

NOTES

HOLDING SUPPORTERS OF TERRORISM ACCOUNTABLE: THE EXERCISE OF GENERAL JURISDICTION OVER THE PA AND PLO IN A POST-*DAIMLER* FRAMEWORK

*Mark D. Christopher**

TABLE OF CONTENTS

PROLOGUE 101

I. INTRODUCTION 103

II. GENERAL JURISDICTION, *DAIMLER*, AND THE END OF SIGNIFICANT CONTACTS 104

 A. *A History of Personal Jurisdiction* 104

 B. *Daimler and its Effect* 107

 C. *What Exactly is “At Home”?* 108

III. CIVIL LITIGATION UNDER THE ANTI-TERRORISM ACT OF 1991 110

 A. *Litigation Under the Alien Torts Statute* 110

 B. *The Anti-Terrorism Act of 1991* 112

IV. APPLICATION OF *DAIMLER* TO UNINCORPORATED, NON-SOVEREIGN ENTITIES 113

 A. *Case Law in the District Court of D.C.* 113

 B. *Current Cases in the District of Columbia* 118

 C. *Cases in the Southern District of New York* 123

V. GENERAL JURISDICTION AND ANTI-TERRORISM LITIGATION MOVING FORWARD 127

 A. *Application of Due Process Rights to Non-Sovereign, Non-Corporate Entities* 127

* J.D., University of Georgia School of Law, 2017; B.A., University of Georgia, 2009. I would like to thank my family for their love and support, particularly my wife. I would also like to thank Dean Peter “Bo” Rutledge for his guidance and advice.

*B. Examining Personal Jurisdiction Under the Fifth
Amendment Instead of the Fourteenth Amendment* 129

C. The Possibility of Exceptional Cases Under Daimler 130

VI. CONCLUSION 132

PROLOGUE

While this Note was undergoing the last stages of revision before publication, the Second Circuit Court of Appeals published its decision in the appeal by the Palestine Liberation Organization (PLO) to the Southern District of New York's judgment in *Sokolow v. PLO*.¹ The Second Circuit disagreed with the district court and vacated the judgment against the PLO.² Specifically, the court held that the district court did not have personal jurisdiction over the defendants regarding the claims brought against them.³ This Note will briefly cover the recent decision, but the remainder of the Note will remain as originally written as other cases are still pending an appeal which may reintroduce this issue, or if this issue is raised to the Supreme Court.

In the opinion, the court first addressed the three requirements of exercising personal jurisdiction.⁴ First, service of process on the defendant by the plaintiff must have been proper.⁵ Second, such service of process must fulfill a statutory basis for personal jurisdiction to be effective.⁶ Lastly, such "exercise of personal jurisdiction must comport with constitutional Due Process principles."⁷ As the defendants did not dispute the first two requirements, the court only analyzed whether the third prong was met; whether the exercise of jurisdiction over the defendants was consistent with the Constitution.⁸

Before analyzing due process under the Constitution, the court addressed three threshold issues, some of which were addressed in this Note. First, the court noted that the defendants had not waived or forfeited their objection to the district court's exercise of personal jurisdiction because they consistently raised the issue.⁹ Second, the PLO and Palestinian Authority (PA) did have due process rights because they were a non-sovereign entity and neither had been recognized as a sovereign state by the United States, whose determination is conclusive.¹⁰ The Second Circuit Court of Appeals took an alternate viewpoint on this issue than what is described in this Note, which advocated that the court could deem the PA and PLO not to have due process

¹ Waldman v. PLO, 835 F.3d 317 (2d Cir. 2016).

² *Id.* at 322.

³ *Id.*

⁴ *Id.* at 327.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (quoting *Licci ex rel Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59–60 (2d Cir. 2012)).

⁸ *Id.* at 328.

⁹ *Id.*

¹⁰ *Id.* at 329.

rights. Third, the court recognized that a due process analysis was substantially the same under both the Fifth and Fourteenth Amendment to the Constitution, with the principal difference being that under the Fourteenth Amendment, a court can only consider all of the defendant's contacts with the forum state, while under the Fifth Amendment, the court can consider all of the defendant's contacts in the United States.¹¹ Here, the court again analyzed this issue differently from this Note by judging the test to be roughly the same under both legal views.

Rather than review the court's entire analysis of the reasonableness of exercising personal jurisdiction and the minimum contacts of the PA and PLO, this section will briefly cover the parts of the Second Circuit's opinion that related to this Note. Mainly, the court held that the *Daimler* decision applied not just to corporations, but to all "entities," and therefore, it applied to the defendants in this case.¹² The court also rejected the idea that the defendants' contacts throughout the United States were enough to subject it to general jurisdiction because "there is no doubt that the 'far larger quantum' of the defendants' activities too place in Palestine."¹³ In regards to the "exceptional cases" referenced in *Daimler*, the Second Circuit rejected that this was such a case.¹⁴ The court stated that such exceptional cases were ones like in *Perkins v. Benguet*, where the defendants were temporarily located in the United States due to World War II.¹⁵ Nor were the attacks in this case, in the court's opinion, sufficiently aimed at the United States to allow the exercise of personal jurisdiction.¹⁶

Of course, this decision by the Second Circuit eliminates the split between the courts that forms the centerpiece of this Note. The judgments of the District Court of D.C. are still awaiting appeal, though. If the D.C. Circuit decides the issue differently from the Second Circuit, then this Note will once again be an important discussion on the issues at play. Even so, the author hopes that this Note will provide useful background information regarding the exercise of jurisdiction over defendants in terrorism litigation and other jurisdictional issues.

¹¹ *Id.* at 330 (citing *Chew v. Dietrich*, 143 F.3d 24, 28 n.4 (2d Cir. 1998)).

¹² *Id.* at 332.

¹³ *Id.* at 333.

¹⁴ *Id.* at 335.

¹⁵ *Id.*

¹⁶ *Id.* at 338.

I. INTRODUCTION

Terrorism is an inescapable aspect of the modern global political landscape. It can be as “small” as a shooting of Jewish worshippers attempting to visit a holy tomb or as “big” as a wave of suicide bombings across an entire country. The United States has felt the effects at home: from shootings by extremists linked to a new threat like the Islamic State, to a layered, orchestrated plot to strike at the symbols of our nation in New York and Washington. Some of these attacks are carried out by lone wolves, independent of support or funding. Others are part of consolidated strategies pushing for political change or disruption.

Plaintiffs in New York and Washington, D.C. have taken it upon themselves to pursue the perpetrators and supporters of these attacks.¹⁷ For decades, litigation has sought some measure of remedy for the victims and their families. In particular, the PA and PLO have been named as defendants in American courts, called to answer allegations that their organizations supported and controlled such attacks.

In New York, plaintiffs have won major victories with record punitive damage awards.¹⁸ In Washington, D.C., though, plaintiffs have found their cases dismissed for lack of personal jurisdiction.¹⁹ The United States Supreme Court’s recent decision in *Daimler AG v. Bauman*²⁰ led the courts in Washington to conclude that they could not exercise general personal jurisdiction over such foreign defendants because they were not “essentially at home” in the forum. In New York, the court found it could exercise personal jurisdiction in spite of the *Daimler* decision, holding that there was jurisdiction under the Anti-Terrorism Act of 1991 (ATA) and that this jurisdiction fell under the Court’s range of possible exceptional cases in *Daimler*. Currently, all these decisions are on appeal at their respective circuit courts.

This Note will examine the history of personal jurisdiction in the United States and its effects on this litigation. Further, it will review the evolution of anti-terrorism litigation over the last few decades, looking at legislation and its effects on the litigation of terrorism. Next, this Note will analyze the cases pending in the Southern District of New York and the District Court of

¹⁷ See *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37 (D.D.C. 2015); *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237 (D.D.C. 2015); *Sokolow v. Palestine Liberation (Sokolow II)*, No. 04 Civ. 597, 2014 U.S. Dist. LEXIS 168114 (S.D.N.Y. Dec. 1, 2014).

¹⁸ Benjamin Weiser, *Palestinian Groups Are Found Liable at Manhattan Terror Trial*, N.Y. TIMES (Feb. 23, 2015), http://www.nytimes.com/2015/02/24/nyregion/damages-awarded-in-terror-case-against-palestinian-groups.html?_r=0.

¹⁹ *Livnat*, 82 F. Supp. 3d at 19; *Safra*, 82 F. Supp. 3d at 37; *Klieman*, 82 F. Supp. at 237.

²⁰ 134 S. Ct. 746 (2014).

D.C. Finally, this Note will consider the future of this litigation and the possible avenues the circuit courts may follow in deciding these cases. In particular, the courts will have to examine if Due Process rights even apply to the PA and PLO. The courts will also have to determine if the *Daimler* and Fourteenth Amendment analysis used by the D.C. courts was appropriate or if a Fifth Amendment analysis is required. Lastly, the courts will likely look at the Supreme Court's recognition of exceptional cases under *Daimler* and whether the PA and PLO fit into that category of defendants.

II. GENERAL JURISDICTION, *DAIMLER*, AND THE END OF SIGNIFICANT CONTACTS

A. *A History of Personal Jurisdiction*

The *Daimler* decision is the latest in the long string of cases read by first year law students. Since the Court's ruling in *Pennoyer v. Neff*, the Court has produced numerous opinions attempting to narrow down exactly when a court has jurisdiction over a defendant. In *Pennoyer*, the Court made the landmark decision that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."²¹ This established the general limit under the Fourteenth Amendment on the exercise of personal jurisdiction extraterritorially, though that strict approach has loosened over time with the advances in "technology of transportation and communication, and the tremendous growth of interstate business activity."²²

The first major opinion that expanded a State's ability to exercise personal jurisdiction extraterritorially came in *International Shoe Co. v. Washington*.²³ There, the Court held Due Process requires the defendant to have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."²⁴ As the Court noted later, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."²⁵ The importance of *International Shoe* is that the lawsuit must arise from the activities of the defendant in the forum.²⁶ Today, this is known as specific jurisdiction.²⁷ Though the Court

²¹ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

²² *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 617 (1990).

²³ 326 U.S. 310 (1945).

²⁴ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²⁵ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

²⁶ *International Shoe*, 326 U.S. at 319.

avoided giving a detailed rule on what kind of acts or connections allow the exercise of specific jurisdiction, it recognized that “the commission of some single or occasional acts of the corporate agent in a state” could potentially be enough.²⁸ In his concurrence, Justice Stevens commented that what is needed is fair notice, which “includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign.”²⁹ The Due Process Clause requires this fair notice in order to “[give] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”³⁰

International Shoe also distinguished between the exercise of jurisdiction over a defendant in a lawsuit originating from their actions in the forum state and the exercise of jurisdiction over a foreign defendant when their “operations within a state [are] so substantial and of such a nature” that lawsuits arising from actions or dealings outside the state are justified.³¹ Later, the Court would hold that a state could only exercise this “general jurisdiction” over foreign defendants “when their affiliations with the State [were] so ‘continuous and systematic’ as to render them essentially at home in the forum State.”³² The seminal case on “general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum” is *Perkins v. Benguet Consol. Mining Co.*³³ In that case, the defendant corporation was incorporated in the Philippines but left the country during the Japanese occupation of the islands in World War II.³⁴ The company’s president moved to Ohio where he maintained an office and from where he oversaw the business.³⁵ The plaintiff sued the company over a claim that did not arise in Ohio and was not related to the defendant’s actions or connections in that state.³⁶ The Court held that due process would

²⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

²⁸ *International Shoe*, 326 U.S. at 318.

²⁹ *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring). See also *Calder v. Jones*, 465 U.S. 783 (1984) (holding that defendant’s intentional actions aimed at the forum State of California were enough that he might reasonably have expected to be sued there). But see *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (rejecting that a defendant’s predicting that its goods would reach the forum was enough to exercise specific jurisdiction and requiring “purposeful availment”).

³⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (holding that the fair notice requirement is satisfied where defendants have “purposefully directed” the activities at the forum State).

³¹ *International Shoe*, 326 U.S. at 318.

³² *Goodyear*, 131 S. Ct. at 2851.

³³ *Id.* at 2856.

³⁴ *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447 (1952).

³⁵ *Id.* at 447–48.

³⁶ *Id.* at 447.

not be violated by the exercise of jurisdiction over the corporate defendant³⁷ because, it later noted, “Ohio was the corporation’s principal, if temporary, place of business.”³⁸

The next case to clarify the exercise of general jurisdiction was *Helicopteros Nacionales de Colombia, S.A. v. Hall*.³⁹ The plaintiffs in the case were the survivors and representatives of four American citizens killed in a helicopter crash in Peru.⁴⁰ The defendants had contacts with Texas, but they were limited to one trip by the CEO to Houston, the purchasing of helicopters and equipment from a company in Texas, and sending personnel to Texas for training.⁴¹ The Court refused to classify these connections as the type of “continuous and systematic general business contacts” necessary for the exercise of general jurisdiction.⁴²

In 2011, the Court again addressed the restrictions on general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, a case arising from the deaths of two North Carolina residents in a bus accident near Paris.⁴³ The defendants were Goodyear USA, an Ohio corporation that operated tire plants in North Carolina, as well as three foreign subsidiaries.⁴⁴ Though Goodyear USA did not contest to jurisdiction, the foreign subsidiaries did so on the grounds that the small percentage of tires they produced that entered the stream of commerce and were distributed in North Carolina were not enough to warrant the exercise of general jurisdiction.⁴⁵ The Court held that such contacts were inadequate and “[did] not establish the ‘continuous and systematic’ affiliation necessary to empower the North Carolina courts to entertain claims unrelated to the foreign corporation’s contacts with the State.”⁴⁶ The Court specifically noted that the foreign defendants could not be described “in [any] sense [as] at home in North Carolina.”⁴⁷

³⁷ *Id.* at 448.

³⁸ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984).

³⁹ 466 U.S. 408 (1984).

⁴⁰ *Id.* at 410.

⁴¹ *Id.* at 416.

⁴² *Id.*

⁴³ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2850–51.

⁴⁶ *Id.* at 2851. *See also* *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987) (holding that mere awareness that the goods defendant has manufactured, sold, and delivered outside the country would reach the forum state through the stream of commerce did not constitute minimum contacts such as to justify the exercise of jurisdiction).

⁴⁷ *Goodyear*, 131 S. Ct. at 2857.

B. *Daimler and its Effect*

Most recently, the Supreme Court unanimously clarified its position on the exercise of general jurisdiction over foreign corporate defendants in *Daimler AG v. Bauman*.⁴⁸ In a holding that has had far-reaching consequences, the Court reiterated the rule from *Goodyear* that a court could only assert general jurisdiction over a foreign defendant “when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’”⁴⁹ The plaintiffs alleged that a subsidiary of Daimler AG, Mercedes-Benz Argentina (MB Argentina), worked with the Argentinian government to “kidnap, detain, torture, and kill” their own employees during a period of Argentinian history known as the “Dirty War.”⁵⁰ The plaintiffs claimed that jurisdiction was merited through the California contacts of another subsidiary of Daimler, Mercedes-Benz USA, LLC (MBUSA).⁵¹ MBUSA is a Delaware corporation with its principal place of business in New Jersey that distributes vehicles for sale to independent dealerships across the country, including in California.⁵²

The Court held that Daimler was not essentially at home in California and therefore was not subject to general jurisdiction there,⁵³ reasoning that subjecting the defendant to general jurisdiction in California based on its limited contacts there would subject it to general jurisdiction in every State, thus making it difficult for the corporation “to structure [its] primary conduct with some minimum assurance as to where that conduct will and will not render [it] liable to suit.”⁵⁴

However, the Court did not say that the place of incorporation and principal place of business were the only places a defendant could be subject to general jurisdiction, only that those were “paradigm all-purpose forums.”⁵⁵ This leaves open the possibility of an exceptional case where a corporation’s connections with a forum state other than “its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”⁵⁶ However, the Court dismissed the plaintiff’s proposal that a corporation be subject to general

⁴⁸ *Daimler*, 134 S. Ct. 746.

⁴⁹ *Id.* at 751 (quoting *Goodyear*, 131 S. Ct. at 2851) (alteration in original) (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 762.

⁵⁴ *Id.* at 761–62 (quoting *Burger King Corp.*, 471 U.S. at 472).

⁵⁵ *Id.* at 760 (referencing *Goodyear*, 131 S. Ct. at 2853).

⁵⁶ *Id.* at 761 n.19.

jurisdiction in any state where the corporation “engages in a substantial, continuous, and systematic course of business.”⁵⁷

C. *What Exactly is “At Home”?*

What, exactly, does it mean to be “at home”? In *Daimler*, the Court reiterated the paradigmatic forums for general jurisdiction are the individual’s domicile and the corporation’s place of incorporation or principal place of business.⁵⁸ The latter is derived from *International Shoe*, which referred to all-purpose corporate jurisdiction in “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities.”⁵⁹ A corporation’s principal place of business is “where a corporation’s officers direct, control, and coordinate the corporation’s activities.”⁶⁰ The Court avoided applying a “more general business activities test” where lower courts have looked at the “total amount of business activities that the corporation conducts [in the forum] and determine[d] whether they are ‘significantly larger’ than in the next-ranking State.”⁶¹ However, in *Daimler*, the rule was expanded and general jurisdiction now requires “an appraisal of a corporation’s activities in their entirety, nationwide, and worldwide.”⁶² This leaves an ambiguous rule for litigants where they must evaluate not only the defendant’s contacts with the forum state, but compare the contacts with the forum state in some unspecified way to the defendant’s contacts elsewhere.⁶³

More recently, the Second Circuit clarified this rule and reiterated “that a corporation may nonetheless be subject to general jurisdiction in a state only where its contacts are so ‘continuous and systematic,’ judged against the corporation’s national and global activities, that it is ‘essentially at home’ in that state.”⁶⁴ The Court explained that “[a]side from an ‘exceptional case,’ . . . a corporation is at home (and thus subject to general jurisdiction,

⁵⁷ *Id.* (quoting Brief for Respondents 16–17 & nn.7–8).

⁵⁸ *Id.* The Court cites two cases, *Barrow S. S. Co. v. Kane*, 170 U.S. 100 (1898) and *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917) where a corporation’s continuous operations in a forum State were enough to allow the exercise of general jurisdiction, but dismissed them because they were decided in an “era dominated by *Pennoyer’s* territorial thinking” and “should not attract heavy reliance today.” *Daimler*, 134 S. Ct. at 761, n.18.

⁵⁹ *Daimler*, 134 S. Ct. at 761 (quoting *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 318 (1945)).

⁶⁰ *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010).

⁶¹ *Id.* at 93.

⁶² *Daimler*, 134 S. Ct. at 762, n.20.

⁶³ *Id.* at 770 (Sotomayor, J., concurring).

⁶⁴ *Gucci Am. Inc. v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014) (quoting *Daimler*, 134 S. Ct. at 761–62).

consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business."⁶⁵

Justice Sotomayor criticized the Court's reasoning in *Daimler*, remarking that the case should have been resolved under a forum non conveniens analysis, and concurred only in the judgment.⁶⁶ In her view, the *Daimler* reasoning created a situation where multinational corporations are "too big for general jurisdiction."⁶⁷ She also criticized the Court's examination of *Daimler AG's* contacts with fora beyond California as being inconsistent with general jurisdiction and due process precedent.⁶⁸ In *Perkins*, *Helicopteros*, and *Goodyear* the Court's analysis to determine the appropriateness of the exercise of general jurisdiction included only those defendants' contacts and holdings in the forum states.⁶⁹ This is consistent with the reasoning of *International Shoe* that where a defendant "invoke[s] the benefits and protections of a State . . . the State acquires the authority to subject the company to suit in its courts."⁷⁰ But, inexplicably, the Court followed a path "untethered from this rationale" by analyzing the corporate defendant's contacts in places other than the forum.⁷¹ The Court's new rule requires that defendants possess not only "continuous and systematic contacts" in the forum, but that "those contacts must also surpass some *unspecified level* when viewed in comparison to the company's 'nationwide and worldwide' activities."⁷² In Justice Sotomayor's view of the *International Shoe* rule, the nature of the global economy has evolved to a point where a foreign defendant could sufficiently enjoy the benefits of multiple states to be considered "essentially at home" in each of them.⁷³ Such broad jurisdiction is merely an "inevitable consequence" of the *International Shoe* rule being applied in a modern global interconnected

⁶⁵ *Id.* The Second Circuit's examination of general jurisdiction is relevant because the District Court of D.C. uses this as their reference for application of general jurisdiction over the Palestinian Authority and Palestine Liberation Organization.

⁶⁶ *Daimler*, 134 S. Ct. at 764 (Sotomayor, J., concurring).

⁶⁷ *Id.* Justice Sotomayor compares this to the recent phenomenon where banks and corporations are deemed "too big to fail."

⁶⁸ *Id.* at 767–70.

⁶⁹ *Id.* at 767–68. In fact, as Justice Sotomayor notes, in *Perkins*, the Court recognized that the corporation's contacts in the forum state "were *not* substantial in comparison to its contacts elsewhere." *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 341 U.S. 437, 438 (1952)).

⁷⁰ *Id.* at 768.

⁷¹ *Id.* See also Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 742 (1988) ("We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states . . . [T]he amount of activity elsewhere seems virtually irrelevant to . . . the imposition of general jurisdiction over a defendant."). Interestingly, this article was cited and relied on by the majorities of both *Daimler* and *Goodyear*.

⁷² *Daimler*, 134 S. Ct. at 770 (emphasis added).

⁷³ *Id.* at 771.

economy.⁷⁴ The majority rejected this view and the prospect of an analysis based on reasonableness factors on the grounds that it was unpredictable for the company and judicially inefficient.⁷⁵

III. CIVIL LITIGATION UNDER THE ANTI-TERRORISM ACT OF 1991

A. *Litigation Under the Alien Torts Statute*

Anti-terrorism litigation is a relatively new brand of cases. It has been used both as a way for families of victims to receive compensation and as a way to influence those who commit or support terrorism. The first cases were brought under the Alien Torts Statute (ATS), which provided district courts with jurisdiction over “any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States.”⁷⁶ The first major case attempting to hold the PLO responsible for terrorist attacks, *Tel-Oren v. Libyan Arab Republic*, did not provide much guidance or precedent because each judge on the D.C. Circuit’s panel wrote his own separate concurring opinion.⁷⁷ Judge Edwards refused jurisdiction on the grounds that the PLO was not a “recognized member of the community of nations”⁷⁸ and that the lack of consensus in the international community on the legitimacy of terrorism indicated that it was not a violation of the laws of nations.⁷⁹ Judge Bork also took issue with the fact that there was no international agreement defining terrorism and therefore couldn’t be considered a violation of customary international law.⁸⁰ He reasoned that there was no cause of action to sue under international law or under the ATS.⁸¹ Judge Robb invoked the political question doctrine in his concurrence, reasoning that this issue was wholly outside of the court’s purview.⁸² This result left the issue unresolved and ripe for further litigation.

⁷⁴ *Id.*

⁷⁵ *Id.* at 762 n.20. Such reasonableness factors as those identified in *Asahi* include “the burden on the defendant,” “the interests of the forum State,” “the plaintiff’s interest in obtaining relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” “the shared interest of the several States in furthering fundamental substantive social policies,” and “the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction.” *Asahi*, 480 U.S. at 113–15.

⁷⁶ 28 U.S.C. § 1350 (LexisNexis through Pub. L. No. 114-327).

⁷⁷ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring); *id.* at 798 (Bork, J., concurring); *id.* at 823 (Robb, J., concurring).

⁷⁸ *Id.* at 791 (Edwards, J., concurring).

⁷⁹ *Id.* at 796.

⁸⁰ *Id.* at 806–07 (Bork, J., concurring).

⁸¹ *Id.* at 799. In Judge Bork’s view, the ATS was purely jurisdictional and did not create any cause of action for the plaintiffs. *Id.* at 813.

⁸² *Id.* at 823 (Robb, J., concurring).

The next case arose from the tragic killing of wheelchair-bound Leon Klinghoffer in the 1985 forcible seizure of the Italian passenger liner Achille Lauro.⁸³ This time, the district court found subject matter jurisdiction under both admiralty jurisdiction⁸⁴ and the Death on the High Seas Act.⁸⁵ The court justified its exercise of personal jurisdiction under state law based on the PLO's contacts in New York through its permanent observer to the U.N.⁸⁶ Most importantly, the court rejected the idea that suits against the PLO were nonjusticiable under the political question doctrine.⁸⁷ The court reiterated that the doctrine excluded "political questions, not . . . political cases."⁸⁸ The Second Circuit agreed with the district court on the political question issue, but remanded on service of process and personal jurisdiction grounds, holding that "only those activities not conducted in furtherance of the PLO's observer status may properly be considered as a basis of jurisdiction."⁸⁹

Litigation under the ATS took a significant hit in 2013 with the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*⁹⁰ In what seems like a harsh setback to human rights groups,⁹¹ the Court held the presumption against extraterritoriality applied to the ATS because "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."⁹² Though this is a significant limiting decision on the ATS, there are still avenues for victims of human rights abuses abroad to pursue.⁹³

The PA has also been sued under the Torture Victims Protection Act (TVPA),⁹⁴ which provides a cause of action for acts of torture and

⁸³ *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990).

⁸⁴ 28 U.S.C. § 1333 (LexisNexis through Pub. L. No. 114-327).

⁸⁵ *Klinghoffer*, 739 F. Supp. at 858–59. See *Death on the High Seas Act*, 46 U.S.C. §§ 30301–30308 (LexisNexis through Pub. L. No. 114-327).

⁸⁶ *Klinghoffer*, 739 F. Supp. at 862–63.

⁸⁷ *Id.* at 859–60.

⁸⁸ *Id.* at 860 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁸⁹ *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 51–53 (2d Cir. 1991).

⁹⁰ *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013).

⁹¹ See Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business is a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014) (discussing the consequences of *Kiobel* on human rights litigation and the ability of victims to seek remedies from transnational corporations).

⁹² *Kiobel*, 133 S. Ct. at 1665. See also *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

⁹³ See Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Right Litigation Post-Kiobel*, 102 CAL. L. REV. 1495 (2014) (outlining the difficulties of post-*Kiobel* litigation and the avenues still available to victims).

⁹⁴ *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

extrajudicial killing.⁹⁵ However, the Supreme Court rejected the application of the TVPA to the PA on the grounds that the statute only applied to acts committed by individuals, not organizations.⁹⁶

B. The Anti-Terrorism Act of 1991

In the wake of *Tel-Oren* and *Klinghoffer*, Congress passed the Anti-Terrorism Act of 1991 (ATA),⁹⁷ which creates a private cause of action for any U.S. national injured by an act of terrorism and provides that successful plaintiffs “shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”⁹⁸ This act was passed, in part, because many members of Congress felt that jurisdiction should be broadened so it was not only in fortuitous cases like *Klinghoffer* that such suits could go forward.⁹⁹

Following a deadly attack by a gunman at a bat mitzvah in Israel, the family of an American citizen killed in the attack sued the PA and PLO under the ATA.¹⁰⁰ The defendants moved for dismissal on the grounds that they enjoyed sovereign immunity and that the claims were nonjusticiable under the political question doctrine.¹⁰¹ The court rejected the defendants’ sovereign immunity argument because they failed to sufficiently establish that Palestine is a state under international law and because the United States had not recognized Palestine, it was not “entitled in our courts to be accorded all the privileges and immunities of sovereign states. . . .”¹⁰² The court also rejected the nonjusticiability argument by following the same reasoning from *Klinghoffer*, reasoning that a terrorist attack was just like any common law tort claim¹⁰³ and nonjusticiability only applied to “political questions” not “political cases.”¹⁰⁴ After losing on the motion to dismiss, the PA and PLO

⁹⁵ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(1), 106 Stat. 73 (1992).

⁹⁶ *Mohamad*, 132 S. Ct. at 1709 (“[T]he TVPA’s text evinces a clear intent not to subject non-sovereign organizations to liability.”).

⁹⁷ 137 CONG. REC. E1583 (May 2, 1991).

⁹⁸ 18 U.S.C.A. § 2333(a) (LexisNexis through Pub. L. No. 114-327).

⁹⁹ Adam N. Schupack, Note, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 213 (2010) (citing 137 Cong. Rec. S8143 (1991) (statement of Sen. Grassley) (“The ATA removes the jurisdictional hurdles in the courts confronting victims and it empowers victims with all the weapons available in civil litigation”)).

¹⁰⁰ *Knox v. PLO (Knox I)*, 306 F. Supp. 2d 424, 426 (S.D.N.Y. 2004).

¹⁰¹ *Id.* at 427.

¹⁰² *Id.* at 429–30.

¹⁰³ *Id.* at 449 (citing *Klinghoffer*, 937 F.2d at 49–50).

¹⁰⁴ *Id.* (quoting *Baker*, 369 U.S. at 217).

stopped litigating this case and the court entered a default judgment of over \$192 million.¹⁰⁵

Knox I was one of many cases with similar outcomes against the PA and PLO.¹⁰⁶ In response, Mahmoud Abbas, the newly elected president of the PA, announced a new intention to litigate suits like *Knox I*.¹⁰⁷ In response to this change, the court granted the PA's motion for relief and vacated the judgment.¹⁰⁸ Following this, the PA quietly settled the suit with the family of the victim for an undisclosed amount.¹⁰⁹

These early cases under the ATA show some overall trends. The political question doctrine and the nonjusticiability of claims for terrorist attacks are no longer issues; the court now treats these claims as ordinary tort claims. The courts have also continued to reject the sovereign immunity arguments of the PA and PLO on grounds that they fail to meet the international standards of statehood and have not been officially recognized by the executive branch. The recent developments in these cases have also shown a willingness by the PA and PLO to litigate these claims and allow them to be adjudicated on the merits. Lastly, these cases have proven to be a somewhat effective tool against terrorism. Litigation under the ATA can be a lengthy, but effective way for families and victims to receive compensation.

IV. APPLICATION OF *DAIMLER* TO UNINCORPORATED, NON-SOVEREIGN ENTITIES

A. Case Law in the District Court of D.C.

Before examining the recent cases in the District Court of D.C., it is important to explore some earlier decisions in that jurisdiction that might explain how and why the court ruled the way it did.

In 2005, prior to *Kiobel* and *Daimler*, the Court of Appeals for the District of Columbia Circuit heard *Mwani v. Bin Laden*, where the court concluded that specific jurisdiction was proper when defendants "purposefully directed" their activities at the United States and the litigation

¹⁰⁵ *Knox v. PLO (Knox II)*, 248 F.R.D. 420, 423–24 (2008). Note the size of the judgment was due to the allowance of triple damages under 18 U.S.C. § 2333(a).

¹⁰⁶ See, e.g., *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005); *Sokolow v. PLO (Sokolow I)*, 583 F. Supp. 2d 451 (S.D.N.Y. 2008); *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153 (D.D.C. 2006); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96 (D.D.C. 2006); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004).

¹⁰⁷ *Knox II*, 248 F.R.D. at 424.

¹⁰⁸ *Id.* at 433.

¹⁰⁹ Melissa Apter, *PA settles with terror victim*, JEWISH TELEGRAPHIC AGENCY (Feb. 18, 2010, 12:07 AM), <http://www.jta.org/2010/02/18/news-opinion/united-states/pa-settles-with-terror-victim>.

resulted from injuries to the plaintiffs “as a result of those actions.”¹¹⁰ In this case, the plaintiffs were victims, families of victims, and businesses harmed in the 1998 terrorist attack at the American embassy in Nairobi.¹¹¹ The circuit court held that the district court could exercise specific jurisdiction because defendants Osama bin Laden and al Qaeda had “‘purposefully directed their activities at residents’ of the United States.”¹¹² This was because the defendants had “engaged in unabashedly malignant actions directed at [and] felt in this forum.”¹¹³ The plaintiffs’ injuries also clearly arose from the defendant’s activities and therefore bin Laden and al Qaeda had “fair warning that their activities would subject them to the jurisdiction of the United States.”¹¹⁴ The court, however, did affirm the dismissal of claims against defendant Afghanistan because the claims against the nation did not fall within the exceptions of the Foreign Sovereign Immunities Act.¹¹⁵

Following this decision, another important memorandum opinion from the District of D.C. authorized the exercise of personal jurisdiction over Hamas for terrorist attacks in Tel Aviv.¹¹⁶ Like in *Mwani*, the court found the defendant, Hamas, subject to specific jurisdiction and sought to use the long-arm provision of Rule 4(k)(2) of the Federal Rules of Civil Procedure.¹¹⁷ Rule 4(k)(2) “permits a federal court to exercise personal jurisdiction over a defendant (1) for a claim arising under federal law, (2) where a summons has been served, (3) if the defendant is not subject to the jurisdiction of any single state court, (4) provided that the exercise of federal jurisdiction is consistent with the Constitution (and laws) of the United

¹¹⁰ *Mwani v. Bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005). It is important to point out that the plaintiffs used the Alien Torts Statute to provide subject matter jurisdiction and a cause of action so the court might have come to a different conclusion in a post-*Kiobel* analysis. *Id.* at 5, 9–10.

¹¹¹ *Id.* See also FBI Executive Summary, *Bombings of the Embassies of the United States of America at Nairobi, Kenya, and Dar Es Salaam, Tanzania*, FRONTLINE (Nov. 18, 1998), <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html>.

¹¹² *Mwani*, 417 F.3d at 13 (quoting *Burger King*, 471 U.S. at 472).

¹¹³ *Id.* (quoting *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 17.

¹¹⁶ *Sisso v. Islamic Republic of Iran*, 448 F. Supp. 2d 76, 90 (D.D.C. 2006). The court also approved the exercise of personal jurisdiction over Iran under the Foreign Sovereign Immunities Act (FSIA), which only requires proper service and an exception to sovereign immunity. *Id.* at 81–82. The plaintiffs properly served the defendant under Section 1608 of FSIA and the court found Iran’s alleged actions fell under Section 1605(a)(7) of FSIA, which provides that there is no sovereign immunity for nations that support or cause terrorist activities. *Id.* at 84–86.

¹¹⁷ *Id.* at 87.

States.”¹¹⁸ In determining what proper service required, the court recognized that Hamas constituted an “unincorporated association,” which it defined as “a body of persons acting together and using certain methods for prosecuting a special purpose or common enterprise.”¹¹⁹ As such, service is determined in the same way as service for a corporation or association.¹²⁰ Following Rule 4(f)(1), plaintiffs served the summons and complaint on the Director of the Courts of the State of Israel, which manages service of process over the West Bank.¹²¹

Continuing its analysis of jurisdiction under Rule 4(k)(2), the court followed the rule set in *Mwani* that “whenever a plaintiff invokes Rule 4(k)(2) as a basis for personal jurisdiction in federal court, the burden is on the defendant to identify some state court where it could be sued.”¹²² Because Hamas did not appear in the court to suggest another appropriate jurisdiction, the court presumed that Hamas was “not subject to the jurisdiction of the courts of general jurisdiction of any state.”¹²³

Most relevant to this Note, the court held that the exercise of specific personal jurisdiction was appropriate under the Due Process Clause of the Fifth Amendment of the Constitution.¹²⁴ The court followed the standard set forth in *Mwani* that “when a court attempts to assert specific jurisdiction without an out-of-state defendant’s consent, [the] ‘fair warning’ requirement is satisfied if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.”¹²⁵ There was no question that, if proven, the plaintiff’s allegations against Hamas demonstrated that the defendant’s actions were “calculated to cause injury to U.S. citizens (among others) and, predictably, did just that.”¹²⁶ The court distinguished this case from previous cases like *Mwani* but still upheld personal jurisdiction, stating:

Although most such cases have involved terrorist acts that targeted U.S. persons or interests with a directness not evident in the facts alleged here (e.g., assaults on American servicemen or embassies), it is nonetheless entirely foreseeable that an indiscriminate attack on civilians in a crowded metropolitan

¹¹⁸ *Id.* at 87–88 (quoting *Mwani*, 417 F.3d at 10).

¹¹⁹ *Id.* at 88 (quoting *Estates of Ungar v. Palestinian Auth.*, 304 F. Supp. 2d 232, 258 (D.R.I. 2004)).

¹²⁰ *Id.* (citing FED. R. CIV. P. 4(h)).

¹²¹ *Id.*

¹²² *Id.* at 89 (citing *Mwani*, 417 F.3d at 11).

¹²³ *Id.*

¹²⁴ *Id.* at 90.

¹²⁵ *Id.* at 89 (quoting *Mwani*, 417 F.3d at 11–12).

¹²⁶ *Id.*

center such as Tel Aviv will cause injury to persons who reside in distant locales – including tourists and other visitors to the city, as well as relatives of individuals who live in the area. The ripples of harm that flow from such barbarous acts rarely stop at the banks of the Mediterranean Sea or the Jordan River, and those who engage in this kind of terrorism should hardly be surprised to find that they are called to account for it in the courts of the United States – or, for that matter, in any tribunal recognized by civilized peoples.¹²⁷

The court further recognized that other federal courts had concluded that Hamas had sufficient contacts, financial and operational, with the United States to allow the exercise of personal jurisdiction for claims pursued by victims of terrorist attacks and their families.¹²⁸ In sum, there was no constitutional issue with the court's exercise of specific personal jurisdiction over Hamas for plaintiffs' claims under the ATA.¹²⁹

In 2014, only months before its decision regarding the PA and PLO in *Livnat*, the court granted a motion to dismiss claims made against the Turkish Republic of Northern Cyprus (TRNC) because the court concluded it lacked personal jurisdiction.¹³⁰ First, the court evaluated the TRNC's contacts in the District of Columbia under the *Daimler* analysis which requires a defendant be "essentially at home" in the forum.¹³¹ The court found that plaintiff's allegations fell "woefully short" of showing the TRNC to be "at home" and instead demonstrated the TRNC's rightful home was in northern Cyprus, not in the United States.¹³² In particular, the court based its analysis on the plaintiff's assertions that the TRNC:

1. Hir[es] employees from abroad and send[s] them as representative or staff to the District of Columbia, leas[es] office, hir[es] and pay[s] lawyers, [uses] letterhead, [an] interactive website, phone, email, facsimiles, maps, and a DC postal address, writ[es] letters to newspapers, speak[s] at

¹²⁷ *Id.* at 90.

¹²⁸ *Id.* (citing *Estates of Ungar*, 304 F. Supp. 2d at 256 ("Hamas has consistently conducted extensive fundraising, operational planning, recruitment, propaganda, public relations, money laundering, investment, and communication activities in at least six states . . . and Washington, D.C. over at least the past 12 years.")).

¹²⁹ *Id.*

¹³⁰ *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 13 (D.D.C. 2014). The plaintiffs also sued HSBC for their alleged involvement in aiding the TRNC, but the courts granting of HSBC's motion to dismiss for failure to state a claim is not relevant to this issue.

¹³¹ *Id.* at 14–15 (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 n.11 (2014)).

¹³² *Id.* at 15.

- universities, [and] ha[s] offices [with] other TRNC representative[s] who are business owners;
2. Employs a known lobbyist and representative of the Turkish Cypriot Community and not the . . . TRNC, who holds himself out as an ambassador in Washington DC to at least Turkey;
 3. Conducts banking transactions with HSBC and its network of institution[s] under its name;
 4. Maintains a website . . . ; and
 5. Operates in the District without a business license and has failed to pay D.C. taxes.¹³³

With contacts that amounted to what most countries would consider part of a typical diplomatic mission to the United States, the court held it lacked general jurisdiction over the TRNC.

Second, the court analyzed whether it could exert specific jurisdiction under D.C. law¹³⁴ which requires that the defendant have “‘transacted business’ in the District of Columbia” and that the “claims ‘arise from’ the business transacted.”¹³⁵ Specifically, the law required “a nexus between a foreign corporation’s particular contact with the District of Columbia and the claim that the plaintiff asserts.”¹³⁶ Using the same facts from above, the court held that the plaintiffs “failed to provide sufficient factual allegations that the TRNC ‘purposefully avail[ed] itself of the privilege of conducting activities within’ the District of Columbia”¹³⁷ or that the claims pled “[were] based on or arise from those activities.”¹³⁸

Third, under Rule 4(k)(2), the court lacked the ability to exercise personal jurisdiction over the TRNC.¹³⁹ Under Rule 4(k)(2), a federal court may “exercise general or specific personal jurisdiction over a defendant who lacks sufficient contacts with any single forum, but has such contacts with the United States as a whole.”¹⁴⁰ The plaintiffs asserted that the court had jurisdiction under this rule because (1) the defendants maintained a representative in both New York and on the West Coast, (2) “participated in a Small Business Conference in the ‘Southern United States,’ ” and (3) tried to “intervene in litigation in Indiana in 1989.”¹⁴¹ The court rejected this

¹³³ *Id.* at 14.

¹³⁴ D.C. CODE § 13-423(a)(1) (2011).

¹³⁵ *Toumazou*, 71 F. Supp. 3d at 15.

¹³⁶ *Id.* (citing *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 21 (D.D.C. 2014)).

¹³⁷ *Id.* at 16 (quoting *Burger King Corp.*, 471 U.S. at 475).

¹³⁸ *Id.* (citing *Atlantigas Corp. v. Nisource, Inc.*, 290 F. Supp. 2d 34, 44 (D.D.C. 2003)).

¹³⁹ *Id.* at 18.

¹⁴⁰ *Id.* at 17 (citing FED. R. CIV. P. 4(k)(2)).

¹⁴¹ *Id.*

argument because specific jurisdiction was not satisfied as the claims did not arise from these activities and general jurisdiction was not satisfied because the contacts fell “far short of demonstrating that the TRNC [was] ‘at home’ in the United States.”¹⁴²

The district court decided that it did not have personal jurisdiction over a non-sovereign, non-corporate governmental organization because the organization’s contacts were not sufficient to trigger general jurisdiction under a *Daimler* analysis and the claims did not arise from those contacts that did exist.

B. Current Cases in the District of Columbia

Early in 2015, the District Court of the District of Columbia resolved three cases against the Palestinian Authority. In each case, the district court dismissed the claims against the PA because it was not subject to general personal jurisdiction in the United States.¹⁴³ In all three cases, the court examined the issue under the relatively new *Daimler* framework.¹⁴⁴ These rulings came just weeks after a contrary ruling in the Southern District of New York—the *Sokolow II* case discussed below—and as all of these cases are likely to be appealed, this outcome sets the stage for a potential circuit split.¹⁴⁵

The first two cases, *Livnat* and *Safra*, both arose from the same events and were decided by the district court on the same day.¹⁴⁶ On April 24, 2011, fifteen Jewish worshippers arrived by car at Joseph’s Tomb, a holy site near Nablus in the West Bank.¹⁴⁷ While inside, PA security forces outside began firing their weapons.¹⁴⁸ The Jewish worshippers all ran from the building and attempted to escape in their vehicles.¹⁴⁹ The leader of the Palestinian security personnel, Mohammed Saabneh, allegedly told the other Palestinians that he was going to shoot at the vehicles and “cause death.”¹⁵⁰ Along with another member of the security force, Salah Hamed, Saabneh allegedly opened fire on the vehicles at close range.¹⁵¹ In one vehicle, three

¹⁴² *Id.*

¹⁴³ *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d at 22; *Safra v. Palestinian Auth.*, 82 F. Supp. 3d at 40; *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d at 240.

¹⁴⁴ *Livnat*, 82 F. Supp. 3d at 25; *Safra*, 82 F. Supp. 3d at 44; *Klieman*, 82 F. Supp. 3d at 242.

¹⁴⁵ Julie Triedman, *A Split Over Terror Suits*, AM. LAW., Apr. 27, 2015. See also Julie Triedman, *Suit Against PLO Rejected on Jurisdictional Grounds*, N.Y. L.J., Mar. 9, 2015.

¹⁴⁶ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

¹⁴⁷ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

¹⁴⁸ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

¹⁴⁹ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

¹⁵⁰ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

¹⁵¹ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 40.

people were wounded by the gunfire, including Yitzhak Safra and Natan Safra.¹⁵² In the other vehicle, Ben-Yosef Livnat was fatally shot in the neck.¹⁵³ The two cases were brought by the Safras and the family of Ben-Yosef Livnat.¹⁵⁴ The plaintiffs in each case alleged that Saabneh and the other security force personnel attempted to tamper with the scene by replacing shell casings with rocks to make it look like they had been attacked with thrown rocks.¹⁵⁵ The plaintiffs claimed that the attack was “part of the Palestinian Authority’s policy and practice of encouraging acts of terror and using terrorism to influence U.S. public opinion and policy.”¹⁵⁶

The district court used the same legal analysis for both cases, so this Note will only detail the discussion in *Livnat*. The court first examined whether it could exercise jurisdiction under Rule 4(k)(2).¹⁵⁷ Because the PA did not concede that any other state would have had jurisdiction, the court could use 4(k)(2) to confer jurisdiction as long as “exercising jurisdiction [was] consistent with the United States Constitution and laws.”¹⁵⁸ To determine this, the court answered three questions.¹⁵⁹ First, does due process apply to the PA as an entity?¹⁶⁰ Second, can the court exercise general jurisdiction over the PA?¹⁶¹ Third, is there specific jurisdiction over the PA for the claims in these actions?¹⁶²

First, the court concluded that due process is applicable to the Palestinian Authority.¹⁶³ *Price v. Socialist People’s Libyan Arab Jamahiriya* held that foreign states did not possess due process rights because they were “juridical equals” to the United States.¹⁶⁴ However, that rule does not apply to the PA because, “[l]ike foreign state-owned corporations, but unlike sovereign

¹⁵² *Safra*, 82 F. Supp. 3d at 40.

¹⁵³ *Livnat*, 82 F. Supp. 3d at 22.

¹⁵⁴ *Id.*; *Safra*, 82 F. Supp. 3d at 41.

¹⁵⁵ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 41. There are some questions about this set of facts though. Some newspapers reported that the Jewish worshippers were fired upon for attempting to break through a Palestinian security forces checkpoint. See Chaim Levinson & Anshel Pfeffer, *Israelis Shot in West Bank Tried to Break Through Palestinian Roadblock, Probe Shows*, HAARETZ (Apr. 24, 2011), <http://www.haaretz.com/israel-news/israelis-shot-in-west-bank-tried-to-break-through-palestinian-roadblock-probe-shows-1.357885>; Edmund Sanders, *One Israeli killed, three hurt in West Bank Shooting*, L.A. TIMES (Apr. 25, 2011), <http://articles.latimes.com/2011/apr/25/world/la-fg-west-bank-shooting-20110425>.

¹⁵⁶ *Livnat*, 82 F. Supp. 3d at 22; *Safra*, 82 F. Supp. 3d at 41.

¹⁵⁷ *Livnat*, 82 F. Supp. 3d at 24–25.

¹⁵⁸ *Id.* (quoting FED. R. CIV. P. 4(k)(2)).

¹⁵⁹ *Id.* at 25–26.

¹⁶⁰ *Id.* at 25.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 26.

¹⁶⁴ *Id.* (citing *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96–97 (D.C. Cir. 2002)).

nations, the Palestinian Authority, a non-sovereign government, is not a juridical equal of the United States.”¹⁶⁵ The plaintiffs tried to claim that the PA was like a municipality, which they argued had no due process rights, but the court dismissed this argument, stating “in fact, ‘[t]he circuits are split as to whether a state’s political subdivisions are afforded due process under the Fifth Amendment,’ and the D.C. Circuit has not yet spoken on the issue.”¹⁶⁶ The court also rejected the plaintiff’s argument that the PA has no due process rights because of old cases that held the PLO had no rights because it was “outside the constitutional structure of the United States.”¹⁶⁷ More recent case law holds that “foreign state-owned corporations have due process rights even though they are outside of the constitutional structure of the U.S.”¹⁶⁸ The court also distinguished the fact that the PA had not existed when the cases were decided and that the factors to consider in each case would be different.¹⁶⁹

Next, the court held that there was no general jurisdiction over the PA under a *Daimler* analysis.¹⁷⁰ The plaintiffs argued that the *Daimler* framework did not apply to the PA for two reasons: first, *Daimler* only applied to corporations and not to entities like the PA;¹⁷¹ and second, a *Daimler* analysis is appropriate to evaluate contacts with a single state under the Fourteenth Amendment, not under the Fifth Amendment when looking at contacts with the United States as a whole.¹⁷² The court rejected the first argument, stating that the Supreme Court in *Daimler* made no indication that the rule would be limited in application only to corporate defendants.¹⁷³ The court rejected the idea that the Supreme Court intended for corporate defendants to have greater protections under the law than non-sovereign governments like the PA.¹⁷⁴ The court also disagreed that there was “a more flexible jurisdictional inquiry” under the Fifth Amendment Due Process

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (quoting *South Dakota v. U.S. Dep’t of Interior*, 665 F.3d 986, 991 (8th Cir. 2012)).

¹⁶⁷ *Id.* at 27. See also *Palestine Info. Office v. Shultz*, 674 F. Supp. 910 (D.D.C. 1987) (finding that the defendant PLO had no due process rights because the word “person” did not apply to the states or a foreign state), *aff’d*, 853 F.2d 932, 272 U.S. App. D.C. 1 (D.C. Cir. 1988); *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1480–81 (S.D.N.Y. 1988) (holding that a foreign state that “lies outside the structure of the Union” does not abide by United States law or accept the constitutional plan).

¹⁶⁸ *Livnat*, 82 F. Supp. 3d at 27 (citing *GSS Group Ltd v. Nat’l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 30.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 28.

¹⁷⁴ *Id.*

clause than under the Fourteenth Amendment Due Process Clause.¹⁷⁵ Ultimately, the court decided that the *Daimler* analysis was the appropriate framework for analyzing whether the PA was subject to general jurisdiction in U.S. federal court and proceeded to analyze whether the PA was “essentially at home in the United States.”¹⁷⁶

As the Palestinian Authority does not have a place of incorporation or a principal place of business, the court asked where the PA was fairly regarded as “at home.”¹⁷⁷ After considering the fact that the PA governs part of the West Bank in Israel, the court concluded that “[i]t is common sense that the single ascertainable place where a government such as the Palestinian Authority should be amenable to suit for all purposes is the place where it governs.”¹⁷⁸ In this case, that place is in the West Bank, not in the District of Columbia or the United States.¹⁷⁹ The court rejected the plaintiffs’ arguments that the PA was active enough in the United States to be considered at home there.¹⁸⁰

In rejecting specific jurisdiction over the PA, the court looked at whether the defendant’s relationship with the forum arose from “contacts that the defendant himself create[d] with the forum.”¹⁸¹ In particular, it is important that the defendant’s contacts be with the forum itself, not with the people who live there.¹⁸² The court then rejected the plaintiff’s argument that the PA purposefully directed its actions at the United States because the links between the plaintiffs and the United States were too attenuated.¹⁸³ Importantly, the plaintiffs failed to claim that the impact of these attacks was anything but “random or fortuitous.”¹⁸⁴ The court also distinguished these facts from those in *Calder v. Jones*, which applied the effects test and

¹⁷⁵ *Id.* (citing *Abelesz v. OTP Bank*, 692 F.3d 638, 656 (7th Cir. 2012) (“The issue under the Due Process Clauses of the Fifth and Fourteenth Amendments is whether the contacts are so continuous and systematic as to render defendants essentially at home in the forum.”)). See also *S.E.C. v. Straub*, 921 F. Supp. 2d 244, 253 (S.D.N.Y. 2013) (“[B]ecause the language of the Fifth Amendment’s due process clause is identical to that of the Fourteenth Amendment’s due process clause, the same general principles guide the minimum contacts analysis.”).

¹⁷⁶ *Livnat*, 82 F. Supp. 3d at 29.

¹⁷⁷ *Id.* (quoting *Daimler*, 134 S. Ct. at 761).

¹⁷⁸ *Id.* at 30.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* Plaintiffs’ attributed activities conducted by the PLO, such as “fundraisers, community outreach, cultural events, and lectures, as well as certain governmental services, particularly consular services” to the PA, but the court denied that those activities would be “so ‘continuous and systematic’ as to render [it] essentially at home in” the U.S. *Id.* (quoting *Daimler*, 134 S. Ct. at 751).

¹⁸¹ *Id.* at 32 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014)).

¹⁸² *Id.* (quoting *Walden*, 134 S. Ct. at 1122).

¹⁸³ *Id.* at 32–33.

¹⁸⁴ *Id.* The court also quoted to *Walden* where it reinforced that it is “insufficient to rely on a defendant’s random, fortuitous, or attenuated contacts.” See *Walden*, 134 S. Ct. at 1123.

allowed specific jurisdiction where the effects in a libel claim were felt in that forum.¹⁸⁵ In *Calder*, the focal point of the case and the harms were felt in California, while in this case, “[t]he focal point of the harm was surely in the West Bank.”¹⁸⁶

The court also distinguished the unintentional effects in the United States in this case from those in *Mwani*, where the actions of the defendants were directly aimed at the United States and American personnel.¹⁸⁷ Similarly, the court rejected that the decision in *Sisso* applied to this case either.¹⁸⁸ There, the terrorist attack was a bombing in busy downtown Tel-Aviv and the court held that it was reasonably foreseeable that such an attack in a crowded metropolitan area could cause injury to people from other forums around the world.¹⁸⁹ In this case, the actions of a few Palestinian security force members at a remote Jewish religious site do not support the same conclusion of foreseeability.¹⁹⁰ Moreover, the plaintiffs had relied on cases decided prior to *Walden v. Fiore*, where the Supreme Court narrowed the test for specific jurisdiction.¹⁹¹ Ultimately, the court decided that the contacts with the United States were “simply too attenuated to pass Constitutional muster.”¹⁹²

Less than one month after the District Court of D.C. decisions in *Safra* and *Livnat*, the court again tackled this issue in *Estate of Klieman v. Palestinian Authority*.¹⁹³ Again, the court found that under the *Daimler* paradigm, it could not exercise general or specific jurisdiction over the PA.¹⁹⁴ In a 2002 attack on a public bus in the West Bank, American teacher Esther Klieman was shot and killed by armed terrorists.¹⁹⁵ Klieman’s family sued the PA and PLO and other defendants in litigation that has lasted over a decade.¹⁹⁶ After previously denying the defendants’ motions to dismiss, the court granted motions for reconsideration after the *Daimler* decision.¹⁹⁷

For similar reasons to those in *Livnat* and *Safra*, the court concluded that it could not exercise general jurisdiction over the PA and PLO.¹⁹⁸ The

¹⁸⁵ *Livnat*, 82 F. Supp. 3d at 33 (citing *Calder v. Jones*, 465 U.S. 783 (1983)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 34–35.

¹⁸⁹ *Id.* at 35 (citing *Sisso*, 448 F. Supp. 2d at 90).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 35–36.

¹⁹³ *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 257 (D.D.C. 2015). *Livnat* and *Safra* were both decided on February 11, 2015, while *Klieman* was decided on March 3, 2015.

¹⁹⁴ *Id.* at 240.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 240–41.

¹⁹⁷ *Id.* at 241–42.

¹⁹⁸ *Id.* at 244–45.

defendants' contacts in Washington D.C. were not sufficiently "continuous and systematic as to render [the PA and PLO] essentially at home in the forum" ¹⁹⁹

The court also concluded that it could not exercise specific jurisdiction over defendants, even under a *Mwani* analysis, which allows for specific jurisdiction when defendant's actions are "purposefully directed" at the United States and the injuries suffered arose from those actions. ²⁰⁰ The court rejected the plaintiff's argument that the terrorist attack supported by the PA and PLO "relate[d] to" a simultaneous publicity campaign aimed at the United States with the intention of putting pressure on Israel to withdraw from Palestinian areas. ²⁰¹ The court also rejected an argument that it was foreseeable that injury to Americans would occur as a result of the conduct in Israel as that kind of foreseeability test had been rejected in *Walden v. Fiore*, where the Supreme Court held that conduct directed at plaintiffs who were residents of another forum did not justify the exercise of specific jurisdiction. ²⁰²

After failing to find personal jurisdiction over the PA and PLO, the District Court came to the same conclusion and outcome as in *Livnat* and *Safra*.

C. Cases in the Southern District of New York

The Southern District of New York has taken a different approach than the D.C. courts and has provided a forum for plaintiffs to sue the PA and PLO since before the *Daimler* decision. ²⁰³

For the past decade, families of the victims of attacks during the Second Intifada have been waging a legal war against the PA and PLO in the Southern District for compensation. ²⁰⁴ The case arose from six shootings and bomb attacks between 2002 and 2004 that killed thirty-three people and wounded over 450. ²⁰⁵

¹⁹⁹ *Id.* at 245–46.

²⁰⁰ *Id.* at 246–49.

²⁰¹ *Id.* at 247.

²⁰² *Id.* at 248.

²⁰³ See, e.g., *Klinghoffer*, 739 F. Supp. 854; *Knox I*, 306 F. Supp. 2d 424; *Sokolow I*, F. Supp. 2d 451.

²⁰⁴ Stav Ziv, *U.S. Jury Finds Palestinian Organizations Liable in Terrorism Case*, NEWSWEEK (Feb. 23, 2015, 1:43 PM), <http://www.newsweek.com/us-jury-finds-palestinian-organizations-liable-terrorism-case-308804>.

²⁰⁵ *Id.* See also Nate Raymond, *Victims of Israel Attacks Seek \$350 mln as PLO Trial in N.Y. Ends*, REUTERS (Feb. 20, 2015, 5:24 AM), <http://in.reuters.com/article/2015/02/19/plo-israel-attacks-trial-idINKBN0LN2FU20150219>.

After years of litigating, the PLO and PA moved for summary judgment, arguing that the district court lacked jurisdiction after the recent opinion in *Daimler*.²⁰⁶ Prior to the *Daimler* decision, the defendants had made similar motions to dismiss, arguing that they lacked sufficient contacts with the United States.²⁰⁷ The district court “denied those motions and ‘agree[d] with every federal court to have considered the issue that the totality of activities in the United States by the PLO and the PA justify[d] the exercise of general jurisdiction.’”²⁰⁸ The PA and PLO argued, that the law had changed and that the *Daimler* decision served as “an intervening change in the controlling law.”²⁰⁹ Under the new *Daimler* paradigm, the defendants argued they were not “at home” for the purposes of general jurisdiction in the United States.²¹⁰

The district court rejected the PA and PLO’s argument and denied their motions for two reasons.²¹¹ First, even after *Daimler*, the district court had jurisdiction under the ATA.²¹² Second, this action is just “such ‘an exceptional case,’ as alluded to in *Daimler*”²¹³

The district court pointed out that the defendants were not foreign corporations and thus, the paradigm of determining place of incorporation or principal place of business was inappropriate.²¹⁴ Accordingly, the court analyzed the defendants’ “continuous and systematic business and commercial contacts within the United States” and deemed them sufficient to support general jurisdiction, even under the post-*Daimler* and post-*Gucci* analysis.²¹⁵ The defendants failed to sufficiently identify any place other than the United States where the PLO or PA had “greater business or

²⁰⁶ *Sokolow II*, 2014 U.S. Dist. LEXIS 168114, at *4.

²⁰⁷ *Id.* at *5.

²⁰⁸ *Id.* (alterations in original).

²⁰⁹ *Id.* at *6.

²¹⁰ *Id.* at *6–7. The defendants specifically cited to the Second Circuit’s interpretation of the *Daimler* “at home” rule, which states:

[A] corporation may . . . be subject to general jurisdiction in a state only where its contacts are so ‘continuous and systematic,’ judged against the corporation’s national and global activities, that it is ‘essentially at home’ in that state. Aside from ‘an exceptional case’ . . . a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company’s formal place of incorporation or its principal place of business.

Id. at *7 (citing *Gucci*, 768 F.3d at 135).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at *8. The defendants had described themselves by a number of terms, including “foreign organizational defendants,” “unincorporated,” “foreign governmental organizations,” and “an unrecognized foreign state.” *Id.* at *8–9 n.3 (citation omitted).

²¹⁵ *Id.* at *9.

commercial activities” to be considered “at home.”²¹⁶ The district court therefore denied the motions and the case moved ahead to trial.²¹⁷

The case went to trial in February of 2015.²¹⁸ The defense claimed that the senior leadership of the defendant organizations were not involved in planning the violence.²¹⁹ The jury disagreed and awarded a verdict of \$218.5 million in damages to the victims’ families.²²⁰ Under the ATA, the verdict was automatically tripled to an astounding \$655.5 million.²²¹ The defendants immediately announced their intent to appeal the decision.²²²

Shurat HaDin, an Israel-based law office that worked on the case, released a statement of gratitude for the American court’s decision, particularly the decision that “suicide terrorism was indeed [the PA and PLO’s] official policy during the Second Intifada. . . .”²²³ The statement continued, saying:

We started out more than a decade ago with the intent of making the defendants pay for their terrorist crimes against innocent civilians and letting them know that there will eventually be a price to be paid for sending suicide bombers onto our buses and into our cafes. The defendants have already been boasting that they will appeal the decision and we will never collect on the judgment. We will not allow them to make a mockery of the US court process, however, and we continue to pursue them until it is paid in full. If the PA and PLO have the funds to pay the families of the suicide bombers each month, then they have the money to pay these victims of Palestinian terrorism.²²⁴

The lawyers for the plaintiffs also mentioned that they were confident they would be able to collect the damages from the defendants and if not, they

²¹⁶ *Id.* at *9–10.

²¹⁷ *Id.* at *10.

²¹⁸ Alexandra Farone, *US court finds Palestine groups liable for Israel attacks*, JURIST (Feb. 24, 2015, 11:35 AM), <http://jurist.org/paperchase/2015/02/us-court-finds-palestine-groups-liable-for-2002-2004-israel-attacks.php>.

²¹⁹ Ziv, *supra* note 204.

²²⁰ Farone, *supra* note 218.

²²¹ *Id.* See also 18 U.S.C.A. § 2333(a) (LexisNexis through Pub. L. No. 114-327) (“[S]hall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”).

²²² Farone, *supra* note 218. This verdict came amid a series of problems for the PA, including Israel recently deciding to freeze over \$200 million it had collected for the PA. *Id.*

²²³ Ziv, *supra* note 204.

²²⁴ *Id.*

would be able to seize their assets.²²⁵ From their point of view, this verdict “hits those who send terrorists where it hurts them most: in the wallet.”²²⁶ As the plaintiffs’ lawyers put it, “[m]oney is oxygen for terrorism.”²²⁷

Dr. Mahmoud Khalifa, the Palestinian National Authority’s deputy minister of information, responded with the organization’s official response, calling the charges “baseless” and reiterating that they would appeal the verdict.²²⁸ The statement went on to decry the case as one based on political bias, stating:

This case is just the latest attempt by hardline anti-peace factions in Israel to use and abuse the U.S. legal system to advance their narrow political and ideological agenda: to block the two state solution, advance the illegal settlements in our land, continue to attack and divert the PLO and PNA’s limited resources from needed services and programs for our people, and to distract the public from the everyday inequities and injustices Palestinians face, and which we try to address through a proper legal framework. The decision is a tragic disservice to the millions of Palestinians who have invested in the democratic process and the rule of law in order to seek justice and redress their grievances, and to the international community which has invested so much in financial and political capital in a two-state solution in which the PLO and PNA are paramount.²²⁹

The litigation is not over, though. This case will go up to the Second Circuit next. Meanwhile, the cases in the district court of D.C. will also be going up on appeal and the D.C. Circuit will consider the same issues. Primarily, these courts will be looking at whether the *Daimler* analysis applies to the PLO and PA as non-corporate foreign entities. If it does apply, the courts will have to decide if the groups are “at home” in the United States. The courts might also find that this constitutes an “exceptional case” and allow the exercise of general jurisdiction, even under a *Daimler* analysis. With two appellate courts considering these issues, the possibility of a circuit split is imminent. If that happens, then the Supreme Court will have the ultimate say.

²²⁵ Weiser, *supra* note 18.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Ziv, *supra* note 188.

²²⁹ *Id.*

V. GENERAL JURISDICTION AND ANTI-TERRORISM LITIGATION MOVING FORWARD

A. Application of Due Process Rights to Non-Sovereign, Non-Corporate Entities

As these cases come up for appellate review, it will be important for the courts to first decide if entities like the PA and PLO even possess due process rights. The District Court of D.C. addressed this after the D.C. Circuit Court of Appeals decision in *GSS Group Ltd. v. National Port Authority*, which held that the National Port Authority of Liberia and other non-state entities, though state owned, did have due process rights.²³⁰ The court in *Livnat* distinguished the circuit court's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, where the court decided that foreign states were not privileged with due process rights because they were "juridical equals" to the United States.²³¹ The court leaned toward the decision of *GSS Group* and held that the PA was more similar to a foreign state-owned corporation than a sovereign nation and that a non-sovereign government was not a "juridical equal" to the United States.²³²

Further analysis of the decisions in *Price* and *GSS Group* seems to suggest that the answer is not as clear cut as the District Court made it appear. In *Price*, the court held that "the word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union."²³³ The *Price* court reasoned that there was no sense in treating foreign states more favorably than the "States of the Union" under the Due Process Clause and it would actually be "highly incongruous" and "entirely alien to our constitutional system" to grant greater rights to foreign nations than to the States.²³⁴ The Constitution is not designed to limit foreign states in their powers that can be exerted against the United States and the "federal government cannot invoke the Constitution, save possibly to declare war, to prevent a foreign nation from taking action adverse to the interest of the United States or to compel it to take action favorable to the United States."²³⁵ Therefore, the court decided, the Due Process Clause should not be construed

²³⁰ *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 26 (D.C.C. 2015) (citing *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012)).

²³¹ *Id.* (citing *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d at 96–97).

²³² *Id.*

²³³ *Price*, 294 F.3d at 96 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)).

²³⁴ *Id.*

²³⁵ *Id.* at 97.

as to confer upon foreign states the “rights and protections *against* the power of federal government.”²³⁶

The PA blurs the line as a non-sovereign state. It is, without dispute, a government in its own right, though not recognized by the United States as sovereign.²³⁷ The facts of these disputes have arisen because of the PA’s governance of the West Bank and control of security forces. Nor does the PA dispute that it is a state, as it noted in *Sokolow* when it described itself as a “foreign governmental organization[]” of “an unrecognized foreign state.”²³⁸ In the last few years, the PA has taken steps toward recognized sovereign statehood, with a successful bid to become a non-member observer at the U.N. and a referendum to change its name to the State of Palestine.²³⁹ It is even possible that, as a non-member observer state, the PA could participate in and join international organizations such as the World Bank, the International Criminal Court, the World Trade Organization, and the World Health Organization.²⁴⁰ Such participation in the international process indicates a similarity to Libya in *Price*, rather than the National Port Authority of Liberia, as in *GSS Group*.

Of particular importance is the *Price* court’s observation that affording due process rights to foreign states might cause “serious practical problems.”²⁴¹ The court noted, “[f]or example, the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them, could be challenged as deprivations of property without due process of law.”²⁴² If the courts were charged with adjudicating these types of international disputes, then it could inhibit the other branches of government during international crises.²⁴³ There could also be complications with the separation of powers and the potential for judicial overstep into the area of foreign policy.

This argument is particularly persuasive when it comes to the PA and PLO, as the United States is exceptionally involved in the international

²³⁶ *Id.*

²³⁷ *Livnat*, 82 F. Supp. 3d at 30.

²³⁸ *Sokolow II*, 2014 U.S. Dist. LEXIS 168114.

²³⁹ See Ali Gharib, *U.N. Adds New Name: “State of Palestine,”* DAILY BEAST (Dec. 20, 2012, 1:30 PM), <http://www.thedailybeast.com/articles/2012/12/20/u-n-adds-new-name-state-of-palestine.html>; *Palestinians’ UN upgrade to nonmember observer state: Struggles ahead over possible powers*, FOXNEWS.COM (Nov. 29, 2012), <http://www.foxnews.com/world/2012/11/29/palestinians-un-upgrade-to-nonmember-observer-state-struggles-ahead-over/>.

²⁴⁰ *Palestinians’ UN upgrade*, *supra* note 239.

²⁴¹ *Price*, 294 F.3d at 99.

²⁴² *Id.*

²⁴³ *Id.* See also *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (“No one would suppose that a foreign nation had a due process right to notice and a hearing before the Executive imposed an embargo on it for the purpose of coercing a change in policy.”).

affairs of their region. Aid packages and funding are crucial to the United States' influence and relationship with the PA and PLO.²⁴⁴ There have been times when the President or Congress has had to restrict or limit that aid for political or practical reasons.²⁴⁵ The result of the PA having due process rights would seriously undermine executive and legislative power in conducting foreign policy if the PA could litigate every time these issues come up. It is not reasonable that while all nations are denied those rights, the PA, because of its particular status as non-sovereign, is entitled to them.

B. Examining Personal Jurisdiction Under the Fifth Amendment Instead of the Fourteenth Amendment

Assuming for the sake of argument that the PA and PLO do possess due process rights, these cases would fall under the Fifth Amendment rather than the Fourteenth Amendment, which is how the courts have been addressing it. *Daimler* and *Goodyear* set forth guidelines for the limitations on state power in exercising personal jurisdiction over defendants under the Fourteenth Amendment. The "at home" standard is crucial for protecting citizens of one state from the exercise of power by another. However, when claims are brought under federal law, the Fifth Amendment controls the outcome.²⁴⁶

Where the "at home" rule protects citizens from the overreach of the states in exercising personal jurisdiction, no such interest rests in the limitation of federal authority extraterritorially and the Supreme Court has authorized the federal government's ability to exercise power outside United States territory.²⁴⁷ The restrictions on personal jurisdiction under the Fourteenth Amendment "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."²⁴⁸ There are no such interests for limitation on the power of the federal government in exercising power extraterritorially. Under a Fifth Amendment analysis, the interests in

²⁴⁴ See, e.g., Suzy Khimm, *U.S. pledges \$212 million in additional aid to Palestine*, MSNBC (Oct. 12, 2014, 8:47 PM), <http://www.msnbc.com/msnbc/us-pledges-212-million-additional-aid-palestine>.

²⁴⁵ See, e.g., *US suspends aid to Palestinians*, BBC NEWS (Apr. 7, 2006, 21:09 GMT), http://news.bbc.co.uk/2/hi/middle_east/4889668.stm; Hilary Leila Krieger, *US foreign aid package may put conditions on PA funding*, JERUSALEM POST (July 27, 2011, 5:56), <http://www.jpost.com/Diplomacy-and-Politics/US-foreign-aid-package-may-put-conditions-on-PA-funding>.

²⁴⁶ See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

²⁴⁷ See *United States v. Bennett*, 232 U.S. 299, 306 (holding that the due process clause does prevent states from acting outside their own territory, but the Constitution "affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty").

²⁴⁸ *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

preventing encroachment of States' power over others "do not apply with equal force."²⁴⁹ Under a Fifth Amendment Due Process Clause analysis, the "at home" standard is replaced by a "general fairness test incorporating *International Shoe's* requirement that 'certain minimum contacts' exist between the non-resident defendant and the forum 'such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' "²⁵⁰ This "general fairness test" involves a balancing of interests between those of the "individual defendant against the federal interest involved in the litigation."²⁵¹ In these cases dealing with terrorism targeting, even indirectly, American citizens, the federal government's interests are extremely high.²⁵²

Balancing the interests of the United States in civilly prosecuting perpetrators of international acts of terrorism against the PA's and PLO's interests in protecting themselves from litigation in a forum where they maintain significant contacts, it becomes clear that the government's interests prevail.

C. *The Possibility of Exceptional Cases Under Daimler*

Even if the appellate courts find that the *Daimler* framework applies to the PA and PLO, it is not clear that these cases would automatically be precluded. Though the Court seems to rule out the exercise of general jurisdiction in any case where the forum state is not the place of incorporation or the principal place of business, the majority does leave open the possibility of exceptional cases where jurisdiction could still be found.²⁵³ Such an exceptional case would be one in which "[a] corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation *at home* in that State."²⁵⁴

For example, one possibility might be a corporation incorporated and headquartered in one state that conducts all or most of its business in another

²⁴⁹ *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294 (3d Cir. 1985).

²⁵⁰ *Id.* at 293 (quoting *International Shoe*, 326 U.S. at 316).

²⁵¹ *Rep. of Panama v. BCCI Holdings*, 119 F.3d 935, 946 (11th Cir. 1997). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (noting that the Fifth Amendment Due Process inquiry balances the interests of the private individual and the federal government).

²⁵² *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); *Wultz v. Bank of China*, 910 F. Supp. 2d 548, 559 (S.D.N.Y. 2012) ("When the U.S. interest 'in fully and fairly adjudicating matters before its courts' is combined with its interest in combating terrorism, the U.S. interest 'is elevated to nearly its highest point'").

²⁵³ *Daimler*, 134 S. Ct. at 761, n.19. *See also Gucci Am.*, 768 F.3d at 135.

²⁵⁴ *Daimler*, 134 S. Ct. at 761, n.19 (emphasis added).

state.²⁵⁵ Under the *Daimler* paradigm, general jurisdiction could fall in one of two categories. The extent of the corporation's business in a state could turn that state into the corporation's principal place of business, or a court could find that the corporation's systematic and continuous contacts in that state rendered it essentially at home in the forum.²⁵⁶

Another situation the courts might consider to be an exceptional case would be one in which a foreign national corporation conducts the majority of its U.S. business in one state.²⁵⁷ A paradigm that allowed this would allow U.S. residents a forum to pursue claims against a foreign national corporation but would limit the potential forums where the corporation would expect to have to respond to litigation.²⁵⁸

Another potentially exceptional case would be one where a foreign national corporation maintains neither a principal place of business nor a place of incorporation in any state but which conducts the majority of its business in the United States nonetheless, such as in *J. McIntyre Machinery, Ltd. v. Nicastro*.²⁵⁹ This would prevent a corporation from escaping jurisdiction when it does not conduct the majority of its business in a single state.²⁶⁰

A corporation could also be held subject to general jurisdiction in circumstances where it maintains an imposing or "uniquely important business presence" in a forum.²⁶¹ For example, this could include a situation where a corporation establishes an enormous factory or similar commercial endeavor in a particular state which has a large impact on the local economy or domestic market.²⁶² This could be especially important where the corporation negotiated with the state's government for tax incentives and subsidies.²⁶³ As long as litigation would be reasonable under a forum non conveniens analysis, it is hard to say that such a corporation with a large economic presence in a state does not have fair notice that it would potentially be liable to suit in that state.²⁶⁴

²⁵⁵ Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 152 (2015).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 152–53. See also *Nicastro*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting) (noting that the majority's opinion allows a foreign national corporation to inappropriately escape jurisdiction in the U.S.).

²⁶⁰ Cornett & Hoffheimer, *supra* note 255, at 152.

²⁶¹ *Id.* at 153.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

A last possible situation would be one where a corporation operates and maintains a large physical presence in the forum state.²⁶⁵ While a large corporation might have extensive sales and contacts in every state, it would only have such a physical presence in one or a few states, thus giving the corporation fair notice of the possibility of legal liability.²⁶⁶ It could also be argued that such corporations must submit to legal obligations of operating in the state in the same way that local corporations must.²⁶⁷

The list above of possible exceptional scenarios is merely illustrative and not exhaustive. Courts have been reluctant to find an exceptional case since the *Daimler* ruling.²⁶⁸ The cases against the PA and the PLO seem like ideal cases for the courts to analyze exactly what an exceptional case might look like.

Here, the PA and PLO, though their primary activities might be in the West Bank, are extraordinarily active in the United States. They maintain missions and consulates in Washington, D.C. and New York. They actively raise funds and awareness for the Palestinian people through those contacts. They negotiate with the United States government for funding and aid money. They actively pursue policy initiatives in the United States to influence Israeli policy. They use money to fund terrorist activities which are connected to the activities the organizations pursue in the United States. It is clear that the litigation here does not fit squarely within a *Daimler* analysis and that such an exceptional case might fall outside of the “essentially at home” standard.

VI. CONCLUSION

As these cases in Washington and New York proceed on appeal, the courts will have to decide whether to exercise personal jurisdiction over the

²⁶⁵ *Id.* at 154 (suggesting factories, mines, or farms as examples).

²⁶⁶ *Id.* Though courts have asserted jurisdiction over foreign defendants with sufficient real estate holdings in cases like *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938), more recently, when applying the *Daimler* framework, courts have been reluctant to do so. *E.g.*, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 875, 2014 WL 5394310, at *9 (E.D. Pa. Oct. 23, 2014) (finding against the exertion of general jurisdiction over defendant based on the operation of a refinery in the forum state where defendant also operated facilities elsewhere).

²⁶⁷ Cornett & Hoffheimer, *supra* note 255, at 155, n.250 (citing *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 561 (1899); *Asbury Hosp. v. Cass Cnty.*, 326 U.S. 207, 211 (1945)).

²⁶⁸ The Second Circuit has so far found that defendants were not “at home” in a forum when they had more extensive contacts outside the state. *E.g.*, *Gucci*, 768 F.3d at 135 (holding defendant’s contacts in the forum were not so “continuous and systematic” as to be essentially “at home” and constitute an exceptional case); *Sonera Holding B.V. v. Cukoroya Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (holding that even defendant’s substantial business contacts did not render it “at home”); *In re Roman Catholic Diocese of Albany*, 745 F.3d 30, 40 (2d Cir. 2014) (rejecting general jurisdiction over a N.Y. defendant in Vermont).

PA and PLO. This is a question fraught with legal, political, and social implications. There are biases at play that could affect the outcome in each of these jurisdictions. New York's history with terrorism and demographic make-up might have had a subtle effect on the Southern District's decision. More importantly, the decisions in these cases could impact more than just the legal process.

The *Daimler* framework does not appropriately address the issues at play in these cases. The PA and PLO are not corporations. The policy issues concerning governments like these are very different from those concerning corporations. The legal analysis is different too. Allowing non-sovereign non-corporate entities like the PA and PLO to possess due process rights would have drastic consequences for the international relations of the United States. With the long history of violence and intervention in the Middle East, allowing entities such as the PA and PLO due process rights would compromise the ability of the United States to act.

The appellate courts' decisions could also have far-reaching consequences if the courts find jurisdiction under a Fifth Amendment analysis rather than a Fourteenth Amendment analysis. The *Goodyear* and *Daimler* cases set forth a framework for examining state law claims. These cases in New York and Washington were brought under the ATA, a federal statute, so at issue is not whether the States have jurisdiction over activities that take place outside their territory, but whether the federal courts do. Under a balancing test, comparing the interests of the individual to those of the government, it becomes clear that the interest in pursuing groups that support terrorism outweigh those of the PA and PLO in avoiding such suits.

Lastly, the courts could clarify the decision in *Daimler* by expanding on the idea of exceptional circumstances. The PA and PLO do present a different circumstance than the one normally approached under a *Daimler* analysis. They are not corporations, but they are not sovereign nations. Their contacts in the United States and their reliance on those contacts are extensive. The interactions between the PA or the PLO and the federal government are critical to United States' interests in the Middle East and to the interests of Palestinians. Such exceptional connections place the PA and PLO outside the traditional *Daimler* context where the defendant must be "essentially at home."

To hold the supporters of terrorism accountable for these kinds of attacks, it is necessary for the American people to have legal recourse. Hitting terrorism where it hurts the most, in its wallet, is the most effective way for families and victims to find closure and compensation. Denying general jurisdiction over the PA and PLO under *Daimler* is contrary to the purpose of the decision and counter to the interests of the people and government of the United States.