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U.S. Civil Litigation and International Terrorism

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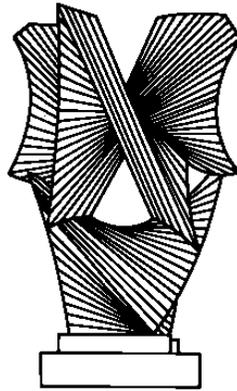
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U.S. CIVIL LITIGATION AND INTERNATIONAL TERRORISM

Jack Goldsmith and Ryan Goodman

**THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO**

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U.S. Civil Litigation and International Terrorism

Jack Goldsmith* & Ryan Goodman**

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Since September 11, the United States has mobilized enormous military, political, and legal resources to combat the threat of terrorism. This paper examines one component of these efforts: civil suits for acts of terrorism. We analyze current U.S. law governing civil actions against terrorists, consider the strengths and weaknesses of such actions, and propose alternative reforms. The paper proceeds in four parts. Part I describes the central pivot around which the doctrinal issues turn—the problem of state action. Part II analyzes U.S. law governing civil litigation against alleged terrorists who do not implicate the Foreign Sovereign Immunities Act (“FSIA”). Part III analyzes U.S. law governing civil litigation against alleged terrorists who do implicate the FSIA. Part IV discusses the policy tradeoffs of civil actions against terrorists, considers the strengths and weaknesses of current law in light of these policy issues, and analyze several legal reforms.

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I. The State Action Problem

Any analysis of U.S. law governing civil actions against terrorists must confront the problem of state action. Resolution of the state action problem as a threshold issue determines many subsequent legal issues.

The easiest place to begin is with the FSIA. The FSIA provides a comprehensive scheme for civil litigation—including civil actions involving terrorism—when the defendant is a foreign state. The FSIA defines a “foreign state” as “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.”¹ Many courts have also held that the FSIA applies to individuals who act in an official capacity.² We shall designate defendants covered by the FSIA, and thus who implicate the FSIA’s special rules, as “FSIA defendants.” The defendants in the *Flatow* litigation are typical of the types of terrorists we call FSIA defendants.³ There, Stephen Flatow sued the state of Iran and other named defendants (the Iranian Ministry of Information and Security, Ayatollah Khamenei, the former President of the Islamic Republic of Iran, and the former head of the Iranian Ministry of Information and Security) for a suicide bombing in which Flatow’s daughter was killed. The court ruled that all of these defendants satisfied the FSIA’s statutory state action requirement, and proceeded to apply special FSIA rules to the entire litigation.

One might think that all defendants who fail to satisfy the FSIA’s state action requirement would be non-state actors. This is not the case. In some civil actions alleging human rights abuses under 28 U.S.C. §1350⁴ or the more recent Torture Victim Protection Act (“TVPA”),⁵ courts have concluded that foreign government officials who committed human rights abuses under color of state law were not state actors for purposes of the FSIA.⁶ These courts interpret the FSIA to extend immunity only to individuals acting in an official capacity. If the official commits human rights abuses beyond his official capacity, these courts reason, he is not protected by the FSIA’s immunities.⁷ For example, the Ninth Circuit held that Ferdinand Marcos was not

¹ 28 U.S.C. §1603(a).

² See, e.g., *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F. 3d 1020 (D.C. Cir. 1997).

³ See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

⁴ 28 U.S.C. §1350.

⁵ 28 U.S.C. §1350 note.

⁶ See, e.g., *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1470 (9th Cir. 1994).

⁷ This class of defendants emerged as an indirect response to the Supreme Court’s decision in *Amerada Hess*. *Amerada Hess* held that the FSIA was the exclusive basis for subject matter jurisdiction in suits against FSIA defendants, even in cases that alleged international law violations under §1350. Because almost all human rights suits under §1350 involved officials acting under color of state law, *Amerada Hess* threatened to nip *Filartiga*-style human rights suits in the bud. See David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 Ga J Int’l L 255 (1995/1996). The interpretation of the FSIA described in the text allows courts to maintain human rights suits against foreign government actors after *Amerada Hess*.

immune in a §1350 suit involving alleged acts of torture, execution, and disappearance. The court concluded that these acts “were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state within the meaning of [the] FSIA.”⁸ In the terrorism context, a military commander involved in the bombing of a civilian population center could ostensibly be sued as a private individual on the theory that extrajudicial killings are not within the mandate of his official capacities. We call this class of defendants “non-FSIA state actors.”

Within the class of non-FSIA state actors, we also place members of organizational entities that possess some qualities of state authority but are not themselves recognized states or “agencies or instrumentalities” of recognized states under the terms of the FSIA. In *Kadic v. Karadzic*, for example, the Second Circuit held that Radovan Karadzic – as the leader of the unrecognized Bosnian-Serb entity of “Srpska” – could be held liable for acting under color of law for purposes of international law violations requiring state action.⁹ Because these defendants may commit acts under of color of law (under *Karadzic*’s rationale) but not receive FSIA immunity (because they are not recognized states),¹⁰ we include such defendants in the category of non-FSIA state actors.

A third and final category of defendants relevant to the analysis that follows are “pure non-state actors.” Pure non-state actors are persons (including organizations with legal personality) who commit acts of terrorism but who neither satisfy the FSIA nor act under color of state law. These are persons who commit acts of terrorism in a private capacity, or with no de facto or de jure governmental connection. Examples of this category include Timothy McVeigh, the Shining Path (Peru), the LTTE (Sri Lanka). Al Qaeda, in so far as it is not an agency or instrumentality of any state, would fit under this category.

The important dividing line between these three classes of defendants is between FSIA defendants, on the one hand, and non-FSIA state actors and pure non-state actors,

⁸ In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1472 (9th Cir. 1994); cf. *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y.1988) (“The FSIA does apply to individual defendants when they are sued in their official capacity.”).

⁹ *Kadic v. Karadzic*, 70 F.3d 232, 244-45 (2d Cir. 1995). The Second Circuit also held that Karadzic was not entitled to head of state immunity. *Kadic*, 70 F.3d at 248.

¹⁰ The FSIA does not specify whether it applies only to states recognized by the United States, but that appears to be the logical conclusion. Cf. *Kadic*, 70 F.3d at 245 (“It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime--sometimes due to human rights abuses--had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.”); Judith Hippler Bello & Theodore R. Posner, *International Decision, Kadic v. Karadzic*, 70 F.3d 232, 90 Am. J. Int'l L. 658, 663 n.21 (1996) (“Alternatively, had the Court taken this route, it might have held that the FSIA applies only to recognized states. Although there is nothing in the definition of “foreign state” in the FSIA to support this theory, the rules for service of process suggest that Congress was contemplating states recognized by the United States.”).

on the other.¹¹ For this reason, in the analysis that follows we group together non-FSIA state actors and pure non-state actors under the general heading of “non-FSIA defendants.” As we shall explain, the procedural law governing civil litigation—issues such as personal and subject matter jurisdiction, service of process, discovery, and enforcement of judgments—differs dramatically depending on whether the defendants are FSIA defendants or non-FSIA defendants. Only when it comes to substantive law issues does the tripartite distinction matter.

We hope these distinctions become more apparent as the analysis proceeds. For now, we offer this chart:

Defendants	FSIA DEFENDANTS	NON-FSIA DEFENDANTS	
		NON-FSIA STATE ACTORS	PURE NON-STATE ACTORS
Criteria	Foreign states & their political subdivisions, agencies, and instrumentalities	Individuals acting under color of foreign law and not implicated by FSIA	Wholly private individuals and organizations
Representative case(s)	<i>Flatow v. Islamic Republic of Iran</i> , 999 F. Supp. 1 (D.D.C. 1998)	(a) <i>In re Estate of Ferdinand Marcos, Human Rights Litigation</i> , 25 F.3d 1467 (9th Cir. 1994) (b) <i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).	<i>Boim v. Quranic Literacy Institute</i> , 127 F. Supp.2d 1002 (N.D. Ill. 2001)
Representative defendants	Iraq; Iranian Ministry of Information and Security	(a) Colonel whose conduct exceeds mandate of official capacities, sued in his private capacity (b) Radovan Karadzic and others, sued in any capacity, who are state actors of unrecognized governments	IRA; Abdullah Ocalan (Kurdish Workers’ Party (PKK))

¹¹ We leave out of the analysis issues of head-of-state immunity. Most courts view head-of-state immunity as an issue of Executive branch discretion. See, e.g., *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Jungquist v. Nahyan*, 940 F. Supp. 312, 321 (D.D.C. 1996). At least one court has viewed a head-of-state as a “state” for purposes of the FSIA, and thus considered head-of-state immunity to be governed by the FSIA. See *O’Hair v. Wojtyla*, No. 79-2463 (D.D.C. Oct. 3, 1979).

With these distinctions in mind, we now proceed in Part II to analyze U.S. law governing civil actions against non-FSIA defendants, and then in Part III to analyze U.S. law governing civil actions against FSIA defendants.

II. Non-FSIA Defendants

This Section describes the procedural and substantive law that governs civil actions against non-FSIA defendants sued for acts of terrorism.

A. Subject Matter Jurisdiction

There are many potential bases of subject matter jurisdiction in U.S. courts over non-FSIA defendants.

State courts are courts of general jurisdiction. This essentially means that their subject matter jurisdiction is more permissive than in federal court. While it is relatively easy to get subject matter jurisdiction in state court, it is unclear what laws might apply in a state court suit against terrorism.

There are several potential bases of subject matter jurisdiction in federal court, but they are limited by both the parties that can invoke them and the types of laws that can be applied. The federal question statute, 28 U.S.C. §1331, provides federal jurisdiction for claims that “arise under” federal law. This statute can establish federal jurisdiction for terrorism actions based on federal statutes (such as the TVPA or RICO) or federal common law that provides a cause of action. There is uncertainty, however, about whether a civil action based on the federal common law of customary international law (“CIL”) “arises under” federal law for purposes of Section 1331.¹² Some federal statutes related to terrorism, such as the Antiterrorism Act (“ATA”), 18 U.S.C. §§ 2333 & 2338, provide their own basis for subject matter jurisdiction.¹³

28 U.S.C. §1350 provides federal district courts with “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.” This statute has been the primary fount of human rights litigation in U.S. courts since 1980. It has thus far been successfully invoked for civil actions alleging human rights abuses under CIL, not treaties.¹⁴ The limitation to CIL appears to be due to uncertainty whether §1350 provides jurisdiction over claims based

¹² Most courts to have reached the issue have rejected the idea that a claim under CIL implicates Section 1331. See, e.g., *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193-94 (D. Mass. 1995); *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985). But see *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987) (“[A] case presenting claims arising under customary international law arises under the laws of the United States for purposes of federal question jurisdiction.”).

¹³ See *Ungar v. Palestinian Authority*, 153 F. Supp.2d 76, 85-86 (D. R.I. 2001).

¹⁴ In most of these cases, courts have considered treaties as a source or reflection of CIL. But, as we discuss below, no plaintiff has successfully brought a claim based exclusively on a human rights treaty.

on non-self-executing treaties. By its terms §1350 is limited to suits brought by aliens, and thus cannot be a jurisdictional basis for terrorist suits brought by U.S. citizens. The diversity statute, 28 U.S.C. §1332, is a potential basis of federal jurisdiction in suits by U.S. citizens against non-U.S. defendants. The diversity statute does not apply in suits between aliens.

In sum, there are many potential bases of subject matter jurisdiction, depending on the identity of the plaintiff and the type of law being invoked.

B. Personal Jurisdiction

Personal jurisdiction is a major hurdle to many types of civil suits against terrorists. Personal jurisdiction depends on two factors. First, there must be service of process pursuant to some affirmative statutory authority, usually (but not always) known as a long-arm statute. Second, the personal jurisdiction asserted under the long-arm statute must be consistent with the Due Process clause.

1. Statutory Basis

Every state has a statute that specifies the circumstances in which personal jurisdiction can be asserted over a defendant. Some of these statutes incorporate federal due process standards and grant jurisdiction to the full extent permitted by the U.S. Constitution. Others list detailed circumstances in which it is appropriate to assert personal jurisdiction over out-of-state defendants.

Rule 4 of the Federal Rules of Civil Procedure provides three bases of long-arm authorization for lawsuits brought in federal court. First, Rule Fed. R. Civ. P. 4(k)(1)(D) permits federal courts to exercise personal jurisdiction when the substantive federal statute in the case contains a long-arm authorization. A good example is the Anti-Terrorism Act, which provides a nation-wide long-arm statute.¹⁵ Second, Fed. R. Civ. P. 4(k)(1)(A) authorizes federal courts to borrow the long-arm statute of the state in which it sits. Third, Fed. R. Civ. P. 4(k)(2) provides long-arm authorization “over foreign defendants for claims arising *under federal law* when the defendant has sufficient contacts with the nation as a whole to justify the imposition of United States law but without sufficient contacts to satisfy the due process concerns of the long-arm statute of any particular state.”¹⁶

2. Due Process

The Due Process Clause permits courts to assert personal jurisdiction over alleged terrorists in four basic situations. First, if a terrorist is served with process in the U.S. jurisdiction asserting personal jurisdiction, such jurisdiction will be upheld.¹⁷

¹⁵ See 18 U.S.C., 2334(a).

¹⁶ *World Tanker Carriers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717, 720 (5th Cir. 1996).

¹⁷ See *Burnham v. Superior Court*, 495 U.S. 604, 640 (1990).

This has been the primary method of obtaining personal jurisdiction in §1350 cases, but it is not a reliable basis for personal jurisdiction over terrorists who commit their acts from abroad.

A second and more fruitful basis of constitutionally sufficient personal jurisdiction over terrorists located abroad is specific personal jurisdiction based on the defendant's "minimum contacts" with the forum. Specific jurisdiction is limited to cases in which the cause of action against the defendant arises out of or relates to the defendant's contacts with the forum. The Supreme Court has allowed the assertion of personal jurisdiction in this context if the defendant "purposefully avails" himself of the benefits of the forum, and if the assertion of jurisdiction in this context is "reasonable."¹⁸

A civil action against a terrorist who commits the terrorist act in the United States from a location abroad will satisfy the purposeful availment prong as long as the terrorist directs his offshore acts toward the United States. The reasonableness prong is more difficult to satisfy for alien defendants than U.S. defendants,¹⁹ but this test is not likely to stand as a barrier to personal jurisdiction over foreign defendant-terrorists who satisfy the purposeful availment prong. Unfortunately, the due process clause, which still has a powerful territorial orientation, probably does not permit the assertion of specific personal jurisdiction over foreign defendants for acts of terrorism committed abroad, even against U.S. citizens.²⁰

It may, however, be possible to get personal jurisdiction over non-FSIA defendants who commit terrorism abroad under a third type of personal jurisdiction permitted by the Constitution—general jurisdiction based on "continuous and systematic" contacts.²¹ The basic idea is that certain defendants—usually corporations or related organizations²²—have so many contacts with the forum that they can be sued there even on causes of actions not related to these contacts. At least one federal district court appears to have invoked this theory of "minimum contacts" in concluding that U.S. plaintiffs could get personal jurisdiction over the PLO and related entities in a suit alleging terrorist action in Israel. The court reasoned that the PLO contacts with the United States—its offices in Washington, its fundraising and speaking activities in the United States, its employment of a U.S. lobbying firm, and other commercial contacts—showed that the PLO had minimum contacts to support personal jurisdiction.²³

¹⁸ See *Asahi Metals Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

¹⁹ See *Asahi*, *supra*.

²⁰ See *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

²¹ *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

²² See *Burnham v. Superior Court of California*, 495 U.S. 604, 639 n. 1 (1990) (opinion of Scalia J.).

²³ See *Ungar v. Palestinian Authority*, 153 F. Supp. 2d 76, 86-89 (D. R.I. 2001). The court did not specify that it was asserting general rather than specific jurisdiction, but this appears to be the best

Fourth, courts can still assert *in rem* jurisdiction even after *Shaffer*, but the cause of action must be related to the property in the forum that forms the basis for personal jurisdiction.²⁴ *Shaffer* effectively eliminated *quasi-in-rem* jurisdiction, and thus a terrorist-defendant's property in the forum cannot be used as a basis for a lawsuit against him unless the property is related to the cause of action.

Finally, the Supreme Court has suggested, but never held, that personal jurisdiction might be constitutional even without minimum contacts "when no other forum is available to the plaintiff."²⁵ This theory could perhaps be pushed in the terrorism context.

In sum, constitutional limits on personal jurisdiction present hurdles to some civil actions against terrorists. Any defendant found and served in the United States can be sued here. If the defendant remains abroad, he can probably be sued in the United States for terrorist acts committed in the United States. If the defendant is abroad and the terrorist action occurred abroad, the only plausible way to get personal jurisdiction is on the basis of a general jurisdiction theory. This might work for the PLO (although even that is controversial, we believe, and might not be affirmed by the Supreme Court), but it is less likely to work for terrorists without the PLO's U.S. administrative presence.

C. Governing Law

A number of federal statutes provide a cause of action for injuries that are directly or indirectly related to acts of terrorism. Here the distinction between non-FSIA state actors and pure non-state actors can matter depending on the substantive law involved. For example, the TVPA's causes of action for torture and extra-judicial killing require state action. In these contexts, non-FSIA state actors would be liable, while pure non-state actors would not. Another distinction concerns the potential plaintiff class. A statute may allow only U.S. nationals to sue (e.g., the ATA), may allow only foreign nationals to sue (e.g., section 1350), or may allow both U.S. and foreign nationals to sue (e.g., RICO). We identify these distinctions in the subheadings below.

1. Anti-Terrorism Act

- Plaintiff class: U.S. nationals
- Causes of action: "acts of international terrorism" as defined by 18 U.S.C. §§ 2332-33

interpretatiopn of what the court did. The court also followed *Klinghoffer v. S.N.C. Achille Lauro*, 937 F. 2d 44 (2d Cir. 1991) in concluding that the PLO's United Nations contacts could not be considered for purposes of personal jurisdiction.

²⁴ *Shaffer v. Heitner*, 433 U.S. 186, 211 (1977).

²⁵ *Id.* at 211 n.37.

In 1992, Congress enacted the Anti-Terrorism Act (ATA), which provides a civil cause of action for U.S. nationals injured by an “act of international terrorism.”²⁶ A common misunderstanding of the ATA is that it concerns only acts of terrorism occurring outside the territorial jurisdiction of the United States. However, the ATA’s definition of “acts of international terrorism” includes acts which “transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”²⁷ Accordingly, the September 11th attacks would meet the ATA’s definition for at least two reasons. First, the planning, preparation, and financing of the attacks transcended national boundaries. Second, al Qaeda is a primarily external organization attempting to intimidate or coerce the U.S. government and its citizenry.

An unsettled question is whether the ATA can be applied to persons, both natural and legal, who have provided financial and other resources to a terrorist organization. Section 2331 of the statute defines terrorism as “activities that ... involve violent acts or acts dangerous to human life.” One question is whether the statute’s definition of “activities that ... involve violent acts or acts dangerous to human life” includes the act of providing money or other material resources to a terrorist organization. A federal district court recently rejected this expansive reading.²⁸ In *Boim v. Quranic Literacy Institute*, the court held that making a financial contribution to a terrorist organization, without more direct connections to the organization, does not fall under this statutory language.²⁹

Under an alternative approach, the ATA may still apply to the act of providing material resources to a terrorist organization due to two subsequent amendments to the federal criminal laws on terrorism. In 1994 and 1996, Congress enacted 18 U.S.C. §§ 2339A & § 2339B, respectively. Section 2339A prohibits knowingly providing material support or resources to be used in preparation for or carrying out acts in violation of § 2332. Section 2339B prohibits knowingly providing material support or resources to a designated foreign terrorist organization. Congress enacted these criminal prohibitions without any explicit connection to civil liability. The *Boim* court, however, relied on the two amendments as an alternative for imposing civil liability under the ATA.³⁰ Interpreting the various statutory provisions as a whole, *Boim* held that violations of §§ 2339A and 2339B fall under the definition of “international terrorism” for the purpose of civil suits.³¹

2. Racketeer Influenced and Corrupt Organizations Act

²⁶ 18 U.S.C. § 2333. The ATA was originally enacted in 1990, repealed in 1991 due to a technical “enrolling error,” and then re-enacted in 1992.

²⁷ 18 U.S.C. § 2331.

²⁸ *Boim v. Quranic Literacy Institute*, 127 F. Supp. 1002, 1011 (N.D. Ill. 2001).

²⁹ *Id.* at 1015.

³⁰ *Id.* at 1016.

³¹ *Id.* at 1016.

- Plaintiff class: U.S. and foreign nationals
- Causes of action: racketeering activity (including specified terrorists acts) that injures plaintiff's business or property

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides a civil cause of action for an individual injured in his business or property by a pattern of organized crime.³² Prior to 2001, some commentators argued that RICO applied to acts of terrorist organizations.³³ The 2001 Patriot Act makes this connection explicit by amending RICO to include a trigger mechanism for terrorism. The Act expands the definition of racketeering to encompass several highly specified acts of terrorism.³⁴

A plaintiff must prove three elements to establish a RICO violation:

- (1) the defendant committed two or more predicate acts that constitute a "pattern of racketeering activity;"
- (2) the defendant directly or indirectly invested in, associated with, or participated in an "enterprise;" and
- (3) the enterprise engaged in, or its activities affected, interstate or foreign commerce.

With regard to the first element, the Patriot Act ensures that specific acts of terrorism constitute predicate acts for the purpose of RICO. Demonstrating a "pattern" of racketeering is more complex. According to RICO's statutory definition, a "'pattern of racketeering activity' requires at least two acts of racketeering activity."³⁵ In *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Supreme Court held that the predicate acts must be related and must demonstrate "continued criminal activity."³⁶ The element of "continuity" can either be closed ("a series of related predicates extending over a substantial period of time"³⁷) or open-ended ("past conduct that by its nature projects into the future with a threat of repetition"³⁸). The Supreme Court suggested that the threat of

³² 18 USC §1964(c).

³³ Stephen C. Warneck, Note, A Preemptive Strike: Using RICO and the AEDPA To Attack The Financial Strength Of International Terrorist Organizations, 78 B.U. L. Rev. 177 (1998); Zvi Joseph, Note, The Application of RICO to International Terrorism, 58 Fordham L. Rev. 1071 (1990).

³⁴ Patriot Act, Sec. 813 (amending RICO to include "any act that is indictable under any provision listed in section 2332b(g)(5)(B)").

³⁵ 18 U.S.C. §1961(5).

³⁶ *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). By holding that the acts should simply be related and demonstrate continuity, the Court sought to end lower court decisions which had held that the predicate acts must occur in different episodes or schemes.

³⁷ *Id.* at 242.

³⁸ *Id.* at 241.

continuity is much easier to establish in situations involving “a long-term association that exists for criminal purposes.”³⁹

The second element should be easily satisfied in suits involving terrorist organizations, but has obvious limitations in suits involving lone actors or loose affiliations. RICO broadly defines “enterprise” to “includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁴⁰ Even narrowly construed, this definition applies to criminal organizations such as syndicates and the mafia. Its application to terrorist organizations is essentially the same.

Suits involving terrorist organizations should easily meet the third element, which requires the enterprise be engaged in, or have activities that affect, interstate or foreign commerce. In *National Organization for Women, Inc. v. Scheidler*, the Supreme Court held that RICO does not require either the enterprise or the predicate acts be motivated by an economic purpose.⁴¹ Terrorist organizations generally threaten the economic foundations of a country, and in most, if not all, cases, plaintiffs will surely be able to prove the organization affects interstate or foreign commerce.

RICO’s conspiracy provision extends liability to a range of actors. In 1997, the Supreme Court settled a circuit split by holding that RICO does not require a coconspirator to have committed or agreed to commit the two or more predicate acts requisite to the underlying offense.⁴² The RICO conspiracy provision is, therefore, more expansive than the general conspiracy provision applicable to federal crimes.⁴³

3. Torture Victim Protection Act

- Plaintiff class: U.S. and foreign nationals
- Causes of action: official torture and extrajudicial killings

The TVPA creates a cause of action against foreign governmental actors for acts of torture and extrajudicial killings.⁴⁴ Section 2 of the TVPA limits the scope of liability to “individual[s] who, under actual or apparent authority, or color of law, of any foreign

³⁹ Id. at 242-43 (“[T]he threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity’s regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.”).

⁴⁰ 18 U.S.C. §1961(4).

⁴¹ *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

⁴² *Salinas v. U.S.*, 522 U.S. 52, 65 (1997).

⁴³ Id. at 63 (“[U]nlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an ‘act to effect the object of the conspiracy’...[t]he RICO conspiracy provision ... is even more comprehensive than the general conspiracy offense....”).

⁴⁴ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

nation.”⁴⁵ The TVPA thus applies only to non-FSIA state actors. The TVPA might be used for terrorist-related acts involving claims of torture (e.g., torture of hostages) or extrajudicial killing (e.g., a suicide bombing).

4. 18 U.S.C. §1350

- Plaintiff class: foreign nationals
- Causes of action: violations of “the law of nations or a treaty of the United States”

Section 1350 potentially provides a cause of action for foreign nationals to sue for terrorism-related acts.⁴⁶ The statute permits a foreign national to bring a suit in federal district court for a tort committed in violation of “the law of nations” (i.e., customary international law (CIL)) or “a treaty of the United States.” Section 1350 permits plaintiffs to sue both non-FSIA state actors and pure non-state actors depending on whether the substantive claim (i.e., the CIL or treaty violation) requires state action. For example, disappearances and prolonged arbitrary detention may require state action and thus apply only to defendants who act under color of state law (i.e., non-FISA actors). Genocide and probably crimes against humanity, by contrast, do not require state action, and thus can apply to private individuals and organizations (i.e., pure non-state actors).

Section 1350 suits against alleged terrorists could involve CIL- or treaty-based claims. However, since the revitalization of Section 1350 in 1980, every successful §1350 claim has been based on a CIL violation and never exclusively on a treaty violation. A CIL claim under Section 1350 must be based on a CIL norm that is “specific, universal, and obligatory.”⁴⁷ As the post-September 11th academic commentary shows, CIL norms related to terrorism are not necessarily well-settled. A particularly difficult issue is whether, and under what circumstances, terrorist acts might constitute violations of the laws of war. In *Kadic v. Karadzic*, the Second Circuit held that war crimes committed by non-state actors are viable causes of action under section

⁴⁵ Id. at § 2. See also *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (“Legislative history confirms that this language was intended to ‘make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,’ and that the statute ‘does not attempt to deal with torture or killing by purely private groups.’ H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87.”)

⁴⁶ See 18 U.S.C. §1350.

⁴⁷ See, for example, *Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

1350.⁴⁸ One controversial issue is whether, in the absence of an international armed conflict, particular acts of terrorism can constitute war crimes.⁴⁹

With respect to terrorism, other potential CIL claims may be invoked. Relevant CIL claims may either be specific to terrorism (e.g., bombing a civilian center) or not (e.g., crimes against humanity). Based on current case law, CIL claims that are likely to succeed include genocide (especially for the mens rea of attempting to destroy a national group in whole or in part); prolonged and arbitrary detention; disappearances; hostage-taking; and perhaps crimes against humanity. The international legal prohibition of cruel, inhuman, and degrading treatment may be relevant, but it has problems of definitional precision.

Claims involving treaty violations face serious difficulties. Such claims might invoke a treaty specific to terrorism (e.g., the Convention for the Suppression of Terrorist Bombings) or a more general treaty (e.g., the Convention on the Protection of Internationally Protected Persons). However, as mentioned above, no modern §1350 claim has succeeded on the basis of a treaty alone. Also, it is unclear whether §1350's so-called "treaty wing" provides a cause of action for non-self-executed treaties, or for treaties ratified by the Senate with non-self-executing declarations attached.⁵⁰ Some of the major terrorism treaties might skirt a potential self-execution requirement under §1350 because they impose direct obligations on individuals. For example, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation provides that "[a]ny person commits an offence if he [among other things] unlawfully and intentionally . . . performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft."⁵¹ However, this

⁴⁸ Kadic, 70 F.3d 232. The jurisdiction of President Bush's proposed military commissions is limited largely, if not exclusively, to law of war violations. Successful prosecutions before such commissions could thus be cited in support of civil actions against terrorists for law of war violations.

⁴⁹ For the argument that it can, see Curtis Bradley and Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d 249 (2002); Derek Jinks, *Terrorism, U.S. Military Commissions, and the Laws of War* (April 3, 2002) (unpublished manuscript, on file with authors).

⁵⁰ See, e.g., *Jama v. I.N.S.*, 22 F. Supp.2d 353, 362 (D.N.J. 1998) (strongly suggesting that non-self-executing human rights treaties cannot provide a cause of action under §1350); *Jaffe v Boyles* 616 F. Supp. 1371, 1378-79 (W.D.N.Y. 1985) (holding that non-self-executing extradition treaty cannot provide a cause of action under §1350). However, a recent federal court decision suggested in dicta that non-self-executing treaties could be actionable under §1350. See *Ralk v. Lincoln County, Ga.*, 81 F. Supp.2d 1372, 1380 (S.D.Ga. 2000) (holding "because the ICCPR is not self-executing, [the plaintiff] can advance no private right of action under that document," but stating in dicta that "it appears to the Court that [the plaintiff] could bring a claim under [§1350] for violations of the ICCPR"); cf. *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1359-60 (S.D.Fla. 2001) (violation of an article of a non-self-executing treaty is actionable under §1350, as long as the alleged conduct is also a violation of CIL).

⁵¹ Article 1 of Convention in its entirety provides:

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or (c) places or causes to be placed on

Convention, which is typical, also suggests that it may be non-self-executing when it states that “[e]ach Contracting State undertakes to make the offences mentioned in [this provision] punishable by severe penalties.”⁵²

All §1350 claims potentially face two additional problems. First, a debate exists among legal scholars over whether §1350 provides a cause of action or is only a jurisdictional statute. With one possible exception,⁵³ Courts of Appeals have uniformly held that §1350 provides a cause of action. The Supreme Court, however, has yet to address the issue. Second, assuming §1350 provides a cause of action, the case law is unclear whether the “tort committed” should be determined by state, federal, international, or foreign law. Federal courts have taken a variety of approaches in considering which jurisdiction’s definition of the tort should apply.⁵⁴

D. Pretrial Issues

This Section discusses two of the most important pretrial procedural issues.

1. Forum Non Conveniens

The doctrine of *forum non conveniens* probably will not be a serious bar to most civil suits against terrorists. This doctrine gives district courts the discretion to dismiss a case if they determine that there is an adequate alternate forum and various private

an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he: (a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or (b) is an accomplice of a person who commits or attempts to commit any such offence.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, U.N.T.S. No. 14118, vol. 974, pp. 178-184, entry into force, January 26, 1973, art. 1; see also [Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; International Convention Against the Taking of Hostages.]

⁵² Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art.3.

⁵³ In 1984, the Court of Appeals for the District of Columbia dismissed a §1350 suit against Libya, the P.L.O., and various other organizations. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984). The case held that the plaintiffs could not sue under §1350, but the rationale for the holding was uncertain because each judge issued a separate, and quite different, concurring opinion. Judge Bork’s opinion is the only judicial opinion ever to conclude that §1350 does not provide a cause of action. See *id.* at 801-16 (Bork, J., concurring).

⁵⁴ For various perspectives, see *Xuncax v. Gramajo*, 886 F. Supp. 162, 193-94 (D. Mass. 1995); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

and public interest factors weigh in favor of adjudicating the case in that forum.⁵⁵ There are many reasons why this doctrine will not likely apply in terrorist cases, but the main one is that it is unlikely that the “alternate available forum” will ever be satisfied.⁵⁶

2. Act of State Doctrine

The act of state doctrine is probably not a serious bar to civil lawsuits against terrorists. The act of state doctrine traditionally precluded courts from inquiring into the validity of foreign acts under foreign law.⁵⁷ If the terrorist acts in question are legally authorized by a foreign government, the act of state doctrine could conceivably be used to block courts from inquiring into the validity of such authorizations. It is more likely, however, that courts will skirt the act of state doctrine in terrorist cases just as they have done in human rights cases. There are two theories under which they might do so. First, *Sabbatino* suggested that the act of state doctrine does not bar inquiry into the validity of a foreign act of state under international law as long as the international law norm is clear and established.⁵⁸ To the extent that international law prohibitions on terrorism are clear and established (a contested point, as we noted above), the act of state doctrine does not apply in this context.⁵⁹ Second, courts might argue that the act of state doctrine is limited to the official, public acts of a foreign government because only adjudication of those acts is likely to embarrass the executive branch in its conduct of foreign relations.⁶⁰ It is possible that a terrorist act is not authorized by a foreign government and thus is not a “public act” covered by the act of state doctrine.⁶¹

E. Enforcement of Judgments

Assuming that the foregoing procedural hurdles can be overcome in suits against most non-FSIA defendants, and that plaintiffs are awarded a valid money judgment, the most serious hurdle to recovery remains: enforcement of the judgment.

⁵⁵ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

⁵⁶ See, e.g., *Estates of Yaron Ungar & Efrat Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 99-100 (D. R.I. 2001).

⁵⁷ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

⁵⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-23 (1964).

⁵⁹ Cf. *Kadic*, 70 F.3d at 250-51; *Liu v. The Republic of China*, 892 F.2d 1419, 1433 (9th Cir. 1989); *De Arellano v. Weinberger*, 745 F.2d 1500, 1540 (D.C. Cir. 1984).

⁶⁰ See Lynn E. Parseghian, *Defining the “Public Act” Requirement in the Act of State Doctrine*, 58 U. Chi. L. Rev. 1151 (1991) (collecting cases).

⁶¹ Compare *Liu v. Republic of China*, 892 F.2d 1419, 1431-34 (9th Cir. 1989); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987).

Most non-FSIA defendants will have few if any assets in the United States.⁶² This means the judgment must be enforced abroad. And this, in turn, is very hard to do.

Consider the record of enforcement in the dozens of human rights suits under §1350 and the TVPA that have resulted in a final judgment against defendants. These suits typically involve defendants who by the time of judgment are located abroad with their assets. To the best of our knowledge, none of these judgments have been successfully enforced.⁶³ Judgments in civil actions involving claims for terrorism will face similar considerable hurdles.

There are many problems in enforcing these judgments abroad. The United States is not a party to any treaty concerning enforcement of judgments. This means that the enforceability of foreign judgments depends on the foreign court enforcing the U.S. judgment under foreign law. A typical obstacle under foreign law is that the foreign court will not enforce the judgment if the originating court lacked personal jurisdiction under the foreign court's standards. Two important bases of personal jurisdiction over non-FSIA defendants—transient jurisdiction, and general jurisdiction based on “continuous and systematic” contacts—are considered exorbitant by most other nations. Judgments premised on this form of personal jurisdiction thus are not likely to be enforced. In addition, judgments enforced against non-FSIA state actors may run into immunity difficulties abroad even if the defendant did not implicate the FSIA in the United States. Finally, many non-U.S. courts do not enforce foreign judgments based on “public” laws. Judgments for suits against terrorists might be viewed to be based on public law; punitive and related damages might not be recoverable for similar reasons.

III. FSIA Defendants

We now turn to consider the legal regime governing FSIA defendants. The FSIA controls any civil action filed against a foreign state or its political subdivisions, agencies, and instrumentalities. For simplicity's sake, we refer to these various entities collectively as a “foreign state.” As described below, the FSIA provides two options for suing a foreign state for terrorism-related injuries: (1) plaintiffs can bring a claim for injuries resulting from terrorism against a foreign state officially designated by the State Department as a sponsor of terrorism; (2) plaintiffs can bring a claim for a

⁶² Secondary supporters of terrorism who live and operate in the United States – for example, civic organizations that collect money for terrorism – constitute a major exception to the proposition in the text. This is one reason why we believe that liability against such secondary actors should be expanded. See our discussion *infra* Part IV, sections A(1) B(1).

⁶³ The only §1350 or TVPA case in which judgment has been collected in the United States involved the seizure of \$400 from a defendant's personal bank account. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 218 (1996) (discussing anomalous enforcement action following *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. Jul. 6, 1988)). At the time of this writing, it remains possible that some of the plaintiffs in the complicated Marcos litigation will be able to recover on a judgment rendered in a Section 1350 case.

noncommercial tort committed in the United States whether or not the foreign state is officially designated as a sponsor of terrorism.

A. Subject Matter Jurisdiction

The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts.⁶⁴ In order to establish subject matter jurisdiction in an action against a foreign state, one of the FSIA's enumerated exceptions to immunity must be satisfied. Two exceptions potentially exist for terrorism-related suits: (1) the state-sponsored terrorism exception; and (2) the noncommercial tort exception. We discuss each exception in turn.

1. The State-Sponsored Terrorism Exception

In 1996, Congress amended the FSIA to provide an exception for suits involving state sponsors of terrorism.⁶⁵ This exception requires four primary conditions to be satisfied:

1. The state is officially designated by the State Department as a state sponsor of terrorism at the time of the incident or as a result of the incident;
2. “[a]n official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency” commits the act or provides material support to an individual or entity which commits the act;
3. the act involves torture, extrajudicial killing, aircraft sabotage, or hostage taking; and
4. the act results in the death or personal injury of a United States citizen.

A number of suits have succeeded under this exception, though most involved default judgments.⁶⁶ Currently six states are officially designated sponsors of terrorism: Cuba, Iran, Iraq, North Korea, Sudan, and Syria.

2. The Noncommercial Tort Exception

⁶⁴ See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

⁶⁵ 28 U.S.C. §1605(a)(7).

⁶⁶ See, e.g., *Anderson v. Islamic Republic of Iran*, 90 F. Supp.2d 107 (D.D.C.2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp.2d 62 (D.D.C.1998); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D.Fla. 1997). In two cases, the defendant responded to the complaint. See *Daliberti v. Republic of Iraq*, 97 F. Supp.2d 38 (D.D.C. 2000) (though foreign state withdrew after judgment denying its motion to dismiss); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

Section 1605(a)(5) of the FSIA provides an exception to immunity for the commission of noncommercial torts. Under this provision, foreign states are denied immunity from suits for “personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.”⁶⁷ Thus, a foreign state would lack immunity for such a tort committed in the course of terrorist activity, even if the state is not an officially designated state sponsor of terrorism.

The scope of 1605(a)(5) has been interpreted narrowly with regard to its geographic nexus. Courts have generally required the commission of both the tortious act and the injury occur in the United States.⁶⁸ If the tortious act does occur inside the United States—such as the September 11 attacks—section 1605(a)(5) would apply. For example, the court in *Letelier v. Republic of Chile* held that the noncommercial tort exception applied to the government of Chile’s alleged assassination of a former Chilean ambassador and his aide, who were killed in a car bombing in the District of Columbia.⁶⁹

Section 1605(a)(5) has a limiting proviso which states that this exception to immunity shall not apply to “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.”⁷⁰ Torts involving acts of terrorism, however, may invariably overcome this limitation. *Letelier*, for example, held that an assassination could not be a discretionary function due to the strict and universal prohibition against such conduct. The court reasoned: “Whatever policy options may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.”⁷¹

B. Personal Jurisdiction

In most FSIA cases, the conditions for establishing subject matter jurisdiction will also clearly satisfy the requirements of personal jurisdiction. The reason is that the criteria for subject matter jurisdiction include a sufficient nexus or level of contact for the purpose of personal jurisdiction. In fact, 28 U.S.C. §1330(b) states that personal jurisdiction over a foreign state “shall exist as to every claim for relief over which the district courts have jurisdiction under [one of the FSIA exceptions and] where service has been made under section 1608 of this title.”⁷²

⁶⁷ 28 USC §1605(a)(5).

⁶⁸ See, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984).

⁶⁹ *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

⁷⁰ 28 USC §1605(a)(5)(A).

⁷¹ *Letelier*, 488 F. Supp. at 673; see also *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989).

⁷² 28 U.S.C. §1330(b).

However, the state-sponsored terrorism exception does not require the same nexus or contact with the forum as required by the other FSIA exceptions. Also, Congress enacted §1130(b) long before the state-sponsored terrorism exception; and, in analyzing §1130(b)'s relationship to the new state-sponsored terrorism exception, courts have recognized that “[u]nlike other FSIA exceptions, the connection between the lawsuit and the United States may seem less obvious.”⁷³ The state-sponsored terrorism exception appears to allow all the relevant conduct and injury to occur wholly outside the United States.

Courts have advanced two solutions to this problem. The first views personal jurisdiction to be satisfied by the fact that the plaintiff allegedly injured by the act of terrorism is a U.S. national.⁷⁴ We doubt whether this solution will survive Supreme Court scrutiny, because it is the *defendant's* contacts, not the plaintiff's, that matter for personal jurisdiction. The second solution is to hold that foreign states do not possess Fifth Amendment rights to due process for purposes of personal jurisdiction.⁷⁵ The Supreme Court has left the door open to this conclusion,⁷⁶ but it remains unclear if this theory will prevail.

C. Governing Law

Terrorism suits against foreign states and their instrumentalities can proceed according to one of two options: (1) a cause of action under the FSIA for state-sponsors of terrorism (the Flatow Amendment); and (2) causes of action provided by substantive law separate from the FSIA.

1. The Flatow Amendment

In 1996, Congress enacted the Civil Liability for Acts of State Sponsored Terrorism, which provides a cause of action against the agents of foreign states.⁷⁷ This piece of legislation, popularly known as the Flatow Amendment, is codified as a note to the FSIA.⁷⁸ The Amendment relates specifically to suits that meet the state sponsor of terrorism exception: “An 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,

⁷³ Daliberti, 97 F. Supp.2d at 53.

⁷⁴ Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 21-23 (D.D.C. Mar 11, 1998).

⁷⁵ Flatow, 999 F. Supp. at 20-21.

⁷⁶ See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (“Assuming, without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause, cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 323- 324 (1966) (States of the Union are not ‘persons’ for purposes of the Due Process Clause), we find that Argentina possessed ‘minimum contacts’ that would satisfy the constitutional test.”).

⁷⁷ Civil Liability for Acts of State Sponsored Terrorism, Pub.L. No. 104-208, § 589, 110 Stat. 3009 (1996).

⁷⁸ See 28 U.S.C. §1605.

employment, or agency shall be liable to a United States national ... 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 under [28 U.S.C. §1605(a)(7)].”

2. Causes of action under separate substantive law

If an exception to immunity applies, Section 1606 of the FSIA provides that a foreign state shall be liable “in the same manner and to the same extent as a private individual under like circumstances.”⁷⁹ Section 1606 appears to permit all of the above-described causes of action pertaining to non-FSIA defendants to FSIA defendants to the extent that a private individual would be liable in similar circumstances. Invoking this logic, one court applied RICO against an FSIA defendant.⁸⁰

D. Pretrial Issues

1. Act of State

The act of state analysis in the discussion above essentially applies in the same manner to FSIA defendants. The applicability of the doctrine generally turns not on the identity of the parties, but rather on whether the validity of a foreign act of state is in issue.

2. Forum Non Conveniens

Forum non conveniens is not an issue for civil actions that meet the FSIA jurisdictional requirements. Courts have refused to entertain forum non conveniens arguments on the ground that (a) Congress balanced these interests in providing federal courts as the forum under the FSIA and (b) it would be inappropriate for a court to “second-guess Congress and apply its own balancing test.”⁸¹

E. Enforcement of Judgments

The general rule for enforcement of judgments against foreign states is set forth in §1610 of the FSIA. However, the rule has proven inadequate in securing judgments.⁸²

⁷⁹ See 28 U.S.C. §1606.

⁸⁰ See *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) (“[W]e hold that the FSIA confers subject-matter jurisdiction upon the district court over civil RICO claims against foreign states, their agencies, and instrumentalities, provided that the commercial activity exception, or another exception contained in §§1605-07 of the FSIA applies.”); see also *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861 (N.D.Ill. Feb 17, 1987).

⁸¹ See *Daliberti v. Republic of Iraq*, 97 F. Supp.2d 38, 54 n.7 (D.D.C. 2000); see also *Flatow*, 999 F. Supp. at 25.

⁸² A rare example of compensation following a judgment against a state in a context related to terrorism can be found in the proceedings following *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). The plaintiffs in *Letelier* were the families of an ambassador and his aide who were assassinated in the District of Columbia by agents of the government of Chile. They won a civil judgment against Chile but

Plaintiffs in terrorism cases have needed additional, special legislation from Congress or exceptional action on the part of the President to obtain payments.

Section 1610 provides exceptions to foreign state's general immunity from attachment and execution. The property of a foreign state used for a commercial activity in the United States is the easiest to secure, but, beyond that, plaintiffs have little hope of receiving money damages. Under §1610(f)(3), the President may, through issuing a waiver, preclude plaintiffs' access to foreign states' assets. The President has generally disallowed use of these assets, on the grounds of interference with his foreign policy agenda and the threat to U.S. property abroad.

In 2000, Congress enacted the Justice for Victims of Terrorism Act (JVTA) to address the lack of enforcement of judgments in a circumscribed set of cases.⁸³ The statute applies only to Cuba and Iran. It also applies only to payment of compensatory, not punitive, damages. The JVTA includes additional restrictions that, in effect, appropriate funds for particular plaintiffs.⁸⁴ The aggregate available amount for judgments against Iran is capped at approximately \$400 million. The JVTA requires normalization of relations with Iran to be preceded by negotiation over Iran's repayment of judgments. The law explicitly blocks return of Iranian assets until agreement on such reimbursement is made "to the satisfaction of the United States."

IV. Policy Issues

We now turn to analysis of the policy issues of civil litigation against terrorists.

A. The Costs and Benefits of Civil Actions Against Terrorism

It is unclear whether the benefits of civil actions against terrorism outweigh their costs. A comprehensive analysis of the issue would require loads of empirical data about these costs and benefits—data which, at present, is either unavailable or anecdotal. It would also require resolution of difficult and contested policy issues. Our more modest aim here is to describe all of the potential costs and benefits of such litigation as a prelude to more thorough empirical and policy analysis.

were unable to enforce the judgment. In 1988, the U.S. government raised an international claim against Chile pursuant to a 1914 bilateral treaty for the settlement of disputes between the two countries. Chile ultimately agreed to make an *ex gratia* payment of \$2.6 million dollars to the families. In accordance with the treaty, a panel of international arbitrators determined the exact amount of compensation. J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 55-58 (3d ed. 1998). This method of recovery is unusual, and in any event is an exception to a general pattern of non-enforcement of terrorism-related judgments against foreign states.

⁸³ Codified at §2002 of the Victims of Trafficking and Violence Protection Act of 2000, PL 106-386, Oct. 28, 2000, 114 Stat 1464.

⁸⁴ For example, one of the eligible groups are persons who "filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000."

1. Benefits

The most direct potential benefit of civil litigation against terrorism is to provide plaintiffs with monetary compensation for their losses. Even if plaintiffs cannot enforce judgments obtained against terrorists, civil litigation still gives them the opportunity to have a day in court to tell their story publicly, and to receive an official condemnation by a judge or jury.

For those interested in the development and refinement of international law on terrorism, civil litigation may promote those goals. Human rights litigation under §1350 and the TVPA has been heralded by some as a mechanism for elaborating human rights norms and familiarizing the judiciary with related international legal rules. In the terrorism context, such arguments may have added force. Civil litigation offers a good forum for elaborating international legal standards that can then be more easily applied in criminal contexts. Also, the United States has an interest in advancing robust standards of liability and elaborating the international law against terrorism more generally. Having U.S. courts operate as engines for those developments may make sense.

To the extent that some civil judgments will be enforceable, civil litigation against terrorists offers a number of advantages over criminal litigation. Civil litigation delegates part of the task of fighting terrorism to “private attorneys general,” allowing the government to harness the resources of private plaintiffs and lawyers. Compared to criminal litigation, civil litigation lowers the burden of proof and makes it easier to apply legal norms retroactively. Finally, to the extent that presidential law enforcement against terrorists is informed, and constrained, by “political” considerations, one might conclude that giving private parties not burdened by such considerations independent rein in civil litigation would increase the costs of terrorism.

Civil litigation also permits more expansive regulation of secondary conduct than does criminal litigation. By secondary conduct, we mean the act of providing material support to terrorist groups (i.e., through funding or other resources). For example, liability could be attached to private organizations that knowingly contribute funds which are used by a terrorist organization to recruit and train members, purchase weapons, or acquire false documents. The category could also include organizations that have a program of donating money to support the families of suicide bombers.

A number of examples indicate the extent of this conduct and the possibility of obtaining sizeable judgments against such defendants. In December 2001, the Bush Administration froze the assets of several U.S.-based charitable organizations, including: the Holy Land Foundation for Relief and Development (the largest American-Muslim charitable organization); the Global Relief Foundation, and Benevolence International Foundation. The Administration stated that it suspects these organizations of directly funding terrorist activities. According to FBI documents obtained by the Chicago Tribune, Hamas political leader Mousa Abu Marzook has stated that the Holy Land

Foundation for Relief and Development was Hamas's primary U.S. fundraiser.⁸⁵ The Holy Land Foundation, which has offices in California, New Jersey, and Illinois, raised over \$13 million in 2000, according to the organization's own tax statements.⁸⁶ The Global Relief Foundation's tax statements show that it raised \$5.3 million in 2000, collected from about 20,000 donors across the United States.⁸⁷

These organizations do not exhaust the number and types of actors potentially involved in supporting terrorism. Policymakers have long dealt with the issue of U.S.-based entities sending financial support to terrorist groups such as the I.R.A. in Northern Ireland and the Tamil Tigers (LTTE) in Sri Lanka. The degree of knowledge—on the part of charitable organizations' individual members and contributors—varies along a spectrum. William Wechsler, former director for transnational threats at the National Security Council and former Special Adviser to the Secretary of the Treasury for Money Laundering, described the range of activities:

On the other end of the spectrum, there are charitable organizations that give money for widows, for orphans, that do a lot of really good social work out there in the world. The people who are running them think that that's all they do. The people who are giving money to them think that that's all they're doing.

But yet, there might be someone from Al Qaeda who is in that organization, who is siphoning money off illegally, and frankly stealing from the charity -- using the charity as cover to move around the world. And then, in between, there are organizations, there are charities, that do both -- that abet terrorist groups and provide legitimate charitable services. And especially in that middle area, that's where you might get into some of the problems that you're discussing now, of wealthy, powerful people being involved and not quite knowing what kind of entities they're involved with....

They don't necessarily know.⁸⁸

In controlling secondary conduct, civil suits may be superior to imposing criminal liability. Because secondary conduct is often far removed from, and thus only indirectly related to, terrorism, secondary actors generally face diminished culpability for terrorist acts. Accordingly, it may be more palatable and politically feasible for policymakers and legislators to attach civil rather than criminal penalties in such situations. Correspondingly, it may be easier for policymakers and legislators to expand the scope of the legal prohibition, or restriction, if only civil penalties are attached.

⁸⁵ Laurie Cohen & Stephen Franklin, FBI Report Helped Shut Down Hamas-linked Local Charity, Chicago Tribune, Dec. 6, 2001.

⁸⁶ See, e.g., Dep't of Treasury, Shutting Down the Terrorist Financial Network (PO-841), Dec. 4, 2001.

⁸⁷ Allan Dodds Frank, CNN Moneyline News Hour, Jan. 21, 2002.

⁸⁸ William Wechsler interview, PBS Frontline, Nov. 6, 2001, (available at <www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/weschler.html>)

Civil litigation also has unique benefits that make it a potentially worthwhile supplement to overlapping criminal liability in regulating secondary conduct. First, regulating such conduct is more likely to require the resources of private attorneys general. While the government will generally prosecute all suspected terrorists when sufficient evidence exists, resources will limit the government's ability to pursue all individuals and organizations connected by secondary relationships—especially when these organizations have vast resources and several attorneys of their own.⁸⁹ Second, the control of secondary conduct is more conducive to the incentive structure and operation of private attorneys general. Individuals with personal knowledge of the financial dealings of such organizations will be more likely to step forward. Correspondingly, the economic rewards from a successful suit should encourage individuals to monitor the conduct of these organizations more closely. Third, and most importantly, judgments against secondary actors are much more likely to be enforceable than judgments against terrorists themselves, because the organizations' assets are much more likely to be found in the United States. This particular feature should enhance the incentives for private attorneys general and the deterrence effects of such suits.

Finally, civil litigation provides a lower burden of proof and a potentially expansive scope of liability, which bring particular advantages in controlling secondary conduct. In criminal cases, the government may find it difficult to prove the requisite *mens rea* element, e.g., proving a defendant knowingly contributed resources to support terrorist activity. In a court case, proving this type of mental state is more amenable to the broader standards of civil liability (e.g., recklessness) and the available lower burdens of proof (e.g., preponderance of the evidence). Consider the record of prosecutions under the corresponding criminal statutes: “[S]even years of legal efforts in U.S. courts to prove allegations that several Islamic charities were fronts for terrorist activities have gone nowhere. Grand juries in Florida, Illinois, New York and Texas have been investigating a number of charities... but have failed to hand up a single indictment against any of these organizations.”⁹⁰ To raise the costs of illicit activity—the ultimate goal of deterrence—civil actions against charities that support terrorism may be the most effective means of controlling this behavior.

For all these reasons, the expansion of civil actions against secondary conduct might significantly deter individuals and organizations from funding terrorist groups. To harness some of these benefits, however, it may be necessary to expand the potential plaintiff class, for example, by broadening the legal definition of the injury suffered by terrorism. As we discuss below in section B(1)b, RICO's plaintiff class is currently limited to any person “injured in his business or property.” For terrorism cases, Congress could extend this clause to include individuals who suffer physical injury. Also, as we

⁸⁹ Indeed, in response to having their assets frozen by the US government, two organizations have separately sued the government alleging violation of their constitutional rights. Laurie Cohen, *2nd Muslim Charity Sues U.S. Officials on Sanctions*, Chicago Tribune, Jan. 31, 2002.

⁹⁰ Laurie P. Cohen & Glenn Simpson, *Aiding and Abetting: Bush's Financial War On Terrorism Strikes At Islamic Charities*, Wall Street Journal, Sept. 25, 2001, at A1.

mention below, the ATA currently provides a cause of action for any U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism.” Congress could extend, or clarify, the definition of “injury” to include harms such as lost revenue for tourist agencies and airlines or lost vacations or business trips for individuals in fear of high rates or terrorism.

Defining the injury in terms of an ongoing violation would also provide opportunities for injunctive relief in addition to damages. For example, a plaintiff suing a domestic organization that funds terrorist groups—e.g., *Boim v. Quranic Literacy Institute*—could potentially seek an injunction to cease the organization’s activities on the basis of ongoing and future injury.

2. Costs

There are also many potential costs of civil litigation against terrorism. The first concerns limited judicial resources. While plaintiffs have already been able to recover very large civil judgments against terrorists, they have had no success in enforcing the judgments against defendants’ assets. There are no easy solutions to this problem. And to the extent that judgments cannot be enforced, the lawsuits leading to the judgments can waste the time and effort of judges and attorneys.

Congress has responded to this problem by providing over \$200 million to satisfy the compensatory portions of some civil judgments against terrorism.⁹¹ This congressional action raises a second set of problems. One problem comes in deciding where to draw the line on compensation. Should all victims of terrorism receive federal compensation? What about economic injuries (to airlines, tourist business, etc.) that results from terrorism. In addition to this problem of equitable treatment, there is Judge Mosk’s concern that terrorist lawsuits compensated by Congress amounts to “picking our own pocket.”⁹² It is unclear if this is correct; government compensation might be viewed as an insurance policy that the market will not provide. Finally, there is the question whether government compensation leads responsible organizations (such as corporate employers, airlines, etc.) to take insufficient precautions against terrorism.

Civil litigation against terrorism also has potential costs *vis-à-vis* the President. One is that private parties suing terrorists do not usually consider the foreign policy and related implications of such suits. These suits thus might interfere with the President’s control of foreign relations. Relatedly, concerns about such suits might create disincentives for the President to designate certain states as sponsors of terrorism. These civil suits might also lessen political branch accountability to use legal tools to fight terrorism. Private civil suits relieve pressure on criminal prosecutions, at least at the

⁹¹ These funds are part of the Justice for Victims of Terrorism Act’s allocation scheme, which we discussed above *supra* Part III, section E.

⁹² *Hitting Where it Hurts: The American Taxpayer may end up paying Osama bin Laden’s legal bills*, THE ECONOMIST, Oct. 4, 2001.

margins. (This is the flip side of the private attorney general benefit.)⁹³ Finally, to the extent that these suits result in judgments that are paid out of frozen assets, this weakens the President's power to use such assets in their traditional role as bargaining chips.

Civil suits also might harm plaintiffs by falsely raising their expectations of monetary recovery. They also provoke resentment over inequitable treatment among classes of plaintiffs. Problems emerge, for example, when victims of terrorism perpetrated by states that are not on the State Department's official list are precluded from relief. Claims of disparate treatment may also be raised when permanent residents and U.S. nationals are victims of the same tragedy, but only one class can bring suit.

Finally, the flip side of expanded regulation of secondary conduct is potential interference with religious expression, free speech, and related association rights of persons indirectly connected to terrorism.⁹⁴ It might also interfere with the good works of charitable organizations through overbroad regulation. Private attorneys general in this realm may also spark or exacerbate tensions between groups in society. Furthermore, suits against secondary actors might also interfere with the President's conduct of foreign policy. Imagine a suit against organizations that funded the Nicaragua contras during the 1980s, the ANC during the late 1990s, the KLA during the late 1990s, the Northern Alliance in late 2001, or members of the Saudi royal family in 2002. We discuss mechanisms to address such concerns in section B(2) below.

B. The Strengths and Weaknesses of Current Law

A critical choice in reforming the present system is deciding whether to (a) encourage Congress to adopt a comprehensive statute to govern civil litigation against terrorists, or (b) encourage Congress to adopt gap-filling and reformative measures with respect to the various laws currently in place. The first approach could potentially provide a unified, and simplified, framework for civil litigation that could balance and resolve competing policy considerations. The present system has grown up piecemeal and haphazardly. It arguably has too many related but separate parts, which undercuts plaintiffs' (and judges') ability to navigate the system.

However, such a unified approach might itself produce the unwelcome uncertainty of novelty, and might undermine legal rules that have been carefully elaborated through past litigation. The current laws have produced a fairly clear and predictable terrain of case law in many respects. Gaps and deficiencies in the present law might be repairable without engaging in a wholesale revamping or synthesis of extant

⁹³ Having said that, private suits might throw the spotlight on certain terrorists and move the Executive to act.

⁹⁴ Courts have already begun to address First Amendment claims concerning the prohibitions on supporting terrorist activity under 18 U.S.C. §§ 2339A and 2339B. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000) (upholding preliminary injunction against First Amendment claims, but overturning aspects of injunction on vagueness grounds); *Boim*, 127 F. Supp.2d at 1021 (rejecting First Amendment challenge to civil suit, but suggesting specific restrictions exist to safeguard freedom of association).

legal rules. Furthermore, because of uncertainties in definitions and conceptions of terrorism, a unified approach may simply be unobtainable. Plaintiffs might always be able to invoke laws that on their face do not apply to terrorism—e.g., the FSIA’s noncommercial tort exception or a §1350 cause of action for prolonged detention—in dealing with factual situations that could be characterized as terrorism. Finally, a unified approach to terrorism may come at the expense of unity in other areas of law. For example, the FSIA’s unified approach for jurisdiction against foreign state defendants balances a variety of foreign policy, international law, and constitutional interests of its own. It is perhaps better to have those legal rules develop in unison, rather than segregating a special class of cases involving terrorism. Finally, merging rules for litigation against terrorist organizations/private individuals with rules for litigation against state sponsors of terrorism may compound these problems.

In the analysis that follows, we proceed on the assumption of piecemeal reform. All of these suggestions could, of course, be repackaged into a stand-alone statutory scheme. We begin with possible reforms to enhance civil litigation against terrorists, and then consider possible limiting strategies.

1. Reforms to enhance or refine civil litigation

There are various measures Congress could take to expand, enhance, or refine civil litigation. We discuss a number of these below.

- a. Substantive law

Congress could expand or clarify the scope of civil liability for terrorism in several areas. Some of these areas are arguably covered implicitly under current law, but Congress would do well to make that coverage clearer and reduce the need for judicial guesswork.

- Congress could enact explicit, terrorism-related causes of action in a statute on the model of the TVPA. As it did in the latter statute, Congress could borrow language from international treaties (e.g., the Hostages Convention, Terrorism Bombing, and the Safety of Civil Aviation) to define the scope of liability. Because the ATA is already available to U.S. nationals, this reform would primarily benefit foreign nationals.
- Congress could clarify the relationship between criminal statutes concerning the provision of resources to terrorists and the ATA. The only federal court to address this issue thus far was relatively innovative in construing the criminal prohibitions to apply to civil liability.⁹⁵ Congress could clarify whether this coverage exists.

⁹⁵ *Boim v. Quranic Literacy Institute*, 127 F. Supp.2d 1002 (N.D. Ill. 2001).

- Congress could create liability, with a related exception added to the FSIA, for foreign states that fail to prosecute or extradite suspected terrorists.
- Congress could expand predicate acts under the FSIA state-sponsored terrorism exception to reach criminal acts specified by the Patriot Act. Currently the FSIA's exception relates only to "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." This exception does not include, for example, physical injury short of death resulting from a bombing. Nor does it include physical injuries short of death resulting from mailing chemical or biological weapons.
- Congress could drop or reduce dimensions of the geographic nexus under the FSIA's noncommercial tort exception. This particular nexus requirement is a gloss on the statute based on legislative history. Congress could make its intention clear or amend the exception to reduce the scope of immunity as currently interpreted by courts. Care should naturally be exercised, because at a certain point reductions in the nexus requirement would run up against constitutional difficulties.

b. Expand plaintiff class

For purposes of equity or to capture added benefits of civil litigation, two devices could be used to expand the potential plaintiff class.

- Congress could amend statutes that limit the plaintiff class to U.S. nationals (e.g., the ATA; the Flatow Amendment) to include foreign nationals, and could amend statutes that limit the plaintiff class to foreign nationals (e.g., §1350) to include U.S. nationals.
- Congress could expand the potential plaintiff class by broadening the scope of an "injury." For example, RICO is limited to any person "injured in his business or property" by a pattern of racketeering. In the case of terrorism at least, Congress could extend this clause to include individuals who suffer physical injury. It could also extend the ATA to include indirect injuries. Currently the ATA provides a cause of action for any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism." If the "injury" were defined to include lost revenue for tourist agencies and airlines, or lost vacations or business trips for individuals in fear of high rates or terrorism, the plaintiff class would be quite broad.

c. Expand defendant class

Congress could in effect expand the potential defendant class through a number of measures already mentioned. We list some of these possibilities below. We also list a

more politically difficult option to consider, namely, whether to expand the category of states under the FSIA's terrorism exception.

- Congress could extend the predicate acts under the FSIA state-sponsored terrorism exception (i.e., adding physical injury resulting from terrorist acts beyond torture, extrajudicial killing, aircraft sabotage, and hostage taking).
- Congress could ensure that the ATA encompasses secondary conduct, such as providing resources to terrorists, which would expand the potential defendants beyond those individuals and organizations directly engaged in acts of terrorism.
- An important consideration is whether to expand the scope of states beyond those designated by the States Department as sponsors of terrorism. A bill currently pending before the House would eliminate the official designation requirement altogether—thus allowing the FSIA's terrorism exception to apply to all foreign states. Congress could also take a half-step by providing an exception for an additional category of states which do not rise to the level of officially designated state sponsors.

2. Reforms to control civil litigation

There are many dimensions along which the federal political branches could control or reduce civil litigation. They could, for example, repeal various pieces of legislation which provide a cause of action, overrule the interpretation of the ATA which extends civil liability to secondary conduct, define or interpret the class of injuries more narrowly, or reduce or eliminate the list of state sponsors of terrorism for purposes of the FSIA. We doubt, however, that the political branches will pursue such narrowing strategies; we think it much more likely that they will be inclined to expand liability in this context.

The political branches, however, might be worried about how to ensure that such litigation does not conflict with broader foreign policy interests. As they did with the FSIA exceptions, they are likely to achieve these ends by giving the Executive branch the discretion, at least to some degree, to monitor and control civil litigation against terrorists. Below we consider possibilities for control based on analogies to a "Bernstein Letter."⁹⁶ Some of these techniques may allow more expansive civil litigation by ensuring that the Executive's interests are protected.

- Model 1: Bernstein Letter

⁹⁶ A "Bernstein letter" is a letter that the State Department files with a court to inform it that it can proceed to adjudicate foreign acts of state, otherwise barred by the act of state doctrine, because U.S. foreign policy interests do not otherwise require. See *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2nd Cir. 1949).

Congress could limit civil actions for terrorism to those cases officially approved by the State Department. Under the “Bernstein letter” model, suits against terrorists would presumptively be barred unless the State Department gave affirmative approval. If the State Department gave its approval, the suit could proceed (assuming that other procedural and subsequent prerequisites are satisfied).

- Model 2: Reverse Bernstein Letter

This strategy reverses the default rule of the Bernstein letter. A court that otherwise has jurisdiction could presumptively proceed with a terrorist suit unless the State Department issues an official letter to the contrary. This model skirts Model 1’s tricky problem of crafting a judicially enforceable definition of terrorism by allowing all suits to proceed unless the State Department says otherwise. (Model 1 requires judges to presumptively bar terrorist suits, which requires a judicial definition of terrorist suits. This is not an insurmountable problem, but is a consideration.)

- Model 3: Tiered System

The Bernstein letter approaches might be combined with a tiering approach to the state-sponsored terrorism exception under the FSIA. The idea here is to continue the system of removing immunity in suits against states officially designated by the State Department as sponsors of terrorism, but add different categories of states that might be potentially susceptible to suit under different circumstances. For example, a second tier might include (a) states that have not satisfied international law requirements to prosecute or extradite suspected terrorists; (b) borderline cases of miscreant states; or (c) terrorist organizations (especially if the ATA is interpreted to allow civil actions against civic organizations that materially support terrorist groups). The different tiers of potential defendants might have different presumptions of suability. For example, all states in the top tier could be sued without any State Department involvement (or subject to a reverse-Bernstein letter), and the lower tiered defendants might be subject to one of the two Bernstein letter presumptions. The general idea is to maximize useful litigation of the sort currently pursued under the FSIA terrorist exceptions, while at the same time maintaining Executive branch flexibility. Such a scheme might also provide the State Department greater flexibility in deciding whether to designate a state.

We note that each of these three models potentially suffers from the problems that occurred under the pre-FSIA regime of executive suggestion. Under that regime, the State Department established an informal administrative process to “pre-adjudicate” immunity claims, the results of which were binding on courts. This process became heavily politicized, and had the effect of offending foreign nations more than when

determinations were made by courts alone applying legal standards.⁹⁷ There are ways to avoid this conundrum, including making the administrative determination of susceptibility to suit subject to strict legal standards. This latter approach may capture both rule of law benefits and expertise benefits in a manner akin to modern administrative agencies.

3. Clarifying reforms: The state action element

Courts interpreting statutes inevitably discover and must resolve ambiguities not anticipated by Congress. Any legislative reform effort with regard to civil actions against terrorism will profit by codifying cases with which Congress agrees and clarifying ambiguities that have produced anomalous or contradictory court decisions. One issue that might profit from congressional clarification is the state action problem discussed in Section I.

The conceptual distinction between FSIA defendants and non-FSIA state actors is, at least at first, difficult to grasp. Some courts have concluded that a state official can be liable for acting under color of state law but not be subject to the FSIA, if the defendant is sued in his personal capacity. This may be an appropriate distinction, but it is not one clearly specified by the FSIA. Congress should perhaps resolve this ambiguity, either by moving non-FSIA defendants under the FSIA's rubric, or by eliminating individuals from FSIA coverage altogether.

4. The Enforcement of Judgment Dead End

The major weakness in current civil litigation against terrorism is inability to enforce judgments. We believe that the expansion of civil liability to secondary actors (and especially to those located in the United States) may offer new prospects in this regard. Nevertheless, in cases against foreign states, plaintiffs routinely receive significant damage awards but recover nothing. States often do have assets in the United States, and, in the case of official state sponsors of terrorism, the assets may be frozen. One problem in using those funds is the threat to U.S. assets and property located abroad in the event foreign states adopt similar or reciprocal practices. Another problem is the potential interference with the Executive's authority in the area of foreign policy and diplomacy. These interests necessarily hang in the balance.

If the political branches decide to allow foreign states' assets to be used in satisfying civil judgments, a number of options are available. They could, for example, permit judgments to be enforced against:

- The sale of any commercial property owned by a foreign state or its instrumentalities;

⁹⁷ See, for example, Andreas Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901 (1969).

- Rental proceeds accrued from a foreign state's diplomatic and consular property;
- The garnishment of private entities' debts owed to a foreign state or its instrumentalities;
- Vested and liquidated frozen assets;
- Attached diplomatic property;
- Payments from U.S. Treasury, with agreement over reimbursement as part of negotiations with a foreign state for normalization of relations.⁹⁸

These and related measures could either be options made available to the President, or potentially congressionally mandated rules. Some, and perhaps most, of these measures may hamper the Executive's ability to confront and cajole states that sponsor terrorism, to abide by international agreements, to protect U.S. property abroad, and to conduct foreign affairs more generally.

CONCLUSION

One aim of this article has been to set forth the legal framework for civil actions in U.S. courts against persons who commit acts of terrorism. Another has been to provide a structure for understanding and assessing normative arguments about how, if at all, the current legal framework should be modified. We have taken no position here on how these normative arguments should be resolved. We nonetheless hope that our analytical efforts will be of some assistance in future debates about the proper role of U.S. courts in civil litigation to redress acts of terrorism.

Readers with comments should address them to:

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⁹⁸ These options are based in part on the 2000 Justice for Victims of Terrorism Act and 28 USC §1610.

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