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THE ARAB-ISRAELI CONFLICT AND CIVIL LITIGATION AGAINST TERRORISM

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ABSTRACT

The Arab-Israeli conflict has been a testing ground for the involvement of U.S. courts in foreign conflicts and for the concept of civil litigation against terrorists. Plaintiffs on both sides of the dispute have sought to recover damages in U.S. courts, embroiling the courts in one of the world's most contentious political disputes. Plaintiffs bringing claims against the Palestine Liberation Organization, the Palestinian Authority, material supporters of terrorism, and the Islamic Republic of Iran have been aided by congressional statutes passed precisely to enhance their ability to bring such lawsuits, whereas plaintiffs bringing suit against Israel or Israeli leaders have not had the benefit of such laws. Although the courts have sought to give effect to the congressional authorization embodied in these statutes, they have faced the resistance—at times half-hearted—of the executive branch, which regards such legislative and judicial involvement as an intrusion on its foreign policy prerogatives. Though these lawsuits have been subject to criticism and have not fully achieved the goals attributed to them, U.S. courts have largely acted within the authority given them by Congress and the executive branch in hearing the suits, and there is at least some evidence that such lawsuits constitute an effective tool in the fight against terrorism.

INTRODUCTION

Alisa Flatow, a twenty-year-old Brandeis University student studying in Israel, was killed on April 9, 1995, when Palestinian

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Islamic Jihad terrorists blew up the bus in which she was traveling in the Gaza Strip.[1] On April 18, 1996, Saadallah Ali Belhas's wife Zeineb and nine of their children were killed when an errant Israeli shell hit the U.N. compound at Qana, Lebanon, where they were sheltering from Israel's Operation Grapes of Wrath against Hezbollah fighters.[2] What separates these victims and their families from thousands of others who have died in the course of the Arab-Israeli conflict is that their families sought justice through private civil litigation in the United States. Using statutes intended to combat terrorism and human rights violations, these plaintiffs and others like them have forced U.S. courts to confront the contentious Arab-Israeli conflict.[3]

In light of that dispute's central role in U.S. foreign policy and international politics, this Note takes the conflict as its starting point. In doing so, it offers a new approach to analyzing how U.S. courts have dealt with civil suits related to terrorism in the context of a conflict laden with foreign policy concerns. Prior scholarship has tended to focus on particular statutes,[4] particular cases,[5] or the general concept of civil litigation against terrorism.[6] In contrast, this Note begins with the conflict and proceeds to examine related civil cases brought in U.S. courts.

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1. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998). For a more thorough discussion of this case, see *infra* Part III.

2. Belhas v. Ya'alon, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/current-cases/belhas-v.-ya'alon (last visited Aug. 30, 2010); *see also* Belhas v. Ya'alon, 515 F.3d 1279, 1282 (D.C. Cir. 2008). For additional discussion, see *infra* Part IV.

3. As used in this Note, the Arab-Israeli conflict means not only the conflict between Palestinian Arabs and Israeli Jews, but also the wider conflict between the State of Israel, Arab and Muslim countries, and nonstate actors such as Hezbollah and Hamas. The term Arab-Israeli conflict is used with the knowledge that Iran—referred to throughout as a participant in the conflict—is not an Arab nation.

4. *See, e.g.*, S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1300 (2000) (arguing that the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a) (2006), is a "futile weapon").

5. *See, e.g.*, Graham Ogilvy, Note, Belhas v. Ya'alon*: The Case for a* Jus Cogens *Exception to the Foreign Sovereign Immunities Act*, 8 J. INT'L BUS. & L. 169, 169 (2009) (arguing that because "General Ya'alon's actions constitute serious *jus cogens* violations" the D.C. Circuit should not have extended Israel's sovereign immunity to his conduct).

6. *See, e.g.*, John Norton Moore, *Introduction* to CIVIL LITIGATION AGAINST TERRORISM 3, 5 (John Norton Moore ed., 2004) (arguing that in light of universal condemnation of terrorism "it is hardly a stretch to ask how the civil justice system might more effectively also contribute to deterrence against such heinous acts" (emphasis omitted)).

The purpose of this approach is twofold. First, the Note categorizes different types of U.S. civil cases that are connected with the Arab-Israeli conflict. After discussing the factual background of one or more important cases in each category, this Note examines how courts have handled that category of cases. Second, the Note analyzes how courts have resolved cases in these different categories and the impact of those decisions on the broader concept of civil litigation against terrorism.

Part I examines civil suits against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA), the first kind of litigation brought in U.S. courts related to the Arab-Israeli conflict.[7] Part II reviews civil actions against nonstate material supporters of terrorism, focusing on attempts by David Boim's parents to hold U.S.-based funders of the Palestinian terrorist group Hamas liable for their son's murder. Part III discusses suits against Iran under the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act (FSIA),[8] including Stephen Flatow's attempt to hold the Iranian government liable for funding the Palestinian terrorists who murdered his daughter. Part IV looks at suits against Israel and Israeli leaders under the Alien Tort Statute (ATS),[9] including attempts by Saadallah Belhas and others to sue Israeli General Moshe Ya'alon for the shelling of Qana. Part V examines the efforts of the family of Rachel Corrie—a U.S. citizen killed by an Israeli bulldozer—to hold Caterpillar, the bulldozer's U.S. manufacturer, liable. Part VI offers some preliminary conclusions derived from an examination of the different categories of cases. Finally, Part VII examines how these cases inform the concept of private civil litigation against terrorism, which has advanced beyond the confines of the Arab-Israeli conflict as a tool to combat terrorism in general.[10] The Note concludes that U.S. courts have proven competent to adjudicate complex issues related to the Arab-Israeli conflict and that, despite numerous problems with these

7. The order of presentation in the Note does not imply any judgment about the relative importance of the categories discussed.

8. FSIA, 28 U.S.C. §§ 1602–1611 (2006).

9. ATS, 28 U.S.C. § 1350 (2006).

10. The definition of "terrorism" is beyond the scope of this Note. Instead, this Note examines how courts have construed different acts of violence related to the Arab-Israeli conflict and how this characterization impacts civil litigation against terrorism—as that term is understood in the statutes authorizing such suits.

cases, abandoning civil litigation against terrorism would be premature.

I. SUITS AGAINST THE PALESTINE LIBERATION ORGANIZATION AND THE PALESTINIAN AUTHORITY

This Part will examine civil lawsuits filed in U.S. courts against the Palestine Liberation Organization[11] and the Palestinian Authority[12] over their alleged involvement in terrorism. It will trace the evolution of the role of U.S. courts both before and after the passage of the Antiterrorism Act of 1990 (ATA),[13] which provides a cause of action to U.S. citizens injured by acts of international terrorism.[14] In the cases decided before the passage of the ATA—*Tel-Oren v. Libyan Arab Republic*[15] and *Klinghoffer v. S.N.C. Achille Lauro*[16]—the courts struggled to determine which legal principles to apply. In contrast, *Knox v. PLO* (*Knox I*),[17] decided after the passage of the ATA, is one of many suits brought by U.S. citizens in which courts have imposed liability on the PA and PLO for acts of terrorism.[18]

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11. The PLO was founded in 1964 as the umbrella organization of the Palestinian national liberation movement. *Palestine Liberation Organization: Introduction*, PERMANENT OBSERVER MISSION OF PALESTINE TO THE UNITED NATIONS, http://www.un.int/palestine/theplointro.shtml (last visited Aug. 30, 2010).

12. The PA was established as the governing body of the Palestinian Territories pursuant to the Oslo Accords, signed by Israel and the PLO in 1993. *The Oslo Accords, 1993*, OFF. OF THE HISTORIAN, U.S. DEP'T OF STATE, http://history.state.gov/milestones/1990-2000/Oslo (last visited Aug. 30, 2010); *see also* Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, 32 I.L.M. 1525 (establishing a framework for the creation of a Palestinian Interim Self-Government Authority). The PA is not a member of the United Nations, *Non-Member States and Entities*, UNITED NATIONS, http://www.un.org/en/members/nonmembers.shtml (last updated Feb. 29, 2008), nor is it recognized as an independent state by the United States, *Independent States in the World*, U.S. DEP'T OF STATE (July 29, 2009), http://www.state.gov/s/inr/rls/4250.htm.

13. ATA, 18 U.S.C. §§ 2331–2339D (2006).

14. *Id.* § 2333(a) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.").

15. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

16. Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990).

17. Knox v. PLO (*Knox I*), 306 F. Supp. 2d 424 (S.D.N.Y. 2004), *vacated*, 248 F.R.D. 420 (S.D.N.Y. 2008).

18. *See infra* note 53.

A. *Suits Prior to the Implementation of the ATA*

The first major attempt to sue the PLO in a U.S. court was *Tel-Oren v. Libyan Arab Republic*, a D.C. Circuit case in which a group of mainly Israeli citizens brought a claim against, among others, Libya and the PLO for a 1978 terrorist attack on an Israeli bus.[19] The plaintiffs filed suit under the ATS,[20] which permits an alien to sue in U.S. courts for torts committed against the law of nations.[21] In *Filartiga v. Pena-Irala*,[22] decided a few years prior to *Tel-Oren*, the Second Circuit had given new life to this largely unused provision.[23]

The D.C. Circuit affirmed the district court's dismissal of the suit in *Tel-Oren*, with all three judges on the panel writing separate concurring opinions.[24] Judge Harry Edwards reasoned that because the PLO was not a recognized state,[25] it could not be held to violate international law regarding torture under *Filartiga*.[26] He also determined that terrorism did not "amount to [a] law of nations violation[]."[27] Judge Robert Bork held that the ATS was only jurisdictional and did not create a cause of action permitting the plaintiffs to sue.[28] He was also concerned that a ruling on the PLO's liability for the attack could interfere with U.S. foreign policy.[29] Finally, he believed that the plaintiffs had not stated a claim for a

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19. *Tel-Oren*, 726 F.2d at 775.

20. 28 U.S.C. § 1350 (2006).

21. *Id.* ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

22. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

23. *See id.* at 887 ("Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history . . . there can be little doubt that this action is properly brought in federal court." (footnotes omitted)).

24. *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring); *id.* at 798 (Bork, J., concurring); *id.* at 823 (Robb, J., concurring).

25. *Id.* at 791 (Edwards, J., concurring).

26. *Id.* at 787.

27. *Id.* The lack of international consensus regarding the permissibility of terrorism convinced Judge Edwards that the law of nations had not yet "outlaw[ed] politically motivated terrorism." *Id.* at 796.

28. *Id.* at 799 (Bork, J., concurring). Judge Bork, citing Blackstone, believed that the ATS was originally concerned with "[v]iolation[s] of safeconducts," "[i]nfringement of the rights of embassadors," and "[p]iracy." *Id.* at 813 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68, *72). The Supreme Court has subsequently adopted a similar view, holding that contemporary ATS claims must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognized." Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

29. *Tel-Oren*, 726 F.2d at 805 (Bork, J., concurring).

violation of customary international law because there was no international consensus regarding the definition of terrorism.[30] Judge Roger Robb held the entire suit nonjusticiable under the political question doctrine because "[i]nternational terrorism consists of a web that the courts are not positioned to unweave," and they would be interfering in U.S. foreign policy if they tried.[31]

A year after *Tel-Oren* was decided, terrorists seized the Italian passenger ship *Achille Lauro* in the Mediterranean Sea and murdered a wheelchair-bound U.S. passenger, Leon Klinghoffer.[32] His wife and daughters sued the PLO, whom they alleged to be responsible for the hijacking, as well as the shipowner and trip organizer, who impleaded the PLO.[33] The PLO moved to dismiss for lack of subject matter and personal jurisdiction and for nonjusticiability.[34]

The district court found that it had subject matter jurisdiction under both the federal admiralty jurisdiction statute[35] and the Death on the High Seas Act[36] because the alleged terrorist activities occurred on a ship in navigable waters.[37] It had personal jurisdiction under state law based on the presence of the PLO's U.N. mission in New York.[38] Moreover, the court rejected the PLO's argument that *Tel-Oren* stood for the proposition that suits against it were nonjusticiable political questions,[39] characterizing the matter before it as an "act[] of piracy" within its jurisdiction.[40]

On appeal, the Second Circuit rejected the PLO's argument that it qualified for immunity as a sovereign state under the FSIA.[41] The Second Circuit also upheld the district court's refusal to apply the political question doctrine to "an ordinary tort suit."[42] Relying on

30. *Id.* at 806–07.

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

32. Judith Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 are Safe; U.S. Assails Deal with Captors*, N.Y. TIMES, Oct. 10, 1985, at A1.

33. Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854, 856–57 (S.D.N.Y. 1990).

34. *Id.* at 858.

35. 28 U.S.C. § 1333 (2006).

36. Death on the High Seas Act, 46 U.S.C. §§ 761–768 (1982) (current version at 46 U.S.C. §§ 30301–30308 (2006)).

37. *Klinghoffer*, 739 F. Supp. at 858–59.

38. *Id.* at 863.

39. *Id.* at 860.

40. *Id.*

41. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47–48 (2d Cir. 1991) (citing 28 U.S.C. § 1602–1611 (1988)).

42. *Id.* at 49–50.

Supreme Court precedent, the court wrote that "the doctrine is one of 'political questions,' not . . . 'political cases.'"[43] The court also reasoned that the political branches "have expressly endorsed the concept of suing terrorist organizations in federal courts."[44] Nevertheless, the court remanded on personal jurisdiction and service of process grounds, determining that only the PLO's non-U.N. related activities could be the basis of jurisdiction.[45] After several years of litigation, the PLO reportedly settled the case with the Klinghoffer family.[46]

B. The Antiterrorism Act

Klinghoffer spurred the passage of the Antiterrorism Act of 1990.[47] Many in Congress viewed the result of the Klinghoffer suit favorably and were concerned that only admiralty jurisdiction and fortuitous PLO contact with New York allowed it to proceed.[48] Many members of Congress also felt that such suits should be permitted more broadly against the perpetrators of terrorist attacks.[49] Thus, Congress passed the ATA, which 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 . . . survivors . . . may sue" in U.S. district court.[50] The ATA permits successful plaintiffs to collect treble damages and attorney's fees.[51] Use of the ATA was infrequent, however, until recently.[52]

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43. *Id.* at 49 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

44. *Id.* at 49–50 (citing 18 U.S.C.A. § 2333(a) (West Supp. 1990) (current version at 18 U.S.C. § 2333(a) (2006)); Letter from Abraham D. Sofaer, Office of the Legal Advisor, U.S. Dep't. of State, to Carmen B. Ciparick, Justice, N.Y. Supreme Court (Sept. 4, 1986)).

45. *Id.* at 50–51.

46. Benjamin Weiser, *A Settlement with P.L.O. over Terror on a Cruise*, N.Y. TIMES, Aug. 12, 1997, at A6.

47. 18 U.S.C. §§ 2331–2339D (2006). The ATA was originally enacted in 1990, but it was repealed and reenacted in 1992 due to an enrolling error. *Id.* ch. 113B codification note.

48. H.R. REP. NO. 102-1040, at 5 (1992).

49. *Id.*; *see also* 137 CONG. REC. S8143 (1991) (statement of Sen. Grassley) ("The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation . . . .").

50. 18 U.S.C. § 2333(a); *see also* H.R. REP. NO. 102-1040, at 5 (noting that the statute intends "to facilitate civil actions" against international terrorism and to extend "civil jurisdiction to accommodate the reach of international terrorism").

51. *Id.*

52. Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 684 (2005); *see also* John F. Murphy, *Civil Lawsuits*

C. Suits against the PA and PLO under the ATA

In 2002, a Palestinian gunman burst into a bat mitzvah reception in Hadera, Israel, killing six—including Aharon Ellis, a U.S. citizen who was singing with the band at the celebration.[53] Alleging that the PA and PLO were responsible for the attack, Ellis's decedents sued them under the ATA.[54] The PA and PLO moved to dismiss the case for lack of subject matter jurisdiction based on sovereign immunity and for nonjusticiability,[55] but the district court denied the defendants' motion.[56] The court rejected the defendants' argument that they were entitled to sovereign immunity for two reasons. First, the court held that the PLO and PA did not meet the criteria for statehood because they lacked control over a defined territory and the capacity to engage in foreign relations.[57] Alternatively, the court held that it could not grant sovereign immunity in the absence of executive branch recognition.[58]

The district court's rejection of the defendants' nonjusticiability argument rested on the maxim that "the doctrine is one of 'political questions,' not one of 'political cases'"[59] and on *Klinghoffer*'s finding that a suit for injuries suffered as a result of a terrorist attack is a "common law tort claim[]" that is "'constitutionally committed' to the judicial branch."[60] Congress's creation of a statutory basis for these suits—the ATA—was also significant to the court.[61] Yet the court expressed concern that each side was seeking to manipulate the case

as a Legal Response to International Terrorism, *in* CIVIL LITIGATION AGAINST TERRORISM, *supra* note 6, at 35, 42–43 ("[T]he ATA has been a form of 'stealth' legislation, largely ignored until recently.").

53. Knox v. PLO (*Knox I*), 306 F. Supp. 2d 424, 426 (S.D.N.Y. 2004), *vacated*, 248 F.R.D. 420 (S.D.N.Y. 2008). This Note discusses *Knox* because the PA subsequently moved for relief from judgment in this case. *Knox* does not otherwise differ significantly from other cases brought against the PA and PLO. *E.g.*, Ungar v. PLO, 402 F.3d 274 (1st Cir. 2005); Sokolow v. PLO, 583 F. Supp. 2d 451 (S.D.N.Y. 2008); Estate of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153 (D.D.C. 2006); Gilmore v. Palestinian Interim Self-Gov't Auth., 422 F. Supp. 2d 96 (D.D.C. 2006); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172 (D.D.C. 2004).

54. *Knox I*, 306 F. Supp. 2d at 427.

55. *Id.* at 426.

56. *Id.*

57. *Id.* at 429, 434–38 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987)).

58. *Id.* at 448 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964)).

59. *Id.* at 449 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

60. *Id.* (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49–50 (2d Cir. 1991)).

61. *Id.*

for its own political ends. Cautioning that its examination was limited and focused, the court emphasized that its responsibilities did not include "answer[ing] . . . these broader and intractable political questions which form the backdrop to this lawsuit."[62] Rather, the court's job was limited to "adjudicat[ing] whether and to what extent the plaintiffs may recover against the defendants under certain causes of action for the violence that occurred in Hadera."[63] After losing their motion to dismiss, the PA and PLO decided not to continue litigating the case, resulting in a default judgment in excess of $192 million.[64]

Following default judgments in *Knox I* and several other cases,[65] the Palestinian leadership instituted a change in policy. The new Palestinian president, Mahmoud Abbas, announced to Secretary of State Condoleeza Rice that the PA and PLO now intended to litigate these suits.[66] Pursuant to this new policy, the PA and PLO filed a motion for relief from the *Knox I* judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, citing their change of leadership and legal strategy (*Knox II*).[67] The PA and PLO presented "evidence . . . that, if proven at a trial, would constitute a complete defense to Plaintiffs' aiding and abetting theory of liability."[68] The PA and PLO also asked the U.S. government to file a statement of interest with the court, which the U.S. government, although expressing concern about the judgment's impact on Palestinian finances, declined to do.[69] Despite the U.S. government's abstention from direct involvement in the case, the court granted the motion,[70]

62. *Id.* at 448.

63. *Id.*

64. The statute stipulates that any successful plaintiff "shall recover threefold the damages he or she sustains and the cost of the suit." 18 U.S.C. § 2333 (2006). A default judgment of $192,740,660.13 was entered on August 1, 2006. Knox v. PLO (*Knox II*), 248 F.R.D. 420, 423–24 (2008).

65. *E.g.*, Ungar v. PLO, 402 F.3d 274 (1st Cir. 2005).

66. *Knox II*, 248 F.R.D. at 424–25.

67. *Id.*

68. *Id.* at 428.

69. Glenn Kessler, *Administration Won't Take Sides in Terrorism Case Against Palestinians*, WASH. POST, Mar. 1, 2008, at A16 (noting that, while the Bush administration was concerned that such lawsuits could harm the "financial and political viability" of the PA, "[g]overnment lawyers decided that the Palestinian Authority had had sufficient opportunities to contest the Knox verdict" and that "the administration . . . did not want to appear indifferent to terrorism victims' needs").

70. *Knox II*, 248 F.R.D. at 433; *see also* Benjamin Weiser, *Palestinians Get 2nd Try in Terror Suit, But at a Price*, N.Y. TIMES, Sept. 8, 2008, at B1 ("The lawyer for Mr. Ellis's

noting the changing political dynamic of the PA, the new leadership's commitment to litigate in good faith, and the size of the judgment.[71] Rather than litigate the case, however, the PLO and PA decided to settle it, paying an undisclosed sum to the plaintiffs.[72]

This review of suits against the PLO and PA shows how courts' handling of such cases has evolved with the passage of the ATA. First, prior to the enactment of the ATA, *Tel-Oren* affirmed the dismissal of a suit against the PLO. Following the enactment of the ATA, courts have generally followed the direction of Congress in permitting these suits to go forward, construing them as ordinary tort suits and not applying the political question doctrine. Second, it is critical in these cases that the PA and the PLO do not enjoy sovereign immunity and that the executive branch has refrained from arguing for their dismissal. Third, though the PA and PLO's failure to contest these suits has in the past resulted in courts entering default judgments on the basis of uncontested evidence, the Palestinian leadership's recent commitment to litigating these cases indicates that courts may soon be called upon to more completely adjudicate these cases on the merits.[73] If these cases are litigated on the merits, *Knox* suggests that plaintiffs may not be able to win them. Fourth, the size of the judgments and lack of attachable PLO and PA assets has made it difficult for plaintiffs to collect on their judgments.[74] The recent decision by the PA and PLO to settle the *Knox* case, however, indicates that these suits may in fact be an effective tool in the fight against terrorism.[75]

II. *BOIM*: SUITS AGAINST MATERIAL SUPPORTERS OF TERRORISM

This Part examines suits against private material supporters of terrorism under the ATA through the lens of *Boim v. Quranic*

family . . . believes the defendants are misleading the court and concealing property . . . ."). The court ultimately required the posting of a $120 million bond. Knox v. PLO (*Knox III*), 628 F. Supp. 2d 507, 508 (S.D.N.Y. 2009).

71. *Knox II*, 248 F.R.D. at 430–31.

72. Josh Gerstein, *Palestinians Reverse on Terror Victim*, POLITICO (Feb. 15, 2010, 11:56 PM EST), http://www.politico.com/news/stories/0210/33021.html.

73. *Compare* Gilmore v. Palestinian Interim Self-Gov't Auth., 675 F. Supp. 2d 104, 107 (D.D.C. 2009) (vacating a default judgment entered against the PA and PLO), *with* Biton v. Palestinian Interim Self-Gov't Auth., 252 F.R.D. 1, 2 (D.D.C. 2008) (expressly refusing to follow *Knox* in vacating a default judgment entered against the PA and PLO).

74. *See* Weiser, *supra* note 70 (describing the precarious financial situation of the PA).

75. *See* Gerstein, *supra* note 72 (noting that the PA may have settled another case that was abruptly dropped in 2008).

Literacy Institute.[76] After laying out the facts of *Boim*, it discusses the Seventh Circuit's conflicting interpretations of the breadth of material support liability and the impact of such liability on the First Amendment rights of alleged violators.

David Boim, a dual Israeli-U.S. citizen, was murdered in a 1996 West Bank shooting attack, allegedly by Hamas terrorists.[77] His parents sued a number of individuals and organizations in federal court under the ATA, including alleged U.S.-based Hamas supporters Muhammad Salah, the Quranic Literacy Institute (QLI), the Holy Land Foundation for Relief and Development (HLF), the Islamic Association for Palestine (IAP), and the American Muslim Society (AMS).[78] The Boims alleged that Salah, a naturalized U.S. citizen, was the U.S.-based leader of the military wing of Hamas, and that HLF, whose assets the United States froze in 2001, supplied funds to Hamas.[79] AMS and IAP, which were found to be one organization, allegedly supported Hamas through HLF.[80] The plaintiffs alleged that QLI, for whom Salah worked, was also a Hamas front organization.[81] The district court granted summary judgment against HLF,

76. Boim v. Quranic Literacy Inst. (*Boim II)*, 340 F. Supp. 2d 885 (N.D. Ill. 2004), *vacated sub nom.* Boim v. Holy Land Found. for Relief & Dev., 511 F.3d 707 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009). Although *Boim*, like *Knox*, was brought under the ATA, this Note classifies it separately because suits against private parties have a lesser impact upon foreign policy. The U.S. government also expressed support for the use of the ATA in the *Boim* case. Brief for the United States as Amicus Curiae Supporting Affirmance at 2, Boim v. Quranic Literacy Inst., 291 F.3d 1000 (7th Cir. 2002) (Nos. 01-1969, 01-1970). Another line of cases involves suits by more than 1,600 plaintiffs against the Jordan-based Arab Bank for allegedly funneling money from wealthy Saudis through its New York office to the families of Palestinian terrorists in the West Bank and Gaza. Lev v. Arab Bank, PLC, No. 08 CV 3251(NG)(VVP), 2010 WL 623636 (E.D.N.Y. Jan. 29, 2010); Litle v. Arab Bank, PLC, 611 F. Supp. 2d 233 (E.D.N.Y. 2009); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); Weiss v. Arab Bank, PLC, 06 CV 1623(NG)(VVP), 2007 U.S. Dist. LEXIS 94029 (E.D.N.Y. Dec. 21, 2007); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005). Plaintiffs have also attempted to bring similar suits against the Swiss bank UBS with mixed results. *Compare* Goldberg v. UBS AG, 660 F. Supp. 2d 410, 414 (E.D.N.Y. 2009) (refusing to dismiss suit against UBS), *with* Rothstein v. UBS AG, 647 F. Supp. 2d 292, 294 (S.D.N.Y. 2009) (dismissing suit against UBS).

77. Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 511 F.3d 707, 711 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009).

78. *Boim II*, 340 F. Supp. 2d at 890. Salah's name appears as both "Mohammed" and "Muhammad." *Compare id.* at 890 ("Mohammed"), *with id.* at 922 ("Muhammad").

79. *Boim III*, 511 F.3d at 712–13.

80. *Id.*

81. *Id.* at 713–14. QLI's ostensible mission was translating Islamic texts into English. *Id.* at 714.

AMS/IAP, and Salah; a jury found QLI liable as well.[82] The jury awarded $52 million in damages, which the court trebled to $156 million pursuant to the ATA.[83]

On direct appeal (*Boim III*), the two major issues were the availability of aiding and abetting liability for acts of terrorism under the ATA and the showing required to hold the defendants liable. The Seventh Circuit had previously ruled on these questions in an interlocutory appeal (*Boim I*).[84] In that decision, the court held that aiding and abetting liability was available under the ATA, even though the statute did not expressly provide for it, because "Congress expressed an intent . . . to import general tort law principles, and those principles include aiding and abetting liability."[85] Thus, the court explained, the holding would be consistent with the congressional "purpose of cutting off the flow of money to terrorists at every point along the chain of causation."[86] The Court thus distinguished *Boim* from *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[87] in which the Supreme Court held that there was no private right of action for aiding and abetting liability unless explicitly mentioned in the statute.[88] In addition, the court determined that the Boims would have "to show[, first,] knowledge of and intent to further" Hamas terrorism, not just funding of it,[89] and second, "that murder was a reasonably foreseeable result of making a donation."[90] The court reasoned that this requirement would be consistent with the "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."[91]

82. *Id.* at 710. Although QLI received a jury trial, the court limited the evidence the Boims needed to present to establish QLI's liability, including through a finding of fact that Hamas had killed David Boim. *Id.* at 719.

83. *Id.* at 719.

84. Boim v. Quranic Literacy Inst. (*Boim I*), 291 F.3d 1000 (7th Cir. 2002). This interlocutory appeal arose from *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001).

85. *Boim I*, 291 F.3d at 1019.

86. *Id.*

87. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

88. *Boim I*, 291 F.3d at 1017 (citing *Cent. Bank of Denver*, 511 U.S. at 174).

89. *Id.* at 1011.

90. *Id.* at 1012.

91. *Id.* at 1010.

In a 2 to 1 decision, the same panel of the Seventh Circuit that heard the interlocutory appeal reversed the district court's application of its principles (*Boim III*).[92] The panel believed that the district court had erred in failing to require the Boims to show that the defendants' actions were a cause in fact of their son's death.[93]

The Seventh Circuit sitting en banc, however, vacated the panel's decision.[94] Revisiting the issue of aiding and abetting liability under the ATA, Judge Richard Posner returned to the *Central Bank of Denver* standard,[95] holding that "statutory silence on the subject of secondary liability means there is none."[96] Instead, through a "chain of explicit statutory incorporations by reference," he found "that a donation to a terrorist group that targets Americans outside the United States may violate" the ATA.[97] This was "[p]rimary liability" with "the character of secondary liability."[98] Thus, one who provided material support after the enactment of the statute criminalizing such support[99] and knew that the funds would be used to carry out acts of terrorism against U.S. citizens overseas could be liable under the ATA.[100] Because Salah was in an Israeli prison between the effective date of the statute and Boim's killing, the court reversed the judgment against him.[101]

At the same time, the en banc majority believed that the panel had set the standard for knowledge and causation too high.[102] Judge Posner likened liability for the provision of material support to terrorists to liability for fires with multiple origins,[103] writing that in such cases "the requirement of proving causation is relaxed because

92. Boim v. Holy Land Found. for Relief & Dev. (*Boim III*), 511 F.3d 707, 710 (7th Cir. 2007), *vacated*, 549 F.3d 685 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009).

93. *Id.* at 741.

94. Boim v. Holy Land Found. for Relief & Dev. (*Boim IV*), 549 F.3d 685, 705 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009).

95. *See* discussion *supra* notes 87–88.

96. *Boim IV*, 549 F.3d at 689.

97. *Id.* at 690. This chain stretched from 18 U.S.C. § 2333(a) to 18 U.S.C. § 2331(1) to 18 U.S.C. § 2339A to 18 U.S.C. § 2332. *Boim IV*, 549 F.3d at 690.

98. *Boim IV*, 549 F.3d at 691.

99. 18 U.S.C. § 2339A (2006).

100. *Boim IV*, 549 F.3d at 691.

101. *Id.*

102. *Id.* at 702.

103. *See id.* at 695 (describing cases in which a defendant was found liable for starting a fire that combined with another fire of unknown cause and destroyed the plaintiff's property, for example *Kingston v. Chicago & N.W. Ry. Co.*, 211 N.W. 913 (Wis. 1927)).

otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury."[104] Thus, if one contributed to Hamas knowingly or recklessly, thereby "significantly enhanc[ing] the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim," one could be liable.[105] Judge Posner concluded that only two types of support were excepted from liability: donations to charities by individuals who did not know or were not reckless in failing to discover that the charity gives money to terrorists and contributions to medical organizations that assist all individuals.[106]

Applying these principles to the other defendants, the court upheld the district court's judgments against AMS/IAP and QLI.[107] The court held that AMS/IAP knew it was giving money to Hamas, which was sufficient to hold it liable.[108] The court also found that despite the district court's finding of fact that Hamas was responsible for Boim's murder, the jury nevertheless found QLI liable on the question of material support to Hamas.[109] QLI waived its ability to object, however, by its refusal to fully participate at trial.[110]

Not all of the Seventh Circuit judges agreed with Judge Posner's interpretation. The dissenting judges were concerned about the potential scope of liability under the majority's decision and about the decision's possible impact on the defendants' First Amendment rights.[111] The dissent contended that the majority departed from tort principles by not requiring the plaintiffs to show causation and the intent to fund terrorism.[112] This expansive tort liability would make it difficult for courts to draw distinctions between purposeful and unintentional funding of terrorism,[113] which could implicate First Amendment freedoms by criminalizing donations to an organization that engages in both legal and illegal activity or, unlike Hamas, is not

104. *Id.* at 697.

105. *Id.* at 698.

106. *Id.* at 699 (naming the Red Cross and Doctors Without Borders as such organizations).

107. *Id.* at 701. The court reversed the verdict against HLF on the ground that the district court should not have collaterally estopped HLF from challenging a D.C. Circuit finding that it had funded Hamas. *Id.*

108. *Id.*

109. *Id.* at 702.

110. *Id.*

111. *Id.* at 705–06 (Rovner, J., concurring in part and dissenting in part); *id.* at 724–25 (Wood, J., concurring in part and dissenting in part).

112. *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).

113. *Id.*

designated as a terrorist organization.[114] The dissent contended that the majority's approach could also lead to liability solely for advocating on behalf of or showing affiliation with a terrorist group.[115]

There are several preliminary conclusions that one can draw from the admittedly small number of cases in this category, including *Boim* and a series of suits against the Arab Bank for allegedly funneling money to Palestinian terrorists.[116] First, despite a lack of international consensus on the definition of terrorism,[117] many U.S. courts appear willing to use the definition of terrorism that Congress has provided.[118] Second, it is difficult for plaintiffs to establish causation and liability in material support cases because of the shadowy nature of terrorist financing networks. Third, given the frequently indirect nature of this material support, scope of liability is often an issue, especially with regard to contributions to groups that have both terroristic and political or charitable branches. The Supreme Court, however, has recently upheld the constitutionality of the material-support statute against a First Amendment challenge brought by U.S.-based organizations and individuals who wished to provide support to the Kurdistan Workers Party (PKK) and the Tamil Tigers (LTTE), both of which the United States has designated as terrorist organizations.[119] The Court held that the judgment of Congress and the executive branch in criminalizing material support was entitled to deference.[120]

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114. *Id.* at 713.

115. *Id.* at 713–14 ("[A]n individual may not be held . . . liable for his mere association with an organization whose members engage in illegal acts." *Id.* (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982)).

116. More than 1,600 plaintiffs have filed suit against the Jordan-based bank. *E.g.*, Litle v. Arab Bank, PLC, 611 F. Supp. 2d 233 (E.D.N.Y. 2009); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257 (E.D.N.Y. 2007); Weiss v. Arab Bank, PLC, No. 06 CV 1623(NG)(VVP), 2007 U.S. Dist. LEXIS 94029 (E.D.N.Y. Dec. 21, 2007); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

117. *See, e.g.*, Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 53–54 (2002) ("[T]here is no precisely agreed upon international definition of terrorism as a crime.").

118. *See, e.g.*, *Boim IV*, 549 F.3d at 690 (using the statutory definitions of terrorism provided by Congress to find that liability exists for providing support to terrorist organizations targeting Americans outside the United States).

119. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2722–30 (2010).

120. *Id.* at 2728 ("At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it.").

III. SUITS AGAINST IRAN

Although some plaintiffs have successfully held private parties civilly liable for aiding terrorism, more plaintiffs have chosen to sue a state—the Islamic Republic of Iran—over its support of terrorism. This Part describes how Congress has abrogated the sovereign immunity of Iran to permit such suits. It then discusses the foremost example of this trend: Stephen Flatow's attempt to hold Iran accountable for the murder of his daughter in a bus bombing in the Gaza Strip.[121]

A. The State Sponsor of Terrorism Exception to FSIA

The Foreign Sovereign Immunities Act provides the exclusive basis for subject matter and personal jurisdiction in suits against foreign nations,[122] and U.S. courts only have jurisdiction under the FSIA if one of the exceptions to immunity applies.[123] Concerned about the ability of state sponsors of terrorism to hide behind sovereign immunity, Congress amended the Foreign Sovereign Immunities Act to abrogate their sovereign immunity as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[124] Though the executive branch initially objected to the bill, President Bill Clinton signed it into law.[125] This abrogation of immunity applied only to those countries on the State Department's list of state sponsors of terrorism.[126] The State Sponsor of Terrorism Amendment, however, proved insufficient to enable Flatow to bring his lawsuit, so

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

122. *Id.* at 11 (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 489 (1983)).

123. *Id.* (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)). The exceptions to immunity include waiver; commercial activity carried out by a foreign state; personal injury, death, or damage to property occurring in the U.S. caused by a tortious act or omission of the foreign state or one of its officials, 28 U.S.C. § 1605(a)(5) (2006), as well as sponsorship of terrorism, *id.* § 1605A (Supp. II 2008).

124. AEDPA, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241–43 (amending 28 U.S.C. § 1605, a part of FSIA).

125. *See* Murphy, *supra* note 52, at 80–81 (noting that the U.S. Departments of State and Justice "strongly opposed" the FSIA amendments).

126. 28 U.S.C. § 1605. These states are listed at the State Department's recommendation under three separate statutory bases: 50 U.S.C. app. § 2405(j), 22 U.S.C. § 2371, and 22 U.S.C. § 2780(d). There are only four countries currently on the list: Iran, Cuba, Sudan, and Syria. *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, http://www.state.gov/s/ct/c14151.htm (last visited Aug. 30, 2010). Iraq was removed from the list in 2004, Presidential Determination No. 2004-52, 3 C.F.R. 295 (2005), Libya in 2006, Presidential Determination No. 2006-14, 3 C.F.R. 283 (2007), and North Korea in 2008, Memorandum of June 26, 2008, 3 C.F.R. 289 (2009).

Congress responded by passing another bill, known as the Flatow Amendment, that allowed civil litigation for acts of state-sponsored terrorism.[127] The Flatow Amendment provided an explicit cause of action to U.S. nationals or their representatives seeking to sue "an . . . official, employee, or agent of a foreign state" under the State Sponsor of Terrorism Amendment.[128] It also made punitive damages available.[129]

In 2008, the State Sponsor of Terrorism Amendment and the Flatow Amendment were both repealed and replaced with a new section, 28 U.S.C. § 1605A.[130] The new statute includes an exception to sovereign immunity for state sponsors of terrorism and a cause of action for victims of terrorism and their decedents.[131] The cause of action is broader, explicitly including foreign terrorist states in addition to their agents, officials, and employees.[132] In addition to specifying that punitive damages are available, the new law also provides for the attachment of the property of a foreign state even if the state does not directly control the property.[133]

B. The Flatow *Case*

Twenty-year-old American student Alisa Flatow was murdered in an April 9, 1995, terrorist attack on an Israeli bus in the Gaza Strip.[134] The Shaqaqi faction of the Palestine Islamic Jihad (PIJ)

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127. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, div. a, § 589, 110 Stat. 3009, 3009-172 (1996) (codified at 28 U.S.C. § 1605 note); *see also* Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM, *supra* note 6, at 137 (discussing the Flatow Amendment). Stephen Flatow's lawsuit is discussed in more detail in Part III.B, *infra*.

128. 28 U.S.C. § 1605 note.

129. *Id.*

130. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (codified at 28 U.S.C. § 1605A (Supp. II 2008)); *see also* JENNIFER K. ELSEA, CONG. RESEARCH SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 48–62 (2008) (describing the changes implemented in the new legislation).

131. ELSEA, *supra* note 130, at 48–49 (discussing 28 U.S.C. § 1605A).

132. 28 U.S.C. § 1605A.

133. *Id.*

134. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998). Although this Note focuses on *Flatow*, other cases connected with the Arab-Israeli conflict have been filed against Iran. Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8 (D.D.C. 2009); Wachsman v. Islamic Republic of Iran, 603 F. Supp. 2d 148 (D.D.C. 2009); Beer v. Islamic Republic of Iran, 574 F. Supp. 2d 1 (D.D.C. 2008); Kirschenbaum v. Islamic Republic of Iran, 572 F. Supp. 2d 200 (D.D.C. 2008); Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39 (D.D.C. 2008); Bennett v. Islamic Republic of Iran, 507 F. Supp. 2d 117 (D.D.C. 2007); Sisso v. Islamic Republic of Iran, No. 1:05CV394(JDB), 2007 U.S. Dist. LEXIS 48526 (D.D.C. July 5, 2007);

claimed responsibility.[135] Stephen Flatow, Alisa's father, filed a wrongful death suit under the FSIA's State Sponsor of Terrorism Amendment and the Flatow Amendment[136] against the Islamic Republic of Iran, the Iranian Ministry of Information and Security (MOIS), and three Iranian leaders.[137] Although served with process, the defendants did not appear.[138]

Pursuant to the FSIA, Flatow needed to provide satisfactory evidence to establish his right to relief.[139] Flatow presented evidence of the State Department's conclusion that the PIJ had perpetrated the bombing and received about $2 million annually from Iran.[140] Iran, which was designated a state sponsor of terrorism in 1984, was found to have provided "material support and resources to [PIJ]" through the MOIS with the approval of the individual defendants.[141] The court concluded that "Alisa Michelle Flatow's death was caused by a willful and deliberate act of extrajudicial killing . . . by . . . the [PIJ] acting under the direction of [the] [d]efendants."[142]

The district court read the State Sponsor of Terrorism Amendment and the Flatow Amendment together.[143] Because "Congress has expressly directed the retroactive application" of the

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Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90 (D.D.C. 2006); Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74 (D.D.C. 2006); Ben Haim v. Islamic Republic of Iran, 425 F. Supp. 2d 56 (D.D.C. 2006); Stern v. Islamic Republic of Iran, 271 F. Supp. 2d 286 (D.D.C. 2003); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002); Mousa v. Islamic Republic of Iran, 238 F. Supp. 2d 1 (D.D.C. 2001); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000). Several cases related to the Arab-Israeli conflict are also discussed in *Matter of Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31, 46–59 (D.D.C. 2009).

135. *Flatow*, 999 F. Supp. at 8.

136. *Id.* at 12. Congress passed the Flatow Amendment to help Flatow bring his lawsuit.

137. *Id.* at 9–10. Those leaders include Ayatollah Ali Khamenei, who remains Supreme Leader of Iran, *Profile: Ayatollah Ali Khamenei*, BBC NEWS, http://news.bbc.co.uk/2/hi/3018932.stm (last updated June 17, 2009, 13:22 GMT), and former President Ali Akbar Hashemi Rafsanjani, who continues to chair both the Assembly of Experts, which is responsible for appointing the Supreme Leader, and the Expediency Council, which handles legislative disputes, *Profile: Akbar Hashemi Rafsanjani*, BBC NEWS, http://news.bbc.co.uk/2/hi/middle_east/4104532.stm (last updated June 19, 2009, 11:47 GMT).

138. *Flatow*, 999 F. Supp. at 6. The court noted that "[t]he Islamic Republic of Iran is an experienced litigant in the United States federal court system." *Id.* at 6 n.1. When the plaintiff attempted to serve Iran through the mail, the envelope was returned with "DO NOT USA" written across it. *Id.*

139. *Id.* (quoting 28 U.S.C. § 1608(e) (1994)).

140. *Id.* at 9.

141. *Id.* at 9–10.

142. *Id.* at 10.

143. *Id.* at 12–13.

State Sponsor of Terrorism Amendment and "international terrorism is subject to universal jurisdiction," the court found that "[d]efendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States."[144] Moreover, the court held extraterritorial application of the statutes proper, since applying them only to countries listed as state sponsors of terrorism did not interfere in foreign affairs.[145]

The court found that it had subject matter jurisdiction, determining that the statutory requirements had been met.[146] The court held that a suicide bombing constituted "extrajudicial killing."[147] "[T]he routine provision of financial assistance to a terrorist group in support of its terrorist activities" qualified as "providing material support or resources" under the statute.[148] There was no requirement that "a plaintiff . . . establish that the material support . . . provided by a foreign state for a terrorist act contributed directly to the act."[149] Finally, the court found that if the state-sponsored terrorism exception applied, personal jurisdiction was established.[150] The court awarded Flatow $22.5 million in compensatory damages and $225 million in punitive damages.[151]

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144. *Id.* at 13–14.

145. *Id.* at 16.

146. *Id.* at 16–19. The requirements of 28 U.S.C. § 1605(a)(7) are:

> (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking; and (2) the act was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant; and (3) the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment; and (4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act; and (5) if the incident complained of occurred within the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter; and (6) either the plaintiff or the victim was a United States national at the time of the incident; and (7) similar conduct by United States agents, officials or employees within the United States would be actionable.

Id. at 16 (citing 28 U.S.C. § 1605(a)(7) (1994 & Supp. III 1997)). This provision was repealed in 2008 and replaced with 28 U.S.C. § 1605A. *See supra* note 130 and accompanying text.

147. *Flatow*, 999 F. Supp. at 18.

148. *Id.* (quoting 28 U.S.C. § 1605(a)(7)).

149. *Id.* (citing § 1605(a)(7)).

150. *Id.* at 19–23.

151. *Id.* at 5. The $225 million figure was three times Iran's alleged annual expenditure on terrorist activities. *Id.* at 34; *see also* Bill Miller & Barton Gellman, *Judge Tells Iran to Pay Terrorism Damages; $247 Million Award for Family of U.S. Victim in Gaza Strip*, WASH. POST, Mar. 12, 1998, at A1 (discussing the outcome of the *Flatow* case).

C. The Struggle to Enforce the Judgment

After receiving his judgment, Stephen Flatow attempted to enforce it by attaching an arbitral award granted to Iran by the Iran–United States Claim Tribunal[152] and rental proceeds and real estate owned by Iran in Washington, D.C.—including the former Iranian embassy.[153] The United States intervened in both cases to argue that the attachments should be quashed, and the court agreed.[154] Despite these setbacks, Flatow persisted in trying to enforce his judgment.[155] He criticized the U.S. government for blocking his attempt to attach Iranian property and insinuated that the Clinton administration was weak on terrorism,[156] leading others to question the propriety of allowing suits against state-sponsors of terrorism.[157] Eventually, Flatow received a portion of his judgment through congressional action.[158] In this and similar cases, the U.S. Treasury has paid more than $390 million to those with judgments against Iran.[159] Despite

152. Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999).

153. Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 18 (D.D.C. 1999).

154. *Id.* (granting U.S. motion to quash attachment which the government argued would violate the Foreign Missions Act, 22 U.S.C. §§ 4301–4316 (2006), and the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95); *Flatow*, 74 F. Supp. 2d at 20 (granting U.S. motion to quash attachment because the United States had sovereign immunity).

155. *See, e.g.*, Bill Miller & John Mintz, *Once-Supportive U.S. Fights Family Over Iranian Assets*, WASH. POST, Sept. 27, 1998, at A8 ("The award in the Flatow case has left the U.S. government in a painful dilemma.").

156. *See* Stephen M. Flatow, Op-Ed., *In This Case, I Can't be Diplomatic; I Lost a Child to Terrorism; Now I'm Losing U.S. Support*, WASH. POST, Nov. 7, 1999, at B2 ("But when I tried to use the law, I found the U.S. government wasn't really in my corner . . . . [The administration] continue[s] to say that carrying out my judgment would endanger the security of the United States. If that's true, *I'm* the bad guy."); Stephen M. Flatow, Op-Ed., *Keep Fighting*, JERUSALEM POST, Sept. 1, 1998, at 10 ("Now, I find myself in the surreal position of being opposed by the State Department in my attempts to enforce our judgment against Iranian assets located in the United States.").

157. *See, e.g.*, Editorial, *Lawsuits and Terrorism*, WASH. POST, Dec. 26, 1999, at B6 ("Congress never should have passed, nor President Clinton signed, a law that could only offer Mr. Flatow justice by depriving the administration of control over important instruments of foreign policy. This law should be repealed.").

158. ELSEA, *supra* note 130, at 15–16. The statute granted plaintiffs in cases against Cuba and Iran that had been filed or would be handed down by a certain date the option of accepting compensatory damages from the U.S. Treasury in return for ceding certain rights, including the right to attach certain categories of property. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1543. Flatow received just over $26 million—his compensatory damages plus interest. ELSEA, *supra* note 130, at 69.

159. ELSEA, *supra* note 130, at 69–71 tbl.A-1. Many of these cases, however, concerned Iran's other terrorist activities in the Middle East not directly related to the Arab-Israeli conflict. The Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, §

these payments, as of March 2008 twenty-nine judgments against Iran remained outstanding and not covered under any legislation.[160] It is unclear how these plaintiffs will be compensated, as the value of their judgments far exceeds the estimated $1.1 million in blocked and $51 million in nonblocked Iranian assets in the United States.[161]

The difficulty of collecting on these judgments led Chief Judge Royce Lamberth of the D.C. District Court—who wrote the *Flatow* opinion and heard many of the other cases against Iran—to conclude that "[c]ivil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy" because "these cases do not achieve justice for victims, are not sustainable and threaten to undermine the president's foreign policy initiatives."[162] For instance, Judge Lamberth estimated Iranian assets in the United States at $45 million and the outstanding judgments against Iran at $10 billion.[163] Yet Congress's enactment of the new 28 U.S.C. § 1605A only serves to "stoke the flames of unrealistic and unmanageable expectations in these terrorism victims."[164] Judge Lamberth also expressed concern that these suits could interfere with the Obama administration's goal of engagement with Iran.[165] Although the court indicated that it will continue to apply the law in these suits,[166] Judge Lamberth "respectfully urge[d] the President and Congress to seek meaningful reforms in this area of law in the form of a viable alternative to private litigation."[167] In Judge Lamberth's view, only Congress and the president can "resolve the intractable political dilemmas that frustrate these lawsuits."[168]

Despite the numerous criticisms of the lawsuits against Iran, Congress has continued to enact the statutory authority that enables

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686, 116 Stat. 1350, 1411 (2002), and the Terrorism Risk Insurance Act of 2002 (TRIA), Pub L. No. 107-297, 116 Stat. 2322, added additional plaintiffs. In addition, section 201 of TRIA made frozen assets of terrorist states available for attachment. ELSEA, *supra* note 130, at 21–23.

160. ELSEA, *supra* note 130, at 72–74.

161. *Id.* at 75.

162. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009).

163. *Id.*

164. *Id.* at 38.

165. *See id.* ("Today, at the start of a new presidential administration . . . it may be time for our political leaders here in Washington to seek a fresh approach.").

166. *See id.* at 140 ("[T]his Court wishes to stress that it . . . will endeavor to see to it that plaintiffs in these actions get all the relief to which they are entitled under the law.").

167. *Id.* at 38.

168. *Id.*

them[169]—and it makes institutional sense to do so. Congress can appear tough on terrorism by authorizing suits on behalf of constituents injured by terrorism while outsourcing responsibility for the litigation to plaintiffs, their attorneys, and the judicial branch. The executive's responsibility for the conduct of foreign affairs makes it more sensitive to the impact of these suits on U.S. foreign relations, but even that branch is likely to refrain from intervening too vigorously on behalf of states like Iran for political reasons. Although the Obama administration has indicated a willingness to reach out to Iran,[170] it remains unlikely that either Congress or the executive will take action to prevent suits against an unfriendly regime.

IV. SUITS AGAINST ISRAEL AND ITS OFFICIALS

Though courts have allowed suits against Iran to go forward, this Part discusses how judges have refused to abrogate Israeli sovereign immunity to permit plaintiffs to sue Israel in U.S. courts.

In *Belhas v. Ya'alon*,[171] the relatives of civilians who died or were injured when an errant Israeli shell hit the U.N. compound in Qana, Lebanon, sued Israeli General Moshe Ya'alon under the ATS and the Torture Victim Protection Act of 1991 (TVPA)[172] for war crimes and extrajudicial killing.[173]

In upholding the district court's dismissal for lack of subject matter jurisdiction, the D.C. Circuit did not allow the plaintiffs to engage in what the court considered an end-run around the FSIA.[174] The court found it dispositive that the plaintiffs had only alleged acts

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169. *See supra* notes 130–33 and accompanying text.

170. *See, e.g.*, Barack Obama, President of the United States, Remarks at Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered ("My administration will seek engagement with Iran based on mutual interests and mutual respect.").

171. Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

172. TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

173. *Id.* at 1281–82. General Ya'alon was the Head of Army Intelligence of the Israel Defense Forces (IDF) during Operation Grapes of Wrath when the shelling of Qana occurred. He was retired and serving as a fellow in a Washington, D.C., think tank when he was served with process in the suit. *Id.* at 1281.

174. *See id.* at 1283 ("Instead of suing the foreign state of Israel, something prohibited by the FSIA in the absence of allegation of any of the statutory exceptions, Plaintiffs sued a retired Israeli general with at most a tangential relationship to the events at issue who made a convenient visit to the District of Columbia.").

Ya'alon performed in his official capacity, as authorized by Israel.[175] The court held that an individual can qualify as an agent or instrumentality of a foreign state for purposes of the FSIA.[176] Extending FSIA immunity to Ya'alon, the court also rejected the plaintiffs' contention that the FSIA does not apply to foreign officials once they have left office.[177] The plaintiffs also alleged that General Ya'alon's actions violated *jus cogens* norms of international law and must therefore be outside the scope of his duties.[178] The court, however, declined to create a *jus cogens* exception to the FSIA in the absence of specific congressional authorization.[179]

In another case against Israeli officials, *Doe I v. State of Israel*,[180] a group of Palestinians—most of whom are U.S. citizens—living in Israel, the West Bank, and the United States, sued various defendants including Israeli leaders and settlers, as well as the settlers' American supporters.[181] Basing their claims on numerous statutes—including the ATS and the TVPA—the plaintiffs alleged genocide, war crimes, and conspiracy to commit racketeering, all stemming from Israel's occupation of the West Bank.[182] In dismissing the case, the district court held that the FSIA protects Israeli officials acting in their official capacities, and that "the personal capacity suits amount to suits against the officers for being Israeli government officials."[183] The

175. *Id.* at 1282–83.

176. *Id.* at 1292 (citing El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996)).

177. *Belhas*, 515 F.3d at 1286. In another case, relatives of those injured or killed in the IDF's 2002 bombing of a Gaza apartment complex sued Avraham Dichter, the director of the Israeli Security Agency. Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009). The State Department expressed the view that the FSIA affords sovereign immunity to countries, not to individuals. *Id.* at 11. The Second Circuit held that even if Dichter was not entitled to immunity under the FSIA, he was entitled to common-law immunity. *Id.* at 15. The Supreme Court settled the question of whether the FSIA applies to foreign officials acting in their official capacity, holding that the FSIA does not grant immunity to such individuals, though it did not address whether common-law immunity attaches. Samantar v. Yousuf, 130 S. Ct. 2278, 2286–92 (2010).

178. *Belhas*, 515 F.3d at 1286 ("[A] *jus cogens* norm . . . 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted . . . .'" (quoting Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331))). For an argument that the court should have found Ya'alon's actions to be a *jus cogens* violation, see Ogilvy, *supra* note 5, at 195.

179. *Belhas*, 515 F.3d at 1287–88.

180. Doe I v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005).

181. *Id.* at 95–96. The American defendants included President George W. Bush, Secretary of State Colin Powell, and several defense contractors. *Id.* at 96.

182. *Id.* at 97.

183. *Id.* at 105.

court also rejected the plaintiffs' contention of a *jus cogens* exception to the FSIA.[184] It did recognize, however, that some courts had permitted violations of *jus cogens* norms to strip FSIA immunity.[185]

The court's broader concern was that the case was nonjusticiable:

> It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli–Palestinian conflict . . . .
>
> Plaintiffs would have this Court adjudicate the rights and liabilities of the Palestinian and Israeli people, making determinations on such issues as to whom the land in the West Bank actually belongs. Plaintiffs ask this Court to declare that Israel's self-defense policies are tantamount to terrorism, racketeering, or some other form of illegal activity. The Court can do none of this.[186]

This statement is characteristic of how courts have handled these cases. Absent specific authorization from Congress to abrogate Israeli sovereign immunity, courts generally have refused to do so. Moreover, although courts have occasionally found the FSIA inapplicable in suits against officials of foreign states based on violations of *jus cogens* norms, they have generally granted immunity to Israeli officials and are unlikely to recognize a *jus cogens* exception in such cases.[187]

This category of cases yields four conclusions. First, as *Doe I* demonstrates, U.S. courts have generally recognized the political nature of the Arab-Israeli conflict, Israel's status as a U.S. ally, and the major role that the region plays in U.S. foreign policy and domestic politics.[188] Second, the courts have been reluctant to abrogate the sovereign immunity of Israel or former Israeli officials for acts committed within the scope of their official duties. The law in this area, however, is unsettled. Since *Belhas* and *Doe I* were decided, the Supreme Court has held that the FSIA does not apply to provide

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184. *Id.*

185. *Id.* (citing Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990)).

186. *Id.* at 111–12 (citations omitted).

187. Numerous circuit courts have refused to recognize a *jus cogens* exception. *E.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 245 (2d Cir. 1996) (holding that Congress did not intend a *jus cogens* exception to the FSIA).

188. *See, e.g.*, Matar v. Dichter, 563 F.3d 9, 14 (2d Cir. 2009) ("The United States . . . filed a Statement of Interest . . . recognizing Dichter's entitlement to immunity. . . . [E]ven if Dichter, as a former foreign official, is not categorically eligible for immunity under the FSIA . . . he is nevertheless immune from suit under common-law principles . . . .").

immunity to foreign government officials acting in their official capacity.[189] The Court emphasized, however, that it was not deciding whether officials may still be entitled to common law immunity.[190] In *Matar v. Dichter*,[191] the Second Circuit decided an Israeli official was entitled to precisely such common law immunity for his official acts.[192] Third, unlike the cases against the PA and Iran, the Israeli defendants have more vigorously defended themselves.[193] Finally, the courts recognize justiciability concerns because both Congress and the executive have strong policy positions on the Arab-Israeli conflict. In *Belhas* and *Doe I*, the courts recognized these suits as fundamentally against Israel itself.[194] They refused to allow such an end-run around Israeli sovereign immunity. In contrast to suits against the PA and Iran, therefore, courts resolving suits against Israel have directly considered the political and foreign policy implications of ruling on the matter before deciding to dismiss the suits. The courts make no fine-grained distinctions between political cases and political questions, nor do they find these claims to be ordinary torts.

V. *CORRIE V. CATERPILLAR*: CHALLENGING SALES TO ISRAEL

This Part examines a suit against Caterpillar,[195] a U.S. corporation, for selling a bulldozer to Israel which ran over and killed the plaintiffs' daughter. The case was ultimately dismissed on political question grounds, but it could mark the creation of a new category of litigation relating to the conflict. Just as plaintiffs have increasingly brought suits against corporations for alleged complicity in human rights violations, litigants will likely continue to bring suits against companies based on their sales of military equipment to Israel.

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189. Samantar v. Yousuf, 130 S. Ct. 2278, 2286–92 (2010) (holding that a Somali official was not entitled to immunity for his official acts under the FSIA).

190. *Id.* at 2292–93.

191. Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009).

192. *Id.* at 14.

193. *See supra* notes 171–76, 180–86 and accompanying text.

194. *See* Belhas v. Ya'alon, 515 F.3d 1279, 1283 (D.C. Cir. 2008) ("Instead of suing the foreign state of Israel, something prohibited by the FSIA . . . Plaintiffs sued a retired Israeli general with at most a tangential relationship to the events at issue who made a convenient visit to the District of Columbia."); Doe I v. State of Israel, 400 F. Supp. 2d 86, 111–13 (D.D.C. 2005) (refusing to adjudicate the merits of Israeli defense measures and the Israeli occupation of the West Bank).

195. Caterpillar has also been the target of a public relations campaign decrying its sales to Israel. *Caterpillar Campaign*, U.S. CAMPAIGN TO END THE ISRAELI OCCUPATION, http://www.endtheoccupation.org/section.php?id=158 (last visited Aug. 30, 2010).

Rachel Corrie, a U.S. citizen, was killed in the Gaza Strip in 2003 when she was run over by an IDF bulldozer manufactured by Caterpillar.[196] Rather than sue Israeli leaders, her family—as well as Palestinians from the West Bank and Gaza—sued Caterpillar for violations of international law, racketeering, and wrongful death.[197] The district court determined that Caterpillar's sale of a legal, nondefective product did not violate a norm of international law sufficient to establish an ATS claim.[198] The court also held the matter nonjusticiable under the political question doctrine, as the executive and legislative branches had approved the U.S. policy of selling weapons and other goods to Israel.[199] Furthermore, the court found that the act of state doctrine applied because the plaintiffs were asking the court to pass judgment on official military acts of Israel.[200] Thus, the court dismissed the case.[201]

The Ninth Circuit affirmed.[202] On appeal it emerged that the U.S. government had paid for Israel's purchases of bulldozers.[203] The court found this fact decisive in applying the political question doctrine,[204] given that it was unable to reconcile the U.S. government's participation in the sale with the plaintiffs' claims that such sales were

196. Gwynne Skinner, *War Crimes Litigation in U.S. Courts: The Caterpillar Case* 2 (Palestine Ctr., Information Paper No. 9, 2006), *available at* http://ssrn.com/abstract=1304839.

197. Corrie v. Caterpillar, Inc. (*Corrie I*), 403 F. Supp. 2d 1019, 1023–24 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007). *See generally* SKINNER, *supra* note 196 (providing background on the incident and the case).

198. *Corrie I*, 403 F. Supp. 2d at 1026. The Supreme Court has held that the standard for an ATS claim is whether it "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms we have recognized." Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

199. *Corrie I*, 403 F. Supp. 2d at 1032 ("[N]either of the other branches of government has urged or enjoined sale of weapons to Israel nor restrained trade with Israel in any other manner. For this court to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government.").

200. *Id.* ("The Act of State Doctrine . . . precludes United States courts from judging the validity of a foreign sovereign's official acts . . . .").

201. *Id.* at 1033.

202. Corrie v. Caterpillar, Inc. (*Corrie II*), 503 F.3d 974, 984 (9th Cir. 2007).

203. *Id.* at 978.

204. *Id.* at 982–83.

wrongful.[205] Thus, although the plaintiffs could still sue in Israeli courts,[206] U.S. courts were not open to their claim.

Had the Ninth Circuit allowed the plaintiffs' claim to proceed, the plaintiffs would have faced difficulties proving causation—the IDF soldiers' use of the bulldozers likely would have constituted an intervening cause. Yet the court instead dismissed the case based on the political question doctrine, refusing to rule on the propriety of American aid to Israel in light of contemporary congressional and executive policy.[207] Though some have argued that the court improperly applied the doctrine in this case,[208] it is difficult to see how the court could have decided this case without making a judgment about U.S. foreign policy.[209] Had the court found Caterpillar liable, it would have directly contradicted foreign policy and declared American aid to Israel to be culpable conduct.[210] Yet in other contexts courts have seemed more receptive to litigation seeking to hold corporations liable for aiding and abetting human rights violations.[211] The difference here, however, is the importance of the Arab-Israeli conflict in U.S. foreign policy and the alliance between the United States and Israel.[212]

VI. LESSONS FROM THESE CASES

Having reviewed five categories of civil litigation related to the Arab-Israeli conflict, this Part draws several lessons from an analysis of these cases. First, the courts do not apply the political question doctrine uniformly in these cases. Second, courts have been sensitive to the politics involved in litigation surrounding the conflict and have

205. *Id*. at 982–84.

206. The Corries recently filed a civil suit against the Israeli Ministry of Defense in an Israeli court. *Rachel Corrie Relatives Sue Israel over Her Death*, BBC NEWS, http://news.bbc.co.uk/2/hi/8558701.stm (last updated Mar. 10, 2010, 13:02 GMT).

207. *Corrie II*, 503 F.3d at 984.

208. *See* SKINNER, *supra* note 196, at 29 ("The plaintiffs do not challenge U.S. policy toward Israel, nor do they seek a judgment on the Israeli-Palestinian conflict. Rather, they seek compensation for certain home demolitions and deaths that violated the law. The Political Question Doctrine should not result in the dismissal of the case on these grounds.").

209. *See Corrie II*, 503 F.3d at 982 ("[E]ach claim unavoidably rests on the singular premise that Caterpillar should not have sold its bulldozers to the IDF.").

210. *Id.* at 984. ("A court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel.").

211. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 191 (2d Cir. 2009) (reversing dismissal of a suit against Pfizer for nonconsensual medical tests of an antibiotic on Nigerian children).

212. *See supra* notes 186, 203–06 and accompanying text.

generally deferred to the judgment of at least one of the political branches. Third, the high proportion of default judgments in these cases results in important issues not being litigated. Finally, an important caveat is in order. Given the prevalence of default judgments and the lack of long-established precedent, these lessons are tentative and subject to future revision as these cases continue to work through the courts.

A. *Courts Make Distinctions in Applying the Political Question Doctrine*

The cases examined in previous Parts demonstrate that U.S. courts do not apply the political question doctrine uniformly to refrain from involvement in all cases involving the Arab-Israeli conflict. Despite the particularly contentious nature of the conflict, when plaintiffs have sued under the ATA and the state sponsor of terrorism exception to the FSIA, courts have refused to dismiss the cases on political question grounds. The courts in cases such as *Knox* and *Flatow* have construed suits against the PA, PLO, and Iran as ordinary tort cases, placing them firmly in the realm of judicial resolution.[213] In suits against Iran, courts have found liability under the state sponsor of terrorism exception despite executive branch opposition to courts considering such cases.[214]

Yet when no such explicit congressional authorization exists, the courts have been more willing to dismiss lawsuits on political question grounds. The *Corrie* court applied the political question doctrine, declining to decide whether Caterpillar was liable for Rachel Corrie's death as a result of supplying U.S.-financed bulldozers to Israel.[215] Similarly, courts have refused to grant sovereign immunity to the PA, ruling that decisions of recognition are political questions for the executive branch.[216] Thus, when specific authorization exists, the courts have generally not heeded the views of Judge Bork or Judge Robb that ruling on liability for international terrorism would interfere with the executive branch's conduct of foreign policy.[217] Nor have the courts viewed cases related to the Arab-Israeli conflict as entirely off-limits based solely on its contentious nature.

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213. *See supra* Parts I.C and III.B.

214. Murphy, *supra* note 52, at 80–81.

215. *See supra* Part V.

216. *E.g.*, Knox v. PLO (*Knox I*), 306 F. Supp. 2d 424, 448 (S.D.N.Y. 2004).

217. *See supra* Part I.A.

B. Courts Show Deference to at Least One of the Political Branches

The courts have not applied the political question doctrine in a uniform fashion, and politics have played a role in decisions about whether to invoke it. Indeed, the courts have admitted as much in reiterating that the political question "doctrine is one of political questions, not political cases."[218] The courts recognize that they are being called upon to make sensitive judgments in cases fraught with political concerns. In all of these cases, the courts have therefore tread cautiously in interpreting statutes and in speculating about the position of the executive branch.

The courts have frequently invited the executive branch to participate in these cases by filing a statement of interest; the executive branch, however, has only selectively become involved. It has communicated its position that an Israeli leader should enjoy immunity for his official acts,[219] and it has opined that Caterpillar should not be held liable for its sale of bulldozers to Israel.[220] It has also intervened to prevent the attachment of certain Iranian assets,[221] and it designates certain countries as state sponsors of terrorism. At the same time, the executive branch did not intervene in suits against the PA and PLO to argue that such suits were counter to U.S. policy. Nor did it intervene to argue against the abrogation of Iran's sovereign immunity. In addition, both President Clinton and President Bush signed into law statutes that plaintiffs have used to sue terrorists and their supporters.

Political considerations underlie these decisions, and the courts have largely deferred to the judgment of at least one of the political branches in deciding whether to rule on these cases. Congress has provided statutes under which the PA, PLO, Iran, and other alleged supporters of terrorism can be sued; it has not done so in the case of Israel, a U.S. ally. The courts have deferred to the policy judgment implicit in these congressional actions. The judiciary has generally deferred to the judgment of the executive branch as well, proceeding

218. *See supra* notes 43, 59 and accompanying text.

219. Matar v. Dichter, 563 F.3d 9, 11 (2d Cir. 2009).

220. Brief of the United States as Amicus Curiae in Support of Affirmance, Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) (No. 05-36210).

221. *See, e.g.*, Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 18 (D.D.C. 1999) (describing how the United States moved to quash attachment of Iranian diplomatic property); Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 19 (D.D.C. 1999) (describing how the United States moved to quash the attachment of an arbitral award).

when a statute exists and the executive does not intercede and dismissing cases when the opposite is true.

Yet the reality is more complex. The courts are caught in the middle between a Congress pushing civil litigation against terrorism and an executive branch reluctantly acquiescing in such suits.[222] For instance, the Departments of State and Justice opposed the State Sponsor of Terrorism Amendment to the FSIA out of concern that it would interfere with the executive branch's conduct of foreign policy and make the United States an outlier among the international community.[223] Yet this opposition has generally not translated into active involvement in suits against Iran, except to prevent the attachment of certain Iranian assets. The criticisms of the executive branch for its weakness on terrorism as a result of those interventions demonstrate the potential political consequences of intervening to urge dismissal of suits against Iran. Similarly, in *Knox* the United States refrained from intervening on behalf of the PA. Again, political considerations likely played a role.[224] Thus, though the executive branch's circumspect involvement in these cases likely stems from political considerations rather than from support for the litigation, its lack of involvement in many of these cases has left the courts to rely on Congress for direction.

C. Significant Issues in These Cases Have Not Been Litigated

Finally, it is significant that those cases that have proceeded to judgment have usually been the result of defaults, obviating the need for the plaintiffs to prove their cases in a contested forum.[225] A default judgment results in the plaintiffs' evidence not being scrutinized as carefully as it would be in a contested, fully litigated case. Since Iran, the PA, and the PLO failed to contest the initial suits and thus had

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222. *See In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 127 (D.D.C. 2009) ("[T]his Court itself is . . . stuck in the middle and forced to referee these highly charged and highly political disputes . . . in something of a political quagmire . . . .").

223. Murphy, *supra* note 52, at 80–81.

224. *See* Kessler, *supra* note 69 (reporting that intervention could force a choice between compensation for terrorist victims and support for the PA).

225. *See* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 35 (2002) ("[T]he federal district courts have entered default judgments . . . often after evidentiary hearings that resemble non-jury trials, albeit one-sided trials."); John D. Shipman, Comment, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 534 (2008) ("As a result of these default judgments, many aspects of the AEDPA remain untested almost a decade after it was enacted.").

default judgments entered against them, courts did not subsequently need to deviate from the key findings of fact in those initial cases in order to establish liability.

Despite the number of judgments awarded against the PA, PLO, and Iran, the statutes under which the claims were brought have not truly been tested. Proving causation in the context of support for terrorism, as the court required in *Boim*,[226] has proven to be a significant challenge for plaintiffs. As the *Knox II* court noted, defendants charged with material support may very well be able to show that they were not responsible for the acts of terrorists.[227] By defaulting, however, the defendants in many cases have made the results a foregone conclusion.

VII. EVALUATING THE DESIRABILITY AND EFFICACY OF THIS LITIGATION

Aside from providing specific lessons, these cases also raise questions about the desirability and efficacy of private civil litigation against terrorism. Numerous commentators have defended these suits as a useful tool in the fight against terrorism.[228] Critics, however, have described them as "inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to the foreign policy and national security goals of this country."[229] This final Part examines the impact of these cases on civil litigation against terrorism in general. It does so through the lens of seven arguments typically advanced for and against such litigation: compensation, symbolic justice, deterrence, impact on U.S. foreign policy, bias in U.S. foreign policy, the prevalence of default judgments, scope of liability, and First Amendment concerns. This Part concludes that, despite the mixed results of these cases, such suits are nonetheless a desirable tool in the fight against terrorism.

226. *See supra* Part II.

227. Knox v. PLO (*Knox II*), 248 F.R.D. 420, 428 (S.D.N.Y. 2008).

228. *See, e.g.*, Moore, *supra* note 6, at 5 ("There is considerable reason to believe that the civil justice system has substantial, underutilized potential in the war against terrorism."); Strauss, *supra* note 52, at 682 ("[T]he time has come for private citizens to enter the battle [against terrorism] on civil grounds through lawsuits aimed at crippling terrorist organizations at their foundation—their assets, funding, and financial backing.").

229. Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, at A1 (quoting William H. Taft IV, Legal Adviser, U.S. Department of State).

A. Compensation

One strong argument in favor of these suits is their potential to provide the victims of terrorism or their decedents with just compensation.[230] Courts have viewed these suits as ordinary tort actions brought by one who has suffered harm.[231] The plaintiffs in these cases are thus deserving of compensation, but such compensation is unlikely without access to the U.S. civil justice system for several reasons.[232] First, other countries have higher jurisdictional thresholds and are more reluctant than the United States to permit foreign nationals to bring such actions in their courts, especially against foreign states.[233] Second, given the international community's difficulty in achieving agreement on the definition of terrorism,[234] it is unlikely that international bodies would respond favorably to these suits.[235] Third, although the U.S. government established a compensation fund for the victims of the September 11 attacks, no such fund is available to the victims of smaller terrorist

230. *See, e.g.*, Moore, *supra* note 6, at 8 ("Compensation for victims of terrorism has been woefully neglected.").

231. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991); Knox v. PLO (*Knox I*), 306 F. Supp. 2d 424, 449 (S.D.N.Y. 2004), *vacated*, 248 F.R.D. 420 (S.D.N.Y. 2008).

232. *See* Murphy, *supra* note 52, at 76–77 (noting the difficulty of suing terrorists abroad and that "only the United States has claimed . . . the right to assert jurisdiction over states for tortious acts they commit abroad"); Hamish Hume & Gordon Dwyer Todd, *Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror*, FEDERALIST SOC'Y (Dec. 1, 2003), http://www.fed-soc.org/publications/pubID.118/pub_detail.asp (arguing that the United States "has become a world leader in providing a judicial forum for private rights of action against foreign terror groups and the regimes that support them").

233. *See* Shipman, *supra* note 225, at 549 ("[S]ubjecting foreign defendants to the American legal system based upon mere 'minimum contacts' is regarded by many in the international community as an 'exorbitant' basis of federal jurisdiction." (quoting Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 211 (1999))).

234. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795–96 (D.C. Cir. 1984) (Edwards, J., concurring); *see also* Murphy, *supra* note 52, at 50–55 ("[I]t is still debatable whether acts of terrorism are crimes or torts that violate the law of nations or customary international law.").

235. *See* Heiser, *supra* note 225, at 41 ("[T]he United States is not a signatory to any treaty that would require another country to recognize and enforce our civil judgments."); Ruth Wedgwood, *Civil Remedies and Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM, *supra* note 6, at 157, 179 (noting that there is no global treaty on international recognition or execution of nonarbitral judgments). *But see* Moore, *supra* note 6, at 5 ("[T]errorist acts are not gray area human activities, but rather are activities that are clearly viewed as criminal in every legal system *and* are criminalized in the major U.N.-sponsored antiterrorism conventions embodying community consensus against such acts.").

attacks or their families.[236] Finally, although the U.S. could espouse the claims of U.S. citizen victims of terrorism, the government is unlikely to employ this infrequently used tool of international law.[237]

On the other hand, critics argue that these suits provide "hollow rights"[238] and false hope[239] to plaintiffs who have little chance of enforcing their judgments.[240] Indeed, the number of uncompensated plaintiffs undermines the compensation rationale for these suits.[241] Furthermore, even plaintiffs who have received some compensation, such as Stephen Flatow, have been paid out of the U.S. Treasury.[242] The reality is that the parties found liable in these suits have insufficient attachable assets to satisfy the judgments.[243] For instance, in seeking relief from judgment in *Knox*, the PA argued that it was teetering on the brink of insolvency and could not afford to pay the judgment or the bond against it.[244] Similarly, Iranian assets in the United States are insufficient to pay the judgments against Iran,[245] and the courts have sided with the executive branch in quashing attempts to attach those assets. Congressional intervention in favor of Flatow and other plaintiffs has enabled them to collect only a portion of their judgments from the U.S. Treasury.[246] Furthermore, this congressional

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236. *See* John F. Murphy, *Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects*, 28 REV. LITIG. 315, 341 (2008) (noting that Senator Lugar proposed a bill to create an alternative compensation scheme).

237. *See* Moore, *supra* note 6, at 8 ("[W]e have frequently neglected the victims of international terrorism[, and] espousal of claims . . . seem[s] to have been largely forgotten.").

238. Jonathan Fischbach, Note, *The Empty Pot at the End of the Rainbow: Confronting "Hollow-Rights Legislation" After* Flatow, 87 CORNELL L. REV. 1001, 1004 (2002).

239. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 38 (D.D.C. 2009).

240. *See, e.g.*, Baletsa, *supra* note 4, at 1251 ("[S]uch suits have resulted in unenforceable judgments that deny the victims' families the closure and accountability they desperately need.").

241. *See supra* notes 160–61 and accompanying text.

242. *See supra* notes 158–59 and accompanying text; *see also* Goldsmith & Goodman, *supra* note 127, at 146 (likening paying compensation out of the U.S. Treasury to "picking our own pocket" (quoting *Hitting Where it Hurts: The American Taxpayer May End Up Paying Osama Bin Laden's Legal Bills*, ECONOMIST, Oct. 6, 2001, at 57–58)).

243. *See* ELSEA, *supra* note 130, at 75 (showing the large discrepancy between the blocked and non-blocked assets of terrorist states in the United States and the outstanding damages owed by these states); Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT'L L. & FOREIGN AFF. 199, 214 (2000) ("[D]efendant states in terrorism exception cases tend to be those that have limited assets in the U.S.").

244. Weiser, *supra* note 70.

245. ELSEA, *supra* note 130, at 75.

246. *Id.* at 69–71.

action has led to charges that better-connected plaintiffs are compensated while others are left holding empty judgments.[247]

The record is thus decidedly mixed. Some victims have collected on judgments through settlement or congressional action, while others have not collected and may never collect. These suits have at times pitted the executive branch against victims of terrorism. Yet in the absence of these suits, the plaintiffs would likely have no recourse to seek compensation.[248] Moreover, as in the case of Libya, it is possible that the United States could attempt to settle such claims as part of a normalization process.[249] Given that the tort system is the primary avenue available to U.S. citizens for achieving compensation for intentional wrongdoing, cutting off these plaintiffs' access would leave them with no possible remedy.

B. Symbolic Justice and Historical Record

Though monetary compensation is important to many victims and their families, an equally significant argument is that these suits provide plaintiffs the opportunity to be heard and to seek justice through the judicial process,[250] which can help victims to heal.[251] Because it may be impossible to prosecute individual terrorists or their organizations, a civil suit against a funder or state sponsor may be these plaintiffs' only opportunity to have their day in court.[252] Additionally, these suits provide a historical record of terrorist attacks.[253] Although many cases result in default judgments, the

247. Fischbach, *supra* note 238, at 1037.

248. *See* Murphy, *supra* note 236, at 316 ("[U]nlike criminal prosecutions, civil suits provide at least the possibility that victims may be compensated . . . .").

249. *See* Exec. Order No. 13,477, 3 C.F.R. 247 (2009) (announcing the settlement of private American claims against Libya pursuant to a U.S.-Libyan agreement).

250. *See, e.g.*, Goldsmith & Goodman, *supra* note 127, at 140–41 ("Even if plaintiffs cannot enforce judgments obtained against terrorists, civil litigation still gives them the opportunity to have a day in court to tell their story publicly and to persuade a judge or jury to officially condemn the defendant's acts.").

251. *See* Shipman, *supra* note 225, at 569 ("While judgments rendered in American courts may often be unenforceable, victims may nevertheless gain some closure by establishing liability—a crucial part of the healing process." (citing Seth Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 53 (2004))).

252. *See* Murphy, *supra* note 52, at 315 ("[T]he prospects for holding the perpetrators of international terrorism civilly liable for their actions are substantially greater than the prospects for holding them criminally liable.").

253. *See, e.g.*, Moore, *supra* note 6, at 8 (arguing in favor of civil lawsuits against terrorism as a means of "[t]elling the truth about terrorism").

requirement that plaintiffs present sufficient evidence for the court to find in their favor establishes this record.[254] If the case is litigated, as in *Boim*, discovery provides plaintiffs access to important documents and testimony regarding the defendants' alleged support for terrorism.[255] Even in cases that are eventually dismissed, such as *Belhas*, *Doe*, and *Corrie*, plaintiffs have the opportunity to present evidence of the alleged wrongdoing and their injuries. Indeed, one commentator has likened these suits to a "truth commission" for terrorist attacks.[256]

C. Deterrence

A third argument in favor of these suits is their deterrent value.[257] Securing a criminal conviction against an individual terrorist or terrorist entity for acts committed outside the United States is extremely difficult.[258] Achieving accountability through the civil system may be easier, however, due to the lower standard of proof and the availability of discovery in civil litigation.[259] Moreover, the funders and supporters of terrorism are more likely to have attachable assets than are the direct perpetrators.[260] Courts may not be well-equipped to take action against terrorists in the field, but they *are* well-positioned to take action against financiers and their bank accounts.[261] These civil suits by "private attorneys general" may supplement U.S. efforts to freeze terrorist assets.[262] Indeed, private civil suits "may be more palatable and politically feasible" to government policymakers than criminal penalties,[263] and such private assistance may be desirable because the government cannot "pursue all individuals and organizations connected by secondary

254. *See supra* Parts I.C, II, and III.B.

255. Murphy, *supra* note 52, at 315–16.

256. Wedgwood, *supra* note 235, at 170.

257. *See, e.g.*, Moore, *supra* note 6, at 7 ("[I]f we can raise realistic expectations in the minds of these terrorists that they and their organization will be held liable for substantial monetary damages . . . wherever they may be, then we may be usefully adding to deterrence against terrorism.").

258. Shipman, *supra* note 225, at 570.

259. Murphy, *supra* note 52, at 315–16.

260. Goldsmith & Goodman, *supra* note 127, at 144.

261. *See, e.g.*, *id.* (arguing that the "incentive structure and operation" of private civil suits may be better adapted to the "control of secondary conduct").

262. *Id.*

263. *Id.* at 143.

relationships."[264] Moreover, a developing international consensus exists that the funding of terrorism should be actionable.[265] Proponents hope that by imposing a cost on the funding of terrorism, these suits will deter individuals, organizations, and rogue states from risking their assets to do so.[266]

To critics of the deterrence rationale, plaintiffs' inability to enforce judgments against Iran undermines this reasoning.[267] Furthermore, measuring the impact of these cases is difficult, and terrorism and terrorist financing in connection with the Arab-Israeli conflict continues. The *Boim* case could have helped to discourage terrorist financing in the United States, but that impact is likely small in comparison with other U.S. antiterrorism measures.

The cases against the PA and PLO appear to have had a greater impact. The PLO paid the Klinghoffers an undisclosed settlement,[268] and the PA has recently indicated its intention to contest suits against it in U.S. courts, which creates the possibility of discovery and greater transparency in PA affairs.[269] Although the PA's new strategy has yet to be tested, a PA that participates in these suits may take more care to ensure its assets and personnel are not funding terrorism. Moreover, Congress has repeatedly acted to authorize and expand plaintiffs' ability to bring these cases.[270] Although it is unlikely that potential civil liability in U.S. courts will ever serve as a strong deterrent to committed terrorists and their backers, it could help deter less committed supporters and force potential funding organizations to behave more responsibly or cease operations.

D. Impact on U.S. Foreign Policy

The suits against the PA, PLO, and Iran have generated a great deal of controversy due to their potential to interfere with the executive branch's conduct of foreign affairs.[271] Critics believe that

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264. *Id.* at 143–44.

265. *See, e.g.*, Wedgwood, *supra* note 235, at 168–69 (suggesting that the post–September 11 international regulatory scheme redefines "what it means to be culpable in a terrorist scheme").

266. *See, e.g.*, *id.* at 168 ("[I]nstitutions may be indulgent or even sympathetic to violent actors, while supposing that the relationship . . . is too distant to carry consequence.").

267. Fischbach, *supra* note 238, at 1025–26.

268. *See supra* Part I.A.

269. *See supra* Part I.C.

270. *See supra* Part III.A.

271. *See* Shipman, *supra* note 225, at 530 (describing U.S. courts as "the newest battleground in a struggle between the executive branch and Congress"); Anne-Marie Slaughter & David

these cases lead to court judgments that may be at odds with the executive branch's foreign policy.[272] For instance, the executive branch has expressed concern that utilizing Iran's frozen assets to satisfy judgments against that state eliminates a bargaining chip that could be used in negotiations[273] and presents an obstacle to normalization of relations.[274] Along these lines, courts have imposed large judgments against the PA—an entity that annually receives millions of dollars in U.S. aid.[275] These suits also lead to factfinding in politically sensitive areas, such as the extent of PA support for terrorism,[276] and they could interfere with ongoing criminal or intelligence investigations.[277]

These judgments could also potentially interfere with U.S. obligations under international law.[278] No other country recognizes such extensive jurisdictional claims for civil suits against sovereign nations.[279] Indeed, the U.S. government intervened to prevent attachment of Iranian diplomatic property largely because it feared that otherwise it would be in violation of its obligations under the Vienna Convention on Diplomatic and Consular Property.[280] The United States was also concerned about retaliation for permitting such suits.[281] Indeed, Iran has passed a law authorizing its citizens to sue the United States for "terrorism."[282]

Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 103 (arguing that congressional encouragement of litigation against foreign governments in U.S. courts has undermined U.S. diplomacy with countries such as Cuba and Iran).

272. Slaughter & Bosco, *supra* note 271, at 112.

273. *Id.* at 113–14.

274. Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029, 1051 (2005); *see also In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 38 (D.D.C. 2009) ("Today, at the start of a new presidential administration—one that has sought engagement with Iran on a host of critical issues—it may be time for our political leaders . . . to seek a fresh approach.").

275. Christine M. Geier, Ungar v. Palestinian Liberation Organization, 19 N.Y. INT'L L. REV. 173, 178–79 (2006) ("[T]his conflict . . . creates the potential for embarrassment, when our government recognizes the P.L.O. and the P.A. in their dealings with Israel, but not in conflicts with our own country.").

276. Wedgwood, *supra* note 235, at 173.

277. *See* Murphy, *supra* note 52, at 62 (noting that the Attorney General is authorized to intervene to stay cases that may interfere with such an investigation).

278. Michael T. Kotlarczyk, Note, "*The Provision of Material Support and Resources" and Lawsuits Against State Sponsors of Terrorism*, 96 GEO. L.J. 2029, 2045 (2008).

279. *Id.* at 2046.

280. Fischbach, *supra* note 238, at 1015.

281. Kotlarczyk, *supra* note 278, at 2047.

282. *Id.* at 2048.

There are, however, numerous counterarguments. First, in the ten years since *Flatow* was decided, there is little evidence that these judgments have damaged U.S. foreign relations or constrained the executive branch significantly. Regarding Iran, for example, these cases have had a much smaller impact than the election of hardliner Mahmoud Ahmadinejad, the Iranian nuclear program, or the U.S. invasion of Iraq. In addition, the FSIA contains other exceptions to sovereign immunity, such as for state commercial activity, and these exceptions have not damaged U.S. international relations significantly.[283] Second, these judgments—which threaten a country's assets and potentially require future payments in the event of normalization—may instead give the United States leverage by providing a means of establishing liability and accountability for terrorism when neither criminal nor international law apply.[284] The executive branch could also dangle the possibility of supporting efforts to reopen judgments, as in *Knox*, or could seek negotiated settlements of claims as part of normalization, as it did with Libya.[285] Third, concerns about possible retaliation against U.S. interests stemming from these suits may be overstated.[286]

Finally, the executive branch's criticisms are best addressed to Congress, not the courts. Courts are abiding by repeated congressional authorization of these suits; they are not overstepping their bounds.[287] Congress views these suits as a useful tool in the fight against terrorism and as a means of providing compensation to victims.[288] The executive branch has some ability to affect the

283. David MacKusick, Comment, *Human Rights v. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 772–73 (1996).

284. *See* Moore, *supra* note 6, at 17 ("Do we really want to send the message 'kill and torture Americans and we will simply ignore responsibility when the government changes?'").

285. *See supra* notes 66–72, 249 and accompanying text. This would likely depend, however, on whether plaintiffs agreed to waive certain vested rights to gain some compensation.

286. Moore, *supra* note 6, at 15 (arguing that "it is strongly in our interest to have every nation on earth copy the 1996 FSIA amendments" and that it would be "bizarre to worry about a few terrorist nations allegedly proceeding against U.S. assets in a setting where they are perfectly willing to kill and torture Americans" (emphasis omitted)).

287. Hume & Todd, *supra* note 232 ("Congress expects U.S. courts to take an aggressive stance towards terrorists, criminal regimes, genocidal warriors, and the entities and individuals who provide their financial support.").

288. Shipman, *supra* note 225, at 569 ("[E]nactment of terrorism-related statutes . . . indicate[s] the unequivocal intent of Congress that victims of terrorism be allowed to seek financial redress in U.S. courts.").

disposition of these suits, but it has not consistently done so.[289] The executive branch could have intervened in suits against the PA, as it did to stop the attachment of Iranian assets, and it has discretion over which countries it classifies as state sponsors of terrorism. The executive also could have vetoed the congressional legislation authorizing these cases, advocated new legislation limiting such suits, or sought legislation implementing an alternative compensation scheme. Instead, presidents have repeatedly acquiesced in Congress's actions in this context. Although the executive's course may be the result of sound political calculations, it is disingenuous for the executive to criticize the courts for exercising a power that it consented to give them.

E. Bias in U.S. Foreign Policy

Regardless of whether these suits interfere with U.S. foreign policy, some critics have attacked these suits for incorporating an alleged bias in U.S. foreign policy.[290] Suits against the PA, PLO, and Iran have resulted in large judgments,[291] while courts have dismissed suits against Israel, Israeli leaders, and Caterpillar.[292] To these commentators, this contrast represents an injustice that undermines the legitimacy of such suits and the notion that litigants who are victims of Israeli actions can rely upon U.S. courts to dispense justice.[293] When Israel or Israeli interests are at stake, the argument goes, U.S. courts and political branches act to protect them.

If bias exists, however, it stems from the democratic process. Congress has made judgments about how to define terrorism, what conduct to punish, and whether to abrogate the sovereign immunity of terrorist states. The executive has not extended recognition to the PA as a sovereign state or intervened to attempt to prevent suits

289. *See* Gilmore v. Palestinian Interim Self-Gov't Auth., 675 F. Supp. 2d 104, 112 n.7 (D.D.C. 2009) (noting that the executive branch has been "unhelpful" in resolving the case, did not file a statement of interest when asked by the court to do so, and instead filed a "mealy-mouthed Notice" that "provided no substantive guidance whatsoever").

290. *See, e.g.*, Keith Sealing, *"State Sponsors of Terrorism" Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 134–41 (2003) (questioning why countries like Pakistan, Saudi Arabia, and Israel are not on the list of state sponsors of terrorism and thus are not subject to suit).

291. *See supra* Parts I.C and III.B.

292. *See supra* Parts IV–V.

293. *See* Sealing, *supra* note 290, at 143 ("Putting the matter in the hands of litigators and haling foreign sovereigns into U.S. courts based on . . . politically motivated notions of whether a given nation is a 'State Sponsor of Terrorism' or an 'ally' is not the solution.").

against it. Presidents have signed the legislation that abrogates the sovereign immunity of state sponsors of terrorism like Iran.[294] Critics arguing that the courts are biased would more appropriately address their complaints to the legislative and executive branches. The courts simply base their rulings on the statutes approved by Congress and signed by the president or on the executive branch's foreign policy decisions.

F. Prevalence of Default Judgments

A further criticism of these suits is that many of them result in default judgments. Critics have questioned the imposition of such large judgments based on defaults, in which the court reviews only the plaintiff's evidence.[295] Many commentators believe that plaintiffs would have a much harder time proving wrongdoing if these suits were contested.[296] Indeed, the *Boim* case demonstrates the difficulty of establishing causation.[297] The plaintiffs in *Knox* would have faced similar challenges had they been required to litigate the case in full.[298] The defendants, however, chose to default in these cases, and it would be counter to Congress's intentions and to these suits' compensatory and deterrent purposes to place the burden of defendants' nonappearance on the plaintiffs.

G. Scope of Liability and First Amendment Concerns

A final concern, specifically with regard to the ATA, is the potential for liability to sweep too broadly and implicate First Amendment rights. The arguments of the *Boim* dissenters exemplifies this concern.[299] It also played a role in the judge's decision to grant the PA and PLO relief from judgment in *Knox II*.[300] Some

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294. *See, e.g.*, Moore, *supra* note 6, at 17 (discussing the compromise between Congress and the Department of State that made blocked assets available to satisfy judgments).

295. *See, e.g.*, Slaughter & Bosco, *supra* note 271, at 114 ("Often foreign states do not even appear to defend themselves. In such an environment, the fairness of the proceedings becomes questionable.").

296. *See, e.g.*, Vadnais, *supra* note 243, at 209 ("Evidence offered to prove issues such as whether a particular state supports a particular group . . . may not hold up well under cross-examination. First, many sources of this type of evidence are classified or not easily subpoenaed. Other sources . . . may not contain the specificity of information to withstand cross-examination." (footnote omitted)).

297. *See supra* Part II.

298. *See supra* Part I.C.

299. *See supra* notes 111–15 and accompanying text.

300. *See supra* notes 66–71 and accompanying text.

commentators have noted that an expansive interpretation of the ATA could result in "interference with religious expression, free speech, and related association rights of persons indirectly connected to terrorism," as well as "with the good works of charitable organizations."[301] Potential solutions include requiring the State Department to authorize suits under the ATA or permitting the State Department to intervene to prevent a suit under the ATA.[302]

CONCLUSION

Despite the many problems with these lawsuits, U.S. courts have proven capable of handling civil litigation related to the Arab-Israeli conflict. Labeling this litigation a failure would be premature. Through these lawsuits, some victims have won compensation—albeit through settlement and congressional action, rather than enforcement of judgments. Further, these suits have likely provided at least some measure of deterrence. The judgment in *Boim* will likely affect the willingness of U.S.-based organizations to send money to groups like Hamas, even if they believe that the money is going to ostensibly charitable purposes. The *Knox* case and the failure of the executive branch to shield the PA from liability will likely provide at least some impetus for the PA to oversee its personnel more carefully, especially with regard to their potential involvement in terrorist activities. *Flatow* and other judgments against Iran have alerted that nation that it will face accountability for its sponsorship of terrorism. Although enforcing these judgments has proven difficult, these plaintiffs likely could not have sought compensation through any other means.

Furthermore, courts have shown a willingness to defer to the general direction provided by the political branches. To that end, the courts have largely followed congressional statutes—signed into law by the executive—in imposing liability. Courts have also deferred to the executive branch when it has clearly stated that a given judgment would interfere with U.S. foreign policy. When the executive branch has refrained from active participation, however, the courts have followed the direction of Congress. Overall, judicial involvement in the Arab-Israeli conflict may have a mixed record of success, but it has not been the unmitigated disaster critics feared.

301. Goldsmith & Goodman, *supra* note 127, at 147.
302. *Id.* at 153.