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# Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism

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# Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism\*

INTRODUCTION .....	526
I. THE CONTEMPORARY LEGAL DEVELOPMENT OF CIVIL TERRORISM LITIGATION .....	531
A. <i>Statutory Causes of Action Against Sponsors of         Terrorism</i> .....	535
B. <i>Effecting Service of Process on Terrorist Defendants</i> .....	546
C. <i>Establishing Personal &amp; Subject Matter Jurisdiction</i> .....	549
D. <i>Defending Choice of Venue in Terrorism Lawsuits</i> .....	553
E. <i>Pre-Trial Discovery Against Terrorist Entities</i> .....	556
F. <i>Executing Judgments Against Private Terrorist         Defendants</i> .....	561
II. JUSTICE IN THE BALANCE: MAKING THE CASE FOR CIVIL TERRORISM LITIGATION .....	566

## INTRODUCTION

With the War on Terrorism now proceeding at full force, it is often difficult to fathom the lethargic development of America's anti-terrorism policy over the past thirty years.<sup>1</sup> In a few instances, the United States has responded to terrorism with direct engagement—military strikes,<sup>2</sup> economic sanctions,<sup>3</sup> and diplomatic isolation.<sup>4</sup> In

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1. See generally Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures, 1960–2000*, 13 TERRORISM & POL. VIOLENCE 15 (addressing differing U.S. responses to acts of international terrorism during the preceding four decades).

2. For example, on August 7, 1998, two bombs were simultaneously detonated outside two American embassies in Kenya and Tanzania, killing twelve Americans and more than two hundred African nationals. See *United States v. Bin Laden*, 92 F. Supp. 2d 225, 227–31 (S.D.N.Y. 2000) (addressing the numerous offenses which arose from defendant Osama bin Laden's involvement in the international bombing of the U.S. embassies). The United States government quickly traced these attacks to a fundamentalist Islamic terror network financed by bin Laden. See David Johnston, *U.S. Says Suspect Does Not Admit Role in Bombings or Ties to Saudi*, N.Y. TIMES, Aug. 18, 1998, at A7; Benjamin Weiser, *Bombing Defendant Said To Claim Coercion*, N.Y. TIMES, Sept. 5, 1998, at A4. In response, the Clinton Administration unilaterally ordered a military strike against suspected terrorist training facilities in Afghanistan and a target in the Sudan thought to be manufacturing weapons for terrorist entities. The military strikes were aimed at both defusing terrorist threats to American interests and deterring additional attacks. See Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1460–62 (Aug. 20, 1998) (justifying

most cases, however, the United States government's responses to terrorism prior to the September 11th attacks had been more insidious and included heightened security measures and more stringent immigration restrictions.<sup>5</sup> The violence and audacity of recent terrorist activities, however, revealed the outlines of a new world, spawning a long overdue war against terrorism as democracies finally began to fully appreciate the grave threat of international terrorism in the twenty-first century.<sup>6</sup> But the terrorist attacks that took place on September 11th were novel only in their magnitude and truculence,<sup>7</sup> and they represented a "shocking culmination" of decades of deadly assaults against American interests both at home and abroad.<sup>8</sup>

Prior to September 11th, increases in international terrorism had been marked by only a faint response from Western democracies, as terrorism quietly "fell into a general background noise of global

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American military action as a response to a perceived threat to American interests abroad); Steven Erlanger, *Missile Strikes Are Seen as New Strategy for U.S.*, N.Y. TIMES, Aug. 23, 1998, § 1, at 10 (framing the American military strikes as a deterrent measure, as opposed to an isolated response pertaining to a particular act of terror).

3. Prior to the embassy bombings in Africa, economic disincentives appeared to be the preferred response to acts of international terrorism. On December 21, 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, killing all 259 people on board, including 188 American citizens. See Michael Wines, *Libya Now Linked to Pan Am Blast*, N.Y. TIMES, Oct. 10, 1990, at A1. Investigators ultimately assigned responsibility to Libyan intelligence officers acting under a directive from their nation's rogue dictatorial regime. See Steven Erlanger, *4 Guilty in Fatal 1986 Berlin Disco Bombing Linked to Libya*, N.Y. TIMES, Nov. 14, 2001, at A7; Andrew Rosenthal, *U.S. Accuses Libya as 2 Are Charged in Pan Am Bombing*, N.Y. TIMES, Nov. 15, 1991, at A1. The first Bush Administration successfully lobbied the international community for economic sanctions that isolated Libya and placed the nation in economic turmoil. See Paul Lewis, *Sanctions on Libya Begin To Take Hold as Deadline Passes*, N.Y. TIMES, Apr. 15, 1992, at A1; Paul Lewis, *U.S. and Allies To Resume Effort To Get Sanctions Against Libya*, N.Y. TIMES, Mar. 26, 1992, at A1; Andrew Rosenthal, *Bush Asks Security Council To Put Sanctions on Libya*, N.Y. TIMES, Feb. 1, 1992, at 6.

4. Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533, 533 (2003); see also Flynt Leverett, *Illusion and Reality*, AM. PROSPECT, Sept. 2006, at 29, 30 (discussing in significant detail the diplomatic "sticks-and-carrots" approach to terrorist engagement that characterized American foreign policy towards the Middle East during the Cold War).

5. See Taylor, *supra* note 4, at 533.

6. See John Norton Moore, *Introduction to CIVIL LITIGATION AGAINST TERRORISM* 3, 3-4 (John Norton Moore ed. 2004).

7. See *id.* at 4.

8. *Id.* For a brief compendium of major terrorist attacks against American interests over the past several decades, see Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 561-62 (2002).

violence.”<sup>9</sup> Even bin Laden’s cryptic “declaration of war”<sup>10</sup> against the United States had fallen by the wayside as the ominous threat of militant Islamic fundamentalism went largely unnoticed by Western governments.<sup>11</sup> Today, America has come to realize that ultimate victory in the War on Terrorism will hinge on our nation’s ability to utilize the entire spectrum of available means to bring terrorists to justice, while striving to maintain our commitment to the rule of law.<sup>12</sup>

Traditionally, the executive branch has shouldered the responsibility of directing U.S. anti-terrorism efforts as part of the President’s broad purview in the areas of foreign policy and international relations.<sup>13</sup> Over the past decade, however, the judicial

9. See Moore, *supra* note 6, at 4.

10. On February 23, 1998, a London-based Arabic newspaper published a formal declaration written by Osama bin Laden and the leaders of several militant Islamic groups. The document criticized America’s role in the Gulf War and its continued presence in the Middle East, and it accused America of “occupying the lands of Islam . . . and using its bases in the [Arabian] peninsula as a spearhead to fight against the neighboring Islamic peoples.” Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT’L L. 1, 12 (2002). It declared that all Muslims had a duty “to fight the invaders of Muslim lands” and concluded “with a *fatwa* [a religious edict] imploring Muslims to engage in jihad” against the United States and its interests abroad. *Id.* at 12–13; see also Bernard Lewis, *License To Kill: Usama bin Laden’s Declaration of Jihad*, 77 FOREIGN AFF., Nov./Dec. 1998, at 14, 14–15 (discussing Osama bin Laden’s formal declaration of war against the United States).

11. Moore, *supra* note 6, at 4.

12. See William P. Hoyer, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State Sponsored Terrorism*, 12 DUKE J. COMP. & INT’L L. 105, 105 (2002) (discussing President Bush’s declaration that America would “not only deal with those who dare attack America,” but also “those who harbor them and feed them and house them”); see also NAT’L COMM’N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INT’L TERRORISM 26 (2000) (Y 3.2:T 27/2000018493), available at <http://purl.access.gpo.gov/GPO/LPS4710> (“The United States should use all the tools at its disposal to stop or disrupt non-state sources of support for international terrorism.”).

13. See Taylor, *supra* note 4, at 533. As one commentator has noted,

In general, the U.S. courts defer to executive foreign policy decisions. The Constitution delegates much of the power to conduct U.S. foreign policy to the executive branch. . . . In the field of foreign relations, any compromise of secrecy and decisiveness weakens the executive branch’s power to negotiate with other nations and use military force.

Michael J. Weiner, *The Importance of a Clear Rule for Judicial Deference to Executive Interpretations of Treaties: A Defense of United States v. Alvarez-Machain*, 12 WIS. INT’L L.J. 125, 132 (1993); see also *An Assessment of the Tools Needed To Fight the Financing of Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 71–77 (2002) [hereinafter *An Assessment of the Tools*], available at [http://judiciary.senate.gov/testimony.cfm?id=519&wit\\_id=1421](http://judiciary.senate.gov/testimony.cfm?id=519&wit_id=1421) (statement of Allan Gerson, Senior Fellow, Council on Foreign Relations); Sean K. Mangan, *Compensation for “Certain” Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payment at an Institutional Cost*, 42 VA. J. INT’L L. 1037, 1067–68 (2002).

branch has also entered the foreign affairs arena, opening the door to permit private citizens to file civil suits “aimed at crippling terrorist organizations at their foundation—their assets, funding, and financial backing.”<sup>14</sup> During this time, America “has become a world leader in providing a judicial forum for private rights of action against foreign terror groups and the regimes that support them.”<sup>15</sup> In *Halberstam v. Welch*,<sup>16</sup> the Court of Appeals for the D.C. Circuit opined that civil terrorism lawsuits serve an invaluable role in supplementing the traditional criminal law process and helping to facilitate government efforts to bankrupt foreign terrorist organizations.<sup>17</sup>

Despite earlier calls for a moratorium on civil suits arising from the September 11th attacks, there has nevertheless been a marked increase in terrorism-related litigation over the past five years.<sup>18</sup> Unlike prior civil suits that generally focused on the terrorists and the sovereign states that directly committed acts of terror, the cases filed in the wake of September 11th have embarked on a new campaign to expand liability beyond the terrorists themselves in order to reach the organizations that support terrorism while hiding beneath a façade of legitimacy.<sup>19</sup>

Although lawsuits against private sponsors of international terrorism appear to be a straightforward pursuit of justice, these cases have quickly evolved into a Byzantine game of complicated legal and political maneuvering—not only among some of the nation’s preeminent law firms,<sup>20</sup> but also between Congress, the judiciary, and

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14. Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT’L L. 679, 682 (2005).

15. Hamish Hume & Gordon Dwyer Todd, *Ambulance Chasing For Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terrorism* (Dec. 1, 2003), [http://www.fed-soc.org/publications/pubID.118/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.118/pub_detail.asp).

16. 705 F.2d 472 (D.C. Cir. 1983).

17. *Id.* at 489.

18. Shortly after the September 11th attacks, the Association of American Justice (formerly the Association of Trial Lawyers of America) called for a moratorium on all civil suits arising from acts of terrorism—the first time the organization had ever called for a moratorium of its kind. See Richard Milin, *Suing Terrorists and Their Private and State Supporters*, N.Y.L.J., Oct. 29, 2001, at S1.

19. See, e.g., *Burnett v. Al Baraka Inv. & Dev. Corp. (Burnett II)*, 292 F. Supp. 2d 9, 10–11 (D.D.C. 2003) (alleging a cause of action against various financial institutions for their complicity in acts of international terrorism).

20. Even prior to the commencement of formal litigation, the Prince Sultan of Saudi Arabia retained Bill Jeffress of Baker Botts, the Arab Bank sought representation at King & Spalding, the Saudi Binladin Group retained Jones Day, and the Al-Rajhi Banking Group negotiated for representation with the law firm of White & Case. Additional law firms representing defendants in recent terrorism-related litigation include Kellog Huber, Akin Gump, and Fulbright & Jaworski. A number of plaintiffs have retained the services

the executive branch.<sup>21</sup> First impressions suggest that civil terrorism lawsuits provide a valuable supplement to America's anti-terrorism strategy. With private lawsuits, however, the fight against terrorism is removed from the political forum and transferred to a world of private international law where the interests of individual plaintiffs may run afoul of the larger, more abstract interests of our national government.<sup>22</sup> In addition to dealing with a host of novel legal issues brought about by civil terrorism litigation, American courts have become the newest battleground in a struggle between the executive branch and Congress. In one respect, the executive branch is seeking to defend its traditional foreign policy powers. In other respects, however, Congress has become increasingly vigilant in its efforts to punish rogue governments, as well as private sponsors of terrorism, in order to allow its constituents a means of financial redress against acts of international terrorism.<sup>23</sup>

This Comment represents only a modest attempt to parse some of the complex legal and political issues arising from lawsuits aimed at private sponsors of terrorism. Indeed, the legal barriers encountered by private litigants in holding terrorists and their supporters civilly accountable for their atrocities are significant. Increasingly, however, plaintiffs have experienced more success in the courtroom,<sup>24</sup> aided by a new battery of federal statutes and a judiciary eager to join the fight against international terror. And despite the political and diplomatic encumbrances inherent when private litigants utilize the judicial branch to target rogue terrorist actors, the use of terrorism lawsuits represents the way of the new world, where democracies must utilize every means at their disposal to fight terrorist actors. Despite recent advancements, however, courts in the United States remain ill-equipped at bringing terrorists to justice on an international scale.<sup>25</sup>

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of international law expert Allan Gerson and famed plaintiff's attorney Ron Motley of Motley Rice, LLC. Interview with Ron Motley, Managing Partner, Motley Rice, LLC, in Mt. Pleasant, S.C. (Dec. 16, 2006 and Dec. 22, 2006).

21. See *infra* Part II.

22. Strauss, *supra* note 14, at 682.

23. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF., Sept./Oct. 2000, at 102, 112.

24. See *infra* notes 88–110 and accompanying text (addressing with greater specificity the issues presented in a number of contemporary cases involving terrorism litigation).

25. Despite the benefits of using civil law to combat terrorism, the limits of our civil justice system—such as the establishment of personal jurisdiction—also place significant restraints on the effectiveness of this tactic. Terrorist adversaries are composed of transient and private networks, and bringing these sometimes invisible enemies to justice has proven elusive even in those cases where plaintiffs have most clearly suffered at the hands of the defendant. See Ruth Wedgwood, *Civil Remedies and Terrorism*, in CIVIL LITIGATION AGAINST TERRORISM, *supra* note 6, at 159–60; see also *infra* Part I.B

The first Part of this Comment surveys the recent legal development of terrorism lawsuits and examines the various causes of action that Congress has created in order to provide civilian-plaintiffs with a means of redressing acts of international terrorism. Additionally, this Part details the unique issues arising with respect to service of process, federal jurisdiction, venue, pre-trial discovery, and the execution of judgments against terrorist defendants. Part II addresses the distinct and complex policy implications that arise when using U.S. civil courts to adjudicate matters traditionally falling within the foreign policy purview of the executive branch. The second Part also outlines the crucial role that private terrorism litigation maintains in America's continuing War on Terrorism.

### I. THE CONTEMPORARY LEGAL DEVELOPMENT OF CIVIL TERRORISM LITIGATION

The September 11th attacks have revitalized the concept of terrorism lawsuits,<sup>26</sup> even though such lawsuits existed long before al-Qaeda became part of our popular nomenclature. Unlike early terrorism lawsuits that generally targeted private terrorist operations and their financial supporters, contemporary terrorism litigation has pursued the foreign governments having facilitated and financed acts of terrorism directed at U.S. nationals traveling abroad.<sup>27</sup>

Between 1975 and 1989, Lebanon was in a constant state of violence as political strife escalated into terrorism—some of which was directed at U.S. citizens residing in the Middle East.<sup>28</sup> Around that same time, a newly formed Iranian government rose to power, led by the hard-line Islamic cleric, Ayatollah Khomeini; the new

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(discussing the difficulties of service of process with respect to terrorist defendants); Part I.C (discussing the difficulties in obtaining personal and subject matter jurisdiction over these defendants).

26. See, e.g., *In re Terrorist Attacks of Sept. 11, 2001 (In re Terrorist Attacks I)*, 349 F. Supp. 2d 765, 779–80 (S.D.N.Y. 2005) (alleging a cause of action against financial institutions and government officials responsible for providing support to the terrorist activities of al-Qaeda).

27. See, e.g., *Eisenfield v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 1 (D.D.C. 2000) (seeking from Iran damages arising from an Iran-sponsored terrorist bombing); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 109 (D.D.C. 2000) (seeking damages from the Islamic Republic of Iran for a kidnapping committed by a government-encouraged terrorist organization).

28. See generally Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 755–62 (2003) (addressing the political and social tensions in Lebanon in 1958); Joshua Slomich, *The Ta'if Accord: Legalizing the Syrian Occupation of Lebanon*, 22 SUFFOLK TRANSNAT'L L. REV. 619 (1999) (discussing the Syrian occupation of Lebanon and subsequent political violence spawned by anti-Western fervor).

regime's anti-Western fervor led to a myriad of state-sponsored terrorist activities directed at U.S. interests in the Middle East.<sup>29</sup> Although the victims of these attacks sometimes turned to America's civil justice system to seek financial restitution from the Iranian government,<sup>30</sup> U.S. courts routinely dismissed cases against foreign states, citing the broad immunity extended to foreign nations by the 1976 Foreign Sovereign Immunity Act ("FSIA").<sup>31</sup>

In 1988, the detonation of a sophisticated Semtex plastic explosive led to the fatal crash of Pan Am Flight 103 over the small town of Lockerbie, Scotland, killing all of the 259 passengers and crew members aboard and eleven people on the ground.<sup>32</sup> Although the attack on Flight 103 was eventually traced to a group of Libyan intelligence agents working under the directive of Colonel Muammar Quaddafi,<sup>33</sup> "the families of the victims . . . were unable to successfully sue Libya for its involvement because international terrorist activities did not fall into one of the exceptions under the FSIA."<sup>34</sup> Frustrated by their inability to establish civil liability for acts of international terrorism, the families of the victims of Flight 103 lobbied Congress

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29. See Winston Nagan & Craig Hammer, *Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 967-73 (2004) (chronicling the fall of the pro-Western Shah and the Ayatollah's subsequent rise to power, which "contaminated America's relations with the Islamic Republic of Iran").

30. See, e.g., *Anderson*, 90 F. Supp. 2d at 107, 109 (filing for damages against the government of Iran for a 1985 kidnapping where Iranian agents held American Terry Anderson hostage in a Lebanese dungeon for over seven years).

31. 28 U.S.C.A. § 1604 (West 2006) ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."); see Hoye, *supra* note 12, at 109 (noting that "foreign governments and their agents have enjoyed broad common law and statutory immunity from criminal prosecution and civil lawsuits under international law, even for international terrorist acts in which they have played key roles"). Congress had originally enacted the FSIA in an effort to codify the long-established principle of restrictive sovereign immunity, which forbids American courts from exercising jurisdiction over foreign governments except in certain enumerated circumstances. See H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605. The key exceptions to immunity under the FSIA include cases that involve commercial activity, non-commercial torts such as car accidents, and cases where there have been explicit or implied waivers of immunity. Taylor, *supra* note 4, at 535; see 28 U.S.C.A. § 1605(a)(1), (2) (West 2006); Keith Sealing, "State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11, 38 TEX. INT'L L.J. 119, 122 (2003).

32. See Michael P. Scharf & Amy M. Miller, *Foreword: Terrorism on Trial*, 36 CASE W. RES. J. INT'L L. 287, 287 (2004); *supra* note 3 and accompanying text.

33. Scharf & Miller, *supra* note 32, at 287-90.

34. Taylor, *supra* note 4, at 536 (citing *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F. 3d 239 (2d Cir. 1996)).



intensely to pass legislation that would facilitate civil lawsuits against sovereign states for acts of state-sponsored terrorism.<sup>35</sup>

Finally, in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"),<sup>36</sup> which amended the FSIA to allow American citizens to sue certain foreign countries<sup>37</sup> for acts of terrorism.<sup>38</sup> Armed with Congressional authorization, victims of international terrorist attacks quickly filed a litany of cases against the governments of Cuba, Iran, Iraq, and Libya, alleging violations arising from a wide range of state-sponsored terror.<sup>39</sup> These lawsuits appear to have reached their zenith with the seminal case of *Flatow v. Islamic*

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35. *Terrorism: Victims' Access to Terrorist Assets: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 44-45 (1999) (statement of Allan Gerson, Senior Fellow, Council on Foreign Relations).

36. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C.A. § 1605(a)(7) (West 2006 & Supp. 2007)).

37. The AEDPA only allows for suits against foreign states that have been designated as a "state sponsor of terrorism" by the U.S. Department of State. § 1605(a)(7)(A); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 589(a), 110 Stat. 3009, 3009-172 (1997) (codified at § 1605) ("[A]n official, employee, or agent of a foreign state designated [as a state sponsor of terrorism] . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction . . . for money damages . . ."). Until recently, Iran, Iraq, Libya, Syria, North Korea, Cuba, and Sudan were officially designated as state sponsors of terrorism. 31 C.F.R. § 596.201 (2007) (listing those nations designated as state sponsors of terrorism and prohibiting U.S. nationals from engaging "in a financial transaction with the government of [such] countr[ies]"). In light of recent events, however, both Iraq and Libya have been removed from the list of state sponsors of terrorism. See Press Release, U.S. Dept. of State, Rescission of Libya's Designation as a State Sponsor of Terrorism (May 15, 2006), <http://state.gov/r/pa/prs/ps/2006/66244.htm>; Press Release, U.S. Dept. of State, Iraq Removed from the State Sponsors of Terrorism List (Oct. 20, 2004), <http://www.state.gov/r/pa/rmo/hglt/37603.htm>.

38. One commentator had the following to say about this amendment:

The terrorist exception sets out certain conditions that must be met in order for a U.S. citizen to bring suit against a foreign state for an act of terrorism. First, the case must be one in which . . . "personal injury or death . . . was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support . . . for such an act." Second, the . . . victim must be a U.S. national . . . . Finally, if the act of terrorism occurred in the defendant state's territory, a plaintiff must first attempt arbitration in accordance with international rules.

Taylor, *supra* note 4, at 536 (footnotes omitted) (quoting AEDPA, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (1996) (codified at § 1605(a)(7))).

39. See, e.g., *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

*Republic of Iran*,<sup>40</sup> which arose from the tragic death of twenty-two year old American Alisa Flatow who was studying abroad in Israel when a suicide bomber drove an explosive-laden van into a bus in the Gaza Strip.<sup>41</sup> The Shafaq faction of the Palestinian Islamic Jihad—a well-known Middle Eastern terror outfit—later claimed responsibility for the attack.<sup>42</sup> Three years after Alisa Flatow's death, a federal district court in Washington, D.C., determined that the Iranian government was civilly liable for devising and financing the terrorist activities conducted by the Palestinian Islamic Jihad in the Israeli-controlled territories.<sup>43</sup> The court ultimately awarded the Flatow family \$27 million in compensatory damages and \$225 million in punitive damages.<sup>44</sup>

The *Flatow* case, like the vast majority of early terrorism lawsuits, resulted in a default judgment.<sup>45</sup> Additionally, the issues presented in *Flatow* were raised *sua sponte* by the court,<sup>46</sup> as was the case with many of its predecessors.<sup>47</sup> As a result of these default judgments, many aspects of the AEDPA remain untested almost a decade after it was enacted.<sup>48</sup> Further, the Flatow family and many other victims who received favorable verdicts against foreign governments found it impossible to execute their judgments and were left only with the cold comfort of hollow victories against seemingly untouchable sovereign aggressors.<sup>49</sup>

The difficulty that plaintiffs have faced in collecting judgments from sovereign defendants has been the death knell for the vast

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40. 999 F. Supp. 1 (D.D.C. 1998).

41. *Id.* at 6.

42. *Id.* at 8.

43. *Id.* at 8–9, 34.

44. *See id.* at 6–8. Although Judge Lamberth freely awarded punitive damages in the *Flatow* case, Congress has since repealed legislation that would have permitted punitive damages against foreign states in claims brought under the AEDPA. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1543. Since then, Judge Lamberth and other federal district court judges have ruled that punitive damages cannot be awarded against a foreign state. *E.g.*, *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 113 n.17 (D.D.C. 2000).

45. *Flatow*, 999 F. Supp. at 6; *see Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT'L L. 691, 699–701 (2005) (discussing the multitude of default judgments that have been entered in civil terrorism lawsuits). Under the FSIA, a court may not enter a default judgment “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” 28 U.S.C. § 1608(e) (2000).

46. *Flatow*, 999 F. Supp. at 6.

47. Strauss, *supra* note 14, at 695.

48. *Id.*

49. *See infra* Part I.F.

majority of lawsuits against state sponsors of terrorism.<sup>50</sup> Professor John Moore, one of the original drafters of the FSIA, believes that both courts as well as the State Department do everything they can to preclude lawsuits against state sponsors of terrorism.<sup>51</sup> Because of this archaic thought process by judges and State Department officials,<sup>52</sup> plaintiffs' attorneys now focus the lion's share of their resources on private terrorist organizations and the institutions that lend them support, rather than pursuing sovereign governments.<sup>53</sup> By attempting to hold private terrorist supporters legally accountable for their actions, contemporary terrorism lawsuits are designed not only to compensate those who have suffered, but also to financially bankrupt terrorist organizations.<sup>54</sup> Looking toward the future, "it becomes clear that the United States courts will have to increasingly grapple with the circumstances in which complicity in terrorism engenders civil liability."<sup>55</sup>

#### A. *Statutory Causes of Action Against Sponsors of Terrorism*

Three federal statutes currently provide plaintiffs with the ability to bring civil suits against private terrorists and their supporters. The most significant of these statutes is the 1992 Anti-Terrorism Act ("ATA"),<sup>56</sup> which "provides the most direct path for citizens to sue non-state terrorists for damages . . . by explicitly conferring new extraterritorial jurisdiction upon the federal courts."<sup>57</sup> In order to supplement the cause of action granted by the ATA, plaintiffs have also utilized the Alien Tort Claims Act ("ATCA")<sup>58</sup> and the civil

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50. Telephone Interview with John Moore, Dir., Ctr. for Nat'l Sec. Law, Univ. of Va. (Dec. 19, 2006).

51. *Id.*

52. *Id.*

53. See *Burnett II*, 292 F. Supp. 2d 9, 10–11 (D.D.C. 2003); *Smith ex rel Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003).

54. See, e.g., Third Amended Complaint at 199–205, *Burnett II*, 292 F. Supp. 2d 9 (No. 1:02-cv-01616-JR) (asserting the rights of terrorism victims to sue those responsible and arguing that they could aid the government in the war against terrorism by helping to bankrupt the terrorist organizations and choke off the support required to maintain a viable global terror network).

55. Allan Gerson, *Terrorism and Genocide: Determining Accountability and Liability*, 28 T. JEFFERSON L. REV. 79, 86 (2005).

56. 18 U.S.C. § 2333 (2000) (initially adopted in 1990 but later repealed as a result of a technical enrolling error and reenacted in 1992).

57. Seth Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 31–32 (2004).

58. 28 U.S.C. § 1350 (2000); see *infra* notes 124–39 and accompanying text.

provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>59</sup>

The ATA permits "any national of the United States . . . [injured by] an act of international terrorism . . . [to] sue . . . in any appropriate district court of the United States."<sup>60</sup> The legislative history of the ATA reveals a distinct Congressional intent to deter and punish acts of international terrorism<sup>61</sup> by "remov[ing] the jurisdictional hurdles . . . and . . . empower[ing] victims with all the weapons available in civil litigation."<sup>62</sup> To this end, Congress used the ATA as a means to enhance the power of private citizens to aid in the War on Terrorism.<sup>63</sup> And although the language of the statute occupies just a few small paragraphs in the United States Code, it has now been broadly accepted that the ATA casts a wide net in terms of terrorist accountability,<sup>64</sup> allowing plaintiffs to pursue not only the terrorists themselves, but also their leadership and financial resources.<sup>65</sup>

Although the ATA extended victims of international terrorism an enormously broad spectrum of rights, it remained "virtually untested" for nearly a decade.<sup>66</sup> In 2001, however, the parents of seventeen-year-old David Boim filed suit<sup>67</sup> under the ATA in the Northern District of Illinois after their son was gunned down by a group of Hamas<sup>68</sup> militants outside a bus station in the Israeli West Bank.<sup>69</sup> Palestinian authorities later apprehended David Boim's

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59. 18 U.S.C. § 1964 (2000); see *infra* notes 116–23 and accompanying text.

60. 18 U.S.C. § 2333(a) (2000).

61. *E.g.*, *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 239 (D.R.I. 2004).

62. 137 CONG. REC. 8143, 8143 (1991) (statement of Sen. Grassley).

63. See Jennifer Rosenfield, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L. REV. 726, 737 (1992).

64. See 138 CONG. REC. 33627, 33628–29 (1992) (statement of Sen. Grassley) (outlining the intended breadth of the ATA and its application to terrorist activities).

65. *Id.*

66. Stratton, *supra* note 57, at 32; see also Milin, *supra* note 18, at 53 (explaining that, prior to the decision in *Boim v. Quranic Literacy Institute & Holy Land Foundation*, the ATA went virtually unnoticed).

67. *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000 (7th Cir. 2002).

68. Hamas is a well-known terror organization that "seeks to establish a fundamentalist Palestinian state," *id.* at 1002, while driving Christians and Jews out of vast regions of Asia and Africa. "Hamas seeks to advance its political objectives through acts of terrorism . . ." *Id.* Members of Hamas operating in the Middle East receive instructions, financial support, and weapons from other Hamas organizers located throughout the world. See *id.*

69. *Id.* at 1001–03.

attackers—both of whom were known members of the military wing of Hamas—in connection with the slaying.<sup>70</sup>

The Boim family, intent on forging a new path of terrorist liability,<sup>71</sup> filed suit not only against the terrorists themselves, but also against the “ostensibly philanthropic groups . . . which they claimed were American front organizations for Hamas.”<sup>72</sup> According to the Boim family and their team of legal experts, the seemingly humanitarian functions of these purportedly charitable organizations simply masked their true mission of raising and funneling money to Hamas operatives in order to carry out terrorist activities abroad.<sup>73</sup> Although the ATA is silent on the issue of “aiding and abetting” terrorism, Congress intended for this statute to impose liability “at any point along the causal chain of terrorism.”<sup>74</sup> The *Boim* case became the first to articulate a theory of terrorist liability based solely upon the defendants’ knowledge that their funds were being used to conduct acts of international terrorism.<sup>75</sup>

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70. *Id.* at 1002.

71. *See id.* at 1001 (stating that the case was one of first impression and suggesting that this theory of terrorist liability had been previously unexplored).

72. Milin, *supra* note 18, at 53.

73. *Boim*, 291 F.3d at 1005. Specifically, the *Boim* plaintiffs contended that Hamas control centers raised funds from sympathetic parties in the United States and then laundered the money to operatives in the Middle East. These Middle East operatives would then use the funds to train terrorists and pay for weapons used in terror attacks. *Id.* The role of Islamic charities in funneling more money to terrorist operatives has recently moved to the forefront with the Justice Department’s high profile indictment of the Holy Land Foundation for Relief and Development, who government prosecutors contend operated as a chief financier of terrorism directed at American civilians. *See Associated Press, Muslim Charity Indicted on Terrorism Charges*, FOX NEWS, July 27, 2004, <http://www.foxnews.com/story/0,2933,127164,00.html> (discussing the forty-two-count indictment returned by the federal grand jury against the charity and seven of its officers); Leslie Eaton, *Prosecutors Say a Charity Aided Terrorists Indirectly*, N.Y. TIMES, Sept. 18, 2007, at A23 (outlining the government’s theory as it progressed during the course of the Holy Land trial); Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. TIMES, Dec. 12, 2006, at A24 (summarizing the charges and the legal theories upon which the government’s case was premised). However, the government’s highly publicized case against the charity recently ended in a mistrial after nineteen days of deliberations. *See* Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 23, 2007, at A1.

74. *See* S. REP. NO. 102-342, at 22 (1992) (Y 1.1/5:102-342); *see also* 136 CONG. REC. 7592, 7592 (statement of Sen. Grassley) (“With the enactment of this legislation, we set an example to the world of how the United States legal system deals with terrorists. If terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them.”).

75. Rudolph Lehr, *Unbalancing the Terrorists’ Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT’L & COMP. L. 333, 358 (2002).

After the *Boim* lawsuit was filed, each of the six defendants filed motions to dismiss, claiming that the ATA did “‘not render them . . . liable for the murder of an American citizen . . . by international terrorists unless they . . . participated directly’” in the act of terrorism.<sup>76</sup> The district court rejected these arguments but subsequently granted the defendants leave to file an interlocutory appeal to the Seventh Circuit.<sup>77</sup> Less than a week after the terrorist attacks of September 11th, the Seventh Circuit convened to address the fundamental question of whether funding a terrorist organization was sufficient in itself to establish civil liability under the ATA.<sup>78</sup>

In its opinion, the Seventh Circuit began with the basic proposition that the ATA represents a codification of “general common law tort principles . . . [intended] to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.”<sup>79</sup> Justifying its significant expansion of an otherwise vague statute, the Seventh Circuit reasoned that the ATA “should be interpreted in light of Congress’s subsequent enactment of [18 U.S.C. § 2339A,<sup>80</sup> a criminal statute that] outlaws the provision of material support to any international terrorist group or terrorist act.”<sup>81</sup> The court concluded that Congress must have intended that the civil portion of the ATA encompass the “generic provision of support [to foreign terrorist organizations] outlawed in section 2339A and

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76. Peter M. Mansfield, *Terrorism and a Civil Cause of Action: Boim, Ungar, and Joint Torts*, CHI.-KENT J. INT’L & COMP. L., Spring 2003, <http://www.kentlaw.edu/jicl/articles/spring2003/Spring2003.htm> (quoting *Boim*, 291 F.3d at 1010).

77. *Boim*, 291 F.3d at 1007; see 28 U.S.C. § 1292(b) (2000) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.”).

78. *Boim*, 291 F.3d at 1007.

79. *Id.* at 1010; see also 137 CONG. REC. 8143, 8143 (1991) (statement of Sen. Grassley) (“The ATA accords victims of terrorism the remedies of American tort law, including treble damages and attorney’s fees.”); *Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 136 (1990) (statement of Joseph A. Morris, President, General Counsel, Lincoln Legal Foundation) (“[T]he bill as drafted is powerfully broad, and its intention . . . is to . . . bring [in] all of the substantive law of the American tort law system.”).

80. “Whoever provides material support or resources . . . knowing or intending that they are to be used in preparation for, or carrying out, a [terrorist act] . . . shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.” 18 U.S.C.A. § 2339A(a) (West Supp. 2007).

81. Hume & Todd, *supra* note 15.

2339B.”<sup>82</sup> Therefore, the court determined that knowingly providing financial support to terrorist organizations is tantamount to committing an act of international terrorism, and that defendants can be civilly culpable under the ATA.<sup>83</sup>

Cautious to limit its decision, however, the court also recognized that “funding *simpliciter*” was insufficient to give rise to liability; thus, plaintiffs must demonstrate that the defendant had some “knowledge of and intent to further the payee’s violent criminal acts.”<sup>84</sup> Perhaps equally significant was the fact that the Seventh Circuit rejected a key provision in the *Restatement of Torts*, which would have allowed a defense to charitable groups that made only modest contributions to terrorist entities.<sup>85</sup> The practical effect of the *Boim* decision was to open American courtrooms to an entirely new class of litigants by explicitly recognizing a cause of action under the ATA for “aiding and abetting” terrorism, even in cases where the defendant had no specific knowledge of the actual terrorist activity.<sup>86</sup> Had the court accepted the provisions in the Restatement, it would have allowed terrorist organizations to “avoid liability [on behalf of those who support them] by simply pooling together small donations.”<sup>87</sup>

By the time of the September 11th attacks, it appeared that courts—at least the Seventh Circuit—were prepared to utilize the ATA to facilitate the economic war against those who provided financial assistance to terrorist entities.<sup>88</sup> Despite plaintiffs’ recent successes under the ATA,<sup>89</sup> however, it was far from “self-evident that the events of September 11 [fell] within the statute’s definition of ‘international terrorism.’”<sup>90</sup> In contradistinction to “domestic terrorism,” the ATA stipulates that an act of “‘international terrorism’ . . . [must] occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries.”<sup>91</sup> Such an act may transcend national boundaries “in terms of the

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82. *Id.*

83. *Boim*, 291 F.3d at 1011.

84. *Id.*

85. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1977) (“[P]articipation by the defendant may be so slight that he is not liable for the act of the other.”).

86. See Recent Case, 116 HARV. L. REV. 713, 716 (2002).

87. *Boim*, 291 F.3d at 1015; Recent Case, *supra* note 86, at 717 (citing *Boim*, 291 F.3d at 1015).

88. See generally Lehrer, *supra* note 75 (discussing *Boim* and its corresponding effect on the ability to hold terrorist financiers responsible for their misdeeds).

89. See *infra* notes 107–10 and accompanying text.

90. *Smith ex rel Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003).

91. 18 U.S.C.A. § 2331(1)(C) (West 2000 & Supp. 2007).

means by which [the act was] accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”<sup>92</sup>

Courts first approached the application of the ATA to the September 11th attacks in *Smith ex rel Smith v. Islamic Emirate of Afghanistan*.<sup>93</sup> In granting the plaintiff’s motion for default judgment against the defendants, the court in *Smith ex rel Smith* determined that, although “the acts of September 11 clearly ‘occurred primarily’ in the United States,” they were nevertheless acts of international terrorism in that they “transcend[ed] national boundaries in terms of the means by which they [were] accomplished . . . or the locale in which their perpetrators operate.”<sup>94</sup> As a result, the plaintiffs had stated a viable cause of action under the ATA.<sup>95</sup>

Following the court’s decision in *Smith ex rel Smith*, victims of the September 11th attacks filed numerous lawsuits against a host of alleged terrorist culprits, and virtually all of the plaintiffs have pleaded a cause of action under the ATA.<sup>96</sup> Two of the most significant cases—both legally and politically—are *Burnett v. Al Baraka Investment & Development Corp.*<sup>97</sup> and *Ashton v. al-Qaeda Islamic Army*.<sup>98</sup> As an illustration, the *Burnett* plaintiffs are seeking over \$100 trillion in actual and punitive damages<sup>99</sup> from an array of

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92. *Id.*

93. 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

94. *Id.* at 221 (citing § 2331(1)(C)).

95. *Id.* at 222.

96. See, e.g., Third Amended Complaint, *supra* note 54, at 199 (bringing suit against over twenty defendants whom plaintiffs alleged “promoted, financed, sponsored, or otherwise materially supported” the events of September 11th).

97. *Burnett v. Al Baraka Inv. & Dev. Corp. (Burnett I)*, 274 F. Supp. 2d 86 (D.D.C. 2003); *Burnett II*, 292 F. Supp. 2d 9 (D.D.C. 2003).

98. *Ashton v. al Qaeda Islamic Army*, C.A. No. 1:02-6977 (S.D.N.Y. 2002). Along with four other lawsuits pending in the District of Columbia and the Southern District of New York, the Judicial Panel on Multidistrict Litigation consolidated the *Burnett* and *Ashton* cases into a single action to be heard in the Southern District of New York. See *In re Terrorist Attacks on September 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003). The Southern District of New York issued an opinion in this consolidated action in early 2005, which this Comment will refer to as *In re Terrorist Attacks I*. See *In re Terrorist Attacks I*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005). Later that year, the district court issued another opinion with respect to other motions in the same matter, which this Comment will refer to as *In re Terrorist Attacks II*. See *In re Terrorist Attacks on September 11, 2001 (In re Terrorist Attacks II)*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005). In the interest of practicality, this Comment will sometimes refer to *In re Terrorist Attacks I*, *In re Terrorist Attacks II*, and other cases arising from the attacks of September 11, 2001, e.g., *Linde v. Arab Bank, PLC*, 384 F. Supp. 571 (E.D.N.Y. 2005), collectively, as the *September 11th Cases*.

99. See Strauss, *supra* note 14, at 718.



defendants alleged to have facilitated the September 11th attacks.<sup>100</sup> Although the *Burnett* and *Ashton* lawsuits differ slightly in their scope, each of the cases are highly complex class action suits with several thousand plaintiffs asserting causes of action against individual terrorists, Islamic charitable organizations, and a number of large financial institutions having allegedly provided material support to terrorist organizations.<sup>101</sup>

On August 7, 2003, the Saudi Binladin Group,<sup>102</sup> a defendant in virtually all of the pending September 11th lawsuits, filed a motion to transfer and consolidate the *Burnett* and *Ashton* lawsuits, along with four other civil cases arising from the September 11th attacks.<sup>103</sup> The Judicial Panel on Multidistrict Litigation agreed to the pre-trial consolidation of these six lawsuits into a single action before Judge Casey in the Southern District of New York.<sup>104</sup> Like its progeny, the consolidated action, *In re Terrorist Attacks on September 11, 2001* ("*In re Terrorist Attacks I*"),<sup>105</sup> alleges a number of statutory causes of action—many arising under the ATA.<sup>106</sup>

Unlike previous terrorism lawsuits, however, the *September 11th Cases* have taken special aim at the banks and financial institutions whose "continued provision of banking services to [terrorist groups] facilitates their illegal activities."<sup>107</sup> The *September 11th Cases* remain in their early stages more than five years after the attacks, although several of the banking defendants have already filed motions to

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100. See Jennifer Senior, *A Nation Unto Himself*, N.Y. TIMES MAG., Mar. 14, 2004, at 36.

101. See Third Amended Complaint, *supra* note 54, at 189–208.

102. The Saudi Binladin Group is one of the Kingdom's largest and most successful corporate conglomerates, with assets estimated in excess of \$5 billion. The Group was initially founded by Mohammad bin Laden, Osama bin Laden's father. Corporate executives continually profess the Group's disdain for terrorist activities, while leaders insist that Osama bin Laden has maintained no connection with the Group since being stripped of his Saudi citizenship in 1994 for engaging in terrorist activities and criticizing the House of Saud. See generally Joseph Rense, *It's Business as Usual for the Bin Laden Group*, TIMES OF INDIA, Jan. 13, 2002 (discussing generally the Saudi Binladin Group).

103. *In re Terrorist Attacks on September 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003); NANCY CHANG & ALAN KABAT, CTR. FOR CONSTITUTIONAL RIGHTS, SUMMARY OF RECENT COURT RULINGS ON TERRORISM-RELATED MATTERS HAVING CIVIL LIBERTIES IMPLICATIONS 31 (2004). Pursuant to 28 U.S.C. § 1407, "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407 (2000).

104. *In re Terrorist Attacks on Sept. 11, 2001*, 295 F. Supp. 2d 1377 (J.P.M.L. 2003).

105. *In re Terrorist Attacks I*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

106. See *id.* at 780 (setting forth the plaintiffs' causes of action).

107. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 576 (E.D.N.Y. 2005).

dismiss for failure to state a claim under the ATA.<sup>108</sup> Building upon the Seventh Circuit's decision in *Boim*, courts thus far have denied the vast majority of the defendants' motions to dismiss.<sup>109</sup> Although the defendants claim to be providing only routine banking services, courts have determined that in light of the "knowing and intentional nature of the [defendants'] activities, there is nothing 'routine' about the services" that the banks have allegedly provided.<sup>110</sup>

While much of the litigation stemming from the September 11th attacks remains in its early stages, it appears that the ATA will provide the victims of the attacks with their most viable cause of action against terrorist entities.<sup>111</sup> Contemporary terrorism lawsuits, however, have also stated causes of action under the ATCA<sup>112</sup> and the civil provisions of RICO.<sup>113</sup> These federal statutes "provide additional avenues of relief for victims of terrorism . . . [which] typically have been brought . . . in combination with other causes of action."<sup>114</sup> These statutes are generally less effective and more limited in scope than the ATA,<sup>115</sup> but they nevertheless provide plaintiffs with a supplemental cause of action against terrorists and their private sponsors.

During President Bush's address to a joint session of Congress just days after the September 11th attacks, he remarked that "[a]l-Qaeda is to terror what the mafia is to crime. But its goal is not making money; [rather] its goal is remaking the world . . . ."<sup>116</sup> In light of this comparison, it is unsurprising that there was significant speculation and debate in the legal community regarding whether terrorism victims could successfully plead a cause of action under RICO—a statute originally aimed at combating organized crime.<sup>117</sup>

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108. See, e.g., *id.* at 579.

109. See, e.g., *id.* at 591 (denying the defendants' 12(b)(6) motion on all but four counts).

110. *Id.* at 588.

111. Telephone Interview with John Moore, *supra* note 50.

112. 28 U.S.C. § 1350 (2000).

113. 18 U.S.C. § 1964 (2000).

114. Strauss, *supra* note 14, at 710 ("This is important, because the plaintiffs suing under [statutes such as the] AEDPA will need to find an applicable cause of action to invoke if the AEDPA . . . does not itself provide a cause of action.").

115. Telephone Interview with John Moore, *supra* note 50.

116. President George W. Bush, Televised Address to a Joint Session of Congress and the American People (Sept. 20, 2001) [hereinafter President Bush's Speech to Congress], available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

117. See generally Zvi Joseph, *The Application of RICO to International Terrorism*, 58 FORDHAM L. REV. 1071, 1084 (1990) (arguing that RICO "is a potentially powerful weapon available to the federal government in the war on terrorism [which] should be expanded to facilitate its use against terrorist organizations"); Stephen Warneck, *A*

Supporters of the concept argued that clandestine networks of global terrorists were virtually indistinguishable from the criminal organizations being targeted by RICO.<sup>118</sup> Before this notion could be tested in court, however, Congress passed the USA PATRIOT ACT ("PATRIOT Act"),<sup>119</sup> which amended RICO to include "any act that is indictable under any provision listed" in the criminal liability section of the ATA.<sup>120</sup>

By amending the provisions of RICO to include acts of international terrorism, Congress conveyed its manifest intent to provide plaintiffs another avenue of relief in addition to what had already been conferred by the ATA. Despite Congressional intentions, however, courts have been quick to dismiss RICO claims that have arisen from acts of terrorism.<sup>121</sup> In *In re Terrorist Attacks I*, for example, the court began its analysis by noting that "[c]ivil RICO is an unusually potent weapon . . . [and that] courts should strive to flush out frivolous RICO allegations at an early stage of the litigation."<sup>122</sup> The court, therefore, ultimately dismissed the RICO portions of the complaint, noting that the plaintiffs had not alleged that the defendants were "central figures" in the schemes underlying the terrorist acts—a requirement for liability under the statute.<sup>123</sup>

While plaintiffs have encountered a rough road in pursuing their claims under civil RICO provisions, they have been eminently more successful in using the ATCA to establish liability for acts of terrorism. In contrast to the ATA, which provides only a cause of action for U.S. nationals,<sup>124</sup> the ATCA expands the class of potential

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*Preemptive Strike: Using RICO and the AEDPA To Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 211 (1998) (discussing the application of RICO statutes to contemporary terrorist operations).

118. *E.g.*, Warneck, *supra* note 117, at 193–94.

119. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272. The USA PATRIOT Act, while controversial, is aimed primarily at strengthening the already broad prerogative of the "Justice Department so it can better detect and disrupt terrorist threats." Remarks on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423 (Mar. 9, 2006). The legislation also substantially facilitates the ability of the intelligence and law enforcement communities to share information and resources. *See id.*

120. USA PATRIOT Act § 813.

121. *See, e.g., In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 837–38 (S.D.N.Y. 2005) (dismissing the plaintiff's RICO claims against the SAAR Network, a collection of twelve individual organizations).

122. *Id.* at 827 (citing *Katzman v. Victoria's Secret*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996)).

123. *Id.* at 828.

124. 18 U.S.C. § 2333(a) (2000) ("Any *national* of the United States . . . may sue . . . in any appropriate district court of the United States." (emphasis added)).

plaintiffs in terrorism lawsuits by permitting foreign nationals to bring suit in a federal district court for a tort committed in "violation of the law of nations."<sup>125</sup> Historically, the ATCA has been strikingly "underutilized in cases involving terrorism."<sup>126</sup> Only recently has the ATCA been used to allow foreign nationals to bring suits against terrorist entities under theories similar to those advanced by U.S. nationals under the ATA.<sup>127</sup>

In the *September 11th Cases*, the plaintiffs' only substantive barrier to pursuing a cause of action under the ATCA was convincing the court that an act of international terrorism constitutes a violation of the "law of nations."<sup>128</sup> In one of the more memorable rebukes of the ATCA, the court in *Tel-Oren v. Libyan Arab Republic*<sup>129</sup> concluded that, even though "this nation unequivocally condemns all terrorist attacks, that sentiment is not universal," and "[g]iven this division . . . terrorist attacks [do not] amount to a law of nations violation."<sup>130</sup> After *Tel-Oren*, however, some courts substantially broadened the class of activities that run afoul of the "law of nations."<sup>131</sup> In *In re Terrorist Attacks I*, for example, Judge Casey, relying on a strong legacy of federal case law, has already ruled that "aircraft hijacking is generally recognized as a violation of international law."<sup>132</sup>

In light of the generally favorable treatment that the ATCA received from federal courts in the two decades following *Tel-Oren*, it appeared, at least initially, that foreign nationals would be permitted to pursue private terrorist entities under the ATCA in virtually the

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125. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

126. Strauss, *supra* note 14, at 710. On the other hand, "the scope of the ATCA has [recently] expanded with the addition of its legislative cousin, the TVPA [Torture Victim Protection Act]. In enacting the [TVPA], Congress intended to supply an unambiguous cause of action for both aliens and U.S. citizens . . ." *Id.*; see also S. REP. NO. 102-249, at 4 (1991) (explaining that the TVPA provides "an unambiguous basis for a cause of action that has been successfully maintained under" the ATCA).

127. See, e.g., *Burnett I*, 274 F. Supp. 2d 86, 92 (D.D.C. 2003) (alleging a cause of action on behalf of 128 foreign nationals under the provisions of the ATCA).

128. *In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005).

129. 517 F. Supp. 774 (D.D.C. 1981).

130. *Id.* at 795.

131. See *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447 (2d Cir. 2000), *rev'd on other grounds*, 48 F.3d 176 (2d Cir. 2006); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (recognizing that "certain forms of conduct by private individuals may violate the law of nations even where the individual in question does not act under color of law").

132. *In re Terrorist Attacks I*, 349 F. Supp. 2d at 826 (citing *Bigio*, 239 F.3d at 447-49; *Kadic*, 70 F.3d at 240).

same manner that U.S. nationals have pursued these entities using the ATA.<sup>133</sup> The U.S. Supreme Court, however, added another layer of complexity to the ATCA in *Sosa v. Alvarez-Machain*,<sup>134</sup> which involved a Mexican national that brought suit under the ATCA after he was kidnapped by agents of the American Drug Enforcement Agency and taken to the United States to stand trial.<sup>135</sup> *Sosa* did not involve issues directly pertaining to civil terrorism litigation, although the case did afford the Court an opportunity to revisit the deceptively simplistic provisions of the ATCA. While Justice Souter's majority opinion refused to adopt Judge Bork's earlier position in *Tel-Oren*,<sup>136</sup> the Court did elect to narrow the class of litigants under the ATCA by requiring that a "law of nations" violation "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [it had previously] recognized."<sup>137</sup> By balancing both conservative and liberal approaches, the Court seems to have left further development of the ATCA to the lower federal courts.<sup>138</sup> At least one legal expert believes that an issue of clarity still exists regarding whether civil terrorism lawsuits state valid causes of action under the ATCA.<sup>139</sup> Consequently, it remains to be seen what effect the *Sosa* decision may have on foreign plaintiffs pursuing terrorism lawsuits under the ATCA.

Aside from the directly applicable federal statutes that enumerate a specific cause of action for victims of terrorism, common law tort claims also provide plaintiffs with additional causes of action, such as battery, assault, infliction of emotional distress, wrongful death, aiding and abetting, conspiracy, and false imprisonment.<sup>140</sup> Indeed, many plaintiffs have found that the most judicious approach to terrorism lawsuits has been to aggregate their claims using "a

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133. See Telephone Interview with Moore, *supra* note 50.

134. 542 U.S. 692 (2004).

135. *Id.* at 697-99.

136. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-827 (D.C. Cir. 1984) (Bork, J., concurring) (determining that the appellant's interpretation of "section 1350 is too sweeping. It would authorize tort suits for the vindication of any international legal right . . . [which] would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself, and would run counter to constitutional limits on the role of federal courts.").

137. *Sosa*, 542 U.S. at 725.

138. See M. Christie Helmer & Brian W. Esler, *Litigating Claims Under the Alien Tort Claims Statute After SOSA V. ALVAREZ-MACHAIN* (Miller Nash, LLP), <http://www.millernash.com/showarticle.aspx?Show=1529> (last visited Oct. 3, 2007).

139. Telephone Interview with John Moore, *supra* note 50.

140. Strauss, *supra* note 14, at 739.

combination of all available causes of action, each of which will apply with varying effectiveness against particular defendants . . . depending on the facts” of the particular case.<sup>141</sup>

*B. Effecting Service of Process on Terrorist Defendants*

As a result of federal terrorism statutes such as the ATA, virtually all civil suits arising from an act of terrorism are filed in federal court, despite the fact that a lawsuit in a state court of general competence may sometimes appear to be an attractive proposition.<sup>142</sup> Before federal courts can exercise jurisdiction over a defendant, the sometimes arduous “requirement of service of summons must be satisfied.”<sup>143</sup> The reality that many terrorist defendants are generally difficult to locate only adds another layer of complexity to a process that is already frustrating to many plaintiffs.<sup>144</sup>

As a practical matter, service of process issues rarely arise in the context of foreign corporations that have extensive contacts with the United States. In *Linde v. Arab Bank*,<sup>145</sup> for example, service of process was easily effectuated by simply serving the appropriate agent at the defendant bank’s New York offices.<sup>146</sup> Likewise, the plaintiffs in the *September 11th Cases* have encountered little difficulty with serving process on large financial institutions with a significant business nexus to the United States.<sup>147</sup> Despite being able to serve process on some defendants with relative ease, however, plaintiffs have encountered more challenges in attempting to serve process on terrorist organizations, foreign government officials, and Islamic charities operating out of the Middle East.<sup>148</sup>

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141. *Id.* (“By aggregating these claims, victims and their families can target terrorist groups, officials and other individuals, along with the foreign states, organizations, and agencies who sponsor them.”).

142. John Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 47 (explaining that, because state courts have subject matter jurisdiction over transitory torts committed outside of the United States, a suit could proceed in state court if a plaintiff were able to properly serve a defendant, obtain personal jurisdiction, and survive a motion for forum non conveniens).

143. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

144. *See* Stratton, *supra* note 57, at 33.

145. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 571 (E.D.N.Y. 2005).

146. *Id.* at 571.

147. *See, e.g., In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 806 (S.D.N.Y. 2005) (conducting a thorough minimum contacts analysis with regard to the defendants, but acknowledging that process had already been served consistent with the ATA’s nationwide service of process provision).

148. *See, e.g., Smith ex rel Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003) (discussing some of the inherent difficulties in serving process on bin Laden, al-Qaeda, and Taliban officials).

In an effort to facilitate service of process on terrorist organizations and their sponsors, the ATA includes a nationwide service of process provision that allows for service “in any district where the defendant resides, is found, or has an agent.”<sup>149</sup> Citing this provision, the court in *Estates of Ungar v. The Palestinian Authority*<sup>150</sup> addressed the sufficiency of the plaintiffs’ service of process on the terrorist group Hamas.<sup>151</sup> The plaintiffs in *Ungar* contended that process had been properly served on Muhammed Salah, the chief of Hamas’ military operations in the Middle East who was residing in the United States at the time of the lawsuit.<sup>152</sup> While addressing the sufficiency of service, the *Ungar* court weighed the application of Rule 4(h)(1) of the Federal Rules of Civil Procedure, which allows for service on an “unincorporated association . . . by delivering a copy of the summons and of the complaint to an officer or . . . general agent” of the organization.<sup>153</sup> The court accepted the plaintiff’s argument that Hamas qualified as an “unincorporated association” because it was “‘composed of individuals, without a legal identity apart from its membership, formed for specific objectives.’”<sup>154</sup> Because of Salah’s high level in the Hamas hierarchy, the court also found that it was reasonable to conclude that he had the authority to exercise his discretion in handling the lawsuit; the plaintiffs, therefore, had properly effectuated service of process.<sup>155</sup>

Defendants in other terrorism lawsuits, however, may not be as well known or as easy to locate as Hamas.<sup>156</sup> In cases involving foreign defendants without known agents in the United States, courts have turned to Rule 4(f), which permits service upon individuals in a foreign country by any “means not prohibited by international agreement as may be directed by the court.”<sup>157</sup> Accordingly, in the vast majority of cases arising out of the September 11th attacks,

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149. 18 U.S.C. § 2334(a) (2000).

150. 304 F. Supp. 2d 232 (D.R.I. 2004).

151. *Id.* at 257–60.

152. *Id.* at 258.

153. FED. R. CIV. P. 4(h)(1).

154. *Ungar*, 304 F. Supp. 2d at 258 (quoting *Estates of Ungar ex rel Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 89 (D.R.I. 2001)). Specifically, the *Ungar* court defined an unincorporated association “‘as a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise.’” *Id.* (quoting *Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 485 (1st Cir. 1985)).

155. *Id.* at 259 (citing *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria*, 739 F. Supp. 854, 867 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991)).

156. Stratton, *supra* note 57, at 38.

157. FED. R. CIV. P. 4(f).

courts have permitted service on terrorist organizations and their leaders by publication.<sup>158</sup> The court in *Mwani v. Bin Laden*,<sup>159</sup> for example, found that service by publication “‘was reasonably calculated to apprise [the alleged terrorists] of the lawsuit and afford them an opportunity to present their objections.’”<sup>160</sup>

Although there has been little hesitation in permitting service by publication for terrorist defendants, courts have been far less willing to allow this type of service with respect to foreign-based organizations whose location is more readily ascertainable.<sup>161</sup> In the case of Islamic charities operating out of the Middle East, the *Burnett* court refused to permit service by publication and insisted that plaintiffs identify a more effective method of service.<sup>162</sup> As a result, plaintiffs in the *September 11th Cases* have attempted to utilize the laws of Saudi Arabia to effectuate service of process on a number of Saudi nationals and Islamic charities operating out of the Arabian Peninsula.<sup>163</sup> Much to the plaintiffs’ frustration, however, Saudi Arabia’s legal system—premised on a complex morass of Islamic law—provides very little guidance in their efforts to serve process within the Kingdom.<sup>164</sup> As an additional source of dissatisfaction, the plaintiffs’ efforts have been impeded by the Saudi government, which has expressed very little interest in facilitating service of process in lawsuits where the Saudi government itself has become a common target.<sup>165</sup> Illustrative of the dangers inherent in serving terrorist organizations, one process agent who was hired to effect service on

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158. See, e.g., *Smith ex rel Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003) (allowing service by publication in the case of bin Laden and al-Qaeda, but requiring service upon an agent in the case of the Taliban government).

159. 417 F.3d 1 (D.C. Cir. 2005).

160. *Id.* at 8 (quoting the district court’s order).

161. Interview with Ron Motley, *supra* note 20.

162. See *id.* (alluding to *Burnett II*, 292 F. Supp. 2d 9 (D.D.C. 2003)).

163. *Id.*

164. As one commentator noted,

[T]he [Saudi] constitution establishes that the Koran, the holy book of Islam, will be the law of the land. Of the 6,236 verses of the Koran, only 500 or so contain instructions that could be taken as moral or legal rules. However, around these verses and the sayings and deeds of the prophet Muhammad has developed a complex legal system.

Mary Carter Duncan, *Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia*, 27 GA. J. INT’L & COMP. L. 231, 238 (1998); see also John Daniszewski, *Judging the Divine Law of Islam*, L.A. TIMES, Jan. 31, 1997, at A1.

165. Interview with Ron Motley, *supra* note 20. See generally *Burnett II*, 292 F. Supp. 2d 9 (D.D.C. 2003) (stating a cause of action against Prince Turki Al-Faisal bin Abdulaziz Al-Saud and Prince Sultan bin Abdulaziz Al-Saud, both of whom are prominent members of the House of Saud).



several Saudi charities was kidnapped and later found beheaded on the outskirts of Riyadh—demonstrating one of the more tragic setbacks in subjecting terrorist groups to American-style justice.<sup>166</sup>

### C. *Establishing Personal & Subject Matter Jurisdiction*

Though effectuating service of process is required in order to establish personal jurisdiction over a defendant in federal court, it is not in itself sufficient. A plaintiff must also demonstrate a “constitutionally sufficient relationship between the defendant and the forum.”<sup>167</sup> Terrorist organizations are considered unincorporated associations for jurisdictional purposes.<sup>168</sup> Consequently, these organizations may be subjected to a personal jurisdiction test similar to that for corporations—whether minimum contacts exist between the organization and the forum in which the suit has been filed.<sup>169</sup>

American rules of personal jurisdiction, though, are highly controversial from an international perspective.<sup>170</sup> Indeed, subjecting foreign defendants to the American legal system based upon mere “minimum contacts” is regarded by many in the international community as an “exorbitant” basis of federal jurisdiction.<sup>171</sup> In light of the international community’s reservations, courts in the United States, understanding the competing policy considerations of subjecting foreign defendants to American justice, tend to exercise “[g]reat care and reserve . . . when extending our notions of personal jurisdiction into the international field.”<sup>172</sup> In the context of terrorism lawsuits, however, courts have been far less prone to exercising such jurisdictional restraint, relying instead on the notion that “no foreign

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166. Interview with Ron Motley, *supra* note 20; see also Senior, *supra* note 100.

167. *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

168. See *supra* notes 153–55 and accompanying text.

169. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108–16 (1987) (holding that minimum contacts suffice to establish personal jurisdiction in the absence of some fundamental unfairness); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–82 (1985) (affirming that minimum contacts existed where the defendant entered into a contract in the forum at issue); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–20 (1945) (articulating the minimum contacts analysis for the first time).

170. See Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 208–12 (1999).

171. *Id.* at 211; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 421 cmt. e (1987).

172. *Asahi*, 480 U.S. at 115 (quoting *United States v. First Nat’l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

terrorist today can fairly assert a lack of 'fair warning' that it could be 'haled into court' in the United States."<sup>173</sup>

In early terrorism lawsuits filed on behalf of victims of the Palestinian *Intifadah*,<sup>174</sup> American courts freely exercised personal jurisdiction over well-known organizations such as Hamas and the Palestinian Authority, relying in part on their extensive "commercial and lobbying activities" in the United States.<sup>175</sup> In *Ungar*, for example, the court rested its basis for jurisdiction on the affidavits of international terrorism expert, Yehudit Barsky,<sup>176</sup> who outlined Hamas' "extensive fundraising, operational planning, recruitment, propaganda, public relations, money laundering, investment, and communication activities" in the United States.<sup>177</sup> Unlike Hamas, however, most terrorist organizations have less notorious affiliations with the United States, and courts have correspondingly been more hesitant to exercise general personal jurisdiction.<sup>178</sup>

Following the 1998 bombing of the U.S. Embassy in Nairobi, Kenya, the Court of Appeals for the District of Columbia in *Mwani v. Bin Laden*<sup>179</sup> addressed the issue of personal jurisdiction over al-

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173. *Biton v. Palestinian Interim Self-Gov't*, 310 F. Supp. 2d 172, 178 (D.D.C. 2004) (quoting *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

174. "The *Intifadah* was a . . . spontaneous grassroots uprising that attempted to end Israel's twenty year illegal military occupation of the West Bank, Gaza Strip, and East Jerusalem." Ardi Imseis, "Moderate" *Torture On Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods*, 19 BERKELEY J. INT'L L. 328, 335 n.66 (2001). Though technically lasting from 1987 to 1993, the violence stemming from the first *Intifadah* continued well into the late 1990s as Palestinians "witnessed an unprecedented level of mass participation and mobilization at every stratum of Palestinian society against the Israeli occupation authorities." *Id.* Israel characterized the *Intifadah* as "a violent war waged . . . by Palestinian 'terrorists,'" and indeed, Palestinian-based terror organizations carried out a number of attacks against Israeli interests in the region. *Id.*

175. Milin, *supra* note 18, at §13 (citing *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 86-91 (D.R.I. 2001)).

176. Mr. Barsky is the director of the Middle East and International Terrorist division of the American Jewish Committee. See *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 255-56 (D.R.I. 2004). After acquiring his master's degree in international relations and Near Eastern studies from New York University, Mr. Barsky spent thirteen years researching and investigating the operations of Middle Eastern terrorist organizations operating in the United States. See *id.* at 256.

177. *Id.* at 256 (referring to Hamas' activities in at least six states: Texas, Louisiana, Missouri, Virginia, Illinois, and New York).

178. See, e.g., *Smith ex rel. Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 220-22 (S.D.N.Y. 2003) (discussing some of the difficulties in establishing personal jurisdiction over bin Laden, al-Qaeda, and the Taliban government).

179. 417 F.3d 1 (D.C. Cir. 2005).

Qaeda defendants.<sup>180</sup> In an earlier ruling, the district court in *Mwani* had refused to exercise personal jurisdiction over bin Laden and al-Qaeda, citing the lack of “specific, physical contacts” between the defendants and the District of Columbia.<sup>181</sup> On appeal, however, the court addressed the district court’s “focus on specific, *physical* contacts between the defendants and the forum,” which it considered to be the “fundamental problem with the [district] court’s analysis.”<sup>182</sup> The court found that even though “‘the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum,’ the ‘foreseeability’ of causing injury in the forum can establish such contacts where ‘the defendant’s conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into [an American] court.’”<sup>183</sup> Thus, the court claimed jurisdiction over both bin Laden and al-Qaeda, reasoning that each defendant’s conscious determination to direct their terror operations at the United States should have caused them to anticipate that they would fall within the jurisdictional purview of American courts.<sup>184</sup>

In light of the court’s decision in *Mwani*, plaintiffs in the *September 11th Cases* have experienced little resistance in establishing personal jurisdiction over terrorist organizations such as al-Qaeda.<sup>185</sup> To further facilitate their efforts, plaintiffs have consistently utilized Rule 4(k)(2) of the Federal Rules of Civil Procedure, which “‘fill[s] a gap in the enforcement of federal law’” by allowing “courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular.”<sup>186</sup> As a result, terrorist defendants that

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180. *See id.* at 4–14.

181. *Id.* at 12.

182. *Id.*

183. *Id.* (citations omitted) (internal quotation marks omitted) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

184. *Id.* at 13 (citing *Burger King*, 471 U.S. at 472).

185. *See generally* Ozan O. Varol, *Substantive Due Process, Plenary-Power Doctrine, and Minimum Contacts: Arguments for Overcoming the Obstacle of Asserting Personal Jurisdiction over Terrorists Under the Anti-Terrorism Act*, 92 IOWA L. REV. 297 (2006) (discussing, among other things, the primary means by which most courts have been able to establish personal jurisdiction over terrorist defendants).

186. *In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 807 (S.D.N.Y. 2005) (citing FED. R. CIV. P. 4(k)(2) advisory committee’s note; *United States v. Int’l Bhd. of Teamsters*, 945 F. Supp. 609, 616–17 (S.D.N.Y. 1996)). The court explained:

For jurisdiction under Rule 4(k)(2), there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process.

“engage[] in unabashedly malignant actions directed at and felt in” the United States will satisfy the minimum contacts requirement for establishing personal jurisdiction.<sup>187</sup>

Though plaintiffs have discovered a relatively wieldy path to establishing personal jurisdiction over organizations that physically carry out acts of international terrorism, courts have been more skeptical of exercising jurisdiction over defendants who may have provided financial and logistical support to terrorist groups, but who were not directly involved in the attacks themselves.<sup>188</sup> In order to establish that defendants who provide support to terrorist groups have “purposefully directed their activities at the United States,” the court in *In re Terrorist Attacks II* held that the “Plaintiffs must make a prima facie showing of each Defendant’s personal or direct participation in the conduct giving rise to [the] Plaintiff’s injuries.”<sup>189</sup> And although the court “does not require direct participation in the attacks themselves,” there must be at least some modicum of “participation in al Qaeda’s terrorist agenda.”<sup>190</sup>

In an effort to demonstrate that the defendants directed their activities at the United States by providing support to terrorists, the plaintiffs in *In re Terrorist Attacks I* have contended that the “Defendants knew that the primary target of . . . al Qaeda’s campaign of terror was the United States and that by providing assistance to these terrorists . . . [the] Defendants aimed their conduct at the United States.”<sup>191</sup> Some defendants have countered this assertion by directing the court’s attention to *In re Magnetic Audiotape Antitrust Litigation*,<sup>192</sup> where the Second Circuit required evidence of “primary participa[tion] in the intentional wrongdoing” before finding sufficient contacts to justify an exercise of personal jurisdiction.<sup>193</sup>

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*Id.* (citing *Int’l Bhd. of Teamsters*, 945 F. Supp. at 617).

187. *In re Terrorist Attacks II*, 392 F. Supp. 2d 539, 558 n.5 (S.D.N.Y. 2005) (citing *Mwani*, 417 F.3d at 13).

188. *See id.* at 556–64.

189. *Id.* at 558 (citing *In re Terrorist Attacks I*, 349 F. Supp. 2d at 807, 809).

190. *Id.*

191. *In re Terrorist Attacks I*, 349 F. Supp. 2d at 807 (relying on the three most recent terrorism cases of that time period: *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000); and *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff’d in part, dismissed in part*, 162 F.3d 748 (2d Cir. 1998)).

192. 334 F.3d 204 (2d Cir. 2003).

193. *Id.* at 208 (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984)) (dismissing a lawsuit against a South Korean corporation after the plaintiffs failed to demonstrate that the defendant was a direct participant in the price fixing activities that were directed at the United States).

Because of the eclectic mélange of defendants in the *September 11th Cases*, the courts appear to have chosen to resolve most issues pertaining to personal jurisdiction on an individualized basis as opposed to applying a consistent comprehensive standard.<sup>194</sup>

Once courts have conferred personal jurisdiction over a defendant by analyzing service of process and the defendant's minimum contacts with the United States, plaintiffs must still establish subject matter jurisdiction by demonstrating that their lawsuit "aris[es] under the Constitution, laws, or treaties of the United States."<sup>195</sup> Subject matter jurisdiction, though often heavily contested in lawsuits against state sponsors of terrorism, has been the subject of minimal judicial controversy in civil cases against private terrorist organizations.<sup>196</sup> Courts have uniformly established that subject matter jurisdiction is conferred by the "plain language" of the ATA, which authorizes lawsuits "in any appropriate district court of the United States."<sup>197</sup> Additionally, supplemental causes of action under the ATCA and civil RICO provisions also arise under federal statutes, placing them squarely within the subject matter jurisdiction of the federal courts.<sup>198</sup>

#### D. Defending Choice of Venue in Terrorism Lawsuits

Immediately prior to the surge in terrorism litigation spawned by the *September 11th Cases*, some speculated that the doctrine of forum

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194. One example of the court's individualized application of minimum contacts analysis is demonstrated in the case of several non-governmental Saudi princes, who despite being well connected to the United States (Prince Salman, for example, maintains significant interests in American corporations and frequently travels to the United States, where he once paid a business visit to the Bush White House) were found to have insufficient minimum contacts to establish personal jurisdiction. On the other hand, institutional defendants (most notably financial conglomerates and Islamic charities) appear to receive substantially less scrutiny, perhaps demonstrating the court's respect for international diplomacy by more readily dismissing suits against influential members of the House of Saud.

195. 28 U.S.C. § 1331 (2000). Plaintiffs may also predicate subject matter jurisdiction on the federal diversity statute, 18 U.S.C. § 1332 (2000), though it is important to note that diversity competence is inapplicable in suits between both foreign plaintiffs and foreign defendants. See Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, in *CIVIL LITIGATION AGAINST TERRORISM*, *supra* note 6, at 115.

196. See *Rubin v. HAMAS—Islamic Resistance Movement*, No. 02-0975, 2004 U.S. Dist. LEXIS 20883, at \*6-7 (D.D.C. Sept. 27, 2004) (outlining the relatively straightforward nature of subject matter jurisdiction in cases involving terrorist defendants).

197. 18 U.S.C. § 2333 (2000); *Rubin*, 2004 U.S. Dist. LEXIS at \*6.

198. See 28 U.S.C. § 1350 (2000); 18 U.S.C. § 1964 (2000).

non conveniens<sup>199</sup> would present few, if any, obstacles to plaintiffs filing civil suits against terrorists and their private sponsors.<sup>200</sup> Indeed, Congress included specific venue provisions within the ATA that create a “heightened standard of dismissal” for defendants asserting forum non conveniens.<sup>201</sup> Under the ATA,

[A] district court shall not dismiss any action . . . 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 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>202</sup>

Even in those cases where the act of terrorism giving rise to the suit occurred in a foreign jurisdiction, courts have expressed an adamant refusal to dismiss these cases in light of the venue provisions of the ATA.<sup>203</sup> In *Linde v. Arab Bank*,<sup>204</sup> for example, the defendant, a Jordanian financial institution, moved for dismissal on forum non conveniens grounds, contending that the plaintiff’s claims should be adjudicated before a Jordanian court.<sup>205</sup> In dismissing such arguments, the *Linde* court not only rejected the notion that “a Jordanian court would be significantly more convenient and appropriate,” but also found that a foreign court would be unlikely to provide “‘substantially the same’” remedy, as required by the ATA.<sup>206</sup>

As a matter of first impression, issues of forum non conveniens appear to be relatively straightforward in the context of civil terrorism litigation. In 2001, however, Congress enacted the Air

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199. This doctrine allows federal district courts to dismiss a case if they determine that there is an adequate alternative forum and certain factors weigh in favor of adjudicating the case in another forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–57 (1981) (holding, among other things, that the interests of foreign plaintiffs should be afforded less deference than those of domestic defendants); Goldsmith & Goodman, *supra* note 195, at 130.

200. Goldsmith & Goodman, *supra* note 195, at 130.

201. 18 U.S.C. § 2334(d) (2000); *Linde v. Arab Bank*, 384 F. Supp. 2d 571, 591 n.13 (E.D.N.Y. 2005).

202. § 2334(d) (emphasis added).

203. See, e.g., *Linde*, 384 F. Supp. 2d at 591 n.13 (noting that the defendant, on trial for facilitating terrorism attacks during the Second *Intifadah*, “failed to meet its burden of showing that [the] heightened standard for dismissal under the ATA [had] been met”).

204. 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

205. See *id.* at 591 n.13.

206. *Id.* (citing § 2334(d)).

Transportation Safety and System Stabilization Act (“ATSSSA”)<sup>207</sup> which granted the Southern District of New York “exclusive jurisdiction over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.”<sup>208</sup> When read in isolation, ATSSSA appears to “unambiguous[ly] . . . require that [a] plaintiffs’ claims be heard in the Southern District of New York” regardless of the defendant or the statutory basis for the plaintiff’s cause of action.<sup>209</sup> Nevertheless, courts have been consistently unwilling to enforce the venue provisions of ATSSSA to their maximum potential.<sup>210</sup> A number of courts have toiled over the legislative history of ATSSSA,<sup>211</sup> ultimately determining that Congress did not intend to centralize all terrorism lawsuits, but rather to “promote the efficiency and rationality of litigation . . . [while] limit[ing] the aggregate exposure of the non-terrorist defendants.”<sup>212</sup>

The *Burnett* case was the first of the *September 11th Cases* to directly address the venue provisions of the ATA.<sup>213</sup> Although the court carefully scrutinized the available legislative history, its ultimate decision turned on the issue of whether the ATSSSA venue provisions could be interpreted in a manner that did not come “irreconcilably into conflict with the ATA,” which allows for terrorism lawsuits to be filed in “ ‘any appropriate district court of the United States.’ ”<sup>214</sup> Ultimately, the court found that “giving a narrow construction to the ‘exclusive jurisdiction’ language of Section

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207. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 note (Supp. IV 2004)).

208. § 408(b)(3), 115 Stat. at 241 (emphasis added).

209. *Burnett I*, 274 F. Supp. 2d 86, 93 (D.D.C. 2003).

210. See, e.g., *Hudson News Co. v. Fed. Ins. Co.*, 258 F. Supp. 2d 382, 387–88 (D.N.J. 2003) (“[M]ost, if not all courts addressing the jurisdictional effect of the Air Safety Act have narrowly construed the scope of Section 408(b)(1) and (3) . . . [and] this Court is, like its sister courts, reluctant to attribute expansive effect to those provisions.”); *Goodrich Corp. v. Winterthur Int’l Am. Ins. Co.*, 2002 WL 31833646, at \*4 (N.D. Ohio 2002) (holding that the ATSSSA applies exclusively to victims of the terrorist-related aircraft crashes of September 11th and not to insurance coverage actions).

211. See, e.g., *Burnett I*, 274 F. Supp. 2d at 94 (citing 147 CONG. REC. S9589, 9589–603 (daily ed. Sept. 21, 2001); 147 CONG. REC. H5894, 5894–918 (daily ed. Sept. 21, 2001)) (struggling over the “meager” legislative history, but ultimately “discern[ing] . . . that the driving force behind ATSSSA was Congress’s concern for the financial survival of the airline industry”).

212. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 371 (S.D.N.Y. 2003); *Burnett I*, 274 F. Supp. 2d at 94 (citing 270 F. Supp. 2d at 371).

213. See *Burnett I*, 274 F. Supp. 2d at 98–99.

214. *Id.* at 95 (quoting 18 U.S.C. § 2333 (2000)).

408(b)(3)” allowed the legislation to be harmonized with the ATA.<sup>215</sup> Consequently, the *Burnett* court permitted suits arising from the September 11th attacks to be filed outside of the Southern District of New York so long as the plaintiffs stated a cause of action against terrorists or their private sponsors.<sup>216</sup>

As a practical matter, the reluctance of courts “to attribute expansive effect to [the] provisions” of ATSSSA has been only of academic value.<sup>217</sup> Shortly after the *Burnett* decision, the Multidistrict Litigation Panel consolidated several cases related to the attacks of September 11th in the Southern District of New York,<sup>218</sup> thereby alleviating the risk of the cases being overturned on appeal because they were tried in the incorrect jurisdiction.<sup>219</sup> As a consequence of the ATA, terrorism lawsuits arising from new instances of terrorism will continue to be filed in a wide variety of federal district courts, and defendants will face significant challenges in asserting forum non conveniens in light of the heightened standard of dismissal under the ATA.

#### *E. Pre-Trial Discovery Against Terrorist Entities*

Engaging in pre-trial discovery against terrorist defendants in an international forum can be exceedingly difficult, requiring an extraordinary amount of financial and logistical resources.<sup>220</sup> And even though the plaintiffs in the *September 11th Cases* have won a number of intermediate courtroom victories, their ultimate success will depend upon an unprecedented investigative effort that will span the far reaches of the Earth. Nathan Lewin, a Washington lawyer who has won wide acclaim for his victories against terrorist

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215. *Id.* (citing *Hudson News Co.*, 258 F. Supp. 2d at 387–88). Furthermore, the court noted that “Congress did not ‘clearly express’ an intention that Section 408(b)(3) was to render the ATA’s jurisdictional provision ineffective, although it is ‘normally expected to be aware of its previous enactments and to provide clear statement of repeal if it intends to do so.’” *Id.* (citing *Navegar, Inc. v. United States*, 192 F.3d 1050, 1063 n.8 (D.C. Cir. 1999)).

216. *Id.* at 92–96.

217. *Hudson News Co.*, 258 F. Supp. 2d at 388.

218. See *In re Terrorist Attacks on September 11, 2001*, 295 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003); *supra* notes 102–04 and accompanying text.

219. Terence J. Kivlan, *Trillion Dollar Lawsuit To Be Heard in Manhattan*, STATEN ISLAND ADVANCE, Feb. 20, 2004, at A5.

220. Kellie McGowan, *Following the Money Trail: Can American Lawyers Use American and International Discovery Procedures To Prove the Link Between International Terrorist Acts and Financiers?*, 18 TEMP. INT’L & COMP. L.J. 175, 196 (2004) (noting the likelihood that defendants will file numerous motions, including “motions for protective orders, as well as challenges to each form of discovery the plaintiffs may attempt”).



defendants,<sup>221</sup> estimates that more than one million hours went into the *Boim* case,<sup>222</sup> much of which was expended in pre-trial discovery efforts.<sup>223</sup>

By honing their focus on financial institutions and charitable organizations, the plaintiffs in the *September 11th Cases* will have to provide evidence that these defendants knowingly and willingly financed acts of terrorism.<sup>224</sup> Establishing that these defendants had the requisite constructive or actual knowledge is going to require more than mere evidence of business deals and financial transactions.<sup>225</sup> Further enhancing the complexity of the pre-trial discovery process, the banking institutions<sup>226</sup> having been implicated in the *September 11th Cases* are intricate organizations with substantial holdings throughout the Middle East. One of the most prominent defendants, the Al Baraka Investment and Development Corporation, is a Saudi financial conglomerate with significant ties to the Sudan and a number of subsidiaries scattered across several continents.<sup>227</sup> It is, therefore, not surprising that attorneys in the *September 11th Cases* expect to be immersed in the largest discovery effort ever conducted in federal court.<sup>228</sup>

Fortunately, the American discovery procedures outlined in the Federal Rules of Civil Procedure are exceedingly broad and allow plaintiffs to engage in a virtual fishing expedition for any information that is “reasonably calculated to lead to the discovery of admissible evidence.”<sup>229</sup> But in order to utilize these permissive American discovery rules, the plaintiffs must demonstrate that the party upon

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221. See generally *An Assessment of the Tools*, *supra* note 13 (addressing Lewin’s work on terrorist-related lawsuits); Lewin & Lewin, LLP, <http://www.lewinlewin.com/nathan.html> (last visited Dec. 11, 2007) (providing a brief biography for Mr. Lewin).

222. *Boim v. Quranic Literary Inst. & Holy Land Found.*, 291 F.3d 1000 (7th Cir. 2002).

223. *An Assessment of the Tools*, *supra* note 13 (statement of Nathan Lewin, Lewin & Lewin, LLP) (noting that without the help and volunteer work of several legal organizations, the firm “would not [have been] able to continue with this exceedingly important lawsuit”).

224. See *Boim*, 291 F.3d at 1012, 1016–21 (holding that funding simpliciter, standing alone, is insufficient to establish liability and that plaintiffs must demonstrate willful knowledge of the terrorist activities).

225. See McGowan, *supra* note 220, at 180.

226. The banking defendants implicated in the *September 11th Cases* include Al Baraka Investment & Development Corp., Al Shamal Islamic Bank, Al-Rajhi Banking & Investment Corporation, National Commercial Bank, and Faisal Islamic Bank. See Third Amended Complaint, *supra* note 54, at 230–46.

227. McGowan, *supra* note 220, at 180; see Third Amended Complaint, *supra* note 54, at 230–35.

228. Interview with Ron Motley, *supra* note 20.

229. FED. R. CIV. P. 26(b)(1).

which discovery is being served is subject to the Federal Rules by establishing personal jurisdiction.<sup>230</sup> When discovery is being served on a party to the lawsuit that is already subject to the jurisdiction of the court, the discovery process has generally proceeded with little fanfare.<sup>231</sup> However, a significant amount of discovery in the *September 11th Cases* will involve non-parties who are outside the jurisdictional purview of the American courts.<sup>232</sup> And although the Federal Rules of Civil Procedure contain provisions for conducting international discovery,<sup>233</sup> these methods are not widely accepted internationally.<sup>234</sup>

The international community has been more accepting of the Hague Convention on the Taking of Evidence Abroad ("Hague Evidence Convention"),<sup>235</sup> which came about in the 1970s in an effort to facilitate discovery procedures in the international forum.<sup>236</sup> Nevertheless, because no Middle Eastern country is currently a signatory to the agreement, the Hague Evidence Convention has only been utilized in order to obtain documents from a handful of European entities.<sup>237</sup> In Saudi Arabia, where plaintiffs tend to focus their most extensive discovery efforts, there "are no outlined procedures for pre-trial discovery . . . and it is unclear what response the [Saudi] court . . . would have to service of pre-trial discovery requests based on the Federal Rules of Civil Procedure."<sup>238</sup>

Unfazed by the procedural and diplomatic encumbrances of international discovery, the plaintiffs in the *September 11th Cases* have frequently renounced the formal channels of discovery in favor

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230. See *supra* Part I.C.

231. Interview with Ron Motley, *supra* note 20.

232. See *id.*

233. See, e.g., FED. R. CIV. P. 28(b) ("Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request . . . or (3) on notice before a person authorized to administer oaths . . . or (4) before a person commissioned by the court . . .").

234. Hidekazu Kayakawa, *Discovering Evidence in International Disputes—American Discovery Procedures and the Hague Convention Procedure*, ILL. BUS. L.J., Nov. 8, 2005, [http://iblsjournal.typepad.com/illinois\\_business\\_law\\_soc/2005/11/discovering\\_evi.html](http://iblsjournal.typepad.com/illinois_business_law_soc/2005/11/discovering_evi.html). In many countries, the discovery process is conducted primarily by the courts, as opposed to the respective parties. *Id.* Accordingly, American discovery procedures may sometimes be perceived as an interference with the province of the foreign court.

235. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention].

236. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 524 (1987) (stating that the Hague Evidence Convention "prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state").

237. Interview with Ron Motley, *supra* note 20.

238. McGowan, *supra* note 220, at 189.

of forming their own “team of investigators from around the world . . . to probe al Qaeda’s financial links.”<sup>239</sup> Even prior to the official commencement of pre-trial discovery in the Spring of 2006, plaintiffs’ counsel in the *September 11th Cases* had already completed a significant fact finding process<sup>240</sup> led by French terrorism expert Jean-Charles Brisard, the author of the most exhaustive study ever completed on the financial network of the bin Laden organization.<sup>241</sup> Ron Motley, “who has made a career of coaxing documents from the shadows,”<sup>242</sup> has already spent \$12 million—much of it his own money—“bankroll[ing] a worldwide intelligence-gathering operation that makes the discovery process, ordinarily marked by subpoenas and dry depositions, read like a Tom Clancy novel.”<sup>243</sup> Motley has retained the services of ten foreign informants, one of whom is a former Taliban official.<sup>244</sup> Through highly unconventional methods of discovery, the plaintiffs in the *September 11th Cases* have also acquired foreign intelligence reports<sup>245</sup> and computer hard drives<sup>246</sup> used by the Taliban government, al-Qaeda operatives, and Islamic charities operating out of Europe and Asia.<sup>247</sup> Motley and his team have now shifted the focus of their discovery process to documents that have already been culled by foreign governments, thereby curtailing the arduous and oftentimes unsuccessful process of vetting and authenticating evidence received from private informants across the world.<sup>248</sup>

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239. *Id.* at 183.

240. To prevent the filing of frivolous lawsuits, Rule 11 of the Federal Rules of Civil Procedure requires that counsel investigate the merits of their claim in order to establish a good faith belief that the defendants are indeed responsible for the plaintiff’s injuries. *See* FED. R. CIV. P. 11.

241. *See generally* JEAN-CHARLES BRISARD & GUILLAUME DASQUIÉ, FORBIDDEN TRUTH: U.S.-TALIBAN SECRET OIL DIPLOMACY, SAUDI ARABIA AND THE FAILED SEARCH FOR BIN LADEN (Lucy Rounds trans., 2002) (chronicling the history and financial breadth of the bin Laden network).

242. Senior, *supra* note 100, at 36.

243. *Id.* at 38, 40; *see* Interview with Ron Motley, *supra* note 20.

244. Senior, *supra* note 100, at 40.

245. Plaintiffs have obtained over two million pages of documents, including Albanian intelligence reports on bin Laden’s business dealings in the Balkans and various Swiss banking records. *See* Interview with Ron Motley, *supra* note 20.

246. In 2001, Motley was able to obtain a computer hard drive from Afghanistan belonging to Muhammad Atef, al-Qaeda’s military commander. The hard drive contained documents directing top Taliban officials to turn over large donations from Saudi charities to terrorist cells in central Asia. Plaintiffs have also been able to obtain hard drives from the Bosnian offices of the Al Haramain Charitable Foundation. *See id.*; *see also* Senior, *supra* note 100, at 36–38.

247. Senior, *supra* note 100, at 36.

248. *See id.*

Back in the United States, however, the plaintiffs in the *September 11th Cases* have found that their largest adversary in the discovery process is not the foreign defendants, but the U.S. Department of Justice.<sup>249</sup> Citing “grave national security concerns” as their motivation, the Department of Justice has “interven[ed] to control access to all evidence and documents related to private litigation . . . regarding the terrorist attacks of September 11, 2001.”<sup>250</sup> Though seemingly intrusive, the Department of Justice’s meddling in the civil discovery process is statutorily permissible under the ATA, which permits the Attorney General to stay discovery or object to the request of certain files if it is deemed that such discovery will impede government criminal prosecutions or raise national security concerns.<sup>251</sup> A Department of Justice letter to the district court reveals that “officials at TSA [Transportation Security Administration] have also been contacting witnesses [that have] already [been] subpoenaed by attorneys for the plaintiff families, telling them that they should send all Plaintiff-subpoenaed evidence and documents to the TSA for initial inspection.”<sup>252</sup> Indeed, the government’s actions thus far have led some to speculate on the constitutional issues that arise when a district court permits bureaucratic appointees to tamper with witnesses and evidence in private civil proceedings.<sup>253</sup> Others have been even more adamant, contending that this “unprecedented vetting of evidence . . . denies the claimants their right to due process.”<sup>254</sup>

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249. Interview with Ron Motley, *supra* note 20.

250. Tom Flocco, *Justice Department To Attempt Shutdown of 9/11 Evidence Friday*, THE FEDERAL OBSERVER, July 13, 2002, <http://www.federalobserver.com/archive.php?aid=3200>. Specifically, the Department of Justice sought the

entry of a global discovery order . . . requiring that 1) Transportation Security Administration (TSA) be served with [have prior access to] all requests for party and non-party discovery; 2) defendants and non-parties submit all proposed discovery responses that may contain sensitive security information . . . to the TSA prior to releasing such material to plaintiffs; and 3) TSA have the necessary opportunity to review such material and to withhold sensitive security information.

*Id.*

251. See 18 U.S.C. § 2336(b) (2000) (“If a party . . . seeks to discover the investigative files of the Department of Justice, the . . . Attorney General may object on the ground that compliance will interfere with a criminal investigation or prosecution of the incident, or a national security operation related to the incident, which is the subject of the civil litigation.”).

252. Flocco, *supra* note 250.

253. See *id.*

254. Walter Gilberti, *Bush Administration Moves To Stifle Discovery in 9/11 Lawsuits*, WORLD SOCIALIST WEB SITE, Aug. 2, 2002, <http://www.wsws.org/articles/2002/aug2002/bush-a02.shtml>.

Unfortunately, it remains too early in the process to gauge the court's response to these intrusions into the evidence-gathering process. It also remains to be seen what role the district court will play in this highly contentious discovery process as well as what information the plaintiffs will manage to procure.<sup>255</sup> It is clear, however, that plaintiffs in terrorism lawsuits face unique barriers, both at home and abroad, in gaining access to the information that is needed to substantiate their claims.<sup>256</sup>

#### F. Executing Judgments Against Private Terrorist Defendants

It is difficult to fully appreciate the legal and political aspects of lawsuits aimed at private terrorists without addressing the practicalities of executing judgments once a favorable verdict has been rendered.<sup>257</sup> In most cases, foreign terrorist organizations have few, if any, tangible assets that can be used to satisfy a judgment.<sup>258</sup> Recognizing this grim reality, the plaintiffs in the *September 11th Cases* have targeted organizations and corporations with substantial financial holdings throughout the world.<sup>259</sup> Even in cases where terrorist organizations and their supporters have considerable holdings dispersed across the globe, attaching these assets to satisfy a civil judgment can be extraordinarily difficult,<sup>260</sup> and plaintiffs are often faced with the complex task of locating and collecting terrorist assets abroad.<sup>261</sup>

While nations are not generally obligated to recognize judgments rendered by foreign courts,<sup>262</sup> international tribunals will often enforce the judgments of U.S. courts "on the basis of reciprocity and comity."<sup>263</sup> It is not entirely atypical for foreign courts, however, to

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255. Interview with Ron Motley, *supra* note 20.

256. McGowan, *supra* note 220, at 196–97 (summarizing a number of the procedural legal barriers that have plagued many plaintiffs in pursuing terrorist defendants).

257. See Strauss, *supra* note 14, at 724.

258. Stratton, *supra* note 57, at 50. After all, the very concept of terrorism allows small, unsophisticated organizations with limited means to carry out their violent missions with only a fraction of the resources otherwise needed to mount conventional military forces. See Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 317–21 (2003).

259. See *supra* note 226 for information about the defendants in the *September 11th Cases*.

260. See Warneck, *supra* note 117, at 220.

261. Strauss, *supra* note 14, at 726.

262. See *id.* at 724–25. See generally RICHARD SCHAEFFER, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 96–97 (6th ed. 2005) (addressing the enforceability of judgments rendered by foreign courts).

263. Strauss, *supra* note 14, at 725; see *Hilton v. Guyot*, 159 U.S. 113, 163–66 (1895); Ronan E. Degan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of*

“refuse to enforce judgments . . . if they view the amount of money awarded to be excessive . . . or if they think the [U.S.] court extended its net of jurisdiction too widely.”<sup>264</sup> Furthermore, countries hostile to the United States are unlikely to recognize any judgment rendered by a U.S. court, regardless of fairness.<sup>265</sup> Some believe that international frustration with American foreign policy and the perceived arrogance of U.S. courts abroad make foreign nations less likely than ever to fulfill the dictates of America’s civil justice system.<sup>266</sup>

To bypass the labyrinth of executing American judgments in foreign jurisdictions, plaintiffs in more recent cases, such as *Boim* and *Burnett*, have focused their efforts on investigating and attaching assets located within the United States or securing funds that have already been frozen by the executive branch.<sup>267</sup> As a general proposition, collecting judgments against individual terrorists<sup>268</sup> is unlikely, as they typically have few assets within the jurisdictional purview of U.S. courts.<sup>269</sup> With respect to executing judgments against terrorist organizations and the organizations that support them, however, “the prospects for enforcement may not be as bleak.”<sup>270</sup> In the case of Islamic charities that raise funds or own

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*Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 846–49 (1988) (noting that the “[e]nforcement of foreign judgments commonly proceeds from notions of comity” and respect for the sovereign power of the foreign state).

264. Strauss, *supra* note 14, at 725; see also Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 133–36 (1992) (opining that European nations are more hesitant to establish jurisdiction predicated on continuous and systematic contacts with the forum); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 114–16 (1999) (explaining that many foreign nations fail to recognize American notions of jurisdiction such as general personal jurisdiction predicated on a defendant’s minimum contacts with the forum).

265. Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT’L L.J. 1, 41 (2002).

266. Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1051–52 (2005).

267. See *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1003 (7th Cir. 2002); *Burnett I*, 274 F. Supp. 2d 86, 91 (D.D.C. 2003).

268. Plaintiffs may also encounter difficulties establishing personal jurisdiction over individual terrorist defendants without the systematic and continuous contacts necessary for general personal jurisdiction. See, e.g., *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 260 (D.R.I. 2004) (refusing to enter default judgments against individual terrorist defendants because of an insufficient showing of the defendant’s contacts with the forum).

269. See Heiser, *supra* note 265, at 38.

270. *Id.*

property within the United States, these assets are routinely attached to satisfy outstanding judgments.<sup>271</sup>

At first glance, executing judgments in the United States would appear to be a relatively straightforward endeavor. After all, the executive branch has tremendously broad discretion in seizing and retaining the assets of foreign terrorist organizations.<sup>272</sup> The International Emergency Economic Powers Act ("IEEPA")<sup>273</sup> authorizes the President to regulate international financial transactions in order to combat threats "to the national security, foreign policy, or economy of the United States."<sup>274</sup> Although presidents have traditionally utilized the IEEPA to impose economic sanctions against foreign governments, more recently, these powers have been employed "in the war on terrorism by using the law to seize the assets of terrorist groups and thereby cut off their funding."<sup>275</sup> Moreover, federal courts have uniformly accepted the President's broad powers under the IEEPA to combat global terrorism in a post-September 11th world.<sup>276</sup> In *Global Relief Foundation v. O'Neill*,<sup>277</sup> for example, the Seventh Circuit upheld President Bush's seizure of the appellant's assets, determining that the IEEPA "is designed to give the President means to control assets that could be used by enemy aliens," possibly to conduct acts of international terrorism directed at the United States.<sup>278</sup>

As part of the United States' response to the September 11th attacks, President Bush issued Executive Order 13,224—"Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism."<sup>279</sup> Similar to prior presidential decrees,<sup>280</sup> Executive Order 13,224 designated a number of Islamic charities and Middle Eastern financial institutions as

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271. 8 U.S.C. § 1189 (2000 & Supp. IV 2004); § 1189(a)(2)(C); see *Boim*, 291 F.3d at 1005.

272. Strauss, *supra* note 14, at 728.

273. 50 U.S.C. §§ 1701–1707 (2000).

274. § 1701(a).

275. Strauss, *supra* note 14, at 728–29.

276. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (upholding the appellant's designation as a "Specially Designated Global Terrorist" pursuant to an Executive Order issued under the IEEPA).

277. 315 F.3d 748 (7th Cir. 2002).

278. *Id.* at 753.

279. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

280. In 1995, President Clinton issued Executive Order 12,947, which designated several organizations, including Hamas, as "Specially Designated Terrorists" and blocked all of their assets within the United States. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

"Specially Designated Global Terrorists" ("SDGTs") and froze all their assets that were within the jurisdiction of the United States.<sup>281</sup> The Holy Land Foundation, a prominent Islamic charitable organization, and the Al-Aqsa Islamic Bank, each of which are defendants in the *September 11th Cases*, have been designated as SDGTs and their assets remain frozen.<sup>282</sup> Currently, there are over 150 organizations designated as SDGTs pursuant to Executive Order 13,224,<sup>283</sup> many of which are defendants in civil terrorism lawsuits stemming from the September 11th attacks. Nearly \$27 million in Taliban and al-Qaeda assets have been frozen in the United States alone, and the U.S. Department of State reports that 139 other nations currently have blocking orders in place.<sup>284</sup>

Despite the government's recent successes in freezing the assets of terrorist organizations, however, there has been little success in utilizing these frozen assets to satisfy civil judgments. Federal courts have long recognized that plaintiffs are not necessarily entitled to execute civil judgments against blocked assets that have been seized by the United States government.<sup>285</sup> In *Smith v. Federal Reserve Board of New York*,<sup>286</sup> for example, the district court denied a request by victims of the September 11th attacks to attach seized assets in order to satisfy a civil judgment.<sup>287</sup> Although the plaintiffs were entitled to compensation, the court determined that the President had frozen the terrorist's assets, thereby vesting title in them with the U.S. Department of the Treasury.<sup>288</sup> After assets become property of the United States government, they cannot be attached in order to satisfy

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281. Exec. Order No. 13,224, 66 Fed. Reg. at 49,079–83 (allowing for additional SDGTs to be named in the event that additional organizations are found to have aided, or are associated with the terrorist groups currently subject to this order).

282. Strauss, *supra* note 14, at 729.

283. See Exec. Order No. 13,224, 66 Fed. Reg. at 49,079–83; MATTHEW LEAVITT, WASH. INST. FOR NEAR EAST POLICY, NAVIGATING THE U.S. GOVERNMENT'S TERRORIST LISTS (2001), available at <http://www.washingtoninstitute.org/templateC05.php?CID=1463>.

284. Press Release, U.S. Department of State, Shutting Down Terrorist Financial Networks (Dec. 4, 2001), [http://usinfo.state.gov/is/Archive\\_Index/Shutting\\_Down\\_Terrorist\\_Financial\\_Networks.html](http://usinfo.state.gov/is/Archive_Index/Shutting_Down_Terrorist_Financial_Networks.html).

285. See Strauss, *supra* note 14, at 737.

286. 280 F. Supp. 2d 314 (S.D.N.Y. 2003), *aff'd*, 346 F.3d 264 (2d Cir. 2003).

287. *Id.* at 324; see also *Acree v. Republic of Iraq*, 370 F.3d 41, 47–48 (D.C. Cir. 2004) (adopting the prior decision of the Second Circuit in *Smith v. Federal Reserve Board of New York*); *Weinstein v. Islamic Republic of Iran*, 274 F. Supp. 2d 53, 62 (D.D.C. 2003) (determining that accounts that were property of the United States could not be attached in order to satisfy the plaintiff's judgment against Iran), *aff'd*, 2005 U.S. App. LEXIS 7062 (D.C. Cir. April 22, 2005).

288. *Smith*, 280 F. Supp. 2d at 321–22.



a civil judgment absent a specific directive from the executive branch.<sup>289</sup> And because the “President prefers to hold such assets as bargaining chips in negotiating with rogue actors and states,” a presidential authorization to permit the use of terrorist assets to satisfy civil judgments appears unlikely.<sup>290</sup> In cases where litigants have attempted to attach the frozen assets of foreign corporations and organizations, the executive branch has repeatedly intervened to prevent such action.<sup>291</sup>

Perhaps understandably, plaintiffs have continually complained of “‘the utter absence of any coherent policy’” by the federal government regarding lawsuits against private sponsors of terrorism.<sup>292</sup> The executive branch, on the other hand, continues to maintain that “the enforcement of these multimillion-dollar judgments undermine[s] its control over foreign policy and may hamper its fight against terrorism.”<sup>293</sup> Meanwhile, the blocked assets of some foreign terrorist organizations have been steadily depleting. The Treasury Department, for example, permitted the Holy Land Foundation to use their frozen assets to pay attorneys fees and defend themselves from the myriad of civil actions having been initiated in the wake of September 11th.<sup>294</sup>

Despite these legal and political encumbrances, however, victims of international terrorism have been undeterred in their quest to bankrupt global terrorist operations. With more financial and legal resources than ever before, victims have begun to target terrorist defendants with substantial assets that can be utilized to satisfy civil judgments.<sup>295</sup> Whether the plaintiffs in the *September 11th Cases* will

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289. See Anne-Marie Slaughter & David L. Bosco, *Fighting Terror with Civil Litigation: The Wrong Approach*, BULLETIN (The Atl. Council of the U.S., Wash., D.C.), May 2002, at 2.

290. S. Foster, *An American Inquiry into Contemporary Terrorist Accountability*, 6 TEX. REV. L. & POL. 513, 531 (2002).

291. See S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1295–99 (2000) (discussing the government’s numerous attempts to prevent litigants from attaching blocked assets); see also Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 317 (2001) (recounting President Carter’s efforts to prevent victims of the Iran hostage crisis from executing their judgments).

292. Marcia Coyle, *A Case of Terrorism: How Two Lawyers Brought a Suit They Just Might Win*, NAT’L L.J., Nov. 11, 2002, at A1 (quoting Allan Mendelsohn, Mendelsohn & O’Keefe).

293. Strauss, *supra* note 14, at 726; see Adam Liptak, *U.S. Courts’ Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, at 1.

294. See Strauss, *supra* note 14, at 736.

295. See, e.g., *In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 779–80 (S.D.N.Y. 2005).

be more successful than their predecessors in executing judgments, however, remains to be seen.

## II. JUSTICE IN THE BALANCE: MAKING THE CASE FOR CIVIL TERRORISM LITIGATION

The road to successfully pursuing a civil lawsuit against a private terrorist entity is indeed hampered by a host of legal and practical barriers. Although Congress has made terrorism lawsuits remarkably easier—at least from a procedural vantage—over the past decade,<sup>296</sup> executive branch officials continue to maintain that terrorism lawsuits interfere with American foreign policy objectives and disrupt efforts to stabilize relations with the Middle East.<sup>297</sup> The rise in civil terrorism litigation that has occurred since the September 11th attacks has succeeded in creating two dimensions in the War on Terrorism—one that emanates from Pennsylvania Avenue and the other which has found its way into federal courtrooms across the United States.<sup>298</sup> This bifurcation of America's counter-terrorism strategy has created an often times tenuous struggle between the judicial interest in compensating victims of terrorism and the more nebulous concepts of diplomacy and international relations in an increasingly hostile world.

Since the beginning of our nation's history, scholars, politicians, and statesmen have debated this very same issue—albeit in differing contexts.<sup>299</sup> There has been consistent disagreement regarding the scope of Executive power in the foreign policy arena and how this power might conflict with the role of an independent judiciary charged with protecting the individual rights of private citizens.<sup>300</sup> This debate is now largely concentrated around an extensive and respected lineage of jurisprudence beginning with Chief Justice Marshall's early analysis of Executive power<sup>301</sup> and ending with more

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296. See *infra* Part I.A.

297. See Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 706 (1999) (discussing the potential adverse implications that terrorism lawsuits may have on the broader foreign policy objectives of the executive branch); Sealing, *supra* note 31, at 120–21, 143–44 (chiding the private justice being sought by many plaintiffs in terrorism lawsuits).

298. Lehrer, *supra* note 75, at 359.

299. See Keller, *supra* note 266, at 1046–47.

300. See *id.*

301. See *Little v. Barreme*, 6 U.S. 170, 177–79 (1804) (pronouncing on an extraordinarily expansive vision of presidential authority in times of conflict by striking down as unconstitutional presidential instructions that were contrary to the laws of Congress).

contemporary notions of presidential authority in a rapidly transforming global environment.<sup>302</sup> In perhaps the most resounding affirmation of broad Executive power in the foreign policy arena, the Supreme Court in *United States v. Curtiss-Wright*<sup>303</sup> described the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”<sup>304</sup>

Critics of terrorism lawsuits contend that these “legal actions distort the structure of international law and the balance of power among the branches of our federal government.”<sup>305</sup> Professor John Yoo, a former official at the Department of Justice, argues that American courts are not institutionally equipped to arbitrate private acts of international terrorism in a civil context.<sup>306</sup> Indeed, Yoo contends that because U.S. courts see “only the discrete cases before [them],” they “aren’t good at measuring the costs and benefits of anything . . . they’re good at right and wrong.”<sup>307</sup> Many critics remain wary of the diplomatic consequences of the *September 11th Cases* in particular, where the range of terrorist defendants has multiplied exponentially and now includes multinational corporations, once-revered Islamic charities, and prominent members of the Saudi royal family.<sup>308</sup> Some argue that “[t]he juxtaposition of [the] increased involvement of U.S. courts in foreign affairs with” America’s continued refusal to actively participate in multinational tribunals “creates the image of a country happy to haul foreign defendants into its own courts while stubbornly resisting even the remote possibility that its own citizens might be called to account.”<sup>309</sup> Further inflaming

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302. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (discussing the classifications of presidential authority, which are now widely accepted and referred to as “zones of presidential authority”—a concept that continues to be cited in support of broad exercises of presidential power); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–22 (1936) (representing one of the most expansive visions of presidential authority in the Supreme Court’s history).

303. 299 U.S. 304 (1936).

304. *Id.* at 320. Indeed, the executive branch continues to rely on the broad declaration of authority pronounced in *Curtiss-Wright* in order to justify its seemingly limitless powers in fighting the War on Terrorism without judicial interference. See Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26–33 (1972) (discussing the “inherent Presidential power” recognized in *Curtiss-Wright* from an original intent perspective); Keller, *supra* note 266, at 1046.

305. Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 434 (2002).

306. See Liptak, *supra* note 293.

307. *Id.*

308. *Id.*

309. Slaughter & Bosco, *supra* note 23, at 115 (noting that successful terrorism lawsuits “suggest that the world’s sole superpower is arming itself with superpower courts,” which “may threaten those uncomfortable with U.S. hegemony”).

the situation, lead counsel in the *September 11th Cases*, Ron Motley—a colorful attorney prone to rhetorical excesses<sup>310</sup> and best known for his infamous closing argument conducted while wearing a toy stethoscope<sup>311</sup>—hardly typifies the most sensitive champion of private action against foreign defendants.

What opponents of terrorism lawsuits fail to appreciate, however, is that plaintiffs have been using America's civil justice system as a means of calling for the atonement of international atrocities for decades.<sup>312</sup> Plaintiffs have pursued thousands of lawsuits for causes of action ranging from human rights abuses in Latin America<sup>313</sup> to acts of international terrorism.<sup>314</sup> In fact, courts in the United States have pioneered the use of civil remedies to address some of the most notorious savagery of the twentieth century, and the success of these civil suits is indeed a remarkable chapter in American legal history.<sup>315</sup> Despite the existence of lawsuits aimed at adjudicating human rights atrocities, there is no evidence that such lawsuits "have weakened the structure of international law or threatened the coherence of our government's foreign policy, much less the foundations of the U.S. constitutional system."<sup>316</sup>

To the contrary, the grave threat of international terrorism may simply be too important to relegate to the "unscrutinized domain" of executive bureaucrats, and plaintiffs pursuing lawsuits against private sponsors of terror are providing an exceptionally important tool in the War on Terrorism.<sup>317</sup> Allan Gerson, a renowned expert in international law, believes that terrorism lawsuits represent the

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310. During press conferences, Ron Motley has referred to Prince Turki (a defendant in *Burnett*) as the "Prince of Boloney," and "Prince Cooked Goose." See Senior, *supra* note 100, at 42.

311. See *id.*

312. For example, during the 1980s, foreign plaintiffs looked to American courtrooms to seek restitution for human rights atrocities that occurred at the hands of rogue dictators. See, e.g., *Estate of Filartiga v. Pena-Irala*, 630 F.2d 876, 877–79 (2d Cir. 1980) (commencing a wrongful death action after a political dissident was tortured and killed by Paraguayan officials). See generally BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996) (providing a detailed guide to the process of human rights litigation under the ATCA and the TVPA and addressing issues such as international law, federal court jurisdiction, and statutory construction).

313. E.g., *Filartiga*, 630 F.2d at 879.

314. E.g., *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1001 (7th Cir. 2002).

315. See STEPHENS & RATNER, *supra* note 312, at 755–57 (summarizing the effective use of American courts to combat human rights abroad).

316. Stephens, *supra* note 305, at 434.

317. *Id.* at 435.

“ ‘ascent of humanitarian law [first] articulated at Nuremberg in a criminal context . . . and brought to bear in current exigencies through the rise of a new jurisprudence.’ ”<sup>318</sup> And despite the potentially adverse consequences of terrorism lawsuits, this type of litigation represents the way of the new world. The *September 11th Cases* epitomize a new “wartime jurisprudence” that combats terror networks by utilizing every available resource in bringing terrorists to justice and maintaining America’s long standing commitment to the rule of law.<sup>319</sup> In today’s borderless society, those that dismiss terrorism lawsuits as “worldwide ambulance chasing” may be surprised to discover that American lawyers, more effectively than ever before, can employ existing statutory schemes and procedures to hold terrorist aggressors responsible, even in the most distant corners of the world.<sup>320</sup>

While plaintiffs in terrorism lawsuits may be prone to meddling in the delicate arena of foreign affairs, the “right to compensation from those who financed terrorism . . . is inscribed in the law and that must be accommodated.”<sup>321</sup> In one of the earliest terrorism lawsuits, a federal court in Washington, D.C., observed:

Today’s holding is not a foreign policy edict; rather it is an edict on the rule of law. It is an edict that reaffirms the unflinching principle that those who intentionally harm United States nationals will be held accountable for that harm in United States courts.<sup>322</sup>

Furthermore, the enactment of terrorism-related statutes such as the ATA seem to indicate the unequivocal intent of Congress that victims of terrorism be allowed to seek financial redress in U.S. courts.<sup>323</sup> While judgments rendered in American courts may often be unenforceable, victims may nevertheless gain some closure by establishing liability—a crucial part of the healing process.<sup>324</sup>

Recently, however, many executive officials seem to have placed their own self-elevated mission of diplomacy ahead of the rights and

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318. Jamie Glazov, *Suing the Saudis*, FRONTPAGE MAGAZINE, Oct. 25, 2002, <http://www.frontpagemag.com/Articles/Read.aspx?GUID=C40094B0-1AFB-4FD5-9C0E-FECD80656B65>.

319. Senior, *supra* note 100, at 39 (stating that preventing America’s civil justice system from adjudicating acts of international terror “ ‘is like King Canute telling the tide not to come in’ ” (quoting Harold Koh, Dean, Yale University School of Law)).

320. *See generally id.*

321. Glazov, *supra* note 318.

322. *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 53 (D.D.C. 2001).

323. *See supra* notes 79–83 and accompanying text.

324. Stratton, *supra* note 57, at 53.

liberties of individual Americans. In a world forever altered by the specter of terrorism, “citizens should be able to press legitimate grievances rather than be shunted aside for some theoretical state interest.”<sup>325</sup> Even some government officials at the Department of Justice have expressed grave concern that certain foreign governments—namely, Saudi Arabia—have failed to impose more stringent financial supervision over donations to Islamic charities and have refused to share information in their possession regarding the funding of al Qaeda.<sup>326</sup> By creating “private attorneys general,” civil terrorism litigation empowers ordinary citizens to track down private terror networks and seek out sources of terrorist financing.<sup>327</sup> Indeed, government initiatives are likely to be facilitated by plaintiffs willing to dedicate vast resources to pinpoint the source of terrorist financing.<sup>328</sup> Unfortunately, it appears that there are currently few, if any, cooperative investigative efforts between victim-plaintiffs and the Department of Justice.<sup>329</sup> Ideally, the government should be able to harness private resources to aid its criminal investigations and, in return, lend its own powerful tools to facilitate lawsuits against private terrorist entities.

Although many Justice Department officials envision civil lawsuits as a secondary alternative to criminal prosecution,<sup>330</sup> the prospect of holding terrorists criminally responsible for their actions is minuscule.<sup>331</sup> Moreover, the mere threat of criminal prosecution is unlikely to provide any meaningful deterrent to future terrorists.<sup>332</sup> Thus, civil litigation will likely bring about greater accountability for defendants that finance and harbor terrorist entities.<sup>333</sup> Increasing the likelihood that terrorists will be held responsible for their economic damages will provide an additional disincentive to carrying out acts of international terrorism.<sup>334</sup> Further, attaching terrorist assets in the United States in order to collect a civil judgment may be more

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325. Glazov, *supra* note 318.

326. Michael Isikoff & Mark Hosenball, *Terror Watch: A Legal Counterattack*, NEWSWEEK WEB EXCLUSIVE, Apr. 16, 2003, <http://www.newsweek.com/id/58274>.

327. Stratton, *supra* note 57, at 54.

328. *See id.*

329. *See* Telephone Interview with John Moore, *supra* note 50.

330. *See id.*

331. *See id.*

332. *See id.*

333. *See* Stratton, *supra* note 57, at 54 (noting that it may be easier to establish civil—as opposed to criminal—liability for supporters of terrorists, thus “tighten[ing] the stranglehold on terrorism”).

334. *See id.*

feasible than actually apprehending the perpetrators for criminal prosecution.<sup>335</sup>

Both the risks and the rewards of civil terrorism litigation are apparent. In the past, the executive branch has relied on the premise that the President should be empowered to broadly dictate the foreign policy objectives of the United States<sup>336</sup>—not individual litigants or their financially driven attorneys. However, “Congressional acquiescence in this area is clearly waning,”<sup>337</sup> and it appears that Congress “will no longer tolerate subordinating victims’ interests to the foreign policy whims of the executive branch.”<sup>338</sup> With Congress by their side, victims of terrorism should be permitted to seek justice in any venue where it can be dispensed, despite any political or diplomatic ramifications.

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335. *Id.*

336. See Lehrer, *supra* note 75, at 359.

337. *Id.*

338. *Id.*