CIVIL REMEDIES FOR VICTIMS OF TERRORISM IN UNITED STATES COURTS

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This report was prepared by Jeffrey Barist for the
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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

CIVIL REMEDIES FOR VICTIMS OF TERRORISM IN UNITED STATES COURTS

I. Introduction

Shortly after the tragic events of September 11, 2001, the families of many of the victims brought lawsuits in United States federal courts. Both in New York and in the District of Columbia, victims have been looking to the judicial system to vindicate their rights and to address the wrongs committed upon them.

This report explores the patchwork of civil remedies available to the victims of terrorism as well as the obstacles that they will have to overcome. Although the statutory framework and the case law provide some guidance with respect to the steps that these individuals must take, there still remain areas that are not well developed and are sometimes ill defined. Accordingly, the last section proposes ways in which to close those gaps and to provide a more comprehensive set of tools for the victims to implement.

As an initial matter, the nationality of the victim determines which remedies will be available. Victims who are United States citizens have available to them certain avenues of recovery that foreign nationals cannot pursue. For example, the causes of action under the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act, *infra*, and the Antiterrorism Act, *infra*, are available only to United States nationals. The Torture Victim Protection Act, *infra*, however, permits both Americans and foreign nationals to pursue claims under it.

Once the prospective plaintiffs have identified which federal statutes are available to them, they must satisfy the elements of the applicable statute under which their claims are brought. As such, the prospective plaintiffs must consider who the defendant is (*i.e.*, is the defendant a corporation, state or natural individual), whether such defendants are subject to personal jurisdiction in the United States, how to serve such defendants, whether the harmful act occurred within or outside the United States and whether the defendants may invoke any defenses.

II. Defining "Terrorism" and the "Law of Nations"

The relevant federal statutes grant federal jurisdiction and create causes of action for injuries caused principally by "terrorism" or by a "violation of law of nations," two terms susceptible to considerable interpretation even where they have been defined in the statutes. What is critical is that the definition of both terms is inherently political.

"Terrorism" may be defined as "the systematic use of terror especially as a means of coercion," where "terror" means "violence (as bomb-throwing) committed by groups in order to intimidate a population or government into granting their demands."[1] "Terrorism" is thus a political act because its purpose is political, namely, the advancement of some policy or set of policies. It is

[1] Webster's Ninth New Collegiate Dictionary (1990). *See also* 18 U.S.C. § 2331(1), *infra* at 5-6 (definition of "international terrorism"). .

commonplace that one state might recognize a "group" as sovereign and consider the group's violent acts to be acts of war, while other states might consider the same to be acts of terrorism. Further, a state, for its own foreign policy reasons, may wish to maintain good relations with, or even assist, a group considered by other states to be a terrorist organization. To take an example from the Soviet experience in Afghanistan, one state's "terrorist forces of reaction" (from the Soviet perspective) can be another's "Freedom Fighters" (from the American perspective). Those same "Freedom Fighters" might then later become "terrorists"—read: Taliban—when circumstances change and foreign policy interests so demand.

Thus, the very act of defining "terrorism," like recognizing a foreign sovereign state, is a political act that, under United States constitutional principles, calls for an initial policy decision from the Executive Branch as the principal repository of United States foreign policy authority. Indeed, as discussed below, such policy decisions are embedded in the relevant legislation. For example, the Executive Branch must formally declare a foreign state to be a "state sponsor of terrorism" before a civil plaintiff can successfully recover against that state under the Foreign Sovereign Immunities Act.

Legislation based on "violations of the law of nations" similarly embodies certain initial foreign policy decisions. The law of nations is defined by (1) the sovereign states in international treaties, and (2) the body of "customary international law," also known as the "law of nations," which arises from the "'customs and usages of civilized nations.'"[2] Treaties are, of course, written agreements with foreign states; they are thus largely the work of the Executive Branch in the exercise of its near-plenary foreign policy power (ratification is still required by Congress). Customary international law, on the other hand, is by definition a body of "law" that has not been reduced to writing—not in one place, at least. There is therefore a lot to choose from, and many choices to be made, when a state decides to embody some part of this unwritten corpus in its municipal laws.

Treaties and customary international law, however, do share one principal characteristic in their relation to municipal law: neither provides a private federal cause of action unless Congress so decides, either by making the treaty "self-executing" or by "domesticating" a norm of customary international law in specific legislation.[3] As a result, this decision is a political one that will be made at least in part on the basis of considered foreign policy interests to the extent the proposed legislation will have an effect outside the United States. This is an area of United States law that is rapidly evolving, and the case law is not wholly consistent: what is and what is not a "violation of the law of nations" is not clearly defined. Moreover, the definition is likely to change as the body of customary international law develops.

In reviewing the remedies granted to victims of terrorism, the tension between the rights of the victims and the political and foreign policy interests of the United States is ever present

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[2] *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (quoting *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 320 (1900)).

[3] Customary international law has "never [] been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *see id*. at 817 (Bork, J., concurring)

and continuous. The resolution reached in the relevant case law and statutes may not always be appropriate.

III. Federal Avenues of Relief

A. Antiterrorism Act

In 1986, Congress passed criminal legislation that provided for extraterritorial criminal jurisdiction for acts of international terrorism against United States nationals.[4] The Antiterrorism Act[5], 18 U.S.C. § 2331, *et seq.*, was passed with the stated purpose of providing "a new civil legal cause of action for international terrorist acts against United States nationals"[6] and to provide "a companion civil legal cause of action for American victims of terrorism."[7] As an example demonstrating the need for this legislation, Congress looked to *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated and remanded*, 937 F.2d 44 (2d Cir. 1991), where the widow of the victim of a terrorist attack on the Achille Lauro cruise liner was able to bring a civil action in New York "[o]nly by virtue of the fact that the attack violated certain Admiralty laws and that the . . . Palestine Liberation Organization – had assets and carried on activities in New York."[8] The House Judiciary Committee noted that had a similar attack occurred on an airplane or in another locale, the victims might not have been able to bring a civil action in the United States.[9] In order to "facilitate civil actions against such terrorists" the Antiterrorism Act included, among other things, "the extension of civil jurisdiction to accommodate the reach of international terrorism – *i.e.*, American civil law would be granted the same extra-territorial reach as American criminal law."[10]

As passed, the Antiterrorism Act provides in relevant part that

> [a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

18 U.S.C. § 2333(a). "International terrorism" is defined in the Act as "activities" that

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4 Added as 18 U.S.C. § 2331 by Pub. L. 99-399, Title XII, § 1202(a) (Aug. 27, 1986), 100 Stat. 896; amended by Pub. L. 102-572, Title X § 1003(a)(1) (Oct. 29, 1992), 106 Stat. 4521; renumbered § 2332 and amended by Pub. L. 102-572, Title X § 1003(a)(2) (Oct. 29, 1992), 106 Stat. 4521; and as subsequently amended.

5 Added by Pub. L. 102-572, Title X, § 1003(a)(3) (Oct. 29, 1992), 106 Stat. 4521; as amended by Pub. L. 107-56, Title VIII, § 802 (Oct. 26, 2001), 115 Stat. 376. The former "Antiterrorism Act of 1990", added by Pub. L. 101-519, § 132 (Nov. 5, 1990), 104 Stat. 2250, was fully repealed pursuant to Pub. L. 102-27, Title IV, § 402 (Apr. 10, 1991), 105 Stat. 130; as amended by Pub. L. 102-135 § 126 (Oct. 25, 1991), 105 Stat. 643.

6 H.R. Rep. No. 102-1040 at 4 (1992); *see also* 137 Cong. Rec. S4511-04 (daily ed. Apr. 16, 1991).

7 H.R. Rep. No. 102-1040 at 5.

8 *Id.*

9 *Id.*

10 *Id.*

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

18 U.S.C. § 2331(1).

The Antiterrorism Act permits a lawsuit in any appropriate federal district court by any United States national, allows for nationwide service of process and broadens the plaintiff's choice of venue. *See* 18 U.S.C. §§ 2333(a), 2334(c)-(d). The Antiterrorism Act, however, does not allow for lawsuits against foreign states or government officials. *See* 18 U.S.C. § 2337. It also excludes suits that result from an act of war. *See* 18 U.S.C. § 2336(a). Moreover, the United States Attorney General can frustrate the suit by seeking a stay of any civil action if there is a pending criminal prosecution or a national security issue involved. *See* 18 U.S.C. § 2336(c). The Attorney General can also deny access to government files and can stay discovery. *See* 18 U.S.C. § 2336(b). Finally, there is a four year statute of limitations to bring a cause of action, measured from the date that the claim accrued. *See* 18 U.S.C. § 2335.

The key problem for most victims of international terrorism under the Antiterrorism Act is that they may want to bring claims against a foreign state. To do so, the victims must bring their claims under the Foreign Sovereign Immunities Act's state sponsor of terrorism exception, but then they are limited to suing only one of six designated states.

The Antiterrorism Act has been applied to date only in the following reported cases: (1) *Boim v. Quranic Literacy Institute, et al.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001), *aff'd* 291 F.3d 1000 (7th Cir. 2002), 340 F. Supp. 2d 885 (N.D. Ill. 2004) and No. 00 C 2905, 2004 WL 2931337 (N.D. Ill. Dec. 14, 2004) (slip copy); (2) *Estates of Ungar, et al. v. The Palestinian Authority*, *et al.,* 153 F. Supp. 2d 76 (D. R.I. 2001), 228 F. Supp. 2d 40 (D. R.I. 2002), *aff'd* No. 03-1544, 2003 WL 21254790 (1st Cir. May 27, 2003), No. Civ. 00-105, 2003 WL 21658605 (D. R.I. Jul. 3, 2003) (Martin, Mag.), *aff'd in part, rev'd in part*, 304 F. Supp. 2d 232 (D. R.I. 2004) and 315 F. Supp. 2d

164 (D. R.I. 2004); (3) *Biton v. The Palestinian Interim Self Gov't Auth.*, 233 F. Supp. 2d 31 (D. D.C. 2002); (4) *Smith, et al. v. Islamic Emirate of Afghanistan, et al.,* 262 F. Supp. 2d 217 (S.D.N.Y. 2003); (5) *Wyatt v. Syrian Arab Republic*, 304 F. Supp. 2d 43 (D. D.C. 2004); and (6) *Knox v. The Palestine Liberation Org.*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004).[11]

1. Boim v. Quranic Literacy Institute

Boim involved a dual citizen of the United States and Israel who was killed in Israel by two acknowledged members of Hamas in 1996. The following year, the Palestinian Authority convicted the Hamas members of murder for the killing. In 2000, the parents of the victim sued one of the murderers, the other murderer's estate (he had by then killed himself in a suicide attack), certain individuals allegedly associated with Hamas, and a number of organizations located in the United States and/or abroad that were allegedly front organizations for Hamas.[12]

The complaint alleged that the two Hamas members were directly responsible for the murder, and that the other defendants aided and abetted the murder by providing material support or resources to Hamas within the meaning of 18 U.S.C. §§ 2339A & 2339B. The plaintiffs pleaded two theories of recovery against the other defendants:

- The scope of the term "international terrorism" under 18 U.S.C. § 2333(a) encompasses the funding of the relevant terrorist organizations and thus the Antiterrorism Act permits recovery against those who fund a known terrorist organization; and

- The Antiterrorism Act permits aiding and abetting liability, treble damages, and an injunction barring the organizations from collecting funds for Hamas.

The Seventh Circuit first held that the allegations that the defendants directly funded a terrorist organization, without more, were insufficient to support direct liability under 18 U.S.C. § 2331. The court explained that "[t]o say that funding simpliciter constitutes an act of terrorism is to give the statute an almost unlimited reach." *Boim*, 291 F.3d at 1011.

The court then held that the provision of funds by defendants to Hamas did not constitute the proximate cause of the victim's murder. The complaint in *Boim* was specific in alleging a causal link; it alleged that the guns and ammunition used to perpetrate the murder had been purchased with the defendants' money. Nevertheless, the court held that these allegations were, as a matter of law, inadequate to establish that the defendants' alleged conduct (*i.e.,* providing direct funding to a terrorist organization) proximately caused the alleged injury. Accordingly, the court found that "the Boims c[ould not] show that David Boim was injured by 'reason of' the defendants' payment to Hamas in the traditional tort sense of causation unless they [] also show[ed] that the

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[11] The Antiterrorism Act has also been invoked in *In re Terrorist Attacks on September 11, 2001*, discussed, *infra.*

[12] In 1995, President Clinton designated Hamas a "foreign terrorist organization" as defined in 8 U.S.C. § 1189. *See* Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

murder was the reasonable foreseeable result of making the donation. To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability." *Id.* at 1012.

The *Boim* court did, however, sustain the theory of civil aiding and abetting under the Antiterrorism Act. In order to sustain aiding and abetting liability, the court held that the plaintiffs would have to prove that the defendants knew of Hamas' illegal activities, that they desired to help those activities succeed, and that they engaged in some act of helping the illegal activities. *Id.* at 1023.

In 2003 and 2004, default judgments were entered against two of the defendant organizations and an individual defendant. Thereafter, the district court, by United States Magistrate Judge Keys, addressed several partial motions for summary judgment and cross-motions for summary judgment on the issue of liability as to certain defendants. *See Boim v. Quranic Literacy Institute, et al.* 340 F. Supp. 2d 885 (N.D. Ill. 2004). In interpreting the Seventh Circuit's requirements for sustaining a claim of material support to Hamas in violation of the Antiterrorism Act, the district court held:

> The Boims need not show that the defendants knew about the attack that killed [the victim] or that they committed any specific acts in furtherance of that attack; rather, the Boims need only show that the defendants were involved in an agreement to accomplish an unlawful act and that the attack that killed David Boim was a reasonably foreseeable consequence of the conspiracy.

Id. at 895.

As against one of the defendant organizations, the Holy Land Foundation for Relief and Development ("HLF"), the plaintiffs relied on the decision *Holy Land Foundation v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), in which the Court of Appeals for the District of Columbia ruled that HLF funded Hamas' terrorist activities. *Boim*, 340 F. Supp. 2d at 892. The plaintiffs argued that based on the ruling in the *Ashcroft* case, HLF was collaterally estopped from denying that it knowingly provided material support to Hamas. *Id.* at 896. As a preliminary matter, the district court rejected HLF's argument that the plaintiffs failed to provide evidence that the victim was actually killed by Hamas. The court found that the evidence showed that Hamas had taken responsibility for the terrorist attack that killed the victim. *Id.* at 899. One of the attackers, a known Hamas member, was charged with and convicted of committing a terrorist act, and the media reported that Hamas took credit for the attack. *Id.*

In the *Ashcroft* case, HLF sued the individuals and agencies responsible for naming HLF a Specially Designated Terrorist ("SDT") and a Specially Designate Global Terrorist ("SDGT"), and for seizing HLF's assets. *Id.* 901. The district court in *Ashcroft* granted the defendants' motion for summary judgment on the claim for violation of the Administrative Procedures Act, finding that the administrative record contained sufficient evidence that HLF acts for, or on behalf of, Hamas. The district court then dismissed the claims for violations of the Religious Freedom Restoration Act, the First Amendment and the Fifth Amendment. HLF appealed and argued, among other things,

that the district court should have ordered the administrative record supplemented, and that HLF's designation as an SDT and SDGT and the seizure of its assets were arbitrary and capricious. *Id.* at 902. The D.C. Circuit held that HLF was accorded all due administrative process and that the record supported the finding that HLF had substantial ties with Hamas. *Id.* at 903. The D.C. Circuit also held that any error on the part of the district court for dismissing HLF's First and Fifth Amendment claims was harmless because HLF could not have provided any evidence showing that the SDT and SDGT designations, and the seizure of assets violated HLF's First or Fifth Amendment rights. *Id.* Specifically, the D.C. Circuit ruled that "[w]hile not in accordance with proper procedures, HLF has had every opportunity to come forward with some showing that [the evidence establishing its funding of Hamas and its terrorist activities] is false or even that its ties to Hamas had been severed." *Id.* (internal quotation marks and citation omitted). Accordingly, the court in *Boim* held that the issue of whether HLF provided material support to Hamas was actually litigated in *Ashcroft* and was necessary to the D.C. Circuit's decision to affirm the dismissal of the bulk of HLF's complaint.

Collateral estoppel does not apply, however, where the party against whom the doctrine is asserted was denied a "full and fair opportunity" to litigate the issue. *Id.* at 904. The full and fair opportunity to litigate requirement is satisfied as long as minimum due process standards have been met. *Id.* HLF argued that it was denied due process in the D.C. Circuit proceedings because it did not have a hearing before the agency whose action HLF challenged, it did not have the opportunity to put exculpatory evidence in the record, it was denied the opportunity to call witnesses to establish innocence, the agency's decision was sustained even though it was based on hearsay, the *Ashcroft* court relied on secret evidence, the court granted summary judgment against HLF *sua sponte* without prior notice and the *Ashcroft* court struck from the record the evidence presented by HLF. *Id.* The court explained that each of HLF's arguments had been raised and rejected in the *Ashcroft* case, and similarly rejected them in *Boim*. The court found that the administrative record did include the documents that HLF sought to include and that HLF never offered any insight into what was lacking in the record before the federal courts in the *Ashcroft* case. *Id.* Having determined that HLF had a full and fair opportunity to be heard on whether it provided material support to Hamas, the court granted the plaintiffs' summary judgment motion against HLF on the issue of liability. *Id.* at 906.

The court also held that two other defendant organizations, the Islamic Association for Palestine and the American Muslim Society, *id.* at 906-13, and one of the individual defendants, *id.* at 913-24, were liable to the plaintiffs as a matter of law. The court held that the liability of the remaining defendant organization and the determination of any damages award, including any damages award against the defaulting defendants, should be addressed by the jury.

The jury trial began on December 1, 2004, concluding on December 8, 2004 with a verdict finding the remaining defendant organization liable and awarding the plaintiffs $52 million in damages. *See Boim v. Quranic Literacy Institute, et al.*, No. 00 C 2905, 2004 WL 2931337, at *2 (N.D. Ill. Dec. 14, 2004). As provided by the Antiterrorism Act, the court trebled the jury's award and entered a judgment for the plaintiffs in the amount of $156 million. *Id.* The court also held that the defendants were jointly and severally liable for the damages award. *Id.*

2. Ungar v. The Palestinian Authority

The second case, *Ungar*, has four reported substantive decisions: (1) 153 F. Supp. 2d 76 (D. R.I. 2001) ("*Ungar I*"); (2) 228 F. Supp. 2d 40 (D. R.I. 2002) ("*Ungar II*"), *aff'd* No. 03-1544, 2003 WL 21254790 (1st Cir. May 27, 2003); (3) No. Civ. 00-105, 2003 WL 21658605 (D. R.I. Jul. 3, 2003) (slip copy) (Martin, Mag.) ("*Ungar III"*), *aff'd in part, rev'd in part*, 304 F. Supp. 2d 232) (D. R.I. 2004) (Lagueux, J.); and (4) 315 F. Supp. 2d 164 (D. R. I. 2004) ("*Ungar IV*")). In *Ungar*, the estates of two persons killed in Israel by an alleged act of international terrorism brought a lawsuit against the Palestinian Authority (the "PA"), Palestine Liberation Organization (the "PLO"), Yasser Arafat, and law enforcement and intelligence agencies officers controlled by the PA and the PLO (collectively, the "PA defendants"). Also named in the complaint were Hamas and individual Hamas members allegedly responsible for the deaths (collectively, the "Hamas defendants"). The complaint set forth five causes of action, comprised of one federal claim for international terrorism under 18 U.S.C. §§ 2331 and 2333, and four state law claims: death by wrongful act; negligence; intentional infliction of emotional distress; and negligent infliction of emotional distress. The PA defendants moved to dismiss the complaint on a number of grounds including lack of subject matter and personal jurisdiction, improper venue, insufficient service of process, failure to state a claim, and inconvenient forum.

In holding that there was federal subject matter jurisdiction, the court found that the plaintiffs' pleading was adequate, namely, the decedent was a United States citizen who was murdered by an act of international terrorism. The court further held that the remaining state law claims were properly before the court under its supplemental jurisdiction pursuant to 28 U.S.C. § 1367[13] because they derived from the "same common nucleus of operative fact . . . ." *Ungar I*, 153 F. Supp. 2d at 86.

The court then turned to the question of personal jurisdiction and held that it had jurisdiction over the PA and the PLO, but not the individual PA defendants. Drawing on the Fifth Amendment, as interpreted by *Lorelei Corp. v. Guadalupe*, 940 F.2d 717, 719 (1st Cir. 1991), the court stated that the "relevant inquiry . . . is whether the defendant has minimum contacts with the United States as a whole, rather than whether the defendant has minimum contacts with the particular state in which the federal court sits." *Ungar I*, 153 F. Supp. 2d at 87. Further, the court stated that "plaintiff must also establish that service of process is authorized by a federal statute or rule." *Id*.

Applying the two-part test above, the court held that it had jurisdiction over the PA and PLO under the nationwide service of process provision of 18 U.S.C. § 2334(c) and Fed. R. Civ. P. 4(k)(1)(D). Among the facts supporting the court's holding was that the PA employed a lobbying firm in the United States, the PA and PLO had an office and maintained several bank accounts in the United States, and the PLO had other "significant commercial contacts" in the United States. *Id.* at 88. The court also found that the PA and PLO, which are unincorporated associations,

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[13] Section 1367 of Title 28 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy."

were properly served under Fed. R. Civ. P. 4(h)(1)[14] by delivery of process to two individuals: the Chief Representative of the PA and PLO in the United States, and the PLO's Permanent Observer to the United Nations.

The court then dismissed the claims against the individual PA defendants for lack of personal jurisdiction. The plaintiffs argued that the court had jurisdiction over the personal defendants pursuant to Fed. R. Civ. P. 4(k)(2), which provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

The plaintiffs further argued that the court should apply the due process analysis used in certain cases interpreting and applying the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* ("FSIA").

Rejecting the plaintiffs' argument, the court held that Rule 4(k)(2) was not satisfied because the plaintiffs had failed to establish that the individual defendants had "any contact with the United States whatsoever." *Ungar I*, 153 F. Supp. 2d at 93. The court further held that the exceptions under the FSIA, 28 U.S.C. § 1605, would not be extended to the defendants, for four reasons. First, the court explained that the FSIA exceptions did not provide an alternative basis for exerting jurisdiction, but rather

> encompass conduct that, by definition, goes beyond what is necessary to establish minimum contacts. [Citation omitted] Thus, "an inquiry into personal jurisdiction over a foreign state need not consider the rubric of 'minimum contacts'; the concept of 'minimum contacts' is inherently subsumed within the exceptions to immunity defined by the statute."

Ungar I, 153 F. Supp. 2d at 93 (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 20 (D. D.C. 1998)). Second, the court found that "[w]hether or not minimum contacts analysis is subsumed by the state-sponsored terrorism exception of Section 1605(a)(7) appears to be somewhat of an open

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[14] Rule 4(h)(1) provides: "**Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected: (1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant . . . ." Fed. R. Civ. P. 4(h)(1).

question." *Id.* at 94. The court, however, adopted the Second Circuit's holding that the "'elements of § 1605(a)(7), unlike those of the commercial activities exception . . . do not entail any finding of minimum contacts.'" *Id.* (quoting *Rein v. Socialist People's Libyan Arab Jamahiriya, et al.*, 162 F.3d 748, 761 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999)). Accordingly, the court determined that the Second Circuit's holding "seriously undermines the idea that the due process clause is satisfied merely by alleging a cause of action under the state-sponsored terrorism exception to the FSIA." *Id.* Third, the nature of contacts in a Section 1605(a)(7) case are typically "the sovereign contacts between the foreign state defendant and the United States, as well as the nationality of the victim . . . [Accordingly] such contacts, seemingly inadequate under a traditional due process analysis, are nonetheless reasonable in the context of the FSIA." *Id.* (citing *Flatow*, 999 F. Supp. at 22). However, as the individual defendants in the case did not have such sovereign contacts with the United States, there was no personal jurisdiction over them. *Id.* at 95. Finally, although "a foreign state is not a 'person' for purposes of constitutional due process analysis" and thus, does not require any minimum contacts analysis, *id.* at 94, here, there was "no question as to whether an individual defendant, as opposed to a foreign state defendant, [wa]s entitled to the constitutional protections afforded by the Due Process Clause." *Id.* at 95.

The court then dismissed the federal claim as to plaintiff Erfat Ungar, the estate of Ungar and any damages resulting from Ungar's death for failure to state a claim upon which relief can be granted because the complaint did not allege that Erfat Ungar was a national of the United States. The court held that 18 U.S.C. § 2333 "authorizes civil actions only on behalf of United States nationals, or their estate, survivors, or heirs." *Id.* at 97.

The court upheld the plaintiffs' federal claims, rejecting the PA defendants' argument that the activity attributed to the PA defendants does not amount to international terrorism as defined by 18 U.S.C. § 2331. *Id.* at 97. The plaintiffs alleged that the PA defendants had: (a) provided defendant Hamas with a safe haven and base of operations; (b) granted material and financial support to the families of Hamas members who had been killed or captured while carrying out terrorist attacks; (c) employed Hamas members as policemen or security officials; and (d) praised and lauded Hamas for its terrorist activities. *Id.* The plaintiffs further alleged that the activities of the PA defendants involved violent acts or acts dangerous to human life, which, if they had occurred in the United States, would violate 18 U.S.C. § 3 (Accessory After the Fact) and 18 U.S.C. § 2339A (Providing Material Support to Terrorists), that these activities were intended to intimidate or coerce a civilian population, and that these activities occurred outside the territorial jurisdiction of the United States. *Id.* at 98. The court found these allegations sufficient to state a cause of action under 18 U.S.C. § 2333. *Id.*

Applying Rhode Island's conflict of laws provisions, the court found that Israeli law applied to the state claims. Because the plaintiffs did not plead Israeli law, the court dismissed these claims for failure to state a cause of action, but provided the plaintiffs thirty days to file an amended complaint against the PA and the PLO. *Id.* at 99.

Finally, the court denied the PA defendants' motion to dismiss the complaint under the doctrine of *forum non conveniens* because 18 U.S.C. § 2334(d) limits when a court can dismiss a case on *forum non conveniens* grounds and the PA defendants failed to name a specific adequate alternative forum. *Id.* at 100.

After the *Ungar I* decision, the plaintiffs amended their complaint, setting forth four claims: (1) international terrorism as defined in 18 U.S.C. §§ 2331 and 2333, and aiding and abetting thereof; (2) negligence; (3) breach of statutory obligation; and (4) assault. The latter three actions were brought under the Israeli Civil Wrongs Ordinances. *Ungar II*, 228 F. Supp. 2d at 42-43. The PA and the PLO (collectively, the "PLO defendants") then moved to dismiss the amended complaint on the grounds of non-justiciability and failure to state a claim. The PLO defendants further moved for an interlocutory appeal and a stay pending disposition of the application for certification and/or appeal. *Id.* at 43. The court denied both motions.

First, the *Ungar II* court outlined the standard for evaluating non-justiciability claims, highlighting the following as relevant to the defendants' motion: (1) "whether judicially discoverable and manageable standards exist for resolving" the issue; (2) "whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department;" and (3) whether it would be impossible to decide the issue "without an initial policy determination of a kind clearly for nonjudicial discretion." *Id.* at 44 (internal quotations and citations omitted). The court found, however, that simply because an issue involves foreign affairs does not mean it automatically renders a case non-justiciable. *Id.* Indeed, even if a case were to have significant political overtones, it would not necessarily be non-justiciable as a political question case. *Id.* Quoting a Second Circuit case that addressed the same issue where the PLO was a defendant, the court found that "an ordinary tort suit in which the plaintiffs allege that the defendants breached a duty of care owed to the plaintiffs or their decedents is an issue which has been 'constitutionally committed to none other than our own – the Judiciary.'" *Id.* at 45 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)). The court did not find the PLO defendants' arguments of non-justiciability convincing because although the PLO defendants claimed the case lacked judicially discoverable and manageable standards to adjudicate the plaintiffs' claims, they failed to identify what standards were lacking. *Id.* Moreover, the court did not agree with the PLO defendants that this case was one where the court would be required to look into the nature and methods by which any country or organization wages war – something which might render a case non-justiciable. *Id.* at 46. The court was concerned with "whether plaintiffs ha[d] alleged in their complaint sufficient facts, which, if true, would entitle them to relief" and denied defendants' motion because the plaintiffs "would be entitled to relief if the allegations in the amended complaint [we]re true." *Id.* at 47.

Second, the court denied the PLO defendants' motion for reconsideration of their original motion to dismiss the plaintiffs' federal claims. The amended complaint properly removed certain plaintiffs pursuant to the *Ungar I* order and the remaining plaintiffs sufficiently alleged facts to maintain a claim under 18 U.S.C. § 2333. *Id.* As for the state claims, the court found that the plaintiffs had properly re-pled these causes of actions under Israeli law as ordered by the decision in *Ungar I*. *Id.* at 48. The PLO defendants again attempted to assert a sovereign immunity defense. However, in rejecting such a defense the court found that "[t]he fact that neither the PA nor the PLO is a Member of the United Nations bears enormous significance. Simply put, Members enjoy diplomatic immunity, Permanent Observers[, which was the PLO's status,] do not." *Id.* at 49.

Finally, the court denied the PLO defendants' motion for certification of an interlocutory appeal. The court stated:

> Since the case at bar should be regarded as an ordinary tort suit properly placed in the hands of the judiciary, the [PLO] defendants have failed to convince this Court that plaintiffs' case presents difficult and pivotal questions of unsettled law. Consequently, this Court concludes that the [PLO] defendants have failed to carry their burden of persuading the Court that this case is the type of extraordinary matter that justifies . . . certification.

Id. at 51.

Subsequently, an entry of default was entered against the PLO defendants for failing to answer the plaintiffs' amended complaint. *See Estates of Ungar v. The Palestinian Authority*, 215 F.R.D. 36 (D. R.I. 2003) (Martin, Mag.), *aff'd* No. 00CV-105L, 2003 WL 22012593 (D. R.I. Aug. 4, 2003) (Lagueux, J.). The plaintiffs' later motion for a judgment of default against the PLO defendants for refusing to submit to depositions, however, was denied. The court's reasoning was based on the fact that the PLO defendants had "not previously been explicitly warned by the court that a failure to comply with their discovery obligations could result in the entry of default judgment against them." *Estates of Ungar v. The Palestinian Authority*, No. Civ. 00-105, 2003 WL 21223844 (D. R.I. May 14, 2003) (Martin, Mag.), *aff'd* No. CV-105L, 2003 WL 22012308 (D. R.I. Aug. 4, 2003) (Lagueux, J.). Accordingly, the court ordered the PLO defendants to comply with all outstanding discovery requests from the plaintiffs by a specified date. *Id.* at *1.

The Magistrate Judge recommended that a motion to enter default judgment be granted as to Hamas, but denied as to the individual Hamas members. *Ungar III*, 2003 WL 21658605, at *1. As an initial matter, the court adopted the District Judge's finding of subject matter jurisdiction over the PA defendants, *see Ungar I*, 153 F. Supp. 2d at 85-86, and applied it equally to the Hamas defendants. *Ungar III*, 2003 WL 21658605, at *4. The court then gave a lengthy discussion regarding personal jurisdiction over Hamas and the individual Hamas members. On a motion for entry of default judgment, the court explained that the issue is whether the plaintiffs have made a *prima facie* showing that the Hamas defendants have minimum contacts with the United States, construing the submitted pleadings and affidavits in the light most favorable to the plaintiff. *Id.* at *5. With respect to Hamas, the court determined that it could exercise personal jurisdiction over Hamas if: (1) Hamas had minimum contacts with the United States as a whole; and (2) Hamas was served in any district where it is found or has an agent. *Id.* at *6.

The court held that Hamas did have the minimum contacts with the United States necessary for personal jurisdiction. First, the court found that in *Matter of Extradition of Mousa Mohammed Abu Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996), Abu Marzook admitted to being the head of the political wing of Hamas[15] as well as the acting leader, and then leader, of Hamas since

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[15] The court provided a detailed background of Hamas, which was founded in the Israel Occupied Territories in 1987. The stated objective of Hamas is to resist Israeli political dominion over the occupied territories. Hamas consists of a political and military branch. The political wing purports to promote political awareness of Palestinian issues, and also provides education, health care and other social services. The military wing engages in hostile activities in Israel and has claimed credit for a number of violent acts in Israel, which are commonly considered "terrorist activities." Further, Hamas was designated by President Clinton as a terrorist organization in 1995 pursuant to Exec. Order No. 12,947. Shortly after the September 11 attacks in New York City, President Bush, pursuant to Exec. Order No. 13,224, designated Hamas as one of those organizations whose property and interests in property are to be blocked. *Ungar III*, 2003 WL 21658605, at *6.

1989. *Ungar III*, 2003 WL 21658605, at *6. Marzook also admitted to residing in the United States until 1993. *Id.* at *7. Based on these facts, the court found that it was "reasonable" that between 1989 and 1993, Marzook conducted significant activities in the United States on behalf of Hamas. *Id.* Second, the court found that Hamas had used United States banks to deposit and to transfer funds to Hamas members and related organizations. *Id.* Third, Muhammed Salah, who was arrested in Israel in January 1993, admitted to Israeli authorities that he was the head of the military wing of Hamas and that he had engaged in activity on behalf of Hamas in the United States and elsewhere. *Id.* at *9. The court also determined that Salah was a "financial conduit" for Hamas in the United States by, among other things, financing travel for new Hamas members. *Id.* The court found that Salah had used the Quranic Literacy Institute ("QLI") in Illinois as a means of disguising and furthering his activities in the United States. For example, on a mortgage loan application to finance the purchase of a residence, Salah stated that his only employment was at the QLI, but there was no evidence that he had ever received income from the QLI. *Id.* at *10. The court also found that real estate purchased by the QLI had been used to support Salah's Hamas related activities. *Id.* at *11. Fourth, based on the affidavit from the director of the Middle East and International Terrorism for the American Jewish Committee, the court found, among others, the following connections between Hamas and the United States: (1) Hamas had extensive operations in the United States since the late 1980s; (2) Hamas consistently conducted fundraising, operational planning, recruitment, propaganda, public relations, money laundering, investment and communications in at least six states during the past 12 years; (3) Marzook helped organize and fund Hamas, and at least ten terrorist incidents for which Hamas was responsible, between 1990 and 1994; (4) Marzook directed and participated in a number of transfers of funds from the United States to Hamas operatives in Israel; (5) Marzook maintained Hamas bank accounts in the United States; and (6) Salah, an American citizen, received field reports of Hamas activities in Israel at his Chicago office, and supervised Hamas activities in Gaza. *Id.* at *11-12.

After determining that Hamas had sufficient minimum contacts with the United States, the court then held that Hamas was properly served under Fed. R. Civ. P. 4(h)(1), *supra* at 13 n.14. The court found that Hamas qualified as an "unincorporated association" under Rule 4(h)(1). *Id.* at *13. The plaintiffs stated that service was effected on Hamas in the United States on June 21, 2000 by serving Salah with a summons and a copy of the complaint at his Illinois residence. *Id.* As the head of the military wing of Hamas, the court held that it could be implied that Salah was authorized to receive service on behalf of Hamas. *Id.* at *14. Moreover, the court also noted that Hamas had been notified of the lawsuit by the delivery of a summons and complaint to its headquarters in Damascus, Syria, by registered return receipt mail. *Id.*

With respect to the individual Hamas defendants, however, the court held that the plaintiffs did not show that such defendants engaged "in the kind of systematic and continuous activity in the United States necessary to support the exercise of general personal jurisdiction over them." *Id.* at *15. Accordingly, the motion for entry of default judgment was denied and the claims against the individual Hamas defendants were dismissed for lack of personal jurisdiction. *Id.*

Because the plaintiffs adequately pleaded the elements of liability under 18 U.S.C. § 2333 and because Hamas defaulted, the court held that the plaintiffs were not required to prove such elements. *Id.* The court thus held that Hamas' liability was established and proceeded to assess damages. *Id.* The court found that the plaintiffs were indisputably "survivors" and "heirs" of victims of international terrorism entitled to recover threefold damages, including attorney's

fees, under 18 U.S.C. § 2333(a). *Id.* at *15-16. The plaintiffs had asked for both pecuniary and non-economic damages. *Id.* at *18. Since the statutory provision is silent on the type of damages that the plaintiffs were entitled to recover, the court looked to the legislative history of the statute.[16] *Id.* at *19. The court found that the legislative history suggested that the Antiterrorism Act was intended to be broadly construed and specifically noted language that the statute was designed to "empower[] victims with all the weapons available in civil litigation." *Id.* (internal quotations and citation omitted). From this language, the court discerned that "Congress intended that the full range of damages should be available to persons entitled to bring actions pursuant to § 2333(a)." *Id.* Additionally, the court found that the national legislative trend during the past few decades favored awarding non-economic losses. *Id.* Applying this reasoning, the court then calculated damages, awarding the plaintiffs over $116 million, plus prejudgment interest. *Id.* at *1. The court also awarded attorneys fees of over $65,000 and costs of $1,437.72. *Id.*

The Magistrate Judge's report and recommendation was adopted by the District Court except as to prejudgment interest. *Estates of Ungar v. The Palestinian Authority*, 304 F. Supp. 2d 232 (D. R.I. 2004). The court held that it would not add prejudgment interest to the "substantial penalties of treble damages, court costs, and attorney's fees already provided for by Congress." *Id.* at 237. The court found the "treble damages provision of 18 U.S.C. § 2333 overwhelmingly punitive, which makes an award of prejudgment interest inappropriate." *Id.* The court also granted the plaintiffs' motion under Fed. R. Civ. P. 54(b) for entry of a final judgment. The court found that although assets in the United States of Hamas and the Holy Land Foundation for Relief and Development ("HLF"), a fund-raiser for Hamas in the United States, had been blocked by the Treasury Department, those assets were being steadily depleted. HLF had been permitted to use the blocked assets to pay attorney fees for challenging the blocking order and defending HLF in civil actions arising from its role as fund-raiser for Hamas. *Id.* at 242. Moreover, the court found that given the designation of Hamas as a terrorist organization, it was unlikely that Hamas would bring any new assets into the United States. The court explained that the blocked assets might be the sole source to satisfy the judgment obtained by the plaintiffs in this litigation and thus, "time [wa]s of the essence." *Id.* Accordingly, the court granted the plaintiffs' motion for entry of a final judgment against Hamas and ordered the Clerk to enter a final judgment against Hamas in the amounts specified by the Magistrate Judge, without interest. *Id.*

The PLO defendants made another motion to dismiss the plaintiffs' amended complaint on the ground the court lacked subject matter jurisdiction. *See Ungar IV*, 315 F. Supp. 2d 164 (D. R.I. 2004). The PLO defendants again argued that the issues in this case were non-justiciable political questions. The PLO defendants also invoked the immunity defense under both the Antiterrorism Act and the FSIA. As in *Ungar II*, the court explained that "the non-justiciability doctrine is one of political questions and not political cases." *Id.* at 174. Thus, "[t]he fact that the PA and PLO's alleged terrorist acts may have arisen in a politically charged context and were committed in an area where the United States has a strong foreign policy interest does not convert the present tort claims into non-justiciable political questions." *Id.*

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[16] The court also found an absence of case law discussing the nature of damages permitted under 18 U.S.C. § 2333(a) The only reported case that the court could find awarding damages under 18 U.S.C. § 2333(a) was *Smith, et al. v. Islamic Emirate of Afghanistan, et al.,* 262 F. Supp. 2d 217 (S.D.N.Y. 2003), *infra*, but that case awarded damages for loss of solatium only under 28 U.S.C. § 1605(a)(7).

With respect to the PLO defendants' immunity defense, the court first explained that the FSIA is the sole and exclusive standard concerning sovereign immunity. *See id.* The language and legislative history of the immunity provision in the Antiterrorism Act indicates that it is to be applied *in pari materia* with the FSIA. *Id.* at 175. "The A[ntiterrorism Act] reflects the doctrine of sovereign immunity and the relevant sections of the A[ntiterrorism Act] and FSIA function in tandem to provide a foreign State with a single statutory defense to actions brought under the A[ntiterrorism Act]." *Id.* Thus, the inquiry into whether sovereign immunity is properly invoked is the same under both the Antiterrorism Act and the FSIA.

Under the FSIA, there is a presumption of immunity for a foreign entity only when the entity has established that it is a foreign state under the definition employed by the FSIA and that the claim relates to a public act. *Id.* at 176. Statehood, determined by international law, exists only where an entity has a permanent population, a defined territory, a government and the capacity to enter into relations with other states. *Id.* at 177. The court held that neither the PA nor the PLO satisfied the legal criteria for statehood. *Id.* at 178-186. The court further held that even assuming the PA and the PLO could claim statehood, they could not invoke the sovereign immunity defense because the United States has not recognized or treated Palestine as a sovereign state, nor has the United States recognized the PA or the PLO as official representatives of a purported Palestine state. *Id.* at 186.

Shortly after denying the PLO defendants' motion to dismiss, the District Court adopted the Magistrate Judge's recommendation for an entry of default judgment of more than $116 million against the PA and more than $116 million against the PLO, both amounts including attorneys' fees. *Estates of Ungar v. The Palestinian Authority*, 325 F. Supp. 2d 15 (D. R.I. 2004), *aff'g*, No. Civ.A.00-105L, 2004 WL 882454 (D. R.I. Mar. 31, 2004).

3. Biton v. The Palestinian Interim Self Gov't Auth.

In a third case, *Biton v. The Palestinian Interim Self Gov't Auth.*, 310 F. Supp. 2d 172 (D. D.C. 2004), Avigail Lewis Biton, individually and on behalf of her husband's estate and her children, and Rachel Astraf brought a lawsuit under the Antiterrorism Act and under various tort theories against the PA, the PLO, Yasser Arafat, two senior members of the Palestinian Preventive Security Service ("PPSS") and two members of the Palestinian Police Services ("PPS"). The lawsuit arose from the bombing of a school bus in the Gaza Strip on November 20, 2000 in which Biton's husband was killed and Asrak was wounded. The defendants moved to dismiss the complaint on the grounds of lack of personal jurisdiction over the five named individual defendants and the PA, sovereign immunity, Biton's failure to state a claim under the Antiterrorism Act, non-justiciability, and the act of war or self-defense doctrine.

First, the court held that it lacked personal jurisdiction over the individual defendants because they did not have the "minimum contacts with the United States that square with the Due Process Clause . . . ." *Id.* at 179. The PA, however, did have sufficient contacts with the United States to satisfy due process concerns. *Id.* The PA maintained offices and agents in the United States, and it conducted extensive activities in the United States, including hiring lobbying firms and entering into a commercial telecommunications contract with a Virginia corporation. *Id.* at 180. Second, the court held that sovereign immunity was not available to the defendants, who claimed to

be part of the foreign state of Palestine. Because of the "long-running conflict between the Israelis and the Palestinians," which "has its very question of statehood between them," the court stated it could not declare Palestine a sovereign state. *Id.* at 181. Third, the court held that Biton could not recover under the Antiterrorism Act as a representative of her husband's estate or as his survivor because he was not a United States national. Biton was able, however, to recover in her individual capacity. The court explained that Biton's injuries of emotional distress, loss of consortium and loss of solatium were injuries in her "person, property or business" as set forth in 18 U.S.C. § 2333(a), which could have reasonably been caused by the bombing. *Id.* at 181-82. Fourth, the court held that the issues in the case were justiciable. The court explained that although the background of this case, *i.e.*, the Israeli-Palestinian conflict, was highly politicized, that alone did not render the plaintiffs' claims non-justiciable. *Id.* at 184-85. Finally, the court held that at the motion to dismiss stage, it was inappropriate to determine whether the bus bombing was an act of war, especially since the defendants conceded that the facts were insufficient to establish the motivation behind the bombing. *Id.* at 185.

4. Smith v. Islamic Emirate of Afghanistan

The Antiterrorism Act was also invoked in *Smith, et al. v. Islamic Emirate of Afghanistan, et al.,* 262 F. Supp. 2d 217 (S.D.N.Y. 2003). In *Smith,* the estates of two victims of the September 11 attacks brought lawsuits against the Islamic Emirate of Afghanistan, the Taliban, al Qaeda and Osama bin Laden. *Id.* at 220. The plaintiffs later amended their consolidated complaint to add Saddam Hussein and the Republic of Iraq as defendants. *Id.* As against the non-sovereign defendants (the "al Qaeda defendants"), the plaintiffs brought claims under the Antiterrorism Act as well as under traditional tort principles. *Id.* None of the defendants appeared in the case and thus the court granted a default judgment against them. Subsequently, the court held an inquest. *Id.*

With respect to the liability of the al Qaeda defendants, the court first noted that "it is not self-evident that the events of September 11 fall within the [Antiterrorism Act's] definition of 'international terrorism.'" *Id.* at 221. The court stated that although the acts of September 11 clearly "occurred primarily" in the United States, "acts of international terrorism also encompass acts that 'transcend national boundaries in terms of the means by which they are accomplished . . . or the locale in which their perpetrators operate.'" *Id.* Thus, although "mindful that an expansive interpretation of 'international terrorism' might render 'domestic terrorism' [under the Antiterrorism Act] superfluous," the court nonetheless held that the acts of September 11 are encompassed in the Antiterrorism Act's definition of "international terrorism." *Id.* The plaintiffs therefore had a viable cause of action against the al Qaeda defendants.

The plaintiffs also asserted claims under the Antiterrorism Act against Iraq and Hussein. Although Section 2337 of the Antiterrorism Act precludes claims against "a foreign state, an agency of a foreign state or an officer or employee of a foreign state or agency thereof acting within his or her official capacity or under color of legal authority," 18 U.S.C. § 2337, the plaintiffs argued that the provision did not apply to their case because the state sponsor of terrorism exception of the FSIA, 28 U.S.C. § 1605(a)(7), stripped Iraq and Hussein of any protection under Section 2337. *Id.* at 225. The court disagreed, noting that the issue is not whether Section 2337 bars a lawsuit against Iraq and Hussein under Section 1605(a)(7) of the FSIA, but whether the plaintiffs had an independent Section 2333 claim, under which they would be permitted to recover treble damages

for civil violations of the Antiterrorism Act. *Id.* The court held that the plaintiffs could not rely on Section 2333 for their claims against Iraq or Hussein because the section clearly prevents lawsuits against foreign states and their officers. *Id.* at 225-26. The plaintiffs were permitted, however, to proceed with their claims against Iraq under the FSIA, but not against Hussein.[17]

5. Wyatt v. Syrian Arab Republic

While traveling in Turkey in 1991, two Americans were kidnapped and held for 21 days by terrorists associated with the Kurdistan Workers Party ("PKK"). One of the victims and the family of the other brought a lawsuit against the PKK under the Antiterrorism Act, as well as other statutes. There have been no substantive published decisions to date.

6. Knox v. The Palestine Liberation Organization

In another case involving the death of an American citizen in a terrorist attack in Israel, the victim's representatives and survivors brought claims under the Antiterrorism Act and under common law. *See Knox v. The Palestine Liberation Org.*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004). The plaintiffs named as defendants, the individual who planned and carried out the attack, the PLO, the PA, Yasser Arafat, and other known and unknown individuals. *Id.* at 426. As on numerous other occasions, the defendants moved to dismiss the complaint, invoking the sovereign immunity defense and the non-justiciability doctrine. Rejecting the defendants' arguments, the court denied the motion to dismiss for reasons similar to those set forth in previous cases such as *Ungar*, *supra*.

B. The Antiterrorism and Effective Death Penalty Act of 1996 Creates An Exception to Sovereign Immunity for Acts of Terrorism

Although the Antiterrorism Act provided a civil cause of action in the United States for acts of terrorism against American nationals, foreign states were often still immune from liability under the FSIA.[18] Recognizing that certain states were directly or indirectly supporting terrorist acts against United States nationals abroad, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[19] The purpose was to permit "U.S. federal courts to hear claims seeking money damages for personal injury or death against [nations designated as state sponsors of terrorism] and arising from terrorist acts they commit, or direct to be committed, against American citizens or nationals outside of the foreign state's territory, and for such acts within the state's territory if the state involved has refused to arbitrate the claim."[20]

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[17] The court noted that the Supreme Court has held that a claim against a United States president for actions identical to the ones alleged against Hussein would be barred pursuant to "the president's absolute immunity from damages for conduct associated with the exercise of his official duties." *Smith*, 262 F. Supp. 2d at 228. Because Section 1605(a)(7) of the FSIA precludes an action "if an official, employee or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States," the claim against Hussein was dismissed. *Id.*

[18] Foreign states are also immune under the Antiterrorism Act. 18 U.S.C. § 2337.

[19] *See* Pub. L. 104-132, Title II, § 221(a) (Apr. 24, 1996) 110 Stat. 1241, amending 28 U.S.C. § 1605.

[20] 142 Cong. Rec. H3305-01 (daily ed. Apr. 15, 1996) at *H3333.

1. The Statutory Test

The AEDPA added a new exception to sovereign immunity applicable to any case

> not otherwise covered by paragraph 2 above [,the so-called "commercial activity" exception to immunity], in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS)[21] in the United States District Court for the District of Columbia; and
>
> (B) even if the foreign state is or was so designated, if—
>
> (i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or
>
> (ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

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

28 U.S.C. § 1605(a)(7).

There are several statutory elements of the state sponsor of terrorism exception, and each one will be discussed in turn.

First, the personal injury or death must have resulted from torture, extrajudicial killing, aircraft sabotage or hostage taking. The state sponsor of terrorism exception adopts the definition of "torture" and "extrajudicial killing" as set forth in Section 3 of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992) (28 U.S.C. § 1350, note) and the definition of "hostage taking" in Article 1 of the International Convention Against the Taking of Hostages. *See* 28 U.S.C. § 1605(e).

Second, the act must have been perpetrated by the foreign state directly or by a non-state actor that receives "material support or resources" from that foreign state. This is defined by reference to 18 U.S.C. § 2339A as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b). However, a plaintiff-victim is not required to establish that the material support or resources provided by the foreign state directly contributed to the terrorist act. *See Flatow v. Islamic Republic of Iran et al.*, 999 F. Supp. 1, 18 (D. D.C. 1998).

Third, the terrorist action or the material support must be engaged in by an agent, an official, or an employee of the foreign state while acting in the scope of such agency. Furthermore, a government must share in the responsibility for any wrongful conduct committed by its agent or employee. The act of routinely providing material support to a terrorist group by a state's agent can be imputed to the government. Such an act falls under the scope of the supporter's agency, office or employment. *See id.*

Fourth, the foreign state must be designated as a state sponsor of terrorism by the Export Administration Act of 1979 or the Foreign Assistance Act of 1961 at the time the act occurred, or be later so designated as a result of the act. *See* 28 U.S.C. § 1605(a)(7)(A). Currently, only Cuba, Iran, Libya, North Korea, Sudan and Syria are designated as state sponsors of terrorism.[22] *See* 22 C.F.R. § 126.1(d) (current through Jun. 3, 2005).

Fifth, if the terrorist act occurred within the foreign state defendant's territory, the plaintiff must offer that state a reasonable opportunity to arbitrate the matter. *See* 28 U.S.C. § 1605(a)(7)(B)(i).

Sixth, either the plaintiff or the victim must have been a national of the United States at the time the incident occurred. *See* 28 U.S.C. § 1605(a)(7)(B)(ii).

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[22] In October 2004, the Secretary of State rescinded the designation of Iraq as a state sponsor of terrorism. *See Rescission of Determination Regarding Iraq*, 69 Fed. Reg. 61,702 (Oct. 20, 2004).

Finally, under the Flatow Amendment, which further clarifies this exception, conduct is actionable under the AEDPA only if similar conduct by United States agents, officials or employees within the United States would be actionable as well. 28 U.S.C. § 1605 (note).

The Flatow Amendment also permits the courts to award punitive damages. 28 U.S.C. § 1605 (note).

The statute of limitations for an action brought under the state sponsor of terrorism exception is ten years, with equitable tolling permitted. *See* 28 U.S.C. § 1605(f). The ten years begins to run from the date the exception was enacted. Accordingly, the earliest date for the statute of limitations to expire for any action brought under this exception is April 24, 2006. *See Flatow*, 999 F. Supp. at 23.

2. Cases Taking Advantage of the Amendment

The first significant case discussing the amendment was *Flatow*, 999 F. Supp. 1, which involved an American college student who was killed in a bomb attack on a bus in Israel. *See id.* at 7. The Shaqaqi faction of the Palestine Islamic Jihad, a small terrorist cell, claimed responsibility. The victim's father, as administrator of the victim's estate, brought a wrongful death action under the FSIA, as amended by the AEDPA, against Iran, the Iranian Ministry of Information and Security (the "MOIS") and three named individuals. None of the defendants appeared, and the court entered judgments against all the defendants upon the plaintiff's presentation of sufficient evidence to establish his claim. In so holding, the *Flatow* court addressed several threshold issues.

Initially, the court held that the state sponsor of terrorism exception can be applied retroactively for purposes of establishing subject matter and personal jurisdiction. *Id.* at 13-14. In order to promote uniformity, the court applied federal common law in determining whether the terrorist acts were within the scope of the defendants' office, agency or employment, and any other legal conclusions which normally rely on state law. *Id.* at 15. The court also held that the extraterritorial application of the exception was proper because Congress specifically restricted the statute's reach to those nations designated as state sponsors of terrorism, thereby removing the possibility of the judiciary inadvertently interfering with foreign relations. *Id.* at 16. The court grappled with the definition of "extrajudicial killing," ultimately holding that suicide bombings were extrajudicial killings for the purpose of the state sponsor of terrorism exception. *Id.* at 17-18. The court then held that the routine provision of financial assistance to a terrorist group in support of terrorist activities constitutes "providing material support or resources" under 28 U.S.C. § 1605(a)(7). *Id.* at 18. Moreover, under the doctrine of *respondeat superior*, the court held that when "a foreign state's heads of state, intelligence service, and minister of intelligence routinely provide material support or resources to a terrorist group, whose activities are consistent with the foreign state's customs or policies, then that agent and those officials have acted squarely within the scope of their agency and offices . . . . " *Id.* Finally, the court held that had United States officials, acting in their official capacities, provided material support to a terrorist group that executed a bombing in the United States, they would not have been immune from civil suit for wrongful death and personal injury – thus, satisfying the last statutory requirement under the state sponsor of terrorism exception. *Id.* at 19. The *Flatow* court held that it did have personal and subject matter jurisdiction, and that the defendants could not invoke the defenses of statute of limitations, act of state doctrine, head of state

immunity or *forum non conveniens*. *Id.* at 23-25. Accordingly, the court awarded economic damages, compensatory damages, solatium damages and punitive damages, jointly and severally against all the defendants. *See id.* at 27-34.

Since *Flatow*, numerous cases have been brought against the designated sovereign states. Prominent are claims arising from acts of bombing, which read as a recapitulation of the last twenty years of terrorist activity. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya et al.*, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part*, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999) (representatives of victims of the Pan Am flight that crashed over Lockerbie, Scotland). Additionally, actions have been sustained against states found to support terrorist groups. *See Wagner v. Islamic Republic of Iran, et al.*, 172 F. Supp. 2d 128, 130 (D. D.C. 2001) (entering a default judgment in favor of the victim of a Hezballah suicide bombing against Iran and the MOIS). The court in *Wagner* found that Hezballah was an agency or instrumentality of the MOIS, receiving significant funding and support from Iran and the MOIS since 1979, and that it was employed by the MOIS to expel the American presence in Lebanon by terrorist means. *See id.* at 132. The court proceeded to calculate and award economic, compensatory and punitive damages. *See id.* at 134-35. Similarly, in *Eisenfeld v. Islamic Republic of Iran, et al.*, 172 F. Supp. 2d 1 (D. D.C. 2000), the families of two victims of a bombing in Israel by Hamas, brought wrongful death claims against Iran, the MOIS and various individual defendants. Hamas, which regularly employed terrorist tactics, acknowledged support from Iran in the amount of $15 million per month. The plaintiffs also presented expert testimony demonstrating that Iran knew of Hamas' purpose and objectives. *See id.* at 4. The court entered a default judgment against the defendants who failed to appear in the matter. The court then awarded damages to the estates of the two American victims. *See id.* at 10-11.

Individuals who had been kidnapped or taken hostage, and tortured by terrorist organizations or agents of various foreign states have also made use of the exception. The first series of cases arose from the kidnappings of American citizens in Beirut, Lebanon. *See Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 64 (D. D.C. 1998). The hostages were held captive for various periods of time ranging from six months to nearly seven years. *See Anderson v. Islamic Republic of Iran, et al.*, 90 F. Supp. 2d 107, 108 (D. D.C. 2000) (an American journalist was kidnapped was held for almost seven years); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 29 (D. D.C. 2001) (an ordained Catholic priest was kidnapped and held for over one and a half years), *aff'd,* 315 F.3d 325 (D.C. Cir. 2003). The victims were repeatedly tortured, held captive in unbearable conditions and continued to suffer numerous health problems after being released. *See, e.g., Cicippio*, 18 F. Supp. 2d at 66-67. Their captors were identified as members of Hezballah, described as "a politico-paramilitary organization sponsored, financed, and controlled by Iran." *Id.* at 64. The *Cicippio* court held that it had personal jurisdiction over Iran pursuant to 28 U.S.C. § 1330(b) and that it had subject matter jurisdiction over Iran under the state sponsor of terrorism exception, 28 U.S.C. § 1605(a)(7). *Id.* at 67. The court further held that the United States Department of State's designation of Iran as a state sponsor of terrorism since January 1984, United States intelligence reports that Iran was a sponsor of Hezballah, and the fact that Iran openly provided such material support and resources to Hezballah were sufficient to impose liability under Section 1605(a)(7). *Id.* at 68. Upon a default judgment against Iran, which failed to appear although the plaintiffs had properly served it with the aid of the Swiss Embassy in Tehran, the court awarded damages to the victims. *See id.* at 70. The reasoning and judgments in *Anderson* and *Jenco* were the same with both cases relying heavily on the findings in *Cicippio*. *Anderson*, 90 F. Supp. 2d 107; *Jenco*, 154 F. Supp. 2d 27.

The next group of cases arose in the summer of 1990 when the Republic of Iraq[23] invaded Kuwait and prevented all foreign nationals who were then present within the borders of either country from departing. Iraq announced that the foreign nationals would be held indefinitely, but they were eventually permitted to leave in December 1990. The conditions in which the victims were held captive, however, were to varying degrees, inhumane. *See Hill, et al. v. Republic of Iraq, et al.*, 175 F. Supp. 2d 36, 37-39 (D. D.C. 2001), *rev'd in part*, 328 F.3d 680 (D.C. Cir. 2003). A number of American citizens (or their personal representatives), who had been detained in either Kuwait or Iraq, sued Iraq and Saddam Hussein for hostage-taking, false imprisonment, personal injury, intentional infliction of emotional distress, and in some cases, assault, battery and loss of consortium. *See id.* at 38. The defendants did not defend the action and defaulted. *See id.* In addressing the FSIA after the 1996 amendments, the court acknowledged that the case law in this area was sparse, that most cases involved isolated acts of extrajudicial killing or hostage taking, and that because most cases proceeded on default, there were no appellate level decisions addressing the legal issues. *See id.* at 46. From the limited jurisprudence available, the court found that federal common law governs where the FSIA is silent. After an evidentiary hearing, the district court was satisfied that the plaintiffs showed that they had suffered from false imprisonment as well as from the physical and psychological effects after being released. *Id*. at 46-47. The court then awarded various amounts of compensatory damages ranging from $136,000 to more than $1.7 million, and punitive damages against Saddam Hussein, individually, in the amount of $300 million. *See id.* at 48-49.

The court did not, however, award damages for the plaintiffs' economic losses and the plaintiffs appealed. The Circuit Court for the District of Columbia initially noted that neither it, nor any of the other circuits, had ever addressed the issue of what evidence a plaintiff must provide to obtain damages against a non-immune foreign state under the FSIA. *Hill*, 328 F.3d at 683. The court explained that although the FSIA does not directly address the quantum of proof for damages, Section 1606 provides that a "'foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances'" subject to certain exceptions that were not applicable to the case. *Id.* (quoting 28 U.S.C. § 1606). Thus, the court held, in order for a plaintiff to recover from a defaulting defendant under the FSIA, that plaintiff must prove damages in the same manner and to the same extent as any other default winner. *Id.* at 684. Applying federal common law for determining the amount of damages a plaintiff can recover, the Circuit Court held that "to recover damages a FSIA plaintiff must prove that the projected consequences are 'reasonably certain' (*i.e.*, more likely than not) to occur, and must prove the amount of damages by a 'reasonable estimate' . . . ." *Id.* Because the district court had not applied the proper standard, the Circuit Court remanded the case.

In a similar case, *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 41 (D. D.C. 2000), the victims brought a lawsuit against Iraq seeking damages for kidnapping, false imprisonment and torture. The court dismissed the claims of the spouses of the victims, which were brought under the commercial activity exception to the FSIA, because the acts of arresting and imprisoning individuals, regardless of Iraq's motivations, were an exercise of Iraq's sovereign powers and not that of a private individual as required by the statutory language of the commercial activity exception. *Id.* at 47 (citing and discussing *Saudi Arabia v. Nelson*, 507 U.S. 349, 362-63 (1993)) The four male

[23] As stated above, Iraq was designated as a state sponsor of terrorism until such designation was rescinded by Secretary of State. *See supra* at 31 n.22.

victims, however, were permitted to proceed under the state sponsor of terrorism exception to the FSIA. The court held that it had personal jurisdiction over Iraq under the FSIA and that the act of state doctrine did not bar the lawsuit. *See id.* at 55. After a four day *ex parte* bench trial, the plaintiffs[24] won a default judgment against Iraq and were awarded compensatory damages, including damages for economic loss. *Daliberti*, 146 F. Supp. 2d 19, 25-26 (D. D.C. 2001). The spouse plaintiffs were also awarded damages for loss of society and companionship of their husbands. *Id.* at 26.

In *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 180 F. Supp. 2d 78 (D. D.C. 2001), the plaintiff sued Libya, claiming that she and her late husband had been taken hostage and tortured by Libya after being forcibly removed from a cruiser, and had been detained for several months. *See id.* at 80-81. The court denied Libya's motion to dismiss and Libya appealed. The D.C. Circuit explained that Section 1605(a)(7) requires a claimant to provide the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration if the act occurred in the foreign state against which the claim is being brought. *Simpson*, 326 F.3d 230, 233 (D.C. Cir. 2003) (quoting 28 U.S.C. § 1605(a)(7)(B)(i)). The D.C. Circuit found that Libya had been provided a "reasonable opportunity" to arbitrate when it had received the plaintiff's offer to arbitrate in April 2001, almost two months before moving to dismiss the complaint. *Id.* at 233-34. The D.C. Circuit, however, dismissed the plaintiff's torture claim, finding that the allegations of death threats, separation from the plaintiff's spouse and interrogations were not sufficiently "extreme and outrageous as to constitute torture within the meaning of the [FSIA]." *Id.* at 234. With respect to the plaintiff's hostage taking claim, the D.C. Circuit held that under the FSIA, an essential element is that the intended purpose of the detention is to compel a third party to do or to refrain from doing something in exchange for the release of the hostage. *Id.* at 234-235 (citing 28 U.S.C. § 1605(e)(2) and Article 1 of the International Convention Against the Taking of Hostages). The D.C. Circuit determined that the plaintiff's complaint failed to state a claim for hostage taking because the plaintiff did not plead the intended purpose behind her detention. Accordingly, on that issue, the D.C. Circuit vacated the lower court's ruling and remanded so that the lower court could permit the plaintiff to amend her complaint. *Id.* at 235.

In *Alejandre v. Republic of Cuba, et al.*, 996 F. Supp. 1239 (S.D. Fla. 1997), the victims were the pilots and passengers of two civilian, unarmed planes that were shot down by the Cuban Air Force. Finding that the two warplanes of the Cuban Air Force were acting as an agent for Cuba, a state sponsor of terrorism as designated by the Export Administration Act of 1979, the court held that it had jurisdiction over the case and that Cuba and the Cuban Air Force were liable for the murders of the victims. Because the defendants failed to appear, the court entered a default judgment against them for more than $187 million in damages, of which approximately $137 million were for punitive damages. *See id.* at 1253.

In *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D. D.C. 2000), the victim, who was killed in Paris, France, had been a university professor and a dissident in Iran. The plaintiff named Iran and the MOIS as defendants, and claimed that they ordered the assassination of

[24] It appears that the spouses of the victims asserted new claims against Iraq under exceptions to the FSIA other than the commercial activity exception.

his brother. *See id.* Neither defendant made an appearance. *See id.* at 99. Satisfied with the evidence presented to establish the plaintiff's case, the court entered a default judgment against the defendants. Damages against the defendants, jointly and severally, were awarded for wrongful death, and pain and suffering. *See id.* at 115. Punitive damages in the amount of $300 million were also awarded against the MOIS. *See id.*

Recently, damages were awarded to the victims of the hijacking of TransWorld Airlines Flight No. 847. *See Stethem, et al. v. Islamic Republic of Iran, et al.*, 201 F. Supp. 2d 78 (D. D.C. 2002). In *Stethem*, a plane flying from Athens to Rome was hijacked by at least two individuals who forced the plane to divert for a fuel landing in Beirut. Several of the passengers on board were overseas American military personnel who were returning to the United States. *See id.* at 80. The plane went on to Algiers and finally returned to Beirut during which time one of the American military personnel, a United States Naval officer, was murdered and the other American servicemen were brutally beaten. *See id.* at 80-81. In Beirut, the surviving servicemen were held captive for about two weeks. *See id.* at 80. The servicemen and their spouses, and the estate of the murder victim sought damages against Iran and the MOIS. *See id.* at 81. The hijackers were identified as members of Hezballah, "a radical Shi'ite paramilitary organization recruited, trained and financially supported" by the MOIS. *Id.* at 85. The defendants defaulted and the court entered a judgment against both defendants, jointly and severally, for compensatory damages and awarded $300 million in punitive damages against MOIS. *See id.* at 92.

3. Extraterritoriality

There is a general presumption against the application of American statutes to conduct occurring outside the territory of the United States. *See Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) ("legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"). The policy behind this general rule is to prevent inadvertent interference with foreign relations. *See Flatow*, 999 F. Supp. at 16. The Constitution, however, permits Congress to enact laws that are applicable to extraterritorial conduct, and in enacting the state sponsor of terrorism exception, courts have held that Congress clearly intended to reach such conduct. *See, e.g. Flatow*, 999 F. Supp. at 15-16; *Rein*, 995 F. Supp. at 330.

In *Rein*, the court denied the motions to dismiss, holding that in enacting the "state sponsor of terrorism" exception to sovereign immunity under the FSIA, Congress intended to reach the extraterritorial conduct alleged in the complaint. *See* 995 F. Supp. at 330-32. The court further held that Libya's designation as a state sponsor of terrorism was not unconstitutional because the state sponsor of terrorism exception was rationally related to a legitimate governmental purpose, and the *ex post facto* doctrine invoked by the defendants was inapplicable. *See id.*

The *Flatow* court reasoned that the state sponsor of terrorism exception to foreign sovereign immunity is a remedial statute that does not create new responsibilities or obligations. Rather, the exception facilitates "the enforcement of pre-existing universally recognized rights under federal common law and international law." *Flatow*, 999 F. Supp. at 13. The *Flatow* court further explained that because the state sponsor of terrorism exception addresses neither the rights nor obligations of the parties, but the power of the courts, it could be applied retroactively. *Id.* (citations omitted).

4. Constitutional Issues

The designation of a foreign state as a sponsor of terrorism has been challenged on due process grounds. As an initial matter, however, any constitutional challenges to the FSIA may only be brought by a party with standing. Unlike an individual person, a foreign state most likely does not have standing to bring such constitutional challenges. *See Daliberti*, 97 F. Supp. 2d at 44-49. One district court has reasoned that foreign states should have comparable status to that of the states of the United States and the United States federal government for purposes of due process analysis, and because a state of the United States is not entitled to substantive due process, neither is a foreign state. *See Flatow*, 999 F. Supp. at 20 (citing *South Carolina v. Katezenbach*, 383 U.S. 301, 323-24 (1966)).[25] Even if a foreign state were to have standing, the state sponsor of terrorism exception would not violate due process because it is only an exception to the FSIA whereby the foreign state loses its immunity; in other words, such a designation does not affect the substantive claim or the merits of the case. *See Rein*, 995 F. Supp. at 330.

Second, in addressing equal protection concerns, courts have held that because no fundamental right is implicated, the rational basis test, and not the strict scrutiny test, should be applied in evaluating the constitutional validity of the state sponsor of terrorism exception. *See, e.g., Daliberti*, 97 F. Supp. 2d at 52; *see also Rein*, 995 F. Supp. at 330-31. Applying the rational basis test, courts have held that the purpose of Congress was to provide a means of redress for American citizens who have become victims of terrorism. *See, e.g., Daliberti*, 97 F. Supp. 2d at 52. Preventing those nations that sponsor and encourage terrorist acts from invoking the immunity privilege is rationally related to the purpose of providing redress in courts for victims of terrorism. *See id.* Accordingly, there is no equal protection violation.

Third, certain defendants who have defended lawsuits brought against them under the state sponsor of terrorism exception have argued that that it abrogates the minimum contacts requirement for obtaining personal jurisdiction over a party. *See, e.g.*, *Daliberti*, 97 F. Supp. 2d at 52. In addressing this concern, courts have reasoned that Congress expressly considered this issue when enacting the FSIA exceptions. *See, e.g., id.* at 53. A foreign state that causes the personal injury or death of a United States national through an act of state-sponsored terrorism has the requisite minimum contacts with the United States by virtue of such actions. *See Flatow*, 999 F. Supp. at 22-23. Moreover, the state sponsor of terrorism exception provides an express jurisdictional nexus based on the victim's American nationality. *See id.*

No state can claim that it was not on notice that terrorist acts are condemned by the international community. As one court has stated:

> As terrorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis*—an enemy of all mankind,

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[25] Other lower courts have held that the federal government, state governments, political subdivisions and municipalities within the United States do not have standing to make due process challenges. *See e.g. City of Sault Ste. Marie, Mich. v. Andrus, et al.*, 532 F. Supp. 157 (D. D.C. 1980); *El Paso County Water Improvement Dist. No. 1 v. Int'l Boundary and Water Comm'n*, *et al.*, 701 F. Supp. 121 (W.D. Tex. 1988).

> this Court concludes that fair play and substantial justice is well served by the exercise of jurisdiction over foreign state sponsors of terrorism which cause personal injury to or the death of the United States nationals.

Flatow, 999 F. Supp. at 23. Accordingly, in *Daliberti*, jurisdiction over the state of Iraq was upheld for the kidnapping, imprisonment and torture of four American businessmen doing business in Kuwait. *See Daliberti*, 97 F. Supp. 2d at 54. The *Daliberti* court reasoned that because the hostages were not returned to the United States until certain economic sanctions were lifted and aid was delivered, Iraq had clearly intended for the kidnappings to affect American foreign policy. *See id.* Accordingly, Iraq could not argue that it had not been on notice of the possibility of dealing with the repercussions of the kidnappings in United States courts. *See id.*

Finally, the fact that the FSIA incorporates the Executive Branch's designations of state sponsors of terrorism does not limit the federal court's jurisdiction. Rather, Congress' delegation of power to the Executive Branch to find facts upon which certain enactments are made is firmly established and constitutionally permissible. The principle of separation of powers does not preclude the Executive Branch from designating states as sponsors of terrorism under the FSIA. *See id.* at 49-51.

C. Torture Victim Protection Act

For victims of torture and the heirs of persons subjected to extrajudicial killing, whether United States nationals or not, the Torture Victim Protection Act ("TVPA") provides an express means of redress in United States courts under specified circumstances. The genesis of the TVPA lies in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980): Congress intended to codify *Filartiga*'s holding that torture is actionable under the Alien Tort Act, 28 U.S.C. § 1350,[26] and also to conform United States law to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[27]

The TVPA provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative,

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[26] 28 U.S.C. § 1350 states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

[27] Pub. L. No. 102-256 (Mar. 12, 1992) 106 Stat. 73, *reprinted in* 28 U.S.C. § 1350 note; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

> or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note, Sec. 2(a). Further, the TVPA provides that a prospective plaintiff must demonstrate that he or she has exhausted "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note, Sec. 2(b). Under the case law that has addressed the TVPA, a prospective plaintiff must make three principal showings to invoke the statute.

First, defendant must have acted with "actual or apparent authority, or color of law, of any foreign nation." In determining whether there has been "state action" under the TVPA, it is sometimes disputed whether an entity can even be considered a state. As mentioned above, under international law, a state is an entity that has a defined territory and permanent population, that is under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. *See Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995). Courts have not, however, required strict adherence to this requirement. *See, e.g., Doe I v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 9 (D. D.C. 1998) ("the TVPA does not require that a particular government be officially recognized"). Rather, any government, regardless of how it came into power, will be considered a *de facto* government if it has full and actual exercise of sovereignty over a territory and people that is large enough to be a nation. *See Kadic*, 70 F.3d at 244. As the court in *Doe I* stated, "[t]he de facto state doctrine recognizes that the TVPA does not concern the legitimacy of a particular organization ***but its power***." *Doe I*, 994 F. Supp. at 9 (emphasis added). Additionally, state action exists not only when the government itself acts directly, but also when private individuals act in concert with state officials or with significant aid from the state. "To determine whether a private actor acts under color of law in the context of a claim under. . . the TVPA**,** the Court must look to the standards developed under 42 U.S.C. § 1983" or 28 U.S.C. § 1350, note, Sec. 2(a). *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 at *13 (S.D.N.Y. Feb. 28, 2002). Under 42 U.S.C. § 1983, "[a] private individual acts under the color of law . . . when he acts together with state officials or with significant aid." *Kadic*, 70 F.3d at 245. The plain language of 28 U.S.C. § 1350, note Sec. 2(a) also makes clear that a plaintiff bringing an action under the TVPA must establish that an individual defendant acted under the "color of law." *Id.* Indeed, the legislative history behind the TVPA states that "this language was intended to 'make[] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute 'does not attempt to deal with torture or killing by purely private groups.'" *Id.* (quoting H.R. Rep. No. 367 at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87).

Second, defendant must have committed "torture" or "extrajudicial killing," as defined in the statute. The TVPA defines an "extrajudicial killing" as:

> a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized 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.

28 U.S.C. § 1350 note, Sec. 3(a). The definition of torture is more extensive:

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. at Sec. 3(b). "This definition, in turn, borrows extensively from the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) ("Torture Convention"), which the United States signed in 1988 and ratified two years later." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002). The D.C. Circuit in *Price* noted that:

> the drafting histories of both the Convention and the statute address two ambiguities lurking in th[e] definition [of torture] that must be confronted . . . . The first concerns the meaning of "severe": how much actual pain or suffering must defendants inflict before their conduct rises to the level of torture? The second involves the "for such purposes" language: what must plaintiffs prove about the

> motivation for the alleged torture if they hope to deprive foreign states of their immunity?

Id. In addressing these issues, the *Price* court explained that the severity question was to ensure that conduct labeled "torture" was "sufficiently extreme and outrageous" to warrant such a categorization. *Id.* Accordingly, simply being in official custody or even being subject to direct physical assault does not necessarily mean that torture has occurred – "[n]ot *all* police brutality, not *every* instance of excessive force used against prisoners, is torture. . . ." *Id.* at 93 (emphasis in original). The *Price* court did not offer a complete or exhaustive list of acts that constitute torture, nor did it try to precisely define torture. Rather, drawing upon legislative history and secondary materials, it determined that, "[t]he more intense, lasting, or heinous the agony, the more likely it is to be torture." *Id.* (citing S. Exec. Rep. No. 101-30 at 15 (1990)). In addressing the "for such purposes" issue, the court found that "it is clear from the text of the TVPA that the list of purposes provided was not meant to be exhaustive." *Id.* Rather, the list was included to emphasize that the act of torture consists of conduct that is both "intentional and malicious." *Id.* (citing S. Exec. Rep. No. 101-30 at 14 (1990)). The definition of torture is difficult to pinpoint with exact words – however, as the legislative and judicial guidelines emphasize, the conduct must be extreme, outrageous and heinous.

Third, plaintiff must have exhausted the remedies available to him or her where the claim occurred. The courts have generally applied a relaxed standard of pleading with regard to this requirement in recognition of the likelihood that a state implicated in torture is unlikely to provide meaningful remedies to the victim. *See, e.g., Xuncax v. Gramajo,* 886 F. Supp. 162, 178 (D. Mass. 1995) (the TVPA does not generally require exhaustion where "foreign remedies are unobtainable, ineffective, inadequate, or obviously futile"); *see also Sarei v. Rio Tinto PLC*., 221 F. Supp. 2d 1116, 1135 (C.D. Cal. 2002) (Congress' intent in including the exhaustion requirement was simply "a means of balancing its desire to provide meaningful remedies to victims of [torture] against its wish to avoid overburdening the nation's courts").

Less obvious from the face of the TVPA is its exclusion of juridical persons and sovereign states as defendants. The choice of the word "individual" instead of "person" in Section 2(a) has been uniformly interpreted, although the authority is sparse, to denote only natural persons and to exclude juridical entities and sovereign states. In *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999), the court held that "because [defendant] as a corporation is not an 'individual' for purposes of the TVPA, [defendant] cannot be held liable under the TVPA. Plaintiff has no cause of action under the TVPA because he cannot satisfy the first element required to state a claim under the Act." *Id.* at 382. Similarly, the court in *Friedman v. Bayer Corp.,* No. 99-CV-3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999), citing *Beanal* with approval, also held that the TVPA does not apply to corporations.[28]

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[28] The only case that suggests otherwise is *Doe I*, 993 F. Supp. 3, a case brought under the Alien Tort Act and the TVPA. Yet this case did not reach this issue. Because one of the defendants was a natural person, and there is no evidence that the other defendant, an "umbrella organization," was a legal entity, it must be presumed that any liability could be imposed only on the natural person members of the defendant organization. Similarly, *Ge v. Peng*, 201 F. Supp. 2d 14, 23 (D. D.C. 2000), *aff'd*, 35 Fed. App. 1, 2002 WL 1052012 (D.C. Cir. Mar. 1, 2002), another action brought under both the Alien Tort Act and the TVPA, did not reach the issue. The *Ge* court held that the corporate defendant did not fall within the scope of the TVPA because it was not a "state actor." *See id*.

These holdings, if not plainly supported by the congressional record, are at least consistent with that record: the House Report accompanying the TVPA bill states "[o]nly 'individuals,' not foreign states, can be sued under the bill." House Report accompanying Torture Victim Protection Bill, H.R. Rep. No. 367(I) (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 1991 WL 255964, at *4. The Senate Report states that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued." Senate Report accompanying Torture Victim Protection Bill, S. Rep. No. 249 (1991), 1991 WL 258662, at *7. Further, Congress' own rules of statutory construction indicate that the term does not include corporations: the rules distinguish between corporations and individuals, defining "person" to include "corporations, companies, associations . . . as well as individuals." 1 U.S.C. § 1.[29]

Any action under the TVPA must be brought within ten years, *see* Sec. 2(c), but equitable tolling may be applied.

In sum, under the TVPA United States and non-United States nationals may sue natural persons, but not juridical persons or sovereign states, for torture committed anywhere in the world under the "actual or apparent authority, or under color of law" of a foreign state.

IV. Defenses

A. Sovereign Immunity – The Federal Sovereign Immunity Act, Before the 1996 Amendment

When a defendant is a foreign state, the plaintiff must overcome the immunity afforded to foreign states under the FSIA, 28 U.S.C. § 1602 *et seq.*, which is the sole basis for obtaining jurisdiction over a foreign state in United States courts. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir. 1997), *cert. denied*, 520 U.S. 1204 (1997); *Hwang Geum Joo v. Japan,* 172 F. Supp. 2d 52, 56 (D. D.C. 2001), *aff'd*, 332 F.3d 679 (D.C. Cir. 2003); *Flatow*, 999 F. Supp. at 11. The "state sponsor of terrorism" designation, 28 U.S.C. § 1605(a)(7), applies only to the six countries designated, *see supra* at 31. Accordingly, it is important to consider the other six express exceptions to immunity. The two most notable among them in this connection are: (1) waiver by the state; and (2) the commercial activity exception.[30]

Under the waiver exception, a foreign state is not immune from suit in the United States if it "has waived its immunity either explicitly or by implication. . . ." 28 U.S.C. § 1605(a)(1).

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[29] This interpretation is in accord with common usage as well. To the extent the word "individual," which ordinarily denotes only a natural person, could be interpreted more broadly to encompass also juridical entities, that broader interpretation must be rejected in light of Congress' use of the relative pronoun "who," which refers exclusively to natural persons. *See also* Black's Law Dictionary 773 (6th ed. 1996) ("person" means "a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association . . . it may, in proper cases, include a corporation").

[30] The other exceptions arise when: (1) property is taken in violation of international law and that property is in the United States in connection with a commercial activity carried on in the United States by the foreign state; (2) there are rights to immovable property in the United States by succession or by gift; (3) a tort is committed in the United States; and (4) an agreement made by a foreign state with or for the benefit of a private party needs to be enforced. *See* 28 U.S.C. § 1605(a).

The waiver must be clear and unambiguous. *See Hwang*, 172 F. Supp. 2d at 59 (holding that the Potsdam Declaration was not an explicit waiver by Japan of its state immunity in United States courts because the alleged waiver was neither clear nor unambiguous). Some plaintiffs have argued that a state waives its immunity when it commits *jus cogens* violations. *See, e.g., Smith*, 101 F.3d 242. However, the Second Circuit (and various district courts) has held that Congress did not contemplate such a waiver under the FSIA § 1605(a)(1). *See Smith*, 101 F.3d at 245 (terrorist bombing of the Pan Am Flight 103 over Lockerbie, Scotland did not constitute waiver of immunity by Libya); *see also Hwang*, 172 F. Supp. 2d at 60 (committing war crimes during World War II did not mean that Japan waived its immunity).

More commonly, courts have exercised jurisdiction over a foreign state when that state has engaged in some commercial activity that causes a direct effect in the United States. *See, e.g., Hwang*, 172 F. Supp. 2d at 61. Under this exception, a foreign state is not immune from jurisdiction where the underlying claim is "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ." 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The United States Supreme Court has further explained that the critical issue is whether the foreign state was engaging in activity that private parties would normally conduct in trade or commerce. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Accordingly, courts have held that crimes against humanity, no matter how barbaric, do not fall under the commercial activity exception. *See, e.g., Hwang*, 172 F. Supp. 2d at 63 (finding that "comfort stations," which were regulated by the Japanese army during World War II and in which women were held as victims of sexual slavery and torture, did not fall under the commercial activity exception even though the army charged Japanese soldiers a fee, a portion of which went to the military); *Daliberti*, 97 F. Supp. 2d at 47 (finding that arrest and imprisonment were within Iraq's sovereign power and thus, torture and hostage taking alone did not fall under commercial activity exception).

Thus, until the FSIA was amended in 1996 by the AEDPA (discussed in detail above),[31] it often proved an effective impediment to suits against states and their instrumentalities alleged to have committed acts of terrorism and human rights violations. For example, in *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 308-09 (E.D.N.Y. 1995), *aff'd*, 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), representatives of people killed

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[31] Pub. L. 104-132 (Apr. 24, 1996) 110 Stat 1214 ("AEDPA"), which was clarified by the Flatow Amendment, note to 28 U.S.C. § 1605 (with numerous references to 28 U.S.C. § 1605(a)(7)).

on the Pan Am plane that was bombed and crashed in Lockerbie, Scotland, sued Libya, the Libyan Arab Airlines, the Libyan External Security Organization and two individuals as agents and instrumentalities of Libya. The complaint alleged that the bomb was put on the plane and detonated at the direction of, and with the support of, Libya. The plaintiffs pleaded tort claims for wrongful death, personal injury, battery, infliction of emotional distress, loss of consortium and violation of international law. The defendants, not including the individual defendants, moved to dismiss for, among other things, lack of subject matter jurisdiction under the FSIA. The court granted the motion to dismiss, holding that Libya had sovereign immunity and could not be sued because the alleged actions of Libya and its instrumentalities did not fall within any enumerated FSIA exception to sovereign immunity. The Second Circuit affirmed the dismissal. *See Smith*, 101 F.3d at 247.

Some cases managed to overcome the pre-amendment FSIA. They remain relevant after the amendment as well because the reasons for their success are still valid today.

Letelier et al. v. Republic of Chile et al., 488 F. Supp. 665 (D. D.C. 1980), for example, was successful because it fell within one of the pre-amendment exceptions to immunity: the relevant killings took place in the United States. *See* 28 U.S.C. § 1605(a)(5)[32]. A former Chilean ambassador and foreign minister were killed in a bomb attack in the District of Columbia. Representatives of the decedents sued the Republic of Chile, several individuals, the Centro Nacional de Intelligencia ("CNI"), and certain CNI agents and officers. The complaint alleged that the individual defendants built and detonated the bomb at the direction, and with the aid of, Chile, the CNI, and the CNI agents and officers. The complaint set forth five causes of action: (1) conspiracy to deprive Letelier and Moffitt of their constitutional rights; (2) assault and battery causing the deaths of Letelier and Moffitt; (3) negligent transportation and detonation of explosives; (4) assassination of Letelier and Moffitt in violation of international law; and (5) assault on Letelier, an internationally protected person under 18 U.S.C. § 112.[33]

Chile argued that Congress intended the scope of subsection (a)(5) to include only private torts such as automobile accidents. *Id.* at 671. Emphasizing the "unambiguous language" of the statute itself, the *Letelier* court disagreed, finding that "[n]owhere is there an indication that the tortious acts to which the [FSIA] makes reference are to only be those formerly classified as 'private' . . . ." *Id.* Moreover, the court also found that upon closer examination, the legislative history of the FSIA does not contradict or qualify the plain meaning of the statute – automobile accidents may have

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[32] Prior to its amendment, subsection (a)(5) provided for an exception to the sovereign immunity defense for cases "not otherwise encompassed in paragraph (2) [(the commercial activity exception)] in which money damages are sought against a foreign state for personal injury or death, or damage to or loss off property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . ." 28 U.S.C. §1605(a)(5) (1976). The provision remains substantially the same post-amendment.

[33] 18 U.S.C. § 112 protects foreign officials, official guests and internationally protected persons from, among other things, assault. The penalty for assault is a fine, imprisonment for not more than three years or both. If a deadly weapon is used or bodily injury is inflicted, the penalty increases to imprisonment of not more than ten years. 18 U.S.C. § 112(a). "Internationally protected person" is defined under 18 U.S.C. § 1116(b)(4) as: "(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household." 18 U.S.C. § 1116(b)(4).

been a "problem foremost in the minds of Congress" but only because of their relative frequency. *Id.* at 672.

Although Chile did not raise the issue, the court discussed whether the exemption provided in FSIA subsection (a)(5) applied to Chile. In so doing, the court found that of the two possible exemptions, only subsection (a)(5)(A)[34] would be applicable in this case. *Id.* at 673. The court further found that subsection (a)(5)(A) corresponded to the discretionary act exception in the Federal Tort Claims Act, under which a discretionary act is "one in which 'there is room for policy judgment and decision.'" *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)). Applying this definition, the court held:

> Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly, there would be no "discretion" within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity under subsection (A) for any tort claims resulting from its conduct.

Id. Thus, Chile could not claim sovereign immunity as a defense against the plaintiffs' claims.

Chile also raised the defense of the act of state doctrine, which provides:

> "Every 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 the means open to be availed of by sovereign powers as between themselves."

Id. at 673-74 (quoting *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897)). Chile argued that any actions it allegedly took to cause the death of Letelier took place within its own borders and thus Chile was protected from liability in the United States under the act of state defense. The court found, however, that even if such acts did occur entirely within Chile, the agents of Chile caused the tortious injury to occur within the United States. The court stated that to allow Chile to escape liability in this case "would totally emasculate the purpose and effectiveness of the [FSIA] by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the [FSIA] through the back door, under the guise of the act of state doctrine." *Id.* at 674 (internal

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[34] The exemptions are: "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(A) & (B) (1976). They remain substantially the same today.

quotations and citations omitted). The court thus implied that the exceptions to the FSIA could not be overcome merely by invoking the act of state doctrine because those exceptions would then be rendered meaningless. Accordingly, the court held that it had subject matter jurisdiction over the lawsuit.

Shortly thereafter, the plaintiffs brought the case before the district court for a final determination. *See Letelier*, 502 F. Supp. 259 (D. D.C. 1980). The court found that the plaintiffs produced sufficient evidence to establish that employees of Chile, acting within the scope of their employment and at the direction of Chilean officers who were acting in the scope of their offices, committed assault and battery, and engaged in the negligent transportation and detonation of explosives that proximately caused the deaths of Letelier and Moffitt. *See id.* at 266. Accordingly, a default judgment as to those claims was entered in favor of the plaintiffs and against Chile. *See id.* The court also entered a default judgment against the individual perpetrators, the CNI agents and the CNI officer, upon whom service was made, for all five counts of the complaint. *See id.*

The plaintiffs in *Klinghoffer v. S.N.C. Achille Lauro et al.*, 739 F. Supp. 854, 858 (S.D.N.Y. 1990), *vacated and remanded*, 937 F.2d 44 (2d Cir. 1991), succeeded against the PLO because the court held the PLO was not a "state" for purposes of the FSIA. In *Klinghoffer*, the plaintiffs sued the owner and chartering company of the ship, the Achille Lauro, for failing to take steps to prevent, and to warn of the risk of piracy, after the ship was hijacked in the Mediterranean Sea and one passenger, Leon Klinghoffer, was shot and thrown into the sea. Two defendants impleaded the PLO for indemnification or contribution, and for damages against the PLO for tortious interference with their business.

The PLO moved to dismiss by arguing, among other things, that it should enjoy sovereign immunity as "the internationally recognized representative of a sovereign people who are seeking to exercise their rights to self-determination, national independence, and territorial integrity." *Id.* at 857. In denying the PLO's motion, the court held that the PLO could not claim immunity from the lawsuit because it was an unincorporated association for jurisdiction and service purposes, not a "state" under the FSIA:

> Although [the PLO] claims the attributes of a state, it controls no defined territory or populace and is not recognized by the United States. International law generally regards a "state" as "'an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.'"

Klinghoffer, 739 F. Supp. at 858 (quoting *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) and Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987)), *aff'd* on this point, 937 F.2d at 47-78.

The court also rejected the PLO's argument that it should not be subject to United States jurisdiction for acts taking place entirely outside the United States under Section 15 of the Agreement Between the United Nations and the United States of America Regarding the Headquarters

of the United Nations.[35] Section 15 provides, in part, that certain United Nations representatives shall "be entitled to the same privileges and immunities . . . as [the United States] accords to diplomatic envoys accredited to it." The court rejected this defense for the simple reason that the "PLO is not a Member of the United Nations, but rather an observer, and section 15 gives it no claim to diplomatic immunity." *Id*. at 864.

On certified interlocutory appeal, the Second Circuit in *Klinghoffer* agreed that the PLO was a non-incorporated association that was not immune from suit under the FSIA, but further held that only those activities in the United States not conducted in furtherance of its status as permanent observer to the United Nations could be used as basis for the assertion of personal jurisdiction over the PLO: "basing jurisdiction on the PLO's participation in UN-related activities would put an undue burden on the ability of foreign organizations to participate in the UN's affairs." *Klinghoffer*, 937 F.2d at 51. Lacking sufficient facts to make a determination about personal jurisdiction, the court vacated and remanded.

On remand, the district court found that the PLO was conducting sufficient non-United Nations activities in New York for purposes of the New York long-arm jurisdiction statute, but only for cases brought before 1988. *See Klinghoffer v. S.N.C. Achille Lauro et al.*, 795 F. Supp. 112, 114-15 (S.D.N.Y. 1992). The court also found that under the applicable New York service of process rules, the plaintiffs had to serve either the president or the treasurer, and not just the Permanent Observer, of the PLO. Accordingly, the claims were dismissed without prejudice for lack of jurisdiction due to ineffective service of process. *Id.* at 116. Later, upon a motion of one of the original defendants, who had impleaded the PLO, the district court held that because New York law permits the court to order alternative methods of service upon an unincorporated association, service of process had been effected on the PLO by serving its Permanent Observer to the United Nation in New York and was thus authorized *nunc pro tunc*, as of its original date. *See Klinghoffer v. S.N.C. Achille Lauro et al.*, 816 F. Supp. 930, 934 (S.D.N.Y. 1993).

B. Political Question Doctrine

When causes of action for acts of terrorism and/or the violation of the law of nations are brought in the United States, federal courts must consider whether the suits are appropriately within the judiciary's discretion, or if they are political issues that should be left to the other branches of government. In addressing the political question doctrine, the courts must consider several factors. A non-justiciable political question typically involves one or more of the following:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind that is clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due the coordinate branches of government; or [5]

[35] 22 U.S.C. § 287 note (1988).

> whether there is an unusual need for unquestioning adherence to a political decision already made; or [6] the potential embarrassment from multifarious pronouncements by various departments on one question.

See Kadic, 70 F.3d at 249 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In the cases brought by victims of terrorism, there generally will not be any problem regarding the justiciability of the claims. As the Second Circuit stated, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for non-judicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Id.* This would generally satisfy the first three factors enumerated above. As for the last three factors, the Legislative and Executive Branches of government also expressly endorsed the suing of terrorist organizations in United States federal courts through the enactment of various statutes. *See Klinghoffer*, 739 F. Supp. at 859-60. Thus, there should be no possibility of embarrassing or encroaching upon the powers of the Legislative or the Executive Branches.

C. Act of State Doctrine

As federal law incorporates the law of nations, one of the legal principles that must be addressed in analyzing civil remedies for victims of terrorism is the act of state doctrine, which foreign states that are sued in United States courts may invoke. The act of state doctrine emerged in United States law in the early eighteenth century and provides that every sovereign state must respect the independence of every other sovereign state, and that the courts of one country will not judge the actions that are done within another country's own territory. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544-45 (N.D. Cal. 1981) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). There is a three part balancing test to determine whether the doctrine applies. A court must consider: (1) the degree of codification or consensus regarding the international legal principle in question; (2) the impact of the matter on United States foreign relations; and (3) the status of the foreign government whose act is allegedly implicated. *See Forti*, 672 F. Supp. at 1545 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). This defense is only applicable to actions occurring within the foreign state's own territory. *See id.*; *see also Flatow*, 999 F. Supp. at 24. Accordingly, the doctrine is not applicable to a state that gives assassination orders, for example, within its own territory, but whose orders result in tortious injury in the United States. *See, e.g., Letelier*, 488 F. Supp. at 674. Additionally, although a state act must be "valid" in order for the doctrine to be invoked, it is not required to be synonymous with American law or the general principles of international law. Therefore, assisting an intra-familial kidnapping by issuing a travel visa is considered a valid state act, but orders of political assassinations, bombings and other acts of international terrorism are not valid. *See Flatow*, 999 F. Supp. at 24.

For most plaintiffs bringing causes of actions for terrorist acts perpetrated, directly or indirectly, by foreign states, the act of state doctrine will be easy to overcome. This is because the purpose of the doctrine

> is rooted in the domestic separation of powers reflecting the strong sense of the Judicial Branch that engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs . . . . The act of state doctrine is designed, at least in part, to avoid having the Judiciary "embarrass" the Executive and Legislative Branches, which are the branches constitutionally empowered to decide matters relating to foreign policy.

Daliberti, 97 F. Supp. 2d at 55 (internal quotations and citations omitted). As further explained, "[w]hile 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." *Id.* Specifically with respect to the state sponsor of terrorism exception to the FSIA, the designation of the foreign states as sponsors of terrorism "was made by the Secretary of State on behalf of the Executive Branch under an express grant of authority by Congress." *Id.* Accordingly, the court in *Daliberti* declined to dismiss a claim brought as a result of terrorist acts because to do so "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." *Id.*

D. Immunity for Heads of State

Another doctrine under international law that must be examined is the immunity afforded to foreign heads of state. This immunity is not a right, but "a matter of grace and comity." *Flatow,* 999 F. Supp. at 25; *see also Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994). The immunity is granted exclusively to heads of state and it is the Executive Branch that decides who to recognize as a head of state. *See Flatow*, 999 F. Supp. at 24. A head of state may waive this immunity, but such waiver must be clear and explicit. *See Lafontant*, 844 F. Supp. at 134. Before the 1996 amendments to the FSIA, one district court held that the common law head of state immunity survived the FSIA. *See id.* at 136-37. With the enactment of the 1996 amendments, the head of state immunity should no longer be available in actions brought under the state sponsor of terrorism exception to the FSIA, which expressly provides for the application of Section 1605(a)(7) to officials, employees and agents of foreign states acting within the scope of their office, employment or agency. *See Flatow*, 999 F. Supp. at 24. The reasoning behind this conclusion is to avoid rendering the state sponsor of terrorism exception meaningless by permitting the heads of state to circumvent liability by invoking immunity. *See id.*

E. Personal Jurisdiction

Although the statutes and the federal common law causes of actions may confer subject matter jurisdiction over certain defendants, courts must still consider personal jurisdiction issues. In the District of Columbia, where many suits against foreign states for terrorist acts are brought, there is a state "transacts business" statute under which personal jurisdiction may be obtained. It has been held to comport with the constitutional standards for personal jurisdiction. *See Doe I*, 993 F. Supp. at 6. Thus, for example, the former leader of the Islamic Salvation Front ("FIS"), which allegedly played a major role in the violence against innocent civilians in Algeria, was found to have the necessary minimum business contacts with the District of Columbia because he had set up

an FIS office there. *See id.* Although the District of Columbia's long arm jurisdiction statute includes an exception for parties whose only contacts are the solicitation of funds from the United States government, the exception did not apply to the leader of the FIS because he had also engaged in many other unrelated activities. *See id.*

The Second Circuit has also provided guidelines for how to treat organizations such as the PLO for jurisdictional purposes. The Second Circuit held that the PLO should be treated as an unincorporated association, but limited the basis of jurisdiction to those activities conducted outside of the PLO's status as Permanent Observer of the United Nations. *See Klinghoffer*, 937 F.2d at 51. Without its status as a Permanent Observer of the United Nations, the court found that the PLO would not even be permitted in New York at all. Moreover, the United Nations is not really United States territory, but internationally neutral ground over which the United States has control. *See id.* Given these circumstances, the Second Circuit was reluctant to confer personal jurisdiction in New York for activities engaged within the United Nations, finding it an undue burden on foreign organizations' ability to participate in United Nations affairs. *See id.* On remand, the district court held that the PLO was conducting sufficient non-United Nations related business within New York for it to fall under New York's long-arm jurisdiction statute. *See Klinghoffer*, 795 F. Supp. at 114-15. The district court found that delivering speeches, giving interviews, making media appearances, distributing informational materials about the PLO, and soliciting and securing a professor's membership in the Palestinian National Council (the legislative body of the PLO) "demonstrate[d] a presence in New York that [wa]s not occasional or casual, but ha[d] a fair measure of permanence and continuity" and thus "suffice[d] to meet the 'doing business' standard for the period." *Id.* at 114.

Generally, it will not be difficult for victims of terrorism to overcome the personal jurisdiction hurdle. As to the foreign states, the state sponsor of terrorism exception to the FSIA specifically provides for a cause of action against those countries designated as sponsors of terrorism. With respect to the individual defendants who generally execute the terrorist action, if they are acting as an agent of a designated state sponsor of terrorism, they will fall under the scope of 28 U.S.C. § 1605(a)(7). As to other individual defendants, if they commit the terrorist act on United States soil, they will have the minimum contacts for personal jurisdiction purposes. As for terrorist acts against United States nationals overseas, personal jurisdictional analysis must be conducted on a case-by-case system, as with any other defendants.

F. Service of Process

Another hurdle that many plaintiffs will face is how to effect service of process upon terrorist organizations or states that are designated as sponsors of terrorism. There are statutory guidelines for service of process upon such parties. *See* Fed. R. Civ. P. 4(e) (authorizes personal service upon an individual physically present within a judicial district of the United States); Fed. R. Civ. P. 4(f) (governs service of process on individuals in a foreign country); Fed. R. Civ. P. 4(h) (governs service of process on corporations and associations). However, in some instances the courts may have to fashion alternative methods for serving certain parties.

Recently, a federal district court in the Southern District of New York ordered the methods by which various defendants in lawsuits arising from the September 11, 2001 attacks could be served. *See Smith v. Afghanistan, et al.*, Nos. 01 CIV 10132, 01 CIV 10144, 2001 WL 1658211

(S.D.N.Y. Dec. 26, 2001) (subsequent decision discussed, *supra* at section III.A.4). The defendants in *Smith* were the Islamic Emirate of Afghanistan ("Afghanistan"), the Taliban, al Qaeda and Osama Bin Laden. The court ruled that since Bin Laden's whereabouts were unknown, he must be served under Fed. R. Civ. P. 4(f)(3), which provides for service "by other means not prohibited by international agreement as may be directed by the court." *See Smith*, 2001 WL 1658211 at *2. The *Smith* court permitted service by publication for six weeks in various Afghani, Pakistani and worldwide media sources, but "with the understanding that once served, Bin Laden [would be allowed to] challenge the Court's jurisdiction as well as the means of service." *Id.* at *3. The court reasoned that Bin Laden should know that the estates of the victims would file civil lawsuits against him in the Southern District of New York as a result of the September 11 attacks "for which he has been widely held accountable." *Id.* at *3. The *Smith* court also noted that if Bin Laden could not be haled into a United States court, there would be no meaningful alternatives by which the plaintiffs could sue Bin Laden. The court noted that during the hunt for Bin Laden, if he were either killed or to disappear, it would be extremely burdensome for the plaintiffs to institute a lawsuit against Bin Laden's estate in Saudi Arabia, from which his citizenship was stripped, or in Afghanistan, whose legal system is in disarray. *See id.*

The *Smith* court held that service on al Qaeda, an unincorporated association, was governed by Fed. R. Civ. P. 4(h). *See id.* at *4. Similar concerns and issues were raised as with service on Bin Laden. Accordingly, the court held that al Qaeda should be served in the same manner as Bin Laden, with the same caveat permitting al Qaeda to challenge jurisdiction and service of process. *See id.*

Lastly, the court found that unlike al Qaeda and Bin Laden, neither the Taliban nor Afghanistan was entirely inaccessible to the plaintiffs. As such, the court held that both could be served pursuant to Rule 4(f)(3) by personal service upon Ambassador Abdul Salaam Zaeef. *See id.* The court reasoned that since service by publication is generally disfavored, where personal service is available it should be implemented. *See id.*

G. Enforcement

In most of the cases in which courts have awarded damages for causes of actions arising from terrorist actions, the defendants did not appear in the lawsuits and the courts ultimately ordered default judgments. Accordingly, while the verdicts are favorable for the victims and their families, it is virtually impossible to collect damages within the United States. As noted by one author, the assets of the states designated as sponsors of terrorism must be seized outside the United States in order for the plaintiffs to collect on the judgments.[36] This presents a whole separate set of problems under United States and international law that the victims and their families must overcome

Under the Victims of Trafficking and Violence Protection Act, ("VTVPA"), Pub. L. 106-386, 114 Stat. 1464 (2000) compensation from the United States Treasury is provided to a limited group of victims of terrorism. VTVPA, Pub. L. 106-386, 114. Stat. 1464, Sec. 2002(a)(2).[37]

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[36] *See* Alan Fisk, *Judge Hits Iran With $321 Million Verdict*, The National Law Journal, May 2, 2002.

[37] Section 2002(a)-(e) has not been codified in the United States Code.

The only persons covered are individuals who as of June 20, 2002 possessed a judgment for money damages for claims brought under the "state sponsor of terrorism" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), against Iran and Cuba or who had brought a claim under § 1605(a)(7) on certain dates specified in the statute Claimants, at their election, are paid by the Secretary of Treasury either 110 percent or 100 percent of their compensatory damages. Those who opt for 110 percent of their compensatory damages forego all rights and claims to punitive damages. With the 100 percent option, individuals retain their rights to pursue punitive damages, but relinquish all rights to execute against or attach property that is the subject of a claim against the United States in an international tribunal. Additionally, the VTVPA contains special provisions for judgments against Iran and Cuba, which essentially subject certain blocked assets of each country to satisfy judgments against them. VTVPA, Pub. L. 106-386, 114. Stat. 1464, Sec. 2002(b)(1) & (2).

In 2002, the Terrorism Risk Insurance Act ("TRIA") , 15 U.S.C. § 1610 note, was enacted in part, to address the treatment of terrorist assets. Title II of the TRIA provides that the blocked assets of terrorist parties are subject to execution or attachment in aid of execution to satisfy judgments obtained against such terrorist parties for claims based on acts of terrorism. The President, however, is authorized to waive the execution of the blocked assets to satisfy the judgments if he determines, on an asset-by-asset basis, that waiver is necessary in the nation's security interest and the property in question is subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Rights. The waiver does not apply to such property that has been used by the United States for any non-diplomatic purpose, or if the property is sold or transferred to a third party for value.

In July 2003, the Senate Foreign Relations Committee conducted a hearing to discuss benefits for United States victims of international terrorism. *Hearing of the Senate Foreign Relations Committee*, Capitol Hill Hearing, FEDERAL NEWS SERVICE (July 17, 2003). William H. Taft, IV, the Legal Advisor to the State Department, testifying on behalf of the administration, was severely critical of the regime established by these two statutes. Taft criticized the system, claiming that it was: inequitable and unpredictable because some United States victims have been successful in obtaining large payments while others have not; costly to the United States taxpayer, with $386 million having been paid from the United States Treasury to 14 victims under the Victims of Trafficking Act; and causing frequent conflicts with foreign policy and national security interests.

Legislation to establish a comprehensive federal program to provide the benefits to terrorism victims has been introduced by Senator Richard G. Lugar. *See* International Terrorism, S. 1275, 108th Cong. (2003).

V. Cases arising from the September 11, 2001 Attacks

Shortly after the events of September 11, 2001, the families of several victims decided to bring lawsuits in federal court. In the Southern District of New York, three separate causes of actions were filed by the estates of three victims against the Afghanistan, the Taliban, al Qaida/Islamic Army ("al Qaida" or "al Qaeda") and Sheikh Usamah Bin-Muhammad Bin-Laden, a/k/a Osama Bin Laden ("Bin Laden"). *See* Complaints filed in *Doe v. Islamic Emirate of Afghanistan, et al.*, No. 01 CIV 9074 (S.D.N.Y. Oct. 10, 2001), *Smith v. Islamic Emirate of Afghanistan, et al.*, No. 01 CIV 10132 (S.D.N.Y. Nov. 15, 2001), *Doe v. Islamic Emirate of Afghanistan, et al.*, No. 01 CIV 10144 (S.D.N.Y.

Nov. 15, 2001).[38] In the District of Columbia, a class action suit was filed against Bin-Laden, the Taliban, Muhammad Omar, al Qaeda, Afghanistan, Iran, Iraq, and the estates of the terrorist hijackers. *See* Complaint filed in *Havlish, et al.* v. *Bin-Laden, et al.* (D. D.C. Feb. 19, 2002). Additionally, the complaint in the District of Columbia also names 141 various organizations that have been identified by the State Department, the Treasury Department and the Attorney General as "Global Terrorists." These designations were made pursuant to President George W. Bush's Executive Order No. 13,224 Sec. 1(d), "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," Sept. 23, 2001. Also in the District of Columbia, a complaint was filed in October 2002 on behalf of over 3,000 United States nationals and foreign nationals who were victims of the terrorist acts at the World Trade Center, the Pentagon and Shanksville, Pennsylvania on September 11. *See Burnett, et al. v. Al Baraka Inv't and Dev. Corp., et al.*, No. 1:02CV01616 (JR)[39] Third Amended Complaint (D. D.C. Nov. 22, 2002 – original complaint filed Oct. 7, 2002) at ¶ 4. The named defendants were separated into three groups: (1) group one named Bin Laden, al Qaeda, the al Qaeda cell in Hamburg, Germany and various individuals directly involved in the terrorist acts; (2) group two named the banks involved in the Islamic banking system which diverted funds meant for alms for the poor and other donations to al Qaeda; and (3) group three named charitable defendants including businesses through which money to al Qaeda was channeled and Saudi royal family members. *See id.* at ¶¶ 5-630. The claims were brought under the Alien Tort Act, the FSIA, the TVPA, the Antiterrorism Act, and the Racketeer Influence and Corrupt Organizations Act. The plaintiffs also asserted the following common law claims: wrongful death; negligence; survival; negligent/intentional infliction of emotional distress; conspiracy; and aiding and abetting.

As an initial matter, there is no doubt that the events of September 11 were acts of terrorism in violation of the law of nations and all international norms. Moreover, considering the number of deaths and injuries that occurred, those events can also properly be classified as extrajudicial killings, wrongful deaths, tortious injuries and even torture (for the victims who were passengers on the four airplanes used to commit the acts of terrorism). Accordingly, the FSIA, the TVPA and the Antiterrorism Act are all implicated as applicable statutes under which these claims may be brought.

With respect to the foreign state defendants, jurisdiction must be obtained under the FSIA. Iran has been designated a state sponsors of terrorism, so it falls squarely under the state sponsor of terrorism exception. *See* 28 U.S.C. § 1605(a)(7). Should the plaintiffs prove that Iran provided material support or resources for the acts of terrorism committed on September 11, it will be held liable under Section 1605(a)(7). The *Havlish* complaint alleges that "Iran, through its officials, officers, agents and employees, provided material support and resources to defendants Al Qaeda and Bin Laden both directly and through its surrogate, Hezballah." *See Havlish* Compl. at ¶ 41. Although it is well known and documented that Hezballah is an agent of Iran and receives a significant amount of support from Iran, it will be more difficult for the plaintiffs to prove Iran's and Hezballah's connection to Bin-Laden and al Qaeda. If, as expected, the named defendants do not appear to

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[38] *Smith*, No. 01 CIV 10132 & *Doe*, No. 01 CIV 10144 were consolidated by order dated January 23, 2003, with *Smith* as the lead case. *See Smith*, 262 F. Supp. 2d at 220.

[39] *Burnett* and *Havlish* were transferred to and consolidated with several actions in the Southern District of New York. *See In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (S.D.N.Y.) (Casey, J.).

defend the suit, whatever evidence that the plaintiffs are able to produce will go uncontested and will probably be sufficient for the court to find all the defendants liable.

The non-governmental individual and organizational defendants may also be sued in United States courts under the Antiterrorism Act. As long as the plaintiffs are United States nationals and were injured as a result of an act of international terrorism, they may sue in any appropriate district court. *See* 18 U.S.C. § 2333. Parties that provide material support to terrorists and terrorist organizations are subject to liability under the Antiterrorism Act. *See Boim*, 127 F. Supp. 2d at 1018-19. Accordingly, the organizations named as defendants in the *Havlish* complaint, if they are found to have sufficient contacts for personal jurisdiction, can be properly brought into the federal district court.

Victims who were not United States nationals will have to bring claims under the TVPA. Such plaintiffs will not be constrained by some of the TVPA's limitations as earlier litigants were. Although the TVPA requires state action and requires the plaintiff to exhaust all adequate and available local remedies, both elements will not be difficult to establish for the plaintiffs who bring claims arising from the September 11 events. The state action factor should be satisfied upon allegations and proof that Afghanistan, through the Taliban and al Qaeda, orchestrated and ordered the terrorist acts that occurred on September 11. State action is also established if the plaintiffs show that Iran and Iraq provided substantial aid to the terrorist organizations and the individual terrorists. More importantly, however, as the acts of torture and extrajudicial killings occurred in the United States, the United States is the place in which the plaintiffs must exhaust all adequate and available local remedies. *See* 28 U.S.C. § 1350, note Sec. 2(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred"). In other words, the plaintiffs will not be forced to go through foreign court systems before they are able to bring their causes of action in the United States.

Given the outcome of earlier cases brought in federal district courts as a result of terrorist actions, it is more than likely that most, if not all, of the defendants will default and judgments awarding millions of dollars in damages to the plaintiffs will be entered. The extent to which these judgments can be enforced is another question.

VI. Legislative Proposals for Consideration

The TVPA, AEDPA, and the Antiterrorism Act overlap in some areas and leave apparent gaps in others. Below is an overview of some of the basic criteria for suit under each act:

	PLAINTIFF		**DEFENDANT**					**PLACE OF HARM**	
STATUTE	US	Foreign	US	Foreign	Indiv.	Corp.	State	US	Foreign
TVPA	X	X	X	X	X	-	-	X	X
Antiterrorism Act	X	-	X	X	X[40]	X	X	X[41]	X
AEDPA	X	-	-	X	X	X	X	X	X

Each statute will be discussed in turn.

The TVPA creates a cause of action against an individual, who acting under the auspices of the state, tortures or causes the extrajudicial killing of another individual, but it does not provide a cause of action against the state itself, or against an individual who does not commit such acts under the color of the law. Additionally, the TVPA, as interpreted thus far, does not permit lawsuits against corporations at all. It is arguable that the TVPA is the most narrow statute under which one may bring a cause of action because it excludes as potential defendants, states and non-official defendants. Thus, for example, a paramilitary group that engages in torturing individuals may not necessarily be brought to a United States court under the TVPA because it is not an "individual acting under the color of the law." Case law has attempted to expand the definition of a "state" to include *de facto* states, interim governments, etc., but unless a group actually seizes power over a country, be it legitimately or otherwise, it will not fall under the state actor requirement of the TVPA. Such a dilemma faced by the prospective plaintiff seems antithetical to the purpose of the TVPA which was expressly enacted to create a cause of action for victims of torture and extrajudicial killings. Moreover, if the act of torture or extrajudicial killing occurred within the territory of the foreign state, the victim must first exhaust the available remedies in the place where the act occurred. With respect to this element, the courts have been more lenient, recognizing that certain countries do not have judicial systems in which meaningful remedies are available. Legislation, however, can remove this requirement for causes of action brought based on conduct committed in those states whose "available remedies" are not remedies at all. Just as certain states are designated as sponsors of terrorism, certain states may also be designated as ones that the United States government recognizes as lacking even the most basic judicial system.

The Antiterrorism Act is difficult to evaluate as there have only been a handful of cases brought under it. The Antiterrorism Act permits a lawsuit in any federal district court, allows for nationwide service of process, expands the plaintiff's choice of venue and permits causes of actions against defendants who provide "material support and resources" to terrorists. Recognizing the fundamentally political nature of the lawsuit, it does not allow lawsuits against any foreign states or governmental officials, excludes lawsuits resulting from an act of war and permits the United States Attorney General to seek a stay of any civil action if there is a pending criminal prosecution or national security issues at stake. In light of such restrictions, a victim of international terrorism might be dissuaded from bring a cause of action under this statute. Yet the potential award of treble damages, as provided for by the statute, may make it an attractive option for some plaintiffs.

Again recognizing the political nature of the matter, the state sponsor of terrorism exception to the FSIA as amended by the AEDPA is limited to the six foreign states that are designated as state sponsors of terrorism. Even where they are so designated, if the terrorist act occurred within the foreign state's own territory, it must be afforded an opportunity to arbitrate the claim in accordance with the international rules of arbitration.

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[40] The Act applies also to the agents, officers, and employees, of the state.

[41] The Act applies to conduct that occurs "primarily outside" the United States or "transcends national boundaries" and thus, by its terms, does not exclude conduct that occurs at least in part within the United States.

More important than addressing the individual gaps of each statute, Congress needs to provide guidelines with respect to how the statutes work together, and perhaps needs to replace the current patchwork of statutes with a comprehensive remedy. With respect to damages, legislation needs to consider how multi-million dollar awards are to be enforced against "terrorist states" or against any other defendant. Although victims sometimes appear especially concerned with obtaining the moral vindication of a judgment in their favor, for many the economic loss is a very real burden that they must bear. Moreover, a judgment that is not enforced means that defendants suffer no repercussions as a result of their terrorist acts (or aiding of terrorist acts).

In spite of these gaps, the existing framework provides a good start for the victims of terrorism to pursue claims against the perpetrators of terrorist acts. A notable distinction that the events of September 11, 2001 have from most of the cases discussed is that the acts of terrorism took place on United States soil. Accordingly, many of the jurisdictional hurdles may be overcome even without the TVPA, the Antiterrorism Act and the state sponsor of terrorism exception to the FSIA. What will be more critical for these victims is identifying the proper defendants. By finding defendants against whom judgments may be enforced, the plaintiffs in *Burnett* may pick up where their predecessors, who obtained awards but were unable to collect on them, left off.

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