

REACHING OUT TO THE INTERNATIONAL COMMUNITY: CIVIL LAWSUITS AS THE COMMON GROUND IN THE BATTLE AGAINST TERRORISM

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“In a very real sense, the world no longer has a choice between force and law. If civilization is to survive, it must choose the rule of law.”

— Dwight D. Eisenhower¹

INTRODUCTION

At a time when fears of terrorism dominate the international community and support for military action has eroded, global security seems elusive but essential. Can it possibly be achieved in a way that will unify the nations without generating unintended negative consequences for all? Perhaps now more than ever, global security requires a novel approach to the problem of international terrorism. One of the goals of the United Nations (“UN”) is to foster the civil discourse among nations. Indeed, this article emphasizes using a *civil*—not military or retaliatory—approach to respond to matters of international terrorism and international trade. In that spirit, this article posits a nonmilitary battle, a civil approach to dealing with a problem that concerns us all. Moreover, the only anticipated side-

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1. President Dwight D. Eisenhower, Statement by the President on the Observance of Law Day (Apr. 30, 1958), DWIGHT D. EISENHOWER MEMORIAL COMMISSION, <http://72.14.205.104/search?q=cache:Y94vKYVU0mMJ:w-ww.eisenhowermemorial.org/speeche/s/19580430%2520Statement%2520by%2520the%2520President%2520on%2520the%2520Obse rvance%2520of%2520Law%2520Day.htm> (in proclaiming the first “Law Day” as May 1st: “The reason is to remind us all that we as Americans live, every day of our lives, under a rule of law”).

effect will be a strengthening of, and increased universal respect for, the rule of law.

A new type of lawsuit has emerged in the United States, in which victims of terrorism, individually or in groups, have pursued the perpetrators of terrorist acts and the organizations or nations who have enabled and funded them. Pursuant to several U.S. statutes—the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996, the Torture Victim Protection Act, and the Alien Tort Claims Act—along with common law tort claims, such as aiding and abetting liability, plaintiff-victims not only deplete the assets of terrorist groups, but also prevent the means for future acts of terrorism.² Combining these statutes maximizes the types of money damages and the range of defendants that can be held civilly accountable, including terrorist groups, officials, and other individuals, along with the foreign states, organizations, and agencies that sponsor them.³

In deciding how to respond appropriately to international terrorism, a debate has generated four approaches.⁴ The first approach views terrorism as a crime which is subject to the rules, punishment, and procedural protections of the criminal justice system.⁵ The second approach considers the struggle to be a war on terrorism, invoking the rules and restraints provided by the

2. See generally Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suits*, 38 VAND. J. TRANSNAT'L L. 679 (2005) (detailing the cases decided under several U.S. statutes – the Antiterrorism Act of 1991, the Antiterrorism and Effective Death Penalty Act of 1996, the Torture Victim Protection Act, and the Alien Tort Claims Act).

3. *Id.* (proposing “an aggregate model for lawsuits by victims against terrorist groups, organizations, and state-sponsors of international terrorism, combining the claims, types of damages, and defendants accessible” under these federal statutes, as well as state common-law-tort claims including aiding and abetting liability).

4. See Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023, 1026-27 (2007) (discussing the four approaches in the literature in his article comparing “information operations,” which is the use of information technology to disrupt a country’s infrastructure, to terrorism and proposing a new international legal framework to deal with this type of threat).

5. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 30 (2003) (proposing that safeguards of the criminal process be applied for terrorist acts); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326-28 (2003) (arguing that claims of a U.S. “war” with al-Qaeda or terrorism carry dangerous implications for acts that should be treated as criminal); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004) (contending that, under the law of war, international terrorists are carrying out organized crime rather than “armed conflict”).

international law of war.⁶ The third theory utilizes both war and crime models as not mutually exclusive.⁷ Lastly, the fourth paradigm contends that terrorism fits neither model and should be treated under a new legal framework developed to respond most effectively.⁸ This article considers civil actions as an alternative approach, and not necessarily an exclusive one.

In Part I, this article reviews the U.S. law underlying some of the most recent cases by victims against terrorist groups, noting the difficulties that plaintiffs have encountered in collecting upon their judgments. Part II examines a new piece of legislation recently signed into law, referred to as the “Justice for Victims of Terrorism Act of 2007.” This new law will correct several limitations in previously existing law, expanding these lawsuits and facilitating the collection of civil judgments for victims against terrorist states through subsidiary banks in the United States.⁹ The new law will produce even more of these judgments. These current developments illustrate how U.S. courts and legislators are doing their part in the civil battle against terrorism.

6. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2070-71 (2005) (arguing that the characterization of the terrorist conflict as “war” by the political branches must be accepted by the courts); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 351-52 (2003) (suggesting a military approach be used to fight terrorism); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 577-79, 601 (2006) (portraying conflict with al-Qaeda as war); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 213 (2003) (rejecting the view that terrorism entails a “massive crime, rather than an act of war”).

7. See, e.g., Mark A. Drumbl, *‘Lesser Evils’ in the War on Terrorism*, 36 CASE W. RES. J. INT’L L. 335, 335-36 (2004) (supporting use of military means and criminal law to counter terrorism); Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 457-58, 484-85 (2002) (rejecting “the binary character of the war/crime” paradigm and proposing both crime and war-related responses to terrorism); Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 49 (2002) (describing the events on September 11 “as both a criminal act and an armed attack”).

8. See, e.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004) (rejecting the war/crime dichotomy in favor of a third framework); Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT’L L.J. 455, 476-77 (2007) (seeking new domestic legal regimes to deal with terrorism); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 761 (2004) (suggesting a reconsideration of the law of armed conflict together with international human rights law as a new antiterrorism paradigm).

9. See generally Strauss, *supra* note 2 (analyzing the limitations of the U.S. statutes under which terrorism victims may pursue certain types of defendants as well as restrictions on punitive or treble damages).

As the judgments from these civil lawsuits build, the United States is on the way to combating terrorism through this novel and different—nonmilitary—approach, whereby one can compensate the victims of terrorism and at the same time potentially deplete the assets and financial support for future terrorist acts. In Part III, this article explores the economic perspective that underlies the effectiveness of this tactic and considers extending this successful approach to international organizations. An analysis of the UN resolutions that authorize the freezing of assets overseas demonstrates that the foundation has already been established. In view of the international community's common goal of drying up the financial means for terrorism, it should build upon this foundation to strengthen and expand current initiatives. Part IV offers a proposal for a unified financial approach to eliminating the money for terrorist organizations that is clearly consistent with the public policy of the UN and its member nations.

Finally, the article concludes that support from the international community could overcome problems in enforcing judgments and exercising jurisdiction. Reciprocity and respect for these decisions of U.S. courts at the international level would bring the global community together around the common goal of ending terrorism. Moreover, member nations could empower national and international courts to provide victims with the ability to pursue their claims and to access frozen assets overseas. Especially in view of the eroding support for military action, these nations and organizations could find common ground in bolstering these civil lawsuits and thereby promote the rule of law.

I. A CIVIL APPROACH: LAWSUITS AS COMPENSATORY AND PREVENTATIVE

As the civil approach to fighting terrorism has taken hold in the United States, individual plaintiffs have sought to vindicate their lost loved ones, punish and deter the terrorist actors, and disrupt the financial trail that could lead to further acts of terror. It is instructive first to highlight some of these cases authorized by U.S. law, and then address the obstacles these plaintiffs have encountered, both in the United States and abroad, in seeking to execute court judgments. A victory in name alone is not enough; one must remember that, in addition to compensating the victims and their families, the ultimate goal of these lawsuits is to access and drain terrorist funds.

A. Recent U.S. Cases and Judgments Obtained

Following most if not all of the terrorist acts perpetrated upon U.S. citizens, the victims and/or their families have sought redress in court, sometimes many years later, against the terrorists and those individuals, organizations and nations that supported and enabled them, particularly through funding. In the United States, victims of international terrorism and their families have successfully pursued lawsuits under the Antiterrorism Act of 1991 (“ATA”),¹⁰ the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),¹¹ the Torture Victim Protection Act (“TVPA”),¹² the Alien Torts Claims Act (“ATCA”),¹³ and combinations of these federal statutes, as well as state common-law tort claims including negligent and intentional infliction of emotional distress, battery, assault, wrongful death, survival, false imprisonment, loss of consortium, solatium, and aiding and abetting liability.¹⁴ For each of these causes of action, the courts have interpreted limits in the types of claims, defendants, and/or damages that can be recovered.¹⁵

The ATA provides that any U.S. citizen injured “by reason of an act of international terrorism,” or his or her surviving heir, may sue in the appropriate U.S. district court for “threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”¹⁶ Courts have noted that the provision of treble damages precludes the possibility of punitive damages.¹⁷ The ATA makes it a crime to provide material support to terrorists and provides jurisdictional tools

10. Antiterrorism Act of 1991, Pub. L. No. 102-572, §1003, 106 Stat. 4522 (codified as amended at 18 U.S.C. §§ 2331-38 (2006)).

11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 21, 28, 42 U.S.C.).

12. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2006)).

13. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

14. For an example of a case that combines these claims, *see generally* Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86 (D.D.C. 2003) (involving a large civil action in which more than two thousand victims and their families seek to hold accountable the persons and international entities that funded and supported al Qaeda in perpetrating the 9/11 World Trade Center tragedy).

15. *See generally* Strauss, *supra* note 2 (analyzing in detail these causes of action and cases decided under each).

16. 18 U.S.C. § 2333(a) (2006).

17. *See, e.g.*, Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 240 (S.D.N.Y. 2003). *See also* Estates of Ungar ex rel. Strachman v. Palestinian Auth., 304 F. Supp. 2d 232, 239 (D.R.I. 2004) (declining to allow prejudgment interest on the same reasoning that treble damages provided the exclusive penalty).

to enable lawsuits.¹⁸ However, a 1992 amendment bars any actions under the ATA against a foreign state, an agency of a foreign state, or an officer or employee of a foreign state acting within his or her official capacity.¹⁹

In turn, section 1605(a)(7) of the AEDPA waives sovereign immunity under the Foreign Sovereign Immunities Act (“FSIA”) in cases that seek money damages for

personal injury or death that was caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18 [of the ATA]) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.²⁰

The 1996 Flatow Amendment extended this statute expressly to create a cause of action against the officials, employees, and agents of state sponsors of terrorism “for money damages which may include economic damages, solatium, pain and suffering, and punitive damages.”²¹ By its terms, actions under the AEDPA are limited to those against foreign states designated by the U.S. State Department as “state sponsors of terrorism.”²² The Court of Appeals for the

18. 18 U.S.C. §§ 2333-34 (2006). *See* 137 CONG. REC. S740 (daily ed. Apr. 16, 1991) (statement of Sen. Grassley). But the courts have interpreted personal jurisdiction more narrowly under the ATA than under the AEDPA. *See* Strauss, *supra* note 2, at 690-91, 740; *see, e.g.*, *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 178 (D.D.C. 2004) (restricting personal jurisdiction of the courts to the traditional “minimum contacts” test for claims brought under the ATA).

19. 18 U.S.C. § 2337 (2006). The legislative history of the 1992 amendment indicates that it was intended merely to clarify that ordinary principles of sovereign immunity, as codified by the Foreign Sovereign Immunities Act (FSIA), would apply to foreign states and their instrumentalities. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602–11 (2006)).

20. 28 U.S.C. § 1605(a)(7) (2006). *See generally* Allison Taylor, *Another Front in the War on Terrorism? Problems with Recent Changes to the Foreign Sovereign Immunities Act*, 45 ARIZ. L. REV. 533 (2003) (discussing flaws in this provision and its revisions, concluding that the terrorism exception to the FSIA has accomplished neither compensation nor deterrence).

21. 28 U.S.C. § 1605 note (2006). The “Flatow Amendment” was named after Alisa Flatow, a twenty-year old college student from New Jersey who was killed in 1995 by a suicide bomber while spending a semester abroad in Israel. Her father, Stephen Flatow, has been a tireless crusader against terrorism in his efforts to collect the rest of the punitive damages awarded by the court. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 27-34 (D.D.C. 1998) (awarding \$22.5 million in compensatory damages and \$225 million in punitive damages against the government of Iran, which the court determined to be responsible for funding the terrorist group Palestine Islamic Jihad).

22. The foreign state must have been designated as a state sponsor of terrorism “under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A

District of Columbia Circuit has interpreted the Flatow Amendment as providing a cause of action only against agents or employees of a foreign state, but not against the foreign state itself or its governmental agencies that are not separate and distinct from the foreign state.²³ Moreover, in interpreting claims brought under this statute following the Flatow Amendment, the most prevalent view of the courts has been that punitive damages are allowed only against agencies and instrumentalities of a foreign state and individuals in their personal capacities, not against the foreign state itself.²⁴ This restrictive view has been modified by the newly passed statutory revisions discussed below.²⁵ Despite the limitations that have been inferred by courts, the AEDPA remains the primary avenue for civil actions against sponsors of terrorism.

In addition, the ATCA confers jurisdiction on federal district courts for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁶ Although traditionally utilized to provide a cause of action for aliens rather than U.S. citizens and applied mainly to human rights violations, its reach has been extended with the addition of the TVPA. The TVPA applies to both aliens and U.S. citizens injured by acts of torture or extrajudicial killing committed under color of foreign law.²⁷ As such, depending on the facts of the case, these two

of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia.” 28 U.S.C. § 1605(a)(7)(A). See generally Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of “Foreign Terrorist Organization” Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A. § 1189, 178 A.L.R. FED. 535 (2002) (collecting and discussing cases decided under the foreign terrorist organization provision of the Antiterrorism and Effective Death Penalty Act § 1189). For more on the designation of “state sponsors of terrorism,” see *infra* notes 97-100 and accompanying text.

23. See *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004). This narrow interpretation was effectively overruled in the most recent amendment of this provision. See *infra* notes 91-93 and accompanying text.

24. See, e.g., *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding punitive damage against the Cuban Air Force but not against the Republic of Cuba); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002) (concluding that punitive damages were no longer available under this statute).

25. 28 U.S.C.A. § 1605A(c) (West 2008). See *infra* notes 95-96 and accompanying text.

26. 28 U.S.C. § 1350 (2006).

27. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2006)). See S. REP. NO. 102-249, at 4 (1991) (explaining that the TVPA provides “an unambiguous basis for a cause of action that has been successfully maintained under” the ATCA); see also Strauss, *supra* note 2, at 710-14.

statutes may offer victims of terrorism a cause of action for claims against a foreign state founded upon the broad jurisdiction of AEDPA.²⁸

In recent years, the best approach has been to employ the aggregate model in order to pursue the widest array of defendants, claims, and damages.²⁹ For example, plaintiffs can apply the ATA to non-sovereign defendants, FSIA section 1605(a)(7) to sovereign state sponsors of terrorism, and the Flatow Amendment to agents and instrumentalities of a foreign state.³⁰ Using these laws in tandem, one can hold agents of foreign states liable in both their official and personal capacity, including potential “aider and abettor” liability.³¹

28. See, e.g., *Regier v. Islamic Republic of Iran*, 281 F. Supp. 2d 87, 98-99 (D.D.C. 2003), *abrogated by Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004) (action by professor who was taken hostage and tortured by Hezbollah in 1984, successfully pursued against Iran and the Iranian Ministry of Information and Security under the FSIA section 1605(a)(7), the TVPA, and several common-law claims); note, however, that this case was later abrogated by *Cicippio-Puleo*, which adopted a more narrow view of section 1605 as merely jurisdictional but was, in turn, superseded by the new legislation. See *infra* notes 92-93 and accompanying text. Cases brought under the AEDPA carry a more expansive view of personal jurisdiction over individual defendants than the restrictive traditional approach of some courts under the ATA. See, e.g., *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59-60 (D.D.C. 2003) (finding personal jurisdiction over individual officials, agents, and employees of Libyan intelligence service for midair explosion because the plane they chose to destroy was on an international flight; thus, the individual defendants could and should have reasonably postulated that passengers of many nationalities would be on board, from which they could also expect they might be haled into the courts of those nations whose citizens would die). See also *Strauss, supra* note 2, at 704-05 (discussing the *Pugh* case, in which the court applied an expansive view of the minimum contacts test under the Due Process clause to the AEDPA in establishing personal jurisdiction over these individual defendants).

29. See *Strauss, supra* note 2, at 739-40 (in view of statutory limitations, proposing an aggregate model of combining federal statutory and state common-law claims).

30. See, e.g., *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 226 (S.D.N.Y. 2003) (awarding estates and survivors of two victims of the 9/11 terrorist attacks on the World Trade Center who sued defendants Islamic Emirate of Afghanistan, the Taliban, al Qaeda, Osama bin Laden, and the Republic of Iraq, pursuant to the ATA and the FSIA, economic damages, pain and suffering, solatium damages—but not punitive damages—and treble damages for the non-sovereign defendants).

31. See *Halberstam v. Welch*, 705 F.2d 472, 477-78, 489 (D.C. Cir. 1983) (noting nonparticipants in tortious conduct may be subject to liability for the tortious conduct of another, aiding-abetting focuses on whether a defendant knowingly gave “substantial assistance” to someone who performed wrongful conduct); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 104-05 (D.D.C. 2003) (citing *Halberstam*, 705 F.2d at 477, 484) (discussing elements of aiding and abetting as means of establishing vicarious civil liability in tort to include that party whom defendant aids must perform wrongful act that causes injury, that defendant must be generally aware of his role as part of overall illegal or tortious activity at time that he provides assistance, and that defendant must knowingly and substantially assist principal violation; further, a joint venturer’s liability extends to all reasonably foreseeable acts done in connection with the tortious act that the person assisted); *Boim v. Quranic Literacy*

Because courts lately have interpreted the Flatow Amendment as not conferring a cause of action but as merely providing jurisdiction, plaintiffs have looked to additional statutory bases and have combined claims, many of which are state law claims.³² To the extent these lawsuits rely upon other federal and/or common-law tort claims in order to pursue terrorist organizations and state sponsors of terrorism in court, they are also limited in the relief that can be granted. While punitive damages have not been available under the AEDPA against all defendants (*i.e.*, not against foreign states or agents in their official capacities), these damages have been available in some circumstances through common-law intentional torts.³³ On the other hand, this dilemma has produced a potpourri of lawsuits

Inst., 127 F. Supp. 2d 1002, 1018 (N.D. Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002) (holding that plaintiffs may bring a cause of action under section 2333 based on a theory that defendants aided and abetted international terrorism); *see also* Peter M. Mansfield, *Terrorism and a Civil Cause of Action: Boim, Ungar, and Joint Torts*, 3 CHL-KENT J. INT'L & COMP. L., at *25 (2003), <http://www.kentlaw.edu/jicl/spring2003.html> (outlining elements of a cause of action for aiding and abetting a tort under sections 2333 and 1607).

32. To the extent the plaintiffs rely upon common law tort claims as the cause of action, these torts must be based on the common law of a particular state. *See* *Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004) (stating “generic common law cannot be the source of a federal cause of action . . . [r]ather, as in any case, a plaintiff proceeding under the FSIA must identify a particular cause of action arising out of a specific source of law”); *see also* *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 35-36 (D.D.C. 2003) (citing other cases establishing that a plaintiff bringing suit under the Flatow Amendment, 28 U.S.C. § 1605 note (2006), may base his claim on conventional state common-law torts such as assault, battery, and intentional infliction of emotional distress), *aff'd*, 376 F.3d 1123 (D.C. Cir. 2004), *abrogated by* *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004); *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78, 87 (D.D.C. 2002); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 33-37 (D.D.C. 2001), *aff'd*, 315 F.3d 325 (D.C. Cir. 2003); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 47-50 (D.D.C. 2001); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000). In each of these cases, the court held that the Flatow Amendment clearly provided a cause of action against an “official, employee, or agent” of a foreign state for the terrorist act, but questioned whether this provision also established a cause of action against the foreign state itself; the later cases, post *Cicippio-Puleo*, limited the Flatow amendment to these officials in their personal capacity and required an alternate basis, such as specific common law tort claims, for a cause of action against the foreign state.

33. *See* *Kilburn*, 277 F. Supp. 2d at 41 (addressing this issue and supporting the availability of punitive damages); *see also* *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 278-79 (D.D.C. 2003) (in terrorist bombing, defendants were liable for common law torts of assault, battery, and intentional infliction of emotional distress; included in the damages against Iran’s Ministry of Information and Security and senior Iranian officials were punitive damages in the amount of \$300 million). *But see* *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261, 274-75 (D.D.C. 2005) (punitive damages not available against Iran’s Ministry of Information and Security as an arm of the foreign state because such damages can only be awarded “against an ‘agency or instrumentality’ of a terrorist-sponsoring state, but not against the foreign state itself” and the MOIS “must be treated as the state of Iran itself rather than as its agent”) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003)).

with inconsistent results in terms of the amount and type of damages awarded.³⁴

One of the more prominent recent cases, *Hurst v. Socialist People's Libyan Arab Jamahiriya*, involved the terrorist act that destroyed Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988, killing all 259 passengers on board and eleven people on the ground.³⁵ Eleven family members of four of the victims brought suit against the Socialist People's Libyan Arab Jamahiriya, the Jamahiriya Security Organization ("JSO"), the Libyan Arab Airline ("LAA"), and two Libyan intelligence officials. They based their claims on the state-sponsored terrorism exception of the FSIA, section 1605(a)(7); the Flatow Amendment; the TVPA; the ATA; intentional infliction of emotional distress; and civil conspiracy.³⁶ In denying the Libyan defendants' motion to dismiss, the District Court for the District of Columbia explained that the plaintiffs properly asserted the state-sponsored terrorism exception to the FSIA as a jurisdictional vehicle, and proceeded to find a sufficient independent cause of action in their claims for intentional infliction of emotional distress and civil conspiracy to commit wrongful death and intentional infliction of emotional distress, under which plaintiffs sought damages for economic loss, pain and suffering, and solatium.³⁷ However, the Court agreed with defendant Libya that punitive damages were not available against it or the JSO, which operated as an arm of the

34. See Jennifer K. Elsea, CRS REPORT FOR CONGRESS: SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 2 (updated Dec. 17, 2007) available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=A476151&Location=U2&doc=GetTRDoc.pdf> (for the most recent version of this report, updated August, 8, 2008, see <http://www.fas.org/sgp/crs/terror/RL31258.pdf>) [hereinafter CRS REPORT]; see also Hans Jörg Albrecht & Michael Kilchling, *Victims of Terrorism Policies: Should Victims of Terrorism be Treated Differently?*, 13 EUR. J. CRIM. POL'Y RES. 13, 23 (2007) (criticizing disparate treatment of 9/11 victims compared to victims of other terrorist acts as well as among 9/11 victims and arguing for adoption of a principled approach to compensation based on social solidarity rather than tort law rules).

35. *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 22 (D.D.C. 2007). In a subsequent development, Libya paid \$1.5 billion into a fund to settle the claims of the families of American victims of the 1988 Pan Am 103 bombing over Lockerbie, Scotland, and the 1986 bombing of a German disco. In exchange, on October 31, 2008, in a move towards "normalizing relations between the United States and Libya," President Bush signed an Executive Order, "Settlement of Claims Against Libya," dismissing pending cases against Libya, providing for a claims procedure for U.S. nationals, and restoring the Libyan government's immunity from terror-related lawsuits. See Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008); Matthew Lee, *Libya Pays to Resolve Terrorism Claims*, Associated Press, Oct. 31, 2008, <http://news.aol.com/article/libya-pays-to-resolve-terrorism-claims/2036396>.

36. *Hurst*, 474 F. Supp. 2d at 22.

37. *Id.* at 27.

government. The court declined to rule on this issue with respect to the LAA, pending a determination as to whether the LAA's core functions were commercial or governmental.³⁸ In considering and denying the individual defendants' motion to dismiss, the court interpreted section 2337 of the ATA to permit the officers to be sued in their personal capacity, "even for acts sanctioned by terrorist states."³⁹ Accordingly, the victims' lawsuit was allowed to proceed against these defendants.

Most recently, *Peterson v. Islamic Republic of Iran* arose from the October 23, 1983 bombing of a U.S. Marine barracks in Beirut, Lebanon, in which 241 American servicemen operating under peacetime rules of engagement were murdered by a suicide bomber.⁴⁰ The plaintiffs founded their claims upon section 1605(a)(7) of the FSIA, along with state common-law claims of wrongful death, battery, and intentional infliction of emotional distress, alleging that the Islamic Republic of Iran ("Iran") and its Ministry of Information and Security ("MOIS") were liable for damages from the attack because they provided material support and assistance to Hezbollah, the terrorist organization that orchestrated and carried out the bombing. Following the entry of judgment against Iran and MOIS, special masters were appointed to consider damages on behalf of the nearly one thousand plaintiffs, consisting of members of U.S. armed forces injured or killed in the attack, and their family members and estates. On September 7, 2007, the U.S. District Court for the District of Columbia awarded the victims and their families a historic \$2.65 billion in damages, mostly for pain and suffering, but noted that no punitive damages were available against the foreign state or its governmental entity.⁴¹ As Judge Lamberth observed:

38. *Id.* at 28.

39. *Id.* at 29 n.13 (citing Strauss, *supra* note 2, stating "[t]he legislative history of section 2337 indicates that it was intended merely to clarify that ordinary principles of sovereign immunity, as codified by the FSIA, would apply to foreign states and their instrumentalities").

40. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003) (involving plaintiff family members of the 241 deceased servicemen and injured survivors of the October 23, 1983 suicide bombing attack of a Marine barracks in Beirut, Lebanon who brought two actions against defendant Islamic Republic of Iran and its Ministry of Information and Security).

41. *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 59 (D.D.C. 2007) (judgment entered in the amount of \$2.65 billion). On the issue of punitive damages, Judge Lamberth noted that such damages are "not available [under the FSIA] against foreign states such as the Islamic Republic of Iran," citing *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 (D.D.C. 2006), nor the Ministry of Information and Security (MOIS) since "MOIS is a governmental entity, and part of the state of Iran itself." *Peterson*, 515 F. Supp. 2d at 59 (citing

Not to be forgotten is the courage demonstrated by the family members who have come forth in bringing this claim. These individuals, whose hearts and souls were forever broken on October 23, 1983, have waited patiently for nearly a quarter of a century for justice to be done, and to be made whole again. And though this Court can neither bring back the husbands, sons, fathers and brothers who were lost in this heinous display of violence, nor undo the tragic events of that day, the law offers a meager attempt to make the surviving family members whole, through seeking monetary damages against those who perpetrated this heinous attack.⁴²

Reflecting on the dual goals of this civil approach, he concluded, “[t]he Court hopes that this extremely sizeable judgment will serve to aid in the healing process for these plaintiffs, and simultaneously sound an alarm to the defendants that their unlawful attacks on our citizens will not be tolerated.”⁴³

Indeed, the courts generally have been supportive of employing federal statutory and state common-law tools to do their part in the battle against terrorism.⁴⁴ Thus, “despite the political and diplomatic encumbrances inherent when private litigants utilize the judicial branch to target rogue terrorist actors, the use of terrorism lawsuits represents the way of the new world, where democracies must utilize every means at their disposal to fight terrorist actors.”⁴⁵ However, U.S. courts face inherent limits in their attempts at “bringing terrorists to justice on an international scale” due to the difficulty of establishing personal jurisdiction and effecting service of process.⁴⁶

Estate of Heiser v. Islamic Republic of Iran, 466 F. Supp. 2d 229, 270-71 (D.D.C. 2006); Greenbaum v. Islamic Republic of Iran, 451 F. Supp. 2d 90, 105 & n.1 (D.D.C. 2006) (citing Roeder v. Islamic Republic of Iran, 333 F.3d 228, 232-33 (D.C. Cir.2003)); and *Haim*, 425 F. Supp. 2d at 71 n.2.

42. *Peterson*, 515 F. Supp. 2d at 60.

43. *Id.*

44. See Ed Morgan, Op-Ed., *Counterterrorism in the Courtroom*, CJC OP-EDS. Dec. 23, 2005, available at <http://www.cjc.ca/template.php?action=oped&Rec=150>.

45. John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 530 (2008). “[C]ivil litigation will likely bring about greater accountability for defendants that finance and harbor terrorist entities” than criminal prosecution. *Id.* at 570. “Increasing the likelihood that terrorists will be held responsible for their economic damages will provide an additional disincentive to carrying out acts of international terrorism.” *Id.*

46. *Id.* at 530 & n.25.

B. Obstacles to Enforcement in the United States and Abroad

Faced with the difficulty of locating abroad the assets of terrorist organizations and the groups that fund them, the victims and their families pursuing civil actions in the war on terrorism most often have sought to enforce their judgments in U.S. courts by investigating and attaching assets tied to the terrorist defendants or through frozen assets as permitted by Congress or the executive branch. A Report for Congress by the Congressional Research Service observes that: “Default judgments won against terrorist States have proved difficult to enforce, and efforts by plaintiffs to attach frozen assets and diplomatic or consular property, while receiving support from Congress, have met with opposition from the executive branch. . . . The use of U.S. funds to pay portions of some judgments has drawn criticism.”⁴⁷ Moreover, the prospects for executing these judgments abroad has been hampered by common trends in international law which tend to limit the enforcement of judgments when the foreign court views the amount of money awarded to be excessive or the jurisdictional net to have been cast too widely.

1. Executing Judgments in the United States

In the United States, the authorization for freezing assets arises from the International Emergency Economic Powers Act (“IEEPA”),⁴⁸ which in the case of “unusual and extraordinary” foreign threats “to the national security, foreign policy, or economy of the United States,” authorizes the President, among other things, to “regulate . . . or prohibit . . . transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.”⁴⁹ The statute grants the President wide discretion in controlling international financial transactions, including the seizure of foreign assets held in U.S. banks or foreign branches of

47. See CRS REPORT, *supra* note 34, at 2.

48. 50 U.S.C. §§ 1701-07 (2000).

49. 50 U.S.C. §§ 1701(a), 1702(a)(1)(B) (2000). The controversy surrounding the broad powers granted to the government under the USA PATRIOT Act of 2001, and its expansion of the seizure of assets provisions under IEEPA, will not be discussed here. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272, as amended. See RICHARD SCHAFFER ET AL., *INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT* 263-66 (Thomson South-Western, 6th ed. 2005). For a discussion of the merits of allowing the victims access to these funds, see Strauss, *supra* note 2, at 730, 742.

U.S. banks.⁵⁰ These broad powers have been repeatedly sustained by courts.⁵¹ Using the IEEPA, U.S. presidents have taken economic action against other governments as a means of implementing foreign policy.

IEEPA functions as a sword wielded against terrorism because it allows the seizure of the assets of terrorist groups and organizations whose funds can be traced to terrorism. Pursuant to the IEEPA, the President issued Executive Order 12947 in 1995, which designated certain terrorist organizations “Specially Designated Terrorists” (“SDTs”), and blocked all their property interests.⁵² The order also allowed for additional designations if an organization or person is found to be “owned or controlled by, or to act for or on behalf of,” an SDT.⁵³ The President used this order to prohibit the contribution, either in the United States or by U.S. citizens outside the country, of funds, goods or services to or for Jihad, Hezbollah, Hamas, the

50. Section 1702(a)(1)(A) provides, *inter alia*, that:

the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise--

(A) investigate, regulate, or prohibit--

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States.

50 U.S.C. § 1702(a)(1)(A) (2000).

51. *See, e.g.*, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) (affirming the District Court’s dismissal of a challenge by HLF to its designation as a “Specially Designated Global Terrorist” pursuant to an Executive Order issued under the IEEPA, accompanied by an order blocking all of the organization’s assets); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 753 (7th Cir. 2002) (“The statute is designed to give the President means to control assets that could be used by enemy aliens.”); *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 701 (D.C. Cir. 1994) *remanded to* 871 F.Supp. 1463 (D.D.C. 1994), *rev’d*, 71 F.3d 909 (D.C. Cir. 1995) (providing that the Treasury “may choose and apply its own definition of property interests, subject to deferential judicial review”).

52. Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995). An initial list of SDTs was published on January 25, 1995, further defining the term in summarizing this executive order: “In addition, the Order blocks all property and interests in property subject to U.S. jurisdiction in which there is any interest of persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any other person designated pursuant to the Order (collectively ‘Specially Designated Terrorists’ or ‘SDTs’).” 60 Fed. Reg. 5,084 (Jan. 25, 1995); *see also* 60 Fed. Reg. 41152-01 (Aug. 11, 1995) (adding name to the SDT list). Additional regulations have implemented the order based upon this designation. *See, e.g.*, *Restrictions on exports and reexports to persons designated pursuant to Executive Order 12947 (Specially Designated Terrorist) (SDT)*, 15 C.F.R. § 744.13 (2008).

53. *Id.*

Popular Front for the Liberation of Palestine, and several other groups and individuals.⁵⁴ After the terrorist attacks on September 11, 2001, President Bush issued Executive Order 13224, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism, pursuant to the IEEPA.⁵⁵ Similar to Order 12947, Order 13224 designated specified terrorist organizations “Specially Designated Global Terrorists” (“SDGTs”) and blocked all their property interests subject to the jurisdiction of the United States.⁵⁶ The order allowed for additional SDGTs to be designated if organizations or persons are found to “act for or on behalf of” or are “owned or controlled by” designated terrorists or if they “assist in, sponsor, or provide . . . support for” or are “otherwise associated” with them.⁵⁷

The designated terrorist states whose assets have been blocked by the United States currently include Cuba, Iran, North Korea, Sudan, and Syria; a recent report indicates that these assets now total \$309.5 million.⁵⁸ Note that as recently as 2002, the amount of frozen

54. *Id.* See also 50 U.S.C. § 1705 (2007) (providing civil and criminal maximum penalties of \$250,000 and a \$1 million fine and/or twenty years imprisonment, respectively).

55. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

56. *Id.* The implementing regulations further provided: “The term specially designated global terrorist or SDGT means any foreign person or person listed in the Annex or designated pursuant to Executive Order 13224 of September 23, 2001.” See Global Terrorism Sanctions Regulations, General Definitions, Specially designated global terrorist; SDGT, 31 C.F.R. § 594.310 (2008); see also Restrictions on exports and reexports to persons designated in or pursuant to Executive Order 13224 (Specially Designated Global Terrorist) (SDGT), 15 C.F.R. § 744.12 (2008).

57. *Id.* For example, on November 2, Hamas and twenty-one other foreign terrorist organizations not related to al Qaeda were added to the executive order. Press Release, U.S. Dep’t of the Treas., Shutting Down Terrorist Financial Networks (Dec. 4, 2001), <http://www.treas.gov/press/releases/po841.htm>. On December 4, 2001, pursuant to this order, the Bush Administration froze the assets of the Holy Land Foundation for Relief and Development, Beit Al-Mal Holdings, and Al-Aqsa Islamic Bank. *Id.* “President Bush said all three are Hamas-controlled organizations that finance terror.” *Id.* At that time, the United States had designated 153 individuals, organizations, and financial supporters of terrorism worldwide pursuant to Executive Order 13224. *Id.* See also *U.S. Targets Hamas Funding*, ASSOCIATED PRESS, Aug. 22, 2003 (explaining that “the Bush Administration froze the assets of six senior Hamas leaders and five European-based organizations it says raise money for the radical Palestinian group,” in “the first effort to block Hamas’ assets or funding sources outside the United States”).

58. For an itemized list of the amount of these assets, see CRS Report, *supra* note 34, at 62 app. II (The amount of assets of terrorist states blocked by the United States as of that date consisted of: Cuba, \$196.1 million; Iran, \$1.1 million; North Korea, \$31.7 million; Sudan, \$80.6 million; and Syria, \$0 million.). See also OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREAS., CALENDAR YEAR 2006 FIFTEENTH ANNUAL REPORT TO CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM

assets in the United States totaled \$3.1 billion.⁵⁹ Many of those assets already have been depleted due to the satisfaction of victims' civil judgments and their removal from the pool of funds by the President.⁶⁰

Resistance from the executive branch at times presents an obstacle to the pursuit of claims as well as the collection efforts by victims of terrorist acts. As a matter of foreign policy, the President regards frozen assets as a powerful bargaining chip to induce behavior desirable to the United States; accordingly, allowing private plaintiffs to file civil lawsuits and tap into the frozen assets located in the United States may weaken the executive branch's negotiating position with other countries.⁶¹ For this reason, several U.S. presidents have opposed giving victims access to these funds.⁶² "On the other hand, doing so may send a strong, unified message to countries that sponsor terrorism."⁶³

PROGRAM DESIGNEES 14 tbl.1 (2006) [hereinafter REPORT TO CONGRESS ON ASSETS] (figures do not include the values of diplomatic and consular real property owned by Iran). Note that the list no longer includes Iraq and Libya. *Id.* at 9 n.11; *see also* 22 C.F.R. § 126.1(A) (2008).

59. *See* DAVID M. ACKERMAN, CRS REPORT FOR CONGRESS: SUITS AGAINST TERRORIST STATES, at 25 app. II (Jan. 25, 2002), <http://fpc.state.gov/documents/organization/8045.pdf> (the amount of assets of terrorist states blocked by the United States as of that date consisted of: Cuba, \$193.5 million; Iran, \$347.5 million; Iraq, \$1587 million; Libya, \$1072.2 million; North Korea, \$24 million; Sudan, \$33.3 million; and Syria, \$249 million).

60. *See infra* note 73.

61. *See, e.g.*, CRS REPORT, *supra* note 34, at 9 (setting forth the rationale of the Clinton Administration opposing the efforts to allow access to the blocked assets of Iran and Cuba, on the grounds that historically such assets have been used as leverage in foreign policy disputes, may be used for negotiating possible future reestablishment of normal relations with these countries, and could expose the United States to the risk of reciprocal actions against U.S. assets). *See also* President William J. Clinton, Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 WEEKLY COMP. PRES. DOC. 2108, 2113 (Oct. 23, 1998) ("Absent my authority to waive section 117's attachment provision, it would also effectively eliminate use of blocked assets of terrorist states in the national security interests of the United States, including denying an important source of leverage.").

62. For a history of the objections of both the Clinton and Bush Administrations to the use of frozen assets of terrorist states to satisfy victims' judgments for compensatory damages, which was noted most vehemently in their opposition to the passage of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") and the Terrorism Risk Insurance Act of 2002 ("TRIA"), discussed *infra* notes 64-73 and accompanying text, *see* CRS REPORT, *supra* note 34, at 9-11, 13, 15, 23. For this reason, although section 2002 of the VTVPA allows claimants to execute against certain assets, the President was given the authority to stop the attachment of the frozen assets of a state "in the interest of national security." *See* 28 U.S.C. § 1610(f)(3) (2006). Immediately after signing the legislation into law, President Clinton exercised this waiver authority. Presidential Determination No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

63. Strauss, *supra* note 2, at 730.

In contrast, the U.S. Congress generally has supported the needs of victims and their families by enacting legislation. Congress enacted the Victims of Trafficking and Violence Protection Act of 2000 (“VTVPA”) to allow certain victims of terrorists’ acts an opportunity to recover funds from the United States to satisfy their outstanding judgments.⁶⁴ Because it was a result of presidential opposition and congressional compromise, the scope of the VTVPA was limited. It only authorized the Secretary of the Treasury to pay portions of the judgments from eleven lawsuits that had been or would be decided against Cuba or Iran under the FSIA exception 1605(a)(7) between the time it was enacted in 1996 and a July 27, 2000 cut-off date (for the filing of the suit).⁶⁵ Section 2002 of the VTVPA provided no assistance for plaintiffs in any other lawsuits against terrorist groups and state sponsors of terrorism for which the courts have continued to enter judgments.

Calls for equal access to frozen assets for all U.S. victims of state-sponsored terrorism who have secured judgments led to the passage of the Terrorism Risk Insurance Act of 2002 (“TRIA”).⁶⁶ The TRIA

64. Victims of Trafficking and Violence Prevention Act (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 22, 27, and 42 U.S.C.).

65. For one judgment against Cuba, section 2002 provided that payment would be made from the assets of Cuba in the United States that have been blocked since 1962. *Id.* § 2002. *See* *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1253 (S.D. Fla. 1997) (awarding approximately \$50 million in compensatory damages and \$137.7 million in punitive damages to the families of three of the four people who were killed in 1996 when Cuban aircraft shot down two “Brothers to the Rescue” planes). For another ten judgments against Iran, Congress directed that payment be made from appropriated funds (up to a specified ceiling) and that the United States then be entitled to seek reimbursement for those payments from Iran. Victims of Trafficking and Violence Prevention Act § 2002(b)(2). *See* *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 27-28 (D.D.C. 2001), *aff’d*, 315 F.3d 325 (D.C. Cir. 2003); *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322, at *6 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 27-28 (D.D.C. 2001); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128, 138 (D.D.C. 2001); *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 107-08 (D.D.C. 2000); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 8-11 (D.D.C. 2000); *Higgins v. Islamic Republic of Iran*, 2000 U.S. Dist. LEXIS 22173, at *6-8 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 62 (D.D.C. 1998); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 27-34 (D.D.C. 1998). However, difficulties in the collection of these judgments have continued. *See, e.g., Flatow v. Islamic Republic of Iran*, 305 F.3d 1249 (D.C. Cir. 2002) (holding that subpoena seeking all documents pertaining to defendant’s finances could be narrowed to exclude Iranian property subject to license by federal government).

66. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, (codified as amended in scattered sections of 12, 15, and 28 U.S.C.). *See, e.g.,* Press Release, Sen. Charles E. Schumer, Schumer: Give Victims of Terrorism Access to Frozen Assets of Terrorist States (July 14, 2002), http://www.senate.gov/~schumer/Schumer-Website/pressroom/press_releases/PR01088.html (proposing bill to “provide equal access to all US victims of state sponsored terrorism

subjects the blocked assets of a terrorist party and any agency or instrumentality of that terrorist party to execution or attachment to satisfy a judgment against them for any claim based on an act of terrorism.⁶⁷ Section 201(a) of the TRIA provides that a person who has obtained a judgment against a foreign state designated as a state sponsor of terrorism may seek to attach the blocked assets of that state in satisfaction of an award of compensatory damages based on an act of terrorism.⁶⁸ The TRIA currently provides the means through which the U.S. government allows access to the frozen assets of terrorist states and organizations held in the United States, and it assists plaintiffs' efforts to identify and seize additional assets.

In total, "U.S. courts have awarded victims of terrorism more than \$10 billion in judgments against State sponsors of terrorism under the terrorism exception to the FSIA," primarily in those cases designated under section 2002 of the VTVPA.⁶⁹ Under section 201 of the TRIA, claimants in cases not covered by the VTVPA vie with each other to obtain the blocked assets of terrorist states to satisfy the compensatory damages portions of their judgments.⁷⁰ But in the case of Iran, the defendant in the largest number of lawsuits filed by victims of terrorism, blocked assets are "virtually non-existent."⁷¹ "Most of the Cuban assets made available by §2002 [of the VTVPA] to satisfy judgments have . . . been paid out to judgment creditors."⁷² Finally, the President has removed Iraq's blocked assets from the pot of funds previously available to satisfy judgments against Iraq.⁷³

who have secured judgements [sic] and awards in Federal courts against state sponsors of terrorism").

67. Terrorism Risk Insurance Act § 201.

68. *See id.*

69. CRS REPORT, *supra* note 34, at 54 ("[C]laimants in the first tier of cases designated under § 2002 of the Victims of Trafficking Act were able to obtain either 100 percent or 110 percent of their compensatory damages awards — nearly \$100 million in one case against Cuba out of Cuba's blocked assets, more than \$380 million in ten cases against Iran out of U.S. funds. Claimants in a second tier of cases designated under § 2002 received a smaller percentage of their compensatory damages awards — about 20 percent.").

70. *See, e.g.,* Anneliese Gryta, *A Herculean Task for Judge Hercules: Analytical Avoidance in Iran v. Elahi*, 41 AKRON L. REV. 249, 281 (2008) ("[F]laws with the terrorist state exception of the FSIA add up to propagate unenforceable judgments" because "full redress to victims is unlikely because of a lack of attachable assets" and inconsistent treatment of victims).

71. CRS REPORT, *supra* note 34, at 54.

72. *Id.* *See also* Julie Kay, *Miami Lawyers Race Each Other to Frozen Cuban Funds*, MIAMI DAILY BUS. REV., Oct. 1, 2007, at 1 (revealing difficulties experienced by judgment creditors of Cuba in attempting to collect damages).

73. At the end of 2002, Iraq's blocked assets totaled approximately \$1.73 billion. *See* OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREAS., CALENDAR YEAR 2002

With the passage of the Justice for Victims of Terrorism Act, discussed below, the total amount of judgments against state sponsors of terrorism and former state sponsors of terrorism is likely to increase. “Whether more assets of those States will become available to satisfy those judgments is less certain.”⁷⁴ Already there are numerous judgments in which damage awards to the victims have not yet been satisfied.⁷⁵ However, it is hoped that this civil approach to fighting terrorism will prove effective, so that “if the terrorism exception to the FSIA results in a decrease in terrorist attacks affecting the interests of U.S. persons, such judgments should become less common with the passage of time and the statute of limitations.”⁷⁶

2. Collecting from Assets Overseas

Some common trends in international law serve as an impediment to the enforcement of judgments against terrorist organizations and the parties that support them. As a general matter, judgments of U.S. courts often will be enforced by foreign courts on the basis of reciprocity and comity in countries where the losing party or its property can be found.⁷⁷ However, foreign courts often are reluctant to recognize and enforce decisions of U.S. courts that include foreign governments or officials as defendants, or decisions that award punitive or treble damages, which are only recognized in the United States.⁷⁸

In general commercial matters, uniform legislation and treaties facilitate uniformity and certainty of enforcement of judgments in the

ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES OF TERRORIST COUNTRIES OR INTERNATIONAL TERRORISM PROGRAM DESIGNEES 8 (2002). On March 20, 2003, immediately after the United States initiated military action against Iraq, President Bush issued an executive order effecting the transfer of Iraq’s frozen assets to the U.S. government to be placed in the Development Fund for Iraq for use in the postwar reconstruction of Iraq. *See* Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 20, 2003). These and other subsequent actions of the President have made Iraq’s frozen assets unavailable to victims who obtain judgments against Iraq for its connection with terrorism. *See, e.g.*, P.L. 108-11, § 1503, 117 Stat. 559, 579 (Apr. 16, 2003); Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 28, 2003); *see also* CRS REPORT, *supra* note 34, at 33-34.

74. CRS REPORT, *supra* note 34, at 55.

75. For an itemized list of judgments against terrorist states, along with the amounts paid out so far and the amount not yet satisfied for each lawsuit, *see id.* at 56-61 app. I.

76. *Id.* at 55.

77. *See generally* RAY AUGUST, INTERNATIONAL BUSINESS LAW 185 (Prentice Hall, 4th ed. 2004) (discussing criteria the courts consider in determining whether to enforce a foreign judgment, including the public policy of the foreign state and “reciprocity of recognition”).

78. *Cf.* Strauss, *supra* note 2, at 725. *See generally* SCHAFFER ET AL., *supra* note 49, at 96-97 (addressing the enforcement of foreign judgments).

international business community. The Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters (“Lugano Convention”)⁷⁹ is one example. Even the Lugano Convention, however, which by its terms applies only to judgments of the contracting states (not the United States), enumerates several situations in which a judgment shall not be recognized. For example, a judgment will not be recognized when “such recognition is contrary to public policy in the State in which recognition is sought”; “where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings”; or “if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.”⁸⁰ In this way, the Lugano Convention simply codifies many of the general principles and trends in the international forum. The important policy implications in this context are even more compelling.

Ironically, the absence of punitive damages in some U.S. cases and, on occasion, the plaintiffs’ failure to obtain treble damages by bringing defendants under the scope of the ATA may assist efforts to enforce U.S. judgments overseas or at least help to avoid some of the enforcement problems generally incurred when punitive or treble damages are involved.⁸¹ However, jurisdictional objections may become an enforcement issue that precludes a foreign state from recognizing the judgment. The abrogation of sovereign immunity under the AEDPA does not constitute voluntary waiver or consent to jurisdiction by a foreign state, and in many of these cases judgments were obtained by default because the defendant state declined to appear.⁸² Other states may also reject these judgments, “since comity

79. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 16 September, 1988, 1988 O.J. (C 189). The Lugano Convention is in force in eighteen countries of Western Europe and in Poland. The “Contracting States” are Belgium, Denmark, Federal Republic of Germany, Greece, France, Ireland, Iceland, Italy, Luxembourg, the Netherlands, Norway, Austria, Portugal, Poland, Switzerland, Finland, Spain, Sweden, and the United Kingdom. In addition to providing recognition generally for the judgments of the contracting states without requiring any special procedures, the Lugano Convention sets forth details for where the application should be submitted for each of the contracting states.

80. *Id.* art. 27.

81. See SCHAFFER ET AL., *supra* note 49, at 96-97.

82. See AUGUST, *supra* note 77, at 185 (many courts will not enforce a default judgment); CRS REPORT, *supra* note 34, at 2 (citing the fact that default judgments entered against terrorist states have “proved difficult to enforce”). For example, because Cuba and Iran do not recognize the jurisdiction of the U.S. courts and have refused to appear in court; all of the judgments

between nations does not require recognition of a judgment that is considered void because of the terrorist state's public policy, sovereign immunity, or in cases in which the only contact with the forum is the killing of a U.S. national abroad and is thus deemed tenuous."⁸³

Thus, exploring the obstacles to enforcement of these judgments through the rule of international law and the difficulty of accessing the frozen assets of terrorist states and organizations reveals that more is needed to effectively utilize lawsuits in the war on terrorism. At the outset, U.S. law can be strengthened by the addition of tools to bolster claims against those connected with terrorism and to open viable financial pathways. Additionally, it will be necessary to construct an alternate basis upon which more global recognition of judgments can be founded. The support of, and collaboration with, the international community can provide the critical element for plaintiffs in the civil battle against terrorism.

II. NEW U.S. LAW FACILITATING CIVIL LAWSUITS BY VICTIMS

A much-anticipated new piece of legislation recently was signed into law, originally called the "Justice for Victims of Terrorism Act of 2007," as part of the "National Defense Authorization Act for Fiscal Year 2008."⁸⁴ The new law amends the FSIA—specifically, the

against them have been obtained by default. *Id.* at 7. *See, e.g.,* Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 68 (D.D.C. 1998); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 27-32 (D.D.C. 1998); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1249-53 (S.D. Fla. 1997).

83. Strauss, *supra* note 2, at 726. *See generally* Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496 (2002) (proposing that the best method for resolving the outstanding judgments under the FSIA is to terminate them and resubmit the claims to ad hoc international tribunals, because the punitive damage awards entered under the terrorism exception make the prospect of a substantial taking claim more likely and the tribunals will be created under conditions acceptable to the defendant states); W. Michael Reisman & Monica Hakimi, *2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561 (2003) (explaining that, because public international law does not conform to the legislative and judicial practices in the United States and does not provide for the standards of compensation applied in the U.S. courts, taxpayers through the U.S. Treasury are likely to pay for the human rights violations of state sponsors of terrorism).

84. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44 (2008). The "Justice for Victims of State Sponsored Terrorism Act," S. 1944, was passed by the Senate as part of the "National Defense Authorization Act for Fiscal Year 2008," H.R. 1585. A modified version of the provision was included by House and Senate Conferees as "Section 1083, Terrorism Exception to Immunity." On December 28, 2007, H.R. 1585 was vetoed by President Bush, who argued that the measure would hinder Iraqi

portion added in 1996 and known as the “Flatow Amendment”—by allowing victims of state-sponsored terrorism to sue countries that support and promote terrorism.⁸⁵ This statute will facilitate these lawsuits and the efforts to collect on successful judgments. Until now, plaintiffs have had difficulty collecting from the assets of banks located in the United States that are subsidiaries or have ties to Iran and other countries that are designated as state sponsors of terror.⁸⁶ Previously, in order to collect, plaintiffs would have to show that the country (*e.g.*, Iran) controls the day-to-day operations of the bank, which is nearly impossible to prove.⁸⁷ The new law enables victims to tap into these hidden commercial assets once the connection to the foreign country is established. This change in the law will give great assistance to victims and their families and further bolster the civil actions confronting terrorism.

Section 1083 of the Act creates a new section 1605A in title 28 of the U.S. Code to incorporate the terrorism exception to sovereign immunity under the FSIA currently codified at 28 U.S.C. § 1605(a)(7) and to create a cause of action against designated state sponsors of terrorism, in lieu of the Flatow Amendment discussed above.⁸⁸ The cause of action and exception to sovereign immunity “apply to cases in which money damages are sought for personal injury or death

reconstruction by exposing the current Iraqi government to liability for terrorist acts committed by Saddam Hussein’s government. Senator Lautenberg, one of the original sponsors of S. 1944, worked with Senate and House leadership to ensure that section 1083 remained in the bill, while giving the Administration authority to waive the provision in cases related to Iraq. The new bill, introduced in the House on January 16 as H.R. 4986, was passed by the House and Senate; and signed by the President on January 28, 2008. *See* H.R. REP. NO. 110-477, at 1001-02 (2007) (dealing with H.R. 1585); Press Release, Sen. Lautenberg, Lautenberg-Specter Bill to Provide Justice for Victims of State-Sponsored Terrorism Signed into Law (Jan. 29, 2008), <http://lautenberg.senate.gov/newsroom/record.cfm?id=291391> [hereinafter Press Release, Senator Lautenberg].

85. *See* Press Release, Senator Lautenberg, *supra* note 84.

86. *See, e.g.*, *Flatow v. Alavi Foundation*, 2000 U.S. App. LEXIS 17753, at *21 (4th Cir. 2000) (holding that a not-for-profit foundation in New York was not an instrumentality of a foreign government, and thus was not subject to a writ of execution to satisfy plaintiff’s judgment against the foreign government); *Flatow v. Islamic Republic of Iran*, 74 F. Supp. 2d 18, 19 (D.D.C. 1999) (quashing a writ of attachment for funds which had been awarded by the Iran-U.S. Claims Tribunal to Iran and were immune in the U.S. Treasury); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 18 (D.D.C. 1999) (quashing writs of attachment for Iran’s embassy and chancery and two bank accounts holding proceeds from the rental of these properties). *See also* Sean D. Murphy, *Contemporary Practice of the United States, State Jurisdiction and Jurisdictional Immunities, Satisfaction of U.S. Judgments Against State Sponsors of Terrorism*, 94 AM. J. INT’L L. 117 (2000).

87. *See Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073 (9th Cir. 2002).

88. 28 U.S.C.A. § 1605A (West 2008).

caused by certain defined terrorist acts or the provision of material support when conducted by an official, agent, or employee of the State acting within the scope of his or her office, employment, or agency.”⁸⁹ Specifically, it provides that:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.⁹⁰

In addition to this jurisdictional provision, the newly passed legislation expressly creates a private right of action to seek money damages in U.S. courts against a foreign state that is or was a state sponsor of terrorism and any official, employee, or agent of that foreign state acting within the scope of employment.⁹¹ This development effectively overrules the decision of the United States Court of Appeals for the District of Columbia Circuit in *Cicippio-Puleo v. Islamic Republic of Iran*,⁹² which interpreted section 1605 of the FSIA as a merely jurisdictional vehicle that does not confer a private right of action against a foreign state and limited the Flatow Amendment to providing a cause of action against officials, employees, and agents of the foreign state in their individual capacity.⁹³ The new law further holds a foreign state vicariously liable for the actions of its officials, employees, or agents.⁹⁴ It provides for a wide array of damages, including “economic damages, solatium, pain and suffering, and punitive damages.”⁹⁵ Previously some courts had limited the types of damages available, and in particular excluded

89. See CRS REPORT, *supra* note 34, at 44 (analyzing H.R. 1585 after it had passed in the House and Senate before being vetoed by the President and incorporated into H.R. 4986, which was signed into law).

90. 28 U.S.C.A. § 1605A(a)(1).

91. *Id.* § 1605A(c).

92. *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1032 (D.C. Cir. 2004).

93. See Strauss, *supra* note 2, at 706-09.

94. 28 U.S.C.A. § 1605A(c).

95. *Id.* In addition, it makes available to the U.S. district courts funding for special masters through the Victims of Crime Act of 1984, 42 U.S.C. § 10603(c), 28 U.S.C.A. § 1605A(e). See, e.g., *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 40, 60-67 (D.D.C. 2007) (special masters appointed to determine damages in connection with the 1983 bombing of the Marine barracks in Lebanon awarded \$2.65 billion of damages to nearly one thousand plaintiffs).

punitive damages against a foreign state,⁹⁶ but these now are permitted explicitly under the new provision.

Note that the law retains the condition that the foreign state be designated by the State Department as a “state sponsor of terrorism.”⁹⁷ This prerequisite has the odd effect of combining law and politics by hinging an individual’s private right of action on the U.S. government’s decision to designate a state as a sponsor of terrorism.⁹⁸ However, the Act sets the parameters for satisfaction of this condition more broadly. Under the Act, this requirement is satisfied if the foreign state was designated as a state sponsor of terrorism either at the time of the act, or as a result of the act, within the six month period before the claim is filed, or when the original action was filed (if now being refiled by reason of section 1083(c)(2)(A) or (c)(3) or as a related action).⁹⁹ Thus, if a state is removed from the list of state sponsors of terrorism, in effect it triggers a six-month period within which to file a suit or be time barred under the statute.¹⁰⁰ The new law also contains a formal statute of limitations of ten years after April 24, 1996 or ten years from the date on which the cause of action arose, whichever is later, for the commencement of an action or a related action under the prior section 1605(a)(7).¹⁰¹

96. See, e.g., *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 n.3 (D.C. Cir. 2003) (holding that Iran’s Ministry of Foreign Affairs should be treated as the foreign state itself; thus, plaintiffs could not collect punitive damages against MOIS or Iran); *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 199 (D.D.C. 2003), *vacated*, 404 F. Supp. 2d 261 (D.D.C. 2005); *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 24 n.1 (D.D.C. 2002); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1249 n.8 (S.D. Fla. 1997). *But see* *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 279 (D.D.C. 2003) (awarding punitive damages of \$300 million against Iran for an extremely heinous bombing). See *Strauss*, *supra* note 2, at 697-98, 701-03; *see also*, *Peterson*, 515 F. Supp. 2d at 59 (discussion of lack of punitive damages).

97. The term “state sponsor of terrorism” means “a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism.” 28 U.S.C.A. § 1605A(h). The U.S. State Department publishes its list of designated state sponsors of terrorism annually. The list currently includes Cuba, Iran, North Korea, Sudan, and Syria; Iraq and Libya are not longer so designated. See 22 C.F.R. § 126.1(A)(2002); *see also* CRS REPORT, *supra* note 34, at 5 n.14.

98. See *Strauss*, *supra* note 2, at 694-95.

99. See 28 U.S.C.A. § 1605A(a)(2).

100. See *also* CRS REPORT, *supra* note 34, at 45.

101. 28 U.S.C.A. § 1605A(b). The previous provision in the FSIA subjected the statute of limitations to equitable tolling, “including the period during which the foreign state was immune from suit.” 28 U.S.C. § 1605(f) (2006). Courts have differed as to whether to interpret the

In order to recover under this Act, the claimant or victim must be a U.S. national, member of the armed forces, or an employee or contractor of the U.S. government acting in the scope of employment at the time the act occurred.¹⁰² This requirement represents an expansion of jurisdiction beyond U.S. nationals as potential plaintiffs, enlarging the class of persons protected by the statute to include members of the armed forces and contract security personnel who may be foreign nationals.¹⁰³ It leaves unchanged the requirement that if the acts complained of occurred in a foreign state, plaintiffs must have given the foreign state “a reasonable opportunity” to arbitrate the claim.¹⁰⁴ The Act uses standard definitions of “torture,” “hostage taking,” “aircraft sabotage,” and “material support or resources,” as defined elsewhere in previous statutes (*e.g.*, the International Convention Against the Taking of Hostages).¹⁰⁵

In a measure to preserve assets, the filing of a lawsuit under this provision:

shall have the effect of establishing a lien of *lis pendens* upon any real property or tangible personal property located within the judicial district that is . . . (A) subject to attachment in aid of execution . . . (B) located within that judicial district; and (C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.¹⁰⁶

This broad measure seeks to protect potential assets for future collection by creating an automatic lien on all real or tangible personal property in the name or control of the defendant state sponsor of terrorism without the usual requirements of specificity and notice.¹⁰⁷ Ordinarily the *lis pendens* applies to specific property at issue in the dispute, which must be described with sufficient

equitable tolling provision to extend the statute of limitations to 10 years beyond the enactment of the original 1605(a)(7) in 1996. *See* CRS REPORT, *supra* note 34, at 45 n.157.

102. 28 U.S.C.A. § 1605A(a)(2)(ii).

103. *See* CRS REPORT, *supra* note 34, at 44 n.155 (citing cases in which some judges, despite absence of language in FSIA excluding service-members and their families from suing under the terrorism exception, have applied a test to determine whether service-members are serving in a non-combatant role).

104. 28 U.S.C.A. § 1605A(a)(2)(iii). However, in practice it is uncommon for foreign states to arbitrate these claims. *See* Strauss, *supra* note 2, at 695 n.86.

105. *See* 28 U.S.C.A. § 1605A(h).

106. 28 U.S.C.A. § 1605A(g)(1).

107. *Id.* *See* CRS REPORT, *supra* note 34, at 46.

specificity to put third parties on notice as potential purchasers.¹⁰⁸ But this mechanism was believed to be necessary to prevent terrorist nations which have assets within the United States from moving them to prevent levy by victims of terrorism after their judgments have been entered.

Most significant for collection efforts in enforcing a judgment, plaintiffs no longer need to show economic control over the targeted property or a revenue stream to a foreign country. Under this new provision, the judgment may be executed on the property “*regardless of—*”:

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.¹⁰⁹

This provision effectively overrides the application of the 1983 Supreme Court case of *First National Bank v. Banco Para El Comercio Exterior de Cuba*¹¹⁰ to judgments against designated terrorist states. *Banco de Cuba* held that “duly created instrumentalities of a foreign state are to be accorded a presumption of independent status,” which could be overcome under the same equitable principles that would justify “piercing the corporate veil” (e.g., “alter ego” or use of corporation to perpetuate fraud or injustice).¹¹¹ Plaintiffs attempting to collect upon their judgments from the U.S. subsidiaries of foreign banks have faced the obstacle of this presumption and complained that Cuba and Iran have hidden terrorist assets in commercial entities.¹¹² The Act removes from the

108. See CRS REPORT, *supra* note 34, at 46-47 (citing 54 C.J.S. *Lis Pendens* §§ 10, 11, 31, 34 (1987)). Because it is unclear whether the property will be sufficiently described to afford prospective purchasers adequate notice, the due process rights of these third parties may be implicated. See *id.* at 46-47.

109. 28 U.S.C.A. § 1610(g)(1) (West 2008) (emphasis added).

110. *First Nat'l Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

111. *Id.* at 627, 629.

112. See, e.g., CRS REPORT, *supra* note 34, at 47-49 & nn.168-69.

victims the burden of specifying targets and allows access to commercial assets to help them receive justice and recover damages.¹¹³

Yet another obstacle to recovery has been removed, as the U.S. government can no longer make its IEEPA or other funds immune from collection.¹¹⁴ The Act explicitly states that:

[any such] property of a foreign state, or agency or instrumentality of a foreign state . . . shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading with the Enemy Act or the International Emergency Economic Powers Act.¹¹⁵

However, this attachment power is subject to the court's authority to prevent the impairment of an interest held by a third-party joint-property-holder who is not liable in the action.¹¹⁶

Interestingly enough, the law is to be applied to pending cases, to related actions, and, retroactively, to suits dismissed for lack of a cause of action under 1605 if filed within 60 days of its enactment.¹¹⁷ This provision thus restarted the clock for victims of terrorism whose cases were dismissed under the old provision, allowing them to re-file their cases in a U.S. District Court within the 60-day period commencing on January 28, 2008.¹¹⁸ Moreover, defendants cannot claim *res judicata*, collateral estoppel, statute of limitations, or other such defenses ordinarily available under common law.¹¹⁹

113. Press Release, Senator Lautenberg, *supra* note 84.

114. The United States Department of Justice has used sovereign immunity to preclude Iranian assets from execution of judgments by victims of terrorism, notwithstanding the authorizing legislation to grant access to those assets. See Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (subjecting the blocked assets of a terrorist party and any agency or instrumentality of that terrorist party to execution or attachment in order to satisfy a judgment against them for any claim based on an act of terrorism); see also Strauss, *supra* note 2, at 734-38 (discussing cases interpreting the TRIA). *But see* CRS REPORT, *supra* note 34, at 49-50 (distinguishing “blocked” assets under the TRIA from “regulated” assets under this new provision).

115. 28 U.S.C.A. § 1610(g)(2).

116. *Id.* § 1610(g)(3).

117. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083(c)(1)-(3), 122 Stat. 3, 342-43 (2008).

118. *Id.*

119. *Id.* This provision may raise problems of a Constitutional dimension, such as the legitimacy of Congress' authority to remove these common law defenses. See *Republic of Austria v. Altmann*, 541 U.S. 677, 677-79 (2004) (deferring to Congress in allowing retroactive application of FSIA to conduct that occurred prior to its enactment). *But see* CRS REPORT, *supra* note 34, at 51-52 (raising the possibility that, to the extent it requires the courts to reopen final judgments or reinstate vacated judgments, this provision may be an improper exercise of

Due to the Administration's concerns that the U.S. government's reconstruction efforts in Iraq would be hampered by judgments against its previous government, which led President Bush to veto the original bill, the final statute includes an exception for Iraq at the President's discretion.¹²⁰ It permits the President to exempt the government of Iraq from any provision "if the President determines that—"

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.¹²¹

However, the provision continues with a statement of the "sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals" who cannot obtain redress in U.S. courts due to the exercise of this waiver.¹²² And by putting the burden on the President to notify Congress in writing of the basis of the waiver,¹²³ Congress clearly seeks to place the presumption in favor of the victims of terrorist acts.

The new law, signed by President Bush on January 28, 2008 and originally sponsored by Senator Frank R. Lautenberg (D-NJ) and Senator Arlen Specter (R-PA), represents a bipartisan effort supported by many U.S. legislators.¹²⁴ "I am pleased we were able to

judicial powers by Congress; and questioning whether abrogation of legal defenses of other parties could raise constitutional due process and separation of powers issues).

120. *See supra* note 84.

121. National Defense Authorization Act for Fiscal Year 2008 § 1083(d)(1).

122. *Id.* § 1083(d)(4).

123. *Id.* § 1083 d(3).

124. "The original bill (S.1944) ha[d] an impressive bipartisan list of 30 cosponsors, including Senators Robert Menendez (D-NJ), Trent Lott (R-MS), Joseph Biden (D-DE), John Cornyn (R-TX), Hillary Clinton (D-NY), Lindsey Graham (R-SC), Diane Feinstein (D-CA), Joseph Lieberman (I-CT), Charles Schumer (D-NY), Norm Coleman (R-MN), Robert Casey (D-PA), Susan Collins (R-ME), Ted Stevens (R-AK), Max Baucus (D-MT), Sherrod Brown (D-OH), Richard Burr (R-NC), Elizabeth Dole (R-NC), James Inhofe (R-OK), Carl Levin (D-MI), Bill Nelson (D-FL), Arlen Specter (R-PA), Sam Brownback (R-KS), Thomas Carper (D-DE), Jim DeMint (R-SC), John Ensign (R-NV), Johnny Isakson (R-GA), Mel Martinez (R-FL), Barbara Mikulski (D-MD), Debbie Stabenow (D-MI), and Sheldon Whitehouse (D-RI)." Press Release, Senator Lautenberg, *supra* note 84. The final bill, spearheaded by Representatives John Conyers (D-MI), Ike Skelton (D-MO), Robert Andrews (D-NJ), and Jim

work with the administration on this legislation which gives the victims of terrorism and their families the ability to seek legal redress,” said Senator Specter. “This bill reaffirms that the United States will not tolerate state sponsored terrorism.”¹²⁵ As discussed in detail above, “the law will give victims their day in court and help them pursue the assets of countries that support terrorism.”¹²⁶ Already word has reached the victims of terrorism as they look forward to a new era in receiving their damage awards at last. Lynn Derbyshire, who serves as the national spokesperson for The Beirut Families, declared:

It’s taken a long time to get to this day—24 painful, grief-filled years—but now the victims and the families of the Beirut Marine Corps Barracks Bombing, and victims of terrorism everywhere, can begin to heal, because we can once again have hope for the future. Before yesterday, state-sponsors of terrorism could avoid being held accountable for their actions. That is no longer the case.¹²⁷

Victims of terrorism and their families have praised the new law and voiced their intention to put it quickly into action: “Our focus now turns back to the court system, where we intend to move vigorously and rapidly to identify and attach the \$2.6 billion in Iranian assets” awarded by the U.S. court to the victims and their families.¹²⁸

Under the 60 day re-filing provision, the “family members of the 17 sailors killed in the attack on the USS Cole in Yemen [in 2000 have sought] to reopen their lawsuit seeking more than \$100 million in damages from Sudan.”¹²⁹ In the original case, the judge ordered Sudan to pay approximately \$8 million for lost wages and earning potential,

Saxton (R-NJ), had comparable support in the House of Representatives. *See, e.g., Beirut Families Applaud Presidential Signing of Landmark Legislation Enabling Victims of State Sponsored Terrorism to Seek Claims Against Hidden Assets*, REUTERS, Jan. 29, 2008, <http://www.reuters.com/article/pressRelease/idUS227270+29-Jan-2008+PRN20080129> [hereinafter *Beirut Families*].

125. Press Release, Senator Lautenberg, *supra* note 84.

126. *Bush Signs Bill Designed to Help Victims of State-Sponsored Terrorism*, The Criminal Division, Feb. 3, 2008, <http://www.criminaldivision.com/articles/496/1/Bush-Signs-Bill-Designed-to-Help-Victims-Of-State-Sponsored-Terrorism/State-Sponsored-Terrorism-Bill--Full-Story.html> (reprinted with permission of FED agent).

127. *Beirut Families*, *supra* note 124 (statement of Lynn Smith Derbyshire, whose brother Captain Vincent Smith was killed in the 1983 Beirut bombing, on behalf of the families of U.S. servicemen killed or injured in the bombing).

128. *Id.* *See* Peterson v. Islamic Republic of Iran, 515 F. Supp. 2d 25, 60 (D.D.C. 2007); *supra* notes 40-43 and accompanying text.

129. *USS Cole Families Seek Suit Rehearing*, INT’L BUS. TIMES, Feb. 4, 2008, <http://www.ibtimes.com/articles/20080204/uss-cole-families-seek-suit-rehearing.htm> [hereinafter *USS Cole Families*].

but denied plaintiffs' request for damages for loss of consortium, loss of solatium, loss of society, and mental anguish and emotional distress because the FSIA did not provide a cause of action and plaintiffs' claims were founded upon the more limited Death on the High Seas Act.¹³⁰ The families have asked the judge to reopen the case on the grounds that the new law, which permits the courts to reopen older terrorism cases, provides for punitive damages, pain and suffering, and emotional distress.¹³¹ Moreover, they are hoping for assistance in retrieving the \$8 million from U.S. banks that hold \$60 million in Sudanese assets, but the banks claim that the U.S. government has frozen the assets.¹³² With the recognition that state sponsors of terrorism "should not be allowed to hide their assets from the victims of terrorism," the new law is being hailed as a "definitive step toward ending terrorism and holding terrorists accountable for their heinous crimes."¹³³

III. A FOUNDATION FOR INTERNATIONAL SUPPORT

Despite the assistance of Congress and U.S. courts, U.S. victims of global terrorism and their surviving family members have experienced enormous difficulty in enforcing their judgments against terrorist organizations and state sponsors of terrorism. The new U.S. law will lead to greater success in maintaining their claims and will aid their efforts in levying upon domestic assets tied to terrorism. However, "[t]he total amount of judgments against terrorist States far exceeds the assets of debtor States known to exist within the jurisdiction of U.S. courts."¹³⁴ If the assets of these groups could be attached and collected overseas, the war on terrorism might be waged more effectively, an effort that would call for the support of the international community through comity and the rule of law.¹³⁵ Support for this proposition comes from examining the economic perspective of several experts and the precedents set by the UN Security Council in dealing with matters of international terrorism. Taken together, they lay the foundation for a more global recognition of these civil judgments.

130. *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 567, 569 (E.D. Va. 2007).

131. *USS Cole Families*, *supra* note 129.

132. *Id.*

133. *Beirut Families*, *supra* note 124 (quoting Judith C. Young and Lynn Smith Derbyshire, respectively, who lost family members in the Beirut bombing of the Marine barracks).

134. CRS REPORT, *supra* note 34, at 2.

135. *See Strauss*, *supra* note 2, at 741.

A. International Seizure of Terrorist Assets: The Economic Perspective

Analyzing terrorism using the same tools that economists use to study the business cycle, researchers have discovered that cycles in terrorism occur due to “copycat” effects (such as the anthrax attacks), the attack/counter-attack process, and economies of scale in planning and executing attacks.¹³⁶ Periods of high terrorism when terrorists expend their resources are followed by low-terrorism periods during which they replenish their resources, including weapons, funds, and new recruits. Using standard economic theory to predict terrorist behavior, two economists explained that “[t]ransnational terrorist groups attempt to economize on their scarce resources in a manner similar to that of everyday business firms. If the costs of performing one type of terrorist attack increase, rational terrorists will substitute into other similar types of attacks.”¹³⁷ Their research has implications for the most effective ways to combat terrorism, concluding that “defensive policies do little to thwart terrorism” because:

Terrorists look for the weakest link, and it is too difficult for a democratic society to effectively defend itself against all possible types of attacks. When there is too much attention paid to one kind of vulnerability, a weakness in security can be exploited elsewhere. Instead, the most successful policies have been those that reduce the ability of terrorists to acquire resources (including weapons, funds and personnel). Actions to freeze terrorist assets and reduce terrorist numbers are better at curbing terrorism than concentrating on select kinds of events or targets. By going after terrorist resources, the authorities thwart all forms of attacks; by focusing on a specific event, the authorities encourage a substitution among modes of attacks.¹³⁸

Their research thus supports a proactive strategy of fighting terrorism through financial measures aimed at depleting the terrorists of their assets and resources.

Many contemporary scholars corroborate the value of utilizing the financial system in the war against terrorism. John B. Taylor, as Undersecretary of the Treasury for International Affairs from 2001 to

136. Lauren Bocchino, *For Terrorists, It's All About Resources*, 6 U. ALA. RES. MAG. ONLINE, 2002, <http://research.ua.edu/archive2002/terrorism.html>.

137. *Id.* (quoting Dr. Walter Enders, professor of economics).

138. *Id.*; see also WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* (2006); Todd Sandler & Walter Enders, *An Economic Perspective on Transnational Terrorism*, 20 EUR. J. POL. ECON. 301 (2003), available at http://www.cba.ua.edu/~wenders/EJPE_Sandler_Enders.pdf.

2005, formed international coalitions to freeze the financial assets of terrorists worldwide.¹³⁹ He describes the merits of the financial approach as the technique of preventing or halting transfers of funds, thereby “freezing” the assets of people or groups that the President designates as terrorist, and taking action against banks that deal with those who fund terrorist organizations.¹⁴⁰ On an international scale, Taylor reports that 172 countries participated in the freezing of \$137 million of assets very soon after 9/11, even though 120 of those countries had to change their laws in order to do so.¹⁴¹ Not only does this deplete the terrorists’ resources, it is also an effective method for tracking the assets and money of the terrorists to locate them and identify their networks. Moreover, this tactic involves less extensive privacy invasions than direct surveillance methods.¹⁴² While much of the current focus in the United States has been on the military and the political aspects of the war, Taylor emphasizes this financial component as “an essential part of the war on terror.”¹⁴³

A five-year effort to curtail terrorist money is having an impact, according to U.S. officials and terrorism experts.¹⁴⁴ Reporting on the reduced flow of terrorism money, experts note the increasing trend of terrorists using cash couriers to smuggle money across borders.¹⁴⁵ Analysts at the U.S. Treasury track terrorist financing, including cash smuggling, through financial and banking records, which they use to identify terrorist financing entities and generate sanctions to block

139. Bill Steigerwald, *Bankers vs. Terrorists*, PITTSBURGH TRIB.-REV., Jan. 28, 2007, available at http://www.pittsburghlive.com/x/pittsburghtrib/opinion/halfpagebooks/s_490515.html (interview with John B. Taylor, currently an economics professor at Stanford University).

140. *Id.*

141. *Id.*

142. See generally Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125 (2008) (arguing that there should be a rebuttable presumption that anyone who provides material support to terrorists was predisposed to do so; thus, entrapment defense should not apply, reducing the need for intrusive surveillance).

143. *Id.* See generally JOHN B. TAYLOR, *GLOBAL FINANCIAL WARRIORS: THE UNTOLD STORY OF INTERNATIONAL FINANCE IN THE POST-9/11 WORLD* (2007) (chronicling his experiences as head of U.S. Treasury Department’s international finance division including freezing terrorist assets worldwide, planning the financial reconstruction of Afghanistan, and overseeing the development of a new currency in Iraq).

144. John Diamond, *Flow of Terror Funds Being Choked*, U.S. SAYS, USA TODAY, June 19, 2006, at 9A.

145. *Id.* (statements of John McLaughlin, deputy CIA director from 2000 to 2004, testifying before the Senate Foreign Relations Committee, and Stuart Levey, United States Treasury Department’s Undersecretary for terrorism and financial intelligence).

these funds.¹⁴⁶ The Treasury has been urging foreign governments to launch similar “financial intelligence units.”¹⁴⁷ Moreover, “the imposition of sanctions by the United States and its international partners against terrorists, terrorist organizations and their support structures is a powerful tool with far-reaching effects that extend beyond the blocking of terrorist assets.”¹⁴⁸ Identifying these individuals and organizations exposes and isolates them from access to the U.S. financial system and, with a UN designation, the global financial system.¹⁴⁹ A Treasury official explains this strategy: “A suicide bomber is difficult to deter. A wealthy individual or an Islamic charity, however, might be deterred by the threat of sanctions, loss of access to financial markets or criminal charges.”¹⁵⁰

B. Freezing Terrorist Assets as an Alternative to War: The United Nations Security Council Approach

As the international community has increasingly disfavored a military response to terrorism, the United Nations Security Council is leaning towards financial warfare: imposing economic sanctions and freezing the assets of terrorist groups. To be sure, the United Nations generally aims to promote international security by intervening in conflicts between nations in the hopes of avoiding war. The Security Council is a subset of the UN charged with maintaining international peace and security.¹⁵¹ An analysis of the precedents of the Security

146. *Id.* But see Kevin McCoy, *Audit: IRS Can't Fully Screen Terrorists*, USA TODAY, May 29, 2007, at 1B (warning that a new federal government audit reveals IRS screening of tax-exempt organizations is inefficient and incomplete; but reporting plans by IRS Tax Exempt and Government Entities Division to implement an effective computer-based system to better screen these organizations for potential terrorist activities).

147. From 1995 to 2005, the number of these “financial intelligence units” has increased from 14 to 101, according to the Government Accountability Office. See Diamond, *supra* note 144.

148. See REPORT TO CONGRESS ON ASSETS, *supra* note 58, at 6.

149. *Id.*

150. Diamond, *supra* note 144 (statement of Stuart Levey, United States Treasury Department’s Undersecretary for terrorism and financial intelligence).

151. The United Nations Security Council has five permanent members – the People’s Republic of China, France, the Russian Federation, the United Kingdom, and the United States – and ten non-permanent members that are elected for two-year terms by the UN General Assembly. The non-permanent members for 2008 are Belgium, Burkina Faso, Costa Rica, Croatia, Indonesia, Italy, Libyan Arab Jamahiriya, Panama, South Africa, and Vietnam. Each Security Council resolution is voted on by the fifteen members of the Security Council; decisions on substantive matters require nine affirmative votes, including all of the five permanent members (*i.e.*, none of the permanent members exercise their power to veto). See

Council will demonstrate that it has favored economic actions and, in particular, the freezing of terrorist assets as an alternative to war. Furthermore, this approach has effectively established an international public policy in support of unified financial methods against terrorism.

The Security Council is the only UN body whose actions are legally binding on all 192 UN member states.¹⁵² In its history, the Security Council has investigated numerous threats to international peace and issued almost two thousand resolutions, but has only authorized two major wars: the Korean War in 1950 and the Gulf War in 1991.¹⁵³ This record reflects its goal “to unite our strength to maintain international peace and security.”¹⁵⁴ The UN Charter sets forth among its purposes:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.¹⁵⁵

Thus, this international body is duly authorized to take action towards ensuring international security,¹⁵⁶ but it predominantly favors economic over military solutions to problems of global security.

The Security Council has been dealing with terrorism issues since the 1990s, passing several resolutions over the years in response to

U.N. Security Council Members, <http://www.un.org/sc/members.asp> (last visited Dec. 23, 2008); U.N. Charter arts. 23, 27.

152. U.N. Charter arts. 25, 48 (“Under the Charter, all Members of the United Nations agree to accept and carry out the decisions of the Security Council. While other organs of the United Nations make recommendations to Governments, the Council alone has the power to take decisions which Member States are obligated under the Charter to carry out.”); *see also UN Summit Supports Millennium Goals, Condemns Terrorism*, ENV’T NEWS SERVICE, Sept. 15, 2005, <http://www.ens-newswire.com/ens/sep2005/2005-09-15-02.asp> [hereinafter *UN Summit Supports Millennium Goals*].

153. S.C. Res. 84, U.N. Doc. S/RES/1588 (July 7, 1950); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); UN Security Council, Resolutions, http://www.un.org/Docs/sc/unscl_resolutions.html (last visited Dec. 23, 2008). *See* SCHAFFER ET AL., *supra* note 49, at 55-56. *See generally* EDWARD C. LUCK, UN SECURITY COUNCIL: PRACTICE AND PROMISE (2006); THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David M. Malone ed. 2004).

154. U.N. Charter pmb1.

155. U.N. Charter art. 1, ¶ 1.

156. *See generally* VAUGHAN LOWE, INTERNATIONAL LAW 271-82 (2007).

terrorism.¹⁵⁷ In the 1990s, these resolutions “took the form of sanctions against States considered to have links to certain acts of terrorism, [for example,] Libya (1992), Sudan (1996), and the Taliban (1999 - expanded to include Al-Qaida in 2000 by Resolution 1333).”¹⁵⁸ These sanctions were consistent with its responses to other acts of aggression by member States, which favored economic pressure over military reaction.¹⁵⁹ Most significant have been the resolutions passed within the past decade regarding the freezing of terrorist assets. United Nations Security Council Resolution 1267, passed in October 1999, requires UN member states to freeze assets controlled by the Taliban, a group of Sunni Muslim fundamentalist insurgents in Afghanistan.¹⁶⁰ Paragraph 4(b) of the resolution asserts that all states must:

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban . . . and ensure that neither they nor any other funds or financial resources so designated are made available . . . to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban¹⁶¹

As support for this economic measure, the Security Council cited its commitment to sovereignty for Afghanistan, its “deep concern” for the Taliban’s violation of human rights, and “its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security.”¹⁶² Instead of calling for military action to achieve its end of impeding international terrorism, this resolution exercises the Security Council’s authority to cause member states to band together and restrict a specific terrorist group’s access to funds. When the Security Council thereby “urges all States to

157. See UN Action to Counter Terrorism, Security Council Resolutions, <http://www.un.org/terrorism/sc-res.shtml> (last visited Dec. 23, 2008).

158. See UN Action to Counter Terrorism, Security Council Actions to Counter Terrorism, <http://www.un.org/terrorism/securitycouncil.shtml> (last visited Dec. 23, 2008) [hereinafter UN Action to Counter Terrorism].

159. For example, the Security Council issued Resolution 661 in 1990 after it condemned Iraq’s invasion of Kuwait. Instead of authorizing war, the resolution imposed economic sanctions on Iraq. All UN member states were required to prevent: the import of products from Iraq or Kuwait; activities by nationals of their territories to promote the export of goods from Iraq or Kuwait, including any transfer of funds; and the sale of products and weapons by nationals of their territories to persons in Iraq or Kuwait. S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (Aug. 6, 1990).

160. S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999).

161. *Id.*

162. *Id.* pmb1.

cooperate with efforts to fulfil [sic] the demand,”¹⁶³ this resolution further establishes a unified public policy to employ economic means to promote peace and counter terrorism.

Following the September 11 terrorist attacks in New York, Washington, D.C., and Pennsylvania, the Security Council issued another resolution aimed at impeding terrorist efforts. Resolution 1373 was adopted on September 28, 2001, broadening the scope of the terrorist assets that member states were obliged to freeze: not only those assets directly or indirectly controlled by the Taliban, but also those of “persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities”¹⁶⁴ The resolution also calls on all UN member states to criminalize the financing of terrorism,¹⁶⁵ deny safe haven to terrorists,¹⁶⁶ bring terrorists to justice,¹⁶⁷ and ensure that all terrorist acts are established as serious criminal offenses in domestic law.¹⁶⁸ Like Resolution 1267, Resolution 1373 reaffirms that any act of international terrorism poses a threat to international security and that the Security Council’s commitment to promoting peace is best achieved through economic means.

However, in combating terrorism, the freezing of assets overseas has not gone far enough. Since September 11, 2001, the United States has been at the forefront of a global war on terror. The country has not been alone in this endeavor, and one of its most important allies has been the United Nations. UN Resolutions 1267 and 1373 present the guidelines and avenues for undertaking the lofty task of fighting terrorism. But critics point to ineffective enforcement mechanisms and an insufficient infrastructure as undercutting much of the resolutions’ stated purpose.¹⁶⁹ Consider, for example, that in the midst of fighting a multi-billion dollar military campaign against Al-Qaeda and the Taliban, the United States has also successfully frozen over

163. *Id.* ¶ 5; see also S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999) (laying additional foundation by directing countries to work together to prevent and suppress all terrorist acts).

164. S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

165. *Id.* ¶ 1(b).

166. *Id.* ¶ 2(c).

167. *Id.* ¶ 2(e).

168. *Id.*

169. See generally, e.g., Eric Rosand, *Current Developments: The Security Council’s Efforts to Monitor the Implementation of Al-Qaeda/Taliban Sanctions*, 98 AM. J. INT’L L. 745 (2004).

\$16 million in assets of groups categorized as Specially Designated Global Terrorists, Specially Designated Terrorists, and Foreign Terrorist Organizations.¹⁷⁰ In addition, the U.S. has blocked \$310 of the \$412 million in assets (located within U.S. jurisdiction) relating to five designated state sponsors of terrorism.¹⁷¹ Comparatively, the entire international community has frozen a mere \$136 million of those persons and entities with known ties to terrorist organizations, by way of blocking orders of 150 member states.¹⁷² As many as 40 countries and jurisdictions have not issued such orders, despite being legally obligated by the UN charter to impose such sanctions.¹⁷³

Another purpose of Resolution 1267 was to “monitor states’ efforts to implement Council-imposed sanctions on Taliban-controlled Afghanistan for its support of Osama bin Laden and Al Qaeda.”¹⁷⁴ Pursuant to the passage of this resolution, the Security Council established a “counter-terrorism tool” that was “tasked with monitoring the sanctions against the Taliban (and subsequently al-Qaeda as of 2000).”¹⁷⁵ The 1267 Committee consists of all fifteen member states that make up the Security Council, each one represented by a chosen diplomat. These diplomats were not, however, experts in the major substantive areas of the mandate (*i.e.*, terrorist financing, arms trafficking, border controls, counter-terrorism and related legal issues) and in 2001 the Secretary General appointed the Analytical Support and Sanctions Monitoring Team, an eight-member group made up of experts in those areas. Similarly, after September 11, Resolution 1373 set forth a series of counter-terrorism requisites on all states and created the Counter Terrorism Committee (“CTC”).¹⁷⁶ The establishment of the CTC was

170. REPORT TO CONGRESS ON ASSETS, *supra* note 58, at 6.

171. *Id.* at 15 tbl.4 (using data from 2006). An additional \$600,000 of the OFAC blocked funds are held in foreign branches of U.S. banks. *Id.* at 14 tbl.2.

172. Rosand, *supra* note 169, at 755. “By the end of 2005, the Security Council had frozen the assets of 347 individuals and 119 entities.” Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071, 1111 (2006) (examining the use of information in this new regime along with the expansion of the powers of the Security Council).

173. See Rosand, *supra* note 169, at 755. However, “as of March 24, 2004, more than 170 countries had issued orders freezing or seizing approximately \$200 million” in financial assets related to terrorism. *See id.* n.67.

174. *Id.* at 747.

175. UN Action to Counter Terrorism, *supra* note 158.

176. See Security Council Counter-Terrorism Committee, <http://www.un.org/sc/ctc/> (last visited March 29, 2008) (“While the ultimate aim of the Committee is to increase the ability of

particularly vital to the success of this resolution, as it was to be the major-capacity building mechanism that would give the states the capability to implement and enforce the resolution's mandates.¹⁷⁷

While Resolutions 1267 and 1373 both represent the admirable efforts of the international community in the battle against terrorism, they have been criticized by some early observers as ineffective, largely political tools.¹⁷⁸ For example, one of the major responsibilities of the 1267 Committee is to maintain a list of terrorist organizations.¹⁷⁹ “Most criticism of the targeted sanctions regime focuses on alleged violations of the rights of persons whose assets have been frozen, or the inappropriateness of the Security Council ‘legislating’ by issuing binding orders of general application without adequate checks on its powers.”¹⁸⁰ The criteria for the designation of individuals and entities on the list are intentionally vague and the lack of sharing of intelligence information makes the removal of a name difficult once so designated.¹⁸¹ The objectivity of the list is further impaired by its lack of identifiers; language experts and name-searching software designers maintain that it is extremely difficult to compile a satisfactory database of names due to “the transliteration of characters from one alphabet to another, variations in the structure of names due to cultural origins, and variant spellings of names.”¹⁸² Some say that the absence of proper identification and the ability both to

States to fight terrorism, it is not a sanctions body nor does it maintain a list of terrorist organizations or individuals.”).

177. See Rosand, *supra* note 169, at 745-46. See generally Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333 (2003) (discussing Resolution 1373 and the work of the CTC).

178. See Rosand, *supra* note 169, at 760.

179. See U.N. Sec. Council, Al-Qaida & Taliban Sanctions Comm., *The Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them*, <http://www.un.org/sc/committees/1267/pd-f/consolidatedlist.pdf> (last visited Dec. 25, 2008) (listing 142 individuals belonging to or associated with the Taliban, and 253 individuals and 96 entities belonging to or associated with al Qaida).

180. Chesterman, *supra* note 172, at 1111. See also Jose Alvarez, Editorial Comment, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 (2003) (analyzing the Security Council's counterterrorism efforts—“imposing financial sanctions on designated individuals and organizations and a welter of other obligations on states . . . that rare phenomenon in international law: legally binding regulation, backed by the possibility of real enforcement action, imposed on all states by a global international organ engaged in a continuous legislative enterprise by virtue of delegated power and subject to no geographic or temporal limitation”—as an example of global hegemonic international law).

181. Chesterman, *supra* note 172, at 1114, 1118.

182. Rosand, *supra* note 169, at 751.

receive confidential information appropriately and to assess its accuracy conveys the impression that the names submitted to the list are sometimes done so for domestic political concerns, and that their link to al-Qaeda is questionable.¹⁸³ These credibility issues threaten to undermine the regime's effectiveness as some states have refused to implement the asset freezes.¹⁸⁴ Moreover, this deficiency reflects the broader problem of poor information sharing in the efforts to fight international terrorism that has led to calls for an organized and enforceable commitment from all member countries.¹⁸⁵

The monitoring group established by the Secretary General in 2001 has had some major shortcomings as well. The group was charged with monitoring the implementation of the global sanctions imposed after September 11.¹⁸⁶ Unfortunately, the monitoring group has not always been responsive to the requests made of it by the Committee. For instance, the group at times did not coordinate its visits to member states with the Committee in advance, and therefore did not concentrate on the areas that the Committee felt required the most consideration.¹⁸⁷ Issues also have arisen concerning "the lack of transparency and sloppiness in the group's work."¹⁸⁸ Perhaps most importantly, the monitoring group based its reports predominantly upon "open-source news reporting," seemingly deficient in "sophisticated analysis."¹⁸⁹

183. *See id.* at 751-52; *see also* Chesterman, *supra* note 172, at 1115-18 (discussing problems with the criteria for designation of individuals on the list for the freezing of assets and the lack of a de-listing procedure).

184. Chesterman, *supra* note 172, at 1119 ("It now seems probable that the greatest hindrance to the regime's effectiveness will not be challenges from courts but the reluctance of states to add to the list.").

185. Ronald K. Noble, *All Terrorism Is Local, Too*, N.Y. TIMES, Aug. 13, 2006, at WK 11 (arguing that the failure to share information about terrorists with global law enforcement in international databases is systemic and needs to be changed through international cooperation); *see also* Rosand, *supra* note 169, at 752 (noting that "[n]ot all states regularly transmit the list to their border services and other relevant domestic authorities charged with implementing the sanctions. Thus, even if the process for adding names to the consolidated list is improved, unless there is increased state compliance in this area, such improvements can have only a limited positive effect on the implementation of the measures.").

186. S.C. Res. 1390, ¶¶ 6, 9, U.N. Doc. S/RES/1390 (Jan. 16, 2002). In Resolution 1390, the Security Council assigned this group to monitor and report on the implementation of its global sanctions for twelve months. Upon the expiration of the group's mandate in January 2003, the Security Council extended this charge in Resolution 1455. S.C. Res. 1455, ¶¶ 9, 11, 13, 14, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

187. Rosand, *supra* note 169, at 754.

188. *Id.*

189. *Id.*

Finally, the roles of the 1267 Committee and the CTC have been effectively diminished by an overwhelming lack of compliance. The Security Council requested that all member states issue a report to the Committee, in writing, of the steps they have taken to implement the measures under each relevant resolution, but the term “requested” negated the legal obligation to act in accordance with the Council’s wishes.¹⁹⁰ In fact, more than one-third of member states initially failed to submit such a report.¹⁹¹ Many within the United Nations and international community viewed the CTC as a non-threatening body because its focus had been on capacity building and not judging states. The monitoring group issued a telling statement when it wrote: “without a much tougher and more comprehensive resolution, in which the Security Council requests States take the mandated measures and obliges them to cooperate fully with the Committee. . . , little or no progress will be achieved with regard to the [Al-Qaeda/Taliban] sanctions regime.”¹⁹²

Many of these early criticisms have since been addressed as the resolutions continue to be strengthened. For example, commencing in March 2005, the CTC began conducting site visits to determine whether member states are fully implementing counter-terrorism mandates, rather than relying exclusively on their reports.¹⁹³ “This has increased the committee’s capacity to provide independent evaluation of counterterrorism capacity needs.”¹⁹⁴ In addition, the Security Council has made it compulsory for member states to submit reports

190. *Id.* at 758.

191. *Id.*

192. *Id.* at 760 (quoting U.N. Sec. Council, Al-Qaida & Taliban Sanctions Comm., *Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolutions 1390 (2002) and 1455 (2003), on Sanctions Against Al-Qaida, the Taliban and Individuals and Entities Associated with Them*, ¶ 173, U.N. Doc. S/2003/1070 (Nov. 3, 2003)).

193. David Cortright, *A Critical Evaluation of the UN Counter-Terrorism Program: Accomplishments and Challenges*, TRANSNAT’L INST., (Apr. 28-29, 2005), at 3, <http://www.tni.org/crime-docs/cortright.pdf>.

194. *Id.* See also Ellen Margrethe Løj, Chairman, Sec. Council Counter-Terrorism Comm., Briefing to the Security Council (Apr. 26, 2005), <http://www.missionfnnewyork.um.dk/en/menu/statements/BriefingbyChairmanofCTCto-theSC.htm> (reporting on the revitalized work of the committee and presenting framework for continuing to implement its reforms); Advisory Council on Int’l Aff. [AIV], *Counterterrorism from an International and European Perspective*, Advisory Report no. 49 at 22, The Hague, Sept. 2006, available at <http://www.icj.org/IMG/AIVReport-2007.pdf> (“The practice of the CTC and its Executive Directorate (CTED) of conducting visits provides additional information on requirements relating to counterterrorism capacity.”).

to the CTC.¹⁹⁵ In contrast to earlier reports, some experts recently have concluded that the CTC's "efforts to collect information from member states on counter-terrorism capacity and implementation have been highly successful."¹⁹⁶ One observer commented: "Member state compliance with CTC reporting requests has been far greater than for any previous Security Council mandate."¹⁹⁷ All UN member states submitted to the CTC first-round reports that described their efforts to comply with Resolution 1373.¹⁹⁸ The CTC's experts responded to these reports by requesting explanations and additional information, in turn generating further submissions.¹⁹⁹ In all, the CTC has received more than 550 reports, a total which is described as "probably the largest body of information about worldwide counterterrorism capacity."²⁰⁰

According to the Advisory Council on International Affairs ("AIV"), "[s]ubstantive compliance is obviously the key issue. The reports and survey indicate that states are amending their legislation and expanding their capacity in order to comply with UN standards."²⁰¹ The AIV reported that in 2003 "only some 30 states satisfied the then-prevailing requirements for intervening in the financing, transport, recruitment and equipment of terrorists," an additional 60 states had "made progress," and 70 states were classified as "'willing but unable,' for reasons such as internal conflict, poverty or a lack of adequate legal and administrative structures."²⁰² But the AIV noted that "[f]or reasons of their own, approximately 20 countries do absolutely nothing despite having the necessary financial resources. Unfortunately, some of these countries have to contend

195. See S.C. Res. 1455, *supra* note 186, ¶ 6.

196. David Cortright, *Can the UN Battle Terrorism Effectively?*, FOURTH FREEDOM F., http://www.fourthfreedom.org/Applications/cms.php?page_id=193 (an extended version of an article originally appearing in the January 2005 issue of *USA Today*) (examining how the United Nations Committee on Counter-Terrorism is working with nation states and regional organizations to combat terrorism multilaterally).

197. *Id.*

198. *Id.* (citing Rosand, *supra* note 177, at 337).

199. Cortright, *supra* note 196.

200. *Id.* (quoting Eric Rosand, *Security Council Resolution 1373 and the Counter-Terrorism Committee: the Cornerstone of the United Nations Contribution to the Fight Against Terrorism*, in *LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM* 603, 616 (C. Fijnaut, Ja. Wouters, & F. Naert eds., 2004)).

201. AIV, *supra* note 194, at 22.

202. *Id.*

with a great deal of terrorist activity, and their lack of commitment undermines the efforts of the United Nations as a whole.”²⁰³

Still “the high levels of member state response to CTC requests confirm the importance many states attach to compliance with the UN counter-terrorism program. The reports indicate that many states are taking concrete steps to revise their laws and enhance their enforcement capacity for compliance with UN counter-terrorism mandates.”²⁰⁴ Security Council resolutions have “mobilized states for a campaign of nonmilitary cooperative law enforcement measures to combat global terrorism.”²⁰⁵ Accordingly, the domestic laws of the vast majority of member states reflect and, indeed, embody the UN’s counter-terrorism goals and objectives.²⁰⁶

In addition, experts universally agree on the importance of monitoring and compliance.²⁰⁷ However, there are inherent limits because the CTC is not a sanctions committee. The most far-reaching measure it has at its disposal is the ability to blacklist countries that are late in submitting their reports, but even in this regard it exercises restraint.²⁰⁸ Moreover, the freezing of assets as a sanctions measure has served the function of preventing future sponsorship of terrorism rather than compelling people towards desirable activities or curtailing their own bad acts.²⁰⁹ Yet it must be acknowledged that “[b]y restricting financing, safe havens and travel options for individuals in the Al Qaida network, the CTC has certainly reduced the flow of financial assistance and has probably disrupted

203. *Id.* See also AIV, *The Nuclear Non-proliferation Regime: the Importance of an Integrated and Multilateral Approach*, Advisory Rep. No. 47 at 13, 32, The Hague, Jan. 2006.

204. Cortright, *supra* note 196.

205. *Id.*

206. “The reports indicate that many states are taking concrete steps to revise their laws and enhance their enforcement capacity for compliance with UN counter-terrorism mandates.” *Id.* See also The Secretary General, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, ¶ 77, delivered to the General Assembly, U.N. Doc. A/60/825 (Apr. 27, 2006), available at <http://www.un.org/unitingagainstterrorism-/contents.htm> [hereinafter *Uniting Against Terrorism*] (“The Security Council in resolution 1373 (2001) contributed to this end by deciding that all States should ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations.”).

207. See, e.g., AIV, *supra* note 194, at 24.

208. See *id.* at 22. But see High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 156, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 1, 2004) (arguing in favor of sanctions).

209. Chesterman, *supra* note 172, at 1110.

operations.”²¹⁰ A recent estimate sets the total figure frozen internationally as approximately \$200 million in potential terrorist funding.²¹¹

Terrorism continues to pose a global threat despite the extensive counter-terrorism activity worldwide. Due to the inherent inefficiencies in the overlapping UN bodies created in this area and limitations in funding available through the UN, some experts have proposed the formation of an independent national body for counterterrorism, either a separate UN agency or a global organization outside of the UN system.²¹² A report prepared by the AIV determined that “[c]ombating terrorism effectively is primarily the responsibility of national governments. Given the international dimension of the problem, however, international cooperation is more important now than ever before.”²¹³ Certainly a financial approach to combating terrorism is more consistent with the UN Charter and resolutions, although the charter does provide a limited exception for self-defense.²¹⁴

Of particular significance is the precedent among these resolutions for direct compensation of the victims of terrorism. Resolution 1566, adopted in 2004, established the 1566 Working Group, once again comprised of all Security Council members, to recommend practical measures against groups and organizations engaged in terrorist activities.²¹⁵ This resolution extended the reach of UN bodies beyond the groups that were subject to the 1267 Committee’s review, namely Al-Qaida/Taliban, to the individuals, groups, and entities that enable and sponsor terrorist groups.²¹⁶ The

210. AIV, *supra* note 194, at 22-23.

211. See WHITE HOUSE, PROGRESS REPORT ON THE GLOBAL WAR ON TERRORISM 1 (Sept. 2003), http://www.whitehouse.gov/homeland/progress/progress_report_0903.pdf.

212. See Eric Rosand, *The UN Security Council’s Counter-Terrorism Efforts, in SWORDS INTO PLOWSHARES: BUILDING PEACE THROUGH THE UNITED NATIONS*, 73, 81-83 (Roy S. Lee ed., 2006). See generally Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, 11 J. CONFLICT & SECURITY L. 399 (2007) (detailing the limitations of the current UN Security Council-led approach due to the inherent, political, administrative and budgetary challenges of operating within the UN system and arguing that a new international body dedicated to counterterrorism outside of, but perhaps related in some way to, the UN may be needed).

213. AIV, *supra* note 194, at 11.

214. *Id.* at 24-25 (“[U]nder international law, self-defense on the basis of Article 51 of the UN Charter is linked to a number of restrictions concerning the nature, scope, location and duration of the relevant measures.”).

215. S.C. Res. 1566, ¶¶ 9-10, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

216. *Id.* ¶ 9.

practical measures to be imposed on these entities would encompass procedures such as: “bringing them to justice through prosecution or extradition, freezing their financial assets, preventing their movement through” territories of Member States, and preventing access to all types of arms and related supplies.²¹⁷ Included among its charges is that this working group “consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors, and submit its recommendations to the Council.”²¹⁸ The Secretary General in a keynote address further emphasized the merit of such a fund.²¹⁹ Thus, the UN Security Council has already laid the foundation for the approach advocated here.

The UN stands historically united in the area of terrorism and the efforts to combat this global problem. On September 8, 2006, the Member States adopted “The Global Counter-Terrorism Strategy,” which serves as “the common platform that brings together the counter-terrorism efforts of the various United Nations system entities into a common, coherent and more focused framework.”²²⁰ Building upon an unprecedented consensus reached by world leaders at their 2005 World Summit to condemn terrorism,²²¹ this strategy signifies the first time that nations agreed to a common strategic

217. *Id.*

218. *Id.* ¶ 10; *see also* UN Action to Counter Terrorism, *supra* note 158. *See generally* SECURITY AND HUMAN RIGHTS, 159-61 (Benjamin J. Goold & Liora Lazarus eds., 2007) (discussing the four Security Council committees on terrorism: the 1267 Committee, the Counter-terrorism Committee, the 1540 Committee, and the 1566 Working Group).

219. *See* Albrecht & Kilchling, *supra* note 34, at 15 (citing Secretary General Kofi Annan, Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security: A Global Strategy for Fighting Terrorism (Mar. 10, 2005), <http://www.un.org/apps/sg/sgstats.asp?nid=1345> (noting, however, that the UN did not adopt a mandatory scheme of support for victims of terrorism)); *see also* U.N. Econ. & Soc. Council, Sub-Comm’n on Human Rights Res. 2003/37, ¶ 11, E/CN.4/2003/135 (Apr. 23, 2003).

220. UN Action to Counter Terrorism, Coordinating Counter-terrorism Actions Within and Beyond the UN System, <http://www.un.org/terrorism/cttaskforce.shtml/68> (last visited Dec. 26, 2008).

221. *UN Summit Supports Millennium Goals*, *supra* note 152. In conjunction with the 2005 World Summit, the Security Council adopted Resolution 1624, “Condemning in the strongest terms all acts of terrorism irrespective of their motivation,” as well as the incitement to such acts; it called on member states to prohibit by law incitement to commit terrorist acts, prevent such incitement, and deny safe haven to any perpetrators. S.C. Res. 1624, *prmb.*, ¶ 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005).

approach to fight terrorism worldwide.²²² Upon launching this initiative, the President of the General Assembly declared:

The passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated.²²³

This statement of a unified strategy strongly evidences a common public policy of all the nations.

As further support for a public policy in favor of compensating victims of terrorism and ensuring their rights, the Council of Europe recently drafted guidelines on the Protection of Victims of Terrorist Acts, which assert that states must devise policies to ensure the effective protection of human life.²²⁴ The guidelines set forth principles for delivering support and compensation for victims, most significantly for addressing pain and suffering.²²⁵ Note, however, that the proposals only focus on compensation and fairness with respect to equal treatment of victims, whereas the civil action approach also utilizes financial means to punish and prevent terrorist acts.²²⁶ Yet a common core is evidenced: “Assistance, protection and compensation for victims of terrorism have a significant impact as a political strategy to counter the dehumanizing of victims, which is a significant component of terrorist strategies worldwide.”²²⁷ In view of this unified policy of the nations, the timing is ideal for international support of monetary actions against terrorism. Although the committees’ attempts to implement these resolutions may be flawed, they are

222. UN Action to Counter Terrorism, *supra* note 158.

223. UN Action to Counter Terrorism, <http://www.un.org/terrorism/index.shtml> (citing statement of Sheikha Haya Rashed Al Khalifa, President of the 61st session of the General Assembly Launching the UN Global Counter-Terrorism Strategy on 19 September 2006).

224. See Council of Europe, Comm. of Ministers, *Guidelines on the Protection of Victims of Terrorist Acts*, princs., CM/Del/Dec(2005)917/4.2/appendix2E (Mar. 7, 2005); Albrecht & Kilchling, *supra* note 34, at 16.

225. Albrecht & Kilchling, *supra* note 34, at 17. See also Org. for Sec. & Cooperation in Europe [OSCE], Office for Democratic Institutions and Hum. Rts., *Technical Workshop on Solidarity with Victims of Terrorism: Final Report*, ¶ 3, ODIHR.GAL/23/06 (Mar. 9-10, 2006).

226. See James Kraska, *Torts and Terror: Rethinking Deterrence Models and Catastrophic Terrorist Attack*, 22 AM. U. INT’L L. REV. 361, 383 (2007) (stating “[t]he application of tort theory . . . offers value in . . . deterrence against . . . nuclear terrorism”).

227. Albrecht & Kilchling, *supra* note 34, at 29. See also *Uniting Against Terrorism*, *supra* note 206, ¶ 5.

laying the foundation for a unified financial approach against global terrorism. While their success thus far has been measured at best, they have nevertheless created further opportunity to build upon this foundation.

IV. BUILDING UPON THIS FOUNDATION: INTERNATIONAL ENFORCEMENT OF CIVIL JUDGMENTS

As demonstrated above, the international community shares a strong commitment to fight terrorism in its myriad manifestations. In view of the common goal of drying up the financial means for terrorism, the international community should build upon this commitment. The time is ripe to take this civil battle to the next level, to strengthen and expand. This proposal entails a three-pronged approach:

First, the Security Council should increase its enforcement of members' efforts to freeze assets overseas. The committees should continue their work to mandate, monitor, and ensure member state compliance with all components of their resolutions against global terrorism. Fresh from the recent unified summit, the new "UN Global Counter-Terrorism Strategy" affords a unique opportunity to do so. Logically this coordinated effort will need to include under its framework increased sharing of information, improved communication, and streamlined technological systems.²²⁸ Some clarification of court jurisdiction will also be necessary in order to give individuals whose names have been placed on the list a forum and means of challenging this designation in particular cases.²²⁹ This work can be augmented through strong statements and additional UN resolutions as necessary.

228. See Noble, *supra* note 185; Rosand, *supra* note 169, at 752; McCoy, *supra* note 146 (identifying these needs).

229. Such a court could exercise a reviewing function over these challenges as both a check on the powers of the executive branch in unilaterally making these designations and a protector of the rights of persons whose assets have been frozen, albeit with appropriate deference. For a discussion of these concerns, see *supra* notes 180-182 and accompanying text; see, e.g., *Swede Removed From Terror Suspect List*, THE SOMALILAND TIMES, Aug. 17, 2006, available at <http://www.somalilandtimes.net/sl/2005/239/24.shtml> (discussing United States removal of Ahmed Yusuf, a Somali-born Swedish man, from its list of people suspected of links to terrorism, almost five years after he was placed on the terror suspects list and had his assets frozen; his attempts to challenge this designation had failed due to a lack of a court with clear jurisdiction, a lack of information sharing, and a strong deference to the U.S. list); see also *Swede Loses EU Terror Link Case*, THE LOCAL (Swed.), Sept. 21, 2005, available at <http://www.thelocal.se/article.php?ID=2132&date=20050921>.

Second, the national courts of member states should commit to the enforcement of the civil judgments of U.S. courts for the victims of terrorism, levying upon the assets of organizations connected to terrorism wherever they may be found. Overall, the enforcement of U.S. judgments at the outset would not be against the public policy of the international community. To the contrary, the universally adopted UN resolutions demonstrate that the guiding principles have already been recognized. Punitive damages and treble damages may be problematic in some nations, but problematic portions of a judgment could be severed by international courts from the enforceability of the main portion of the judgments.²³⁰ At the very least, the main component of the victim's compensatory award should be honored since national courts worldwide hold common belief in reciprocity, comity, and the rule of law.

Finally, international courts should exercise concurrent jurisdiction in these matters, enabled by their potential access to the frozen assets of terrorist organizations. They should provide terrorism victims with access to frozen assets obtained through UN resolutions.²³¹ Indeed, the 1566 Working Group of the Security Council already appears to be exploring an international compensation fund for the victims, which could be comprised of money seized from terrorist organizations and their supporters.²³² Perhaps it will provide an independent avenue for victims of international terrorism to pursue civil lawsuits against terrorist groups and state sponsors of terrorism in international courts. In order to be an effective cause of action, such an approach would need to offer a

230. As a general fundamental principle of construction, if a statute or contract contains a part that is invalid, unconstitutional, or against public policy and the invalid part may be severable from the rest, that invalid part should be stricken while the portion which is constitutional or unobjectionable may stand and be upheld by the court. *See, e.g., Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006) *remanded to* 516 F. Supp. 2d 225 (E.D.N.Y. 2007) (severability rule applied to Religious Freedom Restoration Act); *SKF USA Inc. v. United States*, 451 F. Supp. 2d 1355, 1365 (Ct. Int'l Trade 2006) *remanded to* 502 F. Supp. 2d 1325 (Ct. Int'l Trade 2007) (citing *El Paso & Ne. Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909) which stated, "[W]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid."). *See generally* 16 AM. JUR. 2D *Constitutional Law* §§ 207-11 (2008) (explaining the effect and treatment of partial constitutionality, including tests for determining severability).

231. *See, e.g.,* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, (codified as amended in scattered sections of 12, 15, and 28 U.S.C.), discussed *supra* notes 66-68 and accompanying text.

232. *See* S.C. Res. 1566, *supra* note 215, ¶ 10.

forum, broad jurisdiction, and an enforcement mechanism for these civil suits. Certainly these UN resolutions provide evidence that enforcing U.S. judgments abroad would be consistent with the public policy of the UN, member nations, and international courts on the same basis. The civil approach thus carries favorable implications for the judiciary worldwide; together the international community can employ the courts to prove the old adage that “the pen is mightier than the sword.”²³³

CONCLUSION

Historically the UN Security Council has done its job of promoting international security and peace through non-military measures, particularly with the freezing of terrorist assets as an important alternative to military combat for thwarting terrorism. Scholars have conducted research and concluded that, in comparison to attempts to employ direct preventative or reactive tactics, financial methods are more effective at garnering intelligence and curbing terrorism. The UN Security Council has supported economic alternatives to war, such as freezing terrorist assets, for managing international conflicts and promoting long-term, global peace. Together with their strong enabling language, these resolutions provide the foundation for a unified international economic initiative against terrorism.

As revealed by the closer examination above, the policy of freezing assets as an attempt to combat terrorism is not currently viable as the sole alternative to the use of military force. To be sure, the blocking of funds is a helpful but not an exhaustive method by which to continue the struggle against terrorists and the organizations that support them. Until globalization and the restructuring of the information world is complete, further actions will be necessary to provide security to the international community. In order for the international community to successfully combat terrorism, a multilateral approach is necessary. Strict enforcement of resolutions accented by the seizure of financial assets and the use of the

233. This expression was coined in its current form by Edward Bulwer-Lytton in 1839 for his play, *Richelieu; Or the Conspiracy: A Play in Five Acts* (1839), although he was not the first to use a phrase with this concept. One of those preceding Bulwer-Lytton was Thomas Jefferson, who in 1796 sent a letter to Thomas Paine in which he wrote: “Go on doing with your pen what in other times was done with the sword.” See *Origins of Sayings*, www.trivia-library.com/b/origins-of-sayings-the-pen-is-mightier-than-the-sword.htm (last visited Dec. 26, 2008).

international judicial system is the most effective, logical and realistic approach.

The progress to date is just the beginning. At this time of tremendous unity and potential opportunity, UN resolutions must be strengthened to increase the freezing of terrorist assets overseas and give access to those assets to victims seeking to enforce judgments against terrorist groups and state sponsors of terrorism. The United States has supported civil lawsuits by enacting federal statutory authority both for the claims and for the execution of judgments against terrorists and their supporters. As an increasing number of these lawsuits proceeds successfully through the U.S. courts, and as Congress develops new legislation, such as the Justice for Victims of Terrorism Act, the international community will be called upon to aid these plaintiffs in collecting money judgments. This can be achieved by recognizing that the strong statements and mandates in key Security Council resolutions embody a unified public policy in support of the financial approach to fighting terrorism. Accordingly, individual nations should enforce these judgments through their courts where the terrorists' assets, including frozen assets, are located; and furthermore, route frozen assets of the international community to international courts for enforcement. In addition, the international community can choose to follow this model and provide an avenue for victims of global terrorism directly to pursue civil lawsuits against terrorist groups and organizations in the international courts.

The road to collection is a long and arduous one, fraught with obstacles and frustrations ahead, but endorsing a civil action approach is a significant start. Judith C. Young, the mother of Marine Sgt. Jeffrey Young who was killed in the 1983 Beirut bombing of the Marine barracks, recently commented on the passage of the new U.S. law:

The bells of justice now ring more loudly. We have said to state sponsors of terror: The life-blood of the terrorist, the money that buys their weapons, gives them food and shelter, and pays for their training and travel, will be harder to obtain. The cost of all this support has just gotten hundreds and even thousands of times more expensive . . . State sponsors of terror now know they must pay for their actions.²³⁴

Both the U.S. Congress' enactment of terrorist-related statutes and UN resolutions aimed at impeding terrorists and freezing their assets

234. *Beirut Families*, *supra* note 124.

have laid the foundation to provide victims of terrorism with a forum for that accountability.

When civil monetary damages carry weight beyond national boundaries, the international community reaches common ground: nations recognize the legitimacy of courts in the international sphere; they provide reparation to the victims of terrorism; and they dismantle terrorist infrastructure. As Dwight D. Eisenhower advised,

[T]his peace we seek cannot be born of fear alone: it must be rooted in the lives of nations. There must be justice, sensed and shared by all peoples, for, without justice the world can know only a tense and unstable truce. There must be law, steadily invoked and respected by all nations, for without law, the world promises only such meager justice as the pity of the strong upon the weak.²³⁵

In conclusion, it is only through the active role of the UN and other organizations, including the courts worldwide, that the international community can bring to fruition this struggle to reclaim the world from the clutches of terrorism.

235. President Dwight D. Eisenhower, Second Inaugural Address, 1957 PUB. PAPERS 60, 62 (Jan. 21, 1957), available at <http://www.bartleby.com/124/pres55.html>. One should also keep in mind these words from his farewell address to the nation on January 17, 1961: "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex." See *Americans Who Tell the Truth*, Dwight Eisenhower, http://www.americanswhotellthetruth.org/pgs/portraits/Dwight_Eisenhower.html (last visited Dec. 26, 2008). His admonition is even more compelling today.