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# The Transformation of Human Rights Litigation: the Alien Tort Statute, the Anti-Terrorism Act, and JASTA

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## THE TRANSFORMATION OF HUMAN RIGHTS LITIGATION: THE ALIEN TORT STATUTE, THE ANTI-TERRORISM ACT, AND JASTA

*Stephen J. Schnably*<sup>1</sup>

*A quarter century ago, the prospects for federal civil litigation of international human rights violations under the Alien Tort Statute (ATS) seemed bright. With the statute's modern revival, a decade earlier in *Filártiga*, foreign nationals, often with no recourse in their own countries, had a forum for judicial vindication of a broad range of wrongs by state officials, multinational corporations, and even, in limited circumstances, foreign states themselves. The Supreme Court's *Kiobel* decision in 2013, however, may signal the end of the *Filártiga* revolution, with Congress's seeming acquiescence: Congress, after all, could amend the ATS if it disagreed with the Court. Congress's inaction should not be attributed to inertia, for Congress has not been idle. Over the same period, it has continually expanded civil liability for foreign terrorist acts against American nationals, even to the point of effectively intervening in ongoing cases. The recent Justice Against Sponsors of Terrorism Act (JASTA) is the latest example. The near demise of the ATS and the growth of anti-terrorism legislation are of a piece. They represent a turn*

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<sup>1</sup> Professor of Law, University of Miami. I would like to thank Lili Levi and Sergio Campos for thoughtful comments, and Sean Fard and Juan Olano for excellent research assistance. I would also like to acknowledge the Review's founding editor-in-chief, Víctor Marroquín, J.D. 1992 (Miami), LL.M. 1993 (Harvard), whose vision and dedication as a student benefited the Law School and presaged a distinguished career as a lawyer and public figure in Peru.

*away from a cosmopolitan vision of building a global legal order, in which all states protect human rights regardless of nationality. The emphasis in the more nationalist vision today on protecting Americans from terrorism has some merit, but in practice it lends itself to the use of civil litigation as a weapon against foreign states, often at the expense of the victims the legislation purports to serve. Moreover, the sharp division between Americans and foreigners, with protection only of the former, risks casting foreigners as dangerous others. The division is also unrealistic, given the pervasive effect U.S. actions have throughout the world. Recognition of this effect would also help counter the understanding of many ATS cases, including Filártiga itself, as foreign many times over – “foreign cubed” in the jargon applied to ATS cases involving a foreign plaintiff and foreign defendant litigating over actions that took place in a foreign country. Rather than simply representing the intrusion of foreign concerns into federal courts, ATS cases may serve U.S. democratic interests by helping to cast light on the harmful effects on human rights that U.S. policy may have.*

I.	INTRODUCTION.....	288
II.	THE JUDICIARY AND HUMAN RIGHTS LITIGATION AS OF 1991: AN EXPANDING UNIVERSE.....	296
III.	THE JUDICIARY AND HUMAN RIGHTS LITIGATION TODAY.....	315
IV.	THE GROWTH OF ANTI-TERRORISM LITIGATION .....	334
A.	THE ANTITERRORISM ACT AND THE FOREIGN SOVEREIGN IMMUNITIES ACT .....	335
1.	THE ANTITERRORISM ACT (ATA) .....	335
2.	THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT AND THE FLATOW AMENDMENT .....	344
3.	THE 2008 AMENDMENT TO THE FSIA .....	358
B.	THE 9/11 LITIGATION AND THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT.....	362
V.	FUTURE DIRECTIONS .....	385
A.	TWO VISIONS OF HUMAN RIGHTS LITIGATION .....	385
1.	COSMOPOLITANISM AND NATIONALISM.....	385
2.	CRITIQUE OF THE COSMOPOLITAN VISION .....	388
3.	CRITIQUE OF THE NATIONALIST VISION.....	392
A)	THE PROTECTION OF U.S. CITIZENS AND TERRITORY.....	392
B)	THE FOCUS ON TERRORISM.....	402
B.	BEYOND THE TWO VISIONS: OVERCOMING THE MISCONCEPTION OF “FOREIGN CUBED” .....	408
1.	PARAGUAY AND FILÁRTIGA.....	412
2.	PARAGUAY, THE TRI-BORDER AREA, AND TERRORISM.....	420
VI.	CONCLUSION .....	434

## I. INTRODUCTION

The first issue of the University of Miami Yearbook of International Law, as it was known in 1991, commenced with Sir Robert Jennings' fascinating assessment of the sweeping changes in international law he had observed (and help shape) over a distinguished career spanning more than half a century.<sup>2</sup> Among other things, he took note of the rise of international human rights law – “a radical change from the traditional law which protected individuals only in the capacity of aliens, and only then in terms of the injury done not to the individual but to the State of his nationality.”<sup>3</sup>

U.S. ratification of the International Covenant on Civil and Political Rights in 1992 seemed to confirm that this radical change had taken root here.<sup>4</sup> Perhaps even more telling, federal civil litigation to remedy violations of internationally protected human rights—most notably (though not exclusively) under the aegis of the Alien Tort Statute (ATS)<sup>5</sup>— appeared to herald a cosmopolitan vision in which

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<sup>2</sup> Sir Robert Y. Jennings, *An International Lawyer Takes Stock*, 1 U. MIAMI YEARBOOK INT'L L. 1 (1991).

<sup>3</sup> *Id.* at 9–14, 10.

<sup>4</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171.

<sup>5</sup> 28 U.S.C. § 1350 (2012). The statute provides, in full, “The district courts shall have original jurisdiction of any civil action by an alien for a tort

federal courts not only protected human rights on a global basis but helped build a global legal order that recognizes the rights and worth of every human being, regardless of nationality.

In 1991, Harold Koh captured the potential sweep of these developments with his analysis of “transnational public law litigation,”<sup>6</sup> of which ATS litigation was one example. Only a decade earlier, in *Filártiga v. Peña-Irala*, the Second Circuit had blessed the modern revival of the statute.<sup>7</sup> The court

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only, committed in violation of the law of nations or a treaty of the United States.” It was enacted as part of the Judiciary Act of 1789, and has remained essentially unchanged since then, though subject to some minor modifications. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 587 & nn.1-2 (2002).

<sup>6</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347 (1991) (describing such litigation as encompassing “international human rights suits brought by aliens against foreign and United States governments and officials under the Alien Tort Statute, as well as actions by foreign governments against individual, American government, and corporate defendants.”). For a more limited approach, against which Koh argued, see Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

<sup>7</sup> *Filártiga v. Peña-Irala*, 630 F. 2d 876, 878 (2d. Cir. 1980); see generally WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PENA IRALA* (2007); See also RICHARD ALAN WHITE, *BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS* (2004). Moreover, the ALI’s Third Restatement of

held that torture was a violation of the law of nations. What struck many commentators about the case was that it involved events with seemingly no relation to U.S. actors or territory: A Paraguayan police official had tortured and murdered the son of a Paraguayan political dissident in Paraguay.<sup>8</sup>

With this recognition of a role for human rights in federal courts, litigation could proceed against individuals and states who violated basic human rights abroad. Practical questions relating to service of process might put some limit on bringing some foreign human rights violators to court. Still, the draw of the United States' global status—and, sadly, its close working relationships with many officials in governments with poor human rights records—could

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Foreign Relations Law, adopted in 1987, included a broad definition of what constitutes human rights violations, bolstering plaintiffs who sought relief based on the ATS. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

<sup>8</sup> *Filártiga*, 630 F. 2d at 878-79. To be sure, the plaintiffs and defendant were in fact living in Brooklyn at the time of the lawsuit. This connection allowed for personal jurisdiction: The defendant Norberto Peña-Irala was served while in detention in Brooklyn for overstaying his visa. *Id.* at 878 (plaintiff was living in the U.S., having applied for political asylum). But the connection was not critical to subject matter jurisdiction.

provide opportunities to effect proper service on former human rights violators here in the U.S.<sup>9</sup>

At the start of the nineties there also appeared to be a genuine political commitment to making some form of universal jurisdiction real. One example was the United States' signing of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1988, with ratification following six years later.<sup>10</sup> The

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<sup>9</sup> For example, after former President Marcos was forced out of power in 1989, he moved to Hawaii, where he was subject to service. *See Estate of Domingo v. Republic of Philippines*, 808 F.2d 1349 (9th Cir. 1987); *see generally* WILLIAM J. ACEVES, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS (Amnesty International USA 2002); *see Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass 1995) (service of an ATS complaint on Hector Gramajo, a former Defense Minister of Guatemala, while attending Harvard).

<sup>10</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; *see* Message to the Senate Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, May 20, 1988, S. Treaty Doc. No. 100-20 (1988) ("The core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called 'universal jurisdiction.'"). The U.S. became a party to the treaty on October 21, 1994. *See* Multilateral Treaties Deposited with the Secretary General: Status, Dec. 31, 2009, U.N. Doc. ST/LEG/SER.E/26, 360. .



Convention requires states to prosecute alleged torturers within their jurisdiction, without regard to the citizenship of the perpetrator and victims or where the torture occurred, if the state does not extradite the alleged torturer to another appropriate state for prosecution.<sup>11</sup>

As the International and Comparative Law Review marks its twenty-fifth anniversary, the landscape looks very different. Since 1991, major Supreme Court and lower court decisions have significantly limited the scope of the ATS. In *Sosa v. Alvarez Machain*,<sup>12</sup> the Supreme Court rejected most sweeping attacks on the ATS, but signaled a determination to limit ATS litigation to a relatively narrow class of claims.<sup>13</sup> In 2013, the Court struck a second and much more serious blow against the statute. *Kiobel v. Royal Dutch Petroleum Co.* held that the presumption against extraterritoriality applies to the statute.<sup>14</sup> Some ATS claims will survive, but as one

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<sup>11</sup> Convention Against Torture, *supra* note 10 at art. 5(2).

<sup>12</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>13</sup> *Id.* at 698, 748.

<sup>14</sup> *Koibel v. Royal Dutch Petroleum.*, 133 S. Ct. 1659, 1669 (2013).

commentator put it, *Kiobel* “signals the end of the *Filártiga* human rights revolution.”<sup>15</sup>

These holdings and others evidence a general hardening of judicial attitudes against the application of international human rights norms in federal courts. This change in the judicial landscape, moreover, reflects a deep consensus in the political branches, across parties and enduring over time, that international human rights law is generally to be treated more as a policy matter than a legal commitment.

To conclude that what seemed to be an expanding universe in 1991 is now in a state of contraction and even collapse would, however, greatly oversimplify what has happened in the intervening quarter century. For there has been one persistent growth area since 1991: litigation against states and other non-state actors for committing or supporting terrorism. It is a development Congress has not only endorsed, but actively promoted. And it strongly suggests that Congress’s inaction in the face of the Court’s restrictive interpretation of the ATS is not a matter of inattention or inertia. On the contrary, taken together, the near-demise of the ATS and the explosive growth in anti-terrorism

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<sup>15</sup> Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1753 (2014); see also Ernest A. Young, *Universal Jurisdiction, The Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023 (2015).

legislation reflect the predominance today of a more nationalistic vision, in which the protection of U.S. nationals and U.S. territory, and the effectiveness of U.S. foreign policy, determine the role of federal courts in human rights litigation.

This more nationalistic emphasis also helps explain how the use of courts to vindicate human rights violations—portrayed by the author of *Filártiga* as a noble endeavor exemplifying the rule of law<sup>16</sup>—tends today to become little more than another foreign policy instrument. Congress's interest in promoting such litigation is selective, to say the least, focused on states or other actors that are out of favor with U.S. foreign policy. The promotion of terrorism litigation can also become a weapon to be used by Congress in its struggles with the executive branch over control of foreign policy, as the battles over the recently enacted Justice Against Sponsors of Terrorism Act (JASTA) show.<sup>17</sup> The weaponization of judicial redress for severe human rights violations disrespects the victims whose interests it claims to vindicate and undercuts the integrity of the judicial process.

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<sup>16</sup> Irving R. Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44.

<sup>17</sup> Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222 (2016).

The developments of the last quarter century, then, suggest two different visions of federal civil litigation over human rights violations, one cosmopolitan, one nationalist. Each vision has its legitimate attractions; each also gives cause for concern. My aim here is not to provide a full evaluation, but rather to suggest a possible third alternative. This alternative situates federal civil litigation of human rights violations in a context that recognizes the interconnectedness of the local and the global, but without tying such litigation to a larger project of building a global system of the rule of law.

One modest first step in such a direction would be to question how “foreign” many of the ATS cases are. A closer look at Paraguay, where Joelito Filártiga was tortured and murdered, shows that the nomenclature of “foreign cubed” attached to some cases—to those brought by foreign plaintiffs against a foreign defendant for violations that occurred in foreign territory—can be deeply misleading. The United States’ global role often means that seemingly foreign cases have more ties to the U.S. than might first be apparent. This observation, in turn, might suggest a role for ATS litigation that is not wedded to the cosmopolitan vision, in which federal court adjudication of human rights violations against foreigners helps build a global legal order. Instead, ATS litigation may help raise awareness of the ways in which U.S. policy can contribute to those violations in the first place. For now, however, the turn to a more nationalist vision – which Congress’s avid attention to anti-terrorism legislation embodies – almost certainly precludes any revival of the ATS.

## II. THE JUDICIARY AND HUMAN RIGHTS LITIGATION AS OF 1991: AN EXPANDING UNIVERSE

As of 1991, the prospects for civil litigation seeking to vindicate human rights violations here and abroad seemed bright. The revival of the ATS in *Filártiga v. Peña-Irala* was still fresh, and had already inspired other lawsuits against individual human rights violators.<sup>18</sup> In the 1990s, courts approved legal theories of liability that expanded the universe of potential defendants. Liability was upheld on the basis of command responsibility—meaning that higher officials, not just those who actually committed torture or other human rights violations, could be held liable. Additionally, liability was extended to private actors. This liability covered private actors committing genocide or war crimes, on the theory that no state action was required for such violations. It also covered private actors committing human rights violations that did require state action, if those actors (primarily corporations) acted in concert with state actors. In this latter category, there was no requirement that the state be named as a defendant along with the private

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<sup>18</sup> *E.g.*, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (lawsuit against Argentinian general for disappearance, torture, and summary execution), on reconsideration, 694 F. Supp. 707 (N.D. Cal. 1988). See BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 12-13 (2d ed. 2008). According to William Aceves, some 100 ATS cases were filed between the *Filártiga* and *Sosa* cases. ACEVES, *supra* note 7, at 8 & n.37.

actor that had cooperated with the state in the commission of human rights violations, meaning that foreign sovereign immunity posed no barrier.<sup>19</sup>

Indeed, courts seemed willing to find exceptions to foreign sovereign immunity in human rights cases brought directly against states. In its 1991 decision in *Nelson v. Saudi Arabia*, the Eleventh Circuit allowed an American recruited to work at a Saudi government-owned hospital to sue Saudi Arabia for torturing him, finding subject matter jurisdiction under the “commercial activity” exception to foreign sovereign immunity.<sup>20</sup>

Granted, not all these human rights lawsuits succeeded. Courts did not accept every assertion of an alleged international law norm, and other doctrines such as *forum non conveniens*, act of state, political question, and comity had to be considered, as well as questions of personal jurisdiction.<sup>21</sup> Even before 1991, the D.C. Circuit’s 1984

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<sup>19</sup> For useful summaries, see STEPHENS, *supra* note 18, at 13-15; ACEVES, *supra* note 7, at 91-158.

<sup>20</sup> *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991). Nelson, a U.S. citizen, had been employed in Saudi Arabia by a Saudi government-owned hospital. He brought suit against Saudi Arabia in federal district court, asserting that the government had detained and tortured him in response to whistleblowing. *Id.* at 1530.

<sup>21</sup> See STEPHENS, *supra* note 18, at 15-16.

decision in *Tel-Oren* had struck a cautionary note.<sup>22</sup> And in its 1989 decision in *Amerada Hess*, the Supreme Court had rejected a sweeping attempt to strip foreign states of their immunity to suit in human rights lawsuits alleging violations of peremptory norms.<sup>23</sup> The Eleventh's Circuit decision in 1991 in *Nelson v. Saudi Arabia* was soon to be reversed by the Supreme Court.<sup>24</sup> There the Court read the commercial activity exception to foreign sovereign immunity under the Foreign Sovereign Immunity Act (FSIA) very narrowly, in a way that foreclosed one basis for human rights lawsuits against states.<sup>25</sup>

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<sup>22</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>23</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

<sup>24</sup> *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), *rev'g*, *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th. Cir. 1991).

<sup>25</sup> *Id.* *Nelson*, a U.S. citizen, had been employed in Saudi Arabia by a Saudi government-owned hospital. He brought suit against Saudi Arabia in federal district court, asserting that the government had detained and tortured him in response to whistleblowing. *Id.* at 352-53. Foreign states have immunity from suit in federal courts unless one of the exceptions provided in the FSIA applies. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602-11) (2012)) [hereinafter FSIA]. *Nelson* asserted that his claim fell under the commercial activity exception of Section 1605(a)(2), because he was tortured for activities related to his

Nevertheless, apart from litigation directly against states, ATS litigation continually expanded. This expansion, moreover, came in the context of what appeared to be a decisive political break with the past practice of not ratifying human rights treaties. In 1989, the U.S. finally became a party to the Genocide Convention, four decades after signing it.<sup>26</sup> As noted earlier, the U.S. also ratified the Abolition of Forced Labour Convention in 1991,<sup>27</sup> the International Covenant on Civil and Political Rights in 1992,<sup>28</sup> and both the International Convention on the

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employment contract. *Nelson*, 507 U.S. at 354. The Supreme Court held that the violation of human rights was a sovereign act, not a commercial one, and so was immune. *Id.* at 363.

<sup>26</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; as to the United States, Feb. 23, 1989); see also Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. TIMES, Nov. 5, 1988.

<sup>27</sup> Convention Concerning the Abolition of Forced Labour, June 25, 1957, S. Treaty Doc. No. 88-11, 320 U.N.T.S. 291.

<sup>28</sup> International Covenant on Civil and Political Rights, 1966 U.S.T. 521, 999 U.N.T.S. 171 (entered into force, Mar. 23, 1976).



Elimination of All Forms of Racial Discrimination<sup>29</sup> and the Convention against Torture<sup>30</sup> in 1994.

Significantly, U.S. action went beyond simple ratification of treaties. The Torture Victim Protection Act (TVPA) was enacted in 1991.<sup>31</sup> It provided a right of action for victims of torture or extrajudicial killing by foreign officials (though nothing else—and at the cost of raising questions about the continuing viability of the ATS as a basis for torture and extrajudicial killing claims<sup>32</sup>). And it reinforced the U.S. commitment to the obligations it took on through the Convention Against Torture, which President Reagan had signed in 1988.<sup>33</sup>

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<sup>29</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969; as to the United States, Oct. 21, 1994).

<sup>30</sup> Convention Against Torture, *supra* note 10.

<sup>31</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

<sup>32</sup> See Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L LAW 640, 643-52 (2010).

<sup>33</sup> See 136 Cong. Rec. S17486 (daily ed. Oct. 27, 1990) (TVPA enacted in anticipation of ratification of CAT, article 14 of which requires private right of action for damages.); see also ACEVES, *supra* note 7, at 78-80; but see text accompanying *infra* note 46. Additionally, when the Senate

These developments, moreover, appeared to be a part of a larger global transformation. The year 1991 saw the dissolution of the Soviet Union and the end of the Cold War. Addressing Congress as he sought to assemble an international military coalition to force Iraq's withdrawal from Kuwait, President George H.W. Bush envisioned the emergence of a "new world order."<sup>34</sup> Nothing in this new world order appeared to entail bringing democracy or respect for human rights either to Iraq or to Kuwait, but President Bush did speak of a world in which "the rule of law supplants the rule of the jungle," and "the strong respect the rights of the weak."<sup>35</sup> The "end of history" was proclaimed as the liberal order was taken to have triumphed—an order that could be depicted as uniquely auspicious for the recognition of human rights law.<sup>36</sup>

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approved ratification of CAT, Congress approved a new criminal statute with an extraterritorial prohibition of torture. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (codified at 18 U.S.C. §§ 2340, 2340A (2012)).

<sup>34</sup> Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit, Sept. 11, 1990, 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH 1218, 1219 (1991).

<sup>35</sup> *Id.*

<sup>36</sup> See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

The rise of ATS litigation could be seen as integrally bound up with these developments. The judge who wrote the opinion in *Filártiga* had sentenced the Rosenbergs to death in an iconic Cold War prosecution, under circumstances that may have made a mockery of the rule of law.<sup>37</sup> Now he helped usher in a new era in which the exercise of universal jurisdiction would bring human rights violators around the world to heel.

Legal academics saw ATS litigation as having broad significance. Koh argued that in welcoming transnational public litigation, U.S. courts would “shake the idealist/realist polarities that dominated Cold War debate,”<sup>38</sup> and realize their unique potential to “play a more constructive role in the international legal process.”<sup>39</sup> Anne-Marie Slaughter’s article on the ATS, published in 1989, granted the statute pride of place among the nation’s

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<sup>37</sup> See Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 VAND. L. REV. 885, 896 (2010).

<sup>38</sup> Koh, *supra* note 6, at 2399.

<sup>39</sup> *Id.* at 2396; see also Harold Hongju Koh, *Filártiga v. Peña-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in INTERNATIONAL LAW STORIES 45, 67-73 (John E. Noyes et al. eds., 2007). The phrase, “international legal process,” reflected Chayes’ adoption in the international law context of the Hart and Sacks’ legal process model. Koh, *supra* note 6, at 2398-99 & n.269.

founding documents as a “badge of honor.”<sup>40</sup> The ATS, she argued, represented more than an effort to avoid the international embarrassments that might ensue from failing to provide a judicial forum for aliens (including ambassadors) who were mistreated within the U.S.<sup>41</sup> Rather, it represented the framers’ acknowledgment of “the nation’s *duty* to propagate and enforce those international law rules that directly regulated individual conduct”<sup>42</sup>—rules that the framers understood to be dynamic and evolving over time.<sup>43</sup> The impulse behind the statute, she argued, was not merely prudential (though it was that), but something more: “The Framers sought to uphold the law of nations as a moral imperative—a matter of national honor.”<sup>44</sup>

To be sure, the outlook for ATS litigation was not entirely rosy. There were already, even a quarter century ago, signs of limitations and even push back. The Justice Department under the Reagan administration had been notably hostile to invocation of the ATS; the administration of George H.W.

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<sup>40</sup> Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AMER. J. INT’L L. 461 (1989).

<sup>41</sup> *Id.* at 465-74.

<sup>42</sup> *Id.* at 475.

<sup>43</sup> *Id.* at 477.

<sup>44</sup> *Id.* at 482.

Bush was less so, but hardly welcoming.<sup>45</sup> Multinational corporations were obviously not happy with the expansion of liability to private actors. Notably, when he signed the TVPA, President Bush not only disagreed with Congress about whether the legislation was required by the Convention Against Torture,<sup>46</sup> but also expressed concern that suits by foreigner citizens over torture abroad would embroil U.S. courts in sensitive foreign policy matters.<sup>47</sup> And conservative commentators denounced civil litigation of foreign human rights violations in the strongest of terms.<sup>48</sup>

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<sup>45</sup> Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 NW. J. INT'L L. & BUS. 475, 477, 506 (2013).

<sup>46</sup> Compare Statement on Signing the Torture Victim Protection Act of 1991, March 12, 1992, 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH 437, 437 (1993). (TVPA “does not help implement the Torture Convention”) [hereinafter TVPA Signing Statement] with Sen. Judiciary Comm., Report on the Torture Victim Protection Act of 1991 to accompany S. 313, as amended, S. Rep. No. 249, 102d Cong., 1st Sess. (1991) (Convention obligates states to ensure legal accountability of torturers and not to become a “safe haven” for torturers). In 1994, Congress also approved a new criminal statute with an extraterritorial prohibition of torture. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (April 30, 1994) (codified at 18 U.S.C. §§ 2340, 2340A (2012)).

<sup>47</sup> TVPA Signing Statement, *supra* note 46.

<sup>48</sup> See Ranon Altman, *Extraterritorial Application of the Alien Tort Statute After Kiobel*, 24 U. MIAMI BUS. L. REV. 111, 116 (2016).

*Filártiga* itself came under sharp criticism. Some argued that the Second Circuit had simply gotten the statute wrong: the ATS was simply jurisdictional and provided for no cause of action at all, leaving it to Congress to specify causes of actions through other statutes. Others argued that the statute provided liability only for a highly limited set of offenses that were recognized in 1789 as implicating individual liability. Judge Bork's opinion in *Tel-Oren* took up these themes.<sup>49</sup> The limiting interpretations of the ATS had gained enough traction in the 1980s that a significant part of Slaughter's *Badge of Honor* article was devoted to critiquing those theories. They had also gained enough traction to make the insulation of torture and summary execution claims from their effect one of the aims of human rights advocates in pushing for enactment of the TVPA.<sup>50</sup>

The question of relief, moreover, remained problematic. In ATS cases, judgments ranged from several hundred thousand dollars to (in much rarer cases) judgments over a billion dollars.<sup>51</sup> Collecting on those judgments was another

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<sup>49</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C. Cir. 1984) (Bork, J., concurring).

<sup>50</sup> See Beth Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 388 & n.30 (2008).

<sup>51</sup> Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THEVIEWFROMLL2 (Nov. 11, 2009),

matter. Individual defendants might well not have assets sufficient to cover the compensatory and punitive damages. Corporate defendants might, but multinational corporations' assets would likely be located in different countries, and the defendants had ample resources to resist execution. Judgments against foreign states posed another set of problems. Vulnerability to suit under the FSIA does not automatically entail loss of immunity to execution of assets.<sup>52</sup>

In the *Letelier* case, for example, the Republic of Chile was found liable for having assassinated a leading dissident living in the U.S.<sup>53</sup> Foreign sovereign immunity did not apply by virtue of the non-commercial tort exception set out in section 1605(a)(5) of the FSIA. That section permits suit against a state for "personal injury or death . . . occurring in the United States" that is caused by an act or omission of the

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<https://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/> (updating compilation of damage awards through March 2013).

<sup>52</sup> See FSIA, *supra* note 25, § 1609 (granting states immunity from execution of judgments except where the FSIA provides for an exception); see Mona Conway, *Terrorism, the Law and Politics as Usual: A Comparison of Anti-Terrorism Legislation Before and After 9/11*, 18 *TOURO L. REV.* 735 (2002) (discussing the difficulties of executing judgments).

<sup>53</sup> *De Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980).

foreign state's officials within the scope of their employment.<sup>54</sup> Plaintiffs were, however, unable to execute against Chile's national airline to satisfy the judgment. The airline was a separate legal entity, and even if the court had been willing to consider the airline otherwise, the commercial activity exception did not apply.<sup>55</sup> In general,

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<sup>54</sup> FSIA, *supra* note 25, § 1605(a)(5); *see* *Letelier v. Republic of Chile*, 488 F. Supp. 665, 669 (D.D.C. 1980). There is, in turn, an exception to this exception to sovereign immunity – the FSIA does not remove immunity for claims based on discretionary functions. FSIA, *supra* note 25, § 1605(a)(5)(A); *but see* *Letelier*, 488 F. Supp. at 673 (states have no discretion to assassinate individuals).

<sup>55</sup> FSIA, *supra* note 25, § 1610(a)(2) (allowing execution against the property of a foreign state “used for a commercial activity in the United States,” if that property “is or was used for the commercial activity upon which the claim is based”). The Second Circuit held that even if the airline, a commercial venture, was involved in the assassination of Orlando Letelier and Ronnie Moffitt, assassination is not a commercial activity. *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (“Politically motivated assassinations are not traditionally the function of private individuals.”). Ultimately an international arbitral panel constituted under a 1914 Treaty for the Settlement of Disputes between the U.S. and Chile awarded the victims’ families \$2,611,892 in compensation. *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt*, XXV Rep. of Int’l Arb. Awards 1, 11 (Jan. 11, 1992). *See* Barbara Crossette, *\$2.6 Million Awarded Families in Letelier Case*, N.Y. TIMES, Jan. 13, 1992, at A1. *See also* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 149-51 (2015) (account of the arbitration).



though restrictions on execution leave plaintiffs in the situation of a “right without a remedy,”<sup>56</sup> the moral vindication of obtaining a ruling pronouncing a state to have violated the plaintiff’s internationally guaranteed human rights was still significant.

We should be careful, having the benefit of hindsight, not to overstate the significance of these potential limits to the revolution that *Filártiga* brought about. While there may have been clouds on the horizon, they were just that: clouds. There was no reason to suppose that the expansion of ATS litigation would inevitably come to a halt, let alone be reversed. Indeed, with the election of President Clinton in 1992, the executive branch took a much more favorable stance toward ATS litigation.<sup>57</sup> And in fact the coming years were to witness an explosion of such litigation in federal courts. The ATS went, as one commentator put it, from obscurity to “an important emerging tool for human rights advocates.”<sup>58</sup> Another observed in 2008 that “private

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<sup>56</sup> *De Letelier*, 748 F.2d at 799.

<sup>57</sup> See Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 538-39 (2004-2005).

<sup>58</sup> Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department Statements of Interest in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 810 (2006).

individuals, government officials, and multinational corporations responsible for torture and other egregious abuses may be required to defend their actions in court," and asserted that this litigation contributed to a "world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide."<sup>59</sup>

There was, however, one area with decidedly mixed results: civil lawsuits over alleged acts of terrorism. On the one hand, most cases in which damages were sought for terrorism failed, except where the act touched American soil. (And even where a judgment was obtained, execution remained a significant problem.) On the other hand, advocates for victims of terrorism had recently scored a major legislative success with the Antiterrorism Act of 1990 (ATA), reenacted in 1992.<sup>60</sup> The ATA had serious limitations,

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<sup>59</sup> STEPHENS, *supra* note 18, at xxii.

<sup>60</sup> Military Construction Appropriations Act of 1991, Pub. L. 101-519, 104 Stat. 2251, § 132 (Nov. 5, 1990); Federal Courts Administration Act of 1992, Pub. L. 102-572, title X, § 1003 (Oct. 29, 1992), (codified as amended at 18 U.S.C. §§ 2332-2338 (2012)). The 1990 enactment was flawed on procedural grounds, and was repealed effective November 5, 1990. Dire Emergency Supplemental Appropriations Act of 1991, Pub. L. No. 102-27, 105 Stat. 130, § 402 (April 10, 1991); *see* Military Construction Appropriations Act of 1992, Pub. L. No. 102-136, 105 Stat. 643, § 126 (Oct. 25, 1991) (amending the Dire Emergency Supplemental Appropriations Act of 1991); *see* Senator Charles Grassley, 137 Cong. Rec. S4511 (1991).

however, and ATA litigation was not to take hold until after 2000.<sup>61</sup>

Surprisingly, some of the most successful terrorism-oriented claims were those brought against states. The *Letelier* case against Chile,<sup>62</sup> *Liu v. Republic of China*,<sup>63</sup> and *Estate of*

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The statute was re-enacted in largely the same form by Congress in 1992. For more detailed explanations, see Jimmy Gurulé,  *Holding Banks Liable Under the Anti-terrorism Act for Providing Financial Services to Terrorists: An Ineffective Legal Remedy in Need of Reform*, 41 J. LEGIS. 184, 187 n.18 (2015); John G. McCarthy, *The United States Should Prosecute Those Who Conspired to Assassinate Former President Bush in Kuwait*, 16 FORDHAM INT'L L.J. 1330, 1341 n.69 (1992); Van Schaack, *supra* note 50, at 383 n.6. There is also an earlier Anti-Terrorism Act enacted in 1987. It focuses expressly on the PLO. Anti-Terrorism Act of 1987, Publ. L. 100-204, 101 Stat. 1406 §§ 1001-105, (Dec. 22, 1987) (codified as amended at 22 U.S.C. §§ 5201-5203(2012)). Whether one regards the ATA as having been enacted in 1990 or 1992 makes no difference to my analysis.

<sup>61</sup> See Lanier Saperstein & Geoffrey Sant, *The Antiterrorism Act: Bad Acts Make Bad Law*, 248 N.Y.L.J., No. 46 (Sept. 5, 2012).

<sup>62</sup> The *Letelier* case resulted in a default judgment against Chile. *De Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980). Chile refused to pay the judgment for many years, and resisted efforts to execute it, but under pressure from the U.S. ultimately agreed to a binding determination by an international arbitral panel, which awarded the plaintiffs \$2.6 million. See ACEVES, *supra* note 7, at 88.

*Domingo v. Republic of the Philippines*<sup>64</sup> illustrate one approach. In all three cases, plaintiffs asserted claims against foreign states for assassinating dissidents living in the U.S. Sovereign immunity was held to be no barrier in these cases, at least to judgment. To be sure, the cases did not assert claims for “terrorism” as such; the plaintiffs asserted tort claims under state law. Still, using violent means against civilians in blatant violation of human rights law, for political aims—*i.e.*, not only to silence the dissidents themselves but to intimidate the civilian population here or back home—could plausibly be viewed as terrorism.<sup>65</sup> This

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<sup>63</sup> *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989). The district court dismissed the complaint in *Liu* on act of state grounds, but the Ninth Circuit overturned that holding and remanded the case.

<sup>64</sup> *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988).

<sup>65</sup> The ATA (not adopted as of the time of these lawsuits) defines international terrorism as “violent acts or acts dangerous to human life” that would violate U.S. law if committed here, and are intended, among other things, to “intimidate or coerce a civilian population.” 18 U.S.C. §§ 2331(1)(A), (B) (2012). The complaint in the *Domingo* case, for example, asserted that the “murders were but one overt act of a broader tortious conspiracy to surveil, harass and intimidate the class of anti-Marcos Filipinos in the United States.” THOMAS CHURCHILL, *TRIUMPH OVER MARCOS: A STORY BASED ON THE LIVES OF GENE VIERNES & SILME DOMINGO* 165 (1995) (quoting complaint). The claims against the Republic of the Philippines appear not to have been pursued. In other

route could work only because the harm occurred in the U.S. As *Letelier* had done, *Liu* read section 1605(a)(5) of the FSIA to permit suit against a state that caused death or personal injury in the United States.<sup>66</sup>

Where the wrongful conduct and injuries occurred abroad, on the other hand, there was little, if any, hope of a successful claim. The long saga of attempts by those taken hostage at the U.S. Embassy in Iran in 1979 is illustrative. The first such effort failed, with the D.C. Circuit ruling that Iran was immune from suit under the FSIA.<sup>67</sup>

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contexts, a single assassination by a non-state actor has been so characterized. See *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008).

<sup>66</sup> *Liu v. Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986), *rev'd on other grounds*, 892 F.2d 1419 (9th Cir. 1989). As in *Letelier*, the court held that there is no discretion to assassinate individuals. *Liu*, 892 F.2d at 1431. The claims against the Marcoses resulted in a jury verdict of more than \$15 million; the court had denied Ferdinand Marcos head of state immunity. *Estate of Domingo*, 694 F. Supp. at 786 (W.D. Wash. 1988); see also *Marcoses Ruled Liable in Murders*, CHICAGO TRIBUNE, Dec. 17, 1989; *Marcos Allies Held Liable in Deaths of Foes*, N.Y. TIMES, Jan. 13, 1990.

<sup>67</sup> *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.D.C. 1984). For a useful history of the efforts of the American hostages to bring claims against Iran in federal court, see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R43210, THE IRAN HOSTAGES: EFFORTS TO OBTAIN COMPENSATION (2015). It is not enough, moreover, that the injury was said to have

In other cases, plaintiffs sought relief against non-state actors, asserting claims under international law. Although non-state actors were held not to enjoy sovereign immunity,<sup>68</sup> these lawsuits were largely unsuccessful.<sup>69</sup> The most notable was *Tel-Oren*, which arose out of an armed attack against civilians in Israel by members of the Palestine Liberation Organization in 1978. Israeli survivors of the attack and relatives of the victims brought suit under the ATS and other statutes against Libya, the PLO, and related organizations.<sup>70</sup> Citing the ATS, the plaintiffs asserted that the defendants' actions violated international law norms against genocide, terrorism, and torture. The D.C. Circuit was unanimous in upholding the lower court's dismissal of

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occurred in the U.S. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

<sup>68</sup> See *Klinghoffer v. PLO*, 937 F.2d 44 (2d Cir. 1991).

<sup>69</sup> Another possibility was to sue private actors under domestic law. Relatives of those killed in the Pan Am 103 bombing sued Pan Am, asserting it had been negligent in protecting them from the risk of a terrorist bombing. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804 (2d Cir. 1994). This route left the underlying perpetrators untouched.

<sup>70</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

the complaint, but was unable to agree on a rationale.<sup>71</sup> Judge Edwards doubted the ATS could ever apply to non-state actors.<sup>72</sup> Judge Bork depicted the statute as solely reflecting a Congressional concern for “peaceful relations with other nations,” and would have read it as limited to offenses recognized under the law of nations in 1789.<sup>73</sup> Along with Judge Bork, Judge Robb considered lawsuits asserting terrorism as a human rights violation to present non-justiciable political questions.<sup>74</sup> Judge Bork’s view was the most sweeping, applying potentially to all human rights claims; Judge Robb’s and Judge Edwards’s views would have their greatest impact on claims against non-state actors arising out of terrorist activity.

*Sanchez-Espinoza v. Reagan* involved a claim based on U.S. funding of terrorist activities by the *contras*.<sup>75</sup> It met with no

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 776 (Edwards, J., concurring). He did not address the question of Libya’s sovereign immunity.

<sup>73</sup> *See id.* at 803; *id.* at 816 (Bork, J., concurring).

<sup>74</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 823-26 (Robb, J., concurring); *id.* at 801-805 (Bork, J., concurring). Given their views on the lack of a justiciable claim, neither judge addressed the question of Libya’s sovereign immunity.

<sup>75</sup> *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff’d*, 770 F.2d 202 (D.C. 1985).

more success than had the claims in *Tel-Oren*. The District Court ruled that the case presented a non-justiciable political question;<sup>76</sup> the D.C. Circuit affirmed the dismissal on other grounds, expressing doubt, among other things, that the ATS could apply to the actions of non-state actors.<sup>77</sup>

In sum, while the prospects for the federal civil litigation of human rights violations appeared strong—prospects often tied to the emergence of a global legal order vindicating human rights—the future of lawsuits over terrorist activity appeared far less certain in 1991.

### III. THE JUDICIARY AND HUMAN RIGHTS LITIGATION TODAY

A quarter century later, the Supreme Court's two encounters with the ATS have left it stunted. *Sosa v. Alvarez-Machain*, the first, concerned a claim under the ATS brought by Alvarez, a Mexican national, against Sosa, also a Mexican national. Alvarez accused Sosa of having arbitrarily arrested and detained him as part of a U.S.-sponsored plan to kidnap him

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<sup>76</sup> *Id.* at 599-602.

<sup>77</sup> *Id.* at 206-07. *Sanchez-Espinoza* is indicative of another feature of civil litigation of human rights violations—namely, its tendency to be unsuccessful when the defendants are U.S. officials. For a useful analysis of ATS cases challenging U.S. conduct, see Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005).



and bring him to the U.S. for trial after the Mexican government had denied extradition.<sup>78</sup> The Court held that the conduct alleged did not contravene a “specific, universal, and obligatory” norm of international law. The Court did not provide a general test of what might so qualify,<sup>79</sup> but it suggested it might consider an allegation of prolonged arbitrary detention to do so, unlike the briefer detention overnight, before Alvarez was taken to the U.S. The Court expressed concern that every brief detention of a foreigner by a foreign police officer abroad could provide the basis for a claim in U.S. courts under the statute. In so doing, it overlooked the clear-cut practical and doctrinal barriers—including *forum non conveniens* and the need to achieve personal service—that made this specter largely theoretical. In any event, as was recognized at the time, and as subsequent application by lower courts demonstrated, *Sosa*

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<sup>78</sup> Alvarez also filed a claim against the U.S. Government under the Federal Tort Claims Act. The Court found that claim to be covered by a provision of the FTCA forbidding claims “arising in a foreign country.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004).

<sup>79</sup> For one such effort, see William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT’L L. 51 (2016) (arguing that only peremptory norms should provide the basis for claims under the ATS).

proved far from a death knell for human rights litigation under the ATS.<sup>80</sup>

The same cannot be said of the Court's second encounter with the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*,<sup>81</sup> twelve Nigerians sued three oil companies, none of them U.S.-based, claiming that the companies had sought the help of the Nigerian government in brutally putting down resistance to oil exploration in the Ogoni region of Nigeria. The Second Circuit, which had led the way in *Filártiga*, held that international law simply does not govern the conduct of corporations, potentially eliminating an entire field of human rights litigation.<sup>82</sup> Given the opportunity to review

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<sup>80</sup> See Stephens, *supra* note 57; Ralph Steinhardt, *Non-State Actors and the Alien Tort Claims Act*, in JOHN NORTON MOORE, ED., FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 89, 93 (2013).

<sup>81</sup> 133 S. Ct. 1659, 1660 (2013).

<sup>82</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145, 151 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013). See, e.g., Joe Lodico, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute*, 30 J.L. & COM. 117, 127-29 (2011) (arguing for corporate liability under ATS); Theresa (Maxi) Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 *FORD. INT'L L.J.* 1502, 1542 (2011) (arguing that such liability constitutes "judicial imperialism"). For an argument that the most common framing of the issue – whether corporations are subjects of international law, or have international legal personhood – is misguided, see José E. Alvarez, *Are Corporations "Subjects" of International Law*, 9 *SANTA CLARA J. INT'L L.* 1 (2011).

that decision, the Supreme Court vastly expanded the question before it,<sup>83</sup> and for the first time applied the presumption against extraterritoriality to the ATS.<sup>84</sup>

The Court went on to hold that the presumption had not been overcome, reading the statute as primarily concerned with international law claims by aliens that arose from conduct within the U.S. In *Kiobel*, the Court held, “all the relevant conduct took place outside the United States,”<sup>85</sup> and so did not fall within the statute. The Court further added, in *Delphic* language, that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>86</sup> The Court also cautioned that

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<sup>83</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1660 (2013).

<sup>84</sup> *Id.* at 1661. The Supreme Court did not decide the question of corporate liability under international law. Other circuits have rejected the Second Circuit’s holding on this point. See *Altman*, *supra* note 48, at 114 & n.16. In April 2017, the Court granted *certiorari* in a Second Circuit case squarely raising the issue. *Jesner v. Arab Bank, PLC*, 2017 WL 1199472 (No. 16-499) (April 3, 2017).

<sup>85</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>86</sup> *Id.* It is not clear, for example, whether domestic law or international law provides the rules that determine what “touches and concerns” U.S. territory. For an argument in favor of international law, see Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 *GEO. J. INT’L L.* 1329 (2013).

“mere corporate presence” in the U.S. would not suffice to overcome the presumption.<sup>87</sup> Speaking more generally, the Court viewed any judicial resolution of human rights violations that took place in foreign territory as raising unacceptable risks of drawing the U.S. into contentious disputes with foreign governments.<sup>88</sup>

The potential implications of *Kiobel* are sweeping.<sup>89</sup> Commentators have suggested that a whole category of claims—so-called foreign cubed cases brought by foreign plaintiffs against foreign corporations for violations abroad<sup>90</sup>—may well be discarded. Indeed, the assertion that

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<sup>87</sup> *Kiobel*, 133 S. Ct. at 1670.

<sup>88</sup> For a critique of the view that judicial resolution of ATS cases poses significant foreign policy risks, see Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U.L. REV. 1117 (2011).

<sup>89</sup> The same might be said of other proposed limitations on the scope of the ATS. The denial of any corporate responsibility under international law would be one. See text accompanying *supra* note 82. A limitation of potential defendants to U.S. citizens (a limitation not accepted by the courts today) would be another. See Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609 (2014).

<sup>90</sup> See, e.g., Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 Amer. J. Int'l L. 852, 854 (2013); Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM),

“all the relevant conduct took place outside the United States” could easily be made of *Filártiga* itself, at least as it is commonly portrayed. While the Court did not address the continuing validity of the decision, the logic of *Kiobel* could be fatal to it.<sup>91</sup> *Filártiga* involved federal courts adjudicating the legality of actions by Paraguayan officials with respect to Paraguayan officials in Paraguay.<sup>92</sup>

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<http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>. The phrase is used in other non-ATS contexts as well, e.g., Michael P. Murtagh, *The Rule 23(b)(3) Superiority Requirements and Transnational Class Actions: Excluding Foreign Class Members in Favor of European Remedies*, 34 *Hastings Int'l & Comp. L. Rev.* 1, 1 (2011), but my remarks here are confined to the ATS context.

<sup>91</sup> See *Warfaa v. Ali*, 811 F.3d 653, 658 (4th Cir. 2016) (*Kiobel* and *Sosa* “have significantly limited, if not rejected, the applicability of the *Filártiga* regime”), petition for cert filed, June 6, 2016. In *Warfaa*, the plaintiff, Farhan Warfaa, alleged that Somali soldiers had kidnapped and tortured him there. Later, Yusuf Ali, the colonel whom Warfaa claimed had ordered the torture, moved to the United States, and Warfaa brought suit under the ATS and the TVPA. The Fourth Circuit affirmed the dismissal of the ATS claim. Of particular significance is the court’s statement that under *Kiobel*, “[m]ere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context.” *Id.* at 661.

<sup>92</sup> To be sure, Justice Breyer, with the concurrence of three other Justices, enunciated a broader test that would save *Filártiga* from complete

What accounts for this Court's inhospitable approach to the ATS? One explanation is that the Court is simply following the lead of the political branches. This explanation might seem surprising at first glance, as the attitude of the political branches has varied greatly over the years. In 1991, Congress, as noted earlier, showed its support of federal civil remedies for human rights violations abroad by enacting the TVPA, partly in response to the push for

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oblivion. Even accepting for the sake of argument that the presumption against extraterritoriality would apply, he argued, it should be overcome in three circumstances:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Kiobel, 133 S.Ct. at 1674 (Breyer, J., concurring). The third would save the specific circumstances of *Filártiga*, since the defendant was living in the United States.

Further, there might be other avenues for civil litigation of human rights violations, in both federal and state court, though they have their limitations. See Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After Kiobel*, 92-NOV MICH. B.J. 44 (2013) (suggesting federal question jurisdiction and federal common law, or state court actions).

narrowing interpretations of the ATS. Today, in contrast, there is virtually no prospect of Congressional action to counter application of the presumption against extraterritoriality as determined in *Kiobel*.

Presidential administrations have also varied in outlook.<sup>93</sup> As noted earlier, the Reagan and first Bush administrations favored narrow interpretations of the ATS, the Reagan administration especially so. The Clinton administration proved more amenable to the ATS, supporting adjudication of the claims brought in *Karadzic*<sup>94</sup> and *Doe I v. Unocal Corp.*<sup>95</sup> The second Bush administration returned the executive branch to a position of hostility, arguing that the ATS was jurisdictional and nothing more, and submitting statements of interests in ATS cases arguing for dismissal on the ground that adjudication of the claims would interfere with the

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<sup>93</sup> Nzelibe provides an informative account of how the attitudes of Democratic and Republican administrations to ATS litigation have varied over the years. The partisan divide over ATS litigation is real. Nzelibe, *supra* note 45. The hostility of Congress and the executive branch to the judicial application of human rights law, however, has been largely invariant.

<sup>94</sup> Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 791-92 (2008).

<sup>95</sup> See Baxter, *supra* note 58, at 813.

conduct of foreign policy.<sup>96</sup> The Obama administration has been less unwelcoming, though it filed an amicus brief arguing that the claims in *Kiobel* were beyond the scope of the ATS.<sup>97</sup>

These shifts, while not unimportant, belie a deeper and longer-term consensus in the political sphere. In practice, across parties and administrations, the U.S. has treated human rights largely as a matter of foreign relations policy, not as universally applicable law. Nowhere is this approach clearer than in its approach to ratification of human rights treaties. When the U.S. becomes a party to human rights treaties, one argument the proponents of ratification consistently make is that ratification is vitally important to the credibility of U.S. pressure on other countries to respect human rights. At the same time, the terms of U.S. ratification have been consistently structured to ensure that it has little or no domestic legal impact. Before submission of the treaty to the Senate, the State Department identifies conflicts

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<sup>96</sup> See *id.* at 811-815.

<sup>97</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 WL 6425363. For a very critical take on the Obama administration's approach, see Hannibal Travis, *Reparations for Mass Atrocities as a Path to Peace: After Kiobel v. Royal Dutch Petroleum Co., Can Victims See Relief at the International Criminal Court?*, 40 BROOK. J. INT'L L. 547, 576-85 (2015).



between the text of the treaty and current U.S. law and practice and formulates reservations and understandings aimed at conforming the treaty obligations the U.S. takes on with current U.S. law. A declaration that the treaty is non-self-executing is added—and no implementing legislation is taken up. A somewhat cryptic federalism declaration is added for good measure.<sup>98</sup>

It is no wonder that then-Senator Kerry, Chairman of the Senate Foreign Relations Committee, expressed incredulity that any of his colleagues would hesitate to support ratification of the Convention on the Rights of Persons with Disabilities.<sup>99</sup> Characterizing the treaty, he spoke of “words or suggestions that have no power, that cannot be implemented, that have no access to the courts, that have no effect on the law of the United States, and cannot change the law of the United States.”<sup>100</sup> A description of a treaty in less law-like terms could hardly be imagined.

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<sup>98</sup> See Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 99-110 (2011).

<sup>99</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3.

<sup>100</sup> Mike Lee, *If the U.N. Convention Won't Affect U.S. Laws, How Can It Change Other Nations?*, USA TODAY, Dec. 6, 2012 (op-ed) (quoting Sen. Kerry's remarks). See also Michael Mathes, *US Senate Fails to Ratify UN*

The Court's approach to international law generally is consistent with this deeper political consensus. Increasingly, the Court treats international law as something to avoid as a basis of decision, if at all possible, out of a concern that it is an area better left to the political branches. In *Sosa*, Justice Souter clearly articulated the case for judicial caution in the

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*Treaty on Disabilities*, RSN, Dec. 5, 2012

<http://readersupportednews.org/news-section2/328-121/14866-us-senate-fails-to-ratify-un-treaty-on-disabilities> (“It doesn’t require any changes to American law, zero,” Kerry said. “This has no tying of the hands of America, there isn’t one law of the United States that would be negatively affected.”). Later testifying as Secretary of State when the treaty was again up for ratification, Kerry made a similar argument, arguing that it would only be other countries who had to change their laws and practices, given that the U.S. already embodies the “gold standard.” Penny Starr, *Kerry on U.N. Disabilities Treaty: ‘No Impact Whatsoever On the Sovereignty of the United States,’* CNSNews.com, Nov. 22, 2013, <http://www.cnsnews.com/news/article/penny-starr/kerry-un-disabilities-treaty-no-impact-whatsoever-sovereignty-united-states> (“joining this treaty doesn’t require a change to U.S. law, and there’s no reach whatsoever by any committee or any entity outside – the one committee that exists within the framework of this treaty is allowed to suggest things, but they have no power to enforce, no power to compel”). See also Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 173-74 (2016) (noting concerns of Senators to ensure that Disabilities Convention, if ratified, have no domestic legal effect).

face of Congress's persistent signaling of its distaste for the domestic judicial application of human rights treaties.<sup>101</sup>

The Court's attention to those signals is not limited to ATS litigation, but shows up in a number of spheres. One is the Court's much-remarked references to international and foreign law in several juvenile justice cases. Those cases are notable mainly for how reluctant the Court seems to be to treat international human rights law as something the courts can apply. It is true that in striking down the juvenile death penalty and severely limiting the availability of life without parole for juvenile defendants, the Court discussed international law, foreign law, and the practices of other nations.<sup>102</sup> But the Court lumped those three rather different phenomena together, without any sharp distinction among them—hardly a sign of engagement with international law

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<sup>101</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). For critiques of the distaste for judicial application of human rights law, see, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AMER. J. INT'L L. 341 (1995); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000), <http://chicagounbound.uchicago.edu/cjil/vol1/iss2/14>; for a defense, see Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT'L L. 321 (2010).

<sup>102</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005); *Graham v. Florida*, 560 U.S. 48, 51 (2010), *Miller v. Alabama*, 132 S. Ct. 2455, 2487 (2012).

as law. And in *Graham* it made clear that international law could at most be referred to confirm an interpretation of the Constitution reached by other means.<sup>103</sup>

Consider also the holding in *Kiobel*. The idea of applying a presumption against extraterritoriality to the ATS—a statute that provides jurisdiction for claims based in international law, and which contemplates only foreign plaintiffs—is striking, to say the least. But it reflects the thrust of the Court’s other major recent decisions on extraterritoriality, which emphasize the dangers of judicial involvement in issues that might offend foreign national governments and thereby complicate the conduct of foreign relations matters by the president and congress.<sup>104</sup>

*Medellín v. Texas* provides another example of the Court going out of its way to place treaty questions in the political branches.<sup>105</sup> Texas had convicted Medellín for murder and sentenced him to death without complying with the requirements of the Vienna Convention on Consular Relations.<sup>106</sup> The International Court of Justice held that the

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<sup>103</sup> *Graham*, 560 U.S. at 88.

<sup>104</sup> E.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2107 (2016).

<sup>105</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>106</sup> *Medellin*, 552 U.S. at 503; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

U.S. had violated the Convention, and ruled that he and others who had similarly suffered violations be afforded the opportunity to have a review of their convictions and sentences, even if applicable domestic procedural law would otherwise bar such review. President Bush issued a memorandum effectively directing state courts to give effect to the ICJ's decision. Texas courts declined to do so, and Medellín sought review before the Supreme Court. One question before the Court was whether Article 94 of the U.N. Charter, which obligates member states to comply with ICJ judgments, is self-executing. Reasonable people might come to different interpretations on this issue, as the disagreement on this point between Justice Stevens and Justice Breyer demonstrates.<sup>107</sup> But the majority's approach goes beyond reason. It demands that the treaty itself provide clear language in favor of self-execution. As others have pointed out,<sup>108</sup> that is a nonsensical test. The interest of state parties

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<sup>107</sup> Medellín, 562 U.S. at 522-23; *id.* at 562-63 (Breyer, J., dissenting)

<sup>108</sup> Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 635, 640 (2008); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 714-18 (1995); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUPREME COURT REVIEW 131, 133 ("the relevant intent is that of the U.S. treatymakers (*i.e.*, the Senate and President), not the collective intent of the treaty parties"). Bradley defends Medellín's reference to the treaty text on the theory that it does show what the treatymakers agreed to. *Id.* at 155 ("Treaty text is relevant

to a treaty lies in compliance, not in whether that compliance comes about as a result of judicial implementation, executive action, legislation, or some combination of them. Indeed, national legal systems differ; some do not recognize self-execution at all. If taken seriously, the Court's test would mean, as a practical matter, that in the U.S. no treaty is self-executing unless the Senate expressly so provides.

A final example stems from the first appearance of the *Alvarez-Machain* case. Alvarez challenged the power of the government to bring him to criminal trial in the U.S. by kidnapping him. In ruling that the manner in which he was brought to the U.S. was irrelevant to the power to try him, the Supreme Court went so far as to reject any assertion that kidnapping Alvarez after the Mexican courts had denied

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under this approach because it is what the Senate and President specifically approve when agreeing to the treaty, just as statutory text is relevant in discerning congressional intent with respect to whether and to what extent a statute is to be judicially enforceable"). But since the text of a treaty (especially a multilateral treaty) relates to a number of domestic legal systems with different rules regarding what it takes to make a treaty domestically enforceable, a textual approach effectively amounts to a presumption against self-execution – a presumption likely to be overcome only if the Senate expressly states at the time it gives its consent to ratification that it regards the treaty as self-execution. For a useful collection of commentary, see Venetis, *supra* note 98, at 112 n.89. For a helpful analysis of *Medellin's* effect, see *id.* at 110-16.

extradition in any way violated the U.S.-Mexico extradition treaty.<sup>109</sup> It is scarcely reasonable to imagine that a state ratifying an extradition treaty would regard the treaty as permitting the other party to respond to a denial of extradition by kidnapping the individual whose extradition has been unsuccessfully requested.<sup>110</sup> This strange interpretation of a treaty did, however, leave the breach of obligations undertaken in a treaty with Mexico entirely to the executive branch's discretion.

It would be mistaken, however, to view the Court as simply following the lead of the political branches. One senses in the Court's rulings something more: an aversion to domestic implementation of human rights norms, by any branch of the federal government. Again, *Medellín* provides a telling example. Having held that the treaty is not self-executing, the Court turned to whether the president's memorandum obligated Texas courts to review Medellín's conviction. The

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<sup>109</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 659-70 (1992). The following year, the prosecution ended with a grant by the District Court of a motion for a judgment of acquittal. See *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992), as amended Nov. 3, 1992.

<sup>110</sup> See Vienna Convention on Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").

Court held that it did not.<sup>111</sup> One might have thought that under the familiar three-part test that Justice Jackson laid out in *Youngstown* the president's power would have been upheld. He was acting with the support of the legislative branch, which had after all consented to ratification of the U.N. Charter; thus the president would seem to have been acting at the maximum of his powers, and only a constitutional limitation that stripped the federal government of any power to enforce the treaty would have negated his power. Instead, the Court treated the Senate's inaction—its failure to enact implementing legislation—as an expression of opposition to presidential action to implement the treaty. This placed the president's power in the category under least favorable to upholding president power under Jackson's schema. This implausible understanding of the domestic legal significance of ratifying a treaty that the Court later deems non-self-executing is hard to understand other than as a strong judicial presumption against any domestic application of treaties.

*Bond v. United States*<sup>112</sup> provides another example. There was speculation before the decision that the Court might subject the Congressional power to implement treaties to federalism

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<sup>111</sup> *Medellin*, 552 U.S. at 536.

<sup>112</sup> *Bond v. United States*, 134 S.Ct. 2077 (2014).



constraints, overturning *Missouri v. Holland*.<sup>113</sup> It did not, but just as the Court gave a clear signal in its 2009 decision in *NAMUDNO* that it would eviscerate the pre-clearance requirement of the Voting Rights Act the next time the matter the matter came before it,<sup>114</sup> so *Bond* reads like a portent of future ruling overturning *Missouri v. Holland*.<sup>115</sup> In both *NAMUDNO* and *Bond*, the Court adopted a highly strained reading of a statute to avoid what it made clear were, in its view, serious constitutional problems.<sup>116</sup> That the Court would seriously consider overruling *Missouri v. Holland* is striking, to say the least—especially as it concerns human rights treaties. To subject Congress's power to implement human rights treaties to federalism limits would be to enter uncharted territory. But in the context of the

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<sup>113</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>114</sup> *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

<sup>115</sup> *Bond*, 134 S. Ct. at 2088.

<sup>116</sup> See Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1308 (2016) (in *NAMUDNO*, “implausible reading of the statute”); Jonathan H. Adler, *Anti-Disruption Statutory Construction*, 38 CARDOZO L. REV. 101, 109 (2016) (“strained and scarcely plausible interpretation”). As to the statute at issue in *Bond*, see *id.* at 112 (“implausible”); Nicholas Quinn Rosenkranz, *Bond v. United States: Concurring in the Judgment*, 2014 CATO SUP. CT. REV. 285, 287 (2014) (“dodgy”).

Court's federalism revival—a revival so strong it dealt severe blows to a landmark statute implementing the Fifteenth Amendment and to the major domestic achievement of President Obama's first term—there are good reasons to think that there would be occasions when the national government was powerless to ensure compliance with human rights treaties in the face of recalcitrant state governments. *Medellín* itself suggests one set of facts. The Texas courts declined to give effect to the ICJ ruling, notwithstanding the U.S. treaty commitment to do so. In theory, the Court's objection was simply that Congress had not acted to implement that treaty obligation. But while the Court's federalism jurisprudence is not straightforward, it is worth noting that criminal law is one area the Court has pronounced local in its federalism decisions, in part on the ground that it is not a commercial matter. Thus the Court's own federalism jurisprudence might preclude Congress from giving the President the power to implement the ICJ ruling.

Through a combination of deference to the political branches and the Court's own inclinations, then, the landscape for civil litigation of foreign human rights violations has changed dramatically since 1991. This change, however, is not entirely in the direction of retrenchment. On the contrary, there has been one major growth area unaffected by the *Sosa* and *Kiobel*: litigation in U.S. courts by U.S. victims of foreign terrorism.

#### IV. THE GROWTH OF ANTI-TERRORISM LITIGATION

The range of potential responses to terrorism is, of course, quite broad, encompassing resort to military force, surveillance of communications, and banking regulations targeting the funding of terrorist activities, among others. With dramatic instances of terrorism abroad in the 1980s—particularly the hijacking of the Achille Lauro and the bombing of Pan Am flight 103—Congress began to focus on adding civil litigation by victims of terrorism to the panoply of responses.<sup>117</sup> What had been, as noted earlier, a highly uncertain set of prospects for civil litigation over terrorism began to change significantly.

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<sup>117</sup> See ACEVES, *supra* note 7, at 83-84. Particularly useful accounts of the development of the statutes can be found in Steven R. Perles and Edward B. MacAllister, *Policy Options for the Obama Administration: Enforcement Provisions of the Foreign Sovereign Immunities Act as a Tool Against State Sponsors of Terrorism*, in JOHN NORTON MOORE, ED., *FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS* 21 (2013); Royce C. Lamberth, *The Role of Courts in Foreign Affairs*, in MOORE, *supra*, at 3. For a useful description of remedies not based on litigation, see Deborah M. Mostaghel, *Wrong Place, Wrong Time, Unfair Treatment? Aid to Victims of Terrorist Attacks*, 40 *BRANDEIS L.J.* 83, 103 (2001).

A. THE ANTITERRORISM ACT AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

1. THE ANTITERRORISM ACT (ATA)

As noted earlier, Congress approved a civil remedy for victims of terrorism through the ATA.<sup>118</sup> It provides jurisdiction in the federal courts for a claim by U.S. nationals for injury arising “by reason of an act of international terrorism.”<sup>119</sup> The ATA defines “international terrorism” as violent or dangerous acts that violate U.S. criminal law (or would if U.S. criminal law applied), and which are intended to intimidate or coerce a civilian population or influence government policy or affect government conduct.<sup>120</sup> Only activities that occur primarily outside the U.S. or which “transcend national boundaries” are covered by the Act.<sup>121</sup>

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<sup>118</sup> See *supra* note 60. For a useful analysis of the ATA and the FSIA, see Van Schaack, *supra* note 50, at 385-406. See also Gurulé, *supra* note 60 (analyzing bank liability under the statute); .

<sup>119</sup> 18 U.S.C. § 2333(a) (2012).

<sup>120</sup> 18 U.S.C. § 2331 (2012). Section 2331(1)'s definition of international terrorism was amended in 2001 by the PATRIOT Act, Pub.L. No. 107-56, § 802(a)(1), 115 Stat. 272, 376. It should be noted that U.S. law contains a number of definitions of terrorism; the ATA's is one among many. See Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Many Grails*, 30 J. LEGIS. 249 (2004).

<sup>121</sup> 18 U.S.C. § 2331(1)(C) (2012).

The ATA provides for treble damages, attorneys' fees, and costs (but not punitive damages).<sup>122</sup> The treble damages provision could make it easier for victims to secure counsel, and was also said to fight terrorism by attacking its funding.<sup>123</sup>

What is notable in the first instance is the distinction drawn between terrorism at home and terrorism abroad (or "transcend[ing] national boundaries"); the ATA covers only the latter, insofar as civil liability is concerned.<sup>124</sup> As

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<sup>122</sup> 18 U.S.C. § 2333(a) (2012).

<sup>123</sup> Mostaghel, *supra* note 117, at 101-02 (citing Senate report). The ATA also provided for a four-year statute of limitations. Federal Courts Administration Act of 1992, Pub. L. 102-572, title X, § 1003(a)(2) (Oct. 29, 1992), codified at 18 U.S.C. § 2335 (2012). In 2013, Congress amended the ATA to provide for a ten-year period in general. *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1251(a), 126 Stat. 1632 (Jan. 2, 2013), codified at 18 U.S.C. § 2335 (2012). In a sign of Congress' close attention to pending cases and claims, however, it also provided a "Special Rule Relating to Certain Acts of International Terrorism," by which ATA claims for international terrorism occurring between September 11, 2001 and January 2, 2009) would be timely if filed by Jan. 2, 2019. *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1251(c), 126 Stat. 1632 (Jan. 2, 2013) (not codified).

<sup>124</sup> *See* Margaret K. Lewis, *When Foreign Is Criminal*, 55 VA. J. INT'L L. 625, 666-72 (2015). The PATRIOT Act added a definition of "domestic terrorism" to the ATA. Uniting and Strengthening America by Providing

Margaret Lewis notes, codifying foreignness poses risks of polarization and suspicion of others.<sup>125</sup> Many if not most other nations' laws do not draw such a fundamental distinction.<sup>126</sup> Yet it pervades U.S. anti-terrorism law, on the criminal as well as civil side.<sup>127</sup> In this respect, anti-terrorism law mirrors a more general trend for extraterritorial application of U.S. criminal law to make culpability specifically turn on the presence of a foreign element.<sup>128</sup> In some instances, this approach is hardly surprising (as with

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Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act Of 2001, Pub. L. 107-56, § 802(a)(4) (Oct. 26, 2001), codified at 18 U.S.C. § 2331(5) (2012). But it did not provide for a civil remedy for victims of domestic terrorism. It did make limited provision for compensation for victims of terrorism under the Victims of Crime Act of 1984. USA PATRIOT Act, Pub. L. 107-56, § 624 (a) (Oct. 26, 2001).

<sup>125</sup> Lewis, *supra* note 124, at 679-83.

<sup>126</sup> Keiran Hardy & George Williams, *What is "Terrorism"? Assessing Domestic Legal Definitions*, 16 U.C.L.A. INT'L L. & FOREIGN AFF. 77, 156 (2011).

<sup>127</sup> Lewis, *supra* note 124, at 666-72.

<sup>128</sup> *Id.* at 638-72.

piracy<sup>129</sup>); in other instances, very much so (as with torture).<sup>130</sup>

A second notable feature is the complete absence of any reference in the statute to international law. Terrorism is expressly defined in U.S. law terms, which suggests that courts should also resolve legal issues not expressly addressed (whether there is any state of mind requirement, for example) in terms of U.S. law.<sup>131</sup> This stands in contrast to the ATS, with its reference to torts “committed in violation of the law of nations or a treaty of the United States.”<sup>132</sup> To be sure, the substance of the ATA’s definition reflects elements common in discussions of the international legal provisions on terrorism, and included in some treaties, such as the intent to intimidate or coerce civilian

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<sup>129</sup> *Id.* at 643-45.

<sup>130</sup> U.S. law criminalizes torture that takes place outside the U.S., but not within it. To be sure, acts that constitute torture, if undertaken within the U.S., may constitute criminal offenses, but not for “torture.” *Id.* at 653-55. As Lewis points out, many other nations criminalize torture regardless of where it occurs. *Id.* at 655.

<sup>131</sup> JASTA, enacted in 2016, is clear on this point, commending to courts faced with determining the scope of secondary liability a case about a murder committed in the course of a burglary in Washington, D.C. *See* note 239 *infra*.

<sup>132</sup> 28 U.S.C. § 1350 (2012).

populations.<sup>133</sup> And Congress might have thought it better to specify the definition of terrorism and the terms of liability than to rely on a uncertain provisions of international law.<sup>134</sup> Still, the ATA can easily be seen as a lack of interest on Congress's part in embedding federal civil adjudication of international terrorism claims in any larger global legal order.

The ATA resolved some legal issues and left others unclear, which may be why it had so little impact for more than a decade after its passage.<sup>135</sup> A few aspects were clear from the

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<sup>133</sup> See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 BOSTON COLLEGE INT'L & COMP. L. REV. 23, 52-53, 56-57, 91-93 (2006).

<sup>134</sup> One might even read Congress's silence on some issues as a deliberate stance. For example, there is nothing in the text of the ATA that makes relevant the question of whether the violence was committed in the context of a national liberation struggle, or was inconsistent with international humanitarian law. In reality, though, there is little if any evidence that Congress gave any thought to international law in drafting the ATA, or other anti-terrorism provisions for that matter. This is Young's conclusion with respect to U.S. criminal statutes regarding terrorism. See Young, *supra* note 133, at 80; *see also id.* at 76-80.

<sup>135</sup> See Geoffrey Sant, *So Banks Are Terrorists Now? The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 545-46 (2013); Saperstein and Sant, *supra* note 61; *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 553 (E.D.N.Y. 2012) ("Like a civil RICO claim, a suit for damages



start. It specifies who may be a plaintiff—only U.S. nationals—and it puts no limitation on who may be a defendant, apart from one important provision. Section 2337 prohibits suits under the ATA against the U.S. or foreign states or their officials acting in their official capacity or under color of legal authority.<sup>136</sup> Thus defendants are non-state individuals and entities—in practice, foreign entities and individuals, given that the ATA does not provide for civil liability for domestic terrorism. The ATA clearly disposed of the issue Judge Edwards raised in *Tel-Oren* as to whether international law applies to private actors accused of committing terrorism. The measure of the illegality of “violent acts or acts dangerous to human life” under the ATA is whether those acts would be illegal under U.S. law if committed within the U.S.<sup>137</sup>

Still, there remained serious practical limits to successfully asserting terrorism claims, including personal jurisdiction

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under the ATA ‘is akin to a Russian matryoshka doll, with statutes nested inside of statutes.’) (quoting *Schwab v. Philip Morris USA, Inc.*, 449 F.Supp.2d 992, 1032 (E.D.N.Y. 2006), *rev'd on other grounds sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008)).

<sup>136</sup> 18 U.S.C. § 2337 (2012). As noted below, this section is now inapplicable to JASTA claims. *See infra* note 224.

<sup>137</sup> 18 U.S.C. § 2331(1)(A) (2012).

and the practicalities of executing on any judgment. One of the biggest questions was whether individuals or charities could be liable for funding terrorist conduct abroad through donations, or whether banks could be liable for facilitating transfers of funds in aid of terrorist activities. The ATA as approved in 1992 said nothing one way or the other about liability for aiding and abetting terrorist activity.

Courts have reached differing conclusions on the question of secondary liability, in light of the civil liability provisions of the ATA and criminal penalties for providing “material support” for terrorism.<sup>138</sup> Currently the Second and Seventh

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<sup>138</sup> Congress did specifically address the aiding and abetting question in the ATA in 1994 and 1996, but in the context of provisions for criminal and civil penalties for the “material support” for terrorism. 18 U.S.C. §§ 2339A, 2339B, 2339C (2012). See generally Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). For useful background, see, e.g., Brent Tunis, *Material-Support-to-Terrorism Prosecutions: Fighting Terrorism by Eroding Judicial Review*, 49 AM. CRIM. L. REV. 269 (2012). There is a complex relationship between these criminal provisions and civil liability. One might take the position, as does Sant, that they are entirely separate matters, with the criminal provisions having no relation to civil liability. See Sant, *supra* note 135, at 558-63. Even in this view, there remained a distinct question whether the civil liability provisions of the ATA encompass aiding and abetting liability. Moreover, while inferring a civil cause of action from the ATA’s criminal provisions would be a bold step, one might – as did the Seventh Circuit – look to the criminal provisions on material support “not as independent sources of liability under section 2333, but to amplify what Congress meant by ‘international

Circuits have answered in the negative, other lower courts have found that the ATA does encompass secondary liability.<sup>139</sup> Even where secondary liability is rejected, banks or charities might be primarily liable under the Seventh Circuit's interpretation, where support was given knowing that it would be used for terrorist activities. The Second Circuit, while rejecting secondary liability, permits banks or other alleged providers of support to be held liable under the ATA if the financial support in question was the proximate cause of the injury.<sup>140</sup> In some instances, the court reasoned, donations to groups supporting terrorism could

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terrorism.” *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F.3d 1000, 1016 (7th Cir. 2002) (Boim I). *See also* *Havlish v. Bin Laden (In re Terrorist Attacks on September 11, 2001)*, No. 03 MDL 1570 (GBD), 2011 BL 442294 (S.D.N.Y. Dec. 22, 2011), Conclusions of Law ¶ 17 (holding Iran liable for provision of “material support” to al-Qaeda in 9/11 attacks) (citing 18 U.S.C. § 2339A(b)).

<sup>139</sup> *See* *Rothstein v. UBS AG*, 708 F.3d 82, 97-98 (2d Cir. 2012) (construing ATA not to provide for secondary liability); *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) (same); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010) (construing ATA to provide for secondary liability). For a useful account of the development of secondary liability by a strong critic of it, see Sant, *supra* note 135.

<sup>140</sup> *Rothstein*, 708 F.3d at 91.

be an activity “dangerous to human life.”<sup>141</sup> The unsettled status of many questions relating to the liability of actors others than the individuals or groups who carry out terrorist attacks left a great deal of room for litigation.<sup>142</sup>

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<sup>141</sup> Boim, 549 F.3d at 690. The court analogized it to liability for criminal recklessness in knowingly giving a child a loaded gun. *Id.* The court took note of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, title XII (Sept. 13, 1994). That statute makes it illegal to provide material support within the U.S. to terrorists, where such support is done “knowing or intending that . . . [it is] to be used in preparation for, or in carrying out,” an act of international terrorism as defined by the ATA.

<sup>142</sup> See Saperstein and Sant, *supra* note 61 (as of 2012, there were more than 100 reported decisions under the ATA, with many of them involving banks and donors). For an illuminating analysis of the legal issues posed in relations to banks alleged to have supported terrorism, see Gurulé, *supra* note 60. For an argument that the ATA does not provide for secondary liability, but should, see Alison Bitterly, *Can Banks Be Liable for Aiding and Abetting Terrorism? A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3429 (2015). For a comprehensive proposal to amend the ATA to provide for secondary liability, see Gurulé, *supra* note 60, at 219-23. Of course, as discussed below, JASTA significantly changed the law by giving aiding and abetting liability a statutory basis. See text accompanying *infra* notes 234-239.

## 2. THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT AND THE FLATOW AMENDMENT

In 1996, Congress enacted two provisions dealing with terrorism lawsuits against foreign states, though exactly what Congress intended to accomplish was to become the subject of litigation. These two changes came in separate bills passed within months of each other.

First, Congress amended the FSIA to make two changes to foreign sovereign immunity. Under a new section 1605(a)(7), states that were on the list of state sponsors of terror would not have immunity for claims by U.S. nationals based on "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking."<sup>143</sup> The first suit brought under this provision was against Cuba, for shooting down civilian aircraft over international waters in 1996.<sup>144</sup> Congress also provided in a

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<sup>143</sup> The amendment was part of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 221, 110 Stat. 1214 (April 24, 1996). The AEDPA was, in part, a response to the 1993 World Trade Center attack and the 1995 Oklahoma City bombing. *See* Schaack, *supra* note 50, at 395. But it was also the vehicle for many other changes to federal law, including limitations on post-conviction remedies and challenges to the death penalty.

<sup>144</sup> *Alejandre v. The Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997). *See generally* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments To the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 675-80 (1999);

new section 1610(a)(7) that a foreign state's property, if used for a commercial activity in the United States, would not be immune from execution of a judgment covered by section 1605(a)(7), "regardless of whether the property is or was involved in the act upon which the claim was based."<sup>145</sup> This latter phrase removed the requirement of a nexus between the property being executed upon and the claim.

Several months after amending the FSIA, Congress approved what is commonly known as the Flatow Amendment.<sup>146</sup> The Flatow Amendment provides that an "official, employee or agent of a foreign state" on the list of state sponsors of terrorism, acting within the scope of employment, would be liable to U.S. citizens for personal injury or death, along with punitive damages.<sup>147</sup> Any

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Stephen J. Schnably, *Alejandro v. Republic of Cuba*, 92 AM. J. INT'L L. 768 (1998).

<sup>145</sup> Pub. L. 104-132, (amending 28 U.S.C. § 1610(b)(7)) (2012).

<sup>146</sup> For whatever difference it might make in construing the Flatow Amendment, it is not at all clear that it is an amendment to the FSIA. It is codified as a note to section 1605 of the FSIA. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1067 n.3 (9th Cir. 2002). Similarly, the TVPA, codified as a note to the ATS, is generally not regarded as an amendment to the ATS. *Apostolova*, *supra* note 32, at 652.

<sup>147</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208 § 589 (Sept. 30, 1996). *See generally* Joseph Keller, *The Flatow Amendment*

immunities that a U.S. government official or agent might enjoy would extend to the foreign agent as well.

Two things were notable about these changes. Congress left important matters unclear. And what *was* made clear ranges from the hard-to-defend to the indefensible.

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*and State-Sponsored Terrorism*, 28 SEATTLE U.L. REV. 1029 (2005). The Amendment was named in memory of Alisa Flatow, who was killed in a terrorist attack in the Gaza Strip. The amendment, codified at 28 U.S.C. § 1605 note (2012), provides in full:

(a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section.

No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

The unclarities related to three matters: whether Congress had provided for causes of action against foreign states; whether it had modified sovereign immunity from execution; and whether the changes to the law were retroactive. With regard to the first matter, lifting sovereign immunity from suit is not logically the same thing as providing a cause of action against states. Nor is providing for a cause of action against *agents* of states. In the absence of a federal cause of action against foreign states, plaintiffs would be forced to rely on state tort law, as had been the case in *Letelier*, for example. Applying differing legal standards to victims (and their relatives) of a terrorist attack abroad, depending on the particular U.S. state in which the victims or relatives were domiciled, could only lead to inconsistent relief. It could also affect the availability of punitive damages. Only if the FSIA were held to create a cause of action against states would punitive damages be available.<sup>148</sup> A number of district courts decided that the FSIA amendment did provide for a cause of action against

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<sup>148</sup> Lamberth, *supra* note 117, at 7.



states.<sup>149</sup> In 2004, the D.C. Circuit held otherwise, posing a serious barrier to such lawsuits.<sup>150</sup>

It is worth noting that Congress's lack of clarity did not reflect a lack of interest in the subject. Spurred on by the 1996 legislation, a second effort by the Americans taken hostage in 1979 to press claims against Iran commenced in 2000.<sup>151</sup> After they secured a default judgment, the Bush Administration intervened and took the position that the judgment was inconsistent with the Algiers Accords, which, in resolving the hostage crisis, had precluded further assertion in U.S. courts of claims arising out of it. The Administration also asserted that Iran had immunity under the FSIA, despite the 1996 amendments to it.<sup>152</sup> In response,

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<sup>149</sup> *E.g.*, *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997). The court ruled, however, that *punitive* damages were available only against agents of states, not states themselves. *Id.*

<sup>150</sup> *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004).

<sup>151</sup> *Roeder v. Islamic Republic of Iran (Roeder I)*, 195 F. Supp. 2d 140 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003).

<sup>152</sup> Section 1605(a)(7)(A) provided that a state would not have immunity for torture and other human rights violations only if it was on the list of state sponsors of terrorism at the time of the conduct giving rise to the claims. The list of state sponsors of terrorism was not created until December 1979, and Iran was not added until 1984, after the hostage crisis. *See Roeder I*, 195 F. Supp. 2d at 160. Section 1605(a)(7)(A) further

in November 2001 Congress—through a provision added at the last minute to an appropriations bill—amended then-section 1607(a)(7)(A) (providing terrorism-related exceptions to immunity) to refer to that specific case.<sup>153</sup> In December 2001, after the court expressed uncertainty about the meaning of this provision, Congress made a minor technical change to the FSIA amendment it had approved in November, including the change in a Defense appropriations bill.<sup>154</sup> An accompanying statement in the conference report referred to the Bush Administration's position and stated flatly that the American hostages "have a claim against Iran under the Antiterrorism Act of 1996" and that the amendment to section 1607(a)(7)(A) allowed the default judgment to stand.<sup>155</sup> Ultimately the potential for

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provided that if a state was added to the list after the claims arose, it would have its immunity lifted if it was "so designated as a result of" the conduct giving rise to the claim. The Bush administration informed the court that Iran had not been placed on the list as a result of the taking of hostages. *Roeder I*, 195 F. Supp. 2d at 151.

<sup>153</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-77, § 626(c), 115 Stat. 748, 803 (2001). See *Roeder I*, 195 F. Supp. 2d at 152.

<sup>154</sup> See Department of Defense and Emergency Supplemental Appropriations Act, Pub. L. 107-117, 115 Stat. 2230 (2002).

<sup>155</sup> H.R. REP. NO. 107-350, at 422-423 (2001) (Conf. Rep.).

constitutional confrontation was avoided when the court decided that it would not interpret the 1996 amendments to the FSIA as abrogating the Algiers Accord without a very clear statement of Congressional intent to do so.<sup>156</sup>

As for the second matter, the changes to immunity from execution turned out to be full of hidden pitfalls. As noted earlier, in 1996 Congress removed the nexus requirement for execution on a foreign state's property as to claims under the new terrorism exception.<sup>157</sup> As the Flatows discovered after

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<sup>156</sup> *Roeder v. Islamic Republic of Iran (Roeder II)*, 333 F.3d 228, 237-38 (D.C. Cir. 2003). The court also held that the November 2001 provision affected only jurisdiction, and did not purport to create a cause of action. *See id.* at 238.

Congress acted again the next year with the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (Nov. 26, 2002), codified at 28 U.S.C. § 1610 Note (2012), which allowed plaintiffs with judgments secured under the terrorism exception to the FSIA to execute against assets of the foreign state and its agents that had been frozen under the President's emergency powers. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 (2016). Ten years later, as it sought to ensure that plaintiffs who had secured judgments against Iran on a different matter – the 1983 bombing of the Marine barracks in Beirut – Congress followed up with very specific legislation that occasioned a Supreme Court ruling on Congress's constitutional power to intervene in pending cases. *See* text accompanying *infra* notes 263-271.

<sup>157</sup> *See* text accompanying *supra* note 145.

winning a default judgment against Iran in 1998,<sup>158</sup> however, Congress did *not* eliminate the general requirement in section 1610(a) that only foreign state property “used for a commercial activity in the United States” would be subject to execution.<sup>159</sup> Their efforts to execute on the former Iranian embassy and consular properties in Washington, D.C., appeared to founder on the commercial activity limitation, when the State Department filed a statement opposing their efforts. Congress swiftly enacted a law general in its expression, but seemingly tailored to the Flatows’ efforts: Foreign diplomatic or consular property subject to an asset freeze (as were Iran’s diplomatic and consular properties at the time<sup>160</sup>) could be used to satisfy a claim brought under the terrorism exception.<sup>161</sup> Congress also added a provision allowing the President to waive this new section “in the

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<sup>158</sup> Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

<sup>159</sup> 28 U.S.C. § 1610(a) (2012).

<sup>160</sup> Blocking Iranian Government Property, Executive Order 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AMER. J. INT’L L. 161, 184-85 (1999) (citing U.S. government statement filed with court).

<sup>161</sup> Treasury and General Governmental Appropriations Act, 1999, § 117(a), contained in Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-491 (Oct. 21, 1998). This bill added present § 1610(a)(f)(1)(A).

interest of national security.”<sup>162</sup> President Clinton did so the day he signed the bill, arguing that the new provision “encroach[ed] on my authority under the Constitution” and would endanger the conduct of foreign policy.<sup>163</sup>

Going after the assets of a state-owned bank might seem to be another matter. Suppose U.S. nationals injured by an act of terrorism abroad obtain a judgment against a foreign state, and now seek to execute on the assets of such a bank. Section 1610(a)(7) would seem to permit execution, without any need to show that the bank had in any way been involved in the act of terrorism that underlay the judgment. What Congress did not do in 1996, however, was address the continued relevance of the Supreme Court’s determination in 1983 that the separate corporate form of state-owned entities should be respected for liability purposes unless the degree of control by the state was sufficient to pierce the corporate veil.<sup>164</sup> In other words, did then-section 1610(a)(7) lift immunity from attachment from a state-owned bank

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<sup>162</sup> Treasury and General Governmental Appropriations Act, 1999, § 117(d), *supra* note 161, 112 Stat. 2681-492.

<sup>163</sup> See Murphy, *supra* note 160, at 185 (quoting Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 Weekly Comp. Pres. Doc. 2108, 2113 (Oct. 23, 1998)).

<sup>164</sup> See *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 629-630 (1983).

only if the state exercised day-to-day control over it? The Ninth Circuit, with the concurrence of the Bush Administration, answered this in the affirmative in a case in which the Flatows sought to execute against a California subsidiary of a state-owned Iranian bank.<sup>165</sup> Whatever one concludes about this issue, the very fact that it *was* an issue is a sign of how incomplete Congress's treatment was.

Finally, Congress was of course quite aware of recent terrorist incidents and pending or possible lawsuits, so one might have expected it to be clear about the retroactivity of the changes. It was not. The amendments to the FSIA were expressly made retroactive.<sup>166</sup> But the Antiterrorism Act was silent on the matter; the accompanying conference report stated that it was intended to "apply to cases pending upon enactment of this Act."<sup>167</sup> The reason for the different approaches was not clear.

To be sure, Congress does not always legislate clearly. But one might expect the tolerance for ambiguity or omission ought to be less where the legislation virtually invites U.S.

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<sup>165</sup> See *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073 (9th Cir. 2002).

<sup>166</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 221(c), 110 Stat. at 1243 (1996).

<sup>167</sup> H.R. REP. NO. 104-863, at 985 (1996) (Conf. Rep.). See Schnably, *supra* note 144, at 771-72 & 772 n.42.

citizens to bring suit. What heightened this tolerance, perhaps, was the fact that failing to address these ambiguities allowed Congress to approve legislation that appeared to open up terrorists and states sponsoring them to litigation, while leaving it to the courts to face the hard choices - with the advice of an executive branch that on the whole has tended to be more attuned to the foreign policy strains generated by such litigation than has Congress.

As noted, Congress *was* clear as to certain matters, and what it did make clear is highly questionable as a matter of policy. Remedies for victims of foreign terrorism would continue to be limited to U.S. nationals.<sup>168</sup> That would be so even if non-citizens were injured in the same attack. In one sense this is understandable: we expect elected representatives to be more attuned to the interests of members of the polity. And foreign states could provide judicial remedies for their own nationals. Civil litigation against terrorist groups and state sponsors, however, was touted as part of the United States'

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<sup>168</sup> As then provided in § 1605(a)(7)(B)(ii) (as added to the FSIA by the AEDPA), claims were limited to those brought by "nationals" as defined under immigration law, which includes both citizens and any non-citizens who "owe[] permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2012). The ATA adopts the same definition. *See* 18 U.S.C. § 2331(2) (2012). When the FSIA's terrorism exception was later consolidated into a new Section 1605A, the group of victims covered expanded somewhat. *See infra* note 181.

counterterrorism strategy, and from this perspective exclusion of foreigners—especially foreign nationals with U.S. residency<sup>169</sup>—makes no sense. In any event, the consistent exclusion of foreign nationals from relief for injuries and death caused by terrorism provides a striking contrast to the stirring prospect in 1991 of vindication of universal human rights through civil litigation.

Also open to reasonable difference of opinion would be an approach that legislated vigorously to provide remedies for injury to U.S. nationals caused by “terrorism” but not by other serious human rights violations that do not amount to terrorism. Perhaps the former is much worse, or poses more of a threat to the U.S.

That is not, however, what the amendments did. To begin with, only terrorist actions attributable to states on the State Department list of state sponsors of terrorism would be actionable. That list is notoriously politicized, its composition heavily influenced by strategic questions of U.S. foreign policy.<sup>170</sup> This fact effectively turned liability for

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<sup>169</sup> For an argument that statutes intended to aid victims of terrorism should protect permanent non-citizen residents of the U.S., refugees and others, as well as U.S. citizens, *see* Mostaghel, *supra* note 117, at 104-19.

<sup>170</sup> *See generally* Matthew J. Peed, *Blacklisting as Foreign Policy: The Politics and Law of Listing Terror States*, 54 DUKE L.J. 1321 (2005). In debate over the 1996 AEDPA, Senator Arlen Specter complained that the limitation to



torture or extrajudicial killing into a weapon against disfavored states, with the shield retained for others in U.S. favor. This weaponization of human rights litigation was made even clearer, when Congress gave President George W. Bush the power to waive the application of this exception in the case of Iraq, now an ally after the U.S. invasion.<sup>171</sup>

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states on the terrorism list would “allow impermissible foreign policy consideration[s] to affect the ability of Americans to seek redress for their injuries caused by foreign governments.” He favored a broad lifting of immunity for terrorist actions (as he had proposed in a bill he introduced in 1993), or lifting immunity as to any foreign state that failed to provide adequate remedies to U.S. nationals injured by terrorism. 142 CONG. REC. S3417, 3473 (daily ed. Apr. 17, 1996). Proponents of the limitation argued that lifting immunity was a “powerful and significant tool that should be used cautiously.” 142 CONG. REC. S3417, 3463-64 (daily ed. Apr. 17, 1996) (remarks of Senator Hank Brown).

<sup>171</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 1083(d), 122 Stat. 343-344. (2008). See *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). See also *U.S. Supreme Court Finds President’s Waiver of Terrorism Exception to Iraq’s Sovereign Immunity Bars Pending Claims*, 103 AMER. J. INT’L L. 582 (2009). The first time Congress approved the 1996 amendments to the FSIA, President Bush vetoed the bill, citing concern that large damage judgments would interfere with reconstruction there. Congress approved the bill a second time with this waiver provision. See Lamberth, *supra* note 117, at 8; John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 336-37 (2008).

The legal impact of the list was, for several years, made even greater by the Second Circuit's interpretation of the 1996 amendments to the FSIA. In 2008, that court held that a state not on the list was immune not only to claims arising from terrorism abroad (covered by section 1605(a)(7)) but also to claims arising from damage caused by terrorist acts within the United States (covered in section 1605(a)(5) by the non-commercial tort exception to immunity).<sup>172</sup> The court rejected that interpretation three years later, opening the way for the non-commercial tort exception to immunity to apply to claims for injury within the U.S.—for example, claims that Saudi Arabia had sponsored or financed the 9/11 attacks.<sup>173</sup>

There was an even subtler problem that a less political list would not address. Under the then-new section 1605(a)(7), if a state was on the State Department terrorism list, it would lose its immunity not for “terrorism” but for “personal injury or death” caused by torture, extrajudicial killing, aircraft sabotage, or hostage taking (or by certain support for such acts). There was no requirement that the torture (for example) be related to any terrorist activity at all. If the state was not on the terrorism list, on the other hand, there would

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<sup>172</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F. 3d 71, 89 (2d Cir. 2008).

<sup>173</sup> *Doe v. Usama Bin Laden*, 663 F.3d 64 (2d Cir. 2011).

be no exception to immunity for the same acts of torture. If Congress wanted to make terrorism rather than “lesser” human rights violations by states actionable in federal court, it could have done that. But what it did instead was to provide, in effect, that torture by a state on the State Department terrorism list is worse than torture by other states.<sup>174</sup>

Congress’s legislative efforts in 1996, then, marked a major step in the direction of weaponizing one form of human rights litigation. States that were placed on a highly political list of state sponsors of terrorism were vulnerable to suit for human rights violations including but by no means limited to terrorism. States not on that list would be subject to suit for human rights violations only if the injury occurred within the U.S.

### 3. THE 2008 AMENDMENT TO THE FSIA

In 2008 Congress returned to the subject once again, now amending the FSIA.<sup>175</sup> This provision was embodied in

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<sup>174</sup> 28 U.S.C. § 1605(a)(5) (2012) (stating the new exception to immunity from execution matched the new exception to liability, perpetuating the same distinction).

<sup>175</sup> In the interim, Congress had again modified the FSIA’s provisions on immunity from execution in 1998. *See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999*, Pub. L. No. 105-277 § 117, 112 Stat. 2681 (1998).

section 1083 of the National Defense Authorization Act for Fiscal Year 2008.<sup>176</sup> This Act created a new section 1605A of the FSIA, consolidating what had been sections 1605(a)(7) and 1605(a)(10). As part of this change, Congress resolved the issue that it had left unclear in 1996,<sup>177</sup> expressly creating a cause of action against foreign states for terrorism.<sup>178</sup> Congress also made clear that punitive damages could be awarded in such cases. And it expanded the basis for execution against the assets owned by a foreign state found liable. New section 1610(g) provides that the property of a foreign state or an agency thereof found liable under section 1605A is subject to execution, even if held by a juridically separate entity.<sup>179</sup> It thus resolved the questions courts had

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<sup>176</sup> Pub. L. 110-181, 122 Stat. 3, § 1083.

<sup>177</sup> See text accompanying *supra* notes 148-149.

<sup>178</sup> 28 U.S.C. § 1605A(c) (2012). That section created a private right of action by U.S. nationals and others against a foreign state sponsor of terrorism or officials or agents of the foreign state for personal injury or death in situations where the FSIA denied immunity under § 1605A(a)(1) (the new codification, with some modification) of the terrorism exception created in 1996.

<sup>179</sup> See 28 U.S.C. § 1610(g) (2012):

Property in Certain Actions. —

- (1) In general. — Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such

raised earlier as to whether the separate legal form of state-owned entities should be disregarded.<sup>180</sup> As before, the statute protected primarily U.S. nationals, though the class of potential plaintiffs may have been expanded somewhat.<sup>181</sup> Congress did more than legislate generally. It also included provisions that seemed designed to allow revival of the Iranian hostage victims' lawsuit, and indeed, after section

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a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

<sup>180</sup> See text accompanying *supra* notes 164-165.

<sup>181</sup> In contrast to the old § 1605(a)(7), *see supra* note 168, the denial of immunity is not limited to claims brought by U.S. nationals, but also includes members of the armed forces, U.S. employees or employees of U.S. government contractors acting within the scope of employment, and the legal representative of any of the preceding. 28 U.S.C. § 1605A(c).

1605A was enacted, plaintiffs filed a new lawsuit. As indicated earlier, a fundamental barrier to such a lawsuit was that Iran had not been a designated on sponsor of terrorism when the hostage taking occurred; nor was the hostage taking the official reason for its inclusion when Iran was put on the list in 1984. Thus Iran would still enjoy immunity unless there was some other basis for lifting it. The new section 1605A provided that a state would not have immunity to a claim brought under section 1605A if the state was on the terrorism when “the related action under 1605(a)(7) (as in effect before the enactment of [1605A]) . . . was filed.” Iran was in fact on the State Department terrorism list when a prior related action had been filed in 2000. But did this provision apply only to cases pending under the older section 1605(a)(7) at the time section 1605A was enacted? At the time of section 1605A’s enactment, the earlier Iranian hostage case was no longer pending, having been dismissed. Nothing in section 1605A clarified this question, but a heading within Section 1083 of the appropriations act did refer to “application to pending cases.”<sup>182</sup> The D.C. Circuit determined that it was not sufficiently clear that the 2008 amendment to the FSIA was intended to allow revival of prior cases, as opposed to refiling of cases that were pending in 2008. Even more striking, the court noted that Congress had again failed to

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<sup>182</sup> Pub. L. 110-181, 122 Stat. 3, § 1083(c).

make clear that it intended to abrogate the Algiers Accords.<sup>183</sup>

B. THE 9/11 LITIGATION AND THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT

The 2008 amendment to the FSIA by no means resolved all the general issues related to claims for compensation. Efforts to hold Saudi Arabia and some non-state entities such as charities liable for allegedly sponsoring or financing the 9/11 attacks well illustrate a number of the unresolved issues *and* Congress's detailed attention (or perhaps inattention) to them.<sup>184</sup>

Lawsuits filed in 2003 by survivors of the 9/11 attacks, relatives of those killed, and insurers who paid claims arising from the attacks were consolidated into a single

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<sup>183</sup> *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012). Ultimately, the plaintiffs received compensation through Congressional legislation enacted in 2015. The awards were funded from a \$9 billion penalty against a French bank for violating sanctions against Iran, Sudan, and Cuba. See David M. Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. TIMES, Dec. 24, 2015.

<sup>184</sup> See Steve Vladeck, *The 9/11 Civil Litigation and the Justice Against Sponsors of Terrorism Act (JASTA)*, JUST SECURITY, April 18, 2016, <https://www.justsecurity.org/30633/911-civil-litigation-justice-sponsors-terrorism-act-jasta/> (providing an excellent account of the litigation in relation to JASTA, on which the account here draws).

proceeding in the Southern District of New York and captioned *In re Terrorist Attacks on September 11, 2001*. Plaintiffs were survivors, family members, and insurance companies. Defendants were Saudi Arabia, various Saudi agencies and officials, al Qaeda and related groups, and banks and charities alleged to have supported those groups.<sup>185</sup> In 2005, the district court ruled that Saudi Arabia,

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<sup>185</sup> *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 779-80 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 546-47 (S.D.N.Y. 2005).

The 9/11 claims are not limited to Saudi Arabia. Plaintiffs also brought an action against Iran for aiding and abetting al-Qaeda in the 9/11 attacks. The claims were brought under the terrorism exception to the FSIA, 28 U.S.C. § 1605A (2012). (Iran is on the State Department's state sponsors of terrorism list. See United States Department of State, State Sponsors of Terrorism, <https://www.state.gov/j/ct/list/c14151.htm>; Kenneth Katzman, *Iran Sanctions* 3, 5 (Cong. Res. Serv. Rep. No. RS20871, Jan. 31, 2017). In 2011, the court found Iran liable. *Havlish v. Bin Laden* (*In re Terrorist Attacks on September 11, 2001*), No. 03 MDL 1570 (GBD), 2011 BL 442294 (S.D.N.Y. Dec. 22, 2011), Conclusions of Law ¶¶ 14-35. The following year it made a default award to plaintiffs of \$1,362,277,884 in compensatory damages and \$4,686,235,921 in punitive damages (apparently the second default judgment so rendered). *In re Terrorist Attacks on September 11, 2001* (*Havlish v. bin Laden*, 2012 WL 4711407 (No. 03 Civ. 9848 (GBD) (FM), No. 03 MDL 1570 (GBD) (FM)); Letter from Lee Wolosky & Michael J. Gottlieb to Prime Minister Xavier Bettel, March 2, 2017, at 2, <https://www.documentcloud.org/documents/3480413-Wolosky-Letter->



along with certain Saudi princes and agencies, had sovereign immunity.<sup>186</sup> It found that none of the FSIA exceptions were available to those with sovereign immunity. In particular, it rejected the non-commercial tort exception to the FSIA (section 1605(a)(5)). That section provides an exception to sovereign immunity in a case of injury occurring within the U.S., caused by tortious acts of foreign officials acting within the scope of their employment. The court agreed that the exception to section 1605(a)—for claims based on the exercise of discretionary functions—applied here.<sup>187</sup> Not surprisingly, the court rejected the state sponsors of terrorism exception, because Saudi Arabia is not on the

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to-PM-Bettel-Iran-default-judgment.html. There remains the question of execution, but plaintiffs have sought to attach \$1.6 billion of Iranian funds held by Clearstream, a international clearinghouse in Luxembourg. See Charlie Savage, *Iran Nuclear Deal Could Be Gateway for Terrorism Legal Claims*, N.Y. TIMES, March 6, 2017, [https://www.nytimes.com/2017/03/06/us/politics/terrorism-foreign-governments-lawsuits-iran-nuclear-deal.html?\\_r=1](https://www.nytimes.com/2017/03/06/us/politics/terrorism-foreign-governments-lawsuits-iran-nuclear-deal.html?_r=1).

<sup>186</sup> *Terrorist Attacks*, 349 F. Supp. 2d at 783-92; *Terrorist Attacks*, 392 F. Supp. 2d at 551-53.

<sup>187</sup> 349 F. Supp. 2d at 801-04; 392 F. Supp. 2d at 555-56. See also *supra* note 54. The court also rejected the commercial activities exception under 28 U.S.C. § 1605(a)(2) (2012), see 349 F. Supp. 2d at 793-794; 392 F. Supp. 2d at 553-54; and found insufficient allegations to support causation as to the Kingdom and certain princes, 392 F. Supp. 2d at 795-801.

list.<sup>188</sup> The court also rejected defendants' argument that Saudi Arabia's absence from that list precluded liability not only under the state sponsors of terrorism exception, but also under section 1605(a)(5) (the non-commercial tort exception).<sup>189</sup>

In 2008 the Second Circuit upheld the district court's dismissal of claims, but disagreed with the district court on this last issue. As noted earlier, it ruled that the non-inclusion of Saudi Arabia on the state sponsors of State Department terrorism list precluded liability under the non-commercial tort exception.<sup>190</sup> The Supreme Court later denied *certiorari*.<sup>191</sup> In 2011, however, the Second Circuit, ruling in a different case, rejected the 2008 ruling that the availability of the non-commercial tort exception is dependent on inclusion on the State Department terrorism list.<sup>192</sup> The 9/11 plaintiffs then asked the district court to

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<sup>188</sup> 349 F. Supp. 2d at 793-94.

<sup>189</sup> *See id.* at 795-96.

<sup>190</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008). *See text* accompanying *supra* note 172172.

<sup>191</sup> *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. 935 (2009).

<sup>192</sup> *Doe v. Bin Laden*, 663 F.3d 64, 68-71 (2d Cir. 2011). To rule otherwise, the court noted, would have been to hold put an end to the liability successfully asserted in cases like *Letelier* and *Liu* (in which a foreign

reopen their case; in 2013, the Second Circuit reversed the district court's denial of that motion, and the case was reopened.<sup>193</sup>

In September 2015, the district court dismissed the complaint on a different ground: The non-commercial tort exception to sovereign immunity did not apply, the court held, because of the "entire tort" rule.<sup>194</sup> The claims for liability are complex, but center on assertions that the Saudi government or other defendants (including Saudi princes and various

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state was sued for assassinating a dissident on U.S. soil), *see text* accompanying *supra* notes 62-66, unless the state was on the terrorism list. *See id.* at 69.

<sup>193</sup> *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353, 355-59 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2875 (2014). The Second Circuit did not rule on the discretionary function exception to the non-commercial tort exception to foreign sovereign immunity. *Id.* at 359; *In re Terrorist Attacks*, 714 F.3d 659, 117 n.11 (2d Cir. 2013).

<sup>194</sup> *In re Terrorist Attacks on September 11, 2001*, 134 F. Supp. 3d 774 (S.D.N.Y. 2015). In so ruling, the court followed an earlier ruling of the Second Circuit regarding some of the charity defendants, in which it affirmed the applicability of the "entire tort" rule, which *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989), is generally seen as having established. *See In re Terrorist Attacks of September 11, 2001*, 714 F.3d 109, 116 (2d Cir. 2013). *See* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 12-13 (2002).

Saudi organizations including banks and charities) supported and funded terrorism. While the injuries from 9/11 attacks obviously occurred within the United States, the alleged assistance to the 9/11 hijackers was abroad.<sup>195</sup> The plaintiffs filed an appeal in October 2015, and Congress took an interest.

Within months, members of Congress began to raise issues related to a classified report addressing the question of Saudi Arabia involvement in the 9/11 attacks. This report had been issued in 2002 by a Joint Committee of the House

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<sup>195</sup> 134 F. Supp. 3d at 781, 782-87. The court took note of the earlier ruling finding that the discretionary function exception applied, *see id.* at 781-82, but here found that the entire tort rule was not satisfied as to each of the defendants. The court also rejected the argument that “the 9/11 attacks were themselves an entire tort committed in the United States caused by Defendants’ conduct abroad,” *id.* at 787 n.13, citing the Second Circuit’s ruling in *In re Terrorist Attacks*, 714 F.3d at 117 n.10.

As Steve Vladeck has noted, the claims raise other issues as well. These include whether there is any liability under the ATA for aiding and abetting or something like it, *see* text accompanying *supra* note 141, and, if it is recognized, what if anything must be shown regarding intent and causation. *See* Gurulé, *supra* note 60; *see also* Vladeck, *supra* note 184; Steve Vladeck, *The Senate Killed JASTA, Then Passed It*, JUST SECURITY, (May 18, 2016) [hereinafter, “Vladeck, *The Senate Killed JASTA*”], <https://www.justsecurity.org/31156/senate-killed-jasta-passed-it/>.

and Senate.<sup>196</sup> At that time, a 28-page section had been redacted as classified. Soon after its issuance there had been news reports suggesting that the redacted pages detailed links between the hijackers and Saudi individuals, possibly including officials or individuals with close ties to officials. After largely fading from public view for nearly a decade, the issue was revived by comments by former Senator Bob Graham in 2011 calling for their release; Graham had been a co-chair of the Joint Committee. Members of Congress began to press the Obama administration to declassify and release the 28 pages; bills were introduced to that effect.

In February 2016 the 28 pages briefly became an issue in the presidential primaries. The Obama administration initiated a declassification review, and, responding to the pressure created by the prospect of legislative action on a bill to modify the ATA and FSIA to permit the Saudi claims to go forward,<sup>197</sup> declassified most of the information in them. On July 15, 2016, the House Intelligence Committee released the 28 pages. How useful they may prove to plaintiffs is subject

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<sup>196</sup> Joint Inquiry into the Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. Rep. No. 107-351, H. Rep. No. 107-792.

<sup>197</sup> See Karen DeYoung, *Saudi Officials Tout the Country's Efforts to Crack Down on Terror Financing*, WASH. POST., June 8, 2016 (noting efforts to pass JASTA "led to renewed pressure to release the 28 pages").

to debate, but they were widely regarded as containing no dramatic revelation.<sup>198</sup>

On September 16, 2015, Senator Charles Schumer and Representative Peter King, both of New York, introduced the Justice Against Sponsors of Terrorism Act (JASTA) in Congress, along with a number of co-sponsors from both parties.<sup>199</sup> Its preamble declared that “knowingly or recklessly contribut[ing] material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism” threatens national security.<sup>200</sup> Although drafted in general terms,

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<sup>198</sup> Mark Mazzetti, *In 9/11 Document, View of a Saudi Effort to Thwart U.S. Action on Al Qaeda*, N.Y. TIMES, July 15, 2016; Karen DeYoung, *Congress Releases Long-Classified ‘28 pages’ on Alleged Saudi Ties to 9/11*, WASH. POST., July 15, 2016; Chris Mondics, *Why a Philly Firm Wants the Saudis Sued*, Philly.com, (July 23, 2016), [http://articles.philly.com/2016-07-23/business/74648474\\_1\\_bayoumi-congressional-joint-inquiry-saudi-arabia](http://articles.philly.com/2016-07-23/business/74648474_1_bayoumi-congressional-joint-inquiry-saudi-arabia).

<sup>199</sup> Cong. Rec., Vol. 161, No. 133, Sept. 16, 2015 (114th Cong., 1st Sess. daily ed.), at 56701, <https://www.congress.gov/congressional-record/2015/09/16/senate-section/article/S6700-1>. An earlier version of the bill was introduced in 2009. Juliet Eilperin and Karoun Demirian, *Congress Thwarts Obama on Bill Allowing 9/11 Lawsuits Against Saudi Arabia*, WASH. POST, Sept. 28, 2016.

<sup>200</sup> Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. § 2(a)(6) (2016).

JASTA was formulated with the claims against Saudi Arabia very much in mind.<sup>201</sup> The Saudi government was not unaware of this, and threatened economic retaliation against the U.S. if JASTA were enacted.<sup>202</sup>

The then-proposed JASTA gained publicity when the CBS news show 60 Minutes aired a segment in April 2016 on the case and the 28 pages issue shortly before the President visited Saudi Arabia. Major presidential candidates in both parties endorsed the bill before the New York primary on April 19, 2016.<sup>203</sup> Beyond providing a vehicle for elected officials to express sympathy for victims of 9/11, support for JASTA became a way to express opposition to U.S. support for Saudi Arabia's military intervention in Yemen.<sup>204</sup>

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<sup>201</sup> See William Dodge, *JASTA and Reciprocity*, JUST SECURITY, (June 9, 2016); Curtis Bradley & Jack Goldsmith, *Don't Let Americans Sue Saudi Arabia*, N.Y. TIMES, April 22, 2016.

<sup>202</sup> Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout If Congress Passes 9/11 Bill*, N.Y. TIMES, April 16, 2016.

<sup>203</sup> Michael D. Goldhaber, *The Global Lawyer: Terror Plaintiffs Still Have Friends in Washington*, AM. LAW. DAILY, May 17, 2016, <http://amlawdaily.typepad.com/amlawdaily/2011/09/the-global-lawyer-the-kingdom-and-the-911-plaintiffs.html>.

<sup>204</sup> Bruce Reidel, *What JASTA Will Mean for U.S. Saudi Relations*, BROOKINGS, MARKAZ BLOG, Oct. 3, 2016 (noting that Saudi Arabia "in increasingly unpopular in America," in light of 9/11 and other factors,

The process by which JASTA was adopted was remarkable. The text of the bill was modified as it advanced through the Senate, and underwent major changes shortly before its passage by the Senate in May 2016.<sup>205</sup> In early September 2016, the House approved the bill. Its prospects in the House had previously not appeared great, but it was brought to the floor not long after a group of 9/11 family members met with House Speaker Paul Ryan in anticipation of the fifteenth anniversary of the 9/11 attacks.<sup>206</sup> It was debated in neither house. Support came from both parties, and it was passed overwhelmingly, with more than enough votes to override a veto.

As expected, President Obama vetoed the bill, arguing that it would provide no real protection against terrorist attacks, and would weaken the international law doctrine of

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including war in Yemen),

<https://www.brookings.edu/blog/markaz/2016/10/03/what-jasta-will-mean-for-u-s-saudi-relations/>.

<sup>205</sup> An Act to Deter Terrorism, Provide Justice for Victims, and for Other Purposes, S. 2040, 114th Cong., 2d Sess., Pub. L. No. 114-222 (Sept. 28, 2016) [hereinafter "JASTA"].

<sup>206</sup> Jennifer Steinhauer, *House Passes Bill Allowing 9/11 Lawsuits Against Saudi Arabia; White House Hints at Veto*, N.Y. TIMES, Sept. 9, 2016; Rachael Bade and John Bresnahan, *Suing the Saudis: House GOP Pressed to Pass 9/11 Bill*, POLITICO, Sept. 7, 2016.



sovereign immunity by encouraging other countries to adopt exceptions, thereby putting U.S. officials and service members at risk of suit, and complicating the president's conduct of foreign policy.<sup>207</sup> The administration mounted a lobbying effort seeking to persuade members of Congress who had voted for the bill to sustain the veto.<sup>208</sup> As Congress considered the veto, the Senate voted on a resolution calling for restrictions on arms sales to Saudi Arabia in light of its

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<sup>207</sup> Karoun Demirian and Juliet Eilperin, *Congress Overrides Obama's Veto of 9/11 Bill*, WASH. POST, PowerPost, Sept. 28, 2016 ("The Senate vote was 97 to 1 and the House tally was 348 to 77."). See also Quinta Jurecic, *Letter from Rep. Adam Smith in Opposition JASTA*, LAWFARE (Sep. 27, 2016, 4:51 PM), <https://www.lawfareblog.com/letter-rep-adam-smith-opposition-jasta> (reproducing letter from Rep. Adam Smith, Ranking Member, House Armed Services Committee, to Democratic Colleagues, Sept. 25, 2016).

<sup>208</sup> Karoun Demirjian and Juliet Eilperin, *White House Accuses Congress of "Buyer's Remorse" on 9/11 Bill*, WASH. POST, PowerPost, Sept. 29, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/09/29/republican-leaders-say-911-measure-may-need-to-be-revisited-after-elections/> ("In the days leading up to the override vote, the White House, national security officials, the European Union's delegation to the United States and business leaders urged lawmakers to sustain the veto. They warned the law will damage relations with Saudi Arabia and encourage other countries to pass laws that would allow them to target U.S. officials.").

military operations in Yemen targeting civilians.<sup>209</sup> On September 28, Congress overrode the veto overwhelmingly—the first time in the Obama presidency that that had happened.<sup>210</sup>

President Obama accused members of Congress of lacking familiarity with the provisions and effective consequences of JASTA, attributing its passage to a reaction to “the scars and trauma of 9/11.”<sup>211</sup> What was more unusual was the reaction of Congressional leaders. Noting the hastiness of the bill’s passage, the Chairman of the Senate Foreign Relations

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<sup>209</sup> Demirian and Eilperin, *supra* note 207. See also Eilperin and Demirian, *supra* note 199. The bill was tabled, but as a Human Rights Watch official noted, “[T]he tide is turning” against Saudi Arabia. *Id.*

<sup>210</sup> Eilperin and Demirian, *supra* note 207.

<sup>211</sup> Demirian and Eilperin, *supra* note 207. See also Demirian and Eilperin, *supra* note 208 (“Everybody was aware of who the potential beneficiaries were, but nobody had really focused on the potential downsides in terms of our international relationships”) (quoting Senate Majority Leader Mitch McConnell, a supporter of the bill); Ted Barrett and Deirdre Walsh, *Congress Suddenly Has Buyer’s Remorse for Overriding Obama’s Veto*, CNN POLITICS, Sept. 29, 2016, <http://www.cnn.com/2016/09/29/politics/obama-911-veto-congressional-concerns/> (quoting House Speaker Paul Ryan as having concerns about the bill’s “unintended consequences,” but “you want to make sure that the 9/11 victims and their families get their day in court”).

Committee said he “wish[ed] we had all focused on this a little bit more, earlier.”<sup>212</sup> Senator Lindsey Graham expressed a desire to check whether Congress had opened a Pandora’s box; he and twenty-seven other Senators sent a letter to JASTA’s Senate sponsors calling on them to work “in a constructive manner to appropriately mitigate . . . [JASTA’s] unintended consequences.”<sup>213</sup> Senator Orrin Hatch said, “I don’t think we had enough time to consider all of the ramifications,” adding that he was “worried about getting into a tremendous legal morass that could really cost this country.”<sup>214</sup> House Speaker Ryan expressed the hope that a modified bill could be approved to address the concerns raised.<sup>215</sup> Senate Majority Leader Mitch McConnell said, “I just think it was a ball dropped,” and (as did some other Senate members) proceeded to place the blame on President Obama.<sup>216</sup>

It remains to be seen whether Congress will act on its buyer’s remorse. In October 2016 U.S. Secretary of State John

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<sup>212</sup> Eilperin and Demirian, *supra* note 199.

<sup>213</sup> Jordain Carney, *Senators Already Eyeing Changes to 9/11 Bill After Veto Override*, THE HILL.COM, Sept. 28, 2016.

<sup>214</sup> Carney, *supra* note 213.

<sup>215</sup> Barrett and Walsh, *supra* note 211.

<sup>216</sup> *Id.*

Kerry and Saudi Foreign Minister Adel al-Jubeir had talks about potential proposals to “fix” the problems associated with JASTA.<sup>217</sup> The Trump Administration’s position is not clear. As a candidate, President Trump strongly criticized President Obama’s veto of JASTA.<sup>218</sup> The Saudi government appears to be pressing the Trump administration to reconsider the bill.<sup>219</sup> In November 2016, Senators McCain and Graham introduced a bill to amend JASTA to limit liability to cases where “the foreign state knowingly engaged in the financing or sponsorship of terrorism, whether directly or indirectly.”<sup>220</sup> In the meantime, the case proceeds.

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<sup>217</sup> Megan R. Wilson, *Saudi Arabia Now Employing 14 Lobby Firms as It Fights 9/11 Law*, THE HILL, (Nov. 2, 2016), <http://thehill.com/business-a-lobbying/business-a-lobbying/304019-saudi-arabia-continues-expansion-of-k-street-force>. The month before, the Foreign Minister spoke with the Chair of the Senate Foreign Relations Committee. *Id.*

<sup>218</sup> Mark Habeeb, *Trump’s Election May Have Killed Prospects for Amending JASTA*, THE ARAB WEEKLY, (Nov. 27, 2016), <http://www.thearabweekly.com/Opinion/7174/Trump%E2%80%99s-election-may-have-killed-prospects-for-amending-JASTA>.

<sup>219</sup> Hoda al-Saleh, *Did a CIA Medal to the Saudi Crown Prince Close the JASTA File?*, AL ARABIYA (ENGLISH), (Feb. 15, 2017), <http://english.alarabiya.net/en/News/gulf/2017/02/15/How-a-CIA-medal-to-Saudi-crown-prince-ended-the-JASTA-issue.html> (quoting Saudi Foreign Minister Adel al-Jubeir) (“The US estimates the negative repercussions of implementing JASTA and it may reconsider it”).

<sup>220</sup> Cong. Rec. S6612 (daily ed. Nov. 30, 2016) (statement of Sen. Graham). The quotation is from Sen. Graham’s statement, not the proposed bill.

On February 7, 2017, the Second Circuit granted a joint motion to vacate the district court's September 2015 opinion and remand the case for further consideration in light of JASTA.<sup>221</sup>

JASTA makes a number of changes to the law, including to cases pending as of its effective date.<sup>222</sup> It allows claims for personal injury or property damage occurring in the U.S. if it was caused either by "an act of international terrorism in the United States," or by a tortious act or acts (not, "act or omission") of the foreign state or its agents, "regardless of where the tortious act or acts of the foreign state occurred."<sup>223</sup> This change is accomplished by denying immunity to such claims through a new section 1605B of the

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<sup>221</sup> *In re Terrorist Attacks on September 11, 2001*, No. 15-3426(L) (2d Cir. Feb. 7, 2017).

<sup>222</sup> JASTA, § 3(a), *supra* note 205, § 7.

<sup>223</sup> JASTA, § 3(a), *supra* note 205 (JASTA also bars claims based purely on "mere negligence."). See William Dodge, *Does JASTA Violate International Law?* JUST SECURITY, (Sept. 30, 2016), <https://www.justsecurity.org/33325/jasta-violate-international-law-2/>. It should be noted that JASTA refers to no immunity for "damages against a foreign state" for personal injury or property damage in the U.S. caused by "(1) an act of international terrorism in the United States; and (2) a tortious act of acts of the foreign state . . ." The "and" here apparently refers to two instances in which immunity may be denied, as opposed to two elements that must be satisfied in each case.

FSIA, and authorizing such claims under the ATA.<sup>224</sup> Nothing in this provision requires that the foreign state be on the State Department terrorism list. Plaintiffs must be U.S. nationals.<sup>225</sup>

As with many of Congress's forays in the area, the drafting is not entirely clear. Despite some drafting unclarity, it appears that "international terrorism" and "tortious acts"

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<sup>224</sup> JASTA §3(a), *supra* note 205, (allows claims against foreign states under 18 U.S.C. § 2333(a)) (2012). That section allows U.S. nationals to bring claims for personal injury or property damage by reason of an act of international terrorism. Prior to JASTA, the ATA did not provide for suits under § 2333 against foreign states, *see* 18 U.S.C. § 2337(2) (2012), but JASTA modifies that with respect to any claim as to which JASTA would remove immunity. In turn, a new § 1605B provides an exception to foreign sovereign immunity for claims arising out an act of international terrorism in the U.S., and for tortious acts or omissions of foreign states or their agents, "regardless where the tortious act or acts of the foreign state occurred." *Id.*

<sup>225</sup> JASTA §3(a), *supra* note 205, (codified as 28 U.S.C. § 1605B(c) (2016)). Thus only a U.S. national could bring a JASTA claim against a foreign state for an act of international terrorism occurring in the U.S. Yet a slightly broader category of plaintiffs (U.S. nationals, armed forces members, government employees and government contractors' employees, and their legal representatives) could bring an action for an act of international terrorism occurring outside the U.S. 28 U.S.C. § 1605A(c) (2012); *see supra* note 181.

are alternative bases for liability.”<sup>226</sup> The reference to an act of “international terrorism in the United States” is somewhat infelicitous. JASTA adopts the ATA’s definition of international terrorism.<sup>227</sup> The ATA defines it as terrorism “occur[ring] primarily outside the territorial jurisdiction of the United States” or as terrorism “transcend[ing] national boundaries.”<sup>228</sup> The idea of an act of international terrorism that occurs in the U.S. but primarily outside U.S. territorial jurisdiction is hard to fathom. One explanation may be that Congress simply assumed that the 9/11 attacks were instead acts of terrorism “transcend[ing] national boundaries.”<sup>229</sup>

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<sup>226</sup> JASTA refers to no immunity for “damages against a foreign state” for personal injury or property damage in the U.S. caused by “(1) an act of international terrorism in the United States; *and* (2) a tortious act of acts of the foreign state . . .” The “and” here apparently refers to two instances in which immunity may be denied, as opposed to two elements that must be satisfied in each case.

<sup>227</sup> 18 U.S.C. § 2331(1)(C) (2012).

<sup>228</sup> JASTA, *supra* note 205, § 3(a), (codified as 28 U.S.C. §§ 1605B(a)(1) (2016)).

<sup>229</sup> *See* 18 U.S.C. § 2331(1)(C) (2012) (referring to acts that “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”). There is a separate criminal provision for acts of terrorism transcending

Even then it may be odd to refer to an act that transcends national boundaries as taking place “in the United States.” The provision might refer to the fact that much of the planning took place outside the U.S., while the hijacking, death and destruction occurred within it. In any event, to the extent that the claims relate to the tort of financing and supporting terrorism, JASTA expressly renders the “entire tort” rule in applicable.<sup>230</sup>

There will be other legal issues to resolve as well. In contrast to the non-commercial tort provision of the FSIA, JASTA says nothing about an exception for discretionary functions.<sup>231</sup> If the court interprets this silence as

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national boundaries, added in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 702, 110 Stat. 1216, codified at 18 U.S.C. § 2332b (2012).

<sup>230</sup> See text accompanying *supra* note 223.

<sup>231</sup> See 28 U.S.C. § 1605(a)(5)(A) (201) (qualifying the non-commercial tort exception to sovereign immunity with the proviso that the exception to immunity does not apply to “any claim based upon” the exercise or failure to exercise a “discretionary function”); JASTA, §3(a), *supra* note 205, codified as 28 U.S.C. § 1605B(b) (2016). In proposing in November 2016 to amend JASTA to limit liability to cases where a state “knowingly” aids and abets terrorism, Senator Lindsey Graham plaintively noted that “[s]omebody took the discretionary function language out of the original [JASTA] bill. I guess a lot of them missed it.” Cong. Rec. S6613 (daily ed. Nov. 30, 2016).



Congressional rejection of the discretionary function exception for JASTA claims, that would be significant, since the earlier district court decision on the non-commercial tort exception had found the discretionary function exception to it applicable.<sup>232</sup> The plaintiffs argue that JASTA has modified the law regarding scope of agency and causation, which have been difficult issues for plaintiffs in terrorism litigation in the past. The defendants may argue that JASTA is unconstitutional.<sup>233</sup>

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<sup>232</sup> See text accompanying *supra* notes 185-189; JASTA, §3(a), *supra* note 190 (JASTA does put a limitation on the exception to immunity, just as does section 1605(a)(5). But whereas the limitations on the section 1605(a)(5) exception relate to discretionary functions, § 1605(a)(5)(A) and certain specific torts, § 1605(a)(5)(B), the limitation in JASTA lifting of immunity relates to claims for “mere negligence.”); JASTA, §3(a), *supra* note 205, codified as 28 U.S.C. § 1605B(d) (2016) (“A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.”). The contrast might strengthen the argument that Congress meant for no discretionary function exception to apply to JASTA claims.

<sup>233</sup> See Joint Motion to Vacate and Remand in Light of Changes in Law, *In re* Terrorist Attacks on September 11, 2001, No. 15-3426-cv, at 10 & 12. n3 (filed Oct. 21, 2016).

Despite these uncertainties, in many respects JASTA could cover the 9/11 attacks very well,<sup>234</sup> to the extent that the claim was that Saudi Arabia is primarily responsible for the attacks, though that may prove difficult to prove or even allege with sufficient specificity. As for assertions that high Saudi officials or other agents committed a “tort or tortious acts”<sup>235</sup> in financing or supporting terrorism, the removal of the entire tort rule may provide an opening; it should be noted, though, that in dismissing the claims, the district court emphasized how general or even speculative many of

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<sup>234</sup> After JASTA went into effect, at least one other lawsuit was filed against Saudi Arabia; others are likely. See Greg Clary, *9/11 Widow Files Lawsuit Against Saudi Arabia*, CNN POLITICS, (Oct. 1, 2016), <http://www.cnn.com/2016/10/01/politics/saudi-arabia-9-11-lawsuit/>. Whether there is any state against which a plausible case for causing damage by terrorism in the U.S. could be made is open to debate. A complaint filed in February 2017 against Israeli officials characterizes them as supporting international terrorism. *Peled v. Netanyahu*, No. 1:17-cv-00220 (D.D.C. Feb. 1, 2017), <http://courthousenews.com/wp-content/uploads/2017/02/netanyahu.pdf>. See Joshua Claybourn, *How Congress Made It Easier to Sue Israel*, THE HILL.COM, (Feb. 6, 2017), <http://thehill.com/blogs/pundits-blog/international-affairs/318097-how-congress-made-it-easier-to-sue-israel>. The complaint asserts claims under the ATA, the ATS, JASTA, and a number of other statutes.

<sup>235</sup> JASTA, Pub. L. No. 114-222, *supra* note 205, § 3(a) (codified as 28 U.S.C. § 1605B(b)(2) (2016)).

the allegations were.<sup>236</sup> What may not work is any attempt to predicate liability of Saudi Arabia or its officials or agents on an aiding and abetting or conspiracy theory under Section 4 of JASTA. That section provides that a “person” may be liable if they aid and abet “an act of international terrorism” that was undertaken by an organization designated on the foreign terrorist organization list.<sup>237</sup> “Person,” in turn, is defined to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” – but not, most likely, states.<sup>238</sup> Liability under this section of JASTA may be limited to claims against

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<sup>236</sup> *E.g.*, *In re Terrorist Attacks*, 134 F. Supp. 3d at 787 (plaintiffs intend to renew their bid for additional discovery on remand); *See* Joint Motion, *supra* note 233, at 12-13.

<sup>237</sup> JASTA, *supra* note 205, § 4(a) (codified as 18 U.S.C. § 2333(d)(2)) (2016).

<sup>238</sup> JASTA, *supra* note 205, § 4(a) (codified as 18 U.S.C. § 2333(d)(1)) (2016). The definition is accomplished by referring to the general definition of person in 1 U.S.C. § 1. That definition makes no reference to states or state agencies. It does, however, say that the term “includes” the various entities listed. Courts would likely want a stronger basis than that for holding a foreign state subject to suit. Note, also, that the aiding and abetting liability relates only to an act of international terrorism (presumably in the United States, although the new § 2333(d)(2) does not so specify). A person who aided and abetted the tortious acts of a foreign state would not be covered, since the sole reference in § 2333(d)(2) is to international terrorism.

non-state “persons” who knowingly aid and abet or conspire with persons who commit an act of international terrorism if that act was planned by a designated foreign terrorist organization.<sup>239</sup>

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<sup>239</sup> JASTA, *supra* note 205, § 4(a). Steve Vladeck has made this point very well. Vladeck, *The Senate Killed JASTA*, *supra* note 195. As he points out, the new aiding and abetting liability is available only against “persons” as defined in 1 U.S.C. § 1. *See* JASTA, *supra* note 205, at § 4(a). 1 U.S.C. § 1 (2012) provides that “unless the context indicates otherwise,” the word “person” includes “corporations, companies, associations, firm, partnerships, societies, and joint stock companies, as well as individuals.”

The preamble to JASTA states that the decision in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) provides “the proper legal framework” for how aiding and abetting and conspiracy liability should function “in the context of” the ATA. JASTA, *supra* note 205, § 2(a)(5). *Halberstam* provides a very thorough analysis of civil conspiracy and aiding and abetting liability in the context of a civil action against a woman whose partner had killed a homeowner during a burglary, concluding with a cautionary note that “[t]ort law is not, at this juncture, sufficiently well developed or refined to provide immediate answers to all the serious questions of legal responsibility and corrective justice. . . . Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society.” *Id.* at 489. In some other contexts, as the Supreme Court has pointed out, Congress has defined the elements of aiding and abetting liability very specifically. *See* *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181-83 (1994).

Even assuming a judgment at some point, JASTA appears not to have changed the law on immunity from execution.<sup>240</sup> A more significant barrier might turn out to be a section in JASTA that allows the court to stay proceedings if the Secretary of State certifies that the U.S. is engaged in good faith negotiation with the foreign state or certain other parties over the claims.<sup>241</sup> Of course, that would depend on the somewhat unlikely prospect of Saudi Arabia agreeing to enter into good faith negotiations regarding payment of damages for the 9/11 attacks. Of greater interest is the fact that Congress again employed a technique of seeming to make relief available, but providing (or saddling) the president with the power to preclude judicial resolution.<sup>242</sup> Or perhaps even Congress will step in if too many people take it seriously. The Chairman of the Senate Foreign Relations Committee suggested that Congress might reconsider JASTA if it triggered a flood of lawsuits.<sup>243</sup>

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<sup>240</sup> See Vladeck, *The Senate Killed JASTA*, *supra* note 195.

<sup>241</sup> JASTA, *supra* note 205, § 5(c), codified as 28 U.S.C. § 1605B Note (2016). The request expires after 180 days unless the court renews it following a recertification by the Secretary of State. For a very useful analysis, see Vladeck, *The Senate Killed JASTA*, *supra* note 195.

<sup>242</sup> See text accompanying *supra* note 171.

<sup>243</sup> See Wilson, *supra* note 217. Cf. Sant, *supra* note 135, at 546-47 (noting expectations voiced by Senator Chuck Grassley and a State Department

## V. FUTURE DIRECTIONS

### A. TWO VISIONS OF HUMAN RIGHTS LITIGATION

#### 1. COSMOPOLITANISM AND NATIONALISM

In 1991, U.S. ratification of human rights treaties, together with the opening of American courts to foreigners seeking remedies for their own governments' human rights violations, embodied the prospect of U.S. participation in an emerging post-Cold War order. Two features of this order were the United States' promotion of international trade and market-oriented domestic policies, and its assumption of the military role that other states, particularly Japan and European nations, might otherwise have taken on. U.S. commitment to human rights and international law represented a symbolic feature of this order, lending legitimacy to the U.S. role in it.

In terms of the role of U.S. courts, where might this cosmopolitan vision have taken us, had it been fulfilled? Without attempting a detailed answer, two basic principles may be set out. The first would be a commitment to the full range of well-established human rights, including economic, social and cultural rights. The commitment would include ratification of the major global and regional human rights

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official that civil litigation under the ATA, then under consideration, would be symbolic and rarely used).

treaties. Reservations would be limited, and not aimed at generally bringing treaty obligations into conformity with existing domestic law. Ratification would include acceptance of the competence of the treaty body to hear individual petitions, where the treaty so provides.

The second concerns the courts: They would be open to the enforcement of international human rights, as part of a general U.S. commitment to international law.<sup>244</sup> Treaties would be domestically enforceable, either through regarding them as self-executing or through implementing legislation, as appropriate. Adjudication would be subject to doctrines relating to standing, justiciability, and other general doctrines relating to the role of the courts, interpreted in light of the U.S. commitment to human rights.

The courts, moreover, would be open to civil claims by foreigner nationals or foreign governments arising out of serious violations of human rights abroad, whether committed by U.S. nationals or not. That would not rule out some distinctions between nationals and foreigners, or the U.S. government and foreign governments, related to factors such as the severity of the violation and the degree of its connection to the U.S. Nor would this availability rule out the application of doctrines such as *forum non conveniens*,

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<sup>244</sup> For one version of what this would entail, see Koh, *supra* note 6, at 2371.

immunity, and extraterritoriality—again, so long as they were interpreted in light of the U.S. commitment to human rights.<sup>245</sup>

This cosmopolitan vision stands in striking contrast to a more nationalist vision today. This nationalist vision has two aspects. One is a focus on vindicating the rights of U.S. citizens *as* U.S. citizens, not as the subjects of international human rights law, with far less interest in protecting foreign nationals or playing a role in vindicating their universal rights. In this vision, the normal political accountability of a democratic government is at play: voters expect their government to be particularly focused on protecting citizens, not foreigners who are harmed abroad by foreign governments or other foreign actors. The second is a reconceptualization of human rights as most urgently focused on protection against terrorism. One reason for this reconceptualization may be that terrorism, especially on U.S.

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<sup>245</sup> Cf. Koh, *supra* note 6, at 2390 (envisioning an emerging “Federal Rules of Transnational Civil Procedure”). Richard Haass’s recent prescriptions for U.S. foreign policy manifest a broadly similar spirit in his advocacy of “sovereign obligation.” RICHARD HAASS, *A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER* 227 (2017). He emphasizes the weakening of the significance of national borders in a globalized world and argues that states have some responsibility to foreign citizens abroad. *Id.* at 233 (arguing for a “larger approach to sovereignty, one that includes obligations beyond borders. Call it World Order 2.0”). See generally *id.* at 225-55.



soil, can easily be recast not simply as an attack on individual human rights but as an almost existential threat to the nation. Nationalism draws on many sources, one of which can be “perceived threats to collective dignity and national well-being.”<sup>246</sup>

Congress’s silence on the ATS as the Supreme Court has progressively narrowed its scope can be understood in terms of this vision. The terrorism litigation that Congress has promoted involves the protection of U.S. nationals against heinous acts, whereas the ATS protects foreign nationals. The federal civil redress for victims of human rights violations has been reconceived in more nationalist terms, rooted in protection of U.S. citizens and territory and aimed at enhancing U.S. foreign policy goals. JASTA represents the latest example of this trend.

## 2. CRITIQUE OF THE COSMOPOLITAN VISION

Both visions leave something to be desired. The cosmopolitan vision carries with it a significant danger. The aspiration toward a new world order in which the rule of law prevails could inspire efforts to bring democracy and human rights to other countries by force, especially in light

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<sup>246</sup> AVIEL ROSHWALD, THE ENDURANCE OF NATIONALISM: ANCIENT ROOTS AND MODERN DILEMMAS 122 (2006). *See generally id.* at 88-166.

of the United States' status as the sole superpower. Koh himself might be said to exemplify the connection. He was sharply criticized for taking a broad view of executive power as the State Department Legal Advisor when he opined that Congressional approval was not needed for U.S. intervention into Libya—seemingly in contradiction to his skepticism about executive power in his academic work.<sup>247</sup>

In another sense, though, his views of the American judiciary held a notable consistency with expansive views of the role of the U.S. in bringing democracy to other countries, by force if necessary. Transnational public law litigation represented to him an attractive prospect because U.S. courts were “uniquely positioned” to help fashion a new adjudicative order on a global level, “spur[ring] the recognition of developing global norms.”<sup>248</sup> It is hard to

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<sup>247</sup> See Paul Starobin, *A Moral Flip-Flop? Defining a War*, N.Y. TIMES, Aug. 6, 2011,

<http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html>; Jennifer Steinhauer, *Obama Advisor Defends Libya Policy to Senate*, N.Y. TIMES, June 28, 2011,

<http://www.nytimes.com/2011/06/29/us/politics/29powers.html>. See

Harold Hongju Koh, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

<sup>248</sup> Koh, *supra* note 6, at 2396, 2398. Koh subsequently defended his position with respect to Libya, arguing that he had appropriately interpreted ambiguity in the War Powers Resolution to accommodate the

avoid the sense that the dialogue with international and foreign tribunals that he envisioned as part of an international legal process reshaping the global public order would be one led by the U.S.<sup>249</sup>

With its emphasis on a leading role for the U.S., the cosmopolitan vision overlooks a potentially subversive feature of ATS litigation. The pervasiveness of U.S. military and diplomatic involvement worldwide has meant that seemingly foreign human rights violations often have some

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practice of humanitarian intervention, which he said Congress had not had in mind in 1973. Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 978-89, 1023-28 (2016).

<sup>249</sup> Indeed, this feature becomes explicit in some accounts. See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87 (2009) (arguing that U.S. courts can act as a global judicial forum, providing an otherwise undersupplied public good). Cf. Jonathan Hafetz, *Human Rights Litigation and the National Interest: Kiobel's Application of the Presumption Against Extraterritoriality to the Alien Tort Statute*, 28 MD. J. INT'L L. 107, 122 (2013) ("... enforcement of fundamental individual rights in federal court can advance U.S. strategic interests"). Of course, other critiques of the cosmopolitan vision are possible as well. For example, Curtis Bradley argues that any judicial determination of international human rights law is necessarily "a highly creative process," Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 465 (2001), and that judicial creativity in lawmaking is generally harmful to democracy, *id.* at 464-69.

degree of connection to the U.S. While the availability of the federal courts to hear foreign human rights violations represents U.S. participation in a global legal order in the cosmopolitan vision, there is also some potential for ATS suits to bring that role into question by exposing the ways that U.S. policy can work against human rights.<sup>250</sup>

The cosmopolitan vision, moreover, may have been the agent of its own destruction, by helping to bring about the rise of today's more nationalist approach. While the Persian Gulf War of 1990-1991 did not purport to be about bringing democracy and human rights to Iraq, the 2003 invasion of Iraq was justified by many of its supporters as doing just that. Instead, along with the invasion of Afghanistan, it inflicted enormous costs on the U.S. It also produced catastrophic and continuing violence abroad that may seem to many Americans not only to cast doubt on the very possibility of achieving universal respect for human rights, but to have become a source of the terrorist violence that Congress so assiduously makes a subject of its continuing legislative attention.<sup>251</sup>

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<sup>250</sup> See Part V.B *infra*.

<sup>251</sup> See BARRY POSEN, *RESTRAINT: A NEW FOUNDATION FOR U.S. GRAND STRATEGY* 24-27 (2014). See also *id.* at 9-11 (noting connection with emphasis on global promotion of democracy and the rule of law).

### 3. CRITIQUE OF THE NATIONALIST VISION

Today's more nationalist vision also has its own shortcomings. The first relates to the idea of focusing on the protection of U.S. citizens and territory, rather than on distant human rights violations committed against foreigners. The second relates to the focus on terrorism as the primary concern of human rights.

#### a) THE PROTECTION OF U.S. CITIZENS AND TERRITORY

With regard to the first, the aim of privileging the protection of U.S. citizens and territory seems rather imperfectly fulfilled by what Congress has actually done. For one thing, where a terrorist incident abroad harms both Americans and foreigners, or even foreigners alone, the goal of hitting back at the perpetrators and their supporters through damage judgments—something that could protect all Americans—might be strengthened by allowing foreigners to sue.

Moreover, even as to Americans, Congress's approach is quite selective. First, Americans injured abroad by terrorist acts committed or supported by states not on the State Department terrorism list are not provided the opportunity to bring their claims to federal court. Second, the complete exclusion under the ATA of any possibility of suing the United States for support of terrorism shows a lack of concern for potential U.S. victims of U.S.-supported terrorism abroad. One need not posit that resort to terror is a routine tool of U.S. foreign policy to acknowledge that the U.S. has made use of it in the past, as with the Nicaraguan

*contras*, for example.<sup>252</sup> Third, even as Congress has sought through JASTA to raise the possibility of somehow holding Saudi Arabia accountable for the 9/11 attacks, it has done nothing to make it possible for U.S. nationals to hold foreign states accountable for human rights violations inflicted on them abroad.<sup>253</sup>

Legislation is, however, often imperfect, and can always be improved. But there at least one danger that could not be addressed simply by greater care and consistency in crafting the law. Congress's concern for the U.S. victims of terrorism verges on the misleading, while posing the risk of harm to the domestic institutions that embody the rule of law.

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<sup>252</sup> In fact, the political reaction to victims of U.S. supported terrorism abroad has been to blame the victim. The case of Benjamin Linder is only one example. See Joanne Omang, *Republican Lawmakers, Contra Victim's Parents Trade Charges*, WASH. POST, May 14, 1987

[https://www.washingtonpost.com/archive/politics/1987/05/14/republican-lawmakers-contra-victims-parents-trade-charges/6a6800eb-918e-4bf7-bd6f-94b9adf519f0/?utm\\_term=.7c9327157923](https://www.washingtonpost.com/archive/politics/1987/05/14/republican-lawmakers-contra-victims-parents-trade-charges/6a6800eb-918e-4bf7-bd6f-94b9adf519f0/?utm_term=.7c9327157923).

<sup>253</sup> One way to start would be to modify the FSIA to permit jurisdiction over claims by U.S. citizens against foreign states for severe violations of human rights (other than terrorism). Such legislation would, of course, further embed the distinction between American and foreigner, but it would at least be true to the nationalist vision of protecting U.S. nationals.

There is a strong contrast between the degree of Congress's attention to plaintiffs' cases and the actual effectiveness of its interventions. The attention has been sustained and detailed over the years. Some of Congress's interventions have been framed in terms of seemingly general changes to the law, as in the second of the Iranian hostage cases.<sup>254</sup> At other times, as in the first of the Iranian hostage cases,<sup>255</sup> it has seemingly specified an outcome in the case. A similar point may be made of JASTA.<sup>256</sup> At the last minute, before passage in the Senate, the bill was subject to highly significant revisions.<sup>257</sup> It is not surprising that the text of provisions added under these circumstances may leave something to be desired.

Is this how laws are made? Yes: Legislating is an inherently messy business. And one would not want to fault last-minute changes to a bill needed to ensure its passage.<sup>258</sup>

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<sup>254</sup> See text accompanying notes 182-183.

<sup>255</sup> See text accompanying notes 151-156.

<sup>256</sup> For most of that period JASTA was not a major topic public debate, but that is true of many statutes; and ultimately, with the assistance of the Saudis' threats of economic retaliation, it did rise to public attention. Moreover, the related question of whether to declassify the 28 pages was debated publicly over a number of years.

<sup>257</sup> Vladeck, *supra* note 195.

<sup>258</sup> See Goldhaber, *supra* note 203 (last-minute JASTA changes helped ensure its passage).

What is so remarkable is how often Congress's interventions turn out to be ineffective. It approves legislation that appears to provide strong, effective judicial remedies to U.S. citizens injured abroad in terrorist incidents, but as the courts proceed to apply the statutes, barriers to judgment or execution or both seem to multiply because the legislation is not as comprehensive as first appears. Similarly, JASTA's actual impact—though practically speaking intended as an intervention into one case (while formulated in a way that certainly raises the possibility of wider application)—may prove no more effective at winning judgment for the plaintiffs than did Congress's interventions in the Iranian hostage cases.<sup>259</sup>

Congressional ineptitude is not the only possible explanation of this phenomenon. The actual ineffectiveness of the legislation may not be particularly important to Congress compared to its primary aim of vying with the executive for control of foreign policy. That might seem to be the case with JASTA, for example. There are many in Congress critical of the United States' closeness to Saudi Arabia. Subjecting Saudi Arabia to the spotlight (and, for foreign states, indignity) of judicial scrutiny may be an end in itself for some members, or at least more important than

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<sup>259</sup> See text accompanying *supra* notes 151-156 and text accompanying *supra* notes 182-183.



whether any actual relief is awarded: Regardless of how the 9/11 litigation ultimately ends, Saudi Arabia will have been subjected to judicial processes to which states ordinarily would be immune. By this account, plaintiffs are the victims, induced by what may be a false prospect of relief to play a role in a foreign policy struggle between the president and Congress.<sup>260</sup>

Congress's approach, moreover, imposes real costs on the integrity of the law-making and adjudicative processes. The threat does not arise, in the first instance, from some high-minded/handed Congressional intervention into the judiciary's business. Rather, it arises when proposed legislation emanates from parties seeking a litigation advantage through Congress. The dismissal of the 9/11 claims under the entire tort rule was taken on appeal before the Second Circuit. JASTA may not cure all the potential barriers to success on the claims, but before its passage the

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<sup>260</sup> For an eloquent account of the harms this creates, see Lamberth, *supra* note 117, at 18-20. See also Conway, *supra* note 52, at 763 & n.179 (quoting Stephen Flatow) ("Maybe American policy is a joke.") (citing *60 Minutes: In Memory of Alisa: After Going to Great Lengths to Get the Right to Sue a Terrorist State, a Victim's Father Finds His Own Government Won't Let Him Collect His Settlement* (CBS, Oct. 4, 1998)). How to resolve this dilemma is another matter; the concerns as to how foreign governments might react to fully facilitating such lawsuits at all stages, including execution, are real.

lead counsel for plaintiffs publicly stated that he expected the Second Circuit to remand the case to the district court once JASTA became law, and that is what happened.<sup>261</sup> It is almost as if the plaintiffs appealed the district court's dismissal to Congress, bypassing the Second Circuit.<sup>262</sup> By this account, the courts are the victim, first charged by Congress with adjudicating claims suffused with difficult foreign policy issues, and then by-passed when they come out with the wrong result.

At the same time, it *is* Congress's job to legislate. There is certainly no reason to think the present state of the law regarding the litigation of foreign terrorism claims is perfect. Sometimes a pending case may expose serious deficiencies in existing law. In that situation, counsel to the parties experiencing those deficiencies in court can be in a

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<sup>261</sup> See Goldhaber, *supra* note 203 (quoting one of plaintiffs' counsel, Sean Carter of Cozen O'Connor); text accompanying *supra* note 221.

<sup>262</sup> The change.org petition in favor of JASTA promised that it would "reverse appalling erroneous court decisions on aiding terrorists." Act Now to Pass the Justice Against Sponsors of Terrorism Act (JASTA), CHANGE.ORG, <https://www.change.org/p/act-now-to-pass-the-justice-against-sponsors-of-terrorism-act-jasta>. Section 7 of JASTA provides that it is retroactive. JASTA, *supra* note 205, §7 (applies both to actions "pending on, or commenced on or after, the date of enactment" of JASTA, and to actions "arising out of an injury to a person, property, or business on or after September 11, 2001").

particularly good position to explain them to elected representatives.

The Supreme Court faced this question in *Bank Markazi v. Peterson*.<sup>263</sup> That case involved a set of claims mainly stemming from the 1983 bombing of the U.S. Marine barracks in Beirut. Plaintiffs had secured a default judgment against Iran.<sup>264</sup> They sought to execute on what they said were the assets of Bank Markazi, Iran's central bank, held in a Citibank account in New York controlled by Clearstream, an international clearinghouse. Plaintiffs first sought to enforce their judgment against these bonds in 2008; when these assets were frozen by the President in 2012, plaintiffs asserted that the Terrorism Risk Insurance Act of 2002 rendered the assets available to satisfy the judgment.<sup>265</sup> Bank Markazi and Clearstream, however, asserted a number of substantive and procedural defenses against execution. While the case was pending, Congress quashed these defenses with the Iran Threat Reduction and Syria Human Rights Act of 2012.<sup>266</sup> Referring specifically to the default

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<sup>263</sup> 136 S. Ct. 1310 (2016).

<sup>264</sup> *Id.* at 1319-20. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003).

<sup>265</sup> 136 S. Ct. at 1318, 1320-21. *See note 156 supra.*

<sup>266</sup> Pub. L. No. 112-158, § 502, 126 Stat. 1258 (Aug. 10, 2012), codified at 22 U.S.C. § 8772 (2012).

judgment by its caption and docket number and to the account in question, Congress provided that so long as the district court found that the assets were indeed Iran's alone, they would be "subject to execution," regardless of foreign sovereign immunity or any other defense.<sup>267</sup>

Bank Markazi challenged Congress's action as a violation of separation of powers. The Supreme Court upheld the statute, citing Congress's power to legislate even as to a single individual and to establish new law, even retroactively and in pending cases.<sup>268</sup> Interestingly, the Court suggested that judicial deference was particularly appropriate because the statute related to foreign affairs and sovereign immunity.<sup>269</sup> One wonders whether a statute that did not simply define aiding and abetting liability in pending cases but mandated that it be found in a particular

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<sup>267</sup> *Id.* See 136 S. Ct. at 1318-19.

<sup>268</sup> 136 S. Ct. at 1322-28. Chief Justice Roberts, joined by Justice Sotomayor, dissented. *Id.* at 1329 (Roberts, C.J., dissenting). *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), was held to be less about a lack of Congressional authority to direct an outcome in a pending case than about its lack of authority to direct the courts to act in a way contrary to the president's pardon power under Article II § 2 cl. 1 of the Constitution. 136 S. Ct. at 1323-24.

<sup>269</sup> *Id.* at 1328-29; *see id.* at 1329 ("it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings").

case would also survive scrutiny.<sup>270</sup> The one line Congress cannot cross is reopening final judgments.<sup>271</sup>

In some ways the Court's hesitance is understandable. Determining when Congressional action is sufficiently general in scope to qualify as legislation would be as impractical as determining whether a statute had provided a sufficiently "intelligible principle" to survive a non-delegation challenge.<sup>272</sup> It is not the Court's business to tell Congress how to legislate.

Still, when terrorism litigation follows a path through Congress, it is unlikely that Congress will effectively hear from both sides, since—as Saudi Arabia and Iran both discovered—foreign states accused of supporting terrorism meet with little sympathy, at least in public. To be sure, the administration may provide an alternative view, with some impact; but where Congress is engaged in a struggle with

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<sup>270</sup> It might be enough under *Bank Markazi* for Congress to leave some near-ministerial fact-finding role for the trial court, like finding that Saudi agent X had in fact made a certain payment to Y. *See id.* at 1325 n.20; *id.* at 1335 (Roberts, C.J., dissenting) (statute left "plenty of nothing" for the trial court to determine, and "apparently, nothing is plenty for the Court").

<sup>271</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

<sup>272</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (quoting *Hampton v. United States*, 276 U.S. 394, 409 (1928)).

the executive over the direction of foreign policy (as was the case with JASTA), it may not be inclined to listen. Moreover, terrorism cases attract high-powered and sophisticated counsel; may involve powerful businesses, such as insurers as plaintiffs alongside individual victims and their relatives; and raise the prospect of hundreds of millions or even billions of dollars in damages—or, as in the 9/11 case, \$150 to \$250 billion.<sup>273</sup> It is true that concerns about the potential for highly focused interest groups with significant financial resources to influence legislation are hardly unique to this area. Nor is there any reason to suspect unlawful or unprofessional conduct here. The danger, though, is that because any bill emanating from Congress will be “fighting terrorism,” the usual scrutiny one might hope to see of such a fraught process—fraught not only because of the human suffering behind the claims but also because of the exposure

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<sup>273</sup> See Goldhaber, *supra* note 203. The prospect is certainly a worry for counsel for banks. See Carlos F. Concepción and Johanna Oliver Rousseaux, *Evolution of the ATA and Third-Party Liability for Terrorist Acts*, IN-HOUSE DEFENSE Q., at 16, 20 (Winter 2017), <http://www.jonesday.com/files/Publication/96762fcf-3cb0-40ee-9ceb-d59e217ca9fb/Presentation/PublicationAttachment/5c394a82-eb45-4a0b-9e86-d9969ac8206d/IDQ-2017-01-Evolution%20of%20the%20ATA.pdf> (predicting a wave of lawsuits in light of JASTA’s aiding and abetting provision against not only banks but also “communication providers, social media outlets, means of transportation, weapons and other equipment manufacturers, and even sovereign states”).

to worrisome influence that our campaign finance system fosters—may be diminished. Congress may well exercise some caution in dictating outcomes in particular cases, but as its caution stems less from sober consideration of foreign policy concerns than from a fear of too clearly taking on responsibility, transparency is likely to suffer.

b) The Focus on Terrorism

The second concern relates to the focus on terrorism as the primary concern of human rights. This focus might not be obviously wrong-headed. Congress might believe that putting federal judicial redress for terrorism at center stage would best serve justice and U.S. foreign policy interests.

One reason for focusing on terrorism in the pursuit of these ends might be the relative narrowness of terrorism as a category as opposed to human rights. Human rights treaties are notable for their breadth, and a general commitment to have the courts enforce them—at the behest of foreigners as well as citizens—could be thought to be too broad and vague. The *Sosa* Court expressed this anxiety, raising the specter (assuming, of course, personal jurisdiction) that every brief stop of a foreign national by a foreign police officer in a foreign country could be challenged in federal court as “arbitrary detention” in violation of international human rights law. The courts could be swamped by endless

litigation over relatively small human rights violations.<sup>274</sup> As for the latter, large damage judgments against terrorists and their supporters, including states, would provide compensation to victims of a particularly heinous kind of human rights violation. And they might impede future terrorist attacks by disrupting terrorist financing.<sup>275</sup>

The problem with this understanding of Congressional legislation, however, is that it rests on a fundamentally false understanding of terrorism. “Terrorism” is an unstable, shifting concept—a concept, moreover, with a great tendency to expand in scope.<sup>276</sup> As is well known, terrorism

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<sup>274</sup> Koh, *supra* note 6, at 2396, 2398.

<sup>275</sup> To be sure, there are other ways to accomplish these objectives. Disruption of financial networks supporting terrorist organizations can be pursued through the criminal law, asset seizures, and bank regulation; and compensation can be pursued through compensation programs, as happened with the Iranian hostages. David M. Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. TIMES, Dec. 24, 2015. Congress need not even provide the funding for the compensation, if it is willing to use frozen assets of foreign states or (as was the case with the compensation to the hostages) funds made available by the imposition of penalties on banks that violate sanctions laws. *Id.* But Congress might plausibly want damage suits against terrorists to be part of the mix.

<sup>276</sup> See, e.g., Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375 (2004). The literature on whether “terrorism” can be defined with sufficient precision to be the subject of an international law



was left out of the crimes covered by the Rome Statute of the International Criminal Court, with the conference stating that there is “no generally acceptable definition” of it.<sup>277</sup>

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norm is extensive. For a comprehensive analysis, see BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* (2008). Of course, there are arguments that terrorism does have that specificity. *E.g.*, Thomas Weatherall, *The Status of the Prohibition of Terrorism in International Law; Recent Developments*, 46 *GEO. J. INT'L L.* 589, 625 (2015) (prohibition has attained peremptory norm status); Van Schaack, *supra* note 50, at 468-73 (arguing that “terrorism” meets the test of *Sosa* that a tort be “specific, universal, and obligatory” in order to qualify under the ATS). *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 748 (2004) (quoting *In re Estate of Marco Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)). But proposed consensus definitions often come at the expense of implicitly taking highly controversial positions on important issues. *E.g.*, Van Schaack, *supra* note 50, at 443-44 (limiting it to “international terrorism” where there is some foreign element involved, thereby excluding domestic terrorism); Weatherall, *supra*, at 626-27 (suggesting that application of prohibition of terrorism to peoples in “revolt against oppressive and abusive regimes risks undermining the international crime of terrorism”). *Cf.* ACLU, *How the USA PATRIOT Act Redefines “Domestic Terrorism,”* <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> (noting potential for definition of “domestic terrorism” to encompass civil disobedience protests).

<sup>277</sup> Resolution E, annexed to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, (17 July 1998), UN Doc A/Conf.183/10, quoted in SAUL, *supra* note 276, at 182. *See also* ELIZABETH STUBBINS BATES, *TERRORISM AND INTERNATIONAL LAW*:

There is not even agreement among academics over whether terrorism currently has a meaningful definition under international law.

Nevertheless, “terrorism” is a supremely powerful concept, with a great capacity to entirely delegitimize the persons or entities so labelled.<sup>278</sup> This feature accounts for the tendency of its invocation to expand to more and more types of wrongs. (In this sense “terrorism” curiously parallels the concept of *jus cogens*.) The most notable such expansion—and one highly relevant to JASTA—is the pressure to move states ever closer to the focal point of concern about terrorism, something that Congress has grappled with again and again over the years.

The term “terrorism” has most often applied to acts committed by non-state, private actors. The ATA as enacted in 1990 appeared to focus on exclusively on it. But as early as 1996, Congress began to take aim at states and state officials deemed sponsors of terrorism, amending the FSIA—and its legislative interventions have continued apace ever since.

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*ACCOUNTABILITY, REMEDIES AND REFORM* (A Report of the IBA Task Force on Terrorism) §§ 4.05, 4.06, at pp. 165-66 (2011).

<sup>278</sup> SAUL, *supra* note 61, at 1-7.

In one sense this expansion of liability from non-state actors to states might be defensible. The distinction between public and private is hardly impermeable, as human rights law itself has shown.<sup>279</sup> Perhaps, as Vincent-Joël Proulx argues, terrorism requires a fundamental re-thinking of the international law of state responsibility.<sup>280</sup> What is needed, he argues, is a strict-liability basis for holding states responsible for terrorist activities originating within their territory, thus extending liability to states that have been “willfully blind [to] or overly tolerant” of terrorist groups operating within their borders.<sup>281</sup>

To the extent that Congress thought it was providing facilitating civil actions against Saudi Arabia for supporting terrorism when it enacted JASTA, it may have been grappling with the difficult question of a state’s responsibility for grievous human rights violations that it does not directly commit through its agents as a matter of

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<sup>279</sup> E.g., Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALBANY L. REV. 371, 393-98 (2003).

<sup>280</sup> VINCENT-JOËL PROULX, *TRANSNATIONAL TERRORISM AND STATE ACCOUNTABILITY: A NEW THEORY OF PREVENTION* 315 (2012) (arguing that “[s]hort of egregious and active/direct support by a subsidising government,” establishing state responsibility for actions of terrorist groups is nearly impossible).

<sup>281</sup> *Id.* at 229-307; 317-319. See also SAUL, *supra* note 61, at 196-197.

policy. But, aside from the serious doubt as to whether aiding and abetting claims are viable against a state under JASTA,<sup>282</sup> there is reason to question whether JASTA reflects any general interest on Congress's part in the scope of state responsibility. Indeed, it has shown no interest in the very same issue in a related context. Congress has remained silent through the near-evisceration of ATS claims against multinational corporations—another kind of non-state actor that, like terrorists (though obviously very different in other respects) poses deep conceptual challenges to state-centered approaches to international law.

Of course, Congress is not required to legislate on every challenge it might legitimately take up. What is notable, however, is that Congress's willingness in some contexts simply to treat the designation of state responsibility for terrorism as a matter of pure politics—either on the part of the executive (in the case of states on the terrorism list) or Congress (as in the case of JASTA's effective singling out of Saudi Arabia). Congress's main approach to responsibility for terrorism turns out to be to use it an instrument for pressuring states in disfavor with the U.S. foreign policy.

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<sup>282</sup> See text accompanying *supra* notes 234-239.

B. BEYOND THE TWO VISIONS: OVERCOMING THE MISCONCEPTION OF "FOREIGN CUBED"

Both the cosmopolitan and nationalist visions have significant flaws. Fully articulating an alternative vision of the role of federal civil redress for foreign human rights violations would be a major task. Here I confine myself to setting out its core feature. This alternative would conform with the cosmopolitan vision in one sense, recognizing the blurring of the global and the local. But it would disentangle that recognition from the normative aspiration of using human rights litigation in federal courts to contribute to the growth of a global legal order. The major systemic value of such litigation lies, instead, in its potential to subject U.S. foreign policy to greater democratic scrutiny, by increasing awareness of the potential for U.S. actions abroad to undermine human rights.<sup>283</sup>

While official support for human rights has been part of U.S. policy since the Carter Administration, in practice U.S. actions abroad can also inflict grave harms on human rights. In pursuit of broader strategic aims in the Middle East, for example, the U.S. has consistently provided intelligence and material support to the brutal intervention in Yemen,

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<sup>283</sup> See Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INT.-AM. L. REV. 393, 556-87 (1994).

notwithstanding mounting evidence of major violations of international humanitarian law by the military coalition of Saudi Arabia and eight other Middle Eastern states.<sup>284</sup> Opting for what it saw as stability in 2010, the U.S. backed Nouri al-Maliki's effort to remain as Iraq's prime minister after his party lost the elections that year, and put no pressure on him to pull back from the highly sectarian approach of his government, with its systematic repression of Sunnis.<sup>285</sup> U.S. military aid to Colombia, aimed at fighting drug trafficking and terrorism, profoundly shaped policy options there in the direction of militarization; in turn the Colombian military's cooperation or complicity with

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<sup>284</sup> E.g., Amnesty International Report 2016/17, Yemen 2016/2017, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/yemen/report-yemen/>; U.N. Experts Warn Saudi-Led Coalition Allies Over War Crimes in Yemen, REUTERS, Jan. 29, 2017, <http://www.reuters.com/article/us-yemen-security-un-idUSKBN15D0SB>; Mark Mazzetti & Shuaib Almosawa, *Support for Saudi Arabia Gives U.S. Direct Role in Yemen Conflict*, N.Y. TIMES, Aug. 24, 2016; Mark Mazzetti & Eric Schmitt, *Quiet Support for Saudis Entangles U.S. in Yemen*, N.Y. TIMES, March 13, 2016 <https://www.nytimes.com/2016/03/14/world/middleeast/yemen-saudi-us.html>.

<sup>285</sup> Ned Parker, *The Iraq We Left Behind: Welcome to the World's Next Failed State*, 91 FOR. AFF. 94, 96-98 (March/April 2012); Renad Mansour, *The Sunni Predicament in Iraq* (Carnegie Middle East Center, March 2016), at 6-9, [http://carnegieendowment.org/files/CMEC\\_59\\_Mansour\\_Sunni\\_Final.pdf](http://carnegieendowment.org/files/CMEC_59_Mansour_Sunni_Final.pdf)

paramilitary forces boosted the latter, and provided Colombian elites and multinational corporations with a brutal resource in contests with land activists and union organizers.<sup>286</sup>

The impact of U.S. policy options may often be relatively subtle, but no less real. Paraguay provides an instructive example of this impact in the context of two different wars on terrorism. A close examination is especially appropriate to an appraisal of the current fate of the *Filártiga* revolution. The first war on terrorism had its roots in the coup against the Allende government in Chile on September 11, 1973. As John Dinges observes, the coup was “not just another military takeover,” but the “beginning of a total war justified as a ‘war on terrorism,’” whose “larger goal quickly became the eradication of all traces of political movements akin to Allende’s—in all of Latin America.”<sup>287</sup> Ultimately Operation Condor—an alliance of like-minded Latin American military governments operating with at least tacit support from the

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<sup>286</sup> See William Avilés, *Institutions, Military Policy, and Human Rights in Colombia*, 28 *LAT. AM. PERSP.* 31, 37-44 (2001); see *id.* at 40 (“[I]nternational actors such as the United States and transnational interests have helped to strengthen the repressive actors within civil society and the state.”); Daniel Kovalik, *War and Human Rights Abuses: Colombia & the Corporate Support for Anti-Union Suppression*, 2 *SEATTLE J. FOR SOCIAL JUSTICE* 393 (2004).

<sup>287</sup> JOHN DINGES, *THE CONDOR YEARS: HOW PINOCHET AND HIS ALLIES BROUGHT TERRORISM TO THREE CONTINENTS* 3 (2004).

United States—extended its ambitions globally, with operations and planned operations in the United States and Europe. Paraguay's participation in Operation Condor forms a crucial context to the torture and murder of Joelito Filártiga. When *Filártiga* was decided, moreover, Paraguay was becoming a focus of criticism by the Carter administration for its human rights violations. The case played a role in heightening awareness of U.S. support for the Stroessner regime. A close look at the context of the *Filártiga* case shows how unrealistic it is to depict it as a case about distant foreign wrongs.

The second war on terrorism began after the terrorist attacks of September 11, 2001, with President Bush proclaiming a “war on terror” that would “not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>288</sup> This war on terror, so different in its genesis and aims from the first, shared one characteristic with the earlier one: its global reach and pervasive impact, blurring the distinctions between domestic and foreign. Perhaps surprisingly, a closer look at Paraguay is instructive here as well. Paraguay today has a functional electoral democracy, and, while its record is far from perfect, it is not typically cast as a major human rights violator. Its interest for the U.S.

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<sup>288</sup> *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 1140, 1141 (2001).



now lies rather in the direct terrorist threat that the Tri-Border region, partly in Paraguay, is said to pose to the U.S. In some ways, this transformation parallels the larger shift in vision described here, from the vindication of human rights in a global order to a focus on the protection of U.S. citizens and soil from terrorist attack. But the construction of the Tri-Border area as a terrorist threat permeates seemingly local struggles and human rights violations there.

#### 1. PARAGUAY AND FILÁRTIGA

It is common, even in otherwise thoughtful treatments of the ATS, to see the *Filártiga* case described as one of “foreign cubed” cases that *Kiobel* casts into doubt: foreign plaintiffs brought claims against a foreign defendant for violations that occurred in foreign territory. As Ernst Young summarizes the facts,

[i]n 1976, a Paraguayan police officer named Américo Norberto Peña-Irala tortured Joelito to death [in Paraguay] in retaliation for his father’s political activities. . . . All relevant actors were foreign nationals: Joelito Filártiga, the torture victim; his father and sister, who brought the lawsuit as plaintiffs; and Peña-Irala, the defendant. The events in question –Filártiga’s torture at the hand of Paraguayan security personnel in retaliation for his family’s political opposition to the government–

occurred in Paraguay without any significant effect in the United States.<sup>289</sup>

Missing from this desiccated version, which is entirely typical,<sup>290</sup> is the context of Joelito's torture and execution. His arrest came in the context of Operation Condor, a coordinated, cross-border program of extreme political repression undertaken by right-wing dictatorships.<sup>291</sup> These

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<sup>289</sup> Young, *supra* note 15, at 1048-1049. Depending on how one reads *Kiobel*, *Filártiga* itself might survive today because the parties resided in the U.S. at the time of the action—a fact that played no role in the Second Circuit's determination of subject matter jurisdiction. As noted earlier, however, *Filártiga*'s survival is by no means assured. See note 91 *supra*.

<sup>290</sup> E.g., STEPHENS, *supra* note 18, at 8-9; Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AMER. J. INT'L L. 835, 836 (2013) ("two Paraguayan nationals . . . [brought] an ATS lawsuit against a former Paraguayan government official for committing torture in Paraguay"); *Filártiga v. Peña-Irala: Historic Case*, CENTER FOR CONSTITUTIONAL RIGHTS,

<https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala>.

(It was the Center for Constitutional Rights that brought the suit in *Filártiga*.) Works that describe the case in depth do of course note the context. See ACEVES, *supra* note 7, at 17-21; Harold Hongju Koh, *Filártiga v. Peña-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in INTERNATIONAL LAW STORIES 45, 46 (John E. Noyes et al., eds. 2007) (noting that the arrest came amidst Operation Condor). My point relates to common references to the case in analyses of its significance for ATS litigation.

<sup>291</sup> The best accounts are DINGES, *supra* note 287, and J. PATRICE MCSHERRY, PREDATORY STATES: OPERATION CONDOR AND COVERT WAR IN

included Argentina, Bolivia, Brazil, Chile, Uruguay—and Paraguay.<sup>292</sup> The full story of U.S. involvement in Operation Condor is not known,<sup>293</sup> but the U.S. was clearly aware of its existence and operations<sup>294</sup> and provided assistance to the Latin American “counter-intelligence” agencies that cooperated across borders as part of Operation Condor.<sup>295</sup>

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LATIN AMERICA 7-10 (2005) [hereinafter “MCSHERRY, PREDATORY STATES”], succinctly lays out its main features. See also J. Patrice McSherry, *Operation Condor as a Hemispheric “Counterterror” Organization*, in CECILIA MENJÍVA & NÉSTOR RODRÍGUEZ, EDS., *WHEN STATES KILL: LATIN AMERICA, THE U.S., AND TECHNOLOGIES OF TERROR* 28, 50 (2005) [hereinafter “McSherry, *Operation Condor*”].

<sup>292</sup> There is a particularly rich source of information in Paraguay’s “Archive of Terror” uncovered in 1992 and 1993. See DINGES, *supra* note 287, at 237-241; Katie Zoglin, *Paraguay’s Archive of Terror: International Cooperation and Operation Condor*, 32 U. MIAMI INT.-AM L. REV. 57, 61-62 (2001); Keith M. Slack, *OPERATION CONDOR AND HUMAN RIGHTS: A REPORT FROM PARAGUAY’S ARCHIVE OF TERROR*, 18 HUM. RTS. Q. 492 (1996). See also Simon Watts, *How Paraguay’s “Archive of Terror” Put Operation Condor in Focus*, BBC MAGAZINE, (Dec. 22, 2012), <http://www.bbc.com/news/magazine-20774985>.

<sup>293</sup> E.g., Barbara Zanchetta, *Between Cold War Imperatives and State-Sponsored Terrorism: The United States and Operation “Condor”*, 39 STUDIES IN CONFLICT & TERRORISM 1084, 1093-1097 (2016), <http://dx.doi.org/10.1080/1057610X.2016.1159069>.

<sup>294</sup> For an assessment of U.S. involvement, see MCSHERRY, PREDATORY STATES, *supra* note 291, at 116-22, 247-54.

<sup>295</sup> See DINGES, *supra* note 287, at 247-53. As Dinges notes, the U.S. drew back from its support when Operation Condor, in “Phase Three,” sought

Two examples make clear the deep connections of Operation Condor to the U.S. The first is U.S. participation in the seizure in 1975 by Paraguayan police of the Chilean militant and radical sociologist Jorge Isaac Fuentes Alarcón soon after he entered Paraguay from Argentina.<sup>296</sup> It was the cooperation of Paraguayan and Chilean intelligence officials in the torture of Fuentes and his fellow revolutionary Amílcar Santucho that provided the model for Operation Condor, formalized within the year.<sup>297</sup> And it was an FBI agent who notified Chilean police about the arrest in Paraguay, after which Fuentes and Santucho were transferred to Chile, where they were further tortured for information.<sup>298</sup> Fuentes' address book included three U.S. residents, one of whom was his sister; the FBI subsequently

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to extend its assassinations outside Latin America to the U.S. and Europe. *Id.* at 164-74, 249-251.

<sup>296</sup> *Id.* at 82-98, 116-25; McSherry, *Operation Condor*, *supra* note 291, at 47. See also Report of the Chilean National Commission on Truth and Reconciliation 803-804 (1991), [http://www.usip.org/sites/default/files/resources/collections/truth\\_commissions/Chile90-Report/Chile90-Report.pdf](http://www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf).

<sup>297</sup> DINGES, *supra* note 287, at 89-90. For details of his subsequent torture, see *id.* at 96-97, 109-10; STELLA CALLONI, OPERACIÓN CONDOR, PACTO CRIMINAL 266-69 (2016), [http://www.elperroylarana.gob.ve/wp-content/uploads/2016/12/operacion\\_condor\\_pacto\\_criminal.pdf](http://www.elperroylarana.gob.ve/wp-content/uploads/2016/12/operacion_condor_pacto_criminal.pdf).

<sup>298</sup> DINGES, *supra* note 287, at 90-92.

interrogated her in Texas (without divulging her brother's arrest and torture).<sup>299</sup>

The second example relates to Operation Condor's activities with respect to the United States. The most striking is the Letelier assassination.<sup>300</sup> It is certainly correct to portray that act as one directly implicating the United States' own territorial interest; Letelier was assassinated by Chilean agents on U.S. soil. But it is wrong to view this territorial connection as placing the case as in some entirely different category from *Filártiga*. Even if Letelier had been assassinated in France—the Pinochet regime planned assassinations of refugees there as well<sup>301</sup>—his killing would have had a real and substantial connection to U.S. activities. The assassination of Letelier was another Operation Condor activity, and indeed the lead assassin Michael Townley (a U.S. citizen raised in Chile) initially aimed to enter the U.S. on a false Paraguayan passport with the help of the Stroessner regime.<sup>302</sup> Moreover, there is strong evidence that the U.S. sought to keep that connection, and Pinochet's own involvement in the murder, a secret even as it prosecuted the

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<sup>299</sup> *Id.* at 92-93.

<sup>300</sup> See text accompanying *supra* note 53.

<sup>301</sup> MCSHERRY, PREDATORY STATES, *supra* note 291, at 141.

<sup>302</sup> *Id.* at 153-54; see *id.* at 152-63. Dinges also has a thorough account. See DINGES, *supra* note 287, at 214-29.

killers.<sup>303</sup> Another example, less well known but equally striking, is the Operation Condor threat to assassinate then-Congressman Edward Koch for his opposition to U.S. aid to Southern Cone countries with poor human rights records.<sup>304</sup>

There is no evidence of any direct U.S. involvement in the torture and murder of Joelito Filártiga. But his death in 1976 came at the end of a long period of U.S. support for and deep involvement in the regime of Paraguayan dictator Alfredo Stroessner.<sup>305</sup> The U.S. provided substantial military

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<sup>303</sup> MCSHERRY, *PREDATORY STATES*, *supra* note 291, at 152-63.

<sup>304</sup> See DINGES, *supra* note 287, at 214-29.

<sup>305</sup> Frank O. Mora, *The Forgotten Relationship: United States-Paraguay Relations, 1937-89*, 33 J. CONTEMP. HIST. 451, 457-66 (1998) [hereinafter "Mora, *Forgotten Relationship*"]. See also FRANK O. MORA AND JERRY W. COONEY, *PARAGUAY AND THE UNITED STATES: DISTANT ALLIES* 198 (2007) [hereinafter "MORA AND COONEY, *DISTANT ALLIES*"]:

Between 1954 and 1977 U.S. policy actively served the [Stroessner] regime's interests. In addition to the internal power structure created by the regime during a span of more than two decades (support from the military, Colorado Party, business circles, and, until the 1970s, peasantry), another pillar of the regime that sustained it during this period was the firm and continuous political and economic support provided by five successive U.S. administrations.

In the 1970s the Nixon administration did press the Stroessner regime on its complicity in drug trafficking, and pushed successfully for the extradition to the U.S. of a major drug trafficker under Paraguay's protection. Mora, *Forgotten Relationship*, *supra*, at 464-66. But as Mora points out, once the extradition was granted, the U.S. returned to its

aid, trade benefits, and intelligence assistance to the regime, the last of which helped it weaken the opposition.<sup>306</sup> Joelito's father, Joel Filártiga Ferreira, was a prominent opponent, and that was what cost Joelito his life.<sup>307</sup> When former Police Inspector General Peña-Irala was arrested in Brooklyn in 1979, dissident groups in Paraguay alleged that he was a member of a police death squad that targeted opponents of the Stroessner regime.<sup>308</sup>

By the time of the complaint in the *Filártiga* case was filed, Paraguay's dictator Alfredo Stroessner was falling out of favor with the United States, a target of the Carter Administration's focus on human rights.<sup>309</sup> The *Filártiga* case

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policy of strong support for the regime. *Id.* at 466. See also MORA AND COONEY, *DISTANT ALLIES*, *supra*, at 186-92.

<sup>306</sup> See MORA AND COONEY, *DISTANT ALLIES*, *supra* note 305, at 133-181; Mora, *Forgotten Relationship*, *supra* note 305, at 463.

<sup>307</sup> ACEVES, *supra* note 7, at 17-19; MORA AND COONEY, *DISTANT ALLIES*, *supra* note 305, at 197.

<sup>308</sup> Selwyn Raab, *Paraguay Alien Tied to Murders in Native Land*, N.Y. TIMES, April 5, 1979, <http://query.nytimes.com/mem/archive-free/pdf?res=9E0CE4DF1F39E732A25756C0A9629C946890D6CF>.

<sup>309</sup> See MORA AND COONEY, *DISTANT ALLIES*, *supra* note 305, at 193-230; Mora, *Forgotten Relationship*, *supra* note 305, at 466-467. The advent of the Reagan Administration saw an easing of U.S. pressures over human rights in Paraguay, but not a complete cessation, in part because of the Stroessner regime's involvement in the drug trade, and in part because of "the need of the Reagan administration to criticize and pressure

helped draw attention to human rights violations in Paraguay and U.S. support for Stroessner, and the U.S. Embassy provided assistance to the Filártiga family as it sought justice in Paraguay.<sup>310</sup>

In short, the representation of the *Filártiga* case as somehow entirely foreign to the U.S., ending up in U.S. courts only because of the happenstance that the parties were present in Brooklyn at the time of the lawsuit, is fundamentally misleading. It is equally unsatisfactory to point to *Filártiga* as the kind of case that perhaps should survive *Kiobel* on the ground that the U.S. has an important interest in not becoming a haven for foreign human rights violators. While that is correct, it ignores the interest that U.S. citizens have in learning about their own government's support for regimes that violate human rights violations abroad—especially, as was the case with U.S. support for Operation Condor, in secrecy.

My point is not that every case casually denominated “foreign cubed” must have some direct underlying U.S. connection. But given the United States' extensive global involvement, that may often be the case, and many ATS suits are likely to cast light on some aspect of U.S. conduct

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authoritarian regimes like Paraguay and Chile so as to legitimize its anti-leftist policy in Central America.” *Id.* at 469. *See also id.* at 469-73.

<sup>310</sup> *See* MORA AND COONEY, *DISTANT ALLIES*, *supra* note 305, at 197.



relating to human rights. Consider *Doe v. Saravia*, concerning a Salvadoran paramilitary group's assassination of Archbishop Oscar Romero.<sup>311</sup> The assassination was ordered by Roberto D'Aubisson, a Salvadoran military officer with close ties to the U.S., including training at the U.S. Army School of the Americas. There is no evidence of direct U.S. involvement in the assassination, but lawsuits in the U.S. relating to it help bring to light the U.S. role in supporting the Salvadoran military during a period of brutal repression. As McSherry demonstrates, moreover, the Romero assassination appears to have been the product of an Operation Condor-style system in Central America, established with the aid of Argentinian officers and U.S. intelligence.<sup>312</sup>

## 2. PARAGUAY, THE TRI-BORDER AREA, AND TERRORISM

Terrorism—the particular focus of the nationalist vision—reinforces a blurring of the domestic and the international in the United States' activities. It is commonplace to remark that measures taken after 9/11 to prevent further terrorist attacks carry with them the risk of imposing their own profound distortions on domestic U.S. politics, through excessive government secrecy, suppression of speech, and invasions of privacy, as well as through racial profiling and

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<sup>311</sup> *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

<sup>312</sup> MCSHERRY, PREDATORY STATES, *supra* note 291, at 226.

demonization of immigrants. Whatever the proper balance between security and freedom may be, in the U.S. it is at least a matter for domestic politics and democratic resolution.

Paraguay again provides an instructive example of this blurring of domestic and foreign, though in a very different way from a quarter century ago. It now has an elected government, though the prior president, Fernando Lugo—the first President in six decades not from Stroessner’s Colorado Party—was removed from office in 2012 through a questionable use of impeachment.<sup>313</sup> While it has real

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<sup>313</sup> On Lugo’s election, see Diego Abente-Brun, *Paraguay: The Unraveling of One-Party Rule*, 20 J. DEMOC. 143 (2009). On his impeachment, see Inter-American Commission on Human Rights, *IACHR Expresses Concern Over Ousting of the Paraguayan President*, June 23, 2012 (Press Release 072), [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/072.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/072.asp). For analyses, see Rebecca Szucs, *A Democracy’s “Poor Performance”: The Impeachment of Paraguayan President Fernando Lugo*, 46 GEO. WASH. INT’L L. REV. 409, 432-35 (2014) (calling for reform of constitution to provide more specific grounds for impeachment); but see Thor Halvorssen, *Paraguay Is Not Honduras: President Lugo’s Impeachment Was Not a Coup*, Forbes.com, July 3, 2012, <http://www.forbes.com/sites/thorhalvorssen/2012/07/03/paraguay-is-not-honduras/#25c5cfe02228> (arguing that broad legislative power to impeach is legitimate in light of long history of Stroessner dictatorship). For useful analyses of the land distribution and ethnic context of Lugo’s impeachment, see Gregg Hetherington, *Paraguay’s Ongoing Struggle over Land and Democracy*, 45(3) NACLA REPORT ON THE AMERICAS, (Fall 2012)

problems with corruption, systemic discrimination of campesinos, violence against women and denial of abortion rights,<sup>314</sup> its human rights situation is nowhere as dire as it was in the Stroessner era, and attracts little attention from the U.S.

Since the attacks of 9/11, particularly in national security circles, Paraguay has been the focus of attention for something else besides its human rights record: terrorism. This development exemplifies the way in which U.S. anti-terrorist actions may exercise a profound influence on social, political, and economic struggles in seemingly distant lands.

The Paraguayan Ciudad del Este, along with Foz do Iguacu, Brazil, and Puerto Iguazú, Argentina, make up the Tri-Border area or *Triple Frontera*. The area was long known for its cross-border trade, organized crime, drug trafficking and smuggling, and its significant population of Arabs and

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at 8; Federico Fuentes, *Paraguay: Coup at Heart of Struggle over Latin America*, GREEN LEFT WEEKLY, July 14, 2012, <https://www.greenleft.org.au/content/paraguay-coup-heart-struggle-over-latin-america>.

<sup>314</sup> AMNESTY INTERNATIONAL REPORT 2015/16: THE STATE OF THE WORLD'S HUMAN RIGHTS 289-291 (2016); Hetherington, *supra* note 313; Scott W. Downs, *25 Years of Kleptocracy in Paraguay: Endemic Corruption Perpetuates Poverty*, COUNCIL ON HEMISPHERIC AFFAIRS, Aug. 22, 2014, <http://www.coha.org/25-years-of-kleptocracy-in-paraguay-endemic-corruption-perpetuates-poverty/>.

others of Middle Eastern origin.<sup>315</sup> Soon after 9/11, the U.S. identified the Tri-Border area as a significant potential

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<sup>315</sup> ARTHUR BERNARDES DO AMARAL, *A TRÍPLICE FRONTEIRA E A GUERRA AO TERROR* 206-07 (2010); Benjamin Dangi and April Howard, *City of Terror: Paraguay's 'Casbah' as Terror Central*, EXTRA!, (Sept./Oct. 2007), <http://www.fair.org/index.php?page=3197>. For useful descriptions of the region's cross-border trade, see Carmen Alicia Ferradás, *Environment, Security, and Terrorism in the Trinational Frontier of the Southern Cone*, 11 IDENTITIES: GLOBAL STUDIES IN CULTURE AND POWER 417, 420-26 (2004); Jude Webber, *Ciudad del Este's Deadly Trade Route*, FINANCIAL TIMES, March 13, 2010, <https://www.ft.com/content/dd80bec8-2be5-11df-8033-00144feabdc0>. For an illuminating analysis of the region's Middle Eastern population, the media's construction of the area as source of terrorist threat, and the response of the local population, see John Tofik Karam, *Atravesando las Américas: La "Guerra contra el Terror," los Árabes y las Movilizaciones Transfronterizas en Foz do Iguaçu y Ciudad del Este*, in VERÓNICA GIMÉNEZ BÉLIVEAU & SILVIA MONTENEGRO, EDS., *LA TRIPLE FRONTERA: DINÁMICAS CULTURALES Y PROCESOS TRANSNACIONALES* 119 (2010). See also Damián Setton, *La Construcción de la Triple Frontera a Través de los Encuentros Sociales de la Alter-Globalización*, in BÉLIVEAU & MONTENEGRO, *supra*, at 75, 77 (noting that in the construction of the Tri-Border area as part of the war on terror and "clash of civilizations," the presence of an Arab population is sufficient to establish the existence of terrorist cells) ("Desde este óptica, la prueba de la existencia de células terroristas es la misma comunidad árabe que habita la zona."). For an example of the wilder claims about the Tri-Border area, see Gregory Shapiro, *Terror Reigns Supreme and the Cycle of Violence Is Seemingly Endless in the Triple Frontier*, 19 N.Y.L. SCH. J. HUM. RTS 895, 896-97 (2003) (asserting connection based on fact that there are immigrants from Middle Eastern countries "where the Palestinian terrorists organized and emerged about fifty years ago).

terrorist threat.<sup>316</sup> No longer seen as remote, it was reconceived as a direct threat to U.S. security.<sup>317</sup> The result has been a pressure to “securitize” the Tri-Border area.

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<sup>316</sup> Among the best critical analyses of the construction of the Tri-Border area as a situs of potential terrorist threats are BERNARDES DO AMARAL, *supra* note 315, at 40-41, 183-233, and SILVIA MONTENEGRO & VERÓNICA GIMÉNEZ BÉLIVEAU, *LA TRIPLE FRONTERA: GLOBALIZACIÓN Y CONSTRUCCIÓN SOCIAL DEL ESPACIO* 67-132 (2006). For an account of the different ways that Brazilians and Paraguayans view the challenges facing the region, see Verónica Giménez Béliveau, *La “Triple Frontera” y Sus Representaciones: Políticos y Funcionarios Peinsan la Frontera*, *FRONTERA NORTE*, 23(46), Dec. 2011, at 7. For examples of the national security literature, see William W. Mendel, *Paraguay’s Ciudad del Este and the New Centers of Gravity*, *MILITARY REVIEW* (March-April 2002), at 51; Philip K. Abbott, *Terrorist Threat in The Tri-Border area: Myth or Reality?*, *MILITARY REVIEW* (Sept.-Oct. 2004), at 51; Matthew Levitt, *South of the Border, A Threat from Hezbollah*, *J. INT’L SECURITY AFF.* 77 (Spring 2013); Alma Keshavarz, *Iran and Hezbollah in the Tri-Border areas of Latin America: A Look at the “Old TBA” and the “New TBA,”* *SMALL WARS JOURNAL*, Nov. 12, 2015, <http://smallwarsjournal.com/jrnl/art/iran-and-hezbollah-in-the-tri-border-areas-of-latin-america-a-look-at-the-%E2%80%9Ccold-tba%E2%80%9D-and-the> ; JOSHUA L. GLEIS AND BENEDETTA BERTI, *HEZBOLLAH AND HAMAS: A COMPARATIVE STUDY* 71-75 (2012). For a useful summation of the national security literature – one that played a key role in promoting the popular perception of the Tri-Border area as a source of terrorist threat to the U.S. – see Library of Congress, *Terrorist and Organized Crime Groups in the Tri-Border area (TBA) of South America* (Report Prepared by the Federal Research Division, Library of Congress, under an Interagency Agreement with the Crime and Narcotics Center, Director of Central Intelligence) (July 2003; rev. Dec. 2010). On the role

This re-conception depended crucially on the notion that “terrorism and organized crime are intrinsically connected,”<sup>318</sup> and on a doubtful conflation of sympathy among some of the area’s Middle Eastern population for Hezbollah or other similar organizations with the provision of financial or operational support for terrorist acts.<sup>319</sup> The more lurid versions labelled the Tri-Border area as the “Western base” of Hezbollah<sup>320</sup> and recounted possible

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played by the Library of Congress report, see Dangl & Howard, *supra* note 315.

<sup>317</sup> BERNARDES DO AMARAL, *supra* note 315, at 191 (“[O]s discursos de securitização da Tríplice Fronteira passariam pelo representação da área não mais como uma zona remota, mais sim como ameaça direta, emobora pouco conhecida, à segurança dos Estados Unidos.”). Cf. BARRY POSEN, *RESTRAINT: A NEW FOUNDATION FOR U.S. GRAND STRATEGY* 173 (2014) (“The U.S. presence across the world has been such a stable feature, for such a long time, that danger anywhere can seem like a threat.”).

<sup>318</sup> Ana R. Sverdlick, *Terrorists and Organized Crime Entrepreneurs in the “Triple Frontier” Among Argentina, Brazil, and Paraguay*, 9 *TRENDS IN ORGANIZED CRIME* 84 (2005).

<sup>319</sup> International Institute for Counter-Terrorism, *Assessing the Terrorist Threat in the Tri-Border area of Brazil, Paraguay and Argentina*, at 15, 50 (Oct. 2013), <http://i-hls.com/wp-content/uploads/2014/01/Assessing-the-Terrorist-Threat-in-the-Tri-Border-Area.pdf> [hereafter “Assessing the Terrorist Threat”].

<sup>320</sup> Pablo Gato and Robert Windrem, *Hezbollah Builds a Western Base*, NBC NEWS.COM, 5/9/2007, [http://www.nbcnews.com/id/17874369/ns/world\\_news-](http://www.nbcnews.com/id/17874369/ns/world_news-)

meetings of Hezbollah and al Qaeda representatives in Ciudad del Este.<sup>321</sup>

In 2002, long-standing collaboration among Brazil, Argentina and Paraguay over issues related to smuggling, money laundering, and the like in the Tri-Border area was formalized into a "3+1 Group on Triborder Area Security," with U.S. participation; one of the aims was to "thwart . . . potential terrorist fundraising activities."<sup>322</sup> In its 2005

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[americas/t/hezbollah-builds-western-base/](#). See also Jeffrey Goldberg, *In the Party of God: Hezbollah Sets Up Operations in South America and the United States*, THE NEW YORKER, Oct. 28, 2002; Trish Regan and Andrew Fisher, *In Paraguay, Piracy Bleeds U.S., Aids Terrorists*, CNBC.com, Oct. 4, 2007, <http://www.cnbc.com/id/21082897>.

<sup>321</sup> Mike Boettcher, *South America's 'Tri-Border' Back on Terrorism Radar*, CNN.com, Nov. 8, 2002, <http://www.cnn.com/2002/WORLD/americas/11/07/terror.triborder/>. Nathaniel Greenberg, *War in Pieces: AMIA and the Triple Frontier in Argentine and American Discourse on Terrorism*, 8 A CONTRACORRIENTE: A JOURNAL ON SOCIAL HISTORY AND LITERATURE IN LATIN AMERICA 61, 79 (2010), [https://www.ncsu.edu/acontracorriente/fall\\_10/articles/Greenberg.pdf](https://www.ncsu.edu/acontracorriente/fall_10/articles/Greenberg.pdf) f, has a useful analysis of the way that "fascinated American journalists . . . have constructed for their reading public a virtual Hobbesian realm of transcendent infamy in La Ciudad del Este."

<sup>322</sup> UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM 2005, at 157 (2006), <https://www.state.gov/documents/organization/65462.pdf> [hereafter "2005 TERRORISM REPORT"].

Country Report on Terrorism, the U.S. expressed concern that Hezbollah and Hamas might be raising funds in the Tri-Border area, though it acknowledged that there was “no corroborated information” of any operational presence by terrorist groups there.<sup>323</sup> U.S. troops were sent to Paraguay for 18 months of military training exercises in 2005 to help counter the alleged terrorist threat emanating from the Tri-Border area.<sup>324</sup> U.S. military assistance to Paraguay spiked after 9/11, (peaking in 2010 and decreasing since then), but has continued.<sup>325</sup> Though it periodically denied the existence of a terrorist presence in the region, and expressed concern about the detrimental effect of characterizing the region as a terrorist threat,<sup>326</sup> Paraguay saw in the emphasis on

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<sup>323</sup> 2005 TERRORISM REPORT, *supra* note 322, at 157.

<sup>324</sup> Benjamin Dangl, *The US Military Descends on Paraguay*, THE NATION, July 12, 2006, <https://www.thenation.com/article/us-military-descends-paraguay/>; Kelly Hearn, *U.S. Military Presence in Paraguay Irks Neighbors*, CHRISTIAN SCIENCE MONITOR, Dec. 2, 2005, <http://www.csmonitor.com/2005/1202/p25s02-woam.html>. See also COHA Backgrounder on U.S. Paraguay Relations: *Why Paraguay Matters*, Aug. 17, 2007, <http://www.coha.org/coha-backgrounder-on-us-paraguay-relations-why-paraguay-matters/>; Library of Congress, Country Profile: Paraguay (Oct. 2005) at 19, <https://www.loc.gov/rr/frd/cs/profiles/Paraguay-new.pdf>.

<sup>325</sup> U.S. Military Assistance in Historical Dollars: Paraguay, Quandl.com, Dec. 3, 2016,

[https://www.quandl.com/data/USAID/MILHISTT\\_PARAGUAY](https://www.quandl.com/data/USAID/MILHISTT_PARAGUAY).

<sup>326</sup> E.g., DO AMARAL, *supra* note 315, at 192, 229-30, 233-36. See also *No Se Ha Detectado Evidencia de Terrorismo Operativo en la Región*, ABC COLOR,



terrorism an opportunity to position itself as a major regional ally of the U.S.<sup>327</sup>

The effect was to reconceive the Tri-Border area as another point in an international terrorist network threatening the U.S., as dangerous to it as Afghanistan or Pakistan.<sup>328</sup> When U.S. troops came to Paraguay in 2005, the Paraguayan government, at that time still under the decades-long rule of Stroessner's Colorado Party, accused campesino organizations agitating for land redistribution of ties to terrorism, giving rise to fears of a crackdown on opposition

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(Jan. 10, 2008) <http://www.abc.com.py/edicion-impresa/locales/no-se-ha-detectado-evidencia-de-terrorismo-operativo-en-la-region-1036850.html> (reports by Brazil, Argentina, and Paraguay that there is no reliable evidence of terrorism in the Tri-Border area). *But see Assessing the Terrorist Threat*, *supra* note 319, at 51 (arguing that the public denials by the three countries of any terrorist presence in the Tri-Border area "is nuanced by the concern expressed by the security forces and their engagement in counterterrorism operations, sometimes in collaboration with international actors").

<sup>327</sup> *E.g.*, BERNARDES DO AMARAL, *supra* note 315, at 252. *See also id.* at 256 (noting that Argentina was the most, and Brazil, the least, receptive to the portrayal of the Tri-Border area as a terrorist threat, with Paraguay falling in between); Christine Folch, *Trouble on the Triple Frontier: The Lawless Border Where Argentina, Brazil, and Paraguay Meet*, FOREIGN AFFAIRS, (Sept. 6, 2002)

<https://www.foreignaffairs.com/articles/argentina/2012-09-06/trouble-triple-frontier>.

<sup>328</sup> MONTENEGRO & GIMÉNEZ BÉLIVEAU, *supra* note 316, at 235.

with U.S. support.<sup>329</sup> As have Argentina and Brazil, to varying extents, Paraguay has enacted counter-terrorism laws in recent years and increased its surveillance of the area.<sup>330</sup>

The securitization of the Tri-Border area has had a significant impact on regional political struggles there. Local conflicts over natural resources in the area regularly feature accusations that U.S. attention to potential terrorism there masks an interest in controlling the Guaraní Aquifer, one of the world's largest sources of fresh water.<sup>331</sup> Land ownership, heavily concentrated, is a source of contest, with peasant activism over what are alleged to be illegal grants of state land to wealthy supporters of the former Stroessner regime. The price of activism can be high. In 2014, for example, a leading land activist, Eusebio Torres, was murdered in 2014—possibly with the complicity of security forces—after receiving death threats for his work.<sup>332</sup> Further,

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<sup>329</sup> Dangl, *supra* note 324.

<sup>330</sup> *Assessing the Terrorist Threat*, *supra* note 319, at 45-50.

<sup>331</sup> Ferradás, *supra* note 315, at 433-36; MONTENEGRO & GIMÉNEZ BÉLIVEAU, *supra* note 316, at 116-23, 211-22. *See id.* at 220 (noting concern of activists that “se propone ahora instalar en las sociedades el miedo a la presencia de terroristas en la frontera tripartite entre Argentina, Brasil y Paraguay con el objetivo de controlar recursos aún más escasos y necesarios en el future: el agua y la biodiversidad”).

<sup>332</sup> UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014, Paraguay,

peasants forced off the land by a soy production boom dominated by multinationals and Paraguay's landowning elite, and already operating at the margins of the economy, find themselves ever more effectively excluded from poaching on the Green Corridor currently being created in the area; heightened security in response to the alleged terrorist threat makes entry into environmental reserves even more difficult. A new enclosure of land takes shape, one that puts blame on the poor for practices harmful to the environment "without examining the economic inequalities that often force them into certain practices."<sup>333</sup> Similarly, the

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<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dliid=236708>; Julia Varela, *Paraguay: Soja y Sicarios detrás del Crimen de un Dirigente Campesino*, COSECHA ROJA, March 20, 2014, <http://cosecharoja.org/paraguay-soja-y-sicarios-detras-del-crimen-de-un-dirigente-campesino/>. Torres was active in Alto Paraná, the capital of which is Ciudad del Este. *Id.* Human rights organizations in Paraguay reported that "between 1989 and 2013, landowners were responsible, with the complicity of local authorities and security forces, for the deaths of 115 peasant leaders and land reform activists." COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2014, *supra*. See also UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2015, Paraguay, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dliid=253033>.

<sup>333</sup> Ferradás, *supra* note 315, at 429; *id.* at 430; see *id.* at 432-33 ("most peasants and small farmers today are excluded from the Green Corridor plans and are in fact constructed as posing major threats to the

region's long-standing cross-border smuggling and illicit trade becomes even more difficult with greater government scrutiny, motivated by concerns about terrorism, of all movements across national borders in the Tri-Border area.<sup>334</sup> In short, the U.S. designation of the area as a source of terrorist threat is a significant factor (though far from the only one) in shaping the political space in the Tri-Border area.<sup>335</sup>

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sustainability of the forests"); Jeremy Hobbs, *Paraguay's Destructive Soy Boom*, N.Y. TIMES, July 2, 2012, <http://www.nytimes.com/2012/07/03/opinion/paraguays-destructive-soy-boom.html>.

<sup>334</sup> Ferradás, *supra* note 315, at 431-433, 436-39. *See id.* at 438 ("Besides believing they are victims of a green market-friendly securitization [of areas previously open to peasants and indigenous peoples], many organizers also think that they are the true targets of recent forms of bilateral military securitization, which they perceive as imperialist attempts to seize resources and control civil protest."). The vision of the area as part of a Green Corridor serving environmental and tourism purposes is in some ways a return to an earlier construction of the region. *See* Carmen Ferradás, *How a Green Wilderness Became a Trade Wilderness; The Story of a Southern Cone Frontier*, POLAR, 21(2), Nov. 1998, at 11, 20.

<sup>335</sup> *See* MONTENEGRO & GIMÉNEZ BÉLIVEAU, *supra* note 316, at 238 (referring to extensive North American media coverage of the Tri-Border area as a hotbed of terrorism):

[L]a prensa norteamericana, a través de su insistente referencia a la TF [Triple Frontera] como objeto cerrado, la ha creado. Y los actores locales, aún no acordando con las definiciones de la prensa, no

Paraguay, then, exemplifies the falsity of the sharp division between national and foreign—as to both territory and citizens—that the nationalist vision assumes.<sup>336</sup> It strongly counsels against too easy assumptions about the “foreignness” of seemingly distant territory. If relatives of one of the many land activists murdered in or near the Tri-Border area were to bring an ATS suit against Paraguayan officials, it would be deeply unrealistic to view the lawsuit as yet another instance of a purely foreign matter somehow landing in U.S. courts. Greater realism about the many ways that U.S. policy can deeply affect foreign nationals reveals how unsupportable is the claim that that such lawsuits are not only “foreign,” but foreign many times over: foreign-cubed.

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pueden sino tomarlas como referencia a la hora de hablar de la región. A su vez, la representación de la TF, una vez instalada, aparece a los ojos de ciertos actores como un argumento que debe ser respondido: en este sentido, los medios de prensa norteamericanos han conseguido imponer su visión de la región.

<sup>336</sup> Of course, it is not only the United States’ global counter-terrorism efforts that have the potential to shape or constrain local disputes over land and other natural resources, such as water. U.S. support for the economic restructuring along the lines of the “Washington Consensus” can have a similar effect, for example. For a comprehensive analysis in the context of Bolivia, see BENJAMIN KOHL & LINDA FARTHING, *IMPASSE IN BOLIVIA: NEOLIBERAL HEGEMONY AND POPULAR RESISTANCE* (2006).

Finally, in addition to providing what may often be the only practical forum for seeking justice, ATS lawsuits may represent an instance of universal jurisdiction under international law. But giving concrete form to a legal order of universal human rights need not be seen as the sole (or even primary) systemic benefit they bring. Federal civil litigation to vindicate human rights can help put a spotlight on U.S. policies and actions that may be harmful to human rights elsewhere. This perspective on ATS actions may help avoid the tendency toward hegemony that the cosmopolitan vision too easily slips into.<sup>337</sup>

One might ask whether terrorism litigation could fulfill the same function as ATS litigation. That seems unlikely. Whatever human rights wrongs the U.S. may have committed, they do not include committing terrorist acts against U.S. nationals. The closest analogue might be the 9/11 lawsuits, which could be viewed as putting a spotlight

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<sup>337</sup> See *supra* Part V.A.2. In this regard, my approach differs from the thoughtful argument that Lewis advances against the growing trend in U.S. terrorism statutes to build upon a sharp contrast between what is foreign and what is domestic. Her concern is that the polarizing effect of “America-first” policies may well undermine U.S. soft power globally (as well as promote anti-immigrant sentiment within the U.S.). Lewis, *supra* note 127, at 679-83. My concern here, however, is with the way in which the sharp distinction can undercut domestic U.S. appreciation of the ill effects that U.S. policy can have on human rights abroad, by constructing those effects as taking place in distant lands.

on the United States' closeness to a major ally that (plaintiffs assert) bears responsibility for a terrorist attack here. That would be quite a revelation, but the ongoing battles in the courts and Congress seem fundamentally less about what the Saudis did than about what it takes to be legally responsible for terrorist actions.<sup>338</sup> It is claims by foreigners for wrongs committed against them abroad that have the potential to serve this spotlight function.

## VI. CONCLUSION

Congress's continuing legislative efforts to provide civil remedies to U.S. nationals injured by terrorism might seem unsurprising. The primary focus of any democratic government is the welfare of its citizens and the security of its territory. But the way in which Congress has done so serves all too well to cast foreignness as a source of threat. In terrorism litigation it is foreign states and foreign organizations that cause terrorism; and U.S. nationals who are injured. In this context, Congress's silence as the Supreme Court has dealt grievous blows to the ATS is just as unsurprising. Human rights violations committed against

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<sup>338</sup> The *Halberstam* standard commended by Congress in approving JASTA would likely dispense with any requirement of specific knowledge of such actions; the proposed amendment to JASTA offered by Senators McCain and Graham after its passage would make such knowledge indispensable. See *supra* note 239 and text accompanying *supra* note 220.

foreigners by foreign governments in foreign territory come to be seen as irrelevant to the welfare of the U.S., and concern grievances held by and against dangerous others.

As of now, it would seem, the nationalist vision has triumphed over the cosmopolitan one: The ambition of helping to build a global rule of law through the use of universal jurisdiction has been displaced by a determination to prioritize American interests and safety. It is a displacement that finds resonance in the ascension of a President who promises to put “America First” and protect its citizens from the “ravages” that foreign countries have inflicted on us.<sup>339</sup>

The labels “cosmopolitan” and “nationalist” may be misleading in one respect, however, because what I call the “nationalist” vision does not necessarily signify withdrawal from global affairs. Notably, President Trump promised that “[w]e, the citizens of America . . . will determine the course of America *and the world* for years to come.”<sup>340</sup> This is less a call for disengaging from foreign affairs than for calibrating

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<sup>339</sup> Inaugural Address, Jan. 20, 2017,

<https://www.whitehouse.gov/inaugural-address>. See Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016.

<sup>340</sup> Inaugural Address, *supra* note 339 (emphasis added).



U.S. foreign policy “with the understanding that it is the right of all nations to put their own interests first.”<sup>341</sup>

The weaponization of human rights litigation is one outgrowth of this nationalist perspective. Severing the connection between global justice and federal civil litigation over severe human rights abuses (including terrorism) makes it all too easy to turn that litigation into a weapon to be deployed selectively against foreign states. It should not occasion too much surprise when U.S. citizens, and possibly the integrity of the courts, become collateral damage in this deployment. When Congress legislates with the primary aim of showing displeasure with a long-time ally falling out of favor, or of asserting its primacy in foreign affairs against the executive branch, there is no particular reason to expect that the law will work in a way that is comprehensible to the victims of terrorism whom the law purportedly protects. Nor is there reason to have full confidence that Congress will resist the temptation to tell the courts how to decide particular cases.

JASTA fully exemplifies these features. Granted, it slips at times into precisely the kind of blurring of the distinction between national and foreign that, as I have argued, a more realistic view of the relation of ATS claims to the U.S. would

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<sup>341</sup> *Id.* See also Michael D. Shear and Jennifer Steinhauer, *Trump to Seek \$54 Billion Increase in Military Spending*, N.Y. TIMES, Feb. 27, 2017.

highlight. What, after all, is an act of international terrorism that occurs “*in the United States*” and yet is “primarily outside the territorial jurisdiction of the United States” or “transcends national boundaries”?<sup>342</sup> But for the most part its agenda is clear, even if its ultimate legal impact is not: A foreign state that (it is said) inflicted or helped to inflict terrible harm on U.S. citizens on U.S. soil must be made to pay, and must be pried away from presidents who treat it as an ally. Whatever one thinks about this agenda, it has no place for vindication of the wrongs inflicted by Saudi Arabia on citizens of other states, including Yemen, with U.S. support.

While Congress remains focused on terrorism legislation, the ATS is set to remain severely limited for the foreseeable future. It may not always be so. A long period of desuetude has been the fate of important provisions of the Constitution throughout history. The Fifteenth Amendment, for example, lay dormant from the end of Reconstruction to the enactment of the Voting Rights Act of 1965.<sup>343</sup>

The comparison is not extravagant. In view of its provenance, we might even regard the ATS as semi-constitutional. It is a part of the Judiciary Act of 1789, “the

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<sup>342</sup> See text accompanying *supra* notes 227-230.

<sup>343</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

last of the triad of founding documents, along with the Declaration of Independence and the Constitution itself," and "the genesis of our Nation's continuing constitutional revolution."<sup>344</sup> Like the Constitution, the ATS has spawned endless interpretations and even theories of interpretation. Original intent is one of the most commonly seen theories today in ATS scholarship, with a keen focus on what the First Congress, whose members included a number of the framers, had in mind.<sup>345</sup> But there is no reason why a proper interpretation of the text of the ATS could not take into account its current context, as with any statute. As protean in its language as the Constitution, and nearly as long-lived, the ATS may one day again find favor in the courts.

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<sup>344</sup> Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 CINN. L. REV. 1, 2 (1990). The statute was recodified several times with minor modifications. See Bradley, *supra* note 5, at 587 n.2.

<sup>345</sup> E.g., David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT'L L. 121 (2010) (proposing to limit ATS to violations of international criminal law); Bellia & Clark, *supra* note 89, at 1620-29 (First Congress intended to provide only for remedies against U.S. nationals for a broad range of wrongs). This form of interpretation goes somewhat against the current predominance of the textualist approach to statutory interpretation. On the framers and the First Congress, see David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 777 (1994).

Even if not extravagant, though, the comparison may be unwise. For all its messiness and flaws, Congress's engagement with civil suits for terrorism damages represents a legislature's efforts to accommodate the law to modern challenges. If it were so inclined, Congress could craft a more contemporary statute expressly aimed at providing a forum for vindication of human rights violations committed against foreigners elsewhere. Such a law might be valued in part for its role in increasing awareness not just of human rights violations elsewhere but of the ways that U.S. policy or actions may play a role, even if a very general one, in them.

But Congress is not so inclined. Instead, as the ATS atrophies, Congress moves with increasing boldness to facilitate suits by Americans against foreign states and other foreign entities and officials for terrorism. The politics of fear—the construction of the world as filled with dangerous others threatening the safety of ordinary Americans—proceeds apace.<sup>346</sup> To say that foreign human rights victims

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<sup>346</sup> See, e.g., Protecting the Nation from Foreign Terrorist Entry into the United States, Executive Order, § 11 (March 6, 2017) (providing for reporting on number of foreign nationals charged with terrorism-related offenses or providing material support to terrorism in the United States and on gender-based violence), <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>; Enhancing Public Safety in the Interior of the United States, Executive Order No. 13768, § 13 (Jan. 25, 2017)

are expelled from the courts even as American victims are invited in is an oversimplification, to say the least. But the different fates of ATS litigation and terrorism litigation over the past quarter century fully complement the politics of America First.

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<https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> (establishing an office within U.S. Immigrations and Customs Enforcement to “provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States” and aid victims); David Nakamura, *Trump Uses Speech Guest List to Send a Message on Immigration Enforcement*, WASH. POST, Feb. 28, 2017, [https://www.washingtonpost.com/politics/trump-uses-speech-guest-list-to-send-a-message-on-immigration-enforcement/2017/02/28/5ed67806-fdcf-11e6-99b4-9e613afeb09f\\_story.html](https://www.washingtonpost.com/politics/trump-uses-speech-guest-list-to-send-a-message-on-immigration-enforcement/2017/02/28/5ed67806-fdcf-11e6-99b4-9e613afeb09f_story.html) (“President Trump will feature family members of Americans killed by illegal immigrants during his speech Tuesday to a joint session of Congress, seeking to make an emotional appeal to build support for stronger border-control measures.”).