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Editorial Office: Faculty of Law, Sriwijaya University
Jalan Srijaya Negara, Palembang, South Sumatra 30139, Indonesia.
Phone: +62711-580063 Fax: +62711-581179
E-mail: sriwijalayalawreview@unsri.ac.id | sriwijalayalawreview@gmail.com
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Looking at The Civil Suits and Court Cases Under the Justice Against Sponsors of Terrorism Act: Why it Fails?

Shahrul Mizan Ismail^a, and Ali Ibrahim Alheji^a

^a Faculty of Law, Universiti Kebangsaan Malaysia, Malaysia. Corresponding author Shahrul Mizan Ismail, email: shahrulmizan@ukm.edu.my

Article	Abstract
<p>Keywords: Civil Litigation; Foreign Sovereign Immunities Act (FSIA); Justice Against Sponsors of Terrorism Act (JASTA); Terrorism; US Anti-Terrorism Act (ATA).</p> <p>Article History Received: Aug 22, 2023; Reviewed: Jan 23, 2025; Accepted: Jan 30, 2025; Published: Jan 31, 2025.</p> <p>DOI: 10.28946/slrev.Vol9.Iss1.3128.pp208-233</p>	<p>Terrorism remains a persistent and significant global threat, with far-reaching consequences for world peace and stability. The September 11, 2001 attacks marked a pivotal moment in the fight against terrorism, prompting governments and international organisations to adopt new strategies to counter this threat. In response to these tragic events, the United States enacted the Justice Against Sponsors of Terrorism Act (JASTA), a legislative framework designed to allow victims of terrorism to seek compensation from state sponsors of terrorism. While JASTA reflects a commitment to holding individuals and nations accountable for supporting terrorism, it has sparked controversy, with critics arguing that it undermines the principle of sovereign immunity. In contrast, others view it as a crucial tool for combating terrorism. This study examines the legal and procedural implications of JASTA, focusing on the challenges of bringing civil actions under this law. The study explores anti-terrorism laws, relevant case law, and the practical obstacles of pursuing legal claims under JASTA through a literature-based research approach. The findings highlight the legal complexities and political considerations involved in holding state sponsors accountable, emphasising the need for a balanced approach that upholds international law and diplomacy while ensuring justice for terrorism victims. This research contributes to ongoing discussions on refining strategies to combat state-sponsored terrorism and offers recommendations for potential legislative reforms to enhance the effectiveness of JASTA in achieving justice.</p>

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INTRODUCTION

On September 11, 2001, at 8:46 a.m., American Airlines Flight 11 collided with the north tower of the World Trade Centre in New York City. 16 minutes and 31 seconds later, at 9:03 a.m., United Airlines Flight 175 collided with the South Tower. At 9:37 a.m., approximately 51 minutes and six seconds after the initial collision, American Airlines Flight 77 collided with the Pentagon at a speed of 530 miles per hour. On a fourth aircraft, passengers aboard United Airlines Flight 93, upon realising that their aircraft had been hijacked, unanimously made the decision to

reclaim control of the jet with the aim of ensuring their own safety. Communications with their families ceased as the cockpit's voice recorder captured the sounds of passengers attempting to force open the cockpit door. Shortly after 10:02 a.m., one of the hijackers can be heard saying, "Pull it down! Pull it down!" The audio reveals the passengers' persistent efforts to regain control until the aircraft hurtles into an empty field at a speed of 580 miles per hour.¹

The above incidents occurred during the September 11 attacks. The direct effects of the attacks were the collapse of the Twin Towers, the loss of many lives, and the devastation of numerous properties. The 'indirect consequences of the September 11 attacks were changes in US national security policy and international relations. As stated by President George W. Bush, the events of September 11 initiated the dawn of a "*new kind of war*," thereby rationalising the United States' position as a worldwide policing authority. The Bush administration also emphasised that policies for dealing with terrorist incidents such as September 11 must be new because of the new conditions.² The question arose whether a new type of conflict deserved a new legal system to accompany it.

The families of those killed in the September 11 attacks sought justice and retribution from those they believed responsible by turning to the justice system. Although Al-Qaeda and Osama Bin Laden took the blame for the attacks, suspicion fell on the Kingdom of Saudi Arabia (KSA) after it was determined that 15 of the 19 hijackers were KSA nationals. This led to the KSA being named as a possible sponsor of the attacks. Relatives of the victims of the September 11 attacks reported that the Saudi royal family, banks, and charities financially supported the al Qaeda hijackers by donating to extremist mosques that supported jihad. These contributions were allegedly made in return for jihadist propaganda. Numerous of these hypotheses have origins in the "*28 Pages*," a report from the House and Senate Intelligence Committees in 2002, which raised suspicions about the involvement of the Kingdom of Saudi Arabia (KSA). Nevertheless, an autonomous congressional commission conducted an investigation and did not discover any substantiated proof linking the Saudi Arabian government or its representatives to the funding of the attacks.³

The disclosure of the "*28 Pages*" in July 2016 revived public attention towards a potential connection between the Kingdom of Saudi Arabia (KSA) and the September 11 attacks. In this context, Senator Chuck Schumer from New York and Senator John Cornyn from Texas introduced the Justice Against Sponsors of Terrorism Act (JASTA) (Hattem 2016). JASTA's objective was to establish responsibility for state sponsors of terrorism that had previously avoided accountability due to perceived shortcomings in the US legal framework. The "*flaws*" refer to the immunities granted to KSA under the Foreign Sovereign Immunities Act (FSIA) and the Anti-terrorism Act (ATA), which require plaintiffs to prove that KSA was the primary cause of the September 11 attacks.⁴ The JASTA alters long-standing notions of sovereign immunity and state interactions, although it was originally presented as a method for 9/11 victims to hold

¹ Holcombe and Madeline. "Passengers Fought to the End on United Flight 93." *CNN*, September 11, 2017

² Holcombe and Madeline.

³ Holcombe and Madeline.

⁴ US Department of State Digest of United States Practice in International Law, "Justice Against Sponsors of Terrorism Act," 2016, <https://www.state.gov/wp-content/uploads/2019/11/Edited-2016-Digest-Chapter-10.pdf>.

KSA accountable under the new rules. In addition, it allows individual plaintiffs to sue foreign states for terrorist claims, giving courts in the United States the authority to determine whether a foreign state is a state sponsor of terror.

On September 28, 2016, the US Congress passed JASTA. While most of JASTA's provisions are general, it expressly allows victims of the September 11 attacks and their family members to sue any foreign state (particularly KSA) for its alleged role in those attacks. Two laws were amended to enable civil actions brought under JASTA: the Foreign Sovereign Immunities Act (FSIA) and the Anti-Terrorism Act (ATA).⁵ As per the FSIA, a foreign state is granted immunity from the jurisdiction of both the United States and individual states. The legislation also outlines several instances where this immunity does not apply, one of which pertains to non-commercial torts. This specific exception permits individuals in the United States to file lawsuits against foreign states, seeking compensation for harm or injuries incurred within the country because of wrongful actions conducted by a foreign government, its representatives, or its personnel.⁶

In legal proceedings concerning the Kingdom of Saudi Arabia (KSA) in relation to the September 11 attacks, the exception within the FSIA was narrowly interpreted by US courts to pertain solely to torts that exclusively transpired within the boundaries of the United States. According to this interpretation, a foreign state would maintain immunity even if it engaged in a wrongful act that led to harm or damage within the United States, as long as some aspect of the wrongdoing occurred outside the US. In order to surpass this restricted understanding by US courts, JASTA broadens the scope of the “*terrorism exception*” in Section 3 of the act. This expansion permits legal claims against foreign states (and their officials, employees, and agents) in instances where they commit torts anywhere worldwide that contribute to a terrorist attack taking place within the United States. JASTA eliminates the geographical restriction on liability for wrongful acts established by US courts and enables US citizens to initiate lawsuits against foreign states for torts committed abroad that lead to harm or damage within the United States in connection with international terrorist attacks.

JASTA also amends the ATA, another statute that affords US citizens the right to pursue compensatory damages that are tripled in cases where harm arises from an instance of international terrorism. Within JASTA, Section 4 introduces a fresh provision into the ATA framework, permitting legal actions under ATA against individuals and entities based on concepts of secondary accountability. More specifically, it acknowledges the responsibility for aiding, abetting, or conspiring to execute an act of international terrorism that is planned, authorised, or executed by a designated foreign terrorist organisation. This provision overturns previous court judgments that concluded ATA did not encompass secondary liability. In a gesture aimed at aiding victims of the September 11 attacks, JASTA's application is retroactive, encompassing legal proceedings involving damages stemming from as far back as September 11, 2001. Despite JASTA's intent, concerns persist regarding its enforceability and potential misuse. Critics argue that JASTA could be exploited for political purposes rather than serving justice. It

⁵ State Jurisdiction and Immunity, “Congress Overrides Obama’s Veto to Pass Justice Against Sponsors of Terrorism Act,” *The American Journal of International Law* 111, no. 1 (n.d.): 156.

⁶ Immunity.

also raises diplomatic tensions and threatens US relations with foreign governments. The challenge remains in balancing sovereign immunity principles with the right of terrorism victims to seek redress fairly and effectively under international law.

This article builds upon my previously published work⁷, which examined JASTA primarily through the lens of civil procedure. That study focused on procedural issues, including cause of action, jurisdiction, and the challenges of establishing causation in US courts. It was a doctrinal analysis rooted in procedural law. However, This new research takes a broader approach, investigating why JASTA ultimately fails by considering political, legal, and diplomatic factors hindering its effectiveness. It explores international reactions, sovereign immunity controversies, and potential legislative reforms. While my previous article concentrated on civil procedural constraints, this study delves into JASTA's practical and geopolitical consequences. This research complements my earlier work by distinguishing the procedural aspects from the broader systemic failures while offering a distinct and expanded perspective.

In addition, there are concerns about the enforceability of JASTA and the potential for abuse of the act. For example, there are concerns that JASTA could be used as a political tool to pursue foreign policy objectives rather than as a means of providing justice for victims of terrorism. There are also concerns that JASTA could be used to target countries that are not actually sponsors of terrorism and that it could lead to increased political tensions and strain US relationships with foreign governments. Considering these concerns, the problem with JASTA is finding a way to balance the principles of sovereign immunity and the right of victims of terrorism to seek redress in a way that is fair, effective, and consistent with international law.

RESEARCH METHODS

This qualitative investigative approach was used to analyse JASTA and procedural law, focusing on printed educational materials like textbooks, legal case compilations, and academic journals. The primary foundation for the investigation is civil procedural matters. Library research was conducted using printed textbooks, legal encyclopaedias, and law-focused journals from prominent repositories like the National University of Malaysia and the Law Library of the University of Malaya. Electronic repositories, such as Lexis Nexis, JSTOR, Hein Online, and Westlaw, were used due to their vast troves of diverse information, making them indispensable for obtaining the most recent and comprehensive data.

ANALYSIS AND DISCUSSION

Background of Justice Against Sponsors of Terrorism Act (JASTA)

The enactment of the JASTA stands as a pivotal milestone within the federal legal framework of the United States, a direct response to the harrowing terrorist attacks on September 11, 2001. This legislative measure is meticulously designed to offer a pathway for individuals victimised by acts of terrorism to pursue legal recourse against foreign governments that extend support to such terrorist activities. The crux of JASTA lies in establishing a legal basis for pursuing claims of damages through the mechanism of actionable cause within the jurisdiction of US courts.

⁷ Shahrul Mizan Ismail and Ali Ibrahim Alheji, "The Justice Against Sponsors of Terrorism Act (JASTA) from a Civil Procedure Perspective," *ideas*, 2023.

Preceding the emergence of JASTA, foreign governments typically enjoyed a shield of immunity against lawsuits within US judicial arenas, an established principle recognised as sovereign immunity.

JASTA marks a departure from this long-standing norm by introducing a specific exemption in situations where foreign states are implicated in aiding terrorists. While the contents of JASTA encompass broad language, the statute notably carves out explicit provisions, granting the right to victims and the families of victims affected by the September 11 attacks to institute legal proceedings against any foreign government, with a particular focus on the KSA. In order to facilitate civil lawsuits initiated through JASTA, the act brings amendments to two legislations, namely the FSIA and the ATA. The FSIA establishes the principle that “*a foreign state shall be shielded from the jurisdiction of both United States and State courts.*” Additionally, it outlines several instances where such sovereign immunity is not applicable, including a provision for non-commercial torts. This exception enables an individual in the United States to file a lawsuit against a foreign state seeking compensation for injuries sustained within the US due to wrongful actions committed by a foreign government, its officials, or its employees.

When it comes to civil litigation directed at the KSA in connection with the events of September 11th, the United States courts had taken a narrow stance on interpreting this exception. Their interpretation limited the application of this exception solely to tortious acts that took place entirely within the United States. According to this interpretation, even if a foreign state engaged in a wrongful action that led to harm or damage within the US, immunity remained intact if some of the wrongful action occurred outside the United States. In order to surpass this restricted interpretation by US courts, JASTA broadens the scope of the “*terrorism exception*” within FSIA, as outlined in Section 3 of JASTA. This expanded provision permits civil claims to be pursued against foreign states (including their officials, employees, and agents) for committing wrongful actions anywhere globally that contribute to a terrorist attack executed on US soil. JASTA eliminates the geographic limitations on liability for wrongful actions that US courts established. Consequently, it allows US citizens to initiate lawsuits against foreign states for wrongful actions occurring abroad that result in injury or damage within the United States, particularly concerning incidents of international terrorism. JASTA also revises another statute, ATA, which establishes a legal avenue for US citizens to seek triple damages from those held responsible for injuries stemming from acts of international terrorism.⁸

Under Section 4 of JASTA, a new provision is incorporated into the ATA framework, permitting secondary liability-based legal proceedings against individuals and entities. Specifically, this provision recognises culpability for enabling, abetting, or conspiring to carry out an act of international terrorism that is planned, authorised, or carried out by a foreign terrorist organisation that has been designated as such. This provision effectively overturns prior judicial determinations that the ATA did not include secondary liability. JASTA is applied retroactively to cases involving injuries dating back to September 11, 2001, to assist the victims of the September 11 assaults. Lawmakers from both the Democratic and Republican parties sponsored

⁸ Section 2333(a) provides: “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains...”

JASTA.⁹ The legislation reflects a bipartisan sentiment of compassion for the victims and families impacted by the September 11th attacks, who aim to bring successful lawsuits against the KSA in US courts. This sentiment is in response to the dissatisfaction expressed by these parties with the findings of the 9/11 Commission, which concluded that there was “*no evidence that the Saudi government as an institution or senior Saudi officials individually funded [Al Qaeda].*” Although there was a lot of compassion for the September 11th victims and their families, the Obama administration opposed JASTA because they were worried about unforeseen repercussions. The White House persistently opposed JASTA prior to the bill's passage because of its implications for US economic, diplomatic, and national security interests and its dilution of foreign sovereign immunity.

A significant worry for the United States centred on the possibility that other nations might respond with reciprocal actions, thereby granting access to their legal systems for analogous claims against the US and its officials. The concern lies in the potentially far-reaching ramifications of such lawsuits: they could embroil American individuals based on mere allegations of wrongdoing, contravening foreign regulations; they might necessitate time-intensive requests for sensitive intelligence details during the discovery process; and they could lead to the seizure of US government assets in foreign territories. Adding to this, considering the extensive global presence of the US, the administration cautioned that if other countries were to implement analogous legislation, the repercussions on US interests would likely be more profound compared to any other nation. Following the enactment of JASTA, foreign governments once again raised objections, asserting that the legislation breaches international legal norms.

The Saudi Foreign Ministry stated, it “is of great concern to the community of nations that object to the erosion of the principle of sovereign immunity, which has governed international relations for hundreds of years”.¹⁰ Russia’s Foreign Ministry described the law as evincing a “complete disregard for international law” and a “policy of extending [US] jurisdiction to the entire world and ignoring the concept of state sovereignty ...”. The United Arab Emirates Foreign Ministry declared that JASTA is “contrary to general liability rules,” “not equal with the foundations and principles of relations among states, and represents a clear violation given its negative repercussions and dangerous precedents.”¹¹

⁹ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016) (codified at 18 U.S.C.A. §2333, 28 U.S.C.A. §1605B, was cosponsored by Senator Chuck Schumer, Democratic-New York, and Senator John Cornyn, Republican-Texas.

¹⁰ Kingdom of Saudi Arabia Ministry of Foreign Affairs Press Release, Official at Ministry of Foreign Affairs, “JASTA Great Concern to Community of Nations Objecting to Erosion of Principle of Sovereign Immunity,” Official at Ministry of Foreign Affairs, n.d., <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/news/MinistryNews/Pages/ArticleID201693001814440.aspx>.

¹¹ U.A.E. Ministry of Foreign Affairs & International Cooperation Press Release, “UAE Voices Concerns Regarding US Congress Adoption of Justice Against Sponsors of Terrorism Act,” accessed September 12, 2016, <http://wam.ae/en/print/1395299900156>.

Overview of JASTA and Its Relationship to Compensation for Victims¹²

The JASTA¹³, enacted in 2016, was designed to remove legal barriers that previously prevented terrorism victims and their families from filing civil lawsuits in US courts against foreign states or entities accused of supporting terrorist acts¹⁴. While JASTA does not establish a dedicated compensation fund like the 9/11 Victim Compensation Fund, it expands legal liability for foreign actors and governments, improving victims' ability to seek and collect compensation. It enhances US courts' ability to award damages by broadening the scope of legal accountability.

JASTA introduced significant changes to sovereign immunity under US law. Prior to its enactment, the FSIA¹⁵ granted foreign states immunity from lawsuits unless they were officially designated as "state sponsors of terrorism." JASTA expanded this exception, allowing lawsuits against foreign states accused of aiding or funding terrorist acts on US soil¹⁶, regardless of their official designation. Additionally, JASTA introduced secondary liability¹⁷, meaning entities that knowingly provided material support to terrorism could be held accountable even if they were not the primary perpetrators. This expansion increases the number of potential defendants from whom victims can seek compensation.

JASTA primarily deals with jurisdiction and sovereign immunity, but the actual cause of action for victims often arises from the ATA¹⁸. This law allows US nationals injured by international terrorism to file lawsuits and seek damages, including treble (triple) damages and attorney fees. JASTA's broadened defendant pool means more ATA-based cases can proceed against foreign states and entities¹⁹. Courts can award compensatory damages for medical expenses, lost income, emotional distress, and wrongful death²⁰. In some cases, punitive damages may also be awarded if the state is found to have engaged in or supported terrorism²¹. However, enforcing these judgments presents challenges. Victims must identify and attach the defendant's assets, whether in the US or abroad. Some foreign states hold commercial assets in the US that may be subject to seizure, but diplomatic properties generally remain protected²². When a foreign state is sanctioned or designated as a state sponsor of terrorism, its assets may be blocked or frozen by the US Treasury. Under certain laws, such as the Terrorism Risk Insurance Act (TRIA) of 2002, victims of terrorism may seek to collect compensation from these frozen assets²³.

¹² For an overview of JASTA's background, see *Justice Against Sponsors of Terrorism Act*, Pub. L. No. 114-222, 130 Stat. 852 (2016).

¹³ JASTA was enacted on September 28, 2016, after Congress overrode a presidential veto. See 162 Cong. Rec. S5901 (daily ed. Sept. 28, 2016).

¹⁴ See 28 U.S.C. §1605B, added by JASTA.

¹⁵ 28 U.S.C. §1602(a)(1).

¹⁶ 28 U.S.C. §1605B(c) (creating jurisdiction for claims of physical injury or death in the United States).

¹⁷ JASTA explicitly amended the Anti-Terrorism Act to allow claims under theories of secondary liability (aiding and abetting or conspiracy). See 18 U.S.C. §2333(d).

¹⁸ 18 U.S.C. §2333 provides civil remedies for US nationals injured by acts of international terrorism.

¹⁹ Damages for personal injury can be guided by federal common law or relevant state tort law standards when the ATA is invoked.

²⁰ 18 U.S.C. §2333(a) (mandating treble damages for violations of the ATA).

²¹ See 28 U.S.C. §1605A (terrorism exception to immunity, allowing punitive damages in certain circumstances).

²² FSIA restricts the attachment of certain diplomatic or military assets. 28 U.S.C. §1610 exempts property of a foreign state in some instances but not in commercial contexts.

²³ Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, as amended.

However, accessing these funds often requires court approval and coordination with government agencies, making the process complex and time-consuming. If a foreign state's assets in the US are insufficient, victims may attempt to enforce their judgments in other countries, though success depends on local laws and international agreements. The process can be further complicated if assets are frozen due to US sanctions, requiring court orders and coordination with government agencies.

JASTA itself does not create a compensation fund, but victims may have access to other funds. The 9/11 Victim Compensation Fund provides relief to those affected by the September 11 attacks²⁴, while the US Victims of State-Sponsored Terrorism Fund compensates victims of state-sponsored terrorism using fines and penalties from sanctions violations²⁵. Under JASTA's expanded scope, victims must prove that a foreign state or entity's support, funding, or actions were a direct cause of the terrorist incident²⁶. This evidentiary burden can be substantial, requiring access to classified intelligence, financial records, or witness testimony, which may be difficult to obtain. Proving causation is critical for securing damages, as courts require a clear connection between the defendant's actions and the harm suffered.

Concept of Terrorism

Terrorism is a concept that is difficult to define. This is even so when treating terrorism as a legal offence, which requires a specific and concise definition. Further, this statement was strengthened by the lack of a universally accepted definition of terrorism, where each nation has a different definition of terrorism as a legal offence. Nicholas Perry, the author of "*The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails*", established that there is no settled meaning of terrorism as there exist twenty-two distinct definitions and descriptions of terrorism in the Federal Law of the United States alone, without counting other jurisdiction or organisation bodies.²⁷ Withstanding the previous matter, terrorism as a Legal Offence may be viewed from the perspective of its desired effect instead of its motivated goals, as terrorism generally involves a much more serious use of terror. Most definitions entail "*the use of violence to create fear in a larger audience in order to create change in that larger audience*", irrespective of its objective²⁸.

There are multiple views on whether a certain offence is terrorism. One view concerns the motives of the perpetrator as the main ingredient in deciding whether it is terrorism. This is known as a "*Motive-based definition*," a definition that provides an exception in pursuit of self-determination.²⁹ For instance, among the United Nations resolutions, there is one that does not

²⁴ The Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, Title IV (2001), established the original September 11th Victim Compensation Fund.

²⁵ The USVSST Fund was established under the Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. §20144.

²⁶ Plaintiffs must establish proximate causation between the defendant's conduct and the terrorist act. See *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013).

²⁷ Nicholas J. Perry, "The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails," *Journal of Legislation* 30, no. 2 (2004): 249–254.

²⁸ Arthur H. Garrison, "Defining Terrorism: Philosophy of the Bomb, Propaganda by Deed and Change Through Fear and Violence," *Criminal Justice Studies* 17, no. 3 (2004): 259–79.

²⁹ Perry, "The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails."

constitute a particular offence as terrorism if it was committed by people seeking self-determination against a violently enforced occupation (UN General Assembly 1970). The impact of motive-based definition may legitimise certain groups of universally recognised terrorists to be non-terrorists, e.g., the Irish Republican Army, Hezbollah and Hamas, as they could be seen as "*freedom fighters*" compared to a group of terrorists.

In contrast to the motive-based interpretation, an alternative perspective perceived terrorism as a legal transgression primarily defined by the violent techniques employed by the perpetrator, without assigning political judgments to the acts-effectively categorising most violent actions as apolitical by disregarding the motives behind them. This viewpoint represents the prevailing consensus on terrorism, with many definitions of the term emphasising the methodology of violence as the fundamental criterion for identifying terrorism. An instance of this perspective can be observed in Article 1 of the European Convention on the Suppression of Terrorism, where terrorism is defined to encompass actions involving the use of explosives, grenades, rockets, automatic firearms, or letter/parcel bombs that endanger lives.³⁰ Similarly, in the United States, the commission of an act of terrorism is considered a legal offence when it involves any unlawful activity resulting in harm to any "*person, property, or entity in the United States*".³¹

Terrorism originated in the late 18th Century, derived from the French word *terrorism* and Latin *terror*. Historically, terrorism was a word derived during the rule of the Jacobin Faction (Left-wing Political Organisation) during the French Revolution, a period known as *régime de la terreur* (Reign of Terror).³² They were identified as a political group with the utmost egalitarianism and violence in France. The Jacobin Faction was one of the many clubs to be directly involved in the French Revolution. For the creation of a strong government, the Jacobin Faction was infamous for their Reign of Terror towards the right-wing factions and targeted those who opposed Maximilien Robespierre. Reign of Terror was their highest form of violence, using radical measures to erase Christianity. *La Terrur*, a term in French, was the 10-month period where their enemies were "*officially*" tried and executed, numbered around 17,000 people, with the addition of an unknown number of people who perished in prison or with lack of trial³³.

Initially, the term "*terrorism*" was applied to the Reign of Terror during the French Revolution. During this period, which lasted from September 5, 1793, to July 27, 1794, the Revolutionary Government employed violence and severe tactics against civilians suspected of opposing the Revolution. In reaction to this, public resistance against Napoleon's incursion into the Spanish Peninsula gave birth to a novel category of combatant—the "*guerrilla*." The term "*guerrilla*" is derived from the Spanish word "*guerra*," signifying "*small war*." In this section of this writing, the evolution of terrorism can be gradually seen to evolve from non-state practices and myriad ideologies to overturn the governments and eventually to attacks towards civilians.³⁴

³⁰ "Article 1 of European Convention on the Suppression of Terrorism".

³¹ "Section 442(b) of Domestic Security 6 U.S.C".

³² "United Nations Offence on Drugs and Crime (UNODC)" (2018).

³³ Causes & Dates Timeline, "French Revolution," history.com, accessed February 13, 2025, <https://www.history.com/topics/european-history/french-revolution>.

³⁴ "UNComHR (53rd Sess)" (2001).

By the late twentieth Century, new types of fundamentalist religious terrorism evolved that were independent of specific territorial claims, such as the release of prisoners or tactical restraint. Additionally, terrorism throughout the second part of the twentieth Century lost its selective nature, which is known as modern terrorism, which comprises assaults on civilians and non-governmental authorities. In the context of this emerging ideological shift, accompanied by the sudden revelation of the demise of Osama bin Laden, the prominent leader of the Al Qaeda terrorist organisation, in May 2011, an event that remarkably coincided with the approach of the 10th anniversary of the September 11, 2001, attacks, a chain reaction of critical circumstances has been set into motion. These interconnected factors have subsequently played a pivotal role in instigating a resurgence of terrorist activities targeting the United States and unfolding on its own territory.³⁵

During the winter and spring of 2005, the number and severity of Iraqi suicide bombings increased significantly, from 69 in April 2005 (a record rate at the time) to 90 in May. Similarly, the resurgence of sectarian warfare in 2014, exacerbated by violent conflicts with ISIS, was a resurgence of ethnic carnage that occurred in the early 2000s during the US-led occupation of Iraq. These attacks resulted in hundreds of deaths and outnumbered the previous cycle of vehicle bombings by more than a factor of two.³⁶ In contemporary times, newer strategies encompass a range of unconventional approaches within the realm of terrorism. These tactics encompass various forms, including the highly unorthodox, such as nuclear terrorism – instances where activities like the creation of a "*dirty bomb*" or the targeting of a nuclear reactor are pursued. In addition, the landscape also witnesses a surge in high-tech terrorism characterised by cyberattacks aimed at undermining digital infrastructure. Furthermore, there is the emergence of ecological terrorism, which involves threats to the environment and the deliberate targeting of cultural heritage in acts of terrorism, as exemplified by the actions of groups like ISIL. An illustrative instance can be observed in the case of the Executive Committee of the Commonwealth of Independent States in 1999, within Article 1.³⁷

In the wake of the Al Qaeda attack, American society underwent a significant transformation, veering away from a state of openness and embracing a more security-centric approach. The sheer magnitude and gravity of the attack compelled the United States to engage in warfare and fundamentally reshape its security strategies. Within the United States, the counter-terrorism landscape shifted from being primarily law enforcement-focused to assuming a more pronounced security role. This shift led to the implementation of unprecedented security measures, spanning enhanced protocols at airports and seaports, intensified border searches, heightened visa scrutiny, and more rigorous immigration procedures. Consequently, history underscores that terrorism is deeply interwoven into the very fabric of social and political conflicts. This inherent nature of terrorism remains steadfast, and in today's world, nations and populations facing threats are confronted by what is referred to as the "*New Terrorism*." This form of terrorism can be characterised by several key attributes: (1) decentralised, cell-based networks with minimal hierarchical structures; (2) a desire to acquire high-intensity weapons and

³⁵ Gus Martin, *Understanding Terrorism: Challenges, Perspectives, and Issues* (SAGE Publications, 2015).

³⁶ Gus Martin, *Understanding Homeland Security* (SAGE Publications, 2019).

³⁷ United Nations Office on Drugs and Crime (UNODC), "Module 1: Introduction to Internal Terrorism" (n.d.).

even weapons of mass destruction; (3) motivations that are politically ambiguous, religious, or even mystical in nature; (4) utilisation of asymmetrical tactics designed to maximise casualties; (5) adept utilisation of the Internet and manipulation of media channels to amplify their impact.³⁸ Furthermore, in the contemporary era, terrorist groups benefit enormously from advancements in information technology and the pervasive influence of the Internet. Violent extremists have gained expertise in effectively projecting their conflicts into the homes of millions of individuals. Individuals specialising in tactics such as suicide bombings, vehicle-based explosives, or mass-casualty assaults recognise that carefully selected targets have the potential to capture the attention of a global audience (Martin 2019).

Terrorism In the Perspective of the West

The perspective of the West regarding modern terrorism in the 21st Century revolves around the pattern of religious ideologies. This view is a theory designed by David Charles Rapoport, an Emeritus Professor at the University of California (UCLA), in his work, *"The Four Waves of Modern Terrorism"*. According to his "wave theory," a new wave would arise every 40 years, beginning with what he termed the "Anarchist wave" from the 1880s to the end of World War I—immediately followed by the "Anti-colonial wave" from the end of World War I to the late 1960s. It was preceded by the "New Left wave" from the late 1960s to the present, which overlapped with the "Religious wave" from 1980 to the present.³⁹ Although the wave theory has received numerous criticisms, including being too simplistic, the historical evidence demonstrates that the actual evolution of terrorism has been much "messier".⁴⁰ Nonetheless, the wave theory has garnered substantial popularity and is predominantly referenced within Western contexts. Within this framework, a "wave" signifies a recurring cycle of activities across different time periods, wherein akin actions unfold across multiple nations. This phenomenon is propelled by prevailing and shared energy that moulds the distinct attributes of participating groups and influences the dynamics of their interconnected relationships (Rapoport 2013).

The basis of the fourth wave was introduced due to three major events beginning with the Iranian Revolution, the Soviet Union's invasion of Afghanistan, and the new Islamic Century, which paved the road for religious fundamentalism. Currently, the most infamous militant Islamists who are believed to carry this wave are the groups of Boko Haram, al-Qaeda⁴¹, Hezbollah, and ISIS. This was due to their recent international attention, especially for the "profoundly international attack". For this matter, it was established from the perspective of the West that the religious wave is the heart of the wave.⁴² Further, this was strengthened by an attack rated as "one of the worst incidents" in modern international terrorism, which was the attack on

³⁸ Gus Martin, *Understanding Homeland Security*.

³⁹ David C. Rapoport, *The Four Waves of Modern Terrorism*, in *Attacking Terrorism: Elements of a Grand Strategy*, ed. Audrey Kurth Cronin and James M. Ludes (Washington, D.C: Georgetown University Press, 2004).

⁴⁰ Michael Chertoff, Patrick Bury, and Daniela Richterova, "Bytes Not Waves: Information Communication Technologies, Global Jihadism and Counter-terrorism," *International Affairs* 96, no. 5 (2020): 1305–25, <https://doi.org/doi.org/10.1093/ia/iiaa048>.

⁴¹ Jamal Wiwoho et al., "Examining Cryptocurrency Use among Muslim Affiliated Terrorists: Case Typology and Regulatory Challenges in Southeast Asian Countries," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 18, no. 1 (June 3, 2023): 102–24, <https://doi.org/10.19105/al-lhkam.v18i1.7147>.

⁴² Rapoport, *The Four Waves of Modern Terrorism*, in *Attacking Terrorism: Elements of a Grand Strategy*.

September 11, 2001, by al-Qaeda for their suicidal "*martyrdom mission*" (Martin 2019). Under this attack, it was believed by the West that they were attacked in response to a holy cause against the perceived evil of the West. As such, their goal was seen to be religious and political against the continuing process of domination and exploitation of Muslim Countries. As a response to this incident, the USA Patriot Act was enacted, which allowed the authority for federal law enforcement agencies to engage in surveillance and other investigative work, as well as the formation of the Department of Homeland Security.

From the perspective of the West, the aftermath of this incident is enough to alert policymakers to waging war against the ideology of these terrorist leaders. As the matter stands, the utilisation of resources, including law enforcement as well as military assets such as the invasion of Afghanistan, was "*rightfully justified*" for the very reason of the need to eliminate state-sponsored havens, especially for al-Qaeda and other terrorist groups.⁴³ Similarly, the invasion of Iraq was named "*Operation Iraqi Freedom*" and was justified because of the need to eliminate alleged stockpiles of weapons of mass destruction linked with Saddam Hussein's regime. Aside from that, it is believed that the West considered the withdrawal of coalition forces in Iraq had spread violence from Sunni and Shi'a, killing many civilians in the process, leading to devolved domestic security after the rise of the Islamic State of Iraq and the Levant (ISIS). The New Terrorist Morality is the newest concept adopted in the late 20th Century. It is believed that the new generation of terrorists is more "*spontaneous and gruesome*". One of the examples was an incident in 2014 when ISIS recorded and distributed graphic beheadings of several Western civilians. A few differences between the New Terrorism and Traditional Terrorism are shown in Table 1.⁴⁴

Table 1: The differences between new terrorism and traditional terrorism

New Terrorism	Traditional Terrorism
Cell-based network (minimum lines of command and control)	Identifiable organisations or movements
Requiring high-intensity weapons and weapons of mass destruction	Use of small arms and explosives
Methods are used to maximise casualties	Selection of targets
Skillful use of the Internet	-
Manipulation of media	-

Source: Martin, Gus. Essentials of Terrorism: Concepts and Controversies. SAGE Publications. (2019): p. 38-39.

The New Terrorist Morality may shift the current fourth wave to a new wave. There are a few notable theories on the emergence of a new wave. One of them is by Jeffrey D. Simon, whose theory is on the Technological wave. He believes that the Internet served as the basis for this wave, whereby emphasis was given to lone operators.⁴⁵ According to Simon, lone operators are radicalised in an unstructured virtual environment, which lacks a formal command and control structure, without the constraints of a hierarchical leadership structure. Lone operators can attack at their will instead of carrying out orders. For example, mass shootings, the use of self-made

⁴³ Gus Martin, *Understanding Homeland Security*.

⁴⁴ Gus Martin.

⁴⁵ Jeffrey D. Simon, "Technological and Lone Operator Terrorism: Prospects for a Fifth Wave of Global Terrorism," in *Terrorism, Identity and Legitimacy: The Four Waves Theory and Political Violence*, ed. Jean E. Rosenfeld (London: Routledge, 2011), 53.

explosive devices and suicide attacks against military and civilians for their motives, including different ideological spectrums, white supremacy, anti-abortion, anti-government or Islamic extremist beliefs.⁴⁶ Furthermore, he believes that Terrorist Organization would exploit the Internet to recruit members as well as to spread propaganda, and much dangerously, the Internet provides a vast amount of information and technical instruction on developing and using weapons, including, chemical, biological, radiological, or nuclear weapons (CBRN)⁴⁷ However, his theory received multiple criticisms, including that it was "*too focused on the internet and particular tactics and does not address the impact of other information technologies on organisation strategies, structures, recruitment, training, and financing.*"⁴⁸

Terrorism in the Perspective of the East

The withdrawal of the Soviet Union from Afghanistan in the latter part of the 1980s, combined with the upsurge of Arab mujahideen facilitated by Pakistani involvement, initiated a cascade of fervent dissent. This occurrence not only established the groundwork for acts of anti-regime violence in countries such as Algeria and Libya but also triggered a surge in expenditures on military endeavours within the region.⁴⁹ Consequently, these developments led to an uptick in foreign engagement, aggravated poverty and economic disparities, intensified tribal divisions, sectarian strife, and a dearth of educational opportunities. These factors collectively contribute to the amplification and diffusion of terrorism within the region.⁵⁰ Indeed, according to the 2020 Global Terrorism Index, the Middle Eastern region witnessed the most significant number of fatalities due to terrorism worldwide between 2002 and 2019, registering over 96,000 deaths.⁵¹ Accordingly, the Arab perspective, as expressed by most Arab intellectuals, community spokesmen, and officials, is that terrorism, in any form, must and shall be repudiated, contrary to the public's perceptions towards the Arab nations, which see them as ignorant in combatting terrorism.⁵² Thus, in this section, two levels of approach shall be dissected in detail involving Middle Eastern countries and covering all Arab Nations worldwide in defining terrorism at the international and national levels.

In the realm of international involvement, the establishment of the League of Arab States (LAS) on March 22, 1945, stands as a notable development. Functioning as an intergovernmental organisation, the LAS boasts a membership roster comprising 22 Arab nations. The cornerstone of its establishment is the Charter of the Arab League, formally adopted on the same date, which outlines the organisation's fundamental aims, including the enhancement of inter-state relations among its constituent members.⁵³ Demonstrating a proactive stance against terrorism, the LAS

⁴⁶ Simon.

⁴⁷ Simon.

⁴⁸ Chertoff, Bury, and Richterova, "Bytes Not Waves: Information Communication Technologies, Global Jihadism and Counter-terrorism."

⁴⁹ Wukki Kim and Todd Sandler, "Middle East and North Africa: Terrorism and Conflicts," *Global Policy* 11, no. 4 (2020): 424–38.

⁵⁰ Kim and Sandler.

⁵¹ Institute for Economics and Peace, "Measuring the Impact of Terrorism, Sydney," Global Terrorism Index 2020, n.d., <https://www.visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf>.

⁵² Arab Studies Quarterly, "Terrorism and the Middle East: Context and Interpretations," *JSTOR* 9, no. 2 (n.d.), <https://www.jstor.org/stable/i40087863>.

⁵³ United Nations Office on Drugs and Crimes, "Regional Counter - Terrorism Approaches," UNODC, 2018, <https://www.unodc.org/e4j/en/terrorism/module-5/key-issues/middle-east-and-gulf-region.html>.

has introduced its pivotal legal instrument, the Arab Convention for the Suppression of Terrorism. Officially adopted on April 22, 1998, and coming into force on May 7, 1999, this Convention holds particular significance as it furnishes a comprehensive definition of terrorism in its Article 2 below, thereby solidifying its foundational role in countering terrorism across the Arab League member states:

“Any act or threat of violence, whatever its motives or purposes, that occurs in advancing 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.”

Another notable facet of the Convention, as deliberated within Article 2(a) of the Convention, pertains to its recognition of diverse regional perspectives on defining terrorism. This clause explicitly acknowledges the “*right of peoples to combat foreign occupation and aggression by whatever means, including armed struggle, in order to liberate their territories and secure their right to self-determination.*” Importantly, individuals involved in such armed struggles are exempted from being considered as having committed criminal offences under the Convention. Subsequently, the Organization of Islamic Cooperation (OIC) emerged in 1969 with a core objective of safeguarding and advocating for the interests of the Muslim world. It primarily seeks to achieve this through the reinforcement of solidarity and collaboration among its Member States.⁵⁴ As part of its endeavours, the OIC adopted the Convention of the Organization of the Islamic Conference on Combating International Terrorism, commonly called the ‘OIC Convention,’ on July 1, 1999. This Convention formally came into effect on November 7, 2002, and serves as the organisation's central instrument in its pursuit of counter-terrorism. The OIC Convention boasts several distinctive attributes, with one noteworthy feature expounding in Article 2. This specific clause plays a pivotal role in outlining the organisation's delineation of terrorism as:

“Any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan to terrorise people or threaten to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.”

Irrespective of the established definition, the Convention has additionally incorporated a provision for granting exemption from the purview of its provisions to individuals involved in what it deems to be lawful armed struggles for self-determination. This exemption aligns with a principle shared by the Convention of the League of Arab States, which also acknowledges the legitimacy of armed self-determination efforts. In response to these and numerous other issues associated with the 1999 Convention, the organisation announced in 2016 that it was evaluating a proposal for new protocols and amendments to the 1999 Convention's provisions to improve coordination. This would also better reflect current terrorism trends, such as cyber terrorism, terrorist financing, and transnational terrorist networks, and highlight the importance of human rights in anti-terrorism efforts.⁵⁵ The essence of terrorism in the Middle Eastern perspective is similar, as seen from the definitional approach of both Conventions.

Moving forward, with attention shifted to the national level, the concept of terrorism has remained entangled in intricate definitional quandaries extending beyond the confines of the Middle Eastern region. Respected scholars widely acknowledge the absence of a universally embraced and comprehensive definition of terrorism, underscoring that most interpretations are subject to controversy due to underlying ideological and political predispositions. These

⁵⁴ Crimes.

⁵⁵ “The OIC-2025 Programme of Action” (2016).

motivations often lead to classifying specific actions and entities based on subjective and moment-specific perceptions of the "enemy".⁵⁶ Similarly, across the countries across the Middle East, the delineation of "terrorism" has generated substantial debate and has been subjected to critical examination across numerous scholarly works. These interpretations are frequently criticised for their expansive and excessively ambiguous nature. The commonly employed terminology often encompasses acts that (1) target national unity, state security, and overall stability; (2) disrupt public order and jeopardise societal safety; (3) aim to undermine territorial integrity and impede the regular functioning of state institutions; (4) possess the potential to tarnish the state's reputation and hinder law enforcement efforts; and/or (5) involve the appropriation, damage, or destruction of public or private property, as well as the infliction of harm on the environment.⁵⁷ For instance, the Algerian Penal Code defines terrorism as any act that targets "*state security*," "*national unity*," "*territorial integrity*," or "*stability and normal functioning of institutions*."⁵⁸ The broad definition can be seen in the Article 87bis of the Algerian Penal Code as follows:

"Any act targeting state security, national unity, or the stability and normal functioning of institutions that aims to ... work toward or incite, by any means whatsoever, gaining power or changing the system of governance by non-constitutional means," or "undermine the integrity of the national territory or incite [others] to do so, by any means whatsoever."

Furthermore, terrorism can also be interpreted as encompassing any action driven by the aim of fostering an atmosphere of instability achieved through either moral or physical attacks directed at individuals. This can extend to impeding traffic flow or restricting freedom of movement along thoroughfares, assaulting symbols representative of the nation and its republican values, disturbing graves, or engaging in acts of desecration. Additionally, it includes targeting public and private transportation modes, as well as properties belonging to either category, alongside environmental degradation. Acts that interfere with the functions of public authorities curtail freedom of worship, hinder the exercise of public liberties, or disrupt the normal operation of public institutions also fall within this conceptual framework.⁵⁹ Transitioning forward, it is noteworthy that Saudi Arabia, unlike many jurisdictions, lacks a comprehensive and codified penal code. Instead, it draws its legal framework predominantly from Islamic Sharia law, which forms the basis for its legal interpretation and application. This is exemplified by Article 1(a) of Saudi Arabia's Law Concerning Offenses of Terrorism and Its Financing 2013. According to this legal provision, terrorism encompasses actions undertaken with the deliberate intent to:

"Disturb the public order, destabilise the security of society or the stability of the state, expose its national unity to danger, obstruct the implementation of the organic law or some of its provisions, harm the reputation of the state or its standing, endanger any of the state facilities or its natural resources, [or] force any of its authorities to do or abstain from doing something"(Library of Congress 2015).

Nonetheless, an evaluation conducted by a United Nations Rapporteur specialising in Counter-Terrorism and Human Rights scrutinised Saudi Arabia's legislation, taking issue with the law's utilisation of an "*objectionably broad*" interpretation of terrorism. This interpretation, as outlined in the report, has been manipulated to curtail various manifestations of peaceful dissent, provide grounds for endorsing acts of torture, undermine the right to freedom of expression, and consequently lead to the incarceration of individuals who voice criticism or

⁵⁶ Dina Mansour-Ille, "Counter-terrorism Policies in the Middle East and North Africa: A Regional Perspective," *International Review of the Red Cross* 103, no. 916–917 (2021): 1–25.

⁵⁷ Mansour-Ille.

⁵⁸ Library of Congress, "Algeria, Morocco, Saudi Arabia: Response to Terrorism," The Law Library of Congress, accessed February 13, 2025, <https://www.loc.gov/law/help/counterterrorism/algeria-morocco-saudi-arabia.php>.

⁵⁹ Mansour-Ille, "Counter-terrorism Policies in the Middle East and North Africa: A Regional Perspective."

champion human rights advocacy.⁶⁰ Next, similarly to Saudi Arabia and Algeria, Turkey has defined terrorism as per Article 1 of Turkey's Anti-Terror Law:

'Any criminal action conducted by one or more persons belonging to an organisation to change the attributes of the Republic as specified in the Constitution, [or of] the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardising the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, [or] damaging the internal and external security of the State, the public order or general health.'⁶¹

A prominent shortcoming observed in the region's counter-terrorism endeavours involves consistently relying on imprecise constructs and sweeping definitions to delineate acts of terrorism and criminal offences. This practice is emblematic of a critical flaw inherent in the counter-terrorism strategies. The application of terms like "*national unity*", "*state security*", "*stability*", "*public order*", and "*society safety*" within these definitions has afforded governments the latitude to extend the purview of terrorism to encompass activities and transgressions that might not inherently exhibit connections to terrorism.⁶² Furthermore, Morocco's approach can be reflected in its Penal Code, which similarly hinges on the nebulous and extensive notion of "*public order*" to define terrorism. This is evident in Article 218bis of Morocco's Penal Code, where a comprehensive array of acts deemed to "*gravely undermine public order*" is catalogued. This reliance on vague and expansive terminology showcases how legal definitions are stretched to encompass a wide spectrum of actions within the realm of counter-terrorism⁶³, such as:

"Intentionally inflicting harm on the life or liberties of people; committing fraud or falsifying money; destroying, altering or damaging planes, ships or any other forms of public transport; engaging in theft or the extortion of goods; obstructing or degrading air, sea and land navigation or means of communication; the manufacture, possession, transport or circulation of illegal weapons, explosives or ammunition; engaging in offences related to automated processing systems data; participating in an association or agreement aiming to engage in acts of terrorism or intending to commit a terrorist crime; or knowingly receiving proceeds of terrorism offences".⁶⁴

Similarly, within the context of Turkey, Saudi Arabia, and Algeria, the practice of relying on vagueness in defining acts of terrorism has also encountered criticism akin to the situation in Morocco. The United Nations Working Group for Arbitrary Detention has expressed reservations about this approach, particularly its potential to facilitate the "*systematic criminalisation of activities not related to terrorism, for example in journalism, where publishing and expressing opinions, that maybe don't correspond with those of the regime, or as free speech that denounces authorities' abuses, can suffer scrutiny under terrorism*". A significant concern is raised in Morocco regarding how such ambiguity could inadvertently encompass actions such as journalistic activities. Instances where the publishing of opinions or the expression of viewpoints that deviate from the regime's stance or the exercise of free speech to expose instances of authority abuse may potentially face scrutiny under the banner of terrorism. This cumulative pattern underscores that the strategies adopted by Middle Eastern nations may be construed as

⁶⁰ United Nations Human Rights Council, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism on His Mission to Saudi Arabia," UNHRC, 2018, www.ohchr.org/Documents/Issues/Terrorism/SR/A.HRC.40.XX.Add.2SaudiArabiaMission.pdf.

⁶¹ "Turkey's Law to Fight Terrorism Act 1991. No. 3713 (Amended 1995, 1999, 2003, 2006, 2010) (Anti-Terror Law)" (n.d.), www.legislationline.org/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf.

⁶² Mansour-Ille, "Counter-terrorism Policies in the Middle East and North Africa: A Regional Perspective."

⁶³ Mansour-Ille.

⁶⁴ "Morocco, Code Pénal 1962" (n.d.), www.refworld.org/docid/54294d164.html.

instrumentalising legal frameworks to advance political agendas while simultaneously suppressing opposition factions and scholarly voices. Charges like "*making propaganda for a terrorist organisation*" might be invoked to stifle the voices of dissent, as individuals who employ peaceful means to articulate their political perspectives or viewpoints are targeted and silenced.

The Relationship Between Civil Litigation and Terrorism

Justice against terrorism does not only concern the ground efforts of a nation's military responses; it also considers the needs of the surviving family members affected by the terrorist act.⁶⁵ In the US, international violations fall under civil jurisdiction instead of criminal, displaying a level of reluctance on the part of the federal government to prosecute such cases. However, civil lawsuits are more viable due to their principles of jurisdiction, choice of law, and legal and political culture supporting private utilisation of the legal system.⁶⁶ This allows alleged perpetrators of international terrorism to have their actions more legally bound. In civil suits, the evidence presented by plaintiffs can be of a lower degree of proof, not needing to be beyond a reasonable doubt. Discovery devices have also become more available than criminal proceedings.⁶⁷

Unlike criminal proceedings, civil suits may be more capable of uncovering the full factual context of the crime. In turn, this allows for greater exposure to the community, which could provide more accounts of the event. Victims can also demand compensation, including damages or losses to property and physical and emotional well-being. An advantage of civil suits is that judgment can be made against former high-ranking government officials or even against the state if deemed responsible for terrorism.⁶⁸ Compensation for punitive damages can be rewarded through civil suits. Even when such compensation cannot be collected, judgment for punitive damages acts as a collective condemnation of the community towards the defendant and could resemble criminal penalties. "Punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law ...".⁶⁹

Judicial recognition of such lawsuits can establish a precedent for policy development. Such judicial proceeding may uncover more comprehensive findings, identifying the alleged perpetrators, their culpability, and greater exposure and public recognition of the victim's injuries. This public exposure could be considered a form of punishment to the defendants, though other legal consequences, such as deportation and denial of visas, may also be enforced.⁷⁰ Although such considerations have been made, using civil litigation instead of criminal prosecution to constitute international crimes, e.g., terrorism and human rights violations, is a highly contentious matter, especially regarding the United States and their foreign partners. Certain parties in the

⁶⁵ "Rux v. Republic of Sudan" (n.d.).

⁶⁶ Beth Stephens, "The Bush Administration's Efforts to Limit Human Rights Litigation," *Harvard Human Rights Journal* 17 (2002): 169–200.

⁶⁷ John F. Murphy, "Civil Litigation Against Terrorists and the Sponsors of Terrorism: Problems and Prospects," *Review of Litigation* 28, no. 2 (2008): 315–41.

⁶⁸ Murphy.

⁶⁹ Inc Browning-Ferris Industries of Vermont and Kalco Disposal, "492 U.S. 257, 275" (1989).

⁷⁰ "Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995)." (n.d.).

US find this subjecting of foreign governments to such legal action controversial and disagree with the act. Current legislations are already in place to sustain the sovereignty of foreign governments, i.e., FSIA.⁷¹ Additionally, the country will have difficulty collecting such judgments due to the looming threat of possible hostile and retaliatory action from foreign governments.

The loophole of FSIA was filled when JASTA was introduced to provide a radical exemption to the state immunity principle to start a civil lawsuit against a foreign state for harm, wounds, and loss due to the international terrorism act. The implementation, however, received strong criticism from several states while the US does not view it as an abomination but rather as something to be encouraged, especially when the trend in international law shifted from an absolute to a restricted view of sovereign immunity. Questions arise as to whether the judgments issued under JASTA in US courts are legal or carry any weight in the eyes of international law. If the answer is affirmative, what would be the way to enforce such judgment and is it practical to do so? The results indicate that even though the legality of JASTA is disputable, the JASTA amendment might still be construed narrowly if it does not violate International Law. Moreover, delving into the historical evolution of the FSIA, it becomes evident that while the legislation delineates that the principal avenue for enforcing judgments against foreign sovereign entities lies in attaching properties associated with the commercial activity upon which the claim rests, the practical reality presents challenges for claimants seeking to obtain their desired remedies. Consequently, despite this legal provision, the intricacies of the process often render the enforcement of judgments impractical and, in effect, non-feasible within the framework of the JASTA.

Since the adoption of the FSIA, several legal questions pertaining to its interpretations have emerged. One of them is the prohibition on the Executive Branch from making judgments on state immunity in actions against foreign governments and governmental institutions (Fakhoury 2017). In other words, the statute of limited immunity lifted the duty of deciding sovereign immunity from the State Department to the federal judiciary. JASTA expands the classification of qualified plaintiffs and defendants, which permits many more lawsuits against foreign governments. Nevertheless, JASTA did not provide a commensurate increase in procedures for enforcing judgments against foreign sovereigns. According to Hancock (2019),⁷² FSIA is one of the biggest obstacles in enforcing JASTA. It is essentially a jurisdictional procedure that specifies the requirements that must be completed before a lawsuit may be filed against a foreign sovereign.

The challenges of implementing the JASTA were obtained under § 1605A, where the previous terrorist exemption to the FSIA is expressly mentioned many times in Section 1610 of the US Code, which outlines exceptions to the immunity from attachment or execution.⁷³ Sections 1610(a)(7), 1610(b), 1610(f), and 1610(g) all expressly deal with the execution of judgments obtained under 1605A. JASTA, however, did not alter Section 1610. Therefore, it is unclear to

⁷¹ “28 U.S.C. §§ 1602-1611” (2000).

⁷² Rachael E. Hancock, “Mob-Legislatting’: JASTA’s Addition to the Terrorism Exception to Foreign Sovereign Immunity,” *Cornell Law Review* 103, no. 5 (2019): 1293–1325.

⁷³ “28 U.S.C. §§ 1610(a)(7), (b), (f), (G)” (2012).

observers, judges, claimants, and defendants whether these additional processes apply to the new cause of action created by 1605B. It is unlikely that prosecutions filed under JASTA will be enforced at a greater or even similar rate to earlier cases for international terrorism without the additional enforcement tools that cases brought under 1605A possess.⁷⁴ Hence, it shows that even though JASTA can be enforced after legislative reforms to amend it, it is still difficult to examine. It is worth mentioning that the exception under 1605(A)(a)(1) FSIA (which is entitled to more consideration since it is connected to terrorism) was limited as it applied only to states branded as a terrorist state sponsor during or as a consequence of the alleged act.⁷⁵ Furthermore, for actions committed in a foreign state, that state was to be given a “*reasonable chance to settle the claim in line with recognised international arbitration norms*”.⁷⁶

Analysis of the Court Cases Under JASTA

Earl Crosby, et. al. v. Twitter, Inc. et. al., Case No. 18-1426 / 921 F.3d 617 (6th Cir. 2019)

In the first instance, this case was tried at the District Court, whereby the court dismissed the claim with prejudice. Formerly, the Plaintiffs filed claims against Twitter, Facebook, and Google under the Anti-Terrorism Act for the alleged involvement of ISIS. This international terrorist organisation motivated Mateen through social media for the killing of 49 people and injuring another 53 people. The assertion put forth was that ISIS leveraged the Defendants' social media platforms to engage in a form of “*virtual recruitment*,” targeting Americans in the aftermath of the terrorist attack at the Pulse Night Club. However, the Plaintiffs refrained from indicating that the Defendants provided any form of “*material support*” or maintained any direct ties to Mateen or his reprehensible actions. Consequently, the incapacity to establish ISIS's responsibility fails to create a basis for liability elsewhere.

Consequently, the Plaintiffs amended their legal complaint to encompass several aspects that might potentially fall within the purview of JASTA, which include the following: (1) ISIS commenced using platforms such as Twitter, Facebook, and Google as conduits to disseminate its propaganda and messages of animosity. The Defendants' platforms granted ISIS the capacity to reach a global audience, effectively attracting new recruits and inciting so-called “*lone actor attacks*”; (2) social media platforms were harnessed by ISIS as means to finance its acts of terrorism; (3) twitter's approach to identifying and removing ISIS-linked accounts was criticised for its lack of proactivity. Specifically, Twitter's review mechanisms were characterised as reactive, solely addressing content reported by other users for violating platform rules; (4) in proximity to the attack, Mateen publicly professed allegiance to ISIS on Facebook, and he adopted verbiage consistent with ISIS's narratives on Twitter. Law enforcement findings asserted that Mateen's radicalisation occurred through self-exposure to the Internet and social media content. These amendments collectively serve to expand the scope of the legal complaint by integrating facets potentially applicable under JASTA, signifying a broader engagement with the

⁷⁴ Ingrid Wuerth, “Justice Against Sponsors of Terrorism Act: Initial Analysis,” Lawfare, accessed September 29, 2016, <https://www.lawfaremedia.org/article/justice-against-sponsors-terrorism-act-initial-analysis>.

⁷⁵ 28 U.S.C. § 1605A(a)(1).

⁷⁶ “Foreign Sovereign Immunities Act of 1976” (n.d.).

nuanced dimensions of ISIS's utilisation of social media for recruitment and its role in inciting acts of terror.

Drawing from these assertions, the plaintiffs contended that the defendants had engaged in the subsequent actions as delineated under the scope of JASTA, encompassing the following categories: (1) contributing to and facilitating international terrorism through aiding and abetting, as specified by 18 U.S.C. § 2333; (2) conspiring in the advancement of terrorist activities; (3) supplying material support to individuals involved in terrorist undertakings, as governed by 18 U.S.C. § 2339A; (4) furnishing material support and necessary resources to individuals engaged in acts of terrorism, as outlined in 18 U.S.C. § 2339B(a)(1); (5) causing emotional distress through negligence; (6) instigating wrongful death. These allegations collectively represent the array of legal contentions made by the plaintiffs, premised on the premises of JASTA and addressing a spectrum of perceived offences connected to the defendants' purported involvement in terrorist-related activities. Even so, the district court dismissed every single claim made by the Plaintiffs where it was held that the Pulse Night Club shooting was not an act of international terrorism as the conduct of carrying that attack did not have "*any transnational component*". Further, in their pleading facts, there was nothing to prove that ISIS is directly connected to the shooting, even if they can establish the aiding and abetting claim (secondary liability), the claims would still fail due to no plausible allegations that ISIS committed the shooting or defendant had any tangible connection to Mateen.

For the second instance, which is the appeal that was tried at the Court of Appeal, the plaintiffs only appealed on the grounds of (1) aiding and abetting international terrorism under 18 U.S.C. § 2333; (2) providing material support and resources to terrorists under 18 U.S.C. § 2339B(a)(1); (3) negligent infliction of emotional distress; and (4) wrongful death. In this judicial instance, the court determined that for direct liability to be established against the defendants, the plaintiffs were required to establish a connection whereby the defendants, through their provision of social media platforms to ISIS, had engaged in an act of international terrorism. However, the plaintiffs were unable to establish such a connection effectively, as there existed an insufficient link between the actions of the defendants (purportedly providing social media platforms to ISIS) and the injuries sustained by the plaintiffs at the Pulse Night Club, carried out by Mateen. Regarding secondary liability, the plaintiffs were obligated to assert that ISIS had "*committed, planned, or authorised*" the Pulse Night Club shooting. In presenting their case, the plaintiffs contended that ISIS had virtually recruited individuals via online platforms. Nevertheless, they acknowledged that Mateen had independently orchestrated and executed the Orlando attack without any direct engagement with ISIS, nor did ISIS grant any official authorisation for the attack. It was only after the attack had transpired that ISIS became aware of it and subsequently endorsed the shooting. Given this rationale, the court dismissed the remaining claims in accordance with this analysis.

Jeffrey Siegel, et. al. v. HSBC North America Holdings, Inc. & HSBC Bank USA, Case No. 18-2540 / 933 F.3d 217 (2d Cir. 2019)

Initially, the legal proceedings for this case unfolded within the District Court, where the initial claim was subject to review and resulted in dismissal with prejudice. In the initial phase of this

litigation, the Plaintiffs presented their allegations against HSBC North America Holdings, Inc., and HSBC Bank USA, N.A., asserting that these entities had facilitated and supported the perpetrator's actions, thereby contravening the principles outlined in JASTA. The alleged abetment was purportedly realised through the provision of banking services to Al Rajhi Bank, situated in Saudi Arabia, an institution believed to have affiliations with al-Qaeda, the designated terrorist organisation accountable for the subject attack. In the context of this legal scenario, the plaintiffs themselves or their legally appointed representatives stood as individuals who had suffered the consequences of the terrorist attacks that transpired on the 9th of November 2005. The plaintiffs' core contention revolved around the contention that the defendants knowingly engaged in business dealings with Al Rajhi Bank, even in the face of awareness regarding the bank's connections to terrorism. The plaintiffs asserted that this association should be regarded as sufficient grounds to implicate the defendants in aiding and abetting liability, a charge that JASTA articulates. Central to their argument was the assertion that the defendants had indirectly aided a terrorist entity, an action they posited squarely fit within the framework of liability jurisdiction as delineated by the provisions of JASTA.

The appellate court dismissed the claim and reiterated the ruling made by the District Court. It was determined that the plaintiffs had not successfully presented sufficient allegations regarding two out of the three crucial elements of civil aiding and abetting as established by the Halberstam framework: (1) that HSBC was “*generally aware*” of its role as part of an “*overall illegal or tortious activity at the time that [it] provide[d] the assistance,*” and (2) that HSBC “*knowingly and substantially assist[ed] the principal violation.*” In essence, the plaintiffs did not sufficiently establish that HSBC was cognizant of the fact that by offering banking services to Al-Rajhi Bank, it was, in effect, supporting al Qaeda's activities or assuming a role in their violent pursuits. Moreover, the plaintiffs were unsuccessful in putting forth a valid case for the “substantial assistance” criterion of aiding and abetting liability under JASTA. This standard involves consideration of six pertinent factors that help establish substantial assistance: (1) the nature of the act encouraged; (2) the amount of assistance given by defendant; (3) defendant's presence or absence at the time of the tort; (4) defendant's relation to the principal; and (5) defendant's state of mind, and (6) the period of defendant's assistance.

Brill v. Chevron Corp., Case No.15-cv-04916-JD (N.D. Cal. Aug. 14, 2018)

In this specific legal scenario, the District Court undertook the dismissal of a case initiated by a collective of 329 individual plaintiffs against the Chevron Corporation. The focal point of the plaintiffs' allegations was that Chevron had furnished material assistance to Saddam Hussein, who, in turn, employed the funds to orchestrate and finance a total of twenty-one distinct terrorist attacks within Israel. As part of their claims, the plaintiffs contended that Chevron had made payments with these illicit surcharges to Iraq while concealing these transactions within their financial records by falsely categorising the illicit payments as ‘premiums’. Notably, the Securities and Exchange Commission (SEC) initiated criminal charges against Chevron concerning these unlawful activities, leading to Chevron's payment of fines and disgorgement exceeding twenty-seven million dollars. Subsequently, the plaintiffs filed a separate private civil lawsuit against Chevron based on the ATA. It's important to highlight that in this case, Saddam

Hussein had not been designated as a Foreign Terrorist Organization (FTO). Consequently, both parties involved in the legal dispute acknowledged that the concept of secondary liability did not find applicability. The court further emphasised that, at the outset, both sides concurred that the ATA did not encompass the notion of aiding and abetting liability. As a result, the court stipulated that the complaint against Chevron needed to substantiate a claim against Chevron as the primary offender. This perspective was unanimously accepted by the court, aligning with the conclusions drawn by other circuit courts in similar cases.

The court meticulously assessed the requirements for establishing primary liability in this context. In order to substantiate this type of liability, the plaintiffs were tasked with presenting evidence that Chevron itself had engaged in actions that posed a threat to human life, actions that would constitute violations of United States law had they occurred within the geographical confines of the United States. This criterion was aligned with the intricate definition of “*international terrorism*” as outlined by the ATA. Moreover, it was incumbent upon the plaintiffs to demonstrate that Chevron's actions appeared to be driven by the intention to either intimidate or coerce a civilian population or to exert influence over or impact the conduct of a government. Upon meticulous analysis, the court noted that the plaintiffs' complaint lacked any substantive allegations suggesting that Chevron's payments to Saddam Hussein, colloquially referred to as kickbacks, would inherently yield the foreseeable outcome of intimidating the civilian population or coercing a government. Consequently, the court found no grounds to support the contention that Chevron's actions met the requisites for establishing primary liability under the stipulated framework.

Subsequently, the court dismissed the case, preserving the plaintiffs' ability to reconstitute their claim under the ATA while including the necessary definitional components. It is imperative to note that the court's decision to dismiss the case was rendered without prejudice, thereby enabling the plaintiffs to revise and augment their ATA claim to encompass the specific elements intrinsic to the legal definitions in question. However, the court did express reservations regarding the likelihood of an amended complaint succeeding in establishing primary liability. The basis for this doubt was rooted in the plaintiffs' failure to assert that Chevron had actively participated in the attacks or directly furnished funds to Saddam Hussein. Moreover, the court emphasised that the plaintiffs' amended claim should also address the crucial aspect of demonstrating that the funds provided by Chevron had been employed to carry out the attacks. As highlighted by the court, these elements were essential in establishing a solid foundation for primary liability under the stipulated legal framework. The case serves as a poignant illustration of the challenges posed by a stringent interpretation of JASTA. It underscores the formidable obstacles associated with proving primary liability against individuals who had extended only indirect support to terrorist entities.

CONCLUSION

The ATA has undergone significant changes since the implementation of JASTA, including provisions related to secondary liability. The revised ATA outlines the scope of parties eligible to initiate and be subject to legal actions, allowing individuals or their designated representatives to file a lawsuit if they can demonstrate harm due to acts of international terrorism. Potential

defendants can include direct perpetrators, sponsors of direct perpetrators, or those who provided services to direct perpetrators. There are two primary categories of potential causes of action: (1) instances where harm was inflicted upon a person, property, or business, and (2) cases involving the commission of, or aiding and abetting in, acts of international terrorism. In the former category, plaintiffs must establish that the defendant's actions were recklessly, knowingly, or intentionally. In contrast, in the latter category, plaintiffs must demonstrate that the defendant engaged in illegal or tortious activity while aiding and must know and substantially assist the principal violation. Addressing the cause of action presents challenges, particularly in cases involving services provided to direct actors. This complexity requires the expertise of highly skilled professionals capable of accurately determining such relationships. The notion of causation poses a significant hurdle due to the diverse interpretations presented by different courts, further complicating the difficulties in proving the essential link between the defendant's actions and the act of terror. Implementing JASTA introduces a potential floodgate of cases wherein claims could be brought forth concurrently or subsequently under JASTA or the ATA. This intricate scenario arises from the fact that JASTA confers jurisdiction upon US courts to address civil claims targeting foreign states for physical injuries, deaths, or property damage that occurred within the United States on or after September 11, 2001. The viability of JASTA's implementation is disputed, with concerns about the perceived lack of judicial impartiality within US courts and potential conflicts with established principles of international law. The affected parties encounter significant challenges in seeking remedies, casting doubt upon the practicality of pursuing civil litigation under JASTA and underscoring the inherent difficulties and uncertainties associated with its implementation.

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