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## Taking Terrorists to Court: A Practical Evaluation of Civil Suits against Terrorists under the Anti-Terrorism Act

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## TAKING TERRORISTS TO COURT: A PRACTICAL EVALUATION OF CIVIL SUITS AGAINST TERRORISTS UNDER THE ANTI-TERRORISM ACT

*The lawsuit seeks damages in excess of \$1 trillion.<sup>1</sup> It is a 259-page class action suit filed by more than 600 relatives of victims of the September 11th terrorist attacks.<sup>2</sup> Among the defendants are seven international banks; eight Islamic foundations, charities and their subsidiaries; individual terrorist financiers; the Saudi bin Laden Group; three Saudi princes; and the government of Sudan for allegedly bankrolling the terrorist Al Qaeda network, Osama bin Laden and the Taliban.<sup>3</sup> One of the plaintiffs' lawyers, noted: "This, I think, will be the trial of the century."<sup>4</sup>*

### I. INTRODUCTION

On September 11, 2001, terrorists scarred America, literally and figuratively. The aftermath of September 11th also profoundly impacted the American system of justice.<sup>5</sup> Enormous government resources were funneled toward the investigation and prosecution of terrorist perpetrators.<sup>6</sup> Moreover, the justice system's response raised serious questions about

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<sup>1</sup> See *Burnett v. Al Baraka Investment and Dev. Corp.*, D.D.C., Third Amended Complaint, 22 Nov. 2002, Civ. Action No. 1:02 CV 01616(JR), available at <http://news.findlaw.com/cnn/docs/terrorism/burnettba81502cmp.pdf> (last visited Feb. 28, 2004) [hereinafter *Burnett Complaint*]; see also *Burnett v. Al Baraka Investment and Dev. Corp.*, 274 F. Supp. 2d 86, 91 (D.D.C. 2003) (summarizing nature of complaint). See generally Susan Schmidt, *Sept. 11 Families Join to Sue Saudis: Banks, Charities and Royals Accused Of Funding Al Qaeda Terrorist Network*, WASH. POST, Aug. 16, 2002, at A04 (describing *Burnett* lawsuit).

<sup>2</sup> See *Burnett Complaint*, *supra* note 1.

<sup>3</sup> See *id.*

<sup>4</sup> Schmidt, *supra* note 1 at A04.

<sup>5</sup> See generally Stephen P. Waters and Joseph S. Lawder, *The Permanent Impact of September 11th*, 59-SEP BENCH & B. MINN. 17 (2002) (discussing overall impact of September 11th on legal system).

<sup>6</sup> The United States has deployed more than 60,000 troops around the world to combat terrorism, including 9,000 in Afghanistan alone. *Fact Sheet: News About the War Against Terrorism*, WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, NOV. 16, 2002, available at <http://usinfo.state.gov/topical/pol/terror/02111603.htm>. Approximately 650 enemy combatants are now under U.S. control. *Id.* Worldwide, approximately 2,290 terrorist-related arrests were made in 99 countries between September 12, 2001 and October 28, 2002. *Id.*

government safeguards on fundamental civil rights.<sup>7</sup> Finally, Congress implemented a comprehensive system to facilitate the process of compensating the many victims of September 11th and their families.<sup>8</sup> The federal government has thus far played the primary role in both prosecuting perpetrators and providing compensation for victims.<sup>9</sup>

As time passes, however, the potential for victims to seek redress on their own, individually or collectively, through civil suits becomes an increasingly pertinent issue in addressing terrorism in America.<sup>10</sup> Given the enormity of the injuries sustained on September 11th, there is potential for a myriad of expensive and high-profile civil law suits.<sup>11</sup> It was for this very reason that the federal government established the September 11th Victim Compensation Fund of 2001 ("VCF").<sup>12</sup> Likewise, the American Trial Lawyers Association made an unprecedented call for a moratorium on all civil law suits stemming from the incidents of September 11th.<sup>13</sup> Nonetheless, civil suits have already been filed, and more are sure to come.<sup>14</sup> As one United States District Judge noted, "there are potentially thousands and thousands of cases."<sup>15</sup>

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<sup>7</sup> See generally Whitney D. Frazier, *The Constitutionality of Detainment in the Wake of September 11th*, 90 KY. L.J. 1089 (2002) (exploring constitutional implications of response to September 11th); J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37 (2002) (discussing constitutional issues associated with September 11th); David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29-WTR HUM. RTS. 11 (2002) (explaining impact of heightened security on immigration); *Legal Implications of September Eleventh: A Question of Security or Civil Liberties*, 4 SCHOLAR 189 (2002) (discussing civil liberties in light of September 11th).

<sup>8</sup> On September 22, 2001, President Bush signed into law the Air Transportation and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). Title IV of the Act is titled the "September 11th Victim Compensation Fund of 2001" ("VCF"). See 28 C.F.R. § 104 (2002). The purpose of the VCF is "to provide compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and to the 'personal representatives' of those who were killed as a result of the crashes." *Id.* Victims or their survivors can obtain compensation for their losses through a governmental claims process rather than by filing a lawsuit. See *id.* See generally Carl Vogt and Mark Robertson, *Compensating Victims of Sept. 11 Terrorist Attacks*, N.Y.L.J., Nov. 30, 2001, at 1 (outlining provisions of VCF); Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1273-85 (2002) (discussing VCF as viable option for compensation of victims of September 11th); Richard P. Campbell, *Tort-Model Compensation*, 31-WTR BRIEF 4 (2002) (exploring VCF as model for mass tort compensation).

<sup>9</sup> See *supra* notes 6 and 8 and accompanying discussion.

<sup>10</sup> See Richard K. Milin, *Suing Terrorists and Their Private and State Supporters*, N.Y.L.J., Oct. 29, 2001, at 1.

<sup>11</sup> See *id.*

<sup>12</sup> See *supra* note 8 and accompanying text.

<sup>13</sup> See Milin, *supra* note 10. This moratorium was intended to prevent turning "victims against other victims" through suing airlines, insurers, building owners, and even fertilizer manufacturers. *Id.*

<sup>14</sup> See, e.g., *Ashton v. Al Qaeda*, S.D.N.Y., Complaint, Sep. 3, 2002, available at <http://news.findlaw.com/hdocs/docs/terrorism/ashtonalg90302cmp.pdf> (last visited Feb. 28,

One avenue of civil redress is to sue the terrorists themselves. The idea of initiating a civil cause of action against terrorists, however, is a relatively new concept, that presents unique legal opportunities and challenges.<sup>16</sup> Under which statutory provisions will plaintiffs seek damages? What are the obstacles to establishing jurisdiction over all the potential defendants? Will defendants recognize the jurisdiction of U.S. courts? If not, will plaintiffs be able to enforce default judgments against terrorist defendants? Can such lawsuits detract from or bolster official government efforts to investigate and prosecute terrorists? May the intervention of "private attorneys general" adversely impact U.S. foreign relations? Will the immense time and costs imposed on the judicial system in order to adjudicate these claims be worth the uncertain results? Perhaps most important from a victim's standpoint, even if plaintiffs can successfully sue terrorists, will they realize any monetary award? Judging from developing case law and evolving statutory schemes, the jury is still out.

This note seeks to address these questions by exploring the ability of victimized U.S. citizens to sue non-state terrorist actors in federal court.<sup>17</sup> In doing so, Part II will provide a brief survey of the development of federal law with respect to civil litigation involving terrorism. Part III will focus on the primary statutory provision allowing such suits in federal court, the Anti-Terrorism Act Of 1991,<sup>18</sup> and through the few cases brought under the Act so far, will examine the legal hurdles any private party faces when bringing suit under it. Part IV will conclude by illuminating some of the potential benefits and challenges posed by the Act and will focus on the outlook for the future of such litigation.

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2004); Burnett Complaint, *supra* note 1; Jane Doe v. Islamic Emirate of Afghanistan, S.D.N.Y., Complaint, Oct. 11, 2001, 01 CIV. 9074, available at [http://www.courtstv.com/assault\\_on\\_america/docs/osamasuit1.html](http://www.courtstv.com/assault_on_america/docs/osamasuit1.html) (last visited Feb. 28, 2004). See generally CBS Evening News, "Making Terrorists Pay," Feb. 8, 2002, available at <http://www.cbsnews.com/stories/2002/02/08/eveningnews/main328828.shtml> (last visited Feb. 28, 2004) (describing complaint in *Doe v. The Islamic Emirate*).

<sup>15</sup> Sarah Sparks & Milo Geyelin, *Aftermath: New York's Recovery: Experts Offer Ways to Manage Terror Lawsuits*, WALL ST. J., Sep. 25, 2001, at A10.

<sup>16</sup> See Jennifer A. Rosenfeld, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L. J. 726, 729-31 (1992) (noting divergent legal standards and lack of legislative framework prior to 1990).

<sup>17</sup> Suits involving state-actors will not be addressed herein as the Foreign Sovereign Immunities Act (FSIA) governs such suits. 28 U.S.C. § 1603(a) (2002). See also *infra* note 25 and accompanying text. Non-state actors are all other actors who are not agents of a foreign state or sanctioned to act under the authority of a foreign state. See generally Jack Goldsmith and Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, CHICAGO PUB. LAW AND LEGAL THEORY WORKING PAPER NO. 26 (April 8, 2002) at 2-4, available at [http://ssrn.com/abstract\\_id=312451](http://ssrn.com/abstract_id=312451) (last visited Mar. 16, 2004) (distinguishing "FSIA state actors," "non-FSIA state actors," and "pure non-state actors.") Al Qaeda, for instance, would fit under this category.

<sup>18</sup> 18 U.S.C. § 2333 (2002).

## II. A CIVIL REMEDY FOR TERRORISM?

Within the past decade, Congress has enacted a number of statutes governing civil suits against terrorists and terrorist organizations, including the Anti-Terrorism Act of 1991 ("ATA"),<sup>19</sup> the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),<sup>20</sup> the Torture Victim Protection Act of 1991 ("TVPA"),<sup>21</sup> and an amendment to the Racketeer Influenced and Corrupt Organizations Act ("RICO").<sup>22</sup> While these statutes vary in their scope and applicability, they serve two basic goals: to compensate victims of terrorism and to deter future wrongful acts by terrorists and their sponsors.<sup>23</sup>

For decades, families of terrorism victims have repeatedly attempted to seek civil redress against terrorists, but until recently had been thwarted by the principle of sovereign immunity.<sup>24</sup> In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA"), which opened the door to civil suits against foreign states and their agents.<sup>25</sup> However, the United States Treasury Department's Office of Foreign Assets Control ("OFAC"), which oversees the seizure of foreign assets, effectively limited civil recovery against foreign state assets in the interest of foreign affairs.<sup>26</sup> Then, in 1991, Congress enacted the ATA, which provides for a direct civil cause of action for United States nationals injured by an act of international terrorism perpetrated by private parties.<sup>27</sup> In that same year, Congress also

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<sup>19</sup> 18 U.S.C. § 2333 (2002). The ATA was originally enacted in 1990, repealed in 1991 due to a technical error, and re-enacted in 1992. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, §1003, 106 Stat. 4506, 4521 (1992) (entitled "Terrorism Civil Remedy").

<sup>20</sup> 28 U.S.C. § 1605(a)(7) (2002).

<sup>21</sup> Pub. L. No. 102-256, 106 Stat. 73 (2002).

<sup>22</sup> 18 U.S.C. § 1964(c) (2002) (as amended by Patriot Act, Sec. 813).

<sup>23</sup> See generally Walter W. Heiser, *Civil Litigation As a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 3 (2002) (exploring objectives, benefits and drawbacks of civil suits against terrorists); Rosenfeld, *supra* note 16, at 728 (explaining twin objectives of attacking financial apparatus of terrorism).

<sup>24</sup> See generally Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002) (discussing impact of OFAC on civil recovery attempts under FSIA).

<sup>25</sup> 28 U.S.C. § 1603(a) (2002). The Foreign Sovereign Immunities Act (FSIA) provides a comprehensive scheme for civil suits against foreign states. *Id.* FSIA defines a "foreign state" as a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* In *Flatow v. Islamic Republic of Iran*, the court applied the FSIA rules to a suit against the State of Iran, the Iranian Ministry of Information and Security, Ayatollah Khamenei, and other state actors. 999 F. Supp. 1 (D.D.C. 1998).

<sup>26</sup> See generally Lehrer, *supra* note 24.

<sup>27</sup> 18 U.S.C. § 2333 (2002). Although the ATA focused on acts of "international terrorism," the act's definition of international terrorism includes acts transcending 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 the perpetrators operate or seek

passed the TVPA, which created a cause of action against foreign governmental actors for acts of torture and extrajudicial killings.<sup>28</sup> Later, in 1996, Congress enacted the AEDPA, which amended the FSIA to allow suits against foreign governments that support terrorism.<sup>29</sup> The AEDPA stripped foreign states and officials of their sovereign immunity in personal injury cases involving “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in [the ATA]).”<sup>30</sup> Together these laws form the basis for federal jurisdiction over civil suits involving terrorism.<sup>31</sup> Each, however, has its own requirements and limitations depending on the parties suing and the parties to be sued.<sup>32</sup> The primary statute governing civil suits against non-state terrorists, which will be focused on herein, is the ATA.

### III. THE ANTITERRORISM ACT

Congress enacted the ATA to enable victims of international terrorism to seize assets and recover damages from terrorists within jurisdictional reach.<sup>33</sup> The ATA defines international terrorism as criminal acts that seek to intimidate or coerce a civilian population, to influence governmental policy, or to affect governmental conduct.<sup>34</sup> It also provides the

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asylum.” 18 U.S.C. § 2331 (2002).

<sup>28</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

<sup>29</sup> 28 U.S.C. 1605(a)(7) (2002).

<sup>30</sup> 28 U.S.C. § 1605(a)(7) (2002). *See also* Milin, *supra* note 10. Congress later adopted the “Flatlow Amendment” to the AEDPA, which created a federal cause of action against state actors supporting terrorism and allowed recovery for pain and suffering and punitive damages. *See id.*

<sup>31</sup> *See* Goldsmith & Goodman, *supra* note 17, at 8-16 (summarizing governing law over civil suits against non-FSIA defendants sued for action of terrorism).

<sup>32</sup> *See id.*

<sup>33</sup> *See* Rosenfeld, *supra* note 16, at 737 (discussing legislative intent behind passage of ATA); *see also The Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts and Administrative Practice, Senate Judiciary Comm.*, 101st Cong., 2d Sess. 5-6 (1990). Senator Grassley, co-sponsor of the original bill, stated that the ATA “empowers victims with all the weapons available in civil litigation.” 137 CONG. REC. S4511-04, S4511 (daily ed. April 16, 1991) (statement of Sen. Grassley). Moreover the legislative history indicates that the statute “opens the courthouse door to victims of international terrorism.” *Federal Courts Administration Act of 1992*, S. Rep. No. 342, at 45 (1992), available at 1992 WL 187372.

<sup>34</sup> 18 U.S.C. § 2331 (2002). The ATA provides in relevant part that international terrorism consists of any 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;

(ii) to influence the policy of a government by intimidation or coercion; or

most direct path for citizens to sue non-state terrorists for damages in federal court by explicitly conferring new extraterritorial jurisdiction upon the federal courts in these civil actions.<sup>35</sup>

Although the ATA has been in effect for nearly a decade, it remains virtually untested in the federal courts.<sup>36</sup> Moreover, the statutory provision for civil liability under the ATA consumes no more than a few short paragraphs in the United States Code.<sup>37</sup> Some important questions of statutory and judicial interpretation must, therefore, be considered when a potential plaintiff contemplates bringing suit under the ATA. The general questions that will be addressed below are: (1) how to establish jurisdiction over a defendant; (2) who can be held liable and for what actions; (3) what damages are recoverable and who can recover them.

Notwithstanding the limited judicial treatment of the ATA, the courts have more recently addressed some of these important questions. In 2002, the United States Circuit Court of Appeals for the Seventh Circuit heard *Boim v. Quranic Literacy Institute*.<sup>38</sup> In *Boim*, the court addressed the unsettled issue of whether individuals or organizations could be held liable under the ATA for providing financial support to terrorist groups.<sup>39</sup> The court held that victims of acts of international terrorism could sue groups who knowingly channel money to terrorists.<sup>40</sup> In doing so, the Seventh Circuit explored various theories of liability under which a plaintiff

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(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, and the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

*Id.*

<sup>35</sup> See 18 U.S.C. § 2333(a) (2002). The Act provides in relevant part:

(a) Action and jurisdiction.—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 therefore 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.

*Id.*; see also Rosenfeld, *supra* note 16, at 740 (explaining new jurisdiction conferred on courts).

<sup>36</sup> See 18 U.S.C.A. § 2333 (West 2003) (citing only two cases interpreting § 2333 in the annotations); see also Milin, *supra* note 10 (explaining fact that ATA remains untested in the courts). Prior to 2002, only two published opinions explored its scope. See *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001); *Ungar v. Palestinian Authority*, 153 F. Supp. 2d 76 (D.R.I. 2001).

<sup>37</sup> 18 U.S.C. §§ 2331, 2333, 2334 (2002).

<sup>38</sup> 291 F.3d 1000 (7th Cir. 2002).

<sup>39</sup> See *id.* at 1007.

<sup>40</sup> See *id.* at 1028.

might bring a suit under the ATA.<sup>41</sup> In 2003, the United States District Court for the Southern District of New York, in *Smith v. Islamic Emirate of Afghanistan*, became the first court to render a judgment in a suit brought against the September 11th terrorists under the ATA.<sup>42</sup> Although a default judgment was rendered in the case, the court did address the fundamental question of whether the attacks committed within United States borders were considered acts of international terrorism.<sup>43</sup> Finally, the United States District Court for the District of Rhode Island, in *Estates of Ungar v. Palestinian Authority*, recently addressed questions with respect to the jurisdictional reach of the ATA and the qualification of “survivors” and “heirs” under the Act.<sup>44</sup> Together the rulings in these three recent decisions can provide guidance to those seeking to bring suit under the ATA.

#### A. *The Jurisdictional Reach of the ATA*

As with any other federal cause of action, in an action brought pursuant to the ATA, the court must have both subject matter and personal jurisdiction over the parties in order to enter a default judgment.<sup>45</sup> The language of the ATA explicitly provides that “[a]ny 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 therefore in any appropriate district court of the United States...”<sup>46</sup> In addition, 18 U.S.C. § 2338 provides that the “district courts of the United States shall have exclusive jurisdiction over an action brought under this chapter.”<sup>47</sup> The ATA clearly makes civil suits against terrorists a federal question under the subject matter jurisdiction of the federal district courts.<sup>48</sup>

Obtaining personal jurisdiction over the parties to a suit brought under the act, however, can be more difficult. Two interrelated elements must be satisfied in order to establish personal jurisdiction over a party to a suit brought under the statute: 1) minimum contacts with the United States and 2) effective service of process.<sup>49</sup>

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<sup>41</sup> See *id.* at 1008-1009 (laying out plaintiffs’ three theories of liability under § 2333).

<sup>42</sup> 262 F. Supp. 2d 217 (S.D.N.Y. 2003).

<sup>43</sup> See *id.* at 220-221 (holding facts fall within statute’s definition of “international terrorism”).

<sup>44</sup> 2004 WL 134034 (D.R.I. Jan. 27, 2004).

<sup>45</sup> See *Ungar*, 2004 WL 134034, at \*10 (citing extensive authority that subject matter and personal jurisdiction must be established before entering default judgment).

<sup>46</sup> 18 U.S.C. § 2333(a) (2002).

<sup>47</sup> 18 U.S.C. § 2338 (2002).

<sup>48</sup> See *Estates of Ungar v. Palestinian Authority*, 153 F. Supp. 2d 76, 85-86 (2001) (affirming federal jurisdiction over claim brought pursuant to § 2333).

<sup>49</sup> See *Ungar*, 2004 WL 134034, at \*11. Judge Lageux aptly explained the two-fold burden upon the plaintiff to establish personal jurisdiction in suits such as those brought

In *Ungar*, the United States District Court for the District of Rhode Island addressed the challenge of establishing personal jurisdiction over defendants in a civil action brought pursuant to the ATA.<sup>50</sup> In 1996, United States citizen Yaron Ungar ("Ungar"), his wife, Efrat, and their nine-month-old son, were traveling home from a wedding in Israel when Hamas members in another vehicle opened fire on the Ungars' car, killing Ungar and his wife.<sup>51</sup> The administrator of the Ungars' estates filed an action pursuant to Section 2333 on behalf of the estates.<sup>52</sup> The defendants named in the lawsuit were divided into two groups: the Palestinian Authority ("PA") defendants<sup>53</sup> and the Hamas defendants.<sup>54</sup> The complaint alleged that all defendants engaged in acts of international terrorism as defined in Sections 2331 and 2333 because their actions: (1) were dangerous to human life and were violations of the criminal laws of the United States; (2) appeared to be intended to intimidate or coerce a civilian population, or to influence the policy of a government by means of intimidation or coercion; and (3) occurred outside the territorial jurisdiction of the United States.<sup>55</sup> Notwithstanding two unsuccessful motions by the PA defendants to dismiss the complaint, the primary claim against the PA and PLO—the alleged violation of Section 2333—is still pending before the court.<sup>56</sup> With respect to the Hamas defendants, the plaintiffs filed an Ap-

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under the ATA:

In a federal question case, the starting point of this Court's minimum contacts analysis is the Due Process Clause of the Fifth Amendment.... The relevant inquiry under such circumstances is whether the defendant has minimum contacts with the United States as a whole, rather than whether the defendant has minimum contacts with the particular state in which the federal court sits.... [T]he plaintiff must also establish that service of process is authorized by a federal statute or rule.

*Ungar*, 153 F. Supp. 2d at 86-87.

<sup>50</sup> See *Ungar*, 2004 WL 134034, at \*11 -\*22 (analyzing whether plaintiff made prima facie showing of personal jurisdiction over defendants).

<sup>51</sup> *Ungar*, 153 F. Supp. 2d at 82-83.

<sup>52</sup> See *id.* at 83.

<sup>53</sup> This group included: the Palestinian Authority (PA); the Palestinian Liberation Organization (PLO); Yasser Arafat ("Arafat"), President of defendant PA and Chairman of defendant PLO; Jibril Rajoub ("Rajoub") and Muhammed Dahlan ("Dahlan"), who commanded and controlled the Palestinian Preventive Security Services; Amin Al-Hindi ("Al-Hindi") and Tawfik Tirawi ("Tirawi"), who commanded and controlled the Palestinian General Intelligence Services; and Razi Jabali ("Jabali"), who commanded and controlled the Palestinian Police. See *id.* at 84.

<sup>54</sup> This group included Hamas, as well as the individual operatives of Hamas responsible for the shooting attack that killed Yaron and Efrat Ungar: Rahman Ghanimat, Hor, Abu Hamdiya, Kafishe, and Ibrahim Ghanimat. See *id.*

<sup>55</sup> *Ungar*, 153 F. Supp. 2d at 84; see also 18 U.S.C. §§ 2331, 2333, *supra* notes 34 and 35.

<sup>56</sup> *Ungar v. Palestinian Authority*, 228 F. Supp. 2d 40 (2002). On June 15, 2000, the PA defendants filed a motion pursuant to Rule 12(b) of the Federal Rules of Civil Proce-

plication for Entry of Default against them.<sup>57</sup> The clerk entered the default and the plaintiffs filed a Motion to Enter Default Judgment against the Hamas defendants.<sup>58</sup> The District Court referred the motion to a magistrate judge for preliminary review, findings and recommended disposition.<sup>59</sup> On July 3, 2003, a magistrate judge recommended that the court grant the plaintiffs' motion with respect to defendant Hamas, but deny the motion as to the remainder of the Hamas defendants and dismiss the claims against them for lack of personal jurisdiction.<sup>60</sup> Against Hamas itself, the court recommended awarding the plaintiffs damages of approximately \$116 million, plus interest, attorney's fees and costs.<sup>61</sup> On January 27, 2004, the District Court adopted the magistrate judge's Report and Recommendation, except with regard to prejudgment interest, and ordered a final judgment against Hamas in accordance with it.<sup>62</sup>

In its decision recommending the default judgment against Hamas, the court addressed at length many issues under the ATA including jurisdictional requirements, sufficiency of service, qualification as a survivor, and proper measures of damages.<sup>63</sup> In determining whether the court had personal jurisdiction over Hamas, the court noted that Hamas must have had minimum contacts with the United States as a whole and that Hamas

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ture to dismiss the complaint against them on the grounds of lack of jurisdiction over the subject matter, lack of jurisdiction over the person, insufficiency of service of process, improper venue, failure to state a claim upon which relief can be granted, and inconvenience of the forum. *See Ungar*, 153 F. Supp. 2d at 84. On July 24, 2001, the court denied the PA defendants' motion to dismiss for lack of subject matter jurisdiction; granted the motion to dismiss for lack of personal jurisdiction as to the individual PA defendants, but denied the motion as to defendants PA and PLO; denied the motion to dismiss for improper venue; denied the motion to dismiss for insufficient service of process; denied the motion to dismiss on Count I, the alleged violation of Section 2333; granted the motion to dismiss on all of the other common law claims because the plaintiffs failed to plead those claims under Israeli law as required by Rhode Island's choice of law rules; and denied the motion to dismiss for inconvenience of the forum. *See id.* at 100. On August 23, 2001, the plaintiffs filed an amended complaint realleging Count I and pleading all common law claims pursuant to the Israeli Civil Wrongs Ordinances. *See Ungar*, 228 F. Supp. 2d at 42. On November 28, 2001, the PA and PLO moved again to dismiss the complaint as non-justiciable and for failure to state a claim upon which relief can be granted. *See id.* at 43. On November 4, 2002, the court denied all the defendants' motions. *See id.* at 51.

<sup>57</sup> *Ungar*, 2004 WL 134034, at \*10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The District Court referred the motion to United States Magistrate Judge David Martin pursuant to 18 U.S.C. § 636(b)(1)(B) and Local Rule 32(a). *Id.*

<sup>60</sup> *Ungar*, 2004 WL 134034, at \*39. The court recommended a denial of the Motion to Enter Default Judgment against defendants Rahman Ghanimat, Tzabich Al Hor, Abu Hamdiya, Ibrahim Ghanimat, and Hassan Fuad Kafishe. *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Ungar*, 2004 WL 134034, at \*9. The District Court explained that awarding prejudgment interest on what the trebling provision rendered a largely punitive damages award was inappropriate. *See id.* at \*5-\*6.

<sup>63</sup> *See Ungar*, 2004 WL 134034, at \*10 -\*38.

must have been properly served with process in any district where it was found or had an agent.<sup>64</sup>

The court relied on the following facts to hold that there was “more than enough evidence to find that Hamas has minimum contacts with the United States”: 1) an admitted leader of the political wing of Hamas, Abu Marzook, resided in the United States until 1993; 2) Hamas used United States banks to deposit and transfer funds to Hamas members and Hamas related organizations in the United States and abroad; 3) the admitted head of the military wing of Hamas, Muhammed Salah (“Salah”), had engaged in activity on behalf of Hamas both in the United States and abroad; 4) Salah used the Quranic Literacy Institute (“QLI”) of Oak Lawn, Illinois, as a means for furthering his activities in the United States; 5) real estate that QLI purchased was used to support Salah’s Hamas-related activities; and 6) an expert who had researched and investigated the activities of Middle Eastern terrorist organizations operating in the United States for 13 years affirmed the pervasive activities of Hamas in the United States since the late 1980s.<sup>65</sup>

In determining whether service was sufficient, the court looked to Rule 4(h)(1) of the Federal Rules of Civil Procedure, which allows for service on a foreign or domestic corporation or unincorporated association by serving an “officer” and/or “managing or general agent” of the corporation or association.<sup>66</sup> The court ruled that Hamas qualified as an unincorporated association because “[i]t is composed of individuals, without a

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<sup>64</sup> See *id.* at \*13. The court relied upon Federal Rule of Civil Procedure 4(k)(1)(D), which provides that service of a summons is effective to establish jurisdiction over the person of a defendant “when authorized by a statute of the United States.” FED. R. CIV. P. 4(k)(1)(D). The ATA provides that “[p]rocess in [a civil action brought under section 2333 of this title] may be served in any district where the defendant resides, is found, or has an agent.” 18 U.S.C. § 2334(a) (2002).

<sup>65</sup> *Ungar*, 2004 WL 134034, at \*13-\*20.

<sup>66</sup> See *id.* at \*20. Rule 4(h)(1) provides in pertinent part:

(h) Service Upon Corporations and Associations.

Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

legal identity apart from its membership, formed for specific objectives.”<sup>67</sup> Because the court considered Hamas to be an unincorporated association, it held that service had been properly effectuated by serving Salah, the admitted head of Hamas’ military wing, at his home in Illinois.<sup>68</sup> The court relied on extensive evidence of Salah’s pervasive role in Hamas of directing military operations, receiving direct orders from Marzook, the political leader of Hamas, and distributing hundreds of thousands of dollars to Hamas operatives.<sup>69</sup> The court further noted that based on Salah’s level in the Hamas hierarchy, it was reasonable to conclude that he had the authority to exercise independent judgment and discretion in carrying out his duties.<sup>70</sup>

Explaining that the plaintiffs had satisfied the minimum contacts and service of process requirements, the court affirmed its personal jurisdiction over Hamas.<sup>71</sup> With respect to the individual Hamas defendants, however, the court reaffirmed the reasoning applied earlier in the litigation with respect to the individual PA defendants, and summarily dismissed the claims against them for lack of personal jurisdiction.<sup>72</sup> The court explained that the plaintiffs did not demonstrate that the individual Hamas defendants engaged in the “kind of systematic and continuous activity in the United States necessary to support the exercise of general personal jurisdiction over them.”<sup>73</sup>

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<sup>67</sup> *Ungar*, 2004 WL 134034, at \*20 (quoting *Klinghoffer v. S.N.C. Achille Lauro Ed.*, 739 F.Supp 854, 858 (S.D.N.Y. 1990)). In deciding that Hamas qualified as an unincorporated association, the court relied upon the following definition laid out in *Motta v. Samuel Weiser, Inc.*: “An unincorporated association is defined as a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise.” *Id.* (quoting *Motta v. Samuel Weiser, Inc.*, 768 F.2d 481, 485 (1st Cir. 1985) (citing BLACK’S LAW DICTIONARY 111 (5th ed. 1979))).

<sup>68</sup> *See Ungar*, 2004 WL 134034, at \*20-21. The court explained that in a federal question case, federal law determines whether a person is an agent for purposes of service under Rule 4. *See id.* at \*20 (citing *Ungar*, 153 F. Supp. 2d at 89-90). The court cited federal case law indicating that a general or managing agent is an individual with the authority to exercise independent judgment and discretion in the performance of his or her duties. *See id.*

<sup>69</sup> *See Ungar*, 2004 WL 134034, at \*21.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at \*22. Earlier in the litigation, Judge Lagueux distinguished the due process analysis appropriate under the ATA versus that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on which the plaintiffs relied. *See Ungar*, 153 F. Supp. at 93-95. The court required the plaintiffs demonstrate that the defendants had sufficient minimum contacts to satisfy traditional due process analysis rather than applying the more lenient analysis, according to which the court inquires whether the defendants’ acts were sufficient to provide them with fair warning that the effects of their actions in a foreign country may subject them to the jurisdiction of the courts of that country. *See id.*

<sup>73</sup> *Ungar*, 2004 WL 134034, at \*22.

In other situations, the potential terrorist defendants, unlike Hamas, may not be as well known or as easily located for service.<sup>74</sup> The United States District Court for the Southern District of New York addressed the difficulties of establishing personal jurisdiction over defendants in suits brought under the ATA.<sup>75</sup> In *Smith*, the court adjudicated a claim that the survivors of two victims of the September 11th terrorist attacks brought against the Islamic Emirate of Afghanistan, the Taliban, Al Qaeda, Osama bin Laden, Saddam Hussein, and the Republic of Iraq.<sup>76</sup> The court agreed with the plaintiffs that because none of the defendants could be found in the United States, Rule 4(f) of the Federal Rules of Civil Procedure governed service upon them.<sup>77</sup> Rule 4(f) outlines various methods to be em-

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<sup>74</sup> See, e.g., *Smith v. Islamic Emirate of Afghanistan*, 2001 WL 1658211, \*2-3 (S.D.N.Y. Dec. 26, 2001) (discussing difficulties inherent in service of process on Osama bin Laden, Al Qaeda, & the Taliban).

<sup>75</sup> See *id.* (noting bin Laden and Al Qaeda not amenable by prescribed methods under Rule 4).

<sup>76</sup> See *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003). On November 14, 2001, Raymond Smith, the administrator of the estate of his brother, George Smith, brought suit against the Islamic Emirate of Afghanistan, the Taliban, Al Qaeda, and Osama bin Laden for damages stemming from George's death during the September 11th attacks. See *id.* at 220. On November 15, 2001, Jane Doe, executrix of the estate of Timothy Soulas, who was also killed on September 11th, brought a separate suit against the same defendants. See *id.* The court consolidated the two cases on January 23, 2003. See *id.* With the court's permission, the plaintiffs amended the consolidated complaint on June 10, 2002, to add Saddam Hussein and the Republic of Iraq as defendants. See *id.*

<sup>77</sup> See *Smith*, 2001 WL 1658211, at \*1. Rule 4(f) of the Federal Rules of Civil Procedure provides in relevant part:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

- (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or
- (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
  - (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
  - (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
  - (C) unless prohibited by the law of the foreign country, by
    - (i) delivery to the individual personally of a copy of the summons and the complaint; or
    - (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

ployed for foreign service, and allows for alternative means of service to be directed by the court if the outlined procedures would not be effective.<sup>78</sup> Explaining that any of the established methods for service would likely be futile in attempting to serve Osama bin Laden, the court ordered service by publication in various Arab media outlets.<sup>79</sup> With respect to Al Qaeda, the court found it to be an unincorporated association pursuant to Rule 4(h) of the Federal Rules of Civil Procedure.<sup>80</sup> As such, Al Qaeda could be served in any manner provided in Rule 4(f).<sup>81</sup> The court explained that Al Qaeda was no more amenable to service than bin Laden and, therefore, ordered service by publication in the same manner as with bin Laden.<sup>82</sup> Finally, with respect to the Taliban, the court relied on the same analysis under Rule 4(h) as it applied to Al Qaeda, but noted that the plaintiffs were capable of effectuating personal service on a high-ranking member of the Taliban because it still had a visible presence.<sup>83</sup> Pursuant to Rules 4(h)(2) and 4(f)(3), the court, therefore, ordered that the plaintiffs personally serve Ambassador Abdul Salaam Zaeef rather than serve the Taliban by publication.<sup>84</sup>

Together *Ungar* and *Smith* highlight the challenges of establishing personal jurisdiction over the parties that tend to be defendants in suits brought under the ATA.<sup>85</sup> They are also instructive to those considering bringing suit under the ATA as to the parties upon which they may want to strategically focus. Terrorism, by its very nature, involves covert and informal networks that often cross national borders. Establishing contacts with the United States, especially with respect to individual terrorists, can therefore be challenging. Courts will be more likely to find that known terrorist organizations with extensive international networks reaching the

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(3) by other means not prohibited by international agreement as may be directed by the court.

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

<sup>78</sup> See FED. R. CIV. P. 4(f), *supra* note 77.

<sup>79</sup> See *Smith*, 2001 WL 1658211, at \*3. The court ordered service to be made by publication for six (6) weeks in the following media outlets: (1) Afghan newspapers *Hewad*, *Anis*, *Kabul News*, and *Kabul Times*; (2) Pakistani newspaper *Wahat*; and (3) broadcasters Al Jazeera, Turkish CNN, BBC World, ARN, and ADF. See *id.*

<sup>80</sup> See *id.* at \*4; see also FED. R. CIV. P. 4(h) *supra* note 66.

<sup>81</sup> See *Smith*, 2001 WL 1658211, at \*4; see also FED. R. CIV. P. 4(h) *supra* note 66. Rule 4(h) provides that service upon a corporation or association not within any judicial district of the United States may be made "in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof." FED. R. CIV. P. 4(h)(2).

<sup>82</sup> See *Smith*, 2001 WL 1658211, at \*4.

<sup>83</sup> See *Smith*, 2001 WL 1658211, at \*4. The court reasoned that, when practicable, personal service is preferable to service by publication. See *id.*

<sup>84</sup> See *id.* at \*4 -\*5.

<sup>85</sup> See *Ungar*, 2004 WL 134034; *Smith*, 262 F. Supp. 2d 217.

United States have sufficient minimum contacts to satisfy due process requirements.<sup>86</sup> When practicable, courts will also favor personal service upon officers or agents of terrorist associations rather than general service by publication.<sup>87</sup> While the primary individual perpetrators of a terrorist act may seem to be the most culpable parties, any time a broader organization with which terrorists are associated can be causally linked to an act of terrorism, targeting such organizations may provide better opportunity to surmount the hurdle of establishing personal jurisdiction. This strategy of targeting an organization promoting or supporting terrorism for jurisdictional purposes naturally leads to the question of how broad the net of liability under the ATA can be cast.

## B. Liable Parties Under the ATA

### 1. Defining "International Terrorism"

In *Smith*, the court held that the facts of the case were sufficient to allege an international act of terrorism under the ATA.<sup>88</sup> Because none of the defendants appeared, the court granted a default judgment on December 23, 2002.<sup>89</sup> In its ruling, the court addressed the central issue of whether the events of September 11th fall within the ATA's definition of "international terrorism."<sup>90</sup> As the court noted, the ATA defines "interna-

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<sup>86</sup> See *Ungar*, 2004 WL 134034, at \*13-\*20.

<sup>87</sup> See *Smith*, 2001 WL 1658211, at \*4; see also discussion of FED. R. Civ. P. 4(h) *supra* note 81.

<sup>88</sup> See *Smith*, 262 F. Supp. 2d at 221-22. Because the class of defendants encompassed both state actors ("Iraqi Defendants") and non-state actors ("Al Qaeda Defendants"), the court separated the two classes of defendants and analyzed the claim against the Iraqi Defendants under the FSIA and the Al Qaeda Defendants under the ATA. See *id.* at 222-32. This note focuses only on the analysis of the claims against the Al Qaeda Defendants under the ATA.

<sup>89</sup> See *id.* at 220. The court rendered default judgments against all defendants except Saddam Hussein on December 23, 2002 and then against Saddam Hussein on February 21, 2003. See *id.* Once a valid cause of action was brought against the Al Qaeda Defendants, their failure to appear concluded the liability phase and only a determination of damages remained. See *id.*; see also *Au Bon Pain Corp. v. Arctect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) (when defendant fails to defend, court should accept as true all factual allegations of complaint, except those relating to damages). Nonetheless, the plaintiffs presented evidence of Osama bin Laden's involvement in terrorism in general and in the terrorist attacks of September 11th. See *Smith*, 262 F. Supp. 2d at 222. The plaintiffs provided evidence including a videotape in which bin Laden told a cleric how he planned to destroy the World Trade Center; reference to bin Laden's *fatwah*, or holy war, of February 23, 1998, against the United States; and general evidence of other acts of terrorism against the United States linked or attributed to bin Laden. See *id.*

<sup>90</sup> See *Smith*, 262 F. Supp. 2d at 221-22. The court recognized *Boim* as the seminal

tional terrorism” in contrast to “domestic terrorism.”<sup>91</sup> The primary difference is that domestic terrorism involves acts that “occur primarily within the territorial jurisdiction of the United States,” while international terrorism involves acts that “occur primarily outside the territorial jurisdiction of the United States, or transcend[s] 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.”<sup>92</sup> The court explained that while the acts of September 11th clearly “occurred primarily” in the United States, acts of international terrorism also encompass acts that “transcend national boundaries in terms of the means by which they are accomplished ... or the locale in which their perpetrators operate.”<sup>93</sup> The court noted that this broad provision arguably includes the terrorist acts of September 11th, which were carried out by foreign nationals who apparently received their orders and funding and some training from foreign sources.<sup>94</sup> Although wary that an expansive interpretation of the term “international terrorism” could render the term “domestic terrorism” superfluous, the court held that facts before

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case interpreting the ATA, but explained that the decision was generally unhelpful on this issue because the terrorist acts in *Boim* clearly fell within the definition of “international terrorism.” See *id.* at 222 n. 4.

<sup>91</sup> See *Smith*, 262 F. Supp. 2d at 222. The definitions of the two terms are as follows:

- (1) the term “international terrorism” means 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;
    - (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;
  - (C) and 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...
- (5) the term “domestic terrorism” means activities that--
  - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
  - (B) 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; and
  - (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331 (2002).

<sup>92</sup> *Smith*, 262 F. Supp. 2d at 222.

<sup>93</sup> *Id.* at 221.

<sup>94</sup> See *id.*

it fell within the statute's definition of "international terrorism" and that the plaintiffs pled a valid cause of action against the Al Qaeda defendants.<sup>95</sup>

The *Smith* court dealt with a situation that prior to September 11th may not have been seriously considered—U.S. citizens were victims of international terrorism within the United States.<sup>96</sup> In subjecting the September 11th perpetrators to liability, the court logically extended a remedy for international terrorism targeted at U.S. citizens to follow its new path into the physical boundaries of the United States.<sup>97</sup>

## 2. Aiding and Abetting International Terrorism

The courts also recently addressed the breadth of the concept of an "act of international terrorism." In *Boim*,<sup>98</sup> the parents of an American student murdered in Israel by Hamas<sup>99</sup> terrorists while studying at a yeshiva invoked the ATA to sue several individuals and organizations for the death of their son.<sup>100</sup> Among the defendants named in the suit filed in the United States District Court for the Northern District of Illinois were the Quranic Literacy Institute<sup>101</sup> ("QLI") and the Holy Land Foundation for Relief and Development ("HLF").<sup>102</sup> The Boims alleged that QLI and HLF "aided, abetted and financed" the terrorists who actually murdered David

<sup>95</sup> See *id.*

<sup>96</sup> See *Smith*, 262 F. Supp. 2d at 220.

<sup>97</sup> See *id.* at 222.

<sup>98</sup> 291 F.3d at 1001.

<sup>99</sup> Hamas is an extremist Palestinian militant organization whose mission is to establish a fundamentalist Palestinian state. See *id.* at 1002. It has military and political branches; and the military branch receives orders and material support from the political branch. See *id.* Hamas also allegedly has command and control centers in the United States, Britain, and other Western European countries that help to coordinate fund-raising efforts aimed at sympathizers and then to launder and channel the money to Hamas operatives in Gaza and the West Bank. See *id.* Hamas was designated a terrorist organization in 1995 by executive order of the President. Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995). In 1997, the Secretary of State designated Hamas as a "foreign terrorist organization" pursuant to 8 U.S.C. § 1189.

<sup>100</sup> See *Boim*, 291 F.3d at 1001. The Boims brought survivor and wrongful death actions seeking \$100 million in compensatory damages and \$100 million in punitive damages. See *id.* at 1004.

<sup>101</sup> The Quranic Literacy Institute ("QLI") is an Illinois nonprofit organization that purports to translate and publish sacred texts. See *Boim*, 291 F.3d at 1003. QLI employed Mohammed Abdul Hamid Khalil Salah, another defendant in the case, as a computer analyst. *Id.* Salah is the admitted United States based leader of the military branch of Hamas. *Id.* Salah has been prosecuted for channeling money to Hamas and training terrorist operatives in Israel. *Id.* He is named on OFAC's list of Specially Designated Terrorists. *Id.*

<sup>102</sup> The Holy Land Foundation for Relief and Development ("HLF") is a non-profit organization with offices in Texas and Illinois whose stated mission is to fund humanitarian relief and development efforts. See *Boim*, 291 F.3d at 1003. HLF's director has admitted providing funds to support Hamas. *Id.*

Boim.<sup>103</sup> QLI and HLF moved to dismiss for failure to state a claim upon which relief can be granted.<sup>104</sup> The district court denied the defendants' motion to dismiss and the defendants appealed.<sup>105</sup>

On appeal the Seventh Circuit addressed the following three issues: 1) whether funding of an international terrorist organization in itself constitutes an act of international terrorism under the ATA because it "involves violent act or acts dangerous to human life"; 2) whether the ATA incorporates the definition of international terrorism adopted in the federal statute criminalizing international terrorism, which includes material support of terrorist activities; and 3) whether a cause of action lies for aiding and abetting international terrorism.<sup>106</sup>

With respect to the first issue, the Seventh Circuit held that "funding *simpliciter*" of a terrorist organization is not itself an act of international terrorism and, therefore, is not sufficient alone to establish liability under the ATA.<sup>107</sup> The Boims argued that the provision of funds to a known terrorist group was an action that itself constituted international terrorism because it "involves violent acts or acts dangerous to human life."<sup>108</sup> They urged a broad interpretation of the term "involves" as encompassing any activity related to or supporting a violent act.<sup>109</sup> The defendants, however, argued that the court should interpret the statutory language as applying only to those who actually commit the violent acts.<sup>110</sup> The court refused to adopt the Boims' broad interpretation of the language, explaining that Congress intended to incorporate traditional principles of tort law into the ATA, including the requirements of intent and proximate cause.<sup>111</sup> The court reasoned that failure to require proof of intent and

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<sup>103</sup> *Boim*, 291 F.3d at 1004. The Boims argue that QLI and HLF provided "material support or resources" to Hamas as defined and prohibited in 18 U.S.C. §§ 2339A and 2339B. *See id.*

<sup>104</sup> *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1011 (N.D. Ill. 2001). QLI and HLF argued that the ATA does not include an aiding and abetting action, expressed or implied. *See id.*

<sup>105</sup> *See id.* at 1015-16 (holding Congress intended liability to extend to those providing material support to terrorists).

<sup>106</sup> *See Boim*, 291 F.3d at 1007 (listing issues certified for appeal).

<sup>107</sup> *Id.* at 1012.

<sup>108</sup> *Id.* at 1009. The ATA's definition of "international terrorism" includes any activities that "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." 18 U.S.C. § 2331(1) (2002).

<sup>109</sup> *See Boim*, 291 F.3d at 1009.

<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 1010 (citing congressional record supporting adoption of general principles of tort law).

proximate cause would render the standard for liability under the ATA too vague and would give the statute “an almost unlimited reach.”<sup>112</sup>

On the second issue, the court held that the defendants’ actions were violations of criminal provisions prohibiting the provision of material support or resources to a terrorist organization and therefore gave rise to civil liability under the ATA.<sup>113</sup> The plaintiffs argued that the defendants’ violations of the criminal counterpart to the provisions of the ATA gave rise to civil liability as well.<sup>114</sup> The Seventh Circuit agreed, explaining that it would be “counterintuitive” to assume that Congress intended to impose criminal liability but not civil liability on those who finance terrorism.<sup>115</sup> The court also clarified that criminal liability under these provisions would be sufficient, but not necessary, to establish civil liability for financially supporting terrorism.<sup>116</sup>

Finally, the court held in favor of the Boims on their third theory that aiding and abetting an act of terrorism gives rise to civil liability under the ATA.<sup>117</sup> The plaintiffs contended that aiding and abetting violent acts is conduct that “involves violent acts” according to the ATA’s definition of terrorism.<sup>118</sup> The defendants argued that aiding and abetting liability is

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<sup>112</sup> See *Boim*, 291 F.3d at 1011. The court cautioned that failure to require knowledge of and intent to further violent terrorist acts might lead to constitutional infirmities under the First Amendment by punishing persons for mere association with terrorist groups. See *id.* The court also noted that the ATA requires a plaintiff be injured “by reason of” an act of international terrorism and that the Supreme Court has interpreted identical language to require a showing of proximate cause. See *id.* (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992)). The court concluded that to hold the defendants liable for donating money without the knowledge of the intended criminal use would be to impose strict liability for contributing to terrorist groups, a proposition which the language or history of the statute does not support. See *id.* at 1012.

<sup>113</sup> See *Boim*, 291 F.3d at 1015. According to 18 U.S.C. § 2339(A) intentionally or knowingly providing material support or resources to terrorists is a crime. See 18 U.S.C. § 2339(A) (2002). “Material support or resources” is defined as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” 18 U.S.C. § 2339A(b) (2002). 18 U.S.C. § 2339B extends criminal liability to anyone providing material support or resources to organizations the Secretary of State designates as “foreign terrorist organizations” pursuant to 8 U.S.C. § 1189. 18 U.S.C. § 2339B (2002).

<sup>114</sup> See *Boim*, 291 F.3d at 1012. The plaintiffs reasoned that the enactment of the criminal provisions in § 2339A and § 2339B demonstrate Congress’ intent to include the provision of material support to terrorists in the definition of international terrorism under the ATA. See *id.*

<sup>115</sup> See *id.* at 1014. The court did not find that the criminal violations themselves give rise to civil liability. See *id.* at 1016. Rather, the court explained the fact that Congress made it a crime to provide material support for terrorism shows Congress logically must have intended that such actions also give rise to civil liability. See *id.*

<sup>116</sup> See *Boim*, 291 F.3d at 1015.

<sup>117</sup> See *id.* at 1021.

<sup>118</sup> See *id.* at 1016.

available only when expressly provided for in the statute.<sup>119</sup> The court disagreed, explaining that though the words “aid and abet” do not appear in the statute, Congress intended to extend liability to all points along the causal chain of terrorism.<sup>120</sup>

If other jurisdictions follow the Ninth Circuit’s lead in recognizing a right of action for aiding and abetting terrorism, the *Boim* decision vastly expands the potential for a new class of litigants to recover damages under the ATA.<sup>121</sup> As a practical matter, similar application of the ATA in other cases expands the potential for victims to find defendants over whom the courts’ will have jurisdiction and against whom they may be able to obtain enforceable monetary judgments. However, it is especially true in these types of cases—where terrorist defendants are understandably hesitant to appear in court and defend themselves and are therefore often defaulted—that establishing liability is not the same as effectuating recovery.

### C. Recovery Under the ATA

#### 1. Damages Recoverable

As noted above, Section 2333(a) allows the estate of a U.S. national killed by an act of international terrorism and his or her survivors or heirs to recover threefold the damages they sustain and the cost of the suit, including attorney’s fees.<sup>122</sup> The two primary questions that confront courts under this provision of the ATA are: 1) What damages are recoverable? and 2) Who can recover them? Because there have been very few judgments rendered under the ATA, few courts have interpreted this damages clause, and those that have done so have adopted different approaches.<sup>123</sup>

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<sup>119</sup> See *id.* The defendants relied upon the Supreme Court’s decision in *Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), under which the Court held that a private plaintiff may not maintain an aiding and abetting suit under 10(b) of the Securities and Exchange Act of 1934. See *id.*

<sup>120</sup> See *Boim*, 291 F.3d at 1019-20. The court held that the *Central Bank* analysis was not determinative because: 1) *Central Bank* addresses an implied right of action rather than an expressed right of action; 2) Congress expressed an intent to employ general tort principles, which include aiding and abetting; 3) criminal liability attached to aiders and abettors and Congress intend to make civil liability at least as extensive as criminal liability; and 4) failing to extend aider and abettor liability would not serve Congress’ stated goal of cutting off the flow of money to terrorists. See *id.* at 1019.

<sup>121</sup> See Case Comment, *Tort Law—Civil Remedy for Terrorism—Seventh Circuit Recognizes Implied Action for Aiding and Abetting Terrorism*.—*Boim v. Quranic Literacy Institute*, 116 HARV. L. REV. 713, 716 (2002) (explaining impact of *Boim* decision); Lehrer, *supra* note 24, at 358 (noting prior to 7th Circuit’s decision that *Boim* “could prove to be a watershed case”).

<sup>122</sup> See 28 U.S.C. § 2333(a) (2002) and statutory language *supra* note 35.

<sup>123</sup> Compare *Smith*, 262 F. Supp. 2d. at 232-40 (analyzing damages in terms of pecu-

In *Smith*, after declaring default judgments against the defendants, the court ruled that the plaintiffs were entitled to damages against both Al Qaeda under the ATA and the Republic of Iraq pursuant to FSIA and, accordingly, calculated the damages attributable to each defendant.<sup>124</sup> The court explained that, pursuant to the ATA, Al Qaeda was liable for damages for economic losses and pain and suffering attributable to Smith's and Soulas' wrongful deaths, as well as treble damages as provided for under the statute.<sup>125</sup> The court refused, however, to award punitive damages to either estate, explaining that the ATA fails to provide for punitive damages.<sup>126</sup> Moreover, the court distinguished the Al Qaeda defendants' liability from that of the Republic of Iraq.<sup>127</sup> Because Iraq's liability was based on the FSIA, which allows for damages for economic losses, pain and suffering, and loss of solatium, but not for treble damages, the court held the Republic of Iraq jointly and severally liable for economic losses and pain and suffering, but not for the trebled damages.<sup>128</sup> Additionally, the court attributed liability for the damages for loss of solatium solely to the Republic of Iraq.<sup>129</sup>

While calculating economic losses was straightforward based on calculations of future expected earnings under traditional theories of tort recovery, calculating damages for pain and suffering was much less precise due to the highly unusual and largely unknown details of each of the decedents' deaths.<sup>130</sup> The court distinguished between the deaths of Smith and Soulas, explaining that given the uncertainty of when Smith died and the extent of the pain and suffering, if any, that he endured, an award of \$1 million was appropriate.<sup>131</sup> With respect to Soulas, for whom there was direct evidence that he had survived the plane's impact, the court explained

niary loss and pain and suffering) with *Ungar*, 2004 WL 134034, at \*22-\*39 (including solatium damages in damages analysis).

<sup>124</sup> See *Smith*, 262 F. Supp. 2d at 232-40.

<sup>125</sup> See *id.* at 240. The court distinguished between damages recoverable against Al Qaeda under the ATA and those recoverable against Iraq under the Flatlow Amendment. See *id.*

<sup>126</sup> See *id.* The court explained that to the extent that the ATA's treble damages provisions already provides a penalty, the court was precluded from assessing additional punitive damages against the Al Qaeda defendants. See *id.*

<sup>127</sup> See *Smith*, 262 F. Supp. 2d. at 220-31. The court appropriately analyzed the claims against the Al Qaeda defendants under the ATA and the claims against the Iraqi Defendants under FSIA. See *id.*

<sup>128</sup> See *id.* at 240-41. The court explained that 28 USC § 1606 immunizes foreign states from liability for punitive damages. See *id.* at 240 (citing *Elahi v. The Islamic Republic of Iran*, 124 F. Supp. 2d 97, 113-114, 113 n. 17 (D.D.C. 2000)).

<sup>129</sup> See *Smith*, 262 F. Supp. 2d. at 240-41.

<sup>130</sup> See *id.* at 233 ("The effort after a tragedy of this nature to calculate pain and suffering is difficult at best...The devastation and horror accompanying this tragedy makes a realistic appraisal almost impossible.").

<sup>131</sup> See *id.* at 233-34.

that the “ensuing time must have been psychologically excruciating” and his death “very painful,” and, therefore awarded \$2.5 million as an appropriate measure of damages.<sup>132</sup>

The end result was that Al Qaeda and the Republic of Iraq were jointly and severally liable for approximately \$20,250,000 in damages for economic loss and pain and suffering, while Al Qaeda was liable for approximately \$40,500,000 more for trebling and the Republic of Iraq was liable for \$43,750,000 for solatium damages.<sup>133</sup>

Soon after the court awarded damages in *Smith*, the *Ungar* court entered judgment awarding damages to the plaintiffs in that case.<sup>134</sup> While recognizing the *Smith* court’s interpretation of damages allowable under the ATA, the *Ungar* court highlighted the lack of clarity in the ATA’s damages clause<sup>135</sup> and noted that the *Smith* court’s decision was of “limited assistance” in addressing the issue because of the lack of discussion as to how the court actually determined damages.<sup>136</sup> Because the plaintiffs, who included surviving family members of the victims, were seeking damages for both pecuniary and non-economic losses, including loss of companionship and society and mental anguish, or so-called “solatium damages,” the court was required to determine whether the statute provided for recovery of damages for such losses.<sup>137</sup> To find the answer the court relied on the legislative history of the ATA.<sup>138</sup> The court reasoned that because Congress expressly intended to empower victims “with all the weapons available in civil litigation,”<sup>139</sup> Congress must have fittingly intended that the “full range of damages” be available to those entitled to bring actions under the statute.<sup>140</sup> The court also reasoned that allowing for solatium damages beyond pure economic losses followed recent nationwide legislative tendencies.<sup>141</sup> The court, therefore, analyzed the damages suffered by the plaintiffs in both economic and non-economic terms.<sup>142</sup>

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<sup>132</sup> *Id.* at 238-39.

<sup>133</sup> *See id.* at 240-41.

<sup>134</sup> *See Ungar*, 2004 WL 134034, at \*7.

<sup>135</sup> *See Ungar*, 2004 WL 134034, at \*22. The court pointed out that the ATA fails to define “survivors” or “heirs” and that the lack of these definitions was problematic because those terms are usually defined or determined by state law. *Id.* at \*25. As the court noted: “The measure of damages for causing the death of another depends on the wording of the statute creating the right of action and its interpretation.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 925 (1979)).

<sup>136</sup> *Id.* at \*22-26.

<sup>137</sup> *See Ungar*, 2004 WL 134034, at \*25.

<sup>138</sup> *See id.* at \*26.

<sup>139</sup> *See id.* (citing Antiterrorism Act of 1990: Hearing before the Subcomm. on Intellectual Prop. & Judicial Admin. of the House Comm. on the Judiciary, 102nd Cong. 10 (1992)).

<sup>140</sup> *Id.*

<sup>141</sup> *See Ungar*, 2004 WL 134034, at \*26. The court quoted *Prosser & Keeton on Torts*: “Though recovery for loss of society and comfort is denied under some statutes, it is

## 2. Parties Eligible to Recover

The *Ungar* court also addressed the fundamental question of who could properly recover damages in a suit brought pursuant to Section 2333.<sup>143</sup> The court explained that because the term “survivors” was not defined in § 2333(a) and the pleadings failed to indicate whether the victim’s parents and siblings brought the action as survivors, the court was forced to determine whether the parents and siblings of a decedent who died leaving children are “survivors” within the meaning of the statute.<sup>144</sup> Given the variability of the meaning of the terms, the court again resorted to the legislative history of the statute for assistance in interpreting it.<sup>145</sup> The legislative history indicated that Congress intended to broadly apply theories of recovery generally accepted under traditional tort law.<sup>146</sup> After a comprehensive review of the legislative history of the statute, the court determined that Congress had clearly considered the issue of who could bring suit under the ATA and intended the class to include “family members who are not legal heirs (such as the parents and siblings of a decedent who leaves children).”<sup>147</sup> The court further reasoned that if this were not

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an item usually recognized and made the basis for an award...Even jurisdictions that have rejected the loss of society or consortium claim, as such, have permitted on form of it, namely a loss of guidance and advice that the decedent would have provided.” *Id.* (quoting PROSSER AND KEETON ON TORTS § 127 (W. Page Keeton et al. eds., 5th ed. 1984) (footnotes omitted)).

<sup>142</sup> See *Ungar*, 2004 WL 134034, at \*28-\*37.

<sup>143</sup> See *id.* at \*22.

<sup>144</sup> See *id.*

<sup>145</sup> See *Ungar*, 2004 WL 134034, at \*24. The court compared *Black’s Law Dictionary’s* broad definition of “survivor” as “[o]ne who survives another; one who lives beyond some happening; one of two or more persons who lives after the death of the other or others,” with a number of state statutes that specifically and narrowly define “survivors.” See *id.* at \*23.

<sup>146</sup> See *id.* at 24 (citing *Boim*, 291 F.3d at 1010). In *Boim*, the court explained: “[the legislative] history...evidences an intent by Congress to codify general common law tort principles and to extend civil liability for acts of international terrorism to the full reaches of traditional tort law.” 291 F.3d at 1010 (citing 137 Cong. Rec. S4511-04 (Apr. 16 1991)) (“The [antiterrorism act] accords victims of terrorism the remedies of American tort law.”); see also *Antiterrorism Act of 1990*, Hearing Before the Subcomm. On Courts and Admin. Practice of Comm. on the Judiciary, United States Senate, 101st Cong., 2nd Sess. (1990) (hereinafter “Senate Hearing”) (“[T]he bill as drafted is powerfully broad, and its intention ... is to ... bring [in] all of the substantive law of the American tort law system.”).

<sup>147</sup> *Ungar*, 2004 WL 134034, at \*25. As originally drafted, the ATA allowed compensation only for “any national of the United States....” *Id.* at \*24 (citing Senate Hearing at 8). The Justice Department recommended that Congress modify the statute to explicitly allow suits by the family members as “survivors” and “heirs” of the victim. See *id.* (citing Senate Hearing at 38). In a statement to the Senate Subcommittee, Deputy Assistant Attorney General Steven R. Valentine

the case, there would have been no reason to include the term “survivors” in the language of the statute.<sup>148</sup> The court, therefore, held that the term as used in Section 2333(a) includes the parents and siblings of a U.S. national killed by an act of international terrorism.<sup>149</sup>

Accordingly, the *Ungar* court proceeded to calculate the damages due to the various plaintiffs under the default judgment and arrived at an award that compensated Ungar’s children, parents, and siblings for economic damages, such as lost wages, and non-economic damages, such as loss of companionship, loss of society and guidance and mental anguish.<sup>150</sup>

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proposed: “that this provision be amended to include, in addition to the individual directly affected, such additional parties as the estate of the decedent, survivors, and heirs. This will ensure that the bill is fully protective of the interests of all relevant parties to the civil suit.” *Id.* In response to a question from Senator Thurmond as to whether such a change was needed in order to ensure family members the ability to file a lawsuit on behalf of a slain or injured relative, Mr. Lloyd Green, counselor to the Assistant Attorney General in charge of the Civil Division, responded: “It would make clear that which is already implied in the bill. It would remove any doubt that anyone would have as to whether or not they could bring the litigation.” *Ungar*, 2004 WL 134034, at \*25 (citing Senate Hearing at 46). Mr. Valentine also expressed the Department of Justice’s position on the legislation: “The Department supports legislation to provide a new civil remedy against terrorists and a federal forum for the families and relatives of victims to pursue claims for compensatory damages.” *Id.* (citing Senate Hearing). Consequently, Congress accepted the recommendation and modified the language to create a cause of action for “[a]ny 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....” *Id.* (citing 18 U.S.C. § 2333(a) (2002)).

<sup>148</sup> See *Ungar*, 2004 WL 134034, at \*25.

<sup>149</sup> See *id.* Pointing out that the surviving Ungar children were not U.S. citizens, the court explained that Section 2333(a) contains no requirement that the survivors or heirs of a U.S. national killed by an act of terrorism be U.S. citizens themselves and refused to read such a requirement into the statute. See *id.* at \*31.

<sup>150</sup> See *id.* at \*25-37. The court recommended the following awards:

Estate of Yaron Ungar: \$1,432,158 for lost earnings; \$1,500,000 for pain and suffering;

Divir Ungar (son): \$30 million for loss of companionship, society, and guidance and mental anguish; \$488,482.50 for loss of parental services;

Yishai Ungar (son): \$30 million for loss of companionship, society, and guidance and mental anguish; \$488,482.50 for loss of parental services;

Judith Ungar (mother): \$15 million for loss of society and companionship and mental anguish;

Meir Ungar: \$15 million for loss of society and companionship and mental anguish;

Michal Cohen: \$7.5 million for loss of society and companionship and mental anguish;

Amichai Ungar: \$7.5 million for loss of society and companionship and mental anguish;

The court recommended damages totaling \$116,409,123, plus interest and attorney's fees.<sup>151</sup> While the court analyzed the claims for damages as it would in any other wrongful death suit, of note was the following statement of the court: "Given that [Ungar's sons] have been deprived of the companionship of their father for approximately fifty years, including virtually all of their childhood, and that they will eventually know that their father died a bloody and painful death at the hands of terrorists, a substantial award is warranted."<sup>152</sup>

The court's focus on the heinous nature of the terrorist attack and the substantial monetary damages which it awarded suggest that courts may take a very liberal approach to calculating damages due to victims of terrorism under the ATA. The more practical problem for plaintiffs, however, is enforcing those judgments. While a favorable judgment may be satisfying, without assets against which the judgment can be executed, it is nothing more than a piece of paper.

### 3. Enforcing Judgments

Private terrorist groups may have precious few tangible assets. The very idea behind terrorism is that it allows relatively small, unsophisticated groups with limited resources to wage a war with a fraction of the human and financial resources of conventional military forces. As a result, terrorist groups will not often have the same liquid assets as would, for example, a foreign government. Also, due to the illicit nature of the activities of terrorist groups, even when they have substantial assets, they are likely to be well hidden.<sup>153</sup> Locating and securing these assets may, therefore, be extremely difficult.<sup>154</sup>

Moreover, in the case that an identifiable terrorist organization has substantial assets that can be secured, there is a strong possibility that the United States government may have identified, frozen, and even confis-

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Dafna Ungar: \$7.5 million for loss of society and companionship and mental anguish.

See *Ungar*, 2004 WL 134034, at \*38.

<sup>151</sup> See *id.* at \*39. The court cited the special challenges that the litigation presented and the high caliber of the work performed by plaintiffs' counsel when it awarded approximately \$65,000 in attorney's fees at a higher hourly rate of compensations than it traditionally approved. See *id.* The District Court accepted the Magistrate Judge's recommendations on all aspects of the award, except for the allowance for prejudgment interest. See *id.* at \*7; see also *supra* note 62.

<sup>152</sup> See *Ungar*, 2004 WL 134034, at \*34.

<sup>153</sup> See Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 317-21 (2003) (distinguishing lawful and unlawful sources of terrorist funds).

<sup>154</sup> See Stephen C. Warneck, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. REV. 177, 220 (1998) (discussing difficulty of finding terrorist assets).

cated these assets. Under the International Emergency Economic Powers Act (IEEPA), the President is authorized to block any property subject to the jurisdiction of the United States, with two conditions: 1) the President may only exercise his power under IEEPA "to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared"; and 2) the President may only block "property in which any foreign country or a national thereof has any interest."<sup>155</sup> If the federal government has frozen the terrorist assets, they may be available to secure a money judgment for victims of terrorism.<sup>156</sup> If, however, the President has exercised his authority to confiscate the assets, as President Bush did with all of Iraq's frozen assets, the assets will not be obtainable by successful plaintiffs.<sup>157</sup>

The plaintiffs in *Smith* confronted this challenge in attempting to satisfy a portion their \$104 million judgment against defendants, including Iraq, and were unsuccessful in their bid for an execution against Iraqi assets frozen and later confiscated by the federal government.<sup>158</sup> In *Smith v. Federal Reserve Bank of New York*, the United States Court of Appeals for the Second Circuit upheld the federal government's power to confiscate Iraqi assets and prevent them from being used to satisfy civil judgments despite statutory provisions providing for the availability of blocked funds to satisfy judgments against terrorist parties.<sup>159</sup>

The plaintiffs in *Smith* sought to attach Iraqi assets held by the Federal Reserve Bank of New York, which then-president George H.W. Bush froze in 1990 in response to Iraq's invasion of Kuwait, in satisfaction of the \$63.5 million of their judgment attributable to Iraq.<sup>160</sup> In response to the recent war with Iraq, however, President George W. Bush relied on his expanded power under the USA PATRIOT Act to actually confiscate Iraqi assets that were previously frozen.<sup>161</sup> The plaintiffs sought to execute

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<sup>155</sup> 50 U.S.C. §§ 1701-1707 (2002).

<sup>156</sup> See Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 166 Stat. 2322 (2002). See generally Jill M. Marks, Annotation, *Construction and Application of § 201 of Terrorism Risk Insurance Act of 2002, Public Law 107-297, § 20*, 116 Stat. 2337, 190 A.L.R. FED. 155 (2003); Sean D. Murphy, *Terrorist-State Litigation in 2002-03*, 97 AM. J. INT'L L. 966 (2003). If a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, any blocked assets (assets frozen or seized by the United States) of the terrorist party are subject to execution or attachment in aid of execution to satisfy the judgment obtained. See *id.* The judgment may be against a terrorist party or organization, or a terrorist state. See *id.*

<sup>157</sup> See Exec. Order No. 13,920, 68 Fed. Reg. 14,307 (Mar. 20, 2003) ("All blocked funds held in the United States in accounts in the name of [Iraq and its agents] are hereby confiscated and vested in the Department of the Treasury.").

<sup>158</sup> See *Smith v. Federal Reserve Bank of New York*, 346 F.3d 264 (2nd Cir. 2003).

<sup>159</sup> *Id.* at 272.

<sup>160</sup> *Id.* at 265-267.

<sup>161</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §

judgment against those assets pursuant to the Terrorism Risk Insurance Act of 2002 (TRIA).<sup>162</sup> The court ruled, however, that because the President was within his authority conferred by IEEPA, as amended by the USA PATRIOT Act, in confiscating the blocked Iraqi assets prior to the plaintiffs' judgment against Iraq, the President had vested title in the confiscated assets and there were no more "blocked assets" against which the plaintiffs could execute.<sup>163</sup> The court concluded with the following heartfelt, but hollow, acknowledgment:

We readily acknowledge the importance of satisfying judgments in all cases. The horrific context of the matter at hand with the loss of life and its tragic consequences only underscores that imperative. Nothing we do here abrogates that judgment. We determine only that Plaintiffs must look elsewhere to satisfy it.<sup>164</sup>

While the above decision dealt with judgments against foreign states, as opposed to non-state terrorist actors, the court in *Ungar* very recently highlighted concerns that a similar situation may develop with respect to private assets if plaintiffs do not act quickly.<sup>165</sup> The court explained that the plaintiff's motion to enter a default judgment "must be granted because the limited pool of Hamas assets against which Plaintiffs may execute is steadily depleting."<sup>166</sup> The court noted that because President Bush has designated Hamas a terrorist organization and blocked its assets, it is unlikely that Hamas will bring any new assets into the United States.<sup>167</sup> Citing strong evidence that HLF operated as a fundraiser for Hamas in the United States, and therefore, was an agency or instrumentality of Hamas, the court also concluded that any of HLF's blocked assets could be subject to attachment and execution under TRIA.<sup>168</sup> The court noted, however, that HLF's assets are steadily depleting because the Treasury Department has allowed HLF to use its assets to challenge the

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106, (Oct. 26, 2001). In 2001 Congress amended 50 U.S.C. § 1702 to grant the President additional authority "when the United States is engaged in armed hostilities," to "confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided or engaged in...hostilities or attacks against the United States..." 50 U.S.C. § 1702(a)(1)(C). Under this provision, actual title to the assets vests in the federal government through the President's designee. *See id.*

<sup>162</sup> *See Smith*, 346 F.3d at 271-272; *see also* Terrorism Risk Insurance Act of 2002 (TRIA) *supra* note 156.

<sup>163</sup> *See Smith*, 346 F.3d at 272.

<sup>164</sup> *See id.*

<sup>165</sup> *See Ungar*, 2004 WL 134034, at \*6-\*7.

<sup>166</sup> *Id.* at \*6.

<sup>167</sup> *See id.* at \*7.

<sup>168</sup> *See id.* at \*6-\*7.

blocking order as well as pending civil suits.<sup>169</sup> The court concluded that because the blocked assets of HLF and Hamas may be the sole source from which the plaintiffs can satisfy the court's judgment, "[w]hen the HLF and/or Hamas fully deplete these assets, this Court's judgment against Hamas will likely become a dead letter."<sup>170</sup> Such a result would defeat Congress' clear intent that the ATA deter terrorist acts through the enforcement of judgments in these types of actions.<sup>171</sup>

Thus, despite statutory provisions allowing for the release of assets to satisfy civil judgments for victims of terrorism, victims may have to "look elsewhere" or else the judgments they receive may become "dead letters." The fundamental problem, however, is that there are not many other places to look.

#### IV. CONCLUSION

As a tool to cripple terrorism and compensate victims, the ATA has cast a wide net, but yielded a modest catch. The ideal defendant in a suit brought under the ATA is an identifiable non-state terrorist group that has committed an act of international terrorism, has significant assets, has continuous contacts with the United States, is amenable to service, and will not have its assets subject to confiscation by the federal government. Clearly, such an ideal candidate is hard to come by.

Suits are nonetheless likely to continue; and certain benefits and drawbacks will certainly follow from the prosecution of claims under the ATA. First off, the primary purpose of any damages claim, to allow an opportunity for plaintiffs to be compensated for a loss, is promoted through an enforceable judgment pursuant to the ATA. Victims and survivors of terrorist acts can be compensated by those who are most culpable for the victimization. Even when unenforceable judgments are rendered, however, victims are able to have their day in court and to establish liability. This can be a crucial part of the healing process outside of monetary compensation. But given the slim chances for enforceable judgments, some may question whether it is wise to expend limited judicial resources chasing such elusive rewards. The same hope and consolation that pursuing claims might bring for victims may also be routinely crushed by the inability to secure an enforceable judgment. The benefits and barriers to bringing suits should be seriously weighed, especially if it will be more often than not an exercise of "going through the motions" with no tangible result.

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<sup>169</sup> See *Ungar*, 2004 WL 134034, at \*7.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.*

Another benefit is the continued refinement of international law with respect to civil liability in the context of terrorism. As terrorism continues to pervade the international arena as a mode of political and cultural conflict, dealing with the social impact of terrorist acts through civil justice will be an evolving issue of international law. Because there is little precedent thus far for civil actions against terrorists in the United States, the cases that do come before the courts will have important precedential value in setting the stage for future litigation. The concomitant problem may be that private individuals will be seen as meddling in foreign affairs, a delicate arena in which the Executive Branch has an interest in preventing the involvement of citizens and the Judiciary. The competing interests of the government's War on Terrorism and plaintiffs' claims against terrorists with respect to the disposition of terrorist assets may place the government and citizen plaintiffs in divergent positions.

Having victims and survivors of terrorism join the class of individuals seeking to find and hold terrorists and their supporters responsible may, however, add to the mounting pressure upon them and further inhibit their ability to avoid criminal or civil prosecution. Motivated by notions of justice and economic compensation, plaintiffs may pour resources toward finding and seizing terrorist assets, which may bolster the ongoing government efforts to do the same. The ATA has the potential to create "private attorneys general" empowered to find and rout out terrorists, which may, in turn, allow the government to harness private resources to aid its efforts.

Moreover, the burden of establishing civil liability against those persons or groups who directly or indirectly support terrorism may be easier to meet than the burden of proving criminal liability. In some cases, once liability is established, attaching assets already in the United States may be a more feasible task than locating and apprehending the individual perpetrators for criminal prosecution. While enforcement of civil law does not bring with it the same set of powerful tools, as does enforcement of criminal laws, pursuing civil claims certainly adds some new tools to society's arsenal to fight terrorism. Aggressively pursuing the financial assets that sustain terrorism on both civil and criminal fronts may tighten the stranglehold on terrorism. At the same time, if the scope of liability for supporting terrorism expands, legitimate non-profit, religious, and cultural organizations may find themselves facing mounting claims for liability for terrorist acts that they truly do not support. The possibility of civil "witch-hunts," motivated by desires to hold non-culpable parties with assets responsible for terrorist acts should be guarded against.

Overall, while there are problems and challenges inherent to bringing successful suits, the ATA is not altogether without teeth. Suits against defendants such as the PLO and Hamas hold promise for some form of plaintiff recovery. In addition, the potential expansion of liability under the ATA to those who aid and abet international terrorism through the pro-

vision of material support expands the pool of deep-pocketed parties who contribute to the complex financial infrastructure of terrorist networks and thereby subject themselves to liability. Finally, given the liberal calculation of damages recoverable and parties entitled to recovery, if and when an enforceable judgment is rendered, it is likely to have the financially crippling impact that the ATA intends. As the War on Terrorism persists, more potential defendants may be uncovered, while increasingly more assets may be cordoned off from judicial attachment by the federal government's authority to confiscate such assets. With further judicial interpretation and continued advocacy on behalf of victims of terrorism, the net may be tightened, but with very few cases so far, that catch remains to be seen.

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