



DATE DOWNLOADED: Wed Apr 24 05:35:31 2024

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

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).

ALWD 7th ed.

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).

APA 7th ed.

Reisman, W. Michael, & Hakimi, Monica. (2003). 2001 hugo black lecture: illusion and reality in the compensation of victims of international terrorism. Alabama Law Review, 54(2), 561-582.

Chicago 17th ed.

W. Michael Reisman; Monica Hakimi, "2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism," Alabama Law Review 54, no. 2 (Winter 2003): 561-582

McGill Guide 9th ed.

W. Michael Reisman & Monica Hakimi, "2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism" (2003) 54:2 Ala L Rev 561.

AGLC 4th ed.

W. Michael Reisman and Monica Hakimi, '2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism' (2003) 54(2) Alabama Law Review 561

MLA 9th ed.

Reisman, W. Michael, and Monica Hakimi. "2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism." Alabama Law Review, vol. 54, no. 2, Winter 2003, pp. 561-582. HeinOnline.

OSCOLA 4th ed.

W. Michael Reisman & Monica Hakimi, '2001 Hugo Black Lecture: Illusion and Reality in the Compensation of Victims of International Terrorism' (2003) 54 Ala L Rev 561

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

2001 HUGO BLACK LECTURE:
ILLUSION AND REALITY IN THE COMPENSATION
OF VICTIMS OF INTERNATIONAL TERRORISM

W. Michael Reisman^{*}
Monica Hakimi^{**}

One of the many curious revelations in the increasingly bizarre saga of the presidential pardon of Marc Rich in the twilight hours of the Clinton administration is especially fascinating to the student of international human rights law. Former President Clinton, in justifying the pardon, explained that Mr. Rich was an unheralded human rights activist. Among his apparently numerous, but unacknowledged, good deeds, one stands out for its carefully crafted hypocrisy. Mossad, the Israeli covert action agency, arranged for Mr. Rich secretly to transfer \$400,000 to the Egyptian government, which then established a fund to compensate the families of Israeli victims of a shooting attack by an Egyptian soldier who had run amok in a tourist area near the Egyptian-Israeli border. Thanks to Mr. Rich's anonymous generosity, Egypt could appear to be making voluntary payments to the families, thereby seeming to acknowledge the grave human rights violations that had occurred, while expressing Egypt's contrition for them. Israeli public opinion, which had been aroused by the murders, would be assuaged, while those who viewed events through a human rights lens could take satisfaction in the "fact" that, though horrible things continue to happen, the world as a whole is increasingly sensitive and responsive to human rights claims. We would all feel good, and only Mr. Rich, the Egyptian government, Mossad, and Mr. Clinton would be any the wiser.

If the story is true, it imports something disturbing about the willingness to create and exploit a counterfeit reality with respect to human rights. Had the issue simply been one of rehabilitating or compensating victims, Mr. Rich would have established the fund in question in Israel. But, by pretending that this was a spontaneous Egyptian action, the scheme created a filigree of expectations that was not grounded in reality. Presumably, the justification for the subterfuge was that it would maintain popular support within Israel for a peace treaty that one party did not seem to be supporting with

^{*} Myres S. McDougal Professor of International Law, Yale Law School. This Article derives from the 2001 Hugo Black Lecture that Professor Reisman delivered at The University of Alabama School of Law on March 1, 2001.

^{**} Yale Law School, J.D. 2001.

sufficient conviction and enthusiasm. The result was a perception about the reality of human rights achievements that was quite discrepant from what actually was occurring.

We believe that the United States is embarked on a similar exercise of counterfeiting reality with respect to compensation for victims of violations of international human rights. We accept the utility of symbols in politics and the important function of myth systems in law,¹ and we believe that, in the continuum of attitudes and behavior, social change can be brought about by intervening in either. But we fear that the counterfeiting operation that is underway, abetted in different ways by all three branches of our government, by the human rights community, and by the plaintiffs' bar, ultimately will cause serious injury to international law and actually sets back the program for the protection of human rights by diverting attention from the critical issues. This should be acknowledged and openly examined.

I.

Although the protection of international human rights traces its intellectual roots back to some of the fathers of international law, human rights was not a practical program within the international legal regime until after the Second World War. At that point, the United Nations General Assembly adopted the Universal Declaration of Human Rights,² and states then developed an increasingly comprehensive network of human rights treaties.³ Because none of the early legislative programs addressed the issue of enforcement, human rights advocates early in the modern human rights era sought enforcement of the newly emerged law through the only option available to them. They developed procedures before international inter-governmental bodies. These bodies essentially were state-managed entities, staffed at the higher levels by state-appointed personnel who often were unwilling to enforce human rights law with much vigor, lest they transform an institution designed to be weak into an effective body that might subject their own governments to liability. The inter-governmental bodies thus did not effectively enforce the new law, and enforcement remained the bane of the human rights movement.

The situation changed dramatically with an apparently unrelated development in international commercial law that was itself the culmination of a series of developments reaching to the beginning of the past century. The Mexican, and later, the Bolshevik revolutions had engendered command

1. See generally MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* 15-36 (1979).

2. G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg. at 135, U.N. Doc. A/810 (1948).

3. See, e.g., *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg. at 165-68, U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg. at 168-74, U.N. Doc. A/6316 (1966); *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., 1496th plen. mtg. at 175-76, U.N. Doc. A/6316 (1966).

economies that replaced private economic activity with activity conducted by various organs of the state. Because foreign state activity at the time was entitled to broad sovereign immunity in western national courts,⁴ traders in Western Europe and North America discovered that they could not enforce judicially contracts that had been concluded with new government entities.⁵

The unavailability of judicial remedies in the United States and the resulting dissatisfaction among traders quickly generated demands for legal adjustments to reflect the shifted role of the state in the new command economies. In response, U.S. courts commenced a series of experiments designed to accommodate, on the one hand, the interests of commercial actors who demanded restricted immunity for state commercial entities, and, on the other hand, the interests of the executive branch in maintaining sovereign immunity and avoiding the acute politicization of international commercial disputes, which could be initiated by private parties at a moment convenient to them but quite inconvenient to the government.⁶ However, none of the experiments, whether initiated by the courts or by the executive, was particularly successful.

Finally, after over ten years of negotiation between representatives from the three branches of government, from the private bar, from the commercial sector, and, indirectly, from foreign governments, the legislature arrived at a solution. In 1976, Congress enacted the Foreign Sovereign Immunities

4. The Supreme Court first enunciated the doctrine of sovereign immunity in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.), which held that United States courts lacked jurisdiction over the armed ship of a foreign state. Although the holding of *The Schooner Exchange* was relatively narrow, the decision came to be interpreted "as extending virtually absolute immunity to foreign sovereigns." *Verlinden B.V. v. Cen. Bank of Nig.*, 461 U.S. 480, 486 (1983) (citing *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926)).

5. For examples of decisions finding that a foreign sovereign was immune from jurisdiction in United States courts despite the commercial nature of the foreign sovereign's alleged conduct, see *Spacil v. Crowe*, 489 F.2d 614, 616 (5th Cir. 1974) (Canal Zone) ("The doctrine of foreign sovereign immunity cuts across the rights of individuals when governments engage in commercial or industrial activities reserved in many countries for private enterprise."); *Heaney v. Gov't of Spain*, 445 F.2d 501 (2d Cir. 1971).

6. United States courts historically have deferred to the executive branch on the question of whether to accept jurisdiction over actions against foreign states or their instrumentalities. See, e.g., *Ex parte Peru*, 318 U.S. 578, 588 (1945) ("[C]ourts are required to accept and follow the executive determination that the vessel is immune."); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.") (citation omitted). "Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Verlinden*, 461 U.S. at 486. In 1952, the State Department issued what came to be known as the "Tate Letter," which announced the policy of denying immunity for commercial acts of a foreign nation. See Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Acting Attorney Gen. Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T S. BULL. 984-85 (1952), and in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 app. 2 (1976). However, the policy set forth in the Tate Letter proved difficult to implement. See *Verlinden*, 461 U.S. at 486. For examples of the judiciary's efforts to implement that policy, see *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (finding jurisdiction over counterclaims against a foreign sovereign arising out of a commercial dispute), and *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971) (finding no jurisdiction over a vessel represented by the government of a foreign sovereign, even though the cause of action might have been involving a purely private, commercial decision and the defendant allegedly waived any immunity by entering into the contract giving rise to the dispute).

Act (FSIA).⁷ The FSIA was a complex legal instrument that subjected foreign states to the jurisdiction of U.S. courts in a variety of commercial matters, as interpreted and understood by the United States. Moreover, it gave courts, rather than the executive, the power to determine whether, in a particular instance, the foreign state was immune. The FSIA thus effectively restored the playing field that existed before the development of command economies, again enabling judicial relief for international commercial disputes regardless of whether one party to the dispute was a government entity.⁸

The FSIA was expected to be, and in fact was, a major event in international commercial law. However, the impact that the FSIA had on the protection of human rights by national courts was not anticipated.⁹ Until the FSIA's enactment in 1976, the human rights bar had, rather unsuccessfully, sought to enforce and implement human rights before inter-governmental bodies, because those bodies were, in effect, "the only game in town." With passage of the FSIA, American human rights lawyers shifted their efforts for enforcement of human rights from various international fora to the national judiciary. By combining the new FSIA with the Alien Tort Claims Act (ATCA), an obscure instrument dating from the earliest days of the Republic, human rights lawyers discovered a venue for suits in U.S. courts against foreign governments that allegedly had violated the human rights of their own nationals.¹⁰ This national, "judicialist" initiative received early encouragement from the Second Circuit in the case of *Filaritiga v. Peña-Irala*.¹¹ In *Filaritiga*, the father and sister of a Paraguayan national who had been tortured and killed in Paraguay sued the victim's torturer, a Paraguayan state official.¹² After finding that torture violated the law of nations, the Second Circuit held that the ATCA allowed for the exercise of federal court jurisdiction.¹³ The D.C. Circuit, in *Tel-Oren v. Libyan Arab Repub-*

7. 28 U.S.C. §§ 1602-1607 (2000).

8. 28 U.S.C. § 1605(a)(2) provides that a foreign state shall *not* be immune from jurisdiction where the action is:

[B]ased upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (2000).

9. See Jennifer A. Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765, 770-71 (1996) (implying that the FSIA was not intended as human rights legislation); see also H.R. REP. NO. 103-702, at 4 (1994), available at 1994 WL 449323 ("[T]he FSIA does not currently allow U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil.").

10. The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000). See also KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 90-91 (1990).

11. 630 F.2d 876 (2d Cir. 1980).

12. *Filaritiga*, 630 F.2d at 878.

13. See *id.* at 887.

lic,¹⁴ dampened somewhat the Second Circuit's encouragement by applying a more restrictive interpretation to the phrase "law of nations" in the ATCA.¹⁵ In other U.S. jurisdictions, however, the felicitous conjunction of the FSIA and the ATCA provided opportunities for human rights suits against foreign governments, brought first by the human rights bar and, later, by the plaintiff's bar. To be sure, these judgments could not be enforced, because any damage awards that might be secured could find no readily accessible assets of the defendant. Nevertheless, from the perspective of the human rights advocate, the fact that the national judiciary affirmed the violation and obliged a remedy reinforced international human rights law. That reinforcement was no minor achievement.

However, the Supreme Court to some extent reversed that progress in *Argentine Republic v. Amerada Hess Shipping Corp.*¹⁶ by restricting the jurisdictional scope of the FSIA for potential human rights cases.¹⁷ The plaintiffs in *Amerada Hess* were Liberian corporations that sued the Argentine Republic for bombing their cargo ship on the high seas during the Falklands War.¹⁸ The plaintiffs claimed that their dispute with Argentina was entirely commercial and, therefore, that it fit within the exceptions to the FSIA.¹⁹ The Supreme Court disagreed. The Court concluded that, because no specific exception to the FSIA applied to the type of dispute at issue, the Argentine Republic was immune from suit in U.S. courts.²⁰ The Court thus interpreted the FSIA as the sole basis for jurisdiction over a foreign sovereign and instructed lower courts to construe the FSIA restrictively in this regard.²¹ Foreign sovereign immunity again became the default position, and the FSIA, a long-arm statute for only the specifically enumerated applications set forth therein.

The United States is a vibrant democracy in which dissatisfactions with an existing legal situation quickly generate demands for legal adjustments, which then are effected in proportion to the political influence that the dissatisfied groups are able to mobilize. In this instance, individuals who sought to expand the restrictive exceptions of the FSIA but found themselves blocked in the courts turned to the legislature to alter the FSIA's legal framework, which, in turn, would enable a subsequent judicial remedy. In the environment of political lobbying in Washington, a second convergence of events led to unexpected consequences for the protection of human

14. 726 F.2d 774 (D.C. Cir. 1984).

15. See *Tel-Oren*, 726 F.2d at 775. The plaintiffs in *Tel-Oren* were mostly Israeli survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel. *Id.* The panel found that jurisdiction did not exist, each judge for a different reason. *Id.*

16. 488 U.S. 428 (1989).

17. See *Amerada Hess*, 488 U.S. at 439.

18. *Id.* at 431.

19. *Id.* at 439.

20. *Id.* at 434-39.

21. *Id.* at 443 (explaining that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"); accord *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citing *Amerada Hess*).

rights, in particular, and for the development of international law, more generally. In 1995, Timothy McVeigh and others bombed the federal building in Oklahoma City, causing enormous loss of life. When those responsible were apprehended, the families of the victims intensely demanded justice. To many of the families, justice in that context meant the execution of the perpetrators. When the families learned that those responsible might use the courts to defer the death penalty for decades, if not to avoid it entirely, the families descended on Washington to secure legislative change and to increase the likelihood that capital punishment could be meted out against McVeigh and his accomplices.²² In Washington, the Oklahoma families encountered another group of families, those of the victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland.²³ Neither group, on its own, could likely achieve its desired enactment. However, the groups realized that if they joined forces, each might achieve its objectives. And they did. Working together, the two groups secured passage of the chillingly titled Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).²⁴

The convergence of AEDPA's "effective death penalty" component with its "anti-terrorism" component is somewhat ironic. The "effective death penalty" component narrowed the opportunities available to defendants for challenging their state convictions in federal courts.²⁵ Human rights activists often criticize this component of AEDPA, contending that Congress essentially closed the safety valve by which federal courts rescue state prisoners from unconstitutional state convictions.²⁶ At the same time, however, the human rights movement appreciated the potential of the "anti-terrorism" component, which amended the FSIA to allow U.S. nationals to sue foreign states for violations of human rights that can be deemed "terrorist activities."²⁷ Under the 1996 amendment to the FSIA, a foreign state no longer is immune from jurisdiction in any case:

In which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such act if such act or provision of material support is engaged in by an official, employee, or

22. See, e.g., Laurie Kellman, *Families of Victims Seek to Limit Death-Row Appeals for Terrorists*, WASH. TIMES, May 24, 1995, at A3, available at 1995 WL 2567936 ("Congress should enact legislation to speed the executions of convicted terrorists, according to the families of several Oklahoma City bombing victims."); Jim Myers, *Victims' Families Appeal to Senators*, TULSA WORLD, June 6, 1995, at N1, available at 1995 WL 5598440 ("Families of those killed in the Oklahoma City bombing made an emotional appeal Monday for Congress to speed up death sentences . . .").

23. See ALLAN GERSON & JERRY ADLER, *THE PRICE OF TERROR* 217-39 (2001).

24. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

25. See *id.*

26. See, e.g., Norman Dorsen, *Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context*, 3 U.C. DAVIS J. INT'L L. & POL'Y 143, 149-51 (1997) (arguing that AEDPA violates civil liberties).

27. See Pub. L. No. 104-132, 110 Stat. 1214 (1996).

agent of such foreign state while acting within the scope of his or her office, employment, or agency.²⁸

For the amendment to apply, either the victim or the survivor bringing the claim must be a U.S. national.²⁹ In addition, the U.S. Secretary of State must have designated the foreign state a state sponsor of terrorism, either at the time the event occurred or after that time but as a result of the particular event that gave rise to the suit.³⁰ Finally, the American plaintiff must allow the defendant foreign state a reasonable opportunity to arbitrate the claim.³¹ Of course, everyone recognized that the probability of the foreign state agreeing to arbitrate a claim arising out of the state's terrorist activities was remote and, thus, that the claims would likely proceed before United States courts.

The 1996 amendment to the FSIA was accompanied a few months later by another act, the Civil Liability for Acts of State Sponsored Terrorism Act (the "Civil Liability Act"), passed as part of the 1997 Omnibus Consolidated Appropriations Act.³² The Civil Liability Act, sometimes referred to as the "Flatow Amendment," in memory of an American college student, Alisa Flatow, who was killed in a suicide attack in Israel, provides, in relevant part, as follows:

An official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . . for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under [28 U.S.C. § 1605(a)(7)].³³

The 1996 amendment to the FSIA and the Civil Liability Act together broadened the scope for judicial action and of potential liability for acts of terrorism. First, AEDPA's new exception to the FSIA created an innovative threshold of causality: A foreign state now could be subjected to U.S. jurisdiction even if it only indirectly caused the act of terrorism at issue, i.e., through the provision of material support or resources. Second, the new exception adopted the principles of agency: A foreign state could be subjected to U.S. jurisdiction on the basis of the act of terrorism of an agent or employee, acting within his or her scope of authority. Third, with the Civil Liability Act, plaintiffs no longer needed to incorporate the provisions of

28. 28 U.S.C. § 1605(a)(7) (2000).

29. *Id.* § 1605(a)(7)(B).

30. *Id.* § 1605(a)(7)(A). The list of states specifically designated by the State Department as "state sponsors of terrorism" is at 31 C.F.R. § 596.201 (2001).

31. 28 U.S.C. § 1605(a)(7)(B).

32. Pub. L. No. 104-208, Div. A, Tit. I, § 101(c), 110 Stat. 3009 (1996), *reprinted at* 28 U.S.C. § 1605 note.

33. 28 U.S.C. § 1605 note.

ATCA for a cause of action against individual agents or employees of a terrorist state. And finally, the Civil Liability Act specifically allowed recovery for pain and suffering, economic damages, solatium, and punitive damages.

By allowing recovery for pain and suffering, economic damages, solatium, and punitive damages, the Civil Liability Act introduced an element that had theretofore not been part of the emerging legislative ensemble or, arguably, of international law. U.S. plaintiffs now could receive awards of damages—and, potentially, very high awards—for certain human rights abuses. The only problem was that Congress did not provide a means by which to satisfy those awards.

II.

The 1996 legislation quickly produced striking results. In December 1997, in *Alejandro v. Republic of Cuba*,³⁴ the United States District Court for the Southern District of Florida, sitting without a jury, entered a default judgment of more than \$187 million against Cuba. The case arose from the destruction by Cuban MIGs of two unarmed civilian planes flown by pilots of a Miami-based group called “Brothers to the Rescue.” The American planes had been flying over international waters in the Florida Straits looking for rafters trying to escape Cuba for refuge in the United States. Cuba’s act of downing the private planes was condemned by the U.N. Security Council and by the International Civil Aviation Organization and provoked an international wave of popular revulsion.³⁵

The administrators of the estates of the Brothers to the Rescue pilots brought suit in Florida under the Civil Liability Act and the 1996 amendment to the FSIA. Not surprisingly, Cuba did not appear to defend itself; instead, it sent a diplomatic note asserting that the court lacked jurisdiction over Cuba or any of its entities.³⁶ Because Cuba is a foreign state, the court could not simply enter a judgment in default, as it might have done against a private party. Rather, in order to enter a judgment against Cuba, the plaintiffs had to establish their “claim or right to relief by evidence [that is] satisfactory to the [c]ourt.”³⁷ In the event this proved not to be challenging: The

34. 996 F. Supp. 1239 (S.D. Fla. 1997).

35. See S.C. Res. 1067, U.N. SCOR, 51st Sess., 3683d Mtg., U.N. Doc. SC/6247 (1996), available at [http://daccess-ods.un.org/doc/UNDOC/GEN/N96/190/72/PDF/N9619072.pdf](http://daccess-ods.un.org/doc/UNDOC/GEN/N96/190/72/PDF/N9619072.pdf?OpenDocument); *Consideration of the Report on the 24 February 1996 Shootdown of Civil Aircraft off Cuba*, ICAO Res., at ¶ 4, ICAO Doc. PIO 6/96 (June 27, 1996), available at <http://www.icao.int/icao/en/nr/pio9606.htm>.

36. *Alejandro*, 996 F. Supp. at 1242 (“Neither Cuba nor the Cuban Air Force has defended this suit, asserting through a diplomatic note that this Court has no jurisdiction over Cuba or its political subdivisions.”).

37. 28 U.S.C. § 1608(e) (2000). In a more recent case filed against the government of Iran, Judge Robertson explained that the decisions entering judgments of default under 28 U.S.C. § 1608(e) have applied varying standards for determining whether a plaintiff has established a “claim or right to relief by evidence [that is] satisfactory to the Court.” *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 93 (D.D.C. 2002) (quoting 28 U.S.C. § 1608(e)). Some decisions apply a “clear and convincing evidence” standard. See, e.g., *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 16 (D.D.C. 2002);

victims' estates offered testimonial and documentary evidence that satisfied the court.

The court then turned to the issue of damages. With respect to compensatory damages, it applied the standard method of assessment used in U.S. courts, calculating loss of future earnings based on a projection of the victim's income over a natural life span, discounted for current payment.³⁸ In addition, the court awarded the family of each victim for its mental pain, suffering, and loss of companionship. The wife and daughter of one victim received \$8 million, and each of the parents of the other victims received \$5.5 million.³⁹ Finally, the *Alejandro* court awarded punitive damages on an unprecedented scale. The court explained the basis for its award of punitive damages by borrowing the language of the district court in *Filartiga v. Pena-Irala*,⁴⁰ the fount of the enforcement of human rights in U.S. courts. The *Alejandro* court reasoned as follows:

Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example. To accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense.⁴¹

The district court in *Filartiga* had awarded each plaintiff \$5 million in punitive damages.⁴² The *Alejandro* court, purporting to follow that precedent, awarded the families of the Brothers to the Rescue pilots \$137 million in damages.⁴³ The *Alejandro* court determined that amount by assessing the aggregate value of the assets of the defendant, the Cuban Air Force, and awarding one percent of that amount to each of the victims.⁴⁴ Only through those high damages, the court reasoned, would the Cuban Air Force be deterred from engaging in further acts of terrorism.

We do not know whether the *Alejandro* court awarded such high damages with the expectation that the plaintiffs actually would recover the amounts awarded. Perhaps the judgment was judicial "funny money," the court intending the award only to be a symbol, just as *Filartiga* was, in essence, a symbol. Certainly, the award validated the victims' cause and rein-

Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 4, 8 (D.D.C. 2000). Other decisions require a showing sufficient to support summary judgment, *i.e.*, a showing of a *prima facie* case. See Hill v. Republic of Iraq, 175 F. Supp. 2d 36, 38 n.4 (D.D.C. 2001). Still others require "satisfactory evidence as to each element of [plaintiffs'] claims . . ." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996). In *Ungar*, Judge Robertson required a showing of a legally sufficient evidentiary basis for a reasonable jury to find for plaintiff. *Ungar*, 211 F. Supp. 2d at 98. This is the standard for granting judgment as a matter of law under FED. R. CIV. P. 50(a).

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

39. *Id.* at 1249-50.

40. 577 F. Supp. 860 (E.D.N.Y. 1984).

41. *Alejandro*, 996 F. Supp. at 1251 (quoting *Filartiga*, 577 F. Supp. at 866).

42. *Filartiga*, 577 F. Supp. at 867.

43. *Alejandro*, 996 F. Supp. at 1251-53.

44. *Id.* at 1253.

forced the legitimacy of human rights norms. However, because the 1996 legislation did not provide a means to satisfy judicial awards, the award in *Alejandre*, like the one in *Filatiga*, was a moral, rather than an economic, victory.

Whatever the *Alejandre* court's intention concerning the satisfaction of the \$187 million award, its logic provided a blueprint for future cases under the 1996 legislation. In March 1998, Judge Lamberth of the D.C. district court entered a comparable non-jury and default award against the Islamic Republic of Iran for the terrorist murder of Alisa Flatow, the namesake of the Civil Liability Act.⁴⁵ While in Israel, Alisa Flatow, an American college student, was killed in a suicide attack on a tourist bus in Gaza, then under Israeli military occupation. Like Cuba in *Alejandre*, Iran did not appear to defend itself before the D.C. court. Indeed, Iran did not even send a diplomatic note. Nevertheless, Judge Lamberth concluded that Iran singularly provided the financial support for the faction of the Palestinian Islamic Jihad that took responsibility for the suicide bombing that killed Alisa Flatow.⁴⁶

Judge Lamberth also found that the 1996 legislation provided a basis for the court's exercise of subject matter jurisdiction over Iran.⁴⁷ According to Judge Lamberth, the Civil Liability Act created a cause of action against terrorist states themselves, even though the language of the Act explicitly is limited to the state's agents. The Civil Liability Act provides that "[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . shall be held liable" for the personal harm caused by his or her acts of terrorism.⁴⁸ The Act says nothing of creating a cause of action against the terrorist state itself.⁴⁹ After concluding that the Civil Liability Act provided for subject matter jurisdiction over Iran, Judge Lamberth found that the court could exercise personal jurisdiction over Iran. According to Judge Lamberth, foreign state perpetrators of terrorism had adequate notice of the U.S. policy condemning terrorism, and Iran, in particular, had such notice because Iran had been designated a state sponsor of terrorism since 1984.⁵⁰ Moreover, because, according to Judge Lamberth, international terrorism is subject to universal jurisdiction, Iran knew that it could be hailed into a U.S. court for its actions.⁵¹ Finally, Judge Lamberth found

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

46. Flatow, 999 F. Supp. at 9.

47. *Id.* at 11.

48. 28 U.S.C. § 1605 note (Supp. 2002) (Civil Liability for Acts of State Sponsored Terrorism).

49. Most decisions accept the proposition set forth in *Flatow* that the Civil Liability Act creates a cause of action against the state itself. See, e.g., Wagner v. Islamic Republic of Iran, 172 F. Supp. 2d 128, 133 (D.D.C. 2001) ("[T]he FSIA authorizes a cause of action against a foreign state . . ."); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 3 (D.D.C. 2000); Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 109 (D.D.C. 2000). But cf. Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 166 (D.D.C. 2002) (finding that "[t]he language of the FSIA, as amended . . . does not unambiguously create a cause of action against Iran," in a context in which U.S. substantive law specifically precludes a cause of action against Iran for the alleged offenses). *Roeder* is discussed at greater length, *infra* Part IV.

50. Flatow, 999 F. Supp. at 14.

51. *Id.*

that Iran had the necessary minimum contacts for the exercise of personal jurisdiction.⁵² Even though Iran and the United States had severed diplomatic relations, they had, according to Judge Lamberth, "substantial sovereign contact" in their interactions as state actors in the international community.⁵³ Having undertaken this innovative jurisdictional analysis, Judge Lamberth turned to applying the new exception to the FSIA and to assessing the level of damages.

Judge Lamberth accepted \$1,508,750 as an appropriate projection of the victim's anticipated income.⁵⁴ In addition to awarding that amount for "life earnings," he awarded damages for the hurt feelings of close relatives—the solatium damages—in the amount of \$5 million for each of the victim's parents and \$2.5 million for each of her four siblings.⁵⁵ Finally, Judge Lamberth assessed punitive damages by considering such factors as: (1) the character of the act; (2) the nature and extent of harm to the plaintiff; (3) the need for deterrence; and (4) the wealth of the defendant.⁵⁶ In Judge Lamberth's view, all of these factors augured for high punitive damages. Judge Lamberth found that the defendants' planned attack "extend[ed] to the very limits of any human being's capacity to inflict pain and suffering upon another," because the victim died from a piece of shrapnel that had penetrated her brain.⁵⁷ Judge Lamberth also found that, because Iran generates \$12 billion per year in oil revenue, no mere penalty would deter Iran from continuing such "malicious activity."⁵⁸ Judge Lamberth reasoned that the penalty against Iran would have to be quite severe to serve as a deterrent to future acts of terrorism undertaken by Iran. Based on that analysis, the court awarded \$225 million in punitive damages, three times the amount that, according to the court, Iran spends supporting terrorist activities each year.⁵⁹

Other judicial actions brought under the 1996 legislation also produced striking results. In August 1998, Judge Jackson of the district court in D.C. entered a default judgment against Iran in the amount of \$65 million.⁶⁰ Judge Jackson found that the new exception to the FSIA provided for subject matter jurisdiction over Iran in that Iran supported Hizballah, the Lebanese terrorist organization that committed the acts of terrorism at issue.⁶¹ Hizballah had kidnapped David Jacobsen, Frank Reed, and Joseph Cicippio

52. *Id.* at 21-22. The court makes this finding in the alternative. It first finds that sovereign states may not be entitled to all the due process guarantees provided for individuals. *Id.* at 19-21. The court's primary finding, that a sovereign state may not be entitled to the guarantees of due process, has since been confirmed by the D.C. Circuit. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) (holding that a foreign government is not a "person" for purposes of the Due Process Clause).

53. *Flatow*, 999 F. Supp. at 23.

54. *Id.* at 28.

55. *Id.* at 32.

56. *Id.*

57. *Id.* at 33.

58. *Flatow*, 999 F. Supp. at 33-34.

59. *Id.* at 34.

60. *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998).

61. *Cicippio*, 18 F. Supp. 2d at 67-68.

in Beirut, and had held them hostage for 532, 330, and 1908 days, respectively.⁶² Judge Jackson awarded the victims between \$9 and \$20 million for lost wages and pain and suffering.⁶³ He also awarded the wives of Reed and Cicippio \$10 million each for their solatium during their husbands' absence.⁶⁴

In March 2000, Judge Jackson entered another default judgment against Iran, this time for Hizbollah's kidnapping and six-year detention of Terry Anderson, an American journalist stationed in Beirut.⁶⁵ Judge Jackson awarded the plaintiff over \$341 million, assessing punitive damages at \$300 million based on the testimony of a witness from a private think tank in Washington that Iran contributed between \$50 million and \$100 million each year in support of Hizbollah.⁶⁶ The \$300 million represented three times the maximum amount that Iran allegedly spends supporting terrorist activities each year, a formula developed by Judge Lamberth in *Flatow*.

In July 2000, Judge Lamberth entered yet another default judgment against Iran.⁶⁷ The action was brought by the families of two American students, Matthew Eisenfeld and Sara Duker, who had been studying in Israel and who were killed in a suicide bombing of a public bus in Jerusalem in 1996.⁶⁸ As in *Flatow*, *Cicippio*, and *Anderson*, the link of causality in this action was established by Iran's support for the group that committed the act of terrorism.⁶⁹ Judge Lamberth entered a judgment of \$327 million in compensatory and punitive damages.⁷⁰

62. *Id.* at 64.

63. *Id.* at 69-70.

64. *Id.* at 70.

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

66. *Anderson*, 90 F. Supp. 2d at 112-14.

67. *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000).

68. *Eisenfeld*, 172 F. Supp. at 2.

69. *Id.* at 3. In contrast to the decisions discussed in the text, and to other decisions issued under the 1996 amendment, *see infra* note 72, the D.C. District, in *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91 (D.D.C. 2002), declined to enter a judgment of default against Iran and its agents on the ground that plaintiffs had failed to demonstrate the necessary causal link between defendants' conduct and the victims' deaths. Judge Robertson found that, although plaintiffs had established that Iran provided extensive support for the group responsible for the victims' deaths (Hamas), plaintiffs had not linked Iran's support to plaintiffs' murders specifically. *Ungar*, 211 F. Supp. 2d at 99. Judge Robertson thus contrasted the facts of the case before him from the facts of *Weinstein* and *Eisenfeld*, in which the plaintiffs had demonstrated that the "HAMAS members who bombed a bus were themselves trained on the use of explosives in Iran or by Iranian officials, and the Court concluded that the Iranian support was a but-for cause of the attacks." *Id.* at 99 (citing *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 16 (D.D.C. 2002); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000)). Judge Robertson also distinguished *Flatow*, in which "Iran was shown to have been the sole funding source of the terrorist organization that carried out the attack." *Id.* (citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998)). Finally, Judge Robertson distinguished *Higgins v. Islamic Republic of Iran* and *Cicippio*, in which "Iranian officials were shown to have had approval authority or total control over [the] hostage taking." *Id.* (citing *Higgins v. Islamic Republic of Iran*, No. 1:99CV00377, 2000 WL 33674311, at *1 (D.D.C. Sept. 21, 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 70 (D.D.C. 1998)). Thus, although Judge Robertson does not disagree with the holdings of other decisions that find the necessary causal link, Judge Robertson does seem to narrow their potential reach.

70. *Eisenfeld*, 172 F. Supp. 2d, at 6-9.

Although these five cases—*Alejandro*, *Flatow*, *Cicippio*, *Anderson*, and *Eisenfeld*—produced unprecedented awards, they were, in a sense, empty victories. The plaintiffs may have felt vindicated, but, if the defendant states had assets in the United States, the executive did not allow enforcement. The awards thus remained unenforced, and, it seemed, unenforceable. The new wave of international human rights suits in United States courts seemed to have become exercises of judicial therapy for the families of the victims, and, perhaps, for the courts that entered default judgments in their favor. From an international legal standpoint, the decisions had an eerie, autistic national character; their effects remained largely within the United States and were never tested against international law—because, from the standpoint of international law, in the absence of execution of judgment, nothing was happening.⁷¹

III.

The five judgments we have reviewed are not the only decisions awarding large damages under the 1996 legislation,⁷² but these five became the poster children for a new wave of legislative activity. In 1999, Senators Connie Mack and Frank Lautenberg introduced a bill, the Justice for Victims of Terrorism Act, to allow the execution of judgments that had been won against terrorist states.⁷³ The Act's legislative history reflects a congressional intent to ensure compensation for the victims of terrorism. The House Report lists each of the five decisions reviewed above and then expresses disapproval of the way in which the executive branch had repeatedly blocked the attachment of foreign assets and, therefore, the satisfaction of awards.⁷⁴ In particular, the House Report cites President Clinton's refusal to release Cuban assets to satisfy the award to the families of the Brothers to the Rescue pilots in the *Alejandro* case.⁷⁵ Although President Clinton had expressed outrage immediately after the incident, he later issued a Determination stating that the attachment of assets of terrorist states generally contravenes U.S. national security interests.⁷⁶ According to Congress, "The President's continued use of his waiver power has frustrated the legitimate

71. Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14:2 YALE J. INT'L L. 412 (1989).

72. See, e.g., *Weinsten*, 184 F. Supp. 2d at 13; *Stethem v. Islamic Republic of Iran*, 201 F. Supp. 2d 78 (D.D.C. 2002); *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27 (D.D.C. 2001); *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2000); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 9 (D.D.C. 2000); *Higgins*, 2000 WL 33674311, at *1.

73. S. 1796, 106th Cong. (2000).

74. H.R. REP. NO. 106-733, at 5 (2000).

75. *Id.* at 4.

76. *Id.* (citing Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, Presidential Determination No. 99-1, 63 Fed. Reg. 59201 (Oct. 21, 1998), reprinted in 28 U.S.C.A. § 1610, Historical and Statutory Notes (West 2000 Supp.)).

rights of victims of terrorism," thus necessitating the Justice for Victims of Terrorism Act.⁷⁷

With the purpose of overcoming the executive's resistance to ensuring that the victims receive compensation, the Justice for Victims of Terrorism Act created a scheme by which the Secretary of Treasury would pay out monies from the terrorist states' frozen assets. The Act granted plaintiffs who had obtained money judgments the choice of two compensation options. Under the first, the successful plaintiff would receive 110 percent of the compensatory damages awarded, plus post-judgment interest, but the plaintiff would have to relinquish all rights to punitive damages awarded in connection with his or her claim. Under the second option, the successful plaintiff would receive 100 percent of the compensatory damages awarded, plus post-judgment interest, but the plaintiff would have to relinquish any right to execute that award against property that either is before an international tribunal or is subject to attachment.⁷⁸ The scheme would be available only to plaintiffs who filed suit on one of the five specific dates set forth in the Act.⁷⁹

With respect to the claims against Cuba, i.e., the claims arising out of *Alejandro*, the Justice for Victims of Terrorism Act authorized the liquidation of Cuban assets frozen in the United States to satisfy the judicial award, including any punitive damages. With respect to the claims against Iran, the Act authorized the funding of payments from two sources. First, the Secretary of Treasury could distribute the rental proceeds that accrued from Iranian diplomatic and consular property in the United States, over which the U.S. government had custody after the rupture of diplomatic relations. Second, the Secretary could distribute the "funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund."⁸⁰ The Foreign Military Sales Fund holds approximately \$400 million on behalf of Iran in money paid by Iran, prior to the revolution in 1979, for the purchase of military equipment that was never delivered. The disposition of those funds currently is before the Iran-U.S. Claims Tribunal, an international body established as part of the Algiers Accords, the agreement securing the release of the American diplomatic hostages and providing for settlement of the outstanding disputes between the two nations.⁸¹ The Algiers Accords

77. *Id.* at 5.

78. See 28 U.S.C. § 1610(f)(1)(A) (2000) (providing that, with certain limitations, a foreign state's property in the United States is "subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).")

79. The payment scheme of the Justice for Victims of Terrorism Act was enacted as part of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 2002(a), 114 Stat. 1543 (2000).

80. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 2002(b)(2)(B), 114 Stat. 1543 (2000).

81. Declaration of the Government of the Democratic Republic of Algeria, 1 Iran-U.S. Cl. Trib. Rep. 3 (1981); Declaration of the Government of the Democratic Republic of Algeria Concerning the

were to assume a role of major importance in the events that we are recounting.

The Justice for Victims of Terrorism Act thus provided a political compromise for the deadlock that had developed between the legislative and executive branches. The Act only provided for the disposition of certain judgments and only for certain amounts. Nevertheless, it satisfied the awards of the most politically vocal plaintiffs, and, therefore, seemed to have particular appeal to Congress.⁸²

In February 2001, the Treasury released \$96.7 million in frozen Cuban funds to the families of the Brothers to the Rescue pilots in satisfaction of the *Alejandro* judgment.⁸³ That figure amounted to all of the families' compensatory damages and some of their punitive damages. The Treasury also has released funds to satisfy the awards issued in *Flatow*, *Anderson*, *Eisenfeld*, and *Cicippio*.⁸⁴ However, in contrast to the plaintiffs in *Alejandro*, the plaintiffs in the actions against Iran received only direct damages. Despite these payments to some of the victims' families, the Secretary has not released funds to satisfy a number of outstanding awards, creating an issue of equity as between the respective families of different victims of terrorism.

IV.

The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, galvanized Congress and the executive. But the tension between the branches over the disposition of frozen assets continued. That tension burst forth in *Roeder v. Islamic Republic of Iran*,⁸⁵ an action before the district court in D.C. The class of plaintiffs in *Roeder* was comprised of hostages taken in the U.S. Embassy in Tehran by persons associated with the revolutionary Iranian government.⁸⁶ The hostages were held, and at times tortured, for 444 days between November 1979 and January 1981.⁸⁷ Although certain members of this class had attempted to sue Iran before passage of the 1996 legislation, their attempts failed because Congress had

Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 9 (1981).

82. 28 U.S.C. § 1610(f)(2)(A). As part of the 2002 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary and related agencies, see Pub. L. No. 107-77, 115 Stat. 748 (2001), Congress enacted a provision that increased the burdens on the executive branch to assist judgment creditors of state sponsors of terrorism. Specifically, Congress enacted a provision that requires the president to submit "a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism) that occurred or occurs on or after November 1, 1979." Pub. L. No. 107-77, 115 Stat. at 803 (2001).

83. Christopher Marquis, *Families Win Cuban Money In Pilots' Case*, N.Y. TIMES, Feb. 14, 2001, at A1, available at 2001 WL 13954475.

84. Miriam Shaviv, *Just Rewards*, JERUSALEM POST, Feb. 15, 2002, at 02B, available at 2002 WL 8072150.

85. 195 F. Supp. 2d 140 (D.D.C. 2002).

86. *Roeder*, 195 F. Supp. 2d at 146.

87. *Id.*

not yet waived Iran's foreign sovereign immunity for terrorist activities.⁸⁸ With passage of the 1996 legislation, the plaintiffs suddenly had a basis for asserting that U.S. courts had subject matter jurisdiction over Iran. The plaintiffs again brought suit. As in the other cases under the 1996 amendment, Iran did not appear to defend itself.

Following what had by now become routine in the district of D.C., Judge Sullivan entered a default judgment against Iran on liability and scheduled a date for trial on the damages.⁸⁹ On the eve of trial for damages, however, the State Department, which had only recently become aware of the action, attempted to intervene, and to have the judgment on liability vacated and the suit dismissed. For the State Department, resolution of *Roeder* in the executive's favor (which, ironically, now meant in Iran's favor) was essential, not merely to protect Iran's frozen assets, but also to prevent the potential disregard of the Algiers Accords. Under the Algiers Accords, the U.S. agreed to bar claims in U.S. courts against Iran arising out of the seizure, detention, and injury of the U.S. citizens held hostage.⁹⁰

Had the State Department not intervened in *Roeder*, the D.C. court likely would have violated an explicit term of the Algiers Accords. The plaintiffs' lawyers had not cited the Accords, and, perhaps because Iran had not presented any defense, the court was unaware that the Accords controlled the action before it.⁹¹ The State Department's motion to intervene was undoubtedly motivated in part by the need to preserve the Algiers Accords. Nevertheless, the Department's initial submissions focused not on the Accords as controlling, substantive law, but rather on the explicit language of the 1996 amendment to the FSIA.⁹² The 1996 amendment, it will be recalled, is limited to defendant states that had been designated as state sponsors of terrorism at the time of the event that precipitated the suit or as a result of that event. As of 1979-1981, Iran had not yet been designated a state sponsor of terrorism. Moreover, when Iran was so designated in January 1984, it was not because of Iran's conduct in connection with the taking of the diplomatic hostages, but because of Iran's conduct in support of terrorism following the release of the hostages.⁹³

Whatever Congress may have intended, the State Department in *Roeder* was technically correct: The 1996 amendment to the FSIA did not provide U.S. courts with subject matter jurisdiction over claims arising out of the Iran hostage crisis. On November 28, 2001, Congress removed that technicality by passing a new exception to the FSIA, particular to the facts of

88. *Id.* at 144 (citing *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983); *Ledgerwood v. State of Iran*, 617 F. Supp. 311 (D.D.C. 1985)).

89. *Id.*

90. *Id.* at 147-48.

91. *Roeder*, 195 F. Supp. 2d at 144-45.

92. *See id.* at 140-45.

93. *See* Secretarial Determination, 49 Fed. Reg. 2836-02 (Jan. 23, 1984); *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 108 (D.D.C. 2000); DEP'T S. BULL., Mar. 1984, at 77; *Economic Sanctions*, 3 1981-88 DIGEST § 12, at 3023.

Roeder. Section 626(c) of the 2002 Appropriations Act for the Departments of Justice, Commerce, and Treasury amended the FSIA by excepting from foreign sovereign immunity any act “related to Case Number 1:00CV03110 (ESG) [sic] in the United States District Court for District of Columbia.”⁹⁴ The accompanying House Conference Report explains that the subsection “quashes the State Department’s motion to vacate the judgment obtained by plaintiffs” in *Roeder*.⁹⁵ But the executive had the last word. Upon signing the provision into law, President Bush stated that “the executive branch will act, and encourage the courts to act, with regard to subsection 626(c) of the Act in a manner consistent with the obligations of the United States under the Algiers Accords.”⁹⁶

In light of the enactment of section 626(c), the State Department no longer could argue that the court lacked subject matter jurisdiction over Iran under the FSIA.⁹⁷ Subsection 626(c) clearly provided an exception to the FSIA to allow *Roeder* to proceed. The State Department now invoked the Algiers Accords and the domestic case law interpreting them.⁹⁸ The Department argued that, under Supreme Court precedent, the Algiers Accords’ bar to bringing a claim is not jurisdictional, but rather “substantive governing law.”⁹⁹ The FSIA, by contrast, provides only for jurisdiction.¹⁰⁰ Once that jurisdiction exists a plaintiff still must assert a substantive claim upon which relief can be granted. The Algiers Accords precludes any hostage from asserting such a claim.¹⁰¹ Thus, according to the State Department, the Algiers Accords, as substantive law, were not at odds with the most recent, case-specific amendment to the FSIA.¹⁰² In April 2002, Judge Sullivan accepted that argument and dismissed *Roeder* for failure to state a claim upon which relief could be granted.¹⁰³

94. Pub. L. No. 107-77, 115 Stat. 803 (2001). In late December 2001, Congress corrected a typographical error in subsection 626(c) by including, in the Department of Defense and Emergency Supplemental Appropriations Act, a provision clarifying that the particular case to which 626(c) applies is not “1:00CV03110 (ESG)” but rather “1:00CV03110 (EGS).” Pub. L. No. 107-117, 115 Stat. 2299, § 208 (2002).

95. H.R. CONF. REP. NO. 107-278, at 170 (2001).

96. Bill Signing of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 37 WEEKLY COMP. PRES. DOC. 1723, 1724 (Nov. 28, 2001).

97. Note that the State Department did question the constitutionality of subsection 626(c) on the ground of separation of powers. The court in *Roeder* did not reach this question. *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 166 (D.D.C. 2002).

98. *Roeder*, 195 F. Supp. 2d at 166.

99. See *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981); *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 441 (D.C. Cir. 1981).

100. Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (1994).

101. *Roeder*, 195 F. Supp. 2d at 166-71.

102. On December 20, 2001, during the pendency of *Roeder*, Senator Harkin introduced a bill providing a cause of action to the former hostages of Iran, “[n]otwithstanding the Algiers Accords.” S. 1877, 107th Cong. § 1(a) (2001).

103. *Roeder*, 195 F. Supp. 2d at 185-86 (dismissal order).

V.

Human rights advocates have not faulted the recent wave of legislation enabling U.S. courts to award substantial damages to victims who have suffered grave human rights violations at the hands of state sponsors of terrorism. By awarding damages against those states, many believe, the courts enforce human rights, albeit within a particular context, thus increasing the possibility of expanding the sphere of judicial involvement in the enforcement of human rights in the future.

But it is important to be precise. From a human rights perspective, a judgment contributes to the implementation of the human rights program only if it is enforced against those held responsible for the damages they cause. If state sponsors of terrorism are not the ones actually paying damages for their evil, then the courts are not enforcing human rights so much as they are pronouncing and implementing a policy statement concerning our national community's duty to provide compensation to victims of human rights violations. Thus, for the human rights advocate, the decision of whether to applaud the congressional and judicial action surrounding the 1996 legislation turns, in considerable measure, on whether the terrorist states actually pay the awards issued against them.

As explained above, the Justice for Victims of Terrorism Act authorized the release of frozen assets to satisfy certain awards issued in suits brought under the 1996 legislation.¹⁰⁴ Governments that find themselves locked in hostile relations attach and freeze the assets of their adversary pending a composition of differences and a settlement, which usually involves a reciprocal "lump sum settlement agreement."¹⁰⁵ From the perspective of the executive, the frozen assets of a hostile state are a diplomatic tool.¹⁰⁶ As a general matter, there are few precedents in international diplomacy for one government's distribution of the frozen assets of a hostile adversary without the participation and assent of the foreign state. Indeed, such unilateral conversion by the government holding the assets may well be unlawful under international law. By distributing frozen assets to private parties, the United

104. See Pub. L. No. 106-386 § 2002, 114 Stat. 1543 (2000); *see also*, 42 U.S.C.A. § 10603(c) (1995) (providing for payments from the domestic crime victims fund to victims of international terrorism).

105. See generally RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1999). Examples of lump sum agreements include the 1979 agreement that the Carter administration negotiated with the People's Republic of China, *see* Agreement Concerning the Settlement of Claims, May 11, 1979, U.S.-P.R.C., 30 U.S.T. 1957, *amended* Sept. 28, 1979, 31 U.S.T. 5596, and the Algiers Accords, which established the Iran-U.S. Claims Tribunal to settle claims between those countries, *see* Declaration of the Government of the Democratic Republic of Algeria, 1 Iran-U.S. Cl. Trib. Rep. 3 (1981); Declaration of the Government of the Democratic Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1 Iran-U.S. Cl. Trib. Rep. 9 (1981).

106. See, e.g., R. RICHARD NEWCOMB, A.L.I.-A.B.A., *ECONOMIC SANCTIONS AND EMBARGOS-FOREIGN ASSETS CONTROL PROGRAMS*, 211, 213 (1989) ("Frozen assets may be used as a bargaining chip in negotiating claims settlements with designated nations or, as a last resort, can be vested and distributed to U.S. nationals with claims against those countries.").

States, therefore, may subject itself to liability to the foreign state when diplomatic relations inevitably are restored.

With respect to the awards against Iran, recall that the Justice for Victims of Terrorism Act directed the Treasury to make payments from: (1) the rental proceeds accrued on Iran's diplomatic and consular property; and (2) "funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account."¹⁰⁷ The unilateral conversion of the rents accruing on Iranian diplomatic and consular property is a violation of international treaty law,¹⁰⁸ a fact of which Congress was made aware when it considered the use of rental proceeds to satisfy the awards. The Congressional Budget Office (CBO) reviewed the House version of what became the Justice for Victims of Terrorism Act and remarked as follows:

The United States has a custodial responsibility under international agreements to maintain diplomatic assets belonging to Iran; therefore, the federal government would likely be liable to Iran for the loss of this \$5 million from rental proceeds. If those amounts are seized, CBO anticipates the United States would have to promptly reimburse Iran for their value.¹⁰⁹

Because the release of the \$5 million violated international law, the United States likely will become liable to Iran for that same amount. In other words, the United States, in effect, will pay that portion of the United States judicial awards issued against Iran.

The \$5 million in rental proceeds is a relatively small liability when compared to the potential exposure of the United States with respect to the amount in the Foreign Military Sales trust fund. As explained above, the disposition of the approximately \$400 million in that trust fund is currently before the Iran-U.S. Claims Tribunal. Recall that, under the Justice for Victims of Terrorism Act, the Treasury must make payments from "funds . . . not to exceed the total of the amount in the Iran Foreign Military Sales Program account."¹¹⁰ The Act thus allows the Secretary of Treasury to disburse funds from another source in an amount up to the amount in the Foreign Military Sales Program account.¹¹¹ In distributing payments to judgment creditors against Iran, the Secretary chose not to pay judgment creditors directly out of the Foreign Military Sales trust fund.¹¹² Instead, the Treasury paid the judgments from other U.S. funds with the hope of collecting a re-

107. Pub. L. No. 106-386 § 2002(b)(2)(B), 114 Stat. 1543 (2000).

108. See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 96; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

109. H.R. REP. NO. 106-733, at 4-5 (2000).

110. Pub. L. No. 106-386 § 2002(b)(2)(B) (2000).

111. *Id.*

112. Robert Schlesinger, *Victims of Terrorism Fight to Get Assets of Terror Sponsors*, BOSTON GLOBE, Oct. 10, 2001, at A12, available at 2001 WL 3955652.

imbursement from Iran at a later date. Thus, unless the government receives reimbursement from Iran, the United States will have paid the awards issued against Iran under the 1996 legislation.

Whether the U.S. government can recoup the funds paid to the judgment creditors of the actions in American courts that we have reviewed depends on whether the U.S. legislative and judicial practices that have evolved since 1976, and since 1996 in particular, are consistent with international law, or, if not, whether the United States is willing and able to press for a transformation of public international law so that it is brought into conformity with our own innovative judicial practices. With respect to the decisions against Iran arising out of Iran's support for terrorist organizations, the standard of derivative liability statutorily imposed by Congress and then strictly applied by the courts is not consistent with contemporary international law. The question of derivative liability arose in the *Military and Paramilitary Activities* case that Nicaragua brought against the United States before the International Court of Justice.¹¹³ Nicaragua claimed that the United States was derivatively responsible for the acts of the Contra forces in that the United States supported the Contras financially.¹¹⁴ In light of both congressional legislation and the numerous executive statements in which President Reagan expressed his support for the "Freedom Fighters," it was incontestable that the United States was financing and arming the Contras.¹¹⁵ Nevertheless, the International Court concluded that the acts of the Contras could not be imputed to the United States.¹¹⁶ The court reasoned that, even though the Contras' acts may have violated international law, the United States was not, *ipso facto*, derivatively liable.¹¹⁷ The court stated, "For this conduct [of the Contras] to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."¹¹⁸ The International Court thus rejected the standard of derivative liability that is the legal basis of the United States legislative program we have reviewed.¹¹⁹ The United States did not criticize the International Court of Justice's holding of law on this point, and it is unlikely that the United States would do so today.

To the extent that the *Roeder* decision proves not to be the last word on the claims of the former hostages against Iran (and here, more than anywhere else in the dialectic of American politics, there does not appear to be a last word), any judgment against Iran would violate the Algiers Accords,

113. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

114. *See, e.g., id.* at 60.

115. *Id.* at 55-59.

116. *Id.* at 64-65.

117. *Id.*

118. *Nicar.*, 1986 I.C.J. at 65.

119. *See id.*

for the Accords explicitly preclude the hostages' claims.¹²⁰ Until now, each state has expressed varying levels of hostility toward the other, but neither has questioned, either expressly or through its course of conduct, the validity of the Accords as governing law, and the United States is unlikely to question the validity of the Accords in the future, because the cost of doing so would not be negligible: If the promises of the United States under such agreements are seen as empty, the United States will be less efficacious in negotiating longer-term executory agreements with hostile states.

With respect to the decision against Cuba, the international law is less clear. No doubt Cuba's actions were disgraceful, but, until now, the United States government has been wary about expanding its own liability for acts of destruction committed by U.S. forces operating under authority.¹²¹ Moreover, even if the United States now wished to change the law, the United States would, presumably, not wish the law to be applied without international due process.

In sum, public international law does not conform to the legislative and judicial practices in the United States that we have reviewed, and the United States is unlikely to push for a transformation of international law so that it approximates our domestic program. Moreover, even if public international law conformed to the United States' recent practices on a substantive level, international law clearly diverges from U.S. domestic law with respect to the question of damages. International law does not provide for the standards of compensation applied in U.S. courts. Rather, it makes considerably more modest payments than those awarded by the non-jury trials under the 1996 legislation. In addition, punitive damages are not part of customary international law,¹²² and it is unlikely that the United States government views their introduction into international law with enthusiasm, especially when compensating foreign individuals injured by the United States.

Thus, the United States Treasury is likely to swallow most, if not all, of the payments made under the Justice for Victims of Terrorism Act. In addition, the United States is likely to continue making such payments. A bill currently circulating in Congress would provide for payments to all judgment creditors who filed suit on or before October 28, 2000.¹²³ While passage of that bill would ensure greater equity as between claims, it would only exacerbate the problem of the United States paying the judgments issued against terrorist states.

If there is a clear national decision to compensate American victims of terrorism abroad as we compensate victims of crime domestically, what Congress and the courts have wrought is quite appropriate, even though one

120. See *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 166-71 (D.D.C. 2002).

121. W. Michael Reisman & Robert D. Sloane, *The Incident at Cavalese and Strategic Compensation*, 94 AM. J. INT'L L. 505 (2000).

122. See Detev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path not Taken*, 43 HARV. INT'L L.J. 503, 525 (2002) ("[T]here would be a serious question as to whether international law authorizes punitive damages benefiting private claimants.").

123. S. 2600, 107th Cong. (2d Sess. 2002); H.R. 4647, 107th Cong. (2d Sess. 2002).

would remark on the vast differences in level of compensation to the different victim groups. We are a wealthy nation and we certainly have the right to spend our money as we wish. But if we are pretending that this is a technique for making rogue governments pay for their terrorism, and that it represents an advance of international human rights law, then we are involved in a charade.

VI.

In concluding, we underscore that we are committed to the international protection of human rights. We note with great satisfaction the transformation of international politics and international law from an interstate system governed by *raison d'état* to one in which government actions, both external and internal, are now appraised for lawfulness against a code of international human rights. But precisely because we demand human rights, we refuse to accept counterfeits that conceal fundamental problems and challenges. We are happy that the families of victims of terrorism had a day in court, but we recognize the melancholy truth that only a United States court, not an international one, could hear their grievances. We are happy that the claims of the families of victims have been vindicated and that the general principle that injuries should be compensated has been transposed from the inter-state level to the individual level. But we are concerned that this has been accomplished only within a national court and that the payments ultimately will be made by our national treasury, and, therefore, by taxpayers who may be uninterested in paying for the human rights violations of the state sponsors of terrorism, whose actions served as the bases for these payments.

The program for the international protection of human rights is ultimately concerned with preventing violations of real human beings and, when, those efforts notwithstanding, they occur, the law seeks appropriate remedies. In the context of international politics, that is a tall order and it will be costly. But there is no substitute for it. So let us continue press for progress, but not mistake illusion for reality.