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Alejandro v. Republic of Cuba [Cuban Liability For Shooting Down Civil Aircraft]

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lines that material damage must have been caused as a result.²⁶ It dismissed claims of material damage where there was insufficient proof of the property destroyed or its value.

* * * *

This is a significant case. The judges took great care in identifying and applying the precise pertinent rules of international law without lengthy discussion or undue judicial activism. They relied on the views of leading Greek international law academics²⁷ and judicial decisions of the Supreme Court of Greece. The views they adopted also reflect Greek foreign policy. The Greek Foreign Office itself has relied on these rules in a similar manner in its diplomatic exchanges with Germany. Thus, it would indeed be strange if decisions of other Greek courts expressed different views.

Furthermore, even though the court determined that Germany was acting under *jus imperii*, it categorically noted that there are exceptions to sovereign immunity where rules of *jus cogens* are violated.

This case highlights the difficulties arising from claims for reparation for damage caused in international armed conflict, particularly when raised by individuals before their national courts. Although the court stressed the *jus cogens* obligations arising out of the law of belligerent occupation and Germany's treaty obligations to redress injured states, Germany has consistently refused to offer any such redress. This issue could also be addressed through diplomatic channels, perhaps leading to agreed arbitration. In the present state of affairs, however, it is unlikely that Germany will offer any compensation to these victims of World War II atrocities, since this could open the floodgates to other similar claims.²⁸

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Foreign Sovereign Immunities Act—denial of immunity for extrajudicial killing—Cuban liability for shooting down civil aircraft—punitive damages—retroactive application of statute recognizing cause of action for human rights violations

ALEJANDRE v. REPUBLIC OF CUBA. 996 F.Supp. 1239.
U.S. District Court, S.D. Fla., December 17, 1997.

On February 24, 1996, the Cuban Air Force deliberately shot down two unarmed civil aircraft piloted by members of the Miami-based organization Brothers to the Rescue. The incident resulted in the loss of four lives and evoked widespread international condemnation.¹ It prompted Congress to enact the controversial Helms-Burton Act on March 12, 1996,² tightening the U.S. embargo against Cuba in effect since 1962.³ The

²⁶ Judgment at 17.

²⁷ Reference was also made to scholarly opinions of foreign international jurists.

²⁸ It appears that the measures taken by Germany with respect to the victims of genocide may be distinguished in some respects from the position Germany has taken regarding injuries occasioned by military operations and military occupation as such.

¹ See Contemporary Practice of the United States Relating to International Law, 90 AJIL 442, 448-54 (1996); SC Res. 1067, paras. 2, 6 (July 26, 1996); Resolution Adopted by the Council of the International Civil Aviation Organization at the Tenth Meeting of Its 147th Session on March 6, 1996, reproduced as Appendix A to International Civil Aviation Organization, Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996, Doc. C-WP/10441 (1996); Report on the Situation of Human Rights in Cuba Submitted by the Special Rapporteur, Mr. Carl-Johan Groth, in Accordance with Commission Resolution 1996/69 and Economic and Social Council Decision 1996/275, UN Doc. E/CN.4/1997/53, para. 37 (1997).

² Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§6021-6091, 1643f, and 28 U.S.C. §1611 (Supp. II 1996)). See *Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act*, 90 AJIL 419 (1996).

³ Proclamation No. 3447, 27 Fed. Reg. 1085 (1962). See Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AJIL 419, 420-22 (1996).

next month Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996,⁴ which amended the Foreign Sovereign Immunities Act (FSIA) to make Libya, Cuba and certain other states more amenable to suit in federal court for egregious human rights violations.⁵ In September 1996, Congress approved the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997.⁶ Section 589 of that Act creates a cause of action for the human rights violations for which the Antiterrorism Act amendments deny immunity. In the first case decided under the new statutes, a federal district court in Miami, after trial,⁷ awarded over \$187 million in compensatory and punitive damages against the Cuban Government and Air Force to the families of the American victims.

The court found that an amendment to the FSIA added by the Antiterrorism Act provided an exception to sovereign immunity applicable retroactively to this case.⁸ Section 1605(a)(7) of the FSIA deprives a foreign state of immunity from suit if six basic requirements are satisfied.⁹ First, the action must be "for personal injury or death," as was the case here. Second, the injury must have been "caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such activities. The court held the deaths of the pilots to be "extrajudicial killings," as defined by the Torture Victim Protection Act, which the FSIA incorporates by reference.¹⁰ Third, the extrajudicial killing must be caused by an "official, employee, or agent" of the foreign state acting within the scope of "his or her office, employment, or agency." The court found that the "Cuban Air Force was acting as an agent of Cuba when it committed the killings."¹¹ Fourth, the United States must have designated the foreign state as a "state sponsor of terrorism."¹² Cuba, together with six other countries, has been so designated.¹³ Fifth, the claimant or victim must have been a U.S. national when the extrajudicial killing occurred.¹⁴ One of the victims had Cuban nationality and was barred from bringing suit; the other plaintiffs and victims were U.S. citizens. Sixth, the extrajudicial killing must have taken place outside the territory of the foreign state; otherwise, an arbitration requirement must be satisfied.¹⁵ The court found that the planes had been shot down over international waters.¹⁶

⁴ Pub. L. No. 104-132, §221, 110 Stat. 1214, 1241 (1996) (codified at 28 U.S.C. §§1605(a), 1610(a) (Supp. II 1996)) [hereinafter Antiterrorism Act]. See generally Leslie McKay, *A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya*, 13 AM. U.J. INT'L L. & POL'Y 439 (1997).

⁵ 28 U.S.C. §§1330, 1602-1611 (1994).

⁶ Pub. L. No. 104-208, §589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. §1605 note (Supp. II 1996)) [hereinafter Foreign Operations Act].

⁷ Cuba did not appear. It sent a diplomatic note to the Department of State asserting that the court had no jurisdiction over it. 996 F.Supp. 1239, 1242 & n.1. Under 28 U.S.C. §1608(e), default judgments against foreign states are prohibited.

⁸ Antiterrorism Act, *supra* note 4, §221(c), 110 Stat. at 1243; *Alejandro*, 996 F.Supp. at 1250 n.9.

⁹ For other limitations, see 28 U.S.C. §1605(f), (g) (1994).

¹⁰ 28 U.S.C. §1605(e)(1). See 28 U.S.C. §1350 note ("extrajudicial killing" is "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people").

¹¹ 996 F.Supp. at 1248. The court looked to general common law principles in determining agency under the Foreign Operations Act. *Id.* In addition, it apparently assumed that the term "agent," see 28 U.S.C. §1605 note (referring to "[a]n official, employee, or agent of a foreign state . . . acting within the scope of his or her office, employment, or agency") includes entities other than individuals. While the reference to "his or her" might suggest otherwise, the better explanation is that the Act, part of a grab bag of appropriations and other statutes enacted right before the new fiscal year, was badly drafted.

¹² 28 U.S.C. §1605(a)(7)(A) (referring to designation by Secretary of State under the Foreign Assistance Act of 1961, §620A, 22 U.S.C. §2371(a), or the Export Administration Act of 1979, §6(j), 50 U.S.C. App. §2405(j)).

¹³ See 47 Fed. Reg. 16,623 (1982) (Cuba); 31 C.F.R. §596.201 (1997) (current list) (Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria).

¹⁴ 28 U.S.C. §1605(a)(7)(B)(ii).

¹⁵ See 28 U.S.C. §1605(a)(7)(B)(i) (when "the act occurred in the foreign state against which the claim has been brought," that state is immune if "the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration").

¹⁶ 996 F.Supp. at 1248. Cf. International Civil Aviation Organization, *supra* note 1, at 90-91 (same).

Having established subject matter jurisdiction, the court turned to liability. The claims here were not based on the Alien Tort Statute¹⁷ or the Torture Victim Protection Act,¹⁸ but on the Foreign Operations Act. That Act makes an "official, employee, or agent" of a state designated by the United States as a sponsor of terrorism liable to a U.S. national for "personal injury or death" caused by "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking"¹⁹ carried out within the official's or agent's scope of employment.²⁰ The court found that the Cuban Air Force, acting under orders of state officials, had deliberately shot down the civilian planes in international waters without any attempt to warn or intercept them. This action, the court held, satisfied the requirements of the Foreign Operations Act. The court then found the Cuban Government as well as the Cuban Air Force liable for the death of the three pilots under *respondereat superior*,²¹ holding that the Act properly applied to events before its enactment.²²

The court awarded plaintiffs a total of nearly \$50 million in compensatory damages against the Cuban Government and Air Force. These damages reflected loss of future income-earning potential as well as pain and suffering by the three pilots, and pain and suffering and loss of companionship by their immediate families.²³ The court also awarded punitive damages against the Cuban Air Force pursuant to an express provision in the Foreign Operations Act.²⁴ That the killings were "premeditated and intentional, outside of Cuban territory, wholly disproportionate, and executed without warning or process," the court held, "makes this act unique in its brazen flouting of international norms."²⁵ It arrived at a figure of \$137.7 million by estimating the value of the Cuban Air Force's 102 MIG fighter jets to be \$4.59 billion, and then setting damages at 1 percent of that total, or \$45.9 million, as to each of the three pilots.²⁶

* * * *

Most human rights claims have been brought against individual violators, not states. The FSIA's major exceptions to immunity typically do not cover human rights claims. These limitations may reflect a congressional determination that, however desirable it might be for human rights victims to have access to a judicial forum, the federal courts cannot serve as the tribunal in which foreign plaintiffs regularly seek a remedy against

¹⁷ 28 U.S.C. §1350 (1994).

¹⁸ Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 note (1994)).

¹⁹ 28 U.S.C. §1605(a)(7) (incorporated by reference in 28 U.S.C. §1605 note).

²⁰ The requirements specified in §1605(a)(7) must also be satisfied, and no action may be maintained if a U.S. official, acting within the scope of his or her employment, "would not be liable for such acts if carried out within the United States." 28 U.S.C. §1605 note.

²¹ 996 F.Supp. at 1247-49.

²² *Id.* at 1250 n.9.

²³ The damages were divided roughly equally among the three sets of plaintiffs. *Id.* at 1249-50.

²⁴ 28 U.S.C. §1605 note. Punitive damages could not be awarded against Cuba, a foreign state. 28 U.S.C. §1606. The court held that it had subject matter jurisdiction to award punitive damages against the Cuban Air Force as an "agency or instrumentality" of Cuba. 996 F.Supp. at 1249 n.8 (citing 28 U.S.C. §1606 ("a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages")). The court apparently treated its conclusion that the Air Force was an "agency" of the Cuban Government under the Foreign Operations Act as sufficient to determine that it was an "agency or instrumentality" under the FSIA's provision permitting punitive damages against such entities. It did not address whether the Air Force is a "separate legal person, corporate or otherwise," as specified in 28 U.S.C. §1603(b)(1). *Id. Compare* Marlowe v. Argentine Naval Comm'n, 604 F.Supp. 703, 706-07 (D.D.C. 1985) (Argentine Naval Commission, a part of the Navy, is a foreign state, not agency or instrumentality), *aff'd per curiam on other grounds*, 808 F.2d 120 (D.C. Cir. 1986) *with* Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 396, 403 (D.N.J. 1979) (Air Force "is an agency or instrumentality of a foreign state, Iran").

²⁵ 996 F.Supp. at 1252.

²⁶ *Id.* at 1253. That the MIGs were used to kill civilians made it apt to award a portion (1%) of the fleet's value for each death. Of course, if all that stood between most governments and bankruptcy were one hundred serious human rights violations, national insolvency would be the order of the day. *Alejandro's* approach is most appropriate where the state consistently violates human rights but is unlikely to be held accountable.

their own government. Doing so might well interfere with the conduct of foreign policy generally.²⁷

To be sure, this determination represents a degree of subordination of human rights to foreign policy and other concerns. A commitment to human rights, however, need not be absolute and exclusive of all other interests. Still, a broad balancing is one thing; a practice of selective exceptions to immunity, another. If pressed far enough, such a practice could transform human rights suits against foreign sovereigns into nothing more than a tool of U.S. foreign policy.

Not all exceptions to immunity raise such concerns. The FSIA permits a foreign state to be sued if, for example, it assassinates a political dissident in the United States.²⁸ The human rights principle is easily discernible: a foreign state cannot reasonably expect immunity in U.S. courts if it wages war against its own people on U.S. soil. Congress could add to the list of exceptions. It might provide that any violation of a U.S. citizen's human rights by a foreign sovereign could be adjudicated in U.S. courts.²⁹ Or it might amend the FSIA to provide what some claimants have unsuccessfully argued: that there is no immunity for violations of peremptory norms.³⁰

One might ask whether the Antiterrorism Act embodies a principled exception of its own. Its provision of enhanced protection to U.S. nationals might suggest that it does. But the Act is troubling in three respects. First, "terrorism" is at best a questionable and uncertain category of human rights violation. Second, the Antiterrorism Act does *not* strip state sponsors of terrorism of their immunity; rather, it denies immunity to states designated by the U.S. Government as state sponsors of terrorism. Any such official list may well be heavily influenced by factors unrelated to terrorism or human rights, as the varying treatment of Iraq over the years demonstrates.³¹ Third, the FSIA requires no link between the status of a state as a sponsor of terrorism and the particular wrongful injury or death for which immunity is denied. The Antiterrorism and Foreign Operations Acts appear to treat torture and murder as worse when committed by some states than by others.

It would be unrealistic to expect strategic foreign policy considerations to play no role in the handling of human rights matters by the political branches. It would be unfortunate, however, if the *judiciary's* role in redressing human rights violations abroad were subordinated to the aim of punishing states on an enemies list—in fact or appearance. To do so would risk tarnishing the "badge of honor" that the Alien Tort Statute and Torture Victim Protection Act represent.³²

Given this risk, courts may wish to approach the question of retroactivity with great care, particularly where legislation is heavily influenced by outrage over recent events. Under *Landgraf v. USI Film Products*, a statute is "retroactive" if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."³³ Of course, even if a statute would not be retroactive in this sense, Congress might still make it prospective. Alterna-

²⁷ In addition, the current relatively small burden on the federal courts' caseload—a product in part of the difficulties of obtaining personal jurisdiction over individual defendants—might increase dramatically. And other states might respond by attempting to narrow the United States' immunity in their own courts.

²⁸ 28 U.S.C. §1605(a)(5). See, e.g., *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

²⁹ See Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581 (1993).

³⁰ E.g., *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996).

³¹ When the United States placed Cuba on the list of state sponsors of terrorism in 1982, it removed Iraq from the list at the same time, 47 Fed. Reg. 16,623 (1982) (Cuba); 47 Fed. Reg. 9201 (1982) (Iraq); see 21 ILM 853 (1982), and, apparently as part of a further tilt toward Iraq in the Iran-Iraq war that had begun in September 1980, placed Iran on the list two years later, 49 Fed. Reg. 2836 (1984); see Bernard Gwertzman, *President Affirms His Policy to Keep Marines in Beirut*, N.Y. TIMES, Jan. 24, 1984, at A1. Iraq was then returned to the list after it invaded Kuwait, 57 Fed. Reg. 4553 (1992). Cf. Re, *supra* note 29, at 584 (stating that FSIA "was enacted to depoliticize the sovereign immunity decision process").

³² Anne-Marie [Slaughter] Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461 (1989).

³³ 511 U.S. 244, 280 (1994).

tively, Congress may impose civil liability retroactively if it makes its intention manifest. In the absence of evidence of intent one way or the other, there is a presumption against retroactive application.³⁴

The *Alejandre* court looked first to the language of the statutes. The Antiterrorism Act amendments to the FSIA apply to "any cause of action arising before, on, or after" the date of their enactment.³⁵ But liability was not based on the FSIA; the amendments merely provided subject matter jurisdiction and denied immunity.³⁶ Instead, plaintiffs "base[d] their substantive cause of action" on the Foreign Operations Act.³⁷ That Act has no express provision on retroactivity.

The absence of an express provision should have led the court to examine the legislative history of the Foreign Operations Act.³⁸ Section 589 was added in conference; the conferees stated that they "intend that this section shall apply to cases pending upon enactment of this Act."³⁹ This statement suggests that Congress, aware of the recent holding in *Landgraf*,⁴⁰ determined that section 589 was retroactive, but nevertheless specified that it should apply to pre-enactment causes of action pending on September 30, 1996. Because the *Alejandre* complaints were filed on October 31, 1996,⁴¹ application of the Foreign Operations Act appears questionable.⁴²

If *Landgraf* applied, the court's holding might rest on firmer ground. A fundamental reason for *Landgraf*'s presumption against retroactivity certainly does not apply here: Cuba could not reasonably deny that it had fair notice that its actions violated basic norms of humanity. On the other hand, the Foreign Operations Act may have "increase[d] . . . [Cuba's] liability for past conduct"⁴³ by creating a new cause of action for American citizens not previously available under the Alien Tort Statute or the Torture Victim Protection Act. The House-Senate conferees ambiguously characterized section 589 as "expanding the scope of monetary damage awards available to American victims of international terrorism."⁴⁴

³⁴ See *Lindh v. Murphy*, 117 S.Ct. 2059, 2062-63, 2064 n.4 (1997).

³⁵ Antiterrorism Act, *supra* note 4, §221(c), 110 Stat. at 1243.

³⁶ Thus, they may not be truly "retroactive." *Alejandre*, 996 F.Supp. at 1250 n.9; *Landgraf*, 511 U.S. at 274.

³⁷ 996 F.Supp. at 1249.

³⁸ *Lindh*, 117 S.Ct. at 2062 (rejecting view that "in the absence of an express command regarding temporal reach," courts must apply *Landgraf* presumption "to the exclusion of all other standards of statutory interpretation"). Instead, the *Alejandre* court simply concluded that neither the amendments to the FSIA nor the Foreign Operations Act is retroactive under *Landgraf*, because both are "jurisdictional provisions." 996 F.Supp. at 1250 n.9. While this characterization may be correct as to the FSIA, it is less clear as to the Foreign Operations Act. As to its effect, see *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871, 1878 (1997) (rejecting view that "absent a clear statement of congressional intent, there is a strong presumption in favor of retroactivity for jurisdictional statutes").

³⁹ CONF. REP. ON H.R. 3610, DEPARTMENT OF DEFENSE APPROPRIATIONS, *reprinted in* 142 CONG. REC. H11,915 (daily ed. Sept. 28, 1996).

⁴⁰ *Cf. Lindh*, 117 S.Ct. at 2064 (Congress may well have taken *Landgraf* into account in formulating retroactivity provisions of the Antiterrorism Act).

⁴¹ *Alejandre v. Republic of Cuba*, Nos. 96-10126-Civ-King, 96-10127-Civ-King, 96-10128-Civ-King, Docket Sheets (S.D. Fla. Oct. 31, 1996). There apparently was at least one case pending as of September 30, 1996. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 247 (2d Cir. 1996); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325 (E.D.N.Y. 1998). *Cf. McKay, supra* note 4, at 454 (concern over bombings of Pan Am Flight 103, World Trade Center, and Oklahoma City a factor in adoption of Antiterrorism Act).

⁴² Two other interpretations are possible. First, Congress might have been uncertain whether the statute would create or expand liability for past conduct. It might have left that question to the courts, on the condition that if a court did conclude that the Act was retroactive under *Landgraf*, it should still apply the Act to all pre-enactment causes of action pending on September 30, 1996. This interpretation would be consistent with applying the Act to *Alejandre*'s facts only if the court was correct in concluding that the Act did not create or expand liability for past conduct. Second, Congress might have believed that the statute simply did not create or expand liability for past conduct. If so, no policy would be served by refusing to apply the Act to the facts in *Alejandre*. Unlike the interpretation offered in text, however, both these alternatives assume that Congress chose a rather obscure form in which to express its intentions.

⁴³ *Landgraf*, 511 U.S. at 280.

⁴⁴ CONF. REP. ON H.R. 3610, *supra* note 39, at H11,915. One might view international law itself as having already provided for liability, with the FSIA simply affording claimants a forum. Although one might generally also view the Alien Tort Statute and the Torture Victim Protection Act as providing for liability for human

Alejandre may stand for a more relaxed approach to retroactivity where a peremptory norm is violated.⁴⁵ There is some merit to that approach in compensating victims. (Whether plaintiffs will be able to execute on the judgment is, of course, another question.⁴⁶) Imposing punishment through punitive damages, however, is a different matter. Even defendants who have committed terrible wrongs should not be punished by an ex post facto statute, not because they are unworthy of punishment, but because “the judicial guarantees . . . recognized as indispensable by civilized peoples” forbid it.⁴⁷ In *Xuncax v. Gramajo*, the court declined to award punitive damages under the Torture Victim Protection Act even against a defendant who, “at a minimum . . . was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths.”⁴⁸ The court concluded that awarding punitive damages under that statute—enacted after the events in question and silent as to retroactive application—would raise a “serious constitutional question,”⁴⁹ even though punitive damages had already been available under other sources of law.⁵⁰

The presumption against retroactivity also helps ensure that legislation is well considered. Congress would be remiss if it did not take recent events into account, but it may be unduly influenced by its reaction to past events if it assumes that proposed legislation will apply to them. If the Antiterrorism and Foreign Operations Acts do turn out to herald a new wave of particularized exceptions to sovereign immunity, the courts may need to give careful thought to the matter before applying them retroactively.

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rights violations, neither would apply to the *Alejandre* plaintiffs' cause of action against Cuba and the Air Force. Only aliens can bring claims under the Alien Tort Statute, and only individuals may be sued under the Torture Victim Protection Act.

⁴⁵ See *Alejandre*, 996 F.Supp. at 1252 (holding ban on extrajudicial killing to be *jus cogens*).

⁴⁶ See 28 U.S.C. §1610(a)(7) (broadening exception to immunity from attachment and execution). If they cannot, the size of the awards suggests that a post-Castro government might insist that they be resolved as part of a larger settlement of outstanding claims with the United States. There may be some doubt, however, about the President's (or even Congress's) ability to compromise judgments rendered by a federal court. See *Dames & Moore v. Regan*, 453 U.S. 654, 688–90 (1981) (declining on ripeness grounds to consider whether suspension of claims against Iran constituted a taking). See generally *Abraham-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997); *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir. 1985).

⁴⁷ Torture Victim Protection Act, 28 U.S.C. §1350 note. Cf., e.g., Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, doc. 7, rev., at 671, 687 (1997) (faulting Cuba for disrespecting right “to be judged based on provisions of criminal law enacted prior to when the offense was alleged”); AfCommHPR, Opinion of Mar. 22, 1995 (Comm. 101/93), AHG/Res. 240 (XXXI) (June 28, 1995), reprinted in 18 HUM. RTS. L.J. 31 (1997) (faulting Nigeria for retroactive application of criminal law). It seems inadequate, therefore, simply to justify retroactive imposition of punitive damages as “secondary” to the “primary purpose” of creating a remedy for victims of terrorism, as did *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 27 (D.D.C. 1998), in awarding \$225 million in punitive damages.

⁴⁸ 886 F.Supp. 162, 172 (D. Mass. 1995).

⁴⁹ *Id.* at 200. See also *Landgraf*, 511 U.S. at 281 (“The very labels given ‘punitive’ or ‘exemplary’ damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question.”). See also *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F.Supp. 325, 331 (E.D.N.Y. 1998) (generally rejecting constitutional challenge to retroactive amendments to FSLA, but reserving for later any decision on constitutionality of retroactive imposition of punitive damages).

⁵⁰ See 886 F.Supp. at 200–02 (awarding punitive damages under Guatemalan and Kentucky law).

* The author served as an expert witness on international human rights law in this case, testifying on behalf of the plaintiffs.