# ANOTHER FRONT IN THE WAR ON TERRORISM? PROBLEMS WITH RECENT CHANGES TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

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## I. INTRODUCTION

Following the events of September 11, 2001, a great deal of national attention focused on the risk of terrorist attacks to U.S. citizens. Policymakers struggled to address the needs of the victims and survivors, as well as to anticipate and deter future attacks.[1] Terrorism is hardly a new issue for U.S. policymakers, however; the U.S. response to terrorism has been evolving for at least thirty years.[2] In the last several decades, the United States has reacted in various ways to those who engage in or support terrorist attacks against U.S. interests or U.S. citizens. U.S. reactions have included direct engagement such as military strikes, diplomatic sanctions, and economic sanctions, as well as less direct responses such as increased security and tightened immigration procedures.[3] Traditionally, the executive branch has been primarily responsible for directing U.S. anti-terrorist policy as part of executive foreign policy powers.[4] Only in the last decade has the judicial branch begun to play a role in responding to terrorism.[5]

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1. *See, e.g.*, Malcolm Gladwell, *Connecting the Dots: The Paradoxes of Intelligence Reform*, NEW YORKER, Mar. 10, 2003, at 83.

2. *See generally* Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures, 1960–2000*, TERRORISM & POL. VIOLENCE, Autumn 2001, at 15 (discussing the different and changing U.S. responses to terrorism during the last several decades).

3. *See id.*

4. *Terrorism Fighting Tools: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2000) [hereinafter *Terrorism Fighting Tools Hearings*] (statement of Allan Gerson, Professor, George Washington University); Sean K. Mangan, Note, *Compensation for "Certain" Victims of Terrorism Under Section 2000 of the Victims of*

In an effort to step up the fight against international terrorism, Congress amended the Foreign Sovereign Immunities Act (FSIA) in 1996 to allow a U.S. citizen to bring suit against a foreign state in a U.S. court for damages resulting from a state-sponsored act of terrorism.[6] This legislation was enacted with two primary purposes in mind. First, Congress hoped to provide victims of terrorist acts with previously elusive compensation.[7] In addition, legislators hoped that by forcing states like Iran to pay huge sums to those who won judgments, these foreign states would more reluctant to sponsor acts of terror against U.S. citizens.[8]

In the years since the terrorism exception was added to the FSIA, it has accomplished neither compensation nor deterrence. Instead, suits against state sponsors of terrorism negatively affect U.S. foreign policy and do little to bring compensation or closure to the victims of terrorism or their families. This Note evaluates the state sponsored terrorism exception to foreign sovereign immunity. Section II describes the development of legislation permitting suits against state sponsors of terrorism and the legislation permitting attachment of these states' frozen assets to satisfy judgments. Section III provides analysis of this legislation and the body of cases involving suits against state sponsors of terrorism, highlighting specific problems in the areas of foreign policy and victim compensation. Finally, this Note concludes in Section IV that the terrorist exception is a failed experiment and suggests that alternative methods of victim compensation should be explored.

## II. THE DEVELOPMENT OF THE "STATE SPONSORS OF TERRORISM" EXCEPTION TO THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

### *A. The Foreign Sovereign Immunities Act*

A century ago, the United States and most other countries granted nearly absolute foreign sovereign immunity, meaning that a nation state as an entity could almost never be sued in the courts of other countries.[9] As foreign states

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*Trafficking and Violence Protection Act of 2000: Individual Payment at Institutional Cost*, 42 VA. J. INT'L L. 1037, 1067–68 (2002).

5. *See, e.g.*, Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. Sept.–Oct. 2000, at 102 (analyzing new forms of litigation against states for violations of international law).

6. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, § 221(a), 110 Stat. 1214 (1996) (codified as amendments to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2003)).

7. *See* William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 150 (2002).

8. *See, e.g., Foreign Terrorism and U.S. Courts: Hearings on S. 825, the Foreign Sovereign Immunity Act Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 57 (1994) [hereinafter *Hearings on S. 825*] (testimony of David P. Jacobsen, former hostage).

9. *Id.* (testimony of Jamison S. Borek, Deputy Legal Advisor, U.S. Department of State); *Victims' Access to Terrorist Assets: Hearing on Amendments to the Foreign Sovereign Immunities Act Before the Senate Comm. on the Judiciary*, 106th Cong. (1999)

increasingly became commercial actors, absolute immunity became less practical, and many states began to follow the doctrine of "restrictive" sovereign immunity in the years before and after World War II.[10] The restrictive doctrine of sovereign immunity provides immunity in most cases, but allows states to be sued for claims involving commercial activities.[11]

Congress codified the principle of restrictive sovereign immunity in the FSIA.[12] The FSIA essentially forbids U.S. courts to exercise jurisdiction over other sovereign nations except in certain specific cases.[13] The key exceptions to immunity include cases involving commercial activity, such as contracts involving the purchase of goods;[14] noncommercial torts, like car accidents;[15] and explicit and implicit waivers of immunity.[16] In addition, the Act permits a suit against a sovereign nation to be brought in a U.S. court if the suit involves property located in the United States.[17] Currently, the only way to obtain jurisdiction over a foreign state defendant in a U.S. court is to bring suit under one of the exceptions to immunity listed in the FSIA.[18]

Besides enabling certain kinds of suits against foreign nations, another key purpose in enacting the FSIA was to depoliticize determinations of foreign state immunity.[19] Prior to the enactment of the FSIA, the State Department was primarily responsible for determining questions of immunity.[20] The involvement of the State Department was problematic because the State Department is also the diplomatic machinery of the United States, and determinations of immunity were thus tainted by U.S. foreign policy concerns and political considerations.[21] One of the aims of the FSIA was therefore to promote impartial, non-political determinations of immunity[22] by transferring such decisions to the judiciary.[23]

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[hereinafter *Victims' Access Hearings*] (prepared statement of Stuart E. Eisenstadt, Deputy Secretary, Department of the Treasury); Flatow v. Iran, 999 F. Supp. 1, 11 (D.D.C. 1998).

10. *Flatow*, 999 F. Supp. at 11.

11. DAVID M. ACKERMAN, CONGRESSIONAL RESEARCH SERVICE, SUITS AGAINST TERRORIST STATES, at 3 (2002), *available at* http://fpc.state.gov/documents/organization/8045.pdf (last visited Mar. 28, 2003).

12. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11 (2003).

13. 28 U.S.C. §§ 1605, 1607 (2003); *see also* H.R. REP. NO. 94-1487, at 7 (1976).

14. 28 U.S.C. § 1605(a)(2); *see also* Keith Sealing, *"State Sponsors of Terrorism" is a Question, Not an Answer: The Terrorism Amendment to the FSIA Makes Less Sense Now Than It Did Before 9/11*, 38 TEX. INT'L L.J. 119, 122 (2003).

15. 28 U.S.C. § 1605(a)(5); *see also* Sealing, *supra* note 14, at 122.

16. 28 U.S.C. § 1605(a)(1); *see also* Sealing, *supra* note 14, at 122.

17. 28 U.S.C. § 1605.

18. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); Hoye, *supra* note 7, at 116.

19. Flatow v. Iran, 999 F. Supp. 1, 11 (D.D.C. 1998); Slaughter & Bosco, *supra* note 5.

20. Hoye, *supra* note 7, at 115.

21. *Id.*

22. H.R. REP. NO. 94-1487, at 7 (1976).

23. Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2003).

### *B. The Antiterrorism and Effective Death Penalty Act of 1996*

As it stood in 1976, the FSIA did not permit suits against foreign states for state-sponsored crimes, including torture and execution, against U.S. citizens.[24] Before the FSIA was amended, U.S. courts routinely dismissed cases against foreign states brought by U.S. citizen plaintiffs complaining of serious violations of human rights or international law.[25] For example, before 1996, the families of the victims of the bombing of Pan Am Flight 103 were unable to successfully sue Libya for its involvement because international terrorist activities did not fall into one of the exceptions under the FSIA.[26]

The Pan Am Flight 103 families and other victims of terrorist actions began to lobby Congress, arguing that they should be allowed to sue those responsible for the death of their loved ones.[27] Congress agreed, and in 1996, Congress amended the FSIA to create another exception to sovereign immunity.[28] The resulting legislation allows a U.S. citizen to sue a foreign state for acts of state-sponsored terrorism.[29] The terrorist-exception amendment to the FSIA was enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).

The terrorist exception sets out certain conditions that must be met in order for a U.S. citizen to bring suit against a foreign state for an act of terrorism. First, the case must be one 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 . . . for such an act."[30] Second, the claimant or victim must be a U.S. national when the act of terrorism occurs.[31] Third, the foreign state must be designated a state sponsor of terrorism by the State Department at the time the act occurs.[32] Finally, if the act of terrorism occurred in the defendant state's territory, a plaintiff must first attempt arbitration in accordance with international rules.[33] If all of these conditions are met, the terrorism exception to the FSIA allows a plaintiff to bring suit in a U.S. court seeking compensatory damages from the foreign state.[34]

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24. *Flatow*, 999 F. Supp. at 11; *see also* H.R. REP. NO. 103-702, at 4 (1994).

25. Hoye, *supra* note 7, at 108–09.

26. Smith v. Socialist People's Libyan Arab Jamahiriya, 886 F. Supp. 306 (E.D.N.Y. 1995), *aff'd*, 101 F. 3d 239 (2d Cir. 1996).

27. Sealing argues that the Oklahoma City bombing "provided the impetus" for the terrorism exception to be finally passed. Sealing, *supra* note 14, at 123; *see also Victims' Access Hearings*, *supra* note 9 at 44–45 (statement of Allan Gerson).

28. Antiterrorism and Effective Death Penalty Act, 104 Pub. L. No. 132, § 221, 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 1605(a)(7) (2003)).

29. *Id.*

30. *Id.* The statute further specifies that the material support must be "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office." *Id.*

31. 28 U.S.C. § 1605(a)(7)(B)(ii).

32. *Id.* § 1605(a)(7)(A). Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are currently designated state-sponsors of terrorism. 31 C.F.R. § 596.201 (2003).

33. 28 U.S.C. § 1605(a)(7)(B)(i) (2003).

34. *Id.* § 1605(a)(7).

The terrorism exception was passed with little fanfare, but plaintiffs and other critics quickly argued that compensatory damages were not enough.[35] In order to ensure that suits against state sponsors of terrorism had the "desired deterrent effect" on defendant nations,[36] the terrorism exception to the FSIA was changed. In 1996, the "Flatow Amendment" was added to the FSIA to provide punitive damages for plaintiffs in suits against state sponsors of terrorism.[37] This amendment represents a significant departure from earlier practices because the FSIA expressly prohibits awarding punitive damages in all other cases against foreign states.[38]

Despite the good intentions underlying these amendments to the FSIA, suits against state sponsors of terrorism have been problematic. The terrorism exception "was enacted explicitly with the intent to alter the conduct of foreign states, particularly towards U.S. nationals traveling abroad."[39] Its effect, however, was to erode traditional diplomatic protections without providing a workable system of compensation and deterrence.[40] The state-sponsored terrorism exception to the FSIA is ridden with flaws, and numerous attempts to correct these flaws have failed to create a workable system of victim compensation.[41] Instead, the terrorism exception has resulted in a litigation quagmire that frustrates plaintiffs, leaves many terrorist victims without an effective remedy, costs taxpayers millions, and significantly, leaves terrorists undeterred.[42]

### *C. Suing The State Sponsors of Terrorism and Winning*

The first case under the terrorism exception was brought in 1997 when three families sued Cuba. *Alejandre v. Cuba*[43] arose after the Cuban Air Force shot down two planes belonging to the Florida-based exile Cuban group, Brothers to the Rescue, in 1996.[44] The plaintiffs, the families of three men killed in the attack, alleged that the attack was a terrorist act sponsored by the Cuban government.[45] Cuba did not appear in the case, and the federal District Court for the Southern District of Florida found for the families of the men killed, awarding them $50 million in compensatory damages and $137 million in punitive damages.[46]

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35. Flatow v. Iran, 999 F. Supp. 1, 12 (D.D.C. 1998).
36. *Id.*
37. Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 110 Stat. 3009 (1996) (codified at 28 USC § 1605 (2003)).
38. 28 U.S.C. § 1606 (2003). This provision specifically waives liability for punitive damages. *See also* Richard Milin, *Suing Terrorists and Their Private State Supporters*, N.Y. L.J., Oct. 29, 2001, at 1.
39. *Flatow*, 999 F. Supp. at 25.
40. *See* discussion *infra* Part III.A; *see also* Sealing, *supra* note 14, at 141–44.
41. *See* discussion *infra* Part II.D–F, *see also* ACKERMAN, *supra* note 11; Mangan, *supra* note 4.
42. *See* discussion *infra* Part III.C–D.
43. Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997).
44. *Id.*
45. *Id.* at 1247–48.
46. *Id.* at 1253–54.

Following the plaintiffs' success in *Alejandre*, other victims of terrorism and their families initiated suits against state sponsors of terrorism. One of the most influential cases to be brought under the state-sponsored terrorism exception was *Flatow v. Iran*,[47] brought by the family of Alisa Flatow, a student at Brandeis University.[48] In 1995, while she was on a study program in Israel, Alisa was killed in a suicide bomber attack.[49] The Palestinian Islamic Jihad, an entity funded entirely by the Islamic Republic of Iran, claimed responsibility for the attack.[50] Pursuant to the state sponsored terrorism exception, Alisa's family filed suit against the government of Iran in the District Court for the District of Columbia.[51] Like Cuba, Iran did not appear in the proceedings.[52]

In *Flatow,* the court set precedent by broadly interpreting the terrorism-exception statutes. First, the court established that a plaintiff need only meet a minimum threshold of evidence to establish jurisdiction over a defendant state. Specifically, the court stated that a plaintiff need not establish that a foreign state's "material support" to a terrorist organization contributed directly to the terrorist act in question; rather, a state's general sponsorship of the responsible terrorist group was enough to establish jurisdiction under the state-sponsored terrorism exception.[53] Applying this reasoning, the court determined that Iran's financial sponsorship of the Islamic Jihad was enough to establish responsibility for Alisa's death.[54] The court awarded Alisa's estate damages for lost earnings as well as pain and suffering, and compensated her family for emotional distress—a total in excess of $20 million.[55] The court also awarded punitive damages in the amount of $225 million, or approximately three times Iran's annual expenditure for terrorist activities.[56]

*Flatow* was the first of many cases against Iran. In subsequent cases, former hostages held by the Hizbolla in Lebanon successfully sued Iran, as the sponsor of Hizbolla, for damages resulting from kidnapping and torture.[57] Iran has also been held responsible for the death of three U.S. citizens in a terrorist bombing of a bus in Israel,[58] for the assassination of a U.S. citizen by the Iranian

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47. *Flatow v. Iran*, 999 F. Supp. 1, 1 (D.D.C. 1998).
48. *Id.* at 6–7.
49. *Id.* at 7–8.
50. *Id.* at 9.
51. *Id.* at 1–2.
52. *Id.* at 6 n.1.
53. *Id.* at 18.
54. *Id.* at 9–10.
55. *Id.* at 32.
56. *Id.* at 25–27, 33–34.
57. Cronin v. Islamic Republic of Iran, 238 F. Supp. 2d 222 (D.D.C. 2002); Surette v. Islamic Republic of Iran, 231 F. Supp. 2d 260 (D.D.C. 2002); Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27 (D.D.C. 2001); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000); Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998).
58. Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1 (D.D.C. 2000).

intelligence service in Paris,[59] and for the death of a U.S. Navy Officer who was killed by a Hizbolla car bomb in Lebanon in 1984.[60]

Iraq and Libya have also been named as defendants in terrorist-exception cases. First, several U.S. citizens sued Iraq for injuries stemming from their illegal detention in Iraq.[61] Next, a group of plaintiffs secured judgment against Iraq for their detention and use as "human shields" at the beginning of the Gulf conflict in 1990.[62] The government of Libya has been named as a defendant by families of those killed in the Pan Am bombing over Lockerbie,[63] by cruise ship passengers held hostage in Libya after their ship was forced to stop in a Libyan port during a storm,[64] and by two Americans detained in Libya in 1980.[65]

Finally, the Brothers to the Rescue were involved in a recent suit against Cuba. This was, perhaps, the most unusual case to arise under the terrorism exception. Ana Margarita Martinez sued Cuba, claiming that she was used as a "political pawn" by the Cuban government and by her ex-husband, a Cuban spy.[66] Martinez contended that her ex-husband came to the United States from Cuba in order to infiltrate the Brothers to the Rescue.[67] According to Martinez, the marriage provided cover for his mission and, unbeknownst to her, was merely part of his plot.[68] She explained that because she was not aware of her ex-husband's true identity, her consent to marriage was procured fraudulently, and therefore she had a legitimate suit against the Cuban government for rape.[69] In 2001, a Florida district court determined that Martinez was a victim of fraud sponsored by the Cuban government and awarded her $27 million.[70]

Most plaintiffs who bring suit against state sponsors of terrorism easily win default judgments. At the time of this Note, at least twenty cases have been decided against state sponsors of terrorism, and Iran, Iraq, Cuba, and Libya together owe hundreds of millions of dollars to plaintiffs.[71] Collecting these judgments has been another matter, however.

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59. Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97 (D.D.C. 2000).

60. Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128 (D.D.C. 2001).

61. Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19 (D.D.C. 2001).

62. Hill v. Republic of Iraq, 175 F. Supp. 2d 36 (D.D.C. 2001).

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

64. Simpson v. Socialist People's Libyan Arab Jamahiriya, 180 F. Supp. 2d 78 (D.D.C. 2001).

65. Price v. Socialist People's Libyan Arab Jamahiriya, 110 F. Supp. 2d 10 (D.D.C. 2000).

66. Marcia Coyle & Laurie Cunningham, *Big Thaw: New Law Allows Victims of Foreign Terrorism to Tap into Assets Frozen in U.S. Banks*, MIAMI DAILY BUS. REV., Dec. 10, 2002, at 1.

67. *Id.*

68. *Id.*

69. *CBS News: 60 Minutes* (CBS television broadcast, Jan. 13, 2002), *available at* 2002 WL 8424859 [hereinafter *60 Minutes*].

70. Coyle & Cunningham, *supra* note 66.

71. For a list of cases and detailed descriptions of damages awarded in each case, see Kristine Cordier Karnezis, Annotation, *Award of Damages Under State-Sponsored*

### *D. Attaching Assets to Satisfy Judgments: The 1998 Amendments*

Several problems with the terrorist exception emerged after plaintiffs began to sue terrorist-sponsoring states—and win.[72] Plaintiffs easily won huge default judgments, but then found themselves unable to take the next step and collect the money awarded to them.[73] Beginning in 1998, Congress made several attempts to correct the terrorist exception in order to help successful plaintiffs collect judgments levied against foreign states.[74]

The conflict over judgments is an almost inevitable result of the design of the terrorist exception. When Congress decided to permit citizens to sue state sponsors of terrorism, it also considered how to pay the successful plaintiffs. To facilitate collection, Congress included a provision in the terrorist exception that allows a successful terrorist-exception plaintiff to attach commercial property in the United States belonging to the defendant state.[75] After plaintiffs won judgments against Iran and Cuba, they tried to use this provision to attach assets of those states that were located within the jurisdiction of the United States.[76] All attempts to attach diplomatic and other blocked assets, however, were thwarted by the Clinton Administration.[77] The Administration claimed that diplomatic assets could not be released because they were protected by international agreements,[78] and frozen assets could not be released because they were a valuable foreign policy tool and possibly subject to other claims by U.S. nationals.[79] The successful plaintiffs were left with nothing.

In response to executive stonewalling, Congress amended the FSIA in 1998, attempting to facilitate compensation for the growing number of successful plaintiffs.[80] The resulting legislation specifically stated that frozen and diplomatic assets of a foreign state can be attached to satisfy a judgment for a claim brought under the terrorist exception.[81] This legislative victory for plaintiffs proved to be a hollow one, however. In order to avoid a presidential veto of the legislation, Congress was forced to include a provision that authorized the President to "waive the requirements of this section in the interest of national security," thereby

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*Terrorism Exception to Foreign Sovereign Immunities Act (28 U.S.C.A. §1605(A))*, 182 A.L.R. FED. 1 (2002).

72. ACKERMAN, *supra* note 11, at 6–21.

73. *Id.*

74. *See infra* notes 76–117 and accompanying text.

75. 28 U.S.C. § 1610(b)(2); *see also* ACKERMAN, *supra* note 11, at 4–5.

76. ACKERMAN, *supra* note 11, at 6.

77. *Id.* at 6–7; *see also* Bill Miller, *Terrorism Victims Set Precedent; U.S. to Pay Damages, Collect from Iran*, WASH. POST, Oct. 22, 2000, at A1.

78. ACKERMAN, *supra* note 11, at 6–7. The administration specifically pointed to the Vienna Convention and the Iran-United States Claims Tribunal agreements as prohibiting the release of blocked assets. *Id.*

79. *Id.* at 7; *see also* discussion of other preexisting claims on Cuban and Iranian assets, *infra* notes 206–12 and accompanying text.

80. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681 (1998) (codified as amended at 28 U.S.C. §1610(f)(2)(A) (2003)).

81. *Id; see also* ACKERMAN, *supra* note 11, at 8.

protecting all frozen assets from attachment.[82] President Clinton passed the legislation but then immediately invoked the waiver.[83] The frozen assets of terrorist states thus remained immune from attachment, beyond the reach of successful plaintiffs.[84]

### *E. Victims of Trafficking and Violence Protection Act of 2000*

After the 1998 amendment failed to help plaintiffs collect judgments, Congress went back to the drawing board. The result was more piecemeal legislation: section 2002 of the Victims of Trafficking and Violence Protection Act.[85] Under this Act, specified claimants were to be paid compensatory, but not punitive, damages won in terrorism-exception suits against Iran and Cuba.[86] In return, a claimant had to agree to relinquish rights to attach certain property of the defendant state.[87] This Act allowed payment of damages in one case against Cuba and ten cases against Iran.[88] The families who had prevailed against Cuba in the Brothers to the Rescue case[89] were arguably the most successful under the new legislation because they were paid directly from frozen Cuban assets. In 2001, the U.S. government liquidated approximately half of Cuba's $193.5 million in frozen assets to pay the three families.[90] The Clinton Administration was steadfast in its refusal to release the frozen assets of Iran, however.[91] Instead, the U.S. Treasury paid over $350 million to partially satisfy judgments in nine of the ten cases against Iran.[92]

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82. 28 U.S.C. § 1610(f)(3) (2003).

83. Pres. Determ. No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998) (invoking the waiver).

84. *See* ACKERMAN, *supra* note 11, at 9–10 (citing Statement by President William J. Clinton Upon Signing H.R. 4328, 34 WEEKLY COMP. PRES. DOC. 2108 (Nov. 2, 1998), *reprinted in* 1998 U.S.C.C.A.N. 576).

85. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000) (codified as amended in 28 U.S.C. §§ 1606, 1610 (2003)).

86. *Id.*

87. *Id.*

88. ACKERMAN, *supra* note 11, at 10, 14–17 (see Appendix I for the list of cases); *see also* Joel Mowbray, *So You Wanna Sue the Saudis?*, NAT'L REV., Nov. 25, 2002, at 19.

89. Alejandre v. Republic of Cuba, 996 F. Supp. 1236, 1239 (S.D. Fla. 1997).

90. ACKERMAN, *supra* note 11, at 17; Mowbray, *supra* note 88, at 120; *see also* Roger Parloff, *Deep Freezing Terror's Assets*, AM. LAW., June 2002, at 122.

91. *See* Mangan, *supra* note 4, at 1052–57.

92. Neely Tucker, *Damages Awarded to Terror Victim's Family*, WASH. POST, Feb. 7, 2002, at A26. Tucker states that the U.S. "has paid about $350 million from the general treasury to satisfy some claims" against Iran. *Id.; see also* Barry E. Carter, *Terrorism Supported by Rogue States: Some Foreign Policy Questions Created by Involving U.S. Courts*, 36 NEW ENG. L. REV. 933, 937 (2002); Miriam Shaviv, *Just Rewards*, JERUSALEM POST, Feb. 15, 2002, at 2B. Reflecting on his struggle to collect, Stephen Flatow stated, "[T]he fact that we got any money made me the most surprised man on earth." *Id.* The tenth case, *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78 (2002), awarded plaintiffs over $28 million in compensatory damages and $300 million in punitive damages.

Although some plaintiffs received long-awaited payment, the 2000 legislation made little headway in the effort to unfreeze assets to satisfy judgments in terrorism suits. Part of the problem was that the Act only addressed a few of the many plaintiffs who had been awarded judgments against state sponsors of terrorism. Because Clinton was unwilling to sign legislation that would have made all frozen assets of designated terrorists states vulnerable to attachment,[93] Congress compromised and permitted a few designated plaintiffs to receive payment.[94] Other plaintiffs, including those pursuing suits against Iraq and Libya, were not even mentioned in the legislation.

The payments to Iran plaintiffs represent another type of compromise. Rather than jeopardize relations with Iran, Congress created a way for the plaintiffs to be paid without using Iranian assets.[95] The 2000 legislation placed the responsibility for collecting from the defendant foreign state upon the Executive branch, and in the meantime, the U.S. Treasury bears the burden of funding Iran's judgment payments.[96] Unless the United States pursues repayment for the awards it has paid from the treasury fund, then the suits brought under the terrorist exception have no deterrent effect against Iran at all.[97] As one commentator observes, "[I]t is hard to believe that Iran will be cowed into moderation by the prospect of having large judgments paid on its behalf by the U.S. Treasury."[98]

### *F. Terrorism Risk Insurance Act of 2002*

The most recent development in terrorist-exception legislation came in November 2002 when President Bush signed the Terrorism Risk Insurance Act of 2002.[99] This legislation was designed to "provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans."[100] Another supporter optimistically claimed that the new legislation "will cut financing for terrorism off at the knees" by removing the barriers to the release of frozen assets.[101]

The Terrorism Risk Insurance Act was specifically designed to help successful plaintiffs collect judgments against foreign state sponsors of terrorism. First, the Act removed barriers to the attachment of blocked assets by severely

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For a list of plaintiffs receiving payments under the 2000 legislation, see ACKERMAN, *supra* note 11, at App. I.

93. *See 60 Minutes*, *supra* note 70.

94. *See id.*

95. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(b)(2), 114 Stat. 1464 (2000) (codified as amended in 28 U.S.C. § 1610 (2003)).

96. *See* Miller, *supra* note 78, at A1, A10.

97. Former hostage Terry Southerland, for example, has stated that using taxpayer funds for compensation "defeats the whole purpose" of the suits. Shawn Zeller, *Hoping to Thaw Those Frozen Funds*, NAT'L J., Oct. 27, 2001.

98. Parloff, *supra* note 90.

99. Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, § 201, 116 Stat. 2322 (2002), *codified in* 15 U.S.C. §§ 1610 note, 28 U.S.C. §§ 1606, 1610 (2003).

100. 148 CONG. REC. S11,524, S11,527 (2002) (statement of Senator Harkin).

101. 148 CONG. REC. H6133, H6137 (2002) (statement of Representative Shays).

limiting the availability of the presidential waiver to protect blocked assets.[102] While the old legislation permitted a blanket waiver, the new Act stipulates that a President may no longer waive the attachment of all blocked assets in the interest of national security.[103] Rather, a President must make "an asset-by-asset" determination that "a waiver is necessary in the general national security interest."[104] More importantly, even if the waiver is invoked, the President can use it only to protect a few types of diplomatic property specifically subject to the Vienna Convention.[105] All other types of blocked assets may be attached.[106] A Conference Report on the bill explains that the new Act "eliminates the effect of any [previous] [p]residential waiver . . . making clear that all such judgments are enforceable" against blocked assets.[107]

The Act also contains specific provisions for the payment of judgments against Iran.[108] First, the Act prioritizes payment to a few plaintiffs who secured judgments on specific dates.[109] Other plaintiffs holding judgments are next in line, followed by those with decisions currently pending.[110] Future plaintiffs will be paid with whatever remains of Iran's frozen assets.[111] Although supporters of the Act argued that all plaintiffs holding judgments against Iran would be treated equally "to the maximum extent possible," some plaintiffs will clearly collect more than others, and the fate of future victims of terrorism who will bring suit in the coming years is uncertain at best.[112] Moreover, the system of payment ensures that no plaintiff will receive the full amount of the judgment awarded by the courts, in part because judgments will be paid on a by-share basis and in part because payment is limited to compensatory damages only.[113] Punitive damages are not mentioned anywhere in the 2002 legislation.

This latest modification to plaintiffs' remedies will not solve the myriad problems with the terrorist exception to the FSIA. First, the presidential waiver is limited but not eliminated—the President could certainly continue to hold on to frozen assets if foreign policy goals so dictated. The new legislation also gives plaintiffs the promise of payment, but efforts to secure payment will likely involve

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102. Terrorism Risk Insurance Act of 2002 § 201(b).

103. *Id.*

104. *Id.* § 201(b)(1).

105. *Id.* Not all types of diplomatic property under the Vienna Convention can be protected. For example, any property that has been used "for nondiplomatic purposes," such as "rental property," can be attached. *Id.* § 201(b)(2)(A).

106. *Id.* § 201(a).

107. 148 CONG. REC. H8722, H8728 (2002).

108. Terrorism Risk Insurance Act of 2002 § 201(c)–(d).

109. *Id.* § 201(c); Marcia Coyle, *Helping the Victims, Congress Drops Barriers to Seizing Foreign Assets by Lawsuit Winners*, NAT'L L.J., Nov. 25, 2002, at A1.

110. Terrorism Risk Insurance Act of 2002 § 201(d).

111. *Id.*

112. 148 CONG. REC. S11,528 (2002) (statement of Senator Harkin). At the same hearings, Senator Kyl noted that the remaining Iranian funds ($30 million not disbursed after the 2000 legislation) would be divided up among two plaintiffs, leaving everyone else with nothing. *Id.* at S11,527.

113. Terrorism Risk Insurance Act of 2002 § 201(c)–(d).

more litigation to force the U.S. government to release frozen assets.[114] Further, the State Department strongly opposed the new legislation permitting the attachment of blocked assets, and the State Department will probably continue to intervene in litigation opposing the unfreezing of assets.[115] Finally, plaintiffs with claims against Iran will be paid unequally, based on how quickly they were able to secure judgments.[116] This latest amendment, like others before it, does little to address the problems with payment of judgments in terrorist-exception cases. However, payment to plaintiffs is only one of many troubling aspects of the terrorist-exception suits.

## III. THE COSTS OF LAWSUITS AGAINST STATE SPONSORS OF TERRORISM

Although victims of terrorism and kidnappings undoubtedly deserve to be compensated for their suffering, the role of the U.S. courts in securing compensation is problematic. The terrorist exception interferes with U.S. foreign policy, leaves the United States vulnerable to retaliation, and treats plaintiffs unequally and unfairly.

### *A. Interference with U.S. Foreign Policy Objectives*

Those who favor the terrorist exception suits often defend the suits by arguing that the war on terrorism cannot have too many fronts. For example, at least one court discounted the possibility that the suits could interfere with U.S. foreign policy, arguing that suits against terrorist sponsors could only help the fight against terrorism.[117] Other advocates of terrorist-exception suits argue more directly that the campaign against terrorism can only be strengthened by adding "the force of public advocates—angry victims and aggressive lawyers" to the fray.[118] Yet critics have warned against this type of "plaintiff's diplomacy."[119] Perhaps the most significant problem with permitting lawsuits against a few designated states is that the suits intrude on one policy area long considered outside the province of courts: U.S. diplomacy.[120] At least one commentator argues that it is unwise at best to permit lawyers to act as "private secretar[ies] of state," who determine when and how to confront state sponsors of terrorism.[121] Terrorist-exception suits threaten to interfere with U.S. foreign policy in several ways.

First, the suits themselves are often one-sided. Few foreign states have appeared to defend any aspect of the cases brought under the terrorist exception, and despite the fact that judges must hear evidence before entering judgment, the

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114. Coyle, *supra* note 110, at A7. The U.S. government has already opposed one plaintiff's attempt to attach Iraqi assets pursuant to the new legislation. The assets are held by JP Morgan Chase. *Id.* at A7.

115. *Id.*

116. Terrorism Risk Insurance Act of 2002 § 201(c)–(d).

117. Flatow v. Iran, 999 F. Supp. 1, 15 (D.D.C. 1998).

118. Pamela S. Falk, *Suing Saddam Hussein*, N.Y. TIMES, Nov. 22, 2002, at A27.

119. Slaughter & Bosco, *supra* note 5.

120. *Id.*

121. Parloff, *supra* note 90.

fairness of these default proceedings is questionable.[122] Judges who hear cases brought under the terrorist exception run the risk of becoming politicized and drawn into taking sides on foreign policy questions, sacrificing their impartiality in their desire to bring justice to victims of terrorism.[123] The nature of these suits against designated pariah states gives foreign state defendants little incentive to pay any part of the huge default judgments routinely awarded to plaintiffs.[124]

Paying plaintiffs with the blocked assets of foreign states also creates a set of foreign policy problems because depletion of blocked assets reduces executive leverage over rogue states. The Clinton Administration strenuously objected to legislation allowing terrorist suit plaintiffs to attach blocked assets, reasoning that the President's control over foreign assets has been accepted as a necessary component of a flexible and responsive foreign policy.[125] Long prior to the enactment of the terrorist exception, Congress had recognized the importance of frozen assets by giving the president statutory authority over frozen assets with two acts: the International Emergency Economic Powers Act[126] and the Trading with the Enemy Act.[127] The Supreme Court has agreed that Presidential ability to block assets can only strengthen U.S. foreign policy.[128]

In practice, frozen assets have proven useful as "diplomatic bargaining chips" to encourage a government to cooperate or to reward regime change.[129] For example, former Treasury Deputy Secretary Stuart Eizenstat noted that "the leverage provided by approximately $350 million in blocked assets . . . played an important role in persuading Vietnam's leadership to address important U.S. concerns in the normalization process," including accounting for POWs and MIAs from the Vietnam War.[130] Perhaps more famously, the release of blocked assets played a "critical role" in freeing the U.S. hostages from Iran in 1981.[131] Blocked

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122. Slaughter & Bosco, *supra* note 5, at 114.

123. *Id.*

124. Carter, *supra* note 93, at 937.

125. *See* Mangan, *supra* note 4, at 1067–68.

126. 50 U.S.C. §§ 1701-06 (2003).

127. 50 U.S.C. App. §§ 1–6, 7–39, 41–44 (2003); *Victims' Access Hearings*, *supra* note 9, at 25 (testimony of Stuart E. Eizenstat, Treasury Deputy Secretary). For a discussion of the use of frozen assets in fighting terrorism, see Rudolph Lehrer, Comment, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Foreign Policy in its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333 (2002).

128. Dames & Moore v. Regan, 453 U.S. 654, 673 (1981).

129. *Lobbying: K Street for December 21, 2001*, NAT'L J., Dec. 21, 2002.

130. *Victims' Access Hearings*, *supra* note 9, at 23 (prepared statement of Stuart E. Eizenstat, Treasury Deputy Secretary).

131. Mowbray, *supra* note 88 (citing letter from Deputy Secretary of State Richard Armitage). Several officials noted in a joint statement to Congress that "the critical bargaining chip" in the Iran Hostage Crisis was the $10 billion in assets that had been blocked after the U.S. embassy was taken. The authors of the statement concluded, "[W]e would not have been able to secure the safe release of the hostages . . . if those blocked assets had not been available." H.R. REP. NO. 106-733, at 13–14 (2000) (Joint testimony of Treasury Deputy Secretary Suart E. Eizenstat, Defense Department Undersecretary for Policy Walter Slocombe, and State Department Under Secretary for Policy Thomas Pickering); *see also Morning Edition: Congress Passes Legislation Making it Easier for*

assets have been used to help U.S. citizens achieve settlements with other nations as well, including Romania, Bulgaria, and Cambodia.[132] The potential to use blocked assets to further U.S. foreign policy goals would be eliminated if the President lost the ability to control the frozen assets or if blocked assets of critical nations disappeared into plaintiffs' pockets. As former Treasury Deputy Secretary Eizenstat argued, the loss of frozen assets would "seriously weaken" the President's ability to deal with "threats to our national security."[133]

A second foreign policy problem presented by the terrorist-exception suits is that both the suits and the liquidation of blocked assets could hinder efforts to normalize relations with the designated state sponsors of terrorism. In fact, Congress has stated that it favors making defendant nations pay the judgments as a precondition to normalizing relations.[134] Such policies ignore the possibility of regime change,[135] and demands for payment are likely to burden future relations with the designated rogue nations.[136] Historically, when two countries resume normal relations after a period of tension, outstanding claims between them are settled by an agreement that limits the liability of each state to a specified amount.[137] The terrorism suits could prevent such an arrangement because judgment creditors, along with Congress, might insist that a foreign state pay all compensatory and punitive damages as a precondition to normalizing relations.[138] A nation like Iran might determine that it cannot pay the billions it owes due to terrorism suits, thereby preventing normalization of relations with the United States, no matter how desirable.[139] Moreover, a new, moderate government in any foreign state might resent paying for the crimes of its predecessors.[140]

If friendly overtures to a new government in a country like Iran are accompanied by a bill for terrorist-suit judgments, the costs to the United States could be high. For example, a creditor nation might decide to do business with

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*Victims of Foreign Terrorism to Collect Money* (National Public Radio broadcast, Nov. 21, 2002), *available at* 2002 WL 3190264 [hereinafter *Morning Edition*].

132. *Victims' Access Hearings*, *supra* note 9, at 23 (testimony of Stuart E. Eizenstat, Treasury Deputy Secretary).

133. *Id.*

134. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(d), 114 Stat. 1464 (2000) (codified as amended in 28 U.S.C. §§ 1606, 1610 (2003)) ("It is the sense of the Congress that the President should not normalize relations between the United States and Iran until the claims subrogated have been dealt with to the satisfaction of the United States.").

135. Some argue regime change in the seven designated states is not likely. 148 CONG. REC. S11,527 (2002) (statement of Senator Harkin). International affairs are not easily predictable; for example, in the mid-1980s few saw the possibility for a radical regime change in the Soviet Block.

136. Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 700 (1999).

137. Carter, *supra* note 92, at 938.

138. Congress supports payment of judgments as a condition to normalizing relations. *See* Victims of Trafficking and Violence Protection Act of 2000 § 2002(d).

139. *See* Carter, *supra* note 92, at 938.

140. *See* Parloff, *supra* note 90.

Europe or Japan rather than pay billions in order to normalize trade relations with the United States.[141] The future of U.S. foreign policy should not be jeopardized by judgments rendered in U.S. courts.

Third, allowing plaintiffs to attach defendant states' frozen assets permits courts to act in a way that violates U.S. treaty obligations, especially with respect to those types of blocked assets that are directly controlled by international agreements.[142] Former Treasury Deputy Secretary Eizenstat claims, for example, that our "legal obligation to prevent the attachment of diplomatic property could not be clearer."[143] The Vienna Convention on Diplomatic Relations requires the United States to protect the premises of diplomatic and consular missions, along with their personal and real property and archives.[144] Nonetheless, section 201 of the Terrorism Risk Insurance Act permits plaintiffs to attach some of this property, in direct contravention of the United States' international obligations.[145]

Congress and the courts hearing the suits against Iran have also ignored specific international agreements that protect many Iranian assets. Pursuant to the agreement that freed the hostages in 1981, all claims between the United States and Iran are subject to the Iran-United States Claims Tribunal in the Hague.[146] Claims against both sides are still pending, and the Tribunal could order the United States to pay millions to Iran to settle outstanding claims.[147] Alerted to this possibility, Congress has considered allowing plaintiffs with judgments against Iran to garnish these Tribunal award payments.[148] In other words, rather than paying Iran, the United States would pay the successful plaintiffs. The problem with this idea according to Eizenstat is that "allowing private litigants to garnish amounts we owe Iran under Tribunal awards would not discharge our liability to Iran to pay such money."[149] The result could be double taxpayer liability for the awards if the United States is forced to pay Iran as well as the plaintiffs.[150]

In its eagerness to compensate victims of terrorism, Congress has also ignored international agreements governing lawsuits against foreign states. The most pointed example involves a suit brought by the U.S. citizens who were held hostage in Iran for 444 days from 1979 to 1981.[151] In order to secure the release of

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141. Carter, *supra* note 92, at 938.

142. *See infra* notes 145–51 and accompanying text.

143. *Victims' Access Hearings*, *supra* note 9, at 36 (prepared statement of Stuart E. Eizenstat, Treasury Deputy Secretary).

144. *Id.*

145. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002) (codified in 28 U.S.C. §§ 1606, 1610 (2003)).

146. *Victims' Access Hearings*, *supra* note 9, at 38 (prepared statement of Stuart E. Eizenstat, Treasury Deputy Secretary).

147. *Id.* Eizenstat states that Iran has billions of dollars in claims pending against the United States, and United States is contesting these claims. *Id.*

148. *Id.*

149. *Id.* Eizenstat notes that the Tribunal awards are enforceable in the courts of any country, so Iran could enforce awards against non-immune United States property located in other countries if the United States does not pay voluntarily.

150. *Id.*

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

these hostages in 1981, the United States signed the Algiers Accords, which expressly forbid suits against Iran for damages arising from the hostage crisis.[152] When the former hostages attempted to sue Iran under the terrorist exception, the United States intervened in the case, pointing out that the suit was expressly barred by the Algiers Accords.[153] While the decision whether to permit the suit to go forward was still pending, the former hostages petitioned Congress to create a way for them to bring suit against Iran.[154] In response, Congress tried to make an end-run around the Algiers Accords, amending part of the terrorism-exception statute to specifically permit the hostages' suit, "notwithstanding any other authority."[155] The court hearing the former hostages' case took a dim view of Congress' attempt to interfere in the litigation, however, and stated that Congress had failed to clearly abrogate the Algiers Accords.[156] The case was dismissed for lack of jurisdiction under a different rationale.[157]

Suits against state sponsors of terrorism permit courts to interfere with U.S. foreign policy, potentially jeopardizing U.S. relations with other nations and efforts to stabilize regions like the Middle East. The courts' incursion into foreign policy is but one of several troubling problems with these lawsuits.

Attempts by U.S. courts to compel distribution of foreign states' frozen assets to terrorism-exception plaintiffs could leave the United States vulnerable to retaliatory actions by other nations. By ignoring our obligation to protect diplomatic property of other nations, U.S. property abroad becomes increasingly vulnerable. Commentators have pointed out that "sovereign immunity is meant to be a reciprocal arrangement."[158] By permitting terrorism lawsuits against other nations, the United States invites other nations also to ignore these traditional diplomatic protections. The United States has a great deal to lose: U.S. diplomatic property abroad is valued at $12 to $15 billion.[159] If the United States refuses to guarantee protection to the diplomatic property of other nations, then it should

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152. Sean D. Murphy, *Lawsuit by U.S. Hostages Against Iran*, 96 AM. J. INT'L L. 463, 464 (2002); *see also* J. Scott Orr, *Held by Iran, Then Kept From Suing—Hostages of '79 Are Fighting U.S. Over the Clause That Freed Them*, NEWARK STAR-LEDGER, Jan. 20, 2002. Bush encouraged the courts to act "in a manner consistent with the obligations of the U.S. under the Algiers Accords," but Congress stated in a conference report that the former hostages have a claim against Iran "notwithstanding any other authority." *Id.*

153. *Roeder*, 195 F. Supp. 2d at 144–46.

154. Murphy, *supra* note 153, at 465.

155. *Roeder*, 195 F. Supp. 2d at 152–54, *citing* H.R. CONF. REP. NO. 107-350, at 422–23.

156. *Id.* at 145. Describing Congress' attempt to legislate a cause of action for the former hostages, the court stated: "Rather than proceed with the requisite clarity and assurance of purpose needed when legislating in the realm of foreign affairs, Congress chose to enact two provisions about which only one thing is clear: Congress' intent to interfere with ongoing litigation." *Id.*

157. *Id.* at 160–61; *see also* discussion *infra* notes 174–78 and accompanying text.

158. Slaughter & Bosco, *supra* note 5, at 113.

159. *Victims' Access Hearings*, *supra* note 9, at 36 (prepared statement of Stuart E. Eizenstat, Treasury Deputy Secretary).

expect other countries to target U.S. diplomatic property if relations with the United States go sour.[160]

If the United States allows suits against designated terrorist states, then the United States must be prepared to pay for its own terrorist acts.[161] Commentators have pointed out that the United States has sponsored terrorist groups and military interventions in many parts of the world.[162] Because the United States has "terrorized large swaths of the world through decades of military interventions and support for terrorist regimes and organizations," the United States should not be surprised if other nations consider the United States to be a sponsor of terrorism.[163] For example, although the Brothers to the Rescue families successfully sued Cuba as a sponsor of terrorism for shooting down the Brothers to the Rescue planes, the Cuban government might be justified in believing that the Brothers—with their aggressively anti-Castro policy and actions—provoked retaliation.[164] Richard Mosk, who served on the Iran-United States Claims Tribunal, illustrates another problem with the terrorist-exception suits.[165] Mosk points out that the United States funded the Taliban "way back."[166] Therefore, he wonders, "Are we responsible for what the Taliban did?"[167] He concludes that such problems with the terrorist-exception suits "have [not] been thoroughly thought out."[168]

At least two nations have responded to the terrorist-exception suits with reciprocal policies. After several terrorist-exception suits were decided against Iran, the Iranian parliament expressed its disapproval by enacting legislation allowing Iranian "victims of U.S. interference" to sue the United States for damages.[169] The legislation was especially aimed at Iranian citizens injured in the 1980 to 1988 Iran-Iraq war.[170] Iran claims that if some its citizens suffered injuries from "chemical weapons provided by the United States and other western countries for Iraq."[171] Cuba has also enacted a policy designed to strike back at

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160. Slaughter & Bosco, *supra* note 5, at 113.

161. *See* Sealing, *supra* note 14, at 121.

162. *See, e.g.*, Beth Stephens, *Accountability Without Hypocrisy: Consistent Standards, Honest History*, 36 NEW ENG. L. REV. 919, 922 (2002).

163. *Id.* at 921.

164. *60 Minutes*, *supra* note 69. One month before the attack on Brothers to the Rescue, the group had reportedly "buzzed" Havana and dropped anti-Castro leaflets. *Id.* The State Department had also warned the group to stop invading Cuban airspace. *Id.*

165. *All Things Considered: New Federal Law Says Victims of Terrorism Can Lay Claim to Frozen Assets* (National Public Radio broadcast, Jan. 31, 2003), *available at* 2003 WL 5577935 [hereinafter *All Things Considered*]. Justice Mosk now serves on the California Court of Appeals. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Iran's MPs Cry "Down With America," Approve Lawsuits Against the United States*, AGENCE FRANCE PRESSE, Nov. 1, 2000.

170. *See Iran's Judiciary Head Slams U.S. Judges for Diverting Iranian Assets*, AGENCE FRANCE PRESSE, Jan. 21, 2003.

171. *Id.*

lawsuits against it.[172] The United States cannot enact a one-sided policy against a select group of nations without expecting some measure of retaliation.

### *B. Inconsistent Treatment of Plaintiffs*

The terrorist exception is particularly flawed in that it treats a select few plaintiffs very favorably, while not providing a cause of action for other similarly situated plaintiffs. Victims of terrorist attacks can be denied a cause of action under the terrorist exception in various ways. For example, a group of plaintiffs attempting to sue Iran ran afoul of a statutory requirement that a foreign state must be designated a state sponsor of terrorism at the time of the terrorist act that caused the suit.[173] The case was brought by U.S. citizens who were held in Tehran from 1979 to 1981.[174] Encouraged by other successful suits against Iran for sponsoring terrorist activities, the former hostages sued Iran, asking for compensatory and punitive damages of $33 billion.[175] The United States intervened in the suit, taking a position against the former hostages and arguing that the court had no jurisdiction over Iran because Iran was not designated a state sponsor of terrorism until 1984, several years after the hostages were freed.[176] The court agreed, and the case was dismissed for lack of jurisdiction.[177]

Another significant limitation on terrorist-exception suits is that the FSIA permits such suits against only seven nations, those designated by the State Department to be state sponsors of terrorism.[178] The same seven nations have been listed as state sponsors of terrorism since the State Department implemented the classification in 1979.[179] These nations are not currently the world's only backers of terrorism, or even the primary backers of terrorism. Rather, these seven nations have been singled out for policy reasons.[180]

Many victims of terrorism are therefore left without a remedy simply because some terrorist-sponsoring states do not happen to be on the State Department's list. For example, at least one U.S. citizen has attempted to sue Saudi Arabia for state-sponsored terrorist acts including kidnapping and torture.[181] The U.S. Supreme Court dismissed the suit, holding that the Court had no jurisdiction over Saudi Arabia because the case did not come under any of the exceptions for immunity under the FSIA.[182] Saudi Arabia has never been designated as a state

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172. Mangan, *supra* note 4, at 1058.

173. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 159–60 (D.D.C. 2002).

174. *Id.*

175. *Id.* at 144.

176. *Id.* at 159–60; *see also* Murphy, *supra* note 152.

177. *Roeder*, 195 F. Supp. 2d at 160–61.

178. *See* Sealing, *supra* note 14, at 135–38.

179. *Id.* at 135.

180. *Id.* at 135–36.

181. *See* Saudi Arabia v. Nelson, 507 U.S. 349 (1993). Nelson unsuccessfully argued that his suit was based upon a "commercial activity" of the Saudi government. *Id.* at 356. The Court disagreed, finding that Saudi Arabia's actions, including Nelson's wrongful arrest, detention, and torture, were based on the government's police power. *Id.* at 361.

182. *Id.*

sponsor of terrorism, so Saudi Arabia cannot at this time be sued under the terrorist exception, despite the fact that at least one report claims that Saudi Arabia is the world's largest source of terrorist financing.[183] Family members of victims of the embassy bombings in Tanzania and Kenya are also barred from suing under the current laws because none of the seven designated states has been connected with those events.[184]

Nor have the events of September 11th been clearly connected to any of the seven designated state sponsors of terrorism.[185] Although September 11th plaintiffs might be able to bring suit against non-state actors, such as al Qaida, neither Afghanistan nor Saudi Arabia, home of bin Laden, has been designated a state sponsor of terrorism.[186] Suits against al Qaida are unlikely to yield high awards, however, because the U.S. Treasury holds less than $1.2 million in al Qaida frozen assets.[187] September 11th plaintiffs have been permitted to recover from a specially created Victim Compensation Fund, but the largest award for a September 11th victim or family is estimated to be only $6 million—far less than the judgments routinely awarded in the suits brought under the state sponsors of terrorism exception.[188]

Because only seven nations have been designated state sponsors of terrorism, commentators have speculated that plaintiffs searching for a way to recover from terrorist attacks might look for a nexus to one of the designated states rather than pursue other remedies.[189] Several lawsuits appear to prove this point. For example, hundreds of September 11th families have joined a $1 trillion lawsuit against one of the designated state sponsors of terrorism: Sudan.[190] Some of the same September 11th plaintiffs have also sued Iran and Iraq for their complicity

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183. *See Those Perfidious Princes, Continued*, N.Y. POST, Oct. 19, 2002, at 16; *see also* Sealing, *supra* note 14, at 140 (noting that fifteen of nineteen September 11th hijackers were born in Saudi Arabia, as was bin Laden). Sealing notes that Saudi Arabia is nominally an ally, but argues that the designation might have "more to do with keeping America's SUVs on the road than with reality or justice." *Id.* at 140.

184. *All Things Considered*, *supra* note 165 (comments of Pamela Falk).

185. Several lawsuits have been filed alleging the involvement of Iraq and Sudan, but no court has yet held either nation liable for the September 11th attacks. *See infra* notes 191–92 and accompanying text.

186. The State Department has already intervened seeking dismissal of September 11th plaintiffs' $1 trillion suit against the Saudi royal family, stating that the lawsuit would harm "bilateral relations." Mowbray, *supra* note 88.

187. U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, TERRORIST ASSETS REPORT: CALENDAR YEAR 2002 ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES AND INTERNATIONAL TERRORIST PROGRAM DESIGNEES, at 6–7, *available at* http://www.treas.gov/offices/enforcement/ofac/reports/tar2001short.pdf [hereinafter TERRORIST ASSETS REPORT] (as of March 23, 2003).

188. *See* Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, NEW YORKER, Nov. 25, 2002 at 47.

189. *Foreign Policy by Lawsuit*, WASH. POST, Dec. 9, 2002, at A22.

190. Marcia Coyle, *A Case of Terrorism: How Two Lawyers Brought a Suit They Just Might Win*, NAT'L L.J., Nov. 11, 2002, at A1; Alan Dowd, *Keep Legal Battles off the Battlefield*, AM. ENTERPRISE, Jan. 1, 2003, at 38.

and support of the attacks.[191] In perhaps a bigger stretch, Judicial Watch filed a lawsuit against Iraq alleging Iraqi involvement in the Oklahoma City bombing.[192] One commentator fears that such lawsuits foreshadow "a future in which lawyers bring improbable claims knowing the defendants will default."[193] The new Terrorism Risk Insurance Act could provide an incentive for plaintiffs to sue one of the designated state sponsors of terrorism because the Act increases plaintiffs' access to the states' frozen assets.[194] One commentator noted that September 11th victims "have been tracking this legislation closely, and the fact that it may be easier now to access real money after a trial may well influence many families to take their claims to the courts."[195]

Even terrorist victims who win cases under the terrorist-state exception will probably feel less than satisfied with their judgments. Those who are awarded judgments are unlikely to be compensated fully, if at all, for the simple reason that the money is not available.[196] Although the total value of blocked assets of the seven nations that can be sued for acts of terrorism is approximately $4 billion, most of that amount comes from only two states: Iraq and Libya.[197] The most commonly sued state, Iran, has only $251.9 million in assets,[198] and the State Department has warned that Iran's blocked assets are not sufficient to pay even compensatory damages in existing judgments.[199] The total number of judgments won or pending in all terrorism-exception cases is about $2 billion,[200] and hundreds more U.S. citizens could still bring claims.[201] Distributing frozen assets to the first plaintiffs to win judgments would create "gross inequities in the amounts of compensation received by similarly situated U.S. nationals with claims against foreign governments" because there will simply not be enough funds to go around.[202] The blocked assets will eventually run out and leave future victims without compensation.[203] Such a situation would increase the frustration of

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191. Coyle, *A Case of Terrorism*, *supra* note 191; Dowd, *supra* note 191.

192. Parloff, *supra* note 90; *see also Foreign Policy by Lawsuit*, *supra* note 190, at A22.

193. *Foreign Policy by Lawsuit*, *supra* note 189, at A22.

194. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002) (codified in 28 U.S.C. §§ 1606, 1610 (2003)).

195. *Morning Edition*, *supra* note 131.

196. Carter argues that "[c]ountries that might run athwart of U.S. foreign policy learned not to leave large assets in the United States after the United States froze about $12 billion of Iranian assets during the 1979–81 hostage crisis." Carter, *supra* note 92, at 937.

197. TERRORIST ASSETS REPORT, *supra* note 188, at 1, 10. However, Pamela Falk contends that up to $7 billion lie in "much murkier reach" belonging to foreign terrorist organizations. *See* Coyle, *supra* note 110, at A7.

198. TERRORIST ASSETS REPORT, *supra* note 187, at 10.

199. Coyle, *supra* note 109, at A7.

200. *Morning Edition*, *supra* note 131.

201. *Terror Victims Able to Collect Judgments*, FORT WORTH STAR-TELEGRAM, Nov. 27, 2002, at 18.

202. *Victims' Access Hearings*, *supra* note 9 (prepared statement of Stuart Eizenstadt, former Treasury Deputy Secretary).

203. *All Things Considered*, *supra* note 165; 148 CONG. REC. S11,528 (2002) (statement of Senator Kyl).

successful plaintiffs rather than provide the compensation and closure that the terrorism exception was intended to give victims and their families.

The problem with unequal compensation becomes more complicated if other U.S. citizens with claims against the same foreign states are taken into consideration. In opposing the release of blocked Cuban assets to the Brothers to the Rescue plaintiffs, former Treasury Deputy Secretary Stuart Eizenstat explained that thousands of other U.S. citizens have also lodged claims against Cuba.[204] Many of these claims date back to the Cuban Revolution and the early days of Castro's regime.[205] The U.S. government has certified nearly six thousand claims asking for compensation for the losses of homes and businesses in Cuba, as well as for the deaths of relatives at the hands of the Cuban government.[206] For example, one woman requested compensation for the death of her father, who was executed in 1961 after the Cuban government accused him of being a spy.[207] She was told that although the United States controlled Cuban funds, none of these frozen assets would be released until the United States normalized relations with Cuba.[208] She was shocked, therefore, to learn that the Brothers to the Rescue plaintiffs would be paid out of these frozen funds before she was.[209] Given the number of legitimate claims against Cuba, Eizenstat argued that awarding half the total amount of blocked Cuban assets to only the three Brothers to the Rescue families was unfair.[210] The terrorism-exception suits create widely divergent results, leaving some plaintiffs with huge settlement payments and others with nothing. These inequities, along with other complications in securing payment, have left some plaintiffs understandably frustrated.

### *C. Plaintiffs and Courts See the U.S. Government as Obstructing Payment of Judgments*

Yet another problem with the suits is that, far from providing plaintiffs compensation and closure, the terrorist-exception suits have left some families disappointed. For example, plaintiffs who have been unable to collect judgments especially resent the role the executive branch has taken in resisting the release of frozen assets. Explaining his frustration at the government's refusal to unfreeze Iran's assets, former Iran hostage David Roeder[211] stated, "[I]t never occurred to me when I was getting the crap beat out of me in a Tehran jail cell that I would one day fight the same government that I was defending . . . It's just so demoralizing."[212] Jack Frazier, a plaintiff waiting for a payment for his successful

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204. Parloff, *supra* note 90.
205. *See 60 Minutes*, *supra* note 69.
206. Parloff, *supra* note 90.
207. *60 Minutes*, *supra* note 69.
208. *Id.*
209. *Id.*
210. Parloff, *supra* note 90; *see also 60 Minutes*, *supra* note 69.
211. Neely Tucker, *In Lawsuit Against Iran, Former Hostages Fight U.S. Government Calls Frozen Assets Untouchable*, WASH. POST, Dec. 13, 2001, at A1. Roeder was a U.S. Air Force attaché at the Tehran embassy. *Id.* at 1293.
212. *Id.*; *see also* Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities*

suit against Iraq, states that "[t]here's no compassion" from the government for his quest for payment.[213]

Even when plaintiffs have received payment, more often than not they have been paid directly out of the U.S. Treasury.[214] As litigator Allan Mendelsohn pointed out, "[T]he sad part is these hostages and terrorism victims think they're punishing Iran. . . . It's gross nonsense. What difference does it make to Iran if the U.S. treasury gives money to U.S. victims?"[215] Yet plaintiffs are not unaware that their suits against terrorist-sponsoring nations are having little deterrent effect. One critic of the policy, whose daughter died in the Pan Am 103 bombing, stated: "I could not take money this way. . . . It doesn't punish terrorists, it punishes taxpayers."[216]

The tangled legislation is much to blame for this situation. Victims of terrorism have a cause of action under U.S. law but few remedies in practice, owing to the lack of a workable system for payment of judgments. One litigator noted "'the utter absence of any coherent policy' by the federal government on payment of terrorist-related judgments."[217] At least one court hearing terrorist-exception suits has expressed frustration at the incoherent legislation that leaves successful plaintiffs unable to collect.[218] The District Court for the District of Columbia criticized lawmakers, stating that both the President and Congress "have expressed their support for these plaintiffs' quest for justice, while failing to act definitively to enable these former hostages to fulfill that quest."[219] That court was referring to the 1979 to 1981 hostages specifically,[220] but the criticism applies to all plaintiffs who have yet to receive the payment they were promised. The many attempts to fix the terrorism exception have served more to placate some plaintiffs with partial payments, while failing to address significant problems with the terrorist-exception suits.

### *D. The 2002 Amendments Will Complicate Rather Than Facilitate Payments to Plaintiffs*

The Terrorist Risk Insurance Act, passed in November 2002, is designed to facilitate compensation to those who have won judgments under the terrorist exception by increasing access to defendant states' frozen assets.[221] Given this new

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*Act*, 148 U. PA. L. REV. 1247, 1261–62 (2000) (noting that "from the perspective of the victims' families . . . the United States has sided with the terrorist nation against them"). In addition, Steven Flatow, plaintiff in several AEDPA cases, stated, "I find myself in the surreal position of being opposed by the State Department." *Id.*

213. Richard Leiby, *Hostage Situation: The Man of Steel was Broken in Iraq. He Believes Someone Should Pay for It*, WASH. POST, Nov. 15, 2002, at C1.

214. *See* discussion *supra* Part I.E.

215. Tucker, *supra* note 211, at A29.

216. Mangan, *supra* note 4, at 1058, *citing* Pauline Jelinek, *Terror Victims Criticize Compensation Plan*, CHATTANOOGA TIMES, Oct. 30, 2000, at A8.

217. Coyle, *supra* note 191, at A10 (comments of litigator Allan Mendelsohn).

218. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 145 (D.D.C. 2002).

219. *Id.*

220. *Id.*

221. *See supra* notes 101–02 and accompanying text.

legislation, some plaintiffs holding judgments in terrorist-exception suits have acted quickly to attach the frozen assets of foreign states.[222] Yet these attachments will probably do little to help plaintiffs collect the millions they are owed.

A recent case illustrates this point. In Florida, Ana Martinez was recently awarded $27 million in compensatory and punitive damages in a suit against Cuba.[223] In December 2002, her attorney announced that Martinez would attach a Cuban plane located in Miami and take the proceeds from the sale of the plane in order to partly satisfy the judgment.[224] While early estimates confidently predicted that the sale of the plane would yield approximately $40,000,[225] the highest bid for the plane at auction was only $6,500.[226] Although the attachment did break some ground, Martinez will have to attach a great number of Cuban planes to get her $27 million.[227]

Martinez has not been the only plaintiff successfully to attach assets. In January 2003, a federal judge in Chicago ordered that two condominiums owned by Iran be seized as part of a judgment.[228] The successful plaintiff who will benefit from the attachment is the widow of a terrorist victim who was killed during the hijacking of a Kuwaiti airliner.[229] Iranian-backed terrorists were responsible for the 1984 hijacking.[230] This attachment may be the first of many to cause the United States legal headaches internationally. The condominiums were used to house Iranian diplomatic staff before the hostage crisis in 1979, and are currently valued at approximately $700,000.[231] Because the buildings in question were once used for diplomatic residence, they may qualify for protection from attachment under the Vienna Convention.[232] Diplomatic residences are among the types of diplomatic property permitted to be attached by the 2002 legislation but expressly protected from attachment by the Vienna Convention, so this attachment may be the first of many that puts the United States in direct conflict with its international agreements to protect diplomatic property.[233]

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222. Peter Page, *With Purchase of Cuban-Owned Biplane, Miami Lawyer Makes "A Little Bit of History,"* PALM BEACH DAILY BUS. REV., Jan. 23, 2003, at 13; Kelley Quinn, *Iranian Property Here Seized to Satisfy "Terror" Judgment*, CHICAGO DAILY L. BULL., Jan. 22, 2003, at 1.

223. Page, *supra* note 222.

224. Coyle & Cunningham, *supra* note 66.

225. *Id.*

226. Page, *supra* note 222. At least part of the reason that the plane did not command a higher price is that the plane was too old and damaged to meet FAA requirements for airworthiness. *Id.*

227. *Id.*

228. Quinn, *supra* note 222.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Victims' Access Hearings*, *supra* note 9 (testimony of Stuart E. Eizenstat, Treasury Deputy Secretary); Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297 § 201, 116 Stat. 2322 (2002) (codified in 28 U.S.C. §§ 1606, 1610 (2003)).

233. Terrorism Risk Insurance Act of 2002 § 201.

Although the recent amendments indicate that some frozen assets might be released to satisfy a few plaintiffs' judgments, it is too early to tell what the real results of the new legislation will be. Should the new legislation fail to result in adequate compensation for successful plaintiffs, the U.S. Treasury could continue compensating plaintiffs until a workable system is established. If that occurs, one wonders how long taxpayers will tolerate the payment of hundreds of millions of dollars to select victims of terrorism.

## IV. ALTERNATIVES TO THE TERRORIST-EXCEPTION

The terrorist exception to the FSIA has not produced a workable system to compensate terrorist victims or to punish and deter terrorist-sponsoring states. Part of the problem is that U.S. courts are simply not equipped to function as an arm of U.S. foreign policy, and terrorist-sponsoring states are not the normal type of tortfeasor.[234] Rather than embarking on more fruitless attempts to make the terrorist exception work, other means of both compensation and deterrence should be sought.

Any system designed to combat terrorism and redress its victims is likely to be more effective if it is multinational. Efforts that involve many nations, rather than only the United States, will add an atmosphere of legitimacy and neutrality to the proceedings that is currently lacking in the terrorist-exception suits.[235] In addition, victim compensation is more likely to be accomplished if multinational efforts are used, because a victim of terrorism holding a judgment from an international court likely will be able to enforce the judgment in any country in which the defendant state holds assets.[236]

A number of international forums could be used to hear claims against state sponsors of terrorism. Specifically, several commentators have advocated the International Criminal Court (ICC) as an independent, neutral setting for judicial proceedings involving terrorist sponsors and their victims.[237] When operational, the ICC will be a permanent international forum that will have the power to try individuals, including government officials, for crimes involving the violation of international human rights.[238] The ICC is designed to adjudicate criminal and civil liability, as well as victim compensation, in a single forum, thus potentially providing an efficient and satisfactory outcome for suits involving international human rights violations.[239] The problem with using the ICC as a forum for suits involving terrorist attacks against U.S. citizens is that the United States has not yet

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234. Dowd, *supra* note 190.

235. Hoye, *supra* note 7, at 151.

236. Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L.J. 1, 45–46 (2002); John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 53–54 (1999).

237. *See* Hoye, *supra* note 7, at 148–49; Slaughter & Bosco, *supra* note 5, at 8. For a description of the ICC and its functions, see Diane Marie Amann & M.N.S. Sellers, *The United States and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002).

238. James Podgers, *Quest for Credibility: International Criminal Court Faces Startup Challenges*, 88 A.B.A. J. 16, 16 (2002).

239. Hoye, *supra* note 7, at 148.

ratified the treaty to participate in the ICC.[240] Critics believe that the United States is unlikely to do so, because U.S. officials fear that the ICC could potentially gain jurisdiction over members of the U.S. military.[241]

If the United States continues to refuse to participate in the ICC and persists in pursuing a unilateral response to terrorist attacks on U.S. citizens, then policymakers would be well advised to address the two goals of compensation for victims and deterring future attacks in different settings.[242] Deterrence is largely a foreign policy matter and should be left to the executive branch.[243] Victim compensation could be achieved separately from deterrence in the form of a neutral special victims' fund administered and paid for by the federal government.[244] Such a system could provide a fair, non-political, means of compensating terrorist victims and their families. To start, use of a victims' fund could eliminate some of the inequalities of the present system by compensating victims of terrorist acts perpetrated by states other than the seven currently designated as sponsors of terrorism.[245] In addition, under a neutral fund, a victim's ability to recover would not be dependent on the availability of a terrorist state's assets or a long legal battle to unfreeze blocked assets. Although paying the victims from federal funds would not immediately punish or deter terrorists, the U.S. government could still attempt to collect the amounts paid from the defendant states if relations with these states are normalized.[246] Amounts awarded to victims would undoubtedly have to be lower than the judgments currently awarded in terrorist-exception suits, but fairness to all might well outweigh the value of large judgments to a few.[247]

One example of such a system is the Victim Compensation Fund (VCF) created for September 11th claimants.[248] Under the VCF, the amount of a payment is based in large part on the economic loss suffered by a victim's death or disability.[249] Families who receive payment from the VCF relinquish their right to bring suit against certain parties, including the airlines, for damages from the events of September 11th.[250] Critics of the system argue that some payments are not high enough, but others point out that receiving payment under the fund "is better than the alternative, which is years of litigation and a high risk of getting

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240. *See* COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CICC STATE SIGNATURES AND RATIFICATIONS CHART, *at* http://www.iccnow.org/countryinfo/worldsigsandratifications.html (last visited Mar. 28, 2003). To date, eighty-nine nations have ratified the treaty. *Id.*

241. Amann & Sellers, *supra* note 237, at 384–86.

242. *See, e.g.*, Hoye, *supra* note 7, at 150–51.

243. *Id.*

244. Roger Parloff, *Tortageddon*, AM. LAW., Mar. 2002, at 106.

245. Heiser, *supra* note 236, at 48.

246. *Id.* at 48–49.

247. For example, awards to September 11th victims from the special Victim Compensation Fund average $1.5 million and will rarely exceed $6 million. Kolbert, *supra* note 188, at 47–48.

248. Parloff, *Tortageddon*, *supra* note 244; *see also* Heiser, *supra* note 236, at 47–49.

249. Kolbert, *supra* note 188, at 47.

250. *Id.* at 49.

nothing."[251] A non-confrontational system of awarding payment for damages suffered in terrorist acts would more effectively and equitably compensate victims, leaving the executive branch free to combat terrorist threats without the interference of lawsuits against terrorist states.

## V. CONCLUSION

The terrorist exception to the FSIA is an ineffective vehicle for accomplishing either punishment of terrorist-sponsoring states or compensating victims of terrorist attacks. The United States should bifurcate its response to terrorist attacks, allocating responsibility for a foreign policy response to the executive branch, while allowing the legislature to create a neutral means of victim compensation. Victim compensation can be achieved either through multinational efforts, such as the ICC, or neutral domestic means, such as a special victims fund. Victims should not be permitted directly to confront the state sponsors of terrorist acts; rather, this should be an aspect of U.S. diplomacy. The U.S. government should see that terrorist-victims are compensated, but terrorist-victims should not be able to seek multi-million dollar judgments in U.S. courts. There is no question that victims of terrorism deserve compensation or that terrorism should be deterred, but more effective means of accomplishing both ends must be found.

251. *Id.* at 48–49; *see also* Parloff, *supra* note 244.