

FIGHTING FIRE WITH . . . MIRE? CIVIL REMEDIES AND THE NEW WAR ON STATE-SPONSORED TERRORISM

WILLIAM P. HOYE*

I. INTRODUCTION

On the morning of Tuesday, September 11, 2001, hijackers flew passenger jetliners into each of New York City's World Trade Center towers and the Pentagon in Virginia, in the worst terror attack in U.S. history.¹ Nearly 4,500 people perished in the well-coordinated attack, which U.S. officials believe was orchestrated by Osama bin Laden, a Saudi-born millionaire tied to the 1998 bombings of two American embassies in Africa and the bombing of a U.S. warship in Yemen in 2000.² The devastating events of September 11th galvanized the United States and led President George W. Bush to declare, "We will not only deal with those who dare attack America, we will deal with those who harbor them and feed them and house them."³ President Bush was clearly referring to the Taliban regime in Afghanistan,⁴ which allegedly gave bin Laden refuge for more than five years prior to the attacks.⁵ President Bush vowed that the United States would make no distinction between those who carried out the hijackings and those who supported them.⁶

By October 7, 2001, less than one month after the attacks on the World Trade Center and the Pentagon, U.S. and British war planes

Copyright © 2001 by William P. Hoye

* J.D., Drake University; LL.M., University of Notre Dame Law School. Associate Vice President and Deputy General, Concurrent Associate Professor of Law, University of Notre Dame. The author would like to thank Professor Dinah Shelton, Notre Dame Law School, for reviewing and commenting on earlier drafts of this work. Her suggestions were invaluable and no doubt made this a better manuscript.

1. Serge Schemann, *President Vows to Exact Punishment For 'Evil,'* N.Y. TIMES, Sept. 12, 2001, at A1.

2. Christopher Dickey, *Training for Terror*, NEWSWEEK, Sept. 24, 2001, at 42.

3. Evan Thomas et al., *Bush: We're at War*, NEWSWEEK, Sept. 24, 2001, at 29.

4. Dickey, *supra* note 2, at 42; *see also* Thomas et al., *supra* note 3, at 29.

5. Dickey, *supra* note 2, at 42.

6. Schmemmann, *supra* note 1, at A1.

had bombed targets in Afghanistan and a comprehensive “War on Terrorism” had begun. The campaign focused not only on the terrorists, but also on the states that financed, trained, and supported them. Bank accounts believed to contain money used to fund terrorist organizations around the world were frozen,⁷ and a broad-based coalition of more than forty states was formed. This development led the United States, the United Nations, and others, to address with new urgency the issue of how to effectively combat state-sponsored terrorism. With uncharacteristic speed, the United Nations Security Council unanimously adopted a resolution requiring all 189 U.N. member states to deny money, support, and sanctuary to terrorists.⁸

Undoubtedly, few acts, if any, are more egregious or shocking to the conscience than states utilizing their vast sovereign powers and resources to finance and sponsor acts of terrorism, such as hijackings, kidnappings, bombings, extrajudicial killings, or military attacks directed at innocent civilians. This is especially true since terrorist acts by definition are designed to intimidate a population or compel desired action or inaction by another government or international organization.⁹ The victims of terrorist acts are rarely the primary target or concern of the state sponsor or terrorist organization. Tragically, they are often simply in the wrong place at the wrong time.

During the past several decades, and especially in recent years, the number of terrorist acts directed at citizens living and traveling abroad has been on the rise, especially with respect to attacks against U.S. citizens. Many of these acts have been perpetrated by individuals or groups who are sponsored, directed, supported, or funded, in whole or in part, by states. For example, in the 1979 Iranian hostage crisis, terrorists supported by the Khomeini government in Iran seized the United States embassy in Tehran and held fifty-two Americans hostage for 444 days.¹⁰

In the subsequent two decades, newspapers and magazines around the world have been filled with stories of state-sponsored terrorist acts involving gross violations of human rights, such as kidnap-

7. As of October 22, 2001, the U.S. had found and frozen about \$300 million of Osama bin Laden's and the Taliban's money. Cathy Booth Thomas, *Osama Will Pay. This time in Cash*, TIME, Oct. 22, 2001, at 22.

8. See S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001); see also, *Funds in 50 Accounts Frozen*, THE SOUTH BEND TRIBUNE, Oct. 2, 2001, at A3.

9. See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, art. 2(1)(b), 39 I.L.M. 270, 271.

10. Daniel Pipes, *American Hostages in Iran: The Conduct of a Crisis*, THE NEW REPUBLIC, July 8, 1985, at 37.

pings, extrajudicial murders, torture, hijackings, and suicide bombings in which American citizens have been injured or killed. In addition to the recent World Trade Center and Pentagon attacks, specific examples include the following:

- Beginning on January 8, 1985, U.S. citizens with no connection to the U.S. government, David Jacobsen, Joseph Cicippio, Frank Reed, and Rev. Lawrence M. Jenco were independently assaulted and abducted in Lebanon and held as prisoners¹¹ by members of Hezbollah, a politico-paramilitary organization “funded and controlled by the Iranian government and the Iranian Ministry of Information and Security.”¹²
- Terry Anderson, an American journalist, was kidnapped at gunpoint in Lebanon on March 16, 1985, and held hostage for nearly seven years by agents of the Islamic Republic of Iran at the behest of the Iranian Ministry of Information and Security (MOIS).¹³
- Hezbollah abducted Dr. Thomas Sutherland, a U.S. citizen and Dean of the Faculty of Agriculture at the American University of Beirut, on June 9, 1985, and held him for more than six years.¹⁴
- The MOIS, again acting upon the orders of the Iranian government, assassinated Dr. Cyrus Elahi, a dissident of the Iranian regime, and naturalized American citizen, living in Paris, France, in front of his home on October 23, 1990.¹⁵
- On April 9, 1995, a suicide bomber and member of the Palestine Islamic Jihad, a terrorist cell wholly funded by the Islamic Republic of Iran, drove a van loaded with explosives into a public passenger bus in Israel, killing Alisa M. Flatow, a twenty year old American college student.¹⁶
- Acting under orders from their government, Cuban Air Force planes fired air-to-air missiles without warning at two

11. Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 64 (D.D.C. 1998); Estate of Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 29 (D.D.C. 2001).

12. *Jenco*, 154 F. Supp. 2d at 30. Ultimately, Hezbollah was linked to seventeen kidnappings, as well as car bombings that killed more than 300 people at the U.S. embassy and a U.S. marine barracks in Beirut, Lebanon, in 1983. Susan Postlewaite & Stan Crock, *The Lockerbie Trial May Actually Help Qaddafi*, BUS. WK. (Int'l Ed.), May 15, 2000, at 27, 2000 WL 7826440.

13. Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107, 109–11 (D.D.C. 2000).

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

15. Estate of Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 103–04 (D.D.C. 2000).

16. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7 (D.D.C. 1998).

private planes over international waters, killing three U.S. citizens on a humanitarian mission.¹⁷

- In Jerusalem, on February 25, 1996, two other American students, Matthew Eisenfeld and Sara Rachel Duker, were killed in a bus bombing perpetrated by Hamas, another terrorist organization funded by Iran.¹⁸

As these tragic examples illustrate, the United States and its citizens have been prime targets for acts of state-sponsored terror for decades.¹⁹ Historically, however, foreign governments and their agents have enjoyed broad common law and statutory immunity from crimi-

17. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997).

18. *Eisenfeld v. Islamic Republic of Iran*, No. Civ. 98-1945 RCL, 2000 WL 1918779, at *1 (D.D.C. July 11, 2000).

19. Two other noteworthy examples include the Pan Am and U.S. Embassy bombings. In December of 1988, 259 passengers and eleven bystanders were killed when Pan Am flight 103, en route from London to the United States, exploded over Lockerbie, Scotland. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 754 (2d Cir. 1998); see also Sridhar Krishnaswami, *The Hindu-Editorial: Price of Pre-eminence*, THE HINDU, Oct. 22, 2000, 2000 WL 27346383. An independent international tribunal subsequently indicted two Libyan intelligence government agents for their alleged roles in the bombing. After eight years of intense international pressure, Libyan President Muammar al-Qaddafi released the two suspects, and they were placed on trial in the Netherlands. Mark Smith, *Lockerbie 'Caused By Anti-Tank Explosion'*, EVENING NEWS (Scot.), Apr. 21, 2001, at 4, 2001 WL 15548496. The court convicted Abdel Basset Ali al-Megrahi, a Libyan intelligence agent, of the bombing in February 2001, handing down a life sentence and recommending he serve at least twenty years in prison. *Id.* The court found his co-defendant, Lamen Khalifa Fhimah, not guilty. *Id.* During the trial, a former terrorist testified that Libya also was involved in providing arms and information needed to launch another act of state sponsored terrorism: the 1975 attack on an OPEC oil ministers' conference in Vienna, Austria, which left three people dead. See Mirjam Mohr, *Former Terrorist Links Libya to 1975 OPEC Meeting Attack*, AP NEWSWIRE, Oct. 19, 2000, WESTLAW, Apwireplus library.

In April of 1998, the U.S. embassies in Tanzania and Kenya were bombed simultaneously by terrorists linked by the U.S. government to Osama bin Laden, an exiled national of Saudi Arabia. Bin Laden reportedly enjoys close ties to the government of Sudan and the Taliban militia in Afghanistan, which allegedly has been sheltering him from apprehension. In the wake of the bombings, "Washington launched punitive missile attacks against Afghanistan and Sudan on the grounds that both states played an integral role in supporting the twin assaults." Peter Chalk, *Grave New World*, BELL & HOWELL INFORMATION AND LEARNING COMPANY. FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY, Spring 2000, at 13, 16. According to an April 2001 report by the U.S. Department of State entitled 'Patterns of Global Terrorism,' Afghanistan's Taliban continues to provide a primary safe haven for terrorists by harboring and aiding Osama bin Laden and members of Al Qaeda. Keiji Urakami, *North Korea Could be Off Terrorist Country List*, JAPAN ECON. NEWSWIRE, May 1, 2001, available at <http://web.lexis-nexis.com/universe> (last visited Nov. 16, 2001). Of course, the governments and citizens of many other governments have been victimized by state-sponsored terror as well. Such incidents are beyond the scope of this Article, although similar analysis could be done under the law of other states.

nal prosecution and civil lawsuits under international law, even for international terrorist acts in which they have played key roles.²⁰

In the mid-1990s, the U.S. Congress attempted to fill the gap in international law related to the previously untouchable state sponsors of terrorism. After U.S. courts, in several important and highly publicized cases (e.g., the Pan Am 103 bombing cases, the Iranian hostage crisis cases, and others), held that several states, including Iran and Libya, were immune from liability, Congress created a new civil remedy with respect to certain designated state sponsors of terrorism. Under the auspices of the Foreign Sovereign Immunities Act (FSIA), Congress abrogated the immunity of foreign states involved in funding or sponsoring acts of terrorism against U.S. citizens abroad. As a result, U.S. citizens who were the victims of state-sponsored terrorism could pursue civil lawsuits in U.S. courts against states identified by the U.S. Department of State as supporting, ordering, sponsoring, or funding acts of terror directed against American citizens abroad.²¹

This Article will examine and analyze the efficacy and advisability of utilizing civil lawsuits in domestic courts as a means of providing remedies to victims of state-sponsored terrorist acts. Specifically, the Article addresses the legality of such an approach under international law, as well as its efficacy as a foreign policy tool. Finally, in the context of the U.S. Antiterrorism and Effective Death Penalty Act, this Article examines whether civil litigation in the courts of a particular state is an appropriate means of fighting state-sponsored terrorism in the twenty-first century, especially in the wake of the tragic events of September 11, 2001.

The Article is organized into seven parts, including this introduction and a brief conclusion. Part II provides a brief overview of the international community's legal responses to state-sponsored terrorism. Part III summarizes the statutory exceptions to sovereign immunity crafted in recent years by the U.S. Congress. Part IV surveys and examines the reported case law to date under the FSIA since Congress's adoption of the Antiterrorism Act. Part V analyzes the legality of the current U.S. statutory scheme under international law. Part VI presents a normative discussion of whether civil litigation in domestic courts, even if permissible under international law, is the best or even an appropriate means of combating state-sponsored terrorist

20. See *Flatow*, 999 F. Supp. at 11.

21. See generally JOHN F. MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS* 32-33 (1970) for a discussion of the complex distinctions between state toleration, support, and sponsorship of terrorism.

acts directed against U.S. nationals abroad. This Article recommends expanding the jurisdiction of the envisaged International Criminal Court (ICC) to enable an objective international tribunal to hear cases, punish state actors and other individuals responsible for acts of state-sponsored terror, and fairly compensate victims. Such an approach would represent the most equitable way to compensate victims and punish offending states in an independent and credible forum.

II. INTERNATIONAL LEGAL RESPONSES TO STATE-SPONSORED TERRORISM

State-sponsored terrorist acts deprive innocent civilians of their lives, their liberty, their property, and other rights and freedoms protected by various regional and international human rights treaties,²² including the Universal Declaration of Human Rights,²³ the International Covenant on Civil and Political Rights,²⁴ the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁵ the American Declaration of the Rights and Duties of Man,²⁶ and the American Convention on Human Rights.²⁷ As a result, some courts and commentators have suggested that state-sponsored terrorism might even violate a *jus cogens* norm²⁸ of customary international

22. Joseph W. Dellapenna, *Civil Remedies for International Terrorism*, 12 DEPAUL BUS. L.J. 169, 171, 177, 178 (“Victimization through state-sponsored terrorism, at the least, is one of the most fundamental violations of human rights.” (citing Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT’L L. 191, 194 (1983))).

23. Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71. Article 3 protects the right to life, liberty and the security of the person; Article 5 prohibits torture and cruel, inhuman or degrading treatment; Article 9 prohibits arbitrary arrest, detention or exile.

24. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Article 2 protects the right to an effective remedy; Article 6 protects the inherent right to life; Article 9 protects the right to liberty and security of person and prohibits arbitrary detention.

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Article 2 protects the right to life and prohibits its deprivation; Article 3 prohibits inhuman or degrading treatment; Article 5 protects the right to liberty and security of person.

26. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, O.A.S. Official Rec. OEA/Ser.L/V/I.4 rev. 8. Article I protects the right of every human being to life, liberty, and the security of his person.

27. American Convention on Human Rights (Pact of San José, Costa Rica), Nov. 22, 1969, 1144 U.N.T.S. 123. Article 4 prohibits the arbitrary deprivation of life; Article 7 protects the right to personal liberty and security of every person.

law.²⁹ This point remains hotly disputed, especially in the United States.³⁰ Nevertheless, it is notable that in at least ten resolutions of the United Nations General Assembly, states have reaffirmed their “unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed.”³¹

Despite the nearly universal condemnation of state-sponsored terror, international law does not provide a mechanism by which to impose criminal penalties on states or governments that finance or otherwise support terrorist activities. Such states may be defendants in civil lawsuits for money damages in some countries,³² or subject to civil proceedings before regional and international human rights tri-

28. Janisson G. White, *Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-Up Call for Former Heads of State*, 50 CASE W. RES. L. REV. 127, 155 (1999) (“This type of norm was defined in the Vienna Convention on the Law of Treaties as a ‘peremptory norm’ of international law . . . accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.” (quoting *Hilou v. Marcos*, 25 F.3d 1467, 1471 n.6 (9th Cir. 1994))).

29. Maria Ermolaeva, *Crimes Without Punishment*, 23 S. ILL. U. L.J. 755, 777 (1999) (“Certain rules protecting human rights are already clearly accepted by the international community as peremptory norms of a *jus cogens* character. Among them are the prohibitions of slavery, piracy, genocide, terrorism, and torture.” (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987), which specifies that genocide, slave trade, slavery, murder, torture, and systematic racial discrimination are all violations of *jus cogens* norms)). Ms. Ermolaeva argues that the doctrine of universal jurisdiction is lent support by the promulgation of international conventions based on *jus cogens* norms such as, *inter alia*, the prohibition of terrorism.

30. See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2152 (1999) (noting that three federal appeals courts have rejected the notion that the FSIA contains a *jus cogens* exception).

31. International Convention for the Suppression of the Financing of Terrorism, *supra* note 9, at 270. See also International Convention for the Suppression of Terrorist Bombings, *adopted* Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 37 I.L.M. 251 (1998); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *done* Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 27 I.L.M. 685; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *done* Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 27 I.L.M. 668, 672; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *done* Feb. 24, 1988, S. TREATY DOC. 100-19, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, *adopted* Oct. 26, 1979, T.I.A.S. No. 11,080, 1456 U.N.T.S. 125; International Convention against the Taking of Hostages, *adopted* Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *adopted* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.S.T. 167; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 11641, 860 U.N.T.S. 105.

32. See, e.g., 28 U.S.C. § 1605(a)(7) (1996).

bunals. In stark contrast to state sponsors of terrorist acts, individual terrorists and international terrorist organizations face increasingly severe domestic and international penalties for their conduct. These individuals or entities may be subject to domestic criminal prosecution or civil litigation in the country where the alleged acts occurred, or in other countries having or claiming jurisdiction over them or their acts.³³ In the future, they also may be prosecuted before the ICC.³⁴

On December 9, 1999, the United Nations General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism.³⁵ The Convention requires its signatories to criminalize certain acts and establish jurisdiction over individuals and organizations financing terrorist activities, and to extradite or subject such persons to prosecution.³⁶ In this way, the Convention attempts to expand “the framework for international cooperation in the investigation, prosecution, and extradition of [individual] persons who en-

33. For example, individual defendants may face proceedings in the domestic courts of any state having subject matter and personal jurisdiction over the matter (e.g., the courts of the states where the act occurred and where the accused is present). *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(A) (“A state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory.”). In addition, under the doctrine of passive personality jurisdiction, the state where the victims resided may have jurisdiction, although the International Court of Justice has not yet ruled on this point. LOUIS HENKIN ET AL., HUMAN RIGHTS 657 (1999) (“With respect to . . . certain acts of terrorism, states may rely upon ‘passive personality’ jurisdiction—that is, they may assert jurisdiction over extra-territorial crimes committed against their nationals even when committed by non-nationals.”). Finally, regional human rights tribunals with jurisdiction may be in a position to provide reparations to victims who are able to prove violations of relevant human rights treaties against the individual defendants. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 25, art. 50. The Inter-American Commission on Human Rights has also negotiated settlements that included wide-ranging remedies and large compensatory damages.

34. Rome Statute of the International Criminal Court, *adopted and opened for signature* July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999.

35. International Convention for the Suppression of the Financing of Terrorism, *supra* note 9, at 271.

36. According to Clifton Johnson, an attorney advisor at the U.S. State Department, “the Convention specifically requires that States Parties exercise criminal jurisdiction over the unlawful and willful provision or collection of funds with the intention that they be used or in the knowledge that they are to be used in order to carry out terrorist activity as defined in the Convention.” Clifton Johnson, *Introductory Note to the International Convention for the Suppression of the Financing of Terrorism*, 39 I.L.M. 268, 269 (2000). The Convention also includes provisions relating to “the freezing and seizure of funds used in the commission of the offense, prohibiting mutual legal assistance requests from being refused on bank secrecy grounds.” *Id.* The Convention opened for signature on January 10, 2000, and was slated to remain open for signature through December 31, 2001. It was initially signed by seven states parties and requires twenty-two parties to become effective.

gage in terrorism financing.”³⁷ Unfortunately, neither the Convention nor any other remedy applies to states that finance or sponsor terrorist activities. Pursuant to current international law, states remain immune from criminal culpability for their sponsorship and financing of terrorist acts. Indeed, the revisions to the International Law Commission’s Draft Articles on State Responsibility completely exclude the notion of state criminal responsibility.³⁸

In addition to the range of criminal sanctions imposed on their attackers, victims of state-sponsored terrorist acts and their families may request that their own governments approach the offending government through diplomatic channels to seek compensation and the arrest, extradition, or prosecution of the individuals or groups responsible for terrorist acts.³⁹ Alternatively, if the offending government has voluntarily and explicitly waived its sovereign immunity with respect to claims involving state sponsorship of terrorist acts, or consented to the jurisdiction of certain regional or international human rights tribunals, the victims and their families can, in some cases, seek civil reparations from the state in these forums after exhausting available domestic remedies.⁴⁰ As a practical matter, though, states that sponsor terrorist acts rarely voluntarily and explicitly waive their sovereign immunity. Moreover, although many states are subject to the jurisdiction of human rights tribunals, these proceedings often are unsatisfactory because they are slow, the remedies available are largely inadequate, and the decisions of most tribunals (with the notable exception of the International American Commission on Human Rights (IACHR) and the European Court of Human Rights (ECHR)) are not legally binding.⁴¹ Figure 1 below summarizes available remedies and demonstrates that victims of state-sponsored terrorism and their families are left with few civil remedies and no effective criminal remedies vis-à-vis the offending state sponsor of terrorist acts.⁴²

37. Johnson, *supra* note 36, at 269.

38. Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT’L L.J. 241, 266 (2001) (citations omitted); *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996*, art. 20 cmt., U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/CN.4/SER.A/1977/Add. (1996).

39. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 7 (1999).

40. *Id.*

41. *Id.* at 181–82.

42. For additional information concerning the various remedies available to victims of human rights abuses, see generally *id.*

FIGURE 1
REMEDIES AVAILABLE TO VICTIMS OF STATE-SPONSORED
ACTS OF TERRORISM

AGAINST STATE SPONSORS OF TERRORISM		AGAINST INDIVIDUAL TERRORISTS
CRIMINAL REMEDIES	None available.	<ul style="list-style-type: none"> ● Proposed International Criminal Court.⁴³ ● Extradition to a country with subject matter jurisdiction over the act, personal jurisdiction over defendant or (in some cases) passive personal jurisdiction. ● Arrest and prosecution in domestic courts of the state in which terrorist act occurred.
CIVIL REMEDIES	<ol style="list-style-type: none"> 1. Only available if state: <ul style="list-style-type: none"> ● Consents to International Court of Justice jurisdiction; ● Signs certain regional Human Rights treaties; ● Accepts suit pursuant to social/political covenants; ● Waives sovereign immunity for international or regional human rights tribunals. 2. Victim's government can approach state sponsor of terrorist act seeking compensation and/or exercise diplomatic protection. 	<ol style="list-style-type: none"> 1. Domestic remedies in state in which terrorist act occurred. 2. Some domestic remedies are available in countries with jurisdiction over the person of the defendant and subject matter jurisdiction of dispute. 3. No effective international civil remedies against the individual perpetrator.⁴⁴

III. STATE-SPONSORED TERRORISM: LEGISLATING AN EXCEPTION TO SOVEREIGN IMMUNITY IN THE UNITED STATES

Sovereign states historically enjoyed absolute immunity from civil liability under international law for all actions.⁴⁵ In fact, U.S.

43. *Id.* at 2 (noting that the jurisdiction of the International Criminal Court is limited to a small list of international crimes).

44. *Id.* at 2.

45. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 11 (D.D.C. 1998) (citations omitted).

courts interpreted the Supreme Court's narrow holding in *Schooner Exchange v. M'Faddon*,⁴⁶ "as extending virtually absolute immunity to foreign sovereigns."⁴⁷ Because the *Schooner* majority held that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," federal courts historically have deferred to the executive branch on the question of jurisdiction over foreign sovereigns.⁴⁸

In the middle of the last century, largely pursuant to a document known as the Tate Letter,⁴⁹ the United States began to recognize the restrictive theory of foreign sovereign immunity, which permits civil suits against foreign governments only on the basis of their commercial activities,⁵⁰ but application of the theory proved troublesome. Prior to 1996, initial responsibility for deciding questions of sovereign immunity fell primarily to the executive branch, and foreign nations seeking immunity often placed diplomatic pressure on the U.S. State Department. Consequently, political considerations led to suggestions of immunity where immunity should not have been available. When foreign nations did not make such requests to the State Department, the responsibility fell to courts to determine whether sovereign immunity existed. The courts then made decisions with reference to prior State Department decisions.⁵¹ Since determinations that sovereign immunity should be recognized were made by two different branches of government, governing standards were not clearly or uniformly applied.⁵²

A. The Foreign Sovereign Immunities Act

In 1976, the U.S. Congress adopted the FSIA, which codifies the restrictive theory of foreign sovereign immunity and transfers immunity determinations from the Department of State to the judiciary.⁵³

46. 11 U.S. (7 Cranch) 116 (1812).

47. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) (citations omitted).

48. *Id.* (citing *Ex Parte Republic of Peru*, 318 U.S. 578, 586–90 (1943)).

49. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 711 (1976).

50. *Id.* (citing SOMPONG SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959)); see also W. Friedman, *Changing Social Arrangements in State-Trading States and Their Effect on International Law*, 24 LAW & CONTEMP. PROBS. 350 (1959).

51. See Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 909–12 (1969).

52. *Id.* at 906–09; see also Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. WORLD PUB. ORD. 1, 11–13, 15–17 (1976–1977).

53. 28 U.S.C. §§ 1330, 1602–11 (1994 & Supp. 1999).

Under the Act, foreign state governments are generally immune from the jurisdiction of U.S. courts. These governments are subject to a set of specifically enumerated exceptions involving commercial activities in or directly affecting the United States, as well as an exception for actions where a foreign state has explicitly or implicitly waived its immunity.⁵⁴ The FSIA, however, does not extend to public acts committed outside of the United States, and foreign states can still invoke sovereign immunity as a shield against civil liability for violations of international law committed against U.S. nationals abroad.⁵⁵ Today, the only allowable bases for subject matter and personal jurisdiction in an action against a foreign state defendant in U.S. courts remain the FSIA's enumerated exceptions to immunity.⁵⁶

B. Amending the FSIA: The Antiterrorism Act and the Flatow Amendment

Throughout the 1980s and early 1990s, U.S. courts found a number of foreign states to be immune from civil liability for the roles that the states and their agents played in state-sponsored acts of terror and violations of the law of nations.⁵⁷ These decisions were rendered in a variety of highly publicized cases and involved, *inter alia*, the Iranian hostage crisis, the bombing of Pan Am flight 103, and the kidnappings of Joseph Cicippio and others in Beirut. Congress was doubly outraged, first by the many egregious acts of state-sponsored terror committed against U.S. citizens abroad, and second by “the refusal of the federal courts to find jurisdiction in cases such as *Princz* [*v. Federal Republic of Germany*], *Rein* [*v. Socialist People's Libyan Arab Jamahiriya*], *Cicippio* [*v. Islamic Republic of Iran*], and [*Saudi Arabia*

54. *Id.*

55. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996).

56. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 10 (D.D.C. 1998) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (holding federal courts lack jurisdiction over foreign state defendants unless the circumstances of the case fall within one of FSIA's enumerated exceptions to foreign sovereign immunity).

57. *Nelson*, 507 U.S. at 355; *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 165 (D.C. Cir. 1994) (upholding dismissal of plaintiff's claim on a motion to dismiss for lack of subject matter jurisdiction); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994); *Smith*, 101 F.3d at 249; *see also Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (holding Chilean national airline's assets were not subject to execution to satisfy judgment against Chile in case of car bombing death of Chilean ambassador to the United States in Washington, D.C. because the airline's corporate status distinguished it from the Republic of Chile and because Congress only provided for execution against the property of a foreign state in non-commercial cases; “an act of political terrorism is not the kind of commercial activity that Congress contemplated.”).

v.] *Nelson* and the progressive development of United States legislation and jurisprudence on the subject of *jus cogens* violations.”⁵⁸ As a result, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (Antiterrorism Act or Act), which “lifted the immunity of foreign states for a certain category of sovereign acts [deemed] . . . repugnant to the United States and the international community—terrorism.”⁵⁹ The Antiterrorism Act

created an exception to the immunity of those foreign states officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity which commits such an act, which results in the death or personal injury of a United States citizen.⁶⁰

In order to establish subject matter jurisdiction over a claim filed pursuant to the Antiterrorism Act, seven statutory elements must be satisfied:

- (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking; and,
- (2) 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; and,
- (3) 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; and,
- (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; and
- (5) 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) either the plaintiff or the victim was a United States national at the time of the incident; and
- (7) similar conduct by United States agents, officials or employees within the United States would be actionable.⁶¹

As the court noted in *Estate of Elahi v. Islamic Republic of Iran*, “The Antiterrorism Act merely waived the sovereign immunity of state sponsors of terrorism. To create a cause of action for victims of ter-

58. *Flatow*, 999 F. Supp. at 12 (citations omitted).

59. *Id.* (citing 28 U.S.C. § 1605 (Supp. 1997)).

60. *Id.* (quoting 28 U.S.C. § 1605(a)(7) (Supp. 1997)); see also H.R. Rep. No. 383 at 137–38 (1995).

61. 28 U.S.C. § 1605(a)(7) (2001), quoted in *Flatow*, 999 F. Supp at 15.

rorism, Congress enacted a separate piece of legislation,”⁶² the Civil Liability for Acts of State Sponsored Terrorism Act (Civil Liability Act).⁶³ This amendment to the FSIA, known as the Flatow Amendment, also makes punitive damages available in actions brought under the state-sponsored terrorism exception to immunity against subdivisions and agents of foreign state defendants.⁶⁴ Congress explicitly made the statute retroactively applicable to pre-enactment conduct.⁶⁵

As a result of the Antiterrorism Act, certain state sponsors of terrorist acts already designated by the State Department as “terrorist states,” which engage in terrorist acts against U.S. citizens abroad, are no longer immune from civil lawsuits in the federal courts of the United States. In the years since the Act took effect, numerous American victims of state-sponsored terror have filed civil lawsuits against the governments of Iran, Libya, Cuba, and others, seeking monetary and other relief for the extensive injuries and damages that they and their families have sustained at the hands of the offending government.

C. Recovering Damage Awards From Foreign States

Although a number of plaintiffs have been awarded large verdicts in the years since the Act became law, successful plaintiffs have encountered difficulties collecting money on their judgments from foreign states, their agents, and their instrumentalities—at least until very recently. In an effort to address this problem, Congress enacted a measure in October 1998, calling upon the U.S. Department of State and the Treasury Department to assist victims of state-sponsored terrorist acts in their efforts to locate money and other assets to satisfy judgments.⁶⁶ However, the 1998 legislation contained a

62. 124 F. Supp. 2d 97, 106 (D.D.C. 2000) (“[T]he legislation provides a cause of action against a foreign state and its agents for any act which would give a court jurisdiction under 28 U.S.C. § 1605(a)(7).”).

63. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 U.S.C. § 1605 note (2001)). As the *Elahi* court notes, “although this provision of the statute has been published as a note to 28 U.S.C. § 1605, it has been interpreted as being an ‘independent pronouncement of law.’” *Elahi*, 124 F. Supp. 2d at 26 n.10 (quoting *Flatow*, 999 F. Supp. at 12).

64. *Elahi*, 124 F. Supp. 2d at 113; *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998) (citing H.R. CONF. REP. NO. 863 (1996)).

65. 28 U.S.C. § 1605 (2001).

66. 28 U.S.C. § 1610(f)(2)(A) (2001). Section 1610(f)(2)(A) states:

At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any

“national security” waiver, which allowed the executive branch to refuse such assistance in the interest of national security.⁶⁷ Consequently, the efforts of judgment holders to enforce their judgments were often hampered by the executive branch and its statutory discretion to block the collection of judgments obtained under the Antiterrorism Act.⁶⁸

On October 28, 2000, the Victims of Trafficking and Violence Protection Act of 2000 became law.⁶⁹ The Act creates exceptions to immunity from attachment or execution and obligates the U.S. Treasury to allow the “plaintiffs in specifically designated lawsuits against the Iranian government to recover an award of compensatory damages from Iranian assets frozen by the United States government.”⁷⁰ Its sponsor in the Senate, Senator Frank R. Lautenberg, said the bill would “strengthen our stand against terrorism” by acting as a deterrent to attacks aimed at American citizens.⁷¹ The new legislation makes monies due to the United States from any state against which a judgment is pending under § 1605(a)(7) subject to attachment and execution in like manner and to the same extent as if the United States were a private person.⁷²

As the following summary of the case law under the Antiterrorism Act makes clear, most of the successful plaintiffs’

such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

Id.

67. 28 U.S.C. § 1610(f)(3) (2001) (“The President may waive any provision of paragraph (1) in the interest of national security.”); *see also*, *Senate Passes Bill on Terror Victims’ Lawsuits*, N.Y. TIMES, Oct. 12, 2000, at A9.

68. 28 U.S.C. § 1610(f)(3) (2001)

69. 28 U.S.C. § 1610 (2001).

70. *Estate of Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 109 (D.D.C. 2000) (citing 28 U.S.C. § 1610 (2001)). The Act provides:

The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or . . . (7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(1), (7) (2001). The Act contains a nearly identical provision with respect to the property in the United States of any agency or instrumentality of a foreign state. *See* 28 U.S.C. § 1610(b) (2001).

71. *Senate Passes Bill on Terror Victims’ Lawsuits*, N.Y. TIMES, Oct. 12, 2000, at A7.

72. Justice for Victims of Terrorism Act, 28 U.S.C. § 1610(f) (2001).

claims under § 1605(a)(7) to date have been against the government of Iran. The new Act has enabled some of those plaintiffs to collect on the judgments they have obtained against the Iranian government, its ministries, and its agencies. In fact, in the past year alone, since the passage of the Victims of Trafficking and Violence Prevention Act, more than \$410 million has been paid out to victims of state-sponsored terror and their families. The payments came from frozen funds of state sponsors of terrorist acts, including Cuba and Iran.⁷³

Notably, § 1610(f)(3) of the Act contains a national security waiver provision which, in pertinent part, provides that “[t]he President may waive any provision of paragraph (1) in the interest of national security.”⁷⁴ On October 28, 2000, the very day the new Act took effect, President Clinton issued Presidential Determination No. 2001-03, in which he exercised his waiver authority with respect to § 1610(f)(1) of the Act.⁷⁵ Section 1610(f)(1) provides that “any property with respect to which financial transactions are prohibited or regulated pursuant to” certain provisions of the Trading with the Enemy Act,⁷⁶ the Foreign Assistance Act of 1961,⁷⁷ and the International Emergency Economic Powers Act,⁷⁸ is subject to “execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state . . . claiming such property is not immune [from the jurisdiction of the U.S. federal or state courts] under § 1605(a)(7).”⁷⁹ The Presidential Determination recites that § 1610(f)(1) “would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions.”⁸⁰ Thus, the efficacy of the new Act in terms of helping successful plaintiffs translate their judgments to dollars has been mixed.

73. In the past year, since the passage of the Victims of Trafficking and Violence Prevention Act, more than \$410 million has finally been paid out to victims of state-sponsored terror and their families. The payments came from frozen funds of state sponsors of terrorist acts, including Cuba and Iran. Thomas, *supra* note 7, at 22.

74. 28 U.S.C. § 1610 (f)(3) (2001).

75. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

76. 50 U.S.C. § 5(b) (1988).

77. 22 U.S.C. § 2370(a) (1988).

78. 50 U.S.C. § 1701-02 (1988).

79. 28 U.S.C. § 1610(f)(1) (2001).

80. Presidential Determination No. 2001-03, *supra* note 75.

IV. CASE LAW ARISING UNDER SECTION 1605(A)(7)

Since the Antiterrorism Act became law in 1996, a number of U.S. citizens who were victims of state-sponsored terrorism and their family members have filed civil lawsuits against the foreign states that sponsored the terrorist acts from which they suffered. To date, civil judgments have been entered in reported cases against the governments of Cuba and Iran, and at least one federal court has held that Libya may be sued by the families of the victims of the Pan Am flight 103 bombing.⁸¹ A careful examination of the major reported cases to date under the Antiterrorism Act follows.

A. The *Alejandro* Case

In *Alejandro v. Republic of Cuba*,⁸² the personal representatives of the estates of three U.S. citizens killed when their civilian airplanes were shot down by Cuban Air Force planes in international airspace over the Florida Straits filed suit against the Republic of Cuba and the Cuban Air Force in the United States District Court for the Southern District of Florida. These consolidated cases were the first to rely upon the Antiterrorism Act.⁸³ At the time of their deaths, plaintiffs' decedents were participating in a humanitarian mission on behalf of a nongovernmental organization known as Brothers to the Rescue,⁸⁴ searching for emigrating rafters in the waters between Cuba and the Florida Keys.⁸⁵ Two Cuban Air Force airplanes, acting on direct orders relayed via radio from their Cuban government-employed superiors, used air-to-air missiles in two separate attacks to murder the civilian pilots. There was no provocation or warning for the attack, and a subsequent investigation by the International Civil Aviation Organization confirmed that the incident occurred over international waters.⁸⁶

Both the Republic of Cuba and the Cuban Air Force failed to move, answer, or plead in response to the plaintiffs' complaints, as-

81. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

82. 996 F. Supp. 1239 (S.D. Fla. 1997).

83. *Id.* at 1242.

84. Brothers to the Rescue, also known as Hermanos al Rescate, is an organization "whose principal mission was to search the Florida Straits for rafters, Cuban refugees who had fled the island nation on precarious inner tubes or makeshift rafts, often perishing at sea. Brothers to the Rescue would locate the rafters and provide them with life-saving assistance by informing the U.S. Coast Guard of their location and condition." *Id.* at 1243.

85. *Id.*

86. *Id.* at 1247.

serting through a diplomatic note that the U.S. district court lacked personal jurisdiction over Cuba and its political subdivisions.⁸⁷ A default judgment was entered against the defendants pursuant to Federal Rule of Civil Procedure 55(a); however, because the case involved a foreign state, a default judgment could not be entered under the FSIA until the case proceeded to trial.⁸⁸

Following a trial *in absentia* at which the plaintiffs introduced extensive evidence, the district court concluded it had jurisdiction over the suits pursuant to the “narrow exception to foreign sovereign immunity through the Anti-Terrorism and Effective Death Penalty Act of 1996.”⁸⁹ The district court wrote,

the FSIA now provides that a foreign state shall not be immune from the jurisdiction of U.S. Courts in any case “in which money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing . . . if such act . . . 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.”⁹⁰

The court concluded that all of the requirements of the statute were met on the record before it: plaintiffs’ decedents were U.S. citizens who were victims of an “extrajudicial killing” as that term is defined in the Torture Victim Protection Act of 1991;⁹¹ the Cuban Air Force was acting as an agent of Cuba when it committed the killings;⁹² Cuba had been continuously designated a state sponsor of terrorism by the United States Congress under the Export Administration Act since 1979,⁹³ and the acts in question occurred outside of Cuban territory.⁹⁴

87. *Id.*

88. “In lawsuits against a foreign state, the court may not enter judgment by default. Rather, the claimants must establish the claim or right to relief by evidence that is satisfactory to the Court.” *Id.* (citations omitted).

89. *Id.* at 1247.

90. *Id.* at 1247–48 (quoting 28 U.S.C. § 1605(a)(7) (2001)).

91. The Torture Victim Protection Act defines an extrajudicial killing as “a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Torture Victim Protection Act, Pub. L. No. 102-256, § 3, 106 Stat. 73 (1992), *quoted in* *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1248 (S.D. Fla. 1997).

92. *Alejandro*, 996 F. Supp. at 1248. The pilots of the Cuban airplanes obtained prior permission from state officials before firing the deadly missiles, as the transcript of their radio communications confirmed.

93. *Id.*

94. *Id.* (citing United Nations Convention on the Law of the Sea, Oct. 7, 1982, art. 3, S. TREATY DOC. NO. 103-39, 1833 U.N.T.S. 3). The first plane was shot down “18 miles from the Cuban coast,” and the second was “30.5 miles from the coast when fired upon, . . . well outside of the twelve-mile territorial sea claimed by Cuba and permitted under international law.” *Id.*

As a result, the court held that “the facts of this case fall squarely within the requirements of section 1605(a)(7).”⁹⁵

The plaintiffs’ based their substantive cause of action on 28 U.S.C. § 1605, which “creates a cause of action against agents of a foreign state that act under conditions specified in FSIA § 1605(a)(7).”⁹⁶ The enforcement provision for § 1605(a)(7) provides that if a plaintiff proves a foreign agent’s liability under the Act, then “the foreign state employing the agent would also incur liability under the theory of *respondeat superior*.”⁹⁷ On that basis, the court found that both the Cuban government and the Cuban Air Force were liable for the murders of plaintiffs’ decedents. On the issue of damages, the court noted that the Civil Liability Act provides for agents of foreign states to be held liable for money damages “which may include economic damages, solatium, pain and suffering, and punitive damages.”⁹⁸

Based on an economist’s testimony regarding lost wages, benefits, and services, as well as the testimony of decedents’ surviving family members concerning their pain and suffering, the court awarded the estate of plaintiff Armando Alejandro compensatory damages in the amount of \$17,532,913, the estate of Carlos Costa \$16,130,704 in compensatory damages, and the estate of Mario De La Pena \$16,264,294 in compensatory damages.⁹⁹ In addition, the court awarded each estate punitive damages against the Cuban Air Force (as an agent of the Cuban government), recognizing that courts faced with gross violations of international human rights in the context of Alien Tort Claims Act and Torture Victim Protection Act cases had previously awarded such damages as a means of punishing defendants and deterring others from engaging in similar conduct.¹⁰⁰ Noting that the practice of summary execution has consistently been condemned by the world community, and that “every instrument or agreement

95. *Id.*

96. *Alejandro*, 996 F. Supp. at 1249 (citing 28 U.S.C. §1605 (1997)).

97. *Id.* (citing *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1417 (D.D.C. 1983)).

98. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2001)), *quoted in Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1249 (S.D. Fla. 1997).

99. *Alejandro*, 996 F. Supp. at 1249.

100. *Id.* at 1251 (“By granting large exemplary awards, courts have both expressed their condemnation of human rights abuses and attempted to deter other international actors from engaging in similar practices. Most of these cases have been brought pursuant to the authority of the Alien Tort Claims Act . . . and the . . . [Torture Victims Protection Act].”).

that has attempted to define the scope of international human rights has ‘recognized a right to life coupled with a right to due process to protect that right,’”¹⁰¹ the court held that the ban on extrajudicial killing rises to the level of “*jus cogens*, a norm of international law so fundamental that it is binding on all members of the world community.”¹⁰² Because the defendants’ conduct violated clearly established principles of international law and constituted premeditated, intentional, and “inhumane acts against innocent civilians,” the court awarded punitive damages to the plaintiffs in an amount equaling approximately one percent the value of the Cuban Air Force’s fleet of aircraft, or \$45.9 million, for each of the three killings.¹⁰³ Thus, the total judgment entered against the Cuban government in compensatory and punitive damages for the three killings was \$187,627,911.

B. The Terrorist Bombing Cases

1. *Flatow v. Islamic Republic of Iran*. In *Flatow v. Islamic Republic of Iran*,¹⁰⁴ the estate of Alisa M. Flatow brought suit under 28 U.S.C. § 1605(a)(7) in the United States District Court for the District of Columbia against the Islamic Republic of Iran, its Ministry of Information and Security (MOIS), Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani, jointly and severally. The plaintiff’s decedent, a twenty year old Brandeis University student participating in an independent foreign study program in Israel, died on April 10, 1995,¹⁰⁵ in the Gaza Strip when a suicide bomber drove a van loaded with explosives into the public bus on which she was riding.¹⁰⁶ As in *Alejandre*, the defendants failed to move, answer, or plead in response to the plaintiff’s complaint,¹⁰⁷ and the court found them in default on September 4, 1997, pursuant to 28 U.S.C. § 1608(e) and Federal Rule of Civil Procedure 55(a).¹⁰⁸ Noting that the FSIA “requires that a default judgment against a foreign state be entered only after plaintiff ‘establishes his claim or right to relief by the evidence that is satisfactory to the Court,’”¹⁰⁹ the court conducted a two-day evidentiary hearing and issued a thirty-seven page written decision. The court held that the plaintiffs’ estate had established its right to relief by “clear and convincing evidence sufficient to establish a prima facie case in a contested proceeding.”¹¹⁰ The

101. *Alejandre*, 996 F. Supp. at 1252 (citing *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995)).

102. *Id.* (citations omitted).

103. *Alejandre*, 996 F. Supp. at 1253.

district judge concluded that the Shaqaqi faction of the Palestine Islamic Jihad, the party that claimed responsibility for the suicide attack killing Alisa M. Flatow, had in fact perpetrated the terrorist attack.¹¹¹ According to the court,

Palestine Islamic Jihad is a series of loosely affiliated factions rather than a cohesive group. The Shaqaqi faction is a terrorist cell with a small core membership. Its sole purpose is to conduct terrorist activities in the Gaza region, and its sole source of funding is the Islamic Republic of Iran.¹¹²

The court concluded that “Iran sponsors the Shaqaqi faction’s terrorist activities within the meaning of 28 U.S.C. Section 1605(a)(7) and 28 U.S.C. Section 1605 . . . by providing it with all of its funding.”¹¹³ The court went on to hold that defendant MOIS, acting within the scope of its agency on behalf of the Iranian government and as “a conduit for the Islamic Republic of Iran’s provision of funds and training to the Shaqaqi faction for its terrorist activities in the Gaza Strip region,” caused the death of Alisa M. Flatow.¹¹⁴ Similarly, the court held defendants Khamenei, Hashemi-Rafsanjani, and Fallahian-Khuzestani responsible for causing the decedent’s death since they “approved the provision of material support and resources to the Shaqaqi faction of Palestine Islamic Jihad.”¹¹⁵ According to the court, “Flatow’s death was caused by a willful and deliberate act of extrajudicial killing [within the meaning of 28 U.S.C. §1605(a)(7)] because

104. 999 F. Supp. 1 (D.D.C. 1998).

105. *Id.* at 27. Although the events complained of occurred more than a year prior to the enactment of the Antiterrorism Act, the Act was explicitly given retroactive application by Congress and the *Flatow* court found that it had subject matter jurisdiction over the action. *Id.* at 12; see 28 U.S.C. § 1605 note (2001) (Retroactive Effect).

106. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7-8 (D.D.C. 1998) (noting that “United States nationals often rode this bus line”).

107. *Id.* at 6. The court noted that service of process was accomplished on the defendants with the assistance of the Swiss Embassy in Tehran on June 8, 1997, but as of the date on which its decision was entered, March 11, 1998, no response had been received from the defendants. Switzerland is the protecting power of the United States in the Islamic Republic of Iran.

108. *Id.*

109. *Flatow*, 999 F. Supp. at 6 (quoting 28 U.S.C. § 1608(e) (1994)).

110. *Id.*

111. *Id.* at 8. The court’s finding was based upon the testimony of Dr. Reuven Paz, Dr. Patrick Clawson, and former FBI Deputy Assistant Director for Counterterrorism, Harry Brandon, and was confirmed by the investigation of the Israeli government into the bombing.

112. *Id.* at 8.

113. *Id.* According to the court, “the Islamic Republic of Iran provided approximately \$2 million to Palestine Islamic Jihad annually in support of its terrorist activities.” *Id.* at 9.

114. *Id.* at 9.

115. *Id.* at 9–10.

the explosion was caused by a bomb that was deliberately driven into the bus by a member of the Shaqaqi faction of the Palestine Islamic Jihad acting under the direction of [the] Defendants.”¹¹⁶ The court noted that the Islamic Republic of Iran is a foreign state designated as a sponsor of terrorism pursuant to the Export Administration Act of 1979¹¹⁷ and that it had been so designated since January 19, 1984.¹¹⁸ Judge Lamberth held that the routine provision of financial assistance to a terrorist group in support of its activities constitutes “providing material support or resources” for a terrorist act within the meaning of the statute.¹¹⁹ He awarded the plaintiffs compensatory damages of more than \$1.5 million for loss of accretions,¹²⁰ \$1 million for the decedent’s pain and suffering,¹²¹ and punitive damages of \$225 million (three times the amount of Iran’s annual expenditure for terrorist activities).¹²²

2. *Eisenfeld v. Islamic Republic of Iran*. On February 25, 1996, less than a year after the tragic death of Alisa Flatow, another terrorist bomb in Israel claimed the lives of two more American students pursuing graduate work there, Matthew Eisenfeld and Sara Rachel Duker.¹²³ The two were killed when one of their fellow passengers on the Number Eighteen Egged bus in Jerusalem detonated explosives he had carried onto the bus concealed in a travel bag.¹²⁴ As in the *Flatow* case, the administrators of the decedents’ estates and their surviving immediate family members filed a wrongful death action pursuant to the FSIA in the United States District Court for the District of Columbia, naming as defendants the Islamic Republic of Iran and various senior officials in the Iranian government, as well as the

116. *Id.* at 10.

117. *Id.* at 12 (citing 50 U.S.C. app. § 2405(j) (1994)).

118. *Id.* at 13. The court also noted that Iran’s continued sponsorship of terrorism prompted the United States to suspend diplomatic relations with Iran and participate in an international embargo with trade restrictions.

119. *Id.* at 18. The court concluded that plaintiffs need not prove that the material support provided by a foreign state contributed directly to the act in order for subject matter jurisdiction to lie, holding that “[s]ponsorship of a terrorist group which causes the personal injury or death of a United States national alone is sufficient to invoke jurisdiction.”

120. *Id.* at 28.

121. *Id.* at 29.

122. *Id.* at 34.

123. *Eisenfeld v. Islamic Republic of Iran*, No. Civ. 98-1945 RCL, 2000 WL 1918779, at *2 (D.D.C. July 11, 2000).

124. *Id.*

MOIS.¹²⁵ Hamas, the popular name for the Islamic Resistance Movement, immediately claimed credit for the attack. This claim of responsibility was further verified in statements given to the Israeli police and on the television program *60 Minutes* by Hassan Salamah, the Hamas member who planned the attack. Mr. Salamah was trained at an Iranian base outside of Tehran for the bus attack for a period of three months under the supervision of Iranian military instructors. He was then sent to Israel following his training to carry out a series of terrorist attacks, including the attack on the Number Eighteen Egged Bus. According to the court, the Islamic Republic of Iran gave Hamas \$15 million per month in support.¹²⁶ The court noted that Iran has been designated a state sponsor of terrorism by the U.S. government since 1984 pursuant to § 6(j) of the Export Administration Act of 1979¹²⁷ and concluded that the defendants acted as a conduit and provided funds within the meaning of 28 U.S.C. § 1605(a)(7), which, in turn, caused the deaths of Matthew Eisenfeld and Sara Duker.¹²⁸ Upon concluding that the elements of the Act had been proven by the plaintiffs, the court awarded compensatory damages totaling \$27,161,002 and punitive damages in the amount of \$300 million.¹²⁹

C. Iran and the Hostage Cases

Between 1983 and 1985, Lebanon was in a state of turmoil that has been described as “effectively a state of civil war.”¹³⁰ A number of Americans and Western Europeans were kidnapped during this period by various terrorist organizations funded or sponsored by the Iranian government and its agencies.¹³¹ A number of those kidnapped and their families subsequently filed suit under the FSIA against the Islamic Republic of Iran, the MOIS, and various Iranian government officials for training, funding, and supporting the terrorist organizations.

125. *Id.*

126. *Id.* at *3.

127. 50 U.S.C. app. § 2405(j) (1994).

128. *Eisenfeld*, 2000 WL 1918779, at *2.

129. *Id.* at *6.

130. *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 32 (D.D.C. 2001).

131. Among those kidnapped were William Buckley, the local CIA station chief; Rev. Benjamin Weir of the Episcopal Church; Fr. Lawrence Martin Jenco; Terry Anderson of the Associated Press; and David Jacobson of the AUB Medical School. *Id.* (citations omitted).

1. *Cicippio v. Islamic Republic of Iran*. In *Cicippio v. Islamic Republic of Iran*, three U.S. citizens who were each separately kidnapped, held hostage, and tortured in Beirut, Lebanon between 1985 and 1991, filed suit along with their spouses against the Iranian government pursuant to § 1605(a)(7).¹³² Although served with a copy of the plaintiffs' complaint,¹³³ Iran did not move, answer, or plead in response, and the court entered a default judgment against it. As in *Alejandre and Flatow*, the plaintiffs nevertheless were required under 28 U.S.C. § 1608(e) to establish their right to relief by evidence "satisfactory to the Court," and the case proceeded to a hearing on the merits.¹³⁴

The evidence adduced by the plaintiffs demonstrated that David Jacobson, the CEO of American University of Beirut Medical Center (held hostage for 532 days), Joseph Cicippio, comptroller of the American University of Beirut and its hospital (held hostage for 1,908 days) and Frank Reed, the owner of two private schools in Lebanon (held hostage for 1,330 days), were each independently abducted by armed male assailants on public thoroughfares in Beirut.¹³⁵ They were held separately as prisoners in various locations throughout the city and subjected to regular beatings, death threats, and interrogations. At times they were held in solitary confinement, and all were restrained in chains and tortured.¹³⁶ U.S. government and expert testimony produced at trial identified their captors as members of Hezbollah, a terrorist organization, and Iran as a recognized, state sponsor of terrorist acts.¹³⁷

The court held that Iran "openly provided 'material support or resources' to Hezbollah," and that

Plaintiffs have proved to the Court's satisfaction: (1) that they were injured by acts of torture and hostage-taking; (2) that the acts were perpetrated by a group receiving material support from Iran; (3) that the provision of material support was engaged in by Iranian officials, employees or agents acting within the scope of their office, employment, or agency; (4) that at the time of the acts, Iran was

132. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 63–64 (D.D.C. 1998).

133. The government of Iran received service of process pursuant to 28 U.S.C. § 1608(a) via service on the Embassy of Switzerland in Tehran, Iran, which delivered the summons, complaint, and notice of suit to the Ministry of Foreign Affairs of Iran. *Id.* at 67 n.4.

134. *Id.* at 67.

135. *Id.* at 64–66.

136. *Id.*

137. *Id.* at 64. The court based its finding in part on the testimony of Col. David W. Hurley, USMC, Director of Intelligence for the U.S. Marine Corps, and Dr. Patrick L. Clawson, Director of Research, Washington Institute of Near East Policy. *See id.* at 64 n.2.

designated as a state sponsor of terrorism under 50 U.S.C. App. Section 2405(j) or 22 U.S.C. Section 2371; (5) that the claimants or victims were U.S. nationals at the time the acts occurred . . . and (6) that similar acts conducted by officials, employees, or agents of the U.S. while acting within the scope of [their] office, employment or agency, would also be actionable.¹³⁸

Notably, the court retroactively applied the Antiterrorism Act, holding that “although the abductions of Cicippio, Reed and Jacobsen occurred more than a decade prior to the enactment of 28 U.S.C. Section 1605(a)(7), Congress expressly directed that the statute be given retroactive application.”¹³⁹ The court also found that the ten-year limitations provision in § 1605(a)(7) did not bar plaintiffs’ claims since Congress expressly provided that victims of terrorism should receive “all principles of equitable tolling, including the period during which the foreign state was immune from suit.”¹⁴⁰ Thus, even though the acts giving rise to the suit occurred at a point in time when Iran was *immune* from suit under the FSIA and *before* the law on which plaintiffs’ claims were based had been enacted, the court nevertheless found the government of Iran liable. The court awarded plaintiff Joseph Cicippio \$20 million for his pain, suffering, mental anguish, lost wages, and lost business opportunities, as well as \$10 million to his spouse for her loss of her husband’s society, services, and companionship.¹⁴¹ Frank Reed was awarded \$16 million in compensatory damages, and his wife was awarded \$10 million. Plaintiff David Jacobsen was awarded \$9 million.¹⁴² No punitive damages could be awarded in the case as they were precluded against foreign state defendants under 28 U.S.C. § 1606.¹⁴³

2. *Anderson v. the Islamic Republic of Iran.* In *Anderson v. the Islamic Republic of Iran*,¹⁴⁴ Terry Anderson, an American journalist working as the chief correspondent for the Associated Press in Lebanon, filed suit pursuant to § 1605(a)(7) against the Republic of Iran and the MOIS in the U.S. District Court for the District of Columbia. Mr. Anderson was kidnapped at gunpoint from his car in Beirut on March 16, 1985, held hostage, imprisoned, and chained at various lo-

138. *Id.* at 68.

139. *Id.* at 68–69 (citing 28 U.S.C. § 1605 note (West Supp. 1997)).

140. *Id.* at 69 (citing 28 U.S.C. § 1605(f)).

141. *Id.* at 70.

142. *Id.*

143. *Id.*

144. *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000).

cations in and around Beirut for the next seven years under abhorrent conditions.¹⁴⁵ Like the plaintiffs in *Cicippio*, Anderson was threatened with death and kept in unsanitary conditions in a war zone throughout his ordeal.

Following a trial on the merits, at which the Iranian government again neither appeared nor answered,¹⁴⁶ Judge Thomas Penfield Jackson found conclusive evidence that Terry Anderson was “kidnapped—and imprisoned under deplorable, inhumane conditions—by agents of the Islamic Republic of Iran, known . . . most commonly as Hezbollah, or ‘party of God.’”¹⁴⁷ As in *Cicippio*, the court found that all of the elements of § 1605(a)(7) had been satisfied by the evidence before it. The court entered judgment for the plaintiffs, and awarded compensatory damages to Terry Anderson in the amount of \$24.5 million; to his wife, Madeleine, in the amount of \$10 million; and to his daughter, Sulome, in the amount of \$6.7 million.¹⁴⁸ The court also awarded punitive damages against the MOIS in an amount approximately three times its annual budget for terrorist activities, or \$300 million.¹⁴⁹

3. *The Thomas Sutherland Case.* Less than three months after Terry Anderson was kidnapped, another U.S. citizen, Dr. Thomas M. Sutherland, the dean of the Faculty of Agricultural and Food Sciences at the American University of Beirut, was similarly abducted by eight members of Hezbollah brandishing submachine guns.¹⁵⁰ The kidnapers sideswiped and stopped Dr. Sutherland’s vehicle as he was returning to his home from the airport. He spent almost six and one-half years imprisoned in dungeons throughout Lebanon without sunlight; he attempted suicide three times. He was the subject of horrific physical abuse, beatings, and torture, as well as psychological abuse and abhorrent living conditions; he was often chained to a floor or to other hostages.¹⁵¹ Although he was released on November 18, 1991, it was not until eight years later that Dr. Sutherland and his wife and children filed suit against the Iranian government and the MOIS un-

145. *Id.* at 108.

146. *Id.* at 109 n.1. As in *Cicippio*, service of process of the summons and complaint was effectuated upon the Iranian government and the MOIS via the Swiss Embassy in Tehran.

147. *Anderson*, 90 F. Supp. 2d at 112.

148. *Id.* at 113.

149. *Id.* at 114.

150. *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 33 (D.D.C. 2001).

151. *Id.* at 33.

der the FSIA.¹⁵² The defendants did not appear in the case. Following a bench trial, as required by 28 U.S.C. § 1608(e), the court issued a twenty-four page ruling on June 25, 2001, concluding that the Iranian government and the MOIS had supported the terrorist organization that kidnapped Dr. Sutherland¹⁵³ and that “Hezbollah, funded by MOIS and Iran, was responsible for the kidnapping and captivity of Thomas Sutherland.”¹⁵⁴ According to the court, the defendants’ conduct constituted acts of “torture” and “hostage taking,” or the material support for such acts, within the meaning of 28 U.S.C. § 1605(a)(7).¹⁵⁵ Therefore, the defendants were not entitled to immunity under the FSIA and were civilly liable to the Sutherlands for battery, assault, false imprisonment, loss of consortium, intentional infliction of emotional distress, and loss of solatium.¹⁵⁶ The plaintiffs were variously awarded more than \$53 million in compensatory damages, as well as \$330 million in punitive damages against the MOIS.¹⁵⁷ In setting the compensatory damage award for Dr. Sutherland, the court stated explicitly that it was following a “formula which has evolved as a standard in the hostage cases brought under § 1605(a)(7) This formula grants the former hostage roughly \$10,000 for each day of his captivity.”¹⁵⁸ To explain its use of such a formula, the court wrote:

Any skepticism about the adequacy of this formula must overcome the steep presumption that Congress has tacitly approved its use The formula was developed prior to October 28, 2000. On that day, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000. The Act obligated the United States Treasury to pay terrorist victims—including the hostages described above—the amount awarded them at trial, or in other words, about \$10,000 per day of captivity. Congress must be presumed to have [been] aware of the damages formula, and its failure to amend it in any way amounts to tacit approval of the scheme.¹⁵⁹

152. *Id.* at 31. Jurisdiction over the plaintiffs’ complaint was predicated on 28 U.S.C. §§ 1330(b), 1605(a)(7).

153. *Sutherland*, 151 F. Supp. 2d at 44 (“Since the 1980’s, MOIS has worked closely with Hezbollah to support its terrorist activities in Lebanon. For example, MOIS assisted Hezbollah in collecting information about potential kidnapping targets and planning the prison networks to hold the victims.”).

154. *Id.*

155. *Id.* at 45.

156. *See id.* at 50 (“[W]hen an organization takes someone hostage, it is implicitly intending to cause emotional distress among the members of that hostage’s immediate family.”).

157. *See id.* at 53.

158. *Id.* at 51.

159. *Id.* (citing *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972)).

With respect to punitive damages, the court selected an amount three times the annual funding provided by the Iranian government to MOIS. Noting that there had been no reported hostage taking incidents involving Hezbollah and U.S. nationals since the U.S. courts began awarding substantial punitive damage awards in these cases in 1998, the court stated that it is “not at all convinced that punitive damages are wholly ineffectual.”¹⁶⁰

4. *The Rev. Lawrence M. Jenco Case.* Like the plaintiffs in *Anderson, Sutherland, and Ciccipio*, Lawrence M. Jenco, a Catholic priest and the Director of Catholic Relief Services in Lebanon, was kidnapped by armed members of Hezbollah in 1985.¹⁶¹ He was detained for 564 days, chained, beaten, and almost constantly blindfolded. His clothing and sanitary conditions were spartan at best, and he was denied even the most basic medical care. The psychological torture he endured is best illustrated by the following example:

Most notably, at one point, his captors held a gun to his head and told him that he was about to die. The captors pulled the trigger and laughed as Fr. Jenco reacted to the small click of the unloaded gun. At other times, the captors misled Fr. Jenco into thinking he was going home. They told him to dress up in his good clothes, took pictures of him, and said ‘ha, ha, we’re just kidding.’¹⁶²

After his release, Father Jenco returned to the United States, where he served as a parish priest until he died on July 19, 1996.¹⁶³ On March 15, 2000, his brother, as personal representative of Father Jenco’s estate, along with his five other siblings and twenty-two nieces and nephews, filed suit against Iran and the MOIS under the Antiterrorism Act.¹⁶⁴ As in the cases cited above, the defendants failed to move, answer, or plead in response to the plaintiffs’ complaint and an evidentiary hearing was held in the form of a bench trial to receive evidence from the plaintiffs.

Once again, the court concluded that the defendants funded, supported, and controlled Hezbollah in the kidnapping, detention, and torture of Father Jenco, and that the defendants were not entitled to immunity under the Act.¹⁶⁵ The court found the defendants liable to the plaintiffs on various tort theories, including assault, battery,

160. *Id.* at 53.

161. *Estate of Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 29 (D.D.C. 2001).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 33.

and false imprisonment, as well as intentional infliction of emotional distress, economic loss and loss of consortium.¹⁶⁶ Notably, though, the court only awarded damages to the Estate and to Father Jenco's six siblings.¹⁶⁷ It refused to award damages to the priest's nieces and nephews, holding that "to collect for intentional infliction of emotional distress in cases such as this one, the plaintiff need not be present at the place of outrageous conduct, but must be a member of the victim's immediate family."¹⁶⁸ Applying "the formula which has evolved as a standard in hostage cases brought under section 1605(a)(7)," the court awarded the estate of Father Jenco approximately \$10,000 for each day of his captivity, or \$5,640,000.¹⁶⁹ Father Jenco's six siblings were each awarded \$1.5 million for their emotional distress damages.¹⁷⁰ In addition, the court awarded \$300 million in punitive damages, for a total judgment in excess of \$314 million.¹⁷¹

D. The Iraqi Hostage Case: *Daliberti v. Republic of Iraq*

Between 1992 and 1995, three separate yet similar incidents occurred in which the Iraqi government arrested, detained, and tortured U.S. citizens doing business in Kuwait.¹⁷² In *Daliberti v. Republic of Iraq*, the male victims and their spouses filed suit against the Iraqi government under the state-sponsored terrorism exception to the FSIA in the United States District Court for the District of Columbia. The parties sought damages for kidnapping, torture, false imprisonment, pain and suffering, and loss of consortium. Unlike the cases discussed above, the defendant in *Daliberti* appeared in the case, filing a motion to dismiss the plaintiffs' complaint for lack of personal and subject matter jurisdiction and for failure to state a claim under Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure, respectively.¹⁷³ The Iraqi government asserted that the FSIA gave it immunity from suit and that none of the Act's exceptions applied in the case.¹⁷⁴

166. *Id.* at 37.

167. *Id.* at 40.

168. *Id.* at 36.

169. *Id.* at 37.

170. *Id.* at 40.

171. *Id.* at 39.

172. *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 41 (D.D.C. 2000).

173. *Id.* at 40.

174. The Iraqi government also asserted that because it had insufficient contacts with the United States, no U.S. court had personal jurisdiction over it, and that the complaint should be

The court concluded that the defendant's actions fell within a category of conduct that Congress intended to exempt from FSIA protection when it amended the FSIA to include an exception for state-sponsored terrorism.¹⁷⁵ The court further found that the male plaintiffs were tortured and taken hostage as those terms are defined under the Act.¹⁷⁶ Therefore, the court held that the male plaintiffs met their burden of proving that the actions of the defendants fell within the state-sponsored terrorism exception to foreign sovereign immunity under § 1605(a)(7).¹⁷⁷

The court rejected Iraq's argument that the state-sponsored terrorism exception to the FSIA represented an unconstitutional legislative delegation of authority to the executive branch to determine the federal courts' jurisdiction, as well as the argument that the state-sponsored terrorism exception violated Iraq's due process right to equal protection by discriminating against those sovereigns designated as state sponsors of terrorism.¹⁷⁸ On the separation of powers issue, the court wrote:

Iraq was already on the list of states designated as state sponsors of terrorism at the time the AEDPA was enacted. Thus, Congress, not the Executive, actually made the determination that Iraq would be subject to suit under the new FSIA exception, since Congress in enacting the statute knew that, regardless of what the Secretary of State might do in the future, the state-sponsored terrorism exception would apply to an identifiable group of sovereign states of which Iraq was already a member. 'No decision whatsoever of the Secretary of State was needed to create jurisdiction over [Iraq]' That jurisdiction existed the moment the AEDPA amendment became law.¹⁷⁹

On the equal protection issue, the court also rejected Iraq's argument, applying the rational basis test to conclude the following:

dismissed under the act of state doctrine. *Id.* at 40. See *infra* section IV for a detailed discussion of these arguments.

175. For example, on September 12, 1990, the U.S. Department of State deemed Iraq a state sponsor of terrorism. Determination Iraq, 55 Fed. Reg. 37,793 (Sept. 13, 1990) (codified at 31 C.F.R. § 596.201 (2001); see *Daliberti*, 97 F. Supp. 2d at 44 ("No rescission of this designation has been published pursuant to statute and Iraq remains so designated.")).

176. The FSIA adopted the definition of torture from the Torture Victim Protection Act of 1991 and the definition of hostage taking from the International Convention Against the Taking of Hostages. See *Daliberti*, 97 F. Supp. 2d at 45.

177. Notably, the court dismissed the female plaintiff spouses' claims because they were not pled under the commercial activity or the state-sponsored terrorism exceptions to the FSIA. *Id.* at 40.

178. *Id.* at 50–52.

179. *Id.* (citing *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998)).

Those nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit that is within the prerogative of Congress to grant or withhold. The distinction made by Congress between those states that have been designated as sponsors of terrorism and those that have not is rationally related to its purpose of protecting U.S. citizens by deterring international terrorism and providing compensation for victims of terrorist acts. 28 U.S.C. Section 1605(a)(7) does not violate the equal protection guarantees of the Due Process Clause.¹⁸⁰

The court held that the four male plaintiffs had established sufficient grounds to allow their claims to proceed against Iraq under the state-sponsored terrorism exception.¹⁸¹ The motion to dismiss as to the male plaintiffs was denied, and their case was allowed to proceed to trial.

E. Extrajudicial Killing: the *Elahi* case

In addition to waiving sovereign immunity for acts of state-sponsored torture, hostage taking, and aircraft sabotage, § 1605(a)(7) also waives sovereign immunity for certain acts of state-sponsored extrajudicial killing. In *Estate of Elahi v. Islamic Republic of Iran*, the brother and personal representative of the estate of Cyrus Elahi filed suit against Iran and the MOIS under the FSIA.¹⁸² Cyrus Elahi, a naturalized U.S. citizen and Iranian dissident, was assassinated in Paris on October 23, 1990 by agents of the Iranian government.¹⁸³ Again, the defendants did not appear in the case. Following a bench trial, the court issued an eighteen page opinion, concluding that the defendants were responsible for the extrajudicial killing of Dr. Elahi as part of an Iranian government campaign to eliminate some of the top leaders of its major opposition organizations.¹⁸⁴ The court denounced assassination as “clearly contrary to the precepts of humanity as recognized in both national and international law”¹⁸⁵ and held

180. *Id.* at 52.

181. *Id.* at 55.

182. 124 F. Supp. 2d 97, 99 (D.D.C. 2000).

183. *Id.*

184. The Act defines an extrajudicial killing as “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. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.” *Id.* at 107 (citing Pub. L. No. 102-256, § 3(a) (1992)).

185. 124 F. Supp. 2d at 107 (citations omitted); *see also* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (“The proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory.”); Xuncax v. Gramajo,

Iran and the MOIS responsible under the FSIA for the wrongful death of Cyrus Elahi.¹⁸⁶ The court awarded the plaintiffs \$11,740,035 in compensatory damages and \$300 million in punitive damages.

F. Analysis of Case Law

A number of common threads run through the case law discussed above. In nearly every case, the foreign state defendants and their agents failed to file a motion, answer, or make an appearance in U.S. courts.¹⁸⁷ In fact, all but one of the cases filed under the Act to date have proceeded on the basis of default judgments entered against foreign state defendants *in absentia*. Consequently, only one defendant has formally challenged the jurisdiction of U.S. courts under the Antiterrorism Act, and/or the legality of the Act under international law. These challenges to the Act were soundly rejected by a U.S. court. As a result, a very unusual and lopsided body of case law has developed under the Act, comprised almost entirely of unrefuted and unchallenged evidence presented by plaintiffs in the cases. Until a more broadly based group of successful plaintiffs are able to collect routinely on judgments awarded under the Act, without the extraordinary and unusual remedy of special legislation, there seems to be little incentive for foreign state defendants or their agents to appear, much less to defend themselves aggressively, in Antiterrorism Act cases.

On the other hand, in the wake of the tragic events of September 11, 2001, the mood in the United States seems to be one of unprecedented support for victims of state-sponsored terrorist acts and their families. At least twelve victims or their families have already announced their intent to sue Osama bin Laden and the Taliban.¹⁸⁸ Since western governments had already located and frozen \$300 million in bin Laden's and the Taliban's assets just one month after the attacks, it seems likely that the efficacy of the Act could rapidly improve and a whole new body of case law might develop under the Act. The Taliban's assets might then be utilized to satisfy judgments in favor of the victims of September 11th. However, it is unclear

886 F. Supp. 162, 185 (D. Mass. 1995) (“[E]very instrument and agreement that has attempted to define the scope of human rights has ‘recognized a right to life coupled with a right to due process to protect that right.’”).

186. *Elahi*, 124 F. Supp. 2d at 99–100.

187. The exceptions include *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) and *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998).

188. Thomas, *supra* note 7, at 22.

whether Afghanistan can be officially branded a state sponsor of terrorism under the Act by the U.S. government. The non-governmental status of the Taliban in the eyes of the United Nations and the U.S. government, as well as the Taliban's recent loss of control over most of the territory of Afghanistan, calls into question whether it is a "state" sponsor of terrorism or a non-state actor, for purposes of the Act. As noted above, 28 U.S.C. Section 1605(a)(7) only applies to "foreign states" designated as state sponsors of terrorism by the U.S. government. If the Taliban regime is not a "foreign state" sponsor of terrorism within the meaning of the Act, or officially designated as such by the U.S. government, it may not be subject to suit under the Act. This unresolved threshold question of law would need to be addressed before any civil lawsuits against the Taliban would be possible under the Act.

Independent of these issues, the fact remains that all decisions under the Act are made by the courts of the United States, solely to protect its own citizens against actions by other states. This common theme in all of the cases under the Act might lead citizens of foreign states and other governments to question the fairness, objectivity, and credibility of the decisional law that has developed or will develop in this context. The next two sections of this Article examine the Act's efficacy, as well as its legality under international law.

V. LEGALITY OF THE ANTITERRORISM ACT UNDER INTERNATIONAL LAW

Although several federal courts in the United States have enforced the provisions of the Antiterrorism Act, the legality of the Act under principles of international law has not yet been adequately tested or fully litigated in an adversary proceeding. The Act seems susceptible to challenge under principles of customary international law on at least three fronts: (1) as a violation of the sovereignty rights of foreign states; (2) as a violation of the 'act of state' doctrine; and (3) as a violation of the principle of reciprocity. Each of these issues is addressed below.

A. Foreign State Sovereignty

The legislative scheme created by Congress in the Antiterrorism Act might infringe upon the sovereign rights of those foreign states unilaterally labeled as state sponsors of terrorism by the United

States government.¹⁸⁹ Under customary international law, sovereign governments are immune from civil suit, except to the extent that they expressly have waived their immunity.¹⁹⁰ While the FSIA is premised upon a rationale that state sponsors of terror have impliedly waived their rights to immunity by engaging in gross violations of human rights against U.S. citizens abroad (i.e., through de facto violations of alleged *jus cogens* norms¹⁹¹ of international law), it has long been recognized by various U.S. federal courts that “a waiver of a state’s sovereign immunity must be unequivocally expressed and *never implied*.”¹⁹² In fact, in a number of pre-Antiterrorism Act cases, federal courts stated that “the fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.”¹⁹³ This argument does not appear to have been raised or tested in a single reported case since the Act became law. Furthermore, research has not revealed any legal authority under which international law would permit one state to brand another sovereign state a sponsor of terrorism unilaterally and declare its own domestic courts as the final arbiter of victim compensation for acts of terrorism sponsored by the branded terrorist state. This lack of authority is particularly relevant where the terrorist act, by definition, occurred outside the borders of the state providing the legal remedy. States can and often do call one another names and protest—politically, diplomatically, and sometimes even publicly—particular acts of other states. However, the notion of one state imposing domestic legal remedies upon another state for such behavior is largely without precedent, especially where, as here, there does not appear to have been an express waiver of immunity by the foreign state with respect to the conduct in question.

189. As used here, sovereignty means, “a state’s lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there The sovereignty of a state is reflected also in immunity for the state and its public property from certain exercises of authority by other states.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. (b) (1987).

190. *Saltany v. Reagan*, 702 F. Supp. 319, 321 (D.D.C. 1988) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)).

191. “A *jus cogens* norm is a principle of international law that is ‘accepted by the international community of States as a whole as a norm from which no derogation is permitted’” *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quoting Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331).

192. *Saltany*, 702 F. Supp. at 321.

193. See, e.g., *Princz*, 26 F.3d at 1174 (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992)).

The international law doctrine of sovereign equality suggests states are both sovereign and equal.¹⁹⁴ Under this libertarian principle, one state may not impose its sovereign will upon another sovereign state.¹⁹⁵ As a result, under customary international law, as articulated by the International Court of Justice in the *Lotus* case, sovereign states are empowered to do anything that they have not agreed to refrain from doing.¹⁹⁶ The doctrine of sovereign equality thus calls into question the legality of the Antiterrorism Act pursuant to international law. The doctrine could be used to characterize the Act as an unlawful attempt by one state to abrogate unilaterally the immunity of another sovereign state without that state's express or implied consent.

B. Act of State Doctrine

A second basis on which the legality of the Antiterrorism Act is subject to challenge under international law is the act of state doctrine. Although not a doctrine of customary international law, the act of state doctrine is a recognized matter of etiquette or comity between and among sovereign states. It is based upon the principle that

[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.¹⁹⁷

Historically, “[t]he act of state doctrine in its traditional formulation preclude[d] the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.”¹⁹⁸ The doctrine is not mandated by the U.S. Constitution, however, and many courts have refused to adhere to it where the issue or question of law before a court is well-settled and universal (e.g., in cases involving the Holocaust, where the laws gov-

194. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

195. *Id.*

196. *Id.*

197. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 55 (D.D.C. 2000) (“This doctrine ‘directs United States courts to refrain from deciding a case when the outcome turns upon the legality or illegality . . . of official action by a foreign sovereign performed within its own territory.’” (quoting *Riggs Nat’l Corp. & Subsidiaries v. Comm’r of IRS*, 163 F.3d 1363, 1367 (D.C. Cir. 1999))).

198. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

erning the prohibition of genocide are universally recognized under customary international law).¹⁹⁹

Because the prohibition against terrorism seems well-settled and is perhaps universal, especially in cases involving state-sponsored attacks on civilians, it seems less likely that a court would adhere to the act of state doctrine as a judicially self-imposed means of restraint. Nevertheless, the U.S. Supreme Court has applied the act of state doctrine in appropriate circumstances, expressing its rationale as follows:

The doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. . . . Its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.²⁰⁰

Where the executive branch has expressed a willingness for the judiciary to act, the Supreme Court has declined to adhere blindly to the act of state doctrine.²⁰¹ In fact, in *Daliberti v. Republic of Iraq*,²⁰² the court soundly rejected the argument of the defendant Iraqi government that the act of state doctrine required the dismissal of the plaintiffs' claims under the FSIA, writing:

While the act of state doctrine seeks to prevent courts from interfering in the foreign affairs powers of the President and the Congress, it does not prohibit Congress and the Executive from using the threat of legal action in the courts as an instrument of foreign policy. The designation of Iraq as a terrorist state was made by the Secretary of State on behalf of the Executive Branch under an express grant of authority by Congress. For this Court to grant defendant's motion to dismiss on act of state grounds would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress.²⁰³

199. HENKIN ET AL., *supra* note 33, at 870 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(a) cmt. (c) (“[A] claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.”)).

200. *See Sabbatino*, 376 U.S. at 401.

201. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972).

202. 97 F. Supp. 2d at 54–55 (D.C. Cir. 2000).

203. *Id.* at 55.

Thus, the court concluded that the political branches of the U.S. government (the executive and legislative branches) have expressed willingness for the judicial branch to act in this arena.

It remains unclear whether the act of state doctrine might be invoked successfully under the Antiterrorism Act when the executive branch and Congress are not in agreement. For example, an individual plaintiff may attempt to enforce a judgment obtained pursuant to § 1605(a)(7) against the assets of a state sponsor of terrorism at a time when the President of the United States is attempting to normalize or restore diplomatic relations with the foreign state. It seems plausible that a U.S. court might invoke the doctrine under such circumstances in order to avoid interfering with the national interest and the ability of the executive branch to conduct foreign policy.

In any event, the conduct of foreign state defendants *outside* of their borders, such as the sponsorship of terrorist organizations by Iran in Lebanon and the shooting down of civilian planes by the Cuban Air Force in international airspace, is beyond the scope of the act of state doctrine and subject to adjudication by the U.S. courts, unless U.S. courts were to conclude that the decision to fund terrorist groups or shoot down unarmed civilian planes made *within* the territory of the foreign state is sufficient to justify application of the doctrine.²⁰⁴ The application of the act of state doctrine and its full breadth in the context of the Antiterrorism Act have not been fully defined by the single reported case in which a foreign state defendant has raised the issue before a U.S. court. The doctrine would seem to remain, therefore, a potential impediment to the legality of the Act under the law of nations.

C. Reciprocity

A third basis on which the legislative scheme underlying the Antiterrorism Act might be challenged under international law involves a principle of comity known as reciprocity. Broadly stated, “[t]he concept of reciprocity in the international law context is that a U.S. court should recognize non-U.S. proceedings only when a non-U.S. forum would recognize U.S. proceedings.”²⁰⁵ In the United States, the concept stems from the 1895 case of *Hilton v. Guyot*,²⁰⁶ in which the Supreme Court held that a judgment of a French court was

204. See, e.g., *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1239 (S.D. Fla. 1997).

205. 6A WILLIAM L. NORTON, *NORTON BANKRUPTCY LAW AND PRACTICE* § 152-18 (1997) (citing *Hilton v. Guyot*, 159 U.S. 113, 234 (1895)).

206. *Hilton v. Guyot*, 159 U.S. 113, 234 (1895).

only “prima facie evidence” of the plaintiff’s claims because if the situation had been reversed, the French courts would only have treated a U.S. judgment in the case as prima facie evidence. Although reciprocity is not essential for granting comity to foreign legal proceedings today, it remains a relevant factor to be considered by the U.S. courts.²⁰⁷

While the situation under the Antiterrorism Act seems unlike the circumstances that the court faced in *Hilton*, as foreign governments like Iran and Cuba are essentially being asked to recognize U.S. legal proceedings in cases such as *Flatow*, *Cicippio*, *Anderson*, *Sutherland*, *Jenco*, and *Alejandre*, the principle of reciprocity seems equally applicable. Given the behavior of the defendant governments, as well as their public statements and legal arguments asserting the U.S. courts’ lack of jurisdiction,²⁰⁸ the defendant governments do not appear to recognize the U.S. proceedings in the aforementioned cases. Furthermore, the U.S. courts undoubtedly would be loathe to recognize domestic legal proceedings or judgments of the Iranian or Cuban courts in similar cases, especially if they were premised upon branding the U.S. government a state sponsor of terrorism, in addition to a subsequent finding that the U.S. government was liable for sponsoring specified terrorist acts. For example, U.S. courts would likely deny recognition of proceedings conducted in the domestic courts of Chile for the alleged role of the CIA in the assassination of former Chilean president Salvador Allende in 1973. U.S. courts would likely refuse to afford full faith and credit to the legal

207. *Id.*

208. In *Alejandre*, the diplomatic note filed with the court contested the court’s personal jurisdiction over Cuba. 996 F. Supp. at 1242. In *Daliberti*, the defendant government of Iraq challenged via a motion to dismiss the personal jurisdiction of a federal court with respect to the FSIA, arguing that the state-sponsored terrorism exception to the FSIA violated due process by abrogating the ‘minimum contacts’ requirement necessary for the assertion of personal jurisdiction. 97 F. Supp. 2d at 42. The court rejected that argument, concluding that “Congress expressly addressed the minimum contacts requirement in enacting the FSIA by providing that ‘[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction,’ pursuant to the exceptions of the FSIA, and where service has been made.” *Id.* at 53 (citations omitted). “Under the FSIA, therefore, personal jurisdiction equals subject matter jurisdiction plus valid service of process.” *Id.* The court characterized the FSIA as a “federal long-arm statute over foreign states,” with the minimum contacts requirement embodied in it, since “each of the immunity provisions in the bill, sections 1605–07, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction.” *Id.* The court found it reasonable for foreign states to be held accountable in U.S. courts for terrorist acts committed anywhere against U.S. citizens, and that the detention of the plaintiffs in Iraq had direct and intended effects in the United States. *Id.* at 54.

proceedings brought in a Chinese court by the surviving family members of bombing victims against the U.S. government and its air force for their roles in the bombing of the Chinese Embassy in Sarajevo in 1999. Actions such as seizure of U.S. diplomatic or other property in China to satisfy such a judgment would strain already tense U.S.-Sino relations. Under the principle of reciprocity, however, if the United States expects other states to recognize its legal proceedings under the Antiterrorism Act, the United States must be prepared and willing to recognize foreign domestic legal proceedings against the U.S. government.

Each of the above examples would first require that the foreign states involved adopt a domestic statutory scheme akin to the U.S. Antiterrorism Act, and that they brand the U.S. government a state sponsor of terrorism. Even under the U.S. statutory scheme, the creation of such domestic rights and remedies against foreign states, even years *after* the incidents giving rise to them occurred—as was the case in the *Anderson*, *Cicippio*, *Sutherland*, *Jenco*, *Elahi*, *Eisenfeld*, and *Flatow* cases—has not proved problematic for U.S. courts. The courts have applied the statutes retroactively against the defendant foreign states and their agencies and instrumentalities. In fact, in the *Anderson* case, the Antiterrorism Act was passed some eleven years after the initial kidnapping of plaintiff Terry Anderson in Beirut. On the date of the kidnapping, the defendants enjoyed undisputed and absolute immunity from civil liability under U.S. law and could not have been successfully sued under the FSIA (as numerous pre-1996 cases demonstrated).²⁰⁹ Under similar circumstances, it seems highly unlikely that U.S. courts would recognize a foreign state's legal proceedings.

In the final analysis, although the doctrine of reciprocity has been substantially eroded in recent years, it seems reasonable and fair under what remains of the doctrine to conclude that if the U.S. government expects other countries to recognize its Antiterrorism Act, U.S. courts should be prepared to recognize similar domestic remedies enacted by foreign states. The U.S. government also should be prepared to expose or submit its property abroad to execution, attachment, garnishment, or seizure for U.S. acts defined and perceived abroad as acts of state-sponsored terrorism. If it is not willing to do

209. See, e.g., *id.* at 11 (citing *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434–35 (1989)); see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (noting that federal courts lack jurisdiction unless one of FSIA's enumerated exceptions to foreign sovereign immunity applies).

so then it should not expect reciprocal behavior from other sovereign states under the Antiterrorism Act. Given the aforementioned issues, perhaps the U.S. government should consider yielding to an independent international tribunal's adjudication of such claims, rather than relying upon a determination of liability by its own courts.

The legality of the U.S. Antiterrorism Act under international law is open to legitimate question, especially under the doctrines of reciprocity, sovereignty, and the act of state doctrine. Even in the absence of these legitimate and substantial unanswered questions under international law, there remains the issue of whether the Act is even an appropriate or effective means of combating state-sponsored terrorism. This issue will be discussed in the following section.

VI. IS THE ANTITERRORISM ACT AN APPROPRIATE OR EFFECTIVE MEANS OF FIGHTING STATE-SPONSORED TERRORISM?

Assuming that the Antiterrorism Act is legal under customary international law, the question remains as to whether it is an effective or appropriate means of combating state-sponsored terrorism in the twenty-first century. The effectiveness of the Act largely depends upon the definition of effectiveness one employs and upon the aims of the Act itself. For example, if a primary goal of the Act is to compensate victims of state-sponsored terror and their families, then it seems to have had mixed effectiveness to date. Many successful plaintiffs have experienced years of difficulty collecting on the judgments rendered under the Act. However, to the extent that one goal of the Act is to publicly shame foreign state defendants that commit or sponsor acts of terror, and to draw media and public attention to the heinousness of their acts, the statute appears to be effective. The filing of each case under the Act, and the judgments entered, have led to national and international news stories. Similarly, if a goal of the Act is to provide victims of state-sponsored terror with their day in court or an opportunity to publicize the atrocities committed against them, then the Act has been effective.

If, however, a goal of the Act is to punish state sponsors of terror and to force them to deplete their national treasuries by paying large judgments to atone for their misdeeds, then the Act has not been effective until very recently, and then only with respect to two govern-

ments with frozen assets in the United States (Iran and Cuba).²¹⁰ Additionally, if a primary purpose of the Act is to deter foreign states from engaging in state-sponsored terror under threat of public shame or the obligation to pay large verdicts to successful plaintiffs, then the Act's effectiveness would seem to be mixed. Most foreign state defendants have deep pockets, yet collection efforts have been difficult, time consuming, and only occasionally successful to date, and then largely through special legislation.²¹¹

One cannot know or measure how many foreign states, if any, have decided to forego engaging in acts of terrorism since the Antiterrorism Act became effective. As noted above, several courts have suggested that large punitive damage awards in cases handed down under the Act during the past three years are at least partially responsible for the Iranian government and MOIS refraining from further support for hostage-taking by certain terrorist organizations.²¹² Of course, it is impossible to know whether the verdicts led to this apparent change in behavior, and if so, to what extent.

If a goal of the politicians who sponsored and passed the Antiterrorism Act was to create a system which appears to the American public to "get tough" on state-sponsored terrorism, while providing a forum for victims to air their grievances and publicize their cases (irrespective of whether the judgments they obtain are ultimately collectible), then the Act appears to be quite successful. Many plaintiffs now have had their day in court and a number of multimillion dollar verdicts have been returned.²¹³ Those judgments

210. *See, e.g.*, *Estate of Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 109 n.15 (D.D.C. 2000) ("Recently enacted amendments to the FSIA allow plaintiffs in specifically designated lawsuits against the Iranian government to recover an award of compensatory damages from the Iranian assets frozen by the U.S. government." (citing Pub. L. No. 106-386, § 2002(a)-(c) (2000))).

211. *See, e.g.*, *Eisenfeld v. Islamic Republic of Iran*, No. Civ. 98-1945 RCL, 2000 WL 1918779, at *7 (D.D.C. July 11, 2000) ("The Court is aware of this date that the Flatow plaintiffs have been unable to collect on their judgment. . .").

212. *See, e.g.*, *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 53 (D.D.C. 2001) ("[T]he court is not at all convinced that punitive damages are wholly ineffectual."); *see also* *Estate of Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 39 (D.D.C. 2001) ("[P]revious cases awarding punitive damages against MOIS have only been decided in the past three years. Since that time, there have been no reported hostage incidents involving Hizbollah and U.S. nationals.").

213. *See generally* *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 114 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998); *Daliberti*, 146 F. Supp. 2d at 24; *Eisenfeld*, 2000 WL 1918779, at *6; *Elahi*, 124 F. Supp. 3d at 114; *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 5 (D.D.C. 1998); *Jenco*, 154 F. Supp. at 39; *Sutherland v.*

have been rendered against governments that are extremely unpopular in the United States, such as those of Cuba, Iraq, and Iran, and with which the U.S. government has little apparent desire to normalize relations—at least until after their present governments leave power. Thus, the Act has effectively deflected public pressure to take action against state-sponsored terrorism away from U.S. politicians.

It is difficult, if not impossible, to know or identify all of the goals underlying the Antiterrorism Act. The goals may have varied among members of Congress who voted to adopt the Act, and between Congress and the President when he signed it into law. Nevertheless, until a number of successful plaintiffs are able to collect on the massive judgments entered to date, not only via special legislation using frozen assets held by the U.S. government, but also from assets held by the foreign state defendants themselves, it would be difficult to judge the Act an overall success from the standpoint of its *stated* purposes of compensating victims, punishing wrongdoers, and deterring potential state sponsors of terror.

Even if the Act is deemed effective, one still might question whether it is an appropriate normative tool for combating state-sponsored terrorism. The Act may be an example of fighting fire with the mire of years of litigation and procedural wrangling. By unleashing lawyers, lawsuits, procedural rules, delay, and other characteristics of American-style tort litigation on foreign state defendants, one might argue that the United States government has partially abrogated its own governmental responsibility to fight state-sponsored terrorism, and to obtain justice and compensation for its victims and their families. In fact, it is arguable that the unilateral victim compensation system represented by the Act interferes with, and perhaps even undermines, the art of diplomacy that otherwise could be responsible for resolving issues of state-sponsored terror between and among sovereign states.

A unilateral approach to victim reparations by a single country, even if appropriate, can give unfair advantages or disadvantages based upon citizenship and nationality to parties who file suit. Domestic laws often vary widely with respect to the availability of statutory attorneys fees, court costs, contingent fee arrangements, and punitive damage awards to successful plaintiffs.²¹⁴ For example, while

Islamic Republic of Iran, 151 F. Supp. 2d 27, 53 (D.D.C. 2001); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1253 (S.D. Fla. 1997)

214. See generally SHELTON, *supra* note 39, at 306.

many international, human rights, and domestic tribunals around the world do not allow prevailing parties to recover their attorneys fees and court costs, they sometimes are awarded by national systems.²¹⁵ Such factors can create important advantages for those victims filing suit in one particular country over those who file in other countries or forums. Special U.S. legislation affording relief to particular plaintiffs in specified cases seems to create a fundamental inequity between victims of terrorist acts sponsored by a foreign state like Iran, and victims of terrorist acts sponsored by other states such as Afghanistan, Iraq, Libya, or Cuba. Certain legislation may even lead to unequal or inconsistent treatment of those victims of terrorist acts supported or funded by Iran.

One could argue that the Antiterrorism Act is merely one arrow in the quiver of the U.S. government in its fight against state-sponsored terrorism. In addition to the remedies provided in the Antiterrorism Act, diplomatic, foreign policy, and military efforts by the government remain available and are currently being used in order to punish wrongdoers and deter states from engaging in state-sponsored terrorism.²¹⁶ Such a rationale does not, however, negate potential conflicts that remain between the Act's judicial remedies and those remedies available to the President as the final arbiter of U.S. foreign policy. For example, the Act's legislative scheme could place the interests of a few victims of state-sponsored terrorist acts and their families above, or at least in conflict with, the larger foreign policy interests and goals of the U.S. government. For example, if the successful plaintiffs in *Ciccipio*, *Anderson*, *Jenco*, *Sutherland*, *Eisenfeld*, *Elahi*, and *Flatow* are attempting to collect their judgments against the government of Iran, and the President of the United States is attempting to restore trade relations with Iran, the plaintiffs' legal attempts to enforce their judgments under the Act and the foreign policy interests of the United States could be in direct conflict. Iran could insist on the suspension or dismissal of the proceedings before agreeing to improve or normalize relations, allowing the interests of a handful of plaintiffs, albeit very deserving plaintiffs, to slow or possibly even prevent the ability of two states to restore friendly and effective relations. Alternatively, that determination could remain in the hands of the President, who is constitutionally charged and solely empowered to speak for the nation in the area of foreign affairs,

215. *Id.*

216. *See id.* at 358–61.

rather than in the hands of the legislative branch, the judicial branch, or a group of plaintiffs and their lawyers.²¹⁷ To the extent that the Antiterrorism Act impedes or hinders the foreign policy interests of the U.S. or elevates the individual interests of a few plaintiffs above the national interest, this statutory scheme may not be the most appropriate tool for combating state-sponsored terrorism.

Another potential problem with the Antiterrorism Act involves the issue of collateral estoppel and the protection of the fundamental rights of individual criminal defendants accused of committing acts of state-sponsored terrorism. For example, if an alleged act of state-sponsored terror were adjudicated in a civil action under the Antiterrorism Act, those same facts and circumstances may be deemed finally adjudicated under the doctrine of collateral estoppel in a subsequent domestic or international criminal proceeding against an individual charged with committing the underlying act of terrorism. As a result, the domestic civil proceedings conducted pursuant to the Act might adversely impact the fundamental constitutional rights of the accused criminal defendant.

Although some might argue that civil proceedings should have this effect, it would seem that this problem and the others identified above could be avoided almost entirely if the Antiterrorism Act's domestic proceedings were replaced with an international tribunal that merges criminal remedies and civil remedies into a single proceeding before an independent international court. Perhaps the best example of such an approach is found in Article 75 of the Rome Statute for the proposed International Criminal Court (ICC).²¹⁸ The ICC merges criminal and civil remedies into a single proceeding before a single forum: a single tribunal will adjudicate criminal culpability, punishment, and victim compensation for alleged international crimes. If the same approach were taken with respect to acts of state-sponsored terror, by expanding the jurisdiction of the envisaged ICC to provide civil and criminal remedies for international terrorist acts, the potential conflict between the rights of the victims and the rights of the accused, as well as the preclusive effect of one proceeding on

217. See *Webster v. Doe*, 486 U.S. 592, 614–15 (1988) (“[W]e have also recognized ‘the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.’” (citing *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936))).

218. See generally Rome Statute of the International Criminal Court, *supra* note 34.

another, could be avoided completely without depriving any party of its legal rights or its day in court.

Instead of relying upon a system designed unilaterally by one sovereign state to compensate only its own citizens, what is needed is a credible, independent, and global compensation system, established by multilateral treaty, to adjudicate claims and to compensate all victims of human rights violations arising out of state-sponsored terrorist acts. Such a system, if appropriately designed, could avoid the international law pitfalls previously discussed. It could also help avoid the potential problem of elevating individual plaintiffs' interests above the interests of a single state, as well as avoiding the possibility of limiting a state chief executive's control of foreign policy. Such a system, of course, would require the cooperation and support of states around the world. This may prove difficult if not impossible. However, such a system clearly would be far more efficient, legitimate, and equitable to victims of state-sponsored terrorism than the unilateral system adopted by the United States in the Antiterrorism Act. Because the ICC is already envisaged and enjoys the imprimatur of the international community (as of this writing, 47 states, excluding the U.S., have ratified the ICC treaty),²¹⁹ the jurisdiction of the ICC should be expanded to include adjudication of victim reparations and criminal penalties for state-sponsored acts of terrorism, rather than attempting to create a completely new and separate international tribunal to compensate victims of state-sponsored terror.²²⁰

219. As of December 5, 2001, 139 states were signatories to the treaty, and forty-seven had completed ratification. Many more are in the process of ratification. Sixty ratifications are required for the ICC to come into existence. Updated information on the status of ratification can be found on the website of the Coalition for an International Criminal Court at <http://www.igc.org/icc/> (last visited Dec. 5, 2001).

220. Although the Rome Statute only deals with genocide, war crimes, and crimes against humanity, Resolution E, adopted at the end of the 1998 Rome Conference, contained a pledge on the part of the signatories to the Statute to continue to discuss the crimes of drug trafficking and terrorism, and to consider these crimes for inclusion in the Statute at the seven-year Review Conference. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. E, U.N. Doc. A/Conf.183/10 (1998). Alternatively, it has been argued that a terrorist attack that is the result of a "widespread or systematic attack" against a civilian population, pursuant to a state or organizational policy, may constitute a crime against humanity, and thus perpetrators could be prosecuted under Article 7 of the ICC Statute. See, e.g., GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 335-336 (1999); see also Rome Statute of the International Criminal Court, *supra* note 34, at art. 7.

VII. SUMMARY AND CONCLUSION

The statutory scheme created by the U.S. Congress when it adopted the Antiterrorism Act as an exception to the FSIA is based upon the laudable goal of deterring international terrorism and compensating victims of human rights abuses arising out of state-sponsored terrorist acts.²²¹ However, the legality of the Act under international law is open to question. Furthermore, there is insufficient evidence at present to indicate whether the Act has been successful or effective in deterring state-sponsored terror or adequately and consistently compensating its victims and their families without separate special legislation. In fact, the plaintiffs who successfully have sued foreign states and their agents under the Act have struggled to obtain and collect on the large judgments awarded them by U.S. courts until very recently. Nevertheless, the Act does give victims of human rights abuses resulting from state-sponsored terrorism a forum in which to assert their claims, to seek reparations, and to be heard. The cases brought under the Act to date have attracted significant adverse international publicity for state sponsors of terror, such as Cuba, Libya, Iraq, and Iran, which helps to focus world attention on an important global problem. It seems likely that such public shaming may have a positive impact on reducing international terrorism by pressuring and deterring state sponsors of terror to change their behavior, especially in the wake of the tragic events of September 11, 2001.

Under the status quo there will continue to be tension between the rights and interests of individual plaintiffs on one hand, and the foreign policy of the United States vis-à-vis countries like Afghanistan, Iran, Cuba, Iraq, and Libya on the other. When these interests collide there is a danger that the constitutional foreign policy-making power of the President and perhaps the security interests of the United States could be limited by the individual interests of a small number of citizens. Furthermore, under the status quo, U.S. citizens who are victimized are given access to a remedy that is simply unavailable to citizens of other countries. This can confer unfair and inequitable advantages on certain victims as compared to others. This policy runs the risk that the global community will perceive the result as a caste system based upon wealth and power. What is needed is an independent, global compensation system for victims of human rights

221. See *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 52 (D.D.C. 2000) (concluding that the distinctions drawn by FSIA bear rational relation to the legitimate purpose of eliminating terrorism).

violations arising out of state-sponsored terror. To facilitate this, the author recommends the expansion of the jurisdiction of the ICC to explicitly include the crime of terrorism, and to provide a civil and criminal remedy for victims of state-sponsored terrorism. This system would seem far more likely to pass muster under international law and would avoid the complex question under the Antiterrorism Act of whether states have implicitly consented to the jurisdiction of the tribunal. It would help avoid the problematic sovereignty, equality, and collateral estoppel issues that plague the Act as well as other unilateral domestic compensation systems under international law. Such an international forum would be more legitimate, efficient, and fair than the unilateral system adopted by the U.S. in the form of the Antiterrorism Act.

To be an effective remedy for human rights abuses occurring in the context of state-sponsored terrorism, a system must be designed with the input of the entire global community, not just that of a single country acting unilaterally on behalf of its own citizens. Moreover, the compensation system created should not be infirm or subject to legitimate challenge under international law. It must be widely and fairly perceived as objective and equitable. Such a system will more fully and fairly compensate victims of human rights violations resulting from state-sponsored terrorist acts.

Historically, the challenge has been in persuading states to surrender a portion of their sovereignty and submit themselves to the authority of an independent international tribunal with full legal authority to impose criminal and civil penalties on them for their sponsorship of terrorist acts. The states most likely to fund and sponsor terrorist acts have tended to be the least likely to voluntarily submit themselves to the jurisdiction of an international tribunal. Unless sufficient international political will develops to create such a body, the best alternative civil remedy reasonably available to victims of state-sponsored terrorist acts is the domestic victim compensation systems in individual states. In light of the tragic events of September 11, 2001, there may never be greater opportunity or greater political will than at present for the global community to expand the jurisdiction of the ICC, in order to allow it to adjudicate civil and criminal claims, compensate victims of state-sponsored terrorist acts and their families, and punish the perpetrators of state-sponsored terror. If the world community fails to take full advantage of this rare and unique window of opportunity to act, while the consensus against state-sponsored terror is at unprecedented levels globally, the chance to do

so may be forever lost. Without taking the initiative, the best the global community can hope for is a flawed, lopsided, and inequitable system whose legitimacy, independence, and legality under international law is questionable at best. The victims of the September 11, 2001 attacks and their families, as well as the entire world community and future victims of state-sponsored terrorism, deserve and are entitled to demand more, especially if the new war on state-sponsored terrorism is to be a success in the long term.