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TABLE OF CONTENTS

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I. INTRODUCTION

On December 13, 1999, plaintiffs Thomas Sutherland and his family filed a multi-count complaint against defendants Islamic Republic of Iran and the Iranian Ministry of Information and Security alleging that the defendants were responsible for plaintiff Sutherland's kidnapping, detention, and torture by the Hizbollah terrorist group in Lebanon. On June 25, 2001, after entry of default, the United States District Court for the District of Columbia awarded the plaintiffs $53,040,000 in compensatory damages and $300,000,000 in punitive damages. In the conclusion of its opinion, the District Court observed: "today's holding is not a foreign policy edict; rather it is an edict on the rule of law. It is an edict that reaffirms the unflinching principle that those who intentionally harm United States nationals will be held accountable for that harm in United States courts."[1]

This article discusses the rules of procedural law that authorize United States courts to enter civil judgments against international terrorists and the foreign states that sponsor them. Somewhat surprisingly, these rules do not make such judgments difficult to obtain. As the Sutherland case

1. Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 53 (D.D.C. 2001).

illustrates, plaintiffs have already recovered substantial money judgments against terrorist defendants. Not surprisingly, the real difficulties are encountered when plaintiffs seek to enforce such judgments.

Private parties have successfully utilized civil litigation as a means of neutralizing domestic hate groups. The question now is whether they can achieve similar success with respect to international terrorists. Success in this context is measured by two basic goals: compensating victims of international terrorism, and deterring future wrongful acts on the part of international terrorist organizations and their state sponsors. This article attempts to provide some assessment of whether the rules of domestic and international procedural law permit private parties to accomplish these goals.

There has been a considerable amount of civil litigation involving international terrorism, even before the attacks in New York and Washington on September 11, 2001. Nearly all these cases have resulted in default judgments. As a consequence, few appeals have been taken and many of the procedural issues have not been addressed by appellate courts. This article therefore begins with discussion of the three components that determine the validity of a default judgment within the United States courts: personal jurisdiction, service of process, and subject matter jurisdiction. Other issues discussed include venue and forum non conveniens, choice-of-law and jurisdiction to prescribe, the Act of State Doctrine, and judgments and enforcement of judgments. This Article concludes with some suggestions for the courts, the Congress, and the Executive branch that may provide victims of international terrorism with more effective means of redress through civil litigation.

There are three sets of factual variables that significantly affect the analysis of these procedural issues. One is whether the defendant committed the harmful act and caused injury to the plaintiff within the territory of the United States or outside the territory of the United States. The second is whether the defendant is a private party or a foreign sovereign entity. The third is whether the defendant's assets, potentially available to satisfy a civil judgment, are located within the jurisdiction of the courts of the United States or are located outside United States territory. Each of these factual variations raise distinct, yet related, issues as to the proper application of the rules of procedural law. The analysis below addresses these issues in the context of each of these factual variations.

II. ISSUES ASSOCIATED WITH OBTAINING A VALID JUDGMENT AGAINST INTERNATIONAL TERRORISTS

A. Personal Jurisdiction

1. Private Party Defendants

a. Due Process Limitations, Generally

Personal jurisdiction has both a statutory and a constitutional component. First, a court's exercise of personal jurisdiction over a defendant must be authorized by a long-arm statute or rule. Second, even if so authorized, the exercise of jurisdiction must also be consistent with the Due Process Clause. As explained in the Supreme Court's seminal decision in *International Shoe Co. v. Washington*,[2] the Due Process Clause requires, as a prerequisite to a binding judgment, that a nonresident defendant have certain "minimum contacts" with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[3] The main focus of this "minimum contacts" analysis is whether the defendant has purposefully conducted activities in the forum state.[4] This "purposeful availment" requirement ensures that a defendant will not be haled into court solely as a result of attenuated contacts with the forum state, or of the unilateral activity of the plaintiff or some third party.[5] The rationale for this

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2. 326 U.S. 310 (1945).

3. *Id.* at 316.

4. As the Supreme Court first explained in *Hanson v. Denckla*, 357 U.S. 235 (1958), and repeated in subsequent decisions, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

5. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980). The Supreme Court has repeatedly invalidated state court assertions of personal jurisdiction over nonresident defendants who have not *themselves* engaged in purposeful conduct directed at residents in the forum state. *See, e.g., World-Wide Volkswagen Corp.*, 444 U.S. at 295-99 (holding that Oklahoma court's exercise of personal jurisdiction over several defendants, including New York car dealer and eastcoast distributor, in products liability action violated the Due Process Clause because these defendants did not conduct any purposeful activities in the forum state, such as marketing or selling cars to Oklahoma residents, even though allegedly defective car caused injury to plaintiffs in Oklahoma); Asahi Metal Indus. Co. v. Supeior Court, 480 U.S. 102, 112-13 (1987) (plurality opinion) (ruling that a component manufacturer's knowledge that the final product will be sold in the forum state by ultimate manufacturer was insufficient and that some additional conduct by the component manufacturer itself, such as marketing or advertising, must be directed at the forum state); Kulko v. Superior Court, 436 U.S. 84, 94-95 (1978) (holding that a California court's exercise of personal jurisdiction over the defendant father in child support action violated the Due Process Clause because the

requirement is to provide the defendant with fair warning as to what conduct will and will not subject it to suit in the forum state.[6]

The nature of the minimum contacts inquiry varies with the relationship among the defendant, the forum, and cause of action. When a state exercises personal jurisdiction over a defendant in a suit "arising out of or related to" the defendant's contacts with the forum, the state is said to be exercising "specific jurisdiction."[7] But when a state exercises personal jurisdiction over a nonresident defendant in a suit not arising out of or related to the defendant's contacts with the forum, the state is said to be exercising "general jurisdiction" over the defendant.[8] In a general jurisdiction case, because the cause of action has no relationship to the forum state, a court may assert personal jurisdiction consistent with due process only if a nonresident defendant's forum activities are "continuous and systematic."[9] By contrast, in a specific jurisdiction case there is some nexus between the cause of action and the forum, therefore due process requires a lessor quantum of contacts by the defendant. Indeed, a single contact, such as a tortuous act committed by a nonresident defendant in the forum state, may be sufficient where it directly gives rise to the cause of action.[10]

There is a second level of constitutional analysis with respect to the exercise of personal jurisdiction. Once a court has examined the defendant's "minimum contacts" with the forum state, these contacts

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defendant's passive acquiescence in his children's move to California did not mean he had purposefully availed himself of the benefits and protection of California's laws).

6. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297 (observing that when a nonresident defendant purposefully conducts activities within the forum state "it has clear notice that it is subject to suit there.").

7. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

8. *Id.* at 414 n.9. The type of general jurisdiction referred to here is based on a nonresident defendant's activities in the forum state that are unrelated to the plaintiff's cause of action. Another type of general jurisdiction, sometimes referred to as "transient" or "tag-service" jurisdiction, based solely on service of process on the defendant while physically present within the forum state, has been unanimously approved by the Supreme Court in *Burnham v. Superior Court*, 495 U.S. 604 (1990).

9. *See Helicopteros Nationales de Colom., S.A.*, 460 U.S. at 416; *International Shoe Co.*, 326 U.S. at 318.

10. *See International Shoe Co.*, 326 U.S. at 318 (observing that even a single or occasional acts committed within the forum state can confer jurisdiction over a nonresident defendant because of their nature and quality and the circumstances of their commission). However, the Due Process Clause does not contemplate that a state may make binding a judgment against a nonresident defendant with whom the state has "no contacts, ties, or relations." *Id.* at 319

must be evaluated in light of other factors to determine whether the exercise of personal jurisdiction is "reasonable."[11] These factors were identified by the Supreme Court in *Asahi Metal Industry Co. v. Superior Court*[12] as follows:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies."[13]

The Supreme Court has provided little guidance as to what these "reasonableness" factors mean or as to how they are to be weighed with respect to each other and with respect to the "minimum contacts" analysis.[14] The Court relied on these factors to divest the court of jurisdiction in *Asahi*, but has also explained that these factors may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[15]

Although roundly criticized for increasing unpredictability,[16] the Supreme Court's adoption of the "reasonableness" factors as a second level of due process analysis is significant for international litigation. Some of these factors promote a cautious approach to the extension of personal jurisdiction over foreign defendants.[17] For example, the "burden on the defendant" factor, as applied by the Supreme Court in *Asahi*,

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11. *See World-Wide Volkswagen Corp.*, 444 U.S. at 292; Asahi Metal Indus. Co. v. Superior Court., 480 U.S. 102, 113 (1987).

12. 480 U.S. 102 (1987).

13. *Id.* at 113.

14. *See* Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 927 (2000) (explaining that the "reasonableness" inquiry requires a court to make an "unguided, fact-specific, *ad hoc* determination as to the propriety of personal jurisdiction in each case, regardless of whether the minimum contacts requirement has been satisfied.").

15. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

16. *See, e.g.*, Heiser, *supra* note 14, at 925-27 (reviewing authorities that criticize the subjective nature of the reasonableness inquiry and concluding that the absence of meaningful standards permits a court to justify any "reasonableness" conclusion it desires); Bruce Posnak, *The Court Doesn't Know Its* Asahi *From Its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 887-88 & 891-95 (1990) (criticizing the complexity and uncertainty of the ad hoc balancing required by the reasonableness test); Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 62-63 (1988) (discussing the uncertainty of balancing fairness considerations against minimum contacts); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 76-78 (1990) (criticizing *Asahi*'s use of the reasonableness factors as further muddying the constitutional test for personal jurisdiction).

17. The *Asahi* court explicitly cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115.

suggests that foreign defendants may have an even greater level of due process protection than that accorded domestic defendants with respect to the exercise of personal jurisdiction.[18]

However, some of the other reasonableness factors may actually encourage courts to assert personal jurisdiction over foreign defendants. Unlike the "minimum contacts" test, which is only concerned with protecting the rights of defendants,[19] the "reasonableness" factors are designed to accommodate additional interests, such as those of plaintiffs and of the forum state. These interests would certainly include the plaintiff's interest in seeking compensation for injuries caused by international terrorism, and the forum state's interest in ensuring its residents who are victims of terrorism are appropriately compensated. Moreover, a forum state certainly has a strong interest in deterring future acts of terrorism within its borders. Such interests may be significant factors in determining whether the exercise of jurisdiction over foreign defendants accused of international terrorism is reasonable, particularly in cases where the sufficiency of the foreign defendants' contacts with the forum is questionable.[20]

b. Terrorist Acts by Private Parties

The current due process doctrine of personal jurisdiction, therefore, consists of two components. The first level of analysis is to determine whether the defendant has sufficient "minimum contracts" with the forum state; the second is whether the exercise of personal jurisdiction is "reasonable" based on several factors. As discussed above, foreign defendants are entitled to at least the same level of due process

18. Applying this factor in the context of a Taiwanese corporate plaintiff suing a Japanese corporate defendant for indemnity in a California state court, the *Asahi* court remarked: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114.

19. The personal jurisdiction requirement recognizes and protects the defendant's individual liberty interest, preserved by the Due Process Clause, to be free from the burdens of litigating in a distant or inconvenient forum, unless that defendant has purposeful connections with the forum. *See* Insurance Corp. of Ire., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980); Heiser, *supra* note 14, at 930-35.

20. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998) (finding that the exercise of personal jurisdiction over foreign state sponsors of terrorism ensures fair play and substantial justice to American victims of international terrorism and is therefore reasonable).

protections with respect to the assertion of personal jurisdiction by United States courts as are domestic defendants.[21]

With respect to terrorist acts committed by private defendants within the territory of the United States, such as those directed at the World Trade Center in New York City, the personal jurisdiction question is easily resolved. By intentionally engaging in terrorist acts designed to cause deaths and injuries within New York, these defendants have purposely engaged in wrongful conduct within the forum state. Such purposeful conduct provides both the statutory and the constitutional basis for the exercise of personal jurisdiction.[22] Indeed, the exercise of personal jurisdiction over a defendant who purposely caused harm within the forum state is almost a universally accepted basis for personal jurisdiction in tort litigation.[23]

If the terrorist act occurs overseas, the exercise of personal jurisdiction over a private defendant by a court in the United States presents more difficult issues. The defendant must have sufficient contacts with the forum state, or with the United States as a whole in cases where national contacts may be considered,[24] to make the assertion of personal jurisdiction fair and reasonable. A foreign individual or group may simply have no contacts with the United States, making the assertion of personal jurisdiction impossible based on any theory of minimum contacts.[25] Other bases for

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21. *See, e.g.*, *Asahi*, 480 U.S. at 112 (1987) (applying due process limitations to a California court's assertion of personal jurisdiction over the defendant Japanese corporation); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 419 (1983) (holding that the defendant Colombian corporation lacked sufficient minimum contacts with the forum state to satisfy the requirements of the due process clause). Indeed, foreign defendants may have an even greater level of due process protection than that accorded domestic defendants. *See supra* notes 17-18 and accompanying text.

22. *See* International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (recognizing that the commission of a single act within the forum state, because of its nature and quality, may be sufficient to render the defendant subject to suit in that state); Calder v. Jones, 465 U.S. 783 (1984) (holding that the exercise of personal jurisdiction is consistent with due process where nonresident defendant's intentional and tortious actions were expressly aimed at, and knowingly caused injury in, the forum state). New York's long-arm statute expressly authorizes personal jurisdiction over a nonresident defendant who commits a tortuous act within the state. N.Y.C.P.L.R. § 302(a)(2) (McKinney 2001).

23. For example, Article 5(3) of the Brussels Convention, which governs personal jurisdiction among the member states of the European Community, authorizes personal jurisdiction in tort cases "in the courts for the place where the harmful event occurred." *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,* Sept. 27, 1968, Eur. Cmty. Member States, 8 I.L.M. 229, 232 (1969), *reprinted as amended in* Consolidated and Updated Version of the Brussels Convention of 1968 and the Protocol of 1971, following the 1989 Accession of Spain and Portugal, 1990 O.J. (C 189) 1, 29 I.L.M. 1413, 1419 (1990).

24. *See infra* notes 27-34 and accompanying text.

25. *See, e.g.*, Estates of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 91-95 (D. R.I. 2001) (dismissing terrorist claims against various officers of Palestinian

proper jurisdiction, such as consent by general appearance or transient jurisdiction by service of the complaint and summons on the defendant while physically present within the forum state, are possible [26] but unlikely.

One important issue relevant to the exercise of personal jurisdiction over foreign defendants is whether the Due Process Clause permits a "national contacts" approach. Under the national contacts test, a federal court could exercise personal jurisdiction over a foreign defendant based on an aggregation of contacts with the United States as a whole, rather than the defendant's contacts with the State in which the federal court sits. Several courts have construed federal statutes to authorize jurisdiction based on the defendant's national contacts.[27] Moreover, Rule 4(k)(2) of the Federal Rules of Civil Procedure, as amended in 1993, also authorizes this approach as to federal claims, although only when there is no state that can exercise jurisdiction over the defendant.[28] Although the Supreme Court

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Authority because these individual defendants lacked any contacts with United States whatsoever). *But see* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 50-52 (2nd Cir. 1991) (indicating that personal jurisdiction over the PLO may be proper based on its continuous and systematic "business" contacts with New York, such as fund raising and proselytizing, unrelated to its activities as a permanent observer at the UN); *Estates of Ungar*, 153 F. Supp. 2d, at 88-91 (holding personal jurisdiction over defendants PLO and PA based on their continuous and systematic contacts with the United States as a whole).

26. *See Estates of Ungar*, 153 F. Supp. 2d at 91 (ruling the delivery of the complaint and summons to general agents for defendants PLO and PA while in the United States provided a basis for personal jurisdiction consistent with the Due Process Clause).

27. *See, e.g.*, Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989) (applying national contacts test to uphold personal jurisdiction over foreign defendants with respect to antitrust claims under the Clayton Act); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 132, 139-40 (2nd Cir. 1972) (applying national contacts test to determine personal jurisdiction with respect to claims under Securities Exchange Act); *See* Transport Wiking Trader v. Navimpex Centrala Navala, 989 F.2d 572, 580 (2nd Cir. 1993) (construing the FSIA to authorize personal jurisdiction over defendant Romanian agency based on its contacts with the United States as a whole); *Estates of Ungar*, 153 F. Supp. 2d at 87-88 (construing 18 U.S.C. § 2334(a) to authorize nationwide service of process and national contacts test for personal jurisdiction).

28. FED. R. CIV. P. 4(k)(2) & note (1993 Amendment, Subdivision (k)). *See* United States v. Swiss American Bank, Ltd., 191 F.3d 30, 38-46 (1st Cir. 1999) (discussing the showing required by plaintiff seeking to use national contacts test authorized by Rule 4(k)(2); *Estates of Ungar*, 153 F. Supp. 2d at 91-92 (discussing the circumstances under which a plaintiff may utilize national contacts under Rule 4(k)(2) to establish personal jurisdiction over defendants who allegedly committed terrorist acts overseas). *See also* Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 8-14 (1998) (discussing lower federal courts' use of national contacts test under Rule 4(k)(2)).

has yet to rule on this issue,[29] the lower federal courts have uniformly[30] endorsed the national contacts approach, including some that have upheld personal jurisdiction over terrorists groups based on their minimum contacts with the United States as a whole.[31]

The national contacts approach permits a United States court to assert general jurisdiction over a foreign defendant, based on that defendant's continuous and systematic contacts with the United States as a whole.[32] This issue is very important with respect to defendants who are foreign terrorists organizations, and, as discussed below, may also be relevant with respect to the exercise of personal jurisdiction over foreign sovereign defendants who sponsor terrorism. The constitutionality of the national contacts approach appears to be a foregone conclusion.[33] The Supreme

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29. The Supreme Court has twice declined to rule on whether the national contacts approach is consistent with the Due Process Clause of the Fifth Amendment. *See Asahi*, 480 U.S. at 113 n.29; Omni Capital Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987). In a subsequent decision, however, the Court seemed to employ a national contacts test in determining that the exercise of personal jurisdiction over Argentina under the FSIA, based on its commercial activity in the United States, was consistent with the Due Process Clause. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) (dictum).

30. Nearly every federal circuit has held that when the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service, the applicable forum for minimum contacts purposes is the United States as a whole. *See* SEC v. Carrillo, 115 F.3d 1540, 1543 (11th Cir. 1997) (adopting the national contacts test and citing to six other circuits that have held that the national contacts test is constitutionally appropriate); cases cited *supra* note 27.

31. *See, e.g.,* cases cited *supra* note 25. *See also Estates of Ungar,* 153 F. Supp. 2d at 88-89 (concluding that assertion of personal jurisdiction over defendants PLO's and PA's based on their fundraising, commercial, and public relations campaigns throughout the United States was consistent with due process); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 21-23 (1998) (upholding personal jurisdiction over Iran and its agencies with respect to claims of state-sponsored terrorism, based on their national contacts with the United States).

32. *See* Klinghoffer v. S.N.C. Achille Lauro Lines, 937 F.2d 44, 50-52 (2nd Cir. 1991) (indicating that personal jurisdiction over the PLO may be proper based on its continuous and systematic "business" contacts with New York, such as fund raising and proselytizing, unrelated to its activities as a permanent observer at the UN); *Estates of Ungar,* 153 F. Supp. 2d at 88-91 (holding personal jurisdiction over defendants PLO and PA based on their continuous and systematic contacts with the United States as a whole).

33. In addition to its endorsement by nearly all the federal circuits, *see supra* note 27, the academic literature generally views the national contacts approach as consistent with the Due Process Clause of the Fifth Amendment when utilized by federal courts in cases involving federal statutes, such as the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA). *E.g.*, Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L. J. 799, 813-24 (1988) (explaining why national contacts approach should determine personal jurisdiction as to foreign defendants); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 124-44 (1983) (discussing why the federal courts should apply the minimum contacts test to foreign defendants based on their contacts with the United States as a whole); Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 402-07 (1982) (arguing that

Court should definitively resolve this issue, and do so in a manner that upholds the constitutionality of the "national contacts" approach where authorized by a federal statute or rule.[34]

2. *Foreign Sovereign Defendants*

The exercise of personal jurisdiction by one sovereign over another may be more politically sensitive, but the legal issues are actually less complicated than those encountered when the defendant is a foreign private party. The lower federal courts have had little difficulty in deciding to assert personal jurisdiction over foreign sovereign entities alleged to be sponsors of international terrorism.[35] The main reason for this is the existence of a comprehensive federal statute, the Foreign Sovereign Immunities Act of 1976 (hereinafter, "FSIA"),[36] that not only removes a foreign country's sovereign immunity when the statutory requirements are satisfied, but also provides an aggressive long-arm statute applicable to acts of state-sponsored terrorism within the United States and abroad.

The FSIA is the exclusive basis for obtaining personal jurisdiction over a foreign country or its agencies or instrumentalities.[37] Under the

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in suits against foreign governments under the FSIA, the relevant contacts are those with the United States and not just those with the forum state).

34. The Supreme Court may have already employed the national contacts test in determining the constitutionality of personal jurisdiction asserted over a foreign state pursuant to the FSIA, but did so in dicta and without any real discussion of the issue. *See Weltover*, 504 U.S. at 619-20 (ruling that the exercise of personal jurisdiction over Argentina as authorized by the FSIA was consistent with the Due Process Clause because Argentina purposely conducted commercial activities within the United States).

35. *See, e.g.*, Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10, 14-15 (D.D.C. 2000) (upholding personal jurisdiction over Libya under § 1605(a)(7) of FSIA in an action seeking damages for alleged hostage-taking and torture); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 40 (D.D.C. 2000) (upholding personal jurisdiction over Iraq under state-sponsored terrorism provisions of FSIA); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 67 (D.D.C. 1998) (exercising personal jurisdiction over defendant Iran under FSIA in action seeking damages for alleged kidnaping, imprisonment, and torture by agents of Iran); *Flatow*, 999 F. Supp. 2d 1, 34 (upholding personal jurisdiction over Iran in wrongful death action brought under state-sponsored terrorism provisions of FSIA); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1247-48 (S.D. Fla. 1997) (upholding jurisdiction over Cuba under state-sponsored terrorism provisions of FSIA).

36. 28 U.S.C. §§ 1602-1611 (1994 & Supp. V 1999).

37. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989) (holding that the FSIA is the exclusive basis for asserting jurisdiction over foreign states, and therefore the district court could not assert jurisdiction over Argentina under the Alien Tort Statute); Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (noting

FSIA, a foreign state is presumed to be immune from suit, and is in fact immune unless one or more of the exceptions to immunity enumerated in the FSIA apply.[38] When the plaintiff presents facts that satisfy one of these statutory exceptions, the FSIA not only removes the foreign sovereign's immunity from suit but also simultaneously provides the court with the basis for both personal and subject matter jurisdiction.[39] Although when enacted the FSIA was primarily designed to eliminate the sovereign immunity defense in civil actions against foreign sovereign entities arising out of their commercial activities, two provisions of the FSIA are now directly applicable to litigation involving state-sponsored acts of international terrorism.

a. The FSIA's "Noncommercial Tort" Exception to Foreign Sovereign Immunity

Section 1605(a)(5) of the FSIA removes immunity in any case "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortuous act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[40] The lower federal courts have construed this so-called "noncommercial tort" exception to include a "situs" requirement. Not only must the complained of injury have occurred within the territory of the United States, but the alleged tortuous conduct causing the injury also must have taken place in the United States.[41] In addition, pursuant to section 1605(a)(5)(A), the

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the FSIA is the exclusive basis for asserting personal jurisdiction over foreign states).

38. *See* 28 U.S.C. §§ 1604-1607 (1994 & Supp. V 1999); *Nelson*, 507 U.S. at 355.

39. *See Amerada Hess*, 488 U.S. at 435 n.3; Verlinden B.V. v. Central Bank of Niger., 461 U.S. 480, 483-88 (1983). Pursuant to 28 U.S.C. § 1330(a) (1994), federal district courts have subject matter jurisdiction over any claim for relief against a foreign state with respect to which the foreign state is "not entitled to immunity . . . under §§ 1605-1607," and § 1330(b) provides personal jurisdiction whenever subject matter jurisdiction exists under subsection (a) and service of process has been made under § 1608 of the FSIA.

40. 28 U.S.C. § 1605(a)(5) (Supp. V 1999). The FSIA defines the "United States" to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c) (1994).

41. *See, e.g.*, Olsen ex rel Sheldon v. Government of Mexico, 729 F.2d 641, 645-46 (9th Cir. 1984) (holding that a plaintiff must "allege at least one entire tort occurring in the United States" in order to utilize § 1605(a)(5)); In re SEDCO, Inc., 543 F. Supp. 1561, 1567 (S.D. Tex. 1982) (holding § 1605(a)(5) inapplicable where the alleged tortuous acts all took place in Mexico, even though environmental injury occurred in the United States); Kline v. Kaneko, 685 F. Supp. 386, 391 (S.D.N.Y. 1988) (ruling that § 1605(a)(5) does not deny sovereign immunity to Mexico's Secretary of Government for alleged kidnaping because the entire tort must be committed in United States); *Amerada Hess*, 488 U.S. at 439-40 (observing in dicta that § 1605(a)(5) covers only torts

noncommercial tort exception does not apply to claims arising out of a foreign state's performance of a "discretionary function." Despite this exemption's lack of precise contours,[42] the courts have had little difficulty in concluding that a foreign state has no discretion to commit, or have one of its officers or agents commit, an illegal act.[43]

Consequently, neither the situs requirement nor the discretionary function exemption would preclude the use of the FSIA's noncommercial tort exception in a civil action against a foreign country brought by a private party seeking damages for injuries caused by a state-sponsored act of terrorism occurring within the United States. Because the FSIA both removes sovereign immunity and provides the exclusive basis for the exercise of jurisdiction over a foreign country, a court has the statutory authority to assert personal jurisdiction over a defendant foreign sovereign entity in any action which satisfies the noncommercial tort exception set forth in section 1605(a)(5). The question then is whether the exercise of personal jurisdiction pursuant to section 1605(a)(5) is consistent with the Constitution.

The extent to which the Due Process Clause protects a foreign sovereign is a matter of some debate.[44] But even assuming that the same

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occurring within the United States). Several lower federal courts have applied the situs requirement of § 1605(a)(5) to deny jurisdiction in cases involving terrorists acts occurring outside the United States. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 246 (2d. Cir. 1996) (holding the FSIA does not subject Libya to jurisdiction with respect to the bombing of Pan Am Flight 103); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 839-942 (D.C. Cir. 1984) (rejecting FSIA jurisdiction over Iran for torts committed at the U.S. embassy in Tehran); McKeel v. Islamic Republic of Iran, 722 F.2d 582, 587-88 (9th Cir. 1983) (same).

42. Although the FSIA contains no definition of what constitutes a "discretionary function," the language and legislative history of the FSIA indicate that this exemption corresponds to the discretionary act exception found in the Federal Torts Claim Act. H.R. Rep. No. 1487, at 21, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. *See* Risk v. Halvorsen, 936 F.2d 393, 395 (9th Cir. 1991) (observing that "whether the acts of the [foreign state] officials are within the discretionary function exception to the FSIA is controlled by principles developed under the Federal Torts Claim Act.").

43. *See, e.g.*, Letelier v. Republic of Chile, 488 F. Supp. 665, 673-74 (D.D.C. 1980) (holding that defendants, Chile and its agents, cannot claim sovereign immunity under the FSIA for their alleged involvement in the bombing deaths of Orlando Letilier and others in Washington D.C., because defendants had no "discretion" within the meaning of § 1605(a)(5)(A) to order or aid in such a political assassination); Liu v. Republic of China, 892 F.2d 1419, 1431 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990) (holding that defendant Republic of China did not satisfy the discretionary function exemption of § 1605(a)(5)(A) in a wrongful death action alleging defendant's Director of Intelligence Bureau arranged killing in United States).

44. *See infra* notes 59-60 and accompanying text.

constitutional limitations apply to the assertion of personal jurisdiction over foreign sovereigns as apply to private individuals, those limitations will be readily satisfied in noncommercial tort litigation under section 1605(a)(5). A foreign sovereign entity whose agents or employees purposefully engaged in injurious conduct within the United States certainly has had sufficient minimum contacts with the forum state such that the maintenance of personal jurisdiction is reasonable and fair within the meaning of the Due Process Clause.[45]

b. The FSIA's State-Sponsored Terrorism Exception to Foreign Sovereign Immunity

Congress amended the FSIA in 1996 to specifically include provisions designed to hold rogue states accountable for acts of terrorism perpetrated on United States citizens. These state-sponsored terrorism provisions, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996[46] and codified at 28 U.S.C. section 1605(a)(7), provide an exception to a foreign sovereign's immunity from suit for actions where money damages are sought against a foreign sovereign "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act."[47] Because the Antiterrorism and Effective Death Penalty Act did not authorize a specific cause of action for victims of state-sponsored terrorism, Congress also enacted a separate piece of legislation[48] which provides a cause of action against a foreign state or its agents for any act which would give a court jurisdiction under 28 U.S.C. section 1605(a)(7).[49]

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45. *See supra* notes 4-6 & 10 and accompanying text.

46. Pub. L. No. 104-132, § 1221, 110 Stat. 1214, 1243 (1996). Section 221(c) of this Act states that it shall apply retroactively to any cause of action arising before its date of enactment. *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1248 n.4 (S.D. Fla. 1997) (applying § 1605(a)(7) to state-sponsored acts of terrorism by Cuba occurring before the effective date of the Act).

47. 28 U.S.C. § 1605(a)(7) (Supp. V 1999).

48. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009, 3009-172 (1996), *codified at* 28 U.S.C. § 1605 note (Supp. V 1999). This statute provides that an official, employee, or agent of a foreign state designated as a state sponsor of terrorism shall be liable to a United States national for money damages for personal injury or death caused by acts of that official, employee, or agent while acting in the scope of his or her office, employment, or agency for which jurisdiction is authorized by 28 U.S.C. § 1605(a)(7). *Id.* These damages may include economic damages, solatium, pain and suffering, and punitive damages. *Id.* This statute also overrides any common law doctrine of head of state immunity. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 2d 1, 24-25 (D.D.C. 1998).

49. By its terms, 28 U.S.C. § 1605 note does not expressly authorize a cause of action against the foreign state itself. *See supra* note 48. However, if an agent's liability is proved under the statute, the foreign state employing the agent may incur liability

Three conditions must be met in order to bring suit under the state-sponsored terrorism exception of section 1605(a)(7). The foreign state must have been designated as a state sponsor of terrorism by the Secretary of State.[50] In addition, the plaintiff or the victim must be a United States national.[51] And finally, if the actionable conduct of the foreign state occurred within that state's territory, then the state must be offered an opportunity to arbitrate the claim.[52]

The FSIA's state-sponsored terrorism exception of section 1605(a)(7) therefore differs from the noncommercial tort exception of section 1605(a)(5), in several significant respects. First, section 1605(a)(7) is limited to United States nationals, plaintiffs or victims, who bring an action against one of a small number of foreign countries that the Executive branch has officially designated as a state sponsor of terrorism. Presently, the countries so designated are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.[53] Second, and most importantly for jurisdictional purposes, section 1605(a)(7) does not contain a situs requirement. The language and legislative history reveal clear Congressional intent that section 1605(a)(7) should apply extraterritorially.[54] Therefore, section 1605(a)(7) provides the basis for personal jurisdiction over, and removes the sovereign immunity of, foreign sovereign defendants sued for materially supporting acts of terrorism committed in foreign countries.

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under the theory of respondeat superior. *See Alejandre*, 996 F. Supp. 2d at 1249 (entering money judgment against Cuba for terrorist acts committed by Cuban Air Force in shooting down unarmed airplanes thereby killing United States nationals). *See also* Liu v. Republic of China, 892 F.2d 1419, 1426-31 (9th Cir. 1989) (holding China could be liable for murder of plaintiff's husband ordered by China's Director of Defense Intelligence Bureau, under California's law of respondeat superior, in wrongful death action under noncommercial tort provision of FSIA). *But see* Roeder v. Islamic Republic of Iran, ___ F. Supp. ___, 2002 U.S. Dist. Lexis 6703 (D.D.C. 2002) (holding that § 1605 note does not unambiguously create a cause of action against Iran, and therefore does not provide the type of express statutory mandate sufficient to abrogate the Algiers Accords, an international executive agreement).

50. 28 U.S.C. § 1605(a)(7)(A) (Supp. V 1999). This designation is made pursuant to either the Export Administration Act of 1979, 50 U.S.C. app. § 2405(j) (1994), or Section 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371 (2000). *Id.* The Export Administration Act authorizes the Secretary of State to make a determination that a foreign state has "repeatedly provided support for acts of international terrorism," to notify the relevant committees of Congress, and to publish the determination in the Federal Register. *See* 50 U.S.C. app. § 2405(j).

51. 28 U.S.C. § 1605(a)(7)(B)(ii) (Supp. V 1999).

52. 28 U.S.C. § 1605(a)(7)(B)(i).

53. *See* 31 C.F.R. § 596.201 (2000).

54. *See infra* note 129 and accompanying text.

In several recent cases, the lower federal courts have relied on section 1605(a)(7) as the sole statutory authority for the exercise of personal jurisdiction over foreign state defendants alleged to have sponsored acts of terrorism occurring, and causing injuries, outside the United States.[55] These courts have also addressed the more complicated issue of whether the assertion of jurisdiction in such cases is consistent with the United States Constitution. This issue is potentially a difficult one because, unlike the noncommercial tort and commercial activity exceptions specified in the FSIA, the state-sponsored terrorism exception requires no nexus between the defendant's wrongful conduct and the territory of the United States. However, although their reasoning may differ, these courts have all concluded that their assertion of personal jurisdiction over a foreign state based solely on section 1605(a)(7) is consistent with the United States Constitution.

In all of these state-sponsored terrorism cases, the courts observe that the process of obtaining personal jurisdiction under the FSIA does not follow the traditional approach outlined by the Supreme Court in *International Shoe* with respect to defendants who are private parties.[56] More specifically, they suggest that an independent finding of "minimum contacts" may not be constitutionally required for establishing personal jurisdiction over a defendant foreign state when jurisdiction arises pursuant to section 1605(a)(7).[57] These courts do seem to recognize that the Constitution may limit Congress' power to authorize jurisdiction over foreign states whose actions have little connection with the United States, but they find a sufficient nexus with the United States exists by definition under section 1605(a)(7) based upon the victim's United States nationality.[58] Moreover, in some of

55. *E.g.*, Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 45-51 (D.D.C. 2001); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002); Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 45-46 (D.D.C. 2001); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 105-08 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F. Supp. 2d 1, 12-16 (D.D.C. 1998); Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10, 14-15 (D.D.C. 2000); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 39, 52-54 (D.D.C. 2000); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 67-69 (D.D.C. 1998); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107, 113 (D.D.C. 2000); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1247-49 (S.D. Fla. 1997); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 7-8 (D.D.C. 2000). *See* Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 762-64 (2nd Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

56. *E.g.*, *Price*, 110 F. Supp. 2d at 14; *Rein*, 162 F.3d at 761 (dictum); *Flatow*, 999 F. Supp. at 19-21; *Daliberti*, 97 F. Supp. 2d at 52-54.

57. *E.g.*, *Rein*, 162 F.3d at 761 (observing that the elements of § 1605(a)(7), unlike those of the commercial activities exception in the FSIA, "do not entail any finding of minimum contacts."); *Price*, 110 F. Supp. at 14-15 (same).

58. *Price*, 110 F. Supp. at 14-15; *Eisenfeld*, 172 F. Supp. 2d at 7-8; *Daliberti*, 97 F. Supp. 2d at 53-54; *Flatow*, 999 F. Supp. at 21-23. The *Flatow* court observed that "a

these cases, the courts raise the fundamental question of whether a foreign state is even a "person" within the meaning of the Due Process Clause of the Fifth Amendment.[59]

Whether, or to what extent, the Due Process Clause protects foreign state defendants is an open question, and an important one in civil litigation alleging claims of international terrorism. There are many cogent arguments that support the view that a foreign state is not entitled the same due process protections as afforded a private person under *International Shoe* and its progeny.[60] However, because the Supreme Court has yet to rule squarely on this issue, courts applying section 1605(a)(7) have been hesitant to conclude their constitutional analysis of personal jurisdiction solely on this basis.[61] As discussed above, several

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foreign state that sponsors terrorist activities which causes [sic] the death or personal injury of a United States national will invariably have sufficient contacts with the United States to satisfy Due Process." 999 F. Supp. at 23. The *Daliberti* court also reasoned that the enactment of § 1605(a)(7) gave state sponsors of terrorism "fair warning," within the meaning of the due process "minimum contacts" analysis, that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in a United States court. 97 F. Supp. 2d at 53-54.

59. *Daliberti*, 97 F. Supp. 2d at 48-49; *Flatow*, 999 F. Supp. at 19-21; Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78, 87 (D.D.C. 2001).

60. For analysis of the specific question of whether foreign states are protected by the Due Process Clause of the Fifth Amendment with respect to the exercise of personal jurisdiction, see Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendments to the Foreign Sovereign Immunities Act in Perspective*, 41 Va. J. Int'l L. 369 (2001) (arguing that foreign states and their corporations are not 'persons' under the Due Process Clause, and that United States courts are not constitutionally compelled to apply the minimum contacts test when determining personal jurisdiction in FSIA cases); Joseph W. Glannon and Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 687-96 (1999) (arguing that foreign states are not "persons" within the meaning of the Due Process Clause). For a general examination of the protections afforded foreign governments under the Constitution, see Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 488-89 (1987) (arguing foreign states are not "persons" in the sense that they are entitled to constitutional protections that would permit courts to diminish the plenary power of Congress and the President to establish United States policy toward foreign states).

61. Moreover, in stark contrast to these recent federal district court decisions applying § 1605(a)(7), another line of cases applying the commercial activity exceptions of the FSIA have concluded "each finding of personal jurisdiction under the FSIA requires. . .a due process scrutiny of the court's power to exercise its authority over a particular defendant." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). *See, e.g.*, Gregorian v. Izvestia, 871 F.2d 1515, 1529 (9th Cir. 1989) (ruling personal jurisdiction under the FSIA requires satisfaction of the traditional minimum contacts standard); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-09 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) (indicating a due process contacts

courts, even those that have endorsed the view that foreign states are not entitled to all the protections of constitutional due process guaranteed to individuals, have nonetheless proceeded under the assumption that the "minimum contacts" test may apply to foreign state defendants.[62]

If the Due Process Clause does require application of the minimum contacts test in the same manner as applied to private defendants, then the ability of plaintiffs to utilize the FSIA's state-sponsored terrorism provisions will be severely restricted with respect to terrorist acts occurring outside the United States. The conclusion reached by some courts—that state-sponsored terrorism causing injury to a United States national overseas supplies the requisite "minimum contacts" with the United States—would not pass constitutional muster. Under the Supreme Court's traditional minimum contacts analysis, such terrorist acts causing injury or death overseas would not constitute purposeful activities by the defendant directed at the forum state.[63] Nor is a foreign country, designated as a state sponsor of terrorism, likely to have "continuous and systematic" contacts with the United States, even assuming a national contacts approach is proper and sufficient to satisfy the due process requirements for general jurisdiction.[64] Consequently, the issue of whether and to what extent the Due Process Clause protects foreign state entities, should be settled by the Supreme Court and resolved in a manner that will uphold the exercise of personal jurisdiction over such defendants pursuant to section 1605(a)(7), with respect to claims of state-sponsored terrorism occurring outside the United States.[65]

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analysis is necessary when jurisdiction based on the FSIA).

62. *See* cases cited *supra* note 58. Even the Supreme Court has assumed, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, in finding that a foreign state possessed minimum contacts that would satisfy the constitutional test. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) (upholding personal jurisdiction over Argentina pursuant to the commercial activity provisions of the FSIA).

63. *See supra* notes 4-7 & 10 and accompanying text.

64. *See supra* notes 8-9 and accompanying text.

65. The Supreme Court has already held States of the Union are not "persons" for purposes of the Due Process Clause. South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966). As the *Flatow* court astutely observed when concluding that Iran is not a "person" for purposes of due process analysis, "it would be illogical to grant [personal jurisdiction protection based on due process] to foreign states when it has not been granted to federal, state or local governments of the United States." *Flatow*, 999 F. Supp. at 19-21. *See* Glannon & Atik, *supra* note 60, at 687-95 (reviewing various authorities and concluding that, because foreign states are not "persons," the Due Process Clause does not constrain the exercise of personal jurisdiction under § 1605(a)(7)); Caplan, *supra* note 60 (same). *But see* Keith E. Sealing, *"State Sponsors of Terrorism" Are Entitled to Due Process Too: The Amended Sovereign Immunities Act is Unconstitutional*, 15 AM. U. INT'L L. REV. 395, 397-98 (2000) (arguing that personal jurisdiction under § 1605(a)(7), based solely on a terrorist act overseas that has some

B. Service of Process

1. Service on Private Parties

Service of the complaint and summons on a private party defendant within the United States is a fairly routine matter. Service becomes more complicated, however, when it must be effected on a private party located outside the United States. Many countries view service of process from a United States court directly on a party located within their borders as a violation of their sovereignty and of international law.[66] Likewise, another country will not enforce a civil judgment rendered by a United States court unless service was accomplished in a manner consistent with that country's laws.[67] However, if a plaintiff only wants a judgment against a foreign defendant that is considered valid and enforceable within the United States, service of process presents few problems.

As with personal jurisdiction, service of process on foreign nationals is subject to two basic limitations. First, the manner of service must be authorized by a statute or court rule and, second, must also comply with the Due Process Clause.[68] Under that Clause, foreign nationals are assured of either personal or substituted service that provides "notice

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effect within the United States, violates the Due Process Clause under the minimum contacts test).

66. *See* Degnan & Kane, *supra* note 33, at 836 (observing that in some countries service of process is viewed as a sovereign act and that any attempt to do so directly from a United States court may be deemed a violation of that country's sovereignty and subject to sanction); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS 774-79 (Kluwer 3rd ed. 1996) (surveying various authorities which illustrate that many nations object to foreign service of process within their territory on local nationals as a violation of their sovereignty).

67. *See* Degnan & Kane, *supra* note 33, at 836 (explaining that use of a service method not accepted in a foreign country will mean that any United States judgment that is forthcoming may not be enforced in that country); Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 239 (1993) (noting that a country whose laws were violated by service of United States process might well not enforce a resulting United States judgment); RONALD A. BRAND, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 26-27 (ABA 1992) (observing that judgments from United States courts often will be denied recognition and enforcement abroad unless service is through a method recognized in the enforcing country).

68. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988) (observing that foreign nationals are not excepted from the protections of the Due Process Clause).

reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections."[69] With one major exception, so long as these two domestic law requirements are satisfied, service of process will be considered valid by courts within the United States even though the manner of service conflicts with another nation's laws or violates international law.[70] The major exception is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (hereinafter, the "Hague Service Convention").[71] The Hague Service Convention is a multilateral treaty that provides procedures for the service of process on defendants living in foreign countries. The Convention provides relatively simple and certain, although somewhat costly and time-consuming, means by which to serve process on foreign nationals located in another signatory country.[72] The scope of the Convention is extremely broad,

69. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See Schlunk*, 486 U.S. at 705 (upholding constitutionality of substituted service on foreign corporation by delivery to statutory agent within United States); SEC v. Tome, 833 F.2d 1086, 1094 (2nd Cir. 1987) (upholding constitutionality of service by publication of complaint and summons in the International Herald Tribune as reasonably calculated to notify European defendants whose whereabouts were unknown).

70. *See, e.g.*, Umbenhauer v. Woog, 969 F.2d 25, 32-34 (3rd Cir. 1992) (holding that service by registered mail on defendants located in Switzerland was authorized under the pre-1993 Federal Rule 4 even though contrary to Swiss law and U.S. State Department memorandum); SEC v. International Swiss Investments Corp., 895 F.2d 1272 (9th Cir. 1990) (indicating that Rule 4, and not international law, determines the validity of service on defendant companies who reside in Mexico); Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984) (observing in dicta that federal courts must give effect to clear Congressional mandate authorizing service, even if such effect would conflict with another nation's laws or violate international law). *But see* FED. R. CIV. P. 4 (f)(2)(A) & (C) (generally not authorizing service of complaint and summons by methods that violate the law of the country in which the defendant is located); *Umbenhauer*, 969 F.2d at 33 (stating in dicta that "[i]f proposed rule 4(f)(2)(C) were in effect today, then contrary to our holding here the new Rule would preclude a district court clerk from serving process . . . in a country whose laws forbid that method of service.").

71. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, *ratified by* the United States in 1969 [hereinafter Hague Service Convention].

72. *See Schlunk*, 486 U.S. at 698-99 (summarizing the Convention's provisions). The Hague Service Convention requires each country to establish a "Central Authority" to receive requests for service of documents from other signatory countries. Hague Service Convention, art. 2, *supra* note 71, 20 U.S.T. at 362. Once a Central Authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. *Id.* (art. 5). The Central Authority must then provide a certificate of service that conforms to a specified model. *Id.* at 363 (art. 6). A state may also consent to methods of service within its boundaries other than a request to its central authority. *Id.* at 363-65 (arts. 8-11, 19). One of these alternative methods, if the state of destination does not object, provides that the Convention "shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons

applying to civil or commercial matters "where there is occasion to transmit a judicial or extrajudicial document for service abroad."[73] The Supreme Court has interpreted the Convention as mandatory and exclusive in all cases to which it applies and, by virtue of the Supremacy Clause, as therefore preempting inconsistent methods of service prescribed by state law in such cases.[74] However, the Convention does not define the circumstances in which there is "occasion to transmit" a complaint "for service abroad." This definition is provided by reference to the internal law of the forum state.[75]

According to the Supreme Court, the Hague Service Convention does not apply where service of process on a foreign defendant can be completed within the United States without the necessity of transmittal of documents for service abroad.[76] If service on a foreign defendant is fully accomplished within the United States, then such service does not implicate the Convention. Consequently, for example, if a state statute authorizes service on a foreign defendant by delivery of the complaint and summons to the defendant's domestic agent within the United States, there is no need to resort to the Convention's mechanisms for service abroad.[77] This type of substituted service has been successfully employed where a foreign group sued for supporting terrorist acts, has an agent—an official spokesperson or fund-raiser for that group—who is served within the United States.[78] Of course, unless somehow immune

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abroad." *Id.* at 363 (art. 10(a)). Although there is some authority otherwise, the majority view of this provision is that it does not authorize service of the complaint and summons, as opposed to subsequent documents, directly by mail. *See, e.g.*, Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (collecting cases and holding that use of Article 10(a) is limited to sending subsequent documents after service of process has been properly obtained by other means); Honda Motor Co. v. Superior Court, 12 Cal. Rptr. 2d 861, 863 (Cal. Ct. App. 1992) (same).

73. Hague Service Convention, art 1, *supra* note 71, 20 U.S.T. at 362.

74. *See Schlunk*, 486 U.S. at 698-99.

75. *Id.* at 701-05.

76. *See id.*

77. *See id.* at 706-08. In *Schlunk*, the Supreme Court held that the Hague Service Convention does not apply when process is served on a foreign corporation by serving domestic subsidiary which, under Illinois state law, is the foreign corporation's involuntary agent for service of process. According to the Court, "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications." *Id.* at 707.

78. *See, e.g.*, Estates of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 87-91 (D.R.I. 2001) (holding delivery of complaint and summons on managing or general agent of defendants PLO and PA within the United States constituted valid service of process); Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 52-54 (2nd Cir.) (holding

from service of process,[79] personal service of a complaint and summons upon an individual defendant while physically present within the United States always constitutes proper service.[80]

Another method of effecting proper service on a private party defendant located abroad is by publication, at least in cases where the whereabouts of the foreign defendant cannot be ascertained with reasonable diligence. Because such service is accomplished within the United States, service by publication does not implicate the Hague Service Convention. Moreover, by its terms, the Hague Service Convention does not apply where the address of the person to be served is not known.[81] Service by publication may therefore be an expedient method of service where foreign defendants, such as individuals and groups accused of terrorist acts, are in hiding.[82]

The Hague Service Convention applies only when a court in one signatory country seeks to serve process abroad on a defendant located in another signatory country. As of 2002, the United States and thirty-five other countries have ratified or acceded to the Hague Service Convention, including most of our trading partners in Europe and Asia, as well as Egypt, Israel, and Pakistan.[83] Service abroad on a foreign

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that service of process on the PLO's Permanent Observer to the UN may constitute proper service on the PLO's "managing or general agent" within the meaning of Federal Rule 4(d)(3)).

79. The Headquarters Agreement provides for immunity from service of process for certain representatives of members of the United Nations, for certain other persons while within the "headquarters district" of the U.N., and for persons invited by the U.N. while in transit to or from the "headquarters district." Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, §§ 9 & 15, 61 Stat 756, (1947), *reprinted at* 22 U.S.C. § 287 note (1994). *See* Kadic v. Karadzic, 70 F.3d 232, 247-48 (2nd Cir. 1995), *cert denied*, 518 U.S. 1005 (1996) (upholding personal jurisdiction over defendant Bosnian-Serb official sued for genocide by Croat and Muslim citizens of Bosnia-Herzegovina under the Alien Tort Act, if plaintiffs are able to prove that defendant was personally served while he was in New York outside the U.N. headquarters district).

80. Rule 4(e)(2), F.R.C.P., specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States. Pursuant to *Burnham v. Superior Court*, 495 U.S. 604 (1990), such personal service also comports with the requirements of due process for the assertion of personal jurisdiction. *See Kadic*, 70 F.3d at 246-47.

81. Hague Service Convention, art. 1, *supra* note 71, 20 U.S.T. at 362.

82. *See* People v. Mendocino County Assessor's Parcel, 68 Cal. Rptr. 2d 51, 53 (Ct. App. 1997) (upholding service by publication on defendant, a resident of Spain, whose whereabouts are unknown, and holding Hague Service Convention inapplicable); Kott v. Superior Court, 53 Cal. Rptr. 2d 215, 219-21 (Ct. App. 1996) (noting that service of process by publication in California does not implicate the Hague Service Convention, but also finding such service invalid because plaintiff failed to exercise reasonable diligence to learn defendant's address in Canada prior to seeking court permission to serve by publication, as required by California law).

83. *See* FED. R. CIV. P. 4 note (Conventions), 28 U.S.C.A. app. (West 2001). The United States and many of its trading partners in Central and South America have signed

defendant not located in another signatory country is more problematic and less certain. Due to the absence of any treaty obligation, a court in a nonsignatory country is under no duty to assist a United States court to effect service of process. The traditional method of attempting service in such circumstances is by a letter rogatory or letter of request.

A letter rogatory, in this context, is simply a letter from a court in the United States to one in another country, normally delivered through diplomatic channels, which requests assistance in effecting service of process upon someone located within that country's borders.[84] The main problem with such use of letters rogatory is that the receiving court is under no obligation to comply with the request.[85] Requests for assistance in serving process addressed to a court in a country unfriendly to the United States will most likely be ignored. Even when addressed to a court in a friendly country, such requests may be greeted with indifference and delay. Consequently, when a defendant resides in a nonsignatory country, there often is no effective and efficient means of serving process abroad. In such circumstances, service must be accomplished via substitute or constructive service within the United States or in any other manner that satisfies domestic requirements for proper service.[86]

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a similar multilateral treaties. For example, the Inter-American Convention on Letters Rogatory, *opened for signature,* Jan. 30, 1975, S. Treaty Doc. No. 98-27, XIII (1984), 1483 U.N.T.S. 288; Additional Protocol to the Inter-American Convention on Letters Rogatory, *opened for signature* May 8, 1979, Senate Treaty Doc. No. 98-27, XVIII, (1984), O.A.S.T.S. No. 56 (OEA/Ser. A/33 (English)). However, unlike the Hague Service Convention, the Inter-American Treaty may not be mandatory and exclusive. *See* Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 647 (5th Cir.), *cert. denied,* 513 U.S. 1016 (1994) (concluding the Inter-American Convention does not preempt other methods of service available under state or federal law).

84. For more in-depth discussion of the use of letters rogatory in the context of service of process, see Joseph W. Dellapenna, *Civil Remedies for International Terrorism,* 12 DEPAUL BUS. L. J. 169, 228-29 (2000); Gary N. Horlick, *A Practical Guide to Service of United States Process Abroad,* 14 INT'L LAW 637, 640-42 (1980) (discussing the practical disadvantages of service abroad pursuant to letters rogatory, including cumbersome procedures, delay, and noncompliance, but noting that some countries permit no other form of service from foreign courts); Hans Smit, *International Litigation Under the United States Code,* 65 COLUM. L. REV. 1015, 1019-25 (1965) (discussing the mechanics of service abroad pursuant to letters rogatory, either through diplomatic channels or addressed directly to a foreign tribunal).

85. *See* authorities cited *supra* note 84.

86. *See* discussion *supra* notes 77-82 and accompanying text.

2. *Service on Foreign States*

Compared to service on foreign private parties, service on foreign sovereign entities is relatively straightforward. The FSIA contains uniform, exclusive service rules applicable in both federal and state courts.[87] Section 1608(a) sets forth a list of four alternative methods by which service shall be made upon a foreign state or political subdivision of a foreign state, with specified preferences for the order in which these alternatives must be attempted.[88] First, service should be made in accordance with any special arrangement for service between the plaintiff and the foreign state or, second, in accordance with an applicable international convention on service of judicial documents.[89] If neither of these first two options are available, then section 1608(a)(3) authorizes service by mail requiring a signed receipt addressed to the head of the ministry of foreign affairs of the foreign state concerned.

Finally, if service by mail under section 1608(a)(3) cannot be made within 30 days, section 1608(a)(4) authorizes the clerk of the court to mail copies of the complaint and summons and a notice of suit, with translations, to the U.S. Secretary of State for transmittal of the papers through diplomatic channels to the foreign state. So long as the Department of State properly transmits these papers as instructed and confirms this transmittal with the court, service pursuant to section 1608(a)(4) poses few problems.[90] Indeed, in several recent cases, plaintiffs alleging state-sponsored terrorism have successfully utilized section 1608(a)(4) to accomplish service of process upon foreign state defendants.[91] Even

87. Federal Rule 4(j)(1) provides that "service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608." FED. R. CIV. P. 4 (j)(1).

88. Section 1608(b) contains a somewhat different set of hierarchical alternatives applicable to service on an agency or instrumentality of a foreign state. 28 U.S.C. § 1608(b)(1)-(3) (1994).

89. 28 U.S.C. § 1608(a)(1)-(2) (1994).

90. Service under § 1608(a)(4) is deemed to have been made as of the date of transmittal indicated in the certified copy of the diplomatic note. 28 U.S.C. § 1608(c)(1) (1994).

91. *See, e.g.*, Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 6 n.1 (D.D.C. 1998) (entering default judgment against defendant Iran and noting that, despite Iran's apparent attempt to evade service by international registered mail pursuant to § 1608(a)(3), "service was accomplished with the assistance of the Swiss Embassy in Tehran."); Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 42 (D.D.C. 2000) (noting that defendant Iraq was served via the U.S. Interests Section of the Polish Embassy in Baghdad); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 67 n.4 (D.D.C. 1998) (noting that service was properly "effected through the Embassy of Switzerland in Tehran, which delivered the summons, complaint, and notice of suit to the Ministry of Foreign Affairs of Iran" pursuant to § 1608(a)(4)); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107, 109 n.1 (D.D.C. 2000) (same); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 7 (D.D.C. 2000) (same).

assuming that the same Due Process Clause protections apply to foreign states as apply to private parties, the manner of service authorized by the FSIA would certainly constitute notice "reasonably calculated" to notify foreign sovereign defendants.

C. Subject Matter Jurisdiction, Venue, and Forum Non Conveniens

1. Subject Matter Jurisdiction

A victim of terrorism who wishes to bring suit in U.S. District Court should have little difficulty in finding statutory authority for federal subject matter jurisdiction. If the plaintiff is a citizen of a State and the defendants are citizens of a foreign country, the district court will have alienage jurisdiction under 28 U.S.C. section 1332(a)(2) as to state law claims, and federal question jurisdiction under 28 U.S.C. section 1331 as to federal claims.[92]

In addition to general federal question jurisdiction, several special statutes authorize the district courts to hear federal claims against foreign defendants who have allegedly committed terrorist acts. The Antiterrorism Act of 1991, for example, provides that any United States national injured in his person or property by reason of an act of international terrorism may sue in federal district court for recovery of threefold the damages sustained.[93] The district court may also exercise supplemental jurisdiction over any state law claims arising from the same terrorist conduct, pursuant to 28 U.S.C. section 1367.[94]

With respect to claims of terrorism against foreign sovereign entities, the FSIA provides the basis for federal subject matter jurisdiction. As

92. 28 U.S.C. § 1332(a)(2) (1994 & Supp. V 1994); 28 U.S.C. § 1331 (1994). Under the Torture Victim Protection Act, 28 U.S.C. § 1350 note (1994) (referring to the Torture Victim Protection Act), an alien plaintiff can bring a civil action for damages against another individual who, "under actual or apparent authority, or color of law, of any foreign country," subjects an individual to torture or extrajudicial killing. *See* Kadic v. Karadizic, 70 F.3d 232, 246 (2nd Cir. 1996) (suggesting federal jurisdiction exists under § 1331 as to claims authorized by the Torture Victim Act).

93. 18 U.S.C. § 2333(a) (2000). The federal district courts have exclusive jurisdiction over such actions brought under the Anti-Terrorism Act of 1991. 18 U.S.C. § 2338 (2000). *See* Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1003-04 (N.D. Ill. 2001) (ruling subject matter jurisdiction conferred by § 2333 and § 2338 with respect to plaintiffs' claims against defendant organizations for allegedly providing material support to Hamas terrorists who killed plaintiffs' son in terrorist shooting in Israel).

94. *See* Estates of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 86 (D.R.I. 2001) (asserting supplemental jurisdiction over state law claims against PLO and other defendants arising from killings in Israel by terrorist group Hamas).

discussed previously, when one of the specified exceptions to sovereign immunity applies, the FSIA simultaneously confers both subject matter and personal jurisdiction upon the federal district courts.[95] The FSIA does not preclude state courts from hearing claims against foreign sovereigns.[96] However, the FSIA does encourage a foreign state defendant to remove to federal court in order to avoid a jury trial.[97]

Although most of the jurisdictional determinations are straightforward, one interesting issue has been raised regarding the constitutionality of federal subject matter jurisdiction under the state-sponsored terrorism provisions of the FSIA. In a recent case, a foreign state defendant, Libya, entered an appearance and argued that by allowing the existence of subject matter jurisdiction to depend on the State Department's determinations of whether particular foreign states are sponsors of terrorism, section 1605(a)(7) constitutes an unconstitutional delegation of legislative power.[98] The court rejected this argument on the ground that there was no delegation of power. Because Libya was already on the list of state sponsors of terrorism when section 1605(a)(7) was passed by Congress, no decision whatsoever by the Secretary of State was needed to create jurisdiction as to Libya.[99] However, the court noted the issue of delegation might be presented if another foreign sovereign—one not identified as a state sponsor of terrorism when section 1605(a)(7) was passed—was placed on the list by the State Department and, on being sued in federal court, interposed the defense that Libya raised.[100] Even as to this hypothetical, the court indicated that such delegation by Congress would be constitutionally sound.[101]

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95. *See* authorities cited *supra* notes 36-39. Under 28 U.S.C. § 1330(a) (1994), federal district courts are provided with subject matter jurisdiction if a foreign state is "not entitled to immunity . . . under §§ 1605-1607." In cases where the plaintiff alleges only state law claims, § 1330(a) is authorized by Article III's "minimal diversity" requirement where at least one of the plaintiffs is a citizen of a State, and by Article III's "arising under" jurisdiction where all of the parties are foreign. *See* Verlinden v. Central Bank of Niger., 461 U.S. 480, 481 (1983).

96. *See In re* Estate of Weinstein, 712 N.Y.S. 2d 300, 302 (N.Y. Surr. Ct. 2000) (holding that, because a state court has jurisdiction to hear FSIA claims, New York state court has jurisdiction to grant limited letters of administration where sole asset of estate is cause of action against Syria pursuant to § 1605(a)(7) of FSIA).

97. *See* 28 U.S.C. § 1441(d) (1994).

98. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 763-64 (2nd Cir. 1998). This same issue was raised by defendant, Iraq, in another case where jurisdiction was based on § 1605(a)(7). Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 49-52 (D.D.C. 2000).

99. *Rein*, 162 F.3d at 764.

100. *Id.* The *Rein* court also noted that this federal subject matter jurisdiction issue might also arise if a state on the list when § 1605(a)(7) was enacted is later dropped from the list, in which case a plaintiff could raise the argument of unduly delegated authority. *Id.*

101. *Rein*, 162 F.3d at 763-64 (dictum). Relying on an old Supreme Court case,

2. Venue

The venue restrictions for civil actions against foreign defendants in federal court are insignificant. With respect to private parties generally, the Alien Venue Statute provides that "[a]n alien may be sued in any district."[102] More specifically with respect to treble damage actions brought under the Antiterrorism Act of 1991, venue is proper in "any district where any plaintiff resides or where any defendant resides or is served, or has an agent."[103] The FSIA provides somewhat more limited choices of venue where the defendant is a foreign sovereign entity, but these include any district in which a substantial part of the events giving rise to the claim occurred, or in which an agency or instrumentality is doing business, or in the U.S. District Court for the District of Columbia if the action is brought against a foreign state or its political subdivision.[104]

3. Forum Non Conveniens

The doctrine of forum non conveniens permits a trial court to dismiss a case where an alternative forum is available in another country that is fair to the parties and substantially more convenient for them or the courts.[105] In commercial tort litigation, this is an important tool for defendants who wish to remove a products liability action from a court in the United States to one in a foreign country whose substantive and procedural laws, including the lack of jury trial and punitive damages, are far more favorable to the defendant.[106] However, for a variety of

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Jones v. United States, 137 U.S. 202 (1890), and one of its own recent precedents, *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2nd Cir. 1997), the *Rein* court opined that such delegation by Congress to the Secretary of State would be constitutionally permissible. *Id.* The *Daliberti* court followed *Rein's* reasoning and concluded there was no separation of powers violation when Congress vested jurisdiction in the federal courts over a class of sovereigns identified as terrorist states and delegated that determination to the Secretary of State. *Daliberti*, 97 F. Supp. 2d at 50-52.

102. 28 U.S.C. § 1391(d) (1994).

103. 18 U.S.C. § 2334(a) (2000). *See* Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1034 (N.D. Ill. 2001) (ruling venue proper in Northern District of Illinois pursuant to § 2334(a) with respect to terrorist acts that occurred in Israel where one defendant, the U.S. based leader of military branch of Hamas, resides).

104. 28 U.S.C. § 1391(f) (1994).

105. Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 719 (1st Cir. 1996).

106. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (upholding dismissal of products liability action against defendants, two U.S. manufacturers, on grounds that Scotland was a more convenient forum, even though a Scottish court would not provide a jury trial and would apply liability and damages law less favorable to

reasons, foreign defendants will not likely find this doctrine as helpful in actions seeking damages for acts of international terrorism.

Under the federal common law doctrine, which is similar to the approach utilized in most state courts, there is a strong presumption in favor of the plaintiff's choice of forum, particularly where the plaintiff is a resident of the forum.[107] The defendant must first demonstrate that an adequate alternative forum exists, and then that considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum.[108] In general, the threshold requirement is usually satisfied if the defendant shows that an alternative forum provides some redress for the type of claims alleged in the plaintiff's complaint and that the defendant is amenable to suit in the alternative forum.[109] The possibility of an unfavorable change in the substantive or procedural law is ordinarily not a relevant consideration, unless the remedy provided by the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all."[110] If a suitable alternative forum exists, then the defendant must demonstrate that the balance of various relevant private and public interest factors strongly favor dismissal.[111] The trial court has the discretion to grant or deny a forum non conveniens motion based on its consideration of these relevant factors.[112]

A trial court is unlikely to grant a forum non conveniens dismissal where the plaintiff, a victim of terrorism abroad, is a resident of the United States and the alternative forum is located in a country overtly hostile to the United States. If the terrorist acts occurred in the United

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plaintiffs); *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2nd Cir.), *cert. denied*, 484 U.S. 871 (1987) (upholding forum non conveniens dismissal of mass tort class action even though Indian legal system has limited pre-trial discovery, back log of tort cases, less developed tort law, and no right to jury trial).

107. *See Piper*, 454 U.S. at 255-56 (recognizing that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, but holding that a foreign plaintiff's choice deserves less deference than the choice of a resident); Stangvik v. Shiley, Inc., 819 P.2d 14, 20 (Cal. 1991) (same); Islamic Republic of Iran v. Pahlavi, 467 N.E. 2d 245, 249 (N.Y. 1984) (same).

108. Iragorri v. International Elevator, Inc., 203 F.3d 8, 12 (1st Cir. 2000); Estates of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76, 99 (D.R.I. 2001); *Stangvik*, 819 P.2d at 17-19. *But see Pahlavi*, 467 N.E. 2d at 248-51 (observing that the availability of another suitable forum is a most important factor, but not a prerequisite for applying forum non conveniens).

109. *Piper*, 454 U.S. at 254 n.22.

110. *Piper*, 454 U.S. at 254; *Stangvik*, 819 P.2d at 19.

111. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947) (identifying an illustrative list of considerations relevant to the private and public interests); *Iragorri*, 203 F.3d at 15-18; *Piper*, 454 U.S. at 241, 257-61; *Stangvik*, 54 Cal. 3d at 756-64, 819 P.2d at 22-27 (applying various private and public interest factors); *Pahlavi*, 467 N.E. 2d at 249-50 (upholding forum non conveniens dismissal where no substantial nexus between New York and Iran's cause of action against its former ruler).

112. *Piper*, 454 U.S. at 257; *Stangvik*, 819 P.2d at 17; *Pahlavi*, 467 N.E. 2d at 247.

States, dismissal is unlikely even if the traditional private and public interest factors are considered in the same manner as in commercial tort litigation. Under traditional forum non conveniens analysis, one of the relevant public interest factors is the forum state's interest in deterring wrongful conduct by the defendant in the forum state.[113] If the court emphasizes this interest, a likely scenario in an action involving terrorism, the motion will most certainly be denied. This interest would likely outweigh all other private and public interest in an action against foreign defendants alleged to have engaged in terrorist acts within the forum state.

Different considerations apply when the plaintiff's action seeks treble damages under the Antiterrorism Act of 1991, 18 U.S.C. section 2333, for injuries caused by international terrorism. This Act limits the circumstances under which the district court can entertain a forum non conveniens motion in such an action. One such statutory limitation is that the district court shall not dismiss "unless the foreign court offers a remedy which is substantially the same as the one available in the courts of the United States."[114] This prerequisite would seem to preclude dismissal where the substantive law or the law of damages applicable in the alternative forum is substantially less favorable to the plaintiff than that applied in the district court; a likely scenario in most cases seeking treble damages under the Act for international terrorism. Consequently, the inclusion of a claim under the Antiterrorism Act of 1991 would so reduce the prospects of a forum non conveniens dismissal as to render the motion almost meaningless.

D. Choice-of-Law, Jurisdiction to Prescribe, and the Act of State Doctrine

1. Choice-of-Law

Claims based on terrorist acts occurring overseas may involve choice-of-law issues. The facts of *Estates of Ungar v. Palestinian Authority*[115] illustrate how such issues may arise. Yaron Ungar, a United States citizen, and his wife were killed in Israel by the terrorist group Hamas.

113. *See Piper,* 454 U.S. at 260-61; *Stangvik,* 819 P.2d at 22-23 (considering whether California's interest in deterring wrongful conduct justified retention of plaintiffs' actions in a California court).
114. 18 U.S.C. § 2334(d)(3) (2000).
115. Estates of Ungar v. Palestinian Authority, 153 F. Supp. 2d 76 (D.R.I. 2001).

The Ungars' estate and children subsequently filed an action in the U.S. District Court for Rhode Island against the Palestine Liberation Organization and other nonsovereign foreign defendants, seeking damages under state tort law and the federal Antiterrorism Act of 1991. In ruling on the defendants' motion to dismiss for failure to state a claim, the district court correctly recognized that it must determine whether the substantive law of Rhode Island or of Israel governed the state law tort claims. As required by the *Erie* doctrine, the district court then applied Rhode Island's choice-of-law doctrine, an "interest-weighing" approach, and determined that Israeli law governed the tort claims alleged in the complaint.[116] Although the result may be different under other state doctrines and factual circumstances, such choice-of-law determinations are necessary in international terrorism litigation whenever state law claims are alleged against private parties.[117]

A somewhat similar determination may be necessary under the FSIA when terrorism claims are alleged against sovereign entities. The FSIA does not contain any federal standards of substantive liability. Instead, under section 1606 of the FSIA, a foreign state not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances."[118] There is a split of authority as to whether state or federal choice-of-law doctrine determines the relevant substantive law under section 1606, and as to the nature of the substantive law so chosen.

Cases that have considered choice-of-law issues in the context of the FSIA's commercial activities exceptions to foreign sovereign immunity have applied state rules of decision, including state choice-of-law doctrine.[119] However, cases brought pursuant to the state-sponsored

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116. *Id.* at 98-99.

117. Of course, no such choice-of-law determination is necessary when the cause of action is based on federal laws, such as 28 U.S.C. § 1605 note or the Antiterrorism Act of 1991, 18 U.S.C. § 2333. *See Estates of Ungar*, 153 F. Supp. 2d at 96-97 (construing § 2333 and § 2331 to determine whether plaintiffs stated claims against PLO for terrorist acts occurring in Israel); Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002, 1010-19 (N.D. Ill. 2001) (construing § 2333 and related federal statutes to determine whether plaintiff properly stated a claim against various defendants for providing material support to Hamas for acts of terrorism in Israel).

118. 28 U.S.C. § 1606 (1994).

119. *E.g.*, Barkanic v. General Admin. of Civil Aviation, 923 F.2d 957 (2nd Cir. 1991) (holding New York choice-of-law doctrine applies to wrongful death claims brought under § 1605(a)(2) to ensure that defendant, Chinese agency, is liable in the same manner as a private individual as specified by § 1606 of FSIA, and under that doctrine that the $20,000 damage limit of Chinese law applies to plaintiffs' wrongful death claims); Pittston Co. v. Allianz Ins. Co., 795 F. Supp. 678 (D. N.J. 1992) (applying state choice-of-law rules and concluding that New Jersey law governs most of the substantive issues). *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 14 (D.D.C. 1998) (collecting cases).

terrorism provisions of section 1605(a)(7) have adopted a different approach. These cases have applied federal common law, to both the determination of liability and of appropriate damages, after a federal choice-of-law analysis.[120] The justification for this application of federal law common law is not always made clear. However, one district court reasoned that when Congress created jurisdiction and a cause of action for personal injury resulting from state-sponsored terrorism, including its own statute of limitations, it intended the courts to develop national standards to promote uniform determinations of liability of foreign states for such terrorist acts.[121] This court interpreted the jurisdictional amendments to the FSIA contained in section 1605(a)(7) and the related cause of action against foreign states created by section 1605(a) note *in para materia.*[122] This reasoning lead the court to employ interstitial federal common law to determine substantive issues regarding claims of state-sponsored terrorism where it might otherwise have relied upon state law.[123]

These uses of federal common law do appear appropriate for section 1605 note claims heard pursuant to section 1605(a)(7), even though clearly not appropriate for state law claims heard pursuant to the FSIA's commercial activity exceptions to immunity from suit. The jurisprudence evolving from the federal district courts endorses this approach when determining liability and damages against state sponsors of terrorism.[124] Unless a case proceeds to the merits by way of a contested trial, the appellate courts may have little opportunity to weigh in on the propriety of using federal common law, as opposed to state law, as the choice-of-

120. *E.g., Flatow,* 999 F. Supp. at 14-16 (employing interstitial federal common law as the rule of decision under the state-sponsored terrorism exception); Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128, 134-35 (D.D.C. 2001) (applying a federal choice-of-law rule based on the Second Restatement of Conflicts, and concluding federal common law also applies to calculate the relief to which plaintiffs are entitled in their FSIA case); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 47-53 (applying federal common law notions of battery, assault, false imprisonment, and intentional infliction of mental distress); Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 46 (D.D.C. 2001) (observing that federal common law, rather than the law of any foreign or domestic state, should govern in circumstances to which the FSIA does not speak). *See also* Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), *cert. dismissed,* 497 U.S. 1058 (1990) (applying federal choice-of-law rule to claims brought pursuant to FSIA's noncommercial tort provisions). These cases stress that the liability determination is separate and distinct from the immunity determination.

121. *Flatlow,* 999 F. Supp. at 14-15.

122. *Id.*

123. *Id.*

124. *See* cases cited *supra* notes 120-23.

law doctrine and the rule of decision with respect to claims alleging state-sponsored terrorism under the FSIA.

2. Jurisdiction to Prescribe

A different type of choice-of-law inquiry, sometimes referred to as jurisdiction to prescribe, is required when the plaintiff alleges that conduct which occurred outside the territory of the United States is prescribed by a federal statute. Whether such extraterritorial application of United States law is appropriate is largely a matter of statutory construction. Article I of the Constitution authorizes Congress to enact laws applicable beyond the territorial boundaries of the Untied States.[125] However, a long-standing canon of statutory construction provides that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.[126] This general presumption can be overridden only by a clear expression of Congress that extraterritorial application of a federal statute is intended.[127]

The prescriptive jurisdiction issue is relevant to federal claims alleged against private parties under the Antiterrorism Act of 1991, 18 U.S.C. section 2333; and against sovereign entities for state-sponsored terrorism under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. section 1605(a)(7). The language of the Antiterrorism Act of 1991,[128] and the language and legislative history of section 1605(a)(7) of the FSIA, reveal Congress' clear intent that both federal statutes apply to extraterritorial conduct.[129] Therefore, these federal statutes properly

125. *See, e.g.*, EEOC v. Arabian American Oil Co., 499 U.S. 244, 248-61 (1991) (observing that the parties must concede "that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting) (collecting cases and observing that the Supreme Court has repeatedly upheld Congress' power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected).

126. *See Arabian American Oil*, 499 U.S. at 248.

127. *Id.*

128. The Antiterrorism Act provides a federal cause of action for treble damages for any national of the United States injured by an act of international terrorism. 18 U.S.C. § 2333(a) (2000). That Act defines "international terrorism" as violent activities that "occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1) (2000).

129. Although the language of the 1996 state-sponsored terrorism amendments to the FSIA is not as explicit as that of the Antiterrorism Act of 1991, it indirectly indicates extraterritorial intent. Section 1605(a)(7)(B)(i), which requires the plaintiff to offer the foreign state an opportunity to arbitrate the claim "if the act occurred in the foreign state," would be superfluous if Congress did not intend for § 1605(a)(7) to apply to extraterritorial conduct. Moreover, the legislative history demonstrates a clear Congressional intent that § 1605(a)(7) applies to extraterritorial conduct and an express purpose to effect the conduct of terrorists outside the United States, in order to promote

apply to terrorist conduct occurring outside the territorial jurisdiction of the United States.

3. The Act of State Doctrine

The Act of State Doctrine generally precludes United States courts from reviewing the validity of official action by a foreign state performed within its own territory.[130] The doctrine is a substantive rule of decision created by federal common law, and is therefore applicable in both federal and state courts.[131] Although its precise contours are unclear, for a variety of reasons this doctrine should not play a significant role in litigation alleging state-sponsored terrorism.[132] One reason is that the doctrine has a situs requirement which makes its protections inapplicable unless the official action came to complete fruition within the foreign state.[133] Therefore, the act of state defense may not apply to terrorist acts sponsored by foreign sovereigns, ordered and committed within the United States or a third country.[134]

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the safety of U.S. citizens traveling overseas. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 15 (D.D.C. 1998) (examining the legislative history of § 1605(a)(7) and concluding it applies to extraterritorial terrorism).

130. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

131. *Sabbatino*, 376 U.S. at 427-28.

132. The classic use of the Act of State Doctrine is in cases challenging the validity of expropriation of private property by a foreign state. *See, e.g.*, *Sabbatino,* 376 U.S. 398 (applying Act of State Doctrine in an action to recover proceeds after Cuba expropriated certain sugar properties owned by United States nationals); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (applying Act of State Doctrine in action by former private owners to recover damages after Cuba nationalized Cuban cigar manufacturing companies). It has been applied in other contexts as well, such as an action seeking damages for wrongful imprisonment during a coup in Venezuela in *Underhill v. Hernandez*, 168 U.S. 250 (1897); and therefore may be relevant to cases alleging state-sponsored terrorism.

133. *Sabbatino*, 376 U.S. at 423; Braka v. Bancomer, 762 F.2d 222 (2nd Cir. 1985); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715-16 (5th Cir.), *cert. denied*, 393 U.S. 924 (1968). *See* Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 62-67 (1990) (collecting cases which indicate Act of State Doctrine protects only sovereign acts of a foreign state taken within that state's territory); Daniel C. K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397 (1987) (discussing the territorial limitation of the traditional Act of State Doctrine and arguing for a new approach such that the doctrine would apply only where a sovereign acts within its legitimate sphere of law making competence and not in violation of international law).

134. *See* Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990) (observing that because the court is asked to judge the legality of the assassination of an American citizen by foreign officials within the United States, such an inquiry would hardly affront the sovereignty of the foreign nation). *See*

Even in cases where the complained of terrorist acts occurred within the foreign state's territory, such acts may not invoke the Act of State Doctrine. Several lower federal courts have concluded that such terrorist acts simply do not constitute valid "acts of state" within the meaning of the doctrine.[135] Others have reasoned that the doctrine is inconsistent with, and therefore superceded by, the state-sponsored terrorism exceptions to immunity from suit explicitly authorized by the FSIA.[136] This reasoning seems fundamentally sound. Because the Act of State Doctrine is a creature of federal common law designed to prevent courts from interfering with the foreign affairs powers of the President and the Congress,[137] it should not prohibit Congress and the Executive from authorizing the courts to vindicate such powers.[138] Moreover, if the Act of State Doctrine exists solely as a rule of federal common law and not as a constitutional limitation on judicial powers, Congress certainly has the power to override the doctrine in the FSIA, as it has in other statutes.[139]

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also Fletcher Alford, Note, *When Nations Kill: The Liu Case and the Act of State Doctrine in Wrongful Death Suits*, 12 HASTINGS INT'L & COMP. L. REV. 465 (1989) (arguing the Act of State Doctrine should not apply to alleged extraterritorial and intentional tortuous misconduct by a foreign government).

135. *E.g.*, Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 24 (D.D.C. 1998) (concluding the act of state defense does not apply to bus bombings and other acts of international terrorism); *Liu*, 892 F.2d at 1432-34 (holding that political assassinations ordered by foreign states outside their territory are not valid acts of state within the meaning of the doctrine); Letelier v. Republic of Chile, 488 F. Supp. 665, 673-74 (D.D.C. 1980) (same). *See* Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 242-47 (1983) (reviewing authorities and arguing that the Act of State Doctrine should be inapplicable to terrorist acts in violation of international law).

136. *See, e.g.*, Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 54-55 (D.D.C. 2000) (observing that the Act of State Doctrine does not prohibit Congress and the Executive from authorizing claims against a foreign country designated as a terrorist state); *Letelier*, 488 F. Supp. at 674; *Flatow*, 999 F. Supp. at 24. *See also* Michael J. Brazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 377 (1986) (arguing that application of the Act of State Doctrine to the non-immune activities of a foreign state would frustrate the purposes of the FSIA).

137. According to the Supreme Court, the doctrine is rooted in the "domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." W. S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990) *(quoting Sabbatino*, 376 U.S. at 423).

138. *Daliberti*, 97 F. Supp. 2d at 55. *But see* International Ass'n of Machinists v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (holding the FSIA does not supercede Act of State Doctrine in cases brought under FSIA's commercial activities exceptions to immunity from suit); *Liu*, 892 F.2d at 1432 (ruling the FSIA's noncommercial tort exception does not supercede the Act of State Doctrine because that doctrine addresses different concerns than sovereign immunity).

139. *E.g.*, 9 U.S.C. § 15 (2000) (providing that judicial confirmation and

III. PROBLEMS WITH ENFORCEMENT OF JUDGMENTS AGAINST INTERNATIONAL TERRORISTS

A. Judgments

1. Default Judgments

Nearly all the cases commenced in the United States courts against defendants accused of international terrorism have proceeded to the merits by way of default.[140] As a consequence, few appeals have been taken and the federal circuit courts have not addressed many of the procedural issues discussed in this Article. However, the federal district courts have entered default judgments accompanied by detailed findings of facts and conclusions of law, often after evidentiary hearings that resemble non-jury trials, albeit one-sided trials.[141] This procedure is

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enforcement of arbitral awards "shall not be refused on the basis of the Act of State Doctrine."); Section 302(a)(6) of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), Pub. L. No. 104-114, 110 Stat. 785, *reprinted in* 22 U.S.C. § 6021 note (Supp. 1999) (providing that no court shall decline, based on the Act of State Doctrine, to determine merits of claim by former owner against defendant who illegally traffics in property confiscated by Cuba).

140. Libya, Iraq and the PLO are some of the few defendants to enter an appearance and contest actions alleging international terrorism. *E.g.*, Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 755 (2nd Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) (reviewing denial of defendant Libya's motions, including motion to dismiss for failure to state claim); *Daliberti*, 97 F. Supp. 2d at 40 (denying defendant Iraq's various motions to dismiss); Estates of Ungar v. Palestinian Auth., 153 F. Supp. 2d 76, 84-85 (D.R.I. 2001) (determining motions to dismiss, including for failure to state a claim, filed by defendants Palestinian Authority and PLO).

141. *E.g.*, Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 3-11 (D.D.C. 2000) (entering default judgment after a three-day bench trial, issuing detailed findings of fact and conclusions of law based on sworn testimony and documents entered into evidence in accordance with the Federal Rules of Evidence, and finding facts by clear and convincing evidence which would have been sufficient to establish a prima facie case in a contested proceeding); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1242-54 (S.D. Fla. 1997) (entering a default judgment against Cuba accompanied by a 12-page opinion after receiving evidence on the issues of liability and damages during a three-day trial); Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 45-46 (D.D.C. 2001) (conducting five-day evidentiary hearing, supplemented by declarations under oath, before entering default judgment against Iraq); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13, (D.D.C. 2002) (entering default judgment against Iran along with findings of fact based on sworn testimony entered into evidence during two-day bench trial); Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980) (issuing detailed findings of fact and conclusions of law after evidentiary hearing where plaintiffs

required by the FSIA when the defaulting defendant is a foreign sovereign entity,[142] and is essential to the legitimacy and perceived fairness of any domestic judicial decision in the international arena.

2. Civil Remedies

The full range of traditional civil remedies, including compensatory and punitive damages, are available to plaintiffs who are victims of international terrorism committed by private parties. In addition, the Antiterrorism Act of 1991 authorizes recovery of treble damages, costs and attorney fees, for any United States national injured by an act of international terrorism.[143] The range is only slightly more limited when the defendant is a foreign sovereign entity.[144] The FSIA generally provides that a foreign sovereign shall be liable "in the same manner and to the same extent as a private individual under like circumstances."[145] In addition, the FSIA specifically permits plaintiffs suing under the state-sponsored terrorism provision in section 1605(a)(7) to recover money damages which may include "economic damages, solatium, pain, and suffering."[146] However, the current version of the FSIA exempts a foreign state from liability for punitive damages, although not the "agency or instrumentality" by which that state commits acts of terrorism.[147] Pursuant to these FSIA provisions, courts have awarded plaintiffs hundreds of millions of dollars in compensatory and punitive damages in international terrorism cases against foreign sovereign

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introduced 160 exhibits in support of default judgment under FSIA, including transcripts of sworn testimony in related criminal proceedings).

142. The FSIA requires that a default against a foreign state, or a political subdivision or agency or instrumentality thereof, be entered only after the plaintiff "establishes his claim or right to relief by evidence that is satisfactory to the court." 28 U.S.C. § 1608(e) (1994).

143. 18 U.S.C. § 2333(a) (2000). Section 2333 does not apply to a foreign state or agency of a foreign state, or an officer or employee of a foreign state or agency thereof. 18 U.S.C. § 2337 (2000).

144. However, the provisional remedy of prejudgment attachment is much more limited with respect to assets of a foreign state as opposed to those of a private party. *See* 28 U.S.C. § 1610(d) (1994) (authorizing prejudgment attachment of property of a foreign state used for commercial activity within the United States only if the foreign state explicitly waived its immunity from such attachment).

145. 28 U.S.C. § 1606 (Supp. V 1999).

146. 28 U.S.C. § 1605 note (Supp. V 1999).

147. 28 U.S.C. § 1606 (Supp. V 1999), *as amended* by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1543 (2000) (repealing recent amendments to § 1606 that had permitted punitive damages against a foreign state in actions under § 1605(a)(7)). The FSIA defines an "agency or instrumentality" to include a separate legal entity which is an organ of, or any entity a majority of whose stock or other ownership interest is owned by, a foreign state or political subdivision thereof. 28 U.S.C. § 1603(b)(1)-(2) (1994).

defendants.[148]

B. Enforcement of Judgments

1. Enforcement Within the United States

Enforcement of a money judgment rendered in one State of the United States against a private party in another State poses few procedural problems. Under the Full Faith and Credit Clause,[149] a valid and final judgment of one state must be recognized in all other states.[150] Of course, enforcement of a money judgment in any state is subject to an overriding practical limitation—the defendant may not have any assets

148. *E.g.*, Stethem v. Islamic Republic of Iran, ___ F. Supp. 2d ___, 2002 U.S. Dist. Lexis 7440 (D.D.C. 2002) (awarding plaintiffs $21.4 million in compensating damages against Iran, and $300 million in punitive damages against Iranian agency); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 8-11 (D.D.C. 2000) (awarding plaintiffs $24.66 million for wrongful death, pain and suffering, and solatium against Iran and $300,000 punitive damages against Iranian agencies and officials); Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128, 135-38 (D.D.C. 2001) (awarding plaintiffs $16.3 million for wrongful death economic losses and solatium against Iran and $300 million punitive damages against Iranian agency); Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 47-49 (D.D.C. 2001) (awarding plaintiffs $9.11 million compensatory damages against Iraq and $300 million punitive damages against Saddam Hussein); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 51-53 (D.D.C. 2001) (awarding compensatory damages of $53 million against Iran and punitive damages of $300 million against Iranian agency); Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13, (D.D.C. 2002) (entering judgment for $33.25 million in compensatory damages against Iran and $150 million punitive damages against Iranian agency); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 109-15 (D.D.C. 2000) ($11.74 million compensatory against Iran and $300 million punitive damages against Iranian agency); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 27-34 (D.D.C. 1998) ($22.5 million compensatory and $225 punitive damages against Iran and Iranian officials); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 69-70 (D.D.C. 1998) ($65 million compensatory damages against Iran); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107, 112-14 (D.D.C. 2000) ($24.5 million compensatory and $300 million punitive against Iran); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1249-54 (S.D. Fla. 1997) (awarding $49.9 million compensatory damages against Cuba and $137.7 punitive damages against Cuban Air Force); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 37-40 (D.D.C. 2001) (awarding plaintiffs $14.64 million compensatory damages against Iran and $300 million punitive damages against Iranian agency); Letelier v. Republic of Chile, 502 F. Supp. 259, 266-68 (D.D.C. 1980) (entering wrongful death judgment against Chilean officials of $2.95 million compensatory and $2 million punitive damages).

149. U.S. CONST. art. IV, cl. 1.

150. Fauntleroy v. Lum, 210 U.S. 230 (1908). *See* 28 U.S.C. § 1738 (1994) (requiring federal courts to give full faith and credit to state court judgments). A valid judgment in this context means that the rendering court properly exercised subject matter and personal jurisdiction, and provided the defendant with proper notice. *See Fauntleroy*, 210 U.S. at 237.

within the jurisdiction that can be reached to satisfy the judgment. This practical limitation likely constitutes an insurmountable barrier to collection of money judgments against private individuals who have committed acts of international terrorism. As to terrorist organizations, the prospects for enforcement may not be as bleak. For example, if the organization raises funds or owns property within the United States, such assets may be attached to satisfy the judgment.[151] Moreover, because a civil judgment typically remains effective for several years, the plaintiff can seek to enforce it whenever the organization obtains assets in the future.

Enforcement of a money judgment against a foreign sovereign is governed by the FSIA and related federal statutes. Property of a foreign state entity within the United States is immune from attachment and execution unless one of the FSIA's exceptions provide otherwise.[152] Where the judgment is based on the commercial activity or noncommercial tort exceptions of the FSIA, the property subject to execution is rather limited. A judgment creditor is permitted to execute on property of a foreign state "used for a commercial activity in the United States" only if the property was used for the commercial activity upon which the claim is based.[153] If the judgment is pursuant to the state-sponsored terrorism provisions of section 1605(a)(7), however, such commercial property of a foreign state is not immune from execution regardless of whether the property was involved with the act upon which the claim is based.[154] However, the property must be that of the defendant foreign state and not that of a separate and distinct juridical entity.[155]

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151. *See* Boim v. Quranic Literacy Inst., 127 F. Supp. 2d 1002 (N.D. Ill. 2001) (describing the fundraising activities of the terrorist organization Hamas in North America and Western Europe). The Executive branch has authority to freeze all assets subject to United States jurisdiction of any organization designated a "foreign terrorist organization" as defined by 8 U.S.C. § 1189. 8 U.S.C. § 1189(a)(2)(C) (2000). *See Boim*, 127 F. Supp. 2d at 1005 n.2. Moreover, by virtue of 18 U.S.C. § 2333, domestic organizations that raise funds within the United States and knowingly provide material support to foreign terrorist organizations may be civilly liable for aiding and abetting terrorism. *Id.* at 1014-21.

152. 28 U.S.C. § 1609 (1994).

153. 28 U.S.C. § 1610(a)(2) (1994).

154. 28 U.S.C. § 1610(a)(7) (Supp. V 1999).

155. *E.g.*, Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999) (concluding Cuban telecommunications company is a juridical entity separate from the Cuban government and therefore reversing district court's order which had permitted plaintiffs to collect portion of their money judgments against Cuba, obtained under § 1605(a)(7), by garnishing certain debts owed to this telecommunications company); Letelier v. Republic of Chile, 748 F.2d 790 (2nd Cir. 1984) (concluding that, under the FSIA, the separate juridical existence of the Chilean National Airline makes its assets immune from execution to satisfy a judgment against Chile). *See* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) (recognizing

The FSIA is somewhat less restrictive with respect to enforcement of judgments against an "agency or instrumentality"[156] of a foreign state engaged in commercial activity in the United States. If the judgment relates to a claim for which the agency or instrumentality is not immune under an FSIA exception, then the judgment creditor may execute on any property of the agency or instrumentality in the United States regardless of whether the property was involved in the act upon which the claim is based.[157] Recognizing these limitations may preclude any effective remedy for judgment creditors who are victims of state-sponsored terrorism, Congress amended the FSIA in 1998 to make additional property subject to execution in cases where the judgment is based on the state-sponsored terrorism exception of section 1605(a)(7).[158] This included certain frozen assets of foreign states and properties used for diplomatic purposes that were previously immune from execution.[159] However, pursuant to the express authority to do so contained in section 1610(f)(3), the President waived the attachment provisions related to blocked property of terrorist states.[160] Moreover, section 1611 of the FSIA continues to exempt from execution currency reserve accounts of a foreign state on deposit within the United States

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under the FSIA that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such" but concluding the presumption of separateness was overcome as to Cuban Foreign Trade Bank and Cuba).

156. The FSIA defines an "agency or instrumentality" to include a separate legal entity which is an organ of, or any entity a majority of whose stock or other ownership interest is owned by, a foreign state or political subdivision thereof. 28 U.S.C. § 1603(b)(1)-(2) (1994).

157. 28 U.S.C. § 1610(b)(2) (Supp. V 1999). This provision also applies to such property of an agency or instrumentality where the judgment is based on the state-sponsored terrorism exception of section 1605(a)(7). 28 U.S.C. § 1610(b)(2).

158. For an excellent summary of these various FSIA amendments expanding the exceptions to immunity from attachment and execution, as well as the difficulties encountered by the plaintiffs seeking to enforce their judgments in the *Flatow* and *Alejandre* lawsuits that preceded these amendments, see Comment, *Hell-Bent on Awarding Recovery to Terrorism Victims: The Evolution and Application of the Antiterrorism Amendments to the Foreign Sovereign Immunities Act*, 19 DICK. J. INT'L L. 213 (2000).

159. *See* 28 U.S.C. § 1610(f)(1) (Supp. V 1999).

160. Presidential Determination No. 01-03, 65 Fed. Reg. 66,483 (October 28, 2000) and Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998), *reprinted in* 28 U.S.C.A. § 1610 note (West 2001). This waiver explains that the attachment and execution provisions of section 1610(f)(1) "would impede the ability of the President to conduct foreign policy in the interest of national security." *Id.*

and certain military property.[161]

Congress subsequently revisited these enforcement restrictions, and again amended the FSIA by enacting the Justice for Victims of Trafficking and Violence Protection Act of 2000, to provide new options for payment of some money judgment directly from the United States Treasury Department.[162] Under this compensation scheme, certain plaintiffs who obtained judgments against Iran or Cuba (but not one of the other designated terrorist states) under the state-sponsored terrorism provisions of section 1605(a)(7) have the option of receiving payments in the amount of 100 percent or 110 percent of the compensatory damages awarded in the judgment.[163] In order to obtain 100 percent, the judgment creditor must agree to relinquish all claims and rights to compensatory damages under the judgment.[164] To obtain 110 percent, the judgment creditor must also relinquish all rights and claims to punitive damages awarded by the court.[165] This compensation scheme remains in effect today, and has resulted in payments to judgment creditors of Iran and Cuba in amounts that now apparently total over $250 million.[166]

Funding for these payments, as to judgments against Cuba, is to be secured from liquidation of certain blocked assets of the Cuban government and of certain judicially sanctioned entities.[167] As to judgments against Iran, the Secretary of the Treasury is directed to make payments from rental proceeds of Iranian diplomatic and consular properties located in the United States, and from amounts obtained through liquidation of certain frozen assets.[168] With respect to some sources of these payments, the United States is subrogated, to the extent of the payments, to all rights of the person paid against the debtor foreign state.[169] And specifically as to Iran, the Act provides that the President shall not release any blocked assets to Iran "until such subrogated claims have been dealt with to the satisfaction of the United States."[170] Moreover, the Act expresses the "sense of the Congress" that the President "should not normalize relations between the United States

161. 28 U.S.C. § 1611(b) (Supp. 1996).
162. This amendment to the FSIA is part of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1542-43 (2000).
163. Victims of Trafficking and Violence Protection Act of 2000, § 2002(a).
164. *Id.* at § 2002(a)(2)(B).
165. *Id.* at § 2002(a)(2)(C).
166. *See* Bill Miller, *Terrorism Victims Set Precedent, U.S. to Pay Damages, Collect from Iran,* WASH POST, Oct. 22, 2000, at A1.
167. Victims of Trafficking and Violence Protection Act of 2000, § 2002(b)(1).
168. § 2002(b)(2).
169. § 2002(c).
170. *Id.*

and Iran until the claims subrogated have been dealt with to the satisfaction of the United States."[171] Needless to say, these statutory limitations on rapprochement with Iran are viewed by some as unnecessary interference with the President's ability to conduct foreign policy.[172]

2. *Enforcement Outside the United States*

There is no international Full Faith and Credit Clause. Absent a treaty, a country is under no obligation to recognize or enforce judgments rendered by the courts of other countries.[173] At present, the United States is not a signatory to any treaty that would require another country to recognize and enforce our civil judgments.[174] Each country is therefore free to apply whatever standards it wishes when asked, as a matter of "comity," to recognize and enforce a United States judgment. Countries hostile to the United States, such as those identified as state sponsors of terrorism, may flatly refuse to recognize any judgments rendered by our courts.[175] But even countries generally friendly to the United States may, and likely will, decline to enforce our money judgments where those judgments are based on notions of service of

171. § 2002(d).

172. *See Hell-Bent on Awarding Recovery to Terrorism Victims, supra* note 158, at 239-43 (discussing concerns regarding FSIA's conditioning normalization of relations with terrorist states on recovery of payments made to judgment creditors).

173. *Hilton v. Guyot*, 159 U.S. 113 (1895). *See* Degnan & Kane, *supra* note 33, at 846-49 (surveying authorities and observing that enforcement of foreign judgments commonly proceeds from notions of comity as a matter of respect for the sovereign power of the rendering state).

174. The United States is a signatory to a multi-lateral treaty that requires courts in signatory countries to recognize and enforce foreign arbitration awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *adopted* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (entered into force June 7, 1959).

175. Of course, even an overtly hostile country's leadership may change over time, or at least be willing to compensate victims of terrorism allegedly sponsored by that country. *See, e.g.*, Warren P. Strobel, *Frozen for Years, U.S.-Libyan Relations May Be Nearing a Thaw*, MILWAUKEE J. SENT., March 3, 2002, at A12 (discussing Libya's indication that it may pay billions of dollars in compensation to the families of those who died in the 1988 Pan Am 103 bombing over Lockerbie, Scotland); Andrew Buncombe, *Libya to Pay Damages for Lockerbie*, INDEPENDENT (London), Jan. 20, 2002, at 14 (discussing secret deal being finalized by Libya, Britain and United States under which Libya would compensate victims of Pan Am 103 bombing); Barbara Crossette, *$2.6 Million Awarded to Families in Letelier Case*, N.Y. TIMES, Jan. 13, 1992, at A11 (describing proposed payments by Chile of $2.6 million to United States, pursuant to an arbitration award, for the families of Letelier and Moffat as compensation for state-sponsored assassinations).

process or personal jurisdiction inconsistent with their views on these procedural requirements.[176]

A judgment rendered by a court in the United States will not be recognized in another country unless service of process was accomplished in accordance with the laws of the country where recognition is sought. Failure to comply with the Hague Service Convention where deemed applicable by another signatory country, for example, will likely mean that a resulting judgment will be unenforceable in that country, even though the judgment is valid within the United States court system.[177] This is particularly true with respect to default judgments, which are subject to several specific rules under the Hague Service Convention.[178] Consequently, a plaintiff who anticipates enforcement of a judgment in another signatory country would be ill-advised to avoid the Convention's procedures by substituted or constructive service within the United States, under circumstances where the other country views the Convention's requirements applicable.

Even where a United States judgment is based on procedural standards consistent with those of the foreign country, that country may decline to recognize the judgment based on its notions of public policy.[179] For example, most countries do not permit their courts to award punitive damages or treble damages in civil actions, and may therefore refuse to enforce any United States judgment that includes such damages.[180]

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176. *See* Degnan & Kane, *supra* note 33, at 844-54 (surveying cases and authorities); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 114-16 (1999) (explaining that most other countries will not respect United States judgments based on exorbitant jurisdiction, such as general jurisdiction based on continuous and systematic contacts); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 133-36 (analyzing Brussels Convention and concluding that European countries do not accept personal jurisdiction based on continuous and systematic business contacts with forum). *See also* authorities cited *supra* note 67.

177. *See supra* notes 67 & 72-75 and accompanying text.

178. Pursuant to Article 15 of the Hague Service Convention, the United States has declared that no default judgment shall be given unless the complaint and summons was transmitted by one of the methods provided for in the Convention and service was effected in sufficient time to enable the defendant to defend; or, if no certificate of service has been received from the relevant Central Authority, a period of at least six months has elapsed since the date of the transmission and every reasonable attempt has been made to obtain a certificate of service. *See* FED. R. CIV. P. 4, 28 U.S.C.A. app. (West 2001) (Declarations of the United States).

179. Referring to the near universality of this public policy exception, Professor Lowenfeld observed "it is generally accepted that the law of recognition of judgments, whether expressed in statute, treaty, judicial decision, or even a Restatement, must leave some safety valve for violation of public policy or *ordre public*." Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the Von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 291 (1994).

180. *See* Russell J. Weintraub, *How Substantial is Our Need for a Judgments*

Also, most countries follow more stringent rules regarding sovereign immunity than those applicable in our courts, and may decline to recognize any United States judgment against a sovereign entity under the state-sponsored terrorism provisions of the FSIA.[181] A foreign country asked to enforce a United States judgment need not have a rational reason for its refusal, or any reason at all for that matter. A country may simply decline to recognize a money judgment rendered by a United States court against an international terrorist because that country views such inaction as politically expedient.

IV. CONCLUSION

There are several practical and legal obstacles to the effective use of civil litigation as a means of deterring, and compensating victims of, international terrorism. The practical problems may be insurmountable. The threat of a civil judgment obviously will not deter individuals who are willing to commit suicide in order to achieve terrorist goals. A civil judgment against a foreign state who sponsors such terrorist acts may be more effective, but only if that state considers rapprochement with the United States as a desirable goal. Despite these obvious practical obstacles, there is little reason why the rules of procedural law should add unnecessary barriers to obtaining and enforcing a civil judgment against international terrorists.

A. The Supreme Court Should Resolve the Personal Jurisdiction and Choice-of-Law Issues Relevant to Litigation Involving International Terrorism

With respect to personal jurisdiction, the Supreme Court should consider and resolve two important issues. One is whether the "national contacts" approach to minimum contacts is consistent with the Due

Recognition Convention and What Should We Bargain Away to Get It?, 24 BROOK. J. INT'L L. 167, 181-84 (1998) (discussing statutes and decisions from several countries that have refused, on grounds of public policy, to enforce punitive damages portions of judgments from United States courts); Dellapenna, *supra* note 84, at 241 (observing that foreign courts generally will not enforce United States judgments for punitive damages); Lowenfeld, *supra* note 179, at 293 (same).

181. *See* Glannon & Atik, *supra* note 60, at 700-03 (discussing the FSIA's state-sponsored terrorism provisions, observing that no other nation would similarly subject foreign states to such suits by private parties, and concluding that other countries will refuse to enforce such judgments on public policy grounds).

Process Clause. The second is whether a foreign country is a "person" within the meaning of the Due Process Clause, and, if so, the extent to which the traditional "minimum contacts" test applies to foreign sovereign entities.[182] These issues are unlikely to come before any appellate court in the context of international terrorism because nearly all those cases are resolved by default judgments, and therefore are not appealed by defendants. However, the Supreme Court can resolve these issues in the context of traditional commercial litigation, under the FSIA or otherwise. Because any ruling on these two due process issues will have ramifications beyond cases involving international terrorism, the Supreme Court probably should resolve them in the context of more traditional litigation, such as an action against a foreign sovereign entity brought pursuant to the commercial activity provisions of the FSIA or an action against a foreign private party pursuant to a federal statue that authorizes nationwide service of process. Regardless of how raised, each of these issues deserves a more definitive resolution than currently exists in any context. The Supreme Court should decide these issues in a manner that upholds the constitutionality of personal jurisdiction exercised pursuant to the state-sponsored terrorism provisions in section 1605(a)(7) of the FSIA.

Some of the other unresolved issues discussed above, such as the propriety of the use of federal common law to supply the rules of decision under the state-sponsored terrorism provisions of the FSIA and the proper reach of the Act of State Doctrine, also deserve attention by appellate courts, and perhaps even by the Supreme Court. The most significant issues, of course, have to do with enforcement of judgments. Most of those issues cannot be resolved by the courts because they are not questions of statutory or constitutional construction. They are political issues, and sensitive ones at that, and as such require action by Congress and by the Executive on both the domestic and the international fronts.

B. The United States Should Attempt to Negotiate a Multinational Treaty Focusing on Personal Jurisdiction and Enforcement of Judgments as to Tort Actions

The United States is currently involved in an attempt to negotiate a multilateral treaty on personal jurisdiction and enforcement of judgments in international civil litigation, through the Hague Conference on Private

182. If the Court is unwilling to rule directly on these Due Process Clause issues, it should at least clarify how "reasonableness" factors into the context of the exercise of personal jurisdiction over foreign defendants alleged to have committed acts of international terrorism. *See supra* notes 11-20 and accompanying text.

International Law.[183] Because of fundamental disagreements over appropriate bases for the exercise of personal jurisdiction, the prospects for a successful comprehensive treaty are doubtful.[184] However, most, if not all countries do agree on a proper basis for personal jurisdiction in intentional tort cases: the courts of a state may exercise personal jurisdiction over a nonresident defendant whose intentional and wrongful acts were committed, and directly caused injury or death, within that state.[185] A multilateral treaty that incorporates this universal rule of personal jurisdiction, and requires other signatory countries to recognize and enforce tort judgments obtained through use of this jurisdictional rule, would be an improvement over the current discretionary approach to enforcement of foreign judgments. This could be accomplished through the current Hague Conference negotiations, or through a less comprehensive multilateral treaty concerned only with intentional tort actions.[186]

A multilateral treaty that covers intentional tort actions would mean a

183. A Preliminary Draft of this proposed treaty, referred to as the Hague Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matter, was adopted by the Special Commission on October 30, 1999. Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters [hereinafter Preliminary Draft], *at* http://www.hcch.net/e/conventions/draft36e.html (last visited April 18, 2002).

184. For thoughtful discussions of the various problems associated with the current attempt to draft a proposed Hague Convention on International Jurisdiction, see Ronald A. Brand, *Due Process Jurisdiction and A Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 701-05 (1999); Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK J. INT'L L. 125, 144-53 (1998); Clermont, *supra* note 176, at 106-07; Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference*, 57 LAW & CONTEMP. PROBS. 271 (1994); Lowenfeld, *supra* note 179, at 290-91.

185. The Brussels Convention, for example, authorizes personal jurisdiction in tort cases in the courts of the country "where the harmful event occurred." Brussels Convention, *supra* note 23, art. 5(3). *See* Heiser, *supra* note 14 at 941-42 (discussing interpretations of Article 5(3) by the European Court of Justice which authorize suit in tort cases in the place where the physical injury has occurred); Brand, *Due Process*, *supra* note 184, at 693-701 (same); Brand, *Tort Jurisdiction*, *supra* note 184, at 142-54 (same); Borchers, *supra* note 176, at 143-46 (same).

186. The preliminary draft of the Hague Convention on Jurisdiction provides that a plaintiff may bring a tort action in the courts of the State "in which the act . . . that caused the injury occurred," or "in which the injury arose, unless the defendant establishes that person claimed to be responsible could not have reasonably foreseen that the act. . .could result in an injury of the same nature in that State." Preliminary Draft, *supra* note 183, art. 10.

victim of international terrorism within the United States who obtains a valid civil judgment here would have the authority to enforce that judgment in another signatory country, where the defendant perhaps has reachable assets. The prospects for agreement on the terms of such a limited treaty would seem to be much better than those for a more comprehensive treaty, such as the proposed Hague Convention on International Jurisdiction.

Of course, even though there may be agreement on the fundamental issue of personal jurisdiction in tort actions, additional obstacles to a successful treaty still remain. One is that such a multilateral treaty would likely only apply to actions against private parties unless carefully crafted to protect the sovereign immunity of foreign state entities when enforcement is sought in a third-party country.[187] Another is that other countries are unlikely to agree to enforcement of punitive damages awards.[188] Even if a proposed treaty did not require recognition of punitive damages judgments, many countries view compensatory damages awarded by United States courts as excessive.[189] However, the current Hague Conference negotiations suggest that these obstacles may be overcome if the United States is willing to compromise in these areas.[190] Of course, practical problems will still remain, such as inability to identify and locate assets in foreign countries because they are

187. *See* Glannon & Atik, *supra* note 60, at 700-03 (discussing the difficulties encountered when enforcing an FSIA-based judgment in a third-party foreign country); Dellapenna, *supra* note 84, at 286-87 (observing that in attempting to enforce a judgment against a foreign state outside the United States, the judgment creditor will encounter all the usual difficulties in executing judgments abroad plus restrictions on the execution of judgments against foreign states under the law of the country where enforcement is sought).

188. *See* Lowenfeld, *supra* note 179, at 293 (advising that the United States should be prepared to agree expressly that punitive damages be excluded from a recognition and enforcement treaty, providing that a judgment awarding both punitive and compensatory damages could be upheld as to compensatory elements); Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 Brook. J. Int'l L. 157, 163 (1998) (same). *See also* authorities cited *supra* note 180.

189. *See* Borchers, *supra* note 188, at 162-64 (observing the propensity of the United States legal system to award tort damages considerably in excess of those usually awarded in other systems is the source of much concern in the Hague negotiations); Weintraub, *supra* note 180, at 203-04 (1998) (advising that the problem of punitive, multiple, and excessive damages can be dealt with under a general public policy exception to enforcement, which any judgments convention will undoubtedly include).

190. The Preliminary Draft of the proposed Hague Convention on Personal Jurisdiction provides that recognition or enforcement of a judgment may be refused if "recognition or enforcement would be manifestly incompatible with the public policy of the State addressed." Preliminary Draft, *supra* note 183, art. 28(1)(f). As to damages, Article 33(1) of the Preliminary Draft provides that "in so far as a judgment awards non-compensatory, including exemplary or punitive damages, it shall be recognized at least to the extent that similar or comparable damages could have been awarded in the State addressed." Preliminary Draft, *supra* note 183, art. 33(1).

protected from disclosure by bank secrecy laws, or, more fundamentally, because they are secreted by the judgment debtors. Moreover, countries sympathetic to certain terrorist causes, likely the same countries in which terrorist judgment debtors' assets are located, may simply decline to sign any multilateral treaty on enforcement of judgments.

C. Congress and the President Should Develop a Comprehensive Program of Compensation for Victims of International Terrorism

On November 28, 2001, Congress enacted legislation which requires the President to submit, by the time of submission of the budget for fiscal year 2003, a legislative proposal to establish "a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979."[191] This is a wise approach. It permits the Executive Branch to develop a program that reflects both foreign policy concerns as well as the domestic goals of compensation and deterrence. Hopefully, the resulting legislation will produce a coordinated, straightforward scheme of compensation for victims of international terrorism.

One proposal Congress and the Executive might consider would be a hybrid combination of the statutory scheme currently in effect to compensate victims of terrorist acts sponsored by Iran or Cuba under the most recent amendments to the FSIA, and of the recently enacted program to compensate victims of the September 11 terrorist acts. The September 11th Victim Compensation Fund of 2001 establishes a program, administered by a Special Master, to provide compensation to any individual or relatives of deceased individual who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.[192] An individual may file a claim for compensation

191. Pub. L. No. 107-77, § 626(a), 115 Stat. 748 (2001). Congress also directed that "the legislative proposal shall include, among other things, which types of events should be covered; which categories of individuals should be covered by a compensation program; . . . the establishment of a Special Master to administer the program, the categories of injuries for which there should be compensation; . . . and identifiable sources of funds including assets of any state sponsor of terrorism to make payments under the program." *Id.* at § 626(b).

192. The Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-09 (2001), 115 Stat. 230, *reprinted at* 49 U.S.C.A. § 40101 note (West Dec. 2001).

with the Special Master and, upon a determination of eligibility, will receive payments based on the compensation plan established by the Special Master.[193] The amount of the compensation is based on the claimant's extent of harm, including economic and noneconomic losses, but cannot include punitive damages.[194] Upon submission of a claim, the claimant waives the right to file a civil action for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, except an action to recover collateral source obligations.[195] The United States has the right of subrogation with respect to any claim paid by the United States under this compensation program.[196]

Payments pursuant to this compensation program for victims of the September 11 terrorist attacks are the obligation of the federal government.[197] The President and Congress should consider whether to extend this funding approach to all victims of international terrorism. For example, Congress could amend the FSIA to obligate the federal government to compensate plaintiffs who have obtained money judgments against any foreign sovereign entities, not only those whose property has been previously blocked, for injuries caused by their state-sponsored terrorism. The compensation and subrogation scheme could be the similar to the one currently in effect for payment of such judgments against Cuba and Iran under Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).[198] For example, the United States could pay the entire amount (or whatever portion of the amount is fiscally appropriate) of the compensatory damages portion of the judgment, and in return obtain an assignment of the judgment creditor's right to the remaining damages, such as treble and punitive damages. As in the VTVPA, the judgment creditor would agree to relinquish all claims and rights to further damages, and the United States would be subrogated to the rights of the judgment creditor against the debtor foreign state.[199] However, unlike the VTVPA, the President would be urged, but not be required, to recoup these amounts as a prerequisite to releasing blocked assets or normalizing relations with the debtor foreign state. This approach would remove two of the major concerns regarding the VTVPA.[200] The President's foreign policy activities would not be

193. 49 U.S.C.A. § 40101 note, at §§ 405-07.
194. 49 U.S.C.A. § 40101 note, at §§ 402, 405(b).
195. 49 U.S.C.A. § 40101 note, at §§ 405(c)(3)(B)(i).
196. 49 U.S.C.A. § 40101 note, at § 409.
197. 49 U.S.C.A. § 40101 note, at § 406(b) & (c).
198. *See supra* notes 162-170 and accompanying text.
199. A similar approach could also be enacted to compensate judgment creditors of non-sovereign terrorist groups designated as "foreign terrorist organizations" by the Executive branch pursuant to 8 U.S.C. § 1189. *See* 8 U.S.C. § 1189 (a) (2000).
200. For a good discussion of these concerns regarding the FSIA's state-sponsored

constrained by a recoupment precondition to normalization of relations with terrorist nations; and the assets of the United States overseas would likely not be subject to attachment and execution in retaliatory judgments obtained in foreign courts.

Such a proposal would assure that victims of international terrorism are compensated and would authorize the federal government to pursue reimbursement or other appropriate political action on their behalf, and would do so with minimal interference with the Executive branch's conduct of United States foreign policy. Any such comprehensive program would be an improvement over the scheme currently in effect which, as this Article seeks to demonstrate, relies on piecemeal civil litigation and a hodge-podge of rules regarding enforcement of judgments.

terrorism provisions, such as the possible seizure of United States assets abroad in execution of retaliatory judgments obtained under foreign laws and, more generally, the undermining of the Executive's authority in the area of foreign policy, see *Hell-Bent on Awarding Recovery to Terrorism Victims, supra* note 158, at 236-43 (explaining why the Executive Branch has opposed enforcement of some of the state-sponsored terrorism amendments); Glannon & Atik, *supra* note 60, at 701-06 (suggesting that the presence of state-sponsored terrorism lawsuits may interfere with the Executive's conduct of United States foreign policy).