Tort Law as a Remedy for Terrorism

Boaz Segal

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ABSTRACT

This article examines two basic questions. First, can tort lawsuits against operatives in various circles of the world of terrorism be added to the toolkit of deterrence? Second, assuming that the answer to the first question is in the affirmative, how can tort law be structured to effectively deter terror operatives?

With respect to the first question, despite the intuitive assumption that the relevant branches of the law in such cases are criminal, international, and counter-terrorism law rather than the various branches of private law, this article argues that tort law is capable of serving as a significant deterrent in the fight against terrorism. The Article presents three ways in which this can be accomplished: (a) imposing significant restitution on the operatives engaged in various aspects of terrorist activities; (b) exposing and identifying terror operatives by means of tort law action; and (c) initiating legal proceedings to raise awareness, exert public pressure, and cause reputational damage.

Following this analysis, the Article examines the second basic question, explaining how tort law can be structured to create effective deterrence for perpetrators of terrorism. The Article sets forth preliminary guidelines for a comprehensive tort law system based on six pillars: (a) granting extra-territorial jurisdiction to countries that are fighting terrorism; (b) extension of the boundaries of tortious liability; (c) restructuring the rules of evidence and liability in civil proceedings; (d) creating effective mechanisms for collecting the restitution imposed on tortfeasors; (e) the establishment of statutory compensation

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funds; and (f) strengthening international legal cooperation. In this way, tort law can serve the interests of both injured parties and the public.

This article concludes that even if tort law does not provide complete deterrence and even if the goal of deterrence is not easily achievable, it can make an important contribution to deterring terrorism.

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I. INTRODUCTION: THE ABDELKADER EXAMPLE

The intuitive assumption is that the relevant legal frameworks dealing with worldwide terrorist threats are criminal, administrative, international, counterterrorism, and the like, rather than the various branches of private law. In this Article, I argue that this is a mistake. Does tort law have anything to add to the deterrence of operatives engaged in the various circles of the world of terrorism? If so, how should tort law be structured, so that it offers effective deterrence?

To answer the aforementioned questions, consider the following example. On November 20, 2000, a roadside bomb went off next to a bus in southern Israel transporting students and educational staff from Kfar Darom to Neve Dekalim. Several students were injured, some severely, and two individuals were killed, including a teacher, Ms. Miriam Hana Amitai, who was on her way to the educational institution where she taught. Ms. Amitai's spouse and their four children, who were minors at the time of the event, filed a tort lawsuit against five entities, arguing that they were responsible for the terrorist attack[1]: (a) Abdelkader, based on the assertion that he was the terrorist who perpetrated the attack; (b) Mohammed Dahlan, head of the Preventive Security Force in the Palestinian Authority ("the PA"); (c) Rashid Abu Shanab, Dahlan's deputy; (d) Yasser Arafat, PA President (the claim against defendants 2-4 was that they held senior positions in the PA and the attack was perpetrated at their orders and under their guidance); and (e) the PA, arguing that it encouraged violence against Israeli soldiers and civilians and did not prevent the attack that was initiated in its territory.

In its ruling, handed down on April 27, 2022, the Supreme Court of Israel declined to disturb the District Court judgment which found that the attack was indeed perpetrated by Abdelkader, at the initiative of the PA.[2] Consequently, it did not find it necessary to intervene in the ruling of the Court with regard to the liability of the respondents.[3] Nor did it find it necessary to change the heads of damages awarded to the estate and the family of the deceased, as follows: (a) for pain and suffering and the shortened life of the deceased: ILS

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[1] CivC (DC Jer) 6062-04 Estate of the Deceased Miriam Hana Amitai v. Abdelkader, Nevo Legal Database (June 29, 2022) (Isr.), https://nevo.co.il/.

[2] CivA 7036/19 John Doe v. Abdelkader, 11-15, Nevo Legal Database (Apr. 27, 2022) (Isr.), https://nevo.co.il/.

[3] *Id.* at 15.

1,000,000; (b) for funeral and burial expenses: ILS 20,000; (c) for loss of services of spouse and children: ILS 200,000 for the husband and each of the four children, totaling ILS 1,000,000; (d) for loss of income in the "lost years," taking into consideration the minority status of the children of the deceased and the complexity of calculation: ILS 350,000. Consequently, the total damages awarded amounted to ILS 2,370,000.[4]

By contrast, the Supreme Court chose to intervene in the matter of the amount of *punitive damages* awarded by the District Court. The latter had ordered the payment of punitive damages triple the amount determined for the above heads of loss. Thus, after adding the punitive damages, the total compensation awarded by the District Court amounted to ILS 7,100,000.[5] To this were added court and legal expenses, together with VAT, as prescribed by law. The Supreme Court lowered the amount of the punitive damages, placing it at a total of ILS 3,000,000.[6]

This case, in which the Court addressed in a holistic, systematic way the relevant heads of tort, including punitive damages, I refer to as the "Abdelkader example," used to assist in the presentation of the forthcoming arguments. Thus, the following fundamental questions emerge: (1) whether tort law be drafted to support the war against terrorism; and (2) if so, in what manner this can be achieved. The goal of the present Article is to investigate how tort law can be leveraged as an additional tool in the deterrence toolkit of counterterrorism. To this end, the Article starts by analyzing the effectiveness of implementing tort law against terrorists, their dispatchers, and enablers, with a view toward the deterrence potential of tort law. To answer the first question, my argument is that tort law is capable of playing an important deterrence role in the war on terrorism. To answer the second question, I elaborate on how it is possible to structure tort procedures as a tool in the war against various circles of the world of terrorism, to make tort law an effective deterrence tool.

The Article proceeds as follows: I begin, in Section II, by analyzing the following basic question: Can tort law play an important deterrent role in the war on terrorism? I answer the question along three

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[4] *Id.*

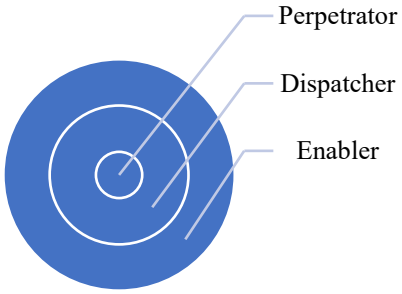
[5] CivC (DC Jer) 6062-04 The Estate of the Deceased Miriam Hana Amitai v. Abdelkader, Nevo Legal Database (June 29, 2022) (Isr.), https://nevo.co.il/.

[6] CivA 7036/19 John Doe v. Abdelkader, 16-17, Nevo Legal Database (Apr. 27, 2022) (Isr.), https://nevo.co.il/.

primary avenues: first, deterrence by the imposition of significant compensation on those responsible for acts of terrorism; second, deterrence by exposing in the course of the tort proceedings the factors supporting terrorism and passing on this information to the relevant authorities; and third, deterrence by the promotion of transparency and public awareness. I conclude this analysis by asserting that tort law can make an important contribution to deterrence in the war on terrorism. In Section III, I demonstrate that in the current legal situation, the application of tort law is likely to generate effective deterrence for terror operatives, both directly and indirectly, adding to the deterrence achieved by the application of other branches of law. In Section IV, I indicate how tort law should be structured, from theory to practice, so that it can be deployed efficiently in the war on terrorism. In Section V, I discuss possible counterarguments to the thesis put forth in this Article, and I provide possible responses. Section VI contains a comprehensive summary and thoughts for the future.

II. CAN TORT LAW PLAY A FUNCTION OF DETERRENCE IN THE WAR ON TERRORISM?

This Section concerns how tort law can effectively deter terror operatives and describes the advantages of using tort law to direct the behavior of these operatives. I clarify the matters in which tort law can produce deterrence for the operatives responsible for terrorist attacks. The term "terror operatives" includes the following three circles of operation:



I use the term *perpetrator* to identify the individual terrorist or group of terrorists who carried out the terror act. In the Abdelkader example, this individual was Abdelkader. The *dispatchers* form the breeding ground where the attack was planned and prepared. These may include organizations like Al-Qaeda, ISIS, Taliban, Hezbollah,

and in the Abdelkader example, the PA. The term *enablers* refer to whoever could have reasonably prevented the act of terrorism and did not do so. This may include a bank that enables the transfer of money from donors to terrorist organizations, which need financial resources to fund their activity. Moreover, terrorist organizations are also liable to use banks for money laundering and camouflaging the source of their funding. Thus, when a bank fails to implement an effective control mechanism, it is liable to become a tool in the hands of terrorist organizations. Charitable organizations are also potential enablers. Although their mission is to help and support certain groups or worthy causes, failure to exercise caution may lead to a situation where the funds end up in the pockets of terrorist organizations rather than the civilian population they are intended for.

A. Imposing Significant Compensation on Terror Operatives

Tort law can play an important deterrent function for terror operatives in three ways: (1) by imposing significant compensation on terror operatives; (2) by using legal proceedings to expose the factors supporting terrorism and passing this information on to the relevant authorities; and (3) by creating public awareness and debate.

Tort law can assist in deterring terror operatives by imposing heavy monetary costs on those found responsible for the perpetration of acts of terrorism and on those who supported them, whether directly or indirectly. Even if these costs may not always deter those in the perpetrator circle, they may deter dispatchers and enablers before the deed is done, in other words, those assisting terrorists and their sponsors. If a person, organization, or state is found liable in a tort lawsuit, they will be obligated to pay substantial sums of money to the victims. Deterring the circle of dispatchers and enablers hinders private perpetrators from operating effectively.

The deterrence is effective with regard to the three circles of terrorism. Perpetrators found guilty or their estates can be sued, and heavy amounts of fines imposed on them for the act of terrorism. If dispatchers such as terror organizations are found liable, all property in their possession can be seized to carry out the court ruling. Enablers, whether banks, corporations, or governments that provided direct or indirect financial support, can also be sued and ordered to pay

damages.[7] As a result, banks are likely to be more careful and meticulous in their examination of their clients and of their business if they know that they are liable to be held accountable for assisting terrorism.

Returning to our example, it is known that the PA budget includes an item called payment to *shaheeds*[8] and security prisoners. In other words, the PA chose to pay people for perpetrating acts of terrorism.[9] It is reasonable to assume that this payment policy serves as an incentive for terrorists to continue to perpetrate acts of terrorism. Among others, the policy provides security prisoners and the families of *shaheeds* with financial security in the form of a monthly salary, which is proportional to the severity of the attack perpetrated by them. Put simply, the longer the terrorists' prison term is, the higher their monthly salary. This PA policy creates a direct, open relationship between the severity of the attack and the size of the salary it pays security prisoners (for those surviving the attack) and their estate (for those killed in the course of the attack). This payment policy has been met with sharp criticism, and several countries have condemned it and halted the transfer of financial aid to the PA because of it.[10]

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[7] See *infra* Section IV.A for a discussion of the difficulty of suing a foreign government because of its immunity.

[8] One who has given his life for his religious belief or a higher cause, especially one who is killed in battle for Islam. *Shahid*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/religion/dictionaries-thesauruses-pictures-and-press-releases/shahid? (on file with the Touro Law Review) (last visited July 1, 2025).

[9] To ensure its payments to security prisoners, released security prisoners, the families of *shaheeds*, and the wounded, the PA enacted, among others, two laws. *See* Law for Support of Prisoners in Israeli Prisons No. 14 (2004), AN-NAJAH NAT'L U., https://maqam.najah.edu/legislation/789; Released Prisoners Law No. 19 (2004), PALESTINIAN NEWS & INFO. AGENCY. *See also* Law of Released Prisoners No. 19 (2004), PALESTINIAN NEWS & INFO. AGENCY, https://info.wafa.ps/ar_page.aspx?id=2586.

[10] For example, Germany expressed concern that funds transferred by it to the PA would be used to fund terrorism and promised to investigate their destination. *See* Raphael Ahren, *In First, Germany Admits PA is Likely Paying Terrorists' Families*, TIMES ISR. (Sep. 5, 2016, 7:45 AM), https://www.timesofisrael.com/in-first-germany-admits-pa-is-likely-paying-terrorists-families/ (on file with the Touro Law Review). The UK suspended the transfer of funds to the PA in 2016 because of similar concerns. *See* Steve Hawkes, *Taxpayer Funded Terrorists: Britain Suspends Millions of Aid Payments to Palestine Amid Claims Cash is Handed to Terrorists*, SUN (Oct. 7, 2016, 3:24 PM), https://www.thesun.co.uk/news/1927874/britain-suspends-millions-of-aid-payments-to-palestine-amid-claims-cash-is-handed-to-terrorists (on file with the Touro Law Review). Australia changed the allocation of payments transferred by it in the course of 2018 because of concerns that they would be used to finance salaries to terrorists. *See* Reallocation of Aid to the Palestinian Authority,

Nevertheless, the PA continues to defend this policy and annually allocates some 7% of its budget, for a total of some 300 million dollars,[11] for payments to security prisoners and their families. The imposition of tort liability on the PA in such cases, obligating it to pay heavy sums of money, is likely to contribute to their deterrence. Yet, for the damages to create effective deterrence, as suggested in this Article, they must contain two elements: tort compensation for the damage caused and punitive damages.

1. Deterrence by Warding Tort Compensation to Victims of Terrorist Attacks for the Harm Caused

Tort law can serve as an important tool for terror victims to receive compensation for the harm they endured, both physically and emotionally. This compensation may include not only pecuniary damages, for example, for medical expenses and loss of salary, but also non-pecuniary damages like pain and suffering. Victims who survived terror attacks frequently endure not only physical harm requiring long-term medical treatment but also emotional harm, such as severe psychological trauma. The families of the victims of terror attacks are also liable to suffer from psychological trauma, in addition to the loss of the financial support that had been provided by the murdered person.[12]

DEP'T FOREIGN AFFS. & TRADE (July 2, 2018) (Austl.), https://www.dfat.gov.au/news/news/Pages/reallocation-of-aid-to-the-palestinian-authority (on file with the Touro Law Review). Norway expressed concern that aid funds would be transferred for these purposes and was satisfied with a promise by the PA that it would refrain from doing so. *See Abbas Confirms PA Still Paying Terrorists' Salaries—Report*, TIMES ISR. (May 7, 2016, 11:29 PM), https://www.timesofisrael.com/abbas-confirms-pa-still-paying-terrorists-salaries-report/ (on file with the Touro Law Review). The U.S. froze the transfer of funds to the PA as long as these payments continued by enacting the Taylor Force Act, Pub. L. No. 115-141, §§ 1002-07, 132 Stat. 347, 1143-47 (2018). In this context, it should be added that the "reallocation game" is problematic. Money is fungible. The money from Norway can be used to fund lunch for kindergarten students and the money saved from the kindergartens' budget is used to pay terrorists.

[11] HILLEL NEUER & DINA ROVNER, ALTERNATIVE REPORT OF UNITED NATIONS WATCH TO THE 99TH SESSION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION FOR ITS REVIEW OF STATE OF PALESTINE 7 (July 12, 2019), https://unwatch.org/wp-content/uploads/2012/01/Alternative-Report-of-United-Nations-Watch-to-the-99th-Session-of-the-Committee-on-the-Elimination-of-Racial-Discrimination-for-its-review-of-State-of-Palestine.pdf (on file with the Touro Law Review).

[12] RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (A.L.I. 1965), which recognizes

Tort lawsuits may provide injured parties with a means of receiving compensation for their harm. This incentive is especially important when government compensation programs are lacking or insufficient.[13]

I argue that the considerable deterrence achieved by tort law as a result of compensation awarded to the injured party is the main motive for initiating legal proceedings. The incentive of potential plaintiffs lies in the possibility of receiving compensation. In this way, tort law generates more plaintiffs who, in turn, increase awareness of the war against terror.

2. Deterrence by Awarding Tort Compensation Over and Above the Harm Caused

Tort law can impose not only tort compensation on terror operatives, but also punitive damages. The latter are accorded as part of the tort proceedings to punish the tortfeasor and deter others from perpetrating similar acts. This award to the injured party is intended to compensate the plaintiff for losses incurred as a result of the tortious conduct of the tortfeasor. In general, there is no place for the imposition of punitive damages in tort law because tort law aspires to generate optimal rather than maximum deterrence.[14] Tort law does not aspire to bring society to a situation of zero damages because it usually deals with accidents that are the outcome of socially desirable activities like driving, medical treatment, and manufacturing, whereas maximum deterrence is warranted only for behaviors intended to cause harm. From the deterrence standpoint, tortfeasors should be aware of the duration of the damage caused by them, and no more (to avoid overdeterrence), and injured parties know that if they endure harm, the compensation they receive will be the equivalent of the duration of the harm, and no more, no less.

By contrast, in tort lawsuits enacted as a remedy for terrorism, the situation is different because it deals with behavior aimed at intentionally inflicting severe harm.[15] Consequently, in such cases, the

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an exception to the presence requirement for family members in cases of extreme and outrageous conduct.

[13] *See infra* Section IV.E.

[14] *See also* Vanessa Wilcox, *Punitive Damages in England*, *in* PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 7, 7-53 (Helmut Koziol & Vanessa Wilcox eds., 2009) (TORT & INS. L. vol. 25).

[15] See *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007), for a justification

aspiration must be maximum deterrence because there is no danger of either overdeterrence of the tortfeasor (society aspires to prevent acts of terrorism entirely) or underdeterrence of the injured person (people are not interested in being murdered in acts of terrorism).

Moreover, in tort lawsuits initiated as a remedy for terrorism, punitive damages can serve as a deterrent in the following way: the essence of tort law is the awarding of compensation to the injured party. This compensation mechanism is essential because of the effective incentives it provides to the victims of terrorism to file tort lawsuits. According to this argument, the main advantage of tort law is the compensation of the injured party. Potential plaintiffs have an incentive because of the high compensation they hope to receive through tort proceedings, so tort law generates more plaintiffs who, in turn, bring about better deterrence of terror operatives. The component of significant punitive damages in tort law motivates injured parties to sue terror operatives, leading to more efficient deterrence. I suggest that deterrence is the only justification for awarding punitive damages,[16] without resorting to the punitive purpose.[17]

I argue that punitive damages can be awarded in tort law when the following two cumulative conditions exist: first, *there is no fear of overdeterrence of the tortfeasor*. As noted above, in tort lawsuits instituted as a remedy for terrorism, the tortfeasor is sued for behavior perpetrated out of ideological motives intended to inflict severe bodily harm. Therefore, the aspiration must be maximum deterrence to completely rid society of the tort feasance. Therefore, there is no fear of overdeterrence of the tortfeasor. Concerns raised in the academic literature that punitive damages lead to excessive deterrence, the paralysis of industry, and loss of welfare do not apply in this case.[18] Second, *there is no fear of underdeterrence of the injured party*. As noted, the

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of punitive damages when the tortious event causes many damages to many injured persons, not all of whom are parties to the proceedings.

[16] See Thomas C. Galligan Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 6, 9-10, 17 (1990), for an explanation of the deterrent purpose.

[17] *See* JAMES D. GHIARDI ET AL., PUNITIVE DAMAGES: LAW AND PRACTICE (2010) (showing the need for both purposes together); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 1, 34-35, 109 (1998) (showing same).

[18] See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2084 (1998), for these concerns in the literature.

awarding of punitive damages for harms resulting from the terrorist activity does not raise concerns of underdeterrence of the injured party because people do not seek to place themselves in danger of being murdered by terrorist activity. When these two conditions are met simultaneously, the conclusion follows that *the harmful activity is one for which optimal deterrence is maximum deterrence*.

B. Using Legal Proceedings to Expose the Factors Supporting Terrorism and Passing This Information to the Relevant Authorities

Individuals, organizations, and countries directly or indirectly engaging in terrorism can be exposed by means of tort lawsuits for providing resources to terror operatives. For example, if a bank (enabler) is sued for providing services to terrorists, the tort proceeding is likely to expose a defect in the bank's examination of its clients or in its regulatory system intended to prevent such failures. Such an examination could lead to a call for more meticulous legislation and stringent enforcement. Thus, tort lawsuits can provide various stakeholders with important, reliable information and influence policy. Heightened awareness may lead to reforms or preventive activity that is likely to limit future acts of terror. Tort lawsuits initiated as a remedy for terrorism can expose how terrorism is financed, its breeding grounds, how it operates, and what type of harm it is liable to cause. Such lawsuits are capable of shedding light on gaps in law enforcement and regulatory systems of which terrorists take advantage. The resulting transparency can help the public understand the nature and extent of the threat posed by terrorism and support appropriate preventive measures.

Terror organizations often rely on facilitators and sponsors to fund and carry out their activities, which include logistic support and the recruitment of new members. This network may include not only private individuals but also businesses,[19] charities,[20] and at times,

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[19] *See* Press Release, Following Terrorist Attack on Israel, Treasury Sanctions Hamas Operatives and Financial Facilitators, U.S Dep't Treasury (Oct. 18, 2023), https://home.treasury.gov/news/press-releases/jy1816 (on file with the Touro Law Review) (describing the use by the Hamas terror organization of businesses to fund its activity).

[20] *See The Funding of Terrorism Through Charities*, ROYAL UNITED SERVS. INST. (Nov. 14, 2007), https://rusi.org/publication/funding-terrorism-through-charities (on file with the Touro Law Review); *see also* CHARITY COMM'N FOR ENGLAND & WALES, COMPLIANCE TOOLKIT CHAPTER 1: CHARITIES AND TERRORISM (Nov. 9,

countries.[21] A meticulous and systematic tort procedure would make it possible to conduct a thorough clarification and uncover these networks to impose liability on them.[22]

During the presentation of the evidence in a tort lawsuit, the process of discovery, disclosure, and hearing of the testimony may uncover unknown links to the terror support network. Plaintiffs can demand documents and present them, get witnesses to testify, and use other legal tools to collect information on the defendants and their *modus operandi*. This information can assist the law enforcement systems and intelligence agencies.

During the tort procedure, diverse information is gathered on the torts, their causes, and on the conditions enabling them. Usually, there is one purpose behind information gathering: to impose tort liability on the tortfeasors (defendants) and obligate them to compensate the injured parties (plaintiffs). But the information discovered in the tort proceeding can produce vital insights concerning institutions, agencies, intelligence agencies, processes, and procedures. This information may be used to prevent the recurrence of similar torts or to remedy failures in the conduct of the relevant agencies.

I propose that the information generated by terrorism lawsuits be used to the fullest to prevent the repetition of similar torts. The courts should be obligated to transfer such information to stakeholders defined by law in clear notification procedures. In parallel, a system should be in place for accepting this information by the target institutions. These procedures could be easily and inexpensively implemented with the use of advanced data processing methods and the ability to analyze free-form text with the help of artificial intelligence and machine learning. Analysis of the information can improve the

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2022), https://www.gov.uk/government/publications/charities-and-terrorism/compliance-toolkit-chapter-1-charities-and-terrorism/ (on file with the Touro Law Review).

[21] *See* Bureau of Counterterrorism, *State Sponsors of Terrorism*, U.S. DEP'T STATE, https://www.state.gov/state-sponsors-of-terrorism/ (on file with the Touro Law Review) (last visited June 10, 2025); Bureau of Counterterrorism, *Country Reports on Terrorism 2022*, U.S. DEP'T STATE, https://www.state.gov/reports/country-reports-on-terrorism-2022/ (on file with the Touro Law Review) (last visited June 10, 2025).

[22] As a rule, countries have foreign state immunity, subject to the recognized exceptions in customary international law. Several countries have removed this immunity in the case of support for terrorism and allow their citizens to sue other countries in this regard. *See infra* Section IV.A; *see, e.g.*, Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003).

decision-making process in public services at various levels and enhance accountability, feedback, and self-inspection. Information about terror operatives generated by the tort procedures, including their characteristics, locations, motives, and *modus operandi*, can help the security forces improve their response to terrorism.

Thus, the transfer of the evidence disclosed in the discovery process should be institutionalized without imposing an obligation on the recipients, who will treat it as "advice." The court will identify the recipients, who will assume responsibility for the information.[23]

C. Creating Public Awareness and Debate

Tort procedure can generate additional deterrence of terror operatives, especially in the circle of enablers, by the public debate and awareness created by it and the reputational damage it can inflict on terror operatives. The publicity and reputational damage generated by tort lawsuits can sway defendants and potential enablers to change their conduct. For example, if a bank is held responsible in a lawsuit, the negative publicity created by it may serve as an incentive to adopt better cautionary measures to ensure that in the future it will not be found, even indirectly, to be assisting terrorism. Because tort lawsuits can cause reputational damage to some terror operatives, they can provide significant deterrence.

Corporations, organizations, and agencies are endowed with the sovereign power to make decisions.[24] Thus, they can determine who their friends are and what actions to take. They also have the capacity to act without the consent of all their members, even when their actions are incompatible with the personal interests of some of them.[25] James S. Coleman noted that the sovereignty of an organization is

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[23] *See generally* Jeffrey Zetino & Natasha Mendoza, *Big Data and Its Utility in Social Work: Learning from the Big Data Revolution in Business and Healthcare*, 34 SOC. WORK PUB. HEALTH 409, 409-17 (2019), https://doi.org/10.1080/19371918.2019.1614508 (discussing the exposure of malfunctions and problems by monitoring systems and an analysis of the entire information to be found in government systems); *see also* Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181, 182 (1978) (explaining that the use of legal information to rectify failures helps agencies focus on the basic goal of achieving desirable social consequences).

[24] *See generally* JAMES S. COLEMAN, THE ASYMMETRIC SOCIETY (1982).

[25] *See generally* EDWARD O. LAUMANN & DAVID KNOKE, THE ORGANIZATIONAL STATE: SOCIAL CHOICE IN NATIONAL POLICY DOMAINS (1987).

created by the joint waivers of its members, who sacrifice some of their rights for the good of the organizational actor. By waiving personal sovereignty for the good of organizational sovereignty, "natural persons"[26] impose restrictions on their own personal freedom and grant the organization power to behave as an autonomous social actor.[27]

It follows from the above that organizations have the power to determine the characteristics of their members and can reward certain behaviors and punish others. Furthermore, organizations have the power to determine which roles will be filled by their members and how they will perform these roles. Focusing on roles, rather than on the people staffing them, is an important element in the perspective of the organization.[28] In organizational environments, the personal preferences of individuals are set aside—or should be—and the collective takes into consideration what "we" as a collective, as an organization, should do.[29] This characteristic of organizational sovereignty enables it to coordinate the conduct of its members to achieve its aspired results.[30]

Organizational sovereignty in decision-making and in its ability to control the activity of its members, both in theory and in practice, supports my approach, which seeks to view organizations, including terrorist organizations, banks, and charitable organizations—not only individuals (lone terrorists)—as tortiously liable. Organizations must be held liable for the activity of their members not only by virtue of their legal standing,[31] but also because of their special standing based on their social power.[32] The missions and goals of organizations, their rules, and the authority they grant their members generate certain types of behavior that are attributable to the organization rather than to any

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[26] COLEMAN, *supra* note 24, at 1.

[27] *See id.*

[28] Brayden G. King et al., *Finding the Organization in Organizational Theory: A Meta-Theory of the Organization as a Social Actor*, 21 ORG. SCI. 290, 293 (2010).

[29] *See generally* Natalie Gold & Robert Sugden, *Collective Intentions and Team Agency*, 104 J. PHIL. 109 (2007).

[30] King et al., *supra* note 28, at 293.

[31] *See generally* COLEMAN, *supra* note 24; *see also* MARK BOVENS, THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANISATIONS (1998).

[32] *See generally* CHARLES PERROW, ORGANIZING AMERICA: WEALTH, POWER, AND THE ORIGINS OF CORPORATE CAPITALISM (2002).

individual member.[33] This being the case, they can, and should be, viewed as liable for the results of this behavior.[34]

We will now show that we can view sovereign organizations as social actors who are deterred by the possibility of being declared and labeled by the court as negligent. Organizational research suggests that viewing sovereign organizations as social actors and attributing two important characteristics to them: external attribution, which seeks to explain the motivations of the organization and the manner in which it acts based on factors external to it; and intentionality, according to which organizations possess unique intentions of their own and the ability to act in accordance with these intentions.[35] Consequently, organizations can be viewed as a kind of social actor that is influenced by factors external to them, capable of processing data and acting in a purposeful, intentional manner.[36]

The characteristic of external attribution assumes that organizations are in constant interaction with the external world and that they attribute great importance to the question of how society perceives them.[37] Sovereign social actors are capable of independent decision making. Consequently, society perceives them as responsible for these decisions.[38] According to the characteristic of external attribution, social actors must be perceived by others as acting autonomously and as responsible for their own decisions and actions.[39] Our language also reflects a reality where organizations act and are perceived by third parties as responsible for their own actions. In everyday language, we

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[33] Imposition of liability on an organization testifies to the belief that it is capable of initiating activity and could and should have acted differently. *See generally* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147 (1983).

[34] The theory of social actors relates to three types of actors in modern society: individuals, organizations, and countries. *See* King et al., *supra* note 28, at 297; John W. Meyer & Ronald L. Jepperson, *The "Actors" of Modern Society: The Cultural Construction of Social Agency*, 18 SOCIO. THEORY 100, 100 (2000).

[35] King et al., *supra* note 28, at 292.

[36] On this claim in the organizational research literature, see JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); Paul Ingram & Karen Clay, *The Choice-Within-Constraints New Institutionalism and Implications for Sociology*, 26 ANN. REV. SOCIO. 525, 526 (2000); David A. Whetten, *Albert and Whetten Revisited: Strengthening the Concept of Organizational Identity*, 15 J. MGMT. INQUIRY 219 (2006) [hereinafter *Strengthening the Concept*].

[37] King et al., *supra* note 28, at 297.

[38] *Id.* at 292.

[39] *Id.* at 294.

say someone "signed a contract with the bank," that "the company fired dozens of workers," and that "the charity raised money and donated it." This linguistic reality is consistent with organizational identity theories, which argue that organizations possess a "[unique] behavioral signature" and a clear pattern of decision making.[40] This is also Coleman's logic, according to which organizations are social actors because society grants them such a status not only legally but also linguistically.[41] The status of organizations is largely shaped by public expectations, holding them accountable for their actions to an extent well-comprehended by executives.[42] Concepts such as image and reputation, customarily used in connection with organizations, also attest to the fact that the public views them as responsible for their actions. Based on the organizational research literature, organizations are sensitive to this.[43] Because organizations are responsible for realizing the goals for which they were established, third parties perceive them as accountable when they fail in this respect.[44] A declaration about a failure and negligence by an organization is not treated lightly. Studies dealing with organizational life cycles determine that organizations go through maturation stages similar to those of "natural persons,"[45] and various models define organizations as unique actors that experience birth and are particularly concerned that if they do not act appropriately, their fate is sealed.[46]

Based on the understanding that organizations are aware of societal expectations of them and their aspiration to survive and retain their bureaucratic autonomy, organizational theory has determined that organizations are capable of intentional activity. This is the

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[40] *Id.* at 292.

[41] COLEMAN, *supra* note 24; *see also* BARBARA CZARNIAWSKA, NARRATING THE ORGANIZATION: DRAMAS OF INSTITUTIONAL IDENTITY (1997).

[42] *See generally* ZYGMUNT BAUMAN & TIM MAY, THINKING SOCIOLOGICALLY (2001).

[43] *See, e.g.*, CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE (2018); Charles J. Fombrun & Mark Shanley, *What's in a Name? Reputation Building and Corporate Strategy*, 33 ACAD. MGMT. J. 233, 234-35 (1990).

[44] Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 228 (1987).

[45] Andrew H. Van de Van & Marshall S. Poole, *Explaining Development and Change in Organizations*, 20 ACAD. MGMT. REV. 510, 513, 515 (1995).

[46] MICHAEL T. HANNAN & JOHN FREEMAN, ORGANIZATIONAL ECOLOGY (1989); MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (Greenwood Press 1977) (1955).

characteristic of intentionality, according to which, organizational actors have some form of intention on which their decision making is based.[47] The basic assumption of organizational researchers is that organizations have intentions independent of the beliefs, preferences, traditions, and personal values of the individuals constituting them,[48] as well as a unique self-conception[49] and self-significance,[50] unique identities that describe them and legitimize their existence.[51] The goals that organizations are designated to realize and the values they are designated to promote are the components that consolidate their identity and delineate their intentions.[52] Failure to realize these goals and the declaration that an organization failed in its mission to do so are liable to jeopardize its survival. Consequently, a judicial declaration of organizational negligence constitutes a powerful conduct guidance tool.[53]

What are the implications for this research of viewing organizations as social actors characterized by external attribution and intentionality? I argue that, to date, most of the literature on this issue refers to tort law as a homogeneous field and fails to sufficiently dwell on the importance of distinguishing between the stage of the imposition of liability and that of the imposition of damages.[54] The criticism voiced in professional literature centers on the deterrent power of the rules of tort damages, objecting that the imposition of damages does not effectively direct the conduct of tortfeasors with deep pockets, such as commercial companies, banking corporations, and the like.[55] By contrast,

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[47] King et al., *supra* note 28, at 292.

[48] *Id.* at 294.

[49] *Strengthening the Concept*, *supra* note 36, at 220.

[50] Peter J. Burke, *The Self: Measurement Requirements from an Interactionist Perspective*, 43 SOC. PSYCH. Q. 18, 20 (1980).

[51] For this conclusion regarding organizations in general, see David A. Whetten & Alison Mackey, *A Social Actor Conception of Organizational Identity and Its Implications for the Study of Organizational Reputation*, 41 BUS. & SOC'Y 393, 410 (2002).

[52] Also see the basic argument in PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION (1957).

[53] Also see the approach in John Freeman, Glenn R. Carroll & Michael T. Hannan, *The Liability of Newness: Age Dependence in Organizational Death Rates*, 48 AM. SOCIO. REV. 692 (1983) (presenting the idea that new organizations are at a higher risk of failure (i.e., closing down or "dying")).

[54] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000). In his Article, Levinson focuses on the difficulties of the damages tool, that is, on the liability rules, in deterring the state-not on the labeling device.

[55] For an analysis of this issue, see Boaz Segal, *Utilizing Tort Law to Deter*

my position is that the rules of tort liability, that is, the stage before that of the imposition of damages, where the tortfeasor is determined to have been negligent and is labeled as such, have powerful guidance value. Tort law is not only "damages law" but also "labeling law."

Organizations, as social actors, are characterized by aspirations for a good reputation, political survival, and bureaucratic autonomy, and they are capable of goal-directed activity. If the tortious effect is broken down into two strongly interconnected components—the imposition of liability and the imposition of damages—then the above forms one basic argument: that as social actors, banking corporations, charities, and the like attach greater importance to not being found and labeled by courts of law as having acted negligently, negligent conduct is more likely deterred and effectively directed. Individuals in organizations are liable to aspire to act ineffectively (e.g., if they identify with terrorism) but are incapable of realizing such aspirations because the deterred organizations of which they are part make it impossible.

Studies found that various organizations aspire to increase their power and improve their status,[56] that organizational decisions are influenced by motives of departmental glorification,[57] and that they attach great importance to their public image.[58] This perception of organizations as social entities enables us to attribute intentions and aspirations of survival and bureaucratic autonomy to them.[59] Hence, a good reputation is likely to improve image, status, independence, and freedom of action of the organization. By contrast, a bad reputation is liable to lead diverse publics to delegitimize the organization and question its competence.[60] The determination that an organization malfunctioned, was negligent, and lent a hand—even indirectly—to

Misconduct in the Public Sector, 91 SEATTLE J. FOR SOC. JUST. 19 (2020).

[56] *See* WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); Jean-Luc Migue & Gerard Belanger, *Towards a General Theory of Managerial Discretion*, 17 PUB. CHOICE 27 (1974).

[57] On this basic argument, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[58] *See* Daniel P. Carpenter, *State Building Through Reputation Building: Coalitions of Esteem and Program Innovation in National Postal System, 1883-1913*, 14 STUD. AM. POL. DEV. 121, 124 (2001); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (2001).

[59] King et al., *supra* note 28, at 293.

[60] *Id.* at 294.

perpetrating a terrorist attack is liable to lead to public and political criticism.[61] The deterrence of an organization by means of tort law will make it difficult for the lone individual to act counterproductively within it, and can be expected to mend its failures.

I summarize by arguing that it is crucial to view organizations as social actors, because this perspective contributes to our understanding of their decision-making processes.[62] A court declaration that an organization displayed negligence by assisting a terrorist attack directs the spotlight to the failure of that organization. This realization can be leveraged to direct the behavior and decision-making processes of organizations.

III. ADVANTAGES OF TORT LAW OVER OTHER BRANCHES OF LAW

In the present state of the law, tort law has several advantages over criminal and administrative law in effectively deterring terror operatives. The merits of tort law derive from the type of remedy granted to the injured party. In criminal law, an action taken against an administrative agency is a matter of a mandatory or prohibitory injunction.[63] The main remedy is the enforcement of a regulatory right by means of the cancellation of the regulatory infringing deed, action prevention of

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[61] In a related context, see also the findings in Carpenter, *supra* note 58, at 121; DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928 (Princeton Univ. Press 2001).

[62] Also see the basic argument in Chip Heath & Sim B. Sitkin, *Big-B Versus Big-O: What is Organizational About Organizational Behavior?*, 22 J. ORGANIZATIONAL BEHAV. 43 (2001).

[63] On the involvement of administrative agencies, see, for example, the lawsuit filed in Israel by some of the victims of the Nova party against the Israel Police and the Israel Defense Forces for authorizing it, and for not canceling it and dispersing the participants earlier. For coverage of the lawsuit in English, see Michael Horovitz, *42 Survivors of the Nova Rave Massacre Sue Defense Establishment for Negligence*, TIMES ISR. (Jan. 1, 2024), https://www.timesofisrael.com/42-survivors-of-the-nova-rave-massacre-sue-defense-establishment-for-negligence/ (on file with the Touro Law Review); *Survivors of 7 October Rave Attack Sue Israeli Security Forces*, MIDDLE E. EYE (Jan. 2, 2024), https://www.middleeasteye.net/news/israel-palestine-wounded-survivors-rave-attack-7-october-sue-israeli-security (on file with the Touro Law Review); Amelie Botbol, *Nova Massacre Survivors Launch $53.6 Million Lawsuit Against the State*, JNS (Jan. 16, 2024), https://www.jns.org/nova-massacre-survivors-launch-53-6m-lawsuit-against-the-state/ (on file with the Touro Law Review).

its repetition, or the obligation to execute it. A remedy of damages can also be awarded for administrative causes, but in practice, this rarely is the case. The remedy awarded in criminal law is the punishment of the offender. Here, too, damages can also be imposed but such damages are partial.

Courts have two main remedies at their disposal in tort procedures: damages—usually relating to the past,[64] and injunctions—usually relating to the future.[65] Despite being able to grant injured parties an injunctive remedy, in most tort cases the court orders tortfeasors to pay damages. Thus, tort law focuses on the remedy of awarding the injured party damages rather than enforcing their rights. This tendency should not come as a surprise, given that in most tort lawsuits, injunctions are irrelevant given that the harm has already been done and damages are the only feasible remedy.[66]

It follows that the main remedy granted to petitioners in administrative procedures is a mandatory or prohibitory injunction and in criminal law the punishment of the offender. By contrast, the main remedy available to petitioners in tort procedures is damages for the harm caused to them.[67] Four important advantages characterizing tort law emerge in comparison to criminal and administrative law:

A first advantage is closely related to the goal of guiding tortfeasors to conduct themselves effectively. As we saw, contrary to administrative and criminal law, the mission of tort law is to award

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[64] Damages can be awarded for future harms as well. See the exhaustive discussion in Ariel Porat & Alex Stein, *Liability for Future Harm* 10-23 (Univ. of Chi. Coase-Sandor Inst. for L. & Econ., Working Paper No. 268, 2009).

[65] An injunction can turn out to be relevant for past harms as well. See, for example, the nuisance laws. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 933 cmt. b (A.L.I. 1965).

[66] The choice between damages and an injunction is discussed in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The authors argue that when transaction costs are low, it is irrelevant to which party the entitlement is given because they will regulate their relationship, preventing the harm as cost-efficiently as possible if it is preventable. This is the essence of the concept of the Coase Theorem. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-16 (1960). By contrast, when there are high transaction costs, the entitlement must be determined in favor of the party that is not the least cost avoider and must be protected by means of property rules. *Id.*

[67] John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999). For further information on the relationship between administrative and tort remedies, see *id.* at 105-10; PETER H. SCHUCK, SUING GOVERNMENTS: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983).

damages to the injured party for the harm to their rights. This compensation mechanism is vital because of the effective incentives it offers injured parties to file a tort claim. The great advantage of tort law is the compensation of the injured party, which serves as a key motive for initiating the legal proceedings. The compensation component in tort law motivates plaintiffs to sue tortfeasors and thereby effectively guide them.

A second advantage of tort proceedings over criminal law, closely related to the first, is that the injured party partakes in the proceedings and has control over them, their core principle being the restoration of the *status quo ante* of the injured party—the plaintiff. Despite developments in the status of victims in criminal proceedings, they are still largely conducted without active input from the victims. Reestablishing control over the legal procedure can have therapeutic benefits.[68]

A third advantage, following from the above, is that an administrative remedy is relevant mainly to the tortious activity of tortfeasors in the present and the future, and in the normal state of affairs, it is irrelevant to torts committed in the past, when the harm has already taken place. The possibility of receiving an injunctive remedy without the right to claim damages when the harm has been proven and can no longer be rectified by an injunction is unsatisfactory. By contrast, tortious remedies are also relevant for harms caused in the past as the tortfeasor is obligated to pay damages.

A fourth advantage of tort law over criminal law in our case concerns the burden of proof. As a rule, in civil law and in tort lawsuits initiated as a remedy for terrorism, the burden of persuading the court that all the elements of the tort are present falls on the plaintiff, who must prove that, on the balance of probabilities, there is at least a 51% likelihood that their claim is true. By contrast, the State, as accuser in a criminal proceeding, must persuade the court of the truth of its version beyond all reasonable doubt.

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[68] On the close relationship to the idea that retributive justice—whose essence is the imposition of sanctions on the tortfeasor proportionate to the severity of their actions—is deeply embedded in moral human intuitions, see Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 191 (2006).

IV. TORT LAW AS A REMEDY FOR TERRORISM: OUTLINE FOR A COMPREHENSIVE LEGAL TORT SCHEME

Below I present a preliminary outline for a tort scheme resting on the following six pillars: (1) extra-territorial jurisdiction; (2) expansion of the boundaries of tort liability; (3) adapted formulation of the rules of evidence and testimony in tort proceedings; (4) an effective mechanism for the collection of money from tortfeasors; (5) a statutory compensation fund; and (6) international legal cooperation.

A. Granting of Extraterritorial Jurisdiction

Extra-territorial jurisdiction refers to the authority of a country to use judicial power beyond its borders.[69] In tort lawsuits instituted as a remedy for terrorism, the expansion of extra-territorial jurisdiction means granting courts in a given country the right to try and impose liability on individuals and entities—including foreign governments—that perpetrate or support acts of terrorism, even if these deeds are carried out beyond the borders of that country.[70] This idea can be implemented holistically, as shown below.

For example, countries may enact laws enabling their courts to enforce jurisdiction over people, organizations, and foreign governments involved in acts of terrorism affecting their citizens, irrespective of the place where the terror-related activity took place. Countries can also negotiate international treaties granting them extra-territorial jurisdiction over acts of terror. This practice is likely to create an agreed-upon mechanism for handling cases of cross-border terrorism. Signatories would have to recognize and enforce foreign rulings if operatives responsible for the act of terror reside in their territory and have assets there. To facilitate this, countries can agree to accept each other's rulings.

In the U.S., legislation that regulates this issue consists of three laws: (1) The Foreign Sovereign Immunities Act (FSIA) (1976) constitutes the federal legal framework for understanding when and how

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[69] As a rule, the jurisdiction of a country is limited to its own borders. International law, however, allows for extra-territorial jurisdiction as long as this is not prohibited, as in a situation of enforcement in another country's territory. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 44-45 (Sep. 7).

[70] *See id.* at 45-46.

tort claims against foreign countries can be filed in U.S. courts.[71] It grants immunity to foreign countries from lawsuits against them and it enshrines the basic principle, whereby a sovereign country is not subject to the jurisdiction of another and is immune from legal proceedings in another country, thereby preserving its sovereignty.[72] But the law includes several exceptions through which a foreign country can be sued, including activities of a commercial nature.[73] If a country controls a commercial company operating in the U.S., it can be sued for its activity. Other exceptions concern damage caused on U.S. territory,[74] and terrorist activity, allowing countries that have been declared by the U.S. Department of State to support terrorism to be sued for terror acts that caused damage to American citizens or their property.[75] In sum, the FSIA provides the basis for determining whether a foreign sovereign state is immune from the jurisdiction of U.S. courts and sets the limits of sovereign immunity.[76]

(2) The Anti-Terrorism Act (ATA) (1990) is a fundamental legal tool for managing the fight against terrorist activity using civil law.[77] It is intended to give American citizens the possibility to file tort claims against terrorist organizations and their supporters, including also against states and private entities that have been found involved in terrorist activities against Americans.[78] This law served as the basis for lawsuits against an enabling circle when banks and companies accused of providing financial support to terror organizations were sued

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[71] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976).
[72] 28 U.S.C. § 1604 (2016).
[73] *Id.* § 1605(a)(2) (2016).
[74] *Id.* § 1605(a)(5).
[75] 28 U.S.C. §§ 1605A-1605B (2016).
[76] See, for example, *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006), which dealt with the bombing of the U.S. embassies in Kenya and Tanzania in 1998. The lawsuit was filed under the authority of the FSIA for providing material support to the terrorist organizations that carried out the attacks. The court found Sudan responsible for providing support to al-Qaeda, which carried out the bombings, and imposed on Sudan an obligation to pay compensation to the victims and their families. Also see *Rubin v. Islamic Republic of Iran*, 2011 U.S. App. LEXIS 6758 (7th Cir. 2011), which dealt with a tort claim filed by victims of a suicide attack by Hamas in Jerusalem. American citizens who were seriously injured in this attack filed a tort claim against Iran in the Federal District Court in Washington, claiming that Iran had a hand in it with the training and support it provided to Hamas. In imposing liability, the court based its jurisdiction in this case on the FSIA.
[77] *See Antiterrorism Act of 1990*, 18 U.S.C. §§ 2331, 2333 (1990).
[78] *Id.* § 2333(a).

based on it, including banks that transferred funds to terror organizations.[79] The law was also used in lawsuits against countries such as Iran, which was accused of supporting terrorism that harmed American citizens.[80] In conclusion, the ATA is intended to deter entities in the various circles of the terrorist world by giving American citizens the possibility to use private law and to file tort claims for damages caused to them as a result of international terror acts.

(3) The Justice Against Sponsors of Terrorism Act (JASTA), 2016,[81] is a significant amendment to the FSIA and the ATA. Its purpose is to expand the ability of terror victims to file tort claims against foreign countries that sponsor terrorism, especially in the case of events that occurred on U.S. soil. A key feature of this law is its broad applicability. Whereas the FSIA provides immunity to certain countries from lawsuits in the U.S., as long as they are not on the U.S. State Department's list of countries that support terrorism, JASTA allows foreign countries to be sued even if they are not on that list. This is a significant expansion of the limits of tortious liability because it allows tort claims against countries for their support of terrorism without an official declaration by the American government.[82] In summary, JASTA reduces the scope of immunity granted to foreign countries and officials in cases of terror acts, allowing U.S. citizens to file tort claims

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[79] One of the well-known rulings is *Miller v. Arab Bank, PLC*, 372 F. Supp. 3d 33 (E.D.N.Y. 2019). The plaintiffs in this case were victims of American terrorist attacks and their families who claimed that the Arab Bank facilitated the transfer of funds to Hamas leaders and charitable organizations affiliated with Hamas, and that these funds were used to carry out and encourage attacks. The bank was accused of managing the accounts of known Hamas operatives, making payments to the families of suicide terrorists, and financing charities that were used for terrorism. A jury found the Arab Bank responsible for providing material support to Hamas. It was a significant case because it was the first time a financial institution was held liable under the ATA. Once liability was imposed, the Arab Bank agreed to settle the compensation amount as part of a compromise, the details of which remain confidential.

[80] See, for example, *Peterson v. Islamic Republic of Iran*, 2023 U.S. Dist. LEXIS 49039 (S.D.N.Y. Mar. 22, 2023), which dealt with tort claims by American victims of an attack that occurred in Beirut in 1983 against American marines. The court found Iran responsible for providing support to the Hezbollah organization, which carried out the attack, and awarded significant compensation to the injured.

[81] *See* 28 U.S.C. § 1605B.

[82] Based on this law, tort claims were filed by the families of the victims of September 11th and several thousand survivors against Saudi Arabia. The prosecutors claimed that Saudi Arabia aided the planners and perpetrators of the attack. *See, e.g.*, Ashton v. Kingdom of Saudi Arabia, No. 1:17-cv-02003, 2017 WL 1056098 (S.D.N.Y. 2017).

against foreign countries that support terrorism even if they are not designated as state sponsors of terrorism by the U.S. government.

In Israel, the main law covering this issue is the 2008 Foreign States Immunity Law.[83] According to section 2 of this law "a foreign state shall have immunity from the jurisdiction of the courts in Israel,"[84] but section 5 qualifies this immunity by stating that "a foreign state shall not have immunity from jurisdiction in a lawsuit due to a tort resulting in damage to the body or tangible property, provided that the wrongdoing was committed in Israel."[85]

The possibility of filing tort claims against terrorist actors is more limited in Israeli law than in American law. Israeli law limits this possibility in relation to wrongs committed in Israel, whereas American law allows these lawsuits to be filed even for acts committed outside the U.S. Included amongst these are provisions that specifically allow lawsuits to be filed against certain designated countries that finance terrorism, regardless of where the terror act took place.[86]

The expansion of extra-territorial jurisdiction faces challenges, however. For example, the implementation of the concept is liable to create tension between states for being perceived as harming national sovereignty. Moreover, the determination and expansion of jurisdiction over international cases can be inherently complex. Enforcement of rulings can be difficult, especially if it involves the seizing of assets held in other countries or extradition. Therefore, while extra-territorial jurisdiction can empower countries seeking to deter operatives engaging in terrorism by means of tort law, it must be part of a broad, multifaceted approach to the war on terrorism. Such a strategy must include a combination of diplomacy, international cooperation, military activity, and intelligence-sharing, rather than only legal cooperation.

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[83] *See* Foreign States Immunity Law, 5768-2008 (Isr.).

[84] *Id.* § 2.

[85] *Id.* § 5.

[86] *See* 28 U.S.C.S. § 1605A (LexisNexis 2025). The National Defense Authorization Act (NDAA) is passed annually and reflects the priorities and challenges facing the U.S. military and the broader national security landscape at that time. The 2008 NDAA achieved considerable public acclaim for its focus on improving the treatment of combat-injured veterans and reforming aspects of defense procurement. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-191, § 1083, 122 Stat. 3, 338 (2008). This amendment introduces a federal cause of action against foreign state sponsors of terrorism, allowing victims and their families to seek compensation.

B. Readiness to Expand the Boundaries of Tort Liability

To make tort law relevant as an effective deterrence tool for terrorist activity, the boundaries of tort liability may have to be carefully stretched. This will enable tort liability to be imposed on all the circles involved in terrorist activity, with emphasis on enablers and dispatchers.[87] Naturally, this challenge requires great caution.

It will be recalled that the circle of enablers includes people or bodies that make it possible for terrorists to receive financial support. This may be done by means of direct financing, or indirectly by means of activities such as money laundering or the supply of resources.[88] As for the circle of dispatchers, this category includes all those who extend practical help to terrorists, such as offering those engaging directly in terrorism: a safe haven, training, logistic support, or fundraising help.[89]

In Israel, section 12 of the Torts Law Ordinance states that "[f]or the purposes of this Ordinance, any person joins himself or aids in, counsels, or solicits any act, or omission, done or about to be done by any person, or commands, permits or authorizes them, shall be deemed liable for such act or omission."[90] Based on this Ordinance, the Supreme Court determined that the payments made by the PA to terrorists and their families amount to "ratification" and therefore, the PA was also responsible for committing an act of terrorism.[91]

This being the case, the tort liability of these parties must be expanded, given that they had the ability to prevent an act of terrorism and did not do so. This category can also include security companies,

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[87] The American law allows imposing tortious liability on foreign countries even if they are not officially declared as supporting terrorism by the U.S. government. It also allows submitting tort claims against terrorist actors for acts committed outside the U.S. *See supra* Section IV.A.

[88] According to the ATA, banks and other financial institutions can be held liable if they knowingly provide financial services to organizations involved in terrorist activity. Section 18 U.S.C. § 2333 of the ATA allows victims of international terrorism to claim civil damages in US courts. The provision has been interpreted to include secondary parties such as banks that may knowingly assist a terrorist organization by providing financial services.

[89] Thus, for example, a key section in JASTA, which allows countries to be sued even if they are not on the U.S. State Department's list of sponsors of terrorism, is Section 5, which amends the FSIA by adding a new exception to sovereign immunity in cases involving acts of terrorism in the U.S.

[90] Israeli Tort Law Ordinance, 5728-1968, SH 541 1 (Isr.).

[91] CivA 2362/19 A v. Palestinian Authority (Apr. 17, 2022) (Isr.).

building owners, and even government agencies, although the imposition of liability in this manner must be carried out carefully because it may be controversial.

To expand tort liability appropriately, several issues must be taken into account. First, tort legislation must clearly define what constitutes "enabling" or "sponsoring" terrorism, to ensure that these categories are not used for unjustified purposes, such as frivolous lawsuits or overdeterrence of innocent parties. Defendants must also have the right to a fair procedure, including the ability to appeal court rulings against them. When facing challenges in enforcing such a legal scheme for expanded liability, in particular with respect to tortfeasors located in other countries, international cooperation and mutual legal assistance are vital.

To summarize, expanded tort liability in lawsuits intended as a remedy for terrorism may constitute a deterrent by creating significant legal and financial risks for entities considering direct or indirect involvement in such activity.[92] At the same time, it must be ascertained that the basic principles of justice and effective deterrence are respected.

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[92] The expansion can also be done through the identity of the victim. See, for example, cases that dealt with non-citizen victims, such as *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003), which dealt with a lawsuit filed by the families of U.S. Marines who were killed in the 1983 attack in Beirut, Lebanon. *Id.* at 48. In this attack, which occurred during a peacekeeping mission of international forces, 241 U.S. Marines were killed when a suicide bomber detonated a truck full of explosives near their residence. *Id.* at 48, 56. This case included family members of different nationalities, who represented the multi-national composition of the forces stationed in Beirut at the time. *Id.* at 49. Most of the victims were Americans, but they also included French, Italian, British, and other forces. The court ruled that Iran and Hezbollah supported and participated in the planning and execution of the attack. *Id.* at 58. According to the court decision, compensation of approximately 2.65 billion dollars was awarded to the victims and their families. These claims are also relevant in the case of mass disasters. *See* Havlish v Islamic Republic of Iran [2018] EWHC (Comm) 1478 (Eng.) (dealing with a lawsuit filed by family members and victims of the September 11, 2001, attacks). The plaintiffs claimed that Iran and other parties actively supported and assisted al-Qaeda in planning and carrying out the attacks. In 2011, the United States District Court for the Southern District of New York accepted the lawsuit and ruled in favor of the plaintiffs. The Court found that there were connections and coordination between elements in Iran and al-Qaeda, including training received from terrorists in Iran. As part of the verdict, the court demanded that Iran pay billions of dollars in compensation to the families of the victims. However, as in many cases of judgments against Iran, there is great difficulty in enforcing the compensation and obtaining the funds from the defendant country.

C. Adapted Structuring of the Rules of Evidence and Testimony in Tort Proceedings

This requirement relates to procedural law. In matters concerning terrorism lawsuits, it may be necessary to consider adapting the structuring of the rules relating to the collection and presentation of evidence, as well as those relating to getting witnesses to testify. This may make it easier for terrorism victims to file and manage tort lawsuits. Such structuring must take into consideration the purpose of the lawsuit but also respect the right of the defendants to a fair trial.

Evidence and testimony are crucial components of court procedures, including in tort cases relating to terror acts. In these cases, the burden usually falls on the victims (plaintiffs) to prove that the tortfeasor (defendant) is responsible for their harm. This burden may be challenging to prove given the secretive character of terrorist activity and its international scope. Consequently, below are some ways in which the handling of evidence in tort lawsuits initiated as a remedy for terrorism can be adapted to meet this challenge:

- Lenient standards of evidence: Relaxing certain standards of evidence may be warranted as a remedy in tort lawsuits for terrorism harms. This may mean that indirect circumstantial evidence may be accepted.
- Granting of permission to use classified information: Testimony in cases of terrorism may include classified or sensitive information. Therefore, special procedures may be needed to protect such information while enabling its use in court. For example, the court can allow the claimant to peruse sensitive evidence without making it public.
- Use of special witnesses: Terrorism experts can play a vital role in tort lawsuits seeking a remedy for terrorism harms. They can present the context to the court and explain technical details and complex issues related to the world of terrorism.
- Remote testimony: Given the potential international nature of tort lawsuits for remedy for terrorism harms, adapted rules may be necessary to enable witnesses located abroad to testify. Such tools may include video and other forms of remote testimony.

- Witness protection: Witnesses in terrorism lawsuits are liable to face significant threats. Programs for the protection of witnesses and their families may be needed to ensure that they are able and prepared to testify in court.
- International cooperation: International cooperation is needed to collect evidence in cases of terrorist attacks. This can include mutual legal assistance treaties, shared databases, and other forms of cooperation.

Although the above adaptations can make it easier for plaintiffs to file and manage their lawsuits, this interest must be balanced with the need for the right to a fair procedure, including the right of the defendant to see the evidence and appeal it. The goal of deterrence and justice must be achieved while observing the fundamental principles of a fair procedure.

D. Effective Mechanism for the Collection of the Restitution Imposed on the Tortfeasor

Efficient collection mechanisms are needed to enable securing the restitution from the tortfeasor and its transfer to the injured party.[93]

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[93] On the challenge regarding the execution of the judgments, see *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003, 1005 (N.D. Ill. 2014) (dealing with an attempt by victims of terrorism to expropriate assets of the State of Iran located in the U.S. to receive compensation). In this case, the plaintiffs were victims and families of victims of an attack in Jerusalem. *Id.* at 1006. The plaintiffs won damages from the state of Iran in U.S. federal court but faced difficulties in collecting the funds because Iran held no available assets in the U.S., with the exception of some artwork on display at the University of Chicago. *Id.* The question raised before the Supreme Court was whether the art collections at the University of Chicago could be used to pay the damages. The Supreme Court ruled that the art collections are not considered assets that can be redeemed. Another example of enforcement difficulties, in the United States is *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535-37, 542 (D. Md. 1999) (involving Alyssa Flatow, an American student, who was killed in a hit-and-run action when the bus she was traveling in collided with a van loaded with explosives). The U.S. State Department determined that the Islamic Jihad carried out the attack and that it was Iran that provided material support and resources to the Islamic Jihad to carry out this attack. The court held Iran responsible for the attack in light of its material support for the Palestinian Islamic Jihad and awarded the Flatow family 247.5 million dollars in damages and punitive damages. The appeals court confirmed the finding of the lower court that Iran was responsible for the attack but referred to a number of issues related to the enforcement of the judgment against Iran. The court discussed the challenges related to the collection of the judgment

Below, I describe a mechanism adopted in the US and Israel, which in certain circumstances can meet this challenge.

The U.S. is among the countries extending financial aid to the Palestinian Authority. Since 1993, the U.S has transferred $41 billion in international aid to the West Bank and Gaza Strip.[94] In a terrorist attack in Tel Aviv in 2016, an American army veteran, Taylor Force, was killed while vacationing in Israel with his wife, who was also wounded.[95] Force's death reverberated throughout the U.S. His family revealed that the terrorist who perpetuated the attack was receiving a stipend for the murder from the PA, which was receiving American financial aid.[96] Thus, the financial aid to the PA, funded by American taxpayers, was paying Force's murderer for his act.

This discovery shook Force's family, who decided to rally broad support to change the legal reality in the U.S. As a result, in July 2017, Congressman Doug Lamborn introduced the Taylor Force Act in the American Congress.[97] Following the legislative process, it was signed into law by President Trump in March 2018.[98]

The Taylor Force Act limits the power of the U.S. President and Secretary of State, vested in them by virtue of Chapter 4, Part II of the Foreign Assistance Act,[99] to extend special international assistance exceeding the limit determined in Chapter 32, Part I[100] for development

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from the assets of a foreign country.

[94] *West Bank and Gaza Aid: USAID Generally Ensured Compliance with Anti-terrorism Policies and Addressed Instances of Noncompliance*, U.S. GOV'T ACCOUNTABILITY OFF. (Dec. 7, 2023), https://www.gao.gov/products/gao-24-106243 (on file with the Touro Law Review).

[95] Raoul Wootliff, Judah Ari Gross & ToI Staff, *Jaffa Terror Victim Was U.S. Army Vet, Vanderbilt Student*, TIMES ISR. (Mar. 8, 2016), https://www.timesofisrael.com/vanderbilt-student-taylor-force-named-as-us-victim-of-jaffa-terror-attack/ (on file with the Touro Law Review).

[96] Press Release, Sens. Ted Cruz, Tom Cotton & Colleagues, Senators Introduce Taylor Force "Martyr Payment" Prevention Act to Target Palestinian Terror Payments (Apr. 6, 2017), https://www.cruz.senate.gov/newsroom/press-releases/sens-cruz-cotton-colleagues-introduce-taylor-force-martyr-payment-prevention-act-to-target-palestinian-terror-payments (on file with the Touro Law Review).

[97] H.R. 1164, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/1164/cosponsors.

[98] Eric Cortellessa, *Trump Signs Into Law Bill Slashing PA Funds Over Terrorist Stipends*, TIMES ISR. (Mar. 23, 2018, 10:57 PM), https://www.timesofisrael.com/trump-signs-into-law-bill-slashing-pa-funds-over-terrorist-stipends/ (on file with the Touro Law Review).

[99] Foreign Assistance Act of 1961, 22 U.S.C. § 2346.

[100] 22 U.S.C. ch. 32, pt. 1.

in special cases that are justifiable for economic, political, or security reasons serving American interests. When the U.S. President decides this is indeed the case, the Secretary of State is responsible for its implementation and for determining the policy with regard to the selected countries.[101]

The Taylor Force Act directs that the U.S. Secretary of State has the power to approve such federal assistance, as determined in Chapter 4, Part II of the Foreign Assistance Act,[102] to the PA, the Palestine Liberation Army, or any other entity demanding it, limited to situations meeting the following four cumulative conditions: (a) the entities that are candidates for assistance are adopting concrete steps to put a halt to terrorist attacks in their jurisdiction against Israeli and American citizens;[103] (b) the entities have halted all payments to all persons concerning whom it was determined, subsequent to a fair proceeding, that they perpetrated an act of terrorism against an Israeli or American citizen, or have halted all payments to the family of the person who perpetrated such an act of terrorism and was killed in so doing;[104] (c) the entity cancelled or took action equivalent to canceling all injunctions and laws regulating a payment policy according to which a stipend is paid to persons based on the length of time they were under arrest for perpetrating an act of terrorism;[105] and (d) the entity publicly condemns acts of terrorism perpetrated by its members and takes concrete steps to investigate such deeds and apprehend collaborators.[106]

Such a tort scheme has a few exceptions. According to the Taylor Force Act, the limitations on foreign aid do not apply to hospitals in East Jerusalem, to water and sanitation services, or to any program designated to vaccinate children.[107] So, the purpose of the law is not to punish innocent people in desperate need of assistance, but rather to exert external, international pressure with the aim of creating incentives to change a policy that harms innocent American and Israeli citizens.

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[101] 22 U.S.C. § 2346(b).
[102] *Id.* § 2346.
[103] Taylor Force Act, Pub. L. No. 115-141, § 1004(a)(1)(A), 132 Stat. 347, 1143-47 (2018) (codified as amended at 22 U.S.C. § 2378c-1(a)(1)(A) (2018)).
[104] *Id.* § 1004(a)(1)(B).
[105] *Id.* § 1004(a)(1)(C).
[106] *Id.* § 1004(a)(1)(D).
[107] *Id.* § 1004(b).

Israel has adopted provisions similar to those in the Taylor Force Act. For example, section 1 of the Israeli Law on Freezing Revenues Designated for the Palestinian Authority determines the following with regard to money paid by the latter to fund terrorism-related activity:[108]

> The purpose of this law is to reduce terrorist activity and to eliminate the economic incentive for terrorist activity by setting provisions for the freezing of funds paid by the Palestinian Authority in connection with terrorism, out of the funds transferred by the Israeli government to the Palestinian Authority according to the provisions under implementing laws.[109]

This law determines that at the close of each year, the Minister of Defense will present to the cabinet for ratification, data on the total amount of funds transferred by the PA to finance terrorism-related activity during that year, as well as data on the effects of freezing such funds on the strength of this law in that year as it concerns Israeli national security and external relations. On the basis of this data, and following ratification by the cabinet, a percentage of the tax money transferred by the Israeli government to the PA, equivalent to one-twelfth of the total amount of funds passed on by the latter to fund terrorism-related activity in the previous year, will be frozen each month.[110] If the data presented by the Minister of Defense to the cabinet shows that in the year in question, the PA did not transfer funds to support terrorism-related activity, the cabinet is entitled to decide to transfer the frozen funds to the PA.[111]

E. Establishment of a Statutory Compensation Fund and Recourse Claims

To ensure that terror victims indeed receive the damages awarded to them, governments can set up funds for the compensation of victims of terrorism. Funds of this kind may be specific to a

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[108] See § 1, Law on Freezing Revenues Designated for the Palestinian Authority Due to Payments Linked to Terrorism, 5778-2018 (Isr.), which reflects a law freezing money transferred by the Israeli government to the PA and allocated by the latter to fund terrorism-related activity.

[109] *See id.*

[110] *Id.* § 4(a).

[111] *Id.* § 4(b).

particular terrorist incident[112] or may be general and relevant to all terrorist acts.[113] Such funds may be financed through general tax revenues or through more specific sources such as fines and punishments to be imposed on the various circles of the terrorist world. Terror victims or their families will therefore be able to submit a claim to the fund, when they present proof of their damages, and the costs incurred because of these damages. The fund can then assess these claims and provide compensation accordingly. In the next step, the fund may file a claim for participation to be reimbursed from the relevant terrorist actors. This claim can be filed against the circle of perpetrators, of dispatchers, and of enablers, as stated in Section II above. The existence of such a fund may even result in better preventive measures against potential terrorist actors because they may be required to pay into the fund even in the event of a terrorist act that was unsuccessful and caused no damage.

Why would the victims of terrorism prefer compensation from the terrorist entities over rewards offered to them by the state? It may be argued that the state pays relatively quickly and there are no difficulties in collecting on a claim for damages caused by terrorism. According to the model proposed in this Article, methods that established government compensation funds would obligate these funds to submit reimbursement claims against the relevant terrorist actors. In this way, both the goals of compensating the injured party and of charging the tortfeasor are achieved.

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[112] *See, e.g.*, *VCF 2023 Annual Report*, SEPTEMBER 11TH VICTIM COMP. FUND (Feb. 12, 2024), https://www.vcf.gov/report/annual/vcf-2023-annual-report (on file with the Touro Law Review). The September 11th Victim Compensation Fund (VCF) was established by the U.S. government to provide compensation to victims of the terrorist attacks on September 11, 2001, and to people who later developed health problems as a result of exposure to waste and toxic conditions at the attack sites. Initially, this fund operated between 2001 and 2004 but it was reactivated in 2011 to provide compensation for new cases and to continue support in view of ongoing health problems related to the attacks.

[113] In the U.S. see, for example, the fund established to compensate victims of state-sponsored terrorism under the Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144; see also in the U.S., the Office for Victims of Crime (OVC), which is relevant to victims of terrorism because it administers various programs that assist victims of terrorism and mass violence, OFF. FOR VICTIMS CRIME, https://ovc.ojp.gov (on file with the Touro Law Review) (last visited Oct. 23, 2024). For Israel, see, for example, Victims of Hostile Actions (Pensions) Law, 5730-1970, LSI 24 131 (1959-60) (Isr.); Fallen Soldier's Families (Pensions and Rehabilitation) Law, 5710-1950, LSI 4 115 (1949-50) (Isr.).

This concept faces some challenges. For example, the damages awarded to the injured parties may be very high, taking into consideration the harms caused by terror attacks. Moreover, the process of litigating and calculating damages is likely to be a long, complex process, necessitating a significant administrative mechanism, and in turn, involving operating expenses.

To summarize, although a damages fund for victims of terrorism can provide important support for victims, set tort proceedings in motion, and function to a certain extent as a deterrent, it is unlikely to be sufficient. A comprehensive approach to the deterrence of terror operatives must also include enforcement by the other branches of law, joint intelligence efforts, and international cooperation.

F. International Legal Cooperation

In general, international cooperation is critical in the war against terrorism, especially in light of its transnational character. On their own, countries have difficulty preventing or responding to terrorism holistically and optimally. As a remedy for harm caused by terrorism, international legal cooperation can find expression, for example, in the establishment of an "international tort law."

Countries can conduct negotiations and sign international treaties determining joint definitions and standards for the imposition of liability on terrorists and their sponsors. Such treaties can address issues like extra-territorial jurisdiction, exceptions to the principle of sovereign immunity, mutual recognition of the court rulings of signatory countries, and acknowledgment of the possibility of enforcing these rulings. This can be accomplished by amending existing treaties, which usually address cooperation in criminal proceedings against terror operatives. It can also be achieved by agreements added to general commitments in existing treaties to cooperate in countering terrorism. Countries can also cooperate by sharing information on the activity of terror operatives worldwide, which can serve as evidence in tort lawsuits. Such mechanisms must be managed carefully to protect information on sensitive sources and ensure the right to a fair trial.

International legal cooperation faces its own challenges. Countries have different legal systems, values, and interests, which are liable to make it difficult to reach an agreement on joint standards and practices when attempting to formulate an international tort law. Countries also have varying abilities to implement and enforce such

standards. Nevertheless, international legal cooperation may be vital in the battle against terrorism.

To summarize, we discussed the fundamental question of how tort law can be best structured to generate effective deterrence by means of tort lawsuits. We presented a preliminary outline of a holistic tort scheme resting on six fundamental pillars, and proposed structuring it accordingly to generate effective deterrence for terror operatives. Each of these pillars deserves a separate investigation.

V. CHALLENGES IN THE PROPOSED THESIS

Below I present and analyze the challenges faced by the proposal to use tort law as a deterrent against terrorism and suggest the beginning of an answer to meeting each challenge.

A. Deterrence by Imposing Significant Compensation on Terror Operatives

In Section II.A, I argued that tort law can generate effective deterrence against terrorism by imposing hefty monetary sanctions on entities found responsible for carrying out acts of terrorism or supporting such acts, directly or indirectly. Yet not all terror operatives, especially those in the perpetrator circle, are motivated by monetary considerations. Terrorism is a complex, multifaceted phenomenon, and many factors may cause people to perpetrate acts of terrorism, including the following:

Individual beliefs: Many terrorists are motivated by deep-set religious or political ideologies. They are convinced that their ideal is just and essential, even if it results in causing harm to innocent people.

Psychological factors: Certain people are more susceptible than others to ideas promoting violence and terrorism. This susceptibility may arise from feelings of alienation, a desire for identity, or a need to belong to something greater than themselves. Some may also have personal characteristics that make them more prone to violence.

Socio-economic factors: Poverty, inequality, lack of education, and unemployment can make certain people more susceptible to extremist ideologies. They are liable to view terrorism as a way of expressing their frustration and achieving a certain degree of control over their life circumstances.

Political factors: Certain people are motivated by political defiance, objections, or resistance. They may feel downtrodden by their government or perceive a wrong that in their opinion can be rectified only by violent means.

Identity and belonging: Belonging to a terrorist group may give a strong sense of identity and belonging, especially for people feeling alienated and excluded from local mainstream society.

Exposure to violence: People growing up in environments where violence is rampant are liable to view acts of violence and terrorism as legitimate means for solving disputes or achieving goals.

Propaganda: Terrorist organizations often have sophisticated propaganda systems intended to enlist supporters. The Internet and social media have made it easier for these groups to reach potential recruits.

Peer pressure and social dynamics: Once people are involved in a group, they can be pressured or persuaded to participate in activities they might not have considered independently.[114]

Additionally, many terrorist organizations are skilled at hiding their assets, making it difficult to collect damages from them. Moreover, legal and practical obstacles may be encountered in attaining legal jurisdiction and enforcing court rulings against certain plaintiffs, in particular those residing abroad. In such an event, it may be difficult to enforce court rulings against terrorists and countries financing terrorism. In light of all this, the effectiveness of financial remedies to generate deterrence may be fairly questioned.

My response is that, nevertheless, significant monetary sanctions can serve as a deterrent even at the implementation level. The proof is that at times, the incentive to perpetuate acts of terrorism is the money itself, so the implementation level itself is affected by monetary considerations.[115]

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[114] On policy documents of countries and international organizations relating to countering radicalization, see Directive 2017/541, of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88) 6 (EU).

[115] A Hamas terrorist admitted under investigation that monetary incentives also led Hamas members to commit the October 7, 2023, massacre against Israeli civilians. According to him, they were promised 10,000 dollars each if they brought back hostages. Yoav Zeiton & Meir Turgeman, *"I Shot her Body. Whoever Brings a Kidnapped Person Gets an Apartment and $10,000": Documentation from Terrorist Interrogations*, YNET (Oct. 10, 2023, 13:08),

Furthermore, tort laws can produce an effective deterrent against other circles in the world of terrorism, especially the enablers, which include banks, corporations, and governments. The understanding of the organizations in the circle of dispatchers and enablers as social actors, characterized by external attribution and intent, leads to the conclusion that they attach great importance to not being found and labeled to have behaved negligently in support of terrorism, and were charged by the law. This threat can deter them, direct their behavior, and may counteract many failures caused by greed. Although the operator may aspire to act inefficiently, he will find it difficult to realize these ambitions because the deterred organization is encouraged not to allow it.

B. Deterrence by Use of Legal Proceedings to Expose the Factors Supporting Terrorism and Passing the Information to the Relevant Authorities

Tort lawsuits may make it possible to uncover the actors directly and indirectly engaged in terrorism and to hold to account the individuals, organizations, and countries providing financial or other resources to the world of terrorism. The discovery and exposure process in the course of the presentation of evidence and of hearing the witnesses in such lawsuits may lead to the exposure of unknown links of the terrorism support network.

This strategy also faces a set of challenges. For example, the task of exposing the tortfeasors and proving that they provided support for the terrorist attack may be difficult, especially given the secretive nature of terrorist networks. There may also be legal barriers to suing certain entities, in particular foreign countries and governments, given the immunity laws cited above. Furthermore, because the motives for terrorist attacks are varied and include ideological beliefs, psychological, socioeconomic, and political factors, issues of identity and belonging, concern about exposure alone may not generate deterrence for the perpetrators of terrorism and those supporting it.

My response is that even under these circumstances, tort law can function as an effective deterrent for those indirectly involved in acts of terrorism, such as banks, corporations, and governments. Yet this deterrence strategy can still be questioned on the grounds that it is not exclusive to civil law and can also be attained by means of criminal

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https://www.ynet.co.il/news/article/h111fbzvg6.

proceedings. A possible response to this argument is that exposure by means of tort law is more accessible to the injured party because of the relatively lighter burden of proof on their shoulders. In civil law generally, including tort lawsuits serving as a remedy for terrorism, the burden of persuasion falls on the plaintiffs, who must prove by a preponderance of the evidence, or a 51% likelihood, that their claims are true, contrary to criminal proceedings, where claims must be proven beyond all reasonable doubt.

C. Deterrence by Creating Debate and Public Awareness

A further deterrent effect that tort proceedings can have on organizational operatives such as banks and charity organizations that directly or indirectly support terrorist activity derives from the reputational damage they incur as a result of a high-profile lawsuit.

Such a deterrence strategy may be questioned by arguing that it is not exclusive to tort law and can also be attained by means of criminal proceedings. For reputational damage to create effective deterrence, the issue of negligence on the part of terror operatives must first be clarified and determined, followed by the imposition of liability. This imposes a double requirement: first, the existence of a neutral, professional strategy capable and authorized to rule that the defendant was negligent and acted inappropriately; and second, that the ruling is disseminated and reaches the wider public. Civil courts constitute a professional body capable of determining, by balancing probabilities alone, that banks, charity organizations, and the like were negligent. They also make their decisions public, and at times are covered by the media.

VI. SUMMARY, CONCLUSIONS, AND THOUGHTS FOR THE FUTURE

This Article examined two fundamental questions: (1) whether tort lawsuits can be added to the terrorism deterrence toolkit and used against operatives in the various circles of the world of terrorism as a remedy, and (2) assuming the answer to the first question is affirmative, how must tort law be structured to generate effective deterrence?

Despite the fact that the relevant legal frameworks for handling terrorism appear to be the criminal, international, and anti-terrorism laws, rather than various branches of civil law, this Article showed that

tort law can serve as an important deterrent of terrorism in three ways: (1) by imposing significant damages on terror operatives in various circles; (2) by exposing the identity of terror operatives in tort lawsuits; and (3) by the court hearings causing public awareness and reputational damage to organizations found liable. Other branches of the law, such as criminal law, are insufficient to independently provide effective deterrence, and tort law can make an important contribution to it.

This Article also examined how tort law can be optimally structured to deter terror operatives and set forth a preliminary outline for a tort scheme resting on six pillars: (a) the granting of extra-territorial jurisdiction; (b) the expansion of the boundaries of tort liability; (c) an adapted formulation of the rules of evidence and testimony in civil proceedings; (d) an effective mechanism for the collection of money from tortfeasors; (e) a statutory compensation fund; (f) and international legal cooperation.

Future research should focus on the application and practical aspects of the framework proposed in this Article, alongside empirical investigation of its effectiveness. Further development and strengthening are important as long as terrorist activity continues.