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Finding the Tort of Terrorism in International Law

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Beth Van Schaack
Associate Professor of Law
Santa Clara University School of Law

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Beth Van Schaack*

I. INTRODUCTION

The concept of terrorism is multidimensional. Terrorism is fundamentally a strategy employed by state and sub-state actors to achieve political, military, or ideological goals.[1] Its apparent pervasiveness is facilitated by the global proliferation of explosives, weapons (of minor and mass destruction), and know-how. Terrorism can precipitate, herald, and occur independently of a state of war. At times, terrorism appears to be an inevitable feature of situations of asymmetrical warfare, governmental repression, unwelcome occupation, and other putatively unjust international relations that spawn grievances and seething discontent among the populace. Regardless of its context, terrorism is a phenomenon with profound sociological implications. Terrorism also has pressing and divergent human rights dimensions, where innocent civilians are deliberately targeted with violence and counter-terrorism measures—including the use of domestic surveillance, the development of arbitrary and preventative detention regimes, the withholding of rights to habeas

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1. *See* Alex P. Schmid, *The Response Problem as a Definition Problem*, *in* WESTERN RESPONSES TO TERRORISM 7, 8 (Alex P. Schmid & Ronald D. Crelinsten eds., 1993) ("Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.").

corpus and judicial review, the resort to punitive immigration remedies, and the use of torture, other forms of cruel treatment, disappearances, and extraordinary renditions against suspected terrorists—impinge on civil and human rights.[2] Certain manifestations of terrorism also constitute international and domestic crimes, as set forth in a web of multilateral treaties and the world's domestic penal codes. This Article aims to consider an altogether different dimension of terrorism: the extent to which terrorism is also a tort—specifically, a "tort in violation of the law of nations or a treaty of the United States."[3]

This Article will focus on the potential of the Alien Tort Statute (ATS) to serve as a vehicle for asserting civil claims in U.S. courts for acts of terrorism.[4] Although this Article primarily considers terrorism torts under the "law of nations" prong of the ATS (which requires a showing that the relevant prohibition is part of customary international law), terrorism torts may provide a vehicle for activating the ATS's dormant treaty prong as well, given the strong support for the terrorism treaties exhibited by the United States and the high degree of domestic incorporation of the crimes identified therein. One of the first modern cases to be filed under the Alien Tort Statute immediately called into question the utility of the ATS as a counter-terrorism tool.[5] Ever since, the statute has been relatively underutilized in this context, even while U.S. courts have

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2. Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1 (2008); Naomi Norberg, *A Harmonized Approach To Combating International Terrorism? Roadwork Ahead*, *in* LES CHEMINS DE L'HARMONISATION PÉNALE 203, 204 (2008) (Fr.) (discussing the growing rift between human rights and counterterrorism regimes and the global harmonization of abusive counter-terrorism tactics).

3. 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

4. This focus on the ATS excludes lengthy consideration of suits against states and other defendants that are entitled to foreign sovereign immunity pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611, or suits brought under the Antiterrorism Act of 1990, Pub. L. No. 101-519, sec. 132(b), § 2333, 104 Stat. 2250, 2251 (current version at 18 U.S.C. § 2333 (2006)), which applies only where U.S. nationals are the victims of acts of terrorism defined in Title 18.

5. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (dismissing action brought by Israeli citizens against Libyan Arab Republic and various organizations for lack of subject matter jurisdiction).

gradually extended jurisdiction under the ATS over other international crimes. Meanwhile, the U.S. Congress has vastly expanded opportunities for U.S. nationals to pursue civil claims in domestic courts for acts of terrorism. For example, the Antiterrorism Act (ATA) enables U.S. nationals—as well as their estates, survivors, and heirs—to sue individuals responsible for personal, property, or business injuries incurred by reason of acts of international terrorism.[6] U.S. victims and claimants may also sue states and state agents implicated in acts of terrorism under the Foreign Sovereign Immunity Act (FSIA),[7] so long as the state itself has been specifically designated as a "sponsor of terrorism" by the Department of State or where the circumstances otherwise satisfy one of the codified exceptions to foreign sovereign immunity. As compared with these statutory causes of action for U.S. citizen victims and claimants, only the ATS has the potential to provide jurisdiction over civil claims arising out of acts of terrorism brought by non-nationals who have access to U.S. courts. The uncertainty surrounding the availability of the ATS to permit such terrorism claims reveals a lacuna in the United States' anti-terrorism statutory scheme.

Since the U.S. Supreme Court issued its landmark opinion in *Sosa v. Alvarez-Machain*[8] and finally set forth a methodology for

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6. Antiterrorism Act of 1990 sec. 132(b), § 2333, 104 Stat. at 2251 (codified at 18 U.S.C. § 2333 (Supp. II 1991)). Although there were prior permutations of the Antiterrorism Act, such as the Anti-Terrorism Act of 1987, Pub. L. No. 100-204, §§ 1001–1005, 101 Stat. 1406, 1406–07, the 1990 version first created a private cause of action for acts of terrorism for U.S. citizens. This Act was repealed in 1991. Act of Apr. 10, 1991, Pub. L. No. 102-27, § 402, 105 Stat. 130, 155. Congress re-enacted 18 U.S.C. §§ 2331 thru 2338 in 1992, but without a specific short title. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521–24. For ease of reference, this Article will use "ATA" to designate the civil cause of action set forth in 18 U.S.C. § 2333.

7. 28 U.S.C. §§ 1602–1611 (withholding sovereign immunity under enumerated circumstances); 28 U.S.C.A. § 1605A (West Supp. 2008) (creating a cause of action against state sponsors of terrorism). Section 1605A originally appeared at 28 U.S.C. § 1605(a)(7), which withheld sovereign immunity for designated state sponsors of terrorism. The National Defense Authorization Act for Fiscal Year 2008 deleted § 1605(a)(7), Pub. L. No. 110-181, § 1083(b)(1), 122 Stat. 3, 341, but re-codified the provision with amendments, *id.* § 1083(a), 122 Stat. at 338–41 (codified at 28 U.S.C.A. § 1605A).

8. 542 U.S. 692 (2004).

considering actionable claims under the ATS, a few cases involving terrorism allegations have begun to work their way through the federal court system. Although it is still difficult to draw broad conclusions, the existing cases do demonstrate that the various federal statutes—the ATA, FSIA, and ATS—can work in tandem to provide causes of action to alien and U.S. plaintiffs injured in terrorist incidents.[9] Furthermore, litigants are creatively utilizing multiple causes of action drawn from statutes, the common law, and international law to press their claims.[10] While the federal courts have yet to definitively recognize a standalone cause of action for terrorism *stricto sensu*, developments in the law of terrorism at the international level reveal the gradual crystallization of a consensus set of elements that comprise a definitive prohibition against terrorism applicable to all but a narrow set of circumstances. What lingering definitional impasse exists highlights an unsettled and highly contentious area of international law: the legal categorization and consequences of attacks by unprivileged combatants against privileged combatants or military targets. In all other situations, the international law governing acts of terrorism is sufficiently precise, robust, and uncontroversial to support the recognition by the federal courts of a cause of action for terrorism under the ATS, assuming the other jurisdictional requirements are satisfied. Recognizing such causes of action will bolster the United States' counter-terrorism regime by enabling a broader array of victims of acts of terror to pursue the assets of individuals and groups that finance or otherwise support acts of terrorism.

II. THE JURISPRUDENTIAL AND LEGISLATIVE BACKGROUND TO ADJUDICATING TERRORISM TORTS IN UNITED STATES COURTS

A. Tel-Oren v. Libya: A False Start

9. *See* Saperstein v. Palestinian Auth., No. 09-20225-CIV-SEITZ/MCALILEY, 2006 U.S. Dist. LEXIS 92778, at *3–6 (S.D. Fla. Dec. 22, 2006) (in a suit by U.S. and non-U.S. citizens, invoking both the ATA and ATS, respectively).

10. *See, e.g.*, Harbury v. Hayden, 522 F.3d 413, 415–16 (D.C. Cir. 2008) (alleging various claims arising under international law and common law in an action against the CIA involving the torture and murder of a Guatemalan rebel).

Any inquiry into the cognizability of the tort of terrorism under the ATS invites a re-examination of *Tel-Oren v. Libyan Arab Republic*,[11] the first case to consider claims of civil liability for acts of terrorism in the United States. *Tel-Oren* was also one of the first cases to be adjudicated following the Second Circuit's landmark ruling in *Filartiga v. Pena-Irala*,[12] which invigorated the ATS as a tool for the private enforcement of civil claims for torts committed in violation of international law. *Tel-Oren* arose out of a horrific attack in Israel in 1978 in which members of the Palestine Liberation Organization (PLO) took 121 civilians hostage in a torturous rampage around the city of Haifa.[13] Before the Israeli police could stop the attackers, twenty-two adults and twelve children were killed, and eighty-seven people were injured.[14] Plaintiffs (U.S. and Israeli citizens) brought suit against Libya, the PLO, and other non-governmental organizations associated with the PLO, whom they accused of masterminding the attack.[15] Plaintiffs premised jurisdiction on the ATS, as well as on federal question and diversity grounds, and advanced claims of torture, terrorism, genocide, and other pendant domestic torts.[16]

The district court dismissed the case, reasoning that plaintiffs had identified no cause of action in U.S. or international law entitling them to sue.[17] In a terse per curiam opinion, the D.C. Circuit affirmed, although the judges splintered in their reasoning.[18] Judge Edwards was the most faithful to the newly-minted *Filartiga* precedent.[19] He agreed in principle that the ATS allowed for the assertion of civil claims based on international law violations.[20] He reasoned, however, that the law of nations, as it then existed, did not

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11. 726 F.2d 774 (D.C. Cir. 1984).
12. 630 F.2d 876 (2d Cir. 1980).
13. *Tel-Oren*, 726 F.2d at 776.
14. *Id.* at 776, 799.
15. *Id*. at 775.
16. *Id.*
17. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 549–51 (D.D.C. 1981).
18. *Tel-Oren*, 726 F.2d at 775.
19. *Id.* at 777 (Edwards, J., concurring).
20. *Id*. at 795.

impose liability on private actors to the same degree as state actors.[21] He also concluded that terrorist attacks did not necessarily violate the law of nations,[22] because there was too much dissension within the international community as to the legality and legitimacy of such acts.[23]

By contrast, Judge Bork rejected the *Filartiga* precedent outright.[24] He reasoned that § 1350 only supported jurisdiction over those law of nations offenses that existed at common law as identified in Blackstone's famous treatise—violations of safe conduct, acts of piracy, and infringements on the rights of internationally protected persons, such as diplomats.[25] Judge Bork rejected the argument that the ATS provided a cause of action for additional international law violations and argued that neither the various treaties cited by plaintiffs nor customary international law enabled plaintiffs to sue for the torts alleged.[26]

Judge Robb took a different approach altogether by arguing that the case presented a non-justiciable political question.[27] He determined that the question of liability was one for the political branches of government, as there were no judicially discoverable

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21. *Id*. at 791.

22. *Id*. at 795; *see also* United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) (per curiam) ("[C]ustomary international law currently does not provide for the prosecution of 'terrorist' acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism."); *id*. at 106–08 (detailing efforts at the international level to define terrorism); *Tel-Oren*, 726 F.2d at 806–08 (Bork, J., concurring) (finding little consensus on the illegality of terrorism).

23. Judge Edwards referenced United Nations instruments that in his estimation demonstrated that members of the international community considered some actions that might be considered terrorism to constitute legitimate acts of aggression or retaliation within certain political contexts. *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) (citing Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103); *see also id.* at 795 ("While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal . . . . Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.").

24. *Id.* at 808–10 (Bork, J., concurring).

25. *Id*.

26. *Id*.

27. *Id.* at 823 (Robb, J., concurring).

standards by which to resolve the dispute.[28] Given this formidable trilogy of arguments, *Tel-Oren* stood for many years as a barrier to subsequent terrorism-related suits under the ATS. The D.C. Circuit's fractured opinion also blocked the development of a unanimous national interpretation of the ATS, as all other circuits to face challenges to the ATS fell in line behind the Second Circuit.[29] As a result, *Tel-Oren* emerged as a favorite citation in scholarship and briefs opposed to ATS litigation.

The Legislative Reaction

Whereas *Tel-Oren* may have discouraged litigants, it mobilized Congress.[30] On the terrorism front, Congress partially overturned *Tel-Oren* by specifically creating a civil cause of action

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28. *Id*.

29. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (holding that the ATS established a federal forum where courts could address customary international law violations by using domestic common law remedies); Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995) (holding that there was subject matter jurisdiction under the ATS because torts allegedly committed by the defendant were in violation of international law); Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1470–71 (9th Cir. 1994) (holding that the district court had subject matter jurisdiction because the alleged behavior was not undertaken due to an official mandate and thus was not covered by FSIA's agency provision); Beanal v. Freeport–McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997) (dismissing complaint where plaintiff failed to adequately allege a violation of the law of nations, but assuming jurisdiction in principle), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

30. To bolster the ATS, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), a statute providing a federal cause of action for acts of torture and summary execution committed against either aliens or United States citizens. Pub. L. No. 102-256, 106 Stat. 73 (2000) (codified at 28 U.S.C. § 1350 note (2006) (Torture Victim Protection)). Passage of the TVPA followed the United States' ratification of the U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment of Punishment, Article 14 of which obligates state parties to provide reparations to victims of torture. For more on the TVPA's legislative history, see Robert F. Drinan & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605, 609–10 (1993). The TVPA House Report made reference to *Tel-Oren* when it announced that the TVPA would "provide a federal cause of action" against individuals who, "under actual or apparent authority or color of law of any foreign nation," subject anyone to torture or summary execution. H.R. REP. NO. 102-367, at 4 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 86–87.

for U.S. citizen victims or their heirs or survivors[31] injured by reason of an act of international terrorism[32] as part of the Antiterrorism Act of 1990.[33] Specifically, the relevant provision provides:

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.[34]

"International terrorism" is defined to encompass activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended—
> (i) to intimidate or coerce a civilian population;

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31. By limiting standing to U.S. citizens, the civil terrorism statute reflects the passive personality principle of extraterritorial jurisdiction, which has become more accepted in light of the greater attention to acts of international terrorism.

32. The ATA was also a response to the *Klinghoffer* case, which involved civil claims arising out of an act of terrorism against a U.S. citizen that could proceed in U.S. courts only because the murder occurred on a ship, triggering admiralty jurisdiction and the Death on the High Seas Act. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854, 856 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991). The *Klinghoffer* case eventually settled, reportedly for millions of dollars. With the ATA, Congress expressed its intention to extend liability for acts of terrorism that occur on foreign territories and to "'empower victims with all the weapons available in civil litigation.'" Debra H. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 684 (2002) (quoting 137 CONG. REC. S4511-04 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley)).

33. Pub. L. No. 101-519, § 132, 104 Stat. 2250, 2250–53 (amending 18 U.S.C. §§ 2331–2338 (Supp. II 1991)).

34. 18 U.S.C. § 2333(a) (2006).

> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
> (C) occur primarily outside the territorial jurisdiction of the United States, or 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.[35]

Acts of war—defined as "(A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) armed conflict between military forces of any origin"[36]—are not actionable under the statute.[37] By defining "international terrorism" with reference to conduct that merely "involves" violence, the ATA enables civil claims for even non-violent acts that have been made criminal under federal law, such as those crimes set out in the various "material support" statutes.[38] Indeed, any violation of the

35. *Id*. § 2331(1).

36. *Id.* § 2331(4).

37. *Id*. § 2336(a) ("No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war."); *see* Estate of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153, 166 (D.D.C. 2006) (ruling as a matter of law that attack on a civilian bus—"an act that violates established norms of warfare and armed conflict under international law"—was not "an act occurring in the course of armed conflict," without deciding question of perpetrators' military status); Morris v. Khadr, 415 F. Supp. 2d 1323, 1333–34 (D. Utah 2006) (concluding that attack on soldier as pleaded by plaintiffs did not constitute an act of war, because al Qaeda was not a "military force"); Biton v. Palestinian Interim Self-Gov't Auth., 412 F. Supp. 2d 1, 10 (D.D.C. 2005) (noting existence of armed conflict in Gaza, but concluding that an attack on children in a school bus could not be committed "during the course of" an armed conflict, which would have brought the case into the ATA act-of-war exception).

38. *See* 18 U.S.C. § 2339A(b) (defining the term "material support or resources" to include the provision of any property, service, currency, monetary instruments, financial securities, or financial service); *id*. § 2339B(a)(1) (prohibiting knowingly providing material support or resources to a foreign terrorist organization); *id.* § 2339C(a)(1) (making it a crime to unlawfully and willfully provide or collect funds, directly or indirectly, intending or knowing that such funds will be used to carry out an act which constitutes an offense within the scope of enumerated terrorism treaties or any other act intended to cause death or

penal provisions in Title 18 may serve as the predicate acts for civil suits under the ATA, so long as the necessary attendant circumstances—i.e., the motivation[39] and transnational elements[40]—exist. Thus, civil liability under the ATA for U.S. citizen plaintiffs is at least as extensive as criminal liability.[41]

Individuals may also sue for any economic or personal injury, such as mental suffering or loss of consortium, even absent physical

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serious bodily injury to a civilian, or to a person not taking an active part in the hostilities in a situation of armed conflict); *see also* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1011, 1020 (7th Cir. 2002) (finding that § 2333 allows a U.S. national injured by reason of international terrorism to recover from anyone along the causal chain, including individuals or entities that provide money or other forms of support); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 580–81 (E.D.N.Y. 2005) (alleging violations of § 2339 (providing material support to terrorists) as well as § 2332 (aiding and abetting and conspiring in the murder, attempted murder, and serious bodily injury of United States nationals)). The U.S. government intervened as an amicus in *Boim* to confirm that the ATA incorporated basic tort principles, including aiding and abetting liability. *See* Hamish Hume & Gordon Dwyer Todd, *Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror*, FEDERALIST SOC'Y, Dec. 1, 2003, http://www.fed-soc.org/publications/pubID.118/pub_detail.asp (discussing brief).

39. *See, e.g.*, *Klieman*, 424 F. Supp. 2d at 167 (noting defendants' argument that the attacks in question were aimed at ending an illegal occupation within Israel and thus did not reflect one of the prohibited intentions).

40. In *Smith v. Islamic Emirate of Afghanistan*, the court determined that the attacks of September 11th qualified as "international terrorism," even though they "occurred primarily" within the United States, because they "transcend[ed] national boundaries in terms of the means by which they [were] accomplished . . . or the locale in which their perpetrators operate." 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003). *Smith* was the first suit to be filed after the attacks. The Judicial Panel on Multidistrict Litigation consolidated additional suits subsequently filed against various individuals, charitable organizations, governmental agents and entities, and financial institutions. *In re* Terrorist Attacks on September 11, 2001, 295 F. Supp. 2d 1377, 1379 (J.P.M.L. 2003).

41. *See Boim*, 291 F.3d at 1015, 1020 (noting that the language and legislative history of 18 U.S.C. § 2333 suggest that it includes tort liability for a host of international terrorism crimes). The ATA further provides for nationwide service of process and that suit may be brought "in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent." 18 U.S.C. § 2334(a). Personal jurisdiction has been found where defendants have minimum contacts with the United States as a whole. Estates of Ungar *ex rel*. Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 88 (D.R.I. 2001).

harm.[42] The ATA applies to natural or legal persons as defendants,[43] but principles of foreign sovereign immunity dictate that actions may not proceed against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority."[44] Individual state actors can, however, be sued in their personal capacities for acts that are beyond their official mandates.[45] The U.S. Government is entitled to stay actions where they may interfere with a criminal prosecution involving the same subject matter or a national security operation.[46] Most cases under the ATA have ended in default, although defendants do occasionally file preliminary defensive motions.[47]

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42. *See* Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 181–82 (D.D.C. 2004) (concluding that wife of victim could be a claimant even where she could not sue as a survivor).

43. In § 813 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 382 (2001), Congress also envisioned terrorism as a form of organized crime and amended the Racketeer Influenced and Corrupt Organizations (RICO) statute to enable acts of terrorism to serve as predicate acts for a pattern of racketeering activity. *See* 18 U.S.C. § 1961(1) (including reference to "any provision listed in § 2332b(g)(5)(B)," which includes a lengthy list of federal terrorism crimes, such as the use of chemical weapons, kidnapping, cybercrime, assassination, attacks on transportation networks, etc.).

44. 18 U.S.C. § 2337(2); *see* Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54, 60–61 (D.D.C. 2003) (dismissing claims brought under ATA against Libya, its intelligence service, and individual defendants sued in their official capacities).

45. *See* Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 29 (D.D.C. 2007) (recognizing that an individual may be sued in a personal capacity under the ATA); *see also* Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1472 (9th Cir. 1994) (finding defendant not entitled to foreign sovereign immunity, because the alleged acts of torture, summary execution, and disappearance were "not taken within any official mandate"). *See generally* Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM 109 (John Norton Moore ed., 2004) (making distinction between FSIA state actors and non-FSIA state actors).

46. 18 U.S.C. § 2336(c) ("The Attorney General may intervene in any civil action brought under section 2333 for the purpose of seeking a stay of the civil action.").

47. *See* John R. Crook, *United States Supports Dismissal of U.S. POW's Billion-Dollar Default Judgment Against Iraq; U.S. Supreme Court Denies Certiorari*, 99 AM. J. INT'L L. 699, 699–701 (2005) (discussing the numerous default judgments entered in civil terrorism lawsuits). *But see* Knox v. Palestine

The ATA's legislative history makes clear Congress's view of the utility of civil suits for terrorism. For one, Congress sought to ensure a remedy where criminal charges may not be brought and to make terrorism "unprofitable" by allowing victims to constitute themselves as private attorneys general and seek the assets of individuals and entities supporting or financing acts of terrorism.[48] The hope was that allowing civil liability would provide an extra measure of deterrence, especially for entities that might financially support acts of terrorism while not engaging in violent acts directly.[49]

In addition to the ATA, Congress has created a cause of action against state sponsors of terrorism and their agents within the Foreign Sovereign Immunities Act of 1976 (FSIA).[50] Historically, states were immune from suit,[51] subject to the whims of the executive. Later, an inclination toward restrictive immunity that withheld immunity for private acts of the state (*jure gestionis*) while maintaining immunity over its public acts (*jure imperii*) emerged. In 1976, Congress enacted the FSIA in many respects to codify the doctrine of restrictive immunity and depoliticize determinations of sovereign immunity. The FSIA reaffirmed immunity as a default

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Liberation Org., 248 F.R.D. 420, 424 (S.D.N.Y. 2008) (allowing defendant to reopen default judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) upon a change of political leadership).

48. H.R. REP. NO. 102-1040, at 4 (1992).

49. *See generally* Dean C. Alexander, *Maritime Terrorism and Legal Responses*, 19 DENV. J. INT'L L. & POL'Y 529 (1991) (noting that private sanctions are an integral part of the U.S. regime against terrorism); Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L. REV. 726 (1992) (arguing that the ATA allows plaintiffs to attack terrorists assets thereby weakening terrorist funding).

50. 28 U.S.C. §§ 1330, 1602–1611 (2006). The FSIA provides the exclusive basis to obtain jurisdiction over a foreign state in any U.S. court. Argentine Republic v. Amarada Hess Shipping Corp., 488 U.S. 428, 439 (1989).

51. The Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 137 (1812) ("One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to this independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.").

defense in litigation against states[52] and their agencies or instrumentalities,[53] subject to a series of exceptions.[54] Enumerated exceptions include situations in which a foreign state has "waived its immunity either expressly or by implication,"[55] cases in which "the action is based upon a commercial activity carried on in the United States,"[56] and suits against a foreign state for "personal injury or death or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[57] Before the civil suit can proceed, the state in question must also be afforded an opportunity to arbitrate the case if the conduct in question occurred on the state's

52. Governmental entities that do not qualify for statehood are not entitled to immunity under the FSIA. *See* Estates of Ungar v. Palestinian Auth., 315 F. Supp. 2d 164, 180 (D.R.I. 2004) (finding the Palestinian Authority was not entitled to immunity because it was not a recognized state and did not sufficiently control Palestine).

53. The courts are split as to whether an individual may constitute an agency or instrumentality of a state. *Compare* Yousuf v. Samantar, No. 07-1893, slip op. at 4 (4th Cir. Jan. 8, 2009) ("[W]e conclude that the FSIA does not apply to individuals and, as a result, Samantar is not entitled to immunity under the FSIA."), *with* Belhas v. Ya'Alon, 515 F.3d 1279, 1283 (D.C. Cir. 2008) (concluding that defendant was acting as an agency or instrumentality of a foreign state), *and In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008) (considering the term "agency or instrumentality" to be broad enough to encompass "senior members of a foreign state's government").

54. 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

55. *Id*. § 1605(a)(1).

56. *Id.* § 1605(a)(2).

57. *Id*. § 1605(a)(5); *see* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 245 (2d Cir. 1996) (dismissing Pan Am 103 case against Libya on grounds that case did not fall under any then-existing enumerated exception to immunity). Once Congress amended the FSIA, the Lockerbie cases were refiled against Libya and other defendants. *See* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 753–55 (2d Cir. 1998). Most of the cases settled for payments of $10 million per victim. Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 23 (D.D.C. 2007). Individuals not deemed to be "wrongful death beneficiaries" sued separately. *See id.* at 23–24 ("Plaintiffs in the present action . . . were excluded from that settlement. . . . Plaintiff's claims were remanded to this court.").

territory.[58] The FSIA also provides rules for service of process,[59] personal jurisdiction,[60] and the attachment and execution of the assets of foreign states.[61] Trial is by a judge, rather than a jury.[62]

Largely in response to the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, Congress amended the FSIA to create an additional exception to immunity for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts[63] as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[64] The exception is only applicable to states designated by the State Department as sponsors of terrorism,[65] effectively re-politicizing certain determinations of foreign sovereign immunity.[66] Additional

58. 28 U.S.C.A. § 1605A(a)(2)(iii) (West Supp. 2008).

59. 28 U.S.C. § 1608.

60. 28 U.S.C. § 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." Many courts have interpreted this to mean that so long as service of process is proper, no additional personal jurisdiction inquiry is necessary. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 19, 20 (D.D.C. 1998) (finding that a foreign state is not a "person" for due process purposes and that "the concept of 'minimum contacts' is inherently subsumed within the exceptions to immunity defined by the [FSIA]."). *But see* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F. 3d 748, 760–61 (2d Cir. 1998) (holding that the state sponsor of terrorism exception did not automatically entail a finding of minimum contacts in the same way that the commercial activities exception did and thus that the subject matter and personal jurisdiction inquiries are not so intertwined).

61. 28 U.S.C. § 1610.

62. *Id.* § 1330(a).

63. 28 U.S.C.A. § 1605A(a)(1). *See generally* Molora Vadnais, *The Terrorism Exception to the Foreign Sovereign Immunities Act*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199 (2000) (discussing the exception).

64. Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241.

65. The State Department identifies state sponsors of terrorism pursuant to three statutory authorizations: (1) section 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. § 2405(j) (2000); (2) section 620A of the Foreign Assistance Act, 22 U.S.C. § 2371(a) (2006); and (3) section 40(d) of the Arms Export Control Act, 22 U.S.C. § 2780(d). This list originally included Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* 22 C.F.R. § 126.1(6) (2002) (setting forth prior list). During his time in office, President George W. Bush delisted Libya, Iraq, and North Korea. . *See* U.S. Dep't of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm.

66. For a fuller discussion of this provision and the litigation thereunder, see JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, SUITS AGAINST TERRORIST

legislative tinkering[67] led to the creation of an express cause of action against individual officials, employees, and agents of designated foreign states acting in their personal capacities and against the states themselves.[68] To bring suit, either the claimant or the victim must be a national of the United States, a member of the U.S. armed forces, or a particular type of employee or contractor of the U.S. government.[69] The plaintiff need not, however, be a legal representative of the victim; rather, the plaintiff can allege his or her own economic damages, pain and suffering, claims for solatium,

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STATES BY VICTIMS OF TERRORISM (CRS Report for Congress No. RL 31258, 2008).

67 The legislation was initially interpreted to provide only for federal jurisdiction and not for a private cause of action. *See* Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1068 (9th Cir. 2002). Through the so-called Flatow Amendment (formally the Civil Liability for Acts of State-Sponsored Terrorism Act), Congress sought to create an express cause of action as well. Foreign Operations, Export Financing, and Related Appropriations Act, 1997, Pub. L. No. 104-208, sec. 101(c), § 583, 110 Stat. 3009-121, 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2006) (Civil Liability for Acts of State Sponsored Terrorism)). The District of Columbia Court of Appeals, however, subsequently ruled that Congress had not in fact created a cause of action against terrorist states themselves, but only against their officials, employees, and agents and only when these individuals were acting in their private—as opposed to official—capacities. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1027 (D.C. Cir. 2004). Congress then passed a rider to the National Defense Authorization Act for Fiscal Year 2008 (the so-called Lautenberg Amendment) to expressly create a federal cause of action against terrorist states and to facilitate the enforcement of judgments. Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338–41 (codified at 28 U.S.C.A. § 1605A). The legislation in effect seeks to hold foreign states vicariously liable for the actions of their officials, employees, and agents. *Id.*

68. Prior to the passage of § 1605A, the majority of courts had found causes of action against states in state law. Specifically, courts interpreted 28 U.S.C. § 1606—which provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"—as "a 'pass-through' to substantive causes of action against private individuals that may exist in federal, state or international law." Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 248–49, 266 (D.D.C. 2006) (alleging claims of wrongful death, intentional infliction of emotional distress, loss of consortium, etc. arising from an act of state-sponsored terrorism and summary execution). *But see* Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004) (dismissing case on ground that plaintiffs had stated no cause of action).

69. 28 U.S.C.A. § 1605A(a)(2)(A)(ii).

etc.[70] In situations in which members of the armed forces are the victims of attack, some judges have required a showing that the victims were serving in non-combatant roles at the time of injury, although this is not an express requirement of the statute.[71] A number of cases have proceeded against Libya, Iran, Iraq, and Cuba.[72] President Bush later waived the withholding of immunity

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70. Bettis v. Islamic Republic of Iran, 315 F.3d 325, 337–38 (D.C. Cir. 2003); Salazar v. Islamic Republic of Iran, 370 F. Supp. 2d 105, 115 n.12 (D.D.C. 2005) (permitting recovery for all immediate family members for intentional infliction of emotional distress).

71. *See, e.g.*, *Estate of Heiser*, 466 F. Supp. 2d at 251 (finding that victims of the 1996 Khobar towers attack were engaged in a peacetime deployment in Saudi Arabia to monitor Iraq's compliance with United Nations Security Council resolutions enforcing the cease-fire that had brought an end to the 1991 war with Kuwait); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 47 (D.D.C. 2006) (same); Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46, 60 (D.D.C. 2003) (allowing suit to proceed because victims of the 1983 Beirut barracks bombing were engaged in a peacekeeping mission under peacetime rules of engagement). For a fuller discussion of the propriety of recognizing terrorism claims by members of the armed forces, see *infra* section III.b.v.c.ii.

72. *See, e.g.*, Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 64 (D.D.C. 1998) (suit against Iranian agents arising out of terrorist act in Lebanon by Hezbollah, found to be financed by Iran); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997) (suit on behalf of families of those killed when Cuban aircraft shot down two Brothers to the Rescue planes in 1996). Most of these cases proceed in default. *See* Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 44 n.2 (D.D.C. 2000) (noting cases ending in default judgments). Where the state defaults, the plaintiff must still establish her claim or right to relief "by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Some payments have been made to plaintiffs, in part as a result of legislation releasing blocked assets and other funds under the control of the U.S. Government. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(1), 114 Stat. 1464, 1543. That legislation also repealed the ability of victims to receive punitive damages against states. *Id*. § 2002(f)(2), 114 Stat. at 1543; 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages."); *see also* ELSEA, *supra* note 66, at 70 (detailing amounts paid). For a discussion of these cases, see Keith Sealing, *"State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 125, 127 (2003). There do not seem to be reported cases against Sudan or Syria. Only one case appears to have been filed against North Korea to date. *See* Massie v. Gov't of the Democratic People's Republic of Korea, Civil Action 06-

for Iraq (2003),[73] Libya (2006),[74] and North Korea (2008).[75] Although Congress has specifically authorized such suits against state sponsors of terrorism, the executive branch has at times intervened against such suits or blocked assets from attachment to satisfy judgments.[76]

The U.S. statutory scheme thus contains interlocking opportunities for U.S. citizens and claimants to sue individuals (both non-state and state actors) and state sponsors of terrorism directly for a variety of acts of international terrorism. In addition, where a state or state actor commits an act of terrorism within the United States, the domestic tort exception to immunity may apply,[77] even absent

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00749, 2008 U.S. Dist. Lexis 104903 (D.D.C. Dec. 20, 2008) (in default proceeding, holding state liable for kidnapping, imprisoning, and torturing crew members of a U.S. military vessel in 1968).

73. Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003). *See* Acree v. Republic of Iraq, 370 F.3d 41, 51 (D.C. Cir. 2004) (dismissing on other grounds, but finding jurisdiction was proper in suit by U.S. prisoners of war held in Iraq, even though district court ruled after various Iraqi sanctions were lifted).

74. Presidential Determination No. 2006-14, 71 Fed. Reg. 30,551 (May 12, 2006).

75. *See* Press Release, U.S. Department of State, U.S.-DPRK Agreement on Denuclearization Verification Measures (Oct. 11, 2008), *available at* http://www.state.gov/r/pa/prs/ps/2008/oct/110922.htm (announcing the delisting of North Korea). *See generally* LARRY NIKSCH, CONGRESSIONAL RESEARCH SERVICE, NORTH KOREA: TERRORISM LIST REMOVAL? (CRS Report for Congress No. RL 30613, 2008) (detailing efforts to remove N. Korea from list of terrorist states).

76. John Norton Moore, *Civil Litigation Against Terrorism: Neglected Promise*, *in* LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR (John Norton Moore & Robert F. Turner eds., forthcoming 2009).

77. The noncommercial tort exception to foreign sovereign immunity allows for suits "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5) (2006). The claim may not be based upon "the exercise or performance or the failure to exercise or perform a discretionary function, regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A); *see* Letelier v. Republic of Chile, 488 F. Supp. 665, 671–73 (D.D.C. 1980) (finding that the car bomb assassination in Washington, D.C. of former Chilean ambassador Orlando Letelier and his assistant qualified as a tortious act within the United States and could not constitute a discretionary function given the clear rule against assassination).

the state sponsor designation.[78] The *Tel-Oren* case coupled with these subsequent statutory developments contributed to the underutilization of the ATS in the terrorism context.[79] In 2004, however, the Supreme Court developed a definitive methodology for determining actionable claims under the "law of nations" prong of the ATS that effectively overturned most of the D.C. Circuit judges' objections to jurisdiction in *Tel-Oren*.[80] This development invites a reconsideration of the potential for the ATS to support jurisdiction over civil terrorism claims as violations of customary international law. The extensive codification of terrorism crimes since *Tel Oren* at the international and domestic levels also invites a consideration into whether terrorism treaty crimes are sufficiently incorporated in U.S. law to activate the ATS's treaty prong.

Expanding Civil Terrorism Litigation Via the Alien Tort Statute

Much of the judicial dissention in *Tel-Oren* was finally resolved in 2004, when the Supreme Court issued its long-awaited ruling in *Sosa v. Alvarez-Machain*.[81] Most importantly, the Supreme

78. *See* Mwani v. Bin Laden, 417 F.3d 1, 17 (D.C. Cir. 2005) (finding victims of embassy bombing attacks could not invoke commercial activities exception of the FSIA to support jurisdiction over the state of Afghanistan where the alleged activities were not the type performed by private parties engaged in commerce). *But see In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 89–90 (2d Cir. 2008) (reasoning that if the state sponsor of terrorism exception to immunity does not apply, other exceptions should not serve as the basis for suit for terrorism crimes).

79. Indeed, even the ATA was underutilized. It was a decade before the first case, *Boim v. Quranic Literacy Inst.*, was filed. 127 F. Supp. 2d 1002 (2001), *aff'd* 291 F.2d 1000 (7th Cir. 2002).

80. *See* discussion *supra* note 8.

81. 542 U.S. 692 (2004). Vis-à-vis other ATS cases, *Sosa* presented a unique set of facts and procedural history. The plaintiff, Dr. Humberto Álvarez-Machain, had already been before the Supreme Court once as a criminal defendant after he was abducted from Mexico in violation of a bilateral extradition treaty by agents of the U.S. government, who suspected him of participating in the torture of a Drug Enforcement Administration official. *Id*. at 698. Dr. Álvarez-Machain contested his abduction from Mexico all the way up to the Supreme Court. *Id*. Overturning both lower courts' rulings, the Supreme Court applied the *male captus bene detentus* principle to hold that Dr. Álvarez-Machain's abduction—although in violation of an extant treaty—did not deprive the federal courts of jurisdiction over the criminal charges against him. United States v. Alvarez-Machain, 504 U.S.

Court ended a longstanding debate in the field and the academy as to whether the ATS provided a private cause of action for international law violations or whether the statute was primarily jurisdictional, that is, only addressing the power of the court to hear a certain class of case. The Court unanimously and unequivocally sided with the latter position based on the ATS's placement in the Judiciary Act and then Title 28, its text and the original use of the term "cognizance," and the fact that the Framers would not have elided the concepts of jurisdiction and cause of action. So, in this respect, Judge Bork of the D.C. Circuit was vindicated.

The Court did not stop there, however. In gleaning the First Congress's intent in enacting the ATS, and by looking closely at the interaction between the ATS and what it termed the "ambient law of the era," the Court concluded that certain international law torts would have been considered to be within federal common law at the time of the drafting of the ATS.[82] According to the Court's account, although international law in 1789 primarily addressed the relations between states, there were subsets of international law rules that regulated the conduct of individuals and were amenable at that time to a judicial remedy in the event of their breach.[83] Some of these rules dealt with the law merchant, admiralty law, and the law of prize.[84] Other such rules were designed for the protection of individuals, but also touched upon state prerogatives.[85] This latter set of rules included the protections afforded ambassadors, the prohibitions against acts of piracy, and the norms governing safe conduct.[86] The Court opined that violations of rules within this subset of international law would have been actionable as international torts under the ATS at the time of its drafting.[87] Therefore, the ATS authorized federal jurisdiction and "the common

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655, 657 (1992). After winning a motion for acquittal, Dr. Álvarez-Machain turned around and sued the U.S. government, along with José Francisco Sosa, one of the Mexican nationals involved in his abduction, alleging among other things that his kidnapping amounted to a tort in violation of the law of nations. *Sosa*, 542 U.S. at 698.

82. *Id.* at 714.

83. *Id*. at 714–15.

84. *Id.* at 715.

85. *Id*.

86. *Id*.

87. *Id*.

law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[88]

This aspect of the opinion was unanimous. The Court then split in considering the implications of the genesis of the ATS to contemporary cases. A majority of the Court—excluding Justices Scalia, Rehnquist, and Thomas—concluded that the statute operates today much as it did in 1789, which is to say that it authorizes suits in federal court where federal common law provides a private right of action for certain tortious violations of international law giving rise to individual responsibility.[89] The dissenters argued that it was erroneous of the Court to grant a "discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms."[90]

In considering the current reach of the ATS, the *Sosa* majority advocated a "restrained" approach toward the recognition of modern causes of action under the ATS, but left the core of the litigation largely intact.[91] It found this cautiously permissive approach warranted by a "series of reasons."[92] These relate to the

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88. *Id*. at 724. Under this framework, the ATS provides federal jurisdiction, international law provides the substantive standard or rule of decision, and the remedy is judicially created. *See* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 640 (2006) (arguing that international law defines the substantive tort claim whereas federal common law defines the remedy and all other rules of decision). *But see* Aldana v. Del Monte, 416 F.3d 1242, 1246 (11th Cir. 2005) (interpreting (probably erroneously) the ATS as providing both jurisdiction and a cause of action). This type of disaggregation has other parallels in federal law. In *Bivens v. Six Unknown Named Agents*, for example, the Court recognized common law causes of action for constitutional violations. 403 U.S. 388, 396 (1971). Congress also created a statutory right of action for such violations. 42 U.S.C. § 1983 (2000).

89. The Court specifically noted that "modern international law is very much concerned with . . . questions" concerning the "limit[s] on the power of foreign governments over their own citizens." *Sosa*, 542 U.S. at 727.

90. *Id*. at 739 (Scalia, J., dissenting).

91. *Id*. at 725, 728–29 (majority opinion) (advocating a "restrained" approach and "judicial caution" to recognizing new causes of action of this kind and noting that "great caution" must be exercised in deciding which "norms of today's law of nations may . . . be recognized legitimately by federal courts").

92. *Id*. at 725; *see* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 268 (2d Cir. 2007) (Katzmann, J., concurring) (arguing that the courts need not

recognition that the courts now openly acknowledge that engaging in common-law lawmaking[93] sits uneasily with contemporary conceptions of the separation of powers, the comparative institutional competencies of courts and legislatures, and our tradition of legislative primacy in substantive lawmaking.[94] The Court also noted that attempts to craft remedies for violations of international law may have "adverse foreign policy consequences" or impinge "on the discretion of the Legislative and Executive Branches in managing foreign affairs."[95] Finally, the Court could identify no modern Congressional mandate to engage in judicial creativity and "seek out and define new and debatable violations of the law of nations," although it did note the modern passage of the

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individually analyze each of these five reasons, because they are "already captured by" the "'high bar to new private causes of action' set by the requirement that a claim be accepted by the civilized world and defined with a sufficient degree of specificity" (quoting *Sosa*, 542 U.S. at 727)).

93. This portion of the Court's opinion seems at times to conflate two distinct concepts: the federal common law and the now extinct "general law" first endorsed by the Court in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *See Sosa*, 542 U.S. at 725–26 (invoking concepts of the general law and common law interchangeably). The latter once reigned in diversity actions in which there was no operative state statute as a result of what later proved to be a stilted interpretation of the Rules of Decision Act, 28 U.S.C. § 1652. The general law met its demise in *Erie R.R. v. Tompkins*, in which the Court ruled that federal courts apply substantive state law—both statutory and decisional— in diversity actions and that federal judges were no longer free to "'exercise their independent judgment as to what the law is.'" 304 U.S. 64, 70 (1938) (quoting Tompkins v. Erie R. Co., 90 F.2d 603, 604 (2d Cir. 1937)). The general law was neither jurisdiction conferring nor binding on the states by virtue of the Supremacy Clause. By contrast, federal common law *stricto sensu*, which has always been both jurisdiction conferring and binding on the states pursuant to the Supremacy Clause, predated and survived *Erie*. Indeed, the *Erie* doctrine itself is a federal common law doctrine, and on the day *Erie* was decided, the Court also decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, which required the application of a federal common law rule for the equitable apportionment of water. 304 U.S. 92, 110 (1938). Federal common law continues to exist in several specialized or interstitial enclaves of national or federal concern, including foreign relations. Henry Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

94. *Sosa*, 542 U.S. at 725–27 (noting the emergence of "a general understanding that the law is not so much found or discovered as it is either made or created" and that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases").

95. *Id*. at 727–28.

TVPA and its legislative history suggesting that the ATS should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[96]

As a result of the *Sosa* analysis, the consideration of claims under the ATS now involves a two-step inquiry.[97] This inquiry begins with the threshold jurisdictional question: are the elements of the ATS satisfied, i.e., (1) has an alien sued (2) for a tort (3) committed in violation of the law of nations? The third part of this analysis requires a showing that the rule in question governs the particular type of defendant.[98] This first inquiry is resolved solely with reference to the familiar sources of international law[99] as set forth in Article 38 of the Statute of the International Court of Justice[100] and as famously demonstrated in *The Paquet Habana*,[101] *United States v. Smith*,[102] and *Filartiga*.[103] As a result, determining whether the conduct alleged is a violation of international law does not invite or require any act of judicial discretion, because the international rule either exists or it does not exist.[104]

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96. *Id*. at 728 (citing 138 CONG REC. 8071 (1992)).

97. *See Khulumani,* 504 F.3d at 266 (Katzmann, J., concurring) ("[W]hether jurisdiction exists and whether a cause of action exists are two distinct inquiries.").

98. *Sosa*, 542 U.S. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."); *see also id*. at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (*e.g.,* a private actor) the plaintiff seeks to sue.").

99. *Id*. at 733 (majority opinion) (directing courts to glean "the current state of international law, looking to those sources we have long, albeit cautiously, recognized").

100. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060, 1 U.N.T.S. xl, xlv.

101. 175 U.S. 677, 700 (1900).

102. 18 U.S. (5 Wheat.) 153, 160–61 (1820).

103. 630 F.2d 876, 880–81 (2d Cir. 1980) (canvassing international law sources and finding a definitive prohibition against torture).

104. *See* Khulumani v Barclay Nat'l Bank Ltd.*,* 504 F.3d 254, 266 (2d Cir. 2007) (noting that question of whether jurisdiction exists under the ATS is "resolved solely by reference to international law"); *id*. at 268 (arguing that the district court "inappropriately injected a discretionary element into the determination of whether it had jurisdiction under the [ATS]").

By contrast, the second element of the inquiry does require an act of judgment on the part of the court.[105] If jurisdiction is proper because the alleged act constitutes a violation of international law, the federal courts must decide whether they should recognize a private cause of action for that violation. Although the Court declined to adopt exhaustive criteria[106] for determining when a court should "accept[] a cause of action subject to jurisdiction under" the ATS,[107] the Court did rule that the ATS supported jurisdiction over a "narrow class of international norms . . . of international character *accepted by the civilized world* and *defined with a specificity* comparable to the features of the eighteenth century paradigms we have recognized."[108] In other words, norms comparable in status to the trilogy of norms mentioned by Blackstone—rules governing safe conducts, outlawing piracy, and protecting ambassadors—are actionable under the ATS today.[109]

In setting forth this "limit upon judicial recognition" of actionable norms, the Court essentially ratified the test that had developed pre-*Sosa* for determining actionable norms under the

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105. Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004) (noting that the determination of whether to recognize a new cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts").

106. *Id*. at 732 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under *§ 1350* . . . ." (emphasis added)); *see In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004) ("[T]he *Sosa* decision did not deliver the definitive guidance in this area that some had come to expect."), *aff'd in part*, *rev'd in part sub nom.* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

107. *Sosa*, 542 U.S. at 732.

108. *Id*. at 725 (emphasis added); *see also id*. at 732 (cautioning the federal courts not to allow "private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116–17 (2d Cir. 2008) ("Whether an alleged norm of international law can form the basis of an ATS claim will depend upon whether it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world.").

109. *Sosa*, 542 U.S. at 738 (noting the courts' "residual common law discretion" to create causes of action under federal common law to remedy the violation of certain international law norms).

ATS.[110] Under that test, courts would evaluate whether the norm in question was sufficiently "specific, universal and obligatory" to constitute a rule of international law and not merely an emerging rule or aspirational *lex ferenda*.[111] Thus, the federal courts are empowered to recognize private causes of action[112] for breaches of modern international law,[113] by "adapting the law of nations to private rights"[114] and recognizing "further international norms as judicially enforceable today."[115] The Court noted that in drafting the ATS, Congress implicitly assumed that the "federal courts could properly identify some international norms as enforceable in the exercise of [the ATS]."[116] In addition to the determination of "whether a norm is sufficiently definite to support a cause of action," courts will also have to consider "the practical consequences of making that cause available to litigants in the federal courts"[117] as well as other prudential concerns.[118]

With respect to Dr. Álvarez-Machain's claims, the Court concluded[119] that the conduct alleged—an arrest and 12-hour period

110. *Id.* at 731 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga.*"); *id*. at 732 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court."); *id*. at 747–48 (Scalia, J. concurring) (noting that the Court essentially endorsed the reasoning of the Ninth and Second Circuits).

111. *Id*. at 748–49; *see, e.g.*, Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

112. *Sosa*, 542 U.S. at 729.

113. *Id*. at 733 ("[Plaintiff's] claim must be gauged against the current state of international law.").

114. *Id*. at 728.

115. *Id*. at 729; *see also id*. at 731 n.19 ("Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.").

116. *Id*. at 730.

117. *Id*. at 732–33.

118. *Id*. at 733 n.21 (noting the propriety of district courts exercising case-specific deference to the political branches).

119. The Court implies that Dr. Alvarez's claim failed both steps of the analysis. *Id*. at 736 ("Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking." (citations omitted)).

of detention lacking authorization in any applicable law followed by transfer to lawful authorities—violated "no norm of customary international law so well defined as to support the creation of a federal remedy."[120] With the outcome, human rights litigants lost the battle in *Sosa*, but won the war.[121]

Justice Breyer, in concurrence, focused on "one further condition" for whether federal courts should recognize a new cause of action for an international law tort: whether there is a procedural consensus that the norm in question is subject to universal jurisdiction.[122] He proposed that in adjudicating ATS claims, courts should consider not only "substantive uniformity" among the legal systems of the world in relation to the elements of a particular offense and the identity of potential perpetrators, but also whether there is an international "procedural agreement" as to whether such norms are subject to extraterritorial enforcement through principles of universal jurisdiction.[123] Under Justice Breyer's approach, confirming that the norm in question is subject to criminal universal jurisdiction would ensure that the extraterritorial adjudication of the norm in the United States is consistent with principles of comity and with the general international law rules governing the exercise of extraterritorial jurisdiction.[124] Turning to the claims in question, Justice Breyer found no procedural agreement that the treatment accorded to Dr. Álvarez-Machain would support the exercise of criminal universal jurisdiction.[125] He thus concurred that the norm's non-recognition in the instant case was appropriate.[126]

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120. *Id*. at 738 (determining that the rule alleged by the plaintiff was aspirational and that "[c]reating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise"); *see also id*. at 725 ("This requirement [that norms be "accepted by the civilized world" and "defined with specificity"] is fatal to Alvarez's claim.").

121. *See* Beth Stephens, Comment, Sosa v. Alvarez-Machain: *"The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 534 (2004) ("*Sosa* affirmed the cautious approach adopted by most of the lower courts and left the door open for current and future cases that address the most egregious violations of international law.").

122. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

123. *Id*. at 761–62.

124. *Id*. at 763.

125. *Id.*

126. *Id.*

III. THE INTERNATIONAL PROHIBITION AGAINST CRIMES TERRORISM

The remainder of this paper applies *Sosa*'s framework to the phenomenon of terrorism. Most of this analysis focuses on whether terrorism is sufficiently prohibited at the international level to constitute a violation of the "law of nations" as required by the ATS. At the same time, the United States has incorporated many terrorism treaty crimes into its domestic penal code. This suggests that certain terrorism crimes—those contained within a multilateral treaty that the United States has domesticated—may also be actionable under the ATS as violations of a "treaty of the United States."

A primary hurdle to invoking the ATS in the terrorism context remains the problem of definition.[127] Although there have been efforts to define terrorism under international law for decades, an omnibus treaty or universal definition condemning terrorism in all circumstances and in all its manifestations continues to elude the international community.[128] Indeed, international instruments condemning terrorism have at times carved out exceptions for putatively legitimate struggles—such as those waged by national liberation movements and groups asserting the right of self-determination—perpetuating the now trite adage that "one man's terrorist is another man's freedom fighter." In particular, a core group of states remains unwilling to condemn acts of violence committed by such non-state actors against the members of the target

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127. H.H.A. Cooper, *Terrorism: The Problem of the Problem of Definition*, 26 CHITTY'S L.J. 105, 107 (1978) ("The problem of the definition of terrorism is more than semantic. It is really a cloak for a complexity of problems, psychological, political, legalistic, and practical.").

128. Indeed, the scholarly literature is replete with competing definitions of terrorism as well. *See* ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES, AND LITERATURE 119–52 (1983) (cataloging over 100 definitions in the scholarly literature). Even U.S. federal law contains different terrorism definitions for different purposes, including penal liability, civil liability, surveillance, immigration, insurance, foreign aid, and so on. *See generally* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249–70 (2004) (cataloging and deconstructing definitions of terrorism within U.S. federal law); *id*. at 270 (noting that different definitions are appropriate for different public policy objectives).

state's armed forces, even outside of an armed conflict situation.[129] These difficulties reflect doctrinal challenges in properly demarcating the domain of international humanitarian law, where certain forms of violence are deemed privileged, as well as lingering normative ambivalence about the utility, propriety, and legality of resorting to violent tactics in certain political contexts. As a result of this historically tepid international commitment to condemn all acts of terrorism in all circumstances, codification efforts have yielded a number of treaties that require state parties to criminalize specific terrorist acts or methods (such as hijacking or attacking internationally protected persons), but no inclusive definition.

Notwithstanding this complex point of dissention, a survey of existing international and domestic prohibitions against terrorism, coupled with more modern developments toward a comprehensive convention against terrorism, suggests that the core of a prohibition against terrorism now exists that is sufficiently specific, identifiable, and universal to serve as the basis for a wide range of suits under the ATS.[130] So long as the facts fall within this core prohibition, it is of no moment that other instances of what might be deemed terrorist acts may remain beyond the ATS's reach. This result is bolstered where claims involving acts of terrorism may also be framed and pled as war crimes, crimes against humanity, and genocide—international crimes for which ATS jurisdiction is already well established.

International Treaty and Customary International Law

The approach of the international community toward terrorism has largely been to endeavor to combat it without defining it.[131] The League of Nations embarked upon the first major attempt in the modern era to codify the crime of terrorism under international law after the 1934 assassination of King Alexander of Yugoslavia

129. Many of these states assert reservations to this effect when they ratify treaties that do not recognize such exceptions. *See infra* note 169–173 and accompanying text.

130. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) (noting that while there may be uncertainty at the margins, the conduct alleged clearly fell within the prohibition against piracy under international law).

131. Gilbert Guillaume, *Terrorism and International Law*, 53 INT'L & COMP. L.Q. 537, 539 (2004).

and others by Croatian separatists in France. The 1937 treaty—the Convention for the Prevention and Punishment of Terrorism—defined terrorism as follows: "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public."[132] The treaty attracted twenty-four state signatories, only one of which (India) ultimately ratified the Convention.[133] The onset of World War II scuttled any further efforts to bring the treaty into effect; after the dissolution of the League of Nations, the treaty was never revived.[134]

From this abortive start, the international community proceeded in a piecemeal fashion by defining and prohibiting particular manifestations of terrorism, often in reaction to high-profile terrorist incidents.[135] So, at the time of the *Tel-Oren* decision, there were multilateral treaties addressed to the terrorist offenses of the day: aircraft hijacking,[136] attacks on diplomats and other international personnel,[137] hostage-taking,[138] and piracy.[139] Notably,

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132. Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.94.M.47.1938.V [hereinafter 1937 Convention]. For a compendium of terrorism treaties, see M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001) (2001).

133. For more on the circumstances surrounding the 1937 Convention, see Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 69–70 (1974); Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 J. INT'L CRIM. JUSTICE 78, 78–83 (2006).

134. Franck & Lockwood, *supra* note 133, at 70.

135. Most of these treaties have their origin in the General Assembly's Sixth (Legal) Committee working in conjunction with the Security Council, the Economic and Social Council, and certain Specialized Agencies (such as the International Civil Aviation Organization).

136. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention of 1963]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Hijacking Convention]; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Hijacking Convention]. The international community subsequently promulgated a Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474 [hereinafter Airports Convention].

137. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *adopted* Dec. 14,

many of these early treaties were not denominated as terrorism treaties per se; rather, they prohibit certain conduct without reference to any terrorist objective, motive, or purpose.

Since the D.C. Circuit rendered the *Tel-Oren* decision in 1984, however, the phenomenon of terrorism and efforts to prohibit it have gained significantly greater prominence in international law. This trajectory predated, but was expedited by, the attacks of September 11th. In particular, the international community, through multiple branches of the United Nations, has promulgated a number of instruments condemning particular instances and types of terrorism and recognizing various manifestations of terrorism as international crimes. Some early instruments reflected ambivalence about the legitimacy of certain violent acts in certain political contexts. Over time, however, articulated justifications for acts that might constitute terrorism have been gradually abandoned, giving rise to a purer and less politicized international prohibition.

By way of examples from the United Nations' political branches, in 1973, the General Assembly issued its Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, which declared that "[t]he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with principles of international law."[140] Even as late as 1991, a

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1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Protected Persons Convention]. This treaty was later joined by the Convention on the Safety of United Nations and Associated Personnel, *done* Dec. 9, 1994, 2051 U.N.T.S. 391 [hereinafter United Nations Convention]. The Organization of American States also promulgated a regional treaty on this front. Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crime Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 194.

138. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205 [hereinafter Hostages Convention].

139. Convention on the High Seas, *done* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11. This treaty was later replaced by the 1982 Convention on the Law of the Sea, the third such treaty setting forth rules governing the oceans.

140. G.A. Res. 3103, ¶ 1, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9142 (Dec. 12 1973). Many of these provisions served as the inspiration for the 1977 promulgation of the two Protocols to the 1949 Geneva Conventions. *See also* G.A. Res. 3314 (XXIX) (Dec. 14, 1974) (defining "aggression," but noting

General Assembly Resolution denounced terrorism, but in virtually the same breath, reaffirmed "the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle legitimately to this end and to seek and receive support in accordance with the principles of the Charter."[141] Several years later, however, the General Assembly signaled a shift in its collective thinking in its approval of a Declaration on Measures to Eliminate International Terrorism.[142] The Declaration more clearly stated that criminal acts "intended or calculated to provoke a state of terror in the general public . . . for political purposes are in any circumstance unjustifiable," regardless of any ideological or other causes that may be invoked to justify them.[143] The Declaration further required Member States to refrain from organizing, instigating, assisting, or participating in terrorist acts in territories of other States or acquiescing in or encouraging activities within their own territories directed towards the commission of such acts.[144]

It was not until 1992 and in response to the bombing of Pan Am Flight 103 that the Security Council officially declared terrorism to be a threat to international peace and security.[145] Building on this

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that nothing in the definition of aggression "could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end . . .").

141. G.A. Res. 46/51, ¶ 15, U.N. Doc. A/RES/46/51 (Dec. 9, 1991).

142. G.A. Res. 49/60, annex, U.N. Doc. A/RES/49/60 (Feb. 17, 1995). The General Assembly reaffirmed this Declaration in Resolution 51/210. U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

143. G.A. Res. 51/210, *supra* note 142, ¶ 3.

144. *Id*. ¶ 5. These ideals were reaffirmed in the United Nations World Summit, a high-level summit of the 60th General Assembly, wherein states "strongly [condemned] terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security." World Summit Outcome, G.A. Res. 60/1, ¶ 81, U.N. Doc. No. A/Res/60/1 (Oct. 24, 2005).

145. *See* S.C. Res. 731, pmbl., U.N. Doc. S/RES/731 (Jan. 21, 1992) (recognizing "the right of all States . . . to protect their nationals from acts of international terrorism that constitute threats to international peace and security"). Prior Security Council resolutions had addressed terrorism, *see, e.g.*, S.C. Res. 635, U.N. Doc. S/RES/635 (June 14, 1989) (concerning the safety of civil aviation

resolution, Security Council Resolution 1373, issued pursuant to Chapter VII in the weeks following the attacks of September 11th, among other things obliged all states of the world to criminalize, prohibit, and prevent various aspects of the financing or sponsorship of terrorism, effectively rendering select provisions of the International Convention for the Suppression of the Financing of Terrorism[146] binding on all United Nations member states.[147] Notwithstanding this dedicated resolution, the Council did not define terrorism, leaving it up to states to implement those obligations based upon their own understanding of the concept. The Resolution also established a Counter-Terrorism Committee, whose directorate monitors state compliance with the anti-terrorism framework and encourages countries to adjust their domestic law as necessary.[148] Subsequently, Council Resolution 1566, issued after the 2004 bombings in Madrid and the attack on a school in Russia, condemned the following:

> [C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an

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and the problem of undetectable explosives), but this resolution squarely placed terrorism on the Council's Chapter VII agenda.

146. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 39 I.L.M. 268 [hereinafter Financing Convention].

147. The Resolution also called upon states to ratify the "relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999," effectively adopting the provisions of those treaties. S.C. Res. 1373, ¶ 3(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001). Controversially, Resolution 1373 made no reference to international human rights. This was later remedied in part by Resolution 1456, which declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

148. Counter-Terrorism Committee, http://www.un.org/sc/ctc/ (last visited Nov. 06, 2008).

> international organization to do or to abstain from doing any act . . . .[149]

This language reads like a definition of terrorism, but the Council did not explicitly identify this provision as such, and this language was followed by a clause indicating that such acts "constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism."[150] Resolution 1566 also contemplates an international compensation fund for victims of terrorist acts that would be financed through voluntary state contributions and assets seized from terrorist groups.[151] Subsequently, Resolution 1624 (2005) obliged states to prohibit "incitement to commit a terrorist act,"[152] and Resolution 1822 (2008) expanded the list of targeted individuals and entities beyond al Qaeda, Osama bin Laden, and the Taliban to include "other individuals, groups, undertakings and entities associated with them."[153]

In 2003, then-U.N. Secretary General Kofi Annan convened a High Level Panel on Threats, Challenges and Change to "assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century."[154] The Report focused on terrorism as one such threat and stressed the need to identify and eliminate root causes, counter extremism and intolerance, develop collective counter-terrorism

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149. S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

150. *Id.* The Council simply "recalls" that such acts constitute offenses within international treaties relating to terrorism and are under no circumstances justifiable. States are called on to prevent such acts and ensure that they are appropriately punished. *Id.*

151. *Id.* ¶ 10.

152. S.C. Res. 1624, U.N. Doc. No. S/RES/1624 (Sept. 14, 2005).

153. S.C. Res. 1822, U.N. Doc. No. S/RES/1822 (June 30, 2008). These Resolutions have given rise to criticism for encouraging states to adopt aggressive counter-terrorism mechanisms in the penal and non-penal contexts (e.g., with regard to surveillance) without ensuring respect for human rights. *See* Kim Lane Scheppele, The International State of Emergency: Challenges to Constitutionalism after September 11 (unpublished manuscript, on file with author).

154. The Secretary-General, *Note by the Secretary-General*, ¶ 3, *delivered to the General Assembly*, U.N. Doc. A/59/565 (Dec. 2, 2004).

methods, build state capacity to prevent terrorist recruitment and operations, and control dangerous materials, all without sacrificing important human rights and rule of law values.[155] The Report also called upon the international community to develop a comprehensive definition of terrorism within a comprehensive convention.[156] This definition, the Panel urged, should consolidate existing counter-terrorism instruments and describe terrorism as:

> "[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[157]

The Panel argued that the lack of a comprehensive definition "prevents the United Nations from exerting its moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes."[158]

On the treaty front, a number of additional manifestations of terrorism are now recognized as criminal, including attacks on maritime navigation[159] and fixed platforms on the continental shelf,[160] acts of nuclear terrorism,[161] terrorist bombings,[162] terrorist

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155. *Id*. ¶ 148.

156. *Id*. ¶¶ 157–59. *See also* World Summit Outcome, *supra* note 144, ¶83.

157. *Id*. ¶ 164(d).

158. *Id*. ¶ 157.

159. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done* Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221 [hereinafter Maritime Navigation Convention]. This treaty was drafted in response to the 1985 seizure of the Italian vessel Achille Lauro. Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991).

160. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *done* Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 304 [hereinafter Fixed Platforms Protocol]. This

financing,[163] and the development or use of biological or chemical weapons of mass destruction.[164] Many of these multilateral treaties are well-subscribed to, indicating a high degree of acceptance within the international community of the prohibitions they contain and the enforcement mechanisms they mandate.[165]

When considered collectively, these piecemeal treaties in many respects come close to covering the field. In particular, the 1999 Terrorist Financing Convention serves in certain respects as a unifying instrument for these various treaties by incorporating a number of extant treaties by reference in its annex. Specifically, Article 2(1) provides that:

> Any person commits an offence within the meaning of this Convention if that person by any means,

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Protocol is open to signatories to the Maritime Navigation Convention, *supra* note 159.

161. Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. 11,080, 1456 U.N.T.S. 125 [hereinafter Nuclear Material Convention]; International Convention for the Suppression of Acts of Nuclear Terrorism, *open for signature* Sept. 14, 2005, 44 I.L.M. 815 [hereinafter Nuclear Terrorism Convention].

162. International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249 [hereinafter Bombing Convention]. The international community promulgated this treaty in response to the 1998 U.S. embassy bombings in Kenya and Tanzania. A predecessor treaty requires the marking for the purpose of detection of plastic explosives. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 359 [hereinafter Plastic Explosives Convention].

163. Financing Convention, *supra* note 146. This Convention attracted very few members until the attacks of September 11th and the issuance of the Security Council of Resolution 1373. *See supra* note 147.

164. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 3 [hereinafter Chemical Weapons Convention]. This treaty built upon a related treaty dealing with Biological Weapons. Convention on the Prohibition of the Development, Production, Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Bacteriological Weapons Convention].

165. The status of these terrorism treaties is compiled here, as of January 2008: Extract from the Report of the Secretary-General on Measures to Eliminate International Terrorism (Jan. 17, 2008), http://untreaty.un.org/cod/terrorism/terrorism_table_update_Jan_2008.pdf.

> directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [any violation of an annexed treaty].[166]

The treaty then comes close to an omnibus definition when it additionally calls for the domestic criminalization of the financing of:

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[167]

These treaties reject all political, philosophical, ideological, racial, ethnic, and religious grounds that may be advanced to excuse or justify the commission of prohibited acts.[168] Nonetheless, certain states continue to make reservations to these treaties that exempt the

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166. Financing Convention, *supra* note 146, art. 2(1).

167. *Id.* art. 2(1)(b); *see also* Council Framework Decision 475/2002, on Combating Terrorism, art. 1, 2002 O.J. (L 164) 3, 4 (EU) [hereinafter EU Framework Decision] (prohibiting "(a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; and (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life").

168. *See, e.g.*, Financing Convention, *supra* note 146, art. 5 (requiring parties to adopt necessary measures, including domestic legislation, to prevent use of such justifications).

treaties' application in situations in which groups are exercising rights of self-determination. For example, in connection with its ratification of the Bombing Convention, Pakistan submitted a declaration stating that "nothing in this Convention shall be applicable to struggles, including armed struggles, for the realization of [the] right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law."[169] Egypt, Jordan, and the Syrian Arab Republic made similar declarations with respect to the Financing Convention.[170] For example, Egypt included the following statement upon ratification of the treaty: "[w]ithout prejudice to the principles and norms of general international law and the relevant United Nations resolutions, the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of . . . the Convention."[171] These reservations reflect language contained in the League of Arab State's Convention on the Suppression of Terrorism,[172] which provides at Article 2(1) that:

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169. United Nations Treaty Database, Declarations and Reservations, Bombing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#EndDec. The majority of states objected to this reservation. *Id*.

170. United Nations Treaty Database, Declarations and Reservations, Financing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=374&chapter=18&lang=en#EndDec. A number of states also lodged objections to these declarations as contrary to Article 6, which obliges parties to "ensure that criminal acts within the scope of [the] Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature." *Id*.

171. United Nations Treaty Database, Declarations and Reservations, Financing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=374&chapter=18&lang=en#EndDec.

172. Arab Convention on the Suppression of Terrorism, April 22, 1998, *reprinted in* INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 132, at 393 [hereinafter Arab League Convention]. The Convention defines terrorism as:

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause

> Any act committed in a situation of a struggle by any means, including the armed struggle against foreign occupation and aggression, for liberation and self-determination, according to the principles of international law is not to be considered a crime. Those acts taken in defense of the soil unity of any Arab state are also not to be considered crimes.[173]

Alongside this sectoral approach to terrorism, the United Nations has endeavored to develop a comprehensive definition of terrorism through an Ad Hoc Committee on International Terrorism first convened in the 1970s.[174] This effort, however, became mired in Cold War politics and polemics. In 1996, pursuant to a proposal from India,[175] the international community renewed this movement by constituting another Ad Hoc Committee to draft additional terrorism treaties, including a comprehensive treaty premised on a criminal law framework.[176] The General Assembly's Sixth (Legal)

> damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources.

Id. art. 1.1. The Arab League Convention also incorporated by reference other terrorism treaties. *Id.* art. 1.2.

173. *Id.* art. 2(a).

174. *See* G.A. Res. 3034 (XXVII), ¶ 9, U.N. Doc. A/8730 (Dec. 18, 1972) (establishing Committee).

175. The Permanent Representative of India, *Letter Dated 1 November 1996 from the Permanent Representative of India to United Nations Addressed to the Secretary-General*, *delivered to the General Assembly*, U.N. Doc. A/C.6/51/6 (Nov. 11, 1996). India later submitted a draft comprehensive convention which served as the starting point for multilateral negotiations. *Draft Comprehensive Convention on International Terrorism: Working Document Submitted by India*, U.N. Doc. A/C.6/55/1 (Aug. 28, 2000), *available at* http://www.indianembassy.org/policy/terrorism/draft_convention.htm.

176. *See* G.A. Res. 51/210, *supra* note 142, ¶ 9 (establishing an Ad Hoc Committee to draft terrorism treaties, including eventually a comprehensive treaty); *see also* G.A. Res. 61/40, U.N. Doc. A/RES/61/40 (Dec. 4, 2006) (discussing measures to eliminate international terrorism). The Committee drafted three topical treaties: the Bombing Convention, *supra* note 162, G.A. Res. 52/164, U.N. Doc. A/52/49 (Dec. 15, 1997), the Financing Convention, *supra* note 146,

Committee transformed the work of the Ad Hoc Committee into a consolidated draft treaty, which defines the applicable offense as follows:

> Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:
> (a) Death or serious bodily injury; or
> (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
> (c) Damage to [such] property, places, facilities or systems . . . resulting in or likely to result in major economic loss when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.[177]

The current language envisions that if a sectoral treaty and the Comprehensive Convention are both applicable, the terms of the former would prevail.[178]

Negotiations on this effort have stalled because delegates have been unable to agree on the scope of the Convention vis-à-vis international humanitarian law (i.e., the law of war) and whether the treaty would address state terrorism.[179] As discussed more fully below,[180] these two stumbling blocks are interrelated. In particular,

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G.A. Res. 54/109, U.N. Doc. A/54/615 (Dec. 9, 1999), and the Nuclear Terrorism Convention, *supra* note 161, G.A. Res. 59/290, U.N. Doc. A/59/766 (April 13, 2005). With Resolution 54/110, the Committee along with a working group of the General Assembly's Legal Committee began to focus on a comprehensive convention. G.A. Res. 54/110, ¶ 12, U.N. Doc. A/54/615 (Dec. 9, 1999).

177. *See* Chairman of the Sixth Committee, *Letter Dated 3 August 2005 from the Chairman of the Sixth Committee to the President of the General Assembly*, app. II, *delivered to the General Assembly*, U.N. Doc. A/59/894, (Aug. 12, 2005) (conveying consolidated text) [hereinafter Draft Comprehensive Convention].

178. *Id.* app. II, art. 3.

179. *Id.* app. I, at 5 (reproducing Jordanian proposal to this effect).

180. *See infra* Part III.c.ii.

delegates have struggled with determining when national liberation and self-determination movements have the right to use force without risking condemnation and prosecution for committing terrorism.[181] In addition, some delegates have favored excluding situations covered by international humanitarian law from the treaty altogether, whereas others want any attack against civilians or other protected persons to fall within the terrorism framework, even if committed within an armed conflict when humanitarian law would also apply.[182]

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181. *See generally* Mahmoud Hmoud**,** *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, 4 J. INT'L CRIM. JUST. 1031 (2006) (discussing the various issues that have proven problematic in defining the crime of terrorism); Ctr. for Nonproliferation Studies, Draft Comprehensive Convention on International Terrorism (August 11, 2006), http://cns.miis.edu/inventory/pdfs/intlterr.pdf (illustrating a draft of the compromise).

182. While a universal comprehensive treaty remains in the works, a number of regional organizations have promulgated treaties prohibiting terrorism. *E.g.*, OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999, http://untreaty.un.org/English/Terrorism/oau_e.pdf [hereinafter OAU Convention]; Convention of the Organisation of the Islamic Conference on Combating International Terrorism, *adopted* July 1, 1999, *reprinted in* UNITED NATIONS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 188 (2d ed. 2004) *available at* http://www.oic-oic.org/oicnew/english/convention/terrorism_convention.htm [hereinafter OIC Convention]; Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, http://untreaty.un.org/English/Terrorism/csi_e.pdf; Arab League Convention, *supra* note 172; SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, http://untreaty.un.org/English/Terrorism/Conv18.pdf [hereinafter SAARC Convention] (primarily governing extradition for treaty-based terrorism crimes); European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93 [hereinafter European Convention] (also addressed to extradition); Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. 196 *available at* http://conventions.coe.int/Treaty/en/Treaties/Html /196.htm [hereinafter Council of Europe Convention] (defining terrorism with reference to existing sectoral treaties); Organization of American States Convention on Terrorism, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 194 [hereinafter OAS Convention]; Inter-American Convention Against Terrorism, June 3, 2002, S. TREATY DOC. NO. 107-18, 42 I.L.M. 19 [hereinafter Inter-American Convention] (defining terrorism with reference to existing sectoral treaties). By way of example, the OAU Convention defines terrorism as:

Similar concerns led to the exclusion of terrorism crimes from the statute of the International Criminal Court. The developments toward a greater recognition and articulation of both the illegitimacy and illegality of acts of terrorism largely post-dated the promulgation of the Rome Statute of the International Criminal Court (ICC),[183] which was finalized in 1998.[184] The lack of a consensus definition for the crime of terrorism was one of the primary reasons that drafters excluded terrorism from the ICC's jurisdiction.[185] Early drafts of the Statute, however, did contemplate some jurisdiction over terrorism crimes. As originally conceived, the ICC's constitutive statute was to be primarily procedural in nature, incorporating the "core" international crimes of genocide, crimes against humanity, and war crimes as defined by customary international law (CIL) along with certain "treaty crimes" set forth in discrete multilateral treaties, such as those addressing terrorism, drug trafficking, money laundering, and the like.[186] To that end, nine of the terrorism treaties referenced above (e.g., those addressing

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> [A]ny act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
> (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
> (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
> create general insurrection in a State.

OAU Convention, *supra*, art. 1.3.

183. ICC Statute, *supra* note 198.

184. The ICC Statute in some respects engaged in the progressive development of the law; in other respects, it did not codify all existing law. *See id.* art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").

185. Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 18 (2002).

186. *Id*. at 17.

terrorism against aircraft, ships, hostages, and diplomats) were included in an annex to the original statute.[187]

Early on in the negotiations, delegates expressed concern that customary international law would not define the relevant ICC crimes as clearly as would be necessary to provide adequate notice to an accused pursuant to the principle of *nullum crimen sine lege*.[188] In addition, with respect to treaty crimes, delegates anticipated that it would be necessary to confirm that the treaty was in force with respect to the relevant states (e.g., the territorial and nationality state) for a prosecution to proceed. These concerns led states to agree to set out the definitions of all the crimes in the Statute (and later adopt Elements of Crimes) rather than incorporate such crimes by reference to pre-existing treaties or CIL. Accordingly, a consolidated text of the ICC Statute included a more universal definition of terrorism, which was reminiscent of the 1937 Convention and defined the crime as:

> Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, or the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them.[189]

As the negotiations proceeded at the 1998 Rome Conference, the treaty crimes eventually either fell out of the Statute, as was the case with terrorism *stricto sensu* and drug trafficking, or were incorporated into the core crimes, as was the case with respect to

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187. *Id*.

188. Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, ¶ 57, U.N. Doc. A/50/22(SUPP) (Sept. 6, 1995).

189. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Report of the Preparatory Committee of the Establishment of an International Criminal Court*, at 27, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

crimes against internationally protected persons (which are enumerated as war crimes at Article 8(2)(b)(iii)) and apartheid (which is listed as a crime against humanity at Article 7(1)(j)).[190] With respect to the crime of terrorism, drafters articulated several reasons for eventually excluding the crime from the Statute altogether: (1) terrorism has no universally accepted definition; (2) terrorism was not considered to be one of "the most serious crimes of international concern" as contemplated by Article 1 of the ICC Statute; (3) at the time, terrorism was not clearly recognized as a crime under customary international law; (4) including crimes of terrorism would unnecessarily politicize the ICC; and (5) there are alternative venues for terrorism prosecutions such that establishing international jurisdiction would be unnecessary or duplicative.[191] In addition, delegates were committed to concluding the treaty in five weeks, and the inclusion of terrorism was proving to be a sticking point in the negotiations.[192]

With respect to the politicization argument, states contended that the inclusion of terrorism would impede ratifications of the Rome Statute for fear of politicized prosecutions and proceedings, especially in cases in which states are battling subversive groups or internal rebellions.[193] As one scholar has noted, terrorism "is not only a phenomenon, it is also an invective, and there are many examples of States using this invective in a most subjective manner to de-legitimize and demonize political opponents, associations or other States."[194]

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190. Martinez, *supra* note 185, at 17–19, 33, 37.

191. *Id.* at 18; s*ee* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 31 (1999) (discussing lack of consensus among states in defining crimes of terrorism); Benjamin B. Ferencz, *Blaine Sloan Lecture: International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998) (discussing the historical development of international law and terrorism).

192. Arsanjani, *supra* note 191, at 29.

193. Christian Much, *The International Criminal Court (ICC) and Terrorism as an International Crime*, 14 MICH. ST. J. INT'L L. 121, 126 (2006).

194. *Id*. at 133. This argument of course overlooks the fact that many of the crimes within the jurisdiction of the Court have significant political ramifications, not the least of which is the as yet undefined crime of aggression. *See* Richard John Galvin, *The ICC Prosecutor, Collateral Damage, and NGOS: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1 (2005)

Terrorism was also excluded under the rationale that effective systems of national and international cooperation are already in place for the prosecution of terrorism crimes. Because governments are usually the direct or indirect target of terrorist acts, states are highly motivated to prosecute acts of terrorism through criminal actions[195] or to encourage the pursuit of civil actions by victims.[196] Indeed, as compared to the so-called "atrocity crimes," terrorism crimes are more often incorporated into domestic penal codes and are more frequently prosecuted by states.[197] Given this, it was argued, the principle of complementarity will likely prevent the prosecution of acts of terrorism before the ICC in many cases.[198] Moreover, effective counter-terrorism measures require "long-term planning,

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(exploring the prospect of a politicized prosecution in the ICC directed against the U.S. military).

195. In the United States, for example, Omar Rahman, the so-called "blind sheik," was sentenced to life in prison for his role in the first attempted bombings of the World Trade Center in 1993. United States v. Rahman, 189 F.3d 88, 111 (2d Cir. 1999). Zacarias Moussaoui, once considered the twentieth hijacker for the September 11th attacks, was sentenced in the U.S. for his role in the 9/11 terrorist attacks. United States v. Moussaoui, No. 1:01CR00455-001 (E.D. Va. May 4, 2006), *available at* http://capitaldefenseweekly.com/library/moussaoui/1_01-cr-00455/docs/72444/0.pdf. Most recently, Jose Padilla was convicted of conspiring to murder, kidnap, and maim persons in another country. United States v. Hassoun, No. 0:04CR60001 (S.D. Fla. Aug. 16, 2007); *see* Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 16, 2007, at A1.

196. *See supra* notes 48–49. *See generally* William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105 (2002) (addressing the legality of utilizing civil lawsuits in domestic courts as a means of providing remedies for victims of state-sponsored terrorist attacks).

197. The United States has codified a number of terrorism crimes at 18 U.S.C. §§ 2331–2332 (2006).

198. Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. The principle of complementarity is fundamental to the ICC framework and provides that the Court will exercise jurisdiction only where the relevant domestic authorities (e.g., the territorial and nationality states) are either unwilling or unable to prosecute offenders. Notably, complementarity is not triggered, at least according to the plain text of Article 17, where the domestic courts are overly zealous about terrorism prosecutions or where the defendant's due process rights are potentially in jeopardy—two risks for terrorism prosecutions where the state is the target of the acts in question. *See* Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 261 (2006).

infiltration into the organizations involved, the necessity of giving immunity to some individuals involved, and so forth"[199]—all functions more effectively exercised by national jurisdictions than an international court far from the events in question and the relevant political milieu.

Principle supporters of including terrorism in the ICC Statute were Algeria, India, Sri Lanka, and Turkey—all states facing serious internal terrorist threats. During the drafting of the Rome Statute, states advocating the inclusion of the various treaty crimes formed an alliance that reflected substantive overlap (in narco-terrorism) as well as the recognition that it would be an uphill battle to include crimes other than the core international crimes in the Statute.[200] At one point, this alliance (consisting of states as varied as Barbados and India) argued for a "compromise" that would list the treaty crimes in Article 5 and then leave their definition to another day, as was the approach taken with respect to the crime of aggression.[201] An alternative proposal advocated for the inclusion of terrorism as an enumerated crime against humanity rather than as a standalone crime.[202] Much opposition to the inclusion of treaty crimes came from NGO participants, who feared that these crimes would distract and overwhelm the Court at the expense of the atrocity crimes.[203]

In the end, most of the treaty crimes were excised or limited, and the final Statute asserts jurisdiction over only four core crimes—genocide, crimes against humanity, war crimes and the crime of aggression, with the latter remaining without a definition.[204] Some drafters remained uneasy with this result and managed to promulgate Resolution E at the Rome Conference, which recommended that a review conference assemble in 2010 to consider the inclusion of the crime of terrorism.[205] As this Conference approaches, many states

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199. Arsanjani, *supra* note 191, at 29.

200. Philippe Kirsh & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 4 (1999).

201. Martinez, *supra* note 185, at 19.

202. *Id.* at 18–19.

203. *See id.* at 18 (listing reasons the Court does not address treaty crimes).

204. *Id.* at 18–19.

205. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, June 15–July 17, 1998, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment*

and scholars continue to argue that terrorism should be included within the Court's jurisdiction.[206] In particular, these advocates question the assumption made during the Rome Conference—which occurred in 1998, prior to the attacks of September 11, 2001—that terrorism is not a serious crime of international concern. They argue that terrorism represents a substantial and growing threat,[207] especially given the possibility of attacks with nuclear, chemical, or biological weapons of mass destruction.[208]

Only one *ad hoc* tribunal will assert jurisdiction over terrorism *stricto sensu*: the Special Tribunal for Lebanon (STL). The STL is a hybrid tribunal established by the United Nations and Lebanon to investigate and prosecute those "responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others."[209] The Tribunal has a mandate to apply the laws of Lebanon "relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy."[210] Article 314 of the

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of an International Criminal Court, at 7–8, U.N. Doc. A/CONF.183/10 (July 17, 1998).

206. *See, e.g.*, Roy S. Lee, *How the World Will Relate to the Court: An Assessment of the ICC Statute*, 25 FORDHAM INT'L L.J. 750 (2002) (arguing that terrorist attacks can and should be includable under the ICC's jurisdiction).

207. CENT. INTELLIGENCE AGENCY, UNCLASSIFIED REPORT TO CONGRESS ON THE ACQUISITION OF TECHNOLOGY RELATING TO WEAPONS OF MASS DESTRUCTION AND ADVANCED CONVENTIONAL MUNITIONS, 1 JULY THROUGH 30 DECEMBER 2003, at 7 (2004) ("[T]he threat of terrorists using chemical, biological, radiological, and nuclear (CBRN) materials remains high."); *see also* Seth Brugger, *International Law, Terrorism, and Weapons of Mass Destruction: Finding and Filling the Gaps*, 57 RUTGERS L. REV. 803, 807 (2005) ("[T]here is a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials.").

208. *See* S.C. Res. 1456, *supra* note 147 (stating that "there is a serious and growing danger of terrorist access to and use of nuclear, chemical, biological and other potentially deadly materials."). A U.N. Committee determined that acts of terrorism increased in number in the post-September 11 period. *See U.N. Ad Hoc Committee Report*, *supra* note 329, at 3–4 (condemning terrorism and calling for further state action to combat its spread).

209. Statute of the Special Tribunal for Lebanon pmbl., May 30, 2007, 46 I.L.M. 999.

210. *Id.* art. 2.

Lebanese Penal Code (LPC), one of several terrorism-related provisions that may be litigated before the STL, "defines 'terrorist acts' as all 'acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents likely to create a public hazard."[211] The *mens rea* requires knowledge and a will to commit the terrorist act along with a specific intent to create a state of alarm or fear.[212] The STL is thus a quasi-international tribunal effectively specializing in the law of terrorism. As such, its jurisprudence may be persuasive as other tribunals consider terrorism crimes in the future.

Many of the sectoral terrorism treaties direct state parties to enact domestic legislation to enable cooperation in the investigation, extradition, and prosecution of individuals and groups involved in acts of terrorism. The United States has been quite diligent in ratifying and implementing these terrorism treaties. Title 18 contains a constellation of terrorism crimes that may be prosecuted at the federal level pursuant to extraterritorial principles of jurisdiction.[213] Many of these federal crimes implement multilateral treaty offenses contained in treaties to which the United States is a party.[214] For example, on the date the Terrorist Bombing Convention entered into force with respect to the United States, 18 U.S.C. § 2332(f) came into effect to provide for criminal penalties for violations of the treaty.[215] By contrast, other terrorism or terrorism-like offenses are unique to U.S. law. The provision of various forms of material support to acts of terrorism constitutes a federal crime, but only some

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211. Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1129 (2007) (emphasis omitted).

212. *Id.* at 1133.

213. Key provisions were enacted by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), among other pieces of legislation.

214. *See also* 18 U.S.C. § 37 (2006) (implementing the Airports Convention, supra note 136); 18 U.S.C. § 1203 (implementing the Hostages Convention); 18 U.S.C. § 2280 (implementing the Maritime Navigation Convention); 18 U.S.C. § 2339C (prohibiting the financing of any act that constitutes a violation of a number of terrorism treaties).

215. *See* 18 U.S.C. § 2332(f) (providing for penalties for unlawfully delivering, placing, discharging, or detonating an explosive in a public place).

prohibited actions would also trigger liability under the Financing Convention.[216] In addition, the U.S. has a number of code provisions criminalizing various forms of attack against U.S. citizens or personnel within the United States that do not find expression in any penal terrorism treaty, including acts of murder, assault,[217] or attacks with weapons of mass destruction.[218]

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216. For example, 8 U.S.C. § 1189 directs the President to designate organizations that "engage in terrorist activity" as defined in 8 U.S.C. § 1182(a)(3)(B) as "foreign terrorist organizations." This designation is a condition precedent for applicability of the material support statutes, which penalizes the provision of material support to such organizations. 18 U.S.C. § 2339B (2006). "Terrorist activities" include sabotaging or hijacking a vessel, aircraft or vehicle; detaining a person and threatening to kill, injure or further detain that person in order to compel a third person to do something; violently attacking an internationally protected person; assassinating any person; using a biological agent, chemical agent, nuclear device, explosive or firearm with intent to endanger the safety or one or more persons or to cause substantial damage to property; or threatening, attempting or conspiring to do any of these things. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006). "Engage in terrorist activity" also includes providing material support to terrorists, such as the preparation and planning of a terrorist activity; gathering of information on potential targets for terrorist activity; providing a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity; soliciting funds or other things of value for any terrorist organization; or soliciting any individual for membership in a terrorist organization or to engage in terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(iv).

217. 18 U.S.C. § 2332. This provision is not defined directly as a terrorist offense. It prohibits the killing of a U.S. national while such national is outside the United States, the extraterritorial participation in a conspiracy or attempt to kill a U.S. national, and the extraterritorial commission of physical violence against a U.S. national. *Id*. § 2332(a)–(c). No prosecution may be commenced, however, without the written certification from the Attorney General's office that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population." *Id*. § 2332(d). In addition, 18 U.S.C. § 2332b prohibits the killing, maiming, kidnapping, or assault of any person within the United States when the conduct in question transcends national boundaries.

218. 18 U.S.C. § 2332a. Reflecting the active and passive personality theories of jurisdiction, this provision prohibits the use, or threat or conspiracy to use, weapons of mass destruction by or against a U.S. national under various territorial and extraterritorial circumstances. *Id*. § 2332a(a)–(b). Weapons of mass destruction are defined as weapons "designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors," weapons that involve "a biological agent, toxin, or vector," weapons that are "designed to release radiation or radioactivity at a level

Consensus Elements of Terrorism

Although this collection of pronouncements, treaties, and soft-law instruments emerging from the United Nations, regional political bodies, and international judicial institutions contain some definitional variations, most modern formulations of terrorism crimes share certain basic structural elements[219] that could serve as the basis of a generalized tort of terrorism under the ATS. These are as follows: (1) terrorism involves the intentional perpetration by non-state, sub-state or, at times, state actors of various forms of violence (2) that targets innocent civilians or civilian infrastructure or, potentially, members of the military not engaged in active combat (3) for the purpose of causing fear or terror, or of coercing or intimidating a government or population (4) in order to achieve some political, military, ethnic, ideological, or religious goal. Most penal instruments also include an internationalizing jurisdictional element that distinguishes prohibited acts of international terrorism from violent acts that implicate only domestic law and that permits, and in some cases mandates, the exercise of expansive forms of extraterritorial jurisdiction.

1. The Objective Element: Violent Acts Otherwise Criminal

Terrorism, like other international crimes (e.g., crimes against humanity or war crimes), is an umbrella crime that encompasses a number of constitutive criminal acts. All definitions of terrorism contain an enumerated set of violent acts (or the threat thereof) whose territorial commission would normally be penalized under domestic law (assault, torture, murder, mayhem, arson,

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dangerous to human life," or other destructive devices (such as bombs, grenades, rockets, missiles, or mines). *Id*. § 2332a(c). No terrorist motive need be shown. There is no exception for acts of war, but the provision criminalizes only conduct committed "without lawful authority," which would likely exclude the use of such weapons by privileged belligerents. *Id*. §2332a(a).

219. *See* Norberg, *supra* note 2, at 209 (identifying common elements of international, regional, and domestic definitions); Susan Tiefenbrun, *A Semiotic Approach To A Legal Definition Of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357, 361 (2003) (collecting and deconstructing multiple legal and sociological definitions of terrorism).

etc.).[220] In addition, the Financing Convention[221] and some domestic statutes[222] also prohibit preparatory or otherwise non-violent actions that become criminal when they are connected to the commission of one or more terrorist acts. In general, these acts may be committed against either private persons or state actors. To be sure, the promulgation of a multilateral treaty does not automatically generate a customary international law prohibition.[223] Indeed, the terrorism treaties are primarily concerned with creating a common regime to encourage and facilitate multilateral cooperation in repressing particular means and methods of terrorism through the provision of mutual assistance, enabling the extradition of offenders, the prosecution of offenders wherever they may be found, providing for the recognition of foreign judgments, and providing for the seizure and forfeiture of assets.[224] That said, as discussed above, there is a high degree of congruence between the prohibitions contained within these treaties and authoritative pronouncements by the United Nations' political bodies. Indeed, the Security Council has ratified many of the terrorism prohibitions while acting under Chapter VII of the U.N. Charter, essentially rendering these prohibitions binding on all U.N. members. In addition, the high degree of treaty ratification and subsequent domestic codifications and adjudications of terrorism prohibitions by state parties signals state acceptance of the norms in question.

Many acts of terrorism also implicate other aspects of international criminal law. Given the normative redundancy and intersectionality in international criminal law, it is possible to situate acts of terrorism in other provisions of international criminal law. Given the frequent overlap between situations in which international humanitarian law (IHL), a.k.a. the law of armed conflict or the law of war, is applicable and situations in which acts of terrorism may

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220. *See, e.g.*, 18 U.S.C. § 2331(a)(A) (2006) (defining terrorism as involving "violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State").

221. *Supra* note 146.

222. *See* discussion *supra* note 38 on the U.S. material support statutes.

223. *See* Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 J. INT'L CRIM. JUST. 933, 935 (2006) (finding a customary rule prohibiting international terrorism).

224. Bombing Convention, *supra* note 162, art. 2(2)–(3).

occur, many acts of terrorism committed within armed conflicts may also constitute war crimes, so long as there is a nexus between the act and the armed conflict.[225] The conventional war crimes are found in the grave breaches regimes of the Geneva Conventions and Protocol I, which prohibit certain acts when committed against persons protected by those conventions, namely civilians and prisoners of war.[226] Many of these crimes involve the same conduct that often constitute acts of terrorism, such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, and the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. Under classic treaty IHL, these acts only constituted war crimes when committed within the context of an international armed conflict.[227] The *ad hoc* international criminal tribunals[228] have

225. *See In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1287–89 (S.D. Fla. 2006) (rejecting plaintiffs' war crimes claims where plaintiffs failed to allege a state of armed conflict); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005) (recognizing customary international law war crime of attacking civilians based on the Geneva Conventions and their incorporation into U.S. law); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1139–40 (C.D. Cal. 2002) ("Courts have held that a violation of the law of war may serve as a basis for a claim under the [ATS]."), *aff'd in part*, *rev'd in part*, *vacated in part*, 487 F.3d 1193 (9th Cir.), *and reh'g en banc granted*, 499 F.3d 923 (9th Cir. 2007). *But see* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 119–20 (2d Cir. 2008) (finding inadequate support in the law for plaintiffs' claims that the deployment of Agent Orange in the Vietnam War violated customary international law prohibitions against the use of poisoned weapons and the infliction of unnecessary suffering on grounds that Agent Orange was used as a defoliant and not as an intentional poison to target human populations).

226. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(3), (4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

227. *See* Protocol I, *supra* note 226, art. 1 (limiting application of the Protocol to only international conflicts and excluding situations of disturbances and strife); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International and Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

228. *See, e.g.*, Prosecutor v. Tadic, No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 83 (Oct. 2, 1995) (announcing framework for adjudicating war crimes in non-international armed conflicts).

consistently identified and adjudicated parallel customary international law prohibitions within non-international armed conflicts.[229] In addition to the treaties' enumerated grave breaches, there is a rich customary international law[230] of war crimes that includes prohibitions drawn from the Hague-law wing of IHL.[231] These include the crimes of intentionally directing attacks against civilians and civilian objects, utilizing force disproportionate to any military advantage gained, attacking undefended towns or buildings, attacks against cultural property, using treachery to kill or wound, employing poisonous or asphyxiating weapons or weapons that are calculated to cause unnecessary suffering, etc.[232]

Most relevant in the terrorism context, the *ad hoc* international criminal tribunals have identified the crime of "terrorizing civilians" as a war crime within the uncodified laws and customs of war.[233] In *Galic*, the Prosecutor so charged the defendants according to Article 51(2) of Additional Protocol I[234] and

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229. *But see* Saperstein v. Palestinian Auth., No. 04-20225-CIV-SEITZ/MCALILEY, 2006 U.S. Dist. LEXIS 92778, at *30–31 (S.D. Fla. Dec. 22, 2006) (questioning whether violations of common Article 3 satisfy the *Sosa* test).

230. *See* JEAN-MAERI HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 574–767 (2005).

231. Hague law derives from a series of conventions concluded in the Hague in 1899 and 1907 that aim to regulate the means and methods of warfare. *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 247 [hereinafter 1907 Hague Convention].

232. *But see* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 122 (2d Cir. 2008) (noting that many of the IHL norms (particularly those concerning the means and methods of warfare) "are all simply too indefinite to satisfy *Sosa's* specificity requirement"); *id.* ("As Plaintiffs' expert opined, 'norms that depend on modifiers such as "disproportionate" or "unnecessary" . . . invite a case-by-case balancing of competing interests . . . [and] black-letter rules become vague and easily manipulated. They lose the definite and specific content that *Sosa* seems to demand for recovery under the ATS.'").

233. Article 3 of the ICTY Statute provides for jurisdiction over an exemplary list of violations of "the laws and customs of war." Statute of the International Tribunal art. 3, May 23, 1993, 32 I.L.M 1192.

234. Protocol I, *supra* note 226, art. 51(2). The Fourth Geneva Convention protecting civilians and governing situations of occupation also prohibits "all measures . . . of terrorism against civilians." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33(1) (1940). These prohibitions are not part of the grave breaches regime; as such, contracting parties are not obliged to penalize such acts or subject them to universal jurisdiction, although they are authorized to do so.

Article 13 of Additional Protocol II,[235] which identically provide that the "civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[236] Neither of these provisions contemplates individual criminal liability or defines "inflicting terror" as a criminal offense. Nonetheless, the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized the crime under customary international law[237] as a variant of the well-established customary international law crime of "making the civilian population or individual civilians the object of attack."[238] The ICTY set out the following elements of the crime of terrorizing the civilian population as follows:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
> 2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.

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235. Protocol II, supra note 227, art. 13. Protocol II also prohibits "acts of terrorism" against all persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted." *Id*. art. 4(1).

236. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 12 (Dec. 5, 2003). *See also* Prosecutor v. Strugar, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶ 10 (Nov. 22, 2002) ("[T]he principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law.").

237. The ad hoc tribunals have recognized a number of war crimes that do not also constitute "grave breaches" of the Conventions. These crimes are not subject to the Conventions' mandatory universal jurisdiction regime, but universal jurisdiction remains permitted under the treaties. *See, e.g.*, Civilian Convention, *supra* note 333, art. 146 ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches.").

238. *Galic*, Case No. IT-98-29-T, Judgment, ¶ 27.

> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[239]

The Statutes of the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone specifically provide for jurisdiction over the war crime of "[a]cts of terrorism."[240] The Special Court similarly adopted the following constitutive elements that must be proven along with the *chapeau*, or general, elements for all Protocol II war crimes: "(i) Acts or threats of violence directed against persons or property; (ii) The accused intended to make persons or property the object of those acts and threats of violence or acted in the reasonable knowledge that this would likely occur; and (iii) The acts or threats of violence were committed with the primary purpose of spreading terror among persons."[241] Terrorism as a war crime is only actionable where the general elements of war crimes are present, namely the act must have been committed within the context of an armed conflict (either international or non-international), the victim must be a person protected by the particular treaty or customary prohibition (such as a civilian or a combatant *hors de combat*), and there must be some

239. *Id.* ¶ 133. Defining the crime of terrorizing civilians in terms of an intent to cause terror is somewhat tautological. *See* Saul, *supra* note 133, at 102 (noting similar circularity in the 1937 Convention).

240. Statute of the International Tribunal for Rwanda art. 4(d), Nov. 8, 1994, 33 I.L.M. 1602; The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, annex art. 3(d), *delivered to the Security Council*, U.N. Doc. S/2000/915 (Oct. 4, 2000). Likewise, the Department of Defense listed terrorism as a crime prosecutable by military commission, although it did not designate it as a war crime per se. *See* DEP'T OF DEF., *supra* note 323, § 6(B) (defining the crime of terrorism to involve the intentional killing of infliction of bodily harm on persons with the intent to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion, when such conduct takes place in the context of and in association with an armed conflict and did not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties).

241. Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 170 (Aug. 2, 2007).

nexus between the act and the armed conflict, although this latter element has been very loosely interpreted.[242]

Acts of terrorism may also constitute crimes against humanity. Crimes against humanity are a constellation of acts made criminal under international law when they are committed within the context of a widespread or systematic attack against a civilian population.[243] Acts of terrorism may implicate certain constitutive acts, including murder, torture, imprisonment, persecution, and other inhumane acts. The ICC Statute defines an "attack against a civilian population" with reference to a state or organizational policy to commit such attack, so crimes against humanity are not expressly limited to state action.[244] Although a policy element is not required by most definitions of crimes against humanity, presumably many terrorist groups could be shown to possess such a policy to attack civilians where violent acts are employed deliberately and consistently for ideological, strategic, or political purposes. Although the widespread or systematic attack must be directed against a civilian population, members of the armed forces may be

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242. The International Criminal Tribunal for the former Yugoslavia has ruled that to satisfy the nexus requirement, it must be shown that the armed conflict "played a substantial part in the perpetrator's ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed;" it was enough if, as in the present case, "the perpetrator acted in furtherance of or under the guise of the armed conflict." Prosecutor v. Kunarac, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 58 (June 12, 2002). The Department of Defense has indicated that such a nexus could involve, but is not limited to, the time, location, or purpose of the conduct in relation to the armed hostilities. DEP'T OF DEF., *supra* note 323, § 5(C).

243. The attack on the civilian population must also be either widespread—meaning involving a substantial number of victims or "massive, frequent, large scale action"—or systemic—meaning demonstrating a degree of organization or orchestration or "following a regular pattern." *See* Aldana v. Del Monte, 416 F.3d 1242, 1247 (11th Cir. 2005) (affirming dismissal of crimes against humanity claim under the ATS where plaintiffs failed to allege the existence of a widespread or systematic attack against a civilian population); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 476 (E.D.N.Y. 2007) (finding crimes against humanity sufficiently pled where plaintiffs alleged that terrorist organizations used a sophisticated financial structure to fund acts of terrorism targeting civilians); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 173, (Sept. 2, 1998) (discussing the scale of the attack against Tutsis and sympathetic Hutus, as well as the nature of the organization and structure of the attack).

244. ICC Statute, *supra* note 198, art. 7.

victims of the crimes against humanity of torture, rape, etc.[245] Post-*Sosa*, U.S. courts have consistently found properly pled crimes against humanity claims to be actionable under the ATS.[246]

Terrorist attacks may also implicate the prohibition against genocide,[247] where the acts target a protected group with the intent to destroy that group.[248] The *actus reus* elements of killing members of the group or causing serious bodily or mental harm to members of the group overlap with the *actus reus* of many terrorism prohibitions. Although there are many instances of acts of terrorism being directed against protected groups (such as those committed during "the troubles" in Northern Ireland or even the attacks of September 11, 2001), it may be difficult to prove the specific intent to commit genocide, the gravamen of the crime of genocide, as opposed to the intent to intimidate or coerce a government, which is the hallmark of terrorism.

Notwithstanding the overlap of international crimes, isolated or exceptional violent acts, committed in times of peace (or without any nexus to an armed conflict) and absent more widespread or systemic repression, will not fall within the prohibitions against war

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245. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 637–43 (May. 7, 1997).

246. *See Almog*, 471 F. Supp. 2d at 274 (sustaining state claims under ATS as violations of international law); Kiobel v. Royal Dutch Shell, 456 F. Supp. 2d 457, 467–68 (S.D.N.Y. 2006) (sustaining crimes against humanity claims); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1180–81 (C.D. Cal. 2005) (denying a motion to dismiss claims brought under ATS); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 136 (E.D.N.Y. 2005) ("Crimes against humanity are also deemed to be part of *jus cogens*—the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law."). This line of cases is consistent with pre-*Sosa* jurisprudence. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 150 n.18 (2d Cir. 2003) ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II."); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002) ("It is well-settled that a party who commits a crime against humanity violates international law and may be held liable under the [ATS].").

247. International Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, S. TREATY DOC. NO. 81-5, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

248. *See Almog*, 471 F. Supp. 2d at 476 (sustaining complaint containing genocide claims in the face of a motion to dismiss alleging the failure to plead state action).

crimes or crimes against humanity. Likewise, where the perpetrator does not act with the requisite specific intent, or where no protected group is targeted, the prohibition against genocide does not apply.[249] The commission of physical harm by non-state actors without any particular interrogatory or discriminatory purpose may be actionable as terrorism where the prohibition against torture would not apply.[250] Litigating acts that fall outside of other international criminal law prohibitions under the ATS thus requires the existence of a standalone prohibition against terrorism. Even where the acts in question implicate multiple international criminal law prohibitions, there is expressive value in concurrent pleading, as each tort includes elements not contained in the other. Calling violent acts both crimes against humanity and acts of terrorism, for example, enables the court to emphasis both the existence of a widespread and systematic attack against a civilian population as well as the terrorist objectives behind the attack, which may not be apparent were the acts not also deemed acts of international terrorism.[251]

2. Individual Responsibility

The majority of the universal treaties address themselves to individual—as opposed to state[252]—liability.[253] In addition, the

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249. Genocide Convention, *supra* note 247, art. II.

250. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *done* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (defining torture in terms of state action and requiring that it be committed "for such purposes as obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind").

251. In addition, denominating such acts as international terrorism should trigger the robust cooperative regimes for investigation and prosecution contained within the multilateral terrorism treaties, especially those that have received a Security Council Chapter VII imprimatur. *See supra* notes 147–150 and accompanying text.

252. Notable exceptions are the 1972 Bacteriological Weapons Convention, *supra* note 164, and the 1993 Chemical Weapons Convention, *supra* note 164, which contain no penal provisions and create only state, rather than individual, obligations. Resolutions and declarations emerging from U.N. bodies are also often addressed to states. *See, e.g.*, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) ("States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from

treaties are, on the whole, oriented toward penal enforcement, although some do envision other forms of liability.[254] In addition to

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organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.").

253. In addition, the Financing and Draft Comprehensive Conventions specifically address civil organizational liability. In particular, the Financing Convention notes that "Each State Party . . . shall take the necessary measures to enable a legal entity located in its territory or organized under its law to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an [enumerated] offence." Financing Convention, *supra* note 146, art. 5(1); *see also* EU Framework Decision, *supra* note 182, art. 7 (requiring liability for actions taken "by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person"); S.C. Res. 1373, *supra* note 147, art. 2(3) (addressing legal entities). The EU Framework Decision provides that the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, instigators, or accessories in offences. EU Framework Decision, *supra* note 182, art. 7(3). The Financing Convention further confirms that organizational liability may be criminal, civil, or administrative and should be incurred without prejudice to any individual criminal liability of responsible individuals. Financing Convention, *supra* note 146, art. 5(2)–(3).

254. One treaty that expressly recognizes the potential for individual (as opposed to organizational) civil liability is a 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. The Protocol is not yet in force. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Feb. 17, 2006, S. TREATY DOC. NO. 110-8. With respect to weapons of mass destruction and entities located in the states parties' territory or organized under their laws, the Protocol notes that "liability [under the Convention] may be criminal, civil, or administrative." *Id.* art. 5(2)(1). *See also* Council of Europe Convention, *supra* note 182, art. 9 (suggesting the imposition of criminal, civil, or administrative liability); Draft Comprehensive Convention, *supra* note 177, art. 10(2) (stating other forms of liability are to be without prejudice to the imposition of criminal liability). Although the terrorism treaties do not specifically call on states to provide private rights of action, in many states (and especially civil law states), victims can append civil claims to penal proceedings, so codified causes of action are unnecessary. *See generally* J.A. Jolowicz, *Procedural Questions, in* 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. II, ch. 13, at 3–15 (Andre Tunc ed., 1986) (comparing the operation of the *partie civile* system in various civil law countries). Scholars have proposed a comprehensive protocol to supplement all the multilateral terrorism treaties. *See* Moore, *supra* note 76 (proposing and providing draft text of protocol for civil liability).

prohibiting the direct commission of prohibited acts, the treaties proscribe other preparatory and ancillary offenses as well as multiple forms of secondary involvement in the enumerated crimes of terrorism, such as aiding and abetting, conspiracy, the provision of financial support, threats, etc.[255] The Bombing Convention, for example, prohibits attempts and defines "commission" to include complicity in, or the organizing or ordering of, prohibited offenses. The treaty also directs its attention to any person who "in any other way contribute[es] to the commission of any offenses by a group of persons acting with a common purpose."[256] This common purpose liability exists where the defendant either had the intent to further the general criminal activity or purpose of the group or played some role with the knowledge that the group intended to commit the prohibited offence.[257]

3. State v. Non-State Action

Although terrorism is often conceptualized as a tool of non-state actors,[258] many of these treaties and instruments do not make a

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255. *See, e.g.*, Maritime Navigation Convention, *supra* note 159, art. 4(4) (prohibiting attempts, abetting, complicity, and threatening to commit acts prohibited by the treaty); Montreal Hijacking Convention, *supra* note 136, art. 1(2) (prohibiting attempts and complicity); Council of Europe Convention, *supra* note 182, arts. 5–7, 9 (prohibiting public provocation, recruitment to terrorism, training in terrorism, etc.); Draft Comprehensive Convention, *supra* note 177, art. 2(2)–(4) (prohibiting *inter alia* threats, attempts, complicity, and engaging in a common purpose to commit prohibited offenses). The Council of Europe Convention makes several acts (including recruitment to terrorism) inchoate crimes, such that they can be prosecuted even where the terrorism offense is never committed. *See* Council of Europe Convention, *supra* note 182, art. 8,

256. Bombing Convention, *supra* note 162, art. 2(3); *accord* Financing Convention, *supra* note 146, art. 2(5)(c).

257. Bombing Convention, *supra* note 162, art. 2(3). This language also contributed to the development of the joint criminal enterprise doctrine in international criminal law by the International Criminal Tribunal for the Former Yugoslavia. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 221 (July 15, 1999) (citing Bombing Convention).

258. The 1937 Convention for the Prevention and Punishment of Terrorism defined terrorism as acts "directed against a state." *See* Saul, *supra* note 133, at 90 (stating that the 1937 Convention did not exclude "state terrorism" as long as the terrorist acts were "directed against a state").

distinction between state or private actors as either perpetrators[259] or victims,[260] implying that the particular acts of terrorism are prohibited whether committed by or against state actors.[261] The 1999 Financing Convention, for example, includes only limited place or manner restrictions.[262] That said, a few treaties focus on state actors and governmental infrastructure as targets, implying that it is envisioned that the prohibited conduct will come from the private sector and target the public sector. For example, the Bombing Convention identifies prohibited targets to include "state or governmental facilities" alongside other public or private "infrastructure facilities" providing services to the public.[263] In addition, as will be discussed below, a number of the treaties do not apply to members of a state's armed forces.[264]

The application of the terrorism prohibitions to private actors is thus uncontroversial within the international community. Indeed, the main contemporary debate concerns whether the terrorism prohibitions apply to state actors as well, with certain states resisting the notion of state terrorism at the conceptual level.[265] Coupled with other developments in international law confirming that the international criminal prohibitions against genocide, crimes against humanity, and war crimes apply to all individuals, regardless of their

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259. *See, e.g.*, Hague Hijacking Convention, *supra* note 136, art. 1 (applying to "[a]ny person").

260. *See, e.g.*, Hostages Convention, *supra* note 138, art. 1 (applying to hostage-taking committed in order to compel "a third party," including "a state, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or abstain from doing" something in exchange for the release of the individual).

261. *But see* 18 U.S.C. § 2337 (2006) (prohibiting civil suits against United States officers or employees "acting within his or her official capacity or under color of legal authority" and "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority").

262. Financing Convention, *supra* note 146, art. 1-2; *see also* EU Framework Decision, *supra* note 182, art. 1 (prohibiting acts irrespective of status as a state actor).

263. Bombing Convention, *supra* note 162, arts. 1–2; *see also* Draft Comprehensive Convention, *supra* note 177, arts. 1–2 (identifying state or governmental facilities, places of public use, and infrastructure facilities as prohibited targets).

264. *See infra* Part III.c.ii.

265. *See supra* Part III.b.iii.

status as state actors,[266] the terrorism treaties' relatively straightforward application to non-state actors[267] renders obsolete Judge Edwards' concerns in *Tel-Oren* that international law does not regulate the acts of private individuals.[268]

The emphasis on non-state action also serves to mitigate one of the reasons identified by the Court in *Sosa* for taking a "restrained" approach toward recognizing new causes of action under the ATS: the potential for such cases to impact U.S. foreign policy and complicate foreign relations.[269] In particular, the Court invoked the thorny situation of U.S. courts placing limits on the power of foreign governments over their own citizens,[270] while acknowledging that this is a primary focus of modern international

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266. The Second Circuit and other courts have confirmed that many international torts (such as war crimes, crimes against humanity, and genocide) do not include state action as a substantive element. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (noting that a relevant consideration to ATS jurisdiction is whether the "scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual" and comparing *Tel-Oren* and *Kadic*); Kadic v. Karadžić, 70 F.3d 232, 239–41 (2d Cir. 1995) (holding that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or by private actors); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007) (finding no effect on defendant bank's liability where state action was lacking).

267. Saperstein v. Palestinian Auth., No. 04-20225-CIV-SEITZ /MCALILEY, 2006 U.S. Dist. LEXIS 92778, at *23 (S.D. Fla. Dec. 22, 2006) ("[Some] cases reflect the trend toward finding that certain conduct violates the law of nations whether committed by a state or a private actor, however, which conduct falls into this realm has not been completely defined.").

268. *See supra* text accompanying notes 21–23 (noting Judge Edward's concern with whether international law addressed state action). Indeed, a year after *Tel Oren*, the D.C. Circuit stated, in dicta, that "this obscure section of the Judiciary Act of 1789 . . . may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of nations—the most prominent examples being piracy and assaults upon ambassadors," although the court considered the claims alleged to require a showing of state action. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985).

269. *Sosa*, 542 U.S. at 727 (noting "the potential implications for the foreign relations of the United States" of recognizing new causes of actions).

270. *Id*. ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

law.[271] Where terrorism cases involve non-state action, U.S. courts are less likely to find themselves considering to what extent the policies or practices of a foreign sovereign violate international law. Indeed, the United States government has less actively intervened in terrorism cases[272] than it has in the human rights cases.[273] Moreover, the judicial abstention doctrines—such as the act of state,[274] international comity,[275] and political question[276] doctrines—are less

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271. *Id*. ("Yet modern international law is very much concerned with just such questions . . . .").

272. *See* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) ("[T]he United States . . . opted to make no statement to the court regarding its position on the cases at hand."). Indeed, in *Boim*, the U.S. government in an *amicus* brief, submitted at the request of the Seventh Circuit on interlocutory appeal, supported the availability of secondary civil liability under the ATA on the ground that § 2333 was meant to incorporate basic common law tort principles. Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1010, 1017 (7th Cir. 2002) (citing Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) (identifying common law tort principles of accomplice liability)).

273. Even in situations in which the Executive Branch does weigh in on an ATS case, courts have not necessarily treated these views as determinative in respect for the separation of powers principle. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18410 (S.D.N.Y. Aug. 30, 2005) (upholding a claim even where the United States submitted a Statement of Interest expressing concerns regarding the impact of the litigation on U.S. foreign affairs and on Canada's foreign policies towards Sudan).

274. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

275. Bigio v. Coca-Cola Co., 448 F.3d 176, 178 (2d Cir. 2006) ("[T]he only issue of international comity properly raised here is whether adjudication of [the] case by a United States court would offend amicable working relationships with [a foreign country].").

276. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."); *see* Ungar v. Palestine Liberation Org., 402 F.3d 274, 280–82 (1st Cir. 2005) (rejecting defendants' political question defense on grounds that the ATA directs courts to

imperative where non-state action is at issue, although Judge Robb found the latter compelling in *Tel-Oren*, given the alleged involvement of the PLO and Libya in the incident in question.[277]

4. An Internationalizing Element

Many treaties limit their application to acts that may be deemed "international terrorism," thus excluding jurisdiction over acts of domestic terrorism committed by state or sub-state actors operating solely within a single state. Under many of these formulations, an act is deemed sufficiently international or transnational when it somehow transcends national boundaries and thus involves the interests of, or otherwise implicates, more than one state. Accordingly, acts may be sufficiently internationalized where the perpetrator and victim hail from different states, where the conduct is initiated abroad or performed in more than one state, where the perpetrator acts outside his or her home state, or where the perpetrator seeks refuge or is captured abroad.[278] For example, the

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consider questions of international terrorism and that the existence of legal standards obviate the need for the court to make non-judicial policy determinations); *see also* Estate of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153, 162 (D.D.C. 2006) (finding that the proliferation of terrorism-related statutes and civil remedies, the Executive Branch's repeated condemnations of international terrorism, and numerous judicial decisions regarding terrorism lead to conclusion that suits by U.S. citizens against their attackers do not present non-justiciable political questions).

277. *See supra* note 23.

278. *See, e.g.*, Bombing Convention, *supra* note 162, art. 3 ("This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under [the territorial or active or passive nationality grounds] to exercise jurisdiction."); Financing Convention, *supra* note 146, art. 3 (limiting application of the convention by precluding offenses committed in a single state when the perpetrator is a national of that state); Maritime Navigation Convention, *supra* note 159, art. 4 (applying to ships navigating beyond the territorial sea of a particular state or where the perpetrator is found in a state other than the state where the offense was committed); Hague Hijacking Convention, *supra* note 136, art. 3 (applying to aircraft outside of the territory of registration, even if the flight was a domestic flight or where the perpetrator is found in a state other than the state where the offense was committed); Montreal Hijacking Convention, *supra* note 136, art. 4(5) (applying to air navigation facilities utilized in international transportation). The

Hostages Convention states that it "shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State."[279] Likewise, the Protected Persons Convention applies only to "internationally protected" persons, such as heads of state, ministers of foreign affairs, or representatives of a state or international organization that are entitled to immunities under international law.[280]

These provisions reflect a perpetual challenge of international criminal law codification: distinguishing international crimes from their domestic counterparts. Many crimes of terrorism have analogs in ordinary crimes (assault, battery, murder, mayhem) contained within the domestic penal codes of the states on whose territory the acts are committed.[281] These acts merit being the subject of a multilateral treaty regime prosecutable according to forms of extraterritorial jurisdiction only when some internationalizing element or transnational impact is present.[282]

5. Extraterritorial Jurisdiction

As a final common element, the penal treaties contain a now-boilerplate jurisdictional formula that requires the nationality, territorial, or victim state to either prosecute offenders in their midst or to extradite them to another state[283] for the purpose of

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Montreal Protocol also prohibits offenses in airports serving international civil aviation. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, ¶ 2, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474.

279. Hostages Convention, *supra* note 162, art. 13; *see also* Council of Europe Convention, *supra* note 182, art. 16 (containing substantially similar language); Draft Comprehensive Convention, *supra* note 177, art. 4(same).

280. Protected Persons Convention, *supra* note 137, art. 1.

281. Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 581 n.7 (E.D.N.Y. 2005) (distinguishing between actionable acts of terrorism and mere street crime).

282. *See* Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999) (noting the difficulty of defining crimes against humanity in a way that distinguishes them from ordinary domestic crimes).

283. These treaties almost uniformly disallow any political offense exception to extradition. *E.g.*, Bombing Convention, *supra* note 162, art. 11; European Convention, *supra* note 182, art. 2.

prosecution.[284] Reflecting the principle of treaty-based universal jurisdiction,[285] these obligations to prosecute or extradite (*aut dedere aut prosequi/judicare*) exist even where there is no nexus between the state and the perpetrator or his or her actions in terms of the traditional bases for exercising criminal jurisdiction.[286] Collectively, these provisions—which act as advanced waivers by states of jurisdictional defenses concerning their citizens[287]—arguably manifest the type of "procedural consensus" about the propriety of exercising extrajudicial jurisdiction over acts of terrorism sought by Justice Breyer in the *Sosa* case,[288] at least with respect to treaty parties *inter se*. Where the states of the world have agreed that criminal universal jurisdiction exists,[289] they are less likely to contest

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284. *E.g.*, Maritime Navigation Convention, *supra* note 159, art. 6; Hostages Convention, *supra* note 138, art. 5–6; Bombing Convention, *supra* note 162, art. 6–8; OAU Convention, *supra* note 182, art. 6; Draft Comprehensive Convention, *supra* note 177, art. 7. States have entered reservations to these provisions to the effect that they will not extradite their own nationals for prosecution. *See, e.g.*, Declaration of Mozambique, United Nations Treaty Database, Declarations and Reservations, Bombing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#EndDec.

285. *But see* United States v. Yousef, 327 F.3d 56, 96 (2d Cir. 2003) (per curiam) (rejecting concept of treaty-based universal jurisdiction).

286. The EU Framework Decision establishes a rudimentary system for prioritizing these potential bases of jurisdiction. *See* EU Framework Decision, *supra* note 182, art. 9 (requiring cooperation between members where more than one state is implicated by an act of terrorism and directing states to take sequential account of the following factors: the Member State in the territory of which the acts were committed, the Member State of which the perpetrator is a national or resident, the Member State of origin of the victims, the Member State in the territory of which the perpetrator was found).

287. *See generally* Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363 (2001) (arguing that state parties to such treaties can prosecute nationals of non-parties).

288. Sosa v. Alvarez-Machain, 542 U.S. 692, 761–62 (2004) (Breyer, J., concurring).

289. Many states have enacted universal jurisdiction statutes to enable extraterritorial prosecutions. *See, e.g.*, United Nations Treaty Database, Article 6(3) Notifications, Bombing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#EndDec. Spain has the most expansive universal jurisdiction provision addressed to terrorism. *See* LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23.4 (Spain) (providing for universal jurisdiction over undifferentiated crime of terrorism); *see also*

extraterritorial or extraordinary assertions of civil jurisdiction.[290] Indeed, with respect to suits within the United States, other members of the international community may perceive civil suits under the ATS as less intrusive than criminal suits under Title 18 or parallel suits under the ATA. ATS cases involve only the exercise of adjudicative jurisdiction over acts committed abroad, as it is international law (presumptively binding on all states through shared treaty obligations or customary international law) that provides the substantive rule of decision. By contrast, criminal and ATA suits within the U.S. also involve the exercise of prescriptive adjudication over offenses defined by U.S. law, which may be *sui generis* (such as the laws penalizing the provision of material support to terrorism).[291]

Elements Lacking a Complete Consensus

The elements just discussed—those prohibiting certain violent acts, providing for individual or organizational responsibility, equally condemning state and non-state action, requiring an international component, and permitting an expansive extraterritorial jurisdiction—are common to many definitions of terrorism in U.N. instruments and multilateral treaties. Where international terrorism definitions show some variation is in two key areas, one more intractable than the other: the requirement of a secondary or enhanced mental state (often defined as either a terrorist motive or a

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Declaration of Spain, United Nations Treaty Database, Declarations and Reservations, Bombing Convention, *available at* http://treaties.un.org/Pages /ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#EndDec (noting that Spanish law already provides for universal jurisdiction over terrorism so no special jurisdiction needs to be established upon ratification of the Convention).

290. *Sosa*, 542 U.S. at 762.

291. In enacting the material support statutes, however, Congress indicated it was invoking its power under Article I, § 8, Clause 10, of the U.S. Constitution, to "define and punish . . . Offenses against the Law of Nations" and thus appears to have determined that providing material support to a foreign terrorist organization is a violation of the law of nations. *See* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996) (stating the Constitution provides Congress the power to punish crimes against the laws of nations and carry out treaty obligations, therefore allowing Congress to impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity).

specific intent to accomplish some objective beyond the commission of the act of violence itself) and the interface between the law governing terrorism and international humanitarian law, or the law of armed conflict.

6. The Terrorist Mental State

Some minor variations exist in the terrorism prohibitions concerning the required mental state. The prosecution of acts of terrorism, like most non-regulatory crimes, requires a showing that the defendant possessed a particular mental state. Variation exists, however, in how this mental element is framed in the various definitions of terrorism. Like many international crimes,[292] formulations of terrorism envision multiple mental states as defining elements. The primary *mens rea* is that associated with the underlying *actus reus* element or constitutive act and usually involves intentional conduct. The Bombing Convention, for example, identifies the relevant *mens rea* as one of specific intent by prohibiting enumerated acts undertaken with "the intent to cause death or serious bodily injury; or . . . the intent to cause extensive destruction of [a] place [of public use], facility or system, where such destruction results in or is likely to result in major economic loss."[293] By contrast, the Financing Convention also prohibits knowingly providing or collecting funds to be used to carry out acts of terrorism.[294]

In addition, many definitions of terrorism, especially in domestic law or the regional instruments, require proof of the existence of some secondary mental state over and above the general intent to commit prohibited acts of violence.[295] In some cases, this

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292. The crime of genocide, for example, requires a showing that prohibited conduct was committed with the specific intent to destroy a protected group in whole or in part. Genocide Convention, *supra* note 247, art. II. Crimes against humanity are defined in terms of a primary *mens rea* and a knowledge element; the prosecution must show that the acts in question were committed in the context of a widespread and systematic attack against a civilian population with knowledge of that attack. ICC Statute, *supra* note 198, art. 7.

293. Bombing Convention, *supra* note 162, art. 2(1).

294. Financing Convention, *supra* note 163, art. 2(1).

295. The definition of international terrorism under U.S. law, for example, requires a showing of a terrorist mental state. *See* 18 U.S.C. § 2331(1)(B) (2006)

mental element is aimed at the civilian population (the intent to cause terror) or a government (the intent to influence a government).[296] For example, the Hostages Convention prohibits the detention of a hostage "in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage."[297] A Council of Europe Parliamentary Assembly Recommendation focused on a broad array of potential motivations:

(defining "international terrorism" as acts that "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping). Canadian law is in accord. *See* Can. Crim. Code, R.S.C., ch. C-46, § 83.01(1)(b)(ii)(E), as amended by 2001 S.C., ch. 41 (Can.) (defining terrorism as acts committed "(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada . . . ."). *See generally* G.A. Res. 49/60, *supra* note 252, annex ¶ 3 (condemning "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes . . . whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them"); Ben Saul, *The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient—Or Criminalising Thought*, *in* LAW AND LIBERTY IN THE WAR ON TERROR 28, 31–34 (Andrew Lynch et al. eds., 2007) (discussing motive elements in various other countries' terrorism statutes).

296. FIROOZ E. ZADEH, ISLAM VERSUS TERRORISM 23 (2002) ("It is difficult to leave the motivation out of the definition.").

297. Hostages Convention, *supra* note 138, art. 1(1); *see also* Draft Comprehensive Convention, *supra* note 175, art. 2(1) (defining an offense as any act intentionally committed in order to damage a government facility, public transportation system, communication system, or infrastructure with the intent to cause destruction likely to result in economic loss). Claims seeking damages for hostage-taking will fail where this intentionality requirement is not satisfied. *See* Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 94–95 (D.C. Cir. 2002) (dismissing hostage taking claim under the FSIA on ground that plaintiffs did not allege that they were detained in order to compel some particular result as a condition for their release); Daliberti v. Iraq, 97 F. Supp. 2d 38, 45, 46 (D.D.C. 2000) (noting incorporation in the FSIA of the definition of hostage-taking from the Hostages Convention and finding plaintiffs had adequately alleged a quid pro quo arrangement for their release).

> "[A]ny offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public."[298]

These mental state formulations reflect several features of terrorism. For one, they recognize that with the exception of cases of assassination, the victims of terrorism are not usually targeted individually; rather, they are targeted at random in order to achieve some ulterior or collective purpose (usually the creation of fear or terror in order to bring about a change in a governmental or organizational policy[299]). These mental state elements also help to distinguish crimes commonly understood to constitute terrorism from ordinary domestic crimes, whose prosecution requires no showing of any special ideological, political, or religious motive or purpose and which are generally committed for personal reasons of greed, sadism, or vengeance. Terrorism is violence of a different quality than that involved in ordinary crimes. As one scholar has noted:

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298. Eur. Parl. Ass., *European Democracies Facing Up to Terrorism*, 25th Sess., RECOMMENDATION NO. 1426, ¶ 5 (1999), *available at* http://assembly.coe.int/Documents/AdoptedText/ta99/EREC1426.htm. The recommendation also considered the possibility of setting up a European court to prosecute acts of terrorism. *Id*. ¶ 16(v); s*ee also* EU Framework Decision, *supra* note 167, art. 1 (defining terrorist offenses as those committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilizing or destroying fundamental political, economic or social structures of a country or an international organization).

299. *See* Cassese, *supra* note 223, at 939 (arguing that the spreading of fear inherent to terrorism is a means for compelling a government or other institution to change course in some way).

> The core premise is that political violence or violence done for some other public-oriented reason (such as religion, ideology, or race/ethnicity) is conceptually and morally different to violence perpetrated for private ends (such as profit, jealously, animosity, hatred, revenge, personal or family disputes and so on).[300]

Finally, defining terrorism with reference to particular objectives or motivations leaves open the possibility of carving out exceptions to these prohibitions for "legitimate" struggles.[301]

It is often unclear if this additional mental element is the equivalent of a specific intent requirement (along the lines of the definition of genocide which is predicated upon the intent to destroy a protected group) or a motive element under classical criminal law terminology.[302] Specific intent has historically been defined as an intent to do some further act or achieve some further or more remote consequence beyond the conduct that constitutes the *actus reus* of the crime. For example, burglary—the breaking and entering into of a dwelling of another—requires a showing of the specific intent to commit a felony therein. To secure a conviction, the prosecution must prove the existence of this specific intent as an additional element of a crime. The concept of specific intent often elides with that of motive, which is the perpetrator's guiding purpose or ulterior intention, i.e., the reason for which an intended criminal act is committed. Normally, proof of motive is not required for a criminal conviction, although proving the defendant's motive is often an

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300. Saul, *supra* note 295, at 29.

301. *See supra* notes 169–173 and accompanying text.

302. In either case, the additional terrorism mental state raises the burden of proof for prosecution. *See* R v. Mallah (2005), 154 A. Crim. R. 150 (N.S.W. Sup. Ct.) (terrorism acquittal where it was unclear whether defendant meant to advance a political, religious or ideological cause with his actions), *available at* http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2005/358.html. Including motive as a criminal element may also have human rights implications as an infringement on protected freedoms of conscience, religion, thought, expression, or belief. R v. Khawaja, 04-G30282, [2006] O.J. No. 4245 QUICKLAW (Ont. Super. Ct. of Justice Oct. 24, 2006); Kent Roach, *The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive*, *in* LAW AND LIBERTY IN THE WAR ON TERROR, *supra* note 295, at 39, 43–44.

integral part of any prosecution with particular relevance during the sentencing phase.[303] One notable exception to this general trend involves hate or bias crimes, which may require proof that the defendant was motivated by animosity toward a protected group.[304]

A review of the treaty definitions reveals that anti-terrorism instruments generally focus on either prohibited methods or prohibited objectives. Indeed, the more specific the *actus reus* of the treaty is, the less likely a secondary mental state element is included. By contrast, where the definition is broader or undifferentiated, an enhanced mental state element is usually present. Scholars have described these two definitional approaches as inductive (setting forth a precise and targeted definition of a crime with no additional mental state) and deductive (setting forth a broad and all encompassing definition of prohibited violence accompanied by an additional mental state).[305] The Bombing Convention, for example, encourages prosecution for prohibited acts "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons."[306] In the Bombing Convention, this secondary mental state also constitutes a jurisdictional hook. In addition to mandating the exercise of jurisdiction over violators of the treaty according to the standard grounds of territoriality, nationality, and universal criminal

303. Saul, *supra* note 295, at 28 ("Motive is anathema to criminal lawyers, who are schooled in the overriding importance of the intention behind conduct and the irrelevance of the motivations underlying it.").

304. *See, e.g.*, CAL. PENAL CODE § 422.6 (West 2008) (criminalizing injury or threat to person or damage to property because of actual or perceived "race, color, religion, ancestry, national origin, disability, gender, or sexual orientation"). *See generally* Anti-Defamation League, State Hate Crimes Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Jan. 7, 2009). The U.S. federal hate crimes legislation reaches only crimes targeting an individual because of his or her actual or perceived race, color, religion, or national origin, and only while the victim is engaging in a federally-protected activity, like voting, jury service, or attending school. 18 U.S.C. § 245(b)(2) (2006).

305. *See* Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986) (noting that deductive definitions are deemed "terrorism" whereas inductive definitions do not necessarily categorize themselves as such); Saul, *supra* note 295, at 30 (arguing that the inductive definitions do not reflect what is distinctive about terrorism and "reach considerably beyond common understandings of terrorism, since violence for public and private motives alike is equally criminalised").

306. Bombing Convention, *supra* note 162, art. 5.

jurisdiction, state parties to the Bombing Convention are also entitled to assert jurisdiction over acts committed "in an attempt to compel that State to do or abstain from doing any act," even if no other nexus to the prosecuting state exists.[307] By contrast, the Hague Hijacking Convention contains no additional mental state, but provides a very precise and narrow definition of prohibited conduct.[308]

Most U.S. code penal provisions within Chapter 133B and denominated as terrorism crimes do not contain some additional terrorist mental state. Rather, the crimes in question are defined solely in terms of their objective conduct (some violent act) and the mental state associated with that conduct (e.g., acting intentionally or knowingly). With respect to crimes against U.S. citizens, however, the existence of a terrorist mental state is a certification precondition for commencing a prosecution.[309] Other code provisions require that an organization or state involved in the crime has previously been designated as a terrorist entity.[310] Given this variation in the law, and the way in which the terrorist mental state serves to distinguish crimes of terrorism from ordinary domestic crimes, any customary international law prohibition of undifferentiated acts of terrorism would likely address only violent acts committed with a secondary mental state.

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307. *Id.* art. 6(2)(d); *see also* Draft Comprehensive Convention, *supra* note 177, art. 7(e) (establishing the state's jurisdiction over any offense which is committed in an attempt to compel that state to do or to abstain from doing any act).

308. Hague Hijacking Convention, *supra* note 136, art. 1.

309. *See* 18 U.S.C. § 2332(d) (requiring certification by Attorney General or designate that the offence was intended to coerce, intimidate, or retaliate against a government or civilian population).

310. *See, e.g.*, 18 U.S.C. § 2339D (making it a crime to receive military-type training from a designated foreign terrorist organization). This provision was added to the code after it became clear that merely training with a designated terrorist organization may not constitute the *provision* of material support or resources to a terrorist organization under 18 U.S.C. § 2339B. *See* United States v. Lindh, 212 F. Supp. 2d 541, 571–72 (E.D. Va. 2002) ("Thus, in Section 2339B, providing 'personnel' to [the Taliban] necessarily means that the persons provided to the foreign terrorist organization work under the direction and control of that organization. One who is merely present with other members of the organization, but is not under the organization's direction and control, is not part of the organization's 'personnel.'").

7. Interface with International Humanitarian Law

A more thorny area in which international consensus about the definition of terrorism has been elusive concerns the applicability of the terrorism prohibitions in the context of armed conflicts, whether international or non-international. In some cases, international terrorism instruments disclaim their applicability altogether whenever IHL applies. In certain regional treaties, by contrast, it is only where an armed struggle is considered just that these instruments deem themselves inapplicable. In either case, applying the terrorism prohibitions to situations involving acts of violence by or against combatants remains problematic given that IHL also regulates, and at times privileges, such conduct in situations of armed conflict.

Recognizing the potential overlap between crimes of terrorism and types of violence committed within armed conflicts, several of the sectoral multilateral terrorism treaties (particularly the more recent ones) altogether exclude situations of armed conflict or the actions of armed forces from their scope of application. The Bombing and Nuclear Terrorism Conventions,[311] for example, provide that their terms do not affect the rights, obligations, and responsibilities of States and individuals under international humanitarian law.[312] Their preambles further indicate that "the

311. Bombing Convention, *supra* note 162, art. 19(1); Nuclear Terrorism Convention, *supra* note 161, art. 4(1); *see also* Draft Comprehensive Convention, *supra* note 177, art. 20(1) (altering this formulation somewhat to read: "Nothing in the present Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.").

312. Likewise, the U.S. statute codifying the Bombing Convention does not apply to "(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are governed by that law, [or] (2) activities undertaken by military forces of a state in the exercise of their official duties." 18 U.S.C. § 2332f. By contrast, the federal crime denominated as "acts of terrorism transcending national boundaries" does apply where a member of the uniformed services is the target of act of killing, kidnapping, assault, etc. within the United States where the conduct transcends national boundaries. 18 U.S.C. § 2332b.

activities of military forces of States are governed by rules of international law outside the framework of this Convention."[313] Later, the treaties state that:

> The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.[314]

The Nuclear Terrorism Convention confirms that this latter section "shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws."[315] The Preambles of the Nuclear Terrorism and Bombing Conventions similarly note that "the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws."[316] These savings clauses emphasize that conduct not governed by the terrorism treaties by operation of IHL, such as attacks on civilians during an armed conflict, is not rendered lawful by its exclusion from the terrorism treaties. Rather, these provisions

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313. Bombing Convention, *supra* note 162, pmbl. Likewise, the Plastic Explosives Convention partially exempts unmarked plastic explosives held by authorities of a state party performing military or police functions. Plastic Explosives Convention, *supra* note 162, arts. III–IV. The airplane hijacking conventions do not apply to aircraft utilized for military, police, or customs purposes. *See, e.g.*, Montreal Hijacking Convention, *supra* note 136, art. 4(1) (expressly excluding aircrafts used for such purposes).

314. Bombing Convention, *supra* note 162, art. 19(2); Nuclear Terrorism Convention, *supra* note 161, art. 4(2); Draft Comprehensive Convention, *supra* note 177, art. 20(2); *see also* EU Framework Decision, *supra* note 182, pmbl. ("(11) Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.").

315. Nuclear Terrorism Convention, *supra* note 161, art. 4(3).

316. *Id.* pmbl.; Bombing Convention, *supra* note 162, pmbl.

assume that such conduct may be unlawful and prosecutable under IHL.

These latter ideas find expression in the text of the Draft Comprehensive Convention, as well,[317] although a proposal to amend this provision reverses the emphasis: "Nothing in this Convention makes acts unlawful which are governed by international humanitarian law and which are not unlawful under that law."[318] This latter proposed formulation indicates that lawful acts of war—such as violent confrontations between privileged combatants or attacks by privileged combatants against lawful targets—would not be not rendered unlawful acts of terrorism by operation of the proposed treaty.[319] Collectively, these treaty provisions seem to treat IHL as the *lex specialis* in situations of armed conflict, effectively displacing the treaty rules governing terrorism.[320]

These exclusion clauses depend, of course, upon a determination of when IHL applies. Although certain situations, such as a full-scale armed conflict between two nation-states, clearly trigger IHL, a certain degree of indeterminacy and contestation remains regarding what level and degree of organized violence on the ground constitutes an armed conflict subject to the rules and protections of IHL. Notwithstanding some treaty provisions[321] and

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317. Draft Comprehensive Convention, *supra* note 177, art. 20(4) ("Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes the prosecution under other laws.").

318. *Proposal to Facilitate Discussion by the Friends of the Chairman of the Working Group on Measures to Eliminate International Terrorism*, *delivered to the General Assembly*, U.N. Doc. A/C.6/60/INF/1 (Oct. 20, 2005).

319. The United States made a reservation to this effect to the Financing Convention when it stated upon ratification that "nothing in this Convention precludes any State Party to the Convention from conducting any legitimate activity against any lawful target in accordance with the law of armed conflict." *See* United Nations Treaty Database, Declarations and Reservations, Financing Convention, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=374&chapter=18&lang=en#EndDec.

320. A softer *lex specialis* approach would displace the terrorism prohibitions only when there was a specific rule of IHL that "governed" the act in question. Under this approach, given that IHL does not prohibit acts of unlawful belligerency, the terrorism prohibitions may remain applicable in armed conflicts when unprivileged belligerents commit acts that would otherwise fall within the treaty prohibitions.

321. The Geneva Conventions themselves provide little insight into the question of their field of application, indicating at Article 2 only that the bulk of

jurisprudence clarifying when IHL is triggered,[322] the international community has yet to settle on a determination of when a single

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their provisions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." POW Convention, *supra* note 226, art. 3. Article 1(4) of Protocol I applies to those situations governed by the four Geneva Conventions and extends the status of international armed conflict to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Protocol I, *supra* note 226, art. 1(3), (4). Common Article 3 of the 1949 Conventions creates a mini-regime governing armed conflicts "not of an international character occurring in the territory of one of the High Contracting Parties" without further definition. It is not until Protocol II, which elaborates on and expands common Article 3, that we find a clear statement that its provisions do not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II, *supra* note 227, art. 1(2). In addition, Protocol II applies to armed conflicts in which Protocol I does not apply "and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id*. art. 1(1). Thus, there may be non-international armed conflicts that are governed by common Article 3 alone, because they do not satisfy the territorial or organizational requirements of Protocol II.

322. The International Criminal Tribunal for the former Yugoslavia (ICTY) has ruled that:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). This definition does not apply to situations in which a state's armed forces are embattled with an organized armed group operating outside of the state. This omission, however, is likely due to the fact of its relative inapplicability to the situation in the former Yugoslavia.

attack[323] or when sustained, but sporadic, attacks over time constitute an armed conflict in the aggregate, especially with respect to non-international armed conflicts (i.e., those conflicts not pitting two nation-states against each other).[324]

In addition, IHL does not apply uniformly to situations of international versus non-international armed conflicts. Accordingly, determining what rules of IHL apply require an exercise in conflict classification. Many fewer IHL treaty rules apply to non-international armed conflicts, and non-state combatants in such conflicts are not privileged to engage in acts of violence. As the quoted text above reveals,[325] terrorism conventions often make certain distinctions with respect to their applicability to the formal military forces of a state on the one hand, and to militia or other armed forces not linked to a state on the other. For example, several recent terrorism treaties define "military forces of a State" as "the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are

323. The U.S. Department of Defense has determined that a "single hostile act or attempted act may provide sufficient basis for [a] nexus [between the conduct and an armed conflict] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war,' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force." DEP'T OF DEF., MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIAL BY MILITARY COMMISSION § 5(C), at 3 (2003), http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf; *see also* Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/98, OEA/Ser.L/V/II. 98, doc. 6 rev. ¶¶155–56 (1998) (determining that a carefully planned and coordinated, if short, armed attack on a barracks constituted an armed conflict triggering IHL).

324. For example, the Supreme Court has determined that, at a minimum, common Article 3 applies to the "Global War on Terror." Hamdan v. Rumsfeld, 548 U.S. 557, 562 (2006).

325. Bombing Convention, *supra* note 162, art. 19(2) ("The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.").

under their formal command, control and responsibility."[326] The alternative and undifferentiated term "armed forces" is not specifically defined, but presumably includes both privileged and unprivileged combatants (such as irregular, insurrectionary, insurgent, or rebel forces operating within a non-international armed conflict).

By these provisions, the actions of all armed forces in all armed conflicts, however classified, are not governed by the terrorism treaties on the assumption that these actions are governed by IHL.[327] Furthermore, the actions of the formal military forces of a state are not governed by the treaty at all, even apparently in times when IHL does not apply.[328] Within these non-war circumstances, the states' armed forces are deemed to be governed by "other rules of international law," language which has been interpreted to make reference to the regulation of the conduct of a state's armed forces by national law, national codes of military justice, and rules of engagement.[329] By contrast, non-state armed forces (rebels and the like) are still governed by the terrorism treaties in situations in which IHL does not apply, i.e., for peacetime acts of violence. Several treaty signatories (e.g., Cuba and Turkey) have objected that this formulation calls for the prosecution of enumerated acts of terrorism (e.g., the usage of prohibited explosive devices or nuclear weapons) when committed by non-state actors in situations outside of IHL, but does not condemn the very same acts committed by state actors in the same circumstances.[330] This apparent asymmetry gives rise to

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326. Bombing Convention, *supra* note 162, art. 1(4); Nuclear Terrorism Convention, *supra* note 161, art. 1(6); Draft Comprehensive Convention, *supra* note 177, art. 1(2).

327. Bombing Convention, *supra* note 162, art. 19(2); Nuclear Terrorism Convention, *supra* note 161, art. 4(2); Draft Comprehensive Convention, *supra* note 177, art. 20(2).

328. Bombing Convention, *supra* note 162, art. 19(2); Nuclear Terrorism Convention, *supra* note 161, art. 4(2); Draft Comprehensive Convention, *supra* note 177, art. 20(3).

329. Ad Hoc Comm. Established by Gen. Assembly Resolution 51/210, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, ¶16, U.N. Doc. A/62/37(Supp) (Feb. 5, 6 & 15, 2007) [hereinafter *U.N. Ad Hoc Committee Report*].

330. *Id.* ¶ 10; *see* United Nations Treaty Database, Declarations and Reservations, Bombing Convention, *available at* http://treaties.un.org/Pages /ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en#EndDec. Cuba

the perception that acts of state terrorism perpetrated by members of the state's armed forces are essentially insulated from opprobrium under the treaty.

Many of these provisions apply regardless of how the armed conflict is classified, whereas others are limited to certain classes of conflict. The Hostages Convention, for example, indicates that it does not apply to situations covered by the 1949 Geneva Conventions or their Protocols[331] in so far as state parties are bound under those conventions to prosecute or extradite hostage-takers. Although the two Protocols prohibit hostage-taking, neither renders such acts a war crime nor obligates the prosecution or extradition of offenders.[332] Likewise, common Article 3, applicable within non-

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declared that "the undue use of the armed forces of one State for the purpose of aggression against another cannot be condoned under the present Convention, whose purpose is precisely to combat, in accordance with the principles of the international law, one of the most noxious forms of crime faced by the modern world. . . . The Republic of Cuba also interprets the provisions of the present Convention as applying with full rigour to activities carried out by armed forces of one State against another state in cases in which no armed conflict exists between the two." *Id*.

331. Hostages Convention, *supra* note 138, art. 12. The Article reads in full:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Id.

332. Protocol I lists the prohibition against hostage taking as among its Fundamental Guarantees, which are applicable at all times, whether committed by civilians or by combatants (privileged or unprivileged), to be enjoyed by all persons in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or the Protocol. Protocol I, *supra* note

international armed conflicts, does not create such obligations. Only the Fourth Geneva Convention specifically obligates states to seek out and prosecute individuals alleged to have committed, or to have ordered to be committed, hostage-taking[333] when committed against individuals protected by that treaty within an international armed conflict.[334] If read literally, this article within the Hostages Convention suggests that the penal obligations within the Hostages Convention continue to apply to full effect in non-international armed conflicts and with respect to individuals not covered by the Fourth Geneva Convention (such as privileged combatants or prisoners of war) within international armed conflicts. It is only where civilians are the victims of hostage-taking that the Fourth Geneva Convention is applicable to the exclusion of the Hostages Convention. Similarly, the United Nations Convention expressly excludes its application only in situations of international armed conflicts. Specifically, it protects United Nations and associated personnel, except where such "personnel are engaged as combatants

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226, art. 75(c). Likewise, Protocol II, which contains no penal regime whatsoever, also treats the prohibition against hostage taking as a Fundamental Guarantee, applicable in all times with respect to all persons who do not take a direct part, or who have ceased to take a part, in hostilities. Protocol II, *supra* note 227, art. 4(2)(c).

333. *See* Convention Relative to the Treatment of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Convention] ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, . . . hand such persons over for trial to another High Contracting Party concerned, provided that such High Contracting Party has made out a prima facie case.").

334. Article 147 of the Fourth Geneva Convention considers hostage taking to be a war crime when committed within an international armed conflict and targets a person protected by that Convention. *Id.* art. 147. Specifically, Article 4 of the Fourth Convention protects "[p]ersons . . . who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 4. The Article withholds protection for nationals of a state that is not bound by the Convention, as well as nationals of a neutral state who are in the territory of a belligerent state and nationals of a co-belligerent state while their state of nationality has normal diplomatic representation in the state in whose hands they are. *Id.* The Fourth Geneva Convention acts as a "catch all" for persons not protected by one of the other four Conventions (governing the wounded and sick, the shipwrecked, and prisoners of war). *Id.* art. 147.

against organized armed forces and to which the law of international armed conflict applies."[335] This too implies that the United Nations Convention continues to govern the seizure of U.N. personnel in non-international armed conflicts (and in peacetime situations).

The Financing Convention, which does not distinguish between classes of conflict, takes a somewhat more nuanced stance toward the interface between the terrorism prohibitions and violations of IHL. In addition to incorporating a number of extant terrorism treaties, the Convention prohibits the financing of activities that will, among other things, "cause death or serious bodily injury to a civilian, or to any other person *not taking an active part in the hostilities* in a situation of armed conflict."[336] This latter provision suggests that even in an armed conflict also governed by IHL, victims of terrorism under the treaty can include a state party's combatants when they are *hors de combat*—whether by injury, capture, or surrender—or even perhaps when not actively engaged in combat (e.g., when off-duty). Under this framework, the funding of violent acts committed by unprivileged belligerents against a state's regular armed forces in an armed conflict would not constitute a violation of the Financing Convention. For example, had these events occurred within the context of an armed conflict, however classified, the financing of the bombing of the Khobar Towers barracks in Saudi Arabia in 1996[337] or the 2000 attack on the U.S.S. Cole in Yemen[338] would not violate the Financing Convention, because the individuals targeted were not *hors de combat*. By contrast, absent the existence of an armed conflict, as was the case with respect to both those events, the treaty would presumably

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335. United Nations Convention, *supra* note 137, art. 2(2). Likewise, Article 20(1) states that nothing in the Convention shall affect the applicability of IHL in relation to the protection of United Nations personnel. *Id.* art. 20(1).

336. Financing Convention, *supra* note 146, art. 2(2) (emphasis added).

337. *See* Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40 (D.D.C. 2006) (suit against Iran for providing material support to group that carried out Khobar towers attack in a peacetime deployment of coalition troops).

338. *See* Owens v. Republic of Sudan, 412 F. Supp. 2d 99, 114 (D.D.C. 2006) ("If . . . Sudan furnished bin Laden and al Qaeda with, among other things, shelter, security, financial and logistical support (including the movement of weapons into and out of the country), and business opportunities—it would not be unreasonable for a factfinder to conclude that such support was a necessary condition for the bombing, and therefore a factual cause of plaintiff's damages.").

condemn and create a duty to prosecute the provision of financial support for those acts because they violated the Bombing Convention, incorporated by reference into the Financing Convention.

As is apparent, when acting collectively the international community has not fully or consistently demarcated the spheres of application of the terrorism treaties and IHL. There are some areas of certainty, however. Given that IHL privileges certain forms of violence under certain conditions, the terrorism treaties must be interpreted in a way that ensures that acts of violence that are lawful under IHL are not rendered unlawful as acts of terrorism. So, for example, attacks by privileged belligerents against other privileged belligerents are inherent to international armed conflicts and cannot be deemed to contravene any prohibition against terrorism. In addition, all states agree that there are violent acts committed within situations that are unregulated by IHL that may be classified as acts of terrorism. These include violent attacks against civilians outside of a state of armed conflict. In general, however, states are not willing to treat acts committed by privileged combatants (i.e., a state's own armed forces) against civilians outside of armed conflict as crimes of terrorism. In addition, there remain situations in which both the terrorism treaties and IHL may apply, depending on technical factors such as conflict classification and the status of the victims or perpetrators. Violent attacks by either privileged or unprivileged combatants against civilians within a state of armed conflict, however classified, constitute war crimes and can be prosecuted as such.[339] These acts may be regulated by both IHL and the prohibitions against terrorism, although theoretically, no terrorism prohibition is necessary in this context as the war crimes prohibitions cover the field.

Where the international community has yet to reach a consensus vis-à-vis the terrorism prohibitions is with respect to the lawfulness of attacks by unprivileged belligerents or civilians against

339. ICC Statute, *supra* note 198, art. 8. Such conduct also gives rise to state responsibility under IHL. *See* Civilian Convention, *supra* note 333, art. 22(1) (prohibiting "all measures . . . of terrorism" against civilians in combat areas or occupied territory); Protocol II, *supra* note 227, art. 4(2)(d) (prohibiting "acts of terrorism" against "persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted").

privileged belligerents, whether in an armed conflict or not. Absent a situation of armed conflict, IHL is inapplicable altogether.[340] Accordingly, there is space for a terrorism prohibition to apply, particularly when privileged combatants are attacked, such as the Khobar Towers and U.S.S. Cole incidents. Within the context of an armed conflict, such attacks breach no specific provision of the Geneva Conventions or any customary IHL rule. For the most part, combatants are not protected persons unless they are *hors de combat*; thus, IHL does not prohibit attacks on combatants by other combatants, even unprivileged ones.[341] As such, there is no war crime of engaging in unprivileged belligerency.[342] Although IHL does not specifically prohibit or penalize acts of unprivileged belligerency, states are entitled to target unprivileged combatants who participate directly in hostilities[343] and treat such individuals as criminals upon their capture. These individuals can then be prosecuted for breaching any applicable domestic criminal law, such as prohibitions against treason, insurrection, assault, mayhem, or murder. In addition, these acts of unprivileged belligerency could also conceivably be considered acts of terrorism. If the terms of the Bombing and Nuclear Terrorism Conventions ("The activities of armed forces during an armed conflict, as those terms are understood

340. *See* Protocol I, *supra* note 226, art. 1(4) ("The situations referred to . . . include armed conflicts.").

341. By way of exception, combatants are protected from certain means and methods of warfare (such as rape), prohibited weapons (such as those that cause unnecessary suffering), and the use of disproportionate force. *See, e.g.*, 1907 Hague Conventions, supra note 231 (prohibiting certain means and methods of warfare against lawful targets).

342. *But see* DEP'T OF DEF., *supra* note 323, § 6(B)(3) (penalizing murder by an unprivileged belligerent, i.e., an individual not entitled to combatant immunity).

343. Protocol II, *supra* note 227, art. 13(3) ("Civilians shall enjoy the protection afforded by this part [not to be targeted], unless and for such time as they take a direct part in hostilities."). The International Committee of the Red Cross in collaboration with the TMC Asser Institute is in the process of defining exactly what constitutes the direct participation in hostilities to provide guidance on when noncombatants lose their immunity from attack. *See* Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities* (T.M.C. Asser Instituut, Background Working Paper, 2004), *available at* http://www.wihl.nl/documents/cms_ihl_id70_1_McDonald%20DPH%20-%20April%202004.doc.

under international humanitarian law, which are governed by that law, are not governed by this Convention"),[344] are interpreted to require that IHL be treated as the exclusive *lex specialis*, however, such acts may fall outside of the terrorism treaties. This would leave these acts essentially unregulated by international law.

By contrast to these United Nations treaties, the drafters of some of the regional conventions have taken a different approach to the terrorism/IHL interface and sought to exclude only a certain category of armed conflict from the treaties' scope of application: those involving struggles for self-determination in the face of colonialism or occupation. The OAU Convention, for example, provides:

> Notwithstanding the provisions of Article 1 [defining terrorism], the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.[345]

Similar exclusions are found in the Arab League Convention[346] and Organisation of Islamic Unity Convention.[347]

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344. *Supra* note 314 and accompanying text.

345. OAU Convention, *supra* note 182, art. 3(1). The language "in accordance with the principles of international law" may not insulate violent acts targeting civilians or otherwise breaching IHL.

346. Arab League Convention, *supra* note 172, art. 2(1); *see supra* note 172–173 and accompanying text (describing the definitional limits in the Arab League Convention).

347. OIC Convention, *supra* note 182, art. 2(a) ("Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be [considered a terrorist crime]."). The OIC also submitted a proposal to the Working Group to the effect that the Draft Comprehensive Convention should exclude "peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law." *See* Surya P. Subedi, *The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of*

Read broadly, such provisions exempt acts of violence from condemnation as terrorism when they are committed within non-international armed conflicts by parties with putatively noble ends. Read broadly, this language would seem to include even violent attacks committed against civilians, although a narrower reading would only exclude belligerent acts committed against lawful military objectives of the repressive state in question as part of a campaign of armed resistance.[348]

These provisions reflect the fact that certain segments of the international community are unwilling to entirely condemn the resort to armed force in the face of putatively unjust situations of foreign domination.[349] Thus, the *jus in bello* (governing the conduct of hostilities once an armed conflict has been initiated) collide with the *jus ad bellum* (governing the legality of the resort to armed force *ab initio*). Doctrinally, contemporary international law treats these two bodies of law as conceptually distinct.[350] This distinction is axiomatic: the legal evaluation of the conduct of hostilities is an inquiry entirely independent of the legal evaluation of the lawfulness of the resort to armed force. As a result, a just war may be fought unlawfully, and an unjust war may be fought lawfully.[351] The International Committee of the Red Cross thus remains strictly agnostic about the causes of the armed conflicts in which it operates but all the while strictly scrutinizes the conflicts' consequences.[352]

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the Definition of Terrorism in International Law, 4 INT'L L.F. DU DROIT INT'L 159, 163 (2002).

348. Cassese, *supra* note 223 at 952–53.

349. Given the demise of most relationships of colonialism and the practice of apartheid, the occupation of the Palestinian Territories by Israel presents the primary concern in this regard.

350. *See* Robert D. Sloane, *The Cost of Conflation: The Dualism of* Jus Ad Bellum *And* Jus In Bello *in the Contemporary Law Of War*, 34 YALE J. INT'L L. (Forthcoming 2009).

351. Sloane, *supra* note 350 ("'It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.'") (quoting MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977)).

352. *See, e.g.*, POW Convention, *supra* note 226, arts. 1–2 (Common Articles 1 and 2 of the Geneva Conventions of 1949 affirm that the *jus in bello* codified in those treaties apply in "all circumstances" and to "all cases of declared war or of any other armed conflict"); *see also* Protocol I, *supra* note 226, pmbl. ("[T]his Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature

Nonetheless, states in these regional treaties continue to justify the actions of unprivileged belligerents that might otherwise be deemed to be war crimes or acts of terrorism with reference to the justness of the cause on behalf of which they are committed. Indeed, there remains a deep-seated unwillingness within segments of the international community to fully relinquish the idea that certain forms of otherwise prohibited violence are legitimate if they are employed in opposition to a colonial, racist, alien, occupying, or oppressive regime by a group seeking independence or self-determination.[353] In such situations of asymmetrical power, an armed conflict fought "according to the rules" would undoubtedly result in a military victory for the dominant power. In the eyes of some members of the international community, the *jus in bello* are subordinate to the *jus ad bellum* under circumstances in which the cause is just.

The exclusion of situations of armed conflict within many terrorism treaties finds parallels in the provisions of the ATA precluding terrorism claims arising out of "acts of war."[354] This provision (§ 2336(a)) betrays confusion about the potential concurrence of the prohibitions against war crimes and acts of terrorism. Notwithstanding this clear exclusionary language, U.S. courts have concluded that certain terrorist crimes committed against by unprivileged combatants do not trigger this exception. One line of argument focuses on the identity of the perpetrator. *Morris v. Khadr*, for example, involved an attack against United States armed forces in Afghanistan by alleged members of al Qaeda.[355] The court concluded that al Qaeda is a terrorist organization that, as such, does not constitute a "military force" within the meaning of 18 U.S.C.

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or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts.").

353. *See supra* Part III.c.ii. (listing instruments exempting certain forms of conflict from condemnation); *supra* notes 311–319 and accompanying text (discussing the approach taken by drafters, which sought to exclude certain categories of armed conflicts).

354. *See supra* note 37 (discussing various cases where claims did not constitute acts of war).

355. 415 F. Supp. 2d 1323 (D. Utah 2006). The defendant in this suit is Ahmad Khadr, father to Omar Khadr, the child soldier detained in Guantánamo Bay, Cuba. *Id.* at 1326. The United States is prosecuting the son for the grenade attack that serves as the basis for this civil suit. *Id.* at 1326–27.

§ 2331(4)(C)[356] that is capable of engaging in an armed conflict.[357] The fact that al Qaeda operatives received military training did not transform the organization into a military force when its members employed such training "in a terroristic fashion to achieve terroristic ends."[358]

Alternatively, courts have concluded that attacks on civilians do not occur "in the course of" armed conflict, even where an armed conflict was in progress in the territory in question. In *Klieman*, for example, defendants argued that the situation in Israel constituted an armed conflict within the meaning of the ATA.[359] They reasoned that war may encompass acts that do not constitute "actual combat," such as attacks on civilians that may be aimed at strengthening or weakening the interests of one side or another.[360] Defendants insisted that attacks that implicate or violate IHL would not trigger the ATA:

> "If illegal the attack may well be a war crime and subject to sanctions as such. However, neither the heinousness nor legality of acts of war occurring in the course of armed conflict is germane to the application of sec. 2336(a). Sec. 2336(a) when applicable bars civil actions under ATA sec. 2333 for 'any act' without regard to its nature or seriousness, or whether the act if not barred by sec. 2336(a) would

356. *Id.* at 1333–34. In the criminal context, a U.S. court ruled that an organization could constitute a military organization if it met three criteria, drawn from Article 4 of the Third Geneva Convention addressed to prisoners of war: (1) it had a hierarchical command structure, (2) it generally conducted itself in accordance with the laws of war, and (3) its members had a distinctive symbol and carried their arms openly. United States v. Yunis, 924 F.2d 1086, 1097 (D.C. Cir. 1991).

357. This ruling is in tension with President Bush's Military Order of Nov 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001), which essentially states that the United States is at war with al Qaeda, a determination that the Supreme Court to a certain extent confirmed in *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–30 (2006), by holding that common Article 3 of the Third Geneva Convention applies to individuals captured in connection with the conflict with al Qaeda.

358. *Morris*, 415 F. Supp. 2d at 1333.

359. Estate of Klieman v. Palestinian Liberation Auth., 424 F. Supp. 2d 153, 163 (D.D.C. 2006).

360. *Id*. at 163.

> constitute international terrorism actionable under the ATA."[361]

In rejecting this argument, the court ruled in essence that an attack on a civilian school bus could not be deemed to have occurred "in the course of" an armed conflict.[362]

In order to escape this exclusionary clause, the court in *Biton* focused instead on the lack of a nexus between the attack in question and the ongoing armed conflict in the region.[363] Notwithstanding that in situations of asymmetrical warfare attacks on civilians often constitute a deliberate, if unlawful, *modus operandi* of non-state actors, the *Biton* court rejected an argument that an attack on civilians constituted an "act of war" that could not trigger the ATA.[364] Specifically, the court concluded that "the circumstances of the alleged attack—on a recognized school bus full of students and teachers—and the status of those non-combatants lead the Court to conclude that the attack did not occur 'during the course of' an armed conflict as a matter of law."[365] In so ruling, the court drew on cases applying the political offense exception to extradition, which require a showing that the acts for which the exception is urged must be "'acts committed *in the course of* and incidental to a violent political disturbance such as a war, revolution or rebellion.'"[366] In *dicta*, however, the court noted that it might reach a different result if the attack had not been on a school bus: "It is not immediately obvious that an attack on a settler, who intentionally went into Palestinian territory to claim it for Israel, would automatically and necessarily be a 'terrorist' attack against a 'civilian.'"[367] Were the

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361. *Id*. (quoting Defendants PA and PLO Supporting Memorandum of Points and Authorities in Support of Their Rule 12(b) Motion at 39, *Estate of Klieman*, 424 F. Supp. 2d 153 (No. 04-1173 (PLF))).

362. *Id*. at 166 ("As a matter of law, an act that violates established norms of warfare and armed conflict under international law is not an act occurring in the course of armed conflict. An armed attack on a civilian bus, such as the one plaintiffs have alleged in the complaint, violates these established norms.").

363. *See supra* notes 242 & 249 and accompanying text.

364. Biton v. Palestinian Interim Self-Gov't Auth., 412 F. Supp. 2d 1, 7 (D.D.C. 2005).

365. *Id*. at 10–11.

366. *Id.* at 9 (quoting Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981)).

367. *Id*. at 10.

framers of the ATA to recognize that acts of terrorism may be committed within armed conflicts as discussed above,[368] the courts would not have to undertake such contortions to assert jurisdiction.

IV. THE TORT OF TERRORISM UNDER THE ALIEN TORT STATUTE

Notwithstanding some doctrinal uncertainty at the border between the prohibitions contained within the terrorism treaties and IHL, a much greater consensus about the contours of the international prohibition against terrorism exists today as compared with the time at which *Tel-Oren* was decided. In particular, the international community has reached a consensus that specific manifestations of terrorism are unlawful regardless of the political context in which they are committed.[369] In many respects, this piecemeal approach has all but covered the field. Many of these developments are already reflected in U.S. penal law and thus may trigger civil liability pursuant to the ATA for U.S. victims. Particularly where federal law incorporates an international penal prohibition, ATS jurisdiction should more readily exist.[370]

Although U.S. domestic law shows greater certainty in this area, international law remains inconclusive as to the need to show an additional terrorist mental state with respect to all manifestations of terrorism, beyond a few specific prohibitions that are clearly defined without this extra *mens rea* element. For the purposes of ATS litigation, until international law displays more uniformity, ambiguity should be resolved against the pleader by requiring a showing of a terrorist mental state for more generalized terrorism claims that do not invoke a particularized terrorism prohibition with

368. These problems may also be avoided were § 2336(a) to be amended to exclude only "lawful acts of war." In addition, where the victims are aliens, all these claims could have conceivably been brought under the ATS as war crimes.

369. *See supra* Part III.b.

370. *See* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1182 (C.D. Cal. 2005) (finding that where international norms are already codified elsewhere in U.S. law, the implication is that these claims "are not impermissibly broad because Congress has adopted statutes that define these concepts and assess liability for these actions"); *id.* ("Legislative approval of punishment for these actions would suggest that the courts may—subject to other doctrines such as forum non conveniens—entertain these suits.").

its own set of elements. In addition, although there remains some ambiguity about when acts of violence committed within an armed conflict by unprivileged combatants would constitute terrorism, civilian victims of attack by unprivileged belligerents should face no barriers to pleading the commission of a tort of terrorism in violation of the law of nations so long as the other elements of the offense are met. (Within the context of an armed conflict, such acts may also constitute war crimes). By contrast, privileged belligerents (i.e., members of a formal armed force) who are the victims of attack by such perpetrators, particularly within an armed conflict where certain norms against the use of armed force are suspended, may be more vulnerable to having their cases dismissed for failing to state a claim of terrorism. Indeed, courts adjudicating such claims under the ATS might be tempted to reject terrorism claims whenever IHL would govern the situation as the *lex specialis* just as the ATA does.[371] Given that IHL does not specifically prohibit acts of unprivileged belligerency, however, the only way to condemn such acts under international law is via a terrorism prohibition.

Reviewing the cases filed so far, U.S. courts seem more comfortable recognizing causes of action for specific terrorist acts that are the subject of a dedicated treaty than an undifferentiated tort of terrorism.[372] The *Arab Bank* cases, for example, involve claims against the Arab Bank, PLC, for knowingly providing banking and administrative services to various entities identified by the U.S. government as terrorist organizations that allegedly sponsored

371. *See* 28 U.S.C. § 2336 (2006) ("No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war.").

372. Likewise, in *Burnett v. Al-Baraka Investment & Development Corp.*, a pre-*Sosa* case arising out of the attacks of September 11, a district court concluded that the ATS supported jurisdiction over acts of hijacking. 274 F. Supp. 2d 86, 91 (D.D.C. 2003). The influential Restatement (Third) of the Foreign Relations Law includes hijacking among the list of rules that may be said to constitute universally accepted norms of international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). Particular defendants in *Burnett* were subsequently dismissed on foreign sovereign immunity grounds. Burnett v. Al Baraka Inv. & Dev. Corp., 292 F. Supp. 2d 9, 23 (D.D.C. 2003); *see also In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005) (holding that various Saudi officials were entitled to immunity under the FSIA), *aff'd*, 538 F.3d 71 (2d Cir. 2008).

suicide bombings and other attacks on civilians in Israel.[373] The plaintiffs are U.S. and alien citizens bringing claims under both the ATA and the ATS, respectively. The ATA claims are premised on allegations that the defendant bank violated, and aided and abetted violations of, all heads of 18 U.S.C. § 2339, the material support statute,[374] and § 2332, which prohibits attacks on, and conspiracies to attack, U.S. nationals abroad.[375] The alien plaintiffs proceeding under the ATS similarly alleged various forms of support for acts of terrorism, genocide, and crimes against humanity.[376]

With respect to the terrorism claims, the plaintiffs were relatively restrained in their pleading, essentially alleging that the defendant had financed a policy of suicide bombings for the purpose of intimidating or coercing the civilian population that violated customary international law as expressed in the Bombing Convention and the Financing Convention.[377] In upholding the complaint in the face of a motion to dismiss for failure to state a claim upon which relief could be granted, the court found it significant that these treaties were well subscribed to and had been ratified and implemented by the United States.[378] The court rejected defendant's contention that there was no universal definition of terrorism under international law because the precise acts and specific conduct alleged by the plaintiffs clearly violated existing treaty law.[379] The court also rejected the contention that state practice did not support the claims alleged, because states reserved the right of groups to use certain forms of violence in struggles for self-determination.[380] The court noted that even the anti-terrorism treaties and state reservations to those treaties that make reference to such struggles recognize that they must be undertaken in accordance with international law[381] and that no state expressly condones actions

373. *E.g.*, Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

374. *Almog*, 471 F. Supp. 2d at 264.

375. *Linde*, 384 F. Supp. 2d at 578.

376. *Almog*, 471 F. Supp. 2d at 265.

377. *Id.*

378. *Id.* at 257, 277, 283.

379. *Id*. at 280–81.

380. *Id.* at 281.

381. *Id*. at 282. The Court also cited for support Security Council Resolution 1566, *supra* note 149, and the fact that the IHL principle of distinction,

such as those alleged.[382] Finally, the court determined that international law provided for the liability of entities indirectly involved in acts of terrorism in keeping with the relevant terrorism treaties.[383]

By contrast, in *Saperstein v. Palestinian Authority*, plaintiffs pled an undifferentiated tort of "terrorism" as a violation of the law of nations in response to suicide bombings in Israel.[384] The court rather summarily ruled that "if the conduct of the Defendants is construed as terrorism, then Plaintiffs have not alleged a violation of the law of nations."[385] The court cited *Tel-Oren* and made no reference to more contemporary international law.[386] Plaintiffs then attempted to recast the alleged crimes as war crimes pursuant to common Article 3 of the Geneva Conventions, which governs non-international armed conflicts.[387] The court questioned whether violations of common Article 3 met the two-part test established in *Sosa*. First, the Court doubted whether other aspects of common Article 3—in particular the provisions prohibiting "violence to life,"

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which prohibits the direct targeting of civilians in armed conflict, also supports the rule of international law plead by the plaintiffs. *Almog*, 471 F. Supp. 2d at 278–79.

382. *Almog*, 471 F. Supp. 2d at 283.

383. *Id.* at 286–89. Human rights cases are largely in accord. Cabello v. Fernandez-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005) (per curiam) (holding the TVPA and the ATS permit claims based on direct and on indirect theories of liability); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 463–64, (S.D.N.Y. 2006) ("[W]here a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well."); Bowoto v. Chevron Corp., No. C99-02506, 2006 U.S. Dist. LEXIS 63209, at *13 (N.D. Cal. Aug. 22, 2006) ("[S]ince the early days of this country, courts have recognized that private individuals may be held liable for aiding and abetting violations of international law."); *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (stating that the ATS includes actions premised on theories of aiding and abetting and conspiracy); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 337–38 (S.D.N.Y. 2005) (collecting cases); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 52–54 (E.D.N.Y. 2005) ("Even under an aiding and abetting theory, civil liability may be established under international law"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320–21 (S.D.N.Y. 2003) (holding conspiracy and aiding and abetting are both actionable under the ATS).

384. Saperstein v. Palestinian Auth., No. 04-20225-CIV-SEITZ /MCALILEY, 2006 U.S. Dist. LEXIS 92778, *26–27 (S.D. Fla. Dec. 22, 2006).

385. *Id*. at *26.

386. *Id*. at *25–26.

387. *Id.* at *28.

"cruel treatment," and "outrages upon personal dignity"—are defined with sufficient specificity to support ATS jurisdiction.[388] The court further declined to allow a cause of action for the particular conduct alleged, the murder of a civilian during an armed conflict, in part on the grounds that to do so would open the federal courts to a flood of claims from armed conflicts all over the world in contravention of the Supreme Court's note of caution in *Sosa*.[389] By contrast, other federal courts have demonstrated themselves to be more comfortable with the fluidity of claims where the prohibitions against war crimes, crimes against humanity, and terrorism are applicable. In the *Linde* case, for example, Plaintiffs also plead the same acts as war crimes and crimes against humanity, and these claims have survived 12(b)(6) and 12(b)(1) motions.[390]

The courts are also quite comfortable with various forms of secondary liability in the terrorism context.[391] These opinions exhibit less angst than is seen in the human rights cases (particularly those concerned with corporate liability) involving such derivative liability,[392] perhaps because the terrorism treaties contain express provisions calling for the criminalization of aiding and abetting, conspiracy, and other forms of indirect participation and because

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388. *Id*. at *30–31 ("For federal courts to interpret such ambiguous standards to assess its own subject matter jurisdiction would pose problems for federal courts and would not meet the defined standards of specificity that *Sosa* requires.").

389. *Id.* at *31 ("[I]f Plaintiffs' specific allegation, i.e., the murder of an innocent civilian during an armed conflict, was sufficient for the purposes of the ATS, then whenever an innocent person was murdered during an 'armed conflict' anywhere in the world, whether it be Bosnia, the Middle East or Darfur, Sudan, the federal courts would have subject matter jurisdiction over the dispute. Clearly, such an interpretation would not only make district courts international courts of civil justice, it would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations.").

390. Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 591 (E.D.N.Y. 2005).

391. *See* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1010–11 (7th Cir. 2002) (noting Congress's intent to import general tort law principles, which include aiding and abetting liability, into the ATA).

392. *But see supra* note 38 (cataloging cases in favor of the cognizability of complicity liability under the ATS). *See generally* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008) (discussing variation in the human rights jurisprudence involving aiding and abetting claims).

U.S. penal law is in accord.[393] In particular, the international community is increasingly concerned with the importance of hindering the financing of terrorism, as expressed in Security Council Resolution 1373 and the Financing Convention.[394] Forms of secondary liability are necessary to reach individuals or groups that may not engage in terrorism directly, but may support or enable the terrorist activities of others.

V. CIVIL LITIGATION UNDER THE ALIEN TORT STATUTE AS A COUNTER-TERRORISM TOOL

Much has been written about the value of civil suits to vindicate rules of international law.[395] Civil litigation involving claims of international terrorism has the potential to play a part in a comprehensive anti-terrorism strategy, especially where military strikes or governmental sanctions may be considered too blunt a response, are politically unpalatable, or lack multilateral support. In particular, by harnessing the motivation, investigative capabilities, and resources of private attorneys general and the robust U.S. tort system on behalf of those victims who have access to the U.S. legal system, civil suits can enhance the government's ability to bring

393. *See supra* note 38 and accompanying text.

394. *See also* Council of Europe Convention, *supra* note 182, art. 13 (emphasizing the provision of compensation to victims); Inter-American Convention, *supra* note182, arts. 4–6 (aiming to eradicate the financing of terrorism).

395. *See, e.g.*, H. H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1990-91); John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 47-49 (1999); Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 581 (1997); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141 (2001); Beth Van Schaack , *With All Deliberate Speed: Civil Human Rights Litigation as a Tool For Social Change*, 57 VAND. L. REV. 2305 (2004). In addition, Congress has recognized the importance of civil suits in the human rights context with the passage of the TVPA and in the terrorism context with the ATA. *See supra* notes 29–30.

targeted criminal suits,[396] aid in the rehabilitation of victims,[397] and promote the rule of law in the face of acts of terrorism.

Because of the practicalities of obtaining personal jurisdiction over potential defendants and the possibility of real monetary recovery, most civil terrorism cases will inevitably focus on the organizations and entities that recruit, train, arm, fund, dispatch, or otherwise enable terrorist groups and networks.[398] Pursuing the hard assets of entities that support terrorism also provides a unique form of leverage over such organizations, their donors, and their benefactors. Where assets are found, civil suits can deny defendants the financial wherewithal to support acts of terrorism. In addition to providing redress to victims, civil suits may deter such entities from maintaining assets or property in the United States, as well as prevent terrorists from benefitting from investments and soliciting funds in the U.S.[399] Suits against private entities under the ATS, or against entities with purposefully tenuous ties to foreign governments, avoid the pitfalls associated with suing state actors under the FSIA and attaching governmental assets,[400] which may be subject to diplomatic or consular immunities or seizure by the U.S. government.[401] Civil suits may also yield better

396. To be sure, in certain situations, the existence of terrorism suits, particular against foreign states under the FSIA, have complicated U.S. foreign relations. *See supra* notes 73–75 and accompanying text (noting executive action barring recovery). In addition, civil suits do not benefit from prosecutorial discretion, which can be exercised in a way that reflects foreign policy considerations.

397. Civil terrorism suits promote emerging international law concerning the right to a remedy and to reparations. *See* Van Schaack, *In Defense of Civil Redress*, *supra* note 395, at 165–68. They also are consistent with pronouncements from the international community calling for the compensation of victims. *See, e.g.*, text accompanying note 151.

398. *See* Strauss, *supra* note 32, at 682 (discussing how civil suits against hate crimes were successful and how private citizens can enter the war on terrorism through civil suits).

399. *See Boim*, 291 F.3d at 1011 (noting expansive purposes of § 2333 in supporting secondary liability).

400. *See supra* note 53 (discussing debate over whether the FSIA applies where individual state actors are sued).

401. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding governmental seizure against private claims); *see also* Exec. Order No. 13,224, 66 Fed. Reg. 186 (Sept. 25, 2001), *available at* http://www.state.gov/s/ct/rls/fs/2002/16181.htm (authorizing "the U.S. government to designate and block the assets of

results than criminal suits by being subject to a lower burden of proof.[402] This is especially true where the criminal justice system may only obtain custody over low level implementers (assuming they are able to obtain custody over anyone at all given that many direct perpetrators ultimately take their own lives in the context of their terrorist activities), and cannot likely reach the real architects of terrorist acts. Even where defendants are judgment-proof, such cases have symbolic value, contribute to norm-enunciation, and harness the expressive functions of the law.

Recognizing terrorism causes of action under the ATS would fill a gap in anti-terrorism litigation and ensure that citizen and non-citizen victims of acts of terrorism can sue together in a concerted fashion.[403] This would remove one of the gaps in coverage of the statutory provisions enabling the civil enforcement of international law violations.[404] To be sure, the concern expressed by the court in

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foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism"). *See generally* 28 U.S.C. § 1610 (2006) (detailing conditions under which governmental assets may be executed upon). Where the U.S. government seizes a foreign government's assets, they are not available to satisfy private judgments. Congress can, however, require the executive branch to release seized assets to satisfy judgments. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 2002(b), 114 Stat. 1464, 1542–43 (releasing blocked assets for victims involved in Cuban and Iranian cases).

402. For a fuller discussion of the benefits of civil suits for terrorism, see generally Hume & Todd, *supra* note 38; Moore, *supra* note 76.

403. In *Ungar*, for example, terrorists attacked a couple and their child in Israel. Estates of Ungar *ex rel*. Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 86 (D.R.I. 2001). The couple was killed, but the child survived. *Id.* The husband's estate could sue under the ATA because the decedent was a U.S. citizen. *Id.* By contrast, the wife was an Israeli citizen. *Id.* Recognizing terrorism claims under the ATS would enable these claims to proceed together. *See also* Alejandre v. Cuba, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997) (noting that fourth victim was not a U.S. citizen). In *Ungar* and *Alejandre*, the non-U.S. citizen plaintiffs could also have brought suit under the TVPA, which also creates a cause of action for summary execution, defined as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note (Torture Victim Protection).

404. The fact that aliens may sue for a broader array of international law violations under the ATS than U.S. citizens is another glaring gap in this regime.

Saperstein about opening the floodgates to terrorism claims by aliens[405] with little connection to the United States other than their ability to access our courts is a real one. A number of structural constraints, however, limit foreign litigants' ability to pursue civil litigation, as well as the desirability of bringing suit here.[406] These include the necessity of establishing personal jurisdiction over[407] and serving process on[408] defendants; the potential for dismissal under

405. *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 736 (2004) (noting that the implications of the proposed rule "would be breathtaking" and that the rule "would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place").

406. *See* K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1 (2004) (noting structural constraints on the exercise of extraterritorial civil jurisdiction with respect to the ATS); John D. Shipman, Comment, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526 (2008) (identifying challenges to effectuating civil terrorism suits within U.S. courts).

407. Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 179–80 (D.D.C. 2004) (finding no personal jurisdiction over Palestinian officials where defendants lacked sufficient contacts with the U.S. to satisfy the Fifth Amendment Due Process Clause, but finding personal jurisdiction over the Palestinian Authority and the Palestine Liberation Organization because they had sufficient contacts with the U.S.). *But see* Mwani v. Bin Laden, 417 F.3d 1, 11–13 (D.C. Cir. 2005) (finding adequate nationwide minimum contacts as required by Federal Rule of Civil Procedure 4(k)(2) where defendants could reasonably expect to be hailed into court as a result of directly targeting U.S. interests); Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 304 F. Supp. 2d 232, 256–57 (D.R.I. 2004) (finding Hamas had constitutionally sufficient minimum contacts with the United States as a whole in light of its fundraising, public relations, money laundering, investment, and other activities); *Estates of Ungar*, 153 F. Supp. 2d at 87–88 (asserting personal jurisdiction over Palestinian Authority on the basis of its non-United Nations activities, including its lobbying efforts, commercial contracts and bank accounts, and its office in Washington D.C.). *See generally* Ozan O. Varol, *Substantive Due Process, Plenary-Power Doctrine, and Minimum Contacts: Arguments for Overcoming the Obstacle of Asserting Personal Jurisdiction over Terrorists Under the Anti-Terrorism Act*, 92 IOWA L. REV. 297 (2006) (discussing methods that courts could use to exert personal jurisdiction over terrorists under the ATA).

408. Any corporate defendants doing business within the U.S. can easily be served process. *See* Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 571 (E.D.N.Y. 2005) (service on bank's New York agent). *But see Estates of Ungar*, 304 F. Supp. 2d at 257–59 (discussing difficulties of effectuating service of process on Hamas as an unincorporated association). Service may also be accomplished by publication in certain circumstances. *See Mwani*, 417 F.3d at 5, 17 (allowing service of process by publication for defendants Osama bin Laden

the doctrine of forum non conveniens;[409] the challenges of discovery;[410] the justiciability doctrines of international comity, political question, and act of state; the potential for executive intervention,[411] and the challenges of executing judgments against available assets.[412]

VI. CONCLUSION

The discussion above suggests that although the U.S. courts have not yet fully embraced a generalized tort of terrorism, the building blocks are in place to recognize such a cause of action under the ATS. An international consensus now exists that violent acts targeting civilians are per se unlawful, either as war crimes (if they are committed within the context of an armed conflict, however classified, with a nexus thereto), crimes against humanity (if committed within the context of a widespread or systematic attack against a civilian population), or terrorism (if the result of an isolated

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and al Qaeda, whose whereabouts were not easily determined); Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003) (same).

409. The ATA contains a heightened forum non conveniens standard for dismissal, requiring a showing that:

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

18 U.S.C. § 2334(d) (2006).

410. Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 43–44 (E.D.N.Y. 2007) (finding discovery about financial accounts relevant to plaintiffs' § 2333 claims).

411. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting the appropriateness of granting case-specific deference to the executive branch).

412. *See generally* Strauss, *supra* note 32, at 724–37 (examining the obstacle to the enforcement of judgments brought against terrorist organizations and the individuals, officials, and states that enable them).

attack outside of a state of war).[413] Only situations in which combatants are targeted by unprivileged belligerents—within or without an armed conflict or war of national liberation—may not be actionable under the ATS. Doctrinal fuzziness at the margins with regard to the illegality of attacks by and against combatants within an armed conflict should not bar the recognition of a universal prohibition against most manifestations of terrorism in the majority of circumstances.

413. Furthermore, so long as the conduct underlying the suit corresponds to a specific terrorism prohibition as set forth in any of the multilateral treaties to which the United States is a party or a provision of Title 18 of the U.S. Code, the case should move forward beyond the failure to state a claim phase.