

# The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?

Captain Gal Asael\*

*Reason can wrestle and overthrow terror.*

—Euripides<sup>1</sup>

## I. Introduction

### A. The Importance of the Topic

On the morning of 28 September 2000, Ariel Sharon, then leader of the Israeli opposition in the Knesset (the Israeli parliament), visited the Temple Mount in Jerusalem.<sup>2</sup> “[T]he moment the plans for the visit had been made public . . . there was concern among Israeli security officials that the heavily media-covered visit might inflame some Palestinian nationalist sentiments . . . .”<sup>3</sup> Eventually, Sharon’s visit was relatively quiet. “By the afternoon, despite sporadic flare-ups of further clashes between police and demonstrators, Israeli security officials concluded that the matter was behind them.”<sup>4</sup> Unfortunately, that conclusion turned out to be totally wrong.<sup>5</sup>

“Within hours, the Voice of Palestine was broadcasting denunciations.”<sup>6</sup> Sharon was blamed for degrading the Muslim holy places.<sup>7</sup> “Yasser Arafat, the Palestinian Authority chairman, called upon the entire Arab and Islamic world to ‘move immediately to stop these aggressions and Israeli practices against holy Jerusalem.’”<sup>8</sup>

The following day brought great escalation.<sup>9</sup> “In the West Bank town of Qalqilya a Palestinian police officer participating in a joint security patrol with Israeli police opened fire and killed his Israeli counterpart.”<sup>10</sup> In Jerusalem,

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\* Israel Defense Forces. Written while assigned as a student in the 56th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, U. S. Army, Charlottesville, Va. 2008, LL.M., The Judge Advocate General’s Legal Ctr. & Sch. (TJAGLCS); 2007, LL.M. (*Cum Laude*), Haifa University, Faculty of Law, Israel; 2001, LL.B., (*Cum Laude*), Haifa University, Faculty of Law, Israel. Previous assignments include Legal Adviser to the Deputy Military Advocate General, Military Advocate General’s Corps, IDF 2005–2007; Security Branch Head, Infrastructure Branch Head, and Senior Legal Advisor, International Law Department, Military Advocate General’s Corps, IDF 2001–2005. Member of the Israel Bar Association.

The Israeli-Palestinian conflict is well-known to the author. In his assignments, the author frequently engaged in legal aspects concerning Israel’s relations with the Palestinians. The author would like to thank the Professors at TJAGLCS for their input on earlier drafts of this article and especially to Lieutenant Colonel Craig Burton.

The positions and opinions stated in this article are those of the author and do not represent the views of the State of Israel, Israel Defense Forces, and the Military Advocate General’s Corps.

<sup>1</sup> RICHARD ALAN KRIEGER, CIVILIZATION’S QUOTATIONS: LIFE’S IDEAL 105 (2002) (quoting Euripides, 480–406 BC).

<sup>2</sup> See, e.g., Mike Hanna & Assoc. Press., *Israeli Troops, Palestinians Clash after Sharon Visits Jerusalem Sacred Site*, CNN, Sept. 28, 2000, <http://archives.cnn.com/2000/WORLD/meast/09/28/jerusalem.violence.02/>.

<sup>3</sup> Ziv Hellman, *The Beginnings of the Second Intifada*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/index.html?VI=010604080630> (follow “History & Community” hyperlink; then follow “Contemporary Israel” hyperlink; then follow “Israeli-Palestinian relations” hyperlink; then follow “Intifada 1” hyperlink; then follow “The second Intifada” hyperlink) (last visited June 30, 2008).

<sup>4</sup> *Id.*

<sup>5</sup> See Hanna, *supra* note 2; see, e.g., Mark Tran, *Middle East Fighting Restarts*, GUARDIAN (London) Oct. 3, 2000, available at <http://www.guardian.co.uk/world/2000/oct/03/israel8>.

<sup>6</sup> Hellman, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also Jerrold Kessel et al., *Violence Escalates Between Palestinians, Israeli Troops*, CNN, Sept. 30, 2000, <http://archives.cnn.com/2000/WORLD/meast/09/30/israel.violence.03/>; Ross Dunn, *Israel-Palestinians Update*, GLOBAL SECURITY, Oct. 5, 2000, <http://www.globalsecurity.org/military/library/news/2000/10/war-001005-meisr7.htm>.

<sup>10</sup> Hellman, *supra* note 3.

hundreds of Palestinians threw heavy rocks onto the Wailing Wall while Jewish worshippers were praying.<sup>11</sup> The worshippers had been coerced to run away and the Israeli border guard responded by opening fire on the Palestinian rioters.<sup>12</sup>

The second Intifada broke out.

The appellation Intifada—meaning uprising in Arabic<sup>13</sup>—was given to the erupting violence as if it was a continuation of the first Palestinian Intifada against Israel.<sup>14</sup> “But the differences between the two rapidly became clear. Where the first Intifada was characterized most memorably by Palestinian youths throwing stones at Israeli soldiers, the second Intifada has been far bloodier, taking on the aspects of armed conflict, guerilla warfare, and terrorist attacks.”<sup>15</sup>

During the second Intifada, wide-ranging terror attacks struck Israel.<sup>16</sup> “Most of the terrorist attacks were directed toward civilians. They struck at men and at women; at elderly and at children. Entire families lost their loved ones. . . . The terror attacks occurred everywhere, including public transportation, shopping centers and markets, coffee houses, and inside . . . houses and communities.”<sup>17</sup> Great fear descended on the streets of Israeli towns.

As time passed, it became more and more clear that the Palestinian Authority was the life and soul of the renewed uprising.<sup>18</sup> Strong evidence showed that the Palestinian Authority engaged in planning and executing terror attacks.<sup>19</sup> It also encouraged them ideologically and authorized them financially.<sup>20</sup> To date, more than a thousand Israelis have been killed in the attacks,<sup>21</sup> and thousands of businesses were damaged.<sup>22</sup> Unfortunately, the terror attacks are still taking place.<sup>23</sup>

Is the law able to come to those victims’ aid?

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Merriam-Webster Online Dictionary, *Definition of Intifada*, <http://www.m-w.com/dictionary/Intifada> (last visited Mar. 14, 2008). The second Intifada is also known as the al-Aqsa Intifada. ITAMAR RABINOVICH, *WAGING PEACE: ISRAEL AND THE ARABS, 1948–2003*, at 308 (2004). “Al-Aqsa” is the important mosque on the Temple Mount. *Id.* The second Intifada is also called the “Oslo War” by those who consider it a tragic result of the Oslo agreements signed by the government of Israel and the PLO. *Id.* The Israel Defense Forces (IDF) codenamed the Palestinian violence “Ebb and Tide Events.” *Id.* However, the common name for the violent events that broke out in September 2000 is “the second Intifada.” *Id.*

<sup>14</sup> The first Intifada broke out in 1987. It began in Jabalia refugee camp in the vicinity of Gaza, and spread to the Gaza Strip and the West Bank.

Palestinian actions took a number of forms, including increased attacks against Israeli civilians, civil disobedience, general strikes, boycotts on Israeli products, graffiti, barricades, Molotov cocktails and grenades, but it was young people throwing stones at Israeli soldiers and vehicles that caught the media attention. Over the course of the first Intifada, an estimated 1,100 Palestinians and 160 Israelis were killed.

RABINOVICH, *supra* note 13, at 147. The Intifada officially ended in 1993 when Israel and the Palestine Liberation Organization signed the Oslo Accords. *Id.* See generally ZE’EV SCHIFF & EHUD YA’ARI, *INTIFADA: THE PALESTINIAN UPRISING: ISRAEL’S THIRD FRONT* (1989) (providing background and historical analysis with regard to the first Intifada).

<sup>15</sup> Hellman, *supra* note 3.

<sup>16</sup> See H CJ 7957/04 Mara’abe v. Prime Minister of Israel [2005] IsrSC 58(2) 393, 395 (discussing the factual background that led to the establishment of the security fence in the West Bank).

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., ISRAELI MINISTRY OF FOREIGN AFFAIRS, *THE INVOLVEMENT OF ARAFAT, PA SENIOR OFFICIALS AND APPARATUSES IN TERRORISM AGAINST ISRAEL* (2002) [hereinafter *TERRORISM AGAINST ISRAEL*], available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2002/5/The%20Involvement%20of%20Arafat-%20PA%20Senior%20Officials%20and](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/5/The%20Involvement%20of%20Arafat-%20PA%20Senior%20Officials%20and) (concluding that the Palestinian Authority under Yasser Arafat supported, encouraged and executed terror attacks).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., B’Tselem Human Rights Organization, *Fatalities Statistics*, <http://www.btselem.org/English/Statistics/Casualties.asp> (last visited July 1, 2008) [hereinafter *Fatalities Statistics*].

<sup>22</sup> See, e.g., Nehemia Strasler, *The Price of the Intifada*, HA’ARETZ, May 24, 2001, available at <http://old.kh-ua.org.il/Crisisnew/archiev/English/enma29.htm>.

<sup>23</sup> See, e.g., Efrat Weiss, *Israeli Killed in West Bank Terror Attack*, YNETNEWS, Nov. 20, 2007, <http://www.ynetnews.com/articles/0,7340,L-3473402,00.html>; see also Efrat Weiss, *Killers of Off-Duty Soldiers near Hebron Were PA Security Officers*, YNETNEWS (Isr.), Jan. 1, 2008, <http://www.ynetnews.com/articles/0,7340,L-3489270,00.html>.

The question placed in the heart of this article is whether the Palestinian Authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts during the second Intifada. Answering this question in the affirmative may create a significant and actual change. It may render hope, relief, and a sense of justice.

## B. The Scope of the Research

This article will demonstrate that under international and domestic law, there is an adequate legal basis for the terror victims to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.

The Israelis have suffered from the Palestinian terrorism since Israel's establishment.<sup>24</sup> Terror was Israel's lot even—and sometimes especially—during the peace process with the Palestinians.<sup>25</sup> However, this article refers to a specific timeframe starting in September 2000 when the second Intifada broke out, with the significant role of the Palestinian Authority in planning and executing terror attacks.<sup>26</sup>

The first section of this article focuses on the Israeli-Palestine conflict and on the involvement of the Palestinian Authority in terror acts against Israel. The legal background will concentrate on the existing legal means the Israeli legal system offers the terror victims in order to sue the Palestinian Authority.

The article will then analyze the topic's key-question: can the Palestinian Authority be sued in Israeli civilian courts for damages caused by its involvement in terror acts? Addressing this key-question, five sub-questions require legal analysis in both domestic and international spheres:

1. Is the Palestinian Authority considered a legal personality; i.e., is the Palestinian Authority entitled to foreign sovereign immunity when it is sued before Israeli courts?
2. Are actions filed by terror victims against the Palestinian Authority justiciable in domestic courts?
3. What is the appropriate forum to deal with actions filed by terror victims against the Palestinian Authority?
4. Assuming the Israeli courts are entitled to treat those actions, which law should be applied in accordance with the rules of private international law?
5. Upon what sources of law can the terror victims base their actions?

This article argues that under international law and domestic law, there is a solid legal basis for the terror victims to sue the Palestinian Authority in Israeli courts.

Finally, this article provides a proposal for domestic legislation designed to regulate the matter of suing the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.

## II. Background

### A. Factual Background

#### *1. The Israeli-Palestinian Conflict*

Before discussing the Palestinian terrorism and its consequences, it is crucial to be familiar with the general picture of the Israeli-Palestinian conflict. The latter "is an ongoing dispute between the State of Israel and Arab Palestinians. In

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<sup>24</sup> See generally AHRON BREGMAN, *ISRAEL'S WARS: A HISTORY SINCE 1947* (2002) (discussing the Israeli-Palestinian ongoing conflict).

<sup>25</sup> See generally DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* (2005) (providing historical background with respect to Palestinian terror acts during the Israeli-Palestinian peace process).

<sup>26</sup> See *TERRORISM AGAINST ISRAEL*, *supra* note 18. This article will not address the much-debated political question whether the Palestinian terror is considered a justified war against Israel, as well as its legal aspects, to include the "acts of war" issue. The discussion on those issues significantly exceeds the article's scope.

general, the Israeli-Palestinian conflict is part of the wider Israeli-Arab continuing conflict.<sup>27</sup> Scholars tend to attribute the origins of the Israeli-Palestinian conflict to three different aspects.<sup>28</sup>

The first aspect is identity. Whereas the “Israeli national identity stems from historic longing and contemporary political realization, a sense of Palestinian peoplehood stems from indigenous settlement.”<sup>29</sup> In the 1800’s, “European Anti-Semitism and increased recognition of small nations’ rights sparked the drive for a Jewish homeland.”<sup>30</sup> At last, millions of Jews would endorse the call made by the founder of Zionism, Theodor Herzl, to “be a free people in our own land.”<sup>31</sup> When the modern state of Israel was founded in 1948, hundreds of thousands of Jews immigrated to Israel.<sup>32</sup> Many of the immigrants were survivors of the European Jewry Holocaust.<sup>33</sup> In spite of the fact that “Palestinian nationalism developed a generation after Zionism, Muslim and Christian Arabs who identify as Palestinian root their nationality in centuries of continued residence in the land they call Palestine, and Jews call Israel. Both Israelis and Palestinians, to varying degrees, have rejected the legitimacy of their neighbors’ national identity.”<sup>34</sup> Arab leaders used to claim that the problems of the Jews in the modern era were not their concern, and that Jews had no more right to settle in Palestine.<sup>35</sup> Conversely, many Israelis assert that there are actually no Palestinian people, and that Jordan is the proper national home for the Arabs of Palestine.<sup>36</sup>

The second aspect refers to land. After World War I, the

European powers awarded Britain the right to determine Palestine’s fate. The 1917 Balfour Declaration promised to work toward a Jewish “national home” in Palestine. But by 1937 the British were desperate to separate the feuding Jewish and Arab communities, and set up a Royal Commission on Palestine to determine a solution that would bring peace to the area. The commission deduced that the Arabs feared that the establishment of a Jewish national home would eliminate their national aspirations and political rights was at the root of Arab opposition to a Jewish presence in Palestine. The commission recommended partition of Palestine into two sovereign states, Arab and Jewish.<sup>37</sup>

Unlike the Jews, the Arab leaders rejected this proposal.<sup>38</sup> In 1947, when the second partition plan was suggested, the Palestinians and surrounding Arab nations responded by initiating a war against the futuristic state of Israel.<sup>39</sup> Eventually, the War of Independence ended in a great defeat for the Arabs.<sup>40</sup> An independent Palestinian state was never established. Thousands of Palestinians fled from their lands, and most of the area designated for the Palestinian state was conquered by Jordan and Egypt.<sup>41</sup> Palestinians believe that they are entitled to return to their lands, whereas Israel rejects the alleged right

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<sup>27</sup> BREGMAN, *supra* note 24, at 29. *See generally* SABINA CITRON, *THE INDICTMENT: THE ARAB-ISRAELI CONFLICT IN HISTORICAL PERSPECTIVE* (2006) (providing general history regarding the Israeli-Arab conflict).

<sup>28</sup> Hellman, *supra* note 3.

<sup>29</sup> Overview: Palestinian-Israeli Relations, [http://www.myjewishlearning.com/history\\_community/Israel/PIConflict.htm](http://www.myjewishlearning.com/history_community/Israel/PIConflict.htm) (last visited Aug 4, 2008).

<sup>30</sup> *Id.*

<sup>31</sup> Israeli Ministry of Foreign Affairs, *A Free People in Our Land: Israel’s Declaration of Independence*, Apr. 1, 2005, <http://www.israel-mfa.gov.il/MFA/Government/Facts+about+Israel+The+State/A+Free+People+in+Our+Land+Declaration+of+Independence.htm>.

<sup>32</sup> *See generally* HOWARD M. SACHAR, *A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME* (2007) (discussing the establishment of Israel).

<sup>33</sup> *Id.*

<sup>34</sup> Ziv Hellman, *Overview: Palestinian-Israeli Relations*, MY JEWISH LEARNING, <http://www.myjewishlearning.com/index.html?VI=010604080630> (follow “History & Community” hyperlink; then follow “Contemporary Israel” hyperlink; then follow “Israeli-Palestinian relations” hyperlink) (last visited June 30, 2008). *See generally* RASHID KHALIDI, *PALESTINIAN IDENTITY* (1998) (providing background regarding the Palestinians and their origins).

<sup>35</sup> Hellman, *supra* note 34.

<sup>36</sup> *See* AVI SHLAIM, *THE IRON WALL: ISRAEL AND THE ARAB WORLD* 311 (2001) (quoting Israeli Prime Minister, Golda Meir’s saying that “there is no such thing as a Palestinian people”).

<sup>37</sup> Hellman, *supra* note 34.

<sup>38</sup> *See* AHARON COHEN, *ISRAEL AND THE ARAB WORLD* 207 (1970); *see also* DORE GOLD, *THE FIGHT FOR JERUSALEM: RADICAL ISLAM, THE WEST, AND THE FUTURE OF THE HOLY CITY* 134 (2007). *See generally* TOM SEGEV, *ONE PALESTINE COMPLETE: JEWS AND ARABS UNDER BRITISH MANDATE* (1999) (describing the proposal to divide Palestine into two sovereign states, Arab and Jewish).

<sup>39</sup> Hellman, *supra* note 34.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

of the attackers.<sup>42</sup> The next significant clash occurred in the 1967 Six-Day War, when “Israeli counterstrikes took over all of Jerusalem and captured Gaza and the western bank of the Jordan. Israel’s ambivalence over control of the territory once set aside for a Palestinian state developed into a policy of building settlements in strategic and historic areas.”<sup>43</sup>

In the first Palestinian Intifada that was initiated in 1987, the land issue played a significant role.<sup>44</sup> The Israeli use of force as well as the continuing control over the West Bank and the Gaza Strip resulted in a controversy within the Israeli society.<sup>45</sup> The pressure on the government to find a solution to the ongoing conflict eventually led to a new elected government and meaningful negotiations between the parties.<sup>46</sup> Similarly, “[i]n the context of the . . . (second) Intifada, the devastating effect of continued terrorist attacks within Israel . . . has . . . increased the pressure to find a solution to the . . . conflict . . . .”<sup>47</sup>

The third and final aspect regarding the origins of the Israeli-Palestinian conflict regards religion.<sup>48</sup> In addition to the known controversies between Islam and Judaism, religious militants in both parties reject the solution of shared sovereignty over disputed holy places, and especially with regard to the Temple Mount in Jerusalem.<sup>49</sup> “For Jews it is the site of the original, ancient Temple and thus a political symbol of their claim to the land. To Muslims, it is the site of two great mosques, the religious center for Palestinian Muslims, and a political symbol of *their* claim to the land.”<sup>50</sup> As mentioned, it was a visit to the Temple Mount by then the opposition leader Ariel Sharon in September 2000 that was claimed to ignite the second Intifada.<sup>51</sup>

In light of these conflicts’ origins, Arab governments had refused to recognize Israel for decades after its establishment. The Palestine Liberation Organization (PLO) was founded in 1964 with a declared aim to eliminate Israel.<sup>52</sup> The breakthrough of actual negotiations between Israel and the PLO occurred in 1993, when the parties reached the Oslo historical agreement.<sup>53</sup> During the Oslo process, the PLO, as the representative of the Palestinian people, was permitted to establish an autonomous authority in the West Bank and the Gaza Strip, with the understanding that it would recognize the existence of Israel.<sup>54</sup> According to the Palestinian narrative, the Oslo process

gave the Palestinian people hope that they would shortly see Israeli settlements dismantled, their economic condition dramatically improved, and their flag raised in a sovereign State of Palestine in all of the Gaza Strip and West Bank.

Seven years later, Israeli settlements had only expanded, the average Palestinian was mired deeper in poverty than before, and the Palestinian Authority—not state—controlled a disappointing less than half of the West Bank. When the Camp David summit meeting of Israeli Prime Minister Ehud Barak, U.S.

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<sup>42</sup> See generally BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED (2004) (providing background information concerning the 1948 War of Independence).

<sup>43</sup> Hellman, *supra* note 34; see also GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967–1977, at 364 (2006); ALAN DERSHOWITZ, THE CASE FOR ISRAEL 91 (2004).

<sup>44</sup> See *supra* note 13 and accompanying text.

<sup>45</sup> Hellman, *supra* note 34.

<sup>46</sup> MICHAEL N. BARNETT, ISRAEL IN COMPARATIVE PERSPECTIVE: CHALLENGING THE CONVENTIONAL WISDOM 43 (2006).

<sup>47</sup> Hellman, *supra* note 34.

<sup>48</sup> See, e.g., RELIGIOUS FUNDAMENTALISM AND POLITICAL EXTREMISM 84 (Leonard Weinberg & Ami Pedahzur eds., 2004).

<sup>49</sup> Hellman, *supra* note 34.

<sup>50</sup> *Id.*

<sup>51</sup> See *supra* Part I.A.

<sup>52</sup> BREGMAN, *supra* note 24, at 58. See generally MARK A. TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT (1994) (discussing the ongoing conflict between Israel and the Palestinians).

<sup>53</sup> ROSS, *supra* note 25, at 38.

<sup>54</sup> *Id.* See generally CHARLES ENDERLIN & SUSAN FAIRFIELD, SHATTERED DREAMS: THE FAILURE OF THE PEACE PROCESS IN THE MIDDLE EAST, 1995–2002 (2003) (providing historical background with respect to the Israeli-Palestinian peace process).

President Bill Clinton, and Arafat in July 2000 failed to conclude an agreement leading to the creation of a Palestinian state, the Palestinian public mood dropped to new lows of despair and heights of anger.<sup>55</sup>

It was claimed that as a result of those emotions, the second Intifada broke out.<sup>56</sup>

As opposed to the Palestinians who blamed Israel for not taking a step towards compromise, Israel considered its offer to be extremely generous, i.e. creating a Palestinian state in 96% of the West Bank and Gaza Strip to include dismantling most of the settlements and dividing sovereignty in Jerusalem.<sup>57</sup> The fact that Palestinians rejected the offer without making any counter-offer and initiated an armed conflict response caused the Israeli public to become disillusioned with the peace process.<sup>58</sup>

After discussing the Israeli-Palestinian conflict, the next section introduces the entity of the Palestinian Authority.

## 2. *The Palestinian Authority*

The Palestinian Authority, or the National Palestinian Authority, is an interim administrative organization designed to govern parts of the West Bank and the Gaza Strip.<sup>59</sup> “It was established in 1994, pursuant to the Oslo Accords between the PLO and the government of Israel, as a 5-year transitional body during which final status negotiations between the two parties were to take place.”<sup>60</sup>

According to the Oslo Accords, the Palestinian Authority was placed in charge of the civil administration mostly in the major cities of the West Bank and the Gaza Strip.<sup>61</sup> The Interim Agreement between the parties that was signed in 1995 gave the Palestinian Authority legislative, executive, and judicial powers, and paved the way for the first presidential and legislative elections in 1996.<sup>62</sup> The PLO’s chairman, Yasser Arafat, was elected to the Presidency.<sup>63</sup> However, since the establishment of the Palestinian Authority and up until the death of Yasser Arafat in late 2004, only one election had taken place.<sup>64</sup> In January 2005, the new PLO chairman, Mahmoud Abbas, won the presidential elections.<sup>65</sup>

In light of the peace process’ deadlock and the continuing second Intifada, in August 2005, Israel unilaterally withdrew its forces and settlers from the Gaza Strip, ceding full control of the area to the Palestinian Authority.<sup>66</sup> In January 2006, Hamas<sup>67</sup> won the Palestinian Legislative Council elections.<sup>68</sup> Following an escalation in intra-Palestinian violence, in June 2007 Hamas seized full control of the Gaza Strip.<sup>69</sup> As a result of Hamas’ takeover, the Palestinian Authority governs de facto only areas of the West Bank.<sup>70</sup> Furthermore, a Palestinian state has not been declared or founded yet.<sup>71</sup>

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<sup>55</sup> Hellman, *supra* note 3.

<sup>56</sup> See THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE 38 (Robert L. Rothstein et al. eds., 2004).

<sup>57</sup> Hellman, *supra* note 3.

<sup>58</sup> See GRASPING THE NETTLE: ANALYZING CASES OF INTRACTABLE CONFLICT 363 (Chester A. Crocker et al., 2005).

<sup>59</sup> NIGEL C. PARSONS, THE POLITICS OF THE PALESTINIAN AUTHORITY: FROM OSLO TO AL-AQSA 23 (2005).

<sup>60</sup> David Brewer, *For Muslim, Palestinian and Arab Sources*, AMF INT’L, <http://www.amfi.org/israelnewlinks.asp> (last visited July 1, 2008) (citing Palestinian National Authority (PNA), <http://www.pna.gov.ps>).

<sup>61</sup> PARSONS, *supra* note 59, at 23.

<sup>62</sup> *Id.*

<sup>63</sup> BARRY M. RUBIN & JUDITH COLP RUBIN, YASIR ARAFAT: A POLITICAL BIOGRAPHY 161 (2003).

<sup>64</sup> PARSONS, *supra* note 59, at 41.

<sup>65</sup> See, e.g., ANTHONY H. CORDESMAN WITH JENNIFER MORAVITZ, THE ISRAELI-PALESTINIAN WAR: ESCALATING TO NOWHERE 174 (2005).

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., Kathryn Westcott, BBC NEWS, 19 Oct. 2000, [http://news.bbc.co.uk/2/hi/middle\\_east/978626.stm](http://news.bbc.co.uk/2/hi/middle_east/978626.stm) (discussing the Hamas organization).

<sup>68</sup> See Assoc. Press, *Hamas Takes Control of Gaza Strip*, USATODAY, June 14, 2007, [http://www.usatoday.com/news/world/2007-06-14-gaza\\_N.htm](http://www.usatoday.com/news/world/2007-06-14-gaza_N.htm).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *As Expected, Palestinian State Not Declared*, GLOBES, May 5, 1999, <http://www.globes.co.il/DocsEn/did=352757.htm>.

### 3. *Palestinian Terror and Its Victims*

Since September 2000, when the second Intifada broke out, a huge wave of terrorism has flooded over Israel.<sup>72</sup> “Most of the terrorist attacks were directed toward civilians. Entire families lost their loved ones. The attacks were designed to take human life . . . to sow fear and panic . . . [and] to obstruct the daily life of the citizens of Israel.”<sup>73</sup> Palestinian terrorism has turned into a strategic threat for Israel. “[Terror attacks] occurred everywhere, including public transportation, shopping centers and markets, coffee houses, and inside . . . houses and communities.”<sup>74</sup>

The Palestinian terrorists have used a variety of means of warfare. “These include suicide attacks, car bombs, explosive charges, throwing of Molotov cocktails and hand grenades, shooting attacks, mortar fire, and rocket fire. A number of Palestinian attempts at attacking strategic targets have failed.”<sup>75</sup> For example, in April 2002 the Palestinians failed to topple a skyscraper in Tel Aviv using a car bomb.<sup>76</sup> In May 2003 another Palestinian terror act failed when they attempted to detonate a truck in a large gas tank farm near Tel Aviv.<sup>77</sup>

To date, more than one thousand Israelis have lost their lives due to the Palestinian attacks<sup>78</sup> and many of those injured in the attacks are now severely handicapped.<sup>79</sup> Israeli commerce has also experienced much hardship.<sup>80</sup> As time passed, the role of the Palestinian Authority in executing the attacks became more and more clear.<sup>81</sup>

### 4. *The Involvement of the Palestinian Authority in Terror*

The Palestinians originally asserted that the second Intifada was spontaneous response to the visit of Ariel Sharon, then leader of the Israeli opposition in the Knesset, to the Temple Mount in Jerusalem.<sup>82</sup> Yet, “later statements by Palestinian leaders in the Arab-language media contradicted this assertion. Nor did the report issued by the Mitchell Committee, composed of American and European leaders, give support to the earlier Palestinian claim.”<sup>83</sup>

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<sup>72</sup> The Israeli Supreme Court has described the Palestinian terror and its terrible consequences in a series of judgments: H CJ 2461/01 Kna’an v. Commander of IDF (unpublished) (upholding seizure of lands in the West Bank for military purposes); H CJ 9293/01 Barake v. Minister of Def. [2001] IsrSC 56(2) 509 (concluding that the prohibition on Israelis to enter the territories governed by the Palestinian Authority is lawful); H CJ 3114/02 Barake v. Minister of Def. [2002] IsrSC 56(3) 11 (approving a compromise regarding burial of terrorists who were killed by the IDF); H CJ 3451/02 Almandi v. Minister of Def. [2002] IsrSC 56(3) 30 (holding that the IDF attack against the terrorists who broke into the Church of the Nativity in Bethlehem was being carried out according to the rules of international law); H CJ 7015/02 Ajuri v. Military Commander [2002] IsrSC 56(6) 352 (deciding that the military commander was authorized to assign the residence of Palestinians who imposed a security threat); H CJ 8172/02 Ibrahim v. Commander of IDF (unpublished) (upholding seizure of lands in the West Bank for the establishment of the security fence); H CJ 7957/04 Mara’abe v. Prime Minister of Israel [2005] IsrSC 58(2) 393 (discussing the legality of a segment of the security fence in the West Bank that surrounds the Israeli town of Alfei Menashe and creates an enclave of Palestinian villages); H CJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2006] IsrSC 57(6) 285 (discussing the legality of the preventive strikes policy executed by the IDF in the West Bank and the Gaza Strip); *see also* ORNA BEN-NAFTALI & YUVAL SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE 142 (2006); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (2005).

<sup>73</sup> *Mara’abe*, IsrSC 58(2) at 396.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The Palestinian terror attacks caused Israel to carry out military operations, such as operation “Defensive Shield” (March 2002) and operation “Determined Path” (June 2002). *Id.* The objective of these military actions was to defeat the Palestinian terrorist infrastructure and to prevent terror attacks. *Id.* These campaigns did not stop immediately the terror attacks. *Id.* Consequently, Israel decided to take additional steps to confront the terror attacks. *Id.* The main decision regarded the construction of the security fence. *Id.*

<sup>78</sup> *See Fatalities Statistics, supra* note 21. Since the second Intifada broke out, more than 4,000 Palestinians were killed, including terrorists. *Id.* However, the fatalities data derives from several sources which often conflict. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See, e.g.,* Martin Wolk, *Economic Impact of Terror May Be Lasting*, MSNBC, July 8, 2005, <http://www.msnbc.msn.com/id/8514278/#storyContinued>. However, since the end of 2003 however, Israel has experienced a strong economic recovery. *Id.*

<sup>81</sup> *See infra* Part II.A.4.

<sup>82</sup> Israeli Ministry of Foreign Affairs, *Israel, the Conflict and Peace*, Nov. 2007, <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Israel+the+Conflict+and+Peace+Answers+to+Frequen.htm>.

<sup>83</sup> *Id.* Imad Al-Falouji, then the Palestinian Minister of Communication, stated that the Palestinian violence had been planned in advance.

Speaking at a symposium in Gaza . . . Al-Falouji confirmed that the Palestinian Authority had begun preparations for the outbreak of the [second] Intifada from the moment the Camp David talks concluded, this in accordance with instructions given by Chairman Arafat himself. Mr. Falouji went on to state that Arafat launched [the second] Intifada as a culminating stage to the immutable

On 13 September 2000, a few days before the second Intifada officially broke out, members of Palestinian leader Yasser Arafat's Fatah movement had executed several attacks on Israeli military and civilian targets.<sup>84</sup> In addition, during that time the Palestinian official television network inflamed the hatred towards Israel with militant broadcasts.<sup>85</sup> However, evidence of the heavy involvement of the Palestinian Authority in terror acts was obtained two years later.<sup>86</sup> During operation "Defensive Shield" which was carried out in the West Bank in April 2002, Israel Defense Forces (IDF) captured documents and obtained information from the questioning of captured terrorists.<sup>87</sup> "Both the documents and the information pointed at the direct and indirect involvement of Arafat, the Palestinian Authority (PA) and the Palestinian intelligence apparatuses . . . in the execution of terrorist attacks against Israel."<sup>88</sup>

A special report prepared by Israeli Minister of Parliamentary Affairs stated that Yasser Arafat and the Palestinian Authority were "involved in the planning and execution of terror attacks. [They] encouraged them ideologically [and] authorized them financially."<sup>89</sup> Arafat was also the head of the terror organization Al Aqsa Brigades that used women and even children to execute terrorist activity.<sup>90</sup> "The Palestinian Authority allocated vast sums of money from its budget to pay salaries to . . . terrorists . . ."<sup>91</sup> To finance terrorist activity, the Palestinian Authority used funds donated by other countries, including the European Union.<sup>92</sup> Moreover, the Palestinian Authority established close links with Iran and Iraq (under the regime of Saddam Hussein) who supplied them with funds and munitions.<sup>93</sup>

The mask was lifted, and the findings were shocking.

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Palestinian stance in the negotiations, and was not meant merely as a protest of Israeli opposition leader Ariel Sharon's visit to the Temple Mount.

Peace with Realism, *Sharon and the Intifada*, Apr. 2005, <http://www.peacewithrealism.org/pdc/sharon.htm> (quoting Al-Ayyam, Dec. 6, 2000).

At 'Ein Al-Hilweh Palestinian refugee camp in Lebanon, Al-Falouji restated that the violence had been planned in advance:

Whoever thinks that the Intifada broke out because of the despised Sharon's visit to the Al-Aqsa Mosque, is wrong, even if this visit was the straw that broke the back of the Palestinian people. This Intifada was planned in advance, ever since President Arafat's return from the Camp David negotiations, where he turned the table upside down on President Clinton. Arafat remained steadfast and challenged Clinton. He rejected the American terms and he did it in the heart of the US. My visit here in South Lebanon is a clear message to the Zionist enemy. We say: Just as the national and Islamic Resistance in South Lebanon taught Israel a lesson and made it withdraw humiliated and battered, so shall Israel learn a lesson from the Palestinian Resistance in Palestine. The Palestinian Resistance will strike in Tel-Aviv, in Ashkelon, in Jerusalem, and in every inch of the land of natural Palestine. Israel will not have a single quiet night. There will be no security in the heart of Israel.

Special Dispatch No. 194, The Middle East Media Research Institute, PA Minister: The Intifad was Planned from the Day Arafat Returned from Camp David (Mar. 21, 2001), available at <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP19401> (quoting Al-Falouji, Speech at 'Ein Al-Hilweh Palestinian refugee camp, Al-Safir, Lebanon (Mar. 3, 2001)).

Mamduh Nofal from the terror organization of the Democratic Front for the Liberation of Palestine, also stated that the second Intifada had been planned in advance. See David Samuels, *In a Ruined Country*, THE ATLANTIC.COM, Sept. 2005, <http://www.theatlantic.com/doc/200509/Samuels>. Nofal recounts that Arafat told him and his colleagues that they must be ready for the approached fight against Israel. *Id.*

<sup>84</sup> See, e.g., Assoc. Press, *Israeli Settler Convoy Bombed in Gaza, Three Injured*, CNN, Sept. 27, 2000, <http://archives.cnn.com/2000/WORLD/meast/09/27/israel.attack.ap/index.html>.

<sup>85</sup> See TERRORISM AGAINST ISRAEL, *supra* note 18.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* Executive Summary para. 1.

<sup>89</sup> *Id.* Introduction, main finding 1.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

## B. Legal Background

### 1 *A Brief on Israel's Law and Legal System*

The Israeli legal system is unique. It is characterized as a mixed system that does not belong to either the Common Law or Civil Law family of legal systems. The origins of the combined nature of the system are rooted in the history of Israel.<sup>94</sup>

For approximately four centuries, until the end of the first World War, the area, now constituting Israel was part of the Ottoman Empire ruled by Turkey. During this period the law of the land was a mixture of traditional Islamic law and modern European laws . . . . Following the defeat of Turkey, a British Mandate was established [by the] League of Nations. The Mandatory government gradually replaced the pre-existing law with legislation supplemented by English principles of common law and equity. While most areas of law have been Anglicized, the British kept intact the Ottoman system of family law, which authorized religious courts of the different religious communities to administer their specific laws on members of these communities.<sup>95</sup>

Israel was founded in 1948 as a democratic state.<sup>96</sup> The legislation enacted by the Knesset has changed the pre-existing non-Israeli law and has created a modern legal system.<sup>97</sup>

Israel has no written constitution. However, in 1950, the Knesset agreed to enact “basic laws” that would gather to a constitution.<sup>98</sup> To date, eleven basic laws have been enacted with regard to Human Dignity and Freedom, and Freedom of Occupation.<sup>99</sup> The Supreme Court has determined that even before the completion of a constitution, the basic laws are of a higher normative status and provide the fundamental principles and rights that in other Western democracies are protected by constitutions.<sup>100</sup>

Many areas of Israeli law are codified. Legislation is the basis of the system and is considered the system’s primary legal source.<sup>101</sup> “The Israeli judiciary enjoys wide judicial discretion and judicial power to create case law. According to the principle of stare decisis as practiced in Israel, a rule laid down by a court will guide any lower court, and the Supreme Court is not bound by its own decisions.”<sup>102</sup> In addition, the jury system does not exist in Israel. Thus, determinations of facts and law are made by a judge only.<sup>103</sup>

As it will be presented throughout this article, the described characters of the system play a very important role when dealing with the question of whether terror victims can sue the Palestinian Authority in Israeli courts for its involvement in terror acts.

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<sup>94</sup> See Ruth Levush, *Features—A Guide to the Israeli Legal System*, LLRX, Jan. 15, 2001, <http://www.llrx.com/features/israel.htm#Supremacy>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELEC. J. COMP. L. (2002), <http://www.ejcl.org/61/art61-1.html>.

<sup>98</sup> Levush, *supra* note 94.

<sup>99</sup> *Id.*

<sup>100</sup> See Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT’L J. CONST. L. 611 (2004).

<sup>101</sup> See generally ARIEL BIN-NUN, *THE LAW OF THE STATE OF ISRAEL: AN INTRODUCTION* (1990) (providing a brief on the law of Israel).

<sup>102</sup> Levush, *supra* note 94.

<sup>103</sup> *Id.*

## 2. Analyzing the Problem: Current Legal Means of Terror Victims to Sue Terrorists in Israeli Courts

### a. The Criminal Aspect

According to the Israeli law, committing a terror act is considered an offense.<sup>104</sup> A terrorist who commits a terror act in Israel or against Israelis and Israeli interests outside of Israel can be brought before a civilian court in Israel.<sup>105</sup> In most cases, if the terror act is committed in the West Bank, the terrorist will be brought before an independent military court that was established under the Fourth Geneva Convention.<sup>106</sup>

The Israeli law enforcement authorities commit to try the terrorists, their collaborators, and their supporters.<sup>107</sup> The courts can order compensation to terror victims,<sup>108</sup> but the domestic criminal procedures are not designed to compensate them.<sup>109</sup> The criminal procedures place the accused against the whole public rather than against the victim solely.<sup>110</sup> Additionally, the courts tend to not “mix” the criminal process with a “civil” matter like compensation.<sup>111</sup> As a result, the compensation is limited and is not intended to cover all of the victim’s damages.<sup>112</sup> Finally, according to the current legal regime, it is unclear whether the Palestinian Authority—as an entity<sup>113</sup>—can be subjected to criminal prosecution for its involvement in terror acts.

### b. The Civil Aspect (Torts)

As in many of the legal systems all over the world, a claim for compensation—not on the grounds of a contract—is governed by the law of torts.<sup>114</sup> The main source of Israel’s law of torts is the Civil Wrongs Ordinance.<sup>115</sup> The statute regulates the basic elements of torts law, and sets the torts of negligence and breach of statutory obligation as general torts.<sup>116</sup> By virtue of the statute, one can initiate an action if negligence or a breach of statutory obligation has been performed.<sup>117</sup>

Theoretically—and discussed in detail later in this article<sup>118</sup>—the Civil Wrongs Ordinance may provide terror victims a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages.<sup>119</sup> Thus, the Civil Wrongs Ordinance may be considered an adequate legal source on which the terror victims are able to rest their actions for compensation.

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<sup>104</sup> 1948 Prevention of Terror Act and 1945 Defense (Emergency) Regulations. The regulations were enacted by the British authorities during the British Mandate over Palestine. In light of the complicated security situation of Israel, all initiatives to abolish the regulations were rejected. See Brigadier General (BG) (Retired) Dov Shefi, Lecture at West Point Military Academy: Counter Terrorism in Democracies: The Legal Experience of Israel (Dec. 8, 1999) [hereinafter BG Shefi Lecture] (transcript available at The Investigative Project on Terrorism, <http://www.investigativeproject.org/article/563>).

<sup>105</sup> See BG Shefi Lecture, *supra* note 104.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> A victim compensation program does not exist in Israel. However, under the domestic law courts can order the accused to pay the victim NIS 84,400 for each offense the accused was convicted of. See Uri Yanay, *Police Assisting Crime Victims: Issues of Victim Compensation*, 6 POLICE & SOC’Y 73–98 (2002).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Levush, *supra* note 94.

<sup>115</sup> Civil Wrongs Ordinance, 1968, S.H. 101.

<sup>116</sup> *Id.* The Civil Wrongs Ordinance also deals with particular torts such as unjustified detention or nuisance, but none of them is relevant to the discussed topic. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *infra* Part II.F.2.

<sup>119</sup> Civil Wrongs Ordinance, 1968, S.H. 101.

Yet, the Civil Wrongs Ordinance was allegedly not designed to govern damages derived from warlike acts, but rather to adjudicate tortious conduct.<sup>120</sup> Moreover, in the existing Israeli legislation there is no other statute that regulates the question of whether the terror victims can sue the Palestinian Authority for its involvement in terror acts.

### *c. The Courts' Rulings*

The Israeli jurisprudential law with respect to the question of whether the Palestinian Authority can be sued in Israeli courts for its involvement in terror acts is slight. Thus, in several cases that were brought in together in the District Court in Jerusalem, the court ruled that neither the Palestinian Authority nor the PLO met the essential elements of a state and therefore were not entitled to foreign sovereign immunity.<sup>121</sup> The court could have made a step towards acknowledging the terror victims legal capability to sue the Palestinian Authority by its ruling. Yet, in the end the court held that the final determination of whether or not the Palestinian Authority is entitled to sovereign immunity and can be sued for its involvement in terror acts was not to be made by the court but rather by the government (via submitting to the court a certificate signed by the Minister of Foreign Affairs).<sup>122</sup>

Approving the district court's opinion at the appeal level, the Israeli Supreme Court emphasized that the question of whether the Palestinian Authority is a state that is entitled to sovereign immunity is a factual question that must be answered by the government.<sup>123</sup> Such a determination should be made on a case by case basis with respect to each action at the relevant time.<sup>124</sup> Applying this policy, the judgment does not clarify the complex questions presented.

In another case that was discussed prior to the Supreme Court decision, the District Court in Jerusalem declined an action against the Palestinian Authority for not enforcing Israeli civil judgments in its territories.<sup>125</sup> The court ruled that the Palestinian Authority meets, in one way or another, the provisions of an independent entity.<sup>126</sup> However, the court neither addressed the matter of sovereign immunity, nor the capability of suing the Palestinian Authority for its involvement in terror acts.

To date most of the actions against the Palestinian Authority which were filed due to its involvement in terror acts are still pending.

### *3. Conclusion: The Question of Whether the Victims Are Able to Sue the Palestinian Authority Is Unclear*

Domestic criminal procedures against terrorists were not designed to compensate terror victims. From the civil aspect, the Civil Wrongs Ordinance is an appropriate legal source for terror victims to rest their actions. However, the Civil Wrongs Ordinance allegedly did not contemplate terror acts scenarios. There is no other Israeli statute regulating the issue of suing the Palestinian Authority for its involvement in terror acts. Additionally, there is a scarcity of Israeli jurisprudential law on the matter.

To conclude, since the current legislation and courts' rulings do not provide an unambiguous response, the question of whether the victims are able to sue the Palestinian Authority for their damages is unclear. Indeed, this is the legal ground for this research.

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<sup>120</sup> See, e.g., HCJ 8276/05 Adalah v. Minister of Def. [2006] (unpublished) (stating that the classic law of torts is not designed to govern damages derived from warlike acts); see also CA 5946/92 Bani Uda v. State of Israel [2002] IsrSC 56(4) 1 (holding that injuries originated from combat acts should not be regulated by the ordinary law of torts).

<sup>121</sup> CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

<sup>122</sup> *Id.*; see discussion *infra* Part III.B.2.d.

<sup>123</sup> CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

<sup>124</sup> *Id.* See discussion *infra* Part III.B.2.d.

<sup>125</sup> CC (Jer) 4049/02 Midreshet Eilon More v. State of Israel [2006] (unpublished).

<sup>126</sup> *Id.*

### III. The Key-Question: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts?

#### A. Introduction: The Method of Analysis

Analysis of the key-question whether the Palestinian authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts requires dividing it into five sub-questions as mentioned above.<sup>127</sup> Each question raises issues in fields of both international and domestic law. When applicable, this article will integrate comparative research with respect to the U.S. law.

#### B. Is the Palestinian Authority Considered a Legal Personality; i.e., Is the Palestinian Authority Entitled to Foreign Sovereign Immunity When It Is Sued in Israeli Courts?

##### 1. *The Palestinian Authority as a Legal Personality*

###### a. *Is the Palestinian Authority a Legal Personality Under Domestic Law?*

Before analyzing whether the Palestinian Authority is entitled to foreign sovereign immunity, the preliminary question is whether the Palestinian Authority is considered a legal personality that generally can sue as a plaintiff and be sued as a defendant before Israeli courts.

Under the Israeli law, a legal personality is an entity that was recognized by law as having rights and obligations.<sup>128</sup> The domestic law contains no explanation of whether the Palestinian Authority is a legal personality. Though, based on the legislation that implemented the international agreements between Israel and the Palestinians,<sup>129</sup> the court held that the Palestinian Authority is considered a legal personality.<sup>130</sup>

###### b. *Is the Palestinian Authority a Legal Personality in Light of the International Agreements Between Israel and the Palestinians?*

According to the provisions of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, the Palestinian Authority is an interim administrative organization designed to govern parts of these areas.<sup>131</sup> Additionally, the Palestinian Authority was given legislative, executive and judicial powers.<sup>132</sup> The executive power includes, among other

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<sup>127</sup> See *supra* Part I.B.

<sup>128</sup> See, e.g., CA 2735/99 Amutat Beit Hakneset Le'sfaradim v. Orenstein [1999] IsrSC 55(3) 433, 440 (discussing the definition of a legal personality).

<sup>129</sup> See, e.g., The Implementation of the Agreement on the Gaza Strip and the Jericho Area Act, 1994, S.H. 85.

<sup>130</sup> CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

<sup>131</sup> The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, art. III, Sept. 28, 1995, KA 1071, 1 [hereinafter Interim Agreement]; see also PARSONS, *supra* note 57, at 83.

<sup>132</sup> Interim Agreement, *supra* note 131, art. III.

things, the power to sue and be sued.<sup>133</sup> In light of these provisions, the Palestinian Authority is considered a legal personality.<sup>134</sup>

To conclude, the international agreements between Israel and the Palestinians, as well as the implemented legislation of the agreements, show that the Palestinian Authority is recognized as a legal personality that can be sued in Israeli courts. This conclusion is supported by the opinion of the District Court in Jerusalem.<sup>135</sup>

## 2. *The Palestinian Authority and Foreign Sovereign Immunity*

### a. *Introduction*

Finding that the Palestinian Authority is recognized as a suable legal entity, the next question to be answered is whether the Palestinian Authority is entitled to foreign sovereign immunity from the jurisdiction of the Israeli courts.

In accordance with the doctrine of foreign sovereign immunity, a state is immune from exercise of judicial jurisdiction by another state.<sup>136</sup> “Originally, the prevailing theory in the international law was that of absolute immunity, according to which actions against foreign states were in general inadmissible without their consent.”<sup>137</sup> Since then, restrictive immunity has gained sway, and today it is the predominant theory.<sup>138</sup> Under the latter theory, immunity is relative and is to be granted only in the case of governmental activities. Thus, a state is not immune from the exercise of judicial jurisdiction over activities of a kind carried out by private persons.<sup>139</sup>

The problem arisen on the matter is “drawing a precise demarcation line between immune and non-immune state activity.”<sup>140</sup> In view of the uncertainty as to the immunity’s application, in 1977 the United Nations (U.N.) General Assembly decided to forward the issue to the U.N. International Law Commission (ILC) for a recommendation.<sup>141</sup> On 2 December 2004, after more than a quarter of a century of intense international negotiations, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property.<sup>142</sup> Articulating a comprehensive approach to the issue of foreign sovereign immunity, the convention embraces notably the restrictive immunity theory.<sup>143</sup>

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<sup>133</sup> *Id.* art. IX. Article IX states:

The executive power of the Palestinian Council shall extend to all matters within its jurisdiction under this Agreement or any future agreement that may be reached between the two Parties during the interim period. It shall include the power to formulate and conduct Palestinian policies and to supervise their implementation, to issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of Palestinian self-government, the power to employ staff, *sue and be sued* and conclude contracts, and the power to keep and administer registers and records of the population, and issue certificates, licenses and documents.

*Id.* art. IX, para. 2 (emphasis added); *see also id.* art. XX (recognizing the legal personality of the Palestinian Authority as well). Article XX states: “The transfer of powers and responsibilities from the Israeli military government and its civil administration to the Council, as detailed in Annex III, includes all related rights, liabilities and obligations arising with regard to acts or omissions which occurred prior to such transfer.” *Id.* art. XX, para 1a. The article also acknowledges that the Palestinian Authority can generally be sued. *Id.*

<sup>134</sup> *See, e.g.,* Celia W. Fassberg, *Israel and the Palestinian Authority: Jurisdiction and Legal Assistance* 28 *ISR. L. REV.* 318, 321 (1994) (“[I]n view of the power to sue and to be sued granted by the agreement, Israel presumably also has jurisdiction over actions against the Palestinian Authority itself whenever a sufficient link is established under the normal rules of jurisdiction.”).

<sup>135</sup> CC (Jer) 2538/00 *Noritz v. Palestinian Auth.* [2003] (unpublished).

<sup>136</sup> *See* Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 *AM. J. INT’L L.* 319 (1985); Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 *N.Y. INT’L L. REV.* 51 (1992). *See generally* GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (1992) (providing a brief regarding the foreign sovereign immunity).

<sup>137</sup> Burkhard Heß, *The International Law Commission’s Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 *EUR. J. INT’L L.* 269 (1993).

<sup>138</sup> *Id.* The absolute theory is applied only in China and a few third world countries. *See* Jin Jingshen, *Immunities of States and Their Property: The Practice of the People’s Republic of China*, 1 *HAGUE Y.B. INT’L L.* 163 (1988).

<sup>139</sup> BORN & WESTIN, *supra* note 136, at 77.

<sup>140</sup> Heß, *supra* note 137, at 269.

<sup>141</sup> G.A. Res. 32/151, U.N. Doc. A/RES/32/151 (Dec. 19, 1977).

<sup>142</sup> G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter G.A. Res. 59/38].

<sup>143</sup> *Id.*; *see also* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 *AM. J. INT’L L.* 194 (2005).

b. *The Term “State” in International Law*

Basically and historically, foreign sovereign immunity is designed for states only.<sup>144</sup> The immunity is procedural and applies when an entity is acknowledged as a state.<sup>145</sup> Its extent is not predetermined.<sup>146</sup> “[T]he independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent.”<sup>147</sup>

Customary international law requires an entity to possess the following qualifications in order to be considered a state:<sup>148</sup>

1. Permanent population. This element refers to a group of people that live permanently within a territory as one social unit although religious, linguistic and ethnical differences may exist.<sup>149</sup> These are the people of the nation.<sup>150</sup>
2. Defined territory. The state has to consist of a certain coherent territory effectively governed and populated.<sup>151</sup>
3. Government. Every sovereign state must have a government, regardless of the regime’s form.<sup>152</sup> The government has to impose its authority over its territory.<sup>153</sup> Additionally, the government must speak for the state as a whole. Thus, the mere presence of independent factions within a territory, lacking common institutions, cannot constitute a government in control.<sup>154</sup>
4. Capacity to enter into relations with other states. Scholars claim that this element is the most important qualification of a state because it equals the fundamental requirement of independence or sovereignty.<sup>155</sup>

It has also been said, that “[t]he first, second, and fourth elements are dependent on (or, sometimes, subsumed by) the third.”<sup>156</sup> According to this approach, the question is whether the entity claiming to be a state has a “defined territory under its control [and] a permanent population under its control.”<sup>157</sup> Political recognition, meaning a formal acknowledgment by a nation that another entity possesses the qualifications of a state, is not a prerequisite to a finding of statehood.<sup>158</sup>

Foreign sovereign immunity can be granted to an entity that does not meet the four discussed qualifications, but is soon to become an independent state.<sup>159</sup> This approach was taken by the ILC who originated the draft of the UN Convention on Jurisdictional Immunities of States and Their Property: “The expression ‘state’ includes fully sovereign and independent

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<sup>144</sup> BORN & WESTIN, *supra* note 136, at 77.

<sup>145</sup> CA 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson* [1997] IsrSC 51(1) 625, 644 (concluding that the immunity applies when an entity is acknowledged as a state).

<sup>146</sup> *Id.*

<sup>147</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 492 (1997).

<sup>148</sup> *See* Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, T.S. 881; *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 70 (1998).

<sup>149</sup> JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40 (1979).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 42.

<sup>153</sup> NII LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 54 (1994).

<sup>154</sup> *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 63 (Oct. 16).

<sup>155</sup> YORAM DINSTEIN, *THE INTERNATIONAL LAW AND THE STATE* 97 (1971); *see also* Joel Singer, *Aspects of Foreign Relations Under Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, 28 *ISR. L. REV.* 268, 269 (1994) (discussing the fourth element of capacity to enter into relations with other states).

<sup>156</sup> *Ungar v. PLO*, 402 F.3d 274, 289 (1st Cir. 2005) (discussing the four elements for an entity to be considered a state).

<sup>157</sup> *Knox v. PLO*, 306 F. Supp. 2d 424, 434 (S.D.N.Y. 2004).

<sup>158</sup> *See, e.g.*, DINSTEIN, *supra* note 155, at 97; *see also* *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 954 F.2d 847, 853 (2d Cir. 1992).

<sup>159</sup> *See* Stewart, *supra* note 143, at 194.

foreign states, and also, by extension, entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign.”<sup>160</sup>

The practice of some states supports the view that semi-sovereign states and even colonial dependencies are able to be treated as foreign sovereign states.<sup>161</sup> United States courts, for instance, consistently declined jurisdiction in actions against semi-sovereign states dependent on the United States.<sup>162</sup> On the other hand, the High Court of New Zealand held that United Nations trust territories, such as the Marshall Islands, have not yet achieved the status of a sovereign state and, therefore, are not entitled to sovereign immunity.<sup>163</sup>

In the case of *Morgan Guaranty Trust Co. Of New York v. Republic of Palau*,<sup>164</sup> the U.S. Court of Appeals for the Second Circuit had to determine whether the Republic of Palau is a foreign state within the definition of the Foreign Sovereign Immunities Act (FSIA).<sup>165</sup> Analyzing the required characteristics for an entity to be considered a state, the court delineated the four qualifications listed in the Montevideo Convention on Rights and Duties of States.<sup>166</sup> In addition, the court listed the following attributes of sovereign statehood: the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties.<sup>167</sup> Applying the mentioned attributes to the Republic of Palau, the court found the latter was a trust territory of the United States under a trusteeship agreement and lacked sovereignty because the trusteeship agreement conferred upon the United States full power of administration, legislation and jurisdiction over the territory.<sup>168</sup> As a result, the court concluded that the Republic of Palau is not a foreign sovereign within the meaning of the FSIA, and, therefore, is not entitled to foreign sovereign immunity.<sup>169</sup>

To conclude, foreign sovereign immunity is designed for states. However, foreign sovereign immunity was also granted to semi-sovereign states and dependencies, notably when actions against them are brought to the courts of the “paternalist state” as opposed to any other state. The matter whether an entity—even on the verge of full independence—meets the required qualifications to become a state is governed by the pertinent facts.

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<sup>160</sup> U.N. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, at 21, U.N. Doc A/46/10, U.N. Sales No. E.93.V.9 (Part 2) (1991) [hereinafter JURISDICTIONAL IMMUNITIES DRAFT]. This approach is reflected in the convention’s broad definition of ‘state’ that includes

constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; [and] agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

G.A. Res. 59/38, *supra* note 142.

<sup>161</sup> See U.N. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 160 (providing a brief regarding the practice of United Kingdom and France on the matter).

<sup>162</sup> See, e.g., *Kawananakoa v. Polybank* 205 U.S. 349 (1907) (holding that the territory of Hawaii is granted sovereign immunity, before it was admitted to the Union on August 21, 1959).

<sup>163</sup> *Marine Steel Ltd. v. Gov’t of Marshall Islands*, [1981] 2 N.Z.L.R. 158 (H.C.).

<sup>164</sup> 924 F.2d 1237 (2d Cir, 1991).

<sup>165</sup> Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330–1332, 1391, 1441, 1602–1611 (2000).

<sup>166</sup> Under the Montevideo Convention on Rights and Duties of States, a state is said to be an entity possessed of a defined territory and a permanent population, controlled by its own government, and engaged in or capable of engaging in relations with other such entities. See Montevideo Convention on Rights and Duties of States, *supra* note 148, art. 1; see also BROWNLIE, *supra* note 148, at 70.

<sup>167</sup> *Morgan Guar. Trust Co. of N.Y.*, 924 F.2d at 1243 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318–19 (1936)). The court also noted:

According to international law, a sovereign state has certain well accepted capacities, rights and duties:

- (a) sovereignty over its territory and general authority over its nationals;
- (b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;
- (c) capacity to join with other states to make international law, as customary law or by international agreement.

*Id.* at 1243–44 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 206 (1987)).

<sup>168</sup> *Id.* at 1246.

<sup>169</sup> *Id.* at 1247.

*c. Is the Palestinian Authority a State in Light of International Law?*

With this background in mind, it is time to move from the general to the specific. Is the Palestinian Authority considered a state that is granted foreign sovereign immunity in accordance with the international law standard?

As mentioned,<sup>170</sup> in 1993, Israel and the PLO signed the Declaration of Principles on Interim Self-Government Arrangements.<sup>171</sup> Israel accepted the PLO as the representative of the Palestinian people and the PLO acknowledged Israel's statehood.<sup>172</sup> The Declaration's stated purposes included the establishment of a Palestinian interim self-governing authority as a precursor to a permanent arrangement.<sup>173</sup> It also set forth a framework for negotiating the structure of the Palestinian Authority,<sup>174</sup> and specified that Israel would remain responsible for external security, including the overall safety of Israelis, in the affected territory.<sup>175</sup>

On 28 September 1995, Israel and the PLO signed the Interim Agreement aspiring to reach a permanent agreement within five years.<sup>176</sup> The Interim Agreement enumerated those powers and responsibilities to be transferred to the Palestinian Authority.<sup>177</sup> Yet, the Palestinian Authority was denied authority over foreign relations, including the establishment of embassies, the hiring of diplomatic staff, and the exercise of diplomatic functions.<sup>178</sup> Moreover, the Interim Agreement stated that Israel would continue to exercise powers and responsibilities that have not been transferred.<sup>179</sup> The Interim Agreement subdivided the West Bank and the Gaza Strip into three main zones (A, B, and C) each under a different level of control of the Palestinian Authority.<sup>180</sup> The overall framework required the Palestinian Authority to police the Palestinian population but Israel continued to be responsible over external threats and border defense.<sup>181</sup> Additionally, the legislative powers of the Palestinian Authority were restricted. The Interim Agreement specified that any law that is inconsistent with the agreement has no effect.<sup>182</sup>

By the year 2000, the two sides failed in an effort to reach a final agreement, and the second Intifada broke out.<sup>183</sup> In 2003, the Quartet—a group comprised of representatives of the United States, the European Union, the Russian Federation, and the United Nations—presented a “road map” setting forth a series of steps designed to break the impasse and move toward a permanent two-state solution in the region.<sup>184</sup> Recently, Israel and the Palestinian Authority restarted the peace negotiations that have been non-existent since 2000, but the violence still continues.<sup>185</sup>

In view of the foregoing, it is unmistakable that the Palestinian Authority is in many ways *sui generis*. As mentioned,<sup>186</sup> the customary international law requires an entity to possess four qualifications in order to be considered a state.<sup>187</sup> The

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<sup>170</sup> See discussion *supra* Part II.A.1.

<sup>171</sup> Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, Sept. 13, 1993 [hereinafter Declaration of Principles], available at [http://www.knesset.gov.il/process/docs/oslo\\_eng.htm](http://www.knesset.gov.il/process/docs/oslo_eng.htm).

<sup>172</sup> See UNITED NATIONS DEP'T OF PUB. INFO., THE QUESTION OF PALESTINE & THE UNITED NATIONS, at 3, U.N. Doc. DPI/2276, U.N. Sales No. 04.I.15 (2003) [hereinafter UN QUESTION OF PALESTINE].

<sup>173</sup> Declaration of Principles, *supra* note 171, art. I.

<sup>174</sup> *Id.* art. VII.

<sup>175</sup> *Id.* art. VIII.

<sup>176</sup> Interim Agreement, *supra* note 131.

<sup>177</sup> *Id.* art. IX.

<sup>178</sup> *Id.* According to the agreement, the PLO was permitted to conduct limited foreign affairs activities on behalf of the Palestinian Authority. Those activities pertained only to economic, cultural, scientific, and educational matters. *Id.*

<sup>179</sup> *Id.* art. I.

<sup>180</sup> *Id.* art. XI.

<sup>181</sup> *Id.* art. XII.

<sup>182</sup> *Id.* art. XVIII.

<sup>183</sup> See UN QUESTION OF PALESTINE, *supra* note 172, at 55.

<sup>184</sup> Letter from the Secretary-General Addressed to the President of the Security Council (May 7, 2003), U.N. Doc. S/2003/529 (2003).

<sup>185</sup> See Kevin Flower et al., *Mideast Peace Push Hits Turbulence*, CNN, Jan. 16, 2008, <http://www.cnn.com/2008/WORLD/meast/01/16/israel.coalition/index.html?iref=newssearch>.

<sup>186</sup> See discussion *supra* Part III.B.2.b.

Palestinians as the people of the Palestinian Authority who live permanently within a territory meet the first element of permanent population. In accordance with the agreements signed between the parties, Israel ceded to the control of the Palestinian Authority areas in the West Bank and the Gaza Strip.<sup>188</sup> These areas were subdivided into three main zones according to the level of control of the Palestinian Authority.<sup>189</sup> Arguably, the Palestinian Authority also meets the element of defined territory.

The question of whether the Palestinian Authority meets the element of government is critical. It is not surprising that this element governs the first, second, and fourth elements of a state.<sup>190</sup> Indeed, the agreements between Israel and the Palestinians have granted some autonomy to the Palestinian Authority. Respectively, the Palestinian Authority has its own government. On the other hand, the responsibilities and powers transferred to the Palestinian Authority were limited and Israel explicitly reserved control over all matters not transferred.<sup>191</sup> Several of these reserved powers are incompatible with the notion that the Palestinian Authority had independent governmental control over the defined territory. Thus, the Interim Agreement expressly left Israel with an undiminished ability to defend and control the territorial borders.<sup>192</sup> The Interim Agreement also denied the Palestinian Authority the right to create or maintain either an army or a navy,<sup>193</sup> retained Israeli control over the territorial airspace,<sup>194</sup> and placed severe restrictions on the Palestinian Authority's lawmaking ability.<sup>195</sup> Hence, it seems that the Palestinian Authority does not meet the element of government since it has no "defined territory . . . [and] a permanent population under its control."<sup>196</sup>

Accordingly, the Palestinian Authority cannot meet the fourth element of capacity to enter into relations with other states. Moreover, the Interim Agreement expressly denied the Palestinian Authority the right to conduct foreign relations.<sup>197</sup>

As stated previously,<sup>198</sup> foreign sovereign immunity can be granted to an entity that does not meet the four discussed qualifications, but is soon to become an independent state. However, in practice, foreign sovereign immunity was granted to those entities when suits against them were brought to the courts of the "paternalist state."<sup>199</sup> This is clearly not the case when engaging in actions against the Palestinian Authority because of its involvement in terror that are brought in the Israeli civil courts.

It should be emphasized that the Palestinian Authority has never declared itself as a state or an independent entity. Such a declaration is expected to emanate from the finalization of the negotiations with Israel.<sup>200</sup> This fact has a significant importance. "While the traditional definition [of state] does not formally require it, an entity is not a state if it does not claim to be a state."<sup>201</sup> Indeed, many countries throughout the world recognized the right of the Palestinian people to establish a state,<sup>202</sup> but refrained from recognizing the Palestinian Authority as a state.<sup>203</sup>

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<sup>187</sup> See BROWNIE, *supra* note 148, at 70; see also discussion *infra* p. 40 with regard to granting a foreign sovereign immunity to an entity that does not meet the four discussed qualifications, but is soon to become an independent state.

<sup>188</sup> Interim Agreement, *supra* note 131, art. XI.

<sup>189</sup> *Id.*

<sup>190</sup> Ungar v. PLO, 402 F.3d 274, 289 (1st Cir. 2005).

<sup>191</sup> Interim Agreement, *supra* note 131, art. I.

<sup>192</sup> *Id.* art. XII.

<sup>193</sup> *Id.* art. XIV. The Palestinian Authority was permitted to organize a police force, but this force had no jurisdiction over Israeli citizens within the territory. *Id.* art. XI.

<sup>194</sup> *Id.* art. XIII.

<sup>195</sup> *Id.* art. XVIII.

<sup>196</sup> Ungar v. PLO, 402 F.3d 274, 289 (1st Cir. 2005) (quoting Knox v. PLO, 306 F. Supp. 2d 424, 434 (S.D.N.Y. 2004)); see discussion *infra* Part III.B.2.e.

<sup>197</sup> Interim Agreement, *supra* note 131, art. IX.

<sup>198</sup> See discussion *supra* Part III.B.2.b.

<sup>199</sup> See, e.g., *Kawanakoa v. Polybank* 205 U.S. 349 (1907).

<sup>200</sup> The Interim Agreement explicitly states that the status of the occupied Palestinian territories will be preserved during the interim period. See Interim Agreement, *supra* note 131, art. XXI.

<sup>201</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. f (1987).

<sup>202</sup> However, political recognition is not a prerequisite to a finding of statehood. See, e.g., DINSTEN, *supra* note 1557, at 97.

<sup>203</sup> See TAL BECKER, INTERNATIONAL RECOGNITION OF A UNILATERALLY DECLARED PALESTINIAN STATE: LEGAL AND POLICY DILEMMAS (2000).

In sum, the Palestinian Authority does not satisfy the requirements for statehood under the principles of international law. This is the prevailing position among scholars as well.<sup>204</sup>

In light of the peace process' deadlock and the continuing violence, in August 2005 Israel unilaterally withdrew from the Gaza Strip, ceding full control of the area to the Palestinian Authority.<sup>205</sup> Following an escalation in intra-Palestinian violence, in June 2007 Hamas seized full control of the Gaza Strip.<sup>206</sup> As a result, the Palestinian Authority governs only areas of the West Bank.<sup>207</sup> Do these recent events change the conclusion that the Palestinian Authority does not satisfy the requirements for statehood?

It seems that the answer is no. The fact that Israel withdrew from the Gaza Strip has not allowed the Palestinian Authority to exercise effective authority in the West Bank.<sup>208</sup> Since the withdrawal was unilateral, it had no effect on the agreements between the parties.<sup>209</sup> Today, the Palestinian Authority has no governmental control at all over any territory or population in the Gaza Strip.<sup>210</sup> As a matter of fact, it has suffered only a continuing deterioration of its control from the date the disengagement plan was implemented to the takeover by Hamas.<sup>211</sup> Therefore, the recent political events certainly exacerbated the ongoing conflict between the parties, but did not render a change in the status of the Palestinian Authority as a non-state entity. The Palestinian Authority still does not meet the requirements for statehood under the principles of international law.

#### *d. The Status of the Palestinian Authority Under Israeli Law*

The Israeli law does not provide an answer to the critical question of whether the Palestinian Authority is considered a state that is entitled to foreign sovereign immunity. As a matter of fact, as opposed to several countries around the globe,<sup>212</sup> Israel has no legislation that governs the issues of foreign sovereign immunity and the definition of "state."

Yet, under the Israeli law, the principles regarding the foreign sovereign immunity and the term of "state" are considered customary international law.<sup>213</sup> The latter is incorporated into the domestic Israeli law as long as it does not explicitly contradict the domestic law.<sup>214</sup> "According to the consistent case law of this court, customary international law is a part of the law of the country, subject to Israeli statute determining a contrary provision."<sup>215</sup> As a result, the laws with respect to

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<sup>204</sup> See, e.g., GEOFFREY R. WATSON, *THE OSLO ACCORDS* 68 (2000) (concluding that "there was no Palestinian state at the time of the signing of the Interim Agreement"); Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 *DENV. J. INT'L L. & POL'Y* 27, 86 (1997) (stating that the Palestinian Authority does not satisfy the four criteria for statehood and is not a state under international legal standards); D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 226 (1998) (concluding that the Interim Agreement "falls short of [achieving] statehood for the Palestinian people"); see also discussion *infra* Part III.B.2.e regarding the status of the Palestinian Authority in U.S. legislation and jurisprudential law. *But cf.* Eyal Benvenisti, *The Status of the Palestinian Authority*, in *THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES* 47 (Eugene Cotran & Chibli Mallat eds., 1996) (stating that one can argue that the Palestinian Authority meets the international qualifications for statehood).

<sup>205</sup> CORDESMAN WITH MORAVITZ, *supra* note 65, at 174.

<sup>206</sup> See Assoc. Press, *Hamas Takes Control of Gaza Strip*, *USATODAY*, June 14, 2007, [http://www.usatoday.com/news/world/2007-06-14-gaza\\_N.htm](http://www.usatoday.com/news/world/2007-06-14-gaza_N.htm).

<sup>207</sup> *Id.*

<sup>208</sup> Israeli Ministry of Foreign Affairs, *Israel's Disengagement Plan: Selected Documents*, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Disengagement+Plan+20-Jan-2005.htm> (last visited July 10, 2008).

<sup>209</sup> *Id.*

<sup>210</sup> See Assoc. Press, *Bush Calls for 'Painful' Mideast Concessions*, *CNN*, Jan. 10, 2008, <http://www.cnn.com/2008/POLITICS/01/10/bush.mideast/>.

<sup>211</sup> See, e.g., *Profile: Gaza Strip*, *BBC NEWS*, Jan. 21, 2008, [http://news.bbc.co.uk/2/hi/middle\\_east/5122404.stm](http://news.bbc.co.uk/2/hi/middle_east/5122404.stm).

<sup>212</sup> See, e.g., Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330–1332, 1391, 1441, 1602–1611 (2000); State Immunity Act, 1978, c. 33 (Eng.); State Immunity Act, R.S.C., ch. S 18 (1985) (Can.); Foreign States Immunities Act, 1986, c. 3 (Austl.).

<sup>213</sup> CA 7092/94 Her Majesty the Queen in Right of Canada v. Edelson [1997] IsrSC 51(1) 625, 639 and the caselaw referred to within (concluding that the principles concerning foreign sovereign immunity are considered customary international law).

<sup>214</sup> *Id.*

<sup>215</sup> HCJ 785/87 Afu v. Commander of IDF Forces in the West Bank [1987] IsrSC 42(2) 4, 35; see also Yaffa Zilbershatz, *Integration of International Law into Israeli Law—The Current Law is the Desirable Law*, 24 *MISHPATIM* 317 (1994) (discussing the applicability of customary international law in the Israeli law).

foreign sovereign immunity are a part of the Israeli system.<sup>216</sup> This customary law is part of Israeli law, “by force of the State of Israel’s existence as a sovereign and independent state.”<sup>217</sup>

The Israeli courts had only a few opportunities to engage in the question of whether the Palestinian Authority is a state. In several cases that were brought together before the District Court in Jerusalem, the court ruled—after applying the principles crystallized in the international law—that apparently the Palestinian Authority does not meet the essential elements of a state and therefore is not entitled to foreign sovereign immunity.<sup>218</sup> However, the court held that the final determination of whether the Palestinian Authority is a state is not to be made by the court but rather by the government through a certificate signed by the Minister of Foreign Affairs.<sup>219</sup>

It should be mentioned that the plaintiffs requested the court to implement the U.S. legislation that permits American citizens to sue for injuries or death caused by international terrorism.<sup>220</sup> The plaintiffs also referred the court to the case of *Ungar v. Palestinian Authority*, in which the federal court in Rhode Island granted a suit between terror victims and the Palestinian Authority after rejecting the defense of foreign sovereign immunity.<sup>221</sup> The Israeli court denied the requests stating that foreign legislation cannot be implemented in the domestic law unless it is adopted in domestic legislation.<sup>222</sup> The court added that a foreign case law cannot lead to the determination whether the Palestinian Authority is a state.<sup>223</sup>

Approving the district court decision at the appeal level, the Supreme Court emphasized that the question of whether the Palestinian Authority is a state is a factual question that shall be answered merely by the executive branch.<sup>224</sup> Such a determination should be made case by case, with respect to each action at the relevant time.<sup>225</sup>

In another case that was discussed prior to the Supreme Court decision, the District Court in Jerusalem declined an action against the Palestinian Authority for not enforcing Israeli civil judgments in its territories.<sup>226</sup> The court ruled that the Palestinian Authority meets, in one way or another, the provisions of an independent entity.<sup>227</sup> However, the court neither addressed the matter of sovereign immunity nor the capability of suing the Palestinian Authority.

In light of the foregoing, according to the current Israeli ruling, the final determination of whether the Palestinian Authority is a state has to be made by the government on a case by case basis.

*e. A Comparative View: The Status of the Palestinian Authority in U.S. Legislation and Jurisprudential Law*

The Foreign Sovereign Immunities Act of 1976 [FSIA] “provides a comprehensive scheme for civil litigation—including civil actions involving terrorism—when the defendant is a foreign state.”<sup>228</sup> Enacting FSIA, Congress embraced the restrictive theory of sovereign immunity.<sup>229</sup> The FSIA provides the only basis for executing jurisdiction over a foreign state

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<sup>216</sup> *Edelson*, IsrSC 51(1) at 639.

<sup>217</sup> *CrimA 174/54 Shtempfeffer v. Att’y Gen.* [1954] IsrSC 10 5, 15.

<sup>218</sup> *CC (Jer) 2538/00 Noritz v. Palestinian Auth.* [2003] (unpublished).

<sup>219</sup> *Id.*

<sup>220</sup> *See* Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (2000).

<sup>221</sup> 153 F. Supp. 2d 76 (D.R.I. 2001); *see* discussion *infra* Part III.B.2.e.

<sup>222</sup> *CC (Jer) 2538/00 Noritz v. Palestinian Auth.* [2003] (unpublished).

<sup>223</sup> *Id.*

<sup>224</sup> *CA 4060/03 Dayan v. Palestinian Auth.* [2007] (unpublished).

<sup>225</sup> *Id.*

<sup>226</sup> *CC (Jer) 4049/02 Midreshet Eilon More v. State of Israel* [2006] (unpublished).

<sup>227</sup> *Id.*

<sup>228</sup> Jack L. Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, in *CIVIL LITIGATION AGAINST TERRORISM* 15 (John Norton Moore ed., 2004).

<sup>229</sup> 28 U.S.C. § 1605(a)(2) (2000).

in U.S. courts.<sup>230</sup> One of the FSIA's listed exceptions to immunity must be satisfied to establish subject matter jurisdiction in a suit against a foreign state.<sup>231</sup> Two of the enumerated exceptions are pertinent for terror-related suits:

1. The state-sponsored terrorism exception.<sup>232</sup> Plaintiffs can bring a claim for injuries resulting from terror acts against a foreign state officially designated by the State Department as a sponsor of terrorism.

This exception requires four primary conditions to be satisfied: 1. The state is officially designated by the State Department as a state sponsor of terrorism at the time of the incident or as a result of the incident; 2. "[A]n official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency" commits the act or provides material support to an individual or entity which commits the act; 3. [T]he act involves torture, extrajudicial killing, aircraft sabotage, or hostage taking; and 4. [T]he act results in the death or personal injury of a United States citizen.<sup>233</sup>

A number of suits have succeeded under this exception.<sup>234</sup>

2. The noncommercial tort exception.<sup>235</sup> According to this exception, foreign states are denied immunity from suits for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."<sup>236</sup> Therefore, "a foreign state would lack immunity for such a tort committed in the course of terrorist activity, even if the state is not an officially designated state sponsor of terrorism."<sup>237</sup>

Does an action against the Palestinian Authority brought in U.S. courts for its involvement in terror acts occurring in Israel fall within one of the discussed FSIA's exceptions? The U.S. courts answered this question in the negative.

The state-sponsored terrorism exception<sup>238</sup> does not apply in these circumstances simply because according to the current judgments the Palestinian Authority is not considered a state.<sup>239</sup> Thus, the Palestinian Authority is not one of the states that are officially designated as sponsors of terrorism.<sup>240</sup> Also, the noncommercial tort exception<sup>241</sup> does not apply to the Palestinian Authority because it is not considered a state. In addition, the scope of the exception has been interpreted narrowly in the sense that both the tortious act and the injury are required to occur in the United States.<sup>242</sup> Since the discussed terror acts occurred in Israel, the requirement cannot be satisfied.

However, a number of suits filed by terror victims against the Palestinian Authority in U.S. courts were successful due to the fact that the courts held that the Palestinian Authority is not a state, and therefore it is not entitled to foreign sovereign immunity.<sup>243</sup> Because the FSIA does not apply in the case of the Palestinian Authority, the suits were based upon the Anti-

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<sup>230</sup> *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 11 (D.D.C. 1998); *see also* SHAW, *supra* note 147, at 480.

<sup>231</sup> The list of exceptions to the jurisdictional immunity of a foreign state is noted in 28 U.S.C. § 1605(a)(2) (1988).

<sup>232</sup> *Id.* § 1605(a)(7).

<sup>233</sup> Goldsmith & Goodman, *supra* note 228, at 29 (quoting the elements of the state-sponsored terrorism exception under FSIA).

<sup>234</sup> However, most of the suits involved default judgments. *See, e.g.,* Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998); *Flatow*, 999 F. Supp. 1; *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000). Currently seven states are officially designated sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* 31 C.F.R. § 596.201 (2008); *see also* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L. J. 1, 15 (2002).

<sup>235</sup> 28 U.S.C. § 1605(a)(5) (2000).

<sup>236</sup> *Id.*

<sup>237</sup> Goldsmith & Goodman, *supra* note 228, at 29.

<sup>238</sup> 28 U.S.C. § 1605(a)(7).

<sup>239</sup> *See* *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005); *Knox v. PLO*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004); *Biton v. Palestinian Interim Self-Gov't Auth.*, 510 F. Supp. 2d 144, 147 (D.D.C. 2007); *see also* discussion *infra* pp. 20–22.

<sup>240</sup> *See supra* note 234.

<sup>241</sup> 28 U.S.C. § 1605(a)(5).

<sup>242</sup> *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

<sup>243</sup> *See* discussion *infra* pp. 20–21.

Terrorism Act of 1991 (ATA), which permits American citizens to sue for injuries or death caused by international terrorism.<sup>244</sup>

The main case against the Palestinian Authority that was litigated in U.S. courts, and the first to be decided at the appeals court level, is the case of *Ungar v. Palestinian Authority*.<sup>245</sup> The case arose in the aftermath of the death of Yaron Ungar (an American citizen) and his wife Efrat on 9 June 1996.<sup>246</sup> They were killed after gunmen affiliated with Hamas opened fire on their car near the town of Beit Shemesh in Israel.<sup>247</sup> In March 2000, the Ungars' estates and their two children filed suit in federal court in Rhode Island.<sup>248</sup> Included among the defendants was the Palestinian Authority, since the plaintiffs claimed that it had aided and abetted the murders.<sup>249</sup> The court denied the motion submitted by the Palestinian Authority to dismiss on the basis of sovereign immunity, and finally entered a \$116 million default judgment.<sup>250</sup> The Palestinian Authority appealed the judgment to the First Circuit, who affirmed.<sup>251</sup>

The defendants argued that the Palestinian Authority was immune from suit under both the FSIA and the ATA because it constituted core elements of a state.<sup>252</sup> The court stated that in determining whether to grant immunity in individual cases, it has to rely on the international law standard as opposed to the actions of the State Department.<sup>253</sup> Analyzing the matter,<sup>254</sup> the court rejected the argument and decided that the Palestinian Authority fails to qualify as a state and thus is not entitled to sovereign immunity from tort suits.<sup>255</sup> The court concluded:

[T]he defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time. In view of the unmistakable legislative command that sovereign immunity shall only be accorded to states—a command reflected in both the FSIA and the ATA—the defendants' sovereign immunity defense must fail.<sup>256</sup>

An appeal filed by the Palestinian Authority to the Supreme Court was denied.<sup>257</sup>

The second case concerned with an action against the Palestinian Authority due to its involvement in terror is *Knox v. PLO*.<sup>258</sup> On the night of 17 January 2002, Ellis, an American citizen then thirty-one years old, was performing as a singer before 180 guests celebrating the Bat Mitzvah of twelve-year-old Nina in Hadera, Israel.<sup>259</sup> At approximately 10:45 p.m.,

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<sup>244</sup> 18 U.S.C. § 2333(a) (2000).

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

*Id.*; see also Keith Sealing, *Cuba Is No Longer a "State Sponsor of Terrorism": Why the Foreign Sovereign Immunities Act Sanction Failed*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 143, 151 (2004). Like FSIA, the ATA provides that no civil action shall be maintained against a foreign state, but it contains no specific definition of the term "foreign state." *Id.* Consequently, in *Ungar*, the court held that an assertion of sovereign immunity under the ATA should be regarded as being functionally equivalent to an assertion of sovereign immunity under the FSIA. 402 F.3d at 282.

<sup>245</sup> 402 F.3d 274.

<sup>246</sup> *Id.* at 276.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004).

<sup>251</sup> *Ungar*, 402 F.3d at 294.

<sup>252</sup> *Id.* at 289.

<sup>253</sup> "[C]ourts should look to international law to determine statehood for purposes of the FSIA." *Id.* at 284.

<sup>254</sup> The analysis of the court referred to three time periods: the period from the beginning of the mandate through the 1967 war; the period from the end of that war until the establishment of the Palestinian Authority in 1994; and the period from 1994 forward. *Id.* at 290.

<sup>255</sup> *Id.* at 292.

<sup>256</sup> *Id.*

<sup>257</sup> *PLO v. Ungar*, 546 U.S. 1034 (2005).

<sup>258</sup> 306 F. Supp. 2d 424 (S.D.N.Y. 2004).

<sup>259</sup> *Id.* at 426.

while the guests were dancing, a terrorist arrived at the banquet hall, burst through the door and, using a machine gun, opened fire into the crowd.<sup>260</sup> Six people were killed in the attack, including Ellis, and over thirty were wounded.<sup>261</sup> “[W]hat began as an initiation ended in fatality.”<sup>262</sup> Plaintiffs sought damages from defendants, claiming, among other things, that the attack was executed under instructions provided by the Palestinian Authority.<sup>263</sup> Defendants moved to dismiss the action for lack of subject matter jurisdiction.<sup>264</sup>

The court denied the motion and held that defendants were not entitled to immunity under the ATA and the FSIA, because they failed to establish that the Palestinian Authority was a state.<sup>265</sup> The court explained that the Palestinian Authority did not sufficiently control a territory, given that its authority was subordinate to Israel’s sovereign control under the Oslo Accords, and it was expressly prohibited from conducting foreign relations under the Interim Agreement.<sup>266</sup> Consequently, the court directed entry of final judgment against the PLO and the Palestinian Authority in the total amount of \$192 million.<sup>267</sup>

The third, and most recent suit, filed by terror victims against the Palestinian Authority is *Biton v. Palestinian Interim Self-Government Authority*.<sup>268</sup> “[O]n November 20, 2000, a roadside device exploded near a bus that was transporting elementary school children and their teachers from Kfar Darom . . . towards Gush Katif.”<sup>269</sup> Gabriel Biton, one of the plaintiff’s husband, was killed.<sup>270</sup> Mrs. Biton asserted that the Palestinian Authority was responsible for his death.<sup>271</sup> The Palestinian Authority again raised the assertion of foreign sovereign immunity.<sup>272</sup> The court rejected the assertion, stating: “Defendants remain collaterally estopped from asserting a defense of sovereign immunity by the prior decisions in *Ungar v. PLO* . . . and *Knox v. PLO* . . . .”<sup>273</sup>

In light of the preceding discussion, the U.S. courts granted a number of suits filed by terror victims against the Palestinian Authority. By applying the international law standards, the U.S. courts—and not the executive branch—decided that the Palestinian Authority was not considered a state, and therefore it was not entitled to foreign sovereign immunity.

### 3. Conclusion: The Palestinian Authority Is a Legal Personality, but Not a State and Therefore Is Not Immune from Civil Actions

The Palestinian Authority is recognized as a suable legal personality. Furthermore, since the foreign sovereign immunity is designed for states, it had to be determined if the Palestinian Authority is a state. In accordance with the customary international law standards, an entity is required to possess the following qualifications in order to be considered a state.<sup>274</sup> permanent population, defined territory, government, and capacity to enter into relations with other states. It has been shown that the Palestinian Authority is in many ways *sui generis*. Arguably, it meets the first two elements of a state. However, it cannot satisfy the latter two elements. The responsibilities and powers transferred to the Palestinian Authority were limited

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 438.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Knox v. PLO*, 2006 U.S. Dist. LEXIS 52320, at \*4 (S.D.N.Y. July 11, 2006)

<sup>268</sup> 510 F. Supp. 2d 144 (D.D.C. 2007).

<sup>269</sup> *Biton v. Palestine Interim Self-Gov’t Auth.*, 412 F Supp. 2d. 1, 2 (D.D.C. 2005).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Biton*, 510 F. Supp. 2d at 147. The court added that defendants remained collaterally estopped from asserting a defense of sovereign immunity in spite of subsequent events to the filing of the complaint in the Gaza Strip, i.e. the withdraw of Israel and the coup by Hamas. *Id.* These events do not change the defendants’ status. *Id.* at 147.

<sup>274</sup> See Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; see also BROWNLEE, *supra* note 148, at 70.

and Israel explicitly reserved control over all matters not transferred.<sup>275</sup> The Palestinian Authority may be close to becoming an independent state, but it has never reached this status.<sup>276</sup> Moreover, the Palestinian Authority has intentionally never declared itself a state.<sup>277</sup>

Engaging in the matter, the Israeli courts have not determined the exact political status of the Palestinian Authority. The determination has been left to be made by the government. However, a different approach can certainly be taken. The U.S. courts have decided that the Palestinian Authority is not considered a state, and is therefore not entitled to foreign sovereign immunity. Clearly, the approach taken by the U.S. courts can ease the way of the terror victims towards compensation and there is no reason to refrain from applying it in Israel as well.

### C. Are Actions Filed by Terror Victims Against the Palestinian Authority Justiciable in Domestic Courts?

#### 1. The Doctrine of Non-Justiciability Under Domestic Law

The doctrine of sovereign immunity is closely related to the doctrine of non-justiciability. The concept of the latter doctrine posits an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction.<sup>278</sup>

According to the Israeli courts' point of view, there is a distinction between an argument of normative non-justiciability and an argument of institutional non-justiciability.<sup>279</sup> "An argument of normative non-justiciability claims that legal standards for deciding the dispute put before the court do not exist."<sup>280</sup> However, under the courts' rulings, the argument of non-justiciability has no legal base, "since there is always a legal norm according to which the dispute can be solved."<sup>281</sup> An argument of institutional non-justiciability "deals with the question whether the law and the court are the appropriate framework for deciding . . . the dispute."<sup>282</sup> Thus, a court must refrain from entering a matter that relates to "questions of policy within the jurisdiction of other branches of a democratic government."<sup>283</sup> The question that must be asked is what the predominant nature of the dispute is; i.e., whether the nature is predominantly political or predominantly legal.<sup>284</sup> Since the borderline between political issue and legal issue might be blurred, the doctrine of non-justiciability should be rarely exercised.<sup>285</sup> Moreover, "there is no application of the doctrine where recognition of it might prevent the examination of impingement upon human rights."<sup>286</sup>

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<sup>275</sup> Interim Agreement, *supra* note 131.

<sup>276</sup> See *supra* note 204 and accompanying text.

<sup>277</sup> See, e.g., Deborah Sontag, *Assembly in Gaza Defers Declaring Palestinian State*, N.Y. TIMES, Sept. 11, 2000, <http://query.nytimes.com/gst/fullpage.html?res=9E02E7DB1F39F932A2575AC0A9669C8B63>.

<sup>278</sup> SHAW, *supra* note 147, at 492.

<sup>279</sup> HCJ 910/86 Resler v. Minister of Def. [1988] IsrSC 42(2) 441, 488 (concluding that enlistment of Yeshiva students to military service is a justiciable issue).

<sup>280</sup> HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2006] IsrSC 57(6) 285, 343 (stating that the doctrine of non-justiciability does not apply when examining the legality of the preventive strikes policy executed by the IDF in the West Bank and the Gaza Strip).

<sup>281</sup> *Id.*

<sup>282</sup> Resler, IsrSC 42(2) at 488.

<sup>283</sup> HCJ 4481/91 Bargil v. Gov't of Israel [1993] IsrSC 47(4) 210, 218 (concluding that Israel's policy regarding the settlements in the West Bank is not justiciable); see also HCJ 9070/00 Livnat v. Rubinstein [2001] IsrSC 55(4) 800, 812 (determining that questions of day to day affairs of the Knesset are not institutionally justiciable).

<sup>284</sup> HCJ 852/86 Aloni v. Minister of Justice [1987] IsrSC 41(2) 1, 29 (deciding that the nature of extradition issue is predominantly legal and therefore justiciable); see also Resler, IsrSC 42(2) at 521.

<sup>285</sup> Resler, IsrSC 42(2) at 488.

<sup>286</sup> Pub. Comm. Against Torture in Israel, IsrSC 57(6) at 343; see also HCJ 606/78 Oyeib v. Minister of Def. [1978] IsrSC 33(2) 113, 124.

[I]t is clear that issues of foreign policy . . . are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations.

*Id.*

Against the background of this discussion, one must ask whether the doctrine of non-justiciability is a hurdle for terror victims in their path towards compensation.

When dealing with suits filed by terror victims against the Palestinian Authority, the District Court in Jerusalem restated that it should not engage in a dispute if its nature is predominantly political, and noted that the suits may raise political questions.<sup>287</sup> Affirming the ruling of the district court, the Supreme Court did not address the issue.<sup>288</sup>

Although the Israeli courts have not determined whether the doctrine of non-justiciability applies to terror victims' actions, the doctrine should not hamper these actions for two reasons. First, the doctrine of non-justiciability is not applicable when impingement of human rights is involved.<sup>289</sup> Since terror acts harm the most basic right of a human being—the right to life—they are justiciable. Second, as stated, “[w]hen the character of the disputed question is political . . . it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional nonjusticiability does not apply.”<sup>290</sup> Indeed, suits filed by terror victims against the Palestinian Authority can influence the relations between Israel and the Palestinian Authority. The suits may raise political aspects, especially when dealing with the validity of the agreements between the parties. Yet, the dominant nature of the suits is not political. The question is whether terror victims can sue the Palestinian Authority for damages caused by its involvement in terror acts. It involves primarily tragic events that violated the victims' rights. The question has a legal dominant character both from a domestic law and international law point of view. It may have political implications, but the dominant nature of the question is legal.

## 2. A Comparative View: The Doctrine of Non-Justiciability and the U.S. Courts

In actions against the Palestinian Authority that are brought in the U.S. courts, the Palestinian Authority kept asserting that the actions should have been dismissed because the actions presented a non-justiciable political question. The court found the assertion unconvincing.

In *Baker v. Carr*<sup>291</sup> the Supreme Court explained that “it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the ‘political question.’”<sup>292</sup> Yet, not “every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>293</sup> The Supreme Court set forth six tests designed to determine whether it deals with a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>294</sup>

In the case of *Ungar v. Palestine Liberation Organization* the court held that the actions against the Palestinian Authority easily clear the six hurdles.<sup>295</sup> Hence, the actions do not present a non-justiciable political question. To begin, the decision of the court “neither signaled an official position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government.”<sup>296</sup> The purpose of the

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<sup>287</sup> *Id.*

<sup>288</sup> CA 4060/03 Dayan v. Palestinian Authority [2007] (unpublished).

<sup>289</sup> *Pub. Comm. Against Torture in Israel*, IsrSC 57(6).

<sup>290</sup> *Id.* at 343.

<sup>291</sup> 369 U.S. 186 (1962).

<sup>292</sup> *Id.* at 210.

<sup>293</sup> *Id.* at 211.

<sup>294</sup> *Ungar v. PLO*, 402 F.3d 274, 280 (1st Cir. 2005) (quoting *Baker*, 369 U.S. at 217).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

FSIA and the ATA is “to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime.”<sup>297</sup> The second and third hurdles present no insuperable obstacles. The courts are able to solve the issue before them by accessing judicially manageable standards, and these standards do not require the court to make nonjudicial policy determinations. The determination of whether the Palestinian Authority has adduced sufficient evidence to satisfy the definition of a “state” is appropriate for a judicial body.<sup>298</sup> The final three hurdles are “relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.”<sup>299</sup> This is not the case here. “[T]he political branches have enacted a law that leaves undiminished their ability either to recognize or withhold recognition from foreign states, while leaving to the courts the responsibility of determining the existence vel non of statehood for jurisdictional purposes.”<sup>300</sup> Moreover, the determination that the Palestinian Authority is not entitled to foreign sovereign immunity “is not incompatible with any formal position thus far taken by the political branches.”<sup>301</sup>

The court also noted that “in these tempestuous times, any decision of a United States court on matters relating to the Israeli-Palestinian conflict will engender strong feelings.”<sup>302</sup> On the other hand, “the capacity to stir emotions is not enough to render an issue nonjusticiable. For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones.”<sup>303</sup>

Fourteen years before, in 1991, the Second Circuit reached the same conclusion in *Klinghoffer v. S.N.C. Achille Lauro* when the PLO sought to dismiss the case on the grounds of non-justiciability.<sup>304</sup> “On October 7, 1985, four persons seized the Italian cruise liner Achille Lauro in the Eastern Mediterranean Sea. During the course of the incident, the hijackers murdered an elderly Jewish-American passenger, Leon Klinghoffer, by throwing him and the wheelchair in which he was confined overboard.”<sup>305</sup> The victim’s estate brought in the court a tort action against various defendants, who impleaded the PLO.<sup>306</sup> The PLO argued that the case raised non-justiciable political questions.<sup>307</sup> The court denied the argument for two reasons. First, the court states that “[t]he fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question.”<sup>308</sup> Second, the court concluded that all the six discussed tests put forth in *Baker v. Carr*, weighed against applying the political question doctrine.<sup>309</sup> The court also noted that common law tort claims are constitutionally committed to the judicial branch and pointed out that Congress had expressly endorsed these types of lawsuits under the ATA.<sup>310</sup>

In sum, the U.S. courts decided that the political question doctrine does not preclude judicial resolution of the actions filed by the terror victims.

### 3. Conclusion: Actions Filed by Terror Victims Against the Palestinian Authority Are Justiciable in Domestic Courts

The doctrine of non-justiciability should not void the terror victims’ actions. The doctrine of non-justiciability is not applicable when impingement of human rights is involved. Furthermore, the suits against the Palestinian Authority may raise

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 281.

<sup>299</sup> *Id.* (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> 937 F.2d 44 (2d Cir. 1991).

<sup>305</sup> *Id.* at 47.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 49.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>310</sup> *Id.*; see also *Knox v. PLO*, 306 F. Supp. 2d 424, 449 (S.D.N.Y. 2004).

political aspects, but the dominant nature of the suits is not political. The approach articulated by the U.S. courts supports this conclusion. In view of the foregoing, suits against the Palestinian Authority should be justiciable in the Israeli courts.

#### D. What Is the Appropriate Forum to Deal with Actions Filed by Terror Victims Against the Palestinian Authority?

##### 1. *The Doctrine of Forum Non Conveniens*

The doctrine of forum non conveniens permits a court to dismiss a case where an alternative forum that is fair to the parties and substantially more convenient for them is available in another country.<sup>311</sup> Generally, there is a strong presumption in favor of the plaintiff's choice of forum, especially if the plaintiff is a resident of the forum.<sup>312</sup> The defendant must first demonstrate "that an adequate alternative forum exists, and then that considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum."<sup>313</sup> The possibility of an unfavorable change in the substantive or procedural law is ordinarily not a relevant consideration, unless the remedy provided by the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all."<sup>314</sup>

##### 2. *The Doctrine of Forum Non Conveniens and the Actions Against the Palestinian Authority Under Israeli Law*

The doctrine of forum non conveniens is also applicable under Israeli law.<sup>315</sup> A domestic court is able to deny an action if a forum in another country is equitable and more convenient for the parties.<sup>316</sup> The convenient forum is the forum to which the alleged tort has the most links.<sup>317</sup> This approach, sometimes called the "majority of links" or "center of gravity" approach, offers an efficient rule of preference, able to assist in solving most cases of forums competition.<sup>318</sup> It was emphasized that it should be an actual possibility to litigate the action in the alternative forum.<sup>319</sup> Yet, there is a strong presumption in favor of the domestic forum. Accordingly, only in rare occasions do courts dismiss cases merely on the grounds of forum non conveniens doctrine.<sup>320</sup>

Is the doctrine of forum non conveniens an obstacle for the terror victims in their actions against the Palestinian Authority? The Interim Agreement between Israel and the Palestinians permits an Israeli to file a suit in a Palestinian court.<sup>321</sup> However, the agreement does not treat—for obvious reasons—a scenario of filing a suit against the Palestinian

<sup>311</sup> See Heiser, *supra* note 234, at 27; see also *Nowak v. Tak How Inv. Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996).

<sup>312</sup> See *Islamic Republic of Iran v. Pahlavi*, 467 N.E. 2d 245, 249 (N.Y. 1984).

<sup>313</sup> See Heiser, *supra* note 234, at 28 (citations omitted). The author also states that "[t]he threshold requirement is usually satisfied if the defendant shows that an alternative forum provides some redress for the type of claims alleged in the plaintiff's complaint and that the defendant is amenable to suit in the alternative forum." *Id.* (citation omitted). See generally *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8 (1st Cir. 2000) (providing guidelines regarding the issue of forum non conveniens).

<sup>314</sup> See Heiser, *supra* note 234, at 28 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)).

<sup>315</sup> See, e.g., CA 1432/03 *Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an* [2004] IsrSC 59(1) 345 (stating that the doctrine of forum non conveniens is applicable in the Israeli law and that there is a strong presumption in favor of the domestic forum).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*; see CA 4716/93 *Arab Ins. Co. v. Zariqat* [1993] IsrSC 48(3) 265, 269; CA 851/99 *Van Doosselaere v. Depyepere* [1999] IsrSC 57(1) 800, 813. However, this approach has been criticized. It has been claimed that such an approach is liable to impinge upon legal certainty, and even be used as a manipulative mechanism in the hands of the court. See MICHAEL KARAYANNI, *THE INFLUENCE OF THE CHOICE OF LAW PROCESS ON INTERNATIONAL JURISDICTION* 53 (2002).

<sup>319</sup> HCJ 8754/00 *Ron v. Beit Hadin Harabani* [2001] IsrSC 56(2) 625, 655 (indicating that there should be an actual possibility to litigate the action in the alternative forum).

<sup>320</sup> See, e.g., CA 9141/00 *Lang v. Markas* [2001] IsrSC 56(1) 118, 123 (concluding that there is a strong presumption in favor of the domestic forum).

<sup>321</sup> Interim Agreement, *supra* note 131, Annex IV Protocol Concerning Legal Affairs, art. III. Article III(2) states that in cases where an Israeli is a party, the Palestinian courts have jurisdiction over civil actions in the following cases:

- a. the subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory);
- b. the subject matter of the action is real property located in the Territory;
- c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority;

Authority due to its involvement in terror acts.<sup>322</sup> It is therefore, the courts' role to provide an answer to this question. In several suits brought in the District Court in Jerusalem by terror victims, the Palestinian Authority raised the doctrine of forum non conveniens as a ground for dismissing the cases.<sup>323</sup> The Palestinian Authority claimed that the appropriate forum for the actions should be the Palestinian court.<sup>324</sup> The court restated the basic principles concerning the doctrine of forum non conveniens but refrained from deciding whether the doctrine is applicable with respect to the suits against the Palestinian Authority.<sup>325</sup> The court added that the applicability of the doctrine of forum non conveniens has to be examined case by case through implementing the "majority of links" approach.<sup>326</sup> Affirming the ruling of the court, the Supreme Court did not address the issue.<sup>327</sup>

However, based on the doctrine's principles one can certainly argue that the doctrine of forum non conveniens should not apply with respect to suits against the Palestinian Authority for several reasons. First, courts should generally not grant a forum non conveniens dismissal where the plaintiff is a resident of Israel since there is a strong presumption in favor of the domestic forum.<sup>328</sup> Second, the Israeli courts have more links to the alleged tort than the Palestinian courts: the victims are Israelis, the terror acts were executed in Israel, and the evidence and witnesses are likely to be located in Israel. In this sense, the Israeli court is the convenient forum.<sup>329</sup> Third, under the Israeli Supreme Court's precedents, only in rare occasions do courts dismiss cases merely on the grounds of the doctrine.<sup>330</sup> Suits filed by Israeli terror victims against the Palestinian Authority do not involve considerations of convenience and judicial efficiency that fall into these rare occasions. Furthermore, there is no unique advantage in litigating these suits in Palestinian courts. In view of the foregoing, the doctrine of forum non conveniens should not impede terror victims in their actions against the Palestinian Authority.

### 3. A Comparative View: The Doctrine of Forum Non Conveniens and the U.S. Law's Approach Towards Actions Against the Palestinian Authority

As a defendant in several actions submitted in the United States, the Palestinian Authority filed a motion to dismiss the actions on the grounds of forum non conveniens. Generally, the court has the discretion to grant or deny a motion to dismiss based on the doctrine of forum non conveniens after consideration of the relevant factors.<sup>331</sup> Nonetheless, suits against the

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d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement;

e. the Israeli party is a plaintiff who has filed an action in a Palestinian court. If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required; or

f. actions concerning other matters as agreed between the sides.

*Id.* The Knesset embraced this article to the domestic law by enacting implementing legislation of the agreement. See The Extension of Emergency Regulations Act (Judea and Samaria—Judging Offences and Legal Assistance), 1967, S.H. 20, art. 2(b).

<sup>322</sup> The agreements between the parties were designed to bring peace and hope; they were not meant to treat terror acts initiated by one party against the other. See Interim Agreement, *supra* note 131, pmb1.

Reaffirming their determination to put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights;

Reaffirming their desire to achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process;

. . . .

Hereby agree as follows . . . .

*Id.*

<sup>323</sup> CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

<sup>328</sup> See, e.g., CA 9141/00 Lang v. Markas [2001] IsrSC 56(1) 118, 123 (concluding that there is a strong presumption in favor of the domestic forum).

<sup>329</sup> See, e.g., CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345.

<sup>330</sup> *Lang*, IsrSC 56(1) at 123.

<sup>331</sup> *Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 100 (D.R.I. 2001). Discussing the relevant considerations, the court stated:

Palestinian Authority are filed under the ATA<sup>332</sup> that limits the circumstances under which a court can entertain a motion to dismiss on the grounds of the inconvenience of the forum. Specifically, § 2334(d) provides that a district court shall not dismiss any action brought under the ATA on the grounds of the inconvenience of the forum, unless:

- (1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants;
- (2) that foreign court is significantly more convenient and appropriate; and
- (3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.<sup>333</sup>

Consequently, the inclusion of a claim under the ATA would reduce the prospects of a forum non conveniens dismissal as to render the motion almost meaningless.<sup>334</sup>

For instance, in the case of *Estates of Ungar v. Palestinian Authority*, brought in the federal court in Rhode Island under the ATA, the court denied the motion to dismiss under the doctrine of forum non conveniens.<sup>335</sup> The court explained that the Palestinian Authority did not name any specific adequate alternative forum and stated that “without some degree of proof as to whether the alternative forum has jurisdiction over the subject matter and all defendants, and offers a remedy which is substantially the same as the one available in this Court,”<sup>336</sup> the motion filed by the Palestinian Authority has no base.

As opposed to the Israeli legislation, the ATA provides guidelines with respect to the applicability of the doctrine of forum non conveniens to suits filed by terror victims. Not only does the ATA regulate the matter, it limits significantly the likelihood of granting a motion to dismiss on the grounds of the inconvenience of the forum.

#### 4. Conclusion: The Israeli Court Is the Convenient Forum for Litigating Actions Against the Palestinian Authority

As explained, the Israeli court is the most convenient and appropriate forum to litigate actions filed by terror victims against the Palestinian Authority. The actions do not involve considerations of judicial efficiency that justify litigating the suits in any other forum. The U.S. view, as articulated in legislation and judgments, supports this conclusion. Respectively, the doctrine of forum non conveniens should not be applied to those actions.

### E. Which Law Should the Courts Apply When Treating Actions of Terror Victims Against the Palestinian Authority?

#### 1. The “Choice of Law” Determination Under Israeli Law

Concluding that the actions filed by terror victims against the Palestinian Authority should be litigated in the Israeli courts, it has to be determined which law applies to these actions. The situation in which a choice of the applying legal system must be made between different legal systems that would apply themselves upon the same case by force of a number of links is called “choice of law” or “conflict of laws.”<sup>337</sup> The legal realm of conflict of laws is usually categorized as part of

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An illustrative list of considerations relevant to the private interest includes: “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508. Factors of public interest include administrative difficulties for courts with overloaded dockets, the imposition of jury duty on a community with no connection to the underlying dispute, the “local interest in having localized controversies decided at home,” and the court’s familiarity with the law to be applied in the case. *Id.* at 508–509.

*Id.* (quoting *Gulf Oil Corp.*, 330 U.S. 501 (1947)).

<sup>332</sup> The Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (2000).

<sup>333</sup> *Id.* § 2334(d).

<sup>334</sup> See Heiser, *supra* note 234, at 27; see also Goldsmith & Goodman, *supra* note 228, at 45 (reaching the same conclusion with respect to suits filed under the FSIA).

<sup>335</sup> *Ungar*, 153 F. Supp. 2d at 100.

<sup>336</sup> *Id.*

<sup>337</sup> See A. LEVONTINE, CONFLICT OF LAW—A BILL 12 (1987) (discussing the “choice of law” theories).

private international law.<sup>338</sup> The choice of law should be made in light of the rules set out in the law of the forum hearing the case.<sup>339</sup> Each legal field has its own unique rule of choice of law.<sup>340</sup> Thus, the Israeli law provides that the law applying to a tort which has links to more than one legal system will usually be the law in the place the tortious conduct was committed (*lex locus delicti*).<sup>341</sup>

Which law should the Israeli courts apply when engaging in actions filed by terror victims against the Palestinian Authority? The answer to this question cannot be found in the agreements between Israel and the Palestinians. The agreements do not treat a scenario of filing a suit against the Palestinian Authority due to its involvement in terror acts.<sup>342</sup> The domestic legislation does not address the matter either. On the other hand, the Israeli courts have provided an answer to the question.<sup>343</sup>

In the cases brought in the District Court in Jerusalem, the Palestinian Authority contended that the law governing the issue is the Palestinian law since several elements of the alleged tortious conduct occurred in territories controlled by the Palestinian Authority.<sup>344</sup> The court was not convinced by this contention. Stating that the tortious conduct as well as the damage occurred in Israel, the court concluded that the sole foreign element involved in the suits is the defendant, i.e. the Palestinian Authority.<sup>345</sup> In these circumstances, and notably since the tortious conduct occurred within the forum's territory, it was determined that the Israeli law should be applied.<sup>346</sup> The Supreme Court affirmed this opinion.<sup>347</sup>

## 2. A Comparative View: The U.S. Courts' Approach

Actions against the Palestinian Authority filed by terror victims that are brought in the U.S. courts may also involve choice of law issue.<sup>348</sup> The case of *Estates of Ungar v. Palestinian Authority*<sup>349</sup> illustrates how the matter may arise. The Ungars' estate filed the action in the federal court in Rhode Island under state tort law and the ATA.<sup>350</sup> As a starting point, the court "correctly recognized that it must determine whether the substantive law of Rhode Island or of Israel governed the state law tort claims."<sup>351</sup> The court then applied Rhode Island's "choice of law" doctrine,<sup>352</sup> and determined that the Israeli law governed the action.<sup>353</sup>

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<sup>338</sup> CA 1432/03 Yonon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345, 348 (concluding that the law applying to a tort which has links to more than one legal system should be the law in the place the tortious conduct was committed).

<sup>339</sup> *Id.* at 359.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> See *supra* note 322 and accompanying text.

<sup>343</sup> CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

<sup>348</sup> Heiser, *supra* note 234, at 30.

<sup>349</sup> 153 F. Supp. 2d 76 (D.R.I. 2001).

<sup>350</sup> *Id.* at 77.

<sup>351</sup> Heiser, *supra* note 234, at 30.

<sup>352</sup> *Ungar*, 153 F. Supp. 2d at 98.

This Court applies Rhode Island law to issues of state law that arise in federal court because the *Erie* doctrine extends to actions in which federal jurisdiction is premised on supplemental jurisdiction over state law claims. *Doty v. Sewall*, 908 F.2d 1053, 1063 (1st Cir. 1990) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966)). This includes the application of Rhode Island's conflict-of-laws provisions.

*Id.*

<sup>353</sup> *Id.* at 99 ("[I]t is the determination of this Court that Rhode Island law requires the application of Israeli law to the state law claims contained in plaintiffs' complaint"). In absence of specific Israeli legislation, the claims were rested upon the general torts of the Israeli Civil Wrongs Ordinance, i.e. negligence and breach of statutory obligation. See discussion *infra* Part III.F.2.

The issue of “choice of law” did not arise with respect to other actions filed in the United States by terror victims against the Palestinian Authority. However, “choice of law” determinations may still be necessary though the result can vary under different state doctrines and factual circumstances.<sup>354</sup>

### 3. Conclusion: The Israeli Law Should Be Applied

According to the Israeli rules of private international law, the law applying to a tort that has links to more than one legal system will usually be the law in the place the tortious conduct occurred.<sup>355</sup> Based on this rule and since the tortious conducts, i.e. the terror acts, were committed in Israel, the Israeli court concluded that the Israeli law is the law to be applied when treating the actions against the Palestinian Authority.<sup>356</sup> A different conclusion would have created unjustified difficulties for the terror victims.

Determining that the Israeli law is the law to be applied, it is time to examine upon what sources of law the terror victims can rest their claims.

## F. Upon What Sources of Law Can the Terror Victims Base Their Actions?

### 1. The International Agreements Between the Parties

Under the Israeli law, there is a significant distinction “between the rules of customary international law, including the general legal principles embodied in international law, and the rules of conventional international law.”<sup>357</sup> Customary international law is an integral part of the Israeli law, “but where obvious conflict arises between those rules and Israeli enacted law, the enacted law prevails.”<sup>358</sup> That is not the case regarding conventional law:

Like the English practice . . . and differing from the American practice under its Constitution, the rules of conventional international law are not adopted automatically and do not become part of the law as applicable in Israel, so long as they have not been adopted or incorporated by way of statutory enactment . . . .<sup>359</sup>

The agreements between Israel and the Palestinians are international agreements. Regardless of the force and validity of the agreements in the international law sphere, it is not a law that the domestic courts will recognize. Indeed, the agreements grant rights and impose obligations, but these are the rights and obligations of the entities that signed the agreements.<sup>360</sup> Such agreements do not fall at all under the jurisdiction of the Israeli courts “except in so far as they, or the rights and duties deriving from them, have become integrated into state legislation and received the status of binding law.”<sup>361</sup>

The agreements between the parties were designed to bring peace and hope; they were not meant to treat terror acts initiated by one party against the other.<sup>362</sup> Moreover, the Interim Agreement is premised upon a mutual fight against terror and calls upon “[b]oth sides [to] take all measures necessary in order to prevent acts of terrorism.”<sup>363</sup> The agreement did not

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<sup>354</sup> See Heiser, *supra* note 234, at 30 (discussing “choice of law” determinations under the FSIA with regard to actions against sovereign entities).

<sup>355</sup> CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara’an [2004] IsrSC 59(1) 345.

<sup>356</sup> CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

<sup>357</sup> HCJ 69/81 Abu A’ita v. Commander of the Judea and Samaria Area [1983] IsrSC 37(2) 197, 234 (discussing the applicability of customary international law in the Israeli law).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*; see also HCJ 785/87 Afu v. Commander of IDF Forces in the West Bank [1987] IsrSC 42(2) 4, 35 (stating that rules of conventional international law are not a part of the Israeli law as long as they have not been adopted or incorporated by domestic legislation); Zilbershatz, *supra* note 215, at 317 (discussing the applicability of international law in the Israeli law).

<sup>360</sup> CA 25/55 Custodian of Absentee Prop. v. Samara [1956] IsrSC 10 1824, 1829 (concluding that rights in international agreements that were not adopted through domestic legislation do not provide a cause of action in domestic courts).

<sup>361</sup> *Id.*; see also Ruth Lapidot, *International Law within the Israel Legal System*, 24 ISR. L. REV. 451, 458 (1990) (discussing the applicability of international law in the Israeli law).

<sup>362</sup> Interim Agreement, *supra* note 131, pmb1.

<sup>363</sup> *Id.* art. XV para. 1.

predict a scenario of filing a suit against the Palestinian Authority due to its involvement in terror acts. Hence, the agreements do not grant the terror victims an explicit right to sue the Palestinian Authority. But even if the agreements would have stipulated that certain rights are to be vested in terror victims, this obligation is in the nature of an international obligation only.<sup>364</sup> That is to say, the terror victims would not have acquired any substantial rights on the basis of the agreements and could not have effectuated their rights in court as beneficiaries of the agreements.<sup>365</sup> Terror victims may, however, rest their actions upon domestic law.

## 2. A Cause of Action Under Domestic Law

As demonstrated,<sup>366</sup> it was proven that the Palestinian Authority was “involved in the planning and execution of terror attacks. . . [It] encouraged them ideologically [and] authorized them financially.”<sup>367</sup> “The Palestinian Authority allocated vast sums of money from its budget to pay salaries to . . . terrorists . . .”<sup>368</sup> To finance terrorist activity, the Palestinian Authority used funds donated by other countries, including the European Union.<sup>369</sup> Moreover, the Palestinian Authority established close links with Iran and Iraq (under the regime of Saddam Hussein) that supplied funds and munitions.<sup>370</sup> In light of the foregoing, it seems that terror victims have a general factual basis to file suits against the Palestinian Authority.

In absence of specific legislation that governs the matter of suing the Palestinian Authority for its involvement in terror acts, the victims may base their actions upon the Israeli Civil Wrongs Ordinance.<sup>371</sup> The statute regulates the basic principles of torts law, and sets the torts of negligence and breach of statutory obligation as general torts.<sup>372</sup> The Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages.<sup>373</sup>

Under the negligence tort, terror victims may allege that a reasonable entity acting in the same circumstances would have foreseen that the victims would likely be injured by the acts and omissions of the Palestinian Authority. According to this argument, the Palestinian Authority failed to use the skill and degree of caution that any reasonable entity or organization would have used under similar circumstances. As a result, the terror victims suffered severe physical, emotional, and financial damages.

The breach of statutory obligation tort provides a cause of action for the failure to comply with an obligation imposed by any Israeli statute or regulation. Examples of statutory obligations breached by the Palestinian Authority in these circumstances are murder and assault offenses under the Israeli Penal Code of 1977,<sup>374</sup> and the prohibition to execute and support terror acts under the 1948 Prevention of Terror Act.<sup>375</sup> Consequently, the victims suffered severe physical, emotional, and financial damages.

As described previously, one suit brought under the Israeli Civil Wrongs Ordinance by terror victims in U.S. courts was successful.<sup>376</sup> This was the case of *Estates of Ungar v. Palestinian Authority* in which the federal court in Rhode Island

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<sup>364</sup> See *Custodian of Absentee Prop.*, IsrSC 10 at 1829.

<sup>365</sup> *Id.*

<sup>366</sup> See discussion *supra* Part II.A.4.

<sup>367</sup> TERRORISM AGAINST ISRAEL, *supra* note 18, Introduction, main finding 2.

<sup>368</sup> *Id.* Introduction, main finding 5.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> Civil Wrongs Ordinance, 1968, S.H. 101.

<sup>372</sup> *Id.* The Civil Wrongs Ordinance also deals with particular torts such as unjustified detention or nuisance, but none of them is relevant to the discussed topic. *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> Penal Code, 1977, S.H. 226.

<sup>375</sup> Prevention of Terror Act, 1948, S.H. 73.

<sup>376</sup> The vast majority of the suits filed by terror victims against the Palestinian Authority are based upon the Anti-Terrorism Act of 1991 (ATA), which permits American citizens to sue for injuries or death caused by international terrorism. See *supra* note 234 and accompanying text.

concluded that the Israeli law governed the suit.<sup>377</sup> The suit was rested upon the general torts of the Civil Wrongs Ordinance, i.e. negligence and breach of statutory obligation. Granting the suit, the court ultimately entered a default judgment against the Palestinian Authority.<sup>378</sup>

Indeed, the Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages. This legislation is an appropriate legal source on which the terror victims are able to rest their actions for compensation. Yet, the Civil Wrongs Ordinance allegedly did not contemplate to govern damages derived from warlike acts,<sup>379</sup> or to engage in terror acts scenarios. Moreover, no other Israeli statute directly regulates the discussed issue.

### 3. Conclusion: Domestic Law Provides an Adequate Cause of Action

The agreements between Israel and the Palestinians do not provide the terror victims an explicit right to sue the Palestinian Authority for its involvement in terror acts. Therefore, the terror victims must rest their actions upon the domestic law. If an individual commits a breach of statutory obligation causing damages, the Civil Wrongs Ordinance provides a cause of action.<sup>380</sup> This legislation should be considered a satisfactory legal source to sue the Palestinian Authority, but as discussed, the Civil Wrongs Ordinance may not be the ideal vehicle to engage in the matter.

Hence, it seems that enacting new legislation may be a good solution in light of the current legal situation. Such legislation will regulate the question of whether terror victims can sue the Palestinian Authority for its involvement in terror acts. In this sense, the U.S. legislation, notably the ATA,<sup>381</sup> can serve as a role model.

## IV. Summary

The Israelis have suffered from the Palestinian terrorism since Israel's establishment.<sup>382</sup> However, the second Intifada has set a record in the brutality of the terror. More than a thousand Israelis were killed in the attacks which were directed mostly and intentionally upon civilians anywhere, anytime.<sup>383</sup> Clear evidence has shown that the Palestinian Authority was involved in the planning and execution those attacks.<sup>384</sup>

Some will raise an eyebrow, some will call it an absurdity, but the facts speak for themselves: the question whether the terror victims are able to sue the Palestinian Authority for damages caused by its involvement in terror acts is unclear under the Israeli law.<sup>385</sup> On one hand, the domestic criminal procedures against terrorists are not primarily designed to compensate the victims. On the other hand, the terror acts executed by the Palestinian Authority allegedly do not fall within scenarios that the Civil Wrongs Ordinance contemplates. No other statute regulates the issue of suing the Palestinian Authority for its involvement in terror acts. In addition, the Israeli jurisprudential law on the matter is sparse. In those circumstances, no wonder the victims feel that they lose twice: first they were damaged, and then they cannot be compensated.<sup>386</sup>

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<sup>377</sup> 153 F. Supp. 2d 76, 99 (D.R.I. 2001) (“[I]t is the determination of this Court that Rhode Island law requires the application of Israeli law to the state law claims contained in plaintiffs’ complaint”).

<sup>378</sup> *Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004).

<sup>379</sup> *See, e.g.*, HCJ 8276/05 *Adalah v. Minister of Def.* [2006] (unpublished) (stating that the classic law of torts is not designed to govern damages derived from warlike acts); *see also* CA 5946/92 *Bani Uda v. State of Israel* [2002] IsrSC 56(4) 1 (holding that injuries originated from combat acts should not be regulated by the ordinary law of torts).

<sup>380</sup> Civil Wrongs Ordinance, 1968, S.H. 101.

<sup>381</sup> Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (1992).

<sup>382</sup> *See supra* Part II.A.

<sup>383</sup> *See supra* Part II.A.3.

<sup>384</sup> *See supra* Part II.A.4.

<sup>385</sup> *See supra* Part II.B.3.

<sup>386</sup> *See discussion supra* Part II.B.2.

This article seeks to attain a change and suggests a clear solution. It presents a thesis that under international and domestic law, there is a legal basis for the terror victims to sue the Palestinian Authority in Israeli courts. To reach this conclusion, the following five sub-questions had to be addressed in both domestic and international law spheres:

1. Is the Palestinian Authority considered a legal personality; i.e., is the Palestinian Authority entitled to foreign sovereign immunity when it is sued before Israeli courts?<sup>387</sup>

The international agreements between Israel and the Palestinians, as well as the implemented legislation of the agreements, demonstrate that the Palestinian Authority is recognized as a suable legal personality. Following this finding, it had to be determined if the Palestinian Authority is a state that is entitled to foreign sovereign immunity from the jurisdiction of the Israeli courts. As explained, the Palestinian Authority is in many ways *sui generis*. Arguably, it meets the first two elements of a state: permanent population and defined territory. Yet, it does not satisfy the latter two elements: government and capacity to enter into relations with other states. The Palestinian Authority may be close to becoming an independent state, but it has never reached this status.

The Israeli courts have ruled that the determination of the exact political status of the Palestinian Authority has to be made by the government. The U.S. courts, however, addressed the issue differently. Several suits filed by terror victims against the Palestinian Authority were granted under the determination that the Palestinian Authority is not considered a state, and therefore it is not entitled to foreign sovereign immunity. It is suggested that the Israeli courts may apply the approach taken by the U.S. courts.

2. Are actions filed by terror victims against the Palestinian Authority justiciable in domestic courts?<sup>388</sup>

It has been demonstrated that the doctrine of non-justiciability should not impede the actions against the Palestinian Authority. First, the doctrine of non-justiciability is not applicable when impingement on human rights is involved. Second, since the dominant nature of the suits against the Palestinian Authority is not political but rather legal, the suits are likely to be justiciable. The approach articulated by the U.S. courts supports this conclusion.

3. What is the appropriate forum to deal with actions filed by terror victims against the Palestinian Authority?<sup>389</sup>

The Israeli court is the most appropriate forum to litigate actions filed by terror victims against the Palestinian Authority for three reasons. First, the plaintiffs are residents of Israel and there is a strong presumption in favor of the domestic forum. Second, the Israeli courts have more links to the alleged tort than the Palestinian courts. Third, suits filed by Israeli terror victims against the Palestinian Authority do not involve considerations of convenience and judicial efficiency that justify litigating the suits in Palestinian courts. The U.S. view as expressed in legislation and judgments supports this position.

4. Assuming the Israeli courts are entitled to treat those actions, which law should be applied?<sup>390</sup>

Under the Israeli rules of private international law, the law applying to a tort that has links to more than one legal system will usually be the law in the place the tortious conduct occurred. Because the terror acts were committed in Israel, the Israeli court concluded that the Israeli law is the law that should be applied when treating the actions against the Palestinian Authority.

5. Upon what sources of law can the terror victims base their actions?<sup>391</sup>

Since the agreements between Israel and the Palestinians do not grant the terror victims an explicit right to sue the Palestinian Authority, the victims must rest their actions upon domestic law. The latter through the Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has occurred and has caused damages. This legislation should be considered a satisfactory legal source to sue the Palestinian Authority.

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<sup>387</sup> See discussion *supra* Part III.B.

<sup>388</sup> See discussion *supra* Part III.C.

<sup>389</sup> See discussion *supra* Part III.D.

<sup>390</sup> See discussion *supra* Part III.E.

<sup>391</sup> See discussion *supra* Part III.F.

Indeed, after concluding that the Palestinian Authority is a legal personality, but not a state and therefore is not immune from civil actions; actions filed by terror victims against the Palestinian Authority are justiciable in domestic courts; the Israeli court is the appropriate forum for litigating this kind of actions; the Israeli law should be applied when treating the actions; and terror victims may rest their actions upon the domestic Civil Wrongs Ordinance when suing the Palestinian Authority for compensation; it is now clear that there is a solid legal basis for the terror victims to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terror acts during the second Intifada. Their path towards compensation is paved.

However, there is no absolute certainty that the described path would be acceptable for the current legal situation in Israel. Consequently, this article also provides a proposal for domestic legislation designed to regulate the matter of suing the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.<sup>392</sup>

The question placed in the heart of this article is whether the Palestinian Authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts during the second Intifada. This article has answered this question in the affirmative. The affirmative answer may create a significant and actual change. It may render hope, relief and a sense of justice. It may prove that the law is able to come to the victims' aid.

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<sup>392</sup> See *infra* App.

## Appendix

### A Proposal for Designated Legislation

The following legislation proposal is designed to regulate and clarify the current legal framework with respect to both substantial and procedural aspects of the capability to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism. The proposal reflects the conclusions and lessons described in the article and is based *inter alia* on the pertinent provisions of the ATA<sup>393</sup> and the existing domestic legislation.

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Actions Against the Palestinian Authority for its Involvement in Terrorism Act of 2008 (AAPAITA)

#### § 1. Definitions

As used in this act—

- (1) The term “terrorism” means activities that—
  - (A) Involve violent acts or acts dangerous to human life that are a violation of the laws of Israel to include customary international law, or that would be a violation if committed within the jurisdiction of Israel; and
  - (B) Appear to be intended—
    - (i) To intimidate or coerce a civilian population; or
    - (ii) To influence the policy of the government by intimidation or coercion; or
    - (iii) To affect the conduct of the government by mass destruction, assassination, or kidnapping.
- (2) The term “Palestinian Authority” means the interim administrative organization which was established pursuant to the Oslo Accords between the PLO and the government of Israel, to include its officials and its collaborators.
- (3) The term “individual” means any person or entity capable of holding a legal or beneficial interest in property.

#### § 2. Jurisdiction and General Provisions

- (a) General Principle.— The Palestinian Authority is a suable legal personality.
- (b) Action.— Any individual injured in his or her person, property, or business by reason of an act of terrorism executed by the Palestinian Authority, or his or her estate, survivors, or heirs, may sue the Palestinian Authority in any appropriate Israeli court and shall recover the damages he or she sustains and the cost of the action, including attorney’s fees.
- (c) Foreign Sovereign Immunity.— The court shall not dismiss any action brought under this act on the grounds of foreign sovereign immunity, unless the court is convinced that the Palestinian Authority is considered a state which possesses foreign sovereign immunity.
- (d) Non-justiciability.— The court shall not dismiss any action brought under this act on the grounds of non-justiciability, unless the court is convinced that the dominant nature of the action is political.
- (e) Choice of Law.— The law applying to an action brought under this act is the Israeli law, unless the court is convinced that other law has more links to the action than the Israeli law has.
- (f) Convenience of the Forum.— The court shall not dismiss any action brought under this act on the grounds of the inconvenience or inappropriateness of the forum chosen, unless—
  - (1) The action may be maintained in a foreign court that has direct jurisdiction over the subject matter and over all the defendants;
  - (2) That foreign court is significantly more convenient and appropriate; and
  - (3) That foreign court offers a remedy which is substantially the same as the one available in the Israeli courts.

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<sup>393</sup> The Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (1992).