regain control of the area within a reasonable time, should also be considered: Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v The Prime Minister of Israel*' (2009) 42 *Israel Law Review* 101.

[154] Yuval Shany, 'Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 *Israel Law Review* 68, 77.

[155] *Nabahin* (n 2) opinion of Justice Sohlberg, para 113.

[156] ibid paras 76, 86.

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Despite the fact that Israel does not place regular forces in the Gaza Strip, it controls its territorial water and airspace. Naturally, it also exercises control over the border between Israel and the Gaza Strip. Through its control of the movement of goods from its borders into Gaza, Israel continues to influence life within the Gaza Strip considerably. For instance, it can decide what type of supplies it chooses to export from the Gaza Strip; thus, to a large extent, it determines the industries in Gaza that will function and those that will collapse.[157] When the border is closed, or operates slowly, the economy in Gaza pays the price.[158] Israel also controls the Palestinian population registry, which is common to the Gaza Strip and the West Bank. Through its control of this registry, Israel continues to regulate the movement of Palestinians. For example, a Palestinian who wishes to leave Gaza by passing the Rafah or Erez border is required to present an identity card approved by the State of Israel.[159] In addition, Israel controls taxation in Gaza, and determines the amount of customs and VAT collected for goods. These tax funds go straight into Israeli hands, which can then decide whether to transfer the funds into Palestinian hands or not.[160] Moreover, Israeli currency is used in Gaza, and Israel retains its control over its use and passage. It also regulates the entry of humanitarian relief supplies and personnel into Gaza; internet, postal and telephone connections are also under its partial control and monitoring.[161] Furthermore, the electricity power in Gaza is based mainly on Israeli supply. This dependence is also tied with the water supply and wastewater treatment. The combination of these factors demonstrates that the level of control that Israel exercises in the Gaza Strip, even without maintaining a permanent military presence in its territory, is significant.[162]

[157] Prime Minister's Office, 'The Exportation of Capsicum Annuum from the Gaza Strip Has Started', 23 January 2011 (in Hebrew), https://www.pmo.gov.il/Communication/spokesman/2010/12/spokes081210.htm (cited in Gisha (n 158) fn 11); see also Israeli Missions Around the World, 'Security Cabinet Decision on Gaza Strip Exports', 8 December 2010, https://embassies.gov.il/MFA/FOREIGNPOLICY/Peace/HUMANITARIAN/Pages/Security-Cabinet-Decision-on-Gaza-Strip-Exports%20-8-Dec-2010.aspx; United Nations, Office for the Coordination of Humanitarian Affairs Occupied Palestinian Territory, 'Easing the Blockade: Assessing the Humanitarian Impact on the Population of the Gaza Strip', Special Focus March 2011, 4, https://www.ochaopt.org/sites/default/files/ocha_opt_special_easing_the_blockade_2011_03_english.pdf.

[158] Gisha – Legal Center for Freedom of Movement, *Scale of Control: Israel's Continued Responsibility in the Gaza Strip*, November 2011, 12, https://gisha.org/UserFiles/File/scaleofcontrol/scaleofcontrol_en.pdf.

[159] ibid 14–15.

[160] For example, Israel refused to transfer funds to the PA from March 2006 to June 2007, a period during which Hamas was part of the PA along with the Fatah party and other parties. A similar step was taken in May 2011; see Moti Basok and Ora Koren, 'Netanyahu and Steinitz Punish: Israel Will Not Transfer Money to Palestinians', *The Marker*, 2 December 2012 (in Hebrew), https://www.themarker.com/news/1.1877549.

[161] Jonathan Kuttab, 'Israel Has Effective Control over Gaza', *Arab Center Washington DC*, 28 March 2020, https://arabcenterdc.org/resource/israel-has-effective-control-over-gaza; 7amleh – Arab Center for the Advancement of Social Media, 'Connection Interrupted: Israel's Control of the Palestinian ICT Infrastructure and Its Impact on Digital Rights', December 2018, https://7amleh.org/wp-content/uploads/2019/01/Report_7amleh_English_final.pdf.

[162] Gisha (n 158) 20.

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It can be argued that, because of the incompatibility of the situation on the ground with the formal requirements of the recognised definition of occupation under international law, Israel cannot be seen as an occupying power in Gaza.[163] However, the view currently accepted by most international legal experts is that Israel should be considered the sovereign power in the territory, mainly because of its ability to seize effective control of the region quickly.[164] This interpretation seems to be based on the attempt to avoid creating a legal vacuum that leaves the residents of Gaza without a functioning sovereign. There is also the fear that the removal of forces from the region, while maintaining high levels of control over it by other means, will be done with the purpose of evading the legal obligations of belligerent occupation towards the population residing in a region, which pertains to the status of 'protected persons'.[165]

Although we are unable to delve more deeply into this debate in the course of our investigation, it follows that Israel's unique relationship with Gaza yields various obligations towards its residents.[166] In *Al Bassiouni*, the HCJ declared that since the 2005 disengagement, Israel has no 'effective control' over what is happening in the Gaza Strip.[167] Nonetheless, it ruled that Israel is

[163] See Roy Schöndorf and Eran Shamir-Borer, 'The (In)applicability of the Law of Occupation to the Gaza Strip' (2020) 43 *Iyunei Mishpat* 403 (2020) (in Hebrew).

[164] See, eg, the 2016 ICRC Commentary (n 152) para 302 ('effective control does not require the exercise of full authority over the territory; instead, the mere capacity to exercise such authority would suffice. Military occupation can be said to exist despite the presence of resistance to it and can be said to exist even when some part of the territory in question is temporarily controlled by resistance forces').

[165] ibid para 322. The conclusion according to which Israel is still obligated to the core provisions of the law of occupation in Gaza can also be supported by the Israeli Office of the Attorney General (OAG) document addressing what it refers to as the ICC's 'lack of jurisdiction over the so-called "situation in Palestine"' published in 2019, in which it stated that 'the bilateral Israeli-Palestinian agreements provide for the transfer to the Palestinians of only limited powers, which do not come close to effective control': Office of Attorney General, 'The International Criminal Court's Lack of Jurisdiction over the So-called "Situation in Palestine"', 20 December 2019, para 35. The OAG later continued to demonstrate how the Palestinians lack control over key attributes of sovereignty which are in Israeli hands. In response to the Palestinian claim for statehood, the OAG specifically hinted, with great caution, that in relation to Gaza Israel still maintains effective control of the territory, stating that '[t]he essential criterion of effective territorial control clearly cannot be met: if the territory is occupied, then the effective control over it must by definition rest with Israel, not with the Palestinians': ibid para 38. Interestingly, in *Nabahin* (n 2) para 65, the HCJ mentioned that this document should be understood through the lens of the framework in which it was written: to address the question of the existence of a Palestinian state as a basis for conferring jurisdiction on the criminal court in The Hague. Therefore, so goes the argument, the statements regarding Israel's control over the Gaza Strip are unrelated to the question of Israel's liability in tort towards its residents.

[166] Some scholars hold a 'functional approach' to the question of the existence of belligerent occupation. According to this approach it is possible to recognise complex situations in which a seizing power exercises certain governmental powers but does not completely expropriate its sovereign power. The approach applies when a seizing power exercises governmental power in parallel with another quasi-state entity: Aeyal M Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017); Eyal Bevenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012).

[167] *Al Bassiouni* (n 71).

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still obliged to fulfil *certain* obligations in relation to the residents of Gaza under IHL as a result of its continued control of the border and given Gaza's dependence on Israel, created by virtue of its direct control over the area for over four decades.[168] This situation obviously diverges from the legal policy in the UK and the US, described above, and differs from the type of situation it was intended to regulate, as it is governed by an additional set of rules which are not solely domestic. With these conclusions, we now move on to examine the output of this debate in terms of the types of obligation that this type of control imposes on Israel.

4.2.3. The duty to ensure the rights of 'protected persons' in a tortious context

This article is concerned especially with Israel's obligation to award tort compensation for negligent actions committed by its security forces in the West Bank and Gaza under Israeli tort law. The emphasis is upon Israel's liability towards the residents of these territories for damage that does not necessarily arise during a combat action, but rather in day-to-day life. In this respect, aside from Israeli tort law – which, as previously stated, relieves Israel from tortious liability towards the residents of Gaza – additional bodies of law oblige Israel to award compensation to Palestinian residents of the West Bank and, as I have tried to argue, to the residents of Gaza as well. These are the law of occupation and IHRL.

A sovereign in a territory held under belligerent occupation is under an obligation to protect the occupied population. This obligation entails numerous positive duties, such as taking action to ensure the well-being of the civilian population, and their safety and security.[169] As such, the occupying power must positively ensure that its actions improve the lives of the local population and safeguard local traditions and ecosystems, as a means to mitigate suffering and the damaging repercussions of occupation on the occupied people.[170] These positive responsibilities include, inter alia, ensuring an adequate and regular supply of food and medical supplies, operating a functioning health system in the occupied territory, and enabling administrative authorities and courts to function properly.[171]

The main provision under IHL to address awarding compensation for damage caused by war is found in Article 3 of the Hague Convention (IV) of 1907.

[168] ibid para 12.

[169] Orna Ben-Naftali and Yuval Shany, *International Law: Between War and Peace* (Ramot Press 2006) 183 (in Hebrew).

[170] ibid.

[171] To name a few, see, eg, Hague Convention (IV) (n 150) Annex, art 43 (duty to ensure public order and life), art 46 (respect family honour and rights, private property, religious convictions and practice); Fourth Geneva Convention (n 149) art 55 (duty to ensure the food and medical supplies of the population), art 56 (duty to maintain health services), art 59 (duty to facilitate relief schemes), art 64 (duty to maintain law and order); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 69(1) ('the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory').

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This provides: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.[172] Another noteworthy provision in this regard is found in Article 23 of the 1907 Hague Convention, which asserts that a party to a conflict may not 'declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party'.[173] This provision has also been incorporated, with moderate modifications, into the Rome Statute of the International Criminal Court (ICC),[174] which means that, under certain conditions, its violation can be prosecuted as a war crime before the ICC. The obligation to compensate an injured party following breaches of IHL caused during war or occupation was also stated indirectly in the Fourth Geneva Convention,[175] and directly in the First Additional Protocol to the Geneva Conventions (to which Israel is not party but sees itself as committed to its customary norms).[176] The occupier also has a duty to protect civilian property from pillage and destruction,[177] as well as a positive obligation to compensate for property duly taken for a public purpose.[178] These provisions may not impose a specific legal obligation to award compensation to protected persons for any negligent act committed by occupying forces; however, their cumulative legal implications – in stating the occupier's responsibilities towards them in monetary terms as well – cannot be easily dismissed.

Under international law, as in various domestic legal systems, the right to receive compensation is a right of second order derived from substantive legal norms. The above-mentioned provisions are intended to declare the legal regime that governs monetary claims brought about as a result of war. Taking into account these provisions, after the hostilities between states have come to an end, parties to an armed conflict at times set a global amount for mutual compensation or introduce mechanisms for mutual waivers of claims for damages, in a peace treaty or other political settlement.[179] However, while such compensation is intended to benefit individuals who have suffered injuries, it is not clear whether they are entitled to claim it because of the non-self-executing nature of the right to reparation under

[172] Hague Convention (IV) (n 150) s 3.

[173] ibid Annex, s 23(h).

[174] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(b)(XIV).

[175] Fourth Geneva Convention (n 149) arts 148–149; Jean Pictet (ed), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Times of War* (ICRC 1958) 603.

[176] AP I (n 171) art 91. State practice also gives effect to the principle underlying these provisions. For instance, the UN Security Council has upheld that Iraq is liable under international law 'for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait': UNSC Res 686 (2 March 1991), UN Doc S/RES/686.

[177] Fourth Geneva Convention (n 149) arts 33, 53.

[178] Hague Convention (IV) (n 150) s 52; See also Lea Brilmayer and Geoffrey Chepiga, 'Ownership or Use? Civilian Property Interests in International Humanitarian Law' (2008) 49 *Harvard International Law Journal* 413, 422.

[179] Yoram Dinstein, *The Laws of War* (Schocken Press 1983) 268 (in Hebrew).

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international law.[180] In general, IHL treaties address intergovernmental disputes. The large number of intergovernmental compensation arrangements concluded after the cessation of hostilities between states strengthens the argument that lawsuits concerning loss and damage arising during war or occupation should be, and normally are, settled by the states themselves and not through a direct individual claim process.[181] This position was also supported by the state respondents in the *Nabahin* case, and was eventually adopted in the court's ruling on the matter.[182]

The situation is somewhat different in relation to another body of law – IHRL – which arguably compels Israel to award compensation to the residents of the West Bank and Gaza. IHRL is based mainly on international treaties to which Israel is a party and has ratified.[183] The extraterritorial application of human rights law in occupied territories was recognised in the advisory opinion of the International Court of Justice (ICJ) on the legal consequences of the construction of a wall in Palestinian territory,[184] as well as in other regional and international tribunals.[185] This advisory opinion even specifically addressed Israel's obligation to award compensation to individuals who suffered harm resulting from the building of the security fence between Israeli

[180] *Adalah* (n 20) State Respondent's written replies, 55. That being said, some scholars suggest that art 3 Hague Convention (IV) does apply to individual claims; see Emanuela-Chiara Gillard (n 106); Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond' (1991) 40 *International and Comparative Law Quarterly* 827. In contrast, see Christian Tomuschat, 'Darfur: Compensation for the Victims' (2005) 3 *Journal of International Criminal Justice* 579, 587. In 2006 the United Nations General Assembly adopted UNGA Res 60/147, The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006), UN Doc A/RES/60/147. The resolution was intended to assist victims of international crimes to obtain remedial relief while also encouraging states to adopt similar policies relating to their responsibility to provide reparations. A similar discussion arose during the drafting of the resolution as to whether the right to reparation is individual or collective; see, eg, Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 36–39.

[181] See examples provided above (n 32); Jessica Bodack, 'International Law for the Masses' (2005) 15 *Duke Journal of Comparative and International Law* 363, 363–66; Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 305, 308.

[182] *Nabahin* (n 2) opinion of Justice Sohlberg, paras 17, 61–64.

[183] Ratification Status by Country or by Treaty, 'Ratification Status of Israel', OHCHR UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN.

[184] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

[185] ECtHR, *Ilascu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004; *Congo v Uganda* (n 151). Another recent example of the obligation to compensate an occupied population under IHRL is that of the ECtHR ruling of 2014, according to which Turkey was ordered to award the Cypriot government a total amount of 90,000,000 EUR, to be distributed by the Cypriot government to individual victims, for the harm suffered as a result of the Turkish invasion of Cyprus in 1974 and its aftermath: ECtHR, *Cyprus v Turkey*, App no 25781/94, 12 May 2014.

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territory and Palestinian territory.[186] International human rights bodies had also called upon Israel to give effect to its obligation under IHRL to compensate the Palestinians residing in the West Bank and the Gaza Strip throughout the years, and criticised its failure to do so.[187]

Israel, conversely, has emphasised in various international legal proceedings that it stands as a persistent objector, as this term is used in international law,[188] to the applicability of human rights law during an armed conflict.[189] Moreover, in various cases the HCJ left unanswered the question of the applicability of Israel's human right laws enshrined in its Basic Laws to the residents of the occupied territories, and has yet to rule specifically on the matter.[190] Notably, in order to apply human rights law to an occupied territory, effective control over the region must also be established, with the effective control needed to be exercised to prompt the law of occupation.[191] In this respect Israel's disengagement from Gaza and consequent erosion of its control of the area will not necessarily preclude its obligations under IHRL towards Gaza's residents. It is important to note that IHRL does recognise the state's obligation to compensate individuals for violation of protected rights, and victims of human rights violations may pursue individual claims directly through regional or universal human rights mechanisms.[192]

[186] *Wall* advisory opinion (n 184) paras 146, 151–53.

[187] Human Rights Council Report (n 116) para 647; Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Israel (21 November 2014), UN Doc CCPR/C/ISR/CO/4, s C ('The State party ... should ensure that all human rights violations committed during its military operations in the Gaza Strip in 2008–2009, 2012 and 2014 are thoroughly, effectively, independently and impartially investigated ... and that victims or their families are provided with effective remedies, including equal and effective access to justice and reparations').

[188] See in general Jonathan I Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) *British Yearbook of International Law* 23; Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *Harvard International Law Journal* 457. For a critique of the rule, see Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 *International and Comparative Law Quarterly* 779.

[189] *Yesh Din* (n 109) State Respondent's written replies, 25.

[190] HCJ 1661/05 *Gaza Coast Local Council v Knesset* 2005 PD 59(2) 481, 560–61; *Adalah* (n 20); HCJ 794/17 *Ziada v Commander of IDF Forces in the West Bank* (30 October 2017), opinion of Justice Joubran, para 95; Yaël Ronen, 'Applicability of Basic Law: Human Dignity and Freedom in the West Bank' (2013) 46 *Israel Law Review* 135. Nonetheless, it was recently determined that '[i]t is hard to believe that the governing authorities, and the Knesset in general, will be able to operate in the Territories when they are freed from the basic values intended to protect human rights, every human, and from the brakes and balances set forth in the Basic Laws. In other words, the power of the Knesset to legislate is outlined and limited by the Basic Laws': HCJ 1308/17 *Silwad Municipality v The Knesset* (9 June 2020), opinion of Chief Justice Hayut, para 32; see also the recent discussion in *Nabahin* (n 2) opinion of Justice Sohlberg, paras 69–91.

[191] Yaël Ronen, 'Post-Occupation Law' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 428, 437.

[192] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 2(3); UN Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (26 May 2004), UN Doc CCPR/C/21/Rev.1/Add.13, para 16.

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A claim often heard in Israeli rulings in this respect is that there is no room to adjudicate claims under international law within the framework of domestic civil proceedings.[193] Some Supreme Court justices, in this vein, noted that an explicit provision of a law of the Knesset supersedes provisions of international law. Hence, as the provisions of the State Liability Law are clear, there is no reason to hold Israel liable to pay compensation under international law.[194] Other Supreme Court rulings have remarked that it is open to hear such claims under a different type of proceedings, such as administrative proceedings or HCJ petitions.[195]

This review shows that as a result of Israel's obligations towards the residents of Gaza under international law, acknowledged also by rulings of the Supreme Court of Israel over the years,[196] there is a difficulty with Israel's complete renouncement of its obligations to compensate the residents of Gaza for negligent behaviour caused by its agents by simply declaring them to be 'enemy state nationals'. Despite the controversy over whether Israel is an occupying power in Gaza, its significant control over the region and impact on the lives of its residents yields certain obligations, be they obligations arising from the law regulating belligerent occupation, post-occupation law,[197] as implied in the *Al Bassiouni* case and a series of subsequent HCJ judgments, or IHRL. Although there is no consensus on the manner and scope of application of the international legal framework and provisions presented, and on the applicability of some of them to the unique circumstances of the region, a wide-ranging denial of tortious compensation in a territory held under Israel's partial control stands contrary to its legal responsibilities towards the residents of the West Bank and Gaza.

With regard to Israel's persistent objection to the extraterritorial application of IHRL, even though Israeli law, as stated in past Israeli rulings, supersedes international law in the event of contradiction,[198] Israel is still bound to interpret its domestic law in a manner consistent with its international legal obligations.[199] Past Israeli case law relied on an interpretive presumption

[193] CivA 220/19 *Abu Elaish v Ministry of Defense* (24 November 2021), para 15.

[194] CivA 6982/12 *The Estate of Rachel Aliene Corrie v The State of Israel* (12 February 2015), para 17.

[195] LCivA 3675/09 *State of Israel v Muhammad Mahmoud Saleh Daoud* (11 August 2011), para 15.

[196] *Al Bassiouni* (n 71); HCJ 5693/18 *Tziam v. Prime Minister* (26 August 2018), para 16; *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 51; CrimA 6434/15 *State of Israel v Hakim Shabir* (4 July 2017), opinion of Justice Barak-Erez.

[197] For more information, see ibid; Shany (n 154); Dana Wolf, 'Transitional Post-Occupation Obligations under the Law of Belligerent Occupation' (2018) 27 *Minnesota Journal of International Law* 5.

[198] See, eg, HCJ 277/51 *Amsterdam and Others v Minister of Finance* (1957) 19 *International Law Reports* 229; CrimA 131/61 *Kamiar v The State of Israel* 1968 PD 22(2) 85, 112; *Nabahin* (n 2) opinion of Justice Sohlberg, paras 17–18, 55.

[199] Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331, art 27; Oliver Dörr and Kirsten Schmalenbach, 'Article 27: Internal Law and Observance of Treaties', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 493; CrimA 6182/98 *Sheinbein v Attorney General* 1999 53(1) 625, opinion of Justice Or, para 19.

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according to which the laws of the state and the norms of international law to which Israel is obligated are in agreement. Therefore, the domestic law should be interpreted, as much as possible, consistently with international law.[200] This principle can also be used as a response to the question of whether Israel's international obligations under IHL, which traditionally are perceived as obligations that do not grant individual rights of remedy, can and should lead to civil domestic obligations, habitually afforded and realised on a personal basis. Some of the overriding principles that underlie the IHL and IHRL legal frameworks applicable to the relationship between Israel and the residents of the West Bank and Gaza seem to stand in contradiction to the state's immunities from tort liability.

Interestingly, the HCJ response to this presumption in the *Nabahin* case was that the question brought before the court is not interpretive, as the appellant is arguing against the constitutionality of section 5B(a)(1) of the Law rather than its correct interpretation.[201] Notwithstanding, this argument, with all due respect, seems somewhat evasive. Clearly, questions of constitutionality are subject to the interpretation of the law, as are questions relating to its application.

While the explicit form in which the above-mentioned legal norms should be respected and realised by the state remains a topic of contemporary scholarly debate,[202] the blanket denial of access to civil justice for Gaza's residents undermines the purposes of these provisions, especially when interstate compensation mechanisms are not employed either. Moreover, the awards that the courts are called upon to grant in tort claims are not granted for violations of international norms, but for violations of domestic tort norms that naturally lie at the heart of its jurisdiction. In this respect the investigation by the ICC into the Israeli-Palestinian conflict also can, and should, be viewed as an additional incentive for the state to adjust its laws.[203] Markedly, the ICC Prosecutor had already released a statement which mentioned that the 2018 border protests will be included in its investigation.[204] If the law were to be amended in such way that would allow it to give effect to Israel's international legal obligations towards the residents of Gaza, the declaration of Gaza residents as 'enemy state nationals', and its implication relating to section 5B of the State Liability Law, should earn particular and careful revaluation.

[200] CivA 562/70 *Alkotov v Shahin* 1971 PD 25(2) 77, 80; CrimA 437/74 *Kwan v State of Israel* 1974 PD 29(1) 589, 596; CrimFH 7048/97 *Does v Ministry of Defense* 2000 PD 54(1) 721, 742–43.

[201] *Nabahin* (n 2) opinion of Justice Sohlberg, para 56.

[202] *Adalah* (n 20) State Respondent's written replies, 81–82.

[203] ICC Office of the Prosecutor (OTP), 'Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction', 20 December 2019, https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-palestine.

[204] ICC OTP, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the Worsening Situation in Gaza', 8 April 2018, https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-regarding-worsening-situation.

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4.2.4. Identity of the injured: Are the protestors considered 'members of a terrorist organisation' or their agents?

After discussing the possibility of classifying the actions of security forces in restraining the protests near the border as combat actions, and the extent to which Israel can belittle its tortious obligations towards the residents of Gaza by characterising them as nationals of an enemy state, the third question we seek to answer in this section is whether the 2018 Gaza border protestors can be classified as members of a terrorist organisation or as their agents under section 5B of the State Liability Law.

The section stipulates that '[a] person who was injured while acting as an agent or on behalf of a subject of an enemy state, a member of a terrorist organisation, or a person active therein' will not be entitled to receive compensation from the state (apart from a few exceptions mentioned above).[205] For the purpose of defining the terms 'enemy state national' or 'terrorist organisation', the State Liability Law refers to section 91 of the Israeli Penal Code. This section defines a terrorist organisation as 'an organisation, the objectives or activities of which aim at the destruction of the State, at damaging its security or the security of its inhabitants or of Jews in other countries'.[206] An 'enemy' is defined under the Penal Law as 'anyone who is a belligerent, maintains a state of war against Israel or declares himself one of those, whether or not war was declared and whether or not armed hostilities are in progress'.[207] The membership of a tort claimant in these types of organisation, as stipulated in the Law, may also nullify the exception that allows a detainee found in Israeli custody to bring claims against the state for harm caused to him while in detention. According to the State Liability Law, if 'he returned to be active in or a member of a terrorist organisation or to act on his behalf or on its mission', state immunity will be triggered once again.[208] As previously stated, the purpose of avoiding strengthening the enemy in its fight against the state is also supported by this exemption, as awarding compensation to members of or activists in a terrorist organisation can also be used against the state and its citizens.[209] Another purpose that may be read into this segment of the Law is to create a chilling effect for potential terrorist organisation members from joining their ranks.

In principle, these are legitimate purposes, which align with the well-established general rule, also applicable to tort liability, according to which *ex turpi causa non oritur action* ('from a dishonorable cause an action does not arise', also known as the defence of illegality).[210] The rule dictates that courts will not provide a remedy where the cause of the proceedings is tainted with

[205] State Liability Law (n 1) ss 5B(a)(2)–5B(a)(3).

[206] Penal Law (n 69) art 91.

[207] ibid.

[208] State Liability Law (n 1) s 5B(a).

[209] *Adalah* (n 20) State Respondent's written replies, 81–82.

[210] Jonathan Mance, 'Ex Turpi Causa: When Latin Avoids Liability' (2014) 18 *Edinburgh Law Review* 175; James Goudkamp and Mimi Zou, 'The Defence of Illegality in Tort: Beyond Judicial Redemption?' (2015) 74 *Cambridge Law Journal* 13.

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illegality.[211] It is supported by several underlying principles, such as refraining from approving or indirectly supporting illegal or immoral behaviour, and preventing a situation in which one will enjoy the fruits of their wrongdoing; deterring the public from criminal or otherwise damaging behaviour; and more.[212] There seems to be little doubt as to the perception of an activity of a terrorist organisation that targets civilians as illegal and immoral, and therefore it naturally falls within the scope of this rule.

At the same time, for the purpose of determining the applicability of the illegality defence in tort law, which denies tort compensation to a claimant, it is acceptable to deploy a causal link test, while also examining the degree of criminality and immorality of the said conduct.[213] The causal link test concludes that the defence will not be valid if there is no causal connection between the illegality with which the claimant's action was tainted and the injury that was suffered.[214] However, the state's immunity from liability to tort claims of those defined as members of a terrorist organisation under section 5B of the State Liability Law is not limited to harm caused during the performance of the organisation's illegal mission. This matter was raised as a critique by scholars involved in the legislative process of section 5B(a)(1) and (2), and also by the Office of the Attorney General. The latter asked the legislature to change the legislative proposal in such a way that the exemption would apply solely to damage caused in connection with a mission performed on behalf of the enemy state or terrorist organisation. However, this suggestion was not accepted and has not been incorporated into the law.[215]

Another approach to the legal handling of a 'dishonourable cause', commonly seen as a complementary approach to the causal link test,[216] seeks to examine the degree of criminality or immorality of the conduct in question based on the presumption that not every unlawful or immoral act should necessarily preclude tortious compensation. Proponents of this approach argue that prohibited conduct which can result in a sanction of a minimum fine or penalty, and reflects a relatively small moral wrong, should not fall within the scope of the principle.[217] Pursuant to this approach, recent Israeli case law points to the existence of a trend of reduction in judgments which completely deny compensation for claimants under the 'dishonourable cause' justification. Instead, courts often adopt doctrines, such as the contributory fault doctrine, which allows claimants to be awarded partial compensation

[211] Daniel Moore, 'From a Dishonorable Cause an Action in Tort Law Does Not Arise?' (1971) 26 *Hapraklit* 254, 257 (in Hebrew).

[212] ibid.

[213] ibid 261.

[214] CivA 360/*64 Abutbul v Kliger* 1965 PD 19(1) 429.

[215] *Adalah* (n 20) opinion of Chief Justice Barak, para 12; Adv Dan Yakir, arguing on behalf of the Association for Civil Rights in Israel, raised this during the discussions concerning the Law; see Protocol of the Knesset's Constitution, Law and Justice Committee, 19 October 2009, 36 (in Hebrew).

[216] CivA 2242/03 *Avraham v Rashid* (18 July 2005); CivA 386/74 *A v B* 1975 PD 40(1) 383, 387–88.

[217] CivA 855/86 *Moriah v Isharov* 1988 PD 42(2) 201, para 17.

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in proportion to the extent of their contribution to the harm caused.[218] However, in cases where it is clear that there is serious and significant criminality hovering over the claimant's conduct, applying the principle which leads to a complete denial of a remedy is seemingly more common. Hence, the controversy over the scope of the application of the principle intensifies when the claimant's behaviour demonstrates only minor anti-social misconduct.

If we apply these principles to membership of a terrorist organisation or affiliation thereof, it is difficult to argue that such involvement, which customarily entails carrying out murderous acts directed against civilians, constitutes negligible immoral conduct. Therefore, even if this test forms an alternative or supplementary test to the causal link test, the principle according to which morally wrong and illegal deeds will not yield a remedy seems to apply naturally in relation to terrorist operatives and their agents. In addition, weight must be given to the fact that an operative in a terrorist organisation who claims a violation of his rights bears responsibility for the status he is in. The culpability of an individual may, in certain circumstances, justify a deferment of their legal rights.[219]

On the other hand, although there is no doubt that deterring and fighting terrorist organisations is of significant importance, and that Israeli citizens are entitled to protection of the safety of their lives, the definition of 'terrorist organisation' under the Israeli Penal Law, to which the State Liability Law refers, adopts a very broad definition of the term.[220] First, the definition does not distinguish between a terrorist organisation that is all military and a dual-purpose organisation that combines military and civilian undertakings. The latter can be carrying out humanitarian relief activities, such as charity work or medical care, and yet is funded by terrorist organisations or have an affiliation with the political movement to which the terrorist organisation belongs.[221] Second, the definition of 'terrorist organisation' fails to separate between 'aiding organisations', which do not carry out acts of terrorism directly but rather act directly or indirectly to assist in promoting its activities, and the connection of which with terrorist activity can be very weak.

Many of the organisations operating in the West Bank and Gaza defined as 'terrorist organisations' operate civilian arms alongside their military wings. Hamas is a notable example of such an organisation. The law, as stated, does not differentiate between an activist in Hamas health and rehabilitation operations for that matter, and between an activist in its military wing. Rather, it applies unanimously to everyone who joins the organisation's ranks. That being the case, the type of activity for which a person can be denied compensation is also very ambiguous and over-inclusive. A person can be deprived of

[218] *Rashid* (n 216); Henry Woods and Beth Deere, *Comparative Fault* (3rd edn, Clark Boardman Callaghan 1996) 1–26.

[219] See and compare with Mordechai Kremnitzer, 'The Principle of Guilt' (1996) 13 *Mehkarei Mishpat* 109 (in Hebrew); *Dirani* (n 27) opinion of Chief Justice Grunis, para 81.

[220] Compare the similarly broad definition of 'terrorist organisation' and 'member of a terrorist organisation' found in the Counter Terrorism Law, 2016 (Israel), art 2.

[221] Liat Levanon, *Membership in a Terrorist Organization* (Israel Democracy Institute 2012) 15 (in Hebrew).

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compensation to which they would otherwise have been legally entitled based solely on behaviour that may express a low level of anti-social characteristics, such as expressing a one-time consent to join a terrorist organisation; being listed in the organisation, or having some involvement in activities that are unrelated to the organisation's military missions.[222] It is also unclear where to draw the line between an act of terrorism and actions such as expressing verbal support of a terrorist organisation or participation in non-military didactic activities managed by terrorist organisations.[223]

In view of the 'dishonourable cause' principle, the denial of compensation under this exception may still be justified on the ground of the great severity of complicity in terrorist acts. It can be argued further that any type of membership and activity associated with terrorist organisations should be severely suppressed based on the organisations' blatant violations of protected values. From an economic theory in a tort law perspective,[224] those associated with terrorist organisations might be viewed as the best preventers of harm, in which case, the said state immunity can minimise potential damage. By the same token, avoiding the award of tort remedies to any type of membership of terrorist organisations may be perceived as an efficient tool in discouraging Palestinians from becoming involved in terror organisations altogether, by creating an incentive to distance themselves from their activities. Nonetheless, it is difficult to see how passive membership of a terrorist organisation without a substantiated connection with the preparations and execution of terrorist offences is considered an act of aiding terrorism that should be sanctioned. Denying compensation on the ground of a very weak form of membership raises legal and moral difficulties in relation to the degree of individual blame assigned to any person defined under the State Liability Law as a 'member' or 'agent' of a terrorist organisation.[225]

One of the greatest complexities that the events described in the *Yesh Din* case invokes is, perceptibly, the mixture of terrorist operatives and the civilian population, including women and children, who participate in the protests side by side. This mixture is intentional. Its main purpose is to make it difficult to locate terrorist operatives within the masses taking part in the events.[226] The protests were organised, coordinated and directed by Hamas. Subsequently,

[222] ibid 15–16.

[223] ibid; a different definition of a 'terrorist organisation' under the Counter Terrorism Law 5776-2016 was recently criticised by the UN Human Rights Committee in its Concluding Observations; see and compare Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Israel (30 March 2022), UN Doc CCPR/C/ISR/CO/5, para 18. It further criticised Israel's criminalisation of what the Committee perceives as civil society organisations as 'terrorist organizations'. These critics emphasise the adverse effects to which overly broad definitions of these terms may lead, from the perspective of tort law and under other legal frameworks: ibid paras 48(c), 49(c).

[224] Peter C Carstensen, 'Explaining Tort Law: The Economic Theory of Landes and Posner' (1988) 86 *Michigan Law Review* 1161; Susan Rose-Ackerman, 'The Simple Economics of Tort Law: An Organizing Framework' (1986) 2 *European Journal of Political Economy* 91; Thomas S Ulen, 'Review: The Economics of Tort Law' (1989) 23 *Law and Society Review* 939.

[225] In a criminal law context see Levanon (n 221) 33–36, 79–80.

[226] *Yesh Din* (n 109) opinion of Chief Justice Hayut, para 7.

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they had a military objective: to break through the security barrier and penetrate Israeli territory.[227] Some of the protesters could certainly be classified as members of a terrorist organisation, even if we define 'membership' of the organisation in a narrow way, which includes only those who take an active part in terrorist activities. The view of some international law scholars is that any type of membership of a terrorist organisation turns a person into a 'direct participant in an armed conflict', not entitled to the protection afforded under IHL as a civilian.[228] Even demonstrators who have agreed physically to protect terrorist organisation members or military objectives by their presence, using their civilian protection under the law and serving as 'human shields', can be viewed as targetable direct participants in hostilities.[229]

Nevertheless, although a large part of the participants in the protests – as well as those injured in the violent clashes between Palestinian protestors and Israeli security forces – were active members of Hamas and its militias,[230] it is not argued that the tens of thousands of protestors, or even a significant portion of them, actively participated in the violence that took place in the protests.[231] According to information published by the media, in order to attract Gaza residents to demonstrate, Hamas reportedly cancelled school days, set up tents and stages near the border, and funded catering services to be provided free of charge to all those present in the area where the protests took place. It also set up wireless networks in the gathering areas so that participants could document the events on social networks, and rented buses to transport the demonstrators to the various protest assemblies at no cost.[232] Various reports additionally argued that Hamas threatened and arrested bus drivers to coerce them into bringing residents to the area of the protests. The organisation also reportedly paid residents who refused to take part in the protests in order to encourage them to leave their homes.[233] In addition, many of the participants in the protests were Hamas operatives receiving wages from the organisation, and their families, which Hamas reportedly forced to attend as well.[234]

Considering this information, can we conclude that all 2018 Gaza border protesters are 'members' or 'activists' of a terrorist organisation under

[227] ibid opinion of Deputy Chief Justice Melcer, para 54.

[228] See, eg, Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *New York University Journal of International Law and Politics* 641, 690–93.

[229] AP I (n 171) art 51(3); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 56–57.

[230] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 54.

[231] *Yesh Din* (n 109) Petition, 10.

[232] Elior Levy, 'WiFi and Free Food: This is How to Entice Gazans to Demonstrate', *Ynet*, 29 March 2019, https://www.ynet.co.il/articles/0,7340,L-5486224,00.htm.

[233] Elior Levy, '"They Said They Would Imprison Us": This is How Hamas Threatens the Demonstrators' Transporters', *Ynet*, 5 April 2018, https://www.ynet.co.il/articles/0,7340,L-5221184,00.html.

[234] Shai Nir, 'Demonstrations in the Strip: Fourth Round', *Davar*, 20 April 2018 (in Hebrew), https://www.davar1.co.il/120776; Elior Levy and Yoav Zeitun, '4 Killed in Demonstrations at the Fence in the Gaza Strip: The Hamas Leadership Has Arrived', *Ynet*, 20 April 2018 (in Hebrew), https://www.ynet.co.il/articles/0,7340,L-5235834,00.html.

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section 5B of the State Liability Law? The matter was not discussed explicitly in the *Yesh Din* case; however, it can be assumed that mere presence at an event organised by Hamas is not enough to consider one an activist or a member of the organisation. Is it possible, then, to establish that presence at the said protests, which were also of a military nature, constitutes assistance to a terrorist organisation, or an action on its behalf? The citizens of Gaza must have known who was organising the protests and were probably also aware of its violent and hostile objectives. Most of the participants, however, did not take an active part in their direct implementation. Another interesting question in this context is whether those present at the protests, including women and children, can be said to have used their civilian protection in order to defend Hamas activists and thus be considered voluntary human shields,[235] although it is clear that Hamas exerted pressure in order to boost their participation. The answer to these questions, other than the issue of tort liability, bears additional significance in respect of the forces that can be used against them, as previously stated.

The aforesaid questions raise a certain inconvenience regarding the broad definition of section 5B of the State Liability Law, which denies members of terrorist organisations and their agents compensation in the circumstances described above. It is important to emphasise, once again, that in relation to Gaza's residents involved in the protests, these questions remain theoretical. Under the current legal regime, the question of whether participants in the protests meet the definition of membership of a terrorist organisation or acting as members' agents is irrelevant to the residents of Gaza, who are defined as nationals of an enemy state. However, at present, these issues are relevant to Palestinians residing in the West Bank, who are not considered enemy state nationals. Admittedly, heated mass protests and violent clashes between Palestinian protestors and Israeli security forces occasionally take place in the West Bank. In the event that such protests do not fall within the definition of a combat action, these questions relating to the levels of affiliation with terrorist organisations which justify the denial of state tort liability can potentially be invoked.

The 2018 Gaza border protests demonstrate the many challenges arising from the exceptions listed under section 5 of the State Liability Law, and section 5B in particular. These challenges, as has been shown, concern the following: (i) the difficulty in applying the mixed classification of the protests described above as both military and civilian, as was stated in the *Yesh Din* ruling,[236] when we discuss the binary all-or-nothing state immunity from paying compensation in situations classified as combat actions; (ii) Israel's obligations towards Gaza's residents originating from Israel's unique control over the Gaza Strip and IHRL, which cannot be dismissed easily in the context of compensatory claims, as well as in others; (iii) the overly broad catch-all definition of a

[235] Rewi Lyall, 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 313.

[236] *Yesh Din* (n 109) opinion of Deputy Chief Justice Melcer, para 39.

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'member' or an 'agent' of a terrorist organisation which may, under certain circumstances, unjustly preclude remedies from individuals who are negligently injured by Israeli security forces – an issue which is currently relevant only to Palestinians residing in the West Bank.

The 2018 Gaza border protests were thus used to illustrate these legal and practical complexities. Before moving on to the final part of the discussion, which offers a solution expected to reduce the incompatibility of the State Liability Law with the legal and factual state of affairs in the West Bank and Gaza, we briefly delve into the claim that existing compensation mechanisms obviate the need to modify the State Liability Law.

4.3. Should each party to the conflict bear its own loss?

A claim often heard when addressing Israel's obligation to compensate Palestinians who were injured by the actions of its security forces in the West Bank and in Gaza is that in times of war each side must bear its own loss.[237] This notion, indeed, can be reflected in Israel's extensive legal arrangements of compensatory laws for Israeli citizens who suffer injuries as a result of hostilities between Israel and the Palestinians. These legal arrangements, which form a social welfare system tailored specifically for citizens affected by war, developed gradually. These arrangements include the Disabled Persons (Benefits and Rehabilitation) Law,[238] and the Fallen Soldier's Families (Pensions and Rehabilitation) Law,[239] both of which concern compensation provided for Israeli citizens serving in the security forces who suffer losses or other bodily or mental injury and their families. The Ministry of Defence Rehabilitation Department and the IDF stand behind yet another legal arrangement that sustains those who served in the security forces and provides assistance for war victims.[240] A further legal provision is prescribed in the Victims of Hostile Action (Pensions) Law, which compensates for bodily injury or death caused to an Israeli citizen as a result of terrorist action.[241] This Law operates alongside the Property Tax and Compensation Fund Law,[242] which awards compensation for property damage caused by such action. Clearly, this is the social system through which the citizens and residents of Israel, as well as security forces personnel, are compensated for losses and harm caused to them in combat.[243]

Supposedly, if we put aside international legal obligations, the requirement for Israel also to bear the costs of damage suffered by Palestinians during hostilities seems somewhat unjust, as it bears solely the cost of its own war

[237] *Abu Elaish* (n 193) para 16; CivA 8279/12 *Al-Dayaya Estate v Ministry of Defense* (29 June 2014).
[238] Disabled Persons (Benefits and Rehabilitation) Law, 1959 (Israel).
[239] Fallen Soldier's Families (Pensions and Rehabilitation) Law, 1950 (Israel).
[240] *Adalah* (n 20) State Respondent's written replies, 5.
[241] Victims of Hostile Action (Pensions) Law, 1970 (Israel).
[242] Property Tax and Compensation Fund Law, 1961 (Israel).
[243] For further information on Israel's compensation policy in this respect, see Hillel Sommer, 'Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience' (2003) 36 *Indiana Law Review* 335.

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damage, as shown above.[244] Moreover, it appears that Israel's responsibility for these hostilities must be taken into account. Israel's status in combat is often of a defensive nature, especially when it comes to organised terrorist attacks aimed at innocent Israeli citizens. These circumstances may yield responsibility on behalf of the PA to participate in compensating Israeli victims for the damage it has caused. Furthermore, according to the agreements between Israel and the PA, civilian establishments and authorities, including the power to compensate war victims, are under the responsibility of the latter.[245]

The PA is made up of a legislative, executive and judicial authority, and therefore does not appear to be prevented from establishing social compensation mechanisms for its residents. In the State Respondent's written replies in the *Adalah* case, it pointed to the existence of an aid system set up for the Palestinians by the PA. It was stated that the PA compensates those whose property was damaged during the fighting with Israel, by transferring budgets to finance their rent and restoration. It was also mentioned that the PA provides financial assistance to farmers whose lands were damaged during the conflict, or seized for military purposes, as well as to business owners who were harmed by Israeli security forces and workers in the tourism industry. In addition, any person who was physically injured in the conflict is entitled to receive financial assistance based on the 1999 Disability Law, through a PA governmental committee that handles their case.[246] The PA also provides assistance for the families of Palestinian victims of the conflict in the form of a monthly allowance or a one-time grant, and it provides an additional set of benefits for the families of war victims, such as exemption from paying for academic tuition. Notably, the PA also allocates money for imprisoned and released Palestinians who carried out hostile and violent activities against Israel, and for the families of 'martyrs'.[247]

However, contrary to the repeated claim that in an armed conflict 'each state must bear its own loss', also made by the initiators of the extensive legislative changes to section 5 of the State Liability Law,[248] it should be kept in mind that the PA is not a state. Conceivably, this political principle of equal responsibility of each government towards compensating its own citizens is based on the premise that there is a balance of power between Israel and

[244] *Adalah* (n 20) opinion of Chief Justice Barak, para 35; see also Protocol of the Knesset's Constitution, Law and Justice Committee, 30 June 2005 (in Hebrew).

[245] 'Israel–Palestine Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip, with Selected Annexes' (1997) 36 *International Legal Materials* 551, art XX.

[246] Yossi Kuperwasser, 'Incentivizing Terrorism: Palestinian Authority Allocations to Terrorists and their Families', *Jerusalem Center for Public Affairs*, 2016, https://jcpa.org/paying-salaries-terrorists-contradicts-palestinian-vows-peaceful-intentions. On payments by Hamas to its activists and their family members see Levitt (n 116) 59–60.

[247] *Adalah* (n 20) State Respondent's written replies, 28–29.

[248] In the Explanatory Notes to Amendment No. 5 (n 47) it was stated that '[t]he accepted rule is that, during armed conflict between nations, each side bears its injuries and cares for its injured ... A situation in which the state bears the injuries of its citizens, and, while acting in the framework of its duty to ensure their safety and to prevent hostile entities from injuring and harming its citizens, also for injuries sustained as a result thereof – is improper, and some of the most properly administered countries in the world prevent the creation of such a situation'.

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the PA. However, these are not two states or even two entities that are equal in their power and ability to exercise control and run a functioning social welfare system. There is a relationship of control and inspection between Israel and the PA, resulting from Israel's holding in the West Bank and Gaza in which the PA operates, as part of a belligerent occupation, notwithstanding the discussion on the legal status of Gaza.[249] As mentioned, this status compels Israel to act in accordance with its obligations towards the residents of the West Bank and Gaza under international law, which it is not allowed to dismiss. Therefore, it appears that the principle that 'each party must bear its own loss' should not affect Israel's responsibility to amend its laws in a way that would limit its immunity from tort liability with regard to the residents of the West Bank and arguably Gaza, under the circumstances which are presented below.

Although this article focuses on the question of Israel's liability in tort towards the Palestinians, a further situation can also be debated where the PA's liability in tort arises in relation to Israeli citizens who suffered damage as a result of negligent conduct carried out by Palestinian authorities officials or their agents. For example, if Gaza residents could sue the security forces for negligent actions they carried out during the protests, the state could demand participation in payments from those who organised the violent protests, or perhaps seize some of the funds entering Gaza, for instance, by confiscating goods at the border belonging to them.[250] However, any conclusion regarding liability to be imposed on the Palestinian side in relation to damage it causes to Israelis, or in relation to any contributory fault it may have for damage suffered by Palestinian residents themselves depends, to some extent, on Israel's willingness to establish liability for some of the harm it has inflicted on Palestinian residents.[251] These matters are not discussed at length in this

[249] Aharon Barak, *The Judge in a Democracy* (University of Haifa Press 2004) 147 (in Hebrew).

[250] Israel has argued in several instances that the Palestinians contributed to the number of their own civilian casualties resulting from the violent clashes between Israel and Hamas in Gaza; see, eg, State of Israel, 'The 2014 Gaza Conflict, 7 July – 26 August 2014: Factual and Legal Aspects', May 2015, 73–100; Israel held a similar position regarding contributory fault attached to Hezbollah fighters in relation to the high number of civilian casualties arising from the armed conflict conducted between Israel and Hezbollah; see Israel Ministry of Foreign Affairs, 'Preserving Humanitarian Principles while Combating Terrorism: Israel's Struggle with Hezbollah in the Lebanon War', 2007, 6–7. On the liability of a non-state actor to pay compensation when incidental injury is caused, see Ronen (n 15) 209–10.

[251] The Supreme Court recently addressed the PA obligation to award monetary compensation for victims of terrorist activities in two main judgments. The first is CivA 2362/19 *A v The Palestinian Authority* (10 April 2022), in which it was determined that the payment of monthly compensation to a security prisoner or to the family members of the offender of the terrorist attack constitutes confirmation of the wrongful act. It was noted that by rewarding these offenders and their families the PA is expressing its consent and recognition of those actions in a manner equivalent to taking responsibility. It was thus stipulated that victims of the attacks could decide whether they prefer to sue the PA for compensation, or receive it in accordance with the Victims of Hostile Action (Pensions) Law (n 241). In CivA 1017/21 *Haig Banoyan v The Palestinian Authority* (10 May 2022), the Supreme Court ruled that although payments by the PA to those who committed terrorist attacks amounts to confirmation of their actions, which imposes tortious liability on the PA, this liability does not include punitive compensation.

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article, despite their great importance in regulating the matter more fully, as this type of argument seems worthy of an in-depth and separate discussion which goes beyond the scope of this study.

5. Amending Section 5B of the State Liability Law: Individual examination as a possible solution

Pursuant to our review of the legal obstacles arising in examining section 5B of the State Liability Law in the light of Israel's obligations under international law and established tort law principles, exemplified by the case study of the 2018 protests, this final section suggests possible responses to these challenges. These suggestions chiefly advocate the adoption of an individual examination mechanism, which would evaluate the connection of each tort claimant – who alleges to have been injured by a negligent act performed by state agents, not in the context of a combat action – to the performance of hostile activities against the state. Based on this evaluation, courts will have the discretion to decide whether to award compensation. In addition, it is proposed to narrow the definitions of 'membership' and 'terrorist organisation' to reconcile the purposes of the State Liability Law exemption enshrined in section 5B with recognised principles of tort law.

The Israeli belligerent occupation in the West Bank and Gaza is reflected in tight urban control in most of the cities and towns of the West Bank, as well as significant control over the borders of Gaza, and all that it entails. This type of control, especially in the territories of the West Bank, involves frequent and prolonged interaction between Israeli security forces and the residents of the West Bank and Gaza, most of which are in the context of policing activities. These encounters, which can occur, for example, during border inspections at checkpoints, car accidents, riot control efforts or a house search, can lead to the negligent infliction of incidental harm to the body or property of Palestinians residing in the area; for this, compensation will not be awarded to Gaza residents or those defined as members of terrorist groups and their affiliates.

Awarding compensation for loss and damage, the purpose of which is to provide redress for the violation of victims' rights and restore the status quo ante, is a fundamental principle of the common law legal system.[252] In cases where the purpose of re-establishing the original situation cannot be fulfilled (as in certain injuries to the mind or body that cannot be reversed), compensation is intended to place the injured party, in monetary terms, closer to the situation they would have been had they not suffered the injury, and assist in medical, psychological and social rehabilitation.[253] Assigning tort liability is also intended to encourage potential tortfeasors to exercise caution and avoid

[252] John CP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2005) 55 *DePaul Law Review* 435.

[253] As stated in the Restatement (Second) of Torts §901 (1979) (US), '[t]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort'.

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causing injuries.[254] The loss and damage that may be caused by negligent activity of Israeli security forces in the West Bank and Gaza may be serious, and bring about fatal consequences for those injured and their families. Thus, the denial of tort compensation for such damage – intended to endorse important human rights such as the right to life, liberty, dignity, privacy and property – precludes the right of access to civil justice and constitutes a denial of one of the main instruments through which the legal system protects these rights.[255]

When the prospect of individual examination with regard to section 5B(a)(1) of the Law was reviewed by the HCJ in *Nabahin*, the following question was raised. Will an individual examination, which is undoubtedly the less harmful option in this respect, fulfil the purpose of the Law to an extent equivalent to that achieved through the arrangement set out in section 5B(a)(1)? The response was that it does not,[256] and that there is therefore no obligation to adopt this method.[257] Nonetheless, while the sweeping denial of the rights of the residents of Gaza may fulfil the purposes underlying section 5B of the State Liability Law (discussed earlier)[258] of not providing monetary compensation to a national of an enemy state or to a member of a terrorist organisation, it seems unbalanced against the backdrop of the core human rights at stake. Truth be told, Israel has fought against Hamas militias and other terrorist groups acting in Gaza more than once. It is therefore not inconceivable that, as Hamas is the ruling political party in Gaza, compensation paid to Gaza's residents will directly or indirectly assist it in their war against Israel. Nevertheless, Israel's obligation towards Gaza's residents under international law is inconsistent with its sweeping release from tort liability. In this respect, Chief Justice Barak's observation in his ruling in *Adalah*, according to which granting sweeping immunity to the state for any action it takes in the West Bank and Gaza does not constitute an adjustment of tort law to a state of war but excludes security forces from tort liability altogether, applies also to the current legal situation.[259]

For those reasons I am of the opinion that the more proportionate and proper way to fulfil the purpose of state immunity from payment of damages to enemy state nationals or members of terrorist organisations seeking the state's destruction is by way of an individual examination mechanism. An examination into those types of claim should review the connection that each claimant filing a tort claim against the state of Israel has with the

[254] Richard A Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 192.

[255] Izhak Englard, *Road Accident Victims Compensation* (3rd edn, Yahalom Press 2005) 9 (in Hebrew); see Gilat J Bachar, 'Access Denied—Using Procedure to Restrict Tort Litigation: The Israeli-Palestinian Experience' (2018) 92 *Chicago-Kent Law Review* 841.

[256] *Nabahin* (n 2) opinion of Justice Sohlberg, para 109.

[257] ibid paras 125–26. It was further argued that an individual examination will not fulfil the purpose of avoiding assisting the enemy in its fighting and that it may infringe the fulfilment of adapting tort law to wartime situations, as the mere investigation of whether an action is a combat action or not places the state at a built-in evidentiary disadvantage.

[258] See discussion in Section 2.

[259] *Adalah* (n 20) opinion of Chief Justice Barak, para 35.

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terrorist organisation; their role in the organisation and contribution to hostile activities performed by it. It should be emphasised that this suggestion does not imply an obligation to prove the existence of a causal link between the occurrence of harm to the injured party and membership of the organisation. It focuses on the examination of the role of the injured party in the terrorist organisation to which he supposedly belongs or assists. If the role of the claimant in the said organisation is related to the core of the fighting against Israel, this claimant should not be awarded compensation, in accordance with the rationales provided in Section 2 and the 'dishonourable cause' principle mentioned earlier.

Interestingly, the 'combat action' exemption, with all the legal challenges it raises, applies de facto an individual scrutiny mechanism to each type of legal scenario filed with the court. Courts review each incident on a case-by-case basis before determining whether it falls within the scope of the exemption.[260] It is not clear, therefore, why similar individual mechanisms cannot be deployed in cases falling within the reach of section 5B to the Law. In this sense, the adoption of an individual examination model could not only advance Israel's adherence to its legal obligations but also contribute to harmonisation of the Law.

A preference for individual examination over sweeping prohibitions, despite the economic and systemic burdens that such an examination would entail, is a recognised principle in rulings of the Israeli HCJ, which has stated, more than once, that '[a] sweeping restriction of a right, which is not based on individual scrutiny, is a suspect measure of disproportionality. That is the way it is in our legal system. The same goes for other legal systems around the world'.[261] Supreme Court Justice Ayala Procaccia also referred to this issue in the *Family Reunification* case, and concluded:[262]

> We must guard against the lurking danger inherent in sweeping harm caused to humans belonging to a particular public by labeling them indiscriminately ... We need to protect our security through individual means of inspection even if it puts a further burden on us.

Thus, with regard to the broad definitions of 'terrorist organisation', 'membership' of such an organisation or affiliation thereof, I propose to amend the language of the law so that it will distinguish between the different types of terrorist organisation (terrorist organisation, civilian arm of a terrorist organisation, or an assisting organisation), and offer to draft a clearer and more limited definition of the terms 'membership' and 'activity' in a terrorist organisation for which individual compensation could be denied. Importantly,

[260] See, eg, *Abu Elaish* (n 193); CivA 1459/11 *Estate of the Late Muhammad (Nabil) Hardan v The Minister of Defense* (16 June 2013); CivA 1864/09 *Estate of the Late Ahmad Skafi v State of Israel* (7 September 2011).

[261] HCJ 7052/03 *Adalah – Legal Center for Arab Minority Rights in Israel v Minister of the Interior* 2006 PD 61(2) 202, opinion of Chief Justice Barak, para 69.

[262] ibid opinion of Justice Procaccia, para 21.

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the distinction between different types of involvement in a terrorist organisation is not based on moral preferences, but rather on the question of personal culpability and responsibility that is sufficiently severe to trigger the 'dishonourable cause' principle. It appears that a factual component should also be added to this definition, which will require proof of the existence of an act of a sufficiently grave and anti-social nature, as well as having a tangible contribution by the claimant to the promotion of terrorist acts.[263]

Irrespectively, it should be mentioned that the distinction between different types of terrorist organisation is unacceptable in the eyes of some jurists, such as Supreme Court Justice Ayala Procaccia, who addressed this issue in *Abidat*:[264]

> It is not possible to distinguish between the civilian function and the military function in the organisation's activities, and any distinction and separation between them is artificial and unfitting. The civilian function feeds the military purpose, and the military purpose provides the cause and purpose for the civic activity, and for the financial flow of funding required for the organisation's activities, including acts of assistance to the needy, and social activities among the young people of the organisation to encourage their involvement in it.

It is true that Israeli law supports the existence of a broad ban on assisting and supporting terrorist organisations. Accordingly, past rulings have professed that joining the civilian arm of a terrorist organisation is also prohibited, and 'goes beyond all that is acceptable and tolerable in a democratic society'.[265] These statements are grounded in the idea that any assistance to a terrorist organisation harms the essential interests of Israeli society.[266] However, it is possible to argue otherwise. For example, a claim can be made that the civilian relief activities performed by the organisation may improve the situation of the population, and consequently reduce the chances that the community enjoying those civil services will feel helpless and choose to act violently. In addition, it appears that the sweeping denial of the state's tort liability concerning anyone who is affiliated with a terrorist organisation ignores questions of individual moral culpability, and negates basic notions of corrective justice.[267] This complexity was also illustrated by the difficulty in

[263] Levanon (n 221) 78–81.

[264] MiscCrimReq 6552/05 *Abidat v State of Israel* (17 August 2005), opinion of Justice Procaccia, para 11.

[265] MiscCrimReq 347/88 *State of Israel v Schwartz* 1988 PD 42(2) 568, 572; MiscCrimReq 854/07 *Abu Daka v State of Israel* (8 March 2007); Administrative Detention Appeal 2595/09 *Sophie v State of Israel* (1 April 2009), opinion of Justice Rubinstein, para 14.

[266] MiscCrimReq 801/05 *State of Israel v Fahima* (30 January 2005), opinion of Justice Rubinstein, para 8.

[267] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349; Jules Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method, Philosophy and the Law of Torts' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press 2001) 184; Jules L Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana Law Journal* 349.

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classifying the participants in the Gaza border protests in this respect.[268] Given the cardinal rights on the line, and tort law principles of culpability and corrective justice, an individual examination of each claimant's tangible contribution to a terrorist organisation, although economically burdensome, better fulfils Israel's duty to respect and protect human rights.

The proposed individual examination mechanism for tort claims made against the state should also be applicable in relation to Israel's tort exemption in relation to the residents of Gaza, precisely because of their special status as residents of an area which is heavily dependent on Israel and held under its partial control. In this respect, doubts can be raised as to whether individual examination into the claims of the residents of Gaza is feasible. The last time a similar question of the feasibility of individual examination of Gaza's residents was examined by the HCJ (in relation to their entry into Israel for the purpose of family reunification), the HCJ ruled that the ability to do so does not exist.[269] However, it seems that although the state's control in Gaza is weaker compared with its control over the West Bank, especially in terms of its ability to obtain information about alleged negligent military actions, the holding of relevant information is still plausible. In the context of the *Yesh Din* case, for example, despite the chaos that characterised the protests, the state was able to trace the cause of death of each protestor and identify them as either members of terrorist organisations or civilians.[270] Other elaborated reports concerning the identity of the injured were published by other bodies.[271] It follows that similar reasonable efforts can be made with regard to tort claims as well.

Justice Sohlberg mentioned in *Nabahin* that the probability that a tort claim filed by a resident of Gaza against the state will be detached from the hostilities between the parties is extremely small scale. This led him to the conclusion that the cumulative potential damage of section 5B(a)(1) of the Law is very low.[272] I, conversely, find that this argument strengthens the claim that in those rare cases where, on the face of it, the damage caused to the claimant appeared to have arisen during action unrelated to combat, it would not be too burdensome to examine the relevant claim based on the individual scrutiny mechanism suggested above. Therefore, I argue that the blanket state immunity in relation to tort claims filed by residents of Gaza should be invalidated. If the tort claim of a Gazan resident could be heard in Israeli courts without falling into any of the legal pitfalls involved in clarifying a tort claim of an enemy state national or of a member of a terrorist organisation, it would be far more just and proper, and align with Israel's international obligations, to allow the claim to be heard without finding shelter in the tort liability immunities enshrined in section 5B. In a case where it is proven,

[268] Compare with Section 4.2.4.

[269] HCJ 466/07 *Galon v Attorney General* (11 January 2012), opinion of Justice Arbel, para 17.

[270] Meir Amit Intelligence and Terrorism Information Center, 'Examination of the Victims of the "Return Marches" Shows that Most of Them Are Operatives of Terrorist Organizations, About Half of Whom Are Affiliated with Hamas' (2019) (in Hebrew).

[271] Human Rights Council Report (n 116) 6.

[272] *Nabahin* (n 2) opinion of Justice Sohlberg, para 132

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based on conclusive evidence, that the Israeli security forces negligently harmed a resident of Gaza in an act that is unrelated to a combat action, and that the resident is not a member of a terrorist organisation (as should be more narrowly defined), there seems to be no valid or convincing reason for the state not to award compensation for damage caused.

6. Conclusion

This article focused on section 5B of the State Liability Law. I have tried to show that the possibility of denying the right to tort compensation in circumstances unrelated to combat actions or remotely related to them, by virtue of the exemptions listed under the said section, is hard to defend. The granting of sweeping immunity in such circumstances stands contrary to the principles of Israeli tort law and Israel's obligations under international law.

Although in cases involving a claim filed by a national of an enemy state there seems to be room to consider the legitimate interests of the state in defending itself, the existing law seems to seek to do much more than that; this is because of the broad definition of 'membership' of a terrorist organisation or an affiliate thereof, and the sweeping denial of the right to compensation for almost any harm caused to Gaza's residents by Israeli security forces. This created uneasiness among the majority of the HCJ justices in the *Nabahin* case, and led them to leave the door open for future litigation on the matter.[273]

Modern tort law upholds the individual's autonomy and right to life, bodily integrity, dignity, liberty and property. The realisation and enjoyment of these rights requires safeguarding the legal protection afforded to victims who suffer from unjustified injuries inflicted upon them. As we have seen, the exemption of the state from tort liability for negligent damage caused to nationals of enemy states and those seeking its destruction, such as members of organised terrorist groups, is not an 'Israeli invention'. They are well-established and age-old principles found among other Western states with long-standing democratic traditions. However, the unique situation created in the Gaza Strip, exemplified throughout the article by analysing the 2018 Gaza border protests, reveals that the application of these rules in the Israeli-Palestinian reality, in their current interpretation, is fraught with difficulties.

The confrontation between Israel and Palestinian terrorist organisations is an armed conflict with unique characteristics, which does not take place between two states whose power is equal, but rather between a sovereign state and non-state actors. This asymmetry necessitates a more detailed examination of the current legal regime codified in the State Liability Law, as it undermines the justification for the existence of a blanket state immunity in tort in relation to the Palestinian population of the West Bank and Gaza, who enjoy the status of protected persons. Therefore, a flexible and individual examination of Israel's tortious liability is required in order to properly fulfil the important purposes underlying the various state liability exceptions

[273] *Nabahin* (n 2) opinion of Justice Grosskopf, paras 19–23; opinion of Deputy Chief Justice Hendel.

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discussed, balanced against the backdrop of the objectives that tort law was meant to achieve, predominantly the protection of fundamental human rights. An individual examination of both types of claimant – namely residents of Gaza and claimants suspected to be affiliated with a terrorist organisation – could thereby promote state accountability and improve the legal regime governing the tort compensation afforded to victims of negligent conduct of Israeli security forces.

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