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The Justice Against Sponsors of Terrorism Act (JASTA) from a Civil Procedure Perspective

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Abstract: Terrorism is a global threat that has caused immense suffering and loss of life. The United States' Justice Against Sponsors of Terrorism Act (JASTA) is an important piece of legislation that allows victims of terrorism to hold foreign entities accountable for their actions. However, there is a need to evaluate the act from the perspective of Civil Procedure to determine its effectiveness in providing remedies for victims and addressing the challenges of holding foreign entities accountable. This paper's analysis is based on the JASTA, for the evaluation of its position and application from a pre-litigation of Civil Procedure perspective. The two most significant parts of Civil Procedure in the segments of preliminary issues including Parties to the Suit and Cause of Action are examined to determine their susceptibility to being exploited in the process of executing the intention and purpose of the act concerning foreign entities, as highlighted in JASTA. Preliminary aspects must be considered before initiating a civil suit based on JASTA. This analysis is important in understanding the strength and weaknesses of JASTA in the civil suit and it involves a qualitative method of research. For the most part, the research methodology adopted will be pure legal research. Since the research will focus on JASTA, the regular method of analysis adopted is by referring to the sources and data discussing JASTA and procedural law. The findings of this work could be used to establish better laws from JASTA and provide the opportunity for the citizens who are victims to bring legal action against foreign states that are also responsible for their loss and suffering. Moreover, other countries faced with litigation initiated under JASTA could also benefit from the findings as they could be used in establishing better laws for countries that had also suffered greatly due to actions resulting from terrorism or the war against terrorism. Future research related to this topic is also recommended in this analysis.

Keywords: Justice Against Sponsors of Terrorism Act (JASTA); civil procedure; parties to the suit; cause of action; foreign state; terrorism; Foreign Sovereign Immunities Act (FSIA); US Anti-Terrorism Act (ATA)

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1. Introduction

There is no doubt that the tragedies of 11 September 2001 continue to haunt the lives of many Americans, and that debates about the moral and legal responsibility for the events of that day have acquired their afterlives. On 28 September 2016, the Justice Against Sponsors of Terrorism Act, also known as JASTA, was officially approved by the United States Congress. JASTA is legislation passed by the US Congress generally to fight terrorism and to provide an avenue for the victims of the September 11 attacks to sue any foreign government that funded such terrorist attacks. Despite the passage of JASTA, the policymakers' objective to provide any foreign individual, institution, or government that supports a foreign terrorist organization with legal standing is clearly transparent. If any of these foreign organizations were to be subordinated under Section 219 of the Immigration and Nationality Act in the course of carrying out a terrorist assault against the US, they would not be immune from the jurisdiction of the US courts. This is clarified extensively in Section 2(b) of the JASTA, which states that the purpose of the act is generally

considered to provide civil litigants with the ability to seek relief against persons, entities, and foreign countries, wherever they may be found and wherever they may be acting, that have provided material support, either directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the US.

To achieve these ends, under Section 4 of the act, JASTA strips foreign states of sovereign immunity in US courts in civil actions for money damages arising out of certain US-linked acts of international terrorism. JASTA also creates substantive causes of action for aiding and abetting and for conspiracy. It was interpreted that any citizen of the US who has been the victim of an act of international terrorism has the right to sue any person, entity, or country in a court in the US for providing "*material support*" for international terrorism. It is important to note that JASTA amends the Antiterrorism Act of the US to clarify that those who aid, abet, or conspire with a foreign terrorist organization are subject to civil liability. In short, if a person aids and abets a State Department-designated foreign terrorist organization by knowingly providing that organization with substantial assistance, that person will be subject to civil liability.

The problem that underpins this article pertains to the impracticality of JASTA from a civil litigation perspective. For example, the ATA was modified to include the secondary responsibility notwithstanding JASTA's acceptance. Under this act, "*any nationals of the United States*" or their representative may file a lawsuit if their person, property, or company was harmed as a result of international terrorism. A person may be sued if they are a direct actor, a direct actor's sponsor, or a direct actor's service provider. There are two main causes of action, which are: (1) the injury on the person, property, or business; or (2) the commits or aids and abets for international terrorism. For the former, to fulfil the requirement under Section 1605B, they must establish that the defendant behaved recklessly, knowingly, or intentionally, whereas for the latter, they must prove that the defendant "*must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance*" and "*must knowingly and substantially assist the principal violation*."

Concerning the cause of action, in situations involving services to direct actors, the difficulty is in demonstrating proximity to show that the act of terrorism was linked to the defendant's act, and this can only be achieved by a highly qualified expert. Second, since there are several legal interpretations, causation is difficult to prove. One of the difficulties in establishing the causality is the impending discrepancies. Thirdly, there would be a floodgate of cases where cause of action can be brought simultaneously or subsequently under JASTA or ATA, where JASTA gives courts the jurisdiction over civil claims against a foreign state for physical injuries, death, or damaged property that has occurred in the US on or after 11 September 2001. Moreover, collecting the remedy (judgment sum) from the defendant, as allowed for under JASTA, is notoriously difficult. It is evident that sovereign immunity has impeded the collection of remedies under JASTA and there are difficulties restoring remedies over long periods of time; this was stated in Section 5 of JASTA addressing the Stay of Actions whilst discussions are ongoing. Thus, several years of litigation would ensue, with the plaintiffs finally failing to obtain their desired relief. Lastly, there can be a waste of court resources when it is impossible to collect on a favorable judgment after a successful lawsuit. Therefore, they cannot provide the prospective remedy requested by the plaintiffs.

2. Methods

The design of this work comprises doctrinal and non-doctrinal legal research. Doctrinal legal research was carried out for the comprehensive understanding of the legal doctrines, development process, and legal reasoning for JASTA, to understand its history and scope of legal jurisdiction. Non-doctrinal research into JASTA was carried out to better appreciate how its jurisdiction impacts society, both for the local and international scenario, and further, to understand where its laws are truly viable and enforceable.

The qualitative research approach is employed in this analysis. The literature research will represent the majority of the approach to study that is ultimately chosen and imple-

mented. Since JASTA will be the primary topic of the investigation, the standard technique of analysis that has been established involves referring to literature that covers JASTA and procedural law.

The literature research refers to printed textbooks, law reports, and periodicals, mainly on JASTA. The main source of reference is the material on JASTA and Civil Procedure. These materials are very important as the main discussion of the research will focus on this area of law.

An examination of the literature is made first, through the traditional way of using the library research method. Printed textbooks, law reports, and legal periodicals are obtained from the libraries of the National University of Malaysia and other public universities, such as the Law Library of the International Islamic University Malaysia and the University of Malaya.

As the above libraries do not hold many hard copies of the reports and seminar papers, some which are generally unpublished, electronic sources such as Lexis Nexis, JSTOR, and Westlaw will be used that contain a wide range of information.

3. Literature Review

The introduction of the law known as the Justice Against Sponsors of Terrorism Act (JASTA) by the United States (US) government has brought a number of issues, particularly in relation to Foreign Sovereign Immunity and the principle of International Law. It raises a number of concerns and objections from various states. The law is too ambitious and could cause numerous repercussions, not just to the affected states, such as the Kingdom of Saudi Arabia (KSA), but also to the US itself. The following is a review of the literature related to terrorism, the September 11 attacks, and JASTA.

In a speech delivered by George W Bush[1], after the September 11 attacks on US soil, to the people of the US and to show his gratitude to the countries around the world who have shown concern over the tragedy that befell them, he called on the nation to unite and strongly defeat their enemies and bring them to justice. He further stated that the act of war committed on US soil was a terrorist attack that was linked to an affiliated terrorist organization known as al-Qaeda. Al-Qaeda is known to be a promoter of Islamic extremism, which is against Islamic principles. Their group leader was Osama bin Laden, who had connections with other organizations in various countries such as Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan, who were trained in Afghanistan.

An article produced by the Library of Congress (2015) views the offences of terrorism, particularly the September 11 attacks against the US, as resulting in serious challenges to the international community in the fight against terrorism. The attack changed and enhanced security systems across the world. Local laws were amended, and new laws were established in countries such as Algeria, Morocco, and Saudi Arabia. The attack has indeed identified challenges to a number of legal systems in different countries, which again called for strict measures for the purposes of combating acts of terrorism across the country and globally. The aftermath also created an avenue for defining and extensively addressing terrorism, prosecutorial aspects of terrorism, criminalizing any form of terrorist acts, financing terrorist acts, and tracking of suspicious transactions by a specialized unit. It was famously perceived that terrorism is associated with religion and that is why Muslim countries such as Saudi Arabia and other Muslim nations have put great effort in creating laws and legislation across the region for a more effective legal system. Against this background, this work examines JASTA to see further changes made to the law and its consequences.

A report by Blanchard and Prados (2007) traces the cause of terrorism to the huge number of donations made by Muslim countries such as Saudi Arabia to other Muslim countries through the establishment of charitable organizations. The report is of the view

[1] United States of America President George W. Bush. Address to a Joint Session Of Congress and The American People. 37, Weekly Comp Ress, Doc 1347, 20 September 2001.

that the growth of terrorism was attributed to such donations. The US Department of State, in 2007, in its International Narcotic Control Strategy Report, labeled Saudi Arabia as a terrorist-sponsoring country and this report was being used against Saudi Arabia. According to Blanchard and Prados's report, the donations were not regulated and were used as a means of financing extremists for the past 25 years. As a result of this, the report has been used to connect Saudi Arabia with terrorism and the September 11 attacks. In addition, the report also states that Saudi Arabia was involved with terrorists and is not fully prepared to fight terrorism. Further, the US government is against the support given to Muslims countries through charitable organizations. This work tries to connect the findings of the report with the provisions of JASTA and determine whether any issues could be raised in relation to the procedural requirements under JASTA.

The Directorate-General for External Policies (Directorate-General for External Policies of the Union 2013) has also published its views, which relied on the report by the US Department of State. It claims that terrorist groups could be linked to the invasion of Afghanistan by the Soviet Union and Saudi Arabia. Further, Saudi influential personalities were also involved. The literature proceeds to aver that the existence of Salafi/Wahhabi sect networks was the result of Saudi Arabia's financial aid to those organizations. In addition, the literature considers Salafis/Wahhabis as the rebel groups responsible for terrorist attacks in Southeast Asia, such as Pakistan and Afghanistan. In the Middle East, Morocco, Tunisia, Libya, and Egypt were said to be fond of this sect's ideologies and have been categorized as jihadist groups. A number of Muslim countries and charitable organizations were benefactors from the donations of Saudi Arabia. The literature tries to establish Saudi Arabia as a financier of terrorists, particularly the Salafi/Wahhabi sects, who are seen as terrorist groups.

Byman (2016) investigated the actions of Saudi Arabia in fighting terrorism and made reference to its relationship with the US. The author perceived Saudi Arabia to be reluctant in the support of fighting terrorism, and as such, presented the status of the Saudi government as the problem and not the solution. Byman opined that the US has limitations to influencing the support of Saudi Arabia in the radicalization process of jihadist movements, in which Saudi is accused of being active role player. Though the US and Saudi Arabia share a number of general interests, they differ in general values and worldview. The literature did not touch on JASTA.

An introductory report viewed that an appropriation bill meant to eliminate funds for Saudi Arabia was a threat to US interests as it would affect measures put in place in fighting terrorist activities (Weiner 2002). The US and Saudi Arabia are working tirelessly in building a strong relationship in the fight against terrorism across the globe, and if such legislation becomes law, then it undermines the working cooperation between the two nations. It is obvious that Saudi Arabia is a target of terrorists. The literature extensively analyzes the working objectives of the two nations and views that Saudi Arabia is making frantic efforts to combat terrorism.

Newton (2015) assessed that in February 2014, Saudi Arabia enacted a law against terrorism and was financing measures to fight terrorism. This law is now among the penal laws in the country with the aim of addressing terrorist activities in the country. This law has changed the face of Saudi Arabia and has demonstrated the commitment of the country to fighting terrorism. The focus of the law is wide and covers specific individuals. Though there are human rights issues in Saudi Arabia, this does not affect the country's objective of fighting terrorism. The literature analyzes the penal law's provisions in relation to terrorism and ensures the effectiveness of the law and human rights.

Entman (2003) assert that the attacks of September 11 triggered changes in the US security system and foreign policy. The paradigm shift of terrorist attacks from Afghanistan to Saudi Arabia was linked to two journalist reports. Such blame created by the media presented a threat to the relationship between the US and Saudi Arabia. The article extensively discusses how the framing of Saudi Arabia by the media has drastically changed foreign policy relations between the two countries.

Krueger and Laitin (2008) analyzed the origins of terrorism from the perspective of countries and target countries. The article found that terrorist activities were connected with political affairs and had little to do with the economy. Terrorists are more interested in political affairs rather than economic factors. This is the reality of terrorism. The political stance of the government in a country is the target when it comes to terrorism.

Atran (2006) analyzed the extent of a suicide attack from the perspective of the terrorist by looking at the morality and logic involved in a suicide attack. The attacks were connected to politics, normally related to foreign occupation. A clear example would be the US military occupation in various countries such as Libya, Iraq, Afghanistan, and Syria. Generally, Muslim countries were the main targets. The morality and justification of such attacks are uncertain. That alone also triggers the establishment and transformation of religious sects such as al-Qaeda and ISIS. According to Scott, al-Qaeda was established by Osama bin Laden, responsible for the September 11 attacks. The article also identifies the connection of Saudi Arabian nationals to the September 11 attacks. However, this current study examines terrorism from a different angle, i.e., the act of sponsoring terrorism, which the literature did not touch upon.

Pape (2003) examined suicide terrorism to find the logic behind suicide attacks. Most records of terrorist attacks indicate political objectivity or to achieve a political objective. The article investigated attacks from 1980 to 2001 across the globe with potential casualties and came to a strategic conclusion that all of the attacks end in political gain. There is no clear explanation as to how there is growth in the number of suicide attacks, though international politics still stood as the central reason, and the superpower countries' interest in scoring their political objectivity further attributed to the rise in suicide attacks. US military occupation increases the growth of suicide attacks. Again, similar to the above, this study will examine terrorism from a different angle, i.e., the act of sponsoring terrorism.

The 9/11 Commission Report examined the roles of nations in the context of terrorism as measures in identifying the US attackers from 11 September 2001 (The National Commission 2002, 2004). The shock of this attack was unprecedented and was the first of its kind. Findings from the investigations caused the US to redefine their position and their relationship with countries on matters concerning the September 11 attacks. The report interviewed over 1200 individuals from 10 different countries around the world and documented over 2.5 million pages. The purpose of the report was to identify whom should be responsible for the September 11 attacks. Muslims countries, particularly the Arab countries, were among the enemy countries indicted by the Commission Report. It was this report that identified Saudi nationals as the ones who attacked US soil. In addition, the report blames Saudi Arabia for the losses in terms of millions in properties, lives, etc., hence becoming one of the main reasons that JASTA was introduced. Continuing from the findings of the report, this study further examines the passing of JASTA by the US Congress based on the report.

Cassese (2001), in his article, reflects scenery changes in the perspective of International Law as a result of the September 11 attacks. Terrorism has changed everything, with legal approach as the key issue in discourse. Nations are devising plans on the appropriate placement of legal measures to curb the activities of terrorists in various ways, and this can only be achieved through collective efforts. The article examined the legal classification of international criminal law and the measures expected to regulate such acts, particularly in the case of the US. It is this change in the legal perspective where nations considered of ways to handle terrorist activities that led to the introduction of JASTA by the US government. Differing from the literature, this study examines the effects of terrorism and the September 11 attacks on the procedural law in the US, especially civil suits brought under JASTA.

With regard to state sovereignty and immunity, Finke (2010) analyzed sovereign immunity as the core foundation of the rule of customary international law, though with specific legal binding principles. The article identified the legal perspective of sovereign immunity under the principle of international law. This practice has long existed, and nations have benefited from the practice, although there are limitations prescribed in

international law. This principle allows nations to enjoy liberty for the greater good. Differing from the literature, this study does not touch on Public International Law. Instead, this study examines the principle of sovereign immunity from the perspective of civil procedural law.

In relation to JASTA, Berger and Sun (2016) analyzed the scope of JASTA in a comprehensive perspective and pointed out its consequences for the US government. In addition to the brief analysis, the article provides an important insight on the amendment of the US Foreign Sovereign Immunity Act (FSIA) as a result of the introduction of JASTA. The discourse ranges from the immunity clause provided to foreign nations wherein JASTA comes up with exceptions to the sovereign immunity clause. The exception for JASTA allows private plaintiffs to institute legal action against foreign states based on the allegations that the states committed or are involved in the international terrorist activities against the US national and its interests. This study further examines this issue and determines whether such a civil suit under JASTA is viable.

In her article, Alfaro (2016) examined the impact of JASTA on the principle of sovereign immunity and how much it has greatly negated such principles. JASTA undermines the relationship of the US and other countries—case in point, Saudi Arabia as the affected nation—and thus considers foreign sovereign immunity no longer existent. This study examines the further issues of sovereign immunity and determines whether such issues could be raised as an objection in relation to civil suits brought under JASTA.

In reaction to the negativity of JASTA on foreign sovereign immunity, Bellinger (2016) analyzed the right to sue Saudi Arabia and other countries under JASTA for acts of international terrorism. This would place the US and other countries in grave danger; for instance, the US can be liable under the jurisdiction of foreign nations, and some nations have even removed the US from their sovereign immunity clause. The intended consequences cause by JASTA would also be harder on the US compared to other foreign nations.

4. The Underlying Problem of JASTA from The Perspective of Civil Litigation

4.1. Underlying Problem in JASTA's Cause of Action

4.1.1. Injury on the Person, Property or Business

Initially, the ATA provided a civil cause of action explanation in its 18 U.S.C. § 2333(a), whereby *"Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees"*. The main point of the clause is that this particular cause of action may only be pursued (i) for a US national (or his/her estate) (ii) injured "*by reason of*" an "*act of international terrorism*" (iii) and to receive treble damages and attorney's fee. Generally, prosecutions brought under Section 2333(a) include a defendant bank that is suspected of giving substantial assistance to an organization that is purportedly linked with a terrorist group that caused particular injuries.

The courts have typically dealt with claims of material assistance under Section 2333(a) in ways that deviate from tort law rules of fault and causation (Jamshidi 2021), despite the fact that Section 2333(a) is technically an intentional tort. In order for the plaintiff to demonstrate the fault component of an intentional tort, they need to prove not only that the defendant meant to conduct the action under issue, but also that they intended to bring about the consequences of that act (Jamshidi 2021). The plaintiff has the responsibility to prove that the conduct of the defendant was both the factual and proximate cause of the plaintiff's injuries in order to comply with the causation requirement of an intentional tort. On the other hand, contrary to these standards, the majority of Section 2333(a) case laws have not required plaintiffs to prove that defendants knew or intended that their material support would further terrorist violence; rather, the plaintiffs only need to show that the defendants knew or recklessly disregarded the fact that its support would go to a terrorist group or activity (Jamshidi 2021).

As a result, a new clause was added to Section 1605B of JASTA, which states that *"[a] foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by (1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state or any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."* A plaintiff must prove that a defendant acted carelessly, maliciously, or knowingly in order for Section 1605B to apply. However, much as with other private terrorism laws, it is not necessary to demonstrate that the criminal meant to advance terrorist violence or a specific terrorist act.

Regardless of where the foreign state's tortious conduct occurred, JASTA establishes a cause of action against foreign states for damages sustained in the United States as a result of an act of international terrorism committed there and a "*tortious act or actions of the foreign state*." Simply defined, JASTA restricts the application of "*foreign sovereign immunity*" under the federal judicial code, prohibiting its use in US courts, and exposes foreign nations and their representatives to civil responsibility under the US Anti-Terrorism Act ("ATA"). Particularly, it authorizes federal courts to hear lawsuits filed against foreign states for injuries, deaths, or property damage that happened in the US on or after 11 September 2001.

4.1.2. Commit or Aids and Abets for International Terrorism

A person who "*conspires to commit or aids and abets by knowingly providing substantial assistance"* to an act of international terrorism planned, committed, or authorized by a designated terrorist organization is subject to civil liability under Section 4 of JASTA and Section 2333 (d)(2) of the federal criminal code. The amendment further stated that claims of aiding and abetting and conspiracy can be expressed *"as of the date on which such act of international terrorism was committed, planned, or authorized."*

The US Court of Appeals for the DC Circuit laid out the elements for aiding and abetting liability in *Halberstam v. Welch*[2], whereby the court stated that a defendant "*must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance*," and "*must knowingly and substantially assist the principal violation*." JASTA specifically and approvingly cites this decision when discussing the necessary intent. It takes both an agreement to take part in an unlawful act and an overt act causing injury to be found liable for civil conspiracy to further that common scheme (Debevoise and Plimpton 2017). Additionally, Halberstam identifies six elements that determine how much encouragement or assistance is substantial enough to satisfy "*the knowing and substantial assistance*", which include "(i) the nature of the act encouraged; (ii) the amount of assistance given by defendant; (iii) defendant's presence or absence at the time of the tort; (iv) defendant's relation to the principal, (v) defendant's state of mind; and (vi) the period of defendant's assistance." This imposes a certain weight placed on the plaintiffs to prove that a person, entity, or corporation provided any form of "substantial assistance" to a Foreign Terrorist Organization (FTO).

Several types of abetting and aiding liability involve (i) companies that made "*protection payments*" to protect their employees against attacks from regional guerrilla organizations; (ii) companies that offer mobile telephony services in regions where armed groups (i.e., the Taliban) operate; or (iii) social media companies alleged to have provided platforms to terrorists. It should be noted that in each of these cases, a plaintiff is likely to face significant legal hurdles, such as in identifying the relevant "*aiding and abetting*" actions, identifying the requisite knowledge that such actions were related to harmful activity and the causal link between the defendant's actions and the harm sustained by the plaintiff (Boucher et al. 2020).

[2] 227 U.S. App. D.C. 167, 705 F.2d 472 (1983).

4.1.3. Problems with the Causes of Action

Indicating Proximity in Regard to the Act of Terror with Plaintiffs' Injuries

The proximate cause will probably be one of the plaintiff's biggest obstacles to overcome, or alternatively, how the terrorist attack that injured the plaintiff was made possible by the unlawful finances. For instance, specialists in the financial sector would likely be required to testify in a case involving corporate defendants, such as banking institutions, since the testimony would be exceedingly complicated and difficult for juries to easily follow (Peeples 2019). Additionally, it is widely acknowledged that neither Congress nor case law has ever determined the level of proximity in specific circumstances for the purposes of a generally applicable norm. This gives plaintiffs the opportunity to use this act to try to hold firms accountable, but it also raises questions about what specific allegations they would need to make in order to succeed (Goodman 2018, p. 174).

Difficulty in Proving Causation as One of the Elements under the Cause of Action to Proceed with Litigation under JASTA

The standard required to establish causation, which is the final requirement that must be met, continues to be the most challenging for plaintiffs to meet in order to go on with their civil claims. The criteria for what is reasonable in this situation have not yet been established and have been interpreted differently by lower courts. Each circuit court has its own definition of "*causation*" in the context of material support litigation, as considered by legal professionals (Goodman 2018, p. 178). The Seventh Circuit, for instance, has a more lenient approach, considering whether the party contributed to misconduct as a whole. On the other hand, in order to satisfy the requirements of the Second Circuit, the material support must be a "*substantial factor*" in causing the damage that was sustained. It would seem that more courts are gravitating toward adopting this strategy (Goodman 2018, p. 174). When it comes to defining "causation" in civil terrorism litigation, here is where the impending differences in the standard of practice across judges may be found.

Besides that, it is also generally acknowledged that the material support need not have been so crucial that any assault or action would not have occurred without it in order to establish causality; this is known as the "but-for" standard of causation (Goodman 2018, p. 174). In *Gill v. Arab Bank PLC*,[3] the court recognizes that §2333 does not require "*but-for*" causation. According to ordinary tort law, proximate causation is all that is necessary, and as a result, the court determined that it is sufficient in this case.

Floodgate of Cases under ATA or JASTA and FSIA

It should be noted that the claims that may be made under both the ATA and the FSIA are not exclusive. Simply said, the plaintiffs have the option of filing both lawsuits simultaneously or even subsequently. Given that the statute of limitations for both laws is ten years, the plaintiffs may decide to proceed with their course of action by bringing an FSIA claim first (Peeples 2019, p. 84). For example, because Iran has been tied several times in federal courts to practically every act of terror against US Americans, suing against Iran seems to be the first step towards abusing such privilege given by the FSIA. Following that, the plaintiff might pursue a separate action for secondary liability under the ATA or JASTA, presumably utilizing the revenues of the successful FSIA judgment to support the ATA claim's legal expenses (Peeples 2019, p. 84).

Until this day, the most common strategy that terror victims use when suing for damages in a civil court under JASTA is to argue that the defendant recklessly or intentionally violated one or more of the broad categories of "material support" activities. This is the basis for the cause of action in the plaintiffs' lawsuits. As a result, the civil cause of action for material support under JASTA serves as the foundation for the growing number of lawsuits that have been brought against social media companies in recent years for their provision of material support to terrorist organizations.

[3] 893 F. Supp. 2d 474, 507 (E.D.N.Y. 2012).

4.2. JASTA'S Parties to the Suit

According to what is documented in the JASTA background history, the passage of this legislation constitutes a modification of the ATA in the sense that it makes provision for aiding and abetting liability in certain circumstances (secondary liability). If the cause of action arises under JASTA, the plaintiff, who can sue, is provided in JASTA as "*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 . . . "*. JASTA would provide private litigants with the authority to initiate legal proceedings against any other individuals implicated in aiding or abetting an act of international terrorism.

As was previously stated, the defendants are any other parties that aid or abet the act, whereas the plaintiffs are any United States citizens. They can be separated into direct actors (e.g., Hamas, al-Qaeda), donors and sponsors to direct actors (e.g., charities, certain governments) or service providers to direct actors, donors and/or sponsors (e.g., banks, airlines, news media). In brief, JASTA grants US courts the authority to hear civil claims against foreign states for injuries, deaths, and property damage that happened in the United States on or after September 11th, 2001, and were allegedly caused by: (1) an act of international terrorism in the United States, and (2) a tort committed anywhere by an official, agent, or employee of a foreign state acting within the scope of employment.

Furthermore, the definition of a "*person*" subject to liability encompasses "*corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals*." JASTA's expanded civil liability applies to "*international terrorism*" that was committed by a "*foreign terrorist organization*" (FTO) specifically designated as such by the Secretary of State. The definition of "international terrorism" can be seen in 18 U.S.C. § 2331 (Section 2331) that it carries the following activities: "*involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;"* and appear to be intended "*(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;* and *(iv) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;".*

Prior to the enactment of JASTA, the ATA primarily precluded lawsuits against a defendant unless the defendant was the both primary and proximate cause of the plaintiff's injuries. The claim under JASTA allowing aiding and abetting or conspiracy eliminates this restriction, which automatically allows for secondary liability. It must be one of the "*designated foreign terrorist organizations*" that the Secretary of States proclaimed, as was specifically stated before. As of 2021, there are around 65 Designated Foreign Terrorist Organizations (Bereau of Counterterrorism 2022). In addition, JASTA eliminated the whole tort requirement. In Section 3 of JASTA, the "*entire tort*" rule was changed by a rule that permits claims to be made in US courts against foreign nations for injuries to US individuals or property "*regardless of where the tortious act or acts of the foreign state occurred*."

4.3. Underlying Problem in JASTA's Remedy

In accordance with the Federal Judicial Code 18 U.S.C. §§ 2331-2338, the ATA establishes a civil remedy for victims of international terrorism and criminalizes harboring and providing material support for terrorists. The ATA's focus on cutting off "*material support*" for terrorism suggests that it aims not only to compensate victims for their injuries, but also to cut off vital sources of terrorist funding, which brings about U.S.C 2333 (a) that provides treble damages to successful plaintiffs. Generally, the Federal Judicial Code 18 U.S.C §2333 (a) has provided that *"Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fee."* It is therefore

apparent that the essence of this provision is that the damages or remedies offered for civil terrorism litigation shall be (i) threefold the damages sustained and (ii) may consist of the cost of suit and attorney's fees (legal fees) for the whole suit.

Damages or remedies that were sought in these instances frequently included recovery for economic losses, medical expenses, pain and suffering, and emotional distress for the victim's family members, as well as punitive or compensatory damages (Boucher et al. 2020). Additionally, a recent US Supreme Court decision affirmed a victim's right to obtain punitive damages in actions against certain states. On 18 May 2020, a decision issued in *Opati v. Republic of Sudan*,[4] whereby it involves an action stemming from al-Qaeda's bombings of the US Embassies in Kenya and Tanzania in 1998, the US Supreme Court permitted the award of punitive damages. Thus, the total judgment of approximately USD 10.2 billion in damages (including about USD 4.3 billion in punitive damages) was affirmed. Before normalizing relations, it was evident that the Congress had demanded that punitive damage judgments be paid or resolved. However, many legal professionals and private or corporate organizations consider that paying damages in the billions of dollars is impractical. For instance, the pending substantial claims against Cuba are seen as a significant barrier to the complete restoration of bilateral relations.

5. Deficiencies of JASTA

Sovereign immunity is an international concept under customary international law where all states are equal in the international legal order (*par in parem non habet imperium*—no state can be subject to the jurisdiction of another state). It is well established that the immunity persists until the state waives its immunity through (1) by submission to the jurisdiction after the dispute has arisen; (2) by prior written agreement; (3) by institution of proceedings; and (4) by intervening or taking a step in the proceedings (other than to assert immunity) (Crawford 2012). Previously, before the enactment of JASTA, an exclusive framework on the jurisdiction of a foreign state was adopted in the Foreign Sovereign Immunities Act (FSIA) where generally, a foreign state is entitled to immunity from adjudication and immunity from attachment and execution of its property except in certain situations (Holcombe 2017, p. 365). One of the exceptions to stripping this immunity is known as "*Terrorism Exception*", which applies to foreign states designated as state sponsors of terrorism only limited to Iran, Cuba, Syria, and the Democratic People's Republic of Korea (North Korea). Although the enactment of JASTA has not changed this fact, it was expanded by adding Section 1605B of Title 28, which allows the claim for damages against foreign states in any case in which money damages are sought against a foreign state for personal injury or death occurring in the US caused by tortious acts or the omission of that foreign state.[5] As such, victims of terrorism may claim against foreign states regardless of whether they were designated as a state sponsor or not during the terrorism act. However, this comes with a caveat, which is explained in the latter part. Further, in interpreting this section, the court in *Gonzalez v. Google, Inc.*[6] viewed that JASTA is Congress's clear intent to provide an exception to the FSIA's presumptive immunity for foreign states in order "*to hold foreign sponsors of terrorism that target the United States accountable in Federal courts*."

JASTA's bill received multiple negative connotations from the international plane and this is where the deficiency begins. The perspective of removing immunity for foreign sovereign actors would prejudice the state of affairs, especially in diplomatic relations between the US and foreign states (Franchini 2017). Considering the previous matter, it allows for legal action to be taken against nations who have neither been flagged by the executive branch as state sponsors of terrorism nor engaged directly in acts of terrorism against the United States. Additionally, this strip of immunity is based upon the allegation

[4] 140 S. Ct. 1601 (2020).
[5] 28 U.S.C. § 1605B.
[6] Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150 – 2017.

of litigants that a foreign government bears the responsibility for terrorist attacks and resulted in overriding customary international law with US law in US court (Fahmy 2017). In response, several states have voiced their concern, for example, Saudi Arabia, where the government warned that it may have to sell off USD 750 billion in American assets if the bill was passed (Clrlig and Pawlak 2016, p. 8). Further, Russia voiced their opinion on this matter through a written statement that "*The United States, where many politicians have come to believe in their own "uniqueness", insistently continues along the line of extending its jurisdiction to the entire world, disregarding the notions of state sovereignty and common sense*" (Clrlig and Pawlak 2016, p. 9). Similarly, the Netherlands considered JASTA as "*a gross and unwanted breach of Dutch sovereignty and the entry . . . was 'unacceptable' for the Netherlands*". Similarly, the Gulf Cooperation Council members viewed JASTA as "*contradict[ing] the foundations and principles of relation between states . . . the sovereign immunity principle*" and this view was supported by the government of Morocco (Clrlig and Pawlak 2016, p. 9). Having faced multiple criticisms, the scope for claiming against a state was narrowed by limiting the ability to bring a claim because of a provision allowing the United States government to stay any case brought under JASTA in perpetuity, another deficiency in trial (Watkins 2018, p. 158).

Although JASTA allowed victims of terrorist acts to claim for damages for their injuries against sponsors of terrorism, it is a fact that they came into existence a bit late. For example, many of victims from the 9/11 incident who suffered injury to their person, property, or business made their claim under ATA for aiding/abetting against sponsors of terrorism, but this was dismissed (Holcombe 2017, p. 370). Litigants have no new ways of reopening claims that were dismissed for failing to establish adequate contacts between foreign defendants and the plaintiff as a result of the ATA's continued silence on the subject of personal jurisdiction. This defeats the purpose of JASTA, which was to correct "poor decisions" and provide compensation for "improper" court rulings that dismissed 9/11 litigation due to lack of subject matter jurisdiction (Holcombe 2017, p. 370).

When JASTA was initially proposed, their aim was to repeal the prohibition on claims against a foreign state, agency, or official acting on behalf of state authority. However, after receiving multiple criticisms, Congress passed the current JASTA, which is described as "*lacking any teeth that allow it to accomplish its stated purpose*" (Watkins 2018, p. 158). Even though JASTA allows victims of terrorist acts to make a claim against a sovereign state, technically, it poses difficulty in doing so as the claimant has to prove under ATA's primary liability that the state is liable (Holcombe 2017, p. 371). It is difficult for a claimant to claim under JASTA's secondary liability principle as aiding-and-abetting liability as well as conspiracy liability must be from an act of terrorism "*committed, planned, or authorized*" by a state designated as a Foreign Terrorist Organization (FTO) (Holcombe 2017, p. 372).

The exception for this rule is in the exception provided in FSIA, where the state is designated as State Sponsors of Terrorism, which are limited to Iran, Cuba, Syria, and the Democratic People's Republic of Korea (North Korea). As such, in most cases, deficiency arises even with the enactment of JASTA due to a limitation of the secondary liability principle where a foreign sovereign is difficult to be liable in US courts. The only worthwhile expansion from JASTA is towards the stripping of sovereign immunity in contexts where the claim is against a foreign state for physical injury or death outside of US soil by a private litigant, which, in practice for claims pursued under JASTA against foreign sovereigns will require a showing of primary liability—"*a high bar for holding foreign sovereigns liable*" (Holcombe 2017, p. 372).

JASTA allows the court to designate a state as a state sponsor of terrorism. However, this is in conflict with the power conferred to executive bodies (Holcombe 2017, p. 380). Further, JASTA recognizes private litigants whose interest might not match the US foreign policy affairs, which has resulted in the Executive not being able to interfere the court process once a case is initiated in court, leaving the determinations in the hands of the presiding judge (Holcombe 2017, p. 381). Officially, through Section 2656f of Title 22, the United States Department of State (DOS) has to produce a report regarding countries that

have provided support for acts of international terrorism.[7] From this, the Secretary of State will determine whether any state has supported the act of international terrorism under requirement of (1) Section 1754(c) of the National Defense Authorization Act for Fiscal Year 2019, (2) Section 40 of the Arms Export Control Act, and (3) Section 620A of the Foreign Assistance Act of 1961 (U.S. Department of State 2022). Deficiency arises when JASTA allow the court to designate a state as a state sponsor of terrorism. The judiciary decides whether a country is responsible for "*international terrorism against the United States*" under JASTA, despite the fact that it cannot formally label a state as a State Sponsor of Terrorism (Johnson 2018, p. 14). Further, if the Court and the Executive give two conflicting statuses to a single state, foreign policy would be difficult for the Executive to execute as the designated state under JASTA would view this designation as an official label placed (Johnson 2018, p. 14).

Regarding the claim under the Secondary Liability Principle of JASTA, ordinary corporate, banking, and sovereign enterprises may be liable if they can be proven to substantially assist or conspire with international terrorism committed by FTO. However, in doing so, minus the legal burden of dismissing the aiding/abetting claim or conspiracy claim, being a defendant in an ATA case will leave a significant mark on their reputation as a whole, including anyone who conducted business with them, and more so when these cases often receive a lot of media attention (Boucher et al. 2020). Withstanding the previous matter, the enactment of JASTA is seen as "*pro-plaintiff legislation*" and may adversely affect ordinary corporate, banking, or sovereign enterprises who conducted their business in a foreign region (Boucher et al. 2020). Allegations made under the ATA may result in counterparties ceasing to engage with the alleged accused as well as the withdrawal of existing clients (Boucher et al. 2020).

For a legislation enacted in the US, but affecting other foreign organizations, corporations, bodies, and sovereign states, the definition of terrorism adopted in JASTA is exclusively "US centric" and does not reflect the international framework. To have a more universal definition of terrorism, adaptation to an International Instrument is one of the most important considerations. Deficiency arises when there is no existing agreeable definition of terrorism and each national has a different definition of terrorism as a legal offence, and they are in constant flux. For instance, there are possibilities that suggest a particular group to be on the US list of terrorist organizations, but not on the list adopted by other particular states. Normally, this would mean that a particular member state would be able to communicate, interact, or conduct business with that particular group, but would pose a problem in the US (Clrlig and Pawlak 2016, p. 10). In such situations, there could be a future legal retaliation against a foreign sovereignty's banks or businesses in the US for allegedly funding international terrorism as a cause of action under JASTA.

5.1. Deficiencies in Trial

5.1.1. Intrusive Discovery Process

The rules of civil procedure in federal courts allow for relatively broad pre-trial discovery (the process by which litigants gather information to prepare for trial, such as facts, documents, objects, and depositions). In general, the discovery process in US courts is unique in its breadth and flexibility for individual litigants (again, subject to limitations). As a result, foreign state defendants in US civil litigation are likely to face more strenuous (and intrusive) discovery than Americans in a foreign court. Foreign plaintiffs bringing civil actions in foreign courts against the United States or US persons are unlikely to have comparable discovery tools and leverage that the US discovery process provides litigants (Masspoint PLLC 2016, p. 4).

According to the former United States Secretary of Defense, Ashton B. Carter, he had voiced concerns about the "intrusive discovery process" that would ensue if foreign actors simply claimed that the US provided support for terrorist activities (Letter from Ash Carter 2016). Along with this worry, Secretary Carter discussed the possibility that

[7] 22 U.S.C. § 2656f.

plaintiffs would seek private government data during the discovery procedure (Letter from Ash Carter 2016). In this sense, it is logical and possible that litigants will seek sensitive government material in order to build their case in US courts against a foreign state under JASTA or against the US in a foreign court, whereby the data involved might contain critical operational information as well as secret intelligence data and analysis.

Another main factor that stirs worry amongst the US officials is how the sensitive and secret intelligence data, as mentioned above, are not protected by any frameworks and legislations in the US, which increases the possibility of sensitive data being released to public litigants under JASTA. Although there may be limited circumstances in which classified information in civil lawsuits brought by private parties against the US allies and partners could be withheld in the United States, no legislation specifically protects classified information in civil actions under JASTA. Additionally, if the United States were to be sued in a foreign court, foreign plaintiffs would consider asking for such a record, and the foreign court would eventually decide whether it was classified or sensitive to the US Government, which may not be accessible for litigants. In this juncture, the United States could face the tough decision of either exposing sensitive or otherwise classified material or risking unfavorable judgments and perhaps significant financial penalties for doing nothing (Letter from Ash Carter 2016).

Moreover, the discovery process may not only pose significant challenges to the US government, but also towards future litigants in locating and conducting discovery to obtain evidence and assets abroad, especially in Western jurisdictions where rules frequently demand that litigants from abroad adhere to particular procedures and fulfil certain requirements, such as proving that the proceedings in their home jurisdiction comply with foreign or international standards. Foreign plaintiffs can (and have been) prevented from succeeding when the processes in a local jurisdiction do not satisfy (or are not demonstrated to meet) such foreign standards (Masspoint PLLC 2016, p. 5). Such a failure to comply with procedures will not be taken for granted, as proven in the case of *United States v. Nova Scotia Bank*[8] where a USD 1.8 million fine (imposed at the rate of USD 25,000 per day) was upheld for discovery non-compliance.

5.1.2. Deposition of Witness

Among the deficiencies of JASTA in the discovery process is the deposition of witnesses. Generally, deposition is a witness's sworn out-of-court testimony used to gather information as part of the discovery process to be used in trial (Legal Information Legal Information Institute (2022). The deposition would play a vital role in the preparation of the trial, especially with regard to JASTA, a suit against foreign enterprise. There are two forms of deposition under the Federal Rules of Civil Procedure, namely, (1) oral deposition; and (2) depositions by written question.[9] Quoting Justice Murphy in *Hickman v. Taylor*[10], "*This instrument of discovery is to narrow and clarify the basic issues between parties as well as to ascertain the facts, or information as to the existence or whereabouts of facts relative to the issue*" (Yeazell and Schwartz 2015, p. 339).

However, deficiency arises when Rule 45 of the Federal Rules of Civil Procedure (FRCP) provides that foreign nationals residing outside the United States cannot be subpoenaed to testify. This was upheld by *United States v. Korolkov*,[11] where the court was *"... unable to compel the attendance of any of these witnesses at trial at New York. As they are not citizens of the United States and do not reside here, they are not amenable to United States subpoenas."* (See note 11 above). This rule has its own exception in Rule 30 of FRCP, where "*only a party to litigation may be compelled to give testimony pursuant to notice of deposition*" and "*if they are*

[8] 740 F.2d 817 (11th Cir. 1984).
[9] Rule 30 and Rule 31 of Federal Rules of Civil Procedure.
[10] Hickman v. Taylor, 329 U.S. 495 (1947).
[11] United States v. Korolkov. 1994. U.S. Dist. LEXIS 17445.

considered to be the equivalent of employees of a party corporation".[12] As such, the party who seeks to depose has to prove the status of the deponent.

JASTA's claim mainly consists of foreign nationals who could not be subpoenaed under the law of the United States aside from the parties to the suit or the exception of managing agent rule. Aside from these categories, it would be difficult to conduct depositions for foreign nationals without obtaining leave from court, for example, In re Terrorist Attacks on 11 September 2001 (2020), the Arab Saudi government dispute on the deposition of 32 people as they are not current employees of Saudi Arabia. The court held that, "*I find that none of the 32 witnesses qualifies on the present record as a managing agent, the Court will not direct the Kingdom, on pain of sanction, to produce individuals for deposition who have refused to do so voluntarily*."[13]

In certain situations, immunity against deposition is granted under international instruments. For instance, immunity under the Vienna Convention on Consular and Diplomatic Relations 1961 (VCDR) and the Vienna Convention on Consular Relations of 1963 (VCCR) provide immunity in relations among states. The VCDR was ratified by the US in 1969 while the VCCR was ratified in 1972. Both of these international instruments were the codification of principles of customary international law with respect to diplomatic relations. Here, diplomatic immunity is given to ensure the efficient performance of the functions of diplomacy. As a result, Article 39(2) of VCDR and Article 53(4) of VCCR privilege and immunities applied to testimony and documents regarding all "*acts performed ... in the exercise of officials' functions*".[14] Further, this immunity persists even after their service ends (See note 14 above). The immunities provided under Article 44(3) of VCCR includes "*no obligation to give evidence concerning matters connected with the exercise of their functions*".[15]

In claiming under JASTA, if a deposition of a diplomat is required, whether in service or after their service ends, they are protected under these international instruments. For example, in the case of In re Terrorist Attacks on 11 September 2001 (2020), the plaintiffs requested leave for deposition of the Arab Saudi government's current and former diplomatic officials that are protected under VCDR and VCCR while contending that the residual immunity does not apply after a diplomat's function ends. Further, the plaintiffs argued that VCDR's and VCCR's immunity protects diplomatic officials when they are the subject of civil or criminal suit and not regarding the obligation to give testimony as a witness. However, in this case, the court held that in cases where the diplomatic official fails to appear in response to a subpoena of plaintiffs, they are excusable under the VCDR convention. In addition, "*Witnesses therefore need not appear for their deposition if their testimony would only cover material that the Court has found to be protected by the Vienna Conventions*." As such, "There is no immunity for "*actions that pertain to [the official's] household or personal life and that may provide, at best, an 'indirect' rather than a 'direct ... benefit to' diplomatic functions*." Out 11 included in the plaintiff's witness list, only three were found to fit these criteria (See note 13 above). This shows the deficiency of JASTA in the deposition of witnesses as claims under JASTA would more often than not involve foreign functions and enterprises.

5.1.3. Limited Applicability of JASTA

JASTA has removed the entire tort requirement for acts of international terrorism to have taken place in the United States, which resulted in a broad possibility of seeking relief against persons, entities, or countries that supported terrorist activities. However, they are still confined within the limited act of terrorism involving harm or violent terrorist acts (Silow 2022, p. 672). The concept of terrorism that is applied in JASTA as mentioned

[12] Rule 30 and Rule 30(b) of Federal Rules of Civil Procedure.

[13] In re Terrorist Attacks on 11 September 2001, 2020 U.S. Dist. LEXIS 166886, 2020 WL 8611024 (S.D.N.Y. 27 August 2020).

[14] Article 39 of Vienna Conventions on Consular and Diplomatic Relations 1961 (VCDR) and Article 53(4) of Vienna Convention on Consular Relations of 1963 (VCCR).

[15] Article 44(3) of Vienna Convention on Consular Relations of 1963 (VCCR).

beforehand is thus limited to harm–violent acts. It sets a limited applicability of JASTA in other types of terrorism including cyberterrorism. Cyberterrorism is a premeditated attack or threat with the intent to use cyberspace to cause real-world consequences to induce fear or coerce civilian, government, or specific targets in the pursuit of social or ideological objectives, whereby real-world consequences in this context include physical, psychosocial, political, ecological, or other impacts that occur outside of cyberspace (Plotnek and Slay 2020, p. 3). The deficiency in the scope of harm–violent acts under JASTA is less likely applicable in the context of cyberterrorism as attacks that constitute damage to humans rarely occur or make up few, if any, of the current wave of cyberattacks (Silow 2022, p. 672).

Although some authors have argued that the extension provided to FSIA through JASTA would be applicable in cases involving cyberterrorism, the quoted example is too far-fetched. For example, John J. Martin argues that "*If a plaintiff, for instance, became injured by a tornado strike in Texas because a cyberattack shut off the plaintiff's local emergency sirens, this would be an obvious case of physical injury that occurred in the United States*"(Martin 2021, p. 147). Although, in theory, that might have been the case, in reality, such an attack has never occurred within the realm of cyberterrorism, nor did the author provide evidence that this example is a widespread phenomenon or has ever occurred before.

A more accurate example would be from Adam L. Silow, who mentioned an example about "*hacking a private company's designs for semiconductors which may lead to a significant economic damage without endangering any human lives*". This is one of the most common cyberattacks nowadays, where the aim of the attacker is to inflict significant economic damage on their particular target. However, this example would not fit the "*acts dangerous to human life*" element required (Silow 2022, p. 673). Further, in most case laws, the US courts, in interpreting JASTA, would take into account the intended purpose of the Congress in passing JASTA. Here, JASTA was originally intended to allow 9/11 victims' families to sue Saudi Arabia. Hence, JASTA was designed to be the state sponsors' exception to mitigate harm for the physical act of terrorism and was not passed to cover the less obvious, but substantial, harms caused by cyberattacks (Silow 2022, p. 673). As such, judges would be very careful in considering cyberterrorism under JASTA as it was not something that Congress expected (Silow 2022, p. 673).

5.1.4. Media Influence on Impartiality of Jurors in Terrorism Cases

Essentially, the perceptions of the 11 September 2001 event may affect how jurors view and evaluate the evidence presented at trial, which has serious implications for the right to a fair and impartial jury trial. Not everyone accused of acts of terrorism or of indirectly supporting terrorists is necessarily guilty. The main concern is whether the standard procedural safeguards of the jury system will be adequate to ensure a fair trial or whether additional measures may be required to safeguard impartiality. It must be noted that the trial procedures—and their underlying presumptions—differ from country to country, especially the influence of the media on trial cases in the US (Vidmar 2006, pp. 2–3).

Generally, according to Section 1865 of the US Code[16] the qualifications in appointing juries in the US mainly comprise: *"anyone who is a U.S. citizen, at least eighteen years of age, proficient in English, not subject to any felony charges or convictions (unless the individual's civil rights have been restored legally), and not subject to any mental or physical condition that would disqualify the individual."* Anyone meeting these criteria may serve as a juror in federal court. In addition, three groups are exempt from federal jury service, in accordance with Section 1861–1878 of the Code (See note 16 above): (i) members of the armed forces on active duty, (ii) members of professional fire and police departments, and (iii) "public officers" of federal, state, or local governments, who are actively engaged full time in the performance of public duty.

[16] 28 U.S.C. § 1865 (2007).

However, at present, before being seated on the jury, American jurors are asked about their biases and are subject to challenges for cause or peremptory challenges during the procedure known as *voir dire* questionnaires. In some high-profile trials, particularly in state courts, the process of jury selection can last days or weeks, with lawyers for opposing sides questioning each other for days or weeks before a jury is seated (Vidmar 2006, pp. 2–3). Hence, it is apparent that the weight of such bias is determined through the issuing of juror questionnaires and through questioning at *voir dire,* which forms a crucial procedure during jury selection (Donohue 2006, p. 1352). Despite the lengthy process of administering questionnaires to jurors, it is undeniable that the mass media has an almost limitless ability to cover all phases of a trial, including pre-trial hearings and the trial itself, which eventually causes impartiality issues among jurors. In fact, some state court proceedings can be televised live. This media access is related to the First Amendment to the United States Constitution, which guarantees press freedom, and the interpretation of that amendment by the United States Supreme Court (Vidmar 2006, p. 4).

As previously stated, since September 11, 2001, trials involving individuals accused of al-Qaeda-linked terrorism differ in complexity and magnitude. All possible forms of prejudice may be involved. There may be extensive media coverage of related events well before charges are laid. A number of factors may be present, including declarations made by authorities such as politicians and the police, unofficial rumors, negative racial and ethnic stereotypes of the accused, worries about one's own safety and the safety of loved ones, and widely prevalent feelings of cultural victimization. However, one must note that the focus on mass media-based publicity must be highlighted, as it could be the crux factor that largely influences jury outcomes.

The influence of media coverage on the outcome of the jurors' decision was also visible in the case of *United States v. Sami Al-Arian and Hatem Fariz*[17] where the defendant, Professor Al-Arian, had been an outspoken and harsh critic of United States policies toward Israel and the Palestinians. In 2003, Al-Arian and others were charged with supporting the Palestinian Islamic Jihad movement. Soon after, Al-Arian was fired from his tenured university position for improperly using his university position to support Palestinian causes. Next, in 2005, Professor Al-Arian and three other men were scheduled for trial on multiple charges, including conspiracy to commit murder abroad, money laundering, and obstruction of justice, along with other charges that the men had helped to organize and finance the Palestinian Islamic Jihad, a designated terrorist group that was responsible for more than 100 deaths in Israel and the occupied territories. Around that time, wide news coverage had started to spread when the Attorney General of the United States declared in front of national television cameras that the charges were an important strike against terrorism. Numerous articles about the circumstances leading up to the trial were published in local and national newspapers, and in this coverage, Al-Arian was described as a "suspected terrorist." The local television coverage of the arrest and charges was intense, including detailed television coverage of Al-Arian being led off in handcuffs after his arrest.

Due to the widespread coverage on this case, a *voir dire* questionnaire was given to the jurors of the case to express any attitudes or beliefs that they had about Palestinians and other Arabs and Muslims. Unsurprisingly, 50 percent of the jurors expressed a view that Arabs, Palestinians, or Muslims were more violent than other ethnic groups or were responsible in some way for the September 11 attacks on the United States (See note 17 above). As a result, there is no clear indication on the applicability of the *voir dire* questionnaire used in JASTA trials; however, given that this questionnaire is also applicable during jury selection in JASTA trials, it would indicate that there is no guarantee that full impartiality can be achieved when media coverage in the United States involving terrorist cases is widespread, as seen in the Sami Al-Arian case.

[17] United States v. Al-Arian and Hatem Fariz (2005). Case No. 8:03-CR-77-t-30TBM.

5.1.5. Underlying Problem in JASTA's Execution of Judgment

Multiple sections of the Foreign Sovereign Immunities Act (FSIA) must be complied with before a judgment may be carried out in accordance with JASTA. In the case of ordinary claims, it may be difficult to carry out the judgment. Foreign assets in the United States are protected by jurisdictional protection and attachment immunity. The former prohibits foreign governments from being sued, and the latter prohibits any foreign state assets from being confiscated to settle a judgment without the justification of an exemption under the FSIA. Concerning the prior point, JASTA does not permit for execution against a foreign state's US assets on its own. To collect on any judgment emerging from a JASTA-based litigation against a foreign state, one of the pre-existing FSIA attachment immunity exclusions should still apply (Kirtland and Lom 2016). In fact, where immunity was invoked and damages (compensatory and/or punitive) were awarded to the plaintiffs, it has been difficult to enforce and execute those judgments, either because those foreign states do not recognize damage judgments issued by US courts, or because those foreign states have insufficient assets in the USA (European Union 2016).

In addition, it is conceivable for any foreign state to simply withdraw their assets from the United States in order to prevent the implementation of a judgment, while the temporary attachment or freezing of the assets raises important issues related to the due process of the law (European Union 2016). Because the FSIA was not amended by JASTA, it continues to grant immunity and shield foreign nations from the execution of judgment. This indicates a difficulty with collecting the judgment amount, which reflects a problem with collecting the judgment sum. Under the FSIA, there are other ways that a judgment may be executed against the assets of a foreign state; however, these methods are limited in scope and are probably not applicable. Moreover, Section 5 of JASTA allows for Stay of Actions where there are pending negotiations. The courts may issue a 180-day stay if the Secretary of State certifies that the US is engaged in good faith negotiations to settle claims against a foreign state, and if the Department of Justice (DOJ) decides to intervene and submit the certification. The court is required to issue 180-day extension(s) upon re-certification by the State Department (again, on petition of the DOJ), which leaves open the possibility of very long-term stays.

6. Conclusions

In conclusion, JASTA was enacted as a response to the 11 September 2001 attacks in the US, and at times may take precedence over pre-existing legal procedures in the country in addressing terrorism, which resulted in amendments being made to ATA and FSIA. Concerns arise when political powers back JASTA, even though reports have been made debunking the correlation between the September 11th attacks and the KSA, the main target of the act and claimed sponsor of the event. Statutory provisions granted by JASTA by civil litigation are questionable and weak, as many of its provisions are in conflict with pre-existing statutes and call for amendments to such provisions, with some cases having been remanded due to remedial awards upheld by pre-existing statutes. Sovereign immunity also plays a large role in hindering JASTA, as it brings into question the legal jurisdiction that the US may have against foreign states, and if such jurisdiction can be reciprocated, hence causing hesitation within US political interests. The implementation of JASTA also contradicts many basic principles of general law in terms of ensuring impartiality and equality in preserving the rights of both the plaintiff and defendant, and contradicts basic criminal law and liability practices in serving judgment to a confirmed perpetrator with no backing of a government.

A number of cases have also shown that JASTA is not viable due to contradicting clauses and amendments that limit US court jurisdiction, allowing for disputable judicial impartiality and difficulty in recovering the sought remedies. The enforceability of JASTA is difficult due to the overlapping amendments JASTA has caused with pre-existing statutes, increasing the complexities and requirements needed to fully execute the act, besides contradictions and violations against jus cogens, international laws, and practices. This is

made clear as no plaintiffs have yet to receive any such compensation from these acts, even though the legal claim is available, due to the inability of the US to force such payments to be made and the defending country having insufficient funds available for such compensation. In summary, JASTA could be perceived as more of a political stunt than legitimate legal action, as its ruling went against pre-established jurisdictions, required amendments to such pre-existing rulings, and ultimately had no realistic methods to enforce accountability when seeking the awarded compensation.

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