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## Enlisting the U.S. Courts in a New Front

Debra M. Strauss

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# Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits

Debra M. Strauss\*

## ABSTRACT

*The time has come to extend the national approach that has been used successfully to dismantle the infrastructure of hate groups to the international realm against terrorist groups. The foundation of this approach is a private right to a cause of action apart from any military or diplomatic efforts by the government. In this Article, Professor Strauss analyzes case precedents under several federal statutes—the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996, the Torture Victim Protection Act, the Alien Tort Claim Act—as well as state common-law tort claims, including aiding and abetting liability. Professor Strauss proposes an aggregate model for lawsuits by victims against terrorist groups, organizations, and state sponsors of international terrorism, combining these claims and the types of damages and defendants accessible. Professor Strauss also outlines important tools for plaintiffs in the civil battle against terrorism by exploring the obstacles to and avenues for enforcement of these judgments through the rule of international law and access to the frozen assets of terrorist states and organizations.*

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## I. INTRODUCTION

International terrorism has long been recognized as a serious threat to foreign and domestic security. A recent report of the Department of State shows minimal change from 2002 to 2003 in the number of terrorist incidents worldwide—a decrease from 199 attacks to 190.<sup>1</sup> Likewise in 2003, the overall number of reported anti-U.S. attacks remained more or less constant, with eighty-two anti-U.S. attacks in 2003 compared with seventy-seven attacks in the previous year. Worldwide deaths from terrorist activity decreased roughly 58 percent from 2002 (from 725 to 307), and the number of wounded was down roughly 21 percent from 2,013 to 1,593.<sup>2</sup> The report emphasizes that most of the attacks in 2003 that have occurred during Operation Iraqi Freedom do not meet the U.S. definition of international terrorism because they were directed at combatants, who are considered to be “American and coalition forces on duty.”<sup>3</sup> As the numerical tally in the report is being revised and corrected, the overall number of incidents, deaths, and casualties reported is expected to be higher.<sup>4</sup> Of course, the numbers do not convey the entire picture, because each of these individual victims of terrorism has his or her own story of tragedy, and the effect on victims’ families and the nation as a whole is incalculable.

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1. Raphael Perl, *Terrorism and National Security: Issues and Trends* (July 6, 2004), at CRS-1, available at <http://www.fas.org>; see also Raphael Perl, *The Department of State's Patterns of Global Terrorism Report: Trends, State Sponsors, and Related Issues* (June 1, 2004), available at <http://www.fas.org>.

2. Perl, *Department of State's Patterns of Global Terrorism Report*, *supra* note 1, at CRS-1; Perl, *Terrorism and National Security*, *supra* note 1, at CRS-1.

3. Perl, *Department of State's Patterns of Global Terrorism Report*, *supra* note 1, at CRS-1.

4. See Perl, *Department of State's Patterns of Global Terrorism Report*, *supra* note 1, at CRS-1; Perl, *Terrorism and National Security*, *supra* note 1, at CRS-1.

A modern trend in terrorism is toward loosely organized, international networks of terrorists and cross-national links among different terrorist organizations, which may involve combinations of military training, funding, technology transfer, or political advice. Terrorists have been able to develop their own sources of funding, ranging from nongovernmental organizations and charities to illegal enterprises, such as narcotics, extortion, and kidnapping.<sup>5</sup> The report acknowledges that because "terrorism is a global phenomenon, a major challenge facing policymakers is how to maximize international cooperation and support, without unduly compromising important U.S. national security interests."<sup>6</sup>

As the U.S. government proceeds on military and diplomatic fronts in the war against terrorism, the time has come for private citizens to enter the battle on civil grounds through lawsuits aimed at crippling terrorist organizations at their foundation—their assets, funding, and financial backing. These types of efforts have been successful in the past at undermining the assets of hate groups in the United States.<sup>7</sup> The national approach that has been used to dismantle the infrastructure of hate groups can be extended to the international realm and used against terrorist groups. The foundation of this approach is a private right to a cause of action rather than, or in addition to, relying upon military or diplomatic efforts by the government. The U.S. courts, aided by Congress' lending of statutory support, have begun to pave the way for civil lawsuits brought by U.S. victims of terrorism against terrorist organizations and the states that enable them. When other countries then enforce these foreign civil judgments, the problem of terrorism is removed from a political forum to the world of private international law where reciprocity and consistency are in those nations' best interests.

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5. Perl, *Terrorism and National Security*, *supra* note 1, at CRS-8.

6. *Id.* at Summ.

7. Morris Dees of the Southern Poverty Law Center has been instrumental in initiating these lawsuits against hate groups as an alternative and supplement to the criminal justice system. *See, e.g.*, *Donald v. United Klans of Am.*, No. 84-0725-AH (N.D. Ala. Feb. 12, 1987) (awarding a \$7 million verdict to the mother of Michael Donald, killed because he was black). In 1998 a South Carolina jury awarded the largest judgment ever against a hate group—\$37.8 million, later reduced by a judge to \$21.5 million—against the South Carolina Christian Knights of the Ku Klux Klan and its state leader, Horace King, for the 1995 burning of Macedonia Baptist Church. *Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan*, No. 96-CP-14-217 (S.C.C.P. July 24, 1998). In September 2000 the Center won a \$6.3 million jury verdict against the Aryan Nations and Butler, finding them grossly negligent in selecting and supervising the guards who shot at two passersby. *Keenan v. Aryan Nations*, No. CV-99-441 (D. Idaho Sept. 12, 2000). The judgment forced Butler to give up the twenty-acre compound that had served for decades as the home of the nation's most violent white supremacists. As a result of this effective use of the civil tort system, several of these hate groups have been largely eviscerated.

As a primer in aid of this approach, Section II of this Article will assemble and analyze case precedents that have developed under several federal statutes as well as common-law tort claims. In Section III, this Article will address obstacles to collecting upon these judgments—obstacles that include the executive branch at times—and present possible avenues for enforcement. Section IV concludes that, in view of these case precedents, the wisest approach is to construct an aggregate model, using a combination of these federal statutory and common-law causes of action. In tandem, the broadest array of defendants can be held civilly accountable, including terrorist groups, officials, and other individuals, along with the foreign states, organizations, and agencies that sponsor them. Despite difficulties in enforcement, pursuing these judgments against terrorist organizations and states is profoundly important and has significant implications for the international business community.

## II. AN ANALYSIS OF CASE PRECEDENTS

In the developing area of civil action against terrorism, lawsuits have been brought under a broad range of federal statutory and state common-law claims. This Article will first survey cases brought under the Antiterrorism Act of 1991 (ATA). It will next consider the most promising avenue of late: numerous precedents under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal statute that amended the Foreign Sovereign Immunities Act to help sever international terrorists from their sources of financial and material support. This Article will also discuss cases brought under other federal statutes, such as the Torture Victim Protection Act and the Alien Tort Claim Act. Lawsuits have been based as well on common-law tort claims—negligent and intentional infliction of emotional distress, battery, assault, aiding and abetting, conspiracy, wrongful death, survival, false imprisonment, and the like—as such claims have not been precluded by the addition of federal statutory causes of action. In addition to compensatory damages for the victims, the availability and ramifications of obtaining punitive damages against terrorist organizations will be examined. The discussion will include the most recent cases arising from the tragic events of 9/11, cases founded upon a combination of these claims against terrorist groups through the institutions that fund and enable them.

### A. *Antiterrorism Act of 1991*

The ATA, 18 U.S.C. § 2333, provides that

[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any

appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.<sup>8</sup>

Provisions are made regarding acts of terrorism that transcend national boundaries.<sup>9</sup> Under § 2331(1) of the ATA, the term "international terrorism" is defined as activities that

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.<sup>10</sup>

Further, any U.S. citizen or national who knowing or having reasonable cause to know that a country is designated as a country supporting international terrorism engages in a financial transaction with the government of that country has committed a crime.<sup>11</sup> It is also stated that providing material support or resources to terrorists is a crime,<sup>12</sup> as is providing material support or resources to a designated foreign terrorist organization.<sup>13</sup> The ATA allows nationwide service of process, broadens plaintiffs' choice of venue, and eases plaintiffs' burden of proof by providing that criminal convictions "shall estop the defendant from denying the essential allegations of the criminal offense."<sup>14</sup> The legislative history indicates that the enactment of the ATA was intended to "remove the jurisdictional hurdles in the courts confronting victims and [to] empower victims with all the weapons available in civil litigation."<sup>15</sup>

Despite the enabling language of the ATA, its use by victims of terrorism has been infrequent, perhaps because of its inherent limitations. A 1992 amendment to the ATA bars any actions under its provisions against a foreign state, an agency of a foreign state, an officer or employee of a foreign state or of an agency thereof acting within his or her official capacity or under color of legal authority.<sup>16</sup>

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8. 18 U.S.C. § 2333(a) (1991).

9. 18 U.S.C. § 2332(b).

10. 18 U.S.C. § 2331(1) (1991).

11. 18 U.S.C. § 2332d(a).

12. 18 U.S.C. § 2339(a) (1991).

13. 18 U.S.C. § 2339(b).

14. 18 U.S.C. §§ 2333-34.

15. 137 CONG. REC. S4511 (1991).

16. 18 U.S.C. § 2337 (1992). Congress reenacted these sections as part of the Federal Courts Administration Act of 1992, Pub. L. No. 103-428, § 1003(a)(1)-(5), 106

Note, however, that foreign governments that are state sponsors of terrorism may now be sued under the AEDPA, discussed below. The ATA also excludes suits resulting from “an act of war,” which may present problems in Iraq and the ensuing “war on terrorism.” In addition, it allows the U.S. Attorney General to seek to stay any civil action based on a pending criminal prosecution or national security, to deny access to government files, and even to stay discovery.<sup>17</sup> In light of the limited cases that have applied the ATA, the potential scope of this statute has not fully been determined.<sup>18</sup>

### 1. The Seminal Case: *Boim v. Quranic Literacy Institute*

In the seminal case under the ATA, *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*,<sup>19</sup> the parents of a young U.S. citizen, seventeen-year-old David Boim, who was murdered in Israel by Hamas terrorists while waiting with other students at a bus stop, sued several individuals and organizations for the loss of their son. They asserted that the organizational defendants aided, abetted, and financed the individual defendants who committed this terrorist act and that these defendants provided “material support” or “resources” to Hamas, as those terms are defined in 18 U.S.C. §§ 2339(A) and 2339(B).<sup>20</sup> The parents sought \$100 million in compensatory damages and \$100 million in punitive damages, plus costs and attorney’s fees, and requested treble damages under the statute.<sup>21</sup> The Seventh Circuit Court of Appeals affirmed the decision of the District Court, which denied defendants’ motion to dismiss as premature.<sup>22</sup>

In this case of first impression, the appeals court decided that funding a foreign terrorist organization is not in itself sufficient to constitute an act of terrorism under 18 U.S.C. § 2331. Funding,

Stat. 4521, 4521-24, which was amended on October 31, 1994, to Pub. L. No. 103-429, § 2(1), 108 Stat. 4377 (1994). The legislative history of the 1992 amendment indicates that it was intended merely to clarify that ordinary principles of sovereign immunity, as codified by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, would apply to foreign states and their instrumentalities.

17. See 18 U.S.C. § 2336(b)-(c) (1992).

18. See generally Jason Binimow, Annotation, *Validity, Construction and Application of 18 U.S.C.A. § 2333(a), Which Allows U.S. Nationals Who Have Been Injured “by Reason of Act of International Terrorism” to Sue Therefor and Recover Treble Damages*, 195 A.L.R. FED. 217 (2004); 45 AM. JUR. 2D *International Law* § 81 (2004) (citing *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002), which held that “sponsorship of a terrorist group which causes the personal injury or death of a United States national alone is sufficient to invoke jurisdiction under Foreign Sovereign Immunities Act”).

19. 291 F.3d 1000 (7th Cir. 2002), *aff’g* 127 F. Supp. 2d 1002 (N.D. Ill. 2001).

20. *Id.*; see *supra* notes 12-13.

21. *Boim*, 291 F.3d at 1001.

22. *Id.* at 1028.



however, that meets the definition of "aiding and abetting an act of terrorism" does create liability under §§ 2331 and 2333.<sup>23</sup> "Because Congress intended to impose criminal liability for funding violent terrorism . . . it also intended through [18 U.S.C.] §§ 2333 and 2331(1) to impose civil liability for funding at least as broad a class of violent terrorist acts."<sup>24</sup> If the plaintiffs could show that defendants violated the criminal counterparts of either 18 U.S.C. §§ 2339(A) or 2339(B), "that conduct would certainly be sufficient to meet the definition of 'international terrorism' under §§ 2333 and 2331."<sup>25</sup> The court determined that such acts would give rise to civil liability under § 2333, "so long as knowledge and intent are also shown."<sup>26</sup>

The court concluded that the term "international terrorism" encompasses the funding of terrorist activities because Congress, in enacting the statute, intended "to allow a plaintiff to recover from anyone along the causal chain of terrorism."<sup>27</sup> It is not funding by itself that constitutes international terrorism, the court explained, but funding provided with knowledge of and intent to further violent acts, which must be a reasonably foreseeable result of the funding. Moreover, civil liability for funding a foreign terrorist organization does not offend the First Amendment as long as the plaintiffs are able to prove that the defendants knew about the organization's illegal activity, desired to help that activity succeed, and engaged in some act of helping.

To determine the meaning and scope of §§ 2331 and 2333, the court in *Boim* noted that the legislative history of the ATA is "replete with references to the then-recent decision" in *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione*.<sup>28</sup> Leon Klinghoffer was a U.S. citizen murdered in a terrorist attack on a cruise ship in the Mediterranean Sea.<sup>29</sup> The District Court in that case found that his survivors' claims were cognizable in federal court under federal admiralty jurisdiction and the Death on the High Seas Act because the tort occurred in navigable waters.<sup>30</sup> As stated in the Congressional Record,<sup>31</sup>

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23. *Id.*

24. *Id.* at 1015.

25. *Id.*

26. *Id.*

27. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 106 (D.D.C. 2003) (quoting *Boim*, 291 F.3d at 1011).

28. *Boim*, 291 F.3d at 1010-11 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated by* 937 F.2d 44 (2d Cir. 1991)); see *Antiterrorism Act of 1990, Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 1, 12, 79, 83, 122, 133 (1990) [hereinafter Senate Hearing]; 137 CONG. REC. S4511-04 (Apr. 16, 1991); 136 CONG. REC. S4568-01 (1990).

29. *Klinghoffer*, 739 F. Supp. at 856.

30. *Boim*, 291 F.3d at 1010 (citing *Klinghoffer*, 739 F. Supp. at 858-59).

31. 137 CONG. REC. E1583 (May 2, 1991).

[o]nly by virtue of the fact that the [Klinghoffer] attack violated certain Admiralty laws and the organization involved—the Palestinian Liberation Organization—had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the U.S. In order to facilitate civil actions against such terrorists the Committee [on the Judiciary] recommends [this bill].<sup>32</sup>

The *Boim* court concluded that “the repeated favorable references to *Klinghoffer* indicate a desire on the part of Congress to extend this liability to land-based terrorism that occurred in a foreign country.”<sup>33</sup>

## 2. A Modern View of “International Terrorism”: *Estates of Ungar v. The Palestinian Authority*

In another prominent case brought primarily under the ATA, *Estates of Ungar ex rel. Strachman v. Palestinian Authority*,<sup>34</sup> a husband and wife living in Israel were shot and killed by members of the terrorist group Hamas while driving home from a wedding with their infant child, who survived the attack. The couple’s estate was able to bring the suit on behalf of their two surviving children because, as a U.S. citizen, the husband met the requirements of the ATA (the claims on behalf of the wife were subsequently dismissed because she was an Israeli citizen).<sup>35</sup> The plaintiffs alleged that the Palestinian Authority (PA) and Palestinian Liberation Organization (PLO) “repeatedly praised Hamas and its operatives, who engaged in terrorist activities and violent acts against Jewish civilians and Israeli targets.”<sup>36</sup> The plaintiffs also alleged that the PA and PLO defendants “praised, advocated, encouraged, solicited, and incited” these terrorist activities.<sup>37</sup> In addition, the plaintiffs alleged that Yaron and Efrat Ungar were killed by these acts of international terrorism and that the individually named defendants aided and abetted such acts.<sup>38</sup> The District Court in Rhode Island maintained jurisdiction over the defendants PA and PLO because neither was entitled to sovereign immunity in the tort action. Neither the PA nor the PLO satisfied the criteria for statehood, since the United States

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32. *Boim*, 291 F.3d at 1011 (citing 137 CONG. REC. S4511-04 (statement of Senator Grassley) (stating that § 2333 would “codify [the *Klinghoffer*] ruling and make the right of American victims definitive”)); see Senate Hearing, *supra* note 28, at 12 (statement of Alan Kreczko, Deputy Legal Advisor, Department of State, “This bill . . . expands the *Klinghoffer* opinion.”); H.R. REP. NO. 102-1040, at 5 (1992); 136 CONG. REC. S4568-01.

33. *Boim*, 291 F.3d at 1010.

34. 315 F. Supp. 2d 164, 169 (D.R.I. 2004).

35. *Id.* at 167.

36. *Id.* at 169.

37. *Id.*

38. *Id.*

did not recognize Palestine, the PA, or the PLO as a state. The PLO and PA did not sufficiently control Palestine, and they could not conduct foreign relations.<sup>39</sup>

Similar to the *Boim* court, the *Ungar* court along the way rejected the PA's argument that "the alleged facilitation, condonation, and failure to prevent terrorist activities in general, does not amount to acts of 'international terrorism' as defined by 18 U.S.C. § 2331, and is therefore not actionable under 18 U.S.C. § 2333."<sup>40</sup> The court concluded that because the plaintiffs had alleged violent acts which would constitute crimes if committed within the jurisdiction of the United States, their allegations satisfied the definition of terrorism under § 2331.<sup>41</sup> It is interesting to note that in the *Ungar* case, despite numerous motions to dismiss predicated on the claim of sovereign immunity, the defendants failed to answer the amended complaint, and the court entered a default judgment against them.<sup>42</sup> As the court commented, "These Defendants have chosen not to challenge the merits of Plaintiffs' case and decided instead to place all of their eggs in one basket: this present motion. Unfortunately for Defendants . . . that basket is porous."<sup>43</sup> Ultimately, the court entered a default judgment against Hamas for more than \$116 million plus attorney's fees and court costs;<sup>44</sup> roughly the same amount was awarded against the Palestinian Authority and the PLO each.<sup>45</sup>

### 3. No Sovereignty for the PLO: *Knox v. Palestine Liberation Organization*

In a recent decision, *Knox v. Palestine Liberation Organization*,<sup>46</sup> the United States District Court for the Southern District of New York noted, in adjudicating the plaintiff's similar ATA claim against the PA and PLO, that it would not give its views on the broader political questions forming the backdrop of the lawsuit; rather, it stated that it would only determine whether and to what extent the plaintiffs could recover in tort for the acts of violence committed against them. The plaintiffs were representatives, heirs, and

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39. *Id.* at 180.

40. Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 97 (D.R.I. 2001).

41. *Id.*

42. 315 F. Supp. 2d at 171.

43. *Id.* at 176.

44. Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 304 F. Supp. 2d 232 (D.R.I. 2004).

45. Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 2004 U.S. Dist. LEXIS 12823 (D.R.I. July 12, 2004).

46. 306 F. Supp. 2d 424 (S.D.N.Y. 2004); *see also* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47-49 (2d Cir. 1991) (holding that the PLO was not a "foreign state" and therefore not entitled to sovereign immunity under the FSIA).

survivors of the Estate of Aharon Ellis; Ellis, a 31-year-old U.S. citizen, was performing as a singer before approximately 180 relatives and guests celebrating the Bat Mitzvah of twelve-year-old Nina Kardoshova at the David's Palace banquet hall in Hadera, Israel in January 2002 when a shooter barged into the premises and opened fire into the crowd of celebrants, killing six people and wounding more than thirty.<sup>47</sup> The plaintiffs sought damages from defendants, claiming that Hassana and the other individually named and unnamed defendants were "employees, agents, and/or co-conspirators of the PLO and PA and, as such, planned and carried out the attack acting in concert with, or under instructions or inducements or with the assistance or material support and resources provided by, the PLO; the PA, Yasser Arafat, and the other individual defendants."<sup>48</sup>

The defendants moved to dismiss the action for lack of subject matter jurisdiction.<sup>49</sup> The court denied the motion, holding that the defendants were not entitled to immunity under 18 U.S.C.S. § 2337 or the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.S. § 1602 et seq., because they failed to establish that Palestine was a state: the PLO and PA did not sufficiently control Palestine—given that their authority was subordinate to Israel's sovereign control under the Oslo Accords—and they were expressly prohibited from conducting foreign relations under the Interim Agreement.<sup>50</sup> Further, the defendants were not entitled to immunity because Palestine was not a foreign entity politically recognized by the United States; there was nothing in the ATA or the FSIA suggesting that Congress intended to disturb the traditional rules of comity, and the court construed the executive branch's silence following other cases as manifesting a view that the PLO and PA were not entitled to sovereign immunity.<sup>51</sup> In interpreting the 1992 amendment to the ATA that provided for sovereign immunity, the court concluded that the relevant sections of the ATA and FSIA function in tandem to provide a foreign state with a single statutory defense to actions brought under the ATA.<sup>52</sup>

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47. *Knox*, 306 F. Supp. 2d at 426.

48. *Id.* at 426-27.

49. *Id.* at 426.

50. *Id.* at 445-46.

51. *Id.* at 447-48.

52. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 315 F. Supp. 2d 164, 174 (citing *Knox*, 306 F. Supp. 2d at 431, which makes it clear that the sovereign immunity inquiries under the ATA and FSIA are identical).

#### 4. A Limitation on Personal Jurisdiction: *Biton v. Palestinian Interim Self-Government Authority*

In an interesting twist, the District Court for the District of Columbia in *Biton v. Palestinian Interim Self-Government Authority*<sup>53</sup> found that it could not exercise jurisdiction over the five individual defendants, including Yasser Arafat and other individuals alleged to have bombed a school bus in the Gaza Strip, which killed the plaintiff's husband, because they had no personal connection with the United States. In rejecting the plaintiffs' request to adopt "a due process analysis specifically fitted to the unique circumstances of civil actions against foreign terrorists and their sponsors," which had been applied by a judge on that court as well as a judge in the Eastern District of New York in cases involving the AEDPA, the court held that "the differences between the ATA and the FSIA are too great for their common focus on antiterrorism to allow cross-pollination on this issue."<sup>54</sup> Under the AEDPA, the court in *Eisenfeld v. Islamic Republic of Iran* had concluded that "a foreign state that causes the death of a United States national through an act of state-sponsored terrorism has the requisite 'minimum contacts' with the United States so as not to offend 'traditional notions of fair play and substantial justice.'"<sup>55</sup> Similarly, in *Rein v. Socialist People's Libyan Arab Jamahiriya*, Judge Platt stated that "the relevant inquiry with respect to the minimum contacts analysis is whether the effects of a foreign state's actions upon the United States are sufficient to provide 'fair warning' such that the foreign state may be subject to the jurisdiction of the courts of the United States."<sup>56</sup> In finding that Libya could stand trial for the 1988 bombing of Pan Am Flight 103 in Lockerbie, Scotland, Judge Platt held that

[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in United States courts.<sup>57</sup>

In contrast, the court in *Biton* declined to extend the more expansive due process analysis set forth above in these AEDPA cases to ATA

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53. 310 F. Supp. 2d 172 (D.D.C. 2004).

54. *Id.* at 178.

55. *Id.* at 178 (citing *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 7 (D.D.C. 2000) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); see also *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 22 (D.D.C. 1998).

56. *Biton*, 310 F. Supp. 2d at 178 (citing *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998) (finding that Libya could stand trial for the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland)).

57. *Id.*

claims filed against individual (non-state) defendants, noting also that in *Ungar* a judge on the United States District Court for the District of Rhode Island considered this same issue and dismissed ATA claims against individual officers of various PA and PLO law enforcement and intelligence agencies under a traditional “minimum contacts” analysis.<sup>58</sup> Like *Ungar*, the *Biton* court did, however, maintain jurisdiction over the U.S. widow’s action against the PA and the PLO under the ATA.<sup>59</sup> In denying the remainder of the motion to dismiss, the court held “that Palestine is not a ‘state’ for purposes of the FSIA based on the current record, that plaintiff had properly stated a claim under the ATA, that supplemental jurisdiction existed over the Biton family’s tort claims, and that this case did not present a non-justiciable political question.”<sup>60</sup>

##### 5. Defining the Scope of Coverage and Damages: *Smith v. Islamic Emirate of Afghanistan*

The court in *Smith v. Islamic Emirate of Afghanistan*,<sup>61</sup> a Southern District of New York case brought in part under the ATA, took considerable care to clarify and define aspects of § 2333 further. Plaintiff estates and survivors of two victims of the 9/11 terrorist attacks on the World Trade Center sued defendants Islamic Emirate of Afghanistan, the Taliban, al Qaeda, Osama bin Laden, and later added Saddam Hussein and the Republic of Iraq as defendants.<sup>62</sup> The claims were brought pursuant to the Antiterrorism Act of 1991, 18 U.S.C.S. § 2333, and the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7).<sup>63</sup> A default judgment was entered against the defendants, and the plaintiffs were awarded damages.<sup>64</sup>

Plaintiffs proceeded against the non-sovereign defendants—Osama bin Laden, al Qaeda, the Taliban, and the Islamic Emirate of Afghanistan—under traditional tort principles and pursuant to the ATA.<sup>65</sup> As an initial matter, Judge Baer grappled with the statute’s definition of “international terrorism” and whether the events of September 11 fell within this definition:

58. *Id.* (citing *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 95 (D.R.I. 2001) (dismissing claims against individual PA defendants for lack of personal jurisdiction because of the failure to show that the individual defendants engaged in the kind of systematic and continuous activity necessary to support the exercise of general personal jurisdiction)).

59. *Id.* at 185.

60. *Id.*

61. 262 F. Supp. 2d 217, 240 (S.D.N.Y. 2003).

62. *Id.* at 220.

63. *Id.* at 220-21.

64. *Id.* at 240-41.

65. *Id.* at 220.

Specifically, the statute defines "international terrorism" in contradistinction to "domestic terrorism." The main difference is that domestic terrorism involves acts that "occur primarily within the territorial jurisdiction of the United States," while international terrorism involves acts that "occur primarily outside the territorial jurisdiction of the United States, or transcends national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum. . . . However, acts of international terrorism also encompass acts that "transcend national boundaries in terms of the means by which they are accomplished . . . or the locale in which their perpetrators operate."<sup>66</sup>

The court held that even though the acts of September 11, 2001 clearly occurred entirely in the United States, they were acts of international terrorism since they were carried out by foreign nationals who apparently received orders, funding, and some training from foreign sources.<sup>67</sup> Therefore, the court concluded, these facts fell within the statute's definition of "international terrorism," and the plaintiffs had a valid cause of action against the al Qaeda defendants.<sup>68</sup>

Concerning Iraq or Saddam Hussein, however, the court held that the ATA prevents suits under § 2333 against foreign states and officers wherein a prevailing plaintiff would be entitled to treble damages.<sup>69</sup> Section 2337 explicitly provides that "no action shall be maintained under section 2333 of this title against . . . a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority."<sup>70</sup> Thus, the plaintiffs could not rely upon § 2333 against Iraq or Saddam Hussein. These are precisely the type of claims, however, that AEDPA was designed to allow.<sup>71</sup>

66. *Id.* at 221.

67. *Id.* at 240.

68. *Id.*

69. *Id.* at 225-26.

70. *Id.* at 226 (quoting *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 n.2 (D.D.C. 2002)).

71. *Cronin*, 238 F. Supp. 2d at 231 ("The Flatow Amendment does provide victims of state-sponsored acts of terrorism with a cause of action against the culpable foreign state."); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260 (D.D.C. 2002) (allowing, without discussion, a case against Iran under § 1605(a)(7), amended by 2002 U.S. Dist. LEXIS 21204 (D.D.C. Nov. 4, 2002); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) (allowing suit against Iraq based on the statute's withdrawal of sovereign immunity for sponsorship of terrorism); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 106 (D.D.C. 2000) (concluding that the Flatow Amendment creates a cause of action against a foreign state); *Higgins v. Islamic Republic of Iran*, No. 99-377, 2000 U.S. Dist. LEXIS 22173 (D.D.C. Sept. 21, 2000) (allowing, with little discussion, a case against Iran under § 1605(a)(7)); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) (allowing suit against Iran based on the statute's withdrawal of sovereign immunity for sponsorship of terrorism).

Ultimately, the court dismissed the claim against Saddam Hussein brought under the AEDPA because a U.S. President would have had absolute immunity for conduct associated with the exercise of his official duties.<sup>72</sup> Still, the court found that all the elements of the Flatow Amendment (discussed below) were satisfied as to Iraq, including that the plaintiffs had shown by evidence satisfactory to the court that Iraq provided material support to bin Laden and al Qaeda.<sup>73</sup> The court awarded economic damages, pain and suffering, solatium damages, but not punitive damages.<sup>74</sup> All defendants were jointly and severally liable.<sup>75</sup> The non-sovereign defendants under 18 U.S.C.S. § 2333 were jointly and severally liable for treble damages.<sup>76</sup>

Also of particular note is that the court in this case addressed the types of damages available under the ATA and concluded that the provision for treble damages precludes an award of punitive damages. The legislative history of § 2333 shows an unequivocal congressional intent to deter acts of international terrorism and to punish those who commit such acts against U.S. citizens.<sup>77</sup> The court held that it would not award additional punitive damages because the treble damages provision of 18 U.S.C. § 2333 already provided a penalty.<sup>78</sup> As is discussed below, the AEDPA carries no such restriction on punitive damages, but it does not provide for treble damages.

In conclusion, the *Smith* case illustrates the benefits of employing multiple federal statutory and common-law causes of action in cases that involve multiple defendants with differing statuses, such as sovereign versus organizational or individual. As will be developed more fully below, the ATA, AEDPA, and other statutes complement each other both in terms of requisite criteria and damages, a partnership especially critical in the post-9/11 world.

#### B. AEDPA Section 1605(a)(7) and the Flatow Amendment to the FSIA

Section 1605(a)(7) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) stripped foreign states and officials of their sovereign immunity under the Foreign Sovereign Immunities Act (FSIA) in cases that seek money damages for

personal injury or death that was caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material

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72. *Smith*, 262 F. Supp. 2d at 228.

73. *Id.* at 232.

74. *Id.* at 233, 239.

75. *Id.* at 240.

76. *Id.*

77. *Id.*

78. *Id.*; see also *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 239 (D.R.I. 2004) (declining to allow prejudgment interest on the same reasoning that treble damages provided the exclusive penalty).



support or resources (as defined in section 2339A of title 18 [of the ATA]) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.<sup>79</sup>

Either the claimant or the victim must have been a U.S. citizen when the act upon which the claim is based occurred; this exception to sovereign immunity applies to pertinent causes of action that arose before, on, or after its date of enactment.<sup>80</sup> The AEDPA authorizes the courts to award both compensatory and punitive damages. Moreover, it allows a foreign state's commercial property in the United States to be attached in satisfaction of a judgment under this provision, regardless of whether the property was involved in the predicate act.<sup>81</sup> In the 1996 Flatow Amendment, Congress also created a federal cause of action against state supporters of terrorism and authorized recovery for, among other things, "pain, and suffering, and punitive damages."<sup>82</sup> Taken together, these provisions of the AEDPA have become the most frequently invoked litigation weapon against defendants tied to terrorist activity.

Like the ATA, the AEPDA has its limitations. It permits suits only against foreign states that were designated "state sponsors of terrorism" before or as a result of the statute.<sup>83</sup> To date, seven countries, not including Afghanistan, have been designated: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria.<sup>84</sup> Thus, in an odd combination of law and politics, the individual's private right to a cause of action depends at the outset on the U.S. government's

79. 28 U.S.C. § 1605(a)(7) (1996). See generally Michael A. Rosenhouse, Annotation, *State Sponsored Terrorism Exception to Immunity of Foreign State and Their Property Under Foreign Sovereign Immunities Act of 1976*, 28 U.S.C.A. § 1605(A), 176 A.L.R. Fed. 1 (2002) (collecting and discussing federal cases in which the courts have considered the scope of the exception to foreign immunity embodied in this amendment, which makes an exception, for state-sponsored terrorism, to foreign immunity under the Foreign Sovereign Immunities Act).

80. 28 U.S.C. § 1605(a)(7)(B)(ii) (1996); 28 U.S.C. § 1605 note (1996).

81. 28 U.S.C. § 1610(b)(2) (1996).

82. 28 U.S.C. § 1605(a)(7) note (1996). The statute gives U.S. nationals and their legal representatives a cause of action for acts of a foreign state over which the U.S. courts have jurisdiction under the AEDPA.

83. 28 U.S.C. § 1605(a)(7)(A). The foreign state must have been designated as a state sponsor of terrorism "under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia." 28 U.S.C. § 1605(a)(7)(A). See generally Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of 'Foreign Terrorist Organization' Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A. § 1189, 178 A.L.R. Fed. 535 (2002) (collecting and discussing cases decided under the foreign terrorist organization provision of the Antiterrorism and Effective Death Penalty Act § 1189).

84. See 22 C.F.R. § 126.1(a) (2001).

decision whether to designate a state as a sponsor of terrorism.<sup>85</sup> The AEDPA also limits suits for acts that “occurred in the foreign state” by requiring that plaintiffs offer to arbitrate their claims “in accordance with accepted international rules.”<sup>86</sup>

Most of these cases have resulted in default judgments, with issues raised *sua sponte* by thorough courts, and therefore many aspects of the AEDPA remain untested. Under the FSIA, of which the AEDPA is a part, a court cannot enter a default judgment against a foreign state “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court”<sup>87</sup> and, consequently, these courts have diligently conducted some sort of evidentiary hearing or bench trial. This Article highlights several of the key cases interpreting and employing these provisions of the AEDPA.

### 1. A Door Opens for Victims: *Flatow v. Islamic Republic of Iran* and Its Progeny

The leading case under the AEPDA, *Flatow v. Islamic Republic of Iran*,<sup>88</sup> which set the standards and procedures for suits brought pursuant to this statute, itself resulted from a default judgment against Iran. The case arose on April 9, 1995, from the tragic murder of Alisa Flatow, a twenty-year-old college student from New Jersey who was spending a semester abroad in Israel when a suicide bomber drove a van loaded with explosives into a bus passing through the Gaza Strip, killing her and seven Israeli soldiers.<sup>89</sup> A terrorist group, the Shaqaqi faction of Palestine Islamic Jihad, which the court found to be funded by the government of Iran, claimed responsibility.<sup>90</sup> On

85. See generally Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887 (2002) (criticizing the terrorism exception in light of the major changes that the 9/11 attacks produced in the international political landscape by arguing that, since the U.S. may have to reach out to countries that are currently designated as state sponsors of terrorism in order to combat this threat effectively, placing the foreign policy power in the courts through this exception is counterproductive and risks disrupting fragile alliances).

86. 28 U.S.C. § 1605(a)(7)(B). Despite this language, however, it is widely viewed that in practice, arbitration of these claims by the foreign states is unlikely to occur.

87. 28 U.S.C. § 1608(e) (2005).

88. 999 F. Supp. 1 (D.D.C. 1998). *Flatow* was superseded by statute, as stated in *Hegna v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 14039 (N.D. Ill. Aug. 11, 2003). For a discussion of this case and others, including efforts to enforce the judgments, see Sean D. Murphy, *Contemporary Practice of the U.S. Relating to International Law*, 93 AM. J. INT'L L. 181 (1999); Sean D. Murphy, *Contemporary Practice of the U.S. Relating to International Law*, 94 AM. J. INT'L L. 117 (2000); Sean D. Murphy, *Contemporary Practice of the U.S. Relating to International Law*, 95 AM. J. INT'L L. 132, 134 (2001) (discussing U.S. judgments against terrorist states).

89. *Flatow*, 999 F. Supp. at 6.

90. *Id.* at 8.

March 11, 1998, the Flatow family obtained a judgment from the court against Iran for \$27 million in compensatory damages and \$225 million punitive damages.<sup>91</sup> Iran denied the allegations, but it did not appear in court in this case or the others described below.<sup>92</sup> Judge Lamberth held that

a plaintiff need not establish that the material support or resources provided by a foreign state for a terrorist act contributed directly to the act from which his claim arises in order to satisfy 28 U.S.C. § 1605(a)(7)'s statutory requirements for subject matter jurisdiction. Sponsorship of a terrorist group which causes the personal injury or death of a United States national alone is sufficient to invoke jurisdiction.<sup>93</sup>

This Article will later discuss the efforts of the family of Alisa Flatow to collect upon this judgment.<sup>94</sup>

Since *Flatow*, many other cases decided in the D.C. Circuit have relied on this reading of the statute.<sup>95</sup> Under the FSIA, the AEDPA, and the Flatow Amendment, this line of cases has developed precedent and judgments against state sponsors of terrorism, many of whom (often Iran) failed to appear in court to contest the claims. For example, the case of *Eisenfeld v. Islamic Republic of Iran*<sup>96</sup> arose from a terrorist attack on February 25, 1996, in which two U.S. nationals, Matthew Eisenfeld and Sara Rachel Duker, were killed in Israel by a

91. *Id.* at 6.

92. *Id.*

93. *Id.* at 18.

94. Mr. Flatow's initial attempts to collect the judgment were unsuccessful. *See Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999). Subsequently, on October 28, 2000, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, became law, affording certain victims of terrorists' acts an opportunity to recover funds from the United States to satisfy their outstanding judgments. One month later, on November 28, 2000, Flatow applied for such funds, electing 100 percent recovery of the amount of compensatory damages plus post-judgment interest. *See Victims of Trafficking and Violence Protection Act* § 2002(a)(1)(B). His application was approved, and on January 4, 2001, the Treasury Department transferred to Flatow more than \$26 million, representing the compensatory damages award and post-judgment interest on that portion of the judgment. As a condition of receiving funds from the United States, Flatow was required under § 2002(a)(2)(D) to relinquish "all rights to execute against or attach property that is . . . subject to section 1610(f)(1)(A) of title 28, United States Code." *Victims of Trafficking and Violence Protection Act* § 2002(a)(2)(D). Subsequent litigation has ensued in his efforts to collect the remainder through the attachment of assets located in the United States. *See, e.g., Flatow v. Islamic Republic of Iran*, 353 U.S. App. D.C. 275 (D.C. Cir. 2002).

95. *See, e.g., Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 31 (D.D.C. 2003); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 234 (D.D.C. 2002); *Surrett v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 267 (D.D.C. 2002); *Mousa v. Islamic Republic of Iran*, 238 F. Supp. 2d 1 (D.D.C. 2001); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 107-08 (D.D.C. 2000).

96. 172 F. Supp. 2d 1, 3 (D.D.C. 2000).

bomb placed on a bus by Hamas, which was funded by the government of Iran. Pursuant to the AEDPA, on July 11, 2000, the families of the victims obtained a judgment against Iran for \$327 million in compensatory and punitive damages.<sup>97</sup>

Similarly, in *Higgins v. Islamic Republic of Iran*, the widow of U.S. marine colonel William R. Higgins, a member of the U.N. peacekeeping mission in Lebanon, filed suit against Iran and the Islamic Revolutionary Guard under FSIA § 1605 (a)(7) for the kidnapping, torture, and murder of her husband by the Hezbollah over an eighteen month period in 1987–88.<sup>98</sup> After Iran failed to appear, the court conducted a nonjury trial on the question of damages and issued an award of \$55,431,937 in compensatory damages jointly against the defendants and an award of \$300 million in punitive damages against the Islamic Revolutionary Guard.<sup>99</sup>

Another case establishing this link between terrorism and Iran, *Sutherland v. Islamic Republic of Iran*,<sup>100</sup> awarded damages to the spouse of a kidnapping victim for loss of consortium and solatium.<sup>101</sup> In another case, *Stern v. Islamic Republic of Iran*,<sup>102</sup> the court held that, where a terrorist bombing caused an extrajudicial killing within the meaning of the FSIA and the Iranian government provided material support and resources to a terrorist group to carry out the attack, the defendants were liable to the deceased's children.

## 2. A Partial Ban on Punitive Damages: *Alejandro v. Republic of Cuba*

The court in *Alejandro v. Republic of Cuba*<sup>103</sup> awarded \$50 million in compensatory damages and \$137.7 million in punitive damages to the families of three of the four people who were killed in 1996 when Cuban aircraft shot down two "Brothers to the Rescue" planes—unarmed Cessna planes in international airspace searching for Cuban refugees. The fourth victim was not able to sue under the AEDPA because he was not a U.S. citizen. As in *Flatow*, the defendant did not appear in the case, but the court nonetheless labored through the factual and legal bases for liability.<sup>104</sup> The key

97. *Id.* at 8.

98. *Higgins v. Islamic Republic of Iran*, No. 99-377, 2000 U.S. Dist. LEXIS 22173 (D.D.C. 2000).

99. *Id.* at \*3. Note that "Hezbollah," "Hizbollah," and "Hizballah" are variant spellings of the same Islamic fundamentalist group.

100. *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 51-52 (D.D.C. 2001).

101. "Loss of consortium" includes loss of society, affection, and loss or impairment of sexual relations; "solatium" refers to damages allowed for injury to the feelings. BLACK'S LAW DICTIONARY 280, 1248 (5th ed. 1979).

102. *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 297 (D.D.C. 2003).

103. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997).

104. *Id.* at 1253.

distinction in *Alejandre* is that the court concluded that punitive damages could be assessed against the Cuban Air Force but not the Republic of Cuba. In determining the amount of punitive damages, Judge King considered the total assets of the Cuban Air Force, which may have resulted in a lower judgment than had such damages been imposed on Cuba under the same formula.<sup>105</sup>

As litigation under the AEDPA has proliferated in recent years, this view of punitive damages appears to be more prevalent, bolstered in 2000 by Congress's repeal of legislation that would have permitted punitive damages against a foreign state in cases brought under the AEDPA. "In so doing, Congress returned the law to its pre-1998 state, when it provided that a 'foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages[.]'"<sup>106</sup> Since then, Judge Lamberth himself has now ruled that punitive damages cannot be awarded against a foreign state, in contrast to his pre-2000 view expressed in *Flatow*.<sup>107</sup>

### 3. A Cause of Action Against a Foreign State for Torture: *Price v. Socialist People's Libyan Arab Jamahiriya*

Several important holdings have come out of the *Price* cases. The lawsuit was brought in 1997 under § 1605 of the FSIA by two U.S. citizens who sued Libya for torture and hostage-taking after their arrest in March 1980 for taking photographs alleged to be antirevolutionary propaganda; before their eventual acquittal, the plaintiffs were incarcerated under deplorable conditions.<sup>108</sup> In *Price v. Socialist People's Libyan Arab Jamahiriya (Price II)*,<sup>109</sup> the Court of Appeals for the District of Columbia concluded that foreign states are not "persons" under the Fifth Amendment and thus the Fifth Amendment does not prohibit the U.S. government from subjecting Libya to personal jurisdiction in its federal courts. This case also set a standard for the amount of evidence required to be alleged in the complaint: the court held that the complaint was "simply too conclusory" in its allegations and thus the plaintiffs did not satisfy the definition of "hostage taking" under the FSIA.<sup>110</sup> The court

105. *Id.* at 1249.

106. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464. See generally *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 102 n.17 (D.D.C. 2000).

107. See *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002) ("The Court's decision in *Eisenfeld* predated this statutory change. Thus, while the Court did award such damages in *Eisenfeld*, it cannot do so in the instant case.").

108. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96, 99 (D.C. Cir. 2002) [hereinafter *Price III*].

109. *Id.* at 99.

110. *Id.* at 85.

remanded the case to allow the plaintiffs to amend their complaint to attempt to satisfy the statute's rigorous definition of "torture."<sup>111</sup>

On remand, in *Price v. Socialist People's Libyan Arab Jamahiriya (Price III)*,<sup>112</sup> the District Court denied the foreign state's motion to dismiss the former prisoners' torture claims under the FSIA because the 1996 amendments to the Act created a federal cause of action for torture against foreign states. The court held that the state-sponsored terrorism exception, § 1605(a)(7), creates a new exception under the FSIA for any foreign nation designated by the U.S. State Department as a sponsor of terrorism if that nation either commits a terrorist act resulting in the death or personal injury of a U.S. national or provides material support and resources to an individual or entity that commits such a terrorist act.<sup>113</sup> That court found that the Flatow Amendment provides a cause of action against foreign states for any act that would provide a court with jurisdiction under 28 U.S.C. § 1605(a)(7).<sup>114</sup>

#### 4. A Clarification of the Elements: *Kilburn v. The Republic of Iran*

In *Kilburn v. Republic of Iran*,<sup>115</sup> the court followed the *Flatow* line of cases in the District of Columbia courts and clarified some key aspects. The action arose from the kidnapping and eventual killing in 1984 of Peter Kilburn, who at the time was employed as a librarian and instructor of library sciences at the American University of Beirut.<sup>116</sup> On June 12, 2001, the plaintiff, the victim's brother, Blake, filed his complaint "seeking recovery for the common-law torts of wrongful death, battery, assault, false imprisonment, slave trafficking, and intentional infliction of emotional distress."<sup>117</sup> The plaintiff alleged jurisdiction under the state-sponsored exception to sovereign immunity, claiming that Iran and the Iranian Ministry of Information and Security (MOIS) provided material support to Hezbollah for their Lebanon-based activities, including the kidnapping and torture of the victim, while Libya and the Libyan External Security Organization (LESO) provided material support to the Arab Revolutionary Cells for their terrorist activities, including the purchase and extrajudicial killing of the victim.<sup>118</sup> The court set forth six separate elements that the plaintiff must establish in order for the court to exercise its jurisdiction over the defendants:

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111. *Id.*  
 112. 274 F. Supp. 2d 20 (D.D.C. 2003) [hereinafter *Price III*].  
 113. *See id.* at 25-32.  
 114. *Id.* at 31.  
 115. 277 F. Supp. 2d 24 (D.D.C. 2003).  
 116. *Id.* at 27.  
 117. *Id.*  
 118. *Id.* at 32-34.

- (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking;
- (2) that the act was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant;
- (3) that the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment;
- (4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act;
- (5) that, if the incident complained of occurred within the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter; and
- (6) that either the plaintiff or the victim was a United States national at the time of the incident.<sup>119</sup>

The defendants Libya and LESO challenged the second and third elements: "that they or a non-state actor receiving material support from them perpetrated the alleged hostage taking and killing of Peter Kilburn, and that they provided support to the terrorist groups involved in those wrongful acts."<sup>120</sup> The court, however, concluded that, under § 1605(a)(7) and the cases interpreting it, the plaintiff's allegations of the defendants' general sponsorship of a terrorist group that engaged in the torture, extrajudicial killing, and hostage-taking of Peter Kilburn, resulting in his personal injuries and death, were enough for the plaintiff to assert the court's jurisdiction.<sup>121</sup> A plaintiff need not establish that the material support or resources provided by a foreign state for a terrorist act contributed directly to the act from which his claim arises. Accordingly, the court denied the motion to dismiss by these defendants, finding as well that the plaintiff properly relied on common-law causes of action for his substantive claims, and that the Flatow Amendment does provide a cause of action against foreign states.<sup>122</sup> In addressing the latter issue, the court acknowledged that, while the Flatow Amendment "clearly establishes a cause of action against an 'official, employee, or agent' of a foreign state that commits or causes another to commit a terrorist act," it is not as clear from the text of the Flatow Amendment that victims of state-sponsored terrorist acts also have a cause of action against the foreign state itself.<sup>123</sup> After considering the legislative history and case precedent, Judge Urbina adopted the reasoning of Judge Lamberth in *Price III* and *Cronin v. Islamic Republic of Iran* in

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119. *Id.* at 32 (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 16 (D.D.C. 1998) (paraphrasing 28 U.S.C. § 1605(a)(7) (1996))).

120. *Id.*

121. *Id.*

122. *See id.* at 35-41.

123. *Id.* at 37.

reaching the conclusion that “the Flatow Amendment does provide victims of state-sponsored acts of terrorism with a cause of action against the culpable foreign state.”<sup>124</sup> As Judge Lamberth noted in *Cronin*, “It is inconceivable that Congress would enable plaintiffs who obtained judgments against foreign states like Iran to recover the damage awards from the United States if the plaintiffs did not have a cause of action against the foreign state in the first place.”<sup>125</sup> Last, the *Kilburn* court supported the availability of punitive damages against the security agency of a foreign sovereign, such as defendant LESO, under the Flatow Amendment.<sup>126</sup>

##### 5. Punitive Damages for an Extrajudicial Killing: *Campuzano v. Islamic Republic of Iran*

In *Campuzano v. Islamic Republic of Iran*,<sup>127</sup> the court again supported a cause of action against Iran, the Iranian Ministry of Information and Security, and individual Iranian officials under § 1605. The plaintiffs were U.S. citizens seriously injured in a triple suicide bombing at a crowded Ben Yehuda Street pedestrian mall in Jerusalem on September 4, 1997.<sup>128</sup> The bombing had been carried out by Hamas, allegedly with training and support by the defendants.<sup>129</sup> Before entering a default judgment against Iran and its agencies, the court conducted the requisite evidentiary hearing, detailing the close relationship between Iran and Hamas.<sup>130</sup> Based on these findings of fact and its conclusion that that the bombing was an act of extrajudicial killing that caused the victims’ injuries, the court entered a default judgment against these defendants and awarded the plaintiffs compensatory damages, consisting of pain and suffering, loss of prospective income, medical expenses, and solatium

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124. *Id.* (citing *Price III*, 274 F. Supp. 2d 20, 25-32 (D.D.C. 2003); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 230-33 (D.D.C. 2002)). *But see* *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 334-35 (D.C. Cir. 2003); *Price II*, 294 F.3d 82, 87 (D.C. Cir. 2002) (recognizing that “the amendment does not list ‘foreign states’ among the parties against whom such an action may be brought”).

125. *Kilburn*, 277 F. Supp. 2d at 40 (citing *Cronin*, 238 F. Supp. 2d at 232-33). Judge Lamberth went on to explain that, for example, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, created a mechanism whereby, among other things, plaintiffs in several cases then pending against Iran or other foreign states for state-sponsored acts of terrorism could obtain damage awards. *Cronin*, 238 F. Supp. 2d at 232-33; *see also* *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 99 (D.D.C. 2003).

126. *See Kilburn*, 277 F. Supp. 2d at 41-44.

127. 281 F. Supp. 2d 258 (D.D.C. 2003).

128. *Id.* at 260.

129. *Id.*

130. *Id.* at 262; *see* 28 U.S.C. § 1608(e) (2005) (explaining when a default judgment may be entered against a foreign state); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 6 (D.D.C. 1998).



damages.<sup>131</sup> Finally, the court awarded punitive damages of \$300 million after considering that the character of the bombing was extremely heinous, in that the bombs were filled with metal pieces and chemicals intended to inflict the highest amount of death and suffering.<sup>132</sup> “The defendants’ demonstrated policy of encouraging, supporting and directing a campaign of deadly terrorism is evidence of the monstrous character of the bombing that inflicted maximum pain and suffering on innocent people. Killing innocent civilians for political ends constitutes unconscionable conduct in any civilized society.”<sup>133</sup>

#### 6. A Contrasting View on Punitive Damages: *Dammarell v. Islamic Republic of Iran*

The case of *Dammarell v. Islamic Republic of Iran*<sup>134</sup> arose from the devastating events that occurred in Beirut, Lebanon on April 18, 1983, when a massive car bomb killed sixty-three persons, including seventeen U.S. citizens, and injured more than one hundred others. More than eighty plaintiffs—victims of the bombing and their families—filed this case under § 1605 of the FSIA, seeking to assign responsibility and liability for their injuries to Iran and its Ministry of Intelligence and Security (MOIS).<sup>135</sup> Once again, Iran and its agency did not appear, and for six days the court conducted an evidentiary hearing, as required by the statute and case law, before entering the default judgment against the defendants.<sup>136</sup> First, it found that Iran and MOIS were indeed responsible for supporting, funding, and otherwise carrying out the unconscionable attack by the Hezbollah terrorist group.<sup>137</sup> Second, the court detailed the personal accounts of the plaintiffs in this action—“stories that supply the necessary human dimension to the stark, horrifying skeleton of the bombing itself.”<sup>138</sup> Third, the court set forth its measure of relief for

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131. *Campuzano*, 281 F. Supp. 2d at 272-74.

132. *Id.* at 277.

133.

Consistent with the longstanding precedent of this court, the court applies the multiple of three times Iran’s annual expenditure on terrorism to award punitive damages against all defendants, except for Iran, jointly and severally in the amount of \$300,000,000, to be shared equally among the eight plaintiffs present at the bombing.

*Id.* at 278-79.

134. 281 F. Supp. 2d 105 (D.D.C. 2003).

135. *Id.* at 108.

136. *Id.* at 108-13.

137. *Id.*

138. *Id.* at 108, 113-91.

the plaintiffs, a total award of \$123,061,657 in compensatory damages.<sup>139</sup>

It should be noted that the court did not include punitive damages because it interpreted the recent developments in the law differently from Judge Urbina in the *Kilburn* case. The District Court of the D.C. Circuit appears split over the current availability of punitive damages. Although frustrated because the circumstances warranted punitive damages, Judge Bates disagreed with his colleague and interpreted a recent D.C. Circuit decision, *Roeder v. Islamic Republic of Iran*,<sup>140</sup> as precluding punitive damages against the MOIS. Section 1606 of the FSIA provides that “as to any claim for relief with respect to which a foreign state is not entitled to immunity under § 1605 or § 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state *except for an agency or instrumentality thereof* shall not be liable for punitive damages.”<sup>141</sup> Thus while the FSIA does not permit an award of punitive damages against a foreign state, it does allow such damages against an “agency or instrumentality” of the foreign state.<sup>142</sup> In another context, the D.C. Circuit in *Roeder* had considered whether Iran’s Ministry of Foreign Affairs was an agent or instrumentality of Iran, or whether it was essentially the state itself. The *Roeder* court held that “if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state.”<sup>143</sup> Applying that categorical approach to *Dammarell*, Judge Bates concluded that MOIS should be treated as the foreign state itself.<sup>144</sup> Thus, the plaintiffs could not collect punitive damages against MOIS.<sup>145</sup> Note that this decision rests upon a statement from the Court of Appeals that the *Kilburn* court considered to be dicta and may, in any event, be limited to that circuit.

Nevertheless, in support of its judgment against the terrorist state, the court concluded that

[a]s the witnesses often recognized, no amount of monetary or other relief can ever bring back those who were killed or restore the past twenty years of the lives of those who have been injured and have suffered. But as those same witnesses frequently observed, perhaps it is only through the financial impact of damage awards in cases such as

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139. *Id.* at 108.

140. 333 F.3d 228, 234 n.3 (D.C. Cir. 2003).

141. *Dammarell*, 281 F. Supp. 2d at 199-200, citing 28 U.S.C. § 1606 (emphasis in original).

142. *Id.*; see *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002).

143. *Dammarell*, 281 F. Supp. 2d at 200 (citing *Roeder*, 333 F.3d at 234-35).

144. *Id.* at 201.

145. *Id.* at 202.

this that the governments (and their agents) responsible for terrorist conduct such as the bombing of the American Embassy in Beirut will be dissuaded from similar conduct in the future.<sup>146</sup>

### 7. Providing an Independent Claim Against a Foreign State and Broad Personal Jurisdiction: *Pugh v. Socialist People's Libyan Arab Jamahiriya*

In *Pugh v. Socialist People's Libyan Arab Jamahiriya*,<sup>147</sup> the District Court for the District of Columbia was called upon to interpret several unresolved issues involving this statute in a case arising from the midair airplane explosion alleged to have resulted from an act of terrorism committed by officials and agents of the government of Libya, its intelligence service (LESO), and seven individuals, including the Libyan head of state, Muammar Qadhafi. Following circuit precedent under *Price*, the court rejected the defendants' argument that the court cannot constitutionally exercise personal jurisdiction over the Libyan state.<sup>148</sup> The court in *Pugh* next addressed a then-unresolved issue in the D.C. Circuit—whether the Flatow Amendment, in conjunction with 28 U.S.C. § 1605(a)(7), actually creates a federal cause of action against a sovereign foreign state.<sup>149</sup> It concluded in the affirmative: “This Court sees no reason to depart from the decisions of its district court colleagues here and elsewhere construing § 1605(a)(7) and the Flatow Amendment as providing a private cause of action for American citizens against foreign states for harm done to them by state-sponsored acts of terrorism.”<sup>150</sup> The court observed, however, that “the D.C. Circuit still regard[ed] the matter to be an open question.”<sup>151</sup>

As for the individual defendants, all of whom—except Qadhafi—were officials, agents, and employees of LESO and who contested personal jurisdiction,<sup>152</sup> the court in *Pugh* adopted an expansive view

146. *Id.* at 108.

147. 290 F. Supp. 2d 54 (D.D.C. 2003).

148. *Id.* at 57 (citing *Price II*, 294 F.3d 82, 96, 99 (D.C. Cir. 2002) (holding that “foreign states are not ‘persons’ protected by the Fifth Amendment,” and “the Fifth Amendment poses no obstacle to the decision of the United States government to subject Libya to personal jurisdiction in the federal courts”).

149. *Id.*

150. *Id.*

151. *Id.*; see *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 n.3 (D.C. Cir. 2003).

152. Jurisdiction over these individuals in their official capacities was established under § 1605, which expressly extended personal liability to the officials, employees, and agents who commit the terrorist acts, limited to acts committed in service to a sovereign state. By its own terms, the FSIA limits its jurisdictional grant to suits against foreign states and individuals acting on their behalf in an official capacity. Therefore, the court reasoned, the Due Process Clause must presumably be satisfied before it may exercise in personam jurisdiction to impose civil liability upon

of the minimum contacts test under the Due Process Clause. Unlike the *Biton* court, which declined to extend such a broad view to claims brought under the ATA,<sup>153</sup> the *Pugh* court found personal jurisdiction over the individual defendants, based upon the following reasoning:

As the plane they chose to destroy was on an international flight and expected to stop in several nations before reaching its final destination, the individual defendants could and should have reasonably postulated that passengers of many nationalities would be on board, from which they could also expect they might be haled into the courts of those nations whose citizens would die. Given the number of passengers on UTA Flight 772, and the international nature of the flight, it was also altogether foreseeable that some Americans would be aboard the plane, whose lives would be lost, and that the individual defendants would have to answer in some fashion in American courts for the consequences of their actions if their identities were ever discovered.

The interest of the United States in preventing and punishing international terrorism has been a matter of worldwide common knowledge for years. Congress has not been indifferent to providing judicial sanctions for terrorist acts committed abroad. Beginning at least five years before the UTA Flight 772 bombing, a succession of federal statutes had evinced an intent to assure the criminal prosecution of foreign individuals who committed terrorist acts overseas against U.S. persons or property.<sup>154</sup>

Asserting as the single most important consideration about whether a defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there,"<sup>155</sup> the *Pugh* court thus held that it had personal jurisdiction over the seven foreign nationals and that the U.S. owner-lessor of the airplane could assert tort claims against them in their personal capacities. Notably, the court could not exercise jurisdiction over the claims brought under § 2333 of the ATA against Libya, LESO, and these individuals in their official capacities because of the jurisdictional limits of 18 U.S.C. § 2337(2); however, the conversion and tortious interference claims could go forward against the individual defendants in their personal capacities.<sup>156</sup>

the individual defendants for their personal conduct undertaken without state sponsorship. *Pugh*, 290 F. Supp. 2d at 58.

153. See *supra* notes 53-60 and accompanying text.

154. *Pugh*, 290 F. Supp. 2d at 59; see also *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 1999 U.S. Dist. LEXIS 15035 (D.D.C. 1999) (denying defendant Libya's motion to dismiss in a suit by insurers to Pan Am and Alert to recover money spent in settling the claims paid to the families of the passengers of Flight 103, reading § 1605 (a)(7) broadly to encompass these third-party claims for indemnity and contribution and conferring jurisdiction of the U.S. courts over this type of action).

155. *Pugh*, 290 F. Supp. 2d at 59 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

156. *Id.* at 60-61. For the epilogue to this story, see *Libya Accepts Lockerbie Blame*, REUTERS, Aug. 15, 2003; *Libya Signs \$170M Deal for Jet Bombing*, REUTERS, Jan. 9, 2004.

## 8. Reining in a Private Cause of Action and Setting New Limits: *Cicippio v. Islamic Republic of Iran* and Its Progeny

Despite this long line of cases establishing a cause of action against foreign terrorist states through § 1605, a recent ruling from the D.C. Circuit has put this interpretation into question. In *Cicippio-Puleo v. Islamic Republic of Iran*,<sup>157</sup> an action filed against Iran by the family of a terrorist victim was considered to be properly dismissed on the grounds that neither the FSIA nor the Flatow Amendment, separately or together, created a private right of action against a foreign government. "This holding applies also to suits 'against agencies or instrumentalities' of a foreign state, which are included in the FSIA's definition of 'foreign state.'"<sup>158</sup> *Cicippio* also made clear that any suit against an official of a foreign state must be brought against that official in his or her personal capacity. Joseph Cicippio was abducted in 1986 by Hezbollah, an Islamic terrorist organization that receives material support from Iran; he was held hostage until 1991, confined in inhumane conditions, and frequently beaten.<sup>159</sup> On August 27, 1998, the District Court entered judgment against Iran for Cicippio and his wife in the amount of \$30 million.<sup>160</sup> In the current action, Joseph Cicippio's children and siblings also sued Iran for the intentional infliction of emotional distress and loss of solatium.<sup>161</sup> Despite the Iranian defendants' failure to respond to this action and the entering of a default judgment, the District Court *sua sponte* dismissed the complaint, holding that the FSIA does not confer subject matter jurisdiction to entertain these claims.<sup>162</sup> On appeal, the government submitted an amicus brief with which the Court of Appeals agreed.<sup>163</sup>

The Court of Appeals read 28 U.S.C. § 1605(a)(7) on its face, declining to scrutinize the legislative history of either the statute or its amendment, and concluded that it was only jurisdictional. It held that § 1605(a)(7)

merely abrogates the immunity of foreign states from the jurisdiction of the courts in lawsuits for damages for certain enumerated acts of terrorism. It does not impose liability or mention a cause of action. The

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157. 353 F.3d 1024 (D.C. Cir. 2004).

158. *Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004).

159. *Cicippio-Puleo*, 353 F.3d at 1027-28.

160. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998). The judgment included damage awards on behalf of two other men—David Jacobsen and Frank Reed—who were held hostage in Lebanon by the Hezbollah and their spouses, for a total judgment against Iran for \$65 million in compensatory damages. No appeal was taken. *Id.*

161. *Cicippio-Puleo*, 353 F.3d at 1028.

162. *Cicippio-Puleo v. Islamic Republic of Iran*, 2002 U.S. Dist. LEXIS 27050, at \*4 (D.D.C. June 21, 2002).

163. *Cicippio-Puleo*, 353 F.3d at 1027.

statute thus confers subject matter jurisdiction on federal courts over such lawsuits, but does not create a private right of action.<sup>164</sup>

In contrast, the Flatow Amendment by its language specifically imposes liability and creates a cause of action “for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7).”<sup>165</sup> But the court held that the liability imposed by the provision is precisely limited to “an official, employee, or agent of a foreign state designated as a state sponsor of terrorism.”<sup>166</sup> Thus, “insofar as the Flatow Amendment creates a private right of action against officials, employees, and agents of foreign states, the cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities.”<sup>167</sup>

The Circuit Court concluded that the multitude of cases decided to the contrary<sup>168</sup> were misguided:

We now hold that neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government. Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself.<sup>169</sup>

Accordingly, the court affirmed the judgment of the District Court but, believing that the plaintiffs may have been misled by the prior favorable judgments in assuming that the Flatow Amendment afforded a cause of action against foreign state sponsors of terrorism, remanded the case “to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law.”<sup>170</sup>

Since *Cicippio*, the district courts of that circuit have followed the clear lead of their court of appeals. In *Wyatt v. Syrian Arab*

164. *Id.* at 1034.

165. *Id.* at 1032.

166. *Id.* at 1034.

167. *Id.*

168 This issue was flagged in *Price II*, 294 F.3d 82, 87 (D.C. Cir. 2002). “Since *Price*, some district court opinions in this circuit have held or assumed that the Flatow Amendment creates a cause of action against foreign states.” *Cicippio-Puleo*, 353 F.3d at 1032. See *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231 (D.D.C. 2002) (holding that the Flatow Amendment provides a cause of action against a foreign state); see also *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003) (adopting *Cronin*’s reasoning that there is a cause of action against foreign states under the Flatow Amendment); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36-41 (D.D.C. 2003).

169. *Cicippio-Puleo*, 353 F.3d at 1033.

170. *Id.* at 1036.

*Republic*,<sup>171</sup> the District Court considered the claims of two U.S. nationals who, while traveling in Turkey in 1991, were kidnapped by terrorists associated with the Kurdistan Workers Party (PKK) and held for twenty-one days until they escaped. The plaintiff Marvin Wilson, along with his family and the family of the late Ronald Wyatt, brought suit against the PKK pursuant to § 2331 of the ATA for international terrorism and the FSIA § 1605(a)(7); they asserted claims under the Flatow Amendment against the Syrian Arab Republic, the Syrian Ministry of Defense, and individual officials for false imprisonment, civil conspiracy and vicarious liability, intentional and negligent infliction of emotional distress, assault, battery, loss of consortium and solatium, and economic damages.<sup>172</sup> Finding that the *Cicippio* case bore directly on this case, the court followed “the circuit’s guidance” and granted the plaintiffs an opportunity to amend their complaint “to clarify the jurisdictional basis for suit, the defendants and the capacity in which each defendant is sued, the cause of action for each claim, the relief requested for each claim, and any other matters affected by the intervening precedent.”<sup>173</sup>

Similarly, in *Lawton v. Republic of Iraq*,<sup>174</sup> a suit brought under § 1605(a)(7) against the sole defendant of Iraq (which had failed to answer), the plaintiffs did not purport to state a cause of action under any other source of law. In light of *Cicippio*, the court granted leave to amend the complaint in the manner described in *Wyatt*.<sup>175</sup>

The full effect of this interpretation was indicated by *Acree v. Republic of Iraq*,<sup>176</sup> a case in which soldiers held as prisoners by Iraq during the Gulf War and their families filed suit under the terrorism exception to the FSIA, 28 U.S.C.S. § 1605(a)(7), against Iraq, its intelligence service, and its President. Two weeks after the court entered judgment for the plaintiffs upon the defendants’ default, the United States moved to intervene, in order to contest subject matter jurisdiction, and argued that provisions of the Emergency Wartime Supplemental Appropriations Act<sup>177</sup> made the terrorism exception inapplicable to Iraq and thus stripped the District Court of its jurisdiction. The court cited its prior holding in *Cicippio*—that the terrorism exception was a jurisdictional provision that did not provide a cause of action against a foreign state and that the Flatow

171. *Wyatt v. Syrian Arab Republic*, 304 F. Supp. 2d 43 (D.D.C. 2004).

172. *Id.* at 44.

173. *Id.*

174. *Lawton v. Republic of Iraq*, 307 F. Supp. 2d 1 (D.D.C. 2004).

175. *Id.* at 2 (citing *Wyatt*, 304 F. Supp. 2d at 44 (granting leave to amend the complaint “to clarify the jurisdictional basis for suit, the defendants and the capacity in which each defendant is sued, the cause of action for each claim, the relief requested for each claim, and any other matters affected by the intervening precedent”).

176. *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004).

177. Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).

Amendment did not afford a cause of action against a foreign state itself.<sup>178</sup> The court also rejected the plaintiffs-appellees attempt to offer common-law torts as an alternate source of a cause of action:

[G]eneric common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law . . . (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support for the proposition that *generic common law itself may furnish the cause of action*. Rather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law.<sup>179</sup>

Nor did the court remand the case to allow appellees to amend their complaint to state a cause of action under another source of law, as it had in *Cicippio*, because its decision in *Cicippio* and its order to the parties before oral argument provided notice of this issue to the appellees. Despite this notice, appellees offered no alternative cause of action when asked to do so at oral argument.<sup>180</sup> While recognizing that the soldiers “endured this suffering while acting in service to their country,” the court nevertheless dismissed their suit against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of Iraq on the grounds that the plaintiffs failed to state a cause of action.<sup>181</sup>

By reducing § 1605 to merely a jurisdictional vehicle, the D.C. Circuit has, to a large degree, taken the bite out of the AEDPA.<sup>182</sup> In response, the lesson learned is to include multiple causes of action and not rely unduly upon this provision. It remains to be seen whether this reading of § 1605 will be limited to the courts of the D.C. Circuit or will be adopted by others, whether the Supreme Court will eventually be called upon to resolve a split among the circuits in this area, or whether Congress will clarify the matter through additional legislation.

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178. *Acree*, 370 F.3d at 53-54.

179. *Id.* at 59 (citation omitted); see *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003) (raising but not resolving the question whether the FSIA creates a cause of action against foreign states). *But see Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) (awarding compensatory and punitive damages for the common-law torts of battery, assault, false imprisonment, intentional infliction of emotional distress, and loss of consortium, each of which was authorized under § 1605(a)(7) of the FSIA).

180. *Acree*, 370 F.3d at 54.

181. *Id.*

182. See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: State Jurisdiction and Immunities: D.C. Circuit Interpretation of Scope of FSIA “Flatow Amendment,”* 98 AM. J. INT’L L. 349 (2004) (discussing recent D.C. cases interpreting the “Flatow Amendment” and whether it supports a cause of action against foreign state sponsors of terrorism).



*C. Other Federal Statutes: Torture Victim Protection Act and  
Alien Tort Claim Act*

Other federal statutes, such as the Torture Victim Protection Act of 1991 (TVPA) and the Alien Tort Claim Act (ATCA), provide additional avenues of relief for victims of terrorism against their tormentors. They typically have been brought in lawsuits in combination with other causes of action. This is important, because the plaintiffs suing under the AEDPA will need to find an applicable cause of action to invoke if the AEDPA merely rescinds immunity and does not itself provide a cause of action. Plaintiffs can pursue actions under these additional federal statutes or under state tort common law, which will be discussed next. Not to be overlooked, however, is the Flatow Amendment, which does provide an explicit enforcement mechanism for the AEDPA immunity exception for claims against officials, employees, and agents of foreign states in their individual capacities.

The ATCA vests the district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>183</sup> Traditionally this statute was read literally to provide a cause of action for aliens but not for U.S. citizens. As a result, it has been widely applied by foreign plaintiffs in humanitarian actions for international human rights violations, but underutilized in cases involving terrorism. In recent years, however, the scope of the ATCA has expanded with the addition of its legislative cousin, the TVPA. In enacting the latter component, Congress intended to supply an "unambiguous" cause of action for both aliens and U.S. citizens injured by acts of torture or extrajudicial killing committed under color of foreign law.<sup>184</sup>

The TVPA provides for a civil action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation[,] . . . subjects an individual to torture" or "subjects an individual to extrajudicial killing."<sup>185</sup> It explicitly requires a plaintiff to show exhaustion of local remedies in the place where the crime occurred, to the extent that such remedies are "adequate and available."<sup>186</sup> It should be underscored that, under the TVPA, a cause of action may be brought by any individual and, unlike the ATA and AEDPA, apparently the claimant need not be a U.S. citizen. By its

183. Alien Tort Claim Act, 28 U.S.C. § 1350 (2005).

184. See 102 S. REP. NO. 249 (1991) (explaining that the TVPA provides "an unambiguous basis for a cause of action that has been successfully maintained under" the ATCA).

185. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(1)-(2), 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (West 1993).

186. Torture Victim Protection Act § 2(b).

terms, the statute also provides a cause of action against “an individual.” The TVPA then defines “torture” as

any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.<sup>187</sup>

The TVPA is read naturally in conjunction with § 1605(a)(7) of the FSIA, which confers jurisdiction on the courts in part for claims of torture, incorporating by reference this definition of “torture.”<sup>188</sup> Similarly, the FSIA adopts the definition of “hostage taking” that appears in the International Convention Against the Taking of Hostages and the definition of “aircraft sabotage” in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.<sup>189</sup> These statutory enactments evidence legislative intent for accountability and provide victims of terrorism with a forum for that accountability. Courts have pointed to these enactments, particularly the TVPA, to support the position that Congress intended to create a cause of action against a foreign state under § 1605(a)(7).<sup>190</sup> The potential for using these statutes in concert has only recently begun to be explored as a litigation weapon by victims of terrorism.

For example, in *Daliberti v. Republic of Iraq*,<sup>191</sup> in which four U.S. nationals alleged that the government of Iraq arrested, detained, and tortured them along the Iraq-Kuwait border, the court stated that such direct attacks on persons and the described deprivation of basic human necessities were more than enough to meet the definition of “torture” in the TVPA and the definition of “hostage taking” in the International Convention Against the Taking of Hostages; such attacks thus gave rise to a claim under the state-

187. Torture Victim Protection Act § 3(b)(1); see *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 97 (D.D.C. 2003).

188. 28 U.S.C. § 1605(e) (2005) (“For purposes of paragraph (7) of subsection (a) – (1) the terms “torture” and “extrajudicial killing” have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991.”).

189. International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 1, T.I.A.S. No. 11,081, at 4, 1316 U.N.T.S. 205, 207; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 18 U.S.C. § 31 (2005).

190. See, e.g., *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 231-34 (D.D.C. 2002) (pointing to these enactments as part of the legislative history supporting the view that the Flatow Amendment does create a cause of action against a foreign state, despite the absence of such express direction).

191. 97 F. Supp. 2d 38 (D.D.C. 2000).

sponsored terrorism exception to foreign sovereign immunity.<sup>192</sup> Moreover, in response to Iraq's objection on constitutional grounds, the court found that longstanding U.S. and international policy toward state sponsors of terrorism provided those states adequate warning that terrorist acts against U.S. nationals, no matter where the acts occur, may subject those states to a U.S. response, including suits in U.S. courts.<sup>193</sup>

In *Weinstein v. Islamic Republic of Iran*,<sup>194</sup> the court held that the action of a Hamas agent in detonating an explosive charge on the Number 18 Egged bus on February 25, 1996 fell within the scope of the TVPA. The court found that it was a "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples."<sup>195</sup> The court noted that

there is no question that HAMAS and its agents received massive material and technical support from the Islamic Republic of Iran. The sophistication demonstrated in the use of a relatively small explosive charge with such devastating effect indicated that it is unlikely that this attack could have resulted in such loss of life without the assistance of regular military forces, such as those of Iran.<sup>196</sup>

Thus, the court found that the defendants not only provided the terrorists with the technical knowledge required to carry out the attack on the Number 18 Egged bus, but it also gave Hamas the funding necessary to do so.<sup>197</sup> The court further noted that, as of the date of the attack, Iran was a nation designated by the U.S. State Department as providing material support for terrorism, and the decedent was an U.S. national.<sup>198</sup> Finally, the court noted that "it is beyond question that if officials of the United States, acting in their official capacities, provided material support to a terrorist group to carry out an attack of this type, they would be civilly liable and would have no defense of immunity."<sup>199</sup> The *Weinstein* court also held that, although the FSIA does not permit the awarding of punitive damages against a foreign state, it does allow such damages against an "agency or instrumentality" of the foreign state.<sup>200</sup>

In *Regier v. Islamic Republic of Iran*,<sup>201</sup> a professor and his wife, both of whom were U.S. citizens living in Beirut, had a cause of action

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192. *Id.* at 45.

193. *Id.* at 52-54.

194. 184 F. Supp. 2d 13 (D.D.C. 2002).

195. *Id.* at 21.

196. *Id.*

197. *Id.* at 21-22.

198. *Id.* at 22.

199. *Id.*

200. *Id.* at 24.

201. *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87 (D.D.C. 2003).

against Iran, where the professor was taken hostage and tortured by Hezbollah in 1984. The action was brought against Iran and the Iranian Ministry of Information and Security (MOIS) under the FSIA § 1605(a)(7), along with the TVPA §3(b)(1) and several common-law claims.<sup>202</sup> The court found the evidence to be “conclusive that Frank Regier was ‘tortured’ and ‘taken hostage’ . . . , as Frank was kidnapped and imprisoned for 65 days under deplorable and inhumane conditions”; it also found that the evidence “[le]ft no doubt that agents of the Islamic Republic of Iran and MOIS were responsible for the abduction and confinement[.]” noting as well that they had been found liable in a number of cases very similar to this one.<sup>203</sup> The court agreed with the analysis and conclusions of Judge Lamberth in *Cronin* (before *Cicippio*) and likewise held that the plaintiffs had a cause of action against Iran.<sup>204</sup> In entering a default judgment for compensatory damages against the defendants, the court declined to award punitive damages. It reasoned that while the FSIA does not permit the award of punitive damages against a foreign state, it does allow such damages against an agency or instrumentality of a foreign state.<sup>205</sup> Because of the intervening D.C. Circuit’s ruling in *Roeder*, however, it held that MOIS should be treated as a foreign state itself, rather than as an “agent,” and hence could not be liable for punitive damages under the Flatow Amendment.<sup>206</sup>

There are limits to the extent victims may rely upon the TVPA or FSIA as a basis for their claims. A rare glimpse of this limit came from the Court of Appeals for the D.C. Circuit in *Price II*, in which the court, after an extensive discussion of the meaning of “torture” sufficient to abrogate immunity under the FSIA, concluded that “the facts pleaded do not reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level of torture.”<sup>207</sup> As a result, the court remanded the case and allowed the plaintiffs to amend the complaint beyond mere conclusory allegations:

202. *Id.* at 88-89.

203. *Id.* at 97-98; *see, e.g.*, *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222, 234 (D.D.C. 2002); *Surette v. Islamic Republic of Iran*, 231 F. Supp. 2d 260, 267 (D.D.C. 2002); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 44 (D.D.C. 2001); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113-14 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68 (D.D.C. 1998).

204. *Regier*, 281 F. Supp. 2d at 104.

205. *Id.* at 101.

206. *Id.* at 99 (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003)); *see also* *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105 (D.D.C. 2003).

207. 294 F.3d 82, 94 (D.C. Cir. 2002).

Plaintiffs must allege more than that they were abused. They must demonstrate in their pleadings that Libya's conduct rose to such a level of depravity and caused them such intense pain and suffering as to be properly classified as torture. Although it is far from certain, their complaint hints that they might be able to state a proper claim for torture under the FSIA. Accordingly, we will remand the case to the District Court to allow plaintiffs to attempt to amend their complaint in an effort to satisfy TVPA's stringent definition of torture.<sup>208</sup>

#### D. Common-Law Tort Claims

A state tort suit based on terrorist acts could, at least in theory, also be brought in state court. A state court may, however, be reluctant to exercise its jurisdiction over a case arising from alleged misconduct occurring outside the United States and may therefore dismiss the case based on the doctrine of *forum non conveniens*.<sup>209</sup> Other issues such as personal jurisdiction and service of process may also make state courts unable to provide remedies against international terrorists.<sup>210</sup>

The focus in this Article, then, remains on maximizing the viability of these civil claims in the federal courts. Common-law tort claims are not precluded by these federal statutory causes of action. Moreover, they are, increasingly, of critical importance to include in a complaint in federal court against terrorist organizations and the states that support them, with federal statutes as a jurisdictional foundation. Possible common-law claims include, but are not limited to, negligent and intentional infliction of emotional distress, battery, assault, wrongful death, survival, false imprisonment, loss of consortium, and solatium. This list is not exhaustive, and each plaintiff should explore the full range of available causes of action that may be applicable. In addition, great potential exists to make use of the general principles of "civil conspiracy" and "aiding and abetting" a tort, set forth in cases such as *Halberstam v. Welch*, as a

208. *Id.* at 91-95.

209. The doctrine of *forum non conveniens* is a rule of U.S. law, which states that when a case is properly heard in more than one court, it should be heard by the one that is most convenient and has the closer connection to the cause of action that led to the case. For more on this doctrine, see RICHARD SCHAFFER ET AL., *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 87-90 (6th ed. 2005).

210. For instance, some states' long-arm statutes, like New York's, do not extend jurisdiction to its constitutional limits. Additional problems may include choice of law, proving causation, establishing a cause of action for supporting as opposed to engaging in terrorism, opposing a *forum non conveniens* motion, and validly serving process on unincorporated organizations. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 n.6, 52-53 (2d Cir. 1991); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1980) (*forum non conveniens*).

way to impose liability on the “aiders and abettors” of international terrorism.<sup>211</sup>

In *Kilburn*, the court specifically addressed this issue and cited other cases establishing that a plaintiff bringing suit under § 1605(a)(7) may base his claim on conventional common-law torts such as assault, battery, and intentional infliction of emotional distress.<sup>212</sup> Neither § 1605(a)(7) nor the Flatow Amendment undermines the viability of existing federal and state common-law claims once sovereign immunity is waived.<sup>213</sup> The Flatow Amendment created a new *statutory* cause of action for certain victims of international terrorism, but it did not overrule the old common-law claims.<sup>214</sup> Indeed, none of the cases dealing with the Flatow Amendment or its corresponding legislative history suggests that Congress intended the Flatow Amendment to provide the *exclusive* cause of action for acts of state-sponsored terrorism.<sup>215</sup> The court concluded that “[t]he plaintiff’s common-law claims must therefore co-exist alongside the federal statutory cause of action granted under the Flatow Amendment.”<sup>216</sup>

The *Kilburn* court further discussed the type of common-law claims that would be allowed. Judge Urbina noted that the D.C. Circuit recently cautioned district courts about the use of “federal common law” in FSIA cases.<sup>217</sup> Because the FSIA provides that “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,” it in effect

211. See *Halberstam v. Welch*, 705 F.2d 472, 477, 478, 489 (D.C. Cir. 1983) (noting for harm resulting to a third person from the tortious conduct of another, one may be subject to liability; aiding-abetting focuses on whether a defendant knowingly gave “substantial assistance” to someone who performed wrongful conduct; there is no reason to believe tort theory cannot also be adapted to new uses); *Boim v. Quaranic Literary Inst.*, 127 F. Supp. 2d 1002, 1018 (N.D. Ill. 2001) (holding that plaintiffs may bring a cause of action under § 2333 that is based on a theory that defendants aided and abetted international terrorism); see also Peter M. Mansfield, *Terrorism and a Civil Cause of Action: Boim, Ungar, and Joint Torts*, 3 CHI.-KENT J. INT’L & COMP. L. 119 (2003) (outlining elements of a cause of action for aiding and abetting a tort under sections 2333 and 1607).

212. *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 35-36 (D.D.C. 2003) (citing *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286 (D.D.C. 2003); *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003)); see also *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 87 (D.D.C. 2002); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33-37 (D.D.C. 2001) (Lamberth, J.); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

213. *Kilburn*, 277 F. Supp. 2d at 36.

214. *Id.*

215. *Id.*; see 28 U.S.C. § 1605(a)(7) (1996); see, e.g., *Price III*, 274 F. Supp. 2d 20 (D.D.C. 2003) (Lamberth, J.); *Cronin v. Islamic Republic of Iran*, 238 F. Supp. 2d 222 (D.D.C. 2002); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

216. *Kilburn*, 277 F. Supp. 2d at 36.

217. *Id.*

instructs the court "to find the relevant law, not to make it."<sup>218</sup> The D.C. Circuit reasoned that the court could look to the common law of the states to determine the meaning of a cause of action, one example being a claim for intentional infliction of emotional distress.<sup>219</sup> Judge Urbina concluded that "the D.C. Circuit is cautioning courts not to create new federal common-law claims for use against foreign sovereigns while at the same time condoning the use of pre-existing common-law claims."<sup>220</sup> In *Kilburn*, the plaintiff's complaint named the preexisting common-law claims of wrongful death, battery, assault, false imprisonment, slave trafficking, and intentional infliction of emotional distress. Accordingly, based on the D.C. Circuit's recent reasoning, the court allowed the plaintiff's claims against the defendants.<sup>221</sup>

The court in *Regier v. Islamic Republic of Iran* stressed that

[e]ven if the Flatow Amendment were held not to create a federal statutory cause of action against state sponsors of terrorism, the Regiers would nevertheless have valid claims against Iran and MOIS under state and/or federal common law. Courts have regularly concluded that common law claims for, e.g., wrongful death, survival, assault, battery, false imprisonment, and kidnapping may be asserted against state sponsors of terrorism under the FSIA.<sup>222</sup>

Here, the plaintiffs alleged battery, assault, false imprisonment, intentional infliction of emotional distress, economic damages, and loss of consortium and solatium, and the court found that the evidence adduced at the hearing clearly supported the defendants' liability on these claims.<sup>223</sup>

Another example of the use of common-law claims in conjunction with § 1605 of the FSIA is illustrated by *Anderson v. Islamic Republic of Iran*.<sup>224</sup> Plaintiff Terry Anderson, a U.S. journalist working in Beirut, Lebanon, had been held hostage by Hezbollah under execrable conditions for nearly seven years.<sup>225</sup> Terry Anderson, his wife, Madeleine Bassil (a Lebanese citizen, a fact which posed no problem for the suit because the victim was a U.S. citizen), and his daughter, Sulome (born while he was in captivity), sued Iran and the MOIS for

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* (citing *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003), and quoting 28 U.S.C. § 1606).

222. 281 F. Supp. 2d 87, 100 (D.D.C. 2003) (citing *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 32-33 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001); *Elahi v. The Islamic Republic of Iran*, 124 F. Supp. 2d 97, 109-13 (D.D.C. 2000); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 27-32 (D.D.C. 1998)).

223. *Id.* at 100.

224. 90 F. Supp. 2d 107 (D.D.C. 2000).

225. *Id.* at 108-09.

damages based on common-law torts of battery, assault, false imprisonment, intentional infliction of emotional distress, and loss of consortium, each of which was found by the court to be authorized under § 1605(a)(7) of the FSIA.<sup>226</sup> Specifically, Anderson himself was awarded compensatory damages for battery, assault, false imprisonment, intentional infliction of emotional distress, and loss of consortium.<sup>227</sup> His wife was compensated for emotional distress and loss of consortium and solatium, and their daughter was compensated for loss of solatium.<sup>228</sup> The court considered punitive damages, but determined that it could not include a punitive damages award against Iran since the FSIA expressly exempts a foreign state from such liability.<sup>229</sup> An “agency or instrumentality” of a foreign state may, however, be liable for punitive damages. The term “agency or instrumentality” includes a separate legal person or entity that is “an organ of a foreign state” or is owned by it.<sup>230</sup> Accordingly, in addition to awarding compensatory damages in the amount of \$41,240,000 against Iran and MOIS, Judge Thomas Penfield Jackson awarded punitive damages of \$300,000,000 against MOIS, which he calculated to be three times its maximum annual budget for terrorist activities.<sup>231</sup> This punitive damages award against MOIS predated the D.C. Circuit’s decision in *Roeder*, a case in which the court found MOIS to be indistinguishable from the Iranian state, a holding since relied upon by the district courts to deny punitive damages against MOIS.<sup>232</sup>

A similar case, *Peterson v. Islamic Republic of Iran*, arose out of the Marine barracks bombing in Beirut, Lebanon on October 23, 1983. The plaintiffs were family members of the 241 deceased servicemen and injured survivors of the attack; they sued under the FSIA § 1605(a)(7) for wrongful death and common-law claims for battery, assault, and intentional infliction of emotional distress.<sup>233</sup> After the defendants failed to appear, the court conducted the evidentiary hearing required under FSIA § 1608(e) and applied the “clear and convincing” standard of proof.<sup>234</sup> There were no additional procedures or analyses specific to the common-law claims. The court found that

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226. *Id.* at 113.

227. *Id.* at 114.

228. *Id.* at 113.

229. *Id.* at 114 (citing 28 U.S.C. § 1606, and *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 69 (D.D.C. 1998)).

230. *Id.* at 114 (citing 28 U.S.C. § 1603(b)).

231. *Id.*

232. *See, e.g., Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 102 (D.D.C. 2003) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003)).

233. 264 F. Supp. 2d 46, 47-48 (D.D.C. 2003)).

234. *Id.* at 48.



[i]t is clear that the formation and emergence of Hezbollah as a major terrorist organization is due to the government of Iran. Hezbollah presently receives extensive financial and military technical support from Iran, which funds and supports terrorist activities. The primary agency through which the Iranian government both established and exercised operational control over Hezbollah was the Iranian Ministry of Information and Security.<sup>235</sup>

Concluding that the attack by the suicide bomber was an act of state-sponsored terrorism, the court entered a default judgment against the defendants, ordered that all damages claims in these actions be submitted to Special Masters, and decided to “take under advisement the issue of imposing an amount in punitive damages against the defendants, pending the entry of judgment as to the amounts of compensatory damages.”<sup>236</sup>

#### E. *A Potpourri of Claims: The Recent 9/11 Case*

The case of *Burnett v. Al Baraka Investment and Development Corporation*,<sup>237</sup> currently pending in the District of Columbia, illustrates an application of the aggregate model. In *Burnett*, a large civil action arising from the 9/11 World Trade Center tragedy, more than two thousand victims and their families seek to hold accountable the persons and entities that funded and supported the international terrorist organization known as al Qaeda, which is now generally believed to have carried out the attacks.<sup>238</sup> With the goal of ending the funding of terrorism, the plaintiffs seek \$100 trillion against banks, charitable organizations, and companies (nearly 200 entities or persons in all) for allegedly supporting terrorism directly or indirectly, providing material support, and aiding and abetting or conspiring with terrorists who perpetrated the attacks.<sup>239</sup> The plaintiffs have brought their suit under several theories: the statutory support of the Foreign Sovereign Immunities Act § 1605(a)(7), the Antiterrorism Act § 2333, the Torture Victim Protection Act, and the Alien Tort Claim Act—and the federal

235. *Id.* at 53.

236. *Id.* at 59-65.

237. No. 02-1616(JR) (D.D.C. filed Aug. 15, 2002). The original complaint in this action was filed on August 15, 2002, and the third amended complaint was filed in the U.S. District Court for the District of Columbia on November 22, 2002.

238. Since the lawsuit was filed, the number of plaintiffs has risen to more than four thousand, and more individuals continue to join the action. See *Burnett et al. v. Al Baraka Investment et al.: A Case Overview*, available at <http://www.aslaw.com/911suit/overview%20WEB.doc> (last visited Aug. 2, 2004) [hereinafter *A Case Overview*]; William Oliver & Anthony Sellitto, *My Involvement in Burnett v. Al Baraka: How and Why*, available at <http://www.aslaw.com/911suit/HOWANDWHY.htm> (last visited Aug. 2, 2004).

239. See *Burnett*, No. 02-1616 (JR)(D.D.C. filed Aug. 15, 2002); *A Case Overview*, *supra* note 238; *How and Why*, *supra* note 238.

common-law tort claims of wrongful death, negligence, survival, negligent and intentional infliction of emotional distress, conspiracy, aiding and abetting, and even the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§1962 (a) and (d).<sup>240</sup> It should be noted that, in addition to compensatory damages, the plaintiffs request punitive damages against all the defendants, but for the punitive damages under 28 U.S.C. § 1606, they request an award against all defendants except the Republic of Sudan.<sup>241</sup>

In a recent development, nineteen of the defendants sought dismissal. In *Burnett I*,<sup>242</sup> the court addressed four of the motions, dismissing some of the common-law tort claims against one of the organizations, but upholding the complaint as stating a cause of action on plaintiffs' federal statutory claims. Specifically, the court denied these defendants' motions to dismiss most of the claims, finding that the complaint stated a cause of action for the ATA, ATCA, and common-law intentional tort claims. It did, however, grant the motion to dismiss the negligent and intentional infliction of emotional distress and RICO claims against defendant Al-Haramain Islamic Foundation (AHIF), and it granted the motion to dismiss the RICO claim for defendants Al Rajhi Banking and Investment and Soliman J. Khudeira.<sup>243</sup> Judge Robertson set forth an interesting discussion of the foundation for many of these claims—for instance, laying out the elements of intentional infliction of emotional distress and noting that “[i]f the defendants’ conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person which is not present, no essential reason of logic or policy prevents liability.”<sup>244</sup> He stated that the funding of terrorist activities is actionable under the ATA, and “[l]iability can be established by proving violations of the criminal counterparts of [18 U.S.C. §§ 2333, 2339A, or 2339B], or . . . by resort to traditional aiding and abetting theory.”<sup>245</sup>

In discussing the theories of conspiracy and aiding and abetting raised, the court supported the potential application of the standards enunciated in *Halberstam v. Welch*: “(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the

240. *Burnett*, No. 02-1616 (JR).

241. *Id.*

242. See *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003) [hereinafter *Burnett I*] (dismissing some of the common-law tort claims against one of the organizations but upholding the complaint as stating a cause of action on plaintiffs' federal statutory claims).

243. *Id.* at 111.

244. *Id.* at 108 (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 307 (2000)).

245. *Id.* at 106-07 (citing *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1011, 1021 (7th Cir. 2002)).

assistance; (3) the defendant must knowingly and substantially assist the principal violation.”<sup>246</sup> In addition, “a ‘joint venturer’s’ liability extends to all reasonably foreseeable acts done in connection with the tortious act that the person assisted.”<sup>247</sup> Judge Robertson also noted that liability for aiding and abetting or for conspiracy must be tied to a substantive cause of action—in defendant AHIF’s case, the ATA, the ATCA, and a number of common-law torts.<sup>248</sup> Given the adequacy of the plaintiffs’ allegations that the AHIF aided, abetted, and conspired with the 9/11 hijackers, the plaintiffs had also stated common-law claims for wrongful death, survival, and intentional infliction of emotional distress.<sup>249</sup>

Turning to the ATCA, the court noted that the question of whether the ATCA creates a separate cause of action or merely confers subject matter jurisdiction is the subject of wide, and current, debate, and it remains unsettled in the D.C. Circuit.<sup>250</sup> But, Judge Robertson wrote, “[t]he great majority of the federal courts outside this Circuit that have addressed the issue have held that the ATCA does create a cause of action[,]” and he decided to adopt that position.<sup>251</sup> Judge Robertson then outlined the elements of a claim thereunder: “(1) the plaintiff is an alien; (2) the claim is for a tort; and (3) the tort is committed in violation of the law of nations or a treaty of the United States.”<sup>252</sup> Finding the first two elements easily met in this case, the court concluded that, concerning the third element, “aircraft hijacking is generally recognized as a violation of

246. *Id.* at 104 (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

247. *Id.* at 105 (citing *Halberstam*, 705 F.2d at 484).

248. *Id.*

249. *Id.* at 107.

250. *Id.* at 99 (citing *Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph, J., concurring); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003)). The *Burnett I* court discussed the case of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), affirming the dismissal for lack of subject matter jurisdiction of an ATCA action brought against Arab and Palestinian organizations by victims of an armed attack on a civilian bus in Israel. *Burnett I*, 274 F. Supp. 2d at 99. In *Tel-Oren*,

Judge Edwards found that, while the ATCA created a cause of action, it would not support an award of damages for torture committed by non-state actors; Judge Bork thought that the ATCA did not grant a cause of action in the first place; and Judge Robb concluded that the action presented a nonjusticiable political question.

*Id.* (citing *Tel-Oren*, 726 F.2d at 791, 795, 799, 823). In *Burnett I*, Judge Robertson adopted the position of Judge Edwards. *Id.*

251. *Burnett I*, 274 F. Supp. 2d at 99 (citing *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993)).

252. *Id.* at 99-100 (citations omitted).

international law of the type that gives rise to individual liability.”<sup>253</sup> Most significant, the court held that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law: “[a]lthough no defendant in this case is sued as a direct perpetrator of a tort committed in violation of the law of nations, proof that they were accomplices, aiders and abettors, or co-conspirators would support a finding of liability under the ATCA.”<sup>254</sup>

The court did, however, preclude the use of RICO claims for these circumstances, concluding that “[t]he overwhelming weight of authority discussing the RICO standing issue holds that the ‘business or property’ language of §1964(c) does not encompass personal injuries.”<sup>255</sup> The court also dismissed a claim that amounted to negligence per se (the plaintiffs had argued that the AHIF’s “failure to identify or track charitable funds being used to promote and finance terrorist activities constitutes a breach of its duty of care and obligations”).<sup>256</sup> The plaintiffs’ failure to identify any applicable laws and regulations, presumably governing charities, doomed this argument.<sup>257</sup> Last, the court dismissed claims against the defendant bank Al Rajhi, holding that “[t]he act of providing material support to terrorists, or ‘funneling’ money through banks for terrorists is unlawful and actionable,” but finding that Al Rajhi was alleged only to be the funnel.<sup>258</sup> “Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service.”<sup>259</sup> Moreover, although the complaint included claims against members of the al-Rajhi family who are bank officers, it made “no allegations that would support an inference that any al-Rajhi family member was acting within the scope of his bank employment when he allegedly provided support to al Qaeda, as would be necessary to

253. *Id.* at 100.

254. *Id.*

255. *Id.* at 101.

256. *Id.* at 109.

257. *Id.*; see also *Riggs v. Schappell*, 939 F. Supp. 321, 332 n.15 (D.N.J. 1996) (“Plaintiffs argue that a duty may be imposed . . . on the basis of a violation of industry custom or practice. However, as plaintiffs have directed this court to no industry custom or practice defendants . . . are alleged to have violated, this argument must be rejected.”).

258. *Burnett I*, 274 F. Supp. 2d at 109.

259. *Id.*; see, e.g., *Tasso v. Platinum Guild Int’l*, 1997 U.S. Dist. LEXIS 252, at \*6 (S.D.N.Y. Jan. 16, 1997) (dismissing claims against corporate defendant because of plaintiff’s failure to plead facts from which an inference could be drawn that the individual defendant’s actions were in furtherance of employer’s business, which is part of the scope of employment test).

impose vicarious liability on the bank for the acts of its officers and employees.”<sup>260</sup>

In a subsequent decision in the *Burnett* case (*Burnett II*),<sup>261</sup> a motion to dismiss by defendants Prince Turki Al-Faisal bin Abdulaziz Al-Saud and Prince Sultan bin Abdulaziz Al-Saud, the court dismissed the claims against them for acts allegedly done in their official capacities for lack of subject matter jurisdiction. The plaintiffs’ reliance upon the “commercial activities” exception, § 1605(a)(2) of the FSIA, and the “noncommercial tort” exception, § 1605(a)(5), was rejected by the court because the official acts that the plaintiffs ascribed to the Princes were squarely covered by the “discretionary function” language.<sup>262</sup> The issue was whether the particular actions that the foreign state performs—whatever the motive behind them—are the type of actions by which a private party engages in trade and traffic or commerce. The “act of contributing to a foundation is not within our ordinary understanding of ‘trade and traffic or commerce,’ nor, apparently, was it within the contemplation of the Congress that enacted the FSIA in 1976”:

By contrast, a foreign state’s mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. . . .<sup>263</sup>

One might argue that funding a terrorist group, although not commercial, would be sponsoring terrorism. A claim, however, could not be brought against the Princes under the “state-sponsored terrorism” exception, 28 U.S.C. § 1605(a)(7), because only a defendant that has been specifically designated by the State Department as a “state sponsor of terrorism” is subject to the loss of its sovereign immunity. Because the Kingdom of Saudi Arabia had not been designated a “state sponsor of terrorism” by September 11, 2001, this provision was inapplicable.<sup>264</sup>

In *Burnett II*, the court also dismissed the claims against Prince Sultan for acts allegedly done in his personal capacity for lack of personal jurisdiction.<sup>265</sup> The court found that “Prince Sultan does not enjoy foreign sovereign immunity from claims that arise from contributions he allegedly made to the IIRO, the WML, the WAMY, and Al-Haramain in his personal capacity. His motion to dismiss

260. *Burnett I*, 274 F. Supp. 2d at 109 n.18.

261. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003) [hereinafter *Burnett II*].

262. *Id.* at 16-20.

263. *Id.* at 18 (citing H.R. REP. NO. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6615).

264. *Id.* at 17 n.3 (citing *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 329 (D.C. Cir. 2003)).

265. *Id.* at 21.

those claims accordingly asserts, not lack of subject matter jurisdiction—which is conferred by the ATA for the claims of United States nationals and by the ATCA for the claims of foreign nationals—but lack of personal jurisdiction.”<sup>266</sup> The plaintiffs had not indicated how official visits, speaking engagements, or an American education might have been connected with their cause of action so as to satisfy the “minimum contacts” necessary for personal jurisdiction. The plaintiffs’ principal argument, instead, was basically that Prince Sultan “brought himself within the jurisdiction of this court, or any American court that might entertain an ATA action against him, when he ‘purposefully directed’ his allegedly tortious activities at residents of the United States.”<sup>267</sup> The core of the plaintiffs’ allegations against Prince Sultan in his personal capacity was that he personally donated money to several foundations that funded terrorist organizations, including al Qaeda, and that “anyone whose actions have led to terrorist activity in the United States should reasonably anticipate that he might be subject to suit here whether or not he himself has targeted the United States.”<sup>268</sup> The court found that the complaint did not allege that Prince Sultan’s actions were “expressly aimed” or “purposefully directed” at the United States, which would be necessary to satisfy the standard:

The Court has consistently held that [foreseeability of causing injury in another State] is not a “sufficient benchmark” for exercising personal jurisdiction. Instead, “the foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” . . . 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.” This “purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts, or of the “unilateral activity of another party or third person.”<sup>269</sup>

Thus, unlike some of the other cases previously cited that treated personal jurisdiction more expansively,<sup>270</sup> Judge Robinson applied a more restrictive, traditional due process analysis. Finding nothing

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266. *Id.*

267. *Id.* at 22.

268. *Id.* at 22-23.

269. *Id.* at 23 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)).

270. For a discussion of the restrictive, traditional due process analysis applied in other ATA cases, such as *Biton* and *Ungar*, as contrasted with the more expansive view evidenced in the AEDPA cases, see *supra* notes 34-45, 53-60 and accompanying text. See, e.g., *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003); *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d (D.D.C. 2000).

like that sort of purposeful availment to be alleged here, he dismissed the claims against this defendant for lack of personal jurisdiction.<sup>271</sup>

As the *Burnett* case continues to proceed against the majority of the defendants through a vast array of claims,<sup>272</sup> new judicial interpretations of the law in this area will undoubtedly be made, adding to the body of cases discussed above. The *Burnett* case, with its combination approach, will serve as a model to future litigants seeking to eradicate the funding of terrorism.

### III. ENFORCEABILITY OF JUDGMENTS

Although the main focus of this Article is to present and analyze the various causes of action that may be brought against terrorist organizations and the individuals, officials, and states that enable them, no discussion in this area would be complete without addressing the practicalities of proceeding once such a judgment has been obtained. Accordingly, this Article will now explore the obstacles to enforcement, such as the general tendency of international courts to disfavor punitive damages, and the political considerations that have at times led the President or State Department to override the release of assets to satisfy these large damage awards. In response to the difficulties encountered by these plaintiffs in enforcing their judgments, Congress has aided the collection efforts with legislation, such as the Victims of Trafficking and Violence Protection Act of 2000 and the Terrorism Risk Insurance Act of 2002, which allow the satisfaction of these judgments with the assets of terrorist groups already held in abeyance in the United States, and which support plaintiffs' efforts to locate and confiscate additional property.

#### A. General Principles of International Law

One impediment to the enforcement of the judgments against terrorist organizations and the parties that support them can be found in the common trends of international law. As a general matter, judgments of U.S. courts will often be enforced by foreign

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271. *Burnett II*, 292 F. Supp. 2d at 23.

272. On December 9, 2003, the Multidistrict Litigation Panel centralized six then-pending 9/11-related cases and transferred them to the District Court for the Southern District of New York "for coordinated or consolidated pretrial proceedings." In his decision on a subsequent set of similar motions to dismiss by other defendants, Judge Richard Conway Casey noted that he would apply the law of the Second Circuit to this case, not the law of the transferee court from the D.C. Circuit. See *Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks)*, 2005 U.S. Dist. LEXIS 640 (S.D.N.Y. Jan. 18, 2005) (dismissing some of the claims against several of the defendants for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim).

courts on the basis of reciprocity and comity in countries where the losing party or its property can be found. Foreign courts, however, sometimes refuse to enforce judgments of U.S. courts if they view the amount of money awarded to be excessive, if there are punitive or treble damages, or if they think the court extended its net of jurisdiction too widely.<sup>273</sup> In general commercial matters, uniform legislation and treaties, such as the Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters (hereinafter, Lugano Convention),<sup>274</sup> have been negotiated and adopted to facilitate uniformity and certainty in the international business community. Even the Lugano Convention, however, which by its terms applies only to judgments of the contracting states (not the United States), provides for situations in which a judgment shall not be recognized. For example, a judgment will not be recognized when “such recognition is contrary to public policy in the State in which recognition is sought”; “where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings . . .”; or “if the judgement is irreconcilable with a judgement given in a dispute between the same parties in the State in which recognition is sought.”<sup>275</sup> In this way, the Lugano Convention simply codifies many of these general principles and trends in the international forum. The important policy implications in this context are no less compelling.

Ironically, the absence of punitive damages in some of the cases discussed above and, on occasion, the plaintiffs’ failure to obtain treble damages by bringing certain of these defendants under the scope of the ATA may assist efforts to enforce U.S. judgments overseas or at least help to avoid some of the enforceability problems generally incurred when punitive or treble damages are involved. Put another way, the plaintiffs might not have collected upon the punitive and treble damage awards in those foreign courts in any event. But because the abrogation of sovereign immunity under the AEDPA does not constitute voluntary waiver or consent to jurisdiction by these

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273. See generally SCHAFFER ET AL., *supra* note 209, at 96-97 (addressing the enforcement of foreign judgments).

274. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters Done at Lugano on 16 September 1988, 1988 O.J. (C 189), available at <http://www.jus.uio.no/lm/ec.efta.jurisdiction.enforcement.judgments.civil.commercial.matters.lugano.convention.1998/doc> (last visited Feb. 6, 2005) [hereinafter *Lugano Convention*]. In Lugano, Italy, eighteen European countries adopted the “Lugano Convention.” The “Contracting States” are Belgium, Denmark, Federal Republic of Germany, Greece, France, Ireland, Iceland, Italy, Luxembourg, the Netherlands, Norway, Austria, Portugal, Switzerland, Finland, Spain, Sweden, and the United Kingdom. In addition to providing recognition generally for the judgments of the contracting states without requiring any special procedures, the Lugano Convention sets forth details for where the application should be submitted for each of the contracting states.

275. *Id.* at art. 27.



states—indeed many of them refused to appear in the action, and the judgment was obtained by default—it is to be expected that the foreign state will not honor or recognize the judgment. Other countries may also decline to enforce these judgments, since comity between nations does not require recognition of a judgment that is considered void because of the terrorist state’s public policy, sovereign immunity, or in cases in which the only contact with the forum is the killing of a U.S. national abroad and is thus deemed tenuous.<sup>276</sup>

Of course, these plaintiffs are often faced with the difficulty of locating these assets abroad from the outset. For these reasons, the victims and their families pursuing civil actions in the war on terrorism have most often sought to enforce their judgments, once obtained, in U.S. courts by investigating and attaching assets tied to the terrorist defendants—or through frozen assets as permitted by Congress or the executive branch.

### B. *Executive Orders and Resistance*

Obstacles have come at times from the executive branch, which generally opposes litigation that crosses the country’s borders because of concern that such lawsuits and the enforcement of these multimillion-dollar judgments undermine its control over foreign policy and may hamper its fight against terrorism. “The current litigation-based system of compensation is inequitable, unpredictable, occasionally costly to the U.S. taxpayer and damaging to foreign policy and national security goals of this country,” William H. Taft IV, the State Department’s legal adviser, said in his testimony before the Senate in July 2003.<sup>277</sup> Over the years, the Administration has voiced its opposition to the Alien Torts Claims Act of 1789, the Torture Victims Protection Act of 1992, and the Flatow Amendment to the Foreign Sovereign Immunities Act of 1996. Many legal scholars believe the Administration’s view is an overreaction, particularly because U.S. courts hear countless international cases involving

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276. See generally W. Michael Reisman & Monica Hakimi, *2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561 (2003) (explaining that, because public international law does not conform to the legislative and judicial practices in the United States and does not provide for the standards of compensation applied in the U.S. courts, taxpayers through the U.S. Treasury are likely to pay for the human rights violations of state sponsors of terrorism); Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496 (2002) (proposing that the best method for resolving the outstanding judgments under the FSIA is to terminate them and resubmit the claims to ad hoc international tribunals, because the punitive damage awards entered under the terrorism exception make the prospect of a substantial taking claim more likely and the tribunals will be created under conditions acceptable to the defendant states).

277. Adam Liptak, *U.S. Courts’ Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, at 1 (quoting William H. Taft IV).

commercial disputes and should be able to adjudicate human rights and other suits of concern to our courts; but separation of powers concerns do remain.<sup>278</sup>

At times this concern has taken the form of an amicus brief filed by the Administration. In *Roeder v. Islamic Republic of Iran*,<sup>279</sup> the executive branch successfully opposed the use of the FSIA to compensate victims in the 1979 Iranian hostage crisis, citing the Algiers Accords signed in negotiating their release. Despite efforts by Congress to surmount this objection through intervening (but vague) legislation, the court was compelled to vacate its initial default judgment in favor of the plaintiffs. Judge Sullivan lamented that “[t]here are two branches of government that are empowered to abrogate and rescind the Algiers Accords, and the judiciary is not one of them. . . . [T]his Court has no choice but to grant the government’s motions and dismiss the case.”<sup>280</sup>

The law in this area reflects awareness that sensitive foreign policy judgments remain the exclusive domain of the executive branch. Thus, the AEDPA gives the State Department the power to decide which states may be sued. Likewise, our courts have traditionally recognized that certain conduct by foreign states ought not to be judicially cognizable because they are “acts of state.” In a similar fashion, legislative enactments and judicial precedent have maintained that not only foreign states but also certain foreign officials should be immune from suit for their official conduct. All three branches of government should act together in supporting these efforts against terrorism, recognizing that the war must proceed on several fronts, civil as well as military and political. Despite the underlying tension inherent in separation of powers issues, it is in the best interests of all to keep this common goal in mind.

278. *Id.*; see Molora Vadnais, Comment, *The Terrorism Exception to the Foreign Sovereign Immunities Act: Forward Leaning Legislation or Just Bad Law?*, 5 UCLA J. INT’L L. & FOREIGN AFF. 199 (2000) (evaluating the potential costs of terrorism and offering modifications to the exception intended to minimize the effect of the exception on U.S. interests while continuing to provide plaintiffs with a forum); Sean P. Vitrano, 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) (examining the controversy surrounding enforcement of judgments under the antiterrorism amendments to the FSIA, including the position of the executive branch and the effect of the government’s intervention in litigation filed under the antiterrorism amendments). See generally Jeewon Kim, Note and Comment, *Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act*, 22 BERKELEY J. INT’L L. 513 (2004) (arguing that in shifting the burden of deciding sovereign immunity from the executive branch to the judicial branch, Congress has exacerbated the struggle between the legislative, executive, and the judicial branches, which leaves successful plaintiffs unable to collect, deprives the executive of its foreign policy prerogatives, and encourages legislative interference in judicial determination of pending litigation).

279. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140 (D.D.C. 2002).

280. *Id.* at 145-46.

The executive branch has tremendous authority to seize and retain assets of these organizations, as well as to release them in certain circumstances. In addition to modifying jurisdiction through the FSIA, provisions of the AEDPA set the procedure for the Secretary of State's designation of foreign terrorist organizations, proscribe providing such organizations with "material support," and institute criminal penalties for violators.<sup>281</sup> Moreover, the AEDPA establishes civil penalties for banks and other financial institutions that fail to freeze and report the assets of such organizations.<sup>282</sup>

Similarly, the International Emergency Economic Powers Act (IEEPA), in the case of "unusual and extraordinary" foreign threats "to the national security, foreign policy, or economy of the United States," authorizes the President, among other things, to "regulate . . . or prohibit . . . transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States. . . ."<sup>283</sup> The statute allows the President wide discretion in controlling international financial transactions, including the transfer of monies, goods, and securities to and from the United States. It allows the President to seize foreign assets held in U.S. banks or foreign branches of U.S. banks. Courts have consistently upheld these broad powers.<sup>284</sup> Presidents have used the IEEPA to impose economic sanctions against particular countries in response to political situations and, most recently, as a major weapon

281. 18 U.S.C. § 2339(b) (2003) (stating that violations are punishable by imprisonment for not more than ten years, a fine of not more than \$250,000, or both).

282. 18 U.S.C. § 2339B. Financial institutions that fail to report or comply with a freeze order are subject to civil penalties of up to the greater of twice the amount involved or \$50,000. 18 U.S.C. § 2339B. The proscriptions apply both in the United States and to Americans and U.S. institutions overseas. 18 U.S.C. § 2339B.

283. International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701, 1702(a)(1) (2003). The controversy surrounding the broad powers granted to the government under the USA PATRIOT Act of 2001, and its expansion of the seizure of assets provisions under IEEPA, will not be discussed here. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272, as amended (for complete classification of this Act to the Code, see Short Title of 2001 Amendment note set out under section 1 of Title 18, Crimes and Criminal Procedure, and Tables). See generally SCHAFFER ET AL., *supra* note 209, at 263-66. This Article instead addresses the merits of allowing the victims access to the funds already frozen by the government.

284. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (affirming the District Court's dismissal of a challenge by HLF to its designation as a "Specially Designated Global Terrorist" pursuant to an Executive Order issued under the IEEPA, accompanied by an order blocking all of the organization's assets); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 753 (7th Cir. 2002) ("[T]he statute is designed to give the President means to control assets that could be used by enemy aliens."); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701 (D.C. Cir. 1994) (providing that the Treasury "may choose and apply its own definition of property interests, subject to deferential judicial review").

in the war on terrorism by using the law to seize the assets of terrorist groups and thereby cut off their funding.

In 1995, the President issued Executive Order 12947 pursuant to the IEEPA.<sup>285</sup> That order designated certain terrorist organizations, including Hamas, as “Specially Designated Terrorists,” or SDTs, and blocked all their property and interests in property. The order also allowed for additional designations if an organization or person is found to be “owned or controlled by, or to act for or on behalf of,” an SDT. The President used this order to prohibit the contribution, either in the United States or by U.S. citizens outside the country, of funds, goods or services to or for Jihad, Hezbollah, the Popular Front for the Liberation of Palestine (PFLP), and several other groups and individuals. Violations are punishable by imprisonment of not more than ten years.<sup>286</sup>

In 2001, as part of his response to the 9/11 attacks, President Bush issued Executive Order 13224, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, pursuant to the IEEP.<sup>287</sup> Similar to Order 12947, Order 13224 designated specified terrorist organizations as “Specially Designated Global Terrorists,” or SDGTs, and blocked all their property and interests in property subject to the jurisdiction of the United States. That order also allowed for additional SDGTs to be designated if organizations or persons are found to “act for or on behalf of” or are “owned or controlled by” designated terrorists or if they “assist in, sponsor, or provide . . . support for” or are “otherwise associated” with them.<sup>288</sup> For example, on November 2, Hamas and twenty-one other foreign terrorist organizations not related to al Qaeda were added to the executive order. On December 4, 2001, pursuant to this order, the Bush Administration froze the assets of the Holy Land Foundation for Relief and Development, Beit Al-Mal Holdings, and Al-Aqsa Islamic Bank. President Bush said all three are Hamas-controlled organizations that finance terror. At that time, the United States had designated 153 individuals, organizations, and financial supporters of terrorism worldwide pursuant to Executive Order 13224. Before that time, the United States had blocked more than \$27 million in assets of the Taliban and al Qaeda, and other nations have blocked at least

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285. 50 U.S.C. § 1701 Executive Orders; Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

286. 50 U.S.C. § 1705.

287. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), *available at* <http://news.findlaw.com/hdocs/docs/dotreass/terroristsanctions110701.html> (discussing Executive Order 13224 blocking Terrorist Property and summarizing the Terrorism Sanctions Regulations, Terrorism List Governments Sanctions Regulations, and Foreign Terrorist Organizations Sanctions Regulations).

288. Exec. Order No. 13,224, 66 Fed. Reg. at 49,079.

\$33 million. The Department of State reports that 139 other nations have blocking orders in force.<sup>289</sup>

The designated terrorist states whose assets have been blocked by the United States include Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria; a recent report indicates that these assets now total \$3.1 billion.<sup>290</sup> In addition, since the 9/11 attacks, the United States has frozen \$112 million in terrorist-related assets worldwide, with \$34 million frozen in the United States. Of the \$112 million, \$38.5 million is related to the Taliban, \$44.5 million is related to al Qaeda, and about \$29 million is related to other terrorist groups. The United States currently holds \$1.1 million of al Qaeda assets in the United States, which potentially can be used to compensate victims of the 9/11 attacks.<sup>291</sup>

Now that billions of dollars in assets have been blocked, the key is to allow access to these assets when, as here, the circumstances warrant it. Because frozen assets provide a powerful bargaining chip for the executive branch—for example, through the government's releasing of assets gradually to reward countries for behavior the United States favors—one must recognize that allowing private plaintiffs to enforce judgments by tapping into the frozen assets located in the United States may weaken the executive branch's negotiating position. On the other hand, doing so may send a strong, unified message to countries that sponsor terrorism.

*C. Collecting the Frozen Assets: The Victims of Trafficking and Violence Protection Act of 2000 and the Terrorism Risk Insurance Act of 2002*

The initial attempts of Flatow and others to collect their judgments were unsuccessful.<sup>292</sup> Two years after *Flatow*, the presiding judge commented that

289. Press Release, U.S. Department of State, Shutting Down Terrorist Financial Networks (Dec. 4, 2001), available at <http://usinfo.state.gov/topical/pol/terror/01120409.htm>; see also *U.S. Targets Hamas Funding*, ASSOCIATED PRESS, Aug. 22, 2003 (explaining that the Bush Administration froze the assets of six senior Hamas leaders and five European-based organizations it says raise money for the radical Palestinian group, in the first effort to block Hamas' assets or funding sources outside the United States).

290. For an itemized list of the amount of these assets, see David Ackerman, *Suits Against Terrorists* (Jan. 25, 2002), at app. II, available at <http://fpc.state.gov/documents/organization/8045.pdf>.

291. Press Release, Charles E. Schumer, Schumer: Give Victims of Terrorism Access to Frozen Assets of Terrorist States (July 14, 2002), available at [http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press\\_releases/PR01088.html](http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01088.html).

292. See, e.g., *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16 (D.D.C. 1999); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18 (D.D.C. 1999) (refusing attempts by a

to this date, the Flatow plaintiffs have been unable to collect on their judgment, and the court views with considerable dismay the fact that the rule of law is being frustrated in that case. Nevertheless, the court cannot shrink from its duty to declare the applicable law in this case, and must express its conviction that ultimately this judgment will not be a mere Pyrrhic victory for the Eisenfeld and Duker families. Their courage and steadfastness in pursuing this litigation, and their efforts to do something to deter more tragic deaths and suffering of innocent Americans at the hands of these terrorists, are to be commended and admired.<sup>293</sup>

### 1. The Victims of Trafficking and Violence Protection Act of 2000

Faced with enforcement problems, the inability to attach any of the millions of dollars in Iranian assets still controlled by the U.S. government, and the slim chance of finding attachable Iranian assets elsewhere, the plaintiffs persuaded Congress to pass legislation ordering the President to release frozen funds to satisfy some of these judgments. On October 28, 2000, the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA)<sup>294</sup> was enacted, affording certain victims of terrorists' acts an opportunity to recover funds from the United States to satisfy their outstanding judgments. Clearly a product of congressional compromise and presidential opposition, the VTVPA only authorizes the Secretary of the Treasury to pay portions of eleven judgments that have been (or will be) handed down in suits against Cuba or Iran under the FSIA exception § 1605(a)(7), since it was enacted in 1996 with a cut-off date of July 27, 2000 (for the filing of the suit).<sup>295</sup> With respect to one judgment against Cuba, § 2002

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private litigant to levy funds of Iran held in the United States under the Foreign Sovereign Immunities Act's state-sponsored terrorism exception); *see also* *Alejandro v. Republic of Cuba*, 64 F. Supp. 1245 (S.D. Fla. 1999) (granting motion to quash writs of garnishment obtained by U.S. families in position of judgment against the Republic of Cuba on account of incidents of terrorism sponsored by Cuba which resulted in the deaths of family members).

293. *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000).

294. Victims of Trafficking and Violence Prevention Act ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended, in part, at 28 U.S.C. § 1610 (2002)).

295. *See* cases cited *supra* Section II.B and notes 203, 212, 222 (citing *Alejandro*, *Flatow*, *Cicippio*, *Anderson*, *Eisenfeld*, *Higgins*, *Sutherland*, and *Jenco*); *see also* *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322 (D.D.C. 2001) (awarding a judgment to widow against the Iranian Ministry of Information and Security, pursuant to the Foreign Sovereign Immunities Act, for \$300 million in compensatory and punitive damages resulting from the thirty-nine-month captivity of her late husband in Lebanon); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001) (holding that the court had subject matter jurisdiction because the evidence established that Iran was designated a state sponsor of terrorism at the time the act occurred, and the suicide bombing was a deliberate and premeditated act that qualified as an extrajudicial killing for purposes of the Foreign Sovereign Immunities Act). All these cases were brought against Iran, with the exception of the *Alejandro* case against Cuba.

provided that payment would be made from the assets of Cuba in the United States that have been blocked since 1962. With respect to ten judgments against Iran, Congress directed that payment be made from appropriated funds (up to a specified ceiling) and that the United States then be entitled to seek reimbursement for those payments from Iran. Judgments in suits against terrorist states other than those eleven have continued to be handed down by the courts, but § 2002 provided no procedure for claimants other than the ones identified to obtain satisfaction of their judgments.

The VTVPA directs the U.S. Secretary of the Treasury to pay, upon request, a qualifying claimant 100 or 110 percent of compensatory damages awarded by a court on claims filed under 28 U.S.C. § 1605(a)(7), plus post-judgment interest and any amounts awarded by judicial order as sanctions against Cuba. The statute gives the designated claimants three options, each with strings attached. Claimants choosing the 100 percent option are entitled to receive 100 percent of the compensatory damages awarded, plus post-judgment interest, on condition that they “relinquish all rights” to compensatory damages and any right to satisfy their punitive damages award out of the blocked assets of the terrorist state (including diplomatic property), debts owed by the United States to the terrorist state as the result of judgments by the Iran-U.S. Claims Tribunal, and any property that is at issue in claims against the United States before that and other international tribunals (such as Iran’s Foreign Military Sales account). Claimants choosing the 110 percent option are entitled to receive 110 percent of the compensatory damages awarded, plus post-judgment interest, on the condition that they relinquish any further right to obtain compensatory and punitive damages. Last, claimants may decline to obtain any payments from the Treasury Department and then continue to pursue their judgments “as best they can.”<sup>296</sup>

An illustration of how the process works can be seen in the case of Alisa Flatow’s father. One month after the enactment of the VTVPA, on November 28, 2000, Flatow applied for such funds, electing 100 percent recovery of the amount of compensatory damages plus post-judgment interest, under § 2002(a)(1)(B). His application was approved, and on January 4, 2001, the Treasury Department transferred to Flatow more than \$26 million of his \$247 million award, representing the compensatory damages award and post-judgment interest portion of the judgment.<sup>297</sup> Under this provision, \$96.7 million of the \$193.5 million in Cuban assets frozen

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296. 28 U.S.C. § 1610.

297. For the procedures governing application for payment by the claimants in the eleven designated cases, see Meeting Notice, 65 Fed. Reg. 70,382 (Nov. 22, 2000); Notice, 65 Fed. Reg. 78,533 (Dec. 15, 2000).

in this country has been paid in the one judgment against Cuba, to the Alejandro plaintiffs, and more than \$350 million has been, or will be, paid in nine judgments against Iran; there is one more case not yet decided (as of the date of this report to Congress).<sup>298</sup>

In addition, Congress passed a measure in 1998 that called for the State and Treasury Departments to assist victims of terrorism in locating money for judgments. Section 2002 of the VTVPA modified this earlier provision by changing the mandate that the State and Treasury Departments “shall” assist those who have obtained judgments against terrorist states in locating the assets of those states to the more permissive “should make every effort” to assist such judgment creditors.<sup>299</sup> Moreover, although the legislation allows claimants to execute against certain assets, the President is given the authority to stop the attachment of the frozen assets of a state “in the interest of national security” and has done so.<sup>300</sup> Thus, the possibility of obtaining additional assets to execute judgments faces an uncertain future under this statute.

As was discussed above, the Victims of Trafficking and Violence Protection Act of 2000 may have, in effect, given with one hand and taken away with the other. When it was passed, the statute deleted the exception language in § 1606, which had provided that a “foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages *except any action under section 1605(a)(7) or 1610(f)*.”<sup>301</sup> The courts have interpreted this change to indicate that punitive damages are no longer available under § 1605(a)(7) against state sponsors of terrorism, but only against their agencies and instrumentalities under the Flatow Amendment.<sup>302</sup>

The VTVPA has engendered other complaints regarding the lack of equity and fairness in the distribution of these assets. No compensation has been paid in the nearly six thousand claims that were determined to be legitimate by the Foreign Claims Settlement Commission in the late 1960s against Cuba for death, injury, and expropriation during and after Castro’s takeover. Some of these

298. The information on the amounts paid was provided by the Office of Foreign Assets Control and is current as of January 24, 2002. For a list of the judgments paid from these funds for each case, see Ackerman, *supra* note 290, at app. II.

299. Pub. L. No. 105-277, § 117, 112 Stat. 2681 (1998) (codified at 28 U.S.C.A. 1610(f)(1)(A)). This section was added to the FSIA by § 117 of the Treasury and General Government Appropriations Act for Fiscal Year 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999.

300. 28 U.S.C. § 1610(f)(3) (2002). Immediately after signing the legislation into law, President Clinton exercised this waiver authority. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

301. 28 U.S.C. § 1606 (2000), *amended by* Pub. L. No. 106-386, § 2002(g), 114 Stat. 1464 (emphasis added).

302. *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 202 (D.D.C. 2003).



claimants now criticize the use of a substantial portion of Cuba's frozen assets to provide compensation for a single, later terrorist act. In the case of the judgments against Iran, some have questioned the use of U.S. funds to pay compensation. Also, both the Clinton and Bush Administrations have raised objections to past efforts to use diplomatic property and frozen assets to satisfy the judgments against terrorist states.<sup>303</sup>

## 2. The Terrorism Risk Insurance Act of 2002

The concerns over the partial and inequitable remedy of the Victims of Trafficking and Violence Protection Act led to calls for equal access for all U.S. victims of state-sponsored terrorism who have secured judgments and awards in federal courts against state sponsors of terrorism;<sup>304</sup> this was ultimately codified as the Terrorism Risk Insurance Act of 2002 (TRIA).<sup>305</sup> The TRIA subjects the blocked assets of a terrorist party and any agency or instrumentality of that terrorist party to execution or attachment in order to satisfy a judgment against them for any claim based on an act of terrorism.<sup>306</sup> Section 201(a) of the TRIA provides that a person who has obtained a judgment against a foreign state designated as a state sponsor of terrorism may seek to attach the blocked assets of that state in satisfaction of an award of compensatory damages based on an act of terrorism.<sup>307</sup>

With the enactment of § 201, it is now easier for victims to collect on judgments against Iran, a state that sponsors terrorism.<sup>308</sup> The TRIA was designed to provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on U.S. citizens. The TRIA removes barriers to the attachment of blocked

303. See Ackerman, *supra* note 290; see, e.g., Letter from Senator Charles E. Schumer to Colin L. Powell, Secretary of State (June 30, 2003), available at [http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press\\_releases/PR01824.html](http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01824.html) (asking the Secretary of State to end courtroom opposition and let families of early terror victims have access to Iranian assets to satisfy their judgments). *But see* Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037 (2002) (arguing that satisfaction of terrorist exception judgments should remain subordinate to executive control of larger foreign policy goals and that, by using court orders as a basis for attaching foreign assets located in the United States, the provisions of 2002 and the terrorism exception of FSIA unwisely pursue foreign policy goals through the federal courts).

304. See, e.g., Schumer, *supra* note 291 (proposing bill to "provide equal access to all U.S. victims of state sponsored terrorism who have secured judgments and awards in Federal courts against state sponsors of terrorism").

305. Terrorism Risk Insurance Act (TRIA) of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 (2002)).

306. Terrorism Risk Insurance Act § 201.

307. Terrorism Risk Insurance Act § 201.

308. 2003 U.S. Dist. LEXIS 14039 (N.D. Ill. 2003).

assets by severely limiting the availability of the presidential waiver to protect blocked assets. Before the TRIA, legislation permitted the President to exercise a blanket waiver to protect blocked assets. Under the new TRIA, a blanket waiver is no longer allowed, since the President is now required to make "an asset-by-asset" determination that "a waiver is necessary in the national security interest."<sup>309</sup> Moreover, the TRIA contains specific exceptions to the presidential waiver authority.<sup>310</sup> A conference report on the bill explains that the new Act "eliminates the effect of any [previous] presidential waiver . . . making clear that all such judgments are enforceable" against blocked assets.<sup>311</sup>

In order for plaintiffs to be entitled to the execution or attachment of the properties, they must first satisfy two requirements set forth in § 201(a) of the TRIA: (1) the judgment for compensatory damages that a plaintiff seeks to enforce must have been obtained against a state sponsor of terrorism for actions arising out of "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking[,] or the material support or resources for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency" (for which a terrorist party is not immune under § 1605(a)(7) of the Foreign Sovereign Immunities Act, 28 U.S.C.S. §§ 1602-1611) and (2) assets subject to execution or attachment must have been actually "blocked."<sup>312</sup>

The courts have begun to execute judgments interpreting the provisions of the TRIA. In *Hegna v. Islamic Republic of Iran*,<sup>313</sup> \$42 million in damages had been awarded to the family of a U.S. Agency for International Development officer who was killed by Hezbollah militants during the hijacking of a Kuwaiti Airlines flight in 1984. In seeking to execute the judgment using the TRIA, the plaintiffs argued that the condominiums at issue were "blocked assets" within the meaning of the TRIA and had not been used "exclusively for diplomatic purposes."<sup>314</sup> The U.S. government in opposition argued

309. Terrorism Risk Insurance Act § 201(b)(1).

310. Terrorism Risk Insurance Act § 201(b)(2).

311. 148 CONG. REC. H8722-06, H8728 (daily ed. Nov. 13, 2002) (conference report submitted by Rep. Shays); see *Hegna*, 2003 U.S. Dist. LEXIS 14039, at \*19.

312. Terrorism Risk Insurance Act § 201(a). See generally Jill M. Marks, Annotation, *Construction and Application of § 201 of Terrorism Risk Insurance Act of 2002*, Public Law 107-297, § 201, 116 Stat. 2337, 190 A.L.R. FED. 155 (2004) (collecting and analyzing the federal cases in which the courts construed or applied § 201 of the Terrorism Risk Insurance Act of 2002 dealing with the treatment of terrorist assets with respect to execution or attachment for the purpose of collecting on judgments obtained against terrorist parties).

313. 2003 U.S. Dist. LEXIS 14039 (D. Ill. Aug. 11, 2003).

314. *Id.* at \*28.

that the condominiums could not be attached because they were being used exclusively for diplomatic purposes.<sup>315</sup> The court turned to the definition of “blocked asset” in the TRIA:

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that –

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.<sup>316</sup>

After examining the legislative history of the Act, the court found that the condominiums in question were blocked assets because they were not used exclusively for diplomatic purposes.<sup>317</sup> Accordingly, the magistrate judge recommended that the U.S. government’s motion to quash writs of attachment be denied and that the plaintiffs’ motion for a turnover order be granted; the judge held that the properties were not immune from attachment under the Terrorism Risk Insurance Act.<sup>318</sup>

In *Ungar*, the court found that the Holy Land Foundation for Relief and Development (HLF) is an agency and instrumentality of Hamas because it acts “for or on behalf of” Hamas as Hamas’ fund-raising agent in the United States.<sup>319</sup> Therefore, the HLF’s blocked assets were subject to attachment and execution under the TRIA in order to satisfy the present judgment against Hamas.<sup>320</sup> The court, however, identified a problem of dwindling assets:

[T]hese blocked assets are steadily depleting because the Treasury Department has allowed the HLF to use the assets to pay its attorneys to challenge the blocking order and defend the HLF against a civil action arising from its collection of funds for Hamas. Any delay in entering a final judgment against Hamas will allow further depletion of these assets and reduce the amount of money available to satisfy this

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315. *Id.*

316. *Id.* at \*30-31.

317. *Id.* at \*35.

318. *Id.* at \*36-37.

319. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 241 (D.R.I. 2004).

320. *Id.* at 241.

Court's judgment. Given Presidents Clinton and Bush's designations of Hamas as a terrorist organization, it is unlikely that Hamas will bring any new assets into the United States. Therefore, the blocked assets of the HLF and Hamas may be Plaintiffs' sole source of money to satisfy this Court's judgment. When the HLF and/or Hamas fully deplete these assets, this Court's judgment against Hamas will likely become a dead letter. Such a result would defeat Congress' clear intent that 18 U.S.C. § 2333 deter terrorist acts through the enforcement of civil causes of action such as the one presently before the Court.

Simply put, time is of the essence. Any delay in entering a final judgment against Hamas may make Plaintiffs unable to collect the compensation due to them and cause Plaintiffs to suffer further injustices at the hands of Hamas.<sup>321</sup>

Therefore, the court determined that there was no just reason for delay and that plaintiffs' motion to enter a final judgment against Hamas should be granted.<sup>322</sup>

The ability to attach the assets in question under the TRIA often hinges on the nature of the assets themselves. Several cases have held that the plaintiffs are not entitled to assets when the assets are the property of the United States. In *Smith v. FRB*,<sup>323</sup> the Second Circuit held that the plaintiffs, 9/11 representatives proceeding under the TRIA to attach seized Iraqi assets in satisfaction of a judgment, were precluded from doing so because the President had previously confiscated the blocked assets and vested title in them in the U.S. Department of the Treasury. Since, pursuant to an executive order, the assets had become assets of the United States, they were not subject to attachment under the TRIA.<sup>324</sup> Similarly, the court in *Weinstein v. Islamic Republic of Iran*<sup>325</sup> held that the TRIA did not provide an express waiver of federal sovereign immunity. Thus, the accounts that were the property of the United States could not be attached by the family to satisfy its judgment against Iran. In a subsequent case, three Iranian banks' assets in U.S. bank accounts could not be attached under TRIA; the Iranian banks operated under a general license and the accounts were not seized or frozen.<sup>326</sup>

Likewise, the plaintiffs seeking compensation through the TRIA have had their efforts complicated by the war in Iraq. On March 20, 2003, on the eve of war, the President issued an executive order that released about \$300 million in funds due in judgments awarded against Iraq, while simultaneously confiscating all remaining Iraqi assets frozen in the United States and designating them for the

321. *Id.* at 241-42 (citations omitted).

322. *Id.*

323. 280 F. Supp. 2d 314 (S.D.N.Y. 2003).

324. *See also* *Acree v. Republic of Iraq*, 370 F.3d 41, 47-48 (D.C. Cir. 2004) (adopting the reasoning of the Second Circuit's decision in *Smith*).

325. 274 F. Supp. 2d 53 (D.D.C. 2003).

326. *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63 (E.D.N.Y. 2004).

reconstruction of Iraq.<sup>327</sup> By taking title to those funds, the President effectively transferred all remaining frozen Iraqi assets in the United States into the coffers of the U.S. Treasury, emptying the bank accounts against which other U.S. plaintiffs with cases against Iraq had hoped to collect. So while a few plaintiffs—those with post-judgment writs of attachment to specific Iraqi assets in the United States—received payment, those who had not yet gotten to that late stage in their lawsuits against Iraq suddenly were deprived of the source of funds from which they had hoped to extract compensation.<sup>328</sup>

Meanwhile, Stephen Flatow's quest to collect the punitive damages awarded in his 1998 case continues.<sup>329</sup> As his lawyer, Steven Perles, explained, "That is the portion of the judgment intended to deter Iran's future conduct."<sup>330</sup> Through investigating and levying suits against instrumentalities and their assets in the United States with connections to the terrorist defendants, Flatow hopes to punish the terrorist groups responsible for his daughter's tragic death. In Flatow's latest effort to attach the funds from a sale of a bank in California that had been nationalized by the Iranian government, a federal judge rejected Flatow's attempt to collect the money because he had not proved that Iran had day-to-day control over the bank.<sup>331</sup> The U.S. Supreme Court declined to hear the case.<sup>332</sup>

#### IV. CONCLUSION

Recognizing that the struggle to collect on these judgments continues, support of this civil action approach is the crucial, though only the first, step. As one court recently noted, "The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts."<sup>333</sup>

327. Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003).

328. Uriel Heilman, *Fighting for their Due*, JERUSALEM POST, June 13, 2003.

329. See *Flatow v. Islamic Republic of Iran*, 353 U.S. App. D.C. 275 (D.C. Cir. 2002) (dismissing appellant's contention that he was entitled to post-judgment interest on his punitive damages award for lack of jurisdiction).

330. Laurence Arnold, *Father of Terror Victim Seeks Court Ruling to Help His Lawsuit*, ASSOCIATED PRESS, Feb. 26, 2003, available at <http://cnnstudentnews.cnn.com/2003/LAW/02/26/suing.terrorists.ap/>.

331. *Flatow*, 353 U.S. App. D.C. 275.

332. *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002), cert. denied, 538 U.S. 944 (2003); see also *Flatow v. Alavi Foundation*, 2000 U.S. App. LEXIS 17753 (4th Cir. 2000) (holding that a not-for-profit foundation in New York was not an instrumentality of a foreign government, and thus was not subject to a writ of execution to satisfy plaintiff's judgment against the foreign government).

333. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1021 (7th Cir. 2002).

Congress' enactment of the terrorist-related statutes discussed above indicates legislative intent for accountability and provides victims of terrorism with a forum for that accountability. The testimony supporting this legislation placed much emphasis on the deterrent effect that these statutes would have on the commission of acts of international terrorism against U.S. citizens. Such legislation would "interrupt, or at least imperil, the flow of terrorism's lifeblood, money."<sup>334</sup> While acknowledging that the execution of civil judgments may be difficult, experts testified that this approach would contribute to the antiterrorism struggle by deterring terrorists from choosing U.S. targets and by "drying up terrorism's financial support in the United States."<sup>335</sup> In addition to accountability and compensation, several of these statutes can be used to punish and deter future acts of terrorism.<sup>336</sup>

Numerous federal statutory and common-law tools are available to litigants in the civil battle against terrorism: the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996 (with its amendment of the Foreign Sovereign Immunities Act), the Torture Victim Protection Act, the Alien Tort Claim Act, and common-law tort claims, including negligent and intentional infliction of emotional distress, battery, assault, aiding and abetting, conspiracy, wrongful death, survival, false imprisonment, and others. The aggregate model proposed here is a judicious approach that uses a combination of all available causes of action, each of which will apply with varying effectiveness against particular defendants or classes of defendants, depending on the facts. By aggregating these claims, victims and their families can target terrorist groups, officials and other individuals, along with the foreign states, organizations, and agencies who sponsor them. As has been shown, particularly in cases with multiple defendants, the ATA and AEDPA can complement each other both in the availability of a cause of action and damages. This can be achieved by employing ATA § 2333 for non-sovereign defendants and FSIA § 1605(a)(7) for sovereign state sponsors of terrorism, and in particular the Flatow Amendment

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334. *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 239 (D.R.I. 2004) (citing *Antiterrorism Act of 1990: Hearing on S2465 Before the Subcomm. on Courts. and Admin. Practice of the Comm. on the Judiciary*, 101st Cong. 85 (1990) (statement of Joseph A. Morris, President and General Counsel for the Lincoln Legal Foundation in Chicago)).

335. *Id.*

336. This is the central argument currently being raised by the plaintiffs in the *Burnett I* case, Third Amended Complaint, filed in the U.S. District Court for the District of Columbia on November 22, 2002. See *Burnett I*, 274 F. Supp. 2d 86 (D.D.C. 2003) (dismissing some of the common-law tort claims against one of the organizations but upholding the complaint as stating a cause of action on plaintiffs' federal statutory claims).

against agents and instrumentalities of a foreign state.<sup>337</sup> In addition, these statutes present jurisdictional variations, such as individuals in their official versus personal capacity, and state versus organization. The more expansive view of personal jurisdiction over individual defendants in the AEDPA cases may be relied upon more favorably than the restrictive traditional approach of some courts under the ATA.<sup>338</sup> Thus, the potential flaws of one claim may be circumvented by another.

Moreover, some courts have held that FSIA § 1605(a)(7) is merely a jurisdictional tool requiring the invocation of other causes of action to maintain an independent claim against the foreign state, and that the Flatow Amendment only provides a private right of action against officials, employees, and agents of that state.<sup>339</sup> Depending on the underlying facts of the case, the TVPA or common-law claims could be the ideal supplement.<sup>340</sup> Not to be overlooked is the potential for “aider and abettor” liability against defendants in their personal capacities.<sup>341</sup>

Finally, one can aggregate the damages available under each. As noted above, the degree to which punitive damages are available as a remedy under each cause of action differs with the nature of the defendants. While the courts have emphasized that the availability of treble damages under the ATA precludes an award of punitive damages,<sup>342</sup> they have found punitive damages to be available under the AEDPA and common-law intentional torts.<sup>343</sup> Note, however, that several cases recently brought under the AEDPA have not allowed punitive damages against a foreign state, but only against agencies and instrumentalities of that state and individuals in their personal capacities under the Flatow Amendment.<sup>344</sup> In sum, one judge explained:

337. See, e.g., *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 226 (S.D.N.Y. 2003).

338. Compare *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (adopting a more expansive view of personal jurisdiction in claims brought under the AEDPA), with *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 178 (D.D.C. 2004) (restricting personal jurisdiction of the courts to the traditional “minimum contacts” test for claims brought under the ATA).

339. See, e.g., *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

340. See, e.g., *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 100 (D.D.C. 2003).

341. *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *Burnett I*, 274 F. Supp. 2d at 104-05.

342. *Smith*, 262 F. Supp. 2d at 240.

343. See *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 42-43 (D.D.C. 2003) (addressing this issue and supporting the availability of punitive damages); see also *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 278-79 (D.C. Cir. 2003).

344. See, e.g., *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105 (D.D.C. 2003).

[A]lthough punitive damages are allowed under the Flatow Amendment, punitive damages are not available against Iraq because 28 U.S.C. § 1606 immunizes foreign states from liability for punitive damages. Furthermore, the Flatow Amendment does not apply to the al Qaeda defendants. The plaintiffs' claims against the al Qaeda defendants are brought under § 2333 of the ATA, which provides for treble damages and attorneys fees but does not provide for punitive damages. To the extent that § 2333's treble-damages provision already provides a penalty, this Court is foreclosed from assessing additional punitive damages against the al Qaeda defendants.<sup>345</sup>

Despite possible interference with the foreign policy efforts of the executive branch and potential difficulties in its enforcement, an award of punitive damages does communicate a strong message. As asserted by the court in *Anderson v. Islamic Republic of Iran*, the purpose of punitive damages

is to punish wrongful conduct—to prevent its repetition by the offender and to deter others who might choose to emulate it. . . . The victim to whom the award is made thus stands as a surrogate for civilized society in general; the victim is made more than whole in order that others may be spared similar injury.”<sup>346</sup>

The enforceability of these judgments has significant implications for the business community as well. If a civil suit in U.S. courts by U.S. victims of overseas terrorism is recognized by foreign courts and the judgment is implemented against terrorist groups, then it stands to reason that lawsuits arising from common business transactions between multinationals would also be enforceable. In reducing wrongs to civil monetary damages that carry weight beyond national boundaries, some common ground is reached in recognizing the legitimacy of courts in the international sphere, thereby providing greater stability for business transactions in a global economy.

Most important, the war on terrorism might be waged more effectively if the assets of these groups were attached and levied upon wherever they are found, with the support of the international community through comity and the rule of law. In the absence of that option, as an alternative or supplement, the government should allow and support access to the frozen assets of terrorist states and organizations that are already present in the United States, and it should help plaintiffs to identify and seize additional assets. The Terrorism Risk Insurance Act of 2002 currently provides the means with which to do so. Use of this powerful tool can deplete these assets before they can be exploited by the terrorists, which would thus help to achieve the dual goals of reparation to the victims and the

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345. *Smith*, 262 F. Supp. 2d at 239-40 (citing *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 113 n.17 (D.D.C. 2000)).

346. *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 114 (D.D.C. 2000) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).



dismantling of the terrorist infrastructure. Each individual plaintiff must now do the rest.