Finding the Tort of Terrorism in International Law

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I. INTRODUCTION

The concept of terrorism is multidimensional. Terrorism is fundamentally a strategy employed by state and sub-state actors to achieve political, military, or ideological goals.\(^1\) Its apparent pervasiveness is facilitated by the global proliferation of explosives, weapons (of minor and mass destruction), and know-how. Terrorism can precipitate, herald, and occur independently of a state of war. At times, terrorism appears to be an inevitable feature of situations of asymmetrical warfare, governmental repression, unwelcome occupation, and other putatively unjust international relations that spawn grievances and seething discontent among the populace. Regardless of its context, terrorism is a phenomenon with profound sociological implications. Terrorism also has pressing and divergent human rights dimensions, where innocent civilians are deliberately targeted with violence and counter-terrorism measures—including the use of domestic surveillance, the development of arbitrary and preventative detention regimes, the withholding of rights to habeas corpus and judicial review, the resort to punitive immigration remedies, and the use of torture, other forms of cruel treatment, disappearances, and extraordinary renditions against suspected terrorists—impinge on civil and human rights.\(^2\) Certain manifestations of terrorism also constitute international and domestic crimes, as set forth in a web of

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

multilateral treaties and the world’s domestic penal codes. This Article aims to consider an altogether different dimension of terrorism: the extent to which terrorism is also a tort—specifically, a “tort in violation of the law of nations or a treaty of the United States.”

This Article will focus on the potential of the Alien Tort Statute (ATS) to serve as a vehicle for asserting civil claims in U.S. courts for acts of terrorism. Although this Article primarily considers terrorism torts under the “law of nations” prong of the ATS (which requires a showing that the relevant prohibition is part of customary international law), terrorism torts may provide a vehicle for activating the ATS’s dormant treaty prong as well, given the strong support for the terrorism treaties exhibited by the United States and the high degree of domestic incorporation of the crimes delineated therein. One of the first modern cases to be filed under the Alien Tort Statute immediately called into question the utility of the ATS as a counter-terrorism tool. Ever since, the statute has been relatively underutilized in this context, even while U.S. courts have gradually extended jurisdiction under the ATS over other international crimes. Meanwhile, the U.S. Congress has vastly expanded opportunities for U.S. nationals to pursue civil claims in domestic courts for acts of terrorism. For example, the Antiterrorism Act (ATA) enables U.S. nationals—as well as their estates, survivors, and heirs—to sue individuals responsible for personal, property, or business injuries incurred by reason of acts of international terrorism. U.S. victims and claimants may also sue states and state

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

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

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

6. Antiterrorism Act of 1990 sec. 132(b), § 2333, 104 Stat. at 2251 (codified at 18 U.S.C. § 2333 (Supp. II 1991)). Although there were prior permutations of the Antiterrorism Act, such as the Anti-Terrorism Act of 1987, Pub. L. No. 100-
agents implicated in acts of terrorism under the Foreign Sovereign Immunity Act (FSIA), so long as the state itself has been specifically designated as a "sponsor of terrorism" by the Department of State or where the circumstances otherwise satisfy one of the codified exceptions to foreign sovereign immunity. As compared with these statutory causes of action for U.S. citizen victims and claimants, only the ATS has the potential to provide jurisdiction over civil claims arising out of acts of terrorism brought by non-nationals who have access to U.S. courts. The uncertainty surrounding the availability of the ATS to permit such terrorism claims reveals a lacuna in the United States' anti-terrorism statutory scheme.

Since the U.S. Supreme Court issued its landmark opinion in Sosa v. Alvarez-Machain and finally set forth a methodology for considering actionable claims under the ATS, a few cases involving terrorism allegations have begun to work their way through the federal court system. Although it is still difficult to draw broad conclusions, the existing cases demonstrate that the various federal statutes—the ATA, FSIA, and ATS—can work in tandem to provide causes of action to alien and U.S. plaintiffs injured in terrorist incidents. Furthermore, litigants are creatively utilizing multiple causes of action drawn from statutes, the common law, and interna-


tional law to press their claims. While the federal courts have yet to definitively recognize a standalone cause of action for terrorism *stricto sensu*, developments in the law of terrorism at the international level reveal the gradual crystallization of a consensus set of elements that comprise a definitive prohibition against terrorism applicable to all but a narrow set of circumstances. What lingering definitional impasse exists highlights an unsettled and highly contentious area of international law: the legal categorization and consequences of attacks by unprivileged combatants against privileged combatants or military targets. In all other situations, the international law governing acts of terrorism is sufficiently precise, robust, and uncontroversial to support the recognition by the federal courts of a cause of action for terrorism under the ATS, assuming the other jurisdictional requirements are satisfied. Recognizing such causes of action will bolster the United States’ counter-terrorism regime by enabling a broader array of victims of acts of terror to pursue the assets of individuals and groups that finance or otherwise support acts of terrorism.

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

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

Any inquiry into the cognizability of the tort of terrorism under the ATS invites a re-examination of *Tel-Oren v. Libyan Arab Republic*, the first case to consider claims of civil liability for acts of terrorism in the United States. *Tel-Oren* was also one of the first cases to be adjudicated following the Second Circuit’s landmark ruling in *Filartiga v. Pena-Irala*, which invigorated the ATS as a tool for the private enforcement of civil claims for torts committed in violation of international law. *Tel-Oren* arose out of a horrific attack in Israel in 1978 in which members of the Palestine Liberation

10. See, e.g., Harbury v. Hayden, 522 F.3d 413, 415–16 (D.C. Cir. 2008) (alleging various claims arising under international law and common law in an action against the CIA involving the torture and murder of a Guatemalan rebel).
11. 726 F.2d 774 (D.C. Cir. 1984).
12. 630 F.2d 876 (2d Cir. 1980).
Organization (PLO) took 121 civilians hostage in a torturous rampage around the city of Haifa. Before the Israeli police could stop the attackers, twenty-two adults and twelve children were killed, and eighty-seven people were injured. Plaintiffs (U.S. and Israeli citizens) brought suit against Libya, the PLO, and other non-governmental organizations associated with the PLO, whom they accused of masterminding the attack. Plaintiffs premised jurisdiction on the ATS, as well as on federal question and diversity grounds, and advanced claims of torture, terrorism, genocide, and other pendant domestic torts.

The district court dismissed the case, reasoning that plaintiffs had identified no cause of action in U.S. or international law entitling them to sue. In a terse per curiam opinion, the D.C. Circuit affirmed, although the judges splintered in their reasoning. Judge Edwards was the most faithful to the newly-minted Filartiga precedent. He agreed in principle that the ATS allowed for the assertion of civil claims based on international law violations. He reasoned, however, that the law of nations, as it then existed, did not impose liability on private actors to the same degree as state actors. He also concluded that terrorist attacks did not necessarily violate the law of nations, because there was too much dissension within the

13. Tel-Oren, 726 F.2d at 776.
14. Id. at 776, 799.
15. Id. at 775.
16. Id.
18. Tel-Oren, 726 F.2d at 775.
19. Id. at 777 (Edwards, J., concurring).
20. Id. at 795.
21. Id. at 791.
22. Id. at 795; see also United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) (per curiam) ("[C]ustomary international law currently does not provide for the prosecution of 'terrorist' acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism."); id. at 106–08 (detailing efforts at the international level to define terrorism); Tel-Oren, 726 F.2d at 806–08 (Bork, J., concurring) (finding little consensus on the illegality of terrorism).
international community as to the legality and legitimacy of such acts. By contrast, Judge Bork rejected the Filartiga precedent outright. He reasoned that § 1350 only supported jurisdiction over those law of nations’ offenses that existed at common law as identified in Blackstone’s famous treatise—violations of safe conduct, acts of piracy, and infringements on the rights of internationally protected persons, such as diplomats. Judge Bork rejected the argument that the ATS provided a cause of action for additional international law violations and argued that neither the various treaties cited by plaintiffs nor customary international law enabled plaintiffs to sue for the torts alleged.

Judge Robb took a different approach altogether by arguing that the case presented a non-justiciable political question. He determined that the question of liability was one for the political branches of government, as there were no judicially discoverable standards by which to resolve the dispute. Given this formidable trilogy of arguments, Tel-Oren stood for many years as a barrier to subsequent terrorism-related suits under the ATS. The D.C. Circuit’s fractured opinion also blocked the development of a unanimous national interpretation of the ATS, as all other circuits to face challenges to the ATS fell in line behind the Second Circuit.

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

24. Id. at 808–10 (Bork, J., concurring).
25. Id.
26. Id.
27. Id. at 823 (Robb, J., concurring).
28. Id.
29. See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (holding that the ATS established a federal forum where courts could address customary international law violations by using domestic common law remedies); Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995) (holding that there was subject matter jurisdiction under the ATS because torts allegedly committed by the
As a result, *Tel-Oren* emerged as a favorite citation in scholarship and briefs opposed to ATS litigation.

**B. The Legislative Reaction**

Whereas *Tel-Oren* may have discouraged litigants, it mobilized Congress. On the terrorism front, Congress partially overturned *Tel-Oren* by specifically creating a civil cause of action for U.S. citizen victims or their heirs or survivors injured by reason of an act of international terrorism as part of the Antiterrorism Act of 1990. Specifically, the relevant provision provides:

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defendant were in violation of international law); Hilao v. Estate of Marcos (*In re Estate of Marcos Human Rights Litig.*), 25 F.3d 1467, 1470–71 (9th Cir. 1994) (holding that the district court had subject matter jurisdiction because the alleged behavior was not undertaken due to an official mandate and thus was not covered by FSIA’s agency provision); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997) (dismissing complaint where plaintiff failed to adequately allege a violation of the law of nations, but assuming jurisdiction in principle), aff’d, 197 F.3d 161 (5th Cir. 1999).


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

32. The ATA was also a response to a case that involved civil claims arising out of an act of terrorism against a U.S. citizen that could proceed in U.S. courts only because the murder occurred on a ship, triggering admiralty jurisdiction and the Death on the High Seas Act. *Klinghoffer* v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854, 856 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991). The *Klinghoffer*
Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.\(^{34}\)

"International terrorism" is defined to encompass activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
(B) appear to be intended—
   (i) to intimidate or coerce a civilian population;
   (ii) to influence the policy of a government by intimidation or coercion; or
   (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.\(^{35}\)

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35. Id. § 2331(1).
Acts of war—defined as “(A) declared war; (B) armed conflict, whether or not war has been declared, between two or more nations; or (C) armed conflict between military forces of any origin”—are not actionable under the statute. By defining “international terrorism” with reference to conduct that merely “involves” violence, the ATA enables civil claims for even non-violent acts that have been made criminal under federal law, such as those crimes set out in the various “material support” statutes. Indeed, any violation of the

36. Id. § 2331(4).
37. Id. § 2336(a) (“No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war.”); see Estate of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153, 166 (D.D.C. 2006) (ruling as a matter of law that attack on a civilian bus—“an act that violates established norms of warfare and armed conflict under international law”—was not “an act occurring in the course of armed conflict,” without deciding question of perpetrators’ military status); Morris v. Khadr, 415 F. Supp. 2d 1323, 1333–34 (D. Utah 2006) (concluding that attack on soldier as pleaded by plaintiffs did not constitute an act of war, because al Qaeda was not a “military force”); Biton v. Palestinian Interim Self-Gov’t Auth., 412 F. Supp. 2d 1, 10 (D.D.C. 2005) (noting existence of armed conflict in Gaza, but concluding that an attack on children in a school bus could not be committed “during the course of” an armed conflict, which would have brought the case into the ATA act-of-war exception).
38. See 18 U.S.C. § 2339A(b) (defining the term “material support or resources” to include the provision of any property, service, currency, monetary instruments, financial securities, or financial service); id. § 2339B(a)(1) (prohibiting knowingly providing material support or resources to a foreign terrorist organization); id. § 2339C(a)(1) (making it a crime to unlawfully and willfully provide or collect funds, directly or indirectly, intending or knowing that such funds will be used to carry out an act that constitutes an offense within the scope of enumerated terrorism treaties or any other act intended to cause death or serious bodily injury to a civilian, or to a person not taking an active part in the hostilities in a situation of armed conflict); see also Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1011, 1020 (7th Cir. 2002) (finding that § 2333 allows a U.S. national injured by reason of international terrorism to recover from anyone along the causal chain, including individuals or entities that provide money or other forms of support); Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 580–81 (E.D.N.Y. 2005) (alleging violations of § 2339 (providing material support to terrorists) as well as § 2332 (aiding and abetting and conspiring in the murder, attempted murder, and serious bodily injury of United States nationals)). The U.S. government intervened as an amicus in Boim to confirm that the ATA incorporated basic tort principles, including aiding and abetting liability. See Hamish Hume & Gordon Dwyer Todd, Ambulance Chasing for Justice: How Private Lawsuits for Civil Damages Can Help Combat International Terror, FEDERALIST SOC’Y, Dec.
penal provisions in Title 18 may serve as the predicate acts for civil suits under the ATA, so long as the necessary attendant circumstances—i.e., the motivation and transnational elements—exist. Thus, civil liability under the ATA for U.S. citizen plaintiffs is at least as extensive as criminal liability.

Individuals may also sue for any economic or personal injury, such as mental suffering or loss of consortium, even absent physical harm. The ATA applies to natural or legal persons as defendants, but principles of foreign sovereign immunity dictate that actions may


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

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

41. See Boim, 291 F.3d at 1015, 1020 (noting that the language and legislative history of 18 U.S.C. § 2333 suggest that it includes tort liability for a host of international terrorism crimes). The ATA further provides for nationwide service of process and that suit may be brought “in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent.” 18 U.S.C. § 2334(a) (2006). Personal jurisdiction has been found where defendants have minimum contacts with the United States as a whole. Estate of Ungar ex rel. Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 88 (D.R.I. 2001).

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

43. In § 813 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 382 (2001), Congress also envisioned terrorism as a form of organized crime and amended the Racketeer Influenced and Corrupt Organizations (RICO) statute to enable acts of terrorism to serve as predicate acts for a pattern of racketeering activity. See 18 U.S.C. § 1961(1) (including reference to “any provision listed in § 2332b(g)(5)(B),” which includes a lengthy list of federal terrorism crimes, such as the use of chemical weapons, kidnapping, cybercrime, assassination, attacks on transportation networks, etc.).
not proceed against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority."\textsuperscript{44} Individual state actors can, however, be sued in their personal capacities for acts that are beyond their official mandates.\textsuperscript{45} The U.S. Government is entitled to stay actions where they may interfere with a criminal prosecution involving the same subject matter or a national security operation.\textsuperscript{46} Most cases under the ATA have ended in default, although defendants do occasionally file preliminary defensive motions.\textsuperscript{47}

The ATA's legislative history makes clear Congress's view of the utility of civil suits for terrorism. For one, Congress sought to ensure a remedy where criminal charges may not be brought and to make terrorism "unprofitable" by allowing victims to constitute themselves as private attorneys general and seek the assets of individuals and entities supporting or financing acts of terrorism.\textsuperscript{48} The hope was that allowing civil liability would provide an extra

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

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

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


measure of deterrence, especially for entities that might financially support acts of terrorism while not engaging in violent acts directly.\textsuperscript{49}

In addition to the ATA, Congress has created a cause of action against state sponsors of terrorism and their agents within the Foreign Sovereign Immunities Act of 1976 (FSIA).\textsuperscript{50} Historically, states were immune from suit,\textsuperscript{51} subject to the whims of the executive. Later, an inclination toward restrictive immunity that withheld immunity for private acts of the state \textit{(jure gestionis)} while maintaining immunity over its public acts \textit{(jure imperii)} emerged. In 1976, Congress enacted the FSIA in many respects to codify the doctrine of restrictive immunity and depoliticize determinations of sovereign immunity. The FSIA reaffirmed immunity as a default defense in litigation against states\textsuperscript{52} and their agencies or instrumentalities,\textsuperscript{53} subject to a series of exceptions.\textsuperscript{54} Enumerated exceptions


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

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

\textsuperscript{53} The courts are split as to whether an individual may constitute an agency or instrumentality of a state. Compare Yousuf v. Samantar, No. 07-1893, 2009 U.S. App. LEXIS 189, at *2–3 (4th Cir. Jan. 8, 2009) ("[W]e conclude that the FSIA does not apply to individuals and, as a result, Samantar is not entitled to immunity under the FSIA."), with Belhas v. Ya’Alon, 515 F.3d 1279, 1283 (D.C.
include situations in which a foreign state has "waived its immunity either expressly or by implication," cases in which "the action is based upon a commercial activity carried on in the United States," and suits against a foreign state for "personal injury or death or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." Before the civil suit can proceed, the state in question must be afforded an opportunity to arbitrate the case if the conduct in question occurred on the state's territory. The FSIA also provides rules for service of process, personal jurisdiction, and the attachment and execution of the assets of foreign states. Trial is by a judge, rather than a jury.
Largely in response to the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, Congress amended the FSIA to create an additional exception to immunity for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). The exception is only applicable to states designated by the State Department as sponsors of terrorism, effectively re-politicizing certain determinations of foreign sovereign immunity. Additional legislative tinkering led to the creation of an express cause of action against individu-
ual officials, employees, and agents of designated foreign states acting in their personal capacities and against the states themselves.\textsuperscript{68} To bring suit, either the claimant or the victim must be a national of the United States, a member of the U.S. armed forces, or a particular type of employee or contractor of the U.S. government.\textsuperscript{69} The plaintiff need not, however, be a legal representative of the victim; rather, the plaintiff can allege his or her own economic damages, pain and suffering, claims for solatium, etc.\textsuperscript{70} In situations in which members of the armed forces are the victims of attack, some judges have required a showing that the victims were serving in non-combatant roles at the time of injury, although this is not an express requirement of the statute.\textsuperscript{71} A number of cases have proceeded themselves, but only against their officials, employees, and agents and only when these individuals were acting in their private—as opposed to official—capacities. Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1027 (D.C. Cir. 2004). Congress then passed a rider to the National Defense Authorization Act for Fiscal Year 2008 (the so-called Lautenberg Amendment) to expressly create a federal cause of action against terrorist states and to facilitate the enforcement of judgments. Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338-41 (codified at 28 U.S.C.A. § 1605A). The legislation in effect seeks to hold foreign states vicariously liable for the actions of their officials, employees, and agents. \textit{Id.} 

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


\textsuperscript{71} See, e.g., \textit{Estate of Heiser}, 466 F. Supp. 2d at 251 (finding that victims of the 1996 Khobar towers attack were engaged in a peacetime deployment in Saudi Arabia to monitor Iraq’s compliance with United Nations Security Council resolutions enforcing the cease-fire that had brought an end to the 1991 war with Kuwait); Blais v. Islamic Republic of Iran, 459 F. Supp. 2d 40, 47 (D.D.C. 2006) (same); Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46, 60 (D.D.C. 2003) (allowing suit to proceed because victims of the 1983 Beirut barracks bombing
against Libya, Iran, Iraq, and Cuba.\footnote{2} President Bush later waived the withholding of immunity for Iraq (2003),\footnote{3} Libya (2006),\footnote{4} and North Korea (2008).\footnote{5} Although Congress has specifically autho-

were engaged in a peacekeeping mission under peacetime rules of engagement). For a fuller discussion of the propriety of recognizing terrorism claims by members of the armed forces, see infra Part III.C.2.

72. \textit{See}, \textit{e.g.}, Cicippio \textit{v. Islamic Republic of Iran}, 18 F. Supp. 2d 62, 64 (D.D.C. 1998) (suit against Iranian agents arising out of terrorist act in Lebanon by Hezbollah, found to be financed by Iran); Alejandre \textit{v. Republic of Cuba}, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997) (suit on behalf of families of those killed when Cuban aircraft shot down two Brothers to the Rescue planes in 1996). Most of these cases proceed in default. \textit{See} Daliberti \textit{v. Republic of Iraq}, 97 F. Supp. 2d 38, 44 n.2 (D.D.C. 2000) (noting cases ending in default judgments). Where the state defaults, plaintiff must still establish her claim or right to relief “by evidence satisfactory to the court.” 28 U.S.C. § 1608(e). Some payments have been made to plaintiffs, in part as a result of legislation releasing blocked assets and other funds under the control of the U.S. Government. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(1), 114 Stat. 1464, 1543. That legislation also repealed the ability of victims to receive punitive damages against states. \textit{Id.} § 2002(f)(2), 114 Stat. at 1543; 28 U.S.C. § 1606 (“As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.”); \textit{see also ELSEA, supra} note 66, at 70 (detailing amounts paid). For a discussion of these cases, see Keith Sealing, \textit{“State Sponsors of Terrorism” Is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11}, 38 TEX. INT’L L.J. 119, 125, 127 (2003). There do not seem to be reported cases against Sudan or Syria. Only one case appears to have been filed against North Korea to date. \textit{See} Massie \textit{v. Gov’t of the Democratic People’s Republic of Korea}, No. 06-00749, 2008 U.S. Dist. LEXIS 104903 (D.D.C. Dec. 20, 2008) (in default proceeding, holding state liable for kidnapping, imprisoning, and torturing crew members of a U.S. military vessel in 1968).


rized such suits against state sponsors of terrorism, the executive branch has at times intervened against such suits or blocked assets from attachment to satisfy judgments. 76

The U.S. statutory scheme thus contains interlocking opportunities for U.S. citizens and claimants to sue individuals (both non-state and state actors) and state sponsors of terrorism directly for a variety of acts of international terrorism. In addition, where a state or state actor commits an act of terrorism within the United States, the domestic tort exception to immunity may apply, 77 even absent the state sponsor designation. 78 The Tel-Oren case coupled with these subsequent statutory developments contributed to the underutilization of the ATS in the terrorism context. 79 In 2004, however, the Supreme Court developed a definitive methodology for determining actionable claims under the "law of nations" prong of the ATS


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

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

79. Indeed, even the ATA was underutilized. It was a decade before the first case, Boim v. Quranic Literacy Institute, was filed. 127 F. Supp. 2d 1002 (2001), aff'd 291 F.2d 1000 (7th Cir. 2002).
that effectively overturned most of the D.C. Circuit judges’ objections to jurisdiction in *Tel-Oren*. This development invites a reconsideration of the potential for the ATS to support jurisdiction over civil terrorism claims as violations of customary international law. The extensive codification of terrorism crimes since *Tel Oren* at the international and domestic levels also invites a consideration into whether terrorism treaty crimes are sufficiently incorporated in U.S. law to activate the ATS’s treaty prong.

C. Expanding Civil Terrorism Litigation Via the Alien Tort Statute

Much of the judicial dissention in *Tel-Oren* was finally resolved in 2004, when the Supreme Court issued its long-awaited ruling in *Sosa v. Alvarez-Machain*. Most importantly, the Supreme Court ended a longstanding debate in the field and the academy as to whether the ATS provided a private cause of action for international law violations or whether the statute was primarily jurisdictional, that is, only addressing the power of the court to hear a certain class of case. The Court unanimously and unequivocally sided with the latter position based on the ATS’s placement in the Judiciary Act and then Title 28, its text and the original use of the term “cognizance,” and the fact that the Framers would not have elided

80. See discussion *supra* Part I.

81. 542 U.S. 692 (2004). Vis-à-vis other ATS cases, *Sosa* presented a unique set of facts and procedural history. The plaintiff, Dr. Humberto Álvarez-Machain, had already been before the Supreme Court once as a criminal defendant after he was abducted from Mexico in violation of a bilateral extradition treaty by agents of the U.S. government, who suspected him of participating in the torture of a Drug Enforcement Administration official. *Id.* at 698. Dr. Álvarez-Machain contested his abduction from Mexico all the way up to the Supreme Court. *Id.* Overturning both lower courts’ rulings, the Supreme Court applied the *male captus bene detentus* principle to hold that Dr. Álvarez-Machain’s abduction—although in violation of an extant treaty—did not deprive the federal courts of jurisdiction over the criminal charges against him. *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992). After winning a motion for acquittal, Dr. Álvarez-Machain turned around and sued the U.S. government, along with José Francisco Sosa, one of the Mexican nationals involved in his abduction, alleging among other things that his kidnapping amounted to a tort in violation of the law of nations. *Sosa*, 542 U.S. at 698.
the concepts of jurisdiction and cause of action. So, in this respect, Judge Bork of the D.C. Circuit was vindicated.

The Court did not stop there, however. In gleaning the First Congress’s intent in enacting the ATS, and by looking closely at the interaction between the ATS and what it termed the “ambient law of the era,” the Court concluded that certain international law torts would have been considered to be within federal common law at the time of the drafting of the ATS. 82 According to the Court’s account, although international law in 1789 primarily addressed the relations between states, there were subsets of international law rules that regulated the conduct of individuals and were amenable at that time to a judicial remedy in the event of their breach. 83 Some of these rules dealt with the law merchant, admiralty law, and the law of prize. 84 Other such rules were designed for the protection of individuals, but also touched upon state prerogatives. 85 This latter set of rules included the protections afforded ambassadors, the prohibitions against acts of piracy, and the norms governing safe conduct. 86 The Court opined that violations of rules within this subset of international law would have been actionable as international torts under the ATS at the time of its drafting. 87 Therefore, the ATS authorized federal jurisdiction and “the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” 88

82. Id. at 714.
83. Id. at 714–15.
84. Id. at 715.
85. Id.
86. Id.
87. Id.
88. Id. at 724. Under this framework, the ATS provides federal jurisdiction, international law provides the substantive standard or rule of decision, and the remedy is judicially created. See William R. Casto, The New Federal Common Law of Tort Remedies for Violations of International Law, 37 Rutgers L.J. 635, 640 (2006) (arguing that international law defines the substantive tort claim whereas federal common law defines the remedy and all other rules of decision). But see Aldana v. Del Monte, 416 F.3d 1242, 1246 (11th Cir. 2005) (interpreting (probably erroneously) the ATS as providing both jurisdiction and a cause of action). This type of disaggregation has other parallels in federal law. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, for example, the Court recognized common law causes of action for constitutional violations. 403
This aspect of the opinion was unanimous. The Court then split in considering the implications of the genesis of the ATS to contemporary cases. A majority of the Court—excluding Justices Scalia, Rehnquist, and Thomas—concluded that the statute operates today much as it did in 1789, which is to say that it authorizes suits in federal court where federal common law provides a private right of action for certain tortious violations of international law giving rise to individual responsibility. The dissenters argued that it was erroneous of the Court to grant a “discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.”

In considering the current reach of the ATS, the Sosa majority advocated a “restrained” approach toward the recognition of modern causes of action under the ATS, but left the core of the litigation largely intact. It found this cautiously permissive approach warranted by a “series of reasons.” These relate to the recognition that the courts now openly acknowledge that engaging in common-law lawmaking sits uneasily with contemporary concep-


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

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

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

92. Id. at 725; see Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 268 (2d Cir. 2007) (Katzmann, J., concurring) (arguing that the courts need not individually analyze each of these five reasons, because they are “already captured by” the “high bar to new private causes of action’ set by the requirement that a claim be accepted by the civilized world and defined with a sufficient degree of specificity” (quoting Sosa, 542 U.S. at 727)).

93. This portion of the Court’s opinion seems at times to conflate two distinct concepts: the federal common law and the now extinct “general law” first endorsed by the Court in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). See Sosa, 542 U.S. at 725–26 (invoking concepts of the general law and common law interchangeably). The latter once reigned in diversity actions in which there was no operative state statute as a result of what later proved to be a stilted interpretation of the Rules of Decision Act, 28 U.S.C. § 1652 (2006). The general law met its demise in Erie R.R. v. Tompkins, in which the Court ruled that federal courts apply
tions of the separation of powers, the comparative institutional competencies of courts and legislatures, and our tradition of legislative primacy in substantive lawmaking. The Court also noted that attempts to craft remedies for violations of international law may have “adverse foreign policy consequences” or impinge “on the discretion of the Legislative and Executive Branches in managing foreign affairs.” Finally, the Court could identify no modern Congressional mandate to engage in judicial creativity and “seek out and define new and debatable violations of the law of nations,” although it did note the modern passage of the TVPA and its legislative history suggesting that the ATS should “remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.”

As a result of the Sosa analysis, the consideration of claims under the ATS now involves a two-step inquiry. This inquiry begins with the threshold jurisdictional question: are the elements of the ATS satisfied, i.e., (1) has an alien sued (2) for a tort (3) committed in violation of the law of nations? The third part of this analysis requires a showing that the rule in question governs the

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

95. Id. at 727–28.

96. Id. at 728 (citing 138 Cong. Rec. 8071 (1992)).

97. See Khulumani, 504 F.3d at 266 (Katzmann, J., concurring) (“[W]hether jurisdiction exists and whether a cause of action exists are two distinct inquiries.”).
particular type of defendant. This first inquiry is resolved solely with reference to the familiar sources of international law as set forth in Article 38 of the Statute of the International Court of Justice and as famously demonstrated in The Paquet Habana, United States v. Smith, and Filartiga. As a result, determining whether the conduct alleged is a violation of international law does not invite or require any act of judicial discretion because the international rule either exists or it does not exist.

By contrast, the second element of the inquiry does require an act of judgment on the part of the court. If jurisdiction is proper because the alleged act constitutes a violation of international law, the federal courts must decide whether they should recognize a private cause of action for that violation. Although the Court declined to adopt exhaustive criteria for determining when a court

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98. Sosa, 542 U.S. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."); see also id. at 760 (Breyer, J., concurring) ("The norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.").
99. Id. at 733 (majority opinion) (directing courts to glean "the current state of international law, looking to those sources we have long, albeit cautiously, recognized").
101. 175 U.S. 677, 700 (1900).
103. 630 F.2d 876, 880–81 (2d Cir. 1980) (canvassing international law sources and finding a definitive prohibition against torture).
104. See Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 266 (2d Cir. 2007) (noting that question of whether jurisdiction exists under the ATS is "resolved solely by reference to international law"); id. at 268 (arguing that the district court "inappropriately injected a discretionary element into the determination of whether it had jurisdiction under the [ATS]").
105. Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004) (noting that the determination of whether to recognize a new cause of action "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts").
106. Id. at 732 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350 . . . ." (emphasis added)); see In re S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004) ("[T]he Sosa decision did not deliver the definitive guidance in this area that some had come to
should “accept[] a cause of action subject to jurisdiction under” the ATS, the Court did rule that the ATS supported jurisdiction over a “narrow class of international norms . . . of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms we have recognized.” In other words, norms comparable in status to the trilogy of norms mentioned by Blackstone—rules governing safe conduct, outlawing piracy, and protecting ambassadors—are actionable under the ATS today.

In setting forth this “limit upon judicial recognition” of actionable norms, the Court essentially ratified the test that had developed pre-Sosa for determining actionable norms under the ATS. Under that test, courts would evaluate whether the norm in question was sufficiently “specific, universal and obligatory” to constitute a rule of international law and not merely an emerging rule or aspirational lex ferenda. Thus, the federal courts are empowered to recognize private causes of action for breaches of

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108. Id. at 725 (emphasis added); see also id. at 732 (cautioning the federal courts not to allow “private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted”); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116–17 (2d Cir. 2008) (“Whether an alleged norm of international law can form the basis of an ATS claim will depend upon whether it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world.”).
109. Sosa, 542 U.S. at 738 (noting the courts’ “residual common law discretion” to create causes of action under federal common law to remedy the violation of certain international law norms).
110. Id. at 731 (“The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided Filartiga.”); id. at 732 (“This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.”); id. at 747–48 (Scalia, J. concurring) (noting that the Court essentially endorsed the reasoning of the Ninth and Second Circuits).
111. Id. at 748–49; see, e.g., Hilao v. Estate of Marcos (In re Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”).
112. Sosa, 542 U.S. at 729.
modern international law, by “adapting the law of nations to private rights” and recognizing “further international norms as judicially enforceable today.” The Court noted that in drafting the ATS, Congress implicitly assumed that the “federal courts could properly identify some international norms as enforceable in the exercise of [the ATS].” In addition to the determination of “whether a norm is sufficiently definite to support a cause of action,” courts will also have to consider “the practical consequences of making that cause available to litigants in the federal courts” as well as other prudential concerns.

With respect to Dr. Álvarez-Machain’s claims, the Court concluded that the conduct alleged—an arrest and 12-hour period of detention lacking authorization in any applicable law followed by transfer to lawful authorities—violated “no norm of customary international law so well defined as to support the creation of a federal remedy.” With the outcome, human rights litigants lost the battle in Sosa, but won the war.
Justice Breyer, in concurrence, focused on “one further condition” for whether federal courts should recognize a new cause of action for an international law tort: whether there is a procedural consensus that the norm in question is subject to universal jurisdiction. He proposed that in adjudicating ATS claims, courts should consider not only “substantive uniformity” among the legal systems of the world in relation to the elements of a particular offense and the identity of potential perpetrators, but also whether there is an international “procedural agreement” as to whether such norms are subject to extraterritorial enforcement through principles of universal jurisdiction. Under Justice Breyer’s approach, confirming that the norm in question is subject to criminal universal jurisdiction would ensure that the extraterritorial adjudication of the norm in the United States is consistent with principles of comity and with the general international law rules governing the exercise of extraterritorial jurisdiction. Turning to the claims in question, Justice Breyer found no procedural agreement that the treatment accorded to Dr. Álvarez-Machain would support the exercise of criminal universal jurisdiction. He thus concurred that the norm’s non-recognition in the instant case was appropriate.

III. THE INTERNATIONAL PROHIBITION AGAINST CRIMES OF TERRORISM

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

122. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).
123. *Id.* at 761–62.
124. *Id.* at 763.
125. *Id.*
126. *Id.*
A primary hurdle to invoking the ATS in the terrorism context remains the problem of definition. Although there have been efforts to define terrorism under international law for decades, an omnibus treaty or universal definition condemning terrorism in all circumstances and in all its manifestations continues to elude the international community. Indeed, international instruments condemning terrorism have at times carved out exceptions for putatively legitimate struggles—such as those waged by national liberation movements and groups asserting the right of self-determination—perpetuating the now trite adage that "one man's terrorist is another man's freedom fighter." In particular, a core group of states remains unwilling to condemn acts of violence committed by such non-state actors against the members of the target state's armed forces, even outside of an armed conflict situation. These difficulties reflect doctrinal challenges in properly demarcating the domain of international humanitarian law, where certain forms of violence are deemed privileged, as well as lingering normative ambivalence about the utility, propriety, and legality of resorting to violent tactics in certain political contexts. As a result of this historically tepid international commitment to condemn all acts of terrorism in all circumstances, codification efforts have yielded a number of treaties that require state parties to criminalize specific

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

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

129. Many of these states assert reservations to this effect when they ratify treaties that do not recognize such exceptions. See infra notes 169–173 and accompanying text.
terrorist acts or methods (such as hijacking or attacking internationally protected persons), but no inclusive definition.

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

\textit{A. International Treaty and Customary International Law}

The approach of the international community toward terrorism has largely been to endeavor to combat it without defining it.\textsuperscript{131} The League of Nations embarked upon the first major attempt in the modern era to codify the crime of terrorism under international law after the 1934 assassination of King Alexander of Yugoslavia and others by Croatian separatists in France. The 1937 treaty—the Convention for the Prevention and Punishment of Terrorism—defined terrorism as follows: "All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public."\textsuperscript{132} The treaty attracted twenty-four state signatories, only

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

\textsuperscript{131} Gilbert Guillaume, \textit{Terrorism and International Law}, 53 INT'\textsc{L} & COMP. L.Q. 537, 539 (2004).

one of which (India) ultimately ratified the Convention. The onset of World War II scuttled any further efforts to bring the treaty into effect; after the dissolution of the League of Nations, the treaty was never revived.

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

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

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


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

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

By way of examples from the United Nations’ political branches, the General Assembly issued its Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes in 1973, which declared that “[t]he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with principles of international law.” Even as late as 1991, a General Assembly Resolution denounced terrorism, but in virtually the same breath, reaffirmed “the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle


legitimately to this end and to seek and receive support in accordance with the principles of the Charter.”141 Several years later, however, the General Assembly signaled a shift in its collective thinking in its approval of a Declaration on Measures to Eliminate International Terrorism.142 The Declaration more clearly stated that criminal acts “intended or calculated to provoke a state of terror in the general public . . . for political purposes are in any circumstance unjustifiable,” regardless of any ideological or other causes that may be invoked to justify them.143 The Declaration further required Member States to refrain from organizing, instigating, assisting, or participating in terrorist acts in territories of other States or acquiescing in or encouraging activities within their own territories directed towards the commission of such acts.144

It was not until 1992 and in response to the bombing of Pan Am Flight 103 that the Security Council officially declared terrorism to be a threat to international peace and security.145 Building on this resolution, Security Council Resolution 1373, issued pursuant to Chapter VII in the weeks following the attacks of September 11th, among other things obliged all states of the world to criminalize, prohibit, and prevent various aspects of the financing or sponsorship of terrorism, effectively rendering select provisions of the International Convention for the Suppression of the Financing of

143. G.A. Res. 51/210, supra note 142, ¶ 3.
144. Id. ¶ 5. These ideals were reaffirmed in the United Nations World Summit, a high-level summit of the 60th General Assembly, wherein states “strongly [condemned] terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.” World Summit Outcome, G.A. Res. 60/1, ¶ 81, U.N. Doc. No. A/Res/60/1 (Oct. 24, 2005).
Terrorism\textsuperscript{146} binding on all United Nations member states.\textsuperscript{147} Notwithstanding this dedicated resolution, the Council did not define terrorism, leaving it up to states to implement those obligations based upon their own understanding of the concept. The Resolution also established a Counter-Terrorism Committee, whose directorate monitors state compliance with the anti-terrorism framework and encourages countries to adjust their domestic law as necessary.\textsuperscript{148} Subsequently, Council Resolution 1566, issued after the 2004 bombings in Madrid and the attack on a school in Russia, condemned the following:

\begin{quote}
[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act . . . .\textsuperscript{149}
\end{quote}

This language reads like a definition of terrorism, but the Council did not explicitly identify this provision as such, and this language was followed by a clause indicating that such acts "constitute offenses within the scope of and as defined in the

\begin{footnotes}
\item[147] The Resolution also called upon states to ratify the "relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999," effectively adopting the provisions of those treaties. S.C. Res. 1373, ¶ 3(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001). Controversially, Resolution 1373 made no reference to international human rights. This was later remedied in part by Resolution 1456, which declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003).
\end{footnotes}
international conventions and protocols relating to terrorism."\textsuperscript{150} Resolution 1566 also contemplates an international compensation fund for victims of terrorist acts that would be financed through voluntary state contributions and assets seized from terrorist groups.\textsuperscript{151} Subsequently, Resolution 1624 (2005) obliged states to prohibit "incitement to commit a terrorist act,"\textsuperscript{152} and Resolution 1822 (2008) expanded the list of targeted individuals and entities beyond al Qaeda, Osama bin Laden, and the Taliban to include "other individuals, groups, undertakings and entities associated with them."\textsuperscript{153}

In 2003, then-U.N. Secretary General Kofi Annan convened a High Level Panel on Threats, Challenges and Change to "assess current threats to international peace and security; to evaluate how our existing policies and institutions have done in addressing those threats; and to make recommendations for strengthening the United Nations so that it can provide collective security for all in the twenty-first century."\textsuperscript{154} The Report focused on terrorism as one such threat and stressed the need to identify and eliminate root causes, counter extremism and intolerance, develop collective counter-terrorism methods, build state capacity to prevent terrorist recruitment and operations, and control dangerous materials, all without sacrificing important human rights and rule of law values.\textsuperscript{155} The Report also called upon the international community to develop a comprehensive definition of terrorism within a comprehensive convention.\textsuperscript{156} This

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

\textsuperscript{151} Id. \S 10.


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

\textsuperscript{154} The Secretary-General, Note by the Secretary-General, \S 3, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004).

\textsuperscript{155} Id. \S 148.

\textsuperscript{156} Id. \S 157–59. See also World Summit Outcome, supra note 144, \S 83.
definition, the Panel urged, should consolidate existing counter-terrorism instruments and describe terrorism as:

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

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

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

\(^{157}\) Id. \& 164(d).

\(^{158}\) Id. \& 157.


\(^{162}\) International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. TREATY DOC. NO. 106-6, 2149 U.N.T.S. 256 [hereinafter Bombing Convention]. The international community promulgated this treaty in
financing, and the development or use of biological or chemical weapons of mass destruction. Many of these multilateral treaties are well-subscribed to, indicating a high degree of acceptance within the international community of the prohibitions they contain and the enforcement mechanisms they mandate.

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

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [any violation of an annexed treaty].


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


166. Financing Convention, supra note 146, art. 2(1).
The treaty then comes close to an omnibus definition when it additionally calls for the domestic criminalization of the financing of:

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

These treaties reject all political, philosophical, ideological, racial, ethnic, and religious grounds that may be advanced to excuse or justify the commission of prohibited acts. 168 Nonetheless, certain states continue to make reservations to these treaties that exempt the treaties' application in situations in which groups are exercising rights of self-determination. For example, in connection with its ratification of the Bombing Convention, Pakistan submitted a declaration stating that "nothing in this Convention shall be applicable to struggles, including armed struggles, for the realization of [the] right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of interna-

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

168. See, e.g., Financing Convention, supra note 146, art. 5 (requiring parties to adopt necessary measures, including domestic legislation, to prevent use of such justifications).
Egypt, Jordan, and the Syrian Arab Republic made similar declarations with respect to the Financing Convention. For example, Egypt included the following statement upon ratification of the treaty: "[w]ithout prejudice to the principles and norms of general international law and the relevant United Nations resolutions, the Arab Republic of Egypt does not consider acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination, as terrorist acts within the meaning of ... the Convention." These reservations reflect language contained in the League of Arab State’s Convention on the Suppression of Terrorism, which provides at Article 2(1) that:

Any act committed in a situation of a struggle by any means, including the armed struggle against foreign occupation and aggression, for liberation and self-


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

171. Id.

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

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources.

Id. art. 1.1. The Arab League Convention also incorporated by reference other terrorism treaties. Id. art. 1.2.
determination, according to the principles of international law is not to be considered a crime. Those acts taken in defense of the soil unity of any Arab state are also not to be considered crimes.\footnote{173}{Id. art. 2(a).}

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
(c) Damage to [such] property, places, facilities or systems . . . resulting in or likely to result in major economic loss when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.\(^{177}\)

The current language envisions that if a sectoral treaty and the Comprehensive Convention are both applicable, the terms of the former would prevail.\(^{178}\)

Negotiations on this effort have stalled because delegates have been unable to agree on the scope of the Convention vis-à-vis international humanitarian law (i.e., the law of war) and whether the treaty would address state terrorism.\(^{179}\) As discussed more fully below,\(^{180}\) these two stumbling blocks are interrelated. In particular, delegates have struggled with determining when national liberation and self-determination movements have the right to use force without risking condemnation and prosecution for committing terrorism.\(^{181}\) In addition, some delegates have favored excluding


\(^{178}\) Id. app. II, art. 3.

\(^{179}\) Id. app. I, at 5 (reproducing Jordanian proposal to this effect).

\(^{180}\) See infra Part III.C.2.

\(^{181}\) See generally Mahmoud Hmoud, Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention, 4 J. INT’L CRIM. JUST. 1031 (2006) (discussing the various issues that have proven problematic in defining the crime of terrorism); Ctr. for Nonproliferation Studies, Draft Comprehensive Convention on International Terrorism (August 11, 2006),
situations covered by international humanitarian law from the treaty altogether, while others want any attack against civilians or other protected persons to fall within the terrorism framework, even if committed within an armed conflict when humanitarian law would also apply.\footnote{182}{http://cns.miis.edu/inventory/pdfs/intltterr.pdf (illustrating a draft of the compromise).}


\begin{quote}[A]ny act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
\end{quote}
Similar concerns led to the exclusion of terrorism crimes from the statute of the International Criminal Court. The developments toward a greater recognition and articulation of both the illegitimacy and illegality of acts of terrorism largely post-dated the promulgation of the Rome Statute of the International Criminal Court (ICC),\(^\text{183}\) which was finalized in 1998.\(^\text{184}\) The lack of a consensus definition for the crime of terrorism was one of the primary reasons that drafters excluded terrorism from the ICC’s jurisdiction.\(^\text{185}\) Early drafts of the Statute, however, did contemplate some jurisdiction over terrorism crimes. As originally conceived, the ICC’s constitutive statute was to be primarily procedural in nature, incorporating by reference the “core” international crimes of genocide, crimes against humanity, and war crimes as defined by customary international law (CIL) along with certain “treaty crimes” set forth in discrete multilateral treaties, such as those addressing terrorism, drug trafficking, money laundering, and the like.\(^\text{186}\) To that end, nine of the terrorism treaties referenced above (e.g., those addressing terrorism against aircraft, ships, hostages, and diplomats) were included in an annex to the original statute.\(^\text{187}\)

Early on in the negotiations, delegates expressed concern that customary international law would not define the relevant ICC crimes as clearly as would be necessary to provide adequate notice to

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\(^{\text{183}}\) OAU Convention, \textit{supra}, art. 1.3.


\(^{\text{186}}\) \textit{Id.} at 17.

\(^{\text{187}}\) \textit{Id.}
an accused pursuant to the principle of nullum crimen sine lege.\textsuperscript{188} In addition, with respect to treaty crimes, delegates anticipated that it would be necessary to confirm that the treaty was in force with respect to the relevant states (e.g., the territorial and nationality state) for a prosecution to proceed. These concerns led states to agree to set out the definitions of all the crimes in the Statute (and later adopt Elements of Crimes) rather than incorporate such crimes by reference to pre-existing treaties or CIL. Accordingly, a consolidated text of the ICC Statute included a more universal definition of terrorism, which was reminiscent of the 1937 Convention and defined the crime as:

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

As the negotiations proceeded at the 1998 Rome Conference, the treaty crimes eventually either fell out of the Statute, as was the case with terrorism \textit{stricto sensu} and drug trafficking, or were incorporated into the core crimes, as was the case with respect to crimes against internationally protected persons (which are enumerated as war crimes at Article 8(2)(b)(iii)) and apartheid (which is listed as a crime against humanity at Article 7(1)(j)).\textsuperscript{190} With respect to the crime of terrorism, drafters articulated several reasons for eventually excluding the crime from the Statute.


\textsuperscript{190} Martinez, \textit{supra} note 185, at 17–19, 33, 37.
altogether: (1) terrorism has no universally accepted definition; (2) terrorism was not considered to be one of “the most serious crimes of international concern” as contemplated by Article 1 of the ICC Statute; (3) at the time, terrorism was not clearly recognized as a crime under customary international law; (4) including crimes of terrorism would unnecessarily politicize the ICC; and (5) there are alternative venues for terrorism prosecutions such that establishing international jurisdiction would be unnecessary or duplicative. In addition, delegates were committed to concluding the treaty in five weeks, and the inclusion of terrorism was proving to be a sticking point in the negotiations.

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

Terrorism was also excluded under the rationale that effective systems of national and international cooperation are already in place for the prosecution of terrorism crimes. Because governments are usually the direct or indirect target of terrorist acts, states are highly

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194. Id. at 133. This argument of course overlooks the fact that many of the crimes within the jurisdiction of the Court have significant political ramifications, not the least of which is the as yet undefined crime of aggression. See Richard John Galvin, The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution, 13 U. MIAMI INT’L & COMP. L. REV. 1 (2005) (exploring the prospect of a politicized prosecution in the ICC directed against the U.S. military).
motivated to prosecute acts of terrorism through criminal actions or to encourage the pursuit of civil actions by victims. Indeed, as compared to the so-called "atrocity crimes," terrorism crimes are more often incorporated into domestic penal codes and are more frequently prosecuted by states. Given this, it was argued, the principle of complementarity will likely prevent the prosecution of acts of terrorism before the ICC in many cases. Moreover, effective counter-terrorism measures require "long-term planning, infiltration into the organizations involved, the necessity of giving immunity to some individuals involved, and so forth"—all functions more effectively exercised by national jurisdictions than an international court far from the events in question and the relevant political milieu.


198. ICC Statute, supra note 183, art. 17. The principle of complementarity is fundamental to the ICC framework and provides that the Court will exercise jurisdiction only where the relevant domestic authorities (e.g., the territorial and nationality states) are either unwilling or unable to prosecute offenders. Notably, complementarity is not triggered, at least according to the plain text of Article 17, where the domestic courts are overly zealous about terrorism prosecutions or where the defendant’s due process rights are potentially in jeopardy—two risks for terrorism prosecutions where the state is the target of the acts in question. See Kevin Jon Heller, The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process, 17 CRIM. L.F. 255, 261 (2006).

199. Arsanjani, supra note 191, at 29.
Principal supporters of including terrorism in the ICC Statute were Algeria, India, Sri Lanka, and Turkey—all states facing serious internal terrorist threats. During the drafting of the Rome Statute, states advocating the inclusion of the various treaty crimes formed an alliance that reflected substantive overlap (in narco-terrorism) as well as the recognition that it would be an uphill battle to include crimes other than the core international crimes in the Statute. At one point, this alliance (consisting of states as varied as Barbados and India) argued for a “compromise” that would list the treaty crimes in Article 5 and then leave their definition to another day, as was the approach taken with respect to the crime of aggression. An alternative proposal advocated for the inclusion of terrorism as an enumerated crime against humanity rather than as a standalone crime. Much opposition to the inclusion of treaty crimes came from NGO participants, who feared that these crimes would distract and overwhelm the Court at the expense of the atrocity crimes.

In the end, most of the treaty crimes were excised or limited, and the final Statute asserts jurisdiction over only four core crimes—genocide, crimes against humanity, war crimes and the crime of aggression, with the latter remaining without a definition. Some drafters remained uneasy with this result and managed to promulgate Resolution E at the Rome Conference, which recommended that a review conference to be assembled in 2010 consider the inclusion of the crime of terrorism. As this Conference approaches, many states and scholars continue to argue that terrorism should be included within the Court’s jurisdiction. In particular, these

201. Martinez, supra note 185, at 19.
202. Id. at 18–19.
203. See id. at 18 (listing reasons the Court does not address treaty crimes).
204. Id. at 18–19.
advocates question the assumption made during the Rome Conference—which occurred in 1998, prior to the attacks of September 11, 2001—that terrorism is not a serious crime of international concern. They argue that terrorism represents a substantial and growing threat, especially given the possibility of attacks with nuclear, chemical, or biological weapons of mass destruction.

Only one ad hoc tribunal will assert jurisdiction over terrorism stricto sensu: the Special Tribunal for Lebanon (STL). The STL is a hybrid tribunal established by the United Nations and Lebanon to investigate and prosecute those “responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others.” The Tribunal has a mandate to apply the laws of Lebanon “relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy.” Article 314 of the Lebanese Penal Code (LPC), one of several terrorism-related provisions that may be litigated before the STL, “defines ‘terrorist


210. Id. art. 2.
acts' as all 'acts designed to create a state of alarm which are committed by means such as explosive devices, inflammable materials, poisonous or incendiary products or infectious or microbial agents likely to create a public hazard.'\(^\text{211}\) The *mens rea* requires knowledge and a will to commit the terrorist act along with a specific intent to create a state of alarm or fear.\(^\text{212}\) The STL is thus a quasi-international tribunal effectively specializing in the law of terrorism. As such, its jurisprudence may be persuasive as other tribunals consider terrorism crimes in the future.

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


\(^{212}\) Id. at 1133.


\(^{215}\) See 18 U.S.C. § 2332(f) (providing for penalties for unlawfully delivering, placing, discharging, or detonating an explosive in a public place).
Convention. In addition, the U.S. has a number of code provisions criminalizing various forms of attack against U.S. citizens or personnel within the United States that do not find expression in any penal terrorism treaty, including acts of murder, assault, or attacks with weapons of mass destruction.

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

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

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

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

1. The Objective Element: Violent Acts Otherwise Criminal

Terrorism, like other international crimes (e.g., crimes against humanity or war crimes), is an umbrella crime that encompasses a number of constitutive criminal acts. All definitions of terrorism contain an enumerated set of violent acts (or the threat thereof) whose territorial commission would normally be penalized under domestic law (assault, torture, murder, mayhem, arson, rockets, missiles, or mines). Id. § 2332a(c). No terrorist motive need be shown. There is no exception for acts of war, but the provision criminalizes only conduct committed “without lawful authority,” which would likely exclude the use of such weapons by privileged belligerents. Id. § 2332a(a).

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

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

\begin{itemize}
\item \textsuperscript{220} See, e.g., 18 U.S.C. § 2331(a)(A) (2006) (defining terrorism as involving “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State”).
\item \textsuperscript{221} Supra note 146.
\item \textsuperscript{222} See discussion supra note 38 on the U.S. material support statutes.
\item \textsuperscript{223} See Antonio Cassese, The Multifaceted Criminal Notion of Terrorism in International Law, 4 J. INT’L CRIM. JUST. 933, 935 (2006) (finding a customary rule prohibiting international terrorism).
\item \textsuperscript{224} Bombing Convention, supra note 162, art. 2(2)–(3).
\end{itemize}
acts of terrorism committed within armed conflicts may also constitute war crimes, so long as there is a nexus between the act and the armed conflict.\textsuperscript{225} The conventional war crimes are found in the grave breaches regimes of the Geneva Conventions and Protocol I, which prohibit certain acts when committed against persons protected by those conventions, namely civilians and prisoners of war.\textsuperscript{226} Many of these crimes involve the same conduct that often constitute acts of terrorism, such as willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful confinement, the taking of hostages, and the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. Under classic treaty IHL, these acts only constitute war crimes when committed within the context of an international armed conflict.\textsuperscript{227} The \textit{ad hoc} international criminal tribunals\textsuperscript{228} have consistently

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\item \textsuperscript{225} See \textit{In re Sinaltrainal Litig.}, 474 F. Supp. 2d 1273, 1287–89 (S.D. Fla. 2006) (rejecting plaintiffs’ war crimes claims where plaintiffs failed to allege a state of armed conflict); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005) (recognizing customary international law war crime of attacking civilians based on the Geneva Conventions and their incorporation into U.S. law); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1139–40 (C.D. Cal. 2002) (“Courts have held that a violation of the law of war may serve as a basis for a claim under the [ATS].”), aff’d in part, rev’d in part, vacated in part, 487 F.3d 1193 (9th Cir.), and reh’g en banc granted, 499 F.3d 923 (9th Cir. 2007). \textit{But see Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.}, 517 F.3d 104, 119–20 (2d Cir. 2008) (finding inadequate support in the law for plaintiffs’ claims that the deployment of Agent Orange in the Vietnam War violated customary international law prohibitions against the use of poisoned weapons and the infliction of unnecessary suffering on grounds that Agent Orange was used as a defoliant and not as an intentional poison to target human populations).
\item \textsuperscript{227} See Protocol I, supra note 226, art. 1 (limiting application of the Protocol to international conflicts and excluding situations of disturbances and strife); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (same).
\item \textsuperscript{228} \textit{See}, e.g., Prosecutor v. Tadic, No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 83 (Oct. 2, 1995) (announcing framework for adjudicating war crimes in non-international armed conflicts).
\end{itemize}
\end{footnotesize}
identified and adjudicated parallel customary international law prohibitions within non-international armed conflicts.\textsuperscript{229} In addition to the treaties' enumerated grave breaches, there is a rich customary international law\textsuperscript{230} of war crimes that includes prohibitions drawn from the Hague-law wing of IHL.\textsuperscript{231} These include the crimes of intentionally directing attacks against civilians and civilian objects, utilizing force disproportionate to any military advantage gained, attacking undefended towns or buildings, attacks against cultural property, using treachery to kill or wound, employing poisonous or asphyxiating weapons or weapons that are calculated to cause unnecessary suffering, etc.\textsuperscript{232}

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

\begin{itemize}
\item \textsuperscript{230} \textit{E.g.}, \textsc{Jean-Maeri Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law} 574–767 (2005).
\item \textsuperscript{231} Hague law derives from a series of conventions concluded in the Hague in 1899 and 1907 that aim to regulate the means and methods of warfare. \textit{See, e.g.}, Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 247 [hereinafter 1907 Hague Convention].
\item \textsuperscript{232} \textit{But see} Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 122 (2d Cir. 2008) (noting that many of the IHL norms (particularly those concerning the means and methods of warfare) "are all simply too indefinite to satisfy \textit{Sosa}’s specificity requirement"); \textit{id.} ("As Plaintiffs’ expert opined, ‘norms that depend on modifiers such as “disproportionate” or “unnecessary” . . . invite a case-by-case balancing of competing interests . . . [and] black-letter rules become vague and easily manipulated. They lose the definite and specific content that \textit{Sosa} seems to demand for recovery under the ATS.’").
\item \textsuperscript{233} Article 3 of the ICTY Statute provides for jurisdiction over an exemplary list of violations of "the laws and customs of war." Statute of the International Tribunal art. 3, May 23, 1993, 32 I.L.M 1192.
\item \textsuperscript{234} Protocol I, \textit{supra} note 226, art. 51(2). The Fourth Geneva Convention protecting civilians and governing situations of occupation also prohibits "all measures . . . of terrorism against civilians." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Convention]. These prohibitions are not part of the grave breaches regime; as such, contracting parties are not obliged
\end{itemize}
Article 13 of Additional Protocol II,\textsuperscript{235} which identically provide that the "civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."\textsuperscript{236} Neither of these provisions contemplates individual criminal liability or defines "inflicting terror" as a criminal offense. Nonetheless, the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized the crime under customary international law\textsuperscript{237} as a variant of the well-established customary international law crime of "making the civilian population or individual civilians the object of attack."\textsuperscript{238} The ICTY set out the following elements of the crime of terrorizing the civilian population as follows:

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

\begin{footnotes}
\item[235] Protocol II, \textit{supra} note 227, art. 13. Protocol II also prohibits "acts of terrorism" against "all persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted." \textit{Id.} art. 4(1).
\item[236] Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 12 (Dec. 5, 2003). \textit{See also} Prosecutor v. Strugar, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶ 10 (Nov. 22, 2002) ("[T]he principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law.").
\item[237] The ad hoc tribunals have recognized a number of war crimes that do not also constitute "grave breaches" of the Conventions. These crimes are not subject to the Conventions' mandatory universal jurisdiction regime, but universal jurisdiction remains permitted under the treaties. \textit{See, e.g.}, Civilian Convention, \textit{supra} note 234, art. 146 ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches.").
\item[238] \textit{Galic}, Case No. IT-98-29-T, Judgment, ¶ 27.
\end{footnotes}
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.\textsuperscript{239}

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

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

\textsuperscript{240} Statute of the International Tribunal for Rwanda art. 4(d), Nov. 8, 1994, 33 I.L.M. 1602; The Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, annex art. 3(d), delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000). Likewise, the Department of Defense listed terrorism as a crime prosecutable by military commission, although it did not designate it as a war crime per se. See Dep't of Def., Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission § 6(B) (2003), http://www.defenselink.mil/news/May2003 /d20030430milcominstno2.pdf (defining the crime of terrorism to involve the intentional killing or infliction of bodily harm on persons with the intent to intimidate or coerce a civilian population or to influence the policy of a government by intimidation or coercion, when such conduct takes place in the context of and in association with an armed conflict and did not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties).

nexus between the act and the armed conflict, although this latter element has been very loosely interpreted.\textsuperscript{242}

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

\textsuperscript{242} The International Criminal Tribunal for the former Yugoslavia has ruled that to satisfy the nexus requirement, it must be shown that the armed conflict “played a substantial part in the perpetrator’s ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed;” it was enough if, as in the present case, “the perpetrator acted in furtherance of or under the guise of the armed conflict.” Prosecutor v. Kunarac, Case No. IT-96-23-A & IT-96-23/1-A, Judgment, ¶ 58 (June 12, 2002). The Department of Defense has indicated that such a nexus could involve, but is not limited to, the time, location, or purpose of the conduct in relation to the armed hostilities. \textsc{Dep't of Def.}, \textit{supra} note 240, § 5(C).

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

\textsuperscript{244} ICC Statute, \textit{supra} note 183, art. 7.
crimes against humanity of torture, rape, etc.\textsuperscript{245} Post-\textit{Sosa}, U.S. courts have consistently found properly pled crimes against humanity claims to be actionable under the ATS.\textsuperscript{246}

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

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

\begin{enumerate}
\item \textsuperscript{245} Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, 637-43 (May. 7, 1997).
\item \textsuperscript{246} \textit{See Almog,} 471 F. Supp. 2d at 274 (sustaining state claims under ATS as violations of international law); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 467–68 (S.D.N.Y. 2006) (sustaining crimes against humanity claims); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1180–81 (C.D. Cal. 2005) (denying a motion to dismiss claims brought under ATS); \textit{In re Agent Orange Prod. Liab. Litig.,} 373 F. Supp. 2d 7, 136 (E.D.N.Y. 2005) (“Crimes against humanity are also deemed to be part of \textit{jus cogens}—the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law.”). This line of cases is consistent with pre-\textit{Sosa} jurisprudence. \textit{See Flores v. S. Peru Copper Corp.,} 343 F.3d 140, 150 n.18 (2d Cir. 2003) (“Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.”); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002) (“It is well-settled that a party who commits a crime against humanity violates international law and may be held liable under the [ATS].”).
\item \textsuperscript{248} \textit{See Almog,} 471 F. Supp. 2d at 476 (sustaining complaint containing genocide claims in the face of a motion to dismiss alleging the failure to plead state action).
\end{enumerate}
crimes or crimes against humanity. Likewise, where the perpetrator
does not act with the requisite specific intent, or where no protected
group is targeted, the prohibition against genocide does not apply.\textsuperscript{249}
The commission of physical harm by non-state actors without any
particular interrogatory or discriminatory purpose may be actionable
as terrorism where the prohibition against torture would not apply.\textsuperscript{250}

Litigating acts that fall outside of other international criminal law
prohibitions under the ATS thus requires the existence of a standa-
lone prohibition against terrorism. Even where the acts in question
implicate multiple international criminal law prohibitions, there is
expressive value in concurrent pleading, as each tort includes
elements not contained in the other. Calling violent acts both crimes
against humanity and acts of terrorism, for example, enables the
court to emphasize both the existence of a widespread and systematic
attack against a civilian population as well as the terrorist objectives
behind the attack, which may not be apparent were the acts not also
deemed acts of international terrorism.\textsuperscript{251}

2. Individual Responsibility

The majority of the universal treaties address themselves to
individual—as opposed to state\textsuperscript{252}—liability.\textsuperscript{253} In addition, the

\textsuperscript{249} Genocide Convention, \textit{supra} note 247, art. II.

\textsuperscript{250} Convention Against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, \textit{supra} note 30, art. 1 (defining torture in terms of state
action and requiring that it be committed "for such purposes as obtaining from [the
victim] or a third person information or a confession, punishing him for an act he
or a third person has committed or is suspected of having committed, or intimidat-
ing or coercing him or a third person, or for any reason based on discrimination of
any kind").

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

\textsuperscript{252} Notable exceptions are the 1972 Bacteriological Weapons Convention,
\textit{supra} note 164, and the 1993 Chemical Weapons Convention, \textit{supra} note 164,
which contain no penal provisions and create only state, rather than individual,
obligations. Resolutions and declarations emerging from U.N. bodies are also
(Feb. 17, 1995) ("States, guided by the purposes and principles of the Charter of
the United Nations and other relevant rules of international law, must refrain from
treaties are, on the whole, oriented toward penal enforcement, although some do envision other forms of liability.\textsuperscript{254} In addition to organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.'\textsuperscript{253}

In addition, the Financing and Draft Comprehensive Conventions specifically address civil organizational liability. In particular, the Financing Convention notes that "Each State Party ... shall take the necessary measures to enable a legal entity located in its territory or organized under its law to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an [enumerated] offence." Financing Convention, \textit{supra} note 146, art. 5(1); see also EU Framework Decision, \textit{supra} note 167, art. 7 (requiring liability for actions taken "by any person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person"); S.C. Res. 1373, \textit{supra} note 147, art. 2(3) (addressing legal entities). The EU Framework Decision provides that the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators, instigators, or accessories in offences. EU Framework Decision, \textit{supra} note 167, art. 7(3). The Financing Convention further confirms that organizational liability may be criminal, civil, or administrative and should be incurred without prejudice to any individual criminal liability of responsible individuals. Financing Convention, \textit{supra} note 146, art. 5(2)--(3).

One treaty that expressly recognizes the potential for individual (as opposed to organizational) civil liability is a 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. The Protocol is not yet in force. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Feb. 17, 2006, \textit{S. TREATY DOC. NO. 110-8}. With respect to weapons of mass destruction and entities located in the states parties' territory or organized under their laws, the Protocol notes that "liability [under the Convention] may be criminal, civil, or administrative." \textit{Id.} art. 5(2)(1). See also Council of Europe Convention, \textit{supra} note 182, art. 9 (suggesting the imposition of criminal, civil, or administrative liability); Draft Comprehensive Convention, \textit{supra} note 177, art. 10(2) (stating other forms of liability are to be without prejudice to the imposition of criminal liability). Although the terrorism treaties do not specifically call on states to provide private rights of action, in many states (and especially civil law states), victims can append civil claims to penal proceedings, so codified causes of action are unnecessary. See generally J.A. Jolowicz, \textit{Procedural Questions, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. II, ch. 13, at 3--15 (Andre Tunc ed., 1986) (comparing the operation of the \textit{partie civile} system in various civil law countries). Scholars have proposed a comprehensive protocol to supplement all the multilateral terrorism treaties. See Moore, \textit{supra} note 76 (proposing and providing draft text of protocol for civil liability).
prohibiting the direct commission of prohibited acts, the treaties 
proscribe other preparatory and ancillary offenses as well as multiple 
forms of secondary involvement in the enumerated crimes of 
terrorism, such as aiding and abetting, conspiracy, the provision of 
financial support, threats, etc.\textsuperscript{255} The Bombing Convention, for 
example, prohibits attempts and defines "commission" to include 
complicity in, or the organizing or ordering of, prohibited offenses. 
The treaty also directs its attention to any person who "in any other 
way contribute[es] to the commission of any offenses by a group of 
persons acting with a common purpose."\textsuperscript{256} This common purpose 
liability exists where the defendant either had the intent to further the 
general criminal activity or purpose of the group or played some role 
with the knowledge that the group intended to commit the prohibited 
offence.\textsuperscript{257}

3. State Versus Non-State Action

Although terrorism is often conceptualized as a tool of non-
state actors,\textsuperscript{258} many of these treaties and instruments do not make a

\begin{itemize}
\item \textsuperscript{255} See, e.g., Maritime Navigation Convention, \textit{supra} note 159, art. 4(4) (prohibiting attempts, abetting, complicity, and threatening to commit acts prohibited by the treaty); Montreal Hijacking Convention, \textit{supra} note 136, art. 1(2) (prohibiting attempts and complicity); Council of Europe Convention, \textit{supra} note 182, arts. 5–7, 9 (prohibiting public provocation, recruitment to terrorism, training in terrorism, etc.); Draft Comprehensive Convention, \textit{supra} note 177, art. 2(2)–(4) (prohibiting \textit{inter alia} threats, attempts, complicity, and engaging in a common purpose to commit prohibited offenses). The Council of Europe Convention makes several acts (including recruitment to terrorism) inchoate crimes, such that they can be prosecuted even where the terrorism offense is never committed. \textit{See} Council of Europe Convention, \textit{supra} note 182, art. 8.
\item \textsuperscript{256} Bombing Convention, \textit{supra} note 162, art. 2(3); \textit{accord} Financing Convention, \textit{supra} note 146, art. 2(5)(c).
\item \textsuperscript{257} Bombing Convention, \textit{supra} note 162, art. 2(3). This language contributed to the development of the joint criminal enterprise doctrine in international criminal law by the International Criminal Tribunal for the Former Yugoslavia. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 221 (July 15, 1999) (citing Bombing Convention).
\item \textsuperscript{258} The 1937 Convention for the Prevention and Punishment of Terrorism defined terrorism as acts "directed against a state." \textit{See} Saul, \textit{supra} note 133, at 90 (stating that the 1937 Convention did not exclude "state terrorism" as long as the terrorist acts were "directed against a state").
\end{itemize}
distinction between state or private actors as either perpetrators or victims, implying that the particular acts of terrorism are prohibited whether committed by or against state actors. The 1999 Financing Convention, for example, includes only limited place or manner restrictions. That said, a few treaties focus on state actors and governmental infrastructure as targets, implying that it is envisioned that the prohibited conduct will come from the private sector and target the public sector. For example, the Bombing Convention identifies prohibited targets to include “state or governmental facilities” alongside other public or private “infrastructure facilities” providing services to the public. In addition, as will be discussed below, a number of the treaties do not apply to members of a state’s armed forces.

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

259. See, e.g., Hague Hijacking Convention, supra note 136, art. 1 (applying to “[a]ny person”).
260. See, e.g., Hostages Convention, supra note 138, art. 1 (applying to hostage-taking committed in order to compel “a third party,” including “a state, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or abstain from doing” something in exchange for the release of the individual).
261. But see 18 U.S.C. § 2337 (2006) (prohibiting civil suits against United States officers or employees “acting within his or her official capacity or under color of legal authority” and “a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority”).
262. Financing Convention, supra note 146, art. 1(2); see also EU Framework Decision, supra note 167, art. 1 (prohibiting acts irrespective of status as a state actor).
263. Bombing Convention, supra note 162, arts. 1–2; see also Draft Comprehensive Convention, supra note 177, arts. 1–2 (identifying state or governmental facilities, places of public use, and infrastructure facilities as prohibited targets).
264. See infra Part III.C.2.
265. See supra note 179 and accompanying text.
status as state actors,\textsuperscript{266} the terrorism treaties’ relatively straightforward application to non-state actors\textsuperscript{267} renders obsolete Judge Edwards’s concerns in \textit{Tel-Oren} that international law does not regulate the acts of private individuals.\textsuperscript{268}

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

\begin{itemize}
\item \textsuperscript{266} The Second Circuit and other courts have confirmed that many international torts (such as war crimes, crimes against humanity, and genocide) do not include state action as a substantive element. \textit{See} \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 732 n.20 (2004) (noting that a relevant consideration to ATS jurisdiction is whether the “scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual” and comparing \textit{Tel-Oren} and \textit{Kadic}); \textit{Kadic v. Karadžić}, 70 F.3d 232, 239–41 (2d Cir. 1995) (holding that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or by private actors); \textit{Almog v. Arab Bank, PLC}, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007) (finding no effect on defendant bank’s liability where state action was lacking).
\item \textsuperscript{267} \textit{Saperstein v. Palestinian Auth.}, No. 04-20225-CIV-SEITZ/MCALILLEY, 2006 U.S. Dist. LEXIS 92778, at *23 (S.D. Fla. Dec. 22, 2006) ("[Some] cases reflect the trend toward finding that certain conduct violates the law of nations whether committed by a state or a private actor, however, which conduct falls into this realm has not been completely defined.").
\item \textsuperscript{268} \textit{See supra} text accompanying notes 21–23 (noting Judge Edwards’s concern with whether international law addressed state action). Indeed, a year after \textit{Tel Oren}, the D.C. Circuit stated, in dicta, that “this obscure section of the Judiciary Act of 1789 . . . may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of nations—the most prominent examples being piracy and assaults upon ambassadors,” although the court considered the claims alleged to require a showing of state action. \textit{Sanchez-Espinoza v. Reagan}, 770 F.2d 202, 206 (D.C. Cir. 1985).
\item \textsuperscript{269} \textit{Sosa}, 542 U.S. at 727 (noting “the potential implications for the foreign relations of the United States” of recognizing new causes of actions).
\item \textsuperscript{270} \textit{Id.} (“It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.”).
\end{itemize}
Where terrorism cases involve non-state action, U.S. courts are less likely to find themselves considering to what extent the policies or practices of a foreign sovereign violate international law. Indeed, the United States government has less actively intervened in terrorism cases involving non-state actors than it has in human rights cases. Moreover, the judicial abstention doctrines—such as the act of state, international comity, and political question

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

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

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

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

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

276. Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."); see Ungar v. Palestine Liberation Org., 402 F.3d 274, 280–82 (1st Cir. 2005) (rejecting defendants’ political question defense on grounds that the ATA directs courts to consider
doctrines—are less imperative where non-state action is at issue, although Judge Robb found the latter compelling in Tel-Oren, given the alleged involvement of the PLO and Libya in the incident in question.277

4. An Internationalizing Element

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

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

277. See supra notes 27–28 and accompanying text.

278. See, e.g., Bombing Convention, supra note 162, art. 3 (“This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under [the territorial or active or passive nationality grounds] to exercise jurisdiction.”); Financing Convention, supra note 146, art. 3 (limiting application of the convention by precluding offenses committed in a single state when the perpetrator is a national of that state); Maritime Navigation Convention, supra note 159, art. 4 (applying to ships navigating beyond the territorial sea of a particular state or where the perpetrator is found in a state other than the state where the offense was committed); Hague Hijacking Convention, supra note 136, art. 3 (applying to aircraft outside of the territory of registration, even if the flight was a domestic flight or where the perpetrator is found in a state other than the state where the offense was committed); Montreal Hijacking Convention, supra note 136, art. 4(5)
Hostages Convention states that it "shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State."\textsuperscript{279} Likewise, the Protected Persons Convention applies only to "internationally protected" persons, such as heads of state, ministers of foreign affairs, or representatives of a state or international organization that are entitled to immunities under international law.\textsuperscript{280}

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

5. Extraterritorial Jurisdiction

As a final common element, the penal treaties contain a now-boilerplate jurisdictional formula that requires the nationality, territorial, or victim state to either prosecute offenders in their midst or to extradite them to another state\textsuperscript{283} for the purpose of prosecu-
tion. Reflecting the principle of treaty-based universal jurisdiction, these obligations to prosecute or extradite (aut dedere aut prosequi/judicare) exist even where there is no nexus between the state and the perpetrator or his or her actions in terms of the traditional bases for exercising criminal jurisdiction. Collectively, these provisions—which act as advanced waivers by states of jurisdictional defenses concerning their citizens—arguably manifest the type of "procedural consensus" about the propriety of exercising extraterritorial jurisdiction over acts of terrorism sought by Justice Breyer in the Sosa case, at least with respect to treaty parties inter se. Where the states of the world have agreed that criminal universal jurisdiction exists, they are less likely to contest

284. E.g., Maritime Navigation Convention, supra note 159, art. 6; Hostages Convention, supra note 138, art. 5–6; Bombing Convention, supra note 162, art. 6–8; OAU Convention, supra note 182, art. 6; Draft Comprehensive Convention, supra note 177, art. 7. States have entered reservations to these provisions to the effect that they will not extradite their own nationals for prosecution. E.g., United Nations Treaty Collection, supra note 169 (Declaration of Mozambique).


286. The EU Framework Decision establishes a rudimentary system for prioritizing these potential bases of jurisdiction. See EU Framework Decision, supra note 167, art. 9 (requiring cooperation between members where more than one state is implicated by an act of terrorism and directing states to take sequential account of the following factors: the Member State in the territory of which the acts were committed, the Member State of which the perpetrator is a national or resident, the Member State of origin of the victims, the Member State in the territory of which the perpetrator was found).

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


289. Many states have enacted universal jurisdiction statutes to enable extraterritorial prosecutions. See, e.g., United Nations Treaty Collection, supra note 169 (Article 6(3) Notifications). Spain has the most expansive universal jurisdiction provision addressed to terrorism. See LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] art. 23.4 (Spain) (providing for universal jurisdiction over an undifferentiated crime of terrorism); see also United Nations Treaty Collection, supra note 169 (noting that Spanish law already provides for universal jurisdiction over terrorism so no special jurisdiction needs to be established upon ratification of the Convention).
extraterritorial or extraordinary assertions of civil jurisdiction.\textsuperscript{290} Indeed, with respect to suits within the United States, other members of the international community may perceive civil suits under the ATS as less intrusive than criminal suits under Title 18 or parallel suits under the ATA. ATS cases involve only the exercise of adjudicative jurisdiction over acts committed abroad, as it is international law (presumptively binding on all states through shared treaty obligations or customary international law) that provides the substantive rule of decision. By contrast, criminal and ATA suits within the U.S. also involve the exercise of prescriptive adjudication over offenses defined by U.S. law, which may be \textit{sui generis} (such as the laws penalizing the provision of material support to terrorism).\textsuperscript{291}

\section*{C. Elements Lacking a Complete Consensus}

The elements just discussed—those prohibiting certain violent acts, providing for individual or organizational responsibility, equally condemning state and non-state action, requiring an international component, and permitting an expansive extraterritorial jurisdiction—are common to many definitions of terrorism in U.N. instruments and multilateral treaties. International terrorism definitions show some variation in two key areas, one more intractable than the other: the requirement of a secondary or enhanced mental state (often defined as either a terrorist motive or a specific intent to accomplish some objective beyond the commission of the act of violence itself) and the interface between the law governing terrorism and international humanitarian law, or the law of armed conflict.

\textsuperscript{290} Sosa, 542 U.S. at 762.

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

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

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

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292. The crime of genocide, for example, requires a showing that prohibited conduct was committed with the specific intent to destroy a protected group in whole or in part. Genocide Convention, *supra* note 247, art. II. Crimes against humanity are defined in terms of a primary *mens rea* and a knowledge element; the prosecution must show that the acts in question were committed in the context of a widespread and systematic attack against a civilian population with knowledge of that attack. ICC Statute, *supra* note 183, art. 7.

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

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

295. The definition of international terrorism under U.S. law, for example, requires a showing of a terrorist mental state. See 18 U.S.C. § 2331(1)(B) (2006) (defining "international terrorism" as acts that "appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping). Canadian law is in accord. See Can. Crim. Code, R.S.C., ch. C-46, § 83.01(1)(b)(ii)(E) (1985), amended by 2001 S.C., ch. 41 (Can.) (defining terrorism as acts committed "(A) in whole or in part for a political, religious or ideological purpose, objective or cause,
mental element is aimed at the civilian population (the intent to cause terror) or a government (the intent to influence a government).²⁹⁶ For example, the Hostages Convention prohibits the detention of a hostage “in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.”²⁹⁷ A Council of Europe Parliamentary Assembly Recommendation focused on a broad array of potential motivations:

“[A]ny offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological con-

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

²⁹⁷ Hostages Convention, supra note 177, art. 1(1); see also Draft Comprehensive Convention, supra note 175, art. 2(1) (defining an offense as any act intentionally committed in order to damage a government facility, public transportation system, communication system, or infrastructure with the intent to cause destruction likely to result in economic loss). Claims seeking damages for hostage-taking will fail where this intentionality requirement is not satisfied. See Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 94–95 (D.C. Cir. 2002) (dismissing hostage taking claim under the FSIA on ground that plaintiffs did not allege that they were detained in order to compel some particular result as a condition for their release); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 45, 46 (D.D.C. 2000) (noting incorporation in the FSIA of the definition of hostage-taking from the Hostages Convention and finding plaintiffs had adequately alleged the existence of a quid pro quo arrangement for their release).
ceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public.²⁹⁸

These mental state formulations reflect several features of terrorism. For one, they recognize that with the exception of cases of assassination, the victims of terrorism are not usually targeted individually; rather, they are targeted at random in order to achieve some ulterior or collective purpose (usually the creation of fear or terror in order to bring about a change in a governmental or organizational policy²⁹⁹). These mental state elements also help to distinguish crimes commonly understood to constitute terrorism from ordinary domestic crimes, whose prosecution requires no showing of any special ideological, political, or religious motive or purpose and which are generally committed for personal reasons of greed, sadism, or vengeance. Terrorism is thus viewed as violence of a different quality than that involved in ordinary crimes. As one scholar has noted:

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

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

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

³⁰⁰. Saul, supra note 295, at 29.
Finally, defining terrorism with reference to particular objectives or motivations leaves open the possibility of carving out exceptions to these prohibitions for "legitimate" struggles.301

It is often unclear if this additional mental element is the equivalent of a specific intent requirement (along the lines of the definition of genocide which is predicated upon the intent to destroy a protected group) or a motive element under classical criminal law terminology.302 Specific intent has historically been defined as an intent to do some further act or achieve some further or more remote consequence beyond the conduct that constitutes the actus reus of the crime. For example, burglary—the breaking and entering into of a dwelling of another—requires a showing of the specific intent to commit a felony therein. To secure a conviction, the prosecution must prove the existence of this specific intent as an additional element of a crime. The concept of specific intent often elides with that of motive, which is the perpetrator's guiding purpose or ulterior intention, i.e., the reason for which an intended criminal act is committed. Normally, proof of motive is not required for a criminal conviction, although proving the defendant's motive is often an integral part of any prosecution with particular relevance during the sentencing phase.303 One notable exception to this general trend involves hate or bias crimes, which may require proof that the defendant was motivated by animosity toward a protected group.304

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


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

304. See, e.g., CAL. PENAL CODE § 422.6 (West 2008) (criminalizing injury or threat to person or damage to property because of actual or perceived "race,
A review of the treaty definitions reveals that anti-terrorism instruments generally focus on either prohibited methods or prohibited objectives. Indeed, the more specific the actus reus of the treaty is, the less likely a secondary mental state element is included. By contrast, where the definition is broader or undifferentiated, an enhanced mental state element is usually present. Scholars have described these two definitional approaches as inductive (setting forth a precise and targeted definition of a crime with no additional mental state) and deductive (setting forth a broad and all encompassing definition of prohibited violence accompanied by an additional mental state).305 The Bombing Convention, for example, encourages prosecution for prohibited acts "in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons."306 In the Bombing Convention, this secondary mental state also constitutes a jurisdictional hook. In addition to mandating the exercise of jurisdiction over violators of the treaty according to the standard grounds of territoriality, nationality, and universal criminal jurisdiction, state parties to the Bombing Convention are also entitled to assert jurisdiction over acts committed "in an attempt to compel that State to do or abstain from doing any act," even if no other nexus to the prosecuting state exists.307 By contrast, the Hague Hijacking

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

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

307. Id. art. 6(2)(d); see also Draft Comprehensive Convention, supra note 177, art. 7(e) (establishing the state's jurisdiction over any offense which is committed in an attempt to compel that state to do or to abstain from doing any act).
Convention contains no additional mental state, but provides a very precise and narrow definition of prohibited conduct.\textsuperscript{308}

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

2. Interface with International Humanitarian Law

A more thorny area in which an international consensus about the definition of terrorism has been elusive concerns the applicability of the terrorism prohibitions in the context of armed conflicts, whether international or non-international. In some cases, international terrorism instruments disclaim their applicability altogether whenever IHL applies. In certain regional treaties, by

\textsuperscript{308} Hague Hijacking Convention, \emph{supra} note 136, art. 1.

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

\textsuperscript{310} \textit{See}, \textit{e.g.}, 18 U.S.C. § 2339D (making it a crime to receive military-type training from a designated foreign terrorist organization). This provision was added to the code after it became clear that merely training with a designated terrorist organization may not constitute the \emph{provision} of material support or resources to a terrorist organization under 18 U.S.C. § 2339B. \textit{See} United States \textit{v. Lindh}, 212 F. Supp. 2d 541, 571–72 (E.D. Va. 2002) ("Thus, in Section 2339B, providing ‘personnel’ to [the Taliban] necessarily means that the persons provided to the foreign terrorist organization work under the direction and control of that organization. One who is merely present with other members of the organization, but is not under the organization’s direction and control, is not part of the organization’s ‘personnel.’").
contrast, it is only where an armed struggle is considered just that these instruments deem themselves inapplicable. In either case, applying the terrorism prohibitions to situations involving acts of violence by or against civilians and combatants remains problematic given that IHL also regulates, and at times privileges, such conduct in situations of armed conflict.

Recognizing the potential overlap between crimes of terrorism and types of violence committed within armed conflicts, several of the sectoral multilateral terrorism treaties (particularly the more recent ones) exclude situations of armed conflict or the actions of armed forces from their scope of application altogether. The Bombing and Nuclear Terrorism Conventions, for example, provide that their terms do not affect the rights, obligations, and responsibilities of states and individuals under international humanitarian law. Their preambles further indicate that “the activities of military forces of States are governed by rules of international law outside the framework of this Convention.” Later, the treaties state that:

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

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

313. Bombing Convention, supra note 162, pmbl. Likewise, the Plastic Explosives Convention partially exempts unmarked plastic explosives held by authorities of a state party performing military or police functions. Plastic Explosives Convention, supra note 162, arts. III–IV. The airplane hijacking conventions do not apply to aircraft utilized for military, police, or customs purposes. See, e.g., Montreal Hijacking Convention, supra note 136, art. 4(1) (expressly excluding aircrafts used for such purposes).
The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.\footnote{Bombing Convention, \textit{supra} note 162, art. 19(2); Nuclear Terrorism Convention, \textit{supra} note 161, art. 4(2); Draft Comprehensive Convention, \textit{supra} note 177, art. 20(2); \textit{see also} EU Framework Decision, \textit{supra} note 167, pmbl. ("(11) Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.").}

The Nuclear Terrorism Convention confirms that this latter text "shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws."\footnote{Nuclear Terrorism Convention, \textit{supra} note 161, art. 4(3).} The Preambles of the Nuclear Terrorism and Bombing Conventions similarly note that "the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws."\footnote{\textit{Id.} pmbl.; Bombing Convention, \textit{supra} note 162, pmbl.} These savings clauses emphasize that conduct not governed by the terrorism treaties by operation of IHL, such as deliberate attacks on civilians during an armed conflict, is not rendered lawful by its exclusion from the terrorism treaties. Rather, these provisions assume that such conduct may be unlawful and prosecutable under IHL.

These latter ideas find expression in the text of the Draft Comprehensive Convention, as well,\footnote{Draft Comprehensive Convention, \textit{supra} note 177, art. 20(4) ("Nothing in the present article condones or makes lawful otherwise unlawful acts, nor precludes the prosecution under other laws.").} although a proposal to amend this provision reverses the emphasis: "Nothing in this Convention makes acts unlawful which are governed by international
humanitarian law and which are not unlawful under that law." 318 This latter proposed formulation indicates that lawful acts of war—such as violent confrontations between privileged combatants or attacks by privileged combatants against lawful targets—would not be rendered unlawful acts of terrorism by operation of the proposed treaty. 319 Collectively, these treaty provisions seem to treat IHL as the lex specialis in situations of armed conflict, effectively displacing the treaty rules governing terrorism.320

These exclusion clauses depend, of course, upon a determination of when IHL applies. Although certain situations, such as a full-scale armed conflict between two nation-states, clearly trigger IHL, a degree of indeterminacy and contestation remains regarding what level of organized violence on the ground constitutes an armed conflict subject to the rules and protections of IHL. Notwithstanding some treaty provisions321 and jurisprudence


319. The United States made a reservation to this effect to the Financing Convention when it stated upon ratification that “nothing in this Convention precludes any State Party to the Convention from conducting any legitimate activity against any lawful target in accordance with the law of armed conflict.” United Nations Treaty Collection, supra note 169.

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

321. The Geneva Conventions themselves provide little insight into the question of their field of application, indicating at Article 2 only that the bulk of their provisions apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” POW Convention, supra note 226, art. 3. Article 1(4) of Protocol I applies to those situations governed by the four Geneva Conventions and extends the status of international armed conflict to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Protocol I, supra note 226, art. 1(3), (4). Common Article 3 of the 1949 Conventions creates a mini-regime governing armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties” without further definition. It is not until Protocol II, which elaborates on and expands common Article 3, that we find a clear statement that its provisions
clarifying when IHL is triggered, the international community has yet to settle on a determination of when a single attack or when

do not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II, supra note 227, art. 1(2). In addition, Protocol II applies to armed conflicts in which Protocol I does not apply "and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Id. art. 1(1). Thus, there may be non-international armed conflicts that are governed by common Article 3 alone, because they do not satisfy the territorial or organizational requirements of Protocol II.

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

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

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

323. The U.S. Department of Defense has determined that a "single hostile act or attempted act may provide sufficient basis for [a] nexus [between the conduct and an armed conflict] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war,' or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force." DEP'T OF DEF., supra note 240, § 5(C), at 3; see also Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/98, OEA/Ser.L/V/II. 98, doc. 6 rev. ¶¶ 155–56 (1998) (determining that a carefully planned and coordinated, if short, armed attack on a barracks constituted an armed conflict triggering IHL).
sustained, but sporadic, attacks over time constitute an armed conflict in the aggregate, especially with respect to non-international armed conflicts (i.e., those conflicts not pitting two nation-states against each other). 324

In addition, IHL does not apply uniformly to situations of international versus non-international armed conflicts. Accordingly, determining what rules of IHL apply requires an exercise in conflict classification. Many fewer IHL treaty rules apply to non-international armed conflicts, and non-state combatants in such conflicts are not privileged to engage in acts of violence. As the quoted text above reveals, 325 terrorism conventions often make certain distinctions with respect to their applicability to the formal military forces of a state on the one hand, and to militia or other armed forces not linked to a state on the other. For example, several recent terrorism treaties define “military forces of a State” as “the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility.” 326 The alternative and undifferentiated term “armed forces” is not specifically defined, but presumably includes both privileged and unprivileged combatants (such as irregular, insurrectionary, insurgent, or rebel forces operating within a non-international armed conflict).

By these provisions, the actions of all armed forces in all armed conflicts, however classified, are not governed by the terrorism treaties on the assumption that these actions are governed

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

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

326. Bombing Convention, supra note 162, art. 1(4); Nuclear Terrorism Convention, supra note 161, art. 1(6); Draft Comprehensive Convention, supra note 177, art. 1(2).
by IHL.\textsuperscript{327} Furthermore, the actions of the formal military forces of a state are not governed by the treaty at all, even apparently in times when IHL does not apply.\textsuperscript{328} Within these non-war circumstances, the states’ armed forces are deemed to be governed by “other rules of international law,” language which has been interpreted to make reference to the regulation of the conduct of a state’s armed forces by national law, national codes of military justice, and rules of engagement.\textsuperscript{329} By contrast, non-state armed forces (rebels and the like) are still governed by the terrorism treaties in situations in which IHL does not apply, i.e., for peacetime acts of violence. Several treaty signatories (e.g., Cuba and Turkey) have objected that this formulation calls for the prosecution of enumerated acts of terrorism (e.g., the usage of prohibited explosive devices or nuclear weapons) when committed by non-state actors in situations outside of IHL but does not condemn the very same acts committed by state actors in the same circumstances.\textsuperscript{330} This apparent asymmetry gives rise to the perception that acts of state terrorism perpetrated by members of the state’s armed forces are essentially insulated from opprobrium under the treaty.

Many of these provisions apply regardless of how the armed conflict is classified, whereas others are limited to certain classes of conflict. The Hostages Convention, for example, indicates that it does not apply to situations covered by the 1949 Geneva Conventions or their Protocols\textsuperscript{331} in so far as state parties are bound under

\begin{itemize}
  \item \textsuperscript{327} Bombing Convention, \textit{supra} note 162, art. 19(2); Nuclear Terrorism Convention, \textit{supra} note 161, art. 4(2); Draft Comprehensive Convention, \textit{supra} note 177, art. 20(2).
  \item \textsuperscript{328} Bombing Convention, \textit{supra} note 162, art. 19(2); Nuclear Terrorism Convention, \textit{supra} note 161, art. 4(2); Draft Comprehensive Convention, \textit{supra} note 177, art. 20(2).
  \item \textsuperscript{329} \textit{U.N. Ad Hoc Committee Report}, \textit{supra} note 208, ¶ 16.
  \item \textsuperscript{330} \textit{Id.} ¶ 10; United Nations Treaty Collection, \textit{supra} note 169. Cuba declared that “the undue use of the armed forces of one State for the purpose of aggression against another cannot be condoned under the present Convention, whose purpose is precisely to combat, in accordance with the principles of the international law, one of the most noxious forms of crime faced by the modern world. ... The Republic of Cuba also interprets the provisions of the present Convention as applying with full rigour to activities carried out by armed forces of one State against another state in cases in which no armed conflict exists between the two.” \textit{Id.}
  \item \textsuperscript{331} Hostages Convention, \textit{supra} note 138, art. 12. The Article reads in full:
those conventions to prosecute or extradite hostage-takers. Although the two Protocols prohibit hostage-taking, neither renders such act a war crime nor obligates the prosecution or extradition of offenders. Likewise, common Article 3, applicable within non-international armed conflicts, does not create such obligations. Only the Fourth Geneva Convention specifically obligates states to seek out and prosecute individuals alleged to have committed, or to have ordered to be committed, hostage-taking when committed against individuals protected by that treaty within an international armed

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

_Id._

332. Protocol I lists the prohibition against hostage taking as among its Fundamental Guarantees, which are applicable at all times, whether committed by civilians or by combatants (privileged or unprivileged), to be enjoyed by all persons in the power of a Party to the conflict who do not benefit from more favorable treatment under the Conventions or the Protocol. Protocol I, _supra_ note 226, art. 75(c). Likewise, Protocol II, which contains no penal regime whatsoever, also treats the prohibition against hostage taking as a Fundamental Guarantee, applicable in all times with respect to all persons who do not take a direct part, or who have ceased to take a part, in hostilities. Protocol II, _supra_ note 227, art. 4(2)(c).

333. _See_ Civilian Convention, _supra_ note 234, art. 146 ("Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, ... hand such persons over for trial to another High Contracting Party concerned, provided that such High Contracting Party has made out a prima facie case.").
conflict. If read literally, this article within the Hostages Convention suggests that the penal obligations within the Hostages Convention continue to apply to full effect in non-international armed conflicts and with respect to individuals not covered by the Fourth Geneva Convention (such as privileged combatants or prisoners of war) within international armed conflicts. It is only where civilians are the victims of hostage-taking that the Fourth Geneva Convention is applicable to the exclusion of the Hostages Convention. Similarly, the United Nations Convention expressly excludes its application only in situations of international armed conflicts. Specifically, it protects United Nations and associated personnel, except where such “personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.” This too implies that the United Nations Convention continues to govern the seizure of U.N. personnel in non-international armed conflicts (and in peacetime situations).

The Financing Convention, which does not distinguish between classes of conflict, takes a somewhat more nuanced stance toward the interface between the terrorism prohibitions and violations of IHL. In addition to incorporating a number of extant terrorism treaties, the Convention prohibits the financing of activities that will, among other things, “cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict.” This latter provision

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

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

336. Financing Convention, supra note 146, art. 2(2) (emphasis added).
suggests that even in an armed conflict also governed by IHL, victims of terrorism under the treaty can include a state party’s combatants when they are hors de combat—whether by injury, capture, or surrender—or even perhaps when not actively engaged in combat (e.g., when off-duty). Under this framework, the funding of violent acts committed by unprivileged belligerents against a state’s regular armed forces in an armed conflict would not constitute a violation of the Financing Convention. For example, had these events occurred within the context of an armed conflict, however classified, the financing of the bombing of the Khobar Towers barracks in Saudi Arabia in 1996 or the 2000 attack on the U.S.S. Cole in Yemen would not violate the Financing Convention, because the individuals targeted were not hors de combat. By contrast, absent the existence of an armed conflict, as was the case with respect to both those events, the treaty would presumably condemn and create a duty to prosecute the provision of financial support for those acts because they violated the Bombing Convention, incorporated by reference into the Financing Convention.

As is apparent, when acting collectively the international community has not fully or consistently demarcated the spheres of application of the terrorism treaties and IHL. There are some areas of certainty, however. Given that IHL privileges certain forms of violence under certain conditions, the terrorism treaties must be interpreted in a way that ensures that acts of violence that are lawful under IHL are not rendered unlawful as acts of terrorism. So, for example, attacks by privileged belligerents against other privileged belligerents are inherent to international armed conflicts and cannot be deemed to contravene any prohibition against terrorism. In addition, all states agree that there are violent acts committed within situations that are unregulated by IHL that may be classified as acts

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

338. See Owens v. Republic of Sudan, 412 F. Supp. 2d 99, 114 (D.D.C. 2006) (“If . . . Sudan furnished bin Laden and al Qaeda with, among other things, shelter, security, financial and logistical support (including the movement of weapons into and out of the country), and business opportunities—it would not be unreasonable for a factfinder to conclude that such support was a necessary condition for the bombing, and therefore a factual cause of plaintiff’s damages.”).
of terrorism. These include violent attacks against civilians outside of a state of armed conflict. In general, however, states are not willing to treat acts committed by privileged combatants (i.e., a state's own armed forces) against civilians outside of armed conflict as crimes of terrorism. In addition, there remain situations in which both the terrorism treaties and IHL may apply, depending on technical factors such as conflict classification and the status of the victims or perpetrators. Violent attacks by either privileged or unprivileged combatants against civilians within a state of armed conflict, however classified, constitute war crimes and can be prosecuted as such.\textsuperscript{339} These acts may be regulated by both IHL and the prohibitions against terrorism, although theoretically, no terrorism prohibition is necessary in this context as the war crimes prohibitions cover the field.

Where the international community has yet to reach a consensus vis-à-vis the terrorism prohibitions is with respect to the lawfulness of attacks by unprivileged belligerents or civilians against privileged belligerents, whether in an armed conflict or not. Absent a situation of armed conflict, IHL is inapplicable altogether.\textsuperscript{340} Accordingly, there is space for a terrorism prohibition to apply, particularly when privileged combatants are attacked, such as the Khobar Towers and \textit{U.S.S. Cole} incidents. Within the context of an armed conflict, such attacks breach no specific provision of the Geneva Conventions or any customary IHL rule. For the most part, combatants are not protected persons unless they are hors de combat; thus, IHL does not prohibit attacks on combatants by other combatants, even unprivileged ones.\textsuperscript{341} As such, there is no war

\begin{itemize}
  \item \textsuperscript{339} ICC Statute, \textit{supra} note 183, art. 8. Such conduct also gives rise to state responsibility under IHL. \textit{See} Civilian Convention, \textit{supra} note 234, art. 22(1) (prohibiting “all measures \ldots of terrorism” against civilians in combat areas or occupied territory); Protocol II, \textit{supra} note 227, art. 4(2)(d) (prohibiting “acts of terrorism” against “persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted”).
  \item \textsuperscript{340} \textit{See} Protocol I, \textit{supra} note 226, art. 1(4) (“The situations referred to \ldots include armed conflicts.”).
  \item \textsuperscript{341} By way of exception, combatants are protected from certain means and methods of warfare (such as rape), prohibited weapons (such as those that cause unnecessary suffering), and the use of disproportionate force. \textit{See}, e.g., 1907 Hague Convention, \textit{supra} note 231 (prohibiting certain means and methods of warfare against lawful targets).
\end{itemize}
crime of engaging in unprivileged belligerency.\footnote{342}{But see Dep't of Def., supra note 240, § 6(B)(3) (penalizing murder by an unprivileged belligerent, i.e., an individual not entitled to combatant immunity).} Although IHL does not specifically prohibit or penalize acts of unprivileged belligerency, states are entitled to target unprivileged combatants who participate directly in hostilities\footnote{343}{Protocol II, supra note 227, art. 13(3) ("Civilians shall enjoy the protection afforded by this part [not to be targeted], unless and for such time as they take a direct part in hostilities.").} and treat such individuals as criminals upon their capture. These individuals can then be prosecuted for breaching any applicable domestic criminal law, such as prohibitions against treason, insurrection, assault, mayhem, or murder. In addition, these acts of unprivileged belligerency could also conceivably be considered acts of terrorism. If the terms of the Bombing and Nuclear Terrorism Conventions ("The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention"),\footnote{344}{See supra note 314 and accompanying text.} are interpreted to require that IHL be treated as the exclusive lex specialis, however, such acts may fall outside of the terrorism treaties. This would leave these acts essentially unregulated by international law.

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

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

Similar exclusions are found in the Arab League Convention\textsuperscript{346} and Organisation of Islamic Unity Convention.\textsuperscript{347} Read broadly, such provisions exempt acts of violence from condemnation as terrorism when they are committed within non-international armed conflicts by parties with putatively noble ends. Read broadly, this language would seem to include even violent attacks committed against civilians, although a narrower reading would only exclude belligerent acts committed against lawful military objectives of the repressive state in question as part of a campaign of armed resistance.\textsuperscript{348}

These provisions reflect the fact that certain segments of the international community are unwilling to entirely condemn the resort to armed force in the face of putatively unjust situations of foreign domination.\textsuperscript{349} Thus, the \textit{jus in bello} (governing the conduct of

\textsuperscript{345} OAU Convention, \textit{supra} note 182, art. 3(1). The language “in accordance with the principles of international law” may not insulate violent acts targeting civilians or otherwise breaching IHL.

\textsuperscript{346} Arab League Convention, \textit{supra} note 172, art. 2(1); \textit{see supra} note 172-173 and accompanying text (describing the definitional limits in the Arab League Convention).

\textsuperscript{347} OIC Convention, \textit{supra} note 182, art. 2(a) (“Peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be [considered a terrorist crime].”). The OIC also submitted a proposal to the Working Group to the effect that the Draft Comprehensive Convention should exclude “peoples’ struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law.” Surya P. Subedi, \textit{The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law}, \textit{4 INT’L L.F. DU DROIT INT’L} 159, 163 (2002).

\textsuperscript{348} Cassese, \textit{supra} note 223, at 952–53.

\textsuperscript{349} Given the demise of most relationships of colonialism and the practice of apartheid, the occupation of the Palestinian Territories by Israel presents the primary concern in this regard.
hostilities once an armed conflict has been initiated) collide with the *jus ad bellum* (governing the legality of the resort to armed force *ab initio*). Doctrinally, contemporary international law treats these two bodies of law as conceptually distinct. This distinction is axiomatic: the legal evaluation of the conduct of hostilities is an inquiry entirely independent of the legal evaluation of the lawfulness of the resort to armed force. As a result, a just war may be fought unlawfully, and an unjust war may be fought lawfully. The International Committee of the Red Cross thus remains strictly agnostic about the causes of the armed conflicts in which it operates but all the while strictly scrutinizes the conflicts' consequences.

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


351. *Id.* ("It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules." (quoting Michael Walzer, *Just and Unjust Wars* 21 (1977))).

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

353. *See supra* Part III.C.2. (listing instruments exempting certain forms of conflict from condemnation); *supra* notes 311–319 and accompanying text (discussing the approach taken by drafters, which sought to exclude certain categories of armed conflicts).
some members of the international community, the *jus in bello* are subordinate to the *jus ad bellum* under circumstances in which the cause is just.

The exclusion of situations of armed conflict within many terrorism treaties finds parallels in the provisions of the ATA precluding terrorism claims arising out of "acts of war." This provision (§ 2336(a)) betrays confusion about the potential concurrence of the prohibitions against war crimes and acts of terrorism. Notwithstanding this clear exclusionary language, U.S. courts have concluded that certain terrorist crimes committed during an armed conflict by unprivileged combatants do not trigger this exception. One line of argument focuses on the identity of the perpetrator. *Morris*, for example, involved an attack against United States armed forces in Afghanistan by alleged members of al Qaeda. The court concluded that al Qaeda is a terrorist organization that, as such, does not constitute a "military force" within the meaning of 18 U.S.C. § 2331(4)(C) that is capable of engaging in an armed conflict. The fact that al Qaeda operatives received military training did not transform the organization into a military force when its members employed such training "in a terroristic fashion to achieve terroristic ends."  

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

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

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

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

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

"If illegal the attack may well be a war crime and subject to sanctions as such. However, neither the heinousness nor legality of acts of war occurring in the course of armed conflict is germane to the application of sec. 2336(a). Sec. 2336(a) when applicable bars civil actions under ATA sec. 2333 for 'any act' without regard to its nature or seriousness, or whether the act if not barred by sec. 2336(a) would constitute international terrorism actionable under the ATA."\textsuperscript{361}

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

In order to escape this exclusionary clause, the court in \textit{Biton} focused instead on the lack of a nexus between the attack in question and the ongoing armed conflict in the region.\textsuperscript{363} Notwithstanding that in situations of asymmetrical warfare attacks on civilians often constitute a deliberate, if unlawful, \textit{modus operandi} of non-state


\textsuperscript{360} \textit{Id.}

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

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

\textsuperscript{363} See supra notes 242 & 249 and accompanying text.
actors, the *Biton* court rejected an argument that the attack on civilians constituted an "act of war" that could not trigger the ATA.\(^{364}\) Specifically, the court concluded that "the circumstances of the alleged attack—on a recognized school bus full of students and teachers—and the status of those non-combatants lead the Court to conclude that the attack did not occur ‘during the course of’ an armed conflict as a matter of law."\(^{365}\) In so ruling, the court drew on cases applying the political offense exception to extradition, which require a showing that the acts for which the exception is urged must be "acts committed *in the course of* and incidental to a violent political disturbance such as a war, revolution or rebellion."\(^{366}\) In *dicta*, however, the court noted that it might reach a different result if the attack had not been on a school bus: "It is not immediately obvious that an attack on a settler, who intentionally went into Palestinian territory to claim it for Israel, would automatically and necessarily be a ‘terrorist’ attack against a ‘civilian.’"\(^{367}\) Were the framers of the ATA to recognize that acts of terrorism may be committed within armed conflicts as discussed above,\(^{368}\) the courts would not have to undertake such contortions to assert jurisdiction.

IV. THE TORT OF TERRORISM UNDER THE ALIEN TORT STATUTE

Notwithstanding some doctrinal uncertainty at the border between the prohibitions contained within the terrorism treaties and IHL, a much greater consensus about the contours of the international prohibition against terrorism exists today as compared with the time at which *Tel-Oren* was decided. In particular, the international community has reached a consensus that specific manifestations of terrorism are unlawful regardless of the political context in which they are committed.\(^{369}\) In many respects, this


\(^{365}\) *Id.* at 10–11.

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

\(^{367}\) *Id.* at 10.

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

\(^{369}\) *See supra* Part III.B.
piecemeal approach has all but covered the field. Many of these developments are already reflected in U.S. penal law and thus may trigger civil liability pursuant to the ATA for U.S. victims. Particularly where federal law incorporates an international penal prohibition, ATS jurisdiction should more readily exist.\footnote{370}{See Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1182 (C.D. Cal. 2005) (finding that where international norms are already codified elsewhere in U.S. law, the implication is that these claims “are not impermissibly broad because Congress has adopted statutes that define these concepts and assess liability for these actions”); \textit{id.} (“Legislative approval of punishment for these actions would suggest that the courts may—subject to other doctrines such as forum non conveniens—entertain these suits.”).}

Although U.S. domestic law shows greater certainty in this area, international law remains inconclusive as to the need to show an additional terrorist mental state with respect to all manifestations of terrorism, beyond a few specific prohibitions that are clearly defined without this extra \textit{mens rea} element. For the purposes of ATS litigation, until international law displays more uniformity, ambiguity should be resolved against the pleader by requiring a showing of a terrorist mental state for more generalized terrorism claims that do not invoke a particularized terrorism prohibition with its own set of elements. In addition, although there remains some ambiguity about when acts of violence committed within an armed conflict by unprivileged combatants would constitute terrorism, civilian victims of attack by unprivileged belligerents should face no barriers to pleading the commission of a tort of terrorism in violation of the law of nations so long as the other elements of the offense are met. (Within the context of an armed conflict, such acts may also constitute war crimes.) By contrast, privileged belligerents (i.e., members of a formal armed force) who are the victims of attack by such perpetrators, particularly within an armed conflict where certain norms against the use of armed force are suspended, may be more vulnerable to having their cases dismissed for failing to state a claim of terrorism. Indeed, courts adjudicating such claims under the ATS might be tempted to reject terrorism claims whenever IHL would govern the situation as the \textit{lex specialis} just as the ATA purports to do.\footnote{371}{See 28 U.S.C. § 2336 (2006) (“No action shall be maintained under section 2333 of this title for injury or loss by reason of an act of war.”).} Given that IHL does not specifically prohibit acts of unprivi-
leged belligerency, however, the only way to condemn such acts under international law is via a terrorism prohibition.

Reviewing the cases filed so far, U.S. courts seem more comfortable recognizing causes of action for specific terrorist acts that are the subject of a dedicated treaty than an undifferentiated tort of terrorism. The Arab Bank cases, for example, involve claims against the Arab Bank, PLC, for knowingly providing banking and administrative services to various entities identified by the U.S. government as terrorist organizations that allegedly sponsored suicide bombings and other attacks on civilians in Israel. Plaintiffs are U.S. and alien citizens bringing claims under both the ATA and the ATS, respectively. The ATA claims are premised on allegations that the defendant bank violated, and aided and abetted violations of, all heads of 18 U.S.C. § 2339, the material support statute, and § 2332, which prohibits attacks on, and conspiracies to attack, U.S. nationals abroad. The alien plaintiffs proceeding under the ATS similarly alleged various forms of support for acts of terrorism, genocide, and crimes against humanity.

With respect to the terrorism claims, plaintiffs were relatively restrained in their pleading, essentially alleging that the defendant had financed a policy of suicide bombings for the purpose of intimidating or coercing the civilian population that violated customary international law as expressed in the Bombing

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


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

376. Almog, 471 F. Supp. 2d at 265.
Convention and the Financing Convention. In upholding the
complaint in the face of a motion to dismiss for failure to state a
claim upon which relief could be granted, the court found it
significant that these treaties were well subscribed to and had been
ratified and implemented by the United States. The court rejected
defendant’s contention that there was no universal definition of
terrorism under international law because the precise acts and
specific conduct alleged by plaintiffs clearly violated existing treaty
law. The court also rejected the contention that state practice did
not support the claims alleged, because states reserved the right of
groups to use certain forms of violence in struggles for self-
determination. The court noted that even the anti-terrorism
treaties and state reservations to those treaties that make reference to
such struggles recognize that they must be undertaken in accordance
with international law and that no state expressly condones actions
such as those alleged. Finally, the court determined that
international law provided for the liability of entities indirectly
involved in acts of terrorism in keeping with the relevant terrorism
treaties.

377. Id.
378. Id. at 257, 277, 283.
379. Id. at 280–81.
380. Id. at 281.
381. Id. at 282. The Court also cited for support Security Council
Resolution 1566, supra note 149, and the fact that the IHL principle of distinction,
which prohibits the direct targeting of civilians in armed conflict, also supports the
rule of international law pled by plaintiffs. Almog, 471 F. Supp. 2d at 278–79.
382. Almog, 471 F. Supp. 2d at 283.
383. Id. at 286–89. Human rights cases are largely in accord. Cabello v.
Fernandez-Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005) (per curiam) (holding
the TVPA and the ATS permit claims based on direct and on indirect theories of
liability); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 463–64,
(S.D.N.Y. 2006) (“[W]here a cause of action for violation of an international norm
is viable under the ATS, claims for aiding and abetting that violation are viable as
at *13 (N.D. Cal. Aug. 22, 2006) (“[S]ince the early days of this country, courts
have recognized that private individuals may be held liable for aiding and abetting
violations of international law.”); In re Terrorist Attacks on September 11, 2001,
392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (stating that the ATS includes actions
premised on theories of aiding and abetting and conspiracy); Presbyterian Church
(collecting cases); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 52–54
By contrast, in *Saperstein v. Palestinian Authority*, plaintiffs pled an undifferentiated tort of "terrorism" as a violation of the law of nations in response to suicide bombings in Israel.\(^{384}\) The court rather summarily ruled that "if the conduct of the Defendants is construed as terrorism, then Plaintiffs have not alleged a violation of the law of nations."\(^{385}\) The court cited *Tel-Oren* and made no reference to more contemporary international law.\(^{386}\) Plaintiffs then attempted to recast the alleged crimes as war crimes pursuant to common Article 3 of the Geneva Conventions, which governs non-international armed conflicts.\(^{387}\) The court questioned whether violations of common Article 3 met the two-part test established in *Sosa*. First, the court doubted whether other aspects of common Article 3—in particular the provisions prohibiting "violence to life," "cruel treatment," and "outrages upon personal dignity"—are defined with sufficient specificity to support ATS jurisdiction.\(^{388}\) The court further declined to allow a cause of action for the particular conduct alleged, the murder of a civilian during an armed conflict, in part on the grounds that to do so would open the federal courts to a flood of claims from armed conflicts all over the world in contravention of the Supreme Court's note of caution in *Sosa*.\(^{389}\) By

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385. Id. at *26.
386. Id. at *25-26.
387. Id. at *28.
388. Id. at *30-31 ("For federal courts to interpret such ambiguous standards to assess its own subject matter jurisdiction would pose problems for federal courts and would not meet the defined standards of specificity that *Sosa* requires.").
389. Id. at *31 ("[I]f Plaintiffs' specific allegation, i.e., the murder of an innocent civilian during an armed conflict, was sufficient for the purposes of the ATS, then whenever an innocent person was murdered during an 'armed conflict' anywhere in the world, whether it be Bosnia, the Middle East or Darfur, Sudan, the federal courts would have subject matter jurisdiction over the dispute. Clearly, such an interpretation would not only make district courts international courts of civil justice, it would be in direct contravention of the Supreme Court's specific prudential guidance admonishing lower courts to be cautious in creating new offenses under the law of nations.").
contrast, other federal courts have demonstrated themselves to be more comfortable with the fluidity of claims where the prohibitions against war crimes, crimes against humanity, and terrorism are applicable. In the *Linde* case, for example, plaintiffs also pled the same acts as war crimes and crimes against humanity, and these claims have survived 12(b)(6) and 12(b)(1) motions.390

The courts are also quite comfortable with various forms of secondary liability in the terrorism context.391 These opinions exhibit less angst than is seen in the human rights cases (particularly those concerned with corporate liability) involving such derivative liability,392 perhaps because the terrorism treaties contain express provisions calling for the criminalization of aiding and abetting, conspiracy, and other forms of indirect participation and because U.S. penal law is in accord.393 In particular, the international community is increasingly concerned with the importance of hindering the financing of terrorism, as expressed in Security Council Resolution 1373 and the Financing Convention.394 Forms of secondary liability are necessary to reach individuals or groups that may not engage in terrorism directly, but may support or enable the terrorist activities of others.

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391. *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1010–11 (7th Cir. 2002) (noting Congress's intent to import general tort law principles, which include aiding and abetting liability, into the ATA).
393. *See supra* note 38 and accompanying text.
394. *See also* Council of Europe Convention, *supra* note 182, art. 13 (emphasizing the provision of compensation to victims); Inter-American Convention, *supra* note 182, arts. 4–6 (aiming to eradicate the financing of terrorism).
V. CIVIL LITIGATION UNDER THE ALIEN TORT STATUTE AS A COUNTER-TERROISM TOOL

Much has been written about the value of civil suits to vindicate rules of international law.395 Civil litigation involving claims of international terrorism has the potential to play a part in a comprehensive anti-terrorism strategy, especially where military strikes or governmental sanctions may be considered too blunt a response, are politically unpalatable, or lack multilateral support. In particular, by harnessing the motivation, investigative capabilities, and resources of private attorneys general and the robust U.S. tort system on behalf of those victims who have access to the U.S. legal system, civil suits can enhance the government’s ability to bring targeted criminal suits,396 aid in the rehabilitation of victims,397 and promote the rule of law in the face of acts of terrorism.

Because of the practicalities of obtaining personal jurisdiction over potential defendants and the possibility of real monetary recovery, most civil terrorism cases will inevitably focus on the


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

397. Civil terrorism suits promote emerging international law concerning the right to a remedy and to reparations. See Van Schaack, In Defense, supra note 395, at 165–68. They also are consistent with pronouncements from the international community calling for the compensation of victims. See, e.g., text accompanying note 151.
organizations and entities that recruit, train, arm, fund, dispatch, or otherwise enable terrorist groups and networks.\textsuperscript{398} Pursuing the hard assets of entities that support terrorism also provides a unique form of leverage over such organizations, their donors, and their benefactors. Where assets are found, civil suits can deny defendants the financial wherewithal to support acts of terrorism. In addition to providing redress to victims, civil suits may deter such entities from maintaining assets or property in the United States, as well as prevent terrorists from benefitting from investments and soliciting funds in the U.S.\textsuperscript{399} Suits against private entities under the ATS, or against entities with purposefully tenuous ties to foreign governments, avoid the pitfalls associated with suing state actors under the FSIA and attaching governmental assets,\textsuperscript{400} which may be subject to diplomatic or consular immunities or seizure by the U.S. government.\textsuperscript{401} Civil suits may also yield better results than criminal suits because they are subject to a lower burden of proof.\textsuperscript{402} This is especially true where the criminal justice system may only obtain custody over low-level implementers (assuming they are able to obtain custody over anyone at all given that many direct perpetrators ultimately take their own lives in the context of their terrorist

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

\textsuperscript{399} See Boim v. Quranic Literary Inst., 291 F.3d 1000, 1011 (7th Cir. 2002) (noting expansive purposes of § 2333 in supporting secondary liability).

\textsuperscript{400} See \textit{supra} note 53 (discussing debate over whether the FSIA applies where individual state actors are sued).


\textsuperscript{402} For a fuller discussion of the benefits of civil suits for terrorism, see generally Hume & Todd, \textit{supra} note 38; Moore, \textit{supra} note 76.
activities), and likely cannot reach the real architects of terrorist acts. Even where defendants are judgment-proof, such cases have symbolic value, contribute to norm-enunciation, and harness the expressive functions of the law.

Recognizing terrorism causes of action under the ATS would fill a gap in anti-terrorism litigation and ensure that citizen and non-citizen victims of acts of terrorism can sue together in a concerted fashion. This would remove one of the gaps in coverage of the statutory provisions, enabling the civil enforcement of international law violations. To be sure, the concern expressed by the court in Saperstein about opening the floodgates to terrorism claims by aliens with little connection to the United States other than their ability to access our courts is a real one. A number of structural constraints, however, limit foreign litigants' ability to pursue civil litigation, as well as the desirability of bringing suit here. These

403. In Ungar, for example, terrorists attacked a couple and their child in Israel. Estate of Ungar ex rel. Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 86 (D.R.I. 2001). The couple was killed, but the child survived. Id. The husband's estate could sue under the ATA because the decedent was a U.S. citizen. Id. By contrast, the wife was an Israeli citizen. Id. Recognizing terrorism claims under the ATS would enable these claims to proceed together. See also Alejandre v. Cuba, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997) (noting that fourth victim was not a U.S. citizen). In Ungar and Alejandre, the non-U.S. citizen plaintiffs could also have brought suit under the TVPA, which also creates a cause of action for summary execution, defined as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." Torture Victim Protection Act of 1991 § 3(a), 28 U.S.C. § 1350 note (Torture Victim Protection).

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

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

include the necessity of establishing personal jurisdiction over defendants; the potential for dismissal under the doctrine of forum non conveniens; the challenges of discovering defendants; and the possibility of serving process. Any corporate defendants doing business within the U.S. can easily be served process. See Linde v. Arab Bank, PLC, 384 F. Supp. 2d 571, 571 (E.D.N.Y. 2005) (service on bank’s New York agent). But see Estate of Ungar, 304 F. Supp. 2d at 257-59 (discussing difficulties of effectuating service of process on Hamas as an unincorporated association). Service may also be accomplished by publication in certain circumstances. See Mwani, 417 F.3d at 5, 17 (allowing service of process by publication for defendants Osama bin Laden and al Qaeda, whose whereabouts were not easily determined); Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 220 (S.D.N.Y. 2003) (same).

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

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

ery;\textsuperscript{410} the justiciability doctrines of international comity, political question, and act of state; the potential for executive intervention;\textsuperscript{411} and the challenges of executing judgments against available assets.\textsuperscript{412}

VI. CONCLUSION

The discussion above suggests that although the U.S. courts have not yet fully embraced a generalized tort of terrorism, the building blocks are in place to recognize such a cause of action under the ATS. An international consensus now exists that violent acts targeting civilians are per se unlawful, either as war crimes (if they are committed within the context of an armed conflict, however classified, with a nexus thereto), crimes against humanity (if committed within the context of a widespread or systematic attack against a civilian population), or terrorism (if the result of an isolated attack outside of a state of war).\textsuperscript{413} Only situations in which members of a state's armed forces are targeted by unprivileged belligerents—within or without an armed conflict or war of national liberation—may not be actionable under the ATS. Doctrinal fuzziness at the margins with regard to the illegality of attacks by and against combatants within an armed conflict should not bar the recognition of a universal prohibition against most manifestations of terrorism in the majority of circumstances.

\textsuperscript{412} See generally Strauss, supra note 32, at 724–37 (examining the obstacle to the enforcement of judgments brought against terrorist organizations and the individuals, officials, and states that enable them).
\textsuperscript{413} Furthermore, so long as the conduct underlying the suit corresponds to a specific terrorism prohibition as set forth in any of the multilateral treaties to which the United States is a party or a provision of Title 18 of the U.S. Code, the case should move forward beyond the failure to state a claim phase.