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INTERNATIONAL TERRORISTS, *INTERNATIONAL SHOE*,  
AND INTERNATIONAL COMITY: *MWANI V. BIN LADEN*  
AND THE ABILITY OF FOREIGN LITIGANTS TO USE  
AMERICAN COURTS FOR INTERNATIONAL DISPUTES

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INTRODUCTION

Three days after the events of September 11, 2001, President George W. Bush stated his vision of the United States' role in preventing international terrorism: "Americans do not yet have the distance of history. But our responsibility to history is already clear: to answer these attacks and rid the world of evil."<sup>1</sup> Bush's view of the United States' international role is not new: ever since the conclusion of the Second World War, the United States has played a role in policing international disputes, not all of which have affected the United States as greatly as terrorism. Historically, the executive and legislative branches have led this movement by pushing for human rights, supporting democracy, and providing foreign aid. However, the international role of the federal judiciary remains unclear—especially when foreigners bring civil claims before United States courts based on international events. Although vested with jurisdiction to hear such claims, courts have long sought ways to respect international comity by minimizing the role of the federal judiciary in these disputes.

The roots of this problem are historical. Since the First Congress passed the Alien Tort Claims Act in 1789,<sup>2</sup> United States district courts have had jurisdiction to hear tort claims by foreign plaintiffs. For many years judges and commentators debated how to apply the very brief and vague statute, which, read literally, seems to confer subject matter jurisdiction to hear almost any foreign claim based on a tort. Seeking to limit the role of the judiciary in international matters, courts have imposed several judicial limitations on the statute, including a strict construction of the term "law of nations."<sup>3</sup>

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<sup>1</sup> The White House, *Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends*, <http://www.whitehouse.gov/nsc/nss3.html> (last visited Apr. 7, 2007).

<sup>2</sup> 28 U.S.C. § 1350 (2000).

<sup>3</sup> See Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350)*, *Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Viola-*

Meanwhile, a separate debate was occurring in our civil justice system concerning the “power” a court has over a defendant. For years, judges struggled to define the circumstances when a court could—and should—exercise its power to render judgment against a person who may not be present in the forum.<sup>4</sup> Eventually, the Supreme Court applied the Fifth and Fourteenth Amendments to this issue, holding that a court violates the Due Process Clause when it renders a judgment against a defendant lacking sufficient contact with the forum. This concept of “personal jurisdiction” evolved from an initial focus on the physical control the court had over the defendant,<sup>5</sup> to an analysis of the defendant’s contacts with the forum,<sup>6</sup> and finally to an intricate framework meant to ensure “substantial justice.” To meet this goal, the framework gauges the plaintiff’s interest in obtaining relief in the forum, the measure of inconvenience to the defendant, the state’s interest in adjudicating the claim, the interstate judicial system’s interest in efficient resolution, and the shared interest of the “several States” in furthering substantive social policies.<sup>7</sup> These “other factors” associated with substantial justice may defeat personal jurisdiction even when the defendant has sufficient minimum contacts with a forum.<sup>8</sup>

These two issues recently collided in *Mwani v. Bin Laden*,<sup>9</sup> where a three-judge panel of the District of Columbia Circuit Court of Appeals found that it could exercise personal jurisdiction over Osama bin Laden<sup>10</sup> for tort claims brought under the Alien Tort Claims Act by Kenyan victims of the 1998 embassy bombing in Nairobi, Kenya.<sup>11</sup> Applying the above analysis, the court found that bin Laden created minimum contacts by purposely bombing a United States embassy.<sup>12</sup> However, the court broadly stated that asserting personal jurisdiction would be compatible with substantial justice, without actually examining any of the other factors involved in the analysis. In doing so, the court failed to consider just how strongly these other factors weighed against a finding of personal jurisdiction: traveling to the United States would certainly be inconvenient to bin Laden; the claim could be more efficiently resolved in Kenya because the evidence and witnesses would mostly be found there; the plaintiff had little interest in

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*tion of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387, §§ 11-13 (1993); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>4</sup> See *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>5</sup> See *id.*

<sup>6</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945).

<sup>7</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

<sup>8</sup> See *id.* at 113-14.

<sup>9</sup> *Mwani v. Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005).

<sup>10</sup> This reflects the spelling of bin Laden’s name throughout *Mwani*’s complaint and the District of Columbia Circuit’s opinion. The district court spelled his name “bin Ladin.” *Mwani v. United States*, No. 99-125, 1999 U.S. Dist. LEXIS 23421 (D.D.C. Nov. 19, 1999).

<sup>11</sup> *Mwani*, 417 F.3d. at 4.

<sup>12</sup> *Id.* at 13.

obtaining relief in a United States court because the judgment was unlikely to be enforced in most Middle Eastern countries; and the United States had little interest in adjudicating the suit because both the deterrent and compensatory effects of tort law were eroded by the lack of an enforceable judgment.

The court's decision holds practical implications for future litigants and policy implications for the federal judiciary. This note begins by discussing the legal background of the Alien Tort Claims Act and the doctrine of personal jurisdiction. Using this discussion as a backdrop, the note next examines the decision in *Mwani*. Finally, this note argues that the Supreme Court's most recent additions to the personal jurisdiction framework weigh strongly against asserting personal jurisdiction in this case. An understanding of "substantial justice" that includes attention to the interests of the United States renders asserting personal jurisdiction unconstitutional in *Mwani*, because the parties and dispute were foreign, and the deterrent and compensatory effects of tort law were eroded by the slim chance that the plaintiff would be able to execute the court's judgment. Moreover, strictly applying personal jurisdiction in cases like *Mwani* could provide a necessary check on the ability of foreign litigants to use the Alien Tort Claims Act to adjudicate entirely international disputes—a goal long sought by the federal judiciary.

## I. LEGAL BACKGROUND

The Alien Tort Claims Act and the doctrine of personal jurisdiction each have an interesting and unique legal history, and both have played an important role in the function of federal courts as mediators of international disputes. This section traces the historical development of each and their applicability to suits brought by foreign plaintiffs against foreign defendants.

### A. "A Legal Lohengrin:" *The Alien Tort Claims Act*

Discussing the mysterious origin of the Alien Tort Claims Act ("ATCA"), Judge Friendly famously described the statute as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."<sup>13</sup> Friendly's quote accurately describes how most courts have greeted the ATCA: with confusion. Seeking to reconcile the Act's broad grant of jurisdiction with the Federal Judici-

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<sup>13</sup> *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted). Lohengrin was a mythical character who was said to lose his magical powers if anyone ever discovered their source.

ary's traditionally reclusive role in foreign events, courts have narrowly construed almost every word of the ATCA.<sup>14</sup>

The First Congress enacted the ATCA in 1789 as a provision of the Judiciary Act, providing the newly created district courts with jurisdiction to hear tort actions brought by aliens for violations of the "law of nations" or a United States treaty.<sup>15</sup> The ATCA, codified at 28 U.S.C. § 1350, remains mostly unchanged today.<sup>16</sup> Congress' constitutional authority to confer jurisdiction on the federal judiciary to hear claims for violations of a treaty is arguably derived from Section 2 of Article III, which authorizes a grant of jurisdiction for cases arising under "Treaties which shall be made."<sup>17</sup> On the other hand, the power to grant jurisdiction for violations of the "law of nations" can only be supported by an understanding that the Framers intended the Constitution to incorporate the "law of nations" as part of the common law of the United States.<sup>18</sup> While no legislative history exists from the First Congress, the Supreme Court has counted the ATCA among a number of statutes reflecting "a concern for uniformity in this country's dealings with foreign nations" and a desire for federal courts to hear matters of international significance.<sup>19</sup>

Recognizing the statute's almost endlessly broad grant of jurisdiction and attempting to minimize the role of the civil justice system in foreign relations, judges have restrictively construed the act's elements. First, courts have held that the initial inquiry in dealing with a case under the ATCA should be whether subject matter jurisdiction exists over the plaintiff's claim.<sup>20</sup> The plaintiff can satisfy this inquiry by showing that: (1) the claim is brought by an alien; (2) the cause of action is for a tort; and (3) the tort was committed in violation of international law or a treaty with the United States.<sup>21</sup>

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<sup>14</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) ("Congress intended the [Alien Tort Statute] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."); Donaldson, *supra* note 3, §§ 8-13, 39 (describing the constructions of "law of nations," "tort only," and "alien"). *But cf.* Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585 (2004) (arguing that Congress did not intend for a narrow construction of the Act).

<sup>15</sup> Donaldson, *supra* note 3, § 2[a]. Amended several times since its original enactment, the ATCA now reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000).

<sup>16</sup> Donaldson, *supra* note 3, § 2[a].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); see *Sosa*, 542 U.S. at 713 (explaining that the constitutional basis for the ATCA was the incorporation of international law into the U.S. Constitution).

<sup>19</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

<sup>20</sup> See Donaldson, *supra* note 3, § 6.

<sup>21</sup> *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995); see also *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998).

The first element—that the claim must be made by an alien—is probably the most simple to apply. However, to avoid interfering with a foreign nation’s sovereignty, some courts have added the additional requirement that the plaintiff and defendant must hail from different countries.<sup>22</sup> Whether the cause of action is a tort can be slightly more problematic to determine. Not surprisingly, courts lack subject matter jurisdiction under the act to hear claims based on breach of contract.<sup>23</sup> However, the gray area between tort and contract has caused some difficulty for courts.<sup>24</sup>

The primary strategy courts have used to limit the scope of the ATCA is strictly construing the term “law of nations.” The Supreme Court’s most recent pronouncement on this issue was in *Sosa v. Alvarez-Machain*, where the Court attempted to reconstruct the legislative intent behind ATCA. According to the Court, modern-day claims under the ATCA must be similar to the 18th-century paradigms that the drafters of the ATCA understood as “the law of nations.”<sup>25</sup> Drawing on the legal climate of early republic, the Court reasoned that “Congress intended the [ATCA] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”<sup>26</sup> These actions originally included offenses against ambassadors, violations of safe conduct, and piracy; thus to be consistent with congressional intent, modern claims under the statute must be well-recognized violations of international law comparable to these original paradigms.<sup>27</sup> Accordingly, the Court disagreed with the respondent’s contention that false arrest could be a violation of the “law of nations.”<sup>28</sup> To expand the meaning of the statute would be to “imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>29</sup>

Various federal courts have included additional requirements in their construction of “international law.” For example, courts have added the heightened requirement that the defendant commit a tort that is a “shockingly egregious violation[] of universally recognized principles of international law.”<sup>30</sup> Courts have also required plaintiffs to furnish clearly defined

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<sup>22</sup> Donaldson, *supra* note 3, at § 38.

<sup>23</sup> See Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324, 327 (E.D. Pa. 1966).

<sup>24</sup> Donaldson, *supra* note 3, at § 27; IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (dismissing a fraud claim against an international investment trust for lack of subject matter jurisdiction).

<sup>25</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>26</sup> *Id.* at 720.

<sup>27</sup> *Id.* at 715, 732.

<sup>28</sup> *Id.* at 725.

<sup>29</sup> *Id.* at 727. Concerning this point, see Steinhardt, *supra* note 14, at 594. Steinhardt dismisses concerns voiced by the Bush administration and argues that the ATCA does not necessarily impinge on the executive’s ability to conduct foreign affairs. See *id.* For example, Steinhardt points to judicial doctrines designed to handle “sensitive” cases, such as political question, forum non conveniens, and act of state. *Id.* at 595.

<sup>30</sup> Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983).

law—holding that some claims cannot be adjudicated under the ATCA because there is no established international law to apply.<sup>31</sup>

Even after establishing both subject matter and personal jurisdiction,<sup>32</sup> plaintiffs litigating foreign events often face another significant hurdle: forum non conveniens, a common-law doctrine courts use to dismiss cases that would be more expediently tried elsewhere. The Supreme Court first recognized forum non conveniens in 1947, and it has since been invoked by numerous ATCA defendants.<sup>33</sup> In assessing whether forum non conveniens dismissal is appropriate, courts engage in a two-step process: “[t]he first step is to determine if an adequate alternative forum exists. If so, courts must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.”<sup>34</sup> Although the doctrine would seem to have an obvious application in ATCA cases, one commentator asserts that no court has yet to use the doctrine to dismiss a suit under ATCA where proper jurisdiction exists.<sup>35</sup>

Finally, plaintiffs litigating especially sensitive international disputes must overcome additional judicial doctrines meant to insulate courts from these types of claims. Such doctrines include diplomatic immunity, the political question doctrine, and the act of state doctrine.<sup>36</sup>

In modern times, plaintiffs proceeding to the merits of an ATCA suit have most often used the statute to litigate allegations of human rights abuses including official murder, causing “disappearances,” torture, kidnapping, slavery, apartheid, and denial of free speech.<sup>37</sup> With recent unrest in the Middle East, however, courts have begun to see more claims resulting from terrorist attacks. One of the early cases was *Tel-Oren v. Libyan Arab Republic*, where victims of a Palestinian terrorist attack on a bus in Israel sued under the ATCA.<sup>38</sup> Most recently, foreign victims of the September 11, 2001 attacks have used United States courts to sue alleged co-conspirators of the hijacking terrorists.<sup>39</sup>

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<sup>31</sup> *E.g.*, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 252 (2d Cir. 2003).

<sup>32</sup> Personal jurisdiction in suits under the ATCA is the primary focus of this note, and will be discussed *infra*.

<sup>33</sup> Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT’L L. & POL. 1001, 1019-20, 1024 (2001).

<sup>34</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (citation omitted).

<sup>35</sup> Short, *supra* note 33, at 1024.

<sup>36</sup> Steinhardt, *supra* note 14, at 595.

<sup>37</sup> *See* Donaldson, *supra* note 3, §§ 14-20. *See generally* Charles W. Brower II, Note, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of Sosa v. Alvarez-Machain*, 26 WHITTIER L. REV. 929 (2005).

<sup>38</sup> *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 544-45 (D.D.C. 1981), *aff’d without majority opinion*, 726 F.2d 774 (D.C. Cir. 1984).

<sup>39</sup> *E.g.*, *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005).

B. *The Doctrine of Personal Jurisdiction and its Application to Foreign Defendants*

The reach of the judiciary's power must have a stopping point, and the doctrine of personal jurisdiction is meant to define this limit. While a court could theoretically adjudge the rights of any person in the world, practical and constitutional concerns limit the purview of our courts. This section traces the historical development of personal jurisdiction and the more recent development of the doctrine's reasonableness factors. This section then discusses the application of these new factors to foreign defendants.

1. From Physical Presence in the Forum to Substantial Justice: The Historical Development of Personal Jurisdiction

The Supreme Court first addressed the issue of personal jurisdiction in *Pennoyer v. Neff*,<sup>40</sup> beginning a long line of jurisprudence. In *Pennoyer*, the Supreme Court held that a court could not exert jurisdiction over an individual absent from the forum, although it could attach property that he owned there.<sup>41</sup> While much of *Pennoyer*'s holding was swept away by later decisions, the case still stands for an important proposition: the Constitution's Due Process Clause requires that courts draw an appropriate limit on the places where a defendant can be required to defend a lawsuit.<sup>42</sup> Since *Pennoyer*, the Supreme Court has attempted to define exactly where this limit lies.

The most important case on personal jurisdiction, and the basis of the modern framework for understanding how far a court may assert its power, is *International Shoe Co. v. Washington*.<sup>43</sup> In that case, the Supreme Court held that the courts of a state may only exercise personal jurisdiction over a defendant who has sufficient minimum contacts with that state to make it fair for him to return to the state to defend a lawsuit.<sup>44</sup> *International Shoe's* holding made it clear that a court could now exercise power over a non-resident of the state that was not physically present in the forum. The Court's holding applied the Fourteenth Amendment to the power of a state court to issue judgment against a non-resident; however, the principle is equally applicable to the federal court's ability to exercise power over an alien under the Fifth Amendment.<sup>45</sup>

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<sup>40</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>41</sup> *Id.* at 733-34.

<sup>42</sup> *See id.* at 733.

<sup>43</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>44</sup> *Id.* at 316-17.

<sup>45</sup> *See, e.g., ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001).

In later decisions, the Supreme Court clarified the extent of the defendant's contacts necessary to subject him to certain types of claims. At one end of the spectrum, the defendant may have such extensive and substantial contact with the state as to give rise to "general in personam jurisdiction," allowing the defendant to be sued in that state for any claim.<sup>46</sup> At the other end of the spectrum, a defendant may have no contacts—indicating that the state has no authority to exercise personal jurisdiction over him. Likewise, no personal jurisdiction exists if the defendant's contacts are "casual" or "isolated."<sup>47</sup> Other single acts, however, may be of sufficient "nature and quality" to provide "specific in personam jurisdiction" for claims resulting from these acts.<sup>48</sup> Likewise, a continuous but limited activity in the forum, such as ongoing business, will support specific jurisdiction for claims related to that activity.<sup>49</sup> The latter two scenarios are dubbed "minimum contacts."

Cases of minimum contacts pose additional problems. First, in defining whether the contacts are of sufficient "nature and quality," the Supreme Court has emphasized whether the defendant has purposely availed himself of these contacts.<sup>50</sup> Thus, the defendant must have made a deliberate choice to relate to the jurisdiction in some meaningful way.<sup>51</sup> In cases where the defendant has not sought any benefit from the forum state but has generated contact with the state only inadvertently, no personal jurisdiction arises.<sup>52</sup> Somewhere in the middle lie cases where the defendant may be aware he is generating contacts with the state but does not play an *active* role in creating the contacts. An example would be a producer who sells his finished product to a middleman, who in turn imports the product to the state. Due to a court split in *Asahi Metal Industry Co. v. Superior Court*, there is no clear law on whether the defendant needs to purposely create these contacts, or whether he merely needs to know that the contacts exist.<sup>53</sup>

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<sup>46</sup> See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (asserting general in personam jurisdiction over a Philippine corporation operating within the United States); *Int'l Shoe*, 326 U.S. at 317-18.

<sup>47</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

<sup>48</sup> *Id.* at 317-18; see also *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (asserting specific in personam jurisdiction in the state of California over a Texas insurance company based on its one customer in California).

<sup>49</sup> *Int'l Shoe*, 326 U.S. at 317-18.

<sup>50</sup> *Id.* at 319.

<sup>51</sup> *Id.*

<sup>52</sup> Compare *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (refusing jurisdiction over a New York car dealership in Oklahoma based on an accident that occurred in Oklahoma), with *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (asserting jurisdiction over magazine carrying on a part of its general business in New Hampshire "when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.").

<sup>53</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

A second issue in establishing personal jurisdiction through minimum contacts is whether asserting personal jurisdiction over the defendant would be compatible with “fair play” and “substantial justice.”<sup>54</sup> Even when the defendant has established minimum contacts in a state, it may be unreasonable to expect the defendant to be subject to litigation there.<sup>55</sup> For example, *Asahi* involved a Japanese manufacturer that sold components to another foreign manufacturer, who in turn sold completed motorcycle tire tubes to California consumers. An injured motorcyclist sued the importer, and the importer asserted a cross claim against the Japanese manufacturer.<sup>56</sup> A clear majority of the Justices found that even if the manufacturer had created minimum contacts, it would be unreasonable to exert personal jurisdiction in suit that required the parties to travel several thousand miles and the court to interpret a foreign contract under Japanese or Taiwanese law.<sup>57</sup>

Applying this same “reasonableness” analysis in other cases, however, the Supreme Court has reached the opposite result. In *Burger King Corp. v. Rudzewicz*, the Court found that it would not be unreasonable for a Michigan franchiser to be sued in Florida by a resident corporation.<sup>58</sup> Given that the franchiser had reached out to the Florida corporation and contractually agreed to be governed by Florida law, it was not unfair for him to defend a suit there.<sup>59</sup> Likewise, in *Keeton v. Hustler Magazine, Inc.*, the Supreme Court closely analyzed the interests of the state of New Hampshire in providing a forum for a non-resident to litigate a defamation suit against *Hustler Magazine*.<sup>60</sup> Even though the plaintiff did not hail from New Hampshire, New Hampshire had an interest in hosting the suit because defamatory remarks harm both the subject and the reader of the comments.<sup>61</sup> Thus, it was not unreasonable to require *Hustler* to defend a suit there.<sup>62</sup>

These cases demonstrate that personal jurisdiction is not automatically defeated by inconvenience. When a defendant purposely directs his activities to a forum, the court will presume that personal jurisdiction exists, unless the defendant makes a “compelling case” that other factors should defeat jurisdiction.<sup>63</sup> These other factors include: (1) the forum state’s interest; (2) the plaintiff’s interests in obtaining relief in a convenient forum; (3) the extent of inconvenience to the defendant; (4) the interstate judicial system’s interests in efficient resolution; and (5) the shared interests of the

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<sup>54</sup> *Id.* at 113.

<sup>55</sup> *Id.* at 114.

<sup>56</sup> *Id.* at 105-08.

<sup>57</sup> RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 576-77 (Foundation Press, 2004).

<sup>58</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985).

<sup>59</sup> *Id.*

<sup>60</sup> *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

<sup>61</sup> *Id.* at 776.

<sup>62</sup> *See id.* at 776-78.

<sup>63</sup> *Burger King*, 471 U.S. at 477.

“several States” in furthering fundamental substantive social policies.<sup>64</sup> The Supreme Court explained that these factors are rooted in the Due Process Clause and derived from *International Shoe*’s attention to “traditional notions of fair play and substantial justice.”<sup>65</sup>

## 2. The Application of the “Other Factors” to Foreign Defendants

As a result of a court split, *Asahi* muddled much of the law concerning purposeful availment. However, the Court made one thing clear that is particularly relevant to foreign litigants: the same limitations on personal jurisdiction should apply to foreigners as are applied to United States citizens.<sup>66</sup> As a result, the previously discussed reasonableness test applies with the same force to aliens as it does to Americans.<sup>67</sup>

In *Asahi*, the Court found that it would be unreasonable to assert personal jurisdiction over the Japanese defendants. First, the Court found that the defendant’s burden in traveling overseas and learning a foreign nation’s legal system weighed heavily against asserting personal jurisdiction.<sup>68</sup> In fact, the Court stated that the “unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing . . . reasonableness,” suggesting, in some cases, that alien defendants may be entitled to greater protection than domestic defendants.<sup>69</sup> Second, the Court found that the plaintiff had little interest in litigating the suit in California, and California had little interest in entertaining the plaintiff’s claims.<sup>70</sup> While the original suit was a products liability claim against the importer, the plaintiff had dropped out—leaving only a contractual cross-claim asserted by the Taiwanese importer against the Japanese manufacturer.<sup>71</sup> The Court stated that the Taiwanese manufacturer “had not demonstrated that it is more convenient” to litigate in California court than in Taiwan or Japan.<sup>72</sup> Moreover, the California plaintiff greatly diminished the forum state’s interest in adjudicating the claim by dropping out of the suit.<sup>73</sup>

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<sup>64</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). The Ninth Circuit has adopted a rule using seven factors, but one of these factors is closely related to the purposeful availment test. *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991).

<sup>65</sup> *Asahi*, 480 U.S. at 113 (quoting *Int’l Shoe Co. v. Washington*, 362 U.S. 310, 316 (1945)).

<sup>66</sup> *See id.* at 113-14.

<sup>67</sup> *See id.* at 115.

<sup>68</sup> *Id.* at 114; Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1418 (1996).

<sup>69</sup> Hornbeck, *supra* note 68, at 1418.

<sup>70</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

<sup>71</sup> *Id.* at 106.

<sup>72</sup> *Id.* at 114.

<sup>73</sup> *See id.*

The Court ended its analysis with a general guideline: courts must respect international comity by adopting an “unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or forum State.”<sup>74</sup> Often, litigation against foreign defendants will implicate the interests of not only the plaintiff and the forum, but also the federal government’s foreign policy and the substantive policies of other nations.<sup>75</sup> One caveat international litigants must bear in mind, however, is the *Burger King* Court’s warning that the above factors will only outweigh minimum contacts in a “compelling” case.<sup>76</sup>

Nevertheless, courts have found such “rare” cases. The Tenth, Sixth, and Second Circuits have all cited *Asahi*’s reasonableness test in refusing to assert personal jurisdiction over a foreign defendant.<sup>77</sup> One illustrative example is *Benton v. Cameco Corp.*, a case in which a Colorado uranium purchaser sued a Canadian corporation for breach of contract and tortious interference.<sup>78</sup> The court found that the corporation created minimum contacts sufficient for specific jurisdiction by entering into an agreement with a Colorado citizen.<sup>79</sup> However, asserting personal jurisdiction would have been inconsistent with fair play and substantial justice. First, the burden on the corporation was great because the corporation had no offices in Colorado and would have to travel from Saskatchewan.<sup>80</sup> The forum state’s interest was a “toss-up” because the plaintiff was from Colorado, but Canadian law would apply. On a similar note, the plaintiff’s interests did not weigh in favor of appearing in Colorado court because Canadian law would apply and the buyer did not show that litigating in Canada would be a hardship.<sup>81</sup> In addition, the interstate judicial system’s interests would be better served by litigating in Canada because the witnesses could be found there and Canadian courts would be more familiar with their own law.<sup>82</sup> Finally,

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<sup>74</sup> *Id.* at 115.

<sup>75</sup> *Id.*

<sup>76</sup> *Burger King*, 471 U.S. at 477. The court also noted that “such considerations” should first be remedied through other means than finding the exercise of personal jurisdiction to be unconstitutional. *Id.* For example, a court may preserve the “fundamental substantive social policies” of another state by applying that state’s law. *Id.* Another possibility, at least in domestic cases, is to grant a change of venue. *Id.*

<sup>77</sup> *Benton v. Cameco Corp.*, 375 F.3d 1070, 1074, 1078-81 (10th Cir. 2004) (Canadian defendant); *Int’l Techs. Consultants, Inc. v. Euroglass S.A.*, 107 F.3d 386, 388, 394 (6th Cir. 1997) (Swiss defendant); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568, 573, 576 (2d Cir. 1996) (Canadian defendant).

<sup>78</sup> *Benton*, 375 F.3d at 1073. The plaintiff alleged that Cameco’s due diligence review of his contracts with other clients constituted a tortious interference with existing business relationships, and that Cameco was in breach of contract when it decided to terminate its own contract after the review. *Id.* at 1073-75.

<sup>79</sup> *Id.* at 1078.

<sup>80</sup> *Id.* at 1079.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1080.

the states' interests in furthering fundamental substantive social policies weighed in favor of allowing Canada to adjudicate the suit because Canada had the greater interest in deciding contract and tort issues occurring within its borders.<sup>83</sup> As a result, the court dismissed the case for lack of personal jurisdiction.<sup>84</sup>

Other cases have involved more serious allegations of overseas atrocities. In *Wortham v. KarstadtQuelle A.G.*, the plaintiffs sought to recover in New York courts assets allegedly divested from their ancestors by a German corporation during the Holocaust.<sup>85</sup> Although the corporation lacked sufficient contacts with the forum, the court held that even if such contacts existed, the assertion of personal jurisdiction would not be consistent with fair play and substantial justice.<sup>86</sup> First, the burden to the defendants was great because they faced a challenging language barrier and had no relationship with a United States law firm.<sup>87</sup> The interests of the forum were minimal because neither the plaintiffs nor defendants hailed from New York.<sup>88</sup> Moreover, the plaintiffs had no special interest in litigating in New York. Even though they believed that New York's choice of law rules would be beneficial to their claim, the court held that these sorts of considerations were irrelevant.<sup>89</sup> In addition, the court found that interests of the interstate judicial system would be furthered by litigating where most of the witnesses and evidence could be found, in this case Germany.<sup>90</sup> Finally and most significantly, Germany had the greater interest in adjudicating suits related to the Holocaust. By hearing the claim, American courts would interfere with Germany's sovereignty and its interests in resolving a painful piece of its history.<sup>91</sup>

Across jurisdictions, litigants can find consistent trends concerning foreign defendants and the "other factors":

(1) *The Burden of the Defendant*: Suits involving a foreign defendant will always involve some sort of travel. If the defendant has never visited the forum before to do business or litigate, he will have an easier time arguing that it would be unreasonable to litigate there.<sup>92</sup> Moreover, the burden

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<sup>83</sup> *Id.*

<sup>84</sup> *Benton v. Cameco Corp.*, 375 F.3d 1070, 1080 (10th Cir. 2004).

<sup>85</sup> *Wortham v. KarstadtQuelle A.G.*, 320 F. Supp. 2d 204, 209-10 (D.N.J. 2004).

<sup>86</sup> *Id.* at 235.

<sup>87</sup> *Id.* at 229.

<sup>88</sup> *Id.* at 229-30.

<sup>89</sup> *Id.* at 230.

<sup>90</sup> *Id.* at 230-31.

<sup>91</sup> *Wortham*, 320 F. Supp. 2d at 231-34.

<sup>92</sup> *See Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991) (reasoning that because the defendant had never traveled to forum before, while the plaintiff had regularly traveled overseas to do business with the defendant, this factor "cut[] in favor" of the defendant).

may be unreasonable even if the travel distance is not drastic.<sup>93</sup> However, courts will acknowledge the modern advances in travel and communication when weighing this factor.<sup>94</sup> Finally, a language barrier or unfamiliarity with the forum's legal system will increase the burden, but neither is determinative of the outcome.<sup>95</sup>

(2) *The Interests of the Forum State*: The greatest two influences on this factor are whether the plaintiff is from the forum, and whether the events occurred within the forum. States have an inherent interest in providing relief to their citizens; if the plaintiff is from another state or country, this interest is not as great.<sup>96</sup> Likewise, if the events occurred in another state or country, other law may apply, and thus the forum state's interest in enforcing its own law no longer applies.<sup>97</sup>

(3) *The Interests of the Plaintiff*: The plaintiff's interests in obtaining relief in the forum are much stronger when the plaintiff is from the forum.<sup>98</sup> Courts have repeatedly held that this factor is not influenced by considerations of where the law will treat the plaintiff's claim the most favorably.<sup>99</sup>

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<sup>93</sup> See *Benton v. Cameco Corp.*, 375 F.3d 1070, 1079 (10th Cir. 2004) (finding that travel between Colorado and Saskatchewan was burdensome). The distance between Saskatoon, Saskatchewan and Denver, Colorado is approximately 993 miles.

<sup>94</sup> E.g., *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988).

<sup>95</sup> See *Mega Tech Int'l Corp. v. Al-Saghyir Establishment*, 1999 U.S. Dist. LEXIS 6381, \*18 (S.D.N.Y.) (burden to Saudi corporation was great because it faced a language barrier); *Wortham*, 320 F. Supp. 2d at 229 (burden to German corporation included a language barrier); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (burden to Japanese corporation to litigate a contractual dispute with a foreign corporation in an American court); *Benton*, 375 F.3d at 1079 (burden to Canadian corporation to litigate contract with an American corporation was increased by its unfamiliarity with the American legal system).

<sup>96</sup> Compare *Asahi*, 480 U.S. at 114 ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished."), and *Wortham*, 320 F. Supp. 2d at 229-30 (finding that the forum had "minimal interests" in the suit because the plaintiff and defendant were residents of other jurisdictions), and *Rio De Janeiro v. Philip Morris Inc.*, 143 S.W.3d 497, 502 (Tex. App. 2004) (finding, in a tobacco tort suit brought by a Brazilian state, that Texas did not have an interest in addressing tortious conduct and damages "occurring outside the borders of Texas and unrelated to defendants' business in Texas"), with *Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988) (finding in a products liability case, that the forum had an interest in protecting its citizens from injuries caused by defective products made by an overseas producer).

<sup>97</sup> See *Benton*, 375 F.3d at 1079 (determining that forum state's interest did not cut either way because plaintiff was a citizen of the forum but foreign law would apply); *Anglo Am. Ins. Grp., P.L.C. v. CalFed Inc.*, 916 F. Supp. 1324, 1336 (S.D.N.Y. 1996) (reasoning that California did not have an interest in adjudicating the fall out of a major English Insurance Corporation's collapse, which would be governed by English law).

<sup>98</sup> See *Asahi*, 480 U.S. at 114; *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996) (finding that a New York corporation had no interest litigating in a Vermont federal court events that occurred in Texas, Missouri, and Florida).

<sup>99</sup> Compare *Metro. Life*, 84 F.3d at 574 (finding that the forum state's more generous statute of limitations was not a consideration in weighing the plaintiff's interest), and *Wortham*, 320 F. Supp. 2d at 230 (finding that the choice of law rules of the forum cannot be considered in weighing the plaintiff's interest), with *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777-78 (1984) (finding that the forum's

(4) *Efficient Resolution of the Claim*: This factor is most heavily influenced by where the events occurred.<sup>100</sup> Most likely, the witnesses and evidence will be found in that forum. Moreover, the law of that jurisdiction will probably decide the claim, or it will at least provide a starting point for a choice of law analysis. When the events at issue occurred in a foreign country, American courts have consistently decided this factor in favor of the defendant to lower the costs of litigation, and to avoid the difficult process of interpreting foreign law.<sup>101</sup>

(5) *The Interest of a Foreign Country in Furthering its Social Policies*: This factor is also heavily influenced by where the events at issue occurred. Courts presume that a foreign nation has a strong interest in policing events that occur within its borders or implicate its citizens.<sup>102</sup> As a result, this factor is influenced by whether one of the parties is a foreign citizen, whether a foreign nation's law governs, and whether a foreign party chose to conduct business with a forum resident.<sup>103</sup> In cases where the events occurred entirely overseas, courts have frequently determined that the assertion of personal jurisdiction interferes with the sovereign nation's interest in furthering its own social policies.<sup>104</sup>

While the law is relatively consistent on how different fact patterns influence these "other factors," no simple formula can determine when the defendant has made a strong enough showing to defeat personal jurisdiction. Based on the Supreme Court's instructions in *Burger King*—that the

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"single publication" rule could not be a factor in weighing the burden to the *defendant* publisher in a libel action).

<sup>100</sup> *Compare Asahi*, 480 U.S. at 114 (noting that the transaction between the plaintiff and defendant companies occurred in Taiwan, and that the companies shipped products between Japan and Taiwan, rather than California), *and Benton*, 375 F.3d at 1080 (noting that the most of the defendant's employees resided in Canada, rather than Colorado, and that the alleged wrong occurred in Canada), *with Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 245 (2d Cir. 1999) (reasoning, in a products liability case, that the most efficient place to litigate was where the accident occurred, even though the product was manufactured overseas).

<sup>101</sup> *See Asahi*, 480 U.S. at 114 ("Cheng Shin has not demonstrated that it is more convenient for it to litigate . . . in California rather than in Taiwan or Japan."); *Benton*, 375 F.3d at 1080 (noting that most of the witnesses will be found in Canada, rather than Colorado); *Wortham*, 320 F. Supp. 2d at 230-31 (noting that the principal witnesses and documentary evidence would be found in Germany, not New York).

<sup>102</sup> *See Asahi*, 480 U.S. at 114-15.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.* at 115 (contract between Japanese and Taiwanese corporations); *Wortham*, 320 F. Supp. 2d at 231-35 (restitution claim based on actions of a German corporation during the Holocaust); *Int'l Tech. Consultants, Inc. v. Euroglas S.A.*, 107 F.3d 386, 394 (6th Cir. 1997) (contract with Swiss corporation incorporating Swiss law); *Anglo Am. Ins. Grp., P.L.C. v. CalFed Inc.*, 916 F. Supp. 1324, 1336 (S.D.N.Y. 1996) (claims resulting from the collapse of an English insurance company). *But see Benitez-Allende v. Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30-31 (1st. Cir. 1988) (products liability case where forum resident was injured).

reasonableness factors can both defeat jurisdiction in cases where the minimum contacts exist, *and* establish the reasonableness of jurisdiction in cases where contacts may be less than would otherwise be required—courts have designed a “sliding-scale” approach, where the court weighs the strength of the defendant’s minimum contacts with the aggregate unreasonableness of asserting personal jurisdiction.<sup>105</sup> When quality contacts exist before the reasonableness analysis, this scale starts out favoring jurisdiction. Certainly, if all five factors weigh in favor of the defendant, the assertion of personal jurisdiction is likely to be unreasonable.<sup>106</sup> However, the final result becomes more challenging and less certain when these factors lie somewhere in the middle of the spectrum.<sup>107</sup>

C. *Asserting Personal Jurisdiction over Foreign Defendants in Suits Under the Alien Tort Claims Act*

Suits against foreign defendants under the Alien Tort Claims Act pose special difficulties with establishing personal jurisdiction. Specifically, courts have struggled to determine when a foreign defendant’s minimum contacts were the product of purposeful availment; often in these suits the events underlying the litigation occurred overseas and the defendant has little meaningful contact with the United States.<sup>108</sup> The analysis of the other factors, which consider the interests of the forum state in providing redress to its citizens and enforcing its law, are theoretically different when a foreign plaintiff sues, but there is little applicable case law on point.

Any plaintiff prosecuting a claim against a foreign defendant must show that the defendant has sufficient minimum contacts with the United States to subject him to personal jurisdiction in a federal court.<sup>109</sup> When the

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<sup>105</sup> *E.g.*, *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir. 1996).

<sup>106</sup> *See Wortham*, 320 F. Supp. 2d at 234-35 (finding jurisdiction unreasonable where all five factors weighed in favor of the defendant).

<sup>107</sup> *See Metro. Life*, 84 F.3d at 575 (defeating jurisdiction because one factor did not favor either party, one factor weighed slightly against jurisdiction, and three factors weighed heavily against jurisdiction); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1080 (10th Cir. 2004) (defeating jurisdiction because a “majority” of factors weighed in favor of the defendant); *Roth v. Garcia Marquez*, 942 F.2d 617, 625 (9th Cir. 1991) (finding that—although it was a “close question”—the three factors weighing in favor of the defendant did not present a “compelling” case that jurisdiction was unreasonable); *Anglo American*, 916 F. Supp. at 1337 (finding that defendant did not present a “compelling” case because factors weighed evenly in favor of defendant and plaintiff).

<sup>108</sup> *E.g.*, *An v. Chun*, 134 F.3d 376 (9th Cir. 1998) (unpublished table decision) (dismissing personal jurisdiction in a suit against a foreign military leader for his role in an execution because the leader had no other contact with the United States other than some official visits and a brief vacation in Hawaii three years earlier).

<sup>109</sup> Before reaching any constitutional issues, a federal court must find a statutory basis to assert personal jurisdiction. Prior to 1993, a plaintiff in federal court establishing a foreign defendant’s minimum contacts with the United States was faced with a daunting task. Although it would be constitution-

alleged actions occurred overseas, this can be particularly problematic.<sup>110</sup> Unless the defendant has a continuous presence in the United States, the analysis in such a case will center on whether the defendant purposely directed his activities toward the United States.<sup>111</sup>

Because this analysis centers entirely on the *defendant's* activity, the minimum contacts analysis is essentially the same in a suit against a foreign defendant under the Alien Tort Claims Act as it is in a traditional lawsuit brought by American citizens.<sup>112</sup> The only possible difference could be a situation in which the court predicated personal jurisdiction in a suit brought by a domestic plaintiff entirely on the fact that the defendant di-

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ally permissible for a federal court to assert personal jurisdiction over a defendant based on his contacts with the United States as a whole, Federal Rule of Civil Procedure 4(e) limited jurisdiction to instances where the defendant would be subject to personal jurisdiction in the state where the federal court sat. FED. R. CIV. P. 4(e). Unless a separate federal statute authorized jurisdiction based on contacts with United States as a whole, the court would only analyze the defendant's contacts with the state where the federal court was located. *Id.* This analysis proved fatal to the plaintiff's claim in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, where the Supreme Court rejected an argument that the court should resolve this "bizarre hiatus" in the federal rules by examining contacts with the United States as a whole. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987) (citation omitted). However, recognizing the problem, the court suggested that:

[a] narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amendable to service under the applicable state long-arm statute, might well serve the ends of [certain] federal statutes.

*Id.* at 111. Congress took notice and created Federal Rule of Civil Procedure 4(k)(2), which authorizes personal jurisdiction based on the defendant's contacts with the United States as a whole when the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state." FED. R. CIV. P. 4(k)(2). However, in solving one problem Congress created another: read literally, the statute seems to require the court to determine if the defendant is subject to personal jurisdiction in *any* of the 49 other states. *Omni Capital*, 484 U.S. at 111. To resolve this second bizarre hiatus the Seventh and Fifth Circuits created a burden shifting framework that forces the defendant to concede to jurisdiction in another state if he wishes to preclude use of rule 4(k)(2). *See ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001); *Adams v. Unione Mediterranea Di Sicurtà*, 364 F.3d 646, 651 (5th Cir. 2004).

<sup>110</sup> *See generally* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1 (2002) (discussing the difficulties in establishing personal jurisdiction in suits arising out of international terrorist attacks).

<sup>111</sup> *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980). In *Filartiga*, the defendant was a former law enforcement official in Paraguay accused of various human rights abuses. *Id.* After the defendant fled to the United States and settled in Brooklyn, a victim's family member living in Washington, D.C. learned of his location. *Id.* The family member notified the INS and served the defendant while he was awaiting deportation. *Id.* The defendant's continuous presence in the United States removed personal jurisdiction from his available defenses. *Id.*

<sup>112</sup> *Compare* *Estates of Ungar v. Palestinian Auth.*, 153 F. Supp 2d 76, 86-96 (D.R.I. 2001) (establishing personal jurisdiction over the PLO based on its political activities in the United States in suit arising from its role in a terrorist attack on Americans vacationing in Israel), *with* *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 6-7 (D.D.C. 1998) (establishing personal jurisdiction over an Algerian political party based on its activities in Washington, D.C., in a suit under the Alien Tort Claims Act for human rights abuses in Algeria).

rected his activities toward an American. Obviously, this line of reasoning would fail if only foreigners were affected.

However, no case has yet made this distinction. In the few cases where personal jurisdiction has been at issue in a suit under the ATCA, the courts found personal jurisdiction based on the defendants' continuous contacts with the United States. For example, the court in *Doe v. Islamic Salvation Front* found personal jurisdiction over a Sudanese political group for claims by Algerian women who had allegedly been brutalized by the group.<sup>113</sup> The court predicated its finding of personal jurisdiction based on the group's operation of an office in Washington, D.C.<sup>114</sup> Along similar lines, a foreign defendant is always subject to personal jurisdiction if he is tagged in the forum. In *Kadic v. Karadzic*, the court found general personal jurisdiction over a foreign military leader who was tagged while visiting New York, even though the leader had essentially no other contact with the United States.<sup>115</sup>

While the "minimum contacts" test is essentially the same in suits under the ATCA as it is for suits brought by American plaintiffs, the "other factors" test should differ.<sup>116</sup> However, these other factors have yet to be applied in a suit brought under the Alien Tort Claims Act. The closest case on point involved a domestic terrorist attack. In *Burnett v. Al Bakra Investment & Development Corp.*, foreign and domestic plaintiffs sued a number of foreign organizations for their alleged involvement in the September 11, 2001 attacks.<sup>117</sup> The case involved an attack on domestic soil rather than an overseas attack—a factor weighing in favor of personal jurisdiction because the plaintiffs and the state had a greater interest in adjudicating the suit in the United States—but the court *sua sponte* considered whether the "other factors" weighed against jurisdiction.<sup>118</sup> However, because the defendant did not litigate the issue, there lacked the "constitutionally significant inconvenience" necessary to defeat personal jurisdiction.<sup>119</sup>

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<sup>113</sup> *Islamic Salvation Front*, 993 F. Supp. at 6-7.

<sup>114</sup> *Id.*

<sup>115</sup> *Kadic v. Karadzic*, 70 F.3d 232, 246-48 (2d Cir. 1995). The defendant was a Bosnian military leader accused of ethnic cleansing. *Id.* at 237. He received service of process while in New York at the U.N.'s invitation. *Id.* at 246. The court rejected his arguments that he was entitled to immunity from service because he was attending a U.N. function. *Id.* at 246-48.

<sup>116</sup> In theory, the analysis should weigh more heavily toward defeating jurisdiction. For example, the interests of the plaintiff in obtaining relief in the forum and the interests of the forum are not as great when the plaintiff is a non-resident.

<sup>117</sup> *Burnett v. Al Bakra Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 91 (D.D.C. 2003).

<sup>118</sup> *Id.* at 96 n.5.

<sup>119</sup> *Id.*

II. *MWANI V. BIN LADEN*

The claims in *Mwani v. Bin Laden* implicated both the Alien Tort Claims Act and the doctrine of personal jurisdiction. The record below indicates the complexity of the issue. The district court dismissed Mwani's claims against bin Laden because there was insufficient evidence to satisfy both the District of Columbia's long-arm statute and the constitutional requirement of purposeful availment.<sup>120</sup> On appeal, the circuit court reinstated the suit. First, it held that the district court should have applied Fed. R. Civ. P. 4(2)(k) in lieu of the District of Columbia's long-arm statute, increasing the scope of the inquiry to bin Laden's contacts with the United States as a whole.<sup>121</sup> Moreover, bin Laden's decision to bomb the United States demonstrated the kind of purposeful availment sufficient to give rise to specific personal jurisdiction.<sup>122</sup> Finally, the fact that the plaintiffs were Kenyan did not serve to defeat the reasonableness of personal jurisdiction, and no other considerations rendered the result incompatible with fair play and substantial justice.<sup>123</sup>

A. *Facts and Procedure*

On August 7, 1998, a truck bomb exploded outside the American Embassy in Nairobi, the capital of Kenya. The blast killed over 200 people, including twelve Americans. Of the 4000 injured, most were Kenyan.<sup>124</sup>

Within a year, a Kenyan national named Odilla Mutaka Mwani filed a complaint in the U.S. District Court for the District of Columbia seeking to represent a class of injured Kenyans.<sup>125</sup> He alleged that the bombing was carried out by Usama bin Laden in conspiracy with al Qaeda. The complaint further alleged that Afghanistan and Sudan provided logistical, financial and other support to bin Laden.<sup>126</sup> Finally, he asserted a claim against the United States under the Federal Tort Claims Act ("FTCA") on the ground that the United States "created circumstances which permitted the Bombing [sic] and subsequently caused and exacerbated the loss and injury sustained by Kenyan victims."<sup>127</sup>

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<sup>120</sup> *Mwani v. Bin Laden*, No. 99-125, 2002 U.S. Dist. LEXIS 27826, at \*24-25 (D.D.C. Sept. 30, 2002).

<sup>121</sup> *Mwani v. Bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005).

<sup>122</sup> *Id.* at 13.

<sup>123</sup> *Id.* at 14.

<sup>124</sup> *Id.* at 4.

<sup>125</sup> *Id.* at 5.

<sup>126</sup> *Id.*

<sup>127</sup> *Mwani v. United States*, No. 99-125, 1999 U.S. Dist. LEXIS 23421, at \*2 (D.D.C. Nov. 19, 1999).

The United States quickly moved to dismiss Mwani's FTCA claim. The suit asserted several theories of liability against the United States, including negligence, nuisance, and violations of Kenyan law.<sup>128</sup> However, Mwani failed to file a claim with an appropriate administrative agency, a prerequisite to bringing suit under the FTCA. As a result, District Judge Kollar-Kottely dismissed the claim against the United States without inquiring into its merits.<sup>129</sup>

To no one's surprise, bin Laden was not as quick to respond to Mwani's complaint. In 2001, Mwani moved for a default judgment against bin Laden. The court rejected his argument that the entry should be automatic, holding that the court's authority to hear the default issue is "closely circumscribed by the limits of its jurisdiction."<sup>130</sup> While the plaintiff had met the requirements of service by publishing notice in several Arabic newspapers, he only satisfied the procedural process by which a court asserts personal jurisdiction.<sup>131</sup> According to the court, the plaintiff still had the burden of showing that bin Laden established sufficient contacts to satisfy the District of Columbia's long-arm statute and constitutional requirements.<sup>132</sup>

Mwani attempted to meet this burden when he responded to the court's order to file a supplemental brief. In that brief, Mwani supported his argument for personal jurisdiction by presenting a patchwork of evidence. First, Mwani referred to a bin Laden *fatwah* that was published in an Arabic newspaper and later distributed in the United States.<sup>133</sup> The court rejected this evidence because Mwani did not translate the Arabic *fatwah*, and he failed to identify the source of the newspaper or provide any sort of affidavit from the publishers.<sup>134</sup> Next, Mwani cited several facts taken from the United States' closing argument in *United States v. Bin Ladin*, a criminal case prosecuting bin Laden and other terrorists associated with the 1998 embassy bombing.<sup>135</sup> In that case, prosecutors stipulated that bin Laden shipped a power supply for a cell phone to Herndon, Virginia, used an agent in Washington, D.C. to arrange an interview with ABC News in Afghanistan, and "transmitted his views to Washington, D.C. by interviews on CNN and ABC."<sup>136</sup> Finally, Mwani attached a printout from the White House's website quoting President Bush's remarks on the September 11,

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<sup>128</sup> *Id.* at \*2-3.

<sup>129</sup> *Id.* at \*14-15.

<sup>130</sup> Mwani v. Bin Ladin, No. 99-125, 2001 U.S. Dist. LEXIS 25964, at \*3-4 (D.D.C. Mar. 14, 2001).

<sup>131</sup> *Id.* at \*5.

<sup>132</sup> *Id.* at \*6.

<sup>133</sup> Mwani v. Bin Ladin, No. 99-125, 2002 U.S. Dist. LEXIS 27826, at \*17-18 (D.D.C. Sept. 30, 2002).

<sup>134</sup> *Id.* at \*18-19.

<sup>135</sup> *Id.* at \*19-21.

<sup>136</sup> *Id.*

2001 attacks and a one-page “fact sheet” issued by the State Department.<sup>137</sup> The court rejected all of this evidence because of “evidentiary defects,” including hearsay problems and the rule that “statements a prosecutor makes in a closing argument are not evidence.”<sup>138</sup> Moreover, none of the evidence supported the contention that bin Laden purposefully directed his activities toward the District of Columbia and that the litigation resulted from those activities. Accordingly, the plaintiff failed to satisfy the District of Columbia’s long-arm statute by a preponderance of the evidence.<sup>139</sup> Finding no personal jurisdiction, the court dismissed the claims against bin Laden with prejudice.<sup>140</sup>

The next day, Mwani submitted a new supplemental memorandum in support of personal jurisdiction. The supplement included three new sources of evidence: a Senate intelligence committee statement and two books about the September 11, 2001 attacks.<sup>141</sup> Judge Kollar-Kotelly treated this as a motion for reconsideration and dismissed it because the evidence was clearly within Mwani’s possession at the time he had filed the original brief.<sup>142</sup>

Mwani suffered a final setback in 2004, when the court dismissed his claims against Afghanistan. Mwani’s claims against Afghanistan did not fall within the exceptions to the Foreign Sovereign Immunities Act (“FSIA”),<sup>143</sup> which limits the liability of a foreign state to cases where the state incurs liability from a commercial activity or where the state is designated as a “state sponsor of terrorism.”<sup>144</sup> Despite its past notoriety, Afghanistan did not fall within the latter category.<sup>145</sup> The court also rejected Mwani’s argument that its support of terrorism was a “commercial activity.”<sup>146</sup> With his claims against Sudan<sup>147</sup> and Afghanistan gone, Mwani’s entire case was dismissed. He filed a timely appeal.

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<sup>137</sup> *Id.* at \*22.

<sup>138</sup> *Id.* at \*20, 22-23.

<sup>139</sup> *Mwani*, 2002 U.S. Dist. LEXIS 27826 at \*11-12. The court cited 2 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 12.31[5] (3rd ed. 2002), for the proposition that plaintiff on the cusp of a default judgment must prove personal jurisdiction by a preponderance of the evidence. *Mwani*, 2002 U.S. Dist. LEXIS 27826 at \*11. However, the court noted that Mwani would have failed to meet any standard due to defects with the evidence he presented. *Id.* at \*12.

<sup>140</sup> *Mwani*, 2002 U.S. Dist. LEXIS 27826 at \*24-26.

<sup>141</sup> *Mwani v. Bin Ladin*, No. 99-125, 2003 U.S. Dist. LEXIS 26556, at \*7-9 (D.D.C. Sept. 30, 2003).

<sup>142</sup> *Id.* at \*8-10.

<sup>143</sup> 28 U.S.C. §§ 1602-11 (2006).

<sup>144</sup> *Mwani v. United States*, No. 99-125, 2004 U.S. Dist. LEXIS 28170, \*5-6 (D.D.C. June 22, 2004).

<sup>145</sup> *Id.* at \*6.

<sup>146</sup> *Id.* at \*22.

<sup>147</sup> Mwani apparently dropped his claim against Sudan sometime between September 30th 2002, and September 30th 2003. The court mentions Sudan in its 2002 order, *Mwani*, 2002 U.S. Dist. LEXIS 27826 at \*25, but not in its 2003 order, *Mwani*, 2003 U.S. Dist. LEXIS 26556.

### B. *The D.C. Circuit's Opinion*

*Mwani v. Bin Laden* came before the D.C. Circuit Court of Appeals in 2005, nearly six years after Mwani had filed his first complaint. The issues on appeal concerned whether the district court had personal jurisdiction over bin Laden and al Qaeda, and whether the district court had erred in dismissing Mwani's claims against Afghanistan and Sudan. Before affirming the court's holding on the latter issue,<sup>148</sup> Judges Garland, Tatel, and Edwards examined the more contentious issue of personal jurisdiction.

Writing for the court, Judge Garland first held that the district court erred by requiring a "preponderance of the evidence" to satisfy personal jurisdiction. As a threshold matter, Garland noted that a "court should satisfy itself that it has personal jurisdiction before entering judgment against an absent defendant."<sup>149</sup> But the district court's evidentiary requirement was misguided; a litigant need only make a prima facie showing that the court may assert personal jurisdiction over the defendant.<sup>150</sup>

Judge Garland found that the district court further erred by applying the District of Columbia's long-arm statute. Although the plaintiff's statutory case for personal jurisdiction expressly relied on that statute, Garland held that the correct statute to be applied was Fed. R. Civ. P. 4(k)(2), which provides personal jurisdiction to the extent constitutionally permissible based on the defendant's contacts with the nation as a whole when no one state's long-arm statute would be sufficient.<sup>151</sup> Applying this rule, the issue became whether bin Laden had sufficient contacts with the United States to make personal jurisdiction over him constitutionally acceptable.<sup>152</sup>

Under this constitutional analysis, the court first examined whether the defendant had "'purposefully directed' his activities at residents of the forum."<sup>153</sup> Judge Garland found that the district court erred by requiring the defendant to have "specific, physical contacts" with the District of Columbia.<sup>154</sup> First, the appropriate issue was the sufficiency of bin Laden's contacts with the United States as whole, not just the District of Columbia.<sup>155</sup> Moreover, these contacts do not have to be physical, "[s]o long as [an] actor's efforts are 'purposefully directed' toward residents of another [forum]."<sup>156</sup> Here there was no doubt that bin Laden engaged in actions di-

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<sup>148</sup> *Mwani*, 417 F.3d at 15-17. The court echoed the District Court's reasoning that state-sponsored terrorism was not a "commercial activity." *Id.*

<sup>149</sup> *Id.* at 6.

<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.* at 8-11.

<sup>152</sup> *Id.* at 11.

<sup>153</sup> *Id.* at 11-12 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

<sup>154</sup> *Mwani*, 417 F.3d at 12.

<sup>155</sup> *Id.* at 12.

<sup>156</sup> *Id.* at 12-13 (quoting *Burger King*, 471 U.S. at 474) (alterations in original).

rected at and felt in the forum. The allegation was that bin Laden conspired to bomb an American embassy not only to hurt Kenyans and American employees, but also to “cause pain and sow terror in the embassy’s home country, the United States.”<sup>157</sup> Moreover, the embassy bombing wasn’t the first time bin Laden had attacked the United States: in 1993 bin Laden bombed the World Trade Center and plotted to bomb the United Nations, the Federal Plaza, and New York City’s Lincoln and Holland Tunnels.<sup>158</sup>

According to Judge Garland, the fact that Kenyans, rather than Americans, choose to sue did not defeat personal jurisdiction.<sup>159</sup> Bin Laden chose to purposefully direct his terror toward Americans, and it was foreseeable that he would be hailed into American court as a result.<sup>160</sup> The court cited *Keeton* for the proposition that the “plaintiff’s residence in the forum state is not a separate requirement, and the lack of residence will not defeat jurisdiction established on the basis of the defendant’s contact.”<sup>161</sup> Judge Garland noted that the claim before the *Keeton* Court was for libel and asserted by a non-resident of the forum state. There, the Supreme Court held that a state has an interest in entertaining libel claims brought by non-residents because false statements harm both the subject of the falsehood and those who read the statement.<sup>162</sup>

Despite citing *Keeton*, however, the court did not go on to analyze how any of the other reasonableness factors affected personal jurisdiction. According to the court, minimum contacts must be “analyzed in light of other factors” to determine whether “personal jurisdiction would comport with ‘fair play and substantial justice.’”<sup>163</sup> Here, there was no compelling case that other considerations would render jurisdiction unreasonable. The defendants had purposefully directed their activities toward the United States, “and the fact that the plaintiffs are Kenyans who were injured in the process is not a consideration that would render the assertion of American jurisdiction incompatible with substantial justice.”<sup>164</sup>

Additionally, the court noted that Mwani’s claims met the ATCA’s requirement of a “tort in violation of the law of nations.” Citing *Sosa v. Alvarez-Machain*, the court held that a conspiracy to attack an American em-

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<sup>157</sup> *Mwani*, 417 F.3d at 13.

<sup>158</sup> *Id.* at 14. The court “put[] to one side” the September 11, 2001 terrorist attacks. *Id.* This probably is because these attacks were not relevant in establishing specific personal jurisdiction based on bin Laden’s involvement in the embassy bombing—the actions giving rise to the litigation. However, the plaintiffs could have asserted a theory that bin Laden’s regular attempts to terrorize Americans constitutes a sort of continuous, but minimum, contact supporting jurisdiction for related claims. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

<sup>159</sup> *Mwani*, 417 F.3d at 13.

<sup>160</sup> *Id.* at 13-14.

<sup>161</sup> *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984)).

<sup>162</sup> *Id.* at 14 n.13.

<sup>163</sup> *Id.* at 14.

<sup>164</sup> *Id.*

bassy and its diplomatic personnel certainly violated a norm comparable to the “features of those 18th-century paradigms” that the First Congress understood to constitute international law.<sup>165</sup>

### III. ANALYSIS

The *Mwani* decision is a mixed bag. The court’s application of Rule 4(k)(2) in lieu of the District of Columbia’s long-arm statute is natural and makes sense in a case like this one.<sup>166</sup> However, the court’s constitutional analysis is defective. While bin Laden purposely directed his activities toward the United States by bombing its Kenyan embassy, the “other factors” weigh so strongly against personal jurisdiction as to render asserting such jurisdiction unconstitutional. If the court is to take its *sua sponte* analysis of personal jurisdiction seriously, it should have at least examined these other factors. Moreover, denying personal jurisdiction in this case would serve the policy end of further limiting the ability of foreign litigants to use the

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<sup>165</sup> *Mwani*, 417 F.3d at 14 n.14 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)).

<sup>166</sup> As noted in *Mwani*, the Supreme Court’s decision in *Omni Capital* gave a less-than-subtle hint that Congress should amend the Federal Rules of Civil Procedure to allow for a national contacts test when no one state’s long-arm statute could sufficiently provide personal jurisdiction over a defendant. *Id.* at 10. Congress took notice, and in 1993 it enacted rule 4(k)(2) to do exactly that. *Id.*

Eleven years later, in *Herero People’s Reparations Corp. v. Duetsche Bank*, the D.C. Circuit considered the plaintiff’s claim that the court should assert personal jurisdiction over a German corporation based on a theory of “universal jurisdiction”—the same theory rejected by the *Omni Capital* Court. *Herero People’s Reparations Corp. v. Duetsche Bank*, 370 F.3d 1192, 1196 (D.C. Cir. 2004). As a last ditch argument on appeal, the plaintiffs argued that the court had personal jurisdiction based on Fed. R. Civ. P. 4(k)(2). *Id.* The court rejected this argument because the plaintiffs failed to raise it before the district court. *Id.*

The plaintiffs in *Mwani* benefited from a much more benevolent court on appeal. Judge Garland explained that while the plaintiffs did not expressly rely on Rule 4(k)(2) to assert personal jurisdiction, “it is best to excuse the forfeiture.” *Mwani*, 417 F.3d at 11 n.10. Moreover, the plaintiffs did cite to “F.R. Civ. P. 4” and a section of a treatise discussing paragraph (k)(2). *Id.*

Whether or not the court should have excused the failure to rely on Rule 4(k)(2), it is clear that the application of Rule 4(k)(2) was appropriate in this case. A lack of a statutory basis for personal jurisdiction in this case truly would have been the type of “bizarre” result that prompted the Supreme Court to drop its hint to Congress in *Omni Capital*. Even if personal jurisdiction was not constitutionally permissible in *Mwani*, Rule 4(2)(k) will certainly be used by future litigants in cases where it is unquestionably valid. Before this decision, a defendant might have been able to escape personal jurisdiction despite establishing constitutionally sufficient contacts with the United States; afterwards, potential litigants are on notice of this powerful statutory tool for asserting personal jurisdiction.

Since *Mwani*, several courts have cited the case for this proposition. For example, in *In re Terrorist Attacks on Sept. 11, 2001*, the court relied on *Mwani* and Rule 4(k)(2) in its analysis of whether it could assert personal jurisdiction over several foreign defendants that allegedly played a role in the September 11, 2001 attacks. *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005); see also *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1334 (C.D. Utah 2006).

Alien Tort Claims Act in lieu of pursuing remedies in their own courts, a practice that benefits neither plaintiffs as a class nor the United States.

A. *The Court's Due Process Analysis*

The *Mwani* court based its due process analysis on only one prong of a two-pronged analysis. Indeed, bin Laden created sufficient minimum contacts by purposefully directing his activities toward the United States, but an objective application of the “reasonableness” factors reveals that the assertion of personal jurisdiction over bin Laden was unconstitutional.

Regarding the first prong of the constitutional analysis, the court of appeals found that bin Laden and al Qaeda created quality minimum contacts by conspiring to bomb a United States embassy.<sup>167</sup> Given the Supreme Court's decision in *Asahi*, this appears to be the correct result. Like the defendant in *Asahi* who sold parts to a manufacturer that imported its finished to the United States, bin Laden acted in a way that unquestionably affected the United States. Both defendants created minimum contacts through these actions. In *Asahi*, however, the Justices were in disagreement over the level of knowledge the defendant corporation needed to have in order to “purposefully” avail itself of its minimum contacts. While four of the *Asahi* Justices would only require an “awareness” standard, all nine Justices agreed that a defendant who purposefully directs his activities toward a forum creates quality minimum contacts with that forum.<sup>168</sup> Here, bin Laden created these contacts by conspiring to explode a truck bomb directly outside a United States embassy. Not only did bin Laden's actions unleash violence on United States soil, but he also intended to terrorize Americans both at home and abroad.

Given the strength of these contacts and bin Laden's clear intention to harm Americans, it could be argued that no other evidence was even necessary to establish quality minimum contacts with the United States. However, this analysis would be different if bin Laden had intended to target Kenyans and in the process he had inadvertently hurt some Americans. In such a case, the confusion achieved in *Asahi* would repeat itself. The court would have to delve into the painful process of examining bin Laden's psyche, determining whether he “knew” that he would hurt Americans or was “merely” aware that they may be injured.<sup>169</sup> At that point it might also be necessary to examine some of the plaintiffs' additional evidence and determine whether it played into a greater scheme to terrorize Americans. However, none of this analysis was necessary because bin Laden's intentions in

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<sup>167</sup> *Mwani*, 417 F.3d at 13.

<sup>168</sup> See FIELD, *supra* note 57, at 576-77.

<sup>169</sup> See Hornbeck, *supra* note 68, at 1424.

the 1998 embassy bombing were clear: to terrorize Americans and promote his radical agenda.

The analysis, of course, does not end once the court determines that the defendant established quality minimum contacts with the forum; the court must further determine whether other considerations make it unreasonable to assert personal jurisdiction.<sup>170</sup> As a threshold matter, it should be acknowledged that these “other factors” only defeat personal jurisdiction when the defendant presents a “compelling” case that it would be incompatible with “fair play and substantial justice” for the court to exercise personal jurisdiction over a defendant.<sup>171</sup> Accordingly, the court did not necessarily have a responsibility to consider these factors. However, the court did not need to consider the issue of personal jurisdiction at all. After all, a defendant could always mount a collateral attack while challenging the plaintiff’s suit on the judgment. However, if the court is to seriously look at the issue of personal jurisdiction and render an opinion with precedential value, it should look at the whole picture and consider all relevant parts of this doctrine.

The *Mwani* court clearly did not apply all of the factors that make up the second prong of the constitutional analysis. To begin, the court did not consider the burden on bin Laden to litigate this suit in the United States. While bin Laden deserves little sympathy, the law is supposed to be objective, and an objective analysis reveals that bin Laden would face a great burden if required to make an appearance before the court. Of great importance, bin Laden would probably have to travel a substantial distance to get to an American court. Most intelligence experts posit that bin Laden is hiding somewhere in the region surrounding the Pakistan-Afghanistan border.<sup>172</sup> The case law suggests that this creates a significant burden. In *Benton v. Cameco Corp.*, the Tenth Circuit considered the travel distance between Canada and Colorado to be burdensome because the Canadian defendant had no real contacts with the United States.<sup>173</sup> Likewise, the court in *Wortham v. KarstadtQuelle A.G.*, the case concerning restitution claims against German corporations, placed significance on the fact that the defendants in that case had no contacts with a United States law firm and they faced a significant language barrier.<sup>174</sup> Considering that bin Laden would have to travel from Pakistan to the United States, probably does not retain a United States law firm, and does not speak fluent English, the burden on bin Laden probably outweighs that found in any other case the courts have examined. Certainly the court should have at least weighed this factor.

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<sup>170</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

<sup>171</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

<sup>172</sup> *E.g.*, David Johnson, *Osama bin Ladin*, in INFOPLEASE, <http://www.infoplease.com/spot/osama-binladen.html>, (last visited Apr. 7, 2007).

<sup>173</sup> *Benton v. Cameco Corp.*, 375 F.3d 1070, 1079 (10th Cir. 2004).

<sup>174</sup> *Wortham v. KarstadtQuelle A.G.*, 320 F. Supp. 2d 204, 229 (D.N.J. 2004).

In addition to the defendant's interests, the court should have considered the strength of the plaintiff's interest in litigating in the United States. It is clear why Mwani brought this suit in United States federal court: he wished to obtain judgments against the United States, Sudan, and Afghanistan. These remedies may not have been available in Kenya. However, this is all irrelevant to asserting personal jurisdiction over bin Laden. First, these claims are against different defendants. Second, even if Mwani's claim against bin Laden would fare better in the United States, that does not mean he has a constitutionally significant interest in litigating here. In *Wortham*, the court noted that favorable law in a particular forum does not affect the personal jurisdiction analysis.<sup>175</sup> Perhaps international "forum shopping" would be more appropriate when the plaintiff alleges some sort of human rights abuse and believes that his home forum would not provide a remedy, but that is not the case here. Similar to the court's conclusion in *Benton*,<sup>176</sup> the plaintiffs in *Mwani* did not demonstrate why Kenyan courts would not provide an acceptable alternative.

Third, the court only tacitly considered whether the United States had an interest in adjudicating this suit. Closer examination reveals that the United States had no interest for several reasons. While some civil suits could play a role in the United States' war on terror by deterring terrorism, this suit cannot. The default judgment in this case will probably not be enforceable because bin Laden's assets are well hidden.<sup>177</sup> Even if bin Laden's assets surfaced, Mwani's tort judgment would probably be subservient to the claims of various sovereign nations seeking his money.<sup>178</sup> And even that reasoning assumes that bin Laden's assets would be found in a nation that is willing to enforce an American judgment.<sup>179</sup>

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<sup>175</sup> *Id.* at 230 (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996)).

<sup>176</sup> *Benton*, 375 F.3d at 1080.

<sup>177</sup> Dan Verton, *U.S. Could Use Cybertactics to Seize bin Laden's Assets*, COMPUTERWORLD, Sept. 20, 2001, <http://www.computerworld.com/securitytopics/security/story/0,10801,64072,00.html>.

<sup>178</sup> This would not be an unusual result. Recently, the United States government redirected seized Iraqi funds that had been attached by a tort judgment in favor of American soldiers. John Norton Moore, *Forgotten POWs, Forgotten Honor*, WASH. POST, Nov. 10, 2004, at A27. The soldiers had been tortured by Iraqi captors during the first Gulf War and won a judgment in the United States District court for the District of Columbia. *See Acree v. Republic of Iraq*, 370 F.3d 41, 60 (D.C. Cir. 2004). The District Court had refused the government's motion to intervene, but the Circuit Court reversed on appeal and agreed with the Government that the case should be dismissed. *Id.*

<sup>179</sup> There is no full faith and credit clause for sovereign nations, and "the United States is not a signatory to any treaty that would require another country to . . . enforce [U.S.] judgments." Heiser, *supra* note 110, at 41. Accordingly, it is entirely in the discretion of the enforcing court whether to honor an American judgment. *Id.* Countries hostile toward the United States may categorically refuse to enforce judgments, and even friendly nations may refuse to enforce a judgment if the plaintiff did not follow adequate procedures for service of process or assertion of personal jurisdiction. *Id.* at 41-42. Heiser suggests—in order to preserve the deterrent effects of tort law in the international context—that

On a related note, one of a state's strongest interests in hosting litigation is to provide redress to its own citizens.<sup>180</sup> Because Kenyans brought this suit, no Americans will have their rights vindicated. In theory, American taxpayers may actually suffer by fronting the bill to maintain their federal courts as forum for foreign litigants to pursue unenforceable international claims. While the court did cite *Keeton* for the proposition that a state may still have an interest in enforcing tort claims brought by non-residents for actions that affect the state's own citizens,<sup>181</sup> as mentioned above, the argument loses force in *Mwani* because the court's judgment will be unenforceable.

Fourth, the suit would clearly be better litigated in Kenya. The evidence and witnesses can be found there. Moreover, although this case would be unlikely to proceed to the merits, Kenyan law would probably apply. As *Asahi* and various circuit courts have noted, these facts suggest that a foreign court would serve as the better forum.<sup>182</sup>

The fifth and final factor—the foreign state's interest in enforcing its own substantive social policy—does not weigh strongly in favor of either plaintiff or defendant. The Supreme Court gave this factor special attention in *Asahi*, warning courts that they should be careful to not interfere with another state's sovereignty.<sup>183</sup> In that case, the California court could have overstepped its bounds by adjudicating a foreign corporation's contractual obligations under Japanese law.<sup>184</sup> But this caveat does not apply with the same force in *Mwani*. Here, Kenya and the United States both suffered from bin Laden's terrorism. Certainly, the United States has an interest in adjudicating terrorist attacks against its embassy. Likewise, it weighs in bin Laden's favor that Kenya has an interest in enforcing its own tort law, especially to provide recovery to its citizens. Assuming an enforceable judgment, this factor would either be a toss-up or weigh slightly in bin Laden's favor, because Kenya may have the greater interest in enforcing tort claims brought by its own citizens. In reality, this factor may be moot because neither state advances any policy by issuing unenforceable default judgments.

The final tally is that four factors clearly weigh in bin Laden's favor, and the fifth is inapplicable to this case. Given the strength with which these four factors weigh against asserting personal jurisdiction, the court's holding was probably unconstitutional. In *Burger King*, the Supreme Court

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the United States seek to negotiate multinational treaties to allow American judgments to be enforced overseas. *Id.* at 44-49.

<sup>180</sup> See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (“Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.”).

<sup>181</sup> *Mwani v. Bin Laden*, 417 F.3d 1, 14 n.13 (D.C. Cir. 2005) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)).

<sup>182</sup> *Asahi*, 480 U.S. at 114; *Benton*, 375 F.3d at 1079.

<sup>183</sup> *Asahi*, 480 U.S. at 115.

<sup>184</sup> *Id.* at 114-16.

explained that personal jurisdiction is determined by a balancing test, and strong minimum contacts may be hard to negate by weaker “reasonableness” factors.<sup>185</sup> Here the minimum contacts are strong, due to bin Laden’s purpose of terrorizing Americans, but the reasonableness factors to the weighing to the contrary are even stronger. It is obvious that the defendant was greatly burdened, the plaintiff had no interest in litigating in the United States, the United States had no interest in hosting this suit, and the more efficient place to resolve this conflict is Kenya.<sup>186</sup> Indeed, this line of reasoning may deny personal jurisdiction in many ATCA suits brought against foreign defendants for events occurring on foreign soil. But as the next section argues, that would be a positive development in the law.

B. *Denying Personal Jurisdiction in Suits Like Mwani Would Help Limit the Ability of Foreign Litigants to Use the Alien Tort Claims Act for International Disputes*

The Supreme Court’s jurisprudence on the doctrine of personal jurisdiction has gradually introduced policy considerations into the mix. In doing so, the Court has removed its focus from the defendant’s actions, favoring instead a balancing test considering not only the defendant, but the interests of the plaintiff, the interests of the forum state, and the interests of other possible fora. Suits under the Alien Tort Claims Act present a special opportunity for these policy considerations: they can prevent litigants from bringing claims in the United States that would be better litigated elsewhere.

Seeking exactly this result, courts have long struggled to narrow the scope of the Alien Tort Claims Act. In the words of the English Court of Appeals, “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.”<sup>187</sup> The text of the statute, construed literally, seems to provide jurisdiction for federal courts to hear any claim involving a tort committed anywhere outside of the United States. As discussed above, courts have put necessary limits on the ability of foreigners to avail themselves of the ATCA by strictly construing the definitions of “tort” and “law of nations.” The personal jurisdiction reasonableness factors can aid in this effort by eliminating ATCA claims where the (1) plaintiff does not have a suffi-

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<sup>185</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

<sup>186</sup> The tally of factors is similar to *Metropolitan Life*, where the court found that the first four factors weighed against jurisdiction, and the final factor—each state’s interests in furthering its substantive policy—did not weigh either way. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 575 (2d Cir. 1996). In that case, the court found that personal jurisdiction would be unreasonable despite the defendant’s minimum contacts with the forum state. *Id.*

<sup>187</sup> U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *GLOBAL FORUM SHOPPING: AN INTERNATIONAL DILEMMA* 1 (2004), [http://www.instituteforlegalreform.com/issues/GlobalForum\\_INTL%20dilemma.pdf](http://www.instituteforlegalreform.com/issues/GlobalForum_INTL%20dilemma.pdf) (quoting *Smith Kline & French Labs. Ltd. v. Bloch*, 1 W.L.R. 730 (C.A. 1982)).

cient interest to litigate in the United States; (2) where the United States does not have an interest in hearing the suit; (3) where the defendant would be greatly burdened; (4) where a more efficient forum exists in another country; or (5) in cases where a United States court could injure a foreign state's sovereignty by adjudicating the claim.

In most cases, these reasonableness factors will operate in similar fashion to other limits on the Alien Tort Claims Act. For example, whether the United States has an interest in hearing the suit has never been an explicit condition to sue under the Alien Tort Claims Act. However, introducing this factor to the ATCA could provide a useful means to distinguish those cases where the United States could play an active role in deterring terrorism or human rights abuses from cases where little can be accomplished. Often this factor will rest on the type of claim that is being asserted. In this sense, weighing the United States' interest will be similar to requiring an "egregious" tort or violation of international law, already a limit on the courts' subject matter jurisdiction.<sup>188</sup> By expressly considering the United States' interests, however, the courts will consider whether adjudication serves the interests of the American public.

Whether the federal courts can provide relief should also be considered. Here the interests of the United States and the interests of the plaintiff may overlap. For example, the United States will not have an interest in issuing an unenforceable tort judgment which is without deterrent effects.<sup>189</sup> Likewise, a plaintiff has no interest in receiving an unenforceable award.<sup>190</sup> These considerations have never expressly been considered by courts hearing ATCA claims, but they can provide a useful way to reduce litigation that lacks any real benefits.

The burden to the defendant and whether it would be more efficient to litigate in another forum are already factors in another judicially-created limit to the ATCA: the doctrine of *forum non conveniens*. As previously discussed, courts have used this doctrine to dismiss cases when the defendant has shown that another forum would be more appropriate to hear the

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<sup>188</sup> *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983).

<sup>189</sup> See generally Heiser, *supra* note 110.

<sup>190</sup> Mwani's own behavior illustrates this point. Mwani most likely chose to sue in the United States in hopes of receiving a large, enforceable award. Recall that Mwani originally asserted claims against the United States, Sudan, and Afghanistan. *Mwani v. United States*, No. 99-125, 1999 U.S. Dist. LEXIS 23421 (D.D.C. Nov. 19, 1999). After these defendants were dismissed, however, Mwani was only left with a claim against bin Ladin and al Qaeda. Most likely, he included these defendants in the first place to give legitimacy to his claims—by adding the primary parties at fault. It would probably be fair to say that Mwani did not pursue his claims against these defendants with much zeal. Throughout March 2001 to September 2002, Mwani failed to meet the district court's request for supplemental briefing on personal jurisdiction. *Mwani v. Bin Ladin*, No. 99-125, 2001 U.S. Dist. LEXIS 25964, at \*9 (D.D.C. Mar. 14, 2001). After Mwani responded by handing in evidence consisting of computer print-outs, citations to a criminal case, and books, the court dismissed his claims with prejudice. *Mwani v. Bin Ladin*, No. 99-125, 2003 U.S. Dist. LEXIS 26556, at \*9 (D.D.C. Sept. 30, 2003).

claim.<sup>191</sup> Considering this factor in the context of personal jurisdiction will further reinforce the policy of encouraging litigants to seek the most efficient forum.

Finally, considering the interests of other sovereign nations would be especially valuable in suits under the ATCA. In *Asahi*, the court spoke of the importance of international comity as a reason to restrain the assertion of personal jurisdiction.<sup>192</sup> This concern is especially salient in cases under the ATCA where one alien sues another for actions on foreign soil.<sup>193</sup> Indeed, this concern was diminished in *Mwani* because United States' interests were involved in the terrorist bombing. However, the case would be different if terrorists targeted and hurt only Kenyans. In such a case, Kenya may wish to adjudicate claims arising out of the incident. By analyzing the interests of a foreign sovereign nation within the personal jurisdiction framework, courts can move to a more uniform position on this issue.

In sum, these "other factors" would often operate in a similar fashion to some of the judicially created limitations on the Alien Tort Claims Act. They will not create radically new limitations, but they will help reinforce and give uniformity to some of the solutions that courts have used to combat undesirable ATCA litigation. While the Alien Tort Claims Act may still remain a legal "Lohengrin" in the sense that "no one knows whence it came," applying the reasonableness factors to foreign defendants will help narrow and give shape to the very broad scope of litigation the statute permits.

## CONCLUSION

The United States' role in preventing international terror will surely grow in the coming years. With District of Columbia Circuit's recent decision in *Mwani v. Bin Laden*, the federal judiciary may find itself participating in this war in an unexpected way.

By holding that Usama bin Laden, a foreign defendant, is subject to personal jurisdiction in a claim by foreign plaintiffs for events occurring on

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<sup>191</sup> See Short, *supra* note 33, at 1001.

<sup>192</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987). See Steinhardt, *supra* note 14, at 526. Steinhardt notes that courts can use other doctrines to handle "sensitive cases" of this sort. *Id.* These doctrines include the "political question doctrine, the act of state doctrine, diplomatic immunity, and forum non conveniens, among others." *Id.*

<sup>193</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring). In *Sosa*, Justice Breyer expressed his concern for international comity:

Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the [ATCA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.

*Id.*

foreign soil,<sup>194</sup> the court has opened up the United States civil justice system to a large range of litigants. Sadly, with instability and a volatile political climate plaguing much of the Middle East and Asia, this class of litigants may grow. It is unclear whether the law of the United States permits these claims. In recent years, the Supreme Court has considered new factors—including the plaintiff’s interest in obtaining relief in the forum, the burden to the defendant, the forum state’s interests in adjudicating the claim, efficient resolution of the claim, and the foreign state’s interest in furthering its substantive policies—when determining whether to assert personal jurisdiction over a defendant. Often, these factors will weigh against asserting personal jurisdiction over an international defendant in a suit under the Alien Tort Claims Act, even if the defendant have minimum contacts with the United States.

Despite some uncertainty of whether precedent allows courts to hear claims such as those in *Mwani*, a related issue of policy is much clearer: federal courts should not adjudicate suits under the Alien Tort Claims Act where the defendant is barely amenable to personal jurisdiction. In these cases, the assertion of personal jurisdiction will not promote an interest of the United States because the plaintiff is foreign and any deterrent effect is eroded by the lack of an enforceable judgment. Moreover, by adjudicating a dispute between foreign parties for events occurring overseas, courts may threaten international comity. Strictly applying the “reasonableness” factors in such cases presents a useful opportunity to free federal courts of this litigation and place a necessary limitation on the Alien Tort Claims Act.

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<sup>194</sup> *Mwani v. Bin Laden*, 417 F.3d 1, 14 (D.C. Cir. 2005).