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Developing tort liability in warfare: a reply

Haim Abraham *

I am grateful to Paula Giliker, Uglješa Grušić, and Luke Moffett for their insightful, rigorous, and thought-provoking engagements with my work. Their analyses advance the conversation by testing the liability framework and arguments that I offer in *Tort Liability in Warfare* through a tort lawyer's perspective, a private international law perspective, and an international law of state responsibility perspective. Each of them critically engages with and illuminates various elements of the manuscript, yet they all share one core query—can the tort liability framework I propose work in practice?

In this brief reply, I take up their engagements sequentially, starting with the arguments that examine *Tort Liability in Warfare* from within tort law's own sensibilities, and ending with the analysis that takes an external viewpoint to tort remedies for belligerent wrongs. Each of my critics shows that there are challenges to the implementation of the framework I offer. Giliker asks whether this framework might be too novel for traditional tort lawyers to accept, and notes that the applicability of some doctrines might be too susceptible to jurisdictional variations to succeed across the common law world. Grušić argues that the theoretical framework and its practical implementation would have benefited from addressing choice of law rules and additional immunities to liability. And while Moffett concurs that tort law could be valuable for redressing civilian harm in warfare, he suggests that a statutory scheme could provide remedies more adequately given the power imbalance between states and individuals.

The broad structure of my reply turns on the theoretical commitments undertaken in *Tort Liability in Warfare* to be able to offer a coherent and comprehensive account of

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why states could and should be held liable in tort, by their own domestic courts, for the wrongs they inflict on civilians in combat. First, warfare is a distinct moral and legal sphere, one in which unpacking what are states' and individuals' rights and obligations, as well as what could be considered as a wrong, requires turning to the norms that regulate actual engagement in hostilities—international humanitarian law and the rules of engagement.[1] Second, given the distinctiveness of warfare, corrective justice yields coherent and consistent theoretical underpinnings for tort liability, whereas its main theoretical counterpart—law and economics—fall short theoretically and empirically.[2] Third, substantive rule of law principles, which rationalized the move away from states' blanket immunity from tort liability throughout the common law world in the early and mid-twentieth century, identify a right to compensation in tort as a key and basic feature of the rule of law, and a limitation of this right requires a robust justification.[3]

1. Novel, yet ordinary

A good starting point would be to address the concern that *Tort Liability in Warfare* might prove too novel in two ways. First, it challenges the orthodox view, which maintains that tort law simply could not and should not apply to combat. Second, the manuscript could be read as prompting courts not only to abolish or minimize exceptions that limit the ability to hold states liable for the wrongs they inflict on civilians in warfare, but also to adopt norms from a different field. Giliker notes:

> Opponents, many from the corrective justice camp, have sought to defend what they see as the integrity of domestic tort law values … However, the current position of the UK Supreme Court is that the common law should not be "gold-plated" (go beyond what is necessary) by reference to EU and human rights law … The challenge facing Abraham's thesis is therefore a stark one: how to overcome the objection that his thesis would "distort" core tort law principle? Will the allure of corrective justice reasoning be sufficient to encourage lawyers to see beyond doctrinal boundaries and accept that the context of warfare requires us to view tort law in the light of international humanitarian law and rules of engagement? Or will a novel thesis prove too novel for traditional domestic lawyers? [footnotes omitted]

There is one sense in which Giliker's observation about the novelty of the manuscript is one which I can whole-heartedly agree with. Thus far, Legislatures and Courts have yet to examine or offer a full, or even thick, theoretical account of states' immunity from tort liability in warfare. There are a few brief comments that hold that tort law cannot apply to the battlefield as a matter of doctrine, or that it

1 Haim Abraham, *Tort Liability in Warfare: States' Wrongs and Civilians' Rights* (Oxford University Press 2024) 5–11; 36–56.

2 *Ibid*, 13–16, 30FN12; Also see: Haim Abraham, 'Tort Liability, Combatant Activities, and the Question of Over-Deterrence' (2022) 47 *Law & Social Inquiry* 885.

3 Abraham (n 1) 59–61, 74–75.

should not apply as a matter of policy, but none really explain why.[4] *Tort Liability in Warfare* is indeed novel in filling this theoretical gap and in calling for the availability of tort remedies when wrongs have been inflicted through actual hostilities.

However, in other respects the arguments I advance are ordinary and should be easy for traditional lawyers to accept. Tort lawyers are no strangers to the applicability of tort law for losses that arise in the context of warfare, but that fall short of engagement in actual hostilities. For instance, tort law has been deemed as applicable to training and equipping operations decisions;[5] vessel malfunctions upon return from the battlefield;[6] air-traffic control services in a mixed civilian-combatant airport;[7] torture and false imprisonment by combatants;[8] use of force in response to public disorder;[9] destruction of property by an auxiliary fuel division;[10] and looting by combatants on a battlefield.[11] The upshot of these examples is that the application of tort law in the context of warfare is ordinary.

While the framework I offer goes beyond the range of cases in which tort law has been deemed applicable thus far, it too should be understood as following ordinary traditional tort law sensibilities. My argument is not that a new tort of violation of international humanitarian law or the rules of engagement be created,[12] nor is it that tort law should be developed in harmony with these 'external' norms. Instead, my argument is that the harms that combatants and states inflict during warfare are no different to those that public officials and bodies inflict during peace. In both contexts, harms are justified and non-wrongful if inflicted while acting within the bounds of authority. While touching another person without their consent is ordinarily a battery, a police officer can touch and even use force against another when arresting a suspect without it being a tort. But if the police officer were to use excessive force in making an arrest, or injured an innocent bystander in the process of an arrest when such injuries are reasonably foreseeable, torts have been inflicted.[13] The reason being that without a justification in the form of proper use of authority, or other statutory or common law immunities, ordinary tort law principles apply. Injuring another without authority is

4 See, for example: *Shaw Savill & Albion Co v Commonwealth* (1940) 66 CLR 344 361; *Koohi v United States* 976 F2d 1328 (1992) 1334–35; CA 5964/92 *Jamal Kasam Bani Uda v Israel* 57(4) PD 1 (2002) 7–8; *Smith v Ministry of Defence* [2013] 4 All ER 794, [84–100] per Lord Hope.

5 *Smith* (n 4), [95] per Lord Hope.

6 *Skeels v United States* 72 F Supp 372 (WD La, 1947) 374; *Johnson v United States* 170 F2d 767 (9th Cir 1948) 769–70.

7 *Badilla v Midwest Air Traffic Control Service, Inc* 8 F4th 105 (2021) 128–31.

8 *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB), [9, 13, 17] per Legatt J.

9 *Bici v Ministry of Defence* [2004] EWHC 786 (QB), [66–72, 101–02] per Mr Justice Elias.

10 CA 623/83 *Levi v Israel* [1986] PD 4(1) 447, 482.

11 CC (Be'er Sheva) 5709-12-12 *Estate of Iman Elhams v Israel* (Nevo, 05/19/2021), [21] per Judge Friedlander.

12 Abraham (n 1) 177–78.

13 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [49, 70, 74] per Lord Reed.

a tort. So much is true for the police officer who is under fire or employs firearms,[14] and equally must be true for combatants and states.

The crux of the argument that traditional lawyers would struggle accepting that tort liability could and should apply to actual hostilities seems to be concerned with the policy implications of the availability of private law remedies in this context. As Giliker notes:

> Undoubtedly, the sticking point will be Lord Hope's final concern in *Smith*: that great care needs to be taken not to subject those responsible to duties that are unrealistic or excessively burdensome. Given that the media response to *Smith*, and that of the armed forces, focused on exactly that issue, there *will* be resistance on this basis. [footnotes omitted]

Giliker's point is a practical one—*Tort Liability in Warfare* seeks to challenge orthodox views, and as such the burden of proof that change is justified and required appears to be on me. This is not the position that follows from substantive rule of law requirements. Recall, that a fundamental element of a rule-of-law-abiding regime is that it offers tort law remedies against wrongdoers, regardless of whether they are private individuals or public officials or bodies. It is on those who wish to limit the availability of tort law to justify such limitations.

Yet, existing justifications for the combatant activities exception fail to meet this requirement. These justifications—separation of powers, over-deterrence, procedural fairness, and judicial and administrative resources—either lack a rational connection between the immunity and the goal it is allegedly supposed to achieve, or go beyond what is necessary to achieve this aim.[15] What we are left with is an immunity from tort liability that is arbitrary, discriminatory, and creates pockets in which combatants and states' powers are unbounded by private law, exacerbating the risk of abuse and misuse of authority. Facing these conclusions, a traditional lawyer should find the framework that I advance in *Tort Liability in Warfare* acceptable and warranted.

2. Application in England and Wales

Both Giliker and Grušić raise several questions about the implementation of *Tort Liability in Warfare* to the law of England and Wales. For example, Giliker questions the viability of vicarious liability claims for sexual violence by combatants against civilians, and also argues that traditional lawyers might only accept that states should have non-delegable duties to ensure the health and safety of prisoners of war. She rejects the likelihood that such duties will be adopted in relation to ensuring that belligerent wrongs are not sustained, either by occupied populations or by civilians more generally.

14 See, for example: *Priestman v Colangelo, Shynall and Smythson* [1959] SCR 615, [24–26] per Locke J; *Poupart v Lafortune* [1974] SCR 175, [16] per Fauteux C. J. *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12.

15 Abraham (n 1) 79–88.

Nevertheless, I remain hesitant regarding the possibility of *a priori* identification of outcomes for types of cases of intentional belligerent wrongs, even when the sole jurisdiction examined is England and Wales. Here, the position under statute and case law is, generally, that the Crown can be held vicariously liable for the intentional torts and negligence of its servants and agents, including those of independent contractors who are employed by the Crown.[16] However, it would be impossible to hold that the Crown could be held vicariously liable in relation to all intentional torts, let alone all intentional belligerent wrongs. The reason lies in the demands of the Stage 2 close connection test and the insufficiency of 'but for' causation. As Lord Burrows notes in *BXB*:

> There are two stages to consider in determining vicarious liability … The test at stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment … [I]n applying the "akin to employment" aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment … The test at stage 2 (the "close connection" test) is whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorized to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment … The application of this "close connection" test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorized activities. That there is a causal connection (I e that the "but for" causation test is satisfied) is not sufficient in itself to satisfy the test … [T]he carrying out of the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, will mean that this test is not satisfied. … The same two stages, and the same two tests, apply to cases of sexual abuse as they do to other cases on vicarious liability.[17]

Put differently, it is not enough for the Crown to have provided the means or opportunity for combatants to wrong civilians (i.e. the 'but for' test). Moreover, if the tort was aimed at harming the Crown rather than furthering its interests, a close connection could also be ruled out. Much depends on the particularities of every case.

Consider a soldier who intentionally and knowingly destroys civilian property. In one alternative, the soldier did so because he was frustrated with his commanders and intended for the incident to cause them, or his state, some form of harm, and it seems likely that a close connection would not be found. Directly targeting civilian property is prohibited under international humanitarian law, and doing so does not promote the state's interests. In another alternative, the soldier destroyed civilian property due to a belief that in doing so he is eliminating a security risk or furthering his country's interest against an enemy nation. In this scenario it seems likely that a close connection test could be established. As similar losses could bring about different legal results due to the individual circumstances of each case, I would hesitate to identify *a priori* categories in which vicarious liability would apply to intentional belligerent torts.[18]

16 Sections 2(1) and 38(2) of the Crown Proceedings Act 1947.

17 *BXB v Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953 971–72.

18 Abraham (n 1) 131.

As for the example of sexual abuse as a form of warfare, I would argue that the framework offered in *Tort Liability in Warfare* is not needed to address these kinds of wrongs. The reason being that sexual violence is not a form of engaging in actual hostilities. Just as tort liability was held to apply to victims of torture, false imprisonment, and looting, so would it apply to victims of sexual violence, and there is nothing in existing case law to bar such claims. There would be a question as to whether the Crown could be held vicariously liable for these torts, but it too could be resolved based on the context of each case.

In relation to non-delegable duties, Giliker and I are mostly aligned. We both agree that it is very plausible to hold such duties to exist in relation to prisoners of war. Also, whereas Giliker believes it is very unlikely that non-delegable duties could be recognized to ensure that belligerent wrongs are not sustained by civilians, I simply note that it is a possibility the likelihood of which depends on multiple factors. We diverge in relation to non-delegable duties towards an occupied population, as Giliker believes it would be 'too broad in nature. Can we consider all members of the occupied population "vulnerable" to the level that triggers a non-delegable duty?'

Giliker's question poses two possible factors that might be the source of the challenge for a traditional lawyer—a quantitative one ('all members'), and a qualitative one (how we define 'vulnerable'). The former factor alone does not readily suggest that non-delegable duties should or should not exist. Such duties were recognized in relation to employers' duty to ensure a safe workplace; schools' duty to ensure a safe environment for their students; and medical institutions' duty to ensure that proper care and safety protocols are followed.[19] If we consider the NHS as an example, as of December 2024 it employed over 2 million people and delivered over 18 million treatments that year.[20] Mere scope has not ruled out the existence of non-delegable duties in their regard, and so it would seem that it should not do so when it comes to an occupied population, even if it is considerable in numbers.

As for who should be considered as vulnerable so that non-delegable duties would be owed to them, I concede that even in an occupied territory, some people might be more vulnerable than others. Moreover, the question as to who should qualify as sufficiently vulnerable for a non-delegable duty to be recognized in relation to them could be answered differently based on different theoretical approaches and policy considerations. My point here is that an occupied population is a sufficiently defined and non-transferable class of vulnerable individuals, and as such it is possible to see how non-delegable duties could be owed to them.[21]

19 See, for example: American Law Institute, *Restatement (Second) of Torts* (1965), §416, §427– 427A, §519–524A; *State of New South Wales v Lepore and Another* (2003) 195 ALR 412 438–39; *Woodland v Swimming Teachers Association* [2013] UKSC 66, [6–7] per Lord Sumption.

20 Office for National Statistics, 'Public Sector Employment, UK' <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/publicsectorpersonnel/bulletins/publicsectoremployment/december2024> accessed 7 April 2025; NHS England, 'Waiting List Falls as NHS Staff Treated Record Numbers Last Year' (13 February 2025) <https://www.england.nhs.uk/2025/02/waiting-list-falls-as-nhs-staff-treated-record-numbers-last-year/> accessed 7 April 2025.

21 Abraham (n 1) 134.

Grušić identifies further potential challenges, and argues that three main changes would be required for *Tort Liability in Warfare* to apply in England and Wales:

(1) Expanding the bases of direct tort liability in the 1947 Act to enable the UK government to be directly liable for intentional torts, negligence and for wrongs inflicted by non-combatants;
(2) Dismantling not only the combat immunity doctrine but also the Crown act of state doctrine and statutory defences;
And
(3) Not applying foreign law to tort claims against the UK government and its agents for the external exercise of British executive authority.

For the most part, I agree with Grušić' observations albeit in a somewhat qualified manner. Consider direct and vicarious liability. Grušić is right in noting that Section 2(1)(a) of the Crown Proceeding Act of 1947 waives immunity in tort for those instances that a private person would be liable for torts committed by their servants or agents. He is also right in pointing out that *Tort Liability in Warfare* asserts that liability could and should be available against the state, but the framework advanced here is not one that necessarily requires that both direct and vicarious liability be available. The theoretical conclusions remain valid even if in their implementation the State's liability could only be achieved vicariously. There is no need to amend the Act so that the Crown could be sued directly for all causes of action in tort for my framework to be relevant. Whether or not such changes are done could have an impact on the comparative merits of tort law vis-à-vis its alternatives, which I discuss in Chapter 7 of the manuscript.

As for the need to abolish additional immunities, such a conclusion may be required. My argument is that as the combatant activities exception is not properly justified, as per the requirements of substantive rule of law, the exception needs to be abolished or narrowed.[22] These conclusions would apply to the War Damage Act of 1965 as well as to 'combat immunity' that is grounded in case law. The split of the exception in England and Wales to statute and case law is unique among the jurisdictions I examine,[23] but it does not change the theoretical analysis or conclusions. Put differently, whether the War Damage Act and combat immunity require abolition hinges on whether a narrower version of these immunities could be properly justified.

However, there appears to be no need to dismantle the Crown Act of State Doctrine. Both Grušić and I note that this doctrine does not apply to instances in which an act exceeds what the Crown can lawfully do.[24] My articulation of 'belligerent wrongs' for which there is a corrective justice duty of redress is similar—these losses are only

22 *Ibid*, 88.
23 *Ibid*, 58.
24 *Ibid*, 140FN55 and Grušić' Review paper.

justified and non-wrongful if they cohere with the requirements of international humanitarian law and the rules of engagement. Otherwise, they fall outside the scope of the State's authority and could not be justified.[25] Adding such a qualification to the combatant activities exception would align it better with the requirements of substantive rule of law, and also with the existing approach to the Crown Act of State Doctrine. That said, such alignment does not rule out a need for further limitations of immunities, or even their abolition. To reach this conclusion would require reviewing whether the immunities have been created with authority, to pursue a public purpose, have a rational connection to their justification, and are necessary.[26] Due to limited space for this reply, I will not be able to engage in such an evaluation here, but such an analysis could potentially point out that the Crown Act of State doctrine ought to be abolished.

This brings me to Grušić' last point, according to which the legal position needs to change so that foreign law would not be applied for claims against the Crown and its servants and agents. We both seem to agree that this would be a better normative position.[27] That said, an assessment of case law in which 'combat immunity' was considered reveals that courts in fact do not apply foreign law to the potential liability of the Crown in tort in this context. For example, in the *Mulcahy*, *Multiple Claimants*, and *Smith* cases there is no mention of foreign law or of choice of law rules.[28] This is in line with the more general observation that English courts tend to submit claims against the State to English law rather than foreign law.[29] The upshot seems to be that there is no clear need to amend the operation of choice of law rules of England and Wales for tort liability to be available for belligerent torts inflicted abroad.[30] More generally, and as Grušić accepts in his review, the theoretical arguments advanced in *Tort Liability in Warfare* do not require in-depth analysis for them to be established. Nevertheless, the manuscript opens a door for future work in this area, which would enrich the discourse greatly.

25 *Ibid*, 48–53.

26 TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press 2013) 92; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006) 12–13, 139.

27 Uglješa Grušić, *Torts in UK Foreign Relations* (Oxford University Press 2023) 267–71; Haim Abraham, 'Myths and Misconceptions in Extraterritorial Torts' (2025) 75 *University of Toronto Law Journal* 45, 52–56.

28 *Mulcahy v Ministry of Defence* [1996] QB 732 740–44; *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 (QB); *Bici* (n 9); *Smith* (n 4), [82–100] per Lord Hope; [110–37] per Lord Mance; [157–88] per Lord Carnwath.

29 Grušić (n 27) 175–79.

30 This conclusion could be grounded by the courts in the exceptions to the applicability of the law of the place of the injury in Sections 12, 14(3) of the Private International Law (Miscellaneous Provisions) Act 1995.

3. Beyond tort law

To Giliker and Grušić's observations about potential hurdles to the applicability of the tort liability framework I advance in England and Wales, Moffett adds lessons learned from past armed conflicts and reparations practices. He notes that:

> [T]he existence of reparations for armed conflict arises out of political compromise that informs the law … For common law jurisdictions like the United Kingdom, it would be better to establish a statutory scheme for civilian harm caused by overseas military operations, rather than through private claims before British courts. The reason for this being, that the Northern Ireland, Afghanistan and Iraq experience have all indicated, the imbalance of power between civilians and the State in seeking redress, that makes it a Sisyphean struggle for civilian harm to be remedied.

Chapters 7 and 8 of the manuscript engage with an examination of the merits of tort law to offer redress for losses inflicted during combat, as well as some potential critiques of such a regime. My account does not exclude the possibility of providing civilians with redress for their losses through bodies of law other than tort law, and I acknowledge that there could be valid reasons in any given context for legislatures to do away with tort in favour of other mechanisms.[31]

So, would it be better to have a statutory redress scheme rather than tort law? Perhaps the amalgamation of potential challenges—the traditional lawyer's hesitance, additional immunities, choice of law complexities, and imbalance of power between states and civilians—all point to the conclusion that something other than tort law would be preferable? This is not a question that I believe can be answered in the abstract.

As I have noted above, tort remedies act as a bulwark against abuse and misuse of power and are key to enforcing the rule of law. They allow injured parties to call on the courts' authority to express and vindicate their rights and social standing as free and equal individuals, as well as to identify the wrong and the wrongdoer.[32] Limiting the availability of tort law requires a justification. It is not enough to argue that tort law is empirically or normatively flawed; it must also be shown that the alternative that comes in its place could be sufficiently superior. A statutory civilian redress mechanism may or may not meet this requirement, depending on its structure and viability.

4. Conclusions

I am grateful to Giliker, Grušić, and Moffett for their generous and provocative engagement with my work. In my brief reply, I have endeavoured to explain the basis of my reservation to fully embrace all of the suggestions offered, and I hope that in doing so I

31 Abraham (n 1) 31, 178.
32 *Ibid*, 165.

have contributed to a constructive and continuing conversation within the field. As Moffett notes in his review, 'the origin story of reparations for victims of armed conflict has its roots in tort law'.[33] *Tort Liability in Warfare* aims to go further, showing that tort law's role in addressing private law wrongs on the battlefield is not merely historical and inspirational, but that it could and should be a viable avenue for civilians to stand on their rights.

Disclosure statement

No potential conflict of interest was reported by the author(s).

33 For an in-depth analysis on what international law of state responsibility in armed conflicts has and could learn from domestic tort law, see: Haim Abraham, 'Frameworks for Accountability: How Domestic Tort Law Can Inform the Development of International Law of State Responsibility in Armed Conflicts' (2023) 64 *Virginia Journal of International Law Online* 1.