Atlantic Council

Closing the Accountability Gap on Human Rights Violators in the Islamic Republic of Iran through Global Civil Litigation Strategies

Gissou Nia

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Cover: Scales of Justice – Frankfurt. *Source:* Creative Commons/Paul Frankenstein (https://search.creativecommons.org/photos/a670ec9d-0a47-404f-ae64-4207a49e0c13).

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Executive Summary and Recommendations

In 2021, the international community is set to re-engage with the Islamic Republic of Iran (IRI) over the IRI's nuclear program and other regional and global issues. In 2014-2015, one major criticism of the Joint Comprehensive Plan of Action was that the nuclear negotiations leading up to the deal overshadowed concerns over the IRI's dismal human rights record—which includes the imprisonment of prisoners of conscience, the execution of individuals for the exercise of their political and civil freedoms, and the persecution of marginalized and minority groups. With no sign of net improvement in human rights in Iran, it is a global imperative to reimagine the ways in which perpetrators of gross human rights violations in Iran can be held accountable.

Investing in strategic civil litigation could prove to be a useful tool toward this goal. Civil litigation authorities that provide remedies in tort for acts of torture, terrorism, crimes against humanity, war crimes, extrajudicial killings, and other human rights violations and atrocity crimes can be used to bring IRI violators to account. It is a targeted, surgical option that directly ties the human rights violations of governments and governmental actors to the money damages they need to pay survivors and victims for those harms. Legal measures are, by their nature, targeted at those in power who abuse their authority. Tools focused on improving human rights accountability take direct aim at those who seek to brutalize their populations. Civil litigation avoids the sweeping, mass punishment of kinetic warfare or broad-based economic sanctions. It also calls for the strengthening of a rules-based system and discourages more extreme measures, like targeted killings. A true peace and security agenda must acknowledge the violence of the daily brutality of dictatorships. Therefore, legal options, which help the globe enforce a rules-based system, should be better understood and improved.

To scope out the potential for these tools, the Atlantic Council's strategic litigation project spoke to policy makers, practitioners, academics, and survivor and victim communities in the United States, Canada, and Europe to catalogue existing civil litigation tools and explore the creation of new laws and mechanisms to help combat impunity for the IRI's human rights violations and atrocity crimes. The following recommendations culminated from that effort.

Recommendations to improve US civil authorities and mechanisms:

- Congress should amend the Foreign Sovereign Immunities Act terrorism exception §1605A—which allows for suits for torture and/or extrajudicial killing—to provide a private right of action to those who became naturalized citizens after the events alleged in the suit occurred, or who are in the process of naturalizing at the time the suit is filed (see §1605A(c)).

- Congress should amend the acts enumerated in the Foreign Sovereign Immunities Act terrorism exception (§1605A(a)(1)) to include crimes against humanity or other atrocity crimes.

- Congress should amend the Foreign Sovereign Immunities Act terrorism exception §1605A to create a private right of action against states with officials sanctioned by the US government for human rights violations.

- US courts hearing Foreign Sovereign Immunities Act terrorism exception cases should apply a "multiplier" to the amount of compensatory damages awarded to victims who are journalists and members of civil society so as to deter the IRI's future targeting of perceived dissidents.

- Congress should render the Alien Tort Statute expressly extraterritorial. In the alternative, Congress should pass legislation that expressly holds that the presumption against extraterritoriality decided in *Kiobel v. Royal Dutch Petroleum Co.* does not apply in cases where the underlying claims involve a country that the US government has sanctioned for human rights abuses.

- Congress should amend the Torture Victim Protection Act so that it expressly provides for liability against corporations, applies to non-state actors, and includes additional causes of action including crimes against humanity.

- Congress should create a form of hybrid relief in the Anti-Terrorism Act that would allow for either monetary damages or equitable/injunctive relief so as to open the door to cases filed by plaintiffs who cannot afford a costly legal battle, and get companies and other actors to stop supporting malign behavior.

- The State Department and/or Treasury should create a policy office dedicated to the issues surrounding terrorism-related judgments, including judgment awards for torture and extrajudicial killing.

The head of the judiciary of the Islamic Republic, Ebrahim Raisi, known for his role in the summary executions of thousands of political prisoners in Iran in 1988. *Source:* Foad Ashtari/Tasnim News Agency (https://www.tasnimnews.com/en/news/2017/05/14/1406968/raisi-visits-oroumiyeh-oncampaign-trail/photo/5).

Recommendations to improve Canadian civil authorities and mechanisms:

- Parliament should pass a torture exception to Canada's State Immunity Act.
- Corporate liability in Canadian courts for human rights abuses committed extraterritorially should be expanded by Parliament to include extraterritorial acts of non-Canadian corporations.

Recommendations to improve European civil authorities and mechanisms:

- The member states of the Council of Europe should pass a serious international crimes exception to state immunity laws to allow victims and survivors of human rights violations to sue states for the crime of genocide, crimes against humanity, war crimes, torture, extrajudicial executions, or enforced disappearances.

I. Introduction

Since the establishment of the Islamic Republic of Iran (IRI) in 1979, it has perpetrated human rights violations against Iran's population with impunity.[1] Discrimination against women, religious minorities, ethnic minorities, LGBTQ (lesbian, gay, bisexual, transgender, and queer individuals), and other marginalized groups is enshrined in IRI laws.[2] The persecution of activists, journalists, human rights lawyers, and other members of civil society is a routine occurrence.[3] Violence against dissidents in the form of securitized crackdowns on peaceful protests and extrajudicial assassinations in Iran and abroad is not uncommon.[4] All the while, the IRI judiciary—which lacks independence and impartiality—is unwilling or unable to charge state officials and other perpetrators for these violations and abuses, leading to an acute lack of justice and redress for victims and survivors.[5]

While in some country contexts, impunity at a global level can be attributed to a lack of awareness about abuses—think Eritrea or Mauritania—the same cannot be said for Iran. The attention on how Iran is situated geopolitically has had a "knock-on" effect of greater awareness about its dire human rights situation. And yet, that increased awareness has not translated into concrete strides for legal justice for human rights violations and abuses, at a national, regional, or global level.

Part of the reason for the lack of justice are the competing narratives at a global level over which countries bear responsibility for the current human rights challenges impacting Iran's population. At primary issue are the US government's unilateral sanctions on Iran, which have had dire consequences on the right to health of the Iranian people, with the negative impact amplified in the context of a pandemic.[6] Europe's disapproval of the Donald Trump administration's unilateral pullout from the Joint Comprehensive Plan of Action (JCPOA) and "maximum pressure" campaign against Iran has caused an impasse between the US government and its European allies as to how best to address the IRI.[7] The resulting political intransigence has unfortunately afforded the IRI continued impunity for its actions against Iran's own people.[8]

There is a chance to reset this global dynamic with the ascension of Joseph Biden to the US presidency, but there is also the risk that in the quest to reengage Iran on the nuclear file, human rights might be relegated to a lesser priority.[9] One way to allay this concern is for the

1 When referring to Iran's government or the state in this report, the term "Islamic Republic of Iran", "Islamic Republic" or "IRI" is used. When referring to the country or the people, as distinct to the ruling regime, the term "Iran" will be used.

2 *World Report 2020: Iran Events of 2019*, Human Rights Watch, 2020, https://www.hrw.org/world-report/2020/country-chapters/iran#.

3 For a running list of prisoners of conscience in Iran, see "Iran Prison Atlas," United for Iran, https://ipa.united4iran.org/en/.

4 For a list of individuals whose lives have been taken by state violence, see "Omid Memorial," Abdorrahman Boroumand Center, https://www.iranrights.org/memorial.

5 "The Iranian Judiciary: A Complex and Dysfunctional System," Iran Human Rights Documentation Center, October 12, 2016, https://iranhrdc.org/the-iranian-judiciary-a-complex-and-dysfunctional-system/.

6 "Bachelet Calls for Easing of Sanctions to Enable Medical Systems to Fight COVID-19 and Limit Global Contagion," Office of the United Nations High Commissioner for Human Rights, Press Release, March 24, 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25744&LangID=E.

7 Ellie Geranmayeh, "Crisis in Iran Will Drive Wedge between Europe and Washington," Politico Europe, January 3, 2020, https://www.politico.eu/article/crisis-in-iran-will-drive-wedge-between-europe-and-washington/.

8 For example, following the November 2019 protests in Iran, in which hundreds of people were killed by IRI state security forces, a group of twenty-four human rights organizations called on the United Nations Human Rights Council (UNHRC) to convene a Special Session to address this human rights emergency. The letter cited concerns about the hundreds of peaceful protesters who had been arrested and were facing imminent torture and even execution. The call was met with inaction by member states on the UNHRC, also in the wake of the Donald Trump administration's withdrawal from the UNHRC the year before in June 2018. See "Joint Call for the UN Human Rights Council to Take Urgent Action on the Situation of Human Rights in the Islamic Republic of Iran in Relation to the Repression of Popular Protests," Iran Human Rights Documentation Center, December 16, 2019, https://iranhrdc.org/joint-call-for-the-un-human-rights-council-to-take-urgent-action-on-the-situation-of-human-rights-in-the-islamic-republic-of-iran-in-relation-to-the-repression-of-popular-protests/. This is also reflected in Europe's relative passivity on Iran's human rights record post-JCPOA. The Trump administration has issued new sanctions against dozens of Iranian human rights abusers. In 2011, the European Union (EU) adopted restricted measures related to violations of human rights in Iran. The EU has extended these existing sanctions on an annual basis, but it has not imposed any new human rights sanctions since the 2015 nuclear deal, despite numerous human rights violations that have been perpetrated since. See "Major New Human Rights-Related Listings and Accompanying Sanctions on Iran," US Department of State, Press Release, September 24, 2020, https://www.state.gov/major-new-human-rights-related-listings-and-accompanying-sanctions-on-iran/; "Treasury Sanctions Iran's Interior Minister and Senior Law Enforcement Officials in Connection with Serious Human Rights Abuses," US Department of the Treasury, Press Release, May 20, 2020, https://home.treasury.gov/news/press-releases/sm1015; "Treasury Sanctions Two Judges Who Penalize Iranians for Exercising Freedoms of Expression and Assembly," US Department of the Treasury, Press Release, December 19, 2019, https://home.treasury.gov/news/press-releases/sm862. For the list of human rights violators sanctioned by the EU, see "Council Decision (CFSP) 2020/512," Official Journal of the European Union, April 7, 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.113.01.0022.01.ENG&toc=OJ:L:2020:113:TOC#ntr1-L_2020113EN.01002201-E0001.

9 Masih Alinejad, "Joe Biden's Iran Plan Needs to Focus More on Human Rights," *The National Interest*, September 28, 2020, https://nationalinterest.org/blog/middle-east-watch/joe-bidens-iran-plan-needs-focus-more-human-rights-169749.

Sadegh Amoli Larijani, former head of the IRI judiciary from 2009 - 2019. As head of the judiciary, Larijani held significant power to use the IRI's legal system to repress activists, journalists and dissidents through unfair trials, long prison terms and even death sentences. *Source:* Wikimedia Commons/ Khamenei.ir (https://commons.wikimedia.org/wiki/File:Sixth_International_Conference_in_Support_of_the_Palestinian_Intifada,_Tehran_(15)_(crop_of_Sadeq_Larijani).jpg)

international community to create new legal tools and supercharge existing ones to better prosecute and sue IRI officials for human rights violations and atrocity crimes in forums around the world.

Under international law, states are under the obligation to respect and ensure the human rights of persons within their territories or subject to their jurisdictions. Ensuring human rights includes the positive obligation of investigating, prosecuting, and punishing individuals who have committed human rights violations and thus providing accountability. Under certain legal criteria under international human rights law, jurisdiction may apply extraterritorially. Under international human rights law, victims of gross human rights violations have the right to justice, truth, and reparations.[10]

As of the writing of this report (November 2020), a former IRI official sits in pretrial detention in Sweden in connection to his alleged role in the killing of thousands of political prisoners in Iran's jails in the summer of 1988, awaiting justice under Sweden's universal jurisdiction laws.[11] The families of those killed in the Islamic Revolutionary Guard Corps's (IRGC's) shootdown of Ukraine International Airlines Flight 752 (PS752) in January 2020 continue to urge Canada to bring a case against the IRI at the International Court of Justice on a theory of war crimes or obstruction of justice for the many Canadian victims.[12] Legal complaints alleging universal jurisdiction claims against a former Iranian judge suspected to have ordered the torture of detained journalists were filed with German and Romanian prosecutors in June 2020.[13] And civil suits to seek redress for past and present prisoners of conscience in Iran's jails are pending in US courts.[14]

This report examines one part of the justice solution as it pertains to civil litigation strategies, around the world, that provide redress for extreme violations of human rights committed by the IRI and its proxies. In this context, "civil litigation strategies" refers to lawsuits for financial damages, injunctive relief, and other remedies against the IRI, its officials, and its proxies pursuant to torture, terrorism, or atrocity crimes laws. Criminal law tools to bring IRI violators to account will be explored in later publications by the Atlantic Council. For the purposes of this report, assessing the responsibility of the IRI includes the government, any political subdivisions of the IRI, and any agency or instrumentality of the IRI, as well as IRI proxies where relevant.

At present, regarding prospects for litigation, the majority of victims and survivors of IRI human rights violations who currently reside outside of Iran with citizenship or

10 For example, this can include extraterritoriality due to "effective control" over a territory or individual, personal jurisdiction (where the victim or the perpetrator is a national), when the state is party to a *aut dedere aut judicare* obligation (treaty law), or universal jurisdiction.

11 For background, see Christian Caryl, "An Iranian Official Thought the World Had Forgotten a Massacre 31 Years Ago. He Was Wrong," *Washington Post*, November 20, 2019, https://www.washingtonpost.com/opinions/2019/11/20/an-iranian-official-thought-world-had-forgotten-massacre-years-ago-he-was-wrong/.

12 "Loved Ones of Flight 752 Victims Demand Plan, Timeline for Holding Iran to Account," Canadian Broadcasting Corporation, June 16, 2020, https://www.cbc.ca/news/canada/windsor/association-flight-ps752-victims-demand-answers-1.5614954.

13 Gissou Nia and Amanda Ghahremani, "The Defenestration of Bucharest: How Europe Can Help Iranian Survivors of Rights Abuses," *IranSource*, July 21, 2020, https://www.atlanticcouncil.org/blogs/iransource/the-defenestration-of-bucharest-how-europe-can-help-iranian-survivors-of-rights-abuses/.

14 See, for example, "Masih Alinejad vs. I.R. of Iran, Ali Khamenei, Judiciary, and IRGC," Herischi & Associates, December 4, 2019, https://www.ibhlaw.com/masih-alinejad.

residency status are based in North America and Europe.[15] While Canada and Europe provide more justice-friendly forums than the US system with respect to criminal accountability for extraterritorial acts that constitute serious international crimes, the United States is arguably a more hospitable jurisdiction when it comes to awarding damages in civil suits for human rights violations.

Therefore, this report opens with a discussion of civil litigation tools in the United States before addressing those in Canada and Europe.

This report covers the following:

1) A brief background on Iran's human rights situation and the violations of the Iranian leadership that this litigation will target
2) A survey of existing civil authorities in the United States, Canada, and Europe that can apply to Iranian human rights violators, and gaps in those laws
3) Recommendations for the creation of new laws and amendments to existing laws to further accountability for human rights violations and abuses
4) Recommendations to US, Canadian, and European government agencies and lawmakers on steps to better enforce and implement these laws
5) Recommendations for further scholarship

The Atlantic Council aims for this report to be the first in a series of reports covering strategic litigation tools that can be applied to the IRI—as well as other states, state actors, and non-state actors in jurisdictions around the world.

June 16, 2009. Tens of thousands of Iranians took to the streets to protest irregularities in the 2009 Iranian presidential election. In response to the protests, state security forces violently cracked down on peaceful protesters with disproportionate force. Scores of protesters were arrested and later tortured, and even killed, in detention centers. *Source:* Wikimedia Commons/Milad Avazbeigi (https://commons.wikimedia.org/wiki/File:Tehran_protest_(1).jpg).

15 While there are sizable populations of Iranians who have fled persecution and human rights abuses based in Turkey, Iraq, and Malaysia as well, many do not have citizenship or residency status in those countries, which is often a requirement to act as a plaintiff in human rights civil litigation.

II. Methodology

August 24, 2008. Located in north Tehran, Evin prison is one of Iran's most notorious prisons. The prison holds a large number of political prisoners, many of whom report having been subjected to harsh interrogations, forced confessions, solitary confinement and mental and physical torture. *Source:* Creative Commons/sabzphoto (https://search.creativecommons.org/photos/90bc75e7-954e-4fe0-81e5-19288638920b).

This report combines a mix of desk research and insights from first-person interviews with government officials, lawyers, academics, and affected communities conducted between July 2019 and May 2020.

The report is based on findings from interviews with the following individuals:

- Twenty-six current or former US government career or elected officials from the US Department of Justice, the US Department of State, various US law enforcement agencies, the US Senate, and the US House of Representatives with firsthand knowledge about the functioning of civil lawsuits for terrorism and human rights violations and abuses—spanning from the passage of relevant legislation all the way to the viability of enforcement of judgments
- Nine US-based private law firm lawyers specialized in terrorism- or human rights–related litigation in US courts and enforcement of judgments
- Six Canadian lawyers and former government officials with firsthand knowledge of efforts to create and apply civil litigation tools against the IRI
- Five lawyers with direct knowledge of the application of European laws for human rights–focused outcomes
- Seven academics with knowledge of the application of civil litigation tools globally
- Eleven survivors and victims of IRI human rights violations who have used civil litigation tools or seek to use such tools in the future, and who shared their experiences and impressions of the utility of litigation

All interviewees were informed of the purpose of the interview and the ways in which the information would be used in future published reports and content. None of the interviewees received monetary compensation or other incentives for speaking with the Atlantic Council's strategic litigation project.

III. Background on Iran's Human Rights Situation

The United Nations (UN) and internationally respected human rights groups have extensively documented the IRI's poor human rights record—which includes discrimination against marginalized groups and excessive state force to silence actual or perceived opposition.[16] The IRI quashes dissent through the arrest, torture, and execution of activists, members of targeted minority groups, and peaceful protesters, such as when state security forces killed and jailed thousands of Iranians during anti-regime protests in November 2019.[17] The state has demonstrated that it is unwilling and/or unable to provide adequate protection or safeguards against human rights violations, as it is the perpetrator of such violations.

Many abuses originate in the judiciary, with a lack of fair trials and disproportionately heavy sentences operating as the norm in cases deemed "politically sensitive."[18] Other abuses are perpetrated by Iran's Ministry of Intelligence (MOI) and the intelligence unit of the IRGC—the latter of which has taken a growing role in the unjust detention, torture, and sometimes even killing of prisoners of conscience in Iran's jails. Further abuses result from the extrajudicial actions of government paramilitary security forces, such as the Basij and Ansar-e Hezbollah, which have a strong and violent grip on society.

These violations are worsened by the lack of transparent mechanisms to investigate violations by government bodies and security forces and little to no reports of government actions to punish violators or enact human rights reforms.[19]

Whereas Iranian leaders have taken other actions of state officials to court, for example, when it comes to charges of corruption, this is usually the result of political infighting.[20] In this environment focused on punishing financial crimes, liability for human rights abuses tends to be largely absent.

Esmail Ghaani, Head of Iran's Islamic Revolutionary Guard Corps Quds Force. The Quds Force has been implicated in perpetrating alleged war crimes in Syria, among other abuses. *Source:* Wikimedia Commons/Tasnim News Agency (https://commons.m.wikimedia.org/wiki/File:Esmail_Ghaani_93874.jpg).

Worse still than inaction in providing redress for victims and survivors or scoping internal reforms, the Iranian authorities also criminalize the activities of those reporting on human rights violations and abuses or advocating for human rights reforms. One negative trend has been increased pressure

16 See, for example, UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, A/HRC/43/61, January 28, 2020, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/021/53/PDF/G2002153.pdf?OpenElement.

17 "Iran: Thousands Arbitrarily Detained and at Risk of Torture in Chilling Post-Protest Crackdown," Amnesty International, December 16, 2019, https://www.amnesty.org/en/latest/news/2019/12/iran-thousands-arbitrarily-detained-and-at-risk-of-torture-in-chilling-post-protest-crackdown/; "Iran: No Justice for Bloody Crackdown," Human Rights Watch, February 25, 2020, https://www.hrw.org/news/2020/02/25/iran-no-justice-bloody-crackdown#.

18 "The Iranian Judiciary," Iran Human Rights Documentation Center.

19 "Iran: Prisoners Who Reported Abuse Charged," Human Rights Watch, October 23, 2020, https://www.hrw.org/news/2020/10/23/iran-prisoners-who-reported-abuse-charged.

20 For example, in the case against Iranian President Hassan Rouhani's brother, Hossein Fereydoun, who was sentenced to five years in prison for a conviction on corruption charges. "Iran Court Sentences Brother of President to Five Years in Prison: Report," Reuters, October 1, 2019, https://www.reuters.com/article/us-iran-rouhani-brother/iran-court-sentences-brother-of-president-rouhani-to-five-years-in-prison-report-idUSKBN1WG3F6.

In November 2019, anti-government protests erupted in Iran and quickly spread nationwide. Known as the Aban protests, the demonstrations were met with a violent response by Islamic Republic state security forces. Thousands of peaceful protesters were killed or jailed on national security charges. To this day, no government officials or perpetrators of the killings have been held responsible. *Source:* Reuters.

on the legal bar and the jailing of lawyers who represent civil society activists.[21] This means that those who—around the world—act as a bulwark in societies for those targeted for political reasons are now the targets themselves in Iran, for no reason other than their peaceful representation of clients in politically sensitive cases.

In addition to the human rights violations listed earlier in this report, a nonexhaustive list of IRI actions that amount to potential crimes against humanity and war crimes and that are ripe for civil or criminal litigation include the following:

1) The killing of thousands of political prisoners by the IRI in the summer of 1988 at the tail end of the Iran-Iraq War
2) The violent post-June 2009 election crackdown in which scores of peaceful protesters were injured, killed, detained, tortured, and sexually assaulted
3) The use of violence to quash nationwide protests in December 2017 and January 2018
4) The war crimes perpetrated by IRGC forces in Syria and Yemen
5) The unjust arrest and detention of dual nationals and foreign nationals for political leverage
6) The recruitment of Afghan child soldiers to fight in the Syrian conflict[22]
7) The killing of hundreds of protesters in November 2019 by state security forces, aided by a one-to-two-week total internet shutdown
8) The use of the passengers on downed flight PS752 as passive human shields[23]

21 In recent years, multiple defense attorneys have been sent to prison for their peaceful activities, including prominent human rights lawyer Nasrin Sotoudeh (thirty-three-year prison sentence), Amirsalar Davoudi (thirty-year prison sentence), Mohammad Najafi (twenty-two-year prison sentence), Soheila Hejab (eighteen-year prison sentence), Payam Derafshan, and others. See "List of Attorneys Imprisoned in Iran for Defending Human Rights," Center for Human Rights in Iran, June 23, 2020, https://iranhumanrights.org/2020/06/list-of-attorneys-imprisoned-in-iran-for-defending-human-rights/.

22 "Iran: Afghan Children Recruited to Fight in Syria," Human Rights Watch, October 1, 2017, https://www.hrw.org/news/2017/10/01/iran-afghan-children-recruited-fight-syria#

23 See arguments from Adil Haque, "Human Shielding (by Omission) in Iran," Just Security, January 31, 2020, https://www.justsecurity.org/68359/human-shielding-by-omission-in-iran/.

IV. Strengths of a Legal Approach

Despite the bleak outlook for human rights in the IRI, there are ways that legal approaches from the outside can help civil society inside the country bring about positive change, and also serve the interests of the international community on Iran and in the region.

At present, there are few pathways to justice for substantive human rights offenses in the IRI. However, there are tools that the international community and countries around the world can use to bring human rights violators and abusers to account, when the home forum in which those violations or abuses occur is unwilling or unable.[24]

The primary motivating factor for human rights–focused litigation should be the pursuit of truth, justice, and reparations for survivors and the families of victims of gross human rights violations—and the international community's responsibility in securing these outcomes.[25]

As noted above, the past four years were marked by intransigence from the international community on how to address the IRI's gross human rights violations—mostly due to the impasse between the United States and Europe on their foreign policy approaches toward Iran. However, with an incoming Biden administration seeking to differentiate its Iran approach from that of the outgoing Trump administration, the global policy environment is ripe for fresh strategies that seek justice for the Iranian people while preventing civilian harm.

Investing in strategic civil litigation could prove to be a useful tool toward this goal. It is a targeted, surgical option that directly ties the human rights violations of governments and governmental actors to the money damages they need to pay survivors and victims for those harms. Legal measures are, by their nature, targeted at those in

Gholam Hossein Mohseni-Ejei, First Vice Chief of Justice, 2014 - present. Mohseni-Ejei plays a key role in the human rights violations of the IRI judiciary and used his prior position as judiciary spokesman to defend and advance its abuses. As Minister of Intelligence, he played a leading role in the violent crackdown on peaceful protesters in the aftermath of the June 2009 presidential election in Iran. *Source:* Tasnim News Agency/ Wikimedia Commons (https://commons.wikimedia.org/wiki/File:Gholamhossein_Mohseni-Ezhe%27i_2018.jpg).

24 Iran is not a state party to the Rome Statute; therefore, the International Criminal Court (ICC) has jurisdiction to investigate and prosecute atrocity crimes committed by the IRI in Iran only if the IRI consents to the jurisdiction of the ICC for a *propio motu* investigation of atrocity crimes, or by way of a UN Security Council referral. These options are unlikely to happen. The IRI denies its role in violations against its population, therefore making a voluntary consent to jurisdiction for criminal prosecution unlikely. And Russia and China are permanent members of the UN Security Council and therefore likely to veto any resolution to refer Iran to the ICC, given their geopolitical relationships. However, the IRI, and its agencies and instrumentalities, can be subject to prosecutions or suit in domestic courts around the world. In Europe, universal jurisdiction laws have allowed for crimes that have occurred outside of the territory to be prosecuted in national courts. As of the writing of this report (November 2020), a historic arrest has been made in Sweden of a former IRI official, the first ever in connection to the summary executions of thousands of political prisoners in Iran in the summer of 1988. See TRIAL International, *Evidentiary Challenges in Universal Jurisdiction Cases*, March 1, 2019, https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf; Caryl, "An Iranian Official Thought the World Had Forgotten a Massacre 31 Years Ago. He Was Wrong." In the United States, there are laws with extraterritoriality that could provide for criminal prosecutions of IRI officials. There is also a robust framework of civil litigation tools in US courts that can be used against human rights abusers for money judgments. Canada also has universal jurisdiction laws, as well as exceptions to its state immunity rules that allow for suits against human rights abusers.

25 Indeed, this thinking has governed the passage of human rights–focused legislation in the United States. For example, in support of the *Torture Victim Protection Act of 1991* and to justify its application to extraterritorial actions, the Senate Judiciary Committee noted that nations that allow, promote, or engage in torture are the same nations that do not adhere to the rule of law and therefore do not provide adequate remedies for victims. US Congress, Senate, Torture Victim Protection Act of 1991, S. REP. NO. 102-249, S. 313, 102nd Congress, 2nd session, Introduced in Senate January 31, 1991, https://www.congress.gov/bill/102nd-congress/senate-bill/313/text.

Judge Abolghasem Salavati, Head of Branch 15 of Tehran's Revolutionary Court, 2009 - present. Salavati has presided over hundreds of unfair trials of human rights defenders, activists and peaceful protesters, in which he delivered harsh sentences of long prison terms or execution. *Source:* Tasnim News Agency/ Wikimedia Commons (https://commons.wikimedia.org/wiki/File:Abolqasem_Salavati_in_Justice_week_conference_cropped.jpg).

power who abuse their authority. Tools focused on improving human rights accountability take direct aim at those who seek to brutalize their populations. Civil litigation avoids the sweeping, mass punishment of kinetic warfare or broad-based economic sanctions. It also calls for the strengthening of a rules-based system and discourages more extreme measures, like targeted killings of IRI officials. A true peace and security agenda must acknowledge the violence of the daily brutality of dictatorships. Therefore, legal options, which help the globe enforce a rules-based system, should be better understood and improved.

While the primary beneficiaries of human rights litigation are the claimants who have been directly impacted and their communities, the effects of this litigation can influence policy in different ways, including the following:

i) ***Significant money judgments coupled with enforcement can incentivize a change in behavior.*** Notably, when terrorism- or human rights–focused civil litigation has occurred involving the IRI, Iranian banks, or Iranian institutions in courts outside of Iran, the Iranian authorities have not usually sent counsel to defend on the merits of the charges but they have sent lawyers to defend in enforcement actions. The loss of millions, or even billions, of dollars—if enforced—is an outcome the Iranian state cannot afford.[26] If enforcement is more rigorously pursued than at present, seizing assets from the IRI for its perpetration of violations can incentivize a curbing of human rights violations so as to prevent the financial loss that results. Alternatively, with a long-term lens, should Iran experience a change in leadership and seek to reach a settlement on any outstanding, unpaid judgment awards, the debt can be used as a leverage point by nations to ensure that Iran's leadership make human rights commitments.[27]

ii) ***Lawsuits revealing the grave human rights abuses of the IRGC, MOI, and other IRI institutions against Iran's own people can counter an increasingly nationalistic, and misleading, narrative about these institutions.*** While Iran's civil society is acutely aware of the many egregious violations committed by Iran's

26 Billions of dollars in damage awards in US courts have been awarded to plaintiffs suing the IRI for terrorism and terrorism-related claims. The IRI challenged this by taking the United States to the International Court of Justice, alleging that this type of litigation and the seizure of Iranian assets to satisfy the judgments violate international law. See *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, International Court of Justice, February 13, 2019, https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf.

27 The counterpoint to this is that the debt should not be used in a way that could stymie a path to democracy. For example, the case of Sudan and its removal from the US State Sponsors of Terrorism (SST) list. As of the writing of this report, Sudan's transition to democracy is ongoing. As part of the effort to get Sudan removed from the SST list, Sudan's transitional council agreed to a number of US government demands for removal, including normalization of relations with Israel. Sudan's SST designation was the primary hurdle in the ability of Sudan to access funds from the International Monetary Fund and the World Bank, which Sudan desperately needs to repair its economy and settle its debts. The protracted period over which negotiations with the US government was taking place threatened to worsen Sudan's increasingly dire financial situation, with people again taking to the streets to protest their poor economic conditions. Observers warned that if a deal were not more speedily reached, the transition to democracy could be derailed and result in further instability in the country. See Lara Jakes, Declan Walsh, and Eric Schmitt, "State Dept. to Remove Sudan from List of Terrorist States," New York Times, October 19, 2020, https://www.nytimes.com/2020/10/19/world/africa/sudan-trump-israel-terrorism.html; see "Sudanese Back on Streets to March against Dire Living Conditions," *Al Jazeera*, October 21, 2020, https://www.aljazeera.com/news/2020/10/21/sudanese-return-to-streets-over-dire-living-conditions; see also Rebecca Hamilton, "Sudan Has Made Amends. Let's Take It off the Terrorism List," *Washington Post*, October 6, 2020, https://www.washingtonpost.com/opinions/2020/10/06/sudan-has-made-amends-lets-take-it-off-terrorism-list/.

government institutions and security forces, the larger population has been inundated by IRI messaging that touts a nationalist narrative in the face of US sanctions and Western pressure.[28] This narrative was supercharged following the US government's targeted killing of General Ghassem Soleimani, the head of the IRGC's Quds force, in January 2020, though was somewhat tempered by the Iranian public's outcry against the IRGC's shootdown of a civilian airliner just days after, which killed all 176 civilians onboard.[29] It has been further strengthened by the Trump administration's rejection of calls to ease broad-based economic sanctions on Iran during the COVID-19 global pandemic, which are detrimental to civilian life.[30] These dynamics have taken the attention off the harms that Iranian civilians face from their own government. And a Biden administration moving away from the "maximum pressure" policy will not immediately change perceptions. Private litigation in which the multitude of the human rights violations and abuses against the Iranian people is laid bare would help build a record of harms and help counter any nationalist narrative created by the Iranian state to soften perceptions of its role in the harm done to its own people.

iii) ***Litigation will give voice to the survivors and victims and empower civil society in Iran, leading to positive outcomes for democracy and human rights.*** In the absence of Iranian courts tackling human rights abuses, litigation outside the country will give a platform to the survivors and victims of IRI actions and policies to clearly outline IRI human rights violations—including the oppression of civil society—for the public record. The more that civil society inside Iran feels like their stories are being preserved and their voices are being heard, the more empowered they will feel to push back on their own leaders and say that they do not have nuclear ambitions, that they do not want proxy wars, and that they wish to be embraced by the international community. In any future dealings with the IRI, on the nuclear file or otherwise, the international community should be centering the demands of Iran's activists. Lessons from the Sudanese revolution, including how a people can steer away from a dictator and embrace democratic norms that translate into stable outcomes in foreign policy, can be instructive in the case of Iran.[31]

While there are many potential upsides to the use of civil litigation tools, both for accountability purposes and effective policies, there are also concerns on the part of states about their expansion and application. At present, two of the greatest challenges to liability in civil litigation for human rights violations are immunity and jurisdiction. Those challenges are borne out of concerns about reciprocity and the likelihood that a state will enact similar laws in retaliation. While the risk is material, it can be mitigated significantly by introducing vetting factors so that only certain kinds of litigation (e.g., against specific countries, for specific acts) can proceed.

28 See Narges Bajoghli, "Trump's Iran Strategy Will Fail. Here's Why," *New York Times*, June 30, 2019, https://www.nytimes.com/2019/06/30/opinion/trump-iran-revolutionary-guards.html.

29 See, for example, Emma Graham-Harrison, "'They Killed Our Sons and Daughters': Anger Rises in Iran over Flight 752," *The Observer*, January 11, 2020, https://www.theguardian.com/world/2020/jan/11/they-killed-our-sons-and-daughters-anger-rises-in-iran-over-flight-752.

30 Philip H. Gordon and Ariane M. Tabatabai, "Trump Must Ease Sanctions against Iran or Face a Humanitarian Catastrophe," *Washington Post*, March 25, 2020, https://www.washingtonpost.com/opinions/2020/03/25/trump-must-ease-sanctions-against-iran-or-face-humanitarian-catastrophe/.

31 "The Human Rights Council Should Support Systemic Human Rights Reforms in Sudan," Human Rights Watch, September 9, 2020, https://www.hrw.org/news/2020/09/10/human-rights-council-should-support-systemic-human-rights-reforms-sudan.

V. United States, Canada, and Europe: The Current Framework

This report covers a survey of available civil litigation tools and the potential for new tools to be used in the United States, Canada, and Europe. Civil litigation tools can apply against states, state actors, and non-state actors, depending on jurisdiction. The potential for criminal and administrative law tools will be covered in subsequent reports from the Atlantic Council.

It is important to note that useful litigation tools with extraterritorial application exist outside of these jurisdictions, including in countries like Senegal and Ghana.[32] However, this report, which examines the IRI's responsibility for human rights violations, focuses on jurisdictions where a significant portion of the Iranian diaspora resides. This group will act as plaintiffs in cases, provide the evidence needed for suits, and mobilize survivor and victim communities in support. Jurisdictions where claims against the IRI can be lodged, such as Argentina and Australia, but which require a different analysis, will be explored in subsequent publications from the Atlantic Council. There are also options to pay reparations to victims in international forums, such as the International Court of Justice (ICJ), and these will also be explored separately in further work.[33] Regional bodies such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights do not have broad application in the Iranian context due to jurisdiction issues or lack of Iranian diaspora plaintiffs in the jurisdiction.[34]

The United States and Europe are essentially mirror images of one another when it comes to litigation of human rights violations that occur extraterritorially. In the United States, civil litigation of extraterritorial torts are the primary focus when it comes to redress for human rights violations and abuses in US courts, while the penal law is used sparingly. In contrast, Europe has a robust universal jurisdiction regime, making the penal law the more relied upon legal route for human rights accountability. Both the penal law and civil law have benefits and challenges as legal tools to combat impunity, and should ideally be used alongside each other in a complementary framework. There is also the example of some civil law countries such as France and Belgium where the systems provide for a claim for compensation to be lodged within criminal proceedings. This is distinct from the United States and other common law countries, where criminal proceedings and civil claims for damages are adjudicated separately.[35]

Because this report focuses on civil remedies in tort, and for now civil remedies for extraterritorial human rights violations are strongest in the US system, the next section begins with a discussion of the civil litigation framework in the United States and then moves on to a discussion of those in Canada and Europe. The discussion in the Europe section focuses on state immunity laws that are a potential impediment to establishing state responsibility for human rights violations before domestic courts in Europe. This report does not delve deeper into the remedies of each country in Europe, as those will be a focus of later work that will examine universal jurisdiction frameworks in the penal law in different European jurisdictions.

32 See TRIAL International, *Universal Jurisdiction Annual Review 2019*, 2019, https://trialinternational.org/wp-content/uploads/2020/06/Activity-Report-2019.pdf.

33 The ICJ hears only interstate claims, not claims by individuals. So, it is up to the state to bring a claim against the offending state for torture or other international crimes, on the basis that its rights were violated by the torture of its citizens, or on some other basis. This is within the state's discretion and not automatic.

34 The ECtHR body does not have jurisdiction to extend to acts that occur outside of Europe, so Iranians who now reside in Europe would not effectively be able to use that as a mechanism for abuses they suffered back in Iran. Similar jurisdictional hurdles exist with the regional courts in Latin America and Africa, and potential plaintiffs are less in number there. Finally, there is no regional court in the Middle East and North Africa region or Asia.

35 With the exception of the Racketeer Influenced and Corrupt Organizations Act in the US system, which is a statute that allows for "mixed" proceedings combining criminal and civil remedies.

VI. US Civil Authorities

A. Overview

When it comes to establishing responsibility for extraterritorial human rights violations and abuses, the United States has a robust set of civil litigation tools—including the Alien Tort Statute, the Torture Victim Protection Act, the terrorism exception to the Foreign Sovereign Immunities Act, and the Anti-Terrorism Act—that litigants can use to pursue individuals, organizations, governments, and corporations responsible for the commission of human rights violations and abuses.[36] While the enforcement of judgments and collection of awards can be challenging, there continues to be a large volume of legal challenges brought under these civil authorities on behalf of atrocity survivors.

While the Alien Tort Statute and Torture Victim Protection Act provide recourse for victims and survivors of human rights violations and abuses from all over the world, survivors of human rights violations perpetrated by the Islamic Republic of Iran and its agents have additional civil litigation tools under terrorism laws to avail themselves of since the US State Department has designated the IRI as a state sponsor of terror. The US and Canadian legal systems are unique in the world in that there is an exception to traditional state immunity, allowing suits for acts of terrorism.[37] Because the IRI is listed as a state sponsor of terror in the United States, suits can be filed on grounds involving torture, extrajudicial killing, and other human rights abuses.

Despite a current lack of formal relations between the United States and Iran, the active community of Iranian human rights defenders based in the United States, the large number of survivors and victims who reside in the United States who can readily provide evidence, and the sophisticated and adversarial US court system make it an ideal venue for this type of civil litigation. Legal tools exist separately from politics and will have relevance regardless of the posture of US administrations to come.

This section examines how these tools can be expanded to provide redress to more potential claimants in human rights–focused cases on Iran and how current legal authorities can be better enforced.

B. Alien Tort Statute (Alien Tort Claims Act)

The Alien Tort Statute (ATS), sometimes known as the Alien Tort Claims Act, is a US federal law that gives federal courts jurisdiction to hear lawsuits filed by non-US citizens for torts committed in violation of international law.[38] It allows survivors of egregious human rights abuses, even where the underlying conduct occurred outside of the United States, the right to sue perpetrators in US courts. Successful ATS suits have been litigated in cases involving torture, extrajudicial killing, war crimes, crimes against humanity, and other grave human rights abuses.[39]

For decades, the US court system was viewed as the world's premier forum for bringing human rights claims between foreign plaintiffs and defendants, in large part due to the power of the ATS and plaintiff-friendly features of the US system.[40] Under the ATS, nationals of countries ranging from Nigeria to Paraguay to Myanmar could seek redress in US courts against government-linked perpetrators, multinational companies, and other individuals and entities that have perpetrated harms against them.[41]

While the ATS was established by the First Congress and has been part of US law since 1789, it was rarely used for two centuries, until a landmark decision in *Filártiga v. Peña-Irala* in 1980. In *Filártiga*, the US Court of Appeals for the Second Circuit animated the ATS by holding that it

36 Other civil litigation tools that can apply to extraterritorial acts include the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595 (TVPRA), and the civil remedies in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962 (RICO). However, as the TVPRA and RICO are less likely tools for accountability for Iranian human rights abuses they are not discussed in this report.

37 The Canadian exception was modeled after the exception in the US system, but there are distinctions in the law. A discussion of the differences is in Section VII(B) *infra* of this report.

38 The ATS is a jurisdictional statute, enacted by the First Congress as part of the Judiciary Act of 1789, providing that "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." See Judiciary and Judicial Procedure, US Code 28, § 1350, 1926.

39 Plaintiffs can bring suit under the ATS for the following: torture; extrajudicial killing; forced disappearance; crimes against humanity; cruel, inhuman, or degrading treatment; prolonged arbitrary detention; genocide; war crimes; slavery; or state-sponsored sexual violence and rape. In contrast, under the Torture Victim Protection Act (TVPA), which gives US citizens the right to sue, US citizens may bring suit only for torture and extrajudicial killing. Therefore, the ATS is rare in US law in that it gives non-US citizens more rights than US citizens. For more on the ATS, see "The Alien Tort Statute," The Center for Justice & Accountability, accessed May 2020, https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/.

40 In addition to legal vehicles with extraterritorial application (e.g., ATS, TVPA), features of the US court system such as class action lawsuits, discovery, jury trials, contingency fees, and potentially high damage awards made the US system more attractive to plaintiffs than many other—though arguably closer connected— foreign forums. Also US courts were sometimes the only available forums for victims or their heirs to pursue their rights.

41 See *Kiobel v. Royal Dutch Petroleum*, *Sosa v. Alvarez-Machain*, and *John Roe I v. Unocal Corporation* (seeking to hold Unocal liable for human rights violations committed during the construction of its gas pipeline in Burma).

could be used to bring claims of violations of international human rights law. A flurry of ATS litigation followed but was then circumscribed by the US Supreme Court decision in *Sosa v. Alvarez-Machain*, in which the court held that the ATS allows for US federal courts to hear only a "narrow set" of claims for violations of international law.

Following the *Sosa* decision, the applicability of the law has been even further restricted by more recent US Supreme Court decisions. In *Kiobel v. Royal Dutch Petroleum Co.* in 2013, the US Supreme Court ruled that civil parties must overcome the presumption against extraterritoriality if they seek to hold perpetrators liable for torts under the ATS.[42] Specifically, the majority opinion said that the claim advanced in an ATS suit must "touch and concern the territory of the United States" and must do so "with sufficient force" to displace the presumption against extraterritorial application.[43] Since then, a number of lower federal courts have dismissed ATS cases, based on the *Kiobel* "touch and concern" precedent.[44]

The application of the ATS was further restricted by the US Supreme Court's holding in *Jesner v. Arab Bank* in 2018, where the court held that the ATS does not extend liability to foreign corporations.[45] In *Kiobel*, the court had already held that the ATS does not extend to suits against foreign corporations when "all the relevant conduct took place outside the United States"; however, *Jesner* took it further by definitively holding that foreign corporations may not be sued under the ATS, regardless of where the underlying conduct alleged in the suit took place.[46] This has limited the use of the ATS greatly, though suits can still be brought against corporations for involvement in human rights violations and abuses abroad, as long as the corporation had sufficient contacts with the United States, acted together with a government entity or official, and had sufficient control over the violations.[47]

However, as of the writing of this report, the ability to bring ATS suits against domestic US corporations is under threat, as the Trump administration reversed its position on this issue to urge the US Supreme Court to hold that domestic corporations are not subject to suit for human rights violations under the ATS.[48]

In the case of Iran, when it comes to the liability of non-corporate actors, it is unlikely that an ATS suit would get past service because the defendant in the suit would likely need to be personally served with the lawsuit while in the United States.[49] That is, the perpetrator must live in or visit

42 *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

43 Ibid.

44 In *Kiobel*, the Supreme Court provided little guidance on how an ATS claim might meet the "touch and concern" requirement. The litigation on this point has resulted in a circuit split. See, for example, *Ali Shimari v CACI Premier Technology, Inc.*, No. 15-1831 (4th Cir. 2016), https://ccrjustice.org/sites/default/files/assets/files/Shimari_Opinion%20Dismissing%20ATS%20Claims%206.26.13.pdf.

45 *Jesner v. Arab Bank*, PLC, 584 U.S. ___ (2018).

46 See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, at 124; Jesner v. Arab Bank, PLC, 584 U.S. ___ (2018).

47 It has been noted that despite the greatly limited application of the ATS in the wake of these two Supreme Court cases, and the low number of actual settlements or trials, there is still a value in introducing cases under the ATS. See Marion Cadier, Valerie Van Goethem, Genevieve Paul, Veronique Van Der Plancke, and Erin Wrzoncki, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms*, FIDH corporate accountability guide, https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf. (Some positives include: "...that the ATS provides a forum where victims can publicly denounce the abuses they suffered, force companies to answer for their actions before an independent court and disclose relevant documents via the disclosure procedure. In addition, calling the reputation of corporations into question plays a preventive role [in curbing corporate human rights abuses].")

48 See arguments in the brief filed by the government as to whether to grant certiorari in *Cargill, Inc. v. Doe I*, https://www.supremecourt.gov/DocketPDF/19/19-453/144200/20200526124902074_Nestle.Cargill%20final.pdf. This brief came just months after Canada's Supreme Court held in the Nevsun case that Canadian corporations may be sued in Canadian courts for human rights violations abroad. Now the Trump administration is proposing that the US Supreme Court take the opposite position. See also the government's argument now that certiorari has been granted: https://www.justice.gov/sites/default/files/briefs/2020/09/11/19-416tsacunitedstates.pdf.

49 There are different reasons that personal service in the United States will likely be required for a case on human rights violations in Iran to move forward. First, the plaintiff in the case must establish that the court has personal jurisdiction over the defendant. This determination turns principally on the nature and extent of the defendant's contacts with the US forum. Following the precedents set by the US Supreme Court rulings in *Goodyear* [*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)] and Daimler [Daimler AG v. Bauman, 134 S. Ct. 746 (2014)] it is a high bar. Given the limited to nonexistent nature of business interaction and personal interaction of Iranian officials with the United States, it is unlikely that the requisite minimum contacts will exist for the court to establish personal jurisdiction. One solve is that in-hand service establishes valid personal jurisdiction over the defendant even when they maintain no other contacts with the United States and the conduct alleged in the suit occurred elsewhere. However, given the travel bans on Iranian officials traveling to the United States (outside of a diplomatic context to UN Headquarters in New York City) this is also unlikely, or impossible. It should be noted that even if a court could establish personal jurisdiction over a defendant outside of in-hand service, actually serving the defendant would be a challenge. Rule 4 of the Federal Rules of Civil Procedure governs service of process requirements in ATS cases (as well as in other human rights litigation). If the defendant is not available within the United States, this requires service of process in a foreign state, which can be governed by a treaty agreement or other means. See "Service of Process," US Department of State, Bureau of Consular Affairs, accessed May 25, 2020, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html. However, the United States does not have any existing agreements with the Islamic Republic of Iran governing service of process. See "Iran Judicial Assistance Information," US Department of State, Bureau of Consular Affairs, accessed May 25, 2020, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/IranIslamicRepublicof.html. A court can also modify service requirements should the circumstances of the case require it, by authorizing service on defendants via publication or other means. See, for example, *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) and *Mwani v. Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005). Regardless, the plaintiffs' proof of service must comply with the Federal Rules of Civil Procedure 4(f), which prescribes the methods by which a summons can be served upon individuals in a foreign country; see, for example, *Mohammadi v. Islamic Republic Iran*, 947 F. Supp. 2d 48 (D.D.C. 2013).

General Assembly Hall at United Nations Headquarters in New York. *Source:* UN Women/Ryan Brown (https://www.flickr.com/photos/51431730@N04/6936809747).

the United States. Given the comprehensive immigration restrictions and travel bans currently in place for Iranian officials, it is not likely that an IRI perpetrator could be served, even once global travel resumes following the ongoing COVID-19 pandemic.[50] Additionally, a current head of state or anyone with diplomatic immunity cannot be the subject of a successful ATS suit, so that would rule out serving process on any IRI officials visiting the United States for the United Nations General Assembly. Extradition is not an option for civil suits so that would not be a means through which an IRI offender could be brought to a US court.

In respect to the liability of corporate actors, because foreign corporations can no longer be sued under the ATS, that limitation greatly restricts the ways this could be a viable option for pursuing human rights claims with respect to Iran.[51] US sanctions on Iran have substantially reduced any commercial engagement between the countries, or any transactions that touch the US dollar. With respect to domestic corporations, it is unlikely that a US-based corporation would have a direct role in perpetrating human rights abuses in Iran, since the corporation would be prohibited by sanctions from having an on-the-ground presence.[52]

50 See, for example, Executive Office of the US President, "Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Senior Officials of the Government of Iran, 2019, Proclamation 9932 of September 25, 2019," Federal Register 84, no. 189 (September 30, 2019): 51935, https://www.federalregister.gov/d/2019-21400.

51 See, for example, *Kaplan v. Central Bank of Iran*, No. 16-7142 (D.C. Cir. 2018), in which the DC Circuit court relied on the Jesner precedent to affirm the lower court's decision to dismiss ATS claims against two foreign banks for injuries sustained in attacks in Israel in 2006.

52 For more analysis of the circuit split on aiding and abetting liability, see Srish Khakurel, "The Circuit Split on Men's Rea for Aiding and Abetting Liability under the Alien Tort Statute," *Boston College Law Review* 59, no. 8, November 2018, 2966-2969, https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/17; see also Ryan S. Lincoln, "To Proceed with Caution? Aiding and Abetting Liability under the Alien Tort Statute," *Berkeley Journal of International Law* 28, no. 2, August 2010, https://ssrn.com/abstract=1692943.

However, at present, aiding and abetting liability could be a possibility for domestic corporations. If the mode of liability under which an ATS plaintiff can plead is narrowed by future US Supreme Court rulings, this may further affect the ability of plaintiffs to hold corporate actors responsible for involvement in human rights violations and abuses in Iran.

While the jurisdictional issues with respect to defendants on Iranian human rights cases are steep, the ATS provides a benefit as compared with other US civil litigation tools as to who is eligible to sue under the law. Since the ATS allows for noncitizens to sue and does not require US nationality at the time the act was committed, this allows for individuals who were subject to human rights violations and abuses in Iran, and then later came to the United States, to recover.[53] It also allows for individuals who are currently still in Iran to sue, as long as the other jurisdictional requirements are met and US courts are somehow accessible to them.[54]

Even prior to the *Kiobel* and *Jesner* decisions, the ATS had seldom been invoked to seek redress for survivors of human rights violations or abuses in Iran. However, even where suits have been dismissed, unsuccessful, or withdrawn by plaintiffs for strategic reasons, this litigation can still have a positive human rights impact.[55]

For example, in 2010, a suit was filed against the multinational telecommunications company Nokia Siemens Networks (now called Nokia Networks) on behalf of the prominent Iranian journalist Isa Saharkhiz, and his son Mehdi Saharkhiz, for the injuries that Isa Saharkhiz suffered on account of his unjust arrest and detention in Iran's Evin Prison following the disputed June 2009 presidential election in Iran.[56] The suit alleged that Nokia Siemens aided and abetted the IRI in its detention and torture of Isa Saharkhiz by providing communications intercept technology with foresight of how the Iranian authorities might use it to violate human rights.[57]

Eventually the plaintiffs decided to withdraw their complaint, for legal and strategic decisions related to the unsettled nature of the ATS case law at the time and Isa Saharkhiz's continued detention in Iran.[58] Post-withdrawal, Nokia Siemens continued to maintain that it was not responsible for the actions of the Iranian authorities.[59] However, despite company denials of liability, the litigation was impactful in that it formed part of a greater pressure strategy on Nokia Siemens.[60] That pressure campaign ultimately led to a company pullout from sales of surveillance equipment to the IRI, as well as the adoption of its first formal corporate human rights policy in 2010.[61]

There are limited options at present for using the ATS as an effective legal vehicle for human rights claims against IRI violators. This is principally because individual perpetrators do not travel to the United States or engage in other activities that would make them come within the personal jurisdiction of a US court, nor it is likely that the claims alleged would "touch and concern" the United States so as to overcome the presumption against extraterritoriality set out in *Kiobel*, and thereby overcome the hurdle of subject matter jurisdiction. However, that could change, depending on the presence of prospective defendants in the United States. If so, it would be important to have Congress render the ATS expressly extraterritorial, essentially reversing the *Kiobel* precedent.[62]

In the alternative, Congress could render the ATS expressly extraterritorial in cases where the underlying

53 Contrast this with the nationality requirement for plaintiffs in the TVPA or 28 US Code § 1605A.

54 For example, in the case against Nokia Siemens, Isa Saharkhiz was a named plaintiff on the suit even though he was imprisoned in Iran at the time of filing. His son Mehdi Saharkhiz, a named co-plaintiff on the suit, resided in New Jersey and facilitated the communications with Ali Herischi, their lawyer on the file.

55 While few ATS cases have actually been litigated to a successful conclusion at trial, just the process of initiating litigation or reaching settlements has led to positive "knock-on" effects for human rights issues, not only on Iran but generally. See, for example, Judith Schrempf-Stirling and Florian Wettstein, "Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies," *Journal of Business Ethics* 145 (2017): 545. (The paper argues that even when not successful at trial, human rights litigation can result in positive judicial, educational, and regulatory effects that have advanced the business and human rights agenda.)

56 Complaint for Tort Damages and Injunctive Relief, *Saharkhiz v. Nokia Siemens Networks*, Case 1:10-cv-00912-AJT-TRJ, (Dist. Ct. East. Dist. of VA. Ct. Alexandria Div., VA.), http://files.courthousenews.com/2010/08/19/Iran.pdf.

57 Ibid.

58 "Nokia Siemens Lawsuit Dropped by Iranian Plaintiffs," *Deutsche Welle*, November 18, 2010, https://www.dw.com/en/nokia-siemens-lawsuit-dropped-by-iranian-plaintiffs/a-6240017.

59 James Farrar, "Nokia Siemens Networks Respond to Iran Human Rights Abuses Claims," *ZDNet*, August 20, 2010, https://www.zdnet.com/article/nokia-siemens-networks-respond-to-iran-human-rights-abuses-claims/.

60 "Telco Hall of Shame: Nokia Siemens Networks B.V.," *Access Now*, January 31, 2013, https://www.accessnow.org/telco-hall-of-shame-nokia-siemens-networks-bv/.

61 Elena Goldstein and Peter Micek, "Nokia Revamps Human Rights Policy, Pledging to Avoid 'Active Surveillance,'" *Access Now*, February 10, 2017, https://www.accessnow.org/nokia-revamps-human-rights-policy-pledging-avoid-active-surveillance/; see also Steve Stecklow, "Nokia Siemens Venture to Reduce Its Business in Iran," Wall Street Journal, December 14, 2011, https://www.wsj.com/articles/SB10001424052970203430404577096503401073904.

62 For more reading on this, see recommendations from Professor Beth Van Schaack in her testimony before the Tom Lantos Human Rights Commission: US Congress, House of Representatives, Tom Lantos Human Rights Commission, *Pursuing Accountability for Atrocities*, 116th Cong., 1st sess., 2019, https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf, 16.

Isa Saharkhiz, Iranian journalist and political activist. Saharkhiz has faced multiple arrests and has been repeatedly targeted by the Iranian authorities for at least a decade. *Source:* Creative Commons/sabzphoto (https://search.creativecommons. org/photos/f6bc4508-b7fd-44d9-a975-1c3f51209fbf).

claims involve a country or course of conduct for which the US government has a dedicated human rights sanctions regime (e.g., the country regimes focused on Iran, Venezuela, or North Korea, or the Global Magnitsky Human Rights Accountability Act). In limiting the ATS across the board, the Supreme Court cited separation-of-powers concerns that "apply with particular force" and cautioned against courts creating private rights of action under the ATS, which would implicate foreign policy issues.[63] In the case of countries, organizations, or individuals already subject to human rights sanctions for the types of violations and abuses that can be litigated under the ATS, the US State Department has already made a decision that those violations and abuses offend US government interests and warrant formal action. Therefore, ATS cases involving sanctioned countries, individuals, and conduct are less likely to negatively affect the comity of nations or those separation-of-powers issues about which the Supreme Court raised concerns.

RECOMMENDATION: Have Congress render the ATS expressly extraterritorial. In the alternative, have Congress pass legislation that expressly holds that the presumption against extraterritoriality does not apply in cases where the underlying claims involve a country or course of conduct that is the subject of US sanctions.

C. Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) of 1991 is a statute that allows both US citizens and noncitizens to bring civil law claims against individuals who, acting in an official capacity for any foreign nation, committed torture and/or extrajudicial killing outside the United States.[64] The TVPA is the only ATS cause of action created by Congress rather than the courts.[65]

As a cause of action, the application of the TVPA differs from that of the ATS in a few important respects. First,

63 *Jesner v. Arab Bank*, PLC, 584 U.S. 19, 25 (2018), https://www.supremecourt.gov/opinions/17pdf/16-499_new_7648.pdf.

64 US Congress – House of Representatives, *Torture Victim Protection Act of 1991*, HR 2092, 102nd Congress, 2nd Session, Introduced April 24, 1991, https://www.congress.gov/bill/102nd-congress/house-bill/2092/text. The TVPA was passed in 1991 and signed into law by President George H.W. Bush in 1992. The statute was codified as a "note" to the Alien Tort Statute 28 U.S.C. § 1350.

65 Ibid. See also *Jesner* at 19-23.

Mahmoud Alavi, Minister of Intelligence, 2013 - present. Alavi has overseen arrests, torture, and the murder of journalists, human rights defenders, dissidents and ethnic and religious minorities in Iran. Alavi also plays a key role in the targeting of Iranians abroad for harassment and even assassination. *Source:* Wikimedia Commons/Tasnim News Agency (https://commons.wikimedia. org/wiki/File:Mahmoud_Alavi_at_Bushehr.jpg).

unlike the ATS, claims under the TVPA can only be brought against defendants who act under the authority of a foreign nation—so non-state actors cannot be sued.[66] Second, while the ATS provides a basis through which corporations can be sued (albeit greatly restricted since *Jesner*) the TVPA provides no basis for liability against corporations.[67] Third, the only torts that a plaintiff can sue for under the TVPA are torture and/or extrajudicial killing, not the wide range of international law torts that a plaintiff can sue for under the ATS.[68] Fourth, the TVPA allows US citizens to act as plaintiffs, unlike the ATS, which allows only non-citizens to file for relief. However the cause of action must require foreign state action. In contrast, under the ATS, a noncitizen plaintiff can bring claims against either citizen or noncitizen defendants. Fifth, TVPA claimants are statutorily required to exhaust all "adequate and available" remedies in the country where the offense occurred, but it is not settled whether this same requirement applies to ATS claimants.[69]

The TVPA can also be invoked by victims of terrorism to sue officials from designated state sponsors of terrorism, and has been pleaded in tandem with claims pursuant to the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA) of 1976 to seek redress for the claimant.[70]

Similar to the ATS, the TVPA helpfully provides a path for redress for those subjected to abuses in Iran but who were not US nationals at the time, to recover under the statute. However, similar to the challenges with service with the

66 In 2010, in *Samantar v. Yusuf*, the Supreme Court decided that the Foreign Sovereign Immunities Act (FSIA) did not apply to individual foreign officials, whose immunity is governed by common law. Therefore, suits against foreign officials brought under the ATS and TVPA could proceed. This decision was applauded by human rights lawyers. See statement from CJA, "Samantar v. Yousuf: Victory at the Supreme Court," The Center for Justice and Accountability, https://cja.org/what-we-do/litigation/yousuf-v-samantar/related-resources/samantar-v-yousuf-victory-at-the-supreme-court/. Aside from state officials, for the purposes of the TVPA, an individual "acts under color of law" when they "ac[t] together with state officials or with significant state aid." *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2nd Cir. 2007).

67 In *Mohamad v. Palestinian Authority*, the US Supreme Court unanimously held that the TVPA applies exclusively to individuals and does not impose liability against corporations. *Mohamad v. Palestinian Authority*, 566 U. S. 449, 456 (2012), https://www.supremecourt.gov/opinions/11pdf/11-88.pdf.

68 The ATS does not provide definitions for what constitutes "law of nations" or a "tort…committed in violation" of that law while the TVPA contains detailed definitions of extrajudicial killing and torture. Therefore, some courts, when ruling on ATS cases, apply the definitions found in the TVPA while other courts look to definitions under international law or alternative sources. See Ekaterina Apostolova, "The Relationship between the Alien Tort Statute and the Torture Victim Protection Act," *Berkeley Journal of International Law* 28 (2010): 640; see also Philip Mariani, "Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act," *University of Pennsylvania Law Review* 156, no. 5 (2008): 1383-438, http://www.jstor.org/stable/40041408. It should be noted that recent precedent has also allowed for "attempted extrajudicial killing" to be pursued as a claim under the TVPA; see Warfaa v. Ali, No. 14-1810 (4th Cir. 2016).

69 The Supreme Court in *Sosa* recognized that the exhaustion requirement may apply to the ATS as well, but did not mandate it. Subsequently some courts have held it is not required, while others have viewed it as a discretionary consideration. For more on the exhaustion of remedies requirement see generally Emeka Duruigbo, "Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection," *Fordham International Law Journal* 29, no. 6 (2005): 1245, 1277-1287, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2031&context=ilj; see also David Nersessian, International *Human Rights Litigation: A Guide for Judges*, Federal Judicial Center, 2016, https://www.fjc.gov/sites/default/files/2017/Intl_Human_Rights_Litigation_2017.pdf, 58-60.

70 The FSIA terrorism exception actually relies on the definitions of extrajudicial killing and torture that are provided in the TVPA. It defines these torts by reference to Sections 3(a) and 3(b) of the Torture Victim Protection Act of 1991, respectively. 28 U.S.C. § 1605A(h)(7). In some cases, the FSIA cause of action has been recognized but not the TVPA cause of action. See, for example, *Dammarell v. Islamic Republic of Iran*, 370 F. Supp. 2d 218 (D.D.C. 2005), https://www.courtlistener.com/opinion/2528828/dammarell-v-islamic-republic-of-iran/.

ATS, with TVPA suits, establishing personal jurisdiction over the defendant is a key hurdle.[71] For the reasons already detailed in Section VI(B) above, this is challenging where IRI perpetrators are concerned due to immigration restrictions that keep them from traveling to the United States. Also, the TVPA does not apply to liability for corporations so that would also rule out serving financial institutions or other corporations that could be alleged to have aided or abetted IRI officials in the commission of torture and/or extrajudicial killings.[72]

However, should the political climate change and potential defendants in human rights–related cases involving Iran begin to come to the United States, process of service would become possible in these cases. If so, changes to the TVPA statute that could make it more effective in Iran-focused human rights litigation include the following:

1) ***Extending liability to corporations.*** In the 2012 US Supreme Court case of *Mohamad v. Palestinian Authority*, the court unanimously ruled that the TVPA applies exclusively to individuals and does not impose liability against corporations. Referencing the extensive legislative history of the TVPA bill, the court noted that the original bill language had used the word "person" and that an amendment was proposed by one of the bill's sponsors "to make it clear we are applying it to individuals and not to corporations." While the court relied on Congress's intentions to rule on whether the statute provided for corporate liability, there is nothing preventing Congress from amending the statute to expressly provide for liability against corporations. This has previously been pushed for by some legal advocacy groups.[73]

2) ***Applying it to non-state actors.*** The statute currently requires that the defendant acted in an official capacity for any foreign nation. If the statute was amended to allow for corporate liability, the "actual or apparent authority" requirement may still preclude financial institutions, for instance, from being sued under TVPA. Instead, the statute could be amended to allow for application to non-state actors.[74] This could also allow for recovery against street vigilantes doing the bidding of the IRI where state nexus may be hard to prove, or against the leadership of formerly armed groups in the IRI, such as the Mujahedin-e-Khalq (MEK).

3) ***Amending with additional causes of action.*** While the ATS allows for civil recovery for a broad range of human rights abuses for noncitizens and the FSIA allows for a US national claimant to sue Iran as a state sponsor of terror, there is currently no civil litigation option open for a US national who wishes to sue individuals for human rights violations and abuses in the Iranian context, when the abuses do not involve allegations of torture or extrajudicial killings. Extending the TVPA so that it covers other atrocity crimes and human rights violations and abuses including crimes against humanity could help close that loophole.[75]

RECOMMENDATION: Have Congress amend the TVPA so that it expressly provides for liability against corporations, applies to non-state actors, and includes additional causes of action including crimes against humanity.

D. Foreign Sovereign Immunities Act Litigation

Another tool that human rights violation survivors and victims can use for litigation is Section 1605A of the United States Code, or what is commonly referred to as the "terrorism exception" to the Foreign Sovereign Immunities Act.

Under US law, the FSIA grants foreign states and their agencies and instrumentalities immunity from suit in the United States (called "immunity from jurisdiction" or "immunity from adjudication") and grants their property immunity from attachment and execution in satisfaction of judgments against them (called "immunity from enforcement" or "immunity from execution").[76]

71 Often, a defendant will need to be served personally to meet this requirement. While Rule 4(k)(2) of the Federal Rules of Civil Procedure sometimes provides personal jurisdiction over foreign defendants, the contacts that the potential defendants in an Iran-focused case have with the United States are likely insufficient to establish personal jurisdiction.

72 Courts are split on whether or not the TVPA allows for accessorial liability. The statutory language does not explicitly address modes of liability. See, for example, *Romero v. Drummond Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777, 779 (9th Cir. 1994); cf. see, for example, *Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912, 924–25 (S.D. Tex. 2012); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010).

73 See, for example, "Fourth Annual Meeting of the International Corporate Accountability Roundtable (ICAR)," International Corporate Accountability Roundtable, September 11-12, 2014, https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58672164be65940ffdeaf058/1483153766436/ICAR-4th-Annual-Meeting-Report.pdf, 7.

74 US Congress - House of Representatives, Tom Lantos Human Rights Commission, *Testimony of Beth Van Schaack on Pursuing Accountability for Atrocities*, June 13, 2019, https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf, 15-16.

75 Currently, there is no substantive criminal statute covering crimes against humanity in Title 18 of the US Code; however, Congress has recognized the concept of crimes against humanity in its legislation and plaintiffs have pleaded crimes against humanity as a cause of action in Alien Tort Statute cases, so there is a precedent to rely on.

76 *Jurisdictional Immunities of Foreign States*, US Code 28 §§1604, 1609.

The grants of jurisdictional immunity are subject to six general exceptions, as well as a seventh specific terrorism exception.[77] The seventh exception, codified as 28 U.S.C. § 1605A, provides that the terrorism-related activities of a state that the US government has designated as a state sponsor of terrorism (SST) are not immune from suit.[78]

This particular exception is almost unique to the United States, since to date only one other country—Canada—has adopted a comparable limitation to the general rule of sovereign immunity when it comes to terrorism.[79]

The value of the terrorism exception to the FSIA for human rights litigation that seeks to hold the IRI to account is that the enumerated acts covered under the provision include torture and extrajudicial killings. While personal jurisdiction can be challenging to secure in the case of IRI officials responsible for human rights abuses for the purposes of ATS and TVPA litigation, as discussed in Sections VI(B) and VI(C) *supra*, the same hurdles do not apply to FSIA terrorism exception litigation, making redress possible for survivors of torture and victims of extrajudicial killing.

Some commentators have criticized the application of these laws as overbroad and the cases as inherently politicized.[80] However, it should be noted that where terrorist activity is alleged, in both criminal and civil litigation, charges or claims of human rights violations and atrocity crimes are not sufficiently explored where they could be.[81] While pushing for strengthening the ATS and TVPA tools, which have been the pillar of human rights litigation and an example worldwide, human rights advocates can also seek to sharpen terrorism-related civil authorities that can provide redress for conduct like torture, extrajudicial killings, and other human rights offenses and atrocity crimes.

There are procedural and substantive benefits to pursuing civil claims for torture against a state as opposed to individuals.

As a procedural matter, service is easier to achieve since complaints are served state to state, and do not require that the defendant maintain sufficient minimum contacts with the forum state or be served in person.[82] Also, as a procedural matter, defendant companies may try to shirk responsibility by alleging that plaintiffs have not sued the IRI directly—a suit against the state filed as part of one complaint or separately would address that criticism, even where it is legally baseless.[83]

As a substantive matter, establishing the responsibility of the state is key to combating impunity. Individual accountability is a vital element in the effort to combat impunity for human rights violations and abuses; however, the state possesses the ultimate position of authority. Therefore, the state is responsible for the wider patterns of violations that must be revealed and adjudicated to fully combat gross impunity for human rights violations. Establishing state responsibility will counter any assertions from governments that the actions being litigated are simply those of a rogue official, when in fact they are indicative of a broader pattern of abuse.

77 See *Jurisdictional Immunities of Foreign States*, § 1605(a), for general exceptions and § 1605A for the specific exception.

78 Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which removed legal immunity for foreign state sponsors of terrorism. Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43. This act allowed US citizens to file lawsuits against countries listed on the state sponsor list; however, it did not provide for the collection of damages. To redress this, Congress passed the Civil Liability for Acts of State Sponsored Terrorism (more commonly known as the "Flatow Amendment," codified as a note to Section 1605, which gave US courts the power to award monetary damages to US citizens victimized by state sponsored acts of terror. Omnibus Consolidated Appropriations Act, US Code Annotated 28 § 1605 (1996).

79 In March 2012, Canada amended its State Immunity Act to permit victims of terrorism who are Canadian citizens and permanent residents of Canada, as well as others if the action has a "real and substantial" connection to Canada, to seek redress against designated state sponsors by way of a civil action for terrorist acts committed anywhere in the world on or after January 1, 1985. *See State Immunity Act*, R.S.C. (1985), § 18, http://laws-lois.justice.gc.ca/PDF/S-18.pdf. Similar laws do not exist in other countries that have their nationals in Iran's prisons, including the United Kingdom, Germany, Australia, and France. These systems could benefit from the addition of these laws that would remove immunity for the IRI's practice of hostage taking. For more on this, see Sections VII(B) and VII(C) of this report.

80 See, for example, E. Perot Bissel V and Joseph R. Schottenfeld, "Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act," *Yale Law Journal* 127, no. 7 (May 2018): 1890-1915, https://www.yalelawjournal.org/comment/exceptional-judgments.

81 In respect to criminal matters in the United States, for example, there is a tendency to treat human rights matters and counterterrorism matters as separate portfolios; however, there is often significant overlap in the underlying conduct that gives rise to these crimes. The artificial separation is partly due to structural design—for example, the way US government investigative and prosecutorial teams are constituted—which does not encourage a cross-sectional approach among departments. This fragmentation has led to outcomes such as returning Islamic State of Iraq and al-Sham (ISIS) members and supporters being charged under US federal terrorism laws, but not being charged with war crimes per 18 U.S.C. § 2441, even though there would be a strong evidentiary showing to support those charges. For example, see the indictment in federal court in Brooklyn charging Ruslan Maratovich Asainov, who was a sniper for ISIS and trained other ISIS members in the use of weapons. The indictment charges him with conspiracy to provide material support to ISIS and providing material support to ISIS, among other charges, but no charge for war crimes. See "American Citizen, an Alleged ISIS Sniper and Weapons Instructor Indicted for Providing Material Support to ISIS," US Department of Justice, September 4, 2019, https://www.justice.gov/opa/pr/american-citizen-alleged-isis-sniper-and-weapons-instructor-indicted-providing-material.

82 See 28 US Code § 1608 for requirements for service on a foreign state or political subdivision of a foreign state. For purposes of service of FSIA suits, there are four methods for serving process upon a foreign state, and they are listed in § 1608(a) in order of descending preference. The least-preferred method, but the one often used in suits against the Islamic Republic of Iran, involves the US State Department forwarding complaints via the Swiss government to the US Interests Section of the Swiss Embassy in Tehran.

83 See, for example, the statement of Nokia Siemens Network in response to the withdrawal by former political prisoner and Iranian journalist Isa Saharkhiz of the suit filed against the company. James Farrar, "Nokia Siemens Networks Respond to Iran Human Rights Abuses Claims," *ZDNet*, August 20, 2010, https://www.zdnet.com/article/nokia-siemens-networks-respond-to-iran-human-rights-abuses-claims/.

An Iranian fugitive judge who died after a fall from a hotel window in the Romanian capital Bucharest, Gholamreza Mansouri was accused of corruption in Tehran and of human rights violations by lawyers and activists. *Source:* Wikimedia Commons (https://commons. wikimedia.org/wiki/File:Gholamreza_mansouri.jpg).

In some instances, suing the state can also fill gaps in accountability where justice has proved elusive. While universal jurisdiction prosecutions in Europe for atrocities in Syria are now on the rise, up until recently, Syrian President Bashar al-Assad's regime enjoyed total legal impunity for war crimes since 2011.[84] In that legal lacuna, US-based human rights lawyers used the terrorism exception to the FSIA to sue the Syrian Arab Republic for the 2012 killing of veteran war correspondent Marie Colvin, who died under regime fire while covering the siege of Homs, Syria.[85] The Colvin case was the first time a court held the Assad regime responsible for crimes committed during the ongoing Syrian civil war.[86]

The sections below lay out the current state of the law, present its potential application to Iran, and outline tweaks in the legislation and enforcement that could aid in the use of this litigation to seek human rights redress.

i. Statutory exception to state immunity for terrorism

Section 1605A(c) of the US Code creates a private right of action against a foreign nation sponsoring terrorism under limited circumstances for certain damages, including economic loss, pain and suffering, and punitive damages. This provision overcomes what is referred to as "immunity from jurisdiction" or "immunity from adjudication," an immunity that prevents a court from hearing a case it would otherwise be able to hear.[87]

The terrorism exception was first established in 1996, and its use has steadily increased since then, with most complaints filed in the District of Columbia.[88] The exception has undergone several legislative amendments, and the contours of what it provides have been the subject of extensive litigation.[89]

In respect to human rights accountability in the context of Iran, the statute helpfully provides a remedy for acts of torture and extrajudicial killing, which can apply to the IRI's treatment of prisoners of conscience. It also provides a remedy for hostage taking, which applies to the IRI's

84 "Germany: Syria Torture Trials Opens," Human Rights Watch, April 23, 2020, https://www.hrw.org/news/2020/04/23/germany-syria-torture-trial-opens.

85 "U.S. Court: Foreign Sovereign Immunities Act," Center for Justice & Accountability, accessed May 28, 2020, https://cja.org/what-we-do/litigation/colvin-v-syria/foreign-sovereign-immunities-act/.

86 Anne Barnard, "Syria Ordered to Pay $302.5 Million to Family of Marie Colvin," *New York Times*, January 31, 2019, https://www.nytimes.com/2019/01/31/world/middleeast/syria-marie-colvin-court-judgment.html.

87 Immunities typically fall into two categories: i) those at the jurisdictional stage (called "immunity from jurisdiction" or "immunity from adjudication"), which prevents a court from hearing a case where it otherwise would have been capable of doing so, and ii) those at the enforcement stage (called "immunity from enforcement" or "immunity from execution"), which prevents a court from recognizing a judgment or arbitral award.

88 In 1996, Congress amended the FSIA to allow civil suits by US victims of terrorism against SSTs responsible for, or complicit in, such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241–43 ("Jurisdiction for Lawsuits against Terrorist States"), codified as 28 U.S.C. § 1605(a)(7). Congress also removed the immunity of assets of foreign states under the FSIA to pay judgment awards in cases advanced under the terrorism exception. 28 U.S.C. § 1610. After the DC Circuit found that the waiver of sovereign immunity did not itself create a cause of action, Congress passed the "Flatow Amendment" to create a cause of action for such cases. Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996), codified as 28 U.S.C. § 1605 note.

89 In 2008, pursuant to the National Defense Authorization Act (NDAA), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338–44, Congress moved §1605(a)(7) to a new section and created an express federal cause of action for acts of terror that also provided for punitive damages. See §1605A(c). In 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA), which created a civil cause of action against foreign states for injury or death occurring in the United States based on an act of international terrorism occurring in the United States and a tortious act undertaken by a foreign state or any official, employee, or agent of that state while acting in their official position. This amendment enabled families of victims of the September 11 attacks to sue the Kingdom of Saudi Arabia for damages. The legislation also explicitly allowed for aiding and abetting liability, and made that retroactive.

Iran's Foreign Minister Mohammad Javad Zarif meets Syria's President Bashar al-Assad in Damascus. *Source:* Reuters.

pattern of jailing dual nationals and foreign nationals for political leverage.[90]

a. Requirements for a claim

To sue under the terrorism exception for acts of terror that occur outside of the United States, a few requirements need to be met.

First, the underlying conduct alleged against the foreign state should involve torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts, resulting in personal injury or death.[91]

Second, at the time of (or as a result of) the acts alleged, the US secretary of state must have formally designated the foreign state as a government that has "repeatedly provided support for acts of international terrorism" pursuant to § 6(j) of the Export Administration Act of 1979, § 620A of the Foreign Assistance Act of 1961, § 40 of the Arms Export Control Act, or any other relevant provision of law. The list of designated state sponsors of terrorism is published every year, on April 30. As of the writing of this report, four countries are on the list: Iran, Syria, North Korea, and Sudan—though Sudan will be removed from the list following the US president informing Congress in October 2020 of his intent to formally rescind Sudan's designation as an SST.[92]

Third, to be eligible to sue, at the time the acts alleged occurred, the claimant or the victim must be one of the following: i) a US national; ii) a member of the US armed forces; or iii) otherwise an employee of the US government or of an individual performing a contract awarded by the US government, acting within the scope of the employee's employment.

90 "Leading Academics and Policy Experts Call on Iran to Release Imprisoned Dual Nationals," Center for Human Rights in Iran, September 18, 2020, https://www.iranhumanrights.org/2020/09/leading-academics-and-policy-experts-call-on-iran-to-release-imprisoned-dual-nationals/.

91 For the purposes of §1605A, "torture" and "extrajudicial killing" have the same meanings given to those terms in Section 3 of the Torture Victim Protection Act of 1991: "'Torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind. 'Extrajudicial killing' means 'a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.' An assassination qualifies." See *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 107 (D.D.C. 2000).

92 See "State Sponsors of Terrorism," US Department of State, https://www.state.gov/state-sponsors-of-terrorism/; see also "Statement from the Press Secretary on Sudan," US White House, October 23, 2020, https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sudan/.

March 11, 2019. Marie Colvin "Why have we been abandoned?"; in homage to slain journalist Marie Colvin who lost her life in Homs while covering attacks by the Bashar al-Assad regime in 2012. *Source:* Kesh Malek Organization (https://glimpse.keshmalek.org/syria-banksy-campaign/).

Victims may include those who were killed or physically or emotionally injured, as well as members of a victim's immediate family who suffered from intentional infliction of emotional distress. Additionally, the private right of action provided by §1605A recognizes that both the foreign state itself and any official, employee, or agent of that state can be held liable for personal injury or death resulting from any of the enumerated acts specified by the statute.[93]

b. Potential expansion

The IRI has been the subject of many suits under the FSIA, including for the IRI's bombing of the marine barracks in Beirut and acts of terrorism committed by IRI proxies like Hamas and Hezbollah.[94]

There is also a raft of cases involving the targeting of Iranian dissidents or perceived dissidents. The families of assassinated Iranian opposition leaders have filed FSIA claims, as have former dual national prisoners of conscience, as have the US-based families of Iranian prisoners of conscience.[95]

The ability of this statute to focus on the last category of cases and bring human rights violators to account can still be improved on by the following: i) expanding the

93 28 U.S.C. § 1605A(c) (2008). For example, the US Supreme Court held in *Samantar v. Yousuf*, 560 U.S. 305, 324–325 (2010) that the statute does not apply to individuals. In its decision, the court referred to § 1605A(c) as an example of Congress's ability to distinguish between "foreign states" and their officers, employees, and agents.

94 See *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31 (D.D.C. 2009), which is a consolidated opinion addressing cases of over one thousand individual plaintiffs who secured US court judgments against the Islamic Republic of Iran.

95 For cases of families filing for injuries resulting from assassinated Iranian dissidents see, for example, *Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27 (D.D.C. 2008) and *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16 (D.D.C. 2011). For cases of dual nationals bringing claims against the IRI for their custodial torture see, for example, *Hekmati v. Islamic Republic of Iran*, 278 F. Supp. 3d 145 (D.D.C. 2017); *Rezaian v. Islamic Republic of Iran*, Civil Case No. 16-1960 (RJL) (D.D.C. Nov. 21, 2019); and complaint filed in *Saberi v. Government of the Islamic Republic of Iran*. For cases involving US-based family members suing for the injuries resulting from treatment of their imprisoned family members see, for example, suit filed by Mehrangiz Kar for damages on account of the house arrest and eventual death of her husband, Siamak Pourzand, and the suit filed by Masih Alinejad for injuries resulting from the unjust arrest and detention of her brother Alireza Alinejad: "Herischi & Associates LLC Announces the Filing of Several Federal Cases against the Islamic Republic of Iran and Leadership," Herischi & Associates LLC, January 8, 2020, https://www.pr.com/press-release/793188; see also the suit filed by the family of Amir Abbas-Entezam, who, until his death in 2018, was the longest-held political prisoner in Iran. "Amirentezam vs. Islamic Republic of Iran and IRGC," Herischi & Associates LLC, July 12, 2019, https://www.ibhlaw.com/amirentezam.

Mohammad Jafar Montazeri, Prosecutor General, 2016 - present. He played a key role in suppressing the December 2017-January 2018 anti-government protests in Iran. He is also responsible for harsh prison sentences, including death sentences, issued against protesters participating in the November 2019 protests. *Source:* Wikimedia Commons/Fars News Agency (https://commons.wikimedia.org/wiki/File:Mohammad_Jafar_Montazeri_2018.jpg).

categories of plaintiffs who can bring suit, what acts they can bring suit for, and which states they can bring suit against; ii) ensuring compensation and enforcement of judgments; and iii) building US governmental mechanisms that can assist with suits and enforcement of judgments.

The expansion of these suits will help US-based victims seek justice for wrongs they cannot redress through Iranian or international courts. Because the money judgments awarded in these cases often number in the millions of dollars, there may be a concern from some observers that if there is a change in leadership in Iran, these judgments may leave a new, democratic government in Iran saddled with billions of dollars to pay out in outstanding court judgments.[96] These fears were amplified by the protracted negotiations between the US government and Sudan's transitional council to remove Sudan's designation as an SST—the length of which threatened to derail Sudan's democratic transition.[97] Should a democratic transition in Iran become a reality, the US government should be careful to support the Iranian people in that transition, and not repeat the missteps that almost threatened the Sudan transition.[98] Past precedents in the case of removal of Libya and Iraq are also instructive.[99]

1. Amendments to parties and scope

Standing

Currently, the standing requirements for FSIA suits are quite narrow. In respect to the Iranian human rights context, there are some individuals who have been able to file because they held US citizenship and were imprisoned and tortured in Iran on a visit back to the country.[100] In other cases, the family members of long-standing prisoners of

96 See, for example, the debate regarding the removal of Sudan from the US State Sponsors of Terrorism (SST) list, which many argued was the vestige of an outdated policy toward the previous authoritarian regime and should have immediately been removed to embrace the new, democratic government in Sudan. Cameron Hudson, "Removing Sudan's Terrorism Designation: Proceeding with Caution," Atlantic Council, Africa Source, March 16, 2020, https://www.atlanticcouncil.org/blogs/africasource/removing-sudans-terrorism-designation-proceeding-with-caution/. The negotiations for Sudan's removal from the list was further complicated by the unanimous US Supreme Court ruling in *Opati v. Republic of Sudan*, 590 US ____ (US Supreme Court 2020), which held that Sudan could be held liable for millions of dollars in punitive damages for the prior government's role in facilitating al-Qaeda's 1998 bombing of US embassies in Kenya and Tanzania. As of the writing of this report, a deal has been reached to remove Sudan from the SST list with the US president informing Congress in October 2020 of his intent to formally rescind Sudan's designation as an SST. See "Statement from the Press Secretary on Sudan," US White House, October 23, 2020, https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sudan/.

97 See Rebecca Hamilton, "'Sudan Has Made Amends. Let's Take It off the Terrorism List," *Washington Post*, October 6, 2020, https://www.washingtonpost.com/opinions/2020/10/06/sudan-has-made-amends-lets-take-it-off-terrorism-list/.

98 See arguments in Nesrine Malik, "Sudan Is Being Rewarded for Its Revolution with Blackmail," *The Guardian*, October 25, 2020, https://www.theguardian.com/commentisfree/2020/oct/25/sudan-rewarded-revolution-blackmail-sanctions-us-compensation.

99 For example, after the overthrow of former Iraqi President Saddam Hussein, the US Congress passed legislation that permitted the US president to make the terrorism exception to immunity under former §1605(a)(7) inapplicable to Iraq, depriving the courts of jurisdiction over then-pending actions, and courts subsequently relied on that authority to dismiss claims. Similarly, in the case of Libya, the Libyan Claims Resolution Act (LCRA), Pub. L. No. 110-301, 122 Stat. 2999, passed on July 31, 2008, and signed by President George W. Bush on August 4, 2008, required Libya to pay money into a settlement fund to compensate American victims of terrorism, upon which Libya's sovereign immunity to suit in US courts for injuries resulting from terrorist attacks would be restored. The families of victims who perished in the 1989 Libyan bombing of UTA Flight 772 over Niger challenged the US government's settlement of terrorism claims against Libya as a government "taking" of their previously obtained district court judgment for the act of terrorism that required just compensation—they did not prevail on appeal and sought US Supreme Court review, but the petition for writ of certiorari was denied. See *Alimanestianu v. United States*, 888 F.3d 1374 (Fed. Cir. 2018); see also the docket before the US Supreme Court: https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/18-295.html.

100 There are also cases in which someone whose application for naturalization was pending at the time the act occurred qualified under §1605A(c). See, for example, Asemani v. Islamic Republic of Iran, 266 F. Supp. 2d 24 (D.D.C. 2003).

Judge Mohammad Moghiseh was appointed as a judge on Iran's Supreme Court in November 2020. From 2014-2020, he was head of Branch 28 of Tehran's Revolutionary Court, where he oversaw countless unfair trials with unsubstantiated charges. He was known for sentencing journalists, artists, activists and internet users to lengthy prison terms, corporal punishment and execution, under the charges of collusion against national security. *Source:* Creative Commons/Mohsen Abolghasem (https://search.creativecommons.org/photos/8c137de1-b445-4b94-941b-5090e896a247).

conscience in Iran eventually moved to the United States and naturalized and could, if the harm was ongoing, sue under the statute once they obtained citizenship.[101]

However, there is a broader class of persons who now reside in the United States who were active parts of civil society in Iran and, for that, were jailed and tortured. Many of them now reside in the Washington, DC, area, where most FSIA complaints are filed. These individuals were not US nationals at the time the acts alleged occurred, but have since sought safe haven in the United States as asylum seekers or otherwise and are now naturalized citizens of the United States. If express language could be added to the statute so that this class of persons can also seek redress, it would at most involve a dozen cases a year, but would represent a major step in empowering victims and survivors to seek justice and reparations for human rights violations.

The broadening of the standing requirement could be achieved in a few ways. Already the term "national" is broader than the term "citizen" since the statute refers to the definition provided in the Immigration and Nationality Act (INA), and that definition holds that national can also mean "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[102]

In *Asemani v. Islamic Republic of Iran*, the federal district court held that the plaintiff, who alleged that he had been tortured and imprisoned in Iran in July 2000, was a "national" for purposes of the statute and bringing a claim.[103] Although Asemani was not a citizen at the time of the acts alleged in the suit, he had become a permanent resident of the United States in 1994 and had applied for US citizenship in 1999.[104]

However, the courts in more recent cases have been reluctant to recognize claims of permanent allegiance as qualifying under §1605A(c).[105] Some have opined that the definition in the INA can refer only to conferrals of US nationality that come from 8 U.S.C. §1408, which describes four categories of persons who "shall be nationals, but not citizens, of the United States at birth."[106]

Despite the restrictive reading by the courts, the US Congress can expand the category of plaintiffs with standing by embracing the INA definition of "national" and providing clarifying language as to whom it intends to permit to sue under this exception.

The operative part of the INA definition emphasizes that a claimant have a "permanent allegiance to the United

101 See, for example, suit filed by Mehrangiz Kar for the torture of her deceased husband, Siamak Pourzand, in Iran. See also the suit filed by prominent dissident Masih Alinejad for the IRGC's hostage taking of her brother Alireza Alinejad. "Herischi & Associates LLC Announces the Filing of Several Federal Cases against the Islamic Republic of Iran and Leadership," Herischi & Associates LLC, January 8, 2020.

102 See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22): "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

103 *Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24 (D.D.C. 2003).

104 Ibid.

105 See the discussion in *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 14 (D.C. Cir. 2015), relying on holding in Lin v. U.S., 561 F.3d 502 (D.C. Cir. 2009) that "manifestations of 'permanent allegiance' do not, by themselves, render a person a U.S. national"; See also In re Terrorist Attacks on Sept. 11, 2001, No. 03-MDL-1570 (GBD)(SN), 2017 WL 2671083 (S.D.N.Y. June 21, 2017).

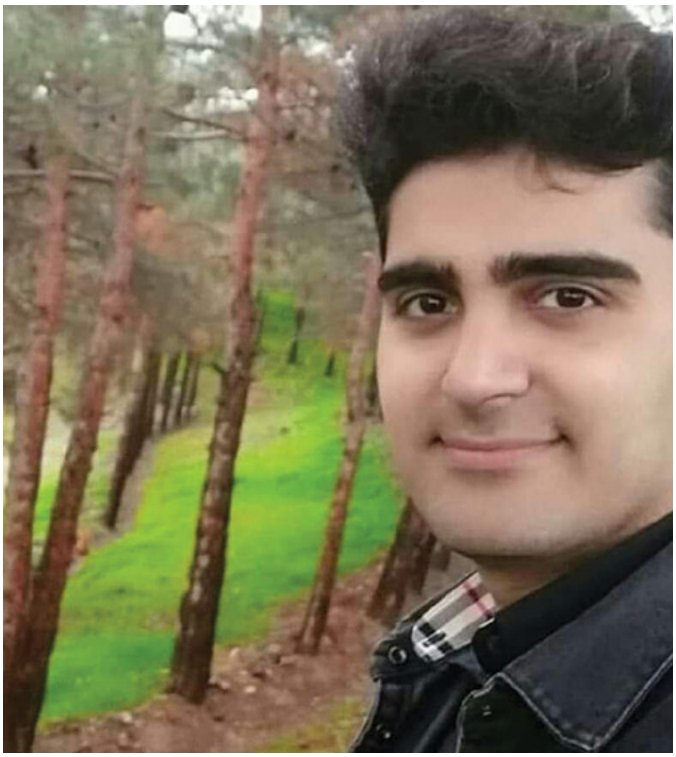
106 See 8. U.S.C. §1408, Public Law Nol: 99-396, 100-525 (2010).

States." It stands to reason that asylum seekers, who have forsaken their prior citizenship—either voluntarily or by force—from the country that they have fled from, and have chosen to embrace the United States as their new permanent home, have demonstrated a permanent allegiance to the United States. Studies have shown that immigrants and asylum seekers to the United States demonstrate high rates of civic engagement and are invested in their adopted home.[107] If express language can be added to the statute that allows for those who were tortured in Iran to now seek redress for their harms in US courts, it would seem an appropriate amendment for a group of persons who have demonstrated their full allegiance to the United States and who often represent a core dissident group to the IRI.

A proposed amendment could include the following language (added language in bold and italicized):

> (ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—
>
> (I) a national of the United States;
> (II) a member of the armed forces; or
> (III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment
>
> ***OR***
>
> ***(iii) if none of the conditions apply above, the victim is now a naturalized citizen or in the process of obtaining citizenship after coming to the United States as an asylum seeker or through another lawful immigration process.***

If a further narrowing of the language is required, it could be worded to say that the exception applies to any asylum seeker turned (or pending) naturalized citizen whose case has been documented in the country reports on human rights practices that are published annually by the US State Department.[108] Many Iranian prisoners of conscience who have sought asylum in the United States previously had their plights documented in these reports. Although the risk for filing frivolous claims is low with the original proposed wording, having a US State Department report requirement would further ensure that no frivolous claimant could file.



Pouya Bakhtiari was a peaceful protester who, according to eyewitnesses, was shot and killed by Iran's state security forces on November 16, 2019 in Karaj during the November 2019 anti-government protests. *Source:* Wikimedia (https://en.wikipedia.org/wiki/File:Paouya_Bakhtiari.png).

As a last note on process, amending the statute's standing requirements is not without precedent. The allowance for members of the US armed forces and foreign nationals working for the US government to sue under Section 1605A was added by Congress to cover victims of the 1996 Khobar Towers bombing in Saudi Arabia and the 1998 al Qaeda bombings of the US embassies in Dar es Salaam and Nairobi.[109]

Acts

Another amendment to FSIA that could encourage human rights accountability would be to have the exception to immunity extend to acts beyond torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such acts, resulting in personal injury or death.

107 See, for example, James C. Witte and Shannon N. Davis, "New Americans and Civic Engagement in the U.S.," *American Sociological Association*, June 26, 2017, https://journals.sagepub.com/doi/10.1177/1536504217714266.

108 US Department of State, *2018 Country Reports on Human Rights Practices: Iran*, March 13, 2019, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/iran/.

109 See Section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

For example, an amendment to the statute could prescribe that designated state sponsors of terrorism are not provided immunity from suit when they commit crimes against humanity. As noted above in Section VI(C), there is no substantive criminal statute covering crimes against humanity in Title 18 of the US Code; however, Congress has recognized the concept of crimes against humanity in its legislation and plaintiffs have pleaded crimes against humanity as a cause of action in Alien Tort Statute cases, so there is a precedent to rely on.[110] If permitted, this would allow plaintiffs to sue the IRI for the crime against humanity of rape, arbitrary detention, and more.[111]

Additional states

There is also an argument for amending the FSIA to provide greater accountability against human rights–violating states. Currently, only states listed on the state sponsor of terrorism list issued by the US State Department can be sued for torture, a substantive human rights violation. However, the FSIA could be amended to hold that any state with officials subject to sanctions for human rights violations issued by the US Treasury Department, in consultation with the US State Department, is not immune from suit for torture or other human rights violations that underpin the sanctions designation. As noted in Section VI(B) *supra* of this report on the Alien Tort Statute, such an amendment is unlikely to trigger concerns for US lawmakers about the comity of nations and diplomatic relations since the US government has already sanctioned the countries in question. The amendment could remove immunity for select states with country-specific human rights sanctions regimes (e.g., Venezuela) or go broader to apply to any countries with officials sanctioned pursuant to the Global Magnitsky Human Rights Accountability Act, which allows the US government to sanction foreign government officials responsible for human rights violations or corruption anywhere in the world.[112] Expanding the scope of the FSIA terrorism exception in this way would be narrow, and also avoid the other negative consequences that come with a state being designated as an SST (e.g., being cut off from the global financial system, getting denied loans from the International Monetary Fund and World Bank).

RECOMMENDATIONS: Amend §1605A(c) to provide a private right of action to those who became naturalized citizens after the events alleged in the suit occurred, or who are in the process of naturalizing at the time the suit is filed. Amend acts enumerated in §1605A(a)(1) to include crimes against humanity or other atrocity crimes. Amend §1605A to create a private right of action against states with officials sanctioned by the US government for human rights violations.

2. Enhancement of enforcement

Since 1996, US courts have awarded an estimated $90 billion against designated SSTs in civil suits pursuant to the terrorism exception to FSIA.[113] More than $50 billion of that amount has been awarded to claimants against the IRI in default judgments, the bulk of which has gone unpaid.[114]

Problems result partly from the restrictive provisions of the law itself, but more generally from the fact that SSTs have taken steps to minimize or eliminate any property or assets in the United States that might be subject to execution.

Yet ensuring that these money judgments can be paid out should be a top priority for any potential FSIA claimants and their counsels. Aside from the reparations that victims justly deserve, there is also the potential deterrent effect that can come with effective enforcement of judgments. While the IRI's lawyers have been unmotivated to defend any terrorism-related cases on the merits, they are incentivized to defend against enforcement of the money judgments that result, and have even taken the United States

110 The text for a US federal law on crimes against humanity, introduced by Senator Richard Durbin (D-IL) in 2009, proposed making it a crime to commit a widespread and systematic attack against a civilian population that involves murder, enslavement, torture, rape, arbitrary detention, extermination, hostage taking, or ethnic cleansing—however, the bill was ultimately unsuccessful. For more on this bill and where the concept of crimes against humanity has been recognized by Congress and US courts in civil litigation, see Beth Van Schaack, "Crimes against Humanity: Repairing Title 18's Blind Spots," *Arcs of Global Justice: Essays in Honour of William A. Schabas*, eds. Margaret M. de Guzman and Diane Marie Amann (Oxford: Oxford University Press, 2018), 350-351, 367-372.

111 The Durbin draft bill (see footnote directly supra) contained a definition of crimes against humanity that was more narrow than the definition under international law, and did not include the crime against humanity of deportation or forced transfer of population, enforced prostitution, persecution, enforced disappearance, apartheid, and the catch-all "other inhumane acts." The crime against humanity of persecution is germane to the Iran context, because it would allow persecuted religious minorities, such as members of the Bahá'í Faith, to see redress under the statute. While the Rome Statute mandates that persecution as a crime against humanity can be alleged only in conjunction with another crime under the statute, US law need not be bound by this formulation and can reject the notion that persecution as a crime against humanity must be committed in connection with other crimes under international law.

112 For an example of targeted sanctions placed on human rights violators, see US President - Executive Order, "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela, Executive Order 13692 of March 8, 2015," *Federal Register* 80, no. 47 (March 11, 2015): 12747. The Global Magnitsky Human Rights Accountability Act was signed into law on December 23, 2016, as Sections 1261-1265, Subtitle F, Public Law 114-328, of the FY17 National Defense Authorization Act. Its provisions were then significantly broadened by Executive Order 13818, issued on December 20, 2017.

113 Jennifer K. Elsea, *Justice for United States Victims of State Sponsored Terrorism Act: Eligibility and Funding*, Congressional Research Service, December 19, 2019, https://crsreports.congress.gov/product/pdf/IF/IF10341.

114 "Certain Iranian Assets" (*Islamic Republic of Iran v. United States of America*), Application Instituting Proceedings, Table 2 in Annex, International Court of Justice, June 14, 2016, https://www.icj-cij.org/files/case-related/164/164-20160614-APP-01-01-EN.pdf.

Alireza Avaei, Minister of Justice, 2017 - present. Avaei is responsible for arbitrary arrests, denial of prisoner rights and the extrajudicial killings of political prisoners. In his former role as a prosecutor, Avaei was involved in the IRI judiciary's mass show trials of civil society leaders and protesters following the disputed June 2009 presidential election. In 1988, he served on the "death commission" that sent thousands of political prisoners to the gallows. *Source:* Wikimedia Commons/Alireza.gharibdoust (https://commons.wikimedia.org/wiki/File:یدیس_عیلضاریآواوی.jpg).

to the International Court of Justice in an effort to stop enforcement of judgment awards.[115]

Some observers have criticized the size of these judgments, or argued that the judgments amount to unlawful seizure of the IRI's assets. In this regard, the following should be noted where it concerns human rights–focused cases brought under Section 1605A: i) The majority of the awards consist of punitive damages, which are on weaker legal footing than compensatory damages, and not guaranteed to be paid; ii) these awards do not resemble sanctions policy, in that these money judgments are tied to direct, clearly delineated harms recognized under international human rights law; and iii) victims of gross human rights violations have the right to justice, truth, and reparations—the last of which can be satisfied by damage awards.

Background on enforcement

With respect to money judgments awarded under the FSIA terrorism exception, judgment holders face an uphill battle in enforcing them against foreign states. This is partly due to the strict standards in place to access foreign sovereign assets even with a finding of liability, and partly due to the scarcity of assets available because the states in question have limited to no commercial engagement in the United States.

In the Iranian context, there have been long-standing litigation disputes around seized and frozen IRI assets in the United States and Europe, for the purposes of enforcing terrorism-related judgments. Some of this litigation has been successful, and has paved the way for millions to be paid to plaintiffs and their counsels.[116] Some of it is still pending over protracted, transnational legal battles.[117] The courts have tended to construe the execution of immunity exceptions as prescribed under the FSIA more narrowly than the exceptions to jurisdictional immunity, which may reflect the view that authorizing execution against a foreign sovereign's property is a greater intrusion on state sovereignty than merely exercising jurisdiction.

Concerning immunity from enforcement, the general rule under 28 U.S.C. §1609 is that the property in the United States of a foreign state or its agencies and instrumentalities is "immune from attachment, arrest and execution." The rule is subject to existing international agreements that the United States was a party to when the FSIA was enacted in 1976, and Section 1610 of the United States Code provides two terrorism-related exceptions to immunity

115 Ibid.

116 See, for example, *Bank Markazi v Peterson*, 578 U.S. 1 (2016), https://www.supremecourt.gov/opinions/15pdf/14-770_9o6b.pdf, in which the US Supreme Court ruled that Iran's Markazi Bank must pay nearly $2 billion to victims of terrorist attacks. The case brought by the families of Americans killed in terrorist attacks sponsored by the IRI, including relatives of those who died in the 1983 Marine Corps barracks bombing in Lebanon which killed 241 servicemen.

117 For example, see the ruling from a Luxembourg court concerning $1.6 billion in frozen IRI assets, where the court held that there is no terrorism exception to sovereign immunity in Luxembourg law and so the court could not enforce the payout of US rulings against the IRI. See the judgment from March 2019 [in French]. "Jugement Civil 2019TALCH01/00116" (District Court, Luxembourg, First Chamber, 2019), https://justice.public.lu/dam-assets/fr/actualites/2019/Jgt20190327-exequatur-anonyme.pdf. The ruling was appealed, but in April 2020 an appeals court in Luxembourg found the US seizure demand "inadmissible." The ruling is not final and can still be appealed at Luxembourg's highest court. "Luxembourg Court Decision to Block Transfer of Iran Money to US Is Not Final," *Radio Farda*, April 13, 2020, https://en.radiofarda.com/a/luxembourg-court-decision-to-block-transfer-of-iran-money-to-us-is-not-final/30551315.html.

from enforcement, the boundaries of which have been extensively litigated in US courts.[118]

Since the 1996 revision to the FSIA, which gave US courts the power to award monetary damages to US citizens victimized by state sponsored acts of terror, Congress has passed several pieces of legislation to aid judgment holders in recovery, including the Iran Threat Reduction and Syria Human Rights Act of 2012.[119]

Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 allowed plaintiffs in one consolidated case to access $2 billion held in a Citibank account in New York once controlled by Iran's Bank Markazi to satisfy judgments won against the IRI (by default). A determination of the legality of this legislation went all the way to the Supreme Court of the United States, with the dissent opining that this was an impermissible intervention by Congress in the judicial process, and the majority simply viewing this as a move to eliminate procedural obstacles unique with a foreign sovereign.[120]

On December 20, 2019, President Trump signed into law Section 1226 of the National Defense Authorization Act, which amends Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, and attempts to solve a protracted court battle to allow even greater recovery of IRI assets overseas for terrorism-related judgment holders.[121]

In 2015, Congress approved the establishment of the US Victims of State Sponsored Terrorism Fund (USVSST Fund), a specific fund for the purpose and a more reliable method of satisfying these judgments. It compensates Americans who i) hold a final judgment for compensatory damages issued by a US district court against a state sponsor of terrorism; ii) were held hostage during the takeover of the US embassy in Tehran in 1979, or are the spouses or children of those hostages; and iii) are the personal representative of a deceased individual in either of these two categories.[122] The fund gets its monies in part from penalties the US government levies on financial institutions engaging in sanctions violations and other illicit activity.[123]

However, claims on the fund by victims of the September 11 attacks have almost exhausted the fund completely, leaving other claimants unpaid.[124] Additionally, the fund can pay out only compensatory damages, leaving millions of punitive damage awards unsatisfied and without prospect of immediate payment. The fund could be replenished with US taxpayer dollars, but there is a question over whether US taxpayers should be shouldering the expense of foreign state sponsored terrorism when other sources may be available.

There are a few suggested changes that can assist in obtaining better outcomes for human rights–focused FSIA terrorism exception cases and eventual enforcement of money judgments, discussed below.

118 The first exception provides that the property in the United States of a foreign state used for a commercial activity in the United States shall not be immune from attachment or execution upon a judgment of a US court, if the judgment relates to a claim for which the foreign state is not immune under the terrorism exception regardless of whether the property is or was involved with the act upon which the claim is based. See 28 U.S.C. 1610(a)(7). The second exception permits attachment of, and execution against, the property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity, and does not require that the property itself has been used for commercial activity. See 28 U.S.C. 1610(b)(3).

119 See 22 U.S.C. § 8772, Public Law No: 112-158 (08/10/2012). Other legislation included the Terrorism Risk Insurance Act of 2002, which had limited practical impact. See Pub. L. No. 107-297, §§ 101(b) and 201(a), 116 Stat. 2322, 2337 (2002 (codified at 28 U.S.C. § 1610 note).

120 See *Bank Markazi v Peterson*, 578 U.S. 1 (2016) (Roberts, C.J., dissenting), https://www.supremecourt.gov/opinions/15pdf/14-770_9o6b.pdf. At the district court and appeals court levels, Bank Markazi contended that Section 8772 violated the separation-of-powers doctrine in the US Constitution, and both courts rejected the challenge. The Supreme Court affirmed the ruling of the lower court.

121 US Senate – Armed Services, "National Defense Authorization Act for Fiscal Year 2020," S. 1790 [ENR], One Hundred Sixteenth Congress of the United States of America - 1st Session, Washington DC, 2019, https://www.govinfo.gov/content/pkg/BILLS-116s1790enr/pdf/BILLS-116s1790enr.pdf. The provision was specifically aimed at making bonds located in an account in Luxembourg maintained by Clearstream Banking S.A., for the ultimate benefit of Bank Markazi, available to the victims and families of the 1983 marine barracks bombing in Lebanon and other terrorism judgment holders. On January 13, 2020, the Supreme Court of the United States remanded the judgment holders' demand for these assets to the US Court of Appeals for the 2nd Circuit for reconsideration in light of the new legislation. Then on June 22, 2020, the 2nd Circuit remanded it back to the lower court. That decision has not yet been issued as of the writing of this report. However, as noted earlier in this report, there is a question of whether judgment holders will even be allowed to recover from the Luxembourg monies. See "Clearstream Banking S.A. v. Peterson," *SCOTUSblog*, accessed September 17, 2020, https://www.scotusblog.com/case-files/cases/clearstream-banking-s-a-v-peterson/; Tucker Higgins, "Supreme Court Tosses Ruling against Iran's Central Bank in Case over Compensation for 1983 Beirut Bombing," CNBC, January 13, 2020, https://www.cnbc.com/2020/01/13/supreme-court-tosses-ruling-against-iran-central-bank-in-case-over-1983-bombing.html. See also P*eterson v. Islamic Republic of Iran*, 15-0690 (2d Cir. 2020).

122 For more on the US Victims of State Sponsored Terrorism Fund, see "U.S. Victims of State Sponsored Terrorism Fund," USVSST, September 8, 2020, http://www.usvsst.com/. The US attorney general appointed attorney Kenneth R. Feinberg on May 17, 2016, as the special master to administer the USVSST Fund. He retired from administering the fund in early 2019 and Deborah L. Connor, chief of the Money Laundering and Asset Recovery Section, Criminal Division, US Department of Justice, was named as the interim special master on March 8, 2019.

123 For example, the fund was supported by the forfeiture from BNP Paribas, which had to pay $3.839 million for sanctions violations. Of that amount, $3.800 million was permanently rescinded and transferred to the fund, as directed by Congress under the Consolidated Appropriations Act of 2016, Pub. L. 114-113, Div. O, Tit. IV, §404(e) and §405(b). See US Department of Treasury, *Treasury Forfeiture Fund: Congressional Budget Justification and Annual Performance Report and Plan FY 2019*, accessed May 2020, https://www.treasury.gov/about/budget-performance/CJ19/21.%20TEOAF%202019%20CJ.pdf.

124 This has been a point of concern for counsel for the Iran hostages, many of whom remain uncompensated, see Sarah Parvini, "They Were Hostages in Iran for 444 Days. Decades Later, They're Waiting for Compensation," *Los Angeles Times*, November 3, 2019, https://www.latimes.com/world-nation/story/2019-11-03/iran-hostages-444-days-decades-later-waiting-compensation; see also Spencer S. Hsu, "Syria Ordered to Pay $302 Million for 'Targeted Murder' of Journalist Marie Colvin," *Washington Post*, January 31, 2019, https://www.washingtonpost.com/local/legal-issues/syria-ordered-to-pay-302-million-for-targeted-murder-of-journalist-marie-colvin/2019/01/31/3ea6eade-2582-11e9-81fd-b7b05d5bed90_story.html.

Trebling compensatory damages for victims' claims

Courts in FSIA cases have awarded both compensatory and punitive damages in judgment awards to plaintiffs. Under the FSIA, compensatory damages are an award of money that includes damages for solatium, pain and suffering, and economic loss, while punitive damages are awarded for the express purpose of punishing the defendant and to deter future similar acts.[125]

Courts will often set a fixed amount per decedent for punitive damages, and typically that award consists of $150 million per decedent.[126] However, courts have recognized that a "multiplier" can be applied to the amount of punitive damages in some cases—for example, in "exceptionally deadly" terrorist attacks that result in multiple deaths—to arrive at a figure designed to deter similar future conduct.[127]

Also, where the foreign state targets journalists or dissidents, courts have ruled that this provides a basis for doubling the punitive damage award. For example, in *Colvin v. Syrian Arab Republic*, the court awarded the plaintiffs $300 million in punitive damages. The court justified the elevated award on the grounds that Colvin was attacked for her profession—unlike with most victims of terrorism—and that the court has an interest in safeguarding the important function of journalism in conflict zones.[128] A similar result was reached in *Oveissi v. Islamic Republic of Iran*, which involved the Paris street assassination of General Gholam Oveissi, a high-ranking official in the government of the former shah of Iran.[129] In *Elahi v. Islamic Republic of Iran*, the court awarded $300 million in punitive damages against the MOI, as an "agency or instrumentality" of the IRI, on the grounds that the assassination of Iranian dissident Cyrus Elahi by MOI agents violated "fundamental precepts of international law that are binding on all members of the world community" and to "recognize society's interest in the free expression of political ideas."[130]

While in theory these punitive damage awards intended to deter attacks on journalists and dissidents serve an important function, they are on weaker legal footing in courts than compensatory damage awards, with courts in Europe declining to recognize some punitive damage awards.[131] They are not prioritized by funds established by the US Congress for the purpose of paying out terrorism-related judgments. For this, and other reasons, commentators have criticized punitive damage awards as excessive and ineffectual from a policy standpoint.[132]

In respect to calculating compensatory damages, many activists, journalists, and dissidents who are targets of the IRI do not have high monetary incomes. They may have even carried out their work pro bono out of belief in the cause. Therefore, they (or their rightful heirs and beneficiaries) may not be awarded high compensatory damages on the basis of that income calculation. Yet, despite their lower monetary incomes, the value of what they worked toward in society (e.g., truth-seeking, peaceful dissent against corruption, championing women's rights) is something that is not easily quantifiable since it is work that advances human rights and democracy.

In Anti-Terrorism Act cases, victims are awarded treble damages for loss of income and other compensatory damages, in recognition of the serious nature of acts of terrorism.[133] A similar provision could be introduced for FSIA terrorism exception cases that would amend the statute to include a "multiplier" for compensatory damages in cases involving activists, journalists, dissidents, and others who are specifically targeted by the foreign state for the ideals they advance. Treble damages are treated differently in different jurisdictions, so while they are deterrent in

125 Compensatory damages seek to provide a plaintiff with the amount of money necessary to restore them to the financial state they were in prior to the action, or to replace what was lost. Punitive damages are calculated by these four factors: i) the character of the defendant's act, ii) the nature and extent of harm to the plaintiff that the defendant caused or intended to cause, iii) the need for deterrence, and iv) the wealth of the defendant. *Cohen v. Islamic Republic of Iran*, 268 F.Supp.3d 19, 27 (D.D.C. 2017).

126 *Wyatt v. Syrian Arab Republic*, 908 F.Supp.2d 216, 233 (D.D.C. 2012) (awarding $300 million in total to the estates of two victims and their families); *Gates v. Syrian Arab Republic*, 580 F.Supp.2d 53, 75 (D.D.C. 2014) (awarding $150 million each to the estates of two victims).

127 See discussion in *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37 (D.D.C. 2012) (applying a 3.44 multiplier).

128 *Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 163-165 (D.D.C. 2019).

129 *Oveissi v. Islamic Republic of Iran*, 879 F.Supp.2d 44, 56-57 (D.D.C. 2012).

130 *Elahi v. Islamic Republic of Iran*, 124 F.Supp.2d at 102, 114 (D.D.C. 2000). The judgment refers to the Ministry of Intelligence and Security (MOIS), the former name for the MOI.

131 See Cedric Vanleenhove, "A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional '¡No Pasarán!'" *Vermont Law Review* 347, no. 41 (February 2017), http://lawreview.vermontlaw.edu/wp-content/uploads/2017/01/06-Vanleenhove.pdf.

132 See, for example, E. Perot Bissel V and Joseph R. Schottenfeld, "Exceptional Judgments: Revising the Terrorism Exception to the Foreign Sovereign Immunities Act," *Yale Law Journal* 127, no. 7 (May 2018): 1890-1915, https://www.yalelawjournal.org/comment/exceptional-judgments (proposal on how to introduce certification processes and other mechanisms to curb punitive damage awards); Haim Abraham, "Awarding Punitive Damages against Foreign States Is Dangerous and Counterproductive," *Lawfare Blog*, March 1, 2019, https://www.lawfareblog.com/awarding-punitive-damages-against-foreign-states-dangerous-and-counterproductive.

133 *Gill v. Arab Bank*, PLC, 11-CV-3706 (E.D.N.Y. Oct. 15, 2012). Portions of the legislative history of the ATA suggest that Section 2333(a) was intended to provide American victims of terrorism with "all the weapons available in civil litigation." 137 Cong. Rec. S4, 511 (daily ed. Apr. 16, 1991) (statement of Senator Chuck Grassley, R-IA).

nature, because they supplant compensatory damages, they may have a greater chance of being paid.[134] These awards would have a stronger chance of being recognized in foreign courts, where IRI assets may be more accessible.

Creating government machinery that can aid in enforcement

Currently there is no machinery at the US State Department or US Treasury Department to deal exclusively with the enforcement of terrorism-related judgments.

Creating a policy office at the US State Department or the US Treasury Department that can weigh in on terrorism judgments would help harness the power of government in support of judgment holders. It could help identify potential opportunities for the recovery of assets to pay out terrorism-related judgments and would prioritize enforcement among other foreign policy aims. While the US State Department's Office of the Legal Adviser and different sections of the US Treasury Department currently touch on some disparate elements of terrorism-related judgment enforcement, establishing a single body dedicated to enforcement would bring all those pieces together and apply a holistic approach that could yield better results.

The US government has a vast ability to track and locate assets of SSTs, in particular through financial institutions. But, currently, none of that information is available to judgment holders, and the US government does not offer any concrete cooperation or pathway to tapping into that government power.[135]

Part of the reason for this might be that the US government wants to preserve for itself the ability to sanction and attach assets for some purposes or to track sponsors of terrorism. It is reasonable for the US government to not want to turn over any information that would frustrate its ability to carry out its national security responsibilities. But there should be a way for US government and judgment holders to work together—maybe even in confidential settings—to secure awards for terrorism. To assist in this, a new office could aid in securing understandings with other countries that if terror-related money or assets ever pass through their jurisdictions, that it can be seized and used to pay out legitimately obtained judgments against the owners of that money.[136]

A new office could also help work out when information can properly be declassified and help reduce the overreliance on redactions when they are not needed. According to attorneys who work on FSIA terrorism exception cases and Anti-Terrorism Act cases, the State Department is reluctant to share information that could help plaintiffs in terrorism-related cases, even where United States Central Command (CENTCOM) might be happy to. Freedom of Information Act (FOIA) requests go through the State Department, a process that attorneys say is cumbersome and exceedingly bureaucratic. Attorneys claim that in some instances, even when the information involves no

134 For example, in the case of *Miller Import Corp. v. Alabastres Alfredo, S.L.*, of November 13, 2001, the Spanish Supreme Court (Tribunal Supremo) decided to enforce a US judgment for treble damages (i.e., punitive damages arrived at by trebling the compensatory damages). While most European jurisdictions, save for the United Kingdom and Ireland, tend to not recognize punitive damages, there is not as much precedent on how treble damages may be treated. Because treble damages are a mix of compensatory and punitive damages in nature, they may have a better chance of being recognized by foreign courts. *Miller Import Corp. v. Alabastres Alfredo, S.L.*, Exequátur No. 2039/1999 (STS, Nov. 13, 2001).

135 One example where an office coordinating cooperation could have been helpful is with respect to the seizure of an Iranian tanker off the coast of Gibraltar in July 2019. The United Kingdom's Royal Marines seized the tanker, named the Grace 1, on July 4, on the grounds that it was carrying oil bound for Syria in breach of European Union sanctions, and passing through the territorial waters of a British Overseas Territory. The Gibraltar authorities planned to release the ship upon a written promise from Iran that the tanker would not sail to Syria or anywhere else covered by EU sanctions. However, as part of a last-ditch effort to hold on to the vessel, a federal court in Washington, DC, issued a warrant for the seizure of the tanker, the more than two million barrels of oil it was carrying, and $995,000, saying that the *Grace 1* had links back to the IRGC and was in violation of US sanctions against Iran. A court in Gibraltar rejected this reasoning, saying it was unable to comply with the US request because EU law has a different sanctions regime than the United States. It also noted that the IRGC was not designated a terrorist organization under EU, UK, or Gibraltar law. With no further legal reason for the tanker to be detained, the tanker eventually left port. However, if the court had been bound by EU, UK, or Gibraltar law, there were other legal arguments that could have been advanced to lay a claim on the tanker, including the satisfaction of terrorism-related judgments issued by US courts. At the time, there were two US court judgments against state sponsors of terror that were "domesticated," or recognized, by jurisdictions in the EU—including one recognized in the UK against the Syrian government for terrorism and one recognized in France against the IRI. The tanker was Iranian and the oil in the tanker was either Syrian or Iranian depending on the bills of lading. Therefore, these domesticated judgments could have been used under EU law to enforce the seizure of the tanker and its oil to pay out these outstanding terrorism judgments. However, according to the lawyers in possession of these domesticated judgments, no one from the US Department of Justice, the US Department of State, or the US Department of Treasury contacted them to inquire about borrowing these judgments for this purpose. It could have been that no one in the US government was aware that these judgments were domesticated and could be used for this purpose, or it could have been due to a lack of interagency coordination; however, if there was a policy office at US State or US Treasury expressly dedicated to the issue of terrorism-related judgments, it is likely it would have been considered as a possibility, and could have made a difference in successfully seizing the tanker and aiding in the effort to compensate victims of IRI-sponsored terrorism.

136 Over the past year, US government seizures of Iranian petroleum shipments obtained from foreign-flagged oil tankers bound for Venezuela—operations executed in cooperation with foreign partners—have sparked intense discussions on legality, global peace and security, and the overreach of sanctions. As of the writing of this report, the US Department of Justice has filed complaints to forfeit the proceeds from the petroleum sales, as well as US government seizures of missiles headed from the IRGC to militant groups in Yemen, with the intention to direct the funds to the USVSST, which pays out terrorism-related judgment holders. Funds successfully forfeited with a connection to a state sponsor of terrorism may in whole or in part be directed to the USVSST after the conclusion of the case. See "United States Files Complaint to Forfeit Iranian Missiles and Sells Previously-Transferred Iranian Petroleum," US Department of Justice, October 29, 2020, https://www.justice.gov/opa/pr/united-stated-files-complaint-forfeit-iranian-missiles-and-sells-previously-transferred.

Iran's Supreme Leader Ali Khamenei and former IRGC Quds Force commander Ghassem Soleimani. *Source:* Wikimedia Commons/ Khamenei.ir (https://commons.wikimedia.org/w/index.php?curid=60620096).

intelligence, no protected sources, or anything else that should be deemed classified, the information has not been provided and has been tagged as 1.4(c), which classifies intelligence activities, sources, and methods, and cryptology.[137] In some cases, attorneys have been forced to file lawsuits in court to enforce rights under FOIA.

There are several reasons why this may be the case.

One is simply institutional: Historically, the US State Department has been reluctant to criticize the IRI. For example, documents produced about the Iraq War that point to the role of the IRI in the ongoing violence in Iraq are so redacted that they have been rendered unusable in litigation. This may be because the invasion and occupation of Iraq—illegal under international law—was a policy failure, and the US government is hesitant to put out a report that reveals its own massive missteps and the levels of corruption in the Iraqi government that was installed following the invasion. It could also be because the years after have been a delicate time for the Iraqi government, as evidenced by mass anti-government protests that erupted in October 2019, and the US government might be concerned about upsetting the diplomatic balance in Iraq with the release of some of these documents.[138] More recently, the recalcitrance could be due to fragility in the Iraqi-US

137 Reasons for classifying documents include the following: "1.4(a) military plans, weapons systems, or operations; 1.4(b) foreign government information; 1.4(c) intelligence activities, sources, or methods, or cryptology; 1.4(d) foreign relations or foreign activities of the United States, including confidential sources; 1.4(e) scientific, technological or economic matters relating to national security; which includes defense against transnational terrorism; 1.4(f) United States Government programs for safeguarding nuclear materials or facilities; 1.4(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects or plans, or protection services relating to the national security, which includes defense against transnational terrorism; and/ or 1.4(h) the development, production, or use of weapons of mass destruction." See 5 FAH-3 H-700, E.O. 13526 and Smart Email Classification, 5 FAH-3 H-710 E.O. 13526 and Smart Email Classification (US Department of State, 2018), https://fam.state.gov/FAM/05FAH03/05FAH030710.html.

138 For more on the delicate US-Iraqi relationship see, for example, Alissa J. Rubin and Falih Hassan, "Protesters Mass in Baghdad, Demanding U.S. Leave Iraq," *New York Times*, January 24, 2020, https://www.nytimes.com/2020/01/24/world/middleeast/protests-iraq-baghdad.html.

relationship in the wake of the US government's targeted killing of Ghassem Soleimani in Iraq's territory, and ongoing militia attacks that have led to diplomatic tensions.[139]

Another reason may be a different philosophical approach to declassification. There is an ongoing debate as to what extent US intelligence needs to be classified. Some military officials have opined that overuse of classification inhibits public debate.[140] This is reflected in the disparity of what information military intelligence will turn over, as compared with what the State Department will turn over.[141] CENTCOM will declassify information that is more sensitive than what the State Department is prepared to declassify, including interrogations of alleged terrorists.

The last reason for FOIA delays and recalcitrance could simply be on account of a lack of resources. The office that processes requests is underfunded and that could be affecting the speed of operations.[142]

While there is no ready legislative fix for this, an office dedicated to terrorism-related cases and enforcement of judgments at State or Treasury could help challenge some of these practices. Much of the information needed to bring FSIA and ATA claims against the IRI is contained in intelligence reports on Iran, Iraq, Syria, and other regions and, arguably, many documents that go back more than a decade do not need strict classification, maybe just some light redactions. The US Secretary of State could direct the new office to work on those declassifications and thereby provide a vital information resource to survivors and families of victims who are seeking to build a case against the IRI and locate assets to assist in recovery.

Greater recognition of US judgments in Europe

At the moment, it is challenging to have US federal court terrorism-related judgments adopted by European jurisdictions. The reasons for the difficulties in enforcement are described in sections i) and ii) below. This is relevant because US judgment holders may seek to have their judgments recognized in Europe so as to access IRI assets in those countries. Any remaining IRI assets in the United States are highly contested, but assets are still available in Europe.

There are two approaches to increased judgment enforceability.

i) Guidelines on recognizing US judgments for terrorism-related judgments

As a starting point, it should be noted that there is no bilateral treaty or multilateral convention governing reciprocal recognition and enforcement of judgments between the United States and any other country.[143] Therefore, when a US judgment holder seeks to enforce a judgment with assets in another jurisdiction, they must seek to enforce the judgment per local laws.

This is not an automatic grant. Whether or not the judgment gets adopted or "domesticated" in the foreign jurisdiction depends on a number of factors. Recognition can be challenging depending on whether or not the local jurisdiction has similar laws, how it treats money damages, and other concerns.[144]

In the case of terrorism-related judgments against states, the difficulties in having a US judgment recognized in another jurisdiction include the differing approach of many jurisdictions to punitive damages and concerns around international comity.

Another major hurdle in recognizing terrorism-related judgments is that jurisdictions have different definitions for what constitutes "terrorism." The UN General Assembly is currently working toward adopting a comprehensive convention against terrorism; however, as of the writing of this

139 Edward Wong, Lara Jakes, and Eric Schmitt, "Pompeo Threatens to Close U.S. Embassy in Iraq Unless Militias Halt Attacks," *New York Times*, September 29, 2020, https://www.nytimes.com/2020/09/29/us/politics/pompeo-embassy-baghdad-iraq.html.

140 For example, in the fall of 2013, General Ray Odierno pushed for thirty thousand pages of documents about the US invasion and occupation of Iraq to be declassified and a report to be drafted that provides a critical assessment of the US experience in Iraq between 2003 and 2011, in the spirit of public debate and to accumulate lessons learned. See Michael R. Gordon, "The Army Stymied Its Own Study of the Iraq War," *Wall Street Journal*, October 22, 2018, https://www.wsj.com/articles/the-army-ordered-an-unvarnished-iraq-war-historythen-let-it-languish-1540220153.

141 For more on that difference see, for example, Warren P. Strobel, "Long-Classified Memo Surfaces Warning of 'Perfect Storm' from Invading Iraq," *Wall Street Journal*, March 13, 2019, https://www.wsj.com/articles/long-classified-memo-surfaces-warning-of-perfect-storm-from-invading-iraq-11552486945.

142 Vision Subcommittee Recommendations to the FOIA Advisory Committee, March 5, 2020, https://www.archives.gov/files/ogis/assets/foiaac-mtg-v-subcom-doc-2020-03-05.pdf.

143 See Carmen-Cristina Cîrlig and Patryk Pawlak, *Justice against Sponsors of Terrorism: JASTA and Its International Impact*, European Parliamentary Research Service, October 28, 2016, https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593499/EPRS_BRI(2016)593499_EN.pdf. "The recognition of a foreign judgment by a state is a matter either for domestic law or for agreement between states. The eight ratifying states of the [European Convention on State Immunity] recognize the judgments taken in their domestic courts, although immunity from enforcement remains absolute. Regulation (EU) No 1215/2012 provides for automatic recognition and enforcement of judgments in civil and commercial matters in the EU, except in Denmark; however, it does not apply to 'acts and omissions in the exercise of State authority (*acta iure imperii*)' and provides several grounds for refusing to enforce a judgment."

144 "Enforcement of Judgments," US Department of State, September 17, 2020, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

The Islamic Revolutionary Guard Corps marching in a Tehran military parade. *Source:* yjr.ir.

report, the international community has not yet agreed to a standard legal definition.[145] Some disputes center around political issues, for example, whether national liberation movements should be excluded from the scope of application of the definition or not.[146] The lack of alignment around a definition as well as selective application of this crime has led to a view by some states that terrorism is a "politicized" crime, and is a reason for reluctance to enforce terrorism judgments across borders.[147]

However, this impasse can be resolved, even before a global definition is finalized. There are common elements to a definition that UN member states have agreed to, and which have informed draft texts of the convention.[148] The Council of Europe (CoE)—the international organization on the European continent established to uphold human rights, democracy, and the rule of law in Europe—has a multilateral treaty on terrorism that provides definitions of the crime.[149] Additionally, although the Rome Statute—which most countries in Europe have ratified and incorporated by provision into their domestic laws—does not include "terrorism" as a separate crime, it does contain offenses that could encompass the terrorist conduct adjudicated in FSIA terrorism exception cases.[150] There are also FSIA terrorism exception cases that focus exclusively on acts of torture, for which there is an accepted global

145 UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 32, Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, https://www.refworld.org/docid/48733ebc2.html.

146 Ibid.

147 Ibid.

148 For example, draft Article 2 of the convention contains a definition of terrorism that includes "unlawfully and intentionally" causing, attempting, or threatening to cause: "(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems..., resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act."

149 Council of Europe, *European Convention on the Suppression of Terrorism*, January 27, 1977, ETS No. 90, https://www.refworld.org/docid/3ae6b38914.html.

150 For example, acts such as deliberate or indiscriminate attacks against civilians or hostage taking might be considered war crimes, as defined under Article 8 of the Rome Statute.

definition, as set forth by the Convention against Torture, which European states have ratified.[151]

In short, despite the lack of a standard global definition for terrorism, the acts alleged in cases against SSTs rise to the level of serious international crimes, for which European systems do have some analogs on which to base at least a minimum level of recognition.

The United Kingdom and Europe should set some clear guidelines for when they will recognize terrorism-related judgments from US courts. A nonrestrictive standard could be that if the victim is American, then they will recognize the judgment on the terrorism exception. A more rigorous standard could hold that the nexus must be an intentional targeting of nationals of the United States to qualify as a judgment their courts will recognize. An even higher standard could be to recognize judgments where i) there is a state that the United Kingdom or the European country recognizes as a sponsor of terrorism, ii) that state commits an act of terrorism, iii) it is clear that the state sponsor of terrorism is targeting nationals of the United States, and iv) there is a victim who is a US national.

If these rules existed then it would allow judgment holders for acts of torture to bring their judgments into European courts and potentially collect their recoveries there. Instead, US judgment holders are presently being dismissed from European courts.[152]

ii) Exception for serious international crimes to state immunity laws in Europe

As noted earlier in this report, some terrorism-related judgments from US courts have been domesticated in Europe. However, what makes it difficult to enforce terrorism-related judgments from US courts in European jurisdictions with IRI assets is that the United Kingdom and Europe do not currently have exceptions to state immunity for these offenses.

Currently, only the United States and Canada have laws on the books that provide an exception to state immunity for acts committed by states that are sponsors of terror. The United Kingdom and Europe have various exceptions to state immunity (e.g., commercial) but they do not have an analog to the terrorism exception to state immunity that the United States and Canada have. Therefore, the systems in the United Kingdom and Europe do not readily recognize the terrorism exception as a basis for jurisdiction.

To not have some form of exception to immunity for terrorist acts—particularly as Europe has seen more terrorist attacks since 2001 as compared with the 1990s—is unnecessarily narrow. The definitions do not need to mirror those of the United States—these countries can make their own sets of rules—but there should be some definition to override immunity in place.[153]

At present, there are not enough IRI assets remaining in the United States to change the IRI's calculation on whether it will still engage in acts like hostage taking. More than a dozen nationals and permanent residents of the United Kingdom and Europe are currently jailed in Iran's prisons.[154] These countries can try and change those numbers by making it costly for the IRI to continue with this practice. For the IRI, much hinges on the calculation. Are the hostages valuable enough in regard to political leverage in negotiations and at moments of crisis to justify still taking them? At the moment, the answer appears to be yes. But if it is gradually made more expensive, for example, by penalizing IRI hostage taking with the paying out of terrorism-related judgments for these acts, then that math can change over time.[155]

151 "Status of Ratification of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," Office of the United Nations High Commissioner for Human Rights, https://indicators.ohchr.org/, accessed November 30, 2020.

152 See case of survivors and families of victims of the marine barracks bombing in Lebanon seeking to enforce their US judgment for damages against an Italian bank holding IRI assets being challenged by Bank Markazi and being dismissed by an appeals court in Italy on January 10, 2020. "Italian Court Dismisses $6b US Lawsuit against CBI," *Financial Tribune*, January 15, 2020, https://financialtribune.com/articles/business-and-markets/101735/italian-court-dismisses-6b-us-lawsuit-against-cbi.

153 It should be noted that Iran has strongly protested the "highway robbery" of its assets and took the dispute to the International Court of Justice. Other countries in the Non-Aligned Movement have supported Iran's position. Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, November 2012), https://assets.cambridge.org/97805218/44017/excerpt/9780521844017_excerpt.pdf, 229; Victor Grandaubert, "Is There a Place for Sovereign Immunity in the Fight against Terrorism? The US Supreme Court Says 'No' in Bank Markazi v. Peterson," *EJIL Talk*, May 19, 2016, https://www.ejiltalk.org/is-there-a-place-for-sovereign-immunity-in-the-fight-against-terrorism-the-us-supreme-court-says-no-in-bank-markazi-v-peterson/.

154 The cases of some of the detainees have been publicized, while others have not. For more background and efforts of the E3 (UK, France, and Germany), see Patrick Wintour, "Nazanin Zaghari-Ratcliffe Avoids Being Returned to Jail," *The Guardian*, November 2, 2020, https://www.theguardian.com/news/2020/nov/02/nazanin-zaghari-ratcliffe-avoids-being-returned-to-jail; see also Patrick Wintour, "UK, France and Germany Summon Iranian Ambassadors over Prisoners," *The Guardian*, September 23, 2020, https://www.theguardian.com/world/2020/sep/23/uk-france-and-germany-summon-iranian-ambassadors-over-prisoners.

155 Some observers believe there is little that civil litigation can do to deter terrorism, citing the fact that multiple judgments have been delivered against the same defendants, sometimes in connection to the same actions, with punitive damages doing little to deter the repetition of terrorist activity. In the case of Iran, the chief judge of the District of Columbia District Court concluded in 2009 that "civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy" because these cases "do not achieve justice for victims, are not sustainable and threaten to undermine the president's foreign policy initiatives." See Carmen- Cîrlig and Pawlak, *Justice against Sponsors of Terrorism*. However, the more likely reason for this is the low percentage of judgments that are enforced—should the money damages have a greater prospect of being paid out, this calculation can change with time.

Introducing these laws in the United Kingdom and Europe will not only help survivors and victims enforce terrorism-related judgments, but will also help change the behavior of the IRI over time as it relates to practices like hostage taking.

The resistance to this is likely that the United Kingdom and Europe do not want to mimic what they view as a political statute in the United States. However, there are ways to approach crafting an exception that carves an independent path, focused on European values. Part of the FSIA terrorism exception focuses on the substantive crime of torture, for which there is currently no European exception to state immunity laws, but for which there is a widely accepted international definition. European jurisdictions should carve out an exception for serious international crimes that is not country-specific. More concrete proposals for Europe are discussed in Section VIII(B) *infra*.

RECOMMENDATION: The US State Department and/or US Treasury should create a policy office dedicated to the issues surrounding terrorism-related judgments, primarily to aid in the claiming of IRI assets abroad. US courts hearing FSIA terrorism exception cases should apply a "multiplier" to the amount of compensatory damages awarded to victims who are journalists and members of civil society so as to deter the IRI's future targeting of perceived dissidents. The US State Department, US Department of Justice, and US Congress should urge European states to adopt their own exceptions to state immunity laws for acts of terrorism and torture.

E. Anti-Terrorism Act

The Anti-Terrorism Act is codified at 18 U.S.C. § 2333, and was amended by the Justice Against Sponsors of Terrorism Act (JASTA) and the Anti-Terrorism Clarification Act (ATCA) of 2018.[156]

The ATA allows a national of the United States to seek treble damages for injuries to "his or her person, property or business by reason of an act of international terrorism." ATA cases have been brought against non-state entities, individuals, and even commercial banks in connection with acts of terrorism overseas.[157] ATA claims are often asserted with claims under other statutes with human rights applications, including the ATS, the TVPA, and the Racketeer Influenced and Corrupt Organizations Act. Standing under the ATA is limited to individuals injured in terrorist attacks or their estates, survivors, or heirs. Some courts have held that available damages include compensation for related emotional injuries as well.

To establish liability under the ATA, the plaintiff must prove the following:

i) *Act of International Terrorism.* The acts must 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." The statute expressly excludes "acts of war" and "domestic terrorism" from the acts a plaintiff can seek damages for. However, the act of war defense was narrowed by the ATCA, which limited the scope of the term "act of war" so that a designated terrorist organization could never be categorized as a "military force" that would be excluded from liability.

ii) *Injury.* The plaintiff (the victim, or their estate, survivors, or heirs) must be a national of the United States.

iii) *Causation.* The burden rests with the plaintiff to establish a causal link between the defendant's conduct (such as transferring funds or providing material support) and the terrorist acts in question.[158] Historically, the plaintiff needed to establish proximate cause. However, post-JASTA, the plaintiff may pursue secondary liability on the argument that a defendant aided and abetted acts of terrorism by others—and that those acts caused the plaintiff's injuries. Prior to the amendment in JASTA, courts were divided over the issue of secondary liability, and the statute was silent on the matter.[159]

iv) *Intent.* The statute does not include a state of mind requirement. Therefore, requisite mental state has

156 JASTA removes obstacles to certain lawsuits against the Kingdom of Saudi Arabia (which is not a US government designated state sponsor of terror) arising from the September 11 attacks, and the ATCA removes blockers to certain terrorism-related lawsuits against the Palestinian Authority (which the United States does not consider a foreign state).

157 Note that the ATA specifically excludes claims against the US government and government officials, however, as well as conduct involving acts of war. However, US companies are not immune from suit, and recent examples of suits filed show how plaintiffs' lawyers are going after companies with reachable assets (see, for example, a 2018 suit from a woman injured in the 2015 Paris attacks by ISIS who sued Facebook, Twitter, and Google, alleging that the social media platforms assisted terrorists by allowing them to recruit members, distribute propaganda, and coordinate activities).

158 The language of the statute: "... any national of the United States injured... by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore" did not explicitly state who could be the target of the lawsuit. Ultimately, *Boim v. Holy Land Foundation* was the first case to clarify that the ATA can impose liability for terrorist acts against persons or entities who provide material support to terrorists. *Boim v. Holy Land Foundation*, 549 F.3d 685 (7th Cir. 2008); see also Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (Oxford: Oxford University Press, 2016), 54-60.

159 Olivia G. Chalos, "Bank Liability under the Antiterrorism Act: The Mental State Requirement under §2333(a)," Fordham Law Review 85, no. 303 (2016), https://ir.lawnet.fordham.edu/flr/vol85/iss1/12.

been left to the courts to define. While secondary aiding and abetting and conspiracy liability are now permitted post-JASTA, the scope of that secondary liability is disputed. However, what is clear is that a showing of mere negligence is insufficient. The defendant must either knowingly engage in intentional misconduct or have acted recklessly or willfully blind to be held liable.

The expansion of the ATA to provide for aiding and abetting liability is significant because it confirms that plaintiffs can sue companies and other corporate actors, where they have provided material support in the form of money, goods, or services to foreign terrorist organizations. This is relevant with respect to cases concerning the actions of the IRI since financial institutions provide "material support" to the IRGC through the provision of financial services—and the IRGC is a designated terrorist organization under US law.

While the ATA has primarily been used to address acts of terrorism, it can also be used to seek redress for human rights violations and abuses and atrocity crimes where there is overlap with the "act of international terrorism" requirement. Such acts include any activities that "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 that "appear to be intended to coerce or intimidate a civilian population or influence government conduct or policy."

For example, ATA claims have been launched against technology giants Facebook, Twitter, and Google on the allegation that they assisted the Islamic State of Iraq and al-Sham (ISIS) and other terrorist organizations by providing the platform that allowed these groups to recruit members, distribute propaganda, and coordinate activities. Some of the underlying conduct alleged included war crimes, crimes against humanity, and torture.[160]

Even with the changes introduced by JASTA and the ATCA, the ATA standard for liability is still difficult to meet. With respect to the IRI, many cases have been brought on behalf of Gold Star Families against banks that provide financial services to the IRI, on the theory that IRI proxies in Iraq or Afghanistan killed those families' service members.[161] Some of those cases have been dismissed, for lack of clear causation, even following the ATA's express expansion to secondary liability.[162]

Such an issue would be less of a concern in alleging that a bank aided the IRI in abuses against Iranians in Iran. There, the links are clear, since IRI proxies are not committing abuses against the Iranian people, the IRI is.

The Trump administration's broad-based economic sanctions on Iran's entire financial sector are not pegged to dissuading any specific behavior. The Trump administration has indicated that it is looking for Iran to come back to the negotiating table on the nuclear file, and yet has also given indications that this is a regime-change strategy.[163] So it is not clear which, if any, actions taken by the Iranian leadership could bring sanctions relief. This may change with the incoming Biden administration, but it will take some time to logistically undo the extensive sanctions framework laid by the Trump presidency.[164]

In contrast, holding financial institutions responsible for acts that tie back to human rights violations and abuses against Iran's people sets clear guidance on which actions will be penalized and which will not. If financial institutions and other actors begin to take precautions, not just based on broad sanctions across a whole sector, but to make sure they do due diligence on whether leadership is engaging in human rights violations or not, this will introduce a different sort of calculus intended to curb human rights violations.

It will also provide for direct reparations to survivors of human rights violations and abuses. Currently, sanctions evaders in violation of the International Emergency Economic Powers Act pay penalties that go into a fund for the victims of terrorism, but this type of litigation will more closely draw the connection between the perpetration of violations and the reparations they need to pay.

160 David Kimball-Stanley, "Summary: Ninth Circuit Dismisses Civil Suit against Twitter for ISIS Attack," *Lawfare*, February 6, 2018, https://www.lawfareblog.com/summary-ninth-circuit-dismisses-civil-suit-against-twitter-isis-attack.

161 See, for example, Joe Palazzolo, "Veterans Accuse Six Banks of Aiding U.S. Foes," *Wall Street Journal*, November 10, 2014, https://www.wsj.com/articles/veterans-accuse-six-banks-of-aiding-1415669113; see also "Families of Americans Killed and Injured by al-Qaeda and Taliban Terrorists Sue Eight Multinational Corporations for Allegedly Financing the Attacks," Associated Press, December 27, 2019, https://apnews.com/press-release/pr-prnewswire/abcc6204fa22ec1ba10de90cf6d986c7.

162 Jonathan Stempel, "Nine Banks Win Dismissal of Iran Terrorism Financing Lawsuit: U.S. Judge," Reuters, March 29, 2019, https://www.reuters.com/article/us-iran-banks-lawsuit/nine-banks-win-dismissal-of-iran-terrorism-financing-lawsuit-u-s-judge-idUSKCN1RA214.

163 Philip H. Gordon and Ariane M. Tabatabai, "Trump Thinks 'Maximum Pressure' Will Change Iran. History Says He's Wrong," *Washington Post*, October 14, 2020, https://www.washingtonpost.com/outlook/2020/10/14/trump-biden-iran-sanctions-nuclear-deal/.

164 Ian Talley, "Trump Administration Hopes to Make Iran Pressure Campaign Harder to Reverse," *Wall Street Journal*, October 23, 2020, https://www.wsj.com/articles/using-terrorism-sanctions-trump-administration-hopes-to-tie-bidens-hands-on-iran-11603473828.

Cost-prohibitive litigation

The potential downside of the big financial penalties involved is that the high financial stakes mean that big corporations will have more resources to defend themselves in the litigation and exhaust the resources of the other side. To help facilitate ATA suits for human rights abuses, Congress should consider amending the statute to introduce a form of equitable or injunctive relief.

Currently, the ATA allows for money damages only as a form of relief.[165] Because some of the activity alleged is against financial institutions, which are helping to facilitate transactions that support the IRI, or other companies, whose goods or services are being used by the IRI to facilitate illicit activity, another form of relief could be equitable or injunctive—to simply get the company involved to stop the activity that is helping to facilitate the alleged activity.

Amended statutory language could provide an injunctive right to any private party who brings suit in federal court. This could be helpful in curbing corporate activity that aids or abets a government's human rights violations. At present, when major penalties are involved, financial institutions—with deep pockets—are willing to hire costly, top-level legal talent to procedurally block these actions, which can take years to litigate. Often, plaintiffs' firms do not have the resources to keep the legal battle going.

If Congress created a form of hybrid relief in the federal code that would allow for either monetary damages or equitable/injunctive relief, this could open the door to cases filed by plaintiffs who cannot afford a costly legal battle. This could allow for creative types of litigation (e.g., the suits against social media platforms) but would not overwhelm the courts, ensuring that potential litigants can seek positive human rights outcomes.

RECOMMENDATION: Congress should create a form of hybrid relief in the ATA that would allow for either monetary damages or equitable/injunctive relief so as to open the door to cases filed by plaintiffs who cannot afford a costly legal battle, and get companies and other actors to stop supporting human rights–violating behavior.

F. Claims under State Law

In addition to the federal statutes described above, claims against human rights abusers can also be brought under state laws in the United States.

Where this is helpful is in claims against financial institutions. As noted in the preceding sections of this report, the Supreme Court has ruled that the Alien Tort Statute can no longer apply to foreign corporations and soon may prohibit suits against domestic corporations as well; the Torture Victim Protection Act does not provide for liability against corporations; and the Anti-Terrorism Act requires that the liability of a company that aided and abetted a human rights–abusing terrorist organization go beyond a negligence standard.

As the ATS and TVPA have been narrowed by the US Supreme Court to limit the liability of companies in the commission of human rights abuses, litigators have increasingly turned to state law for applicable remedies.

One instructive case is *Kashef v. BNP Paribas S.A.*, in which victims of the Sudanese genocide filed a class action lawsuit against the Parisian bank BNP Paribas for its assistance to the Sudanese government, headed by now deposed leader Omar al-Bashir.[166] The plaintiffs alleged that BNP Paribas designed schemes to help Sudanese entities evade US sanctions and access the US financial system, despite knowing that those entities played a key role in supporting the Sudanese government when it was committing human rights violations and atrocity crimes.[167] The defendants admitted they had knowledge of the genocide and ethnic cleansing being perpetrated by the Sudanese regime and the consequences of providing the regime access to additional financial resources, which could be used to escalate the commission of atrocities.[168] The plaintiffs brought their claims under New York tort law, alleging that BNP Paribas conspired with and aided and abetted the Sudanese regime in committing atrocity crimes.[169] Ultimately, the US Court of Appeals for the Second Circuit held that the act of state doctrine—which traditionally precludes courts from inquiring into the validity of public acts that a recognized foreign sovereign power commits within its own territory—did not bar these claims, in part because

165 There are different types of relief, for example, as it applies to torture, such as justice and other forms of reparation, including restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition, in line with the obligations enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

166 Kashef v. BNP Paribas S.A., 925 F.3d 53 (2d Cir. 2019).

167 Ibid.

168 Ibid.

169 Ibid.

January 13, 2020. Faces of PS752 victims. The downing of Ukraine International Airlines Flight 752 (PS752) by Iran's IRGC forces on January 8, 2020 has put Canada's Iranian diaspora community into the spotlight. Of the 176 victims on the flight from Tehran to Kiev/Kyiv, 57 held Canadian citizenship and 138 were en route to Canada. *Source:* Creative Commons/Can Pac Swire (https://search.creativecommons.org/photos/5ac3a75c-4ee4-4da0-87c9-2af316648612).

the Second Circuit held that the underlying acts violate *jus cogens* norms—a category of norms accorded a peremptory status under international law and that includes torture—and therefore cannot trigger the doctrine.[170]

Similar litigation could be pursued on behalf of Iranian victims of human rights abuses perpetrated by the IRI. There are banks that have done, and continue to do, business with the IRGC and IRGC-owned entities, as the IRGC continues to perpetrate crimes against humanity and torture on its populace, and populations elsewhere. Some of the procedural and logistical challenges in bringing this litigation include the following: i) finding Iranian survivors of human rights abuses in the United States to avoid dismissal on *forum non conveniens* grounds, ii) ensuring that the claims are within the applicable statute of limitations, and iii) convincing lawyers to pursue this litigation and pay the costs of the litigation up front, since a future financial settlement or award is not guaranteed.

RECOMMENDATION: Encourage plaintiffs' firms to team up with human rights organizations working on Iran to pursue claims for human rights violations and abuses by pleading torts under state law. Expand the scope of remedies for human rights violations and atrocity crimes under state laws.

170 Ibid.

VII. Canadian Civil Authorities

A. Overview

The Canadian legal system is more limited than that of the United States in the ability of plaintiffs to seek redress in Canadian courts for human rights violations and abuses committed abroad.

However, the system still provides some key paths to redress that are unique in the world, including the exception to state immunity for terrorist acts committed by state sponsors of terror.

Canada is also home to a vibrant Iranian community of human rights organizations, survivors, and victims' groups and boasts a court system with already established precedents for human rights claims.

This section examines how existing tools can be improved upon to provide redress to more potential claimants in human rights–focused cases on Iran and how current authorities can be better enforced.

B. Exceptions to State Immunity for Terrorism and Torture

As noted in this report, Canada and the United States are unique in providing an exception to state immunity for acts of terrorism. Prior to 2012, Canada had a more restrictive approach toward the question of foreign state immunity, but following amendments to Canada's State Immunity Act (SIA) introduced by Parliament in 2011 and passed in 2012, victims of acts of terrorism can sue perpetrators of terrorism in Canadian courts.

That legislation, called the Justice for Victims of Terrorism Act (JVTA), provides that Canadian citizens and permanent residents of Canada who are victims of terrorism, as well as others if the action has a real and substantial connection to Canada, can seek redress through a civil action for terrorist acts committed anywhere in the world on or after January 1, 1985.[171] These civil actions can only be brought against foreign states listed by the government of Canada as supporters of terrorism.[172] Additional amendments to the law provide for the attachment, execution, arrest, detention, seizure, and forfeiture of property belonging to a state sponsor of terror that is located in Canada and used, or intended to be used, to support terrorism. The IRI was listed as a state sponsor of terror by former Canadian Prime Minister Stephen Harper's government in 2012 and therefore is subject to such suits.[173]

While the 2012 amendment was a welcome addition to the global trend of accountability for the non-legitimate acts of states, it does not go far enough in allowing Iranian victims and survivors of human rights violations to hold the IRI to account. Some cases have attempted to use the JVTA against the IRI, such as in the filings by the families of Iranian-Canadian victims of Ukraine International Airlines Flight 752, which was downed by the IRGC.[174] It may also be used to hold the IRI to account for what amounts to hostage taking by the Iranian government of Iranian-Canadians, such as in the case of Saeed Malekpour, an Iranian web developer with Canadian permanent residency who was arrested by the IRGC's cyber army unit to dissuade other technologists from engaging in their online activities.[175]

However, the JVTA, unlike the US terror exception to the FSIA, does not expressly provide that torture or extrajudicial killings are acts for which claimants can seek redress against the IRI. Therefore, it makes it more challenging for prisoners of conscience who survived torture or family members of those killed or tortured in Iran's prisons to file civil suits for acts that might not qualify as acts intended to "intimidate a civilian population" within the meaning of the JVTA.

This can be addressed by Canada's Parliament passing a torture exception to the SIA. Such an amendment has been the subject of much contention since the *Bouzari v. Islamic*

171 Justice for Victims of Terrorism Act (S.C. 2012, c. 1, s. 2), https://laws-lois.justice.gc.ca/eng/acts/j-2.5/FullText.html.

172 To be considered a state sponsor of terror, the state in question must have been listed by the Cabinet in Ottawa, following a recommendation by the minister of foreign affairs in consultation with the minister of public safety and emergency preparedness. The basis for listing a foreign state is that there are reasonable grounds to believe that the state in question supported or supports terrorism, and there will be no ability for a listed state to challenge that listing in the courts.

173 David Akin, "Canada Declares Iran a State Sponsor of Terror," *Toronto Sun*, September 7, 2012, https://torontosun.com/2012/09/07/canada-closes-embassy-in-iran/wcm/091c2514-8a0f-4db5-bfee-b2babce05670.

174 See, for example, the class action lawsuit filed by the families of the victims of Ukraine International Airlines Flight 752 by two Toronto-based law firms. *Estate of John Doe et al v. Islamic Republic of Iran*, CV-20-00635078-00CP, Ontario Superior Court of Justice, January 2020, https://www.ps752classaction.ca/, 1-12. The class action has not been certified yet.

175 For more details on Malekpour's case, see "Good News: Saeed Malekpour Arrives Home in Canada," Amnesty International Canada, August 9, 2019, https://www.amnesty.ca/blog/good-news-saeed-malekpour-arrives-home-canada.

Stephan Hachemi, son of Iranian-Canadian photographer Zahra Kazemi, sits beside a portrait of his mother during a protest in Ottawa, July 16, 2004. Kazemi died as a result of torture and mistreatment while in the custody of the IRI authorities for taking pictures of Evin prison in June 2003. *Source:* Reuters/Jim Young JY/HB.

Republic of Iran case in 2004 in which Ontario's Court of Appeal unanimously decided that the SIA barred a plaintiff from bringing an action against the IRI for torture by agents of the Iranian state.[176] Given that decision, human rights advocates and victims' communities moved to propose legislative reforms to allow redress for Canadian victims of torture committed by foreign sovereigns, rather than waiting for a court to deliver a more expansive interpretation of the SIA. Such efforts were ultimately not successful. A decade later, the issue came before the Supreme Court of Canada in the case of *Kazemi Estate v. Islamic Republic of Iran*, in which Canada's top court ruled that the determination of whether foreign officials could be sued in Canadian courts for acts of torture should be left to Parliament to decide.[177]

While prior advocacy efforts to pass a torture exception to state immunity were unsuccessful under a Conservative-led government, conditions have changed. Canada's Liberal-led government includes decision makers that may be more amenable to broader exceptions to the SIA. A coalition of human rights groups, survivors, and families should recharge the effort to push for a torture exception to SIA and thereby allow Iranian-Canadians who have

176 See *Bouzari v. Islamic Republic of Iran*, [2004] O.J. No. 2800, https://www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.pdf.

177 *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14384/index.do.

suffered abuses perpetrated by the IRI to sue the state in Canadian courts.

RECOMMENDATION: Parliament should pass a torture exception to Canada's State Immunity Act.

C. Suing Corporations for Human Rights Abuses

Canada has no analog to the Alien Tort Statute in the United States and, until recently, even Canadian corporations could not be sued for human rights abuses committed extraterritorially.

This changed on February 28, 2020, with a ruling in *Nevsun Resources Ltd. v. Araya* from the Supreme Court of Canada that allowed Nevsun, a Vancouver-based mining company, to be sued in Canada for alleged human rights abuses committed in Eritrea, including allegations of modern day slavery.[178] The case against Nevsun was originally brought in British Columbia by three Eritrean plaintiffs who came to Canada as refugees. The Supreme Court held that international norms could be applied to the plaintiffs' case. The parties later settled out of court.[179]

Previously, companies could be held liable only in foreign jurisdictions in which alleged abuses occurred. The *Nevsun* Canadian Supreme Court ruling expanded liability for Canadian corporations for serious human rights abuses committed abroad and brought Canadian law more in line with the current state of the ATS in the United States, post-*Jesner*. However, US law is still more expansive in that suits can still be brought against foreign corporations acting extraterritorially, as long as the corporation had sufficient contacts with the United States, acted together with a government entity or official, and had sufficient control over the violations (unless this is narrowed by a future judgment in the *Cargill* case before the US Supreme Court, see Section VI(B) *infra*).

While the ruling of the top court in Canada has significantly opened the path for civil suits by victims against Canadian companies perpetrating abuses abroad, redress could be even more expansive if Canadian lawmakers passed legislation that extended potential liability to foreign corporations as well. In the past, the Supreme Court of Canada declined to create new law when it came to the extraterritorial application of laws and deferred to the decisions of Parliament in that sphere. Canada's international relations may play a role in determining the expansiveness of the law. However, Parliament can still pursue a more expansive framing of corporate liability, in line with the US definition, and allies may be better positioned to do so given the momentum from the *Nevsun* judgment.

RECOMMENDATION: Corporate liability in Canadian courts for human rights abuses committed extraterritorially should be expanded by Parliament to include extraterritorial acts of non-Canadian corporations.

178 *Nevsun Resources Ltd. v. Araya*, Supreme Court of Canada, 2020 SCC 5, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18169/index.do.

179 "Amnesty International Applauds Settlement in Landmark Nevsun Resources Mining Case," Amnesty International, October 23, 2020, https://www.amnesty.ca/news/amnesty-international-applauds-settlement-landmark-nevsun-resources-mining-case.

VIII. European Civil Authorities

A. Overview

With respect to ensuring accountability for individuals who have committed extraterritorial human rights violations, European domestic courts can be viewed as the inverse of the US system. Under universal jurisdiction and other jurisdictional theories, domestic courts in Europe see far more criminal prosecutions against individuals who are accused of having committed extraterritorial human rights violations than US courts. Instead, under US law, the principal form of remedy for human rights violations is tort and the pursuit of money damages for survivors and victims for offenses. With that said, there is the possibility of making claims for compensation in European courts, either appended to a criminal action or through other means, to compensate victims and survivors of human rights violations and abuses and crimes under international law.[180]

For the purposes of this report, the focus is on broad trends across the 47 member states of the Council of Europe as they concern state responsibility for human rights violations. The actions of the 47 CoE member states, which include all 27 European Union member states, are monitored in part by the European Court of Human Rights (ECtHR).

While individual perpetrators and corporations and other entities can be sued for offenses under tort law in European domestic courts, this section focuses on how to improve the legal authorities that can hold states accountable. Individual accountability is a vital element in the effort to combat impunity for human rights violations and abuses; however, the state possesses the ultimate position of authority. Therefore, the state is responsible for the wider patterns of violations that must be revealed and adjudicated to fully combat gross impunity for human rights violations. Establishing state responsibility will counter any assertions from governments that the actions being litigated are simply those of a rogue official, when in fact they are indicative of a broader pattern of abuse.

State immunity laws, which protect states from prosecution before a court of law (immunity from jurisdiction) and shield them from seizure of property and assets (immunity from execution of judgment), may present an impediment to establishing state responsibility for human rights violations before domestic/national courts.[181] To ensure accountability, states should include exceptions in their state immunity laws.

While it is true that national law provides principal remedies in tort, any exceptions made to state immunity laws and other aspects of tort law would be stronger if adopted at a multilateral level—across Europe—so as to avoid inconsistencies between CoE member states on jurisdictional requirements and other legal conflicts. The next subsection analyzes the gaps and proposes opportunities through that lens.

B. Exceptions to State Immunity Laws

As noted earlier in this report, European legal systems do not have a terrorism exception to state immunity laws—neither at the national nor CoE/EU level.[182]

The legislation of European states is similar to those of the United States and Canada in its "restrictive" approach to granting immunity to foreign states, save for carefully delineated exceptions.[183]

European systems do not need to be bound by the choices of the United States and Canada. Rather, they can carve out their own paths, guided by their human rights values. If European systems believe a terrorism exception is too politicized and terrorism lacks legal definitions under international law, then they can have an exception instead for crimes under international law. This exception can apply to any country, not just from a preset designated list such as in the United States and Canada. Instead, other controls can be in place, such as approvals by foreign ministries.

Definitions across European jurisdictions vary but in general the definition of a "foreign state" that enjoys immunity from suit includes some combination of the following: i) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments and any agency of the foreign state; ii) any political subdivision of the foreign state; and iii) any sovereign or other head of the foreign state or of any political

180 See, for example, the French system and the *action civile* or the German system and Adhäsionsverfahren.

181 The European Convention on State Immunity of May 16, 1972, regulates the protection of the property of foreign states. Few states have ratified it.

182 The European Convention on the Suppression of Terrorism is a multilateral treaty that provides definitions of terrorism. See Council of Europe, *European Convention on the Suppression of Terrorism*, January 27, 1977, ETS No. 90, https://www.refworld.org/docid/3ae6b38914.html.

183 There is little uniformity in state approaches to immunity laws. Some states continue to grant "absolute" immunity, while others take the "restrictive" approach to immunity, which limits immunity to specific circumstances. However, the reach of immunity and the tests employed to determine its availability vary considerably, even within the "restrictive" approach.

subdivision of the foreign state while acting as such in a public capacity.

State immunity should not present a barrier to access to justice in the very limited context of crimes under international law, the prohibition of which reaches the level of *jus cogens*. A proposed international crime exception could include an exception for the crime of genocide, crimes against humanity, war crimes, torture, extrajudicial executions, or enforced disappearances. The argument would be that the prohibitions on the commission of these serious international crimes are a peremptory norm under international law. Therefore, the commission of such acts could never be considered an official function of the state that enjoys immunity since international law universally prohibits these acts.[184]

There is some precedent for *jus cogens* violations as a challenge to sovereign immunity in European jurisdictions. In October 2015, by way of an exequatur procedure, the Italian Court of Cassation in *Flatow v. Islamic Republic of Iran* accepted the legality of the terrorism exception to the US Foreign Sovereign Immunities Act, provided that the act of terrorism constitutes a crime against humanity and therefore is a breach of *jus cogens*. The recognition of that carve-out to the terrorism exception in this case did not translate into accompanying legislation that would recognize a terrorism-related exception to immunity—most likely due to the lack of a definition of terrorism under international law and a lack of agreement as to whether terrorism should be considered a violation of *jus cogens*. However, the ruling did recognize crimes against humanity as an exception to state immunity, and provided a basis on which to argue for a general human rights exception to immunity for allegations of the crime of genocide, torture, and other crimes under international law.

Nonetheless, a split persists in the jurisdictional approach to challenging sovereign immunity on the basis of *jus cogens* or the peremptory norms of international law. While some domestic courts in Europe have been increasingly willing to deny foreign states immunity for situations of *jus cogens* violations such as gross human rights violations and international crimes, other domestic courts have upheld state immunity as a requirement of customary international law even in cases alleging gross human rights violations.[185] The change in positions varies according to the sensitivity to the rights of survivors and victims and other considerations. The ECtHR has also supported state immunity over individual rights of access to court and to a remedy.[186]

RECOMMENDATION: The member states of the Council of Europe should pass a serious international crimes exception to state immunity laws to allow victims and survivors of human rights violations to sue states for the crime of genocide, crimes against humanity, war crimes, torture, extrajudicial executions, and enforced disappearances.

184 This extends to the underlying acts of crimes against humanity, including enforced disappearances, which is now recognized as *jus cogens* (a category of norms accorded a peremptory status under international law and that includes torture). See relevant jurisprudence: In 2007, in the Constitutional Case No. C-291/07, the Plenary Chamber of Colombia's Constitutional Court stated: "Taking into account … the development of customary international humanitarian law applicable in internal armed conflicts, the Constitutional Court notes that the fundamental guarantees stemming from the principle of humanity, some of which have attained ius cogens status, … [include] the prohibition of enforced disappearances." In 2007, in the Chuschi case, the National Criminal Chamber of Peru's Supreme Court of Justice stated: "[T]he crime of enforced disappearance, just like every crime against humanity, before becoming a positive rule of criminal law already belonged to what is called 'jus cogens', that is to say, it was part of common law. This is why for many scholars it was unnecessary for such crime to be incorporated into national legal frameworks. Since the crime of enforced disappearance was already part … of humankind, the ability to prosecute and punish such a crime is already an obligation binding every state, as has repeatedly been stated by the Inter-American Court of Human Rights in its jurisprudence."

185 See, for example, the *Italian Supreme Court in Ferrini v. the Federal Republic of Germany* and the Greek Supreme Court (Areios Pagos) in *Prefecture of Voiotia v. the Federal Republic of Germany* (which found that state immunity does not apply to *jus cogens* norms). Cf. Jones v. Saudi Arabia, in which a UK Court of Appeal found that the Kingdom of Saudi Arabia had immunity with respect to civil proceedings relating to torture but denied immunity to individual state officials.

186 See, for example, *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe, European Court of Human Rights, November 21, 2001, https://www.refworld.org/cases,ECHR,3fe6c7b54.html (case involving Al-Adsani, a dual national of the UK and Kuwait who served in the Kuwaiti Air Force, and was severely tortured by the Kuwaiti government. The case rested on whether a state, as opposed to an individual, can be immune for officially sanctioning torture. However, the ECtHR found the Kuwaiti state to be immune from claims).

IX. Conclusion

Civil litigation approaches can provide a potent toolset to governments, practitioners, and survivor and victim communities in seeking accountability for human rights violations and atrocity crimes. However, despite their potential potency, these tools are often underutilized. Part of the limited use of legal tools is not due to any lack of enthusiasm from governments. Instead, the historical factors that have stymied the use of legal approaches include resource considerations, difficulty in securing defendant targets, an inability to conduct in-country investigations, and the timelines needed to build cases. Also, many governments take a "defensive" approach when it comes to litigation against state actors due to concerns over the comity of nations or the possibility for reciprocal action.

As the international community seeks to reengage with the Islamic Republic of Iran on security and trade issues, it should better understand, improve, and implement the civil litigation tools needed to hold IRI perpetrators responsible for serious international crimes. By doing so, the international community will ensure that security and trade issues do not overshadow human rights concerns in engagement with the IRI, and help combat impunity for gross human rights violations and atrocity crimes.

United Nations, flag of the Islamic Republic of Iran. *Source:* Creative Commons/Ashitakka (https://search.creativecommons.org/photos/286f6826-19cd-4898-9c44-3267f95632cf).

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