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Donna M. Balducci

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NOTE

AMERICAN TAXPAYERS BEAR THE BURDEN OF BEATING IRAQ IN THE COURTROOM

I. INTRODUCTION

On September 11, 2001, the unthinkable happened. Two hijacked airplanes crashed into the World Trade Center in New York City ("WTC"), another into part of the Pentagon, and a fourth plane went down in a field in Pennsylvania. Before the smoke even cleared, President Bush vowed to find the perpetrators who committed these horrific acts and to punish them. Shortly after, Osama bin Laden and al Qaeda were linked to the terrorist attacks, and questions began to circulate regarding the culpability of Iraq. The war against terrorism had officially begun.

We would soon find out that the war against terrorism was not only going to be fought in the caves of Afghanistan and the deserts of Iraq, but also in the courtrooms of the United States. After getting over the initial shock of the events that took place on September 11th, one could not help but think of the amount of lawsuits that would be brought as a
result. How would the victims of the World Trade Center, the Pentagon, and the passengers on the four jet planes be compensated? Not to forget the firefighters, police officers, and other emergency rescue workers who were injured or lost their lives as a result of the attacks. Numerous choices for defendants were discussed, ranging from the obvious, the terrorists on the four hijacked airplanes, to the not so obvious, the owners of the World Trade Center. Amongst the list of plausible defendants were the rogue states that supported these terrorist attacks on the United States.

Congress took this all into consideration, and very soon after the attacks, legislation was working its way through Congress that would make it easier for victims of September 11th to seek enforcement of judgments entered against state sponsors of terrorism. The victims of terrorism should not be denied enforcement of their valid court judgments. However, if these judgments are enforced, the passage of the Terrorism Risk Insurance Act of 2002 ("TRIA") will have profound ramifications on the American taxpayer in paying these judgments. This is especially true in light of the civil suit filed against Iraq and the high probability of an outrageous judgment being entered against the country.

Part II of this Note briefly discusses the wide array of lawsuits that we are faced with after September 11th, along with a list of the defendants and an analysis of the possible outcomes in each situation. To better understand the issue addressed in this Note, Part III discusses a 1996 law allowing for civil claims against governments designated by our State Department as sponsors of terror. Part IV discusses the prior judgments entered under the terrorism exception. Part V discusses the difficulties victims faced when it came to collecting their judgments in those cases. Part VI of this Note examines the civil suit brought in the U.S. District Court of Manhattan against Osama bin Laden, al Qaeda, and Iraq, and focuses specifically on the issue of Iraq as a defendant. Part VII discusses the post-September 11th legislation intended to make it easier for victims to collect judgments against state sponsors of terrorism, the ramifications this new legislation will have on the

5. On September 12, 2001, the Association of Trial Lawyers of America requested a moratorium on litigation connected to the attacks that occurred the day before. See Bob Van Voris, A Commitment to Victims of Attacks, NAT’L L.J. (Jan. 7, 2002), at http://www.nlj.com/staging/special/010702pb-alta.shtml. Alan J. Schnurman, a partner at Zalman & Schnurman, stated: "The litigation that is going to arise out of this terrorist attack is enormous." Tom Perrotta et al., Litigation Expected in Attack’s Aftermath, 226 N.Y.L.J. 1 (Sept. 17, 2001); see also Georgene Vairo, Remedies for Victims of Terrorism, 35 LOY. L.A. L. REV. 1265, 1266-67 (2002) (discussing the possible lawsuits following September 11th).
American taxpayers as a result of beating Iraq in the courtroom, and how this injustice should be resolved.

II. WHO TO SUIT?

In the aftermath of September 11th, one could not help but think of the possibilities for legal recourse. Franklin F. Bass, a partner at Wilson, Elser, Moskowitz, Edelman & Dicker, stated: “the disaster is certain to spur plaintiffs’ lawyers to file ‘thousands of unique and innovative suits aimed at any defendant that could possibly provide compensation to their clients.’” Indeed, a complicated range of lawsuits has been filed, and there will be more to come in the future. The question is: Who would be the defendants in these suits? The following is a list of possible defendants broken into four categories:

1) American Airlines and United Airlines, as well as the companies charged with airline security; 2) owners, operators of the buildings; WTC security personnel; the City and Port Authority; the architects and contractors who designed and built the WTC; and other similar defendants (WTC defendants); 3) Osama bin Laden and other individuals, entities, or states responsible for the attacks; and 4) various governmental entities.

In examining the scenarios where the above listed are defendants, the following outcomes are likely:

With respect to the first set of defendants, there would be no problems obtaining jurisdiction or enforcing judgments. However, given that those who hijacked the jets brought no illegal objects aboard, determining the liability of the airlines could be somewhat problematic. Of course, various theories of negligence could be advanced, but the case for liability is arguably not as strong as in the case of Pan Am Flight 103, the Lockerbie crash case, where terrorists smuggled a bomb aboard the jet. And, despite the sympathy factor, it is arguable that jurors would be less likely to find the airlines culpable.

With respect to the WTC defendants, there are some indications that some WTC security personnel told the workers in the second tower that they should go back to their offices. Otherwise, their degree of culpability appears to be somewhat tenuous as well.

6. Perrotta et al., supra note 5, at 1.
The terrorists, of course, are obviously substantively liable, but how will personal jurisdiction be obtained and judgments enforced? With respect to governmental entities such as the city of New York, the state and federal government, and their agencies, to what extent will sovereign immunity preclude recovery by those injured? These questions just scratch the surface.\(^8\)

Although there are numerous possibilities for defendants, the real problem is collecting the judgment.

### III. THE RIGHT TO SUE A COUNTRY

The right to sue a country is a fairly new concept. For most of its history, the United States has respected the international legal principle of sovereign immunity.\(^9\) Sovereign immunity is the principle whereby foreign states may not be sued in other countries' courts for their public acts.\(^10\) At first, the concept of sovereign immunity was absolute; however, over time, the U.S. courts adopted the "restrictive theory" of sovereign immunity.\(^11\) "Under this theory, immunity is confined to those acts which involve a foreign state's public acts, or *jure imperii*, and does not extend immunity to suits based upon a state's commercial or private acts, or *jure gestionis*."\(^12\) The U.S. courts found the restrictive theory difficult to apply and as a result, Congress passed the Foreign Sovereign Immunities Act ("FSIA") in 1976.\(^13\)

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9. *See* Schooner Exch. v. M'Faddon, 11 U.S. 116, 136 (1812) (extending almost absolute sovereign immunity to foreign states). Sovereign immunity has enjoyed a long history in the United States, dating back as early as 1812, when this principle was first recognized in the landmark case of Schooner Exchange v. M'Faddon. *See id.*
12. Wuebbels, *supra* note 10, at 1125. This new approach was more practical considering the growing involvement of governments, directly or indirectly, in traditionally private matters. *See id.*
13. *See id.* at 1126; *see also* Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal. L. Rev. 365, 370 (1989) (stating the Foreign Sovereign Immunities Act ("FSIA") was intended to set forth clearer standards for resolving immunity questions and "to transfer determinations of sovereign immunity from the State Department to the courts, freeing the executive branch from case-by-case diplomatic pressures and relieving due process concerns about the State Department's ability to bind the courts").
A. Foreign Sovereign Immunities Act

The FSIA established the framework for resolving claims of immunity in any civil action against a foreign state.\textsuperscript{14} The statute provides the “sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before federal and state courts in the United States and preempts any other state or federal law.”\textsuperscript{15} The FSIA is based on the premise that “a foreign state is presumed to be immune from suit, and is in fact immune unless one or more of the exceptions to immunity enumerated in the FSIA apply.”\textsuperscript{16}

Previous to the enactment of the 1996 amendments, the FSIA did not list an exception for torts violating international law\textsuperscript{17} and therefore “a United States citizen could not maintain a viable claim for injuries, caused by terrorists, against the foreign state which sponsored or promoted the terrorist act.”\textsuperscript{18} This presented a serious obstacle to citizens attempting to hold a foreign state liable for its actions.\textsuperscript{19} If the plaintiffs’ claim did not fall into one of the specified exceptions to immunity, the foreign state escaped all legal responsibility for its actions.\textsuperscript{20}

During this period,

the exceptions to immunity were limited to when a defendant state voluntarily consents to defend a suit, when a defendant foreign state acts primarily in the pursuit of commercial interests, and when noncommercial tortious acts are committed within the United States by officials or other agents of the defendant foreign state.\textsuperscript{21}

\textsuperscript{14} See Belsky et al., supra note 13, at 370; Wuebbels, supra note 10, at 1126; Walter W. Heiser, Civil Litigation as a Means of Compensating Victims of International Terrorism, 3 SAN DIEGO INT’L L.J. 1, *14 (2002).
\textsuperscript{16} Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 42 (D.D.C. 2000) (citations omitted); see Belsky et al., supra note 13, at 370 (“As a general framework, the FSIA starts from a presumption that states are immune and then creates exceptions to that rule.”).
\textsuperscript{17} See Belsky et al., supra note 13, at 370; McKay, supra note 11, at 447.
\textsuperscript{19} See Belsky et al., supra note 13, at 370 (discussing the limitations of the FSIA before the 1996 amendment).
\textsuperscript{20} See id.
\textsuperscript{21} Micco, supra note 18, at 111.
Not surprisingly, states that sponsor or promote terrorism targeted at U.S. citizens are unlikely to voluntarily consent to jurisdiction in American courts. As a result, "in order to bring suits for harm resulting from foreign state-sponsored terrorism, plaintiffs have attempted to characterize terrorist acts as a form of commercial activity." Courts have rejected this argument holding that terrorist acts do not fall within the bounds of "commercial activity" according to the guidelines of the FSIA. Thus, in the absence of a mechanism providing subject matter jurisdiction over the acts of a terrorist sponsoring state, in the past, the United States courts have "dismissed such cases as Cicippio v. Islamic Republic of Iran and Smith v. Socialist People's Libyan Arab Jamahiriya, holding that terrorist-sponsoring states were immune from suit under the FSIA." The 1996 changes to the 1976 FSIA permit U.S. citizens to bring civil suits against countries on the State Departments terrorism list.

B. Antiterrorism and Effective Death Penalty Act

In 1988, when Pan Am Flight 103 exploded over Lockerbie, Scotland, the FSIA prevented the victims' families from suing Libya, the terrorist sponsoring state. As an alternative, the families of the victims killed in the bombing sued the airline and were awarded $500 million, forcing the airline into bankruptcy. In response to the Pan Am 103 bombing, as well as the Oklahoma City bombing, and the World Trade Center bombing of 1993, the FSIA has since been amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

22. See id.
23. Id.
24. See id. at 111-12.
25. Id. at 112.
27. See Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 247 (2d Cir. 1996) ("We hold that the FSIA, prior to the recent amendment, does not subject Libya to the jurisdiction of the District Court with respect to the bombing."); Foster, supra note 7, at 520.
28. See Foster, supra note 7, at 520.
The AEDPA was passed by Congress in 1996 and included a state sponsored terrorism exception to the FSIA, which amended the FSIA by adding what is now 28 U.S.C. § 1605(a)(7). The terrorism exception was formulated to achieve three main objectives: "to deter international terrorism, to allow the families of the victims of terrorism to sue state sponsors of terrorism for damages, and to punish those states that support terrorism." Under this new section, "Congress lifted the immunity of foreign states for a certain category of sovereign acts which are repugnant to the United States and the international community-terrorism. For example, now the FSIA allows victims to bring civil suits against certain foreign states that have been designated as state sponsors of terrorism, that are involved in hostage taking, aircraft sabotage, and other terrorist acts.

Pursuant to the Export Administration Act of 1979, the Secretary of State has the power to designate foreign nations as "state sponsors of terrorism." Currently, there are seven countries on the State Department’s list of state sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. According to the statute, the foreign state must be designated as a state sponsor of terrorism at the time the act took place. For example, terrorist victims could pursue damages against Iraq because it is one of the designated foreign nations.

The AEDPA created significant changes, but it failed to "provide a specific cause of action for victims of state sponsored terrorism." To correct this problem "a separate piece of legislation was enacted to fill the void." The amendment, the Civil Liability for Acts of State...
Sponsored Terrorism, is also referred to as the "Flatow Amendment."  

The amendment allows a plaintiff to seek punitive damages against a state sponsor of terrorism.

IV. JUDGMENTS ENTERED UNDER THE TERRORISM EXCEPTION

Since the enactment of 28 U.S.C. § 1605(a)(7), several civil suits have been filed under the exception against Cuba, Iran, Iraq, and Libya. However, thus far, judgments have only been entered against Cuba, Iran, and Iraq. This section will focus on those cases in which monetary judgments were entered against state sponsors of terrorism. In the following cases, prevailing in court and being awarded a judgment in the hundreds of millions of dollars was not the problem. The difficult part was collecting the judgment.

A. Cuba as a Defendant

Alejandre v. Republic of Cuba was the first case tried under the terrorism exception. In addition, this is the only judgment entered against Cuba to date. The lawsuit was brought after the Cuban Air Force shot down two unarmed civilian aircrafts over international waters on February 24, 1996. The pilots were on a routine mission for a humanitarian group called “Brothers to the Rescue” where they would fly over “the waters between Cuba and the Florida Keys” looking for Cuban refugees, also known as rafters. The personal representatives for

41. See Flatow, 999 F. Supp. at 12; see also Micco, supra note 18, at 112. “Following these amendments, such cases as Alejandre v. Republic of Cuba, Flatow v. Islamic Republic of Iran and the second Cicippio v. Islamic Republic of Iran (Cicippio II) have been extremely successful in garnering huge damage awards because of these defendant states’ financial, material and logistic support of international terrorist organizations.” Id. (citations omitted).
42. At the moment, several lawsuits are pending against Libya, but no final judgments have been entered thus far. See, e.g., Simpson v. Socialist People’s Libyan Arab Jamahiriya, 180 F. Supp. 2d 78 (D.D.C. 2001) (regarding a lawsuit brought under the AEDPA against Libya for the hostage taking and torture of a husband and wife); Price v. Socialist People’s Libyan Arab Jamahiriya, 110 F. Supp. 2d 10 (D.D.C. 2000) (regarding a lawsuit brought under the AEDPA against Libya for the hostage taking and torture of two U.S. citizens); Rein v. Socialist People’s Libyan Arab Jamahiriya, 162 F.3d 748 (2d Cir. 1998) (regarding a lawsuit brought under the AEDPA against Libya on behalf of the victims of the bombing of Pan Am Flight 103); Smith v. Socialist People’s Libyan Arab Jamahiriya, 101 F.3d 239 (D.D.C. 1996) (regarding a lawsuit brought under the AEDPA against Libya on behalf of the victims of the bombing of Pan Am Flight 103).
43. 996 F. Supp. 1239 (S.D. Fla. 1997).
44. See id. at 1242.
45. See id.
46. Id.
three of the deceased victims chose to file suit against Cuba and the Cuban Air Force under the terrorism exception.47

Cuba, by means of a diplomatic note, responded that “this Court has no jurisdiction over Cuba or its political subdivisions.”48 However, the court rejected this contention, holding that the terrorism exception prevented Cuba from asserting foreign sovereign immunity because “the facts of this case fall squarely within the requirements of section 1605(a)(7).”49 Because Cuba presented no defense besides its diplomatic note, the plaintiffs only needed to demonstrate facts sufficient to support the complaint.50 The court concluded that this case was “precisely the type of action for which Congress meant to provide redress by stripping terrorist states of immunity from the judgment of U.S. courts.”51

The court awarded compensatory damages against Cuba and the Cuban Air Force equaling about $50 million.52 Punitive damages, reaching over $137 million, were awarded to the plaintiffs against the Cuban Air Force.53

B. Iran as a Defendant

To date, sixteen multi-million dollar judgments have been entered against Iran under the terrorism exception. In all of the cases, Iran failed to make a court appearance. However, before the court may enter a judgment by default in a specific monetary amount against the defendant, the FSIA mandates that the plaintiff “establishes his claim or right to relief by evidence satisfactory to the court.”54 In each of the sixteen cases against Iran, the plaintiffs were able to do so, thereby leaving the courts free to enter substantial default judgments against the

47. See id. The family of the fourth victim was excluded from participating in this lawsuit because their loved one was not a United States citizen. See id.

48. Id.

49. Id. at 1248. The plaintiffs sued Cuba, a country designated as a state sponsor of terrorism, for an extrajudicial killing of U.S. nationals that occurred outside Cuba’s borders. See id.

50. See id. at 1242.

51. Id. at 1248.

52. See id. at 1253.

53. See id. In discussing damages, the court notes: “[T]he Cuban Air Force is liable for both compensatory and punitive damages. Under the theory of respondeat superior, Cuba is liable for the same amount of damages as its agent, with the exception of punitive damages, which the FSIA prohibits against foreign states.” Id. at 1249. The court refers to 28 U.S.C. § 1606. See id. at 1249 n.8.

A select few of the cases entered against Iran under the terrorism exception are discussed below.

1. Flatow v. Islamic Republic of Iran

The most famous of the cases is Flatow v. Islamic Republic of Iran. In 1995, Alisa Flatow, a twenty-year-old student from Brandeis University, was killed by a suicide bomber while traveling in Israel. In response, the victim’s family sued Iran, holding the country accountable for funding the group responsible for the terrorist attack.

The Shaqaqi faction of the Palestine Islamic Jihad, whose sole source of funding was Iran, claimed responsibility for the bombing. Accordingly, the district court found that Iran’s support for this terrorist organization exposed it to suit under the terrorism exception. The plaintiffs were ultimately awarded a little over $247.5 million, including $225 million in punitive damages.


57. See id. at 7.

58. See id. at 6-8.

59. See id. at 8.

60. See id. at 9-11.

61. See id. at 5. With regard to punitive damages, the court stated: “Prior to the state sponsored terrorism amendments, the FSIA absolutely prohibited the award or recovery of punitive damages against the foreign state itself. The Flatow Amendment, however, departs from the prior enactment by expressly providing a cause of action for punitive damages for state sponsored terrorism.” Id. at 25 (citations omitted). The court continued:

Even if 28 U.S.C. § 1606 applies to causes of action brought directly against a foreign state pursuant to the state sponsored terrorism exception to immunity and the Flatow Amendment, a foreign state sponsor of terrorism can still be indirectly liable for punitive damages under the principles of respondeat superior and vicarious liability.

Id. at 25-26.
2. Cicippio v. Islamic Republic of Iran

Cicippio v. Islamic Republic of Iran

is the first of a series of kidnapping cases brought under the terrorism exception by U.S. citizens and their families that were abducted and held captive in the 1980s by the terrorist organization Hizbollah, acting as an agent of the Iranian government. In Cicippio, three former U.S. civilian hostages, along with two of their wives, sued Iran under the 1996 amendment to the FSIA, § 1605(a)(7). Over the course of a few months, beginning in 1985, the three men were kidnapped one by one and held captive by Hizbollah. At the time of the abductions the three men were all living in Beirut, Lebanon.

The plaintiffs were able to prove to the court all the necessary elements to successfully sue Iran under § 1605(a)(7). Therefore, the court held for the plaintiffs. A judgment was entered against Iran in the amount of $65 million.

3. Anderson v. Islamic Republic of Iran

In Anderson v. Islamic Republic of Iran, Terry Anderson, an American journalist, and his family brought an action against Iran pursuant to § 1605(a)(7) of the FSIA. In 1985, Anderson had been kidnapped in Beirut, Lebanon, and held captive and tortured for close to seven years before he was finally released. The court stated: "In the instant case the evidence once again discloses that Iran provided Hezbollah with funding, direction and training for its terrorist activities in Lebanon, including the kidnapping and torture of Terry Anderson, and his imprisonment as a hostage for 2,454 days." The court went on to say: "Iran falls within FSIA’s definition of a state sponsor of terrorism and is thus liable for the injuries suffered by plaintiffs as a result of
Hezbollah's terrorist acts. A judgment was entered on behalf of the plaintiffs for an amount close to $350 million, including $300 million in punitive damages.

4. Eisenfeld v. Islamic Republic of Iran

The families of the American victims of a 1996 bus bombing in Israel brought suit pursuant to § 1605(a)(7) against Iran and several other defendants in Eisenfeld v. Islamic Republic of Iran. A terrorist group by the name of Hamas claimed responsibility for the bombing and the plaintiffs were able to show a strong financial link between Hamas and Iran. The court held the defendants liable for over $327 million, including $300 million of punitive damages.

5. Elahi v. Islamic Republic of Iran

In Elahi v. Islamic Republic of Iran, Darius Elahi brought an action for the assassination of his brother in 1990 against Iran and the Iranian Ministry of Information Security ("MOIS") for ordering the murder. The court found the necessary elements to satisfy the conditions of § 1605(a)(7). The court concluded, "for the reasons more fully set forth above, the defendants are judged liable for the assassination of Dr. Elahi under the provisions of the FSIA." The court awarded the plaintiff over $310 million in damages, including $300 million in punitive damages.

6. Sutherland v. Islamic Republic of Iran

In 1985, Thomas Sutherland, a professor at American University of Beirut, was kidnapped by Hizbollah in Lebanon and held captive and tortured for over six years. In Sutherland v. Islamic Republic of Iran, Sutherland and his family sued Iran and MOIS for the financial support and oversight of Hizbollah, which was responsible for the kidnapping.

75. Id.
76. See id. at 114.
78. See id. at 5.
79. See id. at 10-11.
81. See id. at 99.
82. See id. at 106-08.
83. Id. at 114.
84. See id. at 114-15.
86. Id.
87. See id. at 31.
The evidence presented in this case left the court to conclude that the facts at hand fall directly into the required provisions of the terrorism exception to the FSIA. The defendants were held liable for compensatory damages in the amount of approximately $53 million. In addition, the plaintiffs were awarded $300 million in damages against MOIS.

7. Jenco v. Islamic Republic of Iran

In 1985, Father Jenco was kidnapped while working in a Catholic church in Beirut, Lebanon. He was held captive for 564 days. As did Terry Anderson and Thomas Sutherland, Jenco's co-hostages, Father Jenco and his family filed suit against Iran.

As in the precedent cases of his co-hostages, the court found "that Father Jenco's captors were members of the Islamic group Hizbollah and that Hizbollah was funded and controlled by the Iranian government and the Iranian Ministry of Information and Security." This determination, along with the other pertinent facts of the case, clearly removed Iran's right of foreign sovereign immunity and placed the case well within the necessary framework set forth under § 1605(a)(7) of the FSIA. Iran was held liable for over $314 million, $300 million of which constitutes punitive damages.

8. Polhill v. Islamic Republic of Iran

Robert Polhill, a U.S. citizen, was teaching at Beirut University College when he was kidnapped in 1987 and held captive in Lebanon for thirty-nine months. Years later, Polhill's family brought an action against Iran in accordance with § 1605(a)(7), claiming that the country provided material support to the terrorist organization responsible for the kidnapping. The plaintiffs were able to show that there was a link

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88. See id. at 45-47 (explaining step-by-step how the facts of the case meet each of the requirements of § 1605(a)(7)).
89. See id. at 53.
90. See id.
91. See id.
93. See id.
94. See id. at 29 n.2.
95. See id. at 27.
96. Id. at 30.
97. See id. at 33.
99. See id. at *12-13.
between Hizbollah, the group responsible for the kidnapping, and Iran. In addition, the facts of the case satisfied all the conditions of § 1605(a)(7), Iran was designated as a state sponsor of terrorism and Robert Polhill, the victim, was a U.S. national at the time of the incident. The court entered a judgment for the plaintiffs in the amount of $332 million, including $300 million in punitive damages.

9. Wagner v. Islamic Republic of Iran

In 1984, U.S. Navy Petty Officer First Class Michael Wagner was killed in the bombing of the U.S. Embassy in Beirut, Lebanon. Hizbollah was responsible for the bombing. Shortly after the incident an undeniable connection was made between Hizbollah and Iran. However, the family of Michael Wagner had no legal recourse against the country until the passage of the 1996 amendments to the FSIA, which allowed the plaintiffs the opportunity to sue Iran for sponsoring terrorism.

In the decision, the court stated: “It is equally apparent from the evidence before this Court that Hizballah . . . substantially funded and supported by Iran and MOIS since 1979, perpetrated the September 20, 1984 terrorist bombing of the U.S. embassy in Beirut.” The court held that the “the suicide bombing of the U.S. Embassy . . . qualifie[d] as an extrajudicial killing for purposes of the FSIA.” All the other requirements of § 1605(a)(7) were met as well and, therefore, the court awarded damages to the plaintiffs. The plaintiffs were awarded over $316 million, including $300 million in punitive damages.

100. See id. at *11.
101. See id. at *13.
102. See id. at *17-18.
104. See id.
105. See id. at 132.
106. See id. at 131. It was nearly two decades after the bombing at the embassy before the plaintiffs filed suit against Iran under the terrorist exception. See id.
107. Id. at 134.
108. Id. at 133.
109. See id.
110. See id. at 138.
111. See id. The events of September 11th clearly weighed on the mind of the court when the judgment was entered against Iran because the case was before the court shortly after the September 11th terrorist attacks. See id. The court commented: Now more than ever, this Court believes that the acts of terrorists and their sponsors must be punished to the full extent to which civil damage awards might operate to suppress such activities in the future. Indeed, Dr. Clausen opined that since the terrorist attacks of September 11, 2001, Iran has become increasingly aware of the pending FSIA

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C. Iraq as a Defendant

Two judgments have been entered thus far against Iraq. The first judgment was entered before September 11th in Daliberti v. Republic of Iraq. The suit was brought by four United States citizens and their wives, after the men were taken hostage and tortured. In response to the lawsuit, Iraq’s motion to dismiss was denied by the district court. Following the denial, defendant’s counsel withdrew from the case, and the Clerk of Court entered a default against the defendant on October 16, 2000. The plaintiffs moved for a default judgment a few weeks later. Following an ex parte bench trial, the court decided that “judgment shall be entered for the plaintiffs.” The court entered a damage award of close to $19 million against Iraq. Out of that total amount, approximately $13 million was allocated to the four male plaintiffs, while $6 million was to be equally distributed to the four wives.

Shortly following September 11th, a second judgment was entered against Iraq in Hill v. Republic of Iraq. The case was brought by

lawsuits against it here in the United States, and a failure to impose a substantial punitive award against MOIS might be misinterpreted as an inclination on the part of the courts of the United States to be more tolerant of Iranian-sponsored terrorism of a somewhat distant past. That may be a policy option of diplomacy, but not of the law. Terrorism, past and future, is the implacable enemy of all civilization under law.

Id.


113. See id. at 41. The four male plaintiffs all lived in Kuwait and worked around the Kuwait-Iraq border as civilians. See Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19, 21 (D.D.C. 2001). “Beginning in 1992, in separate incidents, each male plaintiff was taken into custody by Iraq government employees, and held captive in Iraq.” Id.

114. See Daliberti, 97 F. Supp. 2d at 55. The district court noted: In only one of these cases other than this one, Rein v. Socialist People’s Libyan Arab Jamahiriya, did the defendant respond to the complaint. The decisions in Anderson, Cicippio, Flatow and Alejandro all resulted in default judgments. As in suits against the United States, however, the FSIA requires that the court make findings of fact sufficient to support the entry of a default judgment. In Anderson, Cicippio, Flatow, and Alejandro, therefore, the courts heard evidence—albeit only from the plaintiffs—and entered findings of fact.

Id. at 44 n.2 (citations omitted).


116. See id. at 21.

117. Id. The court found that the plaintiffs’ claims fell within the terrorism exception and therefore entitled the plaintiffs to damages. See id. at 24-25.

118. See id. at 27.

119. See id. The court looked at prior cases based on the FSIA for guidance in determining the appropriate amount of damages that should be awarded to the plaintiffs. See id. at 25-26.

120. See id. at 27.

twelve United States citizens “who were detained against their will in Kuwait and Iraq between August and December, 1990.” The victims held Iraq and Saddam Hussein, the President of Iraq, responsible for hostage taking, false imprisonment, personal injury, intentional infliction of emotional distress, assault, battery, and loss of consortium under the FSIA. The court found the defendants liable for these offenses and awarded the plaintiffs a total of $9.11 million in compensatory damages. In addition, the plaintiffs received $300 million each against Saddam Hussein for punitive damages.

V. COLLECTING JUDGMENTS

The passage of the AEDPA in 1996 enabled the plaintiffs discussed in Part IV to go after state sponsors of terrorism in court and obtain a judgment. However, following the 1996 legislation, plaintiffs still encountered difficulties collecting their judgments. In an effort to correct this problem Congress amended the FSIA again in 1998 to “permit[] the targeting of frozen assets held in the United States by foreign state sponsors of terrorism.” However, Congress could not ignore the fact that “frozen foreign assets are traditionally seen as tools of foreign policy uniquely within the control of the President, [and therefore] further provided that the President could waive this provision to go after the frozen assets as he saw fit.” President Clinton exercised a blanket waiver of this provision on the date of enactment of the act in Presidential Determination 99-1 that “effectively prevented anyone from

122. Id. at 38.
123. See id.
124. See id. at 47-48.
125. See id. at 49.
126. See Michael L. Martinez, Esq. & Stuart H. Newberger, Esq., Combating State-Sponsored Terrorism with Civil Lawsuits: Anderson v. Islamic Republic of Iran and Other Cases, 3 VICTIM ADVOCATE 5, 7 (2002). The key reason plaintiffs have been unsuccessful is because countries that have been designated as state sponsors of terrorism obviously have hostile relations with the United States and are therefore not going to voluntarily pay these judgments. See Daveed Gartenstein-Ross, Note, Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act, 77 N.Y.U. L. REV. 496, 512 (2002). In addition, “[t]he United States already has imposed sanctions upon states designated as terrorism sponsors, and thus defendant states generally view the prospect of civil liability for state-sponsored terrorism as an extension of an already-hostile U.S. foreign policy.” Id. at 512. Therefore defendant states refuse to make a court appearance or satisfy a judgment. See Vadnais, supra note 29, at 216-17.
128. Id.
pursuing frozen assets,” despite the fact that he signed the legislation into law.129

In 2000, Congress amended the FSIA to address the inability of plaintiffs to enforce their judgments in a specific set of cases.130 The amendment is known as the Justice for Victims of Terrorism Act (“JVTA”)131 and provides an alternative means of compensation only for a select group of cases against Iran and Cuba.132 The JVTA only applies to the collection of compensatory damages, not punitive damages.133

The manner in which a judgment is paid under the JVTA depends on whether the defendant was Iran or Cuba. Approximately $400 million is available to cover the judgments entered against Iran, “the amount of Iranian assets the Pentagon has held frozen for more than twenty years.”134 “After payments are made from these assets, the United States will assume the position of judgment creditor against Iran.”135 This means that the United States government picked up a $400 million tab in

130. See Gartenstein-Ross, supra note 126, at 513.
132. See id. § 2002(a)(2)(A)(i)-(ii), 114 Stat. at 1542 (stating the amendment applies to the cases that had reached final judgment against Iran or Cuba as of July 20, 2000 and those cases filed under the terrorism exception on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000); see also Gartenstein-Ross, supra note 126, at 513; Heiser, supra note 14, at *40. Prior to the JVTA’s passage, there had been several unsuccessful attempts by plaintiffs to execute judgments entered in their favor under the terrorism exception. See Foster, supra note 7, at 522 n.40 and accompanying text.
133. See Gartenstein-Ross, supra note 126, at 513-14 (“These claimants may elect to collect compensatory damages and interest from the U.S. government in exchange for their right to any further payment of their outstanding judgments, including payment of the punitive damage awards.”). For example,

Since 2000, successful FSIA plaintiffs can be paid their compensatory damages from the U.S. Treasury. However, this remedy has tremendous problems. First, the claimants must give up all claim[s] to punitive damages, which are, by far, the largest portions of the claims. For example, the estate of Friar Jenco and his six siblings could demand $14,640,000 from the U.S. Treasury but would thereby forego $300 million in punitive damages. Second, any sort of moral victory by victims or their decedents is eliminated, since the torturers, kidnappers, and murderers pay nothing and the punitives are eliminated.

134. Gartenstein-Ross, supra note 126, at 514; see Heiser, supra note 14, *40 (stating Congress enacted the JVTA and Victims of Trafficking and Violence Protection Act of 2000 “to provide new options for payment of some money judgment directly from the United States Treasury Department”).
135. Gartenstein-Ross, supra note 126, at 514; see Heiser, supra note 14, at *40.
the hope that Iran will repay the money in the future when relations with
the U.S. are restored or the money can be used as a bargaining chip
when times are difficult. 136

With respect to Cuba, under the JVTA, judgments against the
country will be made from frozen assets of the Cuban government
located in the United States. 137 "The U.S. government recently approved
the transfer of nearly $97 million of these assets to the Alejandre
plaintiffs." 138 However, some people are skeptical of this and believe the
U.S. taxpayers will end up paying for the Cuban judgments as well. For
instance, Allan Mendelsohn, a law professor at Georgetown University,
predicts Cuba will be reimbursed when relations with the country are
restored. 139 Mendelsohn commented: "The Cubans will say you owe us,
and you don’t think the United States will not find a way to pay them,
especially when we will be trying to help rebuild Cuba? I am convinced
that this is going to cost taxpayers in the future." 140

VI. CIVIL SUIT AGAINST IRAQ: ASHTON V. AL QAEDA ISLAMIC ARMY

A. The Complaint

On Wednesday, September 4, 2002, a lawsuit seeking more than $1
trillion in damages was filed in the U.S. District Court in Manhattan on
behalf of 1,400 victims of the September 11th terrorist attacks and their
families. 141 The three key defendants named in the lawsuit are Osama bin
Laden, al Qaeda, and Iraq. 142 The civil lawsuit was brought by a New
York City law firm, Kreindler & Kreindler, which specializes in aviation
disaster litigation. 143 Recently, the lawsuit was consolidated with other
terrorism lawsuits that had been filed in New York by several other law

136. See Yigal Schleifer, Suing Bin Laden, MOTHERJONES.COM (Jan. 30,
137. See Gartenstein-Ross, supra note 126, at 515; Heiser, supra note 14, at *40.
138. Gartenstein-Ross, supra note 126, at 515.
139. See Schleifer, supra note 136.
140. Id.
141. See Lawsuit: Iraq Involved in 9/11 Conspiracy (Sept. 5, 2002), at
142. See id.
143. See Kreindler & Kreindler, About the Firm, at http://www.kreindler.com/about.htm (last
visited Mar. 22, 2003). Kreindler & Kreindler "also successfully negotiated a $2.7-billion settlement
this year with Libyan businessmen on behalf of 270 victims of the 1988 bombing of Pan Am Flight
103, which the United States claimed was orchestrated by Libyan government agents, though the
Libyan government denied it." Paul Vitello, Holding Court on Terror Plot, NEWSDAY (Nassau),
firms and on January 7, 2003, a Consolidated Master Complaint ("CMC" or "the lawsuit") was filed by Kreindler & Kreindler. The CMC has added defendants such as Sudan and Iran to the lawsuit, which are both on the State Department's list of state sponsors of terrorism. The lawsuit attempts to "draw the kind of strong link between Iraq and terrorism that the US government has never alleged in public court actions." 

The lawsuit, in count six, makes a claim under the AEDPA against Iraq and Iraqi Intelligence. Count six states as follows:

ANTI TERRORISM AND EFFECTIVE DEATH PENALTY ACT CLAIM, 28 U.S.C. § 1605(A)(7) - - IRAQ, IRAN AND THE SUDAN

614. Plaintiffs reallege the paragraphs above as if fully set forth herein.

615. The death of the plaintiff's decedents and injury to personal injury plaintiffs, who were citizens of the United States at the time, resulted from acts of extrajudicial killing, torture and aircraft sabotage.

616. These acts of extra judicial killing, torture and aircraft sabotage were perpetrated by agents of BIN LADEN and AL QAEDA, who received material support and resources from defendants, TALIBAN, IRAQ, IRAQI INTELLIGENCE, SUDAN, SUDANESE INTELLIGENCE, IRAN, IRANIAN INTELLIGENCE, SUDAN and IRAN.

617. Agents, officials or employees of defendants, TALIBAN, IRAQ, IRAN and the SUDAN provided material support and resources to BIN LADEN and AL QAEDA while acting in the scope of their offices, agencies, or employment. Similar conduct,

145. See Consolidated Master Complaint at 57-58, No. 02CV6977 (S.D.N.Y filed Jan. 7, 2003), available at http://www.kreindler.com/news/wtcanpandpentagon4.htm [hereinafter CMC]; 31 C.F.R. § 596.201 (2002). The lawsuit identifies over one hundred defendants. See Recent Developments, supra note 144. Besides Iraq, the plaintiffs are suing, among others, the al Qaeda Islamic Army, Osama bin Laden personally, as well as Saddam Hussein, the twenty terrorist hijackers, including Zacarias Moussaoui, the Taliban, several international banks in the Arab world, a number of charitable Muslim foundations, and two Saudi princes. See id.
if committed by agents, officials or employees of the United States, would be actionable.

618. At all relevant times, defendants IRAQ, SUDAN and IRAN were and are designated by the U.S. Government as a state sponsor of terrorism.

619. The activities of Islamic Emirate of Afghanistan under the TALIBAN regime, as described in this Complaint, were effectively deemed terrorist activities pursuant to former President Clinton's July 4, 1999, Executive Order No. 13129 and the continuation Order of June 30, 2001, issued by President George W. Bush. In addition, after the terrorist acts on September 11, 2001, President George W. Bush and other senior U.S.,[sic] officials clearly designated the Islamic Emirate of Afghanistan as having sponsored and supported the terrorists. For example, see President George W. Bush's September 24, 2001, Executive Order on Terrorist Financing (Executive Order No. 13224).

WHEREFORE, plaintiffs demand judgment be entered in favor of plaintiffs individually and as personal representatives of their decedents' estates and in favor of the personal injury plaintiffs personally and against defendants IRAQ and IRAQI INTELLIGENCE, IRAN and SUDAN and their instrumentalities and agents for an amount in excess of FIFTY MILLION ($50,000,000.00) DOLLARS for each plaintiff, plus interest, costs, punitive damages, attorneys fees, and such other relief as the Court deems just and proper.147

The lawsuit claims that Iraqi officials knew of bin Laden's plan to attack the United States on September 11, 2001.148 In addition, the suit alleges that Iraq sponsored terrorists for years to avenge its defeat in the Gulf War.149 The lawsuit states: "Since Iraq could not defeat the U.S. military, it resorted to terror attacks on U.S. citizens."150 The lawsuit "is based on a mixture of already-reported contacts between agents for the two avowed enemies of the United States, on the presumption of their shared interests, and on an intriguing newspaper column in the

147. CMC, supra note 145, at 261-263.
148. See id. at 115.
149. See id. at 95.
150. Id. at 74.
government-controlled Iraqi press published six weeks before Sept. 11."151

B. The Case Against Iraq

The plaintiffs in Ashton v. al Qaeda Islamic Army undoubtedly have a strong case against Iraq. This Note is written on the assumption that the plaintiffs will not only win (as far as their claim goes against Iraq) but will also be awarded a massive judgment against the defendant. Nonetheless, this section will flesh out the plaintiffs’ argument against Iraq under the AEDPA.

Iraq will most likely fail to appear before the court and will therefore default. However, before the court can enter a judgment by default against Iraq, pursuant to the FSIA, the plaintiff must “establish[] his claim or right to relief by evidence satisfactory to the court.”152 The plaintiffs must satisfy the requirements of § 1605(a)(7).

The FSIA provides exceptions where a foreign state shall not be immune from suit in U.S. courts.153 Under § 1605(a)(7) a foreign state loses immunity where

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 . . . 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.154

To break this down, the plaintiffs must first demonstrate that one of the listed acts under § 1605(a)(7) was committed in order for the state sponsored terrorism exception to the FSIA to apply. Second, the plaintiffs must establish that the act was perpetrated by a group receiving material support or resources from Iraq. Third, the plaintiffs must prove that the provision of material support or resources was engaged in by an agent, official, or employee of Iraq while acting in the scope of his agency, office, or employment.

151. Vitello, supra note 143.
152. 28 U.S.C. § 1608(e) (2000). As in prior terrorism exception cases, most likely the plaintiffs’ uncontroverted evidence will be accepted as true by the court, and thereby lessen the burden on the plaintiffs. See Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 100 (D.D.C. 2000).
In addition, three more elements must be satisfied in order to bring suit under § 1605(a)(7) of the FSIA. First, the foreign state must be designated by the United States as a state sponsor of terrorism as accorded under section 6(j) of the Export Administration Act of 1979. Second, the act must have occurred outside of the foreign state. Lastly, the claimant or victim must have been a United States national at the time the act occurred.

The facts of this case clearly meet the three requirements of § 1605(a)(7)(A)-(B). First, Iraq is designated as a state sponsor of terrorism pursuant to section 6(j) of the Export Administration Act of 1979. Second, undeniable evidence shows that the act occurred in the United States, therefore satisfying the requirement that the act occur outside the foreign state. Third, the surviving victims participating in this lawsuit were all United States nationals at the time of the terrorist attack and either the plaintiff who is representing a deceased victim or the victim the plaintiff is representing were United States nationals at the time of the terrorist attack.

The victims named in this suit were subject to acts of torture, extrajudicial killing, and aircraft sabotage on September 11th as pursuant to the definitions adopted by § 1605(e)(1) and (3), and resulted in either the personal injury or death of the said victims. The plaintiffs have ample evidence to demonstrate to the court that these three categories of acts occurred and therefore, there is no need to go into great detail. First, what happened to all the victims, both surviving and deceased, clearly falls well within the definition of torture. Second, the murder of the

155. See id. § 1605(a)(7)(A).
156. See id. § 1605(a)(7)(B)(i).
157. See id. § 1605(a)(7)(B)(ii).
158. See 31 C.F.R. § 596.201 (2002).
159. See Moses, supra note 1 (describing where the terrorist attacks took place); see also CMC, supra note 145 at 68-69.
160. See CMC, supra note 145 at 65 (stating that the plaintiffs "are U.S. citizens, residents or foreign citizens"). According to the Immigration and Nationality Act, a "United States national" is defined as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2000). This requirement can easily be satisfied by providing a birth certificate, passport or other official documents as evidence towards ones standing as a U.S. national.
162. The following definition of torture was adopted by § 1605(e)(1):
[A]ny act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering . . . 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
victims listed in this suit constituted extrajudicial killings as set forth in the Torture Victim Protection Act of 1991.\textsuperscript{163} Third, the use of the four aircrafts as weapons clearly meets the definition of aircraft sabotage.\textsuperscript{164}

The plaintiffs must produce evidence showing that the acts discussed above were perpetrated by a group receiving material support or resources from Iraq. There is no doubt that Osama bin Laden and al Qaeda were responsible for the events that occurred on September 11th, especially in light of the fact that Osama bin Laden and al Qaeda have publicly taken credit for the terrorist attacks.\textsuperscript{165} However, showing that bin Laden and al Qaeda received material support or resources from Iraq may prove more difficult.

The FSIA allows for claims against a foreign state that provides material support or resources for acts of torture, extrajudicial killing, and aircraft sabotage.\textsuperscript{166} Therefore, the plaintiffs must show that Iraq provided material support or resources to bin Laden and al Qaeda that caused the extrajudicial killing, torture, and aircraft sabotage of the victims listed in this suit.\textsuperscript{167} The complaint alleges Iraq provided al Qaeda with “support, funding, facilities and training.”\textsuperscript{168} The suit explains the benefits to both Iraq and al Qaeda for teaming up together against the United States.\textsuperscript{169} The plaintiffs plan on demonstrating this link through the use of “a combination of media reports, personal

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.


163. Extrajudicial killing is defined 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.

\textit{Id.}

164. The definition of aircraft sabotage was adopted from Article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft. The term is defined as:

- \textit{Any person who on board an aircraft in flight:}
  - (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
  - (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence (hereinafter referred to as “the offence”).

\textit{Id.}


167. \textit{See id.}

168. \textit{CMC, supra} note 145, at 75.

169. \textit{See id.}
interviews with witnesses who have been in Iraq and Kurdistan and observed many things firsthand, interviews with former U.S. intelligence officers and court documents and affidavits."

In addition, there is a strong possibility that new evidence supporting the connection between Iraq and the terrorists responsible for September 11th will surface in the months to come following the end of Saddam’s reign of terror. Although, some may argue Iraq’s ties to September 11th are dubious, there is no doubt that the plaintiffs will be able to provide undisputed evidence that Iraq supported bin Laden and al Qaeda.

Lastly, the plaintiffs need to establish evidence that the provision of material support or resources was engaged in by an agent, official, or employee of Iraq while acting in the scope of his agency, office, or employment. In paragraphs fifteen and sixteen of the complaint the plaintiffs name the alleged officials, employees, and agents of Iraq that acted within the scope of their employment while providing material support or resources to bin Laden and al Qaeda. Once the previously discussed step is established this step will be easy to prove.

C. Why Sue Iraq?

The main objective of naming Iraq as a defendant is to make the country pay. Pay morally. Pay financially. Morally, in the eyes of the victims, Iraq will pay by being held accountable in an official setting, namely a judicial proceeding, for its actions.

Financially, the hope of the victims is that Iraq will have to pay the enormous judgment entered against it, not for the victims to
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VII. WHO IS GOING TO PAY: IRAQ OR THE AMERICAN TAXPAYERS?

A. Title II Section 201 of the Terrorism Risk Insurance Act of 2002

In the aftermath of September 11th, Congress rushed to create anti-terrorism legislation. The new legislation ranged from improving aviation security\(^{176}\) to providing tax relief to victims.\(^{177}\) As in the past, one of the many concerns of the lawmakers was the ability of victims who were awarded judgments against state sponsors of terrorism to reach blocked assets in order to satisfy those judgments.

In anticipation of lawsuits against state sponsors of terrorism, and in the wake of September 11th, several bills were introduced to the Senate and House with respect to this issue. Although the language of the bills introduced varied slightly, the intent was the same.\(^{178}\) Finally on November 26, 2002, the President signed TRIA into law.\(^{179}\) Title II, Section 201, of the Terrorism Risk Insurance Act of 2002, codified at 17 U.S.C. § 2001 et seq., covered the federal government's financial responsibility in the event that any judgment against a state sponsor of terrorism is not satisfied from the defendant's financial resources.

173. The same is true here as realized in past lawsuits against state sponsors of terrorism, "the plaintiffs [are] not after financial gains as much as after a moral victory: to force accountability from otherwise unreachable officials and parties involved behind the scenes with the terrorist attack." Reinout van Wagendonk, Radio Netherlands, Suing al-Qaeda Bankrollers, at http://www.rnw.nl/hotspots/html/us020816.html (last visited Mar. 22, 2003).


Section 201 of TRIA is called "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism." The statute states in pertinent part:

(a)... Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER—

(1)... Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

In addition, included in the law is a special rule created to address cases against Iran. Section (a) reaffirms victims’ access to frozen terrorist assets, including those of state sponsors of terrorism. However, victims of terrorism who prevail in court under § 1605(a)(7) may only collect the amount they were awarded in compensatory damages. Section (b) permits a Presidential waiver under specific circumstances. The section clearly states that a Presidential waiver may be exercised with regard to section (a) for diplomatic property and on an asset-by-asset basis only if it is necessary for national security interests. The purpose of § 201(b) was to set straight the intended use for a Presidential waiver.

180. Id.
181. Id.
182. See id. § 201(c).
183. See id. § 201(a).
184. See id.
185. See id. § 201(b).
186. See id.
by clarifying the scope of such waiver. However, the Presidential waiver in part (b) of the law will likely result in the American taxpayers footing the cost for any courtroom victories against a state sponsor of terrorism.

B. The Affect of the New Legislation on the American Taxpayers

With the enactment of § 201 of TRIA, Congress intended to pass legislation that will make it easier for victims to collect their judgments against states, like Iraq, that sponsor terrorism, but instead they created legislation that will put the burden of beating Iraq in the courtroom on the innocent American taxpayers. The fact is, that despite legislation to help victims of terrorism collect judgments from blocked assets of the seven countries the U.S. designated as state sponsors of terrorism, it is highly unlikely that the plaintiffs in the case discussed will see any money from the frozen assets of Iraq. 187

The President is certain to exercise his right to the use of the Presidential waiver in § 201(b) of TRIA. Undoubtedly, the recent war with Iraq will play a major role in this decision. 188 The use of the Presidential waiver will thereby deny the plaintiffs access to Iraqi frozen assets which will be necessary to satisfy the judgments entered against the country.

In the past, the U.S. State Department along with the U.S. Treasury have blocked victims’ access to frozen foreign assets. The government defended this policy by arguing that keeping the money frozen is essential to foreign policy. 189 The government is likely to do the same with regard to Iraqi frozen assets. The decision is likely to be based on not only the usual broad national security argument, but also on a more narrow argument tailored to the current changing relationship between the United States and Iraq.

The State Department has historically opposed releasing frozen foreign assets, often arguing national security. In the interest of national security, the government has argued, the assets need to remain frozen to

187. As a side note, for example, in one of the cases filed after September 11th, the Taliban regime and al Qaeda organizations were named as defendants, not countries. Following September 11th, the United States seized approximately $250 million worth of assets tied to the Taliban and al Qaeda, however the U.S. recently returned most of the money to Afghanistan. Approximately $34 million still remains frozen, but that is an insignificant amount “compared to the possible damage claims.” Schleifer, supra note 136.
188. Since the attacks on the United States on September 11, 2001, the U.S. government threatened to go to war with Iraq. On March 19, 2003, the threat became a reality. See President Bush Addresses the Nation, supra note 4.
189. See supra note 129 and accompanying text.
act as a bargaining tool to coerce change in terrorist nations \(^{190}\) and to avoid other countries from creating similar laws. \(^{191}\) Now more then ever, holding on to these assets makes sense.

The war against terrorism promises to be long and difficult, and the United States will need every diplomatic tool at its disposal. The prospect of normalizing relations with countries that currently are designated as state sponsors of terrorism can be used to build and maintain the anti-terror coalition. It also can be used to make these countries more accountable for their actions, thus helping to ensure that they do not revert back to the sponsorship of terrorism. \(^{192}\) The government is sure to insist that in this new era of global terrorism, the United States cannot afford to give up any leverage it has; many may find this hard to disagree with. \(^{193}\)

In a more narrow argument, strictly with regard to Iraq, the State Department is likely to argue that the assets should not be released because of the promising regime change and the need to mend the relationship between the United States and Iraq when this change occurs. Once the war with Iraq is over and the United States is helping rebuild Iraq, the government is going to want to return the frozen foreign assets to Iraq as a gesture of good faith and also to help rebuild a country that is already economically struggling.

After the President exerts his authority to invoke the Presidential waiver, legislation will be passed providing for at least part, if not all, of the judgment entered against Iraq to be paid out of the U.S. Treasury. \(^{194}\) For example, the legislation will probably be similar to that passed to satisfy the judgments in the terrorism exception cases entered against

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190. See Gilbert, supra note 174.

191. See McKay, supra note 11, at 458-61 (arguing the United States fears other countries creating similar legislation and thereby subjecting the U.S. to suit in foreign countries). Iran has already passed similar legislation that allows Iranians to sue the United States. See Michael Theodoulou, Tehran Court Rules Against US, CHRISTIAN SCIENCE MONITOR, available at http://www.csmonitor.com/2003/0203/p06s01-wome.html (last visited Mar. 22, 2003). To date one case naming the U.S. as a defendant has successfully been brought in Iran. See id. The Tehran court entered a $500 million judgment against the U.S. See id.

192. See Gartenstein-Ross, supra note 126, at 534.

193. In reference to releasing foreign frozen assets in order to pay victims' judgments a State Department official commented: "Any choice to give up assets is a choice to give up leverage.... It's a choice to give up the entire public's interest to compensate an individual." Schleifer, supra note 136.

194. See Gartenstein-Ross, supra note 126, 518 n.113 ("President Clinton exercised his waiver authority the day he signed the bill into law, and there is no indication that this situation will change under the Bush Administration.").
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Iran. However, this time the burden on the American taxpayers may be too much.196

C. Correcting the Injustice

"Members of the public are likely to feel that, after the government has granted the right to sue, compensation should be provided by the country responsible for sponsoring the acts of terrorism and not by American taxpayers."197 This is a perfectly logical expectation. However, with the case of Iraq as a defendant this is not an option.198

It is time to break away from the dangerous precedent set by the enactment of the JVTA in the past.199 No additional legislation should be passed in the future to authorize the payment of compensatory damages, by the U.S. Treasury Department, to victims of terrorism who are awarded judgments against Iraq.200 This may sound harsh, but it is

195. See supra notes 133-38 and accompanying text.

196. For example, Americans are already facing a down economy. See Betsy Stark, Tallying the Cost of War, (Mar. 21 2003) at http://abcnews.go.com/sections/business/WorldNewsTonight. Not to mention the recent wartime supplemental budget President Bush submitted to Congress to help pay for the war. See President Submits Wartime Budget (Mar. 25, 2003), at http://www.whitehouse.gov/news/releases/2003/03/20030325-2. The President requested $74.7 billion. See id. The supplemental request is to pay for the military in Operation Iraqi Freedom and the global war on terrorism, humanitarian relief to the Iraqi people, and Homeland Security. See Supporting Our Troops Abroad and Increasing Safety at Home (Mar. 25, 2003), at http://www.whitehouse.gov/news/releases/2003/03/20030325.html (explaining in detail the items the wartime supplemental budget will support). Although judgments against Iraq will not be awarded any time soon, the war and rebuilding Iraq is something taxpayers will be paying for long into the future. See Stark, supra. Paying the judgments entered against Iraq may put some taxpayers over the edge.

197. Gartenstein-Ross, supra note 126, at 520. Interestingly, not all plaintiffs from previous lawsuits against state sponsors of terrorism feel better after being awarded a judgment. For example, Stephen Flatow, who sued Iran under the terrorism exception for the murder of his daughter in 1995, commented “victory brought little comfort.” Schleifer, supra note 136; see supra Part IV.B.1 (discussing Flatow v. Islamic Republic of Iran). “‘People are going to be looking for closure in any way possible, but let me tell you, there is no such thing’ . . . [t]hat’s a lesson that the government and taxpayers may soon be paying for other victims’ families to learn.” Schleifer, supra note 136.

198. See supra Part VI.B.


This bill is not anti-terrorism legislation; it’s an evasion. And it sets a precedent that will haunt us for years to come. Given current political conditions, there are bound to be a lot more American victims of international terrorism. One can almost hear the lawyers salivating, now that our government is acting as a guarantor for terrorist nations ordered by American courts to pay their victims.

Id.

200. Unlike the remedy created with respect to the collection of certain judgments against Iran, a similar solution is not feasible in this case. See supra notes 131-36 and accompanying text. In Count Six of the CMC the plaintiffs request $50 million for each plaintiff in compensatory damages.
necessary in order to protect the American taxpayers. In addition, the plaintiffs in this lawsuit must realize that the United States government has the same objective as they do, to put an end to terrorism. Furthermore, they must realize that a victory for the United States against Iraq is also a victory for the plaintiffs; therefore, the plaintiffs do not need to actually collect their judgment to accomplish their goal.

VIII. CONCLUSION

The issue of terrorism lawsuits is an extremely emotional one. “The pain of the families who have lost loved ones in terrorist attacks and their right to seek compensation for their loss cannot be denied.” However, taking on Iraq as a defendant will not yield the results these plaintiffs desire. The reality is that the American taxpayers are going to pay for the wrongs of Iraq unless the victims forego enforcing the judgments entered against Iraq.

Donna M. Balducci*

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alone, against Iraq, Iran, and Sudan, and their instrumentalities and agents. See CMC, supra note 145, at 261-63. If the court were to award this amount, in a conservative estimate Iraq alone would be liable for approximately $21 billion. This figure indicates Iraq will be liable for about $15 million for each plaintiff. Precedent demonstrates that this figure is in line with other judgments in similar cases. See supra Part IV. Even if a formula were created which reduced this figure by half it still is an incredible amount of money. Not to mention, this is not considering other civil cases that may be brought against Iraq under the terrorism exception.

201. Schleifer, supra note 136.

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