Liability for Terrorism in American Courts: Aiding-and-Abetting Liability Under the FSIA State-Sponsor of Terrorism Exception and the Alien Tort Statute

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I. INTRODUCTION

During the spring semester of 1995, Alisa Michelle Flatow was a twenty-year old junior at Brandeis University studying abroad in an independent foreign study program in Israel. On April 9, 1995, she was a passenger on a bus that was en route to travel to a community on the Mediterranean Sea that was destroyed by a suicide bomber driving a van full of explosives right into the vehicle. Ms. Flatow suffered grave injuries to her brain and the following day it ceased to function, allowing no possibility for recovery, and her family decided to donate her organs before she died that day. The specter of this tragedy being front and focus of litigation in a U.S. court appeared remote on April 10, 1995.

Soon thereafter, the Shaqaqi faction of the Palestine Islamic Jihad claimed responsibility for the April 9, 1995 attack. The Islamic Republic of Iran, designated a

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1 J.D., Certificate in International and Comparative Law, Saint Louis University School of Law, 2008; B.A., Grinnell College, 2005. The author would like to thank Professor David Sloss, Professor of Law at Santa Clara University School of Law, for his guidance in commenting on this essay. He would also like to thank his parents, Dennis and Salud Marzen of Dougherty, Iowa and to his younger brothers Christopher and Ryan for their kind, unending support and encouragement. The author remains solely responsible for all in this essay and for any errors which occur.


3 Id.

4 Id. at 7-8.

5 Id. at 8-9.
state-sponsor of terrorism by the U.S. State Department, supplied state assistance to Palestine Islamic Jihad through funds and training. In response to this and other terrorist attacks, in the Antiterrorism and Effective Death Penalty Act of 1996, by amending the Foreign Sovereign Immunities Act, Congress lifted sovereign immunity for foreign States who commit a terrorist act or provide material support and resources to an individual or entity which commits a terrorist act that results in the personal injury or death of a United States citizen. Less than a year after adopting the state-sponsored terrorism exception, Congress enacted the “Flatow Amendment,” which clarified § 28 U.S.C. 1605(a)(7) by expressly providing for punitive damages. Within three years, Congress not only took action to address this tragedy, but the United States District Court for the District of Columbia held that a judgment of punitive damages of three times the annual expenditures the Islamic Republic of Iran funded for terrorist activities was appropriate for the Flatow family.

The foregoing story of Alisa Michelle Flatow, along with many others, has brought the issue of terrorism to current judicial decisionmaking in the area of foreign affairs. One of the most contentious areas of current litigation implicating foreign affairs in domestic U.S. courts involves the approximately three-decade old Foreign Sovereign

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6 Id. at 9.

7 Id. at 12. 28 U.S.C. § 1605(a)(7), the “State Sponsored Terrorism Exception” to the Foreign Sovereign Immunity Act, states that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case “….. in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 239A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency…..”).

8 Id.

9 Id. at 34.
Immunities Act (“FSIA”) on the one hand, and the over 200 year-old Alien Tort Statute (“ATS”), on the other. This paper addresses the relationship between these two unique statutes and examines how domestic courts have interpreted aiding and abetting liability in both contexts. In this essay, I propose that although both statutes address slightly different policy goals, courts should adopt a similar aiding and abetting liability standard for uniformity of judicial decisionmaking in cases *only involving terrorism*. This proposed standard would be a judicial inquiry of the *actus reus* component of whether a State gave “*substantial* material support” to proscribed actions for both sets of cases under the Foreign Sovereign Immunities Act and also the Alien Tort Statute involving cases where the government aids and abets nonstate actors under the FSIA, and in the case of the ATS specifically when a nonstate actor, foreign government, or nonstate actor acting under color of law aids and abets a government by providing “*substantial* material support” to another nonstate actor which commits genocide, war crimes, crimes against humanity, and suicide bombings and other attacks on innocent civilians intended to intimidate or coerce a civil population. In addition, the courts would engage in analysis of a required second prong of a *mens rea* component under both the FSIA and ATS – whether an actor “*knowingly*”\(^\text{10}\) gives substantial material support which *facilitates* the commission of a terrorist activity. To adopt a similar standard would not only best address the practical issues resulting from changed circumstances in international affairs with the rise of terrorist organizations which operate across national boundaries, but also

\(^{10}\) MODEL PENAL CODE § 2.02(2)(b) (1962). “Knowingly. A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” For the purposes of this paper and proposal, hereafter “knowingly” refers to the definition outlined in the Model Penal Code.
addresses the rise of state collapse throughout the world and ultimately gives the judiciary a more vibrant role not only in international affairs but most critically in the ongoing war on terrorism.

II. FOREIGN SOVEREIGN IMMUNITIES ACT: ITS HISTORY AND STANDARD OF JURISDICTIONAL CAUSATION

A. A History of Foreign Sovereign Immunity

Foreign sovereign immunity has been a longstanding principle in U.S. law, dating back to the country’s founding.\(^\text{11}\) The Supreme Court in *The Schooner Exchange v. McFaddon*, a prominent Supreme Court case from 1812, affirmed this principle in stating “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 his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.”\(^\text{12}\) Absolute immunity remained judicial doctrine for nearly two centuries until the 1950s, when the restrictive theory of immunity was adopted by the Executive branch and the Judiciary.\(^\text{13}\)


\(^{12}\) *THE SCHOONER EXCHANGE V. MCFADDON*, 11 U.S. 116, 137 (1812).

\(^{13}\) See U.S. Department of State, Bureau of Consular Affairs, “Foreign Sovereign Immunities Act,” http://travel.state.gov/law/info/judicial/judicial_693.html (last visited Aug. 7, 2008) (“Under the restrictive theory, a State is immune from any exercise of judicial jurisdiction by another State in respect of claims arising out of governmental activities (de jure imperii); it is not immune from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (de jure imperii).”)
In 1976, Congress codified the restrictive theory of immunity\textsuperscript{14} through the enactment of the Foreign Sovereign Immunities Act.\textsuperscript{15} The FSIA established a presumption that foreign sovereign immunity would apply to shield a State from the jurisdiction of a U.S. court unless the plaintiff could affirmatively prove that an exception to the Act applies.\textsuperscript{16} There are seven exceptions to the FSIA, but the most prominent ones are the commercial activities exception,\textsuperscript{17} the noncommercial torts exception,\textsuperscript{18} cases of explicit or implied waiver of immunity,\textsuperscript{19} and the state-sponsored terrorism exception enacted in 1996.

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\textsuperscript{14} REPUBLIC OF ARGENTINA V. WELTOVER, INC., 504 U.S. 607, 612 (U.S. 1992) ("The Act (and the commercial exception in particular) largely codifies the so-called “restrictive theory” of foreign sovereign immunity first endorsed by the State Department in 1952.")

\textsuperscript{15} 28 U.S.C. § 1604 (1976). The Foreign Sovereign Immunities Act states: “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.”

\textsuperscript{16} BUCCI, \textit{supra} note 13, at 302.

\textsuperscript{17} 28 U.S.C. § 1605(a)(2). The statute is the “commercial activities” exception: “In which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States, …”

\textsuperscript{18} \textit{Id.} Subject to certain exceptions, the “noncommercial torts” exception to the Foreign Sovereign Immunities Act waives sovereign immunity in cases “in which money damages are sought 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 tortuous 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…”

\textsuperscript{19} The explicit or implied waiver immunity exception to the Act applies in cases “in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.” \textit{See} BUCCI, \textit{supra} note 13 at 307-308, who notes three cases in which implicit waiver may occur via FSIA: “1) cases where the foreign state agrees to arbitration in another country; 2) cases where the foreign state has agreed that the law of another country should govern; and 3) cases where the foreign state has filed a responsive pleading and did not raise a defense of sovereign immunity.”
In 1996, the state-sponsored terrorism exception to the FSIA was enacted by Congress. As Molora Vadnais notes, it was the first expansion of the statute to provide for extraterritorial violations over States that commit human rights violations.\(^{20}\) It came as a response to lobbying by victims of terrorism\(^{21}\) and allows U.S. citizens, or their survivors, who are injured or killed in a terrorist attack to file a civil lawsuit against a foreign state, its state agency, or instrumentality that either committed the terrorist act or provided “material support” to a group that committed the act.\(^{22}\) However, the state-sponsored terrorism exception applies only to States that are designated by the U.S. State Department as state sponsors of terrorism.\(^{23}\) Therefore, the exception currently applies only to five States: Cuba, Iran, North Korea, Sudan, and Syria.\(^{24}\)

Just five months later in 1996, Congress enacted the Flatow Amendment, which provides for punitive damages under the FSIA.\(^{25}\) But, domestic courts have had difficulty with the question of whether the Flatow Amendment provides a private cause of action


\(^{21}\) KELLER, *supra* note 11, at 1030.

\(^{22}\) VADNAIS, *supra* note 20, at 202-203.

\(^{23}\) *Id.* at 203.

\(^{24}\) U.S. Department of State, “State Sponsors of Terrorism,” http://www.state.gov/s/ct/c14151.htm (last visited Aug. 10, 2008) (Cuba was designated as a state sponsor of terrorism on March 1, 1982; Iran on January 19, 1984; North Korea on January 20, 1988; Sudan on August 12, 1993; and Syria on December 29, 1979).

\(^{25}\) Flatow Amendment, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 (Supp. 2002)). The Amendment states, with similar language to the state sponsored terrorism exception of FSIA, that “An official, employee, or agent of a foreign state designated as a state sponsor of terrorism … while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national’s legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of Title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).”
against a foreign state or merely against an “official, employee, or agent of a foreign state.”

Another issue has been the relationship between the state-sponsored terrorism exception of the FSIA and the Flatow Amendment – in *Flatow v. Islamic Republic of Iran*, the court addressed this issue and stated “The amendment should be considered to relate back to the enactment of 28 U.S.C. § 1605(a)(7) as if they had been enacted as one provision … and the two provisions should be construed together and in reference to one another.”

Assuming the state-sponsored terrorism exception creates a private cause of action against a foreign state itself, this provision therefore offer victims and the families of victims of terrorist attacks committed by the government or officials, employees, or agents of Cuba, Iran, North Korea, Sudan, and Syria the opportunity to pierce the cloak of sovereign immunity of these States in U.S. courts and recover civil damages.

However, for a case to fall under the state-sponsored terrorism exception, three main jurisdictional requirements must be satisfied before the case can proceed.

The Fourth Circuit Court of Appeals in *Rux v. Republic of Sudan* outlined these jurisdictional requirements as: “1) the provision of material support by a state sponsor of terrorism; 2) the provision of such support by an official of the state “while acting within the scope of

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26 KELLER, *supra* note 11, at 1031-1032.


28 *RUX V. REPUBLIC OF SUDAN*, 461 F.3d 461, 472 (4th Cir. 2006), which notes that “Section 1605(a)(7) strips a foreign state of its immunity only where damages are sought for an injury “that was caused by … the provision of material support or resources [for certain acts of terrorism].” § 1605(a)(7) (emphasis added). Courts have interpreted this statutory language to create a “jurisdictional causation” requirement that a plaintiff must meet to overcome a sovereign immunity-based challenge to subject matter jurisdiction under § 1605(a)(7).”
his or her office, employment, or agency,” and 3) a causal link between the material support and damages resulting from an act of terrorism.”

B. Jurisdictional Causation Under the Terrorism Exception: The Embracing of a “Proximate Cause” Standard

In 1976, Congress enacted the Foreign Sovereign Immunities Act. Two decades later in 1996, Congress enacted the state-sponsored terrorism exception to the FSIA to widen the pierce of sovereign immunity in response to acts of terrorism. Just a mere eight years later, in 2004, the United States Court of Appeals for the District of Columbia widened the pierce of the cloak of foreign sovereign immunity even further in Kilburn v. Libya when it adopted a more relaxed, “proximate cause” standard for jurisdiction under the FSIA.30

Kilburn v. Libya involved the case of an American citizen, Peter Kilburn, who was kidnapped and murdered in Beirut, Lebanon between November 1984 and April 1986.31 Kilburn, who lived in Beirut by working as an instructor and librarian at the American University, was abducted on November 30, 1984 by Hizbollah.32 In April 1986, the United States military conducted airstrikes in Libya in response to Libya’s involvement in the bombing of a Berlin nightclub that killed two soldiers.33 After the airstrikes, the Arab Revolutionary Cells, who were sponsored by Libya, purchased Mr.

29 Id. at 467.


31 KILBURN V. SOCIALIST PEOPLE’S LIBYAN ARAB JAMAHIRIYA, 376 F.3d 1123, 1125 (D.C. Cir. 2004).

32 Id.
Kilburn from Hizbollah for approximately $3 million dollars, tortured, and then murdered him. Peter Kilburn’s brother, Blake Kilburn, filed a lawsuit against several defendants, including the Socialist People’s Libyan Arab Jamahiriya (Libya) and Libya filed a motion to dismiss.

The Libyan defendants articulated two legal arguments regarding the scope of the state-sponsored terrorism exception. First, regarding the court’s jurisdiction under the exception, Libya contended that a causal connection is required between the alleged actions of the foreign state and the victim’s alleged injuries. It argued that the exception requires a “but for” standard of jurisdictional causation, meaning that “but for” Libya’s actions in sponsoring the Arab Revolutionary Cells, Peter Kilburn would not have been purchased by the ARC, tortured, and subsequently killed. Second, Libya argued that the exception requires that a foreign state’s material support must go directly to a specific act that goes toward the claim, (in this case, the plaintiff would have to prove that Libya directly funded ARC’s murder of Peter Kilburn).

The Court rejected Libya’s arguments for “but for” causation, adopting a relaxed, “proximate cause” standard for jurisdictional causation under the state-sponsored terrorism exception.

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33 Id.
34 Id.
35 Id. The District Court in the case denied both a Rule 12(b)(1) and Rule 12(b)(6) motion to dismiss by Libya, and an appeal followed.
36 Id. at 1127.
37 Id.
38 Id. at 1130.
terrorism exception.\(^{39}\) Then, the Court also rejected Libya’s second argument as well, soundly stating such a requirement of direct traceability of a specific act would likely render the state sponsored terrorism exception’s material support provision “ineffectual.”\(^{40}\) But, the Court also noted that the “proximate cause” standard adopted for jurisdictional causation would likely “ameliorate concerns about remoteness,”\(^{41}\) implying that a defendant foreign state’s knowledge or intent to support specific terrorist acts is not necessarily required under the exception to pierce the cloak of foreign sovereign immunity.

As Stephen Townley notes, *Kilburn* presented a unique case in litigation under the state-sponsored terrorism exception – the case of a nonstate actor who received material support and resources from a foreign state, but did not directly act as the foreign state’s agent.\(^{42}\) On the one hand, the decision makes it much more likely that plaintiffs in individual cases will overcome the hurdle of jurisdictional causation. However, Townley argues it will come at a price, resulting in driving more foreign sovereign defendants out of domestic courts because of the extensive jurisdictional discovery that would occur.\(^{43}\) In addition, he contends that the extensive jurisdictional discovery that would result will undermine the efforts of Congress to deter terrorism.\(^{44}\) Instead, Townley proposes that

\(^{39}\) *Id.*. (“Money, after all, is fungible, and terrorist organizations can hardly be counted on to keep careful bookkeeping records.”)

\(^{40}\) *Id.*

\(^{41}\) *Id.*

\(^{42}\) TOWNLEY, *supra* note 30, at 1178.

\(^{43}\) *Id.* at 1180-1182.

\(^{44}\) *Id.* at 1183. Townley offers the following example: “If the Sudan is not only considered liable for damages wrought by al Qaeda long after the Sudan ejected Osama bin Laden, but also must disclose
plaintiffs be required to plead that a foreign sovereign had knowledge of or intent to support specific terrorist attacks before jurisdictional discovery may be ordered, contending that it will result in little harm to plaintiffs’ interests since they must already prove knowledge or intent in the liability phase of the litigation.\footnote{Id.}

Despite Townley’s concerns, courts are moving toward the “proximate cause” standard for jurisdictional causation. In September 2006, the 4th Circuit Court of Appeals in \textit{Rux v. Republic of Sudan} adopted the same “proximate cause” standard.\footnote{\textit{Rux}, 461 F.3d at 473. (“Plaintiffs must establish jurisdiction by alleging facts sufficient to establish a reasonable connection between a country’s provision of material support to a terrorist organization and the damage arising out of a terrorist attack.”)} The Court noted the proximate cause standard “serves simultaneously to weed out the most insubstantial cases without posing too high a hurdle to surmount at a threshold stage of the litigation.”\footnote{Id.}

In \textit{Rux}, a “but for” standard of jurisdictional causation would have proved fatal to the plaintiff’s claims. The Court noted that the plaintiff’s allegations did not create a “direct and unbroken factual line” between the Republic of Sudan’s alleged material support of Al Qaeda, which ultimately committed the October 12, 2000 bombing of the U.S.S. Cole.\footnote{Id. at 474.} However, the Court held that the plaintiff’s allegation demonstrated a reasonable connection between the Republic of Sudan’s actions and the bombing, which satisfied the jurisdictional requirements of the state-sponsor of terrorism exception.\footnote{Id.}
With the adoption of a “proximate cause” standard under the state-sponsor of terrorism exception, cases such as *Kilburn* and especially *Rux* survived the first hurdle of litigation: the jurisdictional causation requirement and motions to dismiss. And the relaxing of the requirements of piercing the cloak of sovereign immunity have not stopped at jurisdictional requirements – the relaxing has gone to the merits stage as well, creating a brighter picture for plaintiffs in the ongoing war on terrorism taking place in domestic courts.

**III. THE FOREIGN SOVEREIGN IMMUNITIES ACT AND AIDING AND ABETTING LIABILITY**

* A Brief Overview of the Origins of the Standard of Aiding and Abetting Liability

Following the relaxing of the jurisdictional causation requirements under the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act, courts are also increasingly embracing a relaxed aiding and abetting liability standard for cases where a foreign defendant has allegedly materially supported acts of terrorism. Under English common law, aiding and abetting liability encompassed a principal in the second degree who was present and aided and abetted the crime taking place.50 If a person was not present at the scene of the crime, but took part either before or after the act, they were considered an accessory but were also liable as “aiders and abettors” if they were not present at the scene of the crime.51

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51 *Id.*
The application of the standard of aiding and abetting liability was not limited to criminal cases under the common law.\textsuperscript{52} In \textit{Purviance v. Angus}, decided by the Pennsylvania Court of High Errors and Appeals, the Court stated “If one does a trespass, and others do nothing but come in aid, yet all are principal trespassers.”\textsuperscript{53} The Restatement (Second) of Torts also outlines three fact patterns in which another person will be liable for one’s tortious conduct if they acted jointly. It provides:

“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:

a) does a tortious act in concert with the other or pursuant to a common design with him, or

b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”\textsuperscript{54}

The standard includes both a \textit{mens rea} and \textit{actus reus} component. In \textit{Doe I v. Unocal}, an Alien Tort Statute case, the Ninth Circuit Court of Appeals defined aiding and abetting liability as “knowing practical assistance that has a substantial effect on the perpetration of the crime.”\textsuperscript{55} Most recently in October 2007, in \textit{Khulumani v. Barclay National Bank Ltd.}, the Second Circuit Court of Appeals extensively discussed both the \textit{mens rea} and \textit{actus reus} components of aiding and abetting liability separately in its

\textsuperscript{52} \textit{Id.} at 822.


\textsuperscript{54} \textit{RESTATEMENT (SECOND) OF TORTS, § 876} (1979).

\textsuperscript{55} \textit{DOE I V. UNOCAL CORP.}, 395 F.3d 932, 947 (9th Cir. 2002).
opinion holding that a standard of aiding and abetting liability may be plead under the Alien Tort Statute.\textsuperscript{56}

With regard to the \textit{mens rea} component, the Court in \textit{Khulumani} referred to the Rome Statute of the International Criminal Court as the most significant international legislation addressing the \textit{mens rea} standard required for aiding and abetting liability.\textsuperscript{57} Under the Rome Statute, a defendant is guilty of aiding and abetting a crime only if he does so “for the purpose of facilitating the commission of such a crime.”\textsuperscript{58}

However, the Court noted that the international legislation on the \textit{actus reus} component was less clear.\textsuperscript{59} The Court looked to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia which concluded in the \textit{Furundzija} case that “the \textit{actus reus} of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a \textit{substantial effect} on the perpetration of the crime.”\textsuperscript{60} After examining both the \textit{mens rea} and \textit{actus reus} components, the Court concluded that a defendant is culpable through aiding and abetting liability under international law when that defendant “1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and 2) does so with the purpose of facilitating the commission of that crime.”\textsuperscript{61}

\textsuperscript{56} \textit{KHULUMANI V. BARCLAY NATIONAL BANK LTD.}, 504 F.3d 254, 277 (2nd Cir. 2007).

\textsuperscript{57} \textit{Id.} at 275-276.


\textsuperscript{59} \textit{Id.} at 277.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} \textit{Id.}
Despite the apparently clear pronouncements of the standard of aiding and abetting liability in international law by the courts, the standard has been applied differently in cases involving the Foreign Sovereign Immunities Act and the Alien Tort Statute.

B. Rux v. Republic of Sudan: Aiding and Abetting Liability through the State-Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act

On October 12, 2000, Osama bin Laden’s Al-Qaeda network committed and claimed responsibility for the suicide bombing of the U.S.S. Cole, a guided missile destroyer of the United States Navy, in the port of Aden, Yemen, killing 17 American sailors and wounding 39 others.\footnote{CNN.com, Bin Laden Praises USS Cole Bombers, March 1, 2001, http://archives.cnn.com/2001/301/WORLD/asiapcf/central/03/01/bin.laden.cole.} Before the attack, the Republic of Sudan supported Al Qaeda and Osama bin Laden. From 1991 to 1996, Al Qaeda used the Republic of Sudan as its main operational and training base.\footnote{Council on Foreign Relations, State Sponsors: Sudan, December 2005), http://www.cfr.org/publication/9367/#3.} In addition, from 1991 to 1996, Osama bin Laden lived in Khartoum until he was expelled.\footnote{Id. (“While under protection of the Sudanese government (which claims that bin Laden became a terrorist only after he left Sudan), bin Laden set up camps to train al-Qaeda members and opened multimillion-dollar businesses that funded and provided cover for al-Qaeda activities.”)}

In response to the U.S.S. Cole bombing, the surviving family members of the sailors killed in the attack filed a suit for damages against the Republic of Sudan under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act. In Rux v. Republic of Sudan, the plaintiffs alleged that the Republic of Sudan “provided material support in the form of funding, direction, training and cover to Al-Qaeda, a worldwide

\footnote{62 CNN.com, Bin Laden Praises USS Cole Bombers, March 1, 2001, http://archives.cnn.com/2001/301/WORLD/asiapcf/central/03/01/bin.laden.cole.} \footnote{63 Council on Foreign Relations, State Sponsors: Sudan, December 2005), http://www.cfr.org/publication/9367/#3.} \footnote{64 Id. (“While under protection of the Sudanese government (which claims that bin Laden became a terrorist only after he left Sudan), bin Laden set up camps to train al-Qaeda members and opened multimillion-dollar businesses that funded and provided cover for al-Qaeda activities.”)}
terrorist organization whose operatives facilitated the planning and execution of the bombing of the U.S.S. Cole.” The plaintiffs specifically alleged an aiding and abetting liability theory in their pleadings, alleging that the bombing of the U.S.S. Cole was “knowingly and deliberately” aided and abetted by the Republic of Sudan. The District Court for the Eastern District of Virginia denied Republic of Sudan’s motion to dismiss, and the Fourth Circuit Court of Appeals affirmed, stating that the plaintiffs alleged sufficient facts to establish the “material support” requirements under the state-sponsored terrorism exception, as well as the jurisdictional causation requirement. Rux thus involved the case of a foreign State who allegedly “materially supported” the actions of a nonstate actor, which, like the Kilburn case, was not its agent.

The requirement of “material support or resources” that the foreign State must give to an individual or organization responsible for an act of terrorism for the state-sponsored terrorism exception to apply in the substantive liability phase of the litigation is less stringent than a typical aiding and abetting liability standard. The state-sponsored terrorism exception, 28 U.S.C. § 1605(a)(7), contains several provisions of “material support or resources,” including “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances,

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65 Rux, 461 F.3d at 468.
66 Id.
67 Id. at 465-466.
explosives, personnel …, and transportation.”68 Thus, while aiding and abetting liability encompasses “knowing practical assistance or encouragement” in the perpetration of the crime, the state-sponsored terrorism exception requires only “material support” for the act, collapsing the knowledge and intent requirements for aiding and abetting liability into one judicial inquiry – whether a State “materially supported” the action in fact, irrespective of knowledge or intent.

In the merits phase of the litigation, the Eastern District Court of Virginia in Rux also collapsed the knowledge and intent requirements of aiding and abetting liability into one inquiry. The Court ultimately held that substantial evidence existed that Sudan’s material support to Al Qaeda led to the deaths of the 17 American sailors on the U.S.S. Cole and awarded a $7,956,344.00 judgment against the Republic of Sudan.69 In its decision, the Court focused upon several links of “material support” between the Republic of Sudan and the Al Qaeda network of Osama bin Laden: assistance by the Sudan in Al Qaeda’s financing,70 the providing of diplomatic passports and travel documentation to facilitate movement of Al Qaeda members,71 that the Cole plot was

68 Id. at 470.

69 RUX V. REPUBLIC OF SUDAN, 495 F.Supp.2d 541, 569 (E.D. Va. 2007).

70 Id. at 549. (“Bin Laden established several joint business ventures with the Sudanese regime that began to flourish to flourish upon his arrival in the Sudanese capital of Khartoum in 1991. ….. Bin Laden continued to maintain his substantial business interests and facilities in Sudan even after his departure to Afghanistan in 1996.”) (“Sudan allowed its banking institutions to be used by Al Qaeda to launder money.”) (“In addition, as reported by the U.S. Department of State in its annual “Patterns of Global Terrorism” reports, the Sudanese military cooperated with Bin Laden and Al Qaeda to finance at least three terrorist training camps in northern Sudan by January 1994.”)

71 Id. at 551. (“The Government of Sudan’s provision of diplomatic passports to Al Qaeda, which was necessarily a government function carried out by Government officers or agents, was critical to Al Qaeda’s method of training its operatives in one country and then dispatching them with their materials to other countries to carry out operations or await instructions. By giving Al Qaeda diplomatic passports, as well as diplomatic pouches that could be carried without inspection, Sudan enabled Al Qaeda to transport weapons and munitions outside the country and into other countries undetected by Customs agents.”)
supervised directly by Osama bin Laden\textsuperscript{72} and was part of a “decade-long plan conceived and executed by Bin Laden and Al Qaeda to attack U.S. interests in the Middle East, specifically American military forces.”\textsuperscript{73} The Court noted that this support given by the Republic of Sudan was “critical to Al Qaeda developing the expertise, networks, military training, munitions, and financial resources necessary to plan and carry out the attack that killed the seventeen American sailors on the U.S.S. Cole.”\textsuperscript{74}

Assuming arguendo these facts display a general support of Al Qaeda by the Republic of Sudan throughout the 1990s until the Cole bombing, none appear directly to temporally trace Sudan’s involvement with Al Qaeda to the bombing of the U.S.S. Cole on October 12, 2000. The closest temporal connection appears to be other finding by the Court: that the explosives utilized in the U.S.S. Cole attack were sent by Al Qaeda operatives in Sudan.\textsuperscript{75} However, this finding was based upon the testimony of several experts who concluded that it was the most likely possibility, not a certain fact.\textsuperscript{76}

The Court in \textit{Rux}, finding the Republic of Sudan liable, therefore ultimately adopted a less restrictive aiding and abetting standard of liability in analyzing substantive liability issues under the state-sponsored terrorism exception to the FSIA. The adoption of a less restrictive aiding and abetting liability standard is part of a two-step movement by the courts, along with the adoption of the “proximate cause” standard of jurisdictional

\textsuperscript{72} \textit{Id.} at 552. (“The Cole plot was an Al Qaeda operation supervised directly by Bin Laden.”)

\textsuperscript{73} \textit{Id.} at 551.

\textsuperscript{74} \textit{Id.} at 553.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}. For instance, former CIA Director James Woolsey testified for the plaintiffs in the case that it was “more likely than not” the Republic of Sudan was the source of the explosives used in the Cole bombing.
causation, toward making it easier for plaintiffs to impose liability on state sponsors of terrorism through the state-sponsored terrorism exception to the FSIA in cases of material support given by the foreign State to a nonstate actor. While a less restrictive aiding and abetting liability standard has been adopted in the FSIA context, a much different one appears in similar cases of a nonstate actor, aiding and abetting violations of international law by another nonstate actor, alleging violations of the Alien Tort Statute.

IV. ALIEN TORT STATUTE AND AIDING AND ABETTING LIABILITY

A. An Overview of the Alien Tort Statute

The Alien Tort Statute, enacted in 1789, provides that 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.”

There are three requirements under the statute: 1) The plaintiff must be an alien; 2) The action must be in tort; and 3) the tort must be a violation of either the law of nations or a United States treaty.

The Alien Tort Statute remained relatively dormant for nearly 200 years until the landmark Second Circuit Court of Appeals case of Filartiga v. Pena-Irala in 1980. In Filartiga, a Paraguayan doctor and opponent of the regime of President Alfredo Stroessner, Dr. Joel Filartiga, brought a lawsuit against the Inspector-General of the

78 BUCCI, supra note 13, at 312.
79 FILARTIGA V. PEÑA-IRALA, 630 F.2d 876 (2nd Cir. 1980).
police in Asuncion, Paraguay for the torture and murder of his son, Joelito. The Court held that official torture is a “clear and unambiguous” prohibition by the law of nations.

Since Filartiga, courts have struggled to determine the contours of what torts are violations of the law of nations. In Sosa v. Alvarez-Machain, the United States Supreme Court held the Alien Tort Statute was jurisdictional and created no new causes of action, and that “the jurisdictional grant is best read as having been enacted on the understanding that 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.” The Court in Sosa also stated that any claim based upon the “law of nations” must 1) rest on a norm of international character, 2) that is accepted by the civilized world, and 3) be defined with specificity.

B. Aiding and Abetting Liability Under the Alien Tort Statute: The Almog Case

The theory of aiding and abetting liability has been recognized by courts under the Alien Tort Statute to apply to the actions of multinational corporations who aid and abet violations by governments of the law of nations. In Doe v. Unocal, a group of Burmese farmers brought a claim against the U.S. oil company Union Oil of California (“Unocal”) in 1996 under the Alien Tort Statute, claiming forced labor, rape, torture, and

80 Id. at 878.

81 Id. at 884. (“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists, we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”)


83 Id. at 725. (“We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”)
murder suffered while being abused by Burmese army units who were allegedly hired by Unocal to secure a pipeline route along Yadana’s gas field in Burma. On appeal, the Ninth Circuit Court of Appeals adopted an aiding and abetting liability standard under the ATS. Most recently, the Second Circuit Court of Appeals in Khulumani endorsed the following aiding and abetting liability standard under the statute: “When a defendant 1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and 2) does so with the purpose of facilitating the commission of that crime.”

The foregoing cases are situations where a multinational corporation allegedly aids and abets the actions of a government; in Kilburn and Rux, under the state-sponsor of terrorism exception to the FSIA, a foreign sovereign allegedly aided and abetted a nonstate actor. Closer factually in the Alien Tort Statute context is Almog v. Arab Bank PLC, a case involving a Jordanian bank which allegedly knowingly provided banking and other services which helped facilitate suicide bombings and other attacks committed by terrorist organizations against mostly Israeli civilians.

In Almog, the plaintiffs alleged that two purported charitable organizations, the Popular Committee for Assisting the Palestinian Mujahideen and the Saudi Committee for Aid to the Al-Quds Intifada, acted as “front organizations” aiding terrorist activities

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85 Doe I, 395 F.3d at 947.
86 Khulumani, 504 F.3d at 277.
88 Id. at 261. The plaintiffs alleged that these two organizations worked as a “front” for four terrorist organizations which conducted suicide bombings and other attacks which targeted Israeli civilians: the Islamic Resistance Movement (Hamas), the Palestinian Islamic Jihad, the Al Aqsa Martyr’s Brigade, and the Popular Front for the Liberation of Palestine.
in Saudi Arabia. These organizations allegedly set up accounts labeled “98 Accounts” at several banks in Saudi Arabia, including the defendant Arab Bank PLC, which raised funds for the families of “martyrs” which took part in terrorist attacks. Arab Bank allegedly materially supported terrorist organizations in two ways: first, providing banking services, including accounts, to Hamas and other terrorist organizations; and secondly, maintaining accounts for the charitable organization even though Arab Bank “knew that the accounts of these various organizations were being used to fund the suicide bombings and other attacks sponsored by the terrorist organizations.”

The Court held that the plaintiffs stated sufficient claims not only for genocide and crimes against humanity, but a third norm as well: “the financing of suicide bombings and other murderous attacks on innocent civilians which are intended to intimidate or coerce a civilian population.” This norm was given content through several international instruments condemning terrorism: the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism, and United Nations Security Council Resolution 1566. In conclusion, the Court held that Arab Bank “acted intentionally and with knowledge that its conduct would ….. facilitate the underlying violations when it

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89 Id.
90 Id.
91 Id. at 262.
92 Id. at 276.
93 Id. at 276-277.
94 Id. at 277-278.
95 Id. at 279.
engaged in the acts alleged.”96 The Court even waived the state action requirement under the Statute, since the terrorist activities alleged in the case were “widespread, organized and systematic attacks on civilians.”97

*Almog* thus presented the unique case of a nonstate actor aiding and abetting another nonstate actor in a case involving terrorism under the Alien Tort Statute. While the case was decided several months before the *Khulumani* decision, it engaged in the two-step analysis of calculating aiding and abetting liability under the statute. First, while the Court in *Almog* did not utilize a “substantial” requirement under the first prong, it enumerated the activities constituting “practical assistance” which assist in the perpetration of the crime. Secondly, the Court adopted the intent prong of “purpose of facilitation,” noting that Arab Bank served a role as a “paymaster” for terrorist organizations.98 The case of *Almog* thus provides a useful roadmap for courts to utilize in terrorism cases under the Alien Tort Statute; courts can engage in a clear two-step inquiry of the *actus reus* and *mens rea* prongs, rather than collapsing both into an ambiguous, single inquiry.

**V. PROPOSAL**

As the foregoing sections illustrate, the standard and even availability of aiding and abetting liability for cases arising under the state-sponsored terrorism exception

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96 *Id.* at 291.

97 *Id.* at 293. “The third international norm alleged to have been violated here, the prohibition of suicide bombings and other murderous attacks on civilians designed to intimidate or coerce a civilian population, also create responsibility without regard to whether the actions are taken under color of state law. As with plaintiffs’ genocide and crimes against humanity allegations, plaintiffs here allege widespread, organized and systematic attacks on civilians. There is no sound reason that a state action requirement be imposed on this norm any more than one is imposed on the genocide and crimes against humanity norms.”

98 *Id.* at 262.
under the Foreign Sovereign Immunities Act and the Alien Tort Statute varies in both contexts. Instead of variation, in cases only involving terrorism, I propose that the judicial inquiry in both contexts should be a two-step analysis. First, the question concerning the required *actus reus* should be whether a State has given “substantial material support” in cases falling under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, and be the same under Alien Tort Statute cases when a nonstate actor, foreign government, or nonstate actor acting under color of law aids and abets an organization which conducts terrorist activities. Secondly, the courts should adopt a *mens rea* component as well in both contexts – whether an actor “knowingly” gives substantial material support which *facilitates* the commission of a terrorist activity, whether it be a government in the FSIA context or a nonstate actor, foreign government, or nonstate actor acting under color of law under the Alien Tort Statute. To enact such a judicial inquiry best effectuates the object and purposes of both statutes.

A. Policy and Purposes of the Foreign Sovereign Immunities Act and the State-Sponsored Terrorism Exception: Application of this Proposal

As mentioned earlier, Congress enacted the Foreign Sovereign Immunities Act in 1976. It has two main purposes: first, to codify the restrictive theory of immunity adopted by the State Department in the 1950s and to place some of the burden on determinations of when sovereign immunity applied away from the Executive branch to the Judicial branch.\(^99\)

\(^99\) BUCCI, *supra* note 13, at 301.
The policies and purposes behind the state-sponsored terrorism exception amendment to the FSIA are slightly different than the policy rationale behind the FSIA statute.\textsuperscript{100} In enacting the exception, Congress had three goals in mind: 1) provide a means of relief for the victims of terrorism and their families can obtain justice in the courts; 2) punish guilty state sponsors of terrorism for their actions in supporting terrorist activities; and 3) deter states from supporting terrorism or committing terrorist acts in the future.\textsuperscript{101} In addition, the Court in \textit{Flatow v. Islamic Republic of Iran} cited another important reason – it creates no new responsibilities or obligations, but instead “only creates a forum for the enforcement of pre-existing universally recognized rights under federal common law and international law.”\textsuperscript{102}

This proposal addresses both the concerns of families who have suffered from the effects of terrorism and also those concerned with the relaxed standard of liability under the exception. While \textit{Kilburn} and \textit{Rux} established a “proximate cause” standard on the jurisdictional causation issue, this proposal would not affect these holdings; rather, it is directed toward the merits phase of the litigation. Therefore, plaintiffs who sufficiently plead cases under the exception will remain more likely to have their cases heard by the courts on the merits and give effect to the policy of the exception to provide relief for victims of terrorism and their families.

However, upon the merits phase, the plaintiffs would accrue a slightly higher burden. First, they would need to show that a foreign government provided “substantial” material support to a nonstate actor which has committed acts of terrorism, and then

\textsuperscript{100} TOWNLEY, \textit{supra} note 30, at 1182.

\textsuperscript{101} VADNAIS, \textit{supra} note 20, at 216.
would need to show that the foreign government did so “knowingly” to facilitate the commission of the acts of terrorism. It would not be the burden to show that the foreign government knowingly facilitated each and every single incident, but rather that the conduct of the foreign government is such that it is fully aware that its actions give a “practical certainty” that its substantial material support will cause the terrorist attacks that occur. Overall, this proposal presents a compromise between both concerns: the exception should remain viable for plaintiffs with a relaxed standard of “proximate cause” for the jurisdictional issue, but for the merits, a slightly higher burden on the “substantial” prong and “knowing” requirements.

B. Policy and Purposes of the Alien Tort Statute: Application of this Proposal

The Alien Tort Statute has a long and colorful history. It was originally enacted to address the unique eighteenth-century concerns of “violation of safe conduct, infringement of the rights of ambassadors, and piracy.”103 In 1980, the groundbreaking Filartiga decision launched a new roadmap for addressing human rights violations in stating that “courts must interpret international law not as it was in 1789, but as it has evolved and exists around the world today.”104 The violations sought to be actionable under the statute not only apply now only to governments – but in some cases, to

103 Sosa, 542 U.S. at 715.
104 Filartiga, 630 F.2d at 881.
organizations and individuals acting under color of law and even private individuals themselves.

On the one hand, human rights organizations, such as Human Rights Watch and Amnesty International, are pushing for a more vibrant Alien Tort Statute that allows victims to sue in courts for serious violations of international law. As Human Rights Watch contends, “The original intent of the law was probably to persuade European countries that the new United States would not become a haven for pirates. But in the modern age, it’s equally important that the United States not be a haven for human rights abusers.” But on the other hand, the State Department and other commentators argue that the specter of increased liability for corporations who invest overseas in countries

105 See, for example, KADIC V. KARADZIC, 70 F.3d 232, 242 (2nd Cir. 1995) (“Appellants’ allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual.”); PRESBYTERIAN CHURCH OF SUDAN v. TALISMAN ENERGY, INC., 244 F.Supp.2d 289, 318-319 (S.D.N.Y. 2003) (“Historically, states, and to a lesser extent individuals, have been held liable under international law. However, as examined ….. substantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations.”).

106 See, for example, Kadic, 70 F.3d at 239 (“We hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”); DOE V. ISLAMIC SALVATION FRONT (FIS), 993 F.Supp. 3, 8 (D.D.C. 1998) (“The Karadzic court held that Common Article 3 applies to all parties to a conflict, not merely to official governments ….. This Court concludes that the acts of the FIS alleged by Plaintiffs are proscribed by international law against both state and private actors.”); EASTMAN KODAK CO. v. KAVLIN, 978 F.Supp. 1078, 1094 (S.D. Fla. 1997) (“The Court finds that the law of nations does prohibit the state to use its coercive power to detain an individual in inhumane conditions for a substantial period of time solely for the purpose of extorting from him a favorable economic settlement. The Court also finds that the Alien Tort Claims Act makes responsible anyone who conspires with state actors to achieve such an unlawful arbitrary detention.”).


109 Human Rights Watch, supra note 107.
where the government, military, or police commit human rights abuses may undermine American foreign policy and the legitimate business of corporations overseas.\textsuperscript{110}

This proposal gives certainty to all corporations and to fluid litigation involving terrorism or support of terrorism under the Alien Tort Statute. First of all, just as in the FSIA context, a nonstate actor is required to give \textit{“substantial”} material support to another nonstate actor, foreign government, or nonstate actor acting under color of law to meet the first prong of aiding and abetting liability. Secondly, it must also \textit{knowingly} assist in the \textit{facilitation} of terrorist attacks, rather than negligently\textsuperscript{111} or even recklessly.\textsuperscript{112}

For example, a hypothetical case under this proposal might look like this: a U.S. bank with overseas branches provides banking services to thousands of customers. One customer might happen to be involved in terrorist activities and has personally instigated numerous terrorist attacks. However, the bank has no knowledge that this customer’s account is being utilized to support such activities, nor does the federal government in the United States give the U.S. bank any reason for such belief. No liability results since the activities of the bank must be done so \textit{knowingly}. Neither does liability result if the bank,


\textsuperscript{111} MODEL PENAL CODE, § 2.02(2)(d) (1962). “Negligently. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.”

\textsuperscript{112} MODEL PENAL CODE, § 2.02(2)(c) (1962). “Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.”
knowing that the customer is on a list provided by the U.S. State Department of persons whose accounts must be frozen, has a computer error place the name off a forbidden accounts list that resulted from the mistake of an employee of the bank’s IT department (negligently). However, if the bank knows that the account is for the illegal purpose of committing and facilitating acts of terrorism, and provides the customer banking services irrespective of this knowledge, liability would follow under the Statute.

This proposal, limited to cases only involving terrorism under the Alien Tort Statute, helps address the challenges the twenty-first century presents with changed circumstances in an increasingly globalized world. While globalization has led to an increase in free trade and a decline in state regulation and intervention in the marketplace, the “unholy trinity” of the globalization of crime, terror, and corruption has appeared.113 Louis Shelley has described the dangers of the “unholy trinity”:

“This Both criminals and terrorists have developed transnational networks, dispersing their activities, their planning, and their logistics across several continents, and thereby confounding the state-based legal systems that are used to combat transnational crime in all its permutations. Transnational criminals are major beneficiaries of globalization. Terrorists and criminals move people, money, and commodities through a world where the increasing flows of people, money, and commodities provide excellent cover for their activities. Both terrorists and transnational crime groups have globalized to reach their markets, to perpetuate their acts, and to evade detection.”114

This century also has presented the haunting specter of state failure or collapse, when states fail to control their borders, prey on their own constituents, provide only limited quantities of essential political goods, exhibit flawed institutions, and/or are


114 Id.
typified by deteriorating or destroyed infrastructures – right before their governments often fall. As Robert Rotberg warns, “The rise and fall of nation-states is not new, but in a modern era when national states constitute the building blocks of legitimate world order the violent disintegration and palpable weakness of selected African, Asian, Oceanic, and Latin American states threaten the very foundation of that system.”

The concerns of terrorism and state collapse are front and center in the foreign policy of the United States. In discussing the war on terrorism in a speech in September 2005, President George W. Bush stated, “The only way the terrorists can win is if we lose our nerve and abandon the mission. For the security of the American people, that’s not going to happen on my watch. We’ll do our duty. We’ll defeat our enemies in Iraq and other fronts in the war on terror. We’ll lay the foundation of peace for our children and grandchildren.” The adoption of this judicial inquiry with the Alien Tort Statute in cases involving terrorism will not only assist with the ongoing war on terrorism, but will provide the judiciary with a vital role in this mission and another means for victims of terrorism to find redress in U.S. courts.

VI. CONCLUSION

In conclusion, I propose not a dramatic proposal, but one that seeks uniformity, clarity, and a vital state-sponsored terrorism exception under the FSIA along with the Alien Tort Statute that are available as a means of judicial relief for victims of terrorism.

115 R. ROTBERG, ED., STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 5-7 (2003).
116 Id.
Therefore, courts should employ a two-step judicial inquiry: first, of whether a State gave “substantial material support” in cases falling under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, and with the Alien Tort Statute, cases when a nonstate actor, foreign government, or nonstate actor acting under color of law aids and abets an organization which commits terrorist attacks and activities. In addition, the courts should employ a second requirement under both the FSIA and Alien Tort Statute that addresses the mens rea of alleged support of terrorist activities: that the actor knowingly acts that facilitates the commission of the terrorist activity.

The “substantial material support” standard of the first prong, a de facto aiding and abetting liability standard, should give full effect to the policies underlying both statutes and will provide for more uniformity in judicial decisionmaking on the fundamental concern of terrorism in the twenty-first century. In addition, the “substantial” requirement should have the effect of rewarding only meritorious claims under both statutes. But moreover, this proposal will ensure that plaintiffs are not only able to seek remedies for the tragedy of terrorism; it will also increase awareness of the judicial role not only in U.S. foreign policy, but the war on terrorism that is waged on many frontiers.