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John F. Murphy

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Articles

BRAVE NEW WORLD: U.S. RESPONSES TO THE RISE IN INTERNATIONAL CRIME—AN OVERVIEW

JOHN F. MURPHY*

I. INTRODUCTION

THE theme for this year's Villanova Law Review symposium, Brave New World: U.S. Responses to the Rise in International Crime, is broad in scope, and papers presented in a one day symposium cannot be expected to cover more than a small part of so vast a subject. The organizers of the symposium hope, however, that the topics covered by the three panels of the symposium address many of the salient issues raised by this "Brave New World" of international crime. Whether this hope has been realized, we leave to the readers' judgment of the articles contained in this symposium issue of the law review.

As indicated by the title, the goal of this Article is to provide a bird's-eye view of the theme of the symposium. This Article first considers why one should evaluate the current situation of international crime as a "Brave New World," focusing primarily on international terrorism, international drug trafficking and the relationship between the two in the form of "narco-terrorism." The Article next examines various U.S. responses to the rise in international crime and attempts to identify some of the primary issues raised by these responses. No attempt is made, however, to explore these issues in exhaustive fashion; rather, the issues are posed and citations provided for more extensive treatment of them. Also, in some instances, these issues are canvassed thoroughly by other articles in this

* Professor of Law, Villanova University. I am indebted to Brooke Haley and J. Ryan Hall, both second year students at the Villanova University School of Law, for able research assistance with this Article.

1. The symposium was held on October 23, 2004.
2. Professor Steven Chanenson and I were the organizers of the 2004 symposium.
3. Panel I was on "The Brave New World of International Crime: An Introduction;" Panel II was on "Combating the Financing of International Crime;" and Panel III was on "Controversies Raised by U.S. Responses to the Rise in International Crimes."
symposium. In a concluding section, the Article makes a few brief observations about possible future developments.

II. WHAT BRAVE NEW WORLD?

In *Brave New World*, Aldous Huxley created a dystopia in which the people who govern use scientific means to ensure social stability through a benevolent dictatorship. He envisaged a highly efficient state in which the all-powerful executive of political bosses and their army of managers control a population of slaves who do not have to be coerced, because they love their servitude. Huxley wrote his novel in 1931, during the depression, when the nightmare was too little order. In the future projected in *Brave New World*, the nightmare was too much order.

Huxley was of the view that control, through the punishment of undesirable behavior, is less effective in the long run compared to control through the reinforcement of desirable behavior by rewards. For example, Huxley believed that government by terror works, on the whole, not as well as government administered through the non-violent manipulation of the environment and of the thoughts and feelings of individual men, women and children. Writing in 1958, he believed that recent developments in Russia, such as Nikita Khrushchev's 1956 disclosure of the crimes of the Stalin era, and recent advances in science and technology, had robbed George Orwell's *1984* of "some of its gruesome verisimilitude."

The dystopia envisioned by the "new" terrorists, especially Osama bin Laden and Al Qaeda, is a mixture of Aldous Huxley, George Orwell and some new, creative dimensions. An especially disquieting aspect of the new terrorism is the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets. Until recently many commentators were of the view that terrorists had little interest in killing large numbers of people because it would undermine their efforts to gain sympathy for their cause. A major cause of this radical change in attitude has been aptly pinpointed by Jeffrey D. Simon:

> Al Qaeda . . . is representative of the emergence of the religious-inspired terrorist groups that have become the predominant form of terrorism in recent years. One of the key differences between religious-inspired terrorists and politically motivated

4. ALDous HUXLEY, BRAVE NEW WORLD (Perennial Library ed., 1965) (1932).
6. *Id.* at 2.
7. It is worth noting that in 1998 Osama bin Laden told ABC News that "he made no distinction between American military and civilian targets, despite the fact that the Koran itself is explicit about the protections offered to civilians." See Peter L. Bergen, Excerpts from Holy War, *Inc.*, 82 PHI KAPPA PHI FORUM 26, 28 (2002).
ones is that the religious-inspired terrorists have fewer constraints in their minds about killing large numbers of people. All nonbelievers are viewed as the enemy, and the religious terrorists are less concerned than political terrorists about a possible backlash from their supporters if they kill large numbers of innocent people. The goal of the religious terrorist is transformation of all society to their religious beliefs, and they believe that killing infidels or nonbelievers will result in their being rewarded in the afterlife. Bin Laden and Al Qaeda’s goal was to drive U.S. and Western influences out of the Middle East and help bring to power radical Islamic regimes around the world. In February 1998, bin Laden and allied groups under the name “World Islamic Front for Jihad Against the Jews and Crusaders” issued a fatwa, which is a Muslim religious order, stating that it was the religious duty of all Muslims to wage war on U.S. citizens, military and civilian, anywhere in the world.8

It is important to note that there are other religious terrorist groups besides Al Qaeda. Examples include Hizbollah, a radical Shia Islamic group in Lebanon, Hamas (Islamic Resistance Movement) and the Palestinian Islamic Jihad, all of whom use terrorism in the West Bank, Gaza Strip and Israel to undermine Middle East peace negotiations and to establish a fundamentalist Islamic Palestine State. There are also the Abu Sayyaf Group, a radical Islamic separatist group operating in the southern Philippines; Al Gama’a al-Islamiyya (Islamic Group), which is based in Egypt and seeks to overthrow the Egyptian government; and the Armed Islamic Group, which is located in Algeria and plots the overthrow of the secular Algerian government and its replacement with an Islamic State.

In their willingness to kill large numbers of their enemies, Al Qaeda and other Islamic fundamentalist terror groups have adopted a Stalinist tack. Like the Marxist-Leninist dogma adopted by Stalin, they promise their members a utopia once their enemies have been defeated and Islam’s past greatness has been restored.9 According to The 9/11 Commission Report, “[t]he extreme Islamist version of history blames the decline from Islam’s golden age on the rulers and people who turned away from the true path of their religion, thereby leaving Islam vulnerable to encroaching foreign powers eager to steal their land, wealth and even their souls.”10

In the modern context, the rulers who have turned away from the true path of Islam include the rulers of Muslim countries, most especially the rulers of Saudi Arabia, where Mecca, the birthplace of Mohammed

10. Id. at 50.
and Islam's holiest city, is located. The primary encroaching foreign power is the United States, with its placement of troops in Saudi Arabia being a particular source of outrage. In the view of bin Laden and Al Qaeda, according to The 9/11 Commission Report:

America is responsible for all conflicts involving Muslims. Thus, Americans are blamed when Israelis fight with Palestinians, when Russians fight with Chechens, when Indians fight with Kashmiri Muslims, and when the Philippine government fights ethnic Muslims in its southern islands. America is also held responsible for the governments of Muslim countries, derided by al Qaeda as "your agents." Bin Laden has stated flatly, "our fight against these governments is not separate from our fight against you." These charges found a ready audience among millions of Arabs and Muslims angry at the United States because of issues ranging from Iraq to Palestine to America's support for their countries' repressive rulers.\footnote{Id. at 51.}

In Aldous Huxley's Brave New World, sexual license and a tranquilizer drug called "soma" serve to keep the repressed populace content with its fate. If the Taliban's rule in Afghanistan is any indication, no such sexual freedom would be permitted in the Brave New World of Al Qaeda. But it is worth noting that promises of sexual promiscuity in the afterlife (seventy virgins) serve as inducements to the troops of Islamist fundamentalists, especially those willing to serve as suicide bombers. Some of Aldous Huxley's observations in Brave New World Revisited may serve to enlighten us on the ambivalent, yet ultimately negative views of Islamic fundamentalists on sexual freedom. In comparing Brave New World with George Orwell's 1984, Huxley notes:

\[(1)\]n 1984, the members of the Party are compelled to conform to a sexual ethic of more than Puritan severity. In Brave New World, on the other hand, all are permitted to indulge their sexual impulses without let or hindrance. The society described in Orwell's fable is a society permanently at war, and the aim of its rulers is first, of course, to exercise power for its own delightful sake and, second, to keep their subjects in that state of constant tension which a state of constant war demands of those who wage it. By crusading against sexuality the bosses are able to maintain the required tension in their followers and at the same time can satisfy their lust for power in a most gratifying way. The society described in Brave New World is a world-state, in which war has been eliminated and where the first aim of the rulers is at all costs to keep their subjects from making trouble. This they achieve by (among other methods) legalizing a degree of sexual

\footnote{Id. at 51.}
freedom (made possible by the abolition of the family) that practically guarantees against any form of destructive (or creative) emotional tension for the Brave New Worlders. In 1984 the lust for power is satisfied by inflicting pain; in Brave New World, it is satisfied by inflicting a hardly less humiliating pleasure.\(^{12}\)

Islamic fundamentalists are, of course, in a constant state of war with, among others, the United States and the West, the rulers of Muslim countries and Muslims not subscribing to their fundamentalist beliefs.

Huxley also had some insightful things to say about the role of propaganda in a dictatorship. He noted that:

> [P]hilosophy teaches us to feel uncertain about the things that seem to us self-evident. Propaganda, on the other hand, teaches us to accept as self-evident matters about which it would be reasonable to suspend our judgment or to feel doubt . . . . The demagogic propagandist must therefore be consistently dogmatic. All his statements are made without qualification. There are no grays in his picture of the world; everything is either diabolically black or celestially white.\(^{13}\)

This certainly describes the propaganda of Al Qaeda, as well as that of other Islamic fundamentalist terror groups.

Recently, moreover, these groups have made good use of modern technology in propagating their message. Initially, the Arabic satellite channels served as their primary conduit of information and communication. But lately, it appears the Internet has replaced these satellite channels for this purpose. According to one report, there are now more than four thousand terrorist Web sites.\(^{14}\) Because the Internet is anonymous, it is difficult for law enforcement or intelligence officials to trace the source of the messages.

Ironically, it may be that the United States and coalition forces' invasion of Afghanistan, which caused the dispersal of Al Qaeda forces, led to greater use of the Internet by Islamic fundamentalist forces. One authority has suggested that Al Qaeda now has four different networks.\(^{15}\) The original network, the one that committed the 9/11 attacks, uses its own resources and people it has recruited and trained. The second is an ad hoc terrorist network composed of franchise organizations that Al Qaeda created in such countries as the Philippines, Jordan and Algeria. The third is the World Islamic Front for Jihad Against Crusaders and Jews, an umbrella organization for Islamic terror groups from Morocco to China.

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\(^{12}\) Huxley, Brave New World Revisited, supra note 5, at 21.

\(^{13}\) Id. at 36.


\(^{15}\) The authority is Gustavo de Aristegui, a leader of the Popular Party in Spain's Basque country and a student of the rise of Islamic terror. See id. at 44.
Fourth, and last, there are imitators who are ideologically aligned with Al Qaeda, but less tied to it financially. Reportedly, these imitators are the ones who committed the train bombings in Madrid on March 11, 2004.16

To be sure, Al Qaeda has apparently not yet been able to recruit all Islamic terror groups into its terror network. Specifically, Hamas and Hizbollah have reportedly so far resisted joining.17 Although there are no doubt various reasons for this resistance, a primary reason may be that (so far) Hamas and Hizbollah have limited their terrorist attack to Israel and Israeli targets; whereas, as we have seen, Al Qaeda focuses primarily on the United States and Muslim countries, whose governments it seeks to overthrow.18

The overthrow of the Taliban in Afghanistan and the removal of the Saddam Hussein regime in Iraq are two spectacular examples of a general trend: the decline in state-sponsored terrorism. Of the seven states that remain on the U.S. Department of State’s list of state sponsors of terrorism,19 Libya and Sudan have recently taken significant steps to cooperate in the war on terrorism and have moved away from their past support of terrorist movements.20 Iraq, while currently still on the list, surely will be removed in the near future. Cuba, while opposed to the U.S.-led coalition prosecuting the war on terrorism, and actively critical of many associated U.S. policies and actions throughout 2003, limited its support of terrorism to serving as a sanctuary for several terrorists and dozens of fugitives from U.S. justice.21 North Korea declined to cooperate in any steps to combat terrorism, but it is not known to have sponsored any terrorist acts since the

16. Id.
17. Id.
18. It has recently been suggested that the March 11, 2004, bombings in Madrid were the first salvo by Islamic fundamentalists in a war against Europe in general and Spain in particular. According to Florentino Portero, a political analyst at el Grupo de Estudios Estrategicos, in Madrid, as quoted by Lawrence Wright:

The real problem of Spain for Al Qaeda is that we are a neighbor of Arab countries—Morocco and Algeria—and we are a model of economy, democracy, and secularism . . . . We support the transformation and Westernization of the Middle East. We defend the Transition of Morocco from a monarchy to a constitutional monarchy. We are allies of the enemies of Al Qaeda in the Arab world. This point is not clearly understood by the Spanish people. We are a menace to Al Qaeda just because of who we are.

Id. at 53.
19. As of June 1, 2004, the states on the Department of State’s list were: Iran, North Korea, Iraq, Libya, Syria, Cuba and Sudan. CRS Report for Congress, The Department of State’s Patterns of Global Terrorism Report: Trends, State Sponsors, and Related Issues (June 1, 2004), available at http://tpc.state.gov/documents/organization/39630.pdf.
21. In fact, in April 2003, the Cuban government executed three Cubans who attempted to hijack a ferry to the United States, and, in 2001, became a party to all twelve global international conventions relating to terrorism. Id.
bombing of a Korean Airlines flight in 1987. Syria has continued to provide political and material support to Palestinian rejectionist groups on the ground that their activities do not constitute terrorism but rather legitimate armed resistance to Israeli occupation of Palestinian territory. On the other hand, Syria has not been implicated directly in any act of terrorism since 1986. In 2003, Syria returned a sought after terrorist planner to U.S. custody and made efforts to tighten its borders with Iraq to limit the movement of anti-coalition foreign fighters into Iraq.22 Only Iran remained an active sponsor of terrorism in 2003.

This decline in state sponsorship of terrorism, and especially in state financing of terrorism, forced terrorist groups to turn to other sources of financing. These sources of financing are considered in detail in other articles in this symposium.23 For present purposes, it suffices to note that terrorist groups have looked increasingly at drug trafficking as a source of revenue.24 And a rich mother lode it has been. According to reports, U.N. sources have recently estimated that the annual proceeds of the drug trade come to 500 billion U.S. dollars around the world.25 Moreover, the U.S. Drug Enforcement Agency claims that thirty-nine percent of the Department of State’s list of designated terrorist organizations have some degree of connection with drug activities.26 The connections between terrorist organizations and drug traffickers take many forms, ranging from facilitation to direct trafficking by the terrorist organization itself to finance its activities. The relationship is highly symbiotic. The drug traffickers benefit from the terrorists’ military skills, weapons supply and access to clandestine organizations. The terrorists gain a source of revenue and expertise in illicit transfer and laundering of proceeds from illicit transactions. Both use similar means to conceal profits and fund raising.27

Latin America has been a fertile area for the fund raising activities for Hizbollah and Hamas, as well as other terrorist groups, especially “in the triborder area of Argentina, Brazil, and Paraguay, where terrorists raise millions of dollars annually via criminal enterprises.” 28 They generate significant income by controlling the sale of various types of contraband in this area, including drugs, liquor, cigarettes, weapons and forged doc-

22. A move that was not very successful. Id.
25. Id.
27. See SECI Center Anti-Terrorism Task Force, supra note 24.
ments. Reportedly, a large sum of the earnings from these illegal activities goes to support the operatives' respective organizations in Lebanon. There have been allegations of Al Qaeda activity in Latin America, but these have remained uncorroborated.

The severity of the September 11, 2001 attacks and of the subsequent use of military force by United States and select North Atlantic Treaty Organization (NATO) forces against the Taliban and Al Qaeda in Afghanistan, as well as the highly controversial use of force to remove the Saddam Hussein regime in Iraq, have raised an issue as to the appropriate legal regime to apply efforts to control international terrorism. Prior to September 11, 2001, international terrorism had been treated primarily as a criminal law matter with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means; or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators.

To be sure, the United States previously used armed force on occasion against terrorism. In 1986, the United States bombed Tripoli, Libya in response to Libya's apparent involvement in the bombing of a West Berlin discotheque frequented by American soldiers, and terrorist attacks by Libyan backed Abu Nidal on El Al airline counters, that ultimately killed five Americans and wounded many others. Similarly, in 1993, the United States bombed Baghdad, Iraq, because of an assassination plot by Saddam Hussein against former President George H.W. Bush. Again, in 1998, the United States engaged in missile strikes against Afghanistan and the Sudan in response to the East African embassy bombings. But none of these actions involved military force of the magnitude and duration of the actions in Afghanistan after September 11, 2001. Hence, after September 11, 2001, the law of armed conflict assumed a much greater prominence than it had previously in efforts to combat international terrorism.

But the law of armed conflict has hardly occupied the field. On the contrary, the issue now may be whether, under any particular circumstances, the law of armed conflict or international criminal law applies. Also, it is important to note, in the wake of September 11, 2001, various fields of law and methodologies for combating international terrorism have come to the fore. These include, among others, immigration and refugee law, international human rights law, international finance, U.S. constitutional law, private remedies, especially civil lawsuits, cyber law, privacy, homeland security, arms control, disarmament, non-proliferation, intelligence gathering and public health law. No one person, of course, can possibly establish a mastery over all of these disparate fields of law and methodologies for combating terrorism.

29. See News from DEA, supra note 26.

30. For a sense of the breadth and depth of subjects now relevant to efforts to combat terrorism, see the series of articles contained in the lengthy symposium on Law and the War on Terrorism, 25 HARV. J.L. & PUB. POL'Y ix-834 (2002).
What then are the most salient characteristics of this Brave New World of international crime? Perhaps the most salient, as well as the most worrisome, characteristic is the ambiguous nature of the threat it poses. Although it is clear that the destructive capability of the criminals, especially of terrorists, has greatly increased within the last decade or two, the exact magnitude of this destructive capability is unclear. It is unclear, for example, whether Al Qaeda or other terrorist groups have the capability effectively to employ weapons of mass destruction—nuclear, chemical or biological—or, if they have the capability, whether they are planning to use it. With increasing evidence of technological capabilities of terrorists in the use of computers, some commentators have claimed that terrorists now have the capacity for hijacking satellites. “Capturing signals beamed from space [it is alleged] terrorists could devastate the communications industry, shut down power grids, and paralyze the ability of developed countries to defend themselves.”

The ambiguity of the threat of international crime is also demonstrated by its worldwide expansion. Al Qaeda allegedly operates in more than sixty countries. It is not the only example, however. Hizbollah reportedly has operations on six continents, and Hamas and the Sri Lankan Tigers of Tamil Eelam are said to “maintain cells far from the lands where their goals and grievances are focused.” This dispersal of terrorist operations makes it extremely difficult to predict where the next attack will come from in order to take steps to prevent it.

Another salient characteristic of the Brave New World of international crime is the willingness of the criminals to engage in any means whatsoever, no matter how brutal, to achieve their goals. Hostage taking is a tactic long employed by common criminals, as well as by terrorists, to

32. See Wright, supra note 14, at 51-52. For some of my views on the threat of computer attacks by terrorists, see John F. Murphy, Computer Network Attacks by Terrorists: Some Legal Dimensions, in COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 321 (Michael H. Schmitt & Brian T. O’Donnell eds., 2002).
35. At this writing, the U.S. government has raised the terror alert at several financial institutions in the New York City and Washington, D.C. areas. Yet much of the information that was the basis for this action is three or four years old, and it is not clear whether a terrorist plot or preparatory surveillance operations are still underway. But intelligence and law enforcement officials have defended their actions by noting that the reconnaissance already conducted has provided Al Qaeda with the knowledge necessary to carry out the attacks against the sites in Manhattan, Washington and Newark and that Al Qaeda has often struck years after its operatives began surveillance of an intended target. See Douglas Jehl & David Johnston, Reports That Led to Terror Alert Were Years Old, Officials Say, N.Y. Times, Aug. 3, 2004, at A1, col.1.
achieve their goals, which, more often than not, has involved the payment of ransom to achieve the release of the hostages. And the hostage takers have, on a number of occasions, been willing to kill their hostages if their demands are not met. The recent hostage taking by the insurgents in Iraq, however, which has largely involved foreign civilian workers on reconstruction projects, has set a new standard for brutality with beheadings of hostages being recorded on videos and broadcast on the Internet or on Arab television stations as a warning to their employers to cease their activities in Iraq. At this writing, this tactic is enjoying a substantial measure of success. Suicide bombings against civilians are another popular tactic utilized by the insurgents in Iraq, as well as by the Palestinians in Israel.

An especially disquieting aspect of the current situation is the lack of forceful objection on the part of Muslim leaders, including those in the United States, to such barbarity. In the words of a leading scholar of Islam, "where are the fatwas condemning such barbaric crimes as the beheading of hostages or suicide-bombing?" Failure on the part of Muslim leaders to protest the barbaric acts of Islamic fundamentalists lends a measure of support to Samuel Huntington’s controversial thesis of a “clash of civilizations” that will destabilize the twenty-first century.

Aldous Huxley’s *Brave New World* envisaged the elimination of war, but at the cost of elimination of individual freedoms. Some critics of U.S. responses to the rise in Islamic terrorism believe that these responses gravely endanger the freedoms that the United States is supposedly defending. The validity of this thesis is examined by several of the participants in this symposium, and some of the primary issues it raises are highlighted later in this paper.

It is time to turn to some U.S. responses to the rise in international crime and to attempt to identify some of the most salient issues they raise. These responses include, in the order of their consideration: steps toward the prevention, prosecution and punishment of international crimes; combating international terrorism through civil liability suits; and coercive

36. For an excellent treatment of the subject, see Joseph J. Lambert, Terrorism and Hostages in International Law (1990).


measures against state sponsors of terrorism other than the use of armed force.

III. PREVENTION, PROSECUTION AND PUNISHMENT OF INTERNATIONAL CRIMES

A. Prevention

Ideally, the goal of law enforcement is to prevent international crimes from being carried out. There are two primary methods for preventing the commission of international crimes: (1) the hardening of possible targets; and (2) the use of intelligence gathered by intelligence agents and of information resulting from investigations by law enforcement officials to intercept criminals before they can commit their crimes. Examples of the hardening of possible targets are the barricades that surround Congress and key governmental agencies in Washington, D.C. and other primary possible targets such as financial institutions in New York City and Newark, New Jersey or nuclear facilities in various locations in the United States. The screening of passengers and baggage on civilian aircraft flights for weapons or bombs is another example. Special problems surround efforts to harden computer networks against attack because of their vulnerability.

The gathering of intelligence and investigations for law enforcement purposes has both an international and domestic dimension. Although there is increasing international cooperation in intelligence gathering and

42. Electronic vulnerabilities are often harder to guard against attack than are "traditional" vulnerabilities. Part of the problem is the vastness and complexity of the information infrastructure. As of 1996, for example, the defense establishment reportedly had over 211 million computers, 1,000 local networks and 100 long-distance networks. See Information Security: Computer Attacks at Department of Defense Pose Increasing Risks, Abstracts of GAO Reports and Testimony, at 5 (May 22, 1996), available at http://www.gao.gov/archive/1996/ai96084.pdf. Moreover, although it is clear that this infrastructure is subjected to a large number of attacks, the number of reported incidents is probably just the tip of the iceberg because, according to estimates, only about one in 150 attacks is actually detected and reported. Id. The same pattern is likely present in other sectors of the U.S. government and in the vast private sector.

Security technologies and products may afford some protection, but they are hardly foolproof. Some examples are firewalls and smart cards. "Firewalls are hardware and software components that protect one set of system resources (e.g., host systems, local area networks) from attack by outside network users (e.g., Internet users) by blocking and checking all incoming network traffic." Id. at 4 n.2. "Smart cards are access cards containing encoded information and sometimes a microprocessor and a user interface. The encoded information and/or the information generated by the processor are used to gain access to a computer system or facility." Id. at 4 n.3. Additionally, as new security tools are developed, computer network attackers learn how to defeat them or exploit other vulnerabilities.

Human failings greatly compound the problem, as when inexperienced or untrained users accidentally publicize their passwords, or weak passwords are chosen which can be easily guessed. Accordingly, it is generally agreed that training in information security for personnel, including top management, is a crucial element for a good information-systems security program.
sharing at the international level, this area is currently largely unregulated in international law. At both the international and domestic levels, there are serious problems regarding a lack of cooperation; it is rather a "fratricidal war between intelligence services and the law enforcement agencies." 44

On a global basis, an important player is Interpol, the International Police Organization. According to Interpol, "strict limits on intelligence sharing are hindering efforts by law enforcement agencies to understand how the global threat is changing." 45 Countries tend to share information only on a bilateral basis because the originating country can thereby control the flow of information, protect its sources and ensure the information is not passed on to third countries without their permission.

The March 11, 2004 bombings in Madrid, Spain created pressure for a different approach. After March 11, 2004, the European Union created the post of terrorism coordinator to improve sharing among European states. Still, there are reportedly problems with Europol, the European Police Office, which began operations in 1999 and is based in The Hague. Europol has been plagued by disputes over who should head the agency, and also has had to deal with varying levels of support for the agency. Reportedly, Germany and the United Kingdom provide four-fifths of Europol's data. 46 Currently, almost half of Europol's work involves fighting drug and human trafficking, but after March 11, 2004, counter-terrorism is receiving increased attention. The United States is apparently bringing increased pressure on the agency to improve its operations. 47

At the domestic level, in the United States, there has long been a separation between intelligence gathering agencies, such as the Central Intelligence Agency, and investigation for law enforcement purposes, such as by the Federal Bureau of Investigation. In both cases, there has been concern that there not be arbitrary or unlawful interference with privacy, family, home or correspondence. Thus, wiretapping, interception of correspondence and searches of private property constitute invasions of privacy. These invasions of privacy may be justified by threats to national security, such as Al Qaeda, but arguably should be subject to judicial supervision. 48 The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot)

44. See Mark Huban, Interpol Urges More Sharing of Terror Intelligence, FIN. TIMES, June 8, 2004, at 5, col 3.
45. Id.
46. Raphael Minder, Europol Dispute Knocks Pledge to Co-Ordinate Terrorism Fight, FIN. TIMES, June 8, 2004, at 4, col.5.
47. Id.
Act,\textsuperscript{49} however, places significant limits on the ability of judges to curtail the activities of law enforcement officials. For example, under Section 215 of the Act, the FBI may apply for a court order requiring the production of "any tangible things," including medical, financial or library records, from any person, upon a written statement that these items are being sought for an investigation "to protect against international terrorism."\textsuperscript{50} In such a case, judges have no authority to refuse the order once the order is received. Section 217 of the Act goes even further. Under it, Internet service providers, universities and network administrators can authorize, without a judicial order, the surveillance of anyone who accesses a computer without authorization.\textsuperscript{51}

A traditional reason for placing limits on sharing information between intelligence agencies and law enforcement officials is the risk of violating the right to privacy and introducing into criminal proceedings evidence from secret sources, such as informants, not available in full to defendants. In November 2002, however, the Foreign Intelligence Surveillance Court of Review reversed a unanimous decision of the Foreign Intelligence Surveillance Court that rejected, in part, proposed Department of Justice procedures designed to permit the complete exchange of information between intelligence and law enforcement officials.\textsuperscript{52}

The Court of Review’s decision reinstated the Justice Department’s guidelines and thereby all but eliminated the wall between intelligence collection and law enforcement. The decision has been criticized.\textsuperscript{53} Professor Patricia Bellia’s contribution to this symposium discusses the For-
The report of the National Commission on Terrorist Attacks Upon the United States (The 9/11 Commission Report) emphasizes the failure of intelligence agents and law enforcement officials to share information ("connect the dots") that might have resulted in apprehending the 9/11 hijackers prior to commission of their acts. It stresses the "importance of intelligence analysis that can draw on all relevant sources of information. The biggest impediment to all-source analysis—to a greater likelihood of connecting the dots—is the human or systemic resistance to sharing information." In the 9/11 Commission's view, "[a]gencies uphold a 'need to know' culture of information protection rather than promoting a 'need-to-share' culture of integration." To change this culture, the Commission recommends that "[i]nformation procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge." If intelligence agents or law enforcement officials are unsuccessful in preventing the criminal attack, the focus shifts to efforts to apprehend the perpetrators and subject them to prosecution and punishment. As we shall see in the next section of this Article, these efforts may raise a host of both legal and moral issues.

B. Apprehension

By definition, an "international" criminal may be located in a great variety of locations. Thus, the perpetrators of an international criminal act are often difficult to locate, especially if, as is often the case with international terrorists, the perpetrators are aided and abetted by an organization like Al Qaeda or by a state sponsor of terrorism.

Colleagues or friends of alleged perpetrators are often interrogated to gain information about their possible whereabouts. The scope of limitations on coercive interrogation techniques is a highly controversial issue. It has become especially controversial because of recent revelations that the Department of Justice's Office of Legal Counsel sent memorandums to the White House in January and August of 2002 (superseded in December of 2004) approving interrogation tactics that stopped just short of a

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54. See Bellia, supra note 41.
55. See, e.g., 9/11 COMMISSION REPORT, supra note 9, at 73-82.
56. Id. at 416.
57. Id. at 417.
prisoner's death and arguably constituted torture or at the least "cruel, inhuman or degrading treatment." Such tactics are prohibited by the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,59 to which the United States is a party. The August 2002 (superseded in December 2004) memorandum also claimed that, in any event, the domestic statute criminalizing the commission of torture outside of the United States60 could be overridden by the President acting under his Commander-in-Chief Power. In the words of the memorandum, "[e]ven if an interrogation arguably were to violate [the criminal statute], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign."61 Accordingly, the memorandum concludes, "if executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, 'it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties.'"62

The revelations of these memorandums, coming as they did in the wake of the Abu Ghraib scandal, precipitated a flurry of sharp reactions, from both ends of the political spectrum, rejecting the arguments set forth in the memorandums.63 The sharply circumscribed definition of torture set forth in the memorandums received especially severe criticism. As noted by Ruth Wedgwood and James Woolsey:

60. See 18 U.S.C. § 2340A (2004) (making it criminal offense for any person "outside the United States [to] commit[ ] or attempt[ ] to commit torture . . ."). Section 2340 defines the act of torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control [."] Id. § 2340(1); see id. § 2340A. Thus, to convict a defendant of torture, the prosecution must establish that: (1) the torture occurred outside the United States; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe physical and or mental pain or suffering; and (5) that the act inflicted severe physical or mental pain or suffering.
61. See Interrogation Memo, supra note 58, at 31.
This diminished definition of the crime of torture will be quoted back at the United States for the next several decades. It could be misused by Al Qaeda defendants in the military commission trials and by Saddam’s henchmen. It does not serve America’s interest in a world in which dictators so commonly abuse their people and quash their political opponents.64

The memoranda also came under attack for their interpretations of and allegedly dismissive attitude toward provisions of the Torture Convention and of the Geneva Conventions of 1949. For example, Article 16 of the Torture Convention requires each state to prevent “cruel, inhuman or degrading treatment or punishment” within its jurisdiction.65 The August 1, 2002 (superseded December 30, 2004) memorandum66 dismisses the significance of this provision by noting that it does not require that state parties provide criminal penalties for persons who commit such acts.67 Wedgwood and Woolsey, however, point out that Article 16 “is still a legal commitment to which we willingly have acceded . . . . We are not legally free to choose cruel techniques just because they fall short of torture.”68

The January 22, 2002 memorandum69 is similarly dismissive of common Article 3 of the Geneva Conventions of 1949, which sets forth minimum protections for persons involved in an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”70 According to the memorandum’s analysis, common

64. Wedgwood & Woolsey, supra note 63.
65. Torture Convention provides in pertinent part:
Each State Party shall undertake to prevent in any territory under its juris-
diction other acts of cruel, inhuman or degrading treatment or treatment
or punishment which do not amount to torture as defined in article 1,
when such acts are committed by or at the instigation of or with the con-
sent or acquiescence of a public official or other person acting in an offi-
cial capacity.
Torture Convention, supra note 59, art. 16 ¶ 1.
66. See Interrogation Memo, supra note 58.
67. Id. at 15.
68. Wedgwood & Woolsey, supra note 63.
69. See Treaties Memo, supra note 58.
70. Common Article 3 is found in all four of the Geneva Conventions on the
Law of Armed Conflict of 1949. It reads in pertinent part:
In the case of armed conflict not of an international character occurring
in the territory of one of the High Contracting Parties, each Party to the
conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in hostilities, including members of
armed forces who have laid down their arms and those placed hors
de combat by sickness, wounds, detention, or any other cause, shall
in all circumstances be treated humanely, without any adverse dis-
tinction founded on race, colour, religion or faith, sex, birth or
wealth, or any other similar criteria.
To this end the following acts are and shall remain prohibited at any
time and in any place whatsoever with respect to the above-men-
tioned persons:
Article 3 applies only to civil wars or to "a large scale armed conflict between a State and an armed movement within its own territory" and not to a struggle for the control of Afghanistan.\textsuperscript{71}

A literal reading of common Article 3 supports the January 2002 memorandum's thesis because by its terms it appears to apply only to an "armed conflict not of an international character," and Afghanistan was clearly an international armed conflict. In 1986, however, a majority of the International Court of Justice, in the Nicaragua case, held that "minimum rules applicable to international and non-international conflicts" are expressed in common Article 3.\textsuperscript{72} By contrast, in his dissenting opinion, Judge Sir Robert Jennings suggested that the majority's view of common Article 3 as a minimum standard of treatment "is not a matter free from difficulty."\textsuperscript{73} For his part, Yoram Dinstein, an eminent authority on the law of armed conflict, may have resolved this "difficulty" by his comment on Sir Jennings' suggestion:

This is particularly true considering that the Court did not deem it fit to produce any evidence for the conclusion that the provision reflects norms identically applicable to international and non-international armed conflicts. Still, it can hardly be disputed that when common Article 3 prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment", or established the need to afford in trial "all the judicial guarantees which are recognized as indispensable by civilized people", the text reflects an irreducible minimum that no State is allowed to rachet down even a notch in any armed conflict (whether international or non-international).\textsuperscript{74}

In June 2004, the Department of Justice took the "unprecedented" step of rescinding the August 2002 memorandum and pledged to review other opinions of the Office of Legal Counsel that dealt with the treat-

\begin{itemize}
\item[(a)] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
\item[(b)] taking of hostages;
\item[(c)] outrages upon personal dignity, in particular humiliating and degrading treatment;
\item[(d)] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
\end{itemize}

(2) The wounded and sick shall be collected and cared for.

\textit{Id.}

\textsuperscript{71} See Treaties Memo, \textit{supra} note 58.

\textsuperscript{72} Military and Paramilitary Activities (Nicar. v. U. S.), 1986 I.C.J. 14, 114 (June 27).

\textsuperscript{73} Id. at 528, 537 (Jennings, J., dissenting).

\textsuperscript{74} YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 32 (2004).
ment and interrogation of captured combatants.75 Critics have claimed, however, that the August 2002 memorandum gave potential abusers a road map for how to avoid prosecution.76

Difficulties in locating a criminal suspect may be especially severe in cases where computers are used as a weapon.77 Computer network attackers can frustrate investigatory efforts by "looping and weaving" their attacks through several foreign countries, thus greatly complicating the efforts of investigators to follow their trail. If the suspect is located, it becomes necessary to induce law enforcement officials where he is located to take him into custody. Local law enforcement, however, will not do so unless the computer network attack in question is a crime under their local law.78 This requirement must also be met as a condition of extradition because of the "double criminality" requirement in virtually all extradition treaties.79

C. Prosecution and Punishment

If the suspect is apprehended abroad, the issue arises whether, and if so where, he will be prosecuted. If the United States wishes to prosecute him, it will seek his return, either through extradition or some other process of "rendition" such as exclusion, deportation, or, in extreme cases, abduction.80 Processes of rendition are explored elsewhere in this symposium.81 For purposes of this Article, I will just note that the so-called anti-terrorism conventions of the United Nations82 normally contain, as a basic provision, an "extradite or prosecute" requirement. That is, a state party that apprehends a person who allegedly committed the terrorist act cov-

75. See Wedgwood & Woolsey, supra note 63.
76. See Liptak, supra note 63.
77. For more detailed discussion of this and other problems associated with computer network attacks, see Murphy, supra note 34, at 321-51.
79. For discussion, see GEOFF GILBERT, TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW 104-16 (1998).
80. The most controversial case of a U.S. abduction involved Alvarez-Machain from Mexico. The validity of this action, at least as a matter of U.S. law, was finally determined by the U.S. Supreme Court in United States v. Alvarez-Machain, 504 U.S. 655 (1992).
81. See Warner, supra note 41.
82. There are twelve such conventions at present, covering a variety of terrorist crimes, such as aircraft hijacking, hostage taking and terrorist bombings. The texts of these twelve conventions are conveniently collected in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (United Nations 2001).
ered by the convention must either extradite him to a state party seeking his extradition or submit his case to its authorities for prosecution. Normally, the decision whether to extradite the accused or submit him to prosecution is the sole discretion of the state party that has the accused in custody. This discretion is not absolute, however, as was shown in the quite extraordinary case of Libya and the bombing of Pan Am Flight 103.

While it was on a flight from London to New York City on December 21, 1988, Pan Am Flight 103 was destroyed by a bomb over Lockerbie, Scotland, killing all 259 persons aboard, as well as 11 persons on the ground. Based on evidence gathered during a long investigation, the United States and the United Kingdom indicted two Libyan nationals in 1992 and demanded that they be turned over for prosecution to the United States or the United Kingdom. Libya declined to extradite, citing as reasons the lack of extradition treaties with either the United States or the United Kingdom and a provision in its constitution prohibiting the extradition of Libyan nationals. It also cited the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, to which all three states are parties, for the proposition that its only obligation under the convention was to investigate and, if appropriate, prosecute. Libya conducted an investigation and determined that it had an inadequate basis to prosecute. Similarly, the Libyan government rejected a request by the French government for the extradition of alleged Libyan


The State Party in the territory of which the alleged offender is present shall . . . if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that state.

Id. art. 8 ¶ 1.


85. The Libyan nationals were Abdelbasset Ali Mohamed Al-Megrahi and Al-Amin Khalifa.


The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state.

Id.
terrorists allegedly involved in the destruction of UTA Flight 772 in September 1989.

The three countries refused to accept the response of the Libyan government and referred the matter to the U.N. Security Council (the "Council"). The Council adopted a resolution urging the Libyan government to provide "full and effective" responses to requests made by the French, the United Kingdom and the United States governments concerning these catastrophes.87 When the Libyan government failed to do so, the Council decided that this failure constituted a threat to international peace and security.88 Acting under Chapter VII of the U.N. Charter, the Council decided that states should adopt various sanctions against Libya unless it responded to the requests for cooperation. To avoid these measures, Libya also had to commit itself "definitely to cease all forms of terrorist action and all assistance to terrorist groups and . . . promptly, by concrete actions, demonstrate its renunciation of terrorism."89 In a third resolution, the Council applied further comprehensive sanctions against Libya in 1993.90

In response, Libya invoked the co-promissory clause in the Montreal Convention and instituted suit before the International Court of Justice against the United States and the United Kingdom.91 The United States and the United Kingdom argued that any claim that Libya might have under the Montreal Convention was superseded by the Security Council resolutions because, under Article 103 of the U.N. Charter, if there is a conflict between the obligations of member states under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail.92 The Court denied Libya's request for

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89. Id.
Any dispute between two or more Contracting States concerning the interpretation or application of this convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
Id.
provisional measures against further U.S. and British efforts to compel Libya to surrender the accused, but it ruled that it had jurisdiction to consider Libya's claims under the Montreal Convention.93

After the Court's ruling, extensive discussions involving Libya, the United States, the United Kingdom and the U.N. Secretary-General resulted in an agreement in April 1999 by Libya to surrender the two accused Libyans to stand trial before Scottish judges sitting as a Scottish court in the Netherlands. On January 31, 2001, one of the accused Libyans was convicted of murder and sentenced to imprisonment for life. The conviction was affirmed on appeal.94 The other accused Libyan was acquitted.95

With the conclusion of the proceedings in the Netherlands, proceedings in Libya's cases against the United States and the United Kingdom remained pending before the International Court of Justice. A decision on the merits by the court in these cases could have been of great significance because Libya had challenged the sanctions imposed against it on the ground that they were *ultra vires*. The first issue, therefore, was whether the court was competent to sit in judgment of a Security Council resolution in the absence of a request from the Council to do so. Had it determined that it was competent, the court would have had to decide whether the Council's resolutions against Libya exceeded its competence. A court decision that the Council's resolutions exceeded its competence would surely have infuriated both the United States and the United Kingdom and called into question the precise scope of Security Council authority under Chapter VII of the Charter. Resolution of these issues, however, was not to be. On September 10, 2003, the President of the International Court of Justice, at the request of the parties, issued an order discontinuing the proceedings before the court.96

The ultimate *denouement* of the Libya case, then, was quite extraordinary. Because of economic and other pressures on Libya, the two individuals accused of the terrorist bombing of the airplane were brought to justice before a national court sitting in the territory of another country. The result was that one of the accused was convicted, and his conviction was affirmed on appeal, while the other accused was acquitted of the charges. Although this extraordinary procedure is unlikely to set a precedent, it did fulfill the primary goal of the antiterrorist conventions,

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95. Al Megrahi v. Her Majesty's Advocate, Appeal No. C104/01 (J.C. 2002) (Scot.).
namely, that persons accused of crimes covered by the conventions be prosecuted before the national courts of states parties in accordance with procedures that safeguard their due process rights.

It is not at all clear, however, that this goal is met with any degree of consistency. The conclusion of new, or even the ratification of old, antiterrorism conventions is not the crucial step in the counter-terrorism process. The crucial step is vigorous implementation of the conventions, encompassing more than merely ratifying the conventions, passing legislation and adopting the necessary administrative measures, such as creating an appropriate legal infrastructure to combat international terrorism. It requires taking active steps toward ensuring that the primary goals of the conventions are met: preventing the crimes covered by the conventions and prosecuting and punishing the perpetrators of the crimes. The record of the conventions in this respect is unclear.

A major part of the problem is the lack of adequate data on the extent of successful actions to prevent terrorist acts and of successful prosecutions of terrorists. Although there appears to be adequate data available on the extradition, prosecution and punishment of aircraft hijackers,97 information regarding other manifestations of terrorism is quite sparse. Most of the antiterrorist conventions contain provisions that require the state party where the alleged offender is prosecuted to communicate the final outcome of the proceedings to the Secretary-General of the United Nations (or to the Director-General of the International Atomic Energy Agency or the Council of the International Civil Aviation Organization),98 and the Secretary-General issued reports on “Measures to Eliminate International Terrorism.”99 But these reports focus primarily on the terrorist events that triggered the conventions and on a summary of the most important provisions of these conventions. There appears to be little information on the extent and success of efforts to either prevent the acts the conventions cover or to prosecute the perpetrators of these acts.

There is some prospect that this situation will be remedied, although not immediately. U.N. Security Council Resolution 1373,100 discussed in the articles addressing the combating of the financing of terrorism in this symposium,101 “[c]alls upon all States” to take a number of steps in coop-

97. At least this was the case around 1985 when I last examined the data. See John F. Murphy, Punishing International Terrorists: The Legal Framework for Policy Initiatives 110-15 (1985).


101. See Zagaris, supra note 23, at xx; Morais, supra note 23, at xx; Smallwood, supra note 23, at xx.
eration with other states to combat terrorism. These steps include, “intensifying and accelerating the exchange of operational information,” becoming parties to the relevant antiterrorist conventions and ensuring, “in conformity with international law,” that refugee status is not abused by terrorists, and that “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”

Significantly, to monitor implementation of Resolution 1373, the Council established the Counter-Terrorism Committee (CTC) and called upon all states to report to the committee—no later than ninety days after the date of adoption of the resolution—on the steps they have taken to implement the resolution. The Council further “[e]xpressed[d] its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter.” Similarly, Ambassador Jeremy Greenstock, the first chairman of the CTC, emphasized the importance of implementing antiterrorist measures. According to Ambassador Greenstock, prior to the resolution “[g]overnments were already familiar with what needed to be done. But few had done it. Resolution 1373 drew on the language negotiated by all U.N. members in the twelve Conventions against terrorism, but also delivered a strong operational message: get going on effective measures now.”

Reportedly, as of June 30, 2004, the committee had received 515 reports from U.N. member states and others. They included 160 second reports from member states and two from non-member states, 116 third reports from member states and 40 fourth reports from member states. Even a cursory review of the reports submitted by member states with sophisticated law and order systems that have had major problems with international terrorism—United States, United Kingdom, Israel, Germany and Italy—reveals that the CTC is gathering valuable information regarding the legislative, executive and judicial steps these countries are taking to combat international terrorism. One of the questions that member states have been asked to respond to is: “[w]hat steps have been taken to establish terrorist acts as serious criminal offenses and to ensure that the punishment reflects the seriousness of such terrorist acts? Please supply

102. S.C. Res. 1373, supra note 100, ¶ 3, (a)-(g).
103. Id. ¶ 6.
104. Id. ¶ 8.
107. Id.
examples of any convictions obtained and the sentence given." The examples of convictions and sentences supplied in these reports, however, are either non-existent or very brief. The United States’ reports appear to be the most forthcoming in this respect, but even this information is skimpy, giving no information on how their law enforcement officials came to have custody of the accused.

There is some hope this situation will improve in the future. Although the Security Council created the CTC through its adoption of Resolution 1373, it left it to the committee to decide on its operating procedures. Because of the broad scope of Resolution 1373, the committee decided to proceed with its assessments of member states’ obligation to carry out the resolution in three stages. As explained by Eric Rosand:

For the first, Stage A, the CTC agreed that states should have legislation in place covering all aspects of the resolution and should begin the process of becoming party to the twelve international terrorism conventions and protocols as soon as possible. In addition, the CTC agreed that states should establish effective executive machinery for preventing and suppressing terrorist financing. The CTC’s review of the second set of reports, contin-

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ued though early 2003, monitors all states regarding these two priorities. Reviews of third and subsequent reports will probably continue to focus on Stage A until the CTC experts are satisfied that adequate legislation covering all aspects of Resolution 1373 is in place. The CTC then will begin to focus on the Stage B priorities that the CTC also agreed to in July, namely: (1) having executive machinery in place covering all aspects of Resolution 1373, (2) having an effective government-wide coordination mechanism for counterterrorism activity, and (3) cooperating on bilateral, regional, and international levels, including exchange of information. Looking further ahead, the CTC envisions that in Stage C it will focus on the implementation of the above legislation and executive machinery to bring terrorists and their supporters to justice.111

The Security Council may have taken a step toward Stage C in adopting Resolution 1535.112 By this resolution, adopted on March 26, 2004, the Council restructured the CTC. Under its new structure, the CTC consists of a Plenary—composed of the Security Council’s member states—and a Bureau, composed of a Chair and Vice-Chairs that are assisted by a Counter-Terrorism Committee Executive Directorate (CTED). The CTED was established as a special political mission under the policy guidance of the Plenary for an initial period ending in December 2007 and subject to a comprehensive review by the Security Council by December 31, 2005.113 On June 29, 2004, Ambassador Javier Ruperez of Spain became Executive Director of CTED. Ambassador Ruperez announced that the newly revitalized CTC was beginning preparations for its first on-site visit to a member state with the state’s permission.114

John Danforth, United States Permanent Representative to the United Nations, reportedly stressed that it was essential for the success of the CTED to move beyond the focus on written reports and to gather enough information to determine which states “had gone beyond just signing treaties and approving resolutions.”115 The creation of CTED will give the CTC a more professional and expert staff, which will begin to

111. Id. at 335-36. For an updated and expanded version of Rosand’s report, see 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 TERRORISM: AN INTERNATIONAL DIALOGUE 603 (Fijaut & Woters eds., 2004).


113. Id. (outlining review provision of Counter-Terrorism Committee Executive Directorate (CTED)).


115. See id. at 4-5 (providing summary of Ambassador Danforth’s remarks).
travel to countries, with experts from other organizations, to start assessing on the ground implementation of Resolution 1373. An important part of this assessment should be whether states are prosecuting, extraditing or harboring terrorists or terrorist groups. Such an assessment will be complicated, however, by the failure of CTC and CTED to adopt an agreed definition of terrorism. In the absence of an agreed definition, each state can decide for itself who is a terrorist. Accordingly, the CTC is likely to confront situations where a state is failing to prosecute individuals that some CTC members believe are terrorists, but the state concerned does not.116 There has been some discussion in the CTC of asking each state to submit a list of successful terrorist prosecutions and then compiling and maintaining a global, public list. There may be some resistance to this proposal because it might draw more attention to those states not on the list, contrary to the non-confrontational approach that has historically characterized CTC’s proceedings.117

IV. COMBATING INTERNATIONAL TERRORISM THROUGH CIVIL LITIGATION

One of the highlights of the October 23rd symposium was the panel on combating the financing of international crime, and we are fortunate to have three excellent articles on that topic in these proceedings.118 The first part of this section of my Article seeks to supplement these articles with a brief overview of a recent development: the use of civil suits in the U.S. courts to counter the financing of terrorists and terrorist organizations.119 The second part does the same with respect to civil suits brought against state sponsors of terrorism.120 Before turning to examples of these kinds of suits, however, we should consider both the advantages and drawbacks of civil suits against terrorists, terrorist organizations and state sponsors of terrorism.121 At first blush, it would appear that civil suits against terrorists would be a “second best” option to criminal prosecution. But it is not clear that this is necessarily so. Depending on the circumstances, the prospects for holding the perpetrators of international terrorism civilly liable for their actions may be greater than the prospects for holding them criminally liable. Plaintiffs in civil suits benefit from the standard of proof in civil suits—preponderance of the evidence rather than proof beyond a reasonable doubt—and are able to use discovery devices and, in some in-

116. For this observation, I am indebted to Eric Rosand, Deputy Legal Counselor, United States Mission to the United Nations in New York.
117. Again, I am indebted to Eric Rosand for this observation.
118. See Morais, supra note 23; Smallwood, supra note 23; Zagaris, supra note 23.
120. My overview of both topics draws heavily on and is an updating of John F. Murphy, Civil Lawsuits as a Legal Response to International Terrorism, in CIVIL LITIGATION AGAINST TERRORISM, supra note 119, at 37.
121. For more extensive exploration of these advantages and drawbacks, see id. at 43-46.
stances, conventions on discovery to obtain documents and other forms of evidence unavailable in criminal proceedings. Moreover, as noted by Professor Jose E. Alvarez, civil suits may be more effective than criminal proceedings in establishing the full factual context in which the perpetrators committed their crimes, thereby enhancing the prospects that the victims will have their suffering brought to the attention of the wider community and that a definitive, historically accurate account of the atrocities will be provided. Also, unlike criminal trials, civil suits provide at least the possibility that victims may be compensated for lost property, for injuries suffered or for emotional distress caused.

To be sure, civil litigation in the United States as an alternative to criminal prosecution for the commission of international crimes or egregious human rights violations is a highly controversial subject. Subjecting foreign governments to such suits has been, if anything, even more controversial. Moreover, as we shall see below, the barriers to successful litigation in this area are formidable and include, inter alia, resistance by the United States government, limits on the lifting of the immunity of foreign states under the Foreign Sovereign Immunities Act (FSIA), difficulties in collecting judgments in the United States and, especially, possible hostile and retaliatory reaction on the part of foreign governments.

A. Civil Suits Against Terrorists and Terrorist Organizations

Although there are a number of possible bases of subject matter jurisdiction in United States law that might permit civil suits against terrorists

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124. Professor Alvarez further points out:
For these reasons, civil suits, controlled by plaintiff/victims and their chosen attorneys, and not prosecutors responsive to other agendas, may also be more effective in preserving a collective memory that is more sensitive to victims than some judicial accounts rendered in the course of criminal trials. Indeed, if studies about litigants' relative satisfactions with adversarial versus inquisitorial methods of criminal procedure are an accurate guide, it may be that having greater control of the process, including the selection of attorneys and the ability to discover and present one's own evidence and develop one's own strategy, is itself a value for victims, and one that is better met through civil suits such as those now occurring in United States courts.

Id. at 2102.

and terrorist organizations, the most significant basis is the Anti-terrorism Act (ATA). The ATA authorizes a U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism" to sue for treble damages, including attorney's fees. To recover under this provision, plaintiffs have to demonstrate that they have been injured by an act of international terrorism as defined under the federal criminal code. Nevertheless, plaintiffs' burden of proof may be considerably reduced by other provisions of the ATA. For example, a final judgment or decree in favor of the United States in criminal proceedings under various provisions of the criminal code covering crimes commonly resorted to by terrorists "shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section." A defendant may be similarly estopped by a final judgment or decree rendered in favor of any foreign state "to the extent that any such judgment or decree may be accorded full faith and credit under the law of the United States . . . ."

The sponsors of the ATA wished to ensure that victims of terrorism were not left without a remedy, especially if, for evidentiary or other reasons, criminal charges could not or would not be brought. They also wished to make it unprofitable to engage in terrorist activities and to prevent terrorists from soliciting and maintaining assets within the United

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126. For a listing and discussion of these various bases, see Murphy, supra note 120, at 47-65.
128. Id. § 2333(a).
129. Id. § 2331(1). Under the Anti-Terrorism Act (ATA), "international terrorism" means activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

Id. § 2331(1).
130. Id. § 2333(b).
131. Id. § 2333(c).
States. To this end they sought to enhance the power of private citizens to combat acts of terrorism.\textsuperscript{133}

Congress, however, placed a number of limitations on this power of private citizens. First, it required that a plaintiff be a United States national, except in the case of "indirect victims" such as survivors and heirs.\textsuperscript{134} Second, the cause of action is subject to a four year statute of limitations, although this is tolled during the time a defendant is absent from the United States or has concealed his whereabouts.\textsuperscript{135} Third, no suits may be maintained against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority."\textsuperscript{136} Fourth, no action may be brought for injury or loss by reason of an act of war.\textsuperscript{137} Finally, there are limitations on discovery of the investigative files of the Department of Justice if the Assistant Attorney General, Deputy Attorney General or Attorney General objects that such discovery will interfere with a criminal investigation of the incident or a national security operation related to the incident.\textsuperscript{138} Similarly, the Attorney General may intervene in any action brought under the ATA for the purpose of seeking a stay on the ground that continuation of the civil action will substantially interfere with a criminal prosecution that involves the same subject matter in which an indictment has been returned, or interfere with national security operations related to the terrorist incident that is the subject of the civil action.\textsuperscript{139}

At this writing, twenty-five cases have arisen under the ATA.\textsuperscript{140} Many of them illustrate the substantial barriers to a successful suit against terrorists or terrorist organizations. Perhaps the most salient of these cases is Smith ex rel. Smith v. Islamic Emirate of Afghanistan.\textsuperscript{141} There, various survivors of the September 11th attacks sued the Taliban, Afghanistan and Osama bin Laden under the ATA. They later added Saddam Hussein and Iraq to the suit. As an initial matter, the court had to determine whether it had personal jurisdiction over the defendants. Plaintiffs effected service on the Taliban and Afghanistan through personal service on Afghanistan's Ambassador Abdul Salaam Zaeef and on the other defendants through service by publication in Afghani and Pakistani newspapers and several television stations. The court determined that this service met "minimal due process" requirements.\textsuperscript{142} When the court granted plaintiffs permis-
sion to add Saddam Hussein and Iraq as defendants, the summons and complaint were served upon Iraq via the United States Department of State’s Director of Special Consular Services, who in turn transmitted the documents to Iraq’s Ministry of Foreign Affairs. None of the defendants appeared before the court.

In determining liability, the court proceeded seriatim to consider the position of the various defendants. Turning first to the Al Qaeda defendants, the court had to decide whether the attacks of September 11th fell within the ATA’s definition of “international terrorism,” since the statute defines international terrorism in contradistinction to “domestic terrorism.” While noting that the attacks of September 11th clearly “occurred primarily” in the United States, the court focused on the part of the definition that included acts that “transcend national boundaries in terms of the means by which they are accomplished . . . or the locale in which their perpetrators operate” or through the foreign nationality of the perpetrators and their receipt of orders, funding and some training from abroad. Based on these factors the court concluded that the acts of September 11th fell within the statute’s definition of international terrorism and the plaintiffs had pled a valid cause of action against the Al Qaeda defendants.

Turning next to the plaintiffs’ suits against Iraq and Saddam Hussein, the court rejected their contention that they had a cause of action under the ATA. Although the Act creates a cause of action for the “estate, survivors, or heirs” of any U.S. national killed by an act of international terrorism, the court noted that 18 U.S.C. Section 2337 appears expressly to foreclose an action against Iraq and its leader. Under this provision of the ATA, “[n]o action shall be maintained under Section 2333 of this title against . . . a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.” The court rejected plaintiffs’ argument that amendments to FSIA permitting civil suits against state sponsors of terrorism under certain circumstances had effectively overridden the limitations of the ATA. In the court’s view, these amend-

143. For the definition of “international terrorism” under the federal criminal code, see supra note 129. The definition of “domestic terrorism” covers activities that:
(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended—
   (i) to intimidate or coerce a civilian population;
   (ii) to influence the policy of a government by intimidation or coercion; or
   (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States.
144. 18 U.S.C. § 2333.
ments to the FSIA were irrelevant to the issue whether the ATA permitted a suit against Iraq and Saddam Hussein.\textsuperscript{145}

The court also held that plaintiffs had no cause of action against Saddam Hussein under FSIA. In doing so, the court engaged in a two-step process. First, it noted that FSIA withdraws sovereign immunity and grants federal courts personal jurisdiction over a foreign state in certain enumerated circumstances.\textsuperscript{146} Second, it referred to an amendment to FSIA entitled "Civil Liability for Acts of State Sponsored Terrorism," the so-called "Flatow Amendment,"\textsuperscript{147} which provides, in pertinent part, that "[a]n 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 court of the United States may maintain jurisdiction under Section 1605(a)(7)."\textsuperscript{148} Although the language of this provision would prima facie appear to support a possible cause of action against Saddam Hussein, the court observed that Congress has placed a significant limitation on this cause of action: "No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States."\textsuperscript{149} Applying this limi-

\textsuperscript{145} In the words of the court: Plaintiff misses the point. The issue is not whether 2337 bars suit against Iraq and Saddam Hussein under FSIA Section 1605(a)(7)—it certainly does not—but whether plaintiffs have a cause of action under § 2333, which permits treble damages for civil violations of the ATA. Section 2337 could not be clearer: it prevents suits under § 2333 against foreign states and officers wherein a plaintiff who prevails would be entitled to treble damages. \textit{Smith}, 262 F. Supp. 2d at 225.  

\textsuperscript{146} Specifically, the court referred to 28 U.S.C. § 1605 (a)(7), which provides, in pertinent part:  

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States 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 an act if such an 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 . . . .  

\textit{Id.}  


\textsuperscript{149} \textit{Smith}, 262 F. Supp. 2d at 228. The \textit{Smith} court quoted \textit{Price v. Socialist People's Libyan Arab Jamahiriya} for the reasons behind this limitation, stating that "[e]xecutive branch officials feared that the proposed amendment [the Flatow
tion to the plaintiffs’ action against Saddam Hussein, the court found that “[t]he Supreme Court has held that a claim against a U.S. president for the conduct identical to that alleged against Saddam Hussein would be barred because of the president’s absolute immunity from damages for conduct associated with the exercise of his official duties.” The court then dismissed the claim against Saddam Hussein.

The court also struggled with the plaintiffs’ claim against Iraq. The court first observed that the Flatow Amendment “provides a cause of action against a foreign state’s officials, employees and agents, but does not expressly provide a cause of action against the foreign state itself.” Nonetheless, the court noted further that “[t]he majority view permits a cause of action against a foreign state, despite the lack of clarity in the statute.” Similarly, while conceding that the matter was “not free from doubt,” the court concluded that “the better view . . . is that the Flatow Amendment likely provides a cause of action against a foreign state.” Having decided that the Flatow Amendment provides a cause of action against a foreign state, the court next noted that plaintiffs had to prove the existence of five elements to recover damages in their suit against Iraq.

First, that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage or hostage taking. Second, the act was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant. Third, the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment. Fourth, the foreign state must be designated as a state sponsor of terrorism either at the time

Amendment] to FSIA might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States.” Id. (quoting Price, 294 F.3d 82, 88-89 (D.C. Cir. 2002)).


151. Id. at 227.


153. Smith, 262 F. Supp. 2d at 228.

154. Id. at 226.
the incident complained of occurred or was later so designated as a result of such act. Fifth, either the plaintiff or the victim was a U.S. national at the time of the incident. Applying these elements to the case before it, the court concluded that several of them required little discussion: "There can be no doubt that [plaintiff's] deaths resulted from aircraft sabotage, and, seemingly, hostage taking and extrajudicial killing as well (first element); that both victims were U.S. nationals at the time of the incident (fifth element) . . . and that since 1990 the United States has designated Iraq as a state-sponsor of terrorism (fourth element)."\footnote{155}

The court found, however, that:

The other two elements—1) that the act was either perpetrated by the foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant and 2) the act or the provision of material support or resources is engaged in by an agent, official or employee of the foreign state while acting within the scope of his or her office, agency or employment—require closer consideration.\footnote{156}

Specifically, plaintiffs' theory required that they prove "Iraqi agents provided material support to bin Laden and al Qaeda in the form of training, providing safehouses, and document forgery."\footnote{157}

To meet their burden of proof, plaintiffs relied primarily on the testimony of two expert witnesses: Robert James Woolsey, Jr., the Director of Central Intelligence from February 1993 to January 1995, and Dr. Laurie Mylroie, an expert on Iraq and its involvement in terrorism generally and the bombing of the World Trade Center in 1993 in particular. Dr. Mylroie described Iraq's covert involvement in acts of terrorism against the United States in the past, including the bombing of the World Trade Center in 1993. For his part, Director Woolsey reviewed several facts that tended in his view to show Iraq's involvement in acts of terrorism against the United States in general and in the events of September 11th in particular.\footnote{158}

Primarily on the basis of this testimony, the court concluded that:

[P]laintiffs have shown, albeit it barely, 'by evidence satisfactory to the court' that Iraq provided material support to Bin Laden and al Qaeda. As noted above, a very substantial portion of plaintiffs [sic] evidence is classically hearsay (and often multiple hearsay), and without meeting any exceptions is inadmissible for substantive purposes. Thus the hearsay rule prevents the Court from considering as substantive evidence: the Ambassador of the Czech Republic's letter which repeats Minister Gross's statement

\footnote{155. Id. at 228.}
\footnote{156. Id.}
\footnote{157. Id.}
\footnote{158. For the court's summary of Dr. Myroie's and Director Woolsey's testimony, see id. at 228-32.}
about a meeting between Atta [one of the September 11th hijackers] and al Ani [a high level Iraqi intelligence agent] in Prague, the contacts described in CIA Director Tenet’s letter to Sen. Graham, the evidence that Secretary Powell recited in his remarks before the U.N., and the defectors’ descriptions about the use of Salman Pak [a highly secure military facility in Iraq] as a camp to train Islamic fundamentalists in terrorist [sic]. However, the opinion testimony of the plaintiffs’ experts is sufficient to meet plaintiffs’ burden that Iraq collaborated in or supported bin Laden/al Qaeda’s terrorist acts of September 11. Although these experts provided few actual facts of any material support that Iraq actually provided, their opinions, coupled with their qualifications as experts on this issue, provide a sufficient basis for a reasonable jury to draw inferences which could lead to the conclusion that Iraq provided material support to al Qaeda and that it did so with knowledge and intent to further al Qaeda’s criminal acts. 159

It is worth noting that the court’s conclusion is contrary to the claims of critics of the Bush Administration who are of the view that no meaningful connection between Iraq and the attacks on September 11th has been established. 160

Be that as it may, the court awarded the plaintiffs substantial damages against Iraq for economic loss, pain and suffering and loss of solatium, as well as treble damages against the “al Qaeda defendants” under the ATA. 161 But collecting on these damage awards has proven so far to be a mission impossible. For example, after receiving their judgment against Iraq, the September 11th plaintiffs sought to satisfy it by attaching certain Iraqi assets that were held by the Federal Reserve Bank of New York. But they were blocked in this endeavor by the United States District Court for the Southern District of New York, which issued a summary judgment in favor of the Federal Reserve Bank of New York and John W. Snow, Secretary of the Treasury, defendants in the case. 162 The District Court’s judgment was affirmed on appeal by the U.S. Court of Appeals for the Second Circuit. 163

In bringing their action, the plaintiffs relied on Section 201 of the Terrorism Risk Insurance Act of 2002 (TRIA), 164 which states in pertinent part that “in every case in which a person has obtained a judgment against

159. Id. at 232.
a terrorist party on a claim based upon an act of terrorism . . . the blocked assets of that terrorist party . . . shall be subject to execution . . . in order to satisfy such judgment."165 Defendants, however, pointed out that, prior to the entry of plaintiffs' judgment,166 on March 20, 2003, President George W. Bush had issued an Executive Order confiscating all frozen Iraqi assets held by the government and vesting title to those assets in the United States Department of the Treasury.167 Defendants further noted that Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA)168 gave the President the authority to "make inapplicable with respect to Iraq" any law "that applies to countries that have supported terrorism."169 According to defendants, the President had exercised this authority and made TRIA inapplicable to Iraq, thereby blocking plaintiffs' right to execute against the funds.170

The Second Circuit agreed with defendants' argument that the President's order confiscating all frozen Iraqi assets and vesting title to those assets in the Treasury Department barred the plaintiffs from collecting on their judgment against Iraq. Because the court concluded this resolved the appeal, it decided there was no need to consider the defendants' contentions regarding the authority of the President to make TRIA inapplicable to Iraq under EWSAA.171 As for the judgments against the Al Qaeda defendants, any assets of Al Qaeda found in the United States have been frozen by presidential order172 and are therefore under the control of the Office of Foreign Assets Control (OFAC). At this writing, reportedly lawyers for the plaintiffs are in discussions with OFAC about making the frozen assets available for execution of the judgments. If these discussions are not successful, legal action to recover from these funds is a distinct possibility.173

165. Id. § 201, 116 Stat. at 2337.
166. The court entered final judgment in favor of plaintiffs on July 14, 2003. See Smith, 346 F.3d at 266.
169. Id. § 1503, 117 Stat. at 579.
171. For discussion of the Second Circuit’s reasoning, see Smith, 346 F.3d at 269-72.
173. I am indebted to James E. Beasley, Jr., attorney for the plaintiffs, for this information.
The record of success for other plaintiffs bringing suits under the ATA is decidedly mixed. In Knox v. Palestine Liberation Organization, plaintiffs were the representative and heirs and survivors of the estate of Aharon Ellis. They alleged that on the night of January 17, 2002, Ellis, an American citizen then thirty-one years old, was performing as a singer at a Bat Mitzvah held in the David’s Palace banquet hall in Hadera, Israel. At 10:45 p.m., a gunman burst through the door of the banquet hall and, using a machine gun, opened fire into the crowd of celebrants, killing six people, including Ellis, and wounding over thirty. Plaintiffs alleged further that the gunman and other individually named and unnamed defendants were employees, agents or co-conspirators of the Palestine Liberation Organization (PLO) and the Palestine Authority (PA) and, as such, planned and carried out the attack acting in concert with or under instructions or inducements or with the assistance or material support and resources provided by the PLO, the PA, Yasser Arafat, chairman of the PLO and leader of the PA and the other individual defendants. Defendants moved to dismiss the complaint, asserting lack of subject matter jurisdiction and non-justiciability. The court denied the defendants’ motion.

In the court’s view neither the PLO nor the PA was a “state” within the meaning of the FSIA. Assuming arguendo that a sovereign state of Palestine existed, the United States had not recognized it, and therefore it was not entitled to immunity under FSIA. Lastly, the court held the political question doctrine did not bar plaintiffs’ action for damages under the ATA, because the court would simply adjudicate whether and to what extent plaintiffs could recover against defendants for the murder of an American citizen in a terrorist attack in Israel and would not have to answer broader and intractable political questions that formed the backdrop to the suit.

By contrast, in Burnett v. Al Baraka Investment and Development Corp., victims and representatives of victims of the terrorist attacks of September 11th brought suit against the director of Saudi Arabia’s Department of General Intelligence and Saudi Arabia’s third-highest ranking government official for allegedly funding and supporting the Al Qaeda terrorist organi-

175. For a decision similar to Knox, see Biton v. Palestinian Interim Self-Govern-
ment Authority, 310 F. Supp. 2d 172 (D.D.C. 2004). There, plaintiffs, an American woman whose husband was killed in the bombing of a school bus in the Gaza Strip and another American woman who was wounded on the bus, brought an action under ATA and various tort theories against the Palestinian Interim Self-Govern-
ment Authority (PA), the PLO and various named and unnamed individuals. De-
fendants moved to dismiss on the basis that the court lacked personal jurisdiction over them and subject matter jurisdiction over the cause of action. The District Court held that: (1) it lacked personal jurisdiction over the named individual de-
fendants; (2) it could exercise personal jurisdiction over the PA; (3) the PA was not a sovereign state entitled to immunity; (4) the complaint sufficiently stated a claim under the ATA; (5) the court had supplemental jurisdiction over tort claims; and (6) the action did not present a non-justiciable controversy.
zation that carried out the attacks. The District Court for the District of Columbia held that: (1) the Director was entitled to foreign sovereign immunity because the alleged acts were taken within the scope of his official duties; (2) the state-sponsored terrorism exception of FSIA was inapplicable because Saudi Arabia was not on the Department of State’s list of state sponsors of terrorism; (3) the official’s alleged conduct did not qualify as “commercial” within the commercial activity exception to the FSIA; (4) the plaintiffs did not allege a causal connection sufficient to invoke the non-commercial tort exception of the FSIA, because “plaintiffs’ allegations that (i) [the individual defendants] funded (ii) those who funded (iii) those who carried out the September 11th attacks would stretch the causation requirement of the noncommercial tort exception not only to ‘the farthest reaches of the common law,’ but perhaps beyond, to terra incognita;” 177 (5) plaintiffs had alleged insufficient minimum contacts with the United States to support the exercise of personal jurisdiction over the government official. 178

In Pugh v. Socialist People’s Libyan Arab Jamahiriya, 179 on September 19, 1989, a DC-10 airliner operated by the French airline Union de Transports Aeriens (UTA) as UTA Flight 772, departed Brazzaville, Congo, with 170 passengers en route to Paris. The passengers were from 17 countries, including seven Americans. While flying over southeastern Niger, after a stopover in N’Djamena, Chad, UTA Flight 772 exploded in mid-air killing all aboard. The 37 plaintiffs in this action—all of them American citizens—were the personal representatives of the estates of the seven Americans who died aboard UTA Flight 772, or their kinsmen, and the American corporate owner-lessee of the aircraft. Drawing upon the results of an extensive investigation by French authorities into the circumstances

177. Id. at 20.

178. For a somewhat bizarre case, see George v. Islamic Republic of Iran, 63 Fed. Appx. 917 (7th Cir. 2003). There, plaintiffs, all prison inmates in Wisconsin, brought an action against over fifty defendants—including Iran, Syria, Iraq, the Sudan, Libya, Al Qaeda, the Taliban, several known or suspected terrorists then in U.S. custody and a number of banks and relief organizations suspected of funneling funds to terrorist organizations—in response to the events of September 11th and sought millions of dollars in compensatory and punitive damages. Before any of the defendants filed an answer, the district court sua sponte dismissed the case for want of subject matter jurisdiction based on lack of standing, and denied a subsequent motion for reconsideration. Upon appeal, the Court of Appeals for the Seventh Circuit affirmed. Although the Seventh Circuit recognized that district courts are generally discouraged from sua sponte dismissing a complaint for lack of subject matter jurisdiction without first providing the plaintiff notice and a hearing or an opportunity to amend, such dismissal is appropriate if the defect is incurable. In this case the defect was incurable because the plaintiffs had never been victims of terrorist acts and were no more likely than the average American citizen to be victims of future attacks. Thus, the “injury” they alleged was purely speculative. An interest that the plaintiffs held in common with society at large was too abstract to constitute an injury in fact and thus was insufficient to confer standing.

of UTA Flight 772's destruction, and judicial proceedings, both civil and criminal, in France, that allegedly determined the explosion to have resulted from an act of terrorism committed by officials and agents of the Libyan government, the American individual plaintiffs sued Libya, its intelligence service (the Libyan External Security Organization (LESO)) and seven individuals (including the Libyan head of state Muammar Qadhafi) for money damages for extrajudicial killings, aircraft sabotage and personal injuries. Jurisdiction was predicated upon FISA and the Flatow Amendment thereto. For its part, the corporate plaintiff based its cause of action on the conventional tort claims of conversion and tortious interference, and a statutory claim based on the ATA.

Defendants moved to dismiss the complaint on five consolidated jurisdictional grounds. They contended that the court was without personal jurisdiction over the individual defendants; that it lacked personal jurisdiction over Libya on due process grounds under the U.S. Constitution; and that it had no subject matter jurisdiction under the FSIA to hear the corporate plaintiffs' claims. They also asserted that FSIA and the Flatow Amendment do not create a private cause of action and that the case should be dismissed because the United States, and in particular the District of Columbia, was an inconvenient forum.

The court relied on a previous decision of the Court of Appeals for the District of Columbia Circuit\(^\text{180}\) to reject defendants' argument that the court could not constitutionally exercise personal jurisdiction over Libya on the ground that "foreign states are not 'persons' protected by the Fifth Amendment" and "the Fifth Amendment poses no obstacle to the decision of the United States Government to subject Libya to personal jurisdiction in the federal courts."\(^\text{181}\) The court decided to go along with "the decisions of its district court colleagues here and elsewhere construing Section 1605(a)(7) and the Flatow Amendment as providing a private cause of action for American citizens against foreign states for harm done to them by state-sponsored acts of terrorism" and therefore rejected the defendants' argument to the contrary.\(^\text{182}\) The court also quickly dismissed defendants' argument that the case should be dismissed because the District of Columbia was an inconvenient forum in comparison to France, where much of the evidence and many of the witnesses were to be found, on the ground that France had not waived the sovereign immunity of Libya and plaintiffs therefore would not be able to bring their claims against Libya in that country.\(^\text{183}\)

\(^{180}\) Price v. Socialist People's Libyan Arab Jamahiriya, 294 F. 3d 82 (D.C. Cir. 2002).

\(^{181}\) Pugh, 290 F. Supp. 2d at 58.

\(^{182}\) Id. at 57 (citing Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 n.3 (D.C. Cir. 2003), cert. denied 124 S.Ct. 2836 (2004)). The court noted, however, that the D. C. Circuit still regards the issue as unresolved. Id.

\(^{183}\) See id. at 57.
The court gave somewhat closer scrutiny to other claims asserted by defendants. First, they submitted that the court lacked personal jurisdiction over the individual defendants in their personal capacities. The court recognized that, unlike the government of Libya, individual defendants acting in their personal capacities were entitled to the due process protections of the Fifth Amendment to the U.S. Constitution. In applying the "minimum contacts" test of *International Shoe Co. v. Washington*, the court stated that "the single most important consideration is whether a defendant's 'conduct and connection with the forum State are such that he should anticipate being haled into court there.'" Applying this test to the facts of the case, the court concluded "[a]s the plane they chose to destroy was on an international flight and expected to stop in several nations before reaching its final destination, 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." The court also pointed out that it was foreseeable that some Americans would be aboard the plane and that the "interest of the United States in preventing and punishing international terrorism has been a matter of worldwide knowledge for years." Hence, the court concluded, "defendants should have anticipated the possibility of being 'haled into court' in the United States in some capacity . . . [and the court] may constitutionally exercise personal jurisdiction over the individual defendants in their personal capacities without offending any 'traditional notions of fair play and substantial justice.'"

Turning to the claims of the corporate plaintiff who owned the airplane that was destroyed in the bombing of UTA Flight 772, the court noted that the plaintiff asserted the conventional tort claims of conversion and tortious interference, and a claim under the ATA. The court quickly concluded that the ATA barred plaintiff's claim against Libya, its intelligence agency LESO, and the individual defendants acting in their official capacities. But since the court had already found that it had personal jurisdiction over the individual defendants in their personal, as well as their official capacities, the corporate plaintiff could assert its conversion

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186. *Id.*
187. *Id.*
188. *Id.* at 60 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).
189. *Id.* at 60-61. The court pointed out that jurisdiction under 18 U.S.C. § 2333 is limited by 18 U.S.C. § 2337(2), which states: No action shall be maintained under section 2333 of the title [18 U.S.C.] against . . . (2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.
*Id.*
and tortious interference claims against the individual defendants in their personal capacities. The ATA provides a cause of action not only against the terrorists themselves, but also against persons, both natural and legal, who have provided financial and other resources to a terrorist organization. Because of this, the Act has been subject to constitutional challenge. The leading case on this issue is *Boim v. Quranic Literacy Institute*, where the parents of a terrorist victim killed by the terrorist organization Hamas in Israel brought a lawsuit against two not-for-profit corporations in the United States that allegedly provided financial support to Hamas. Interpreting the ATA, the Court of Appeals for the Seventh Circuit first ruled that the mere funding of Hamas was not an activity that "involve[s] violent acts or acts dangerous to human life" within the meaning of the Act. In the court's view, the ATA required the defendant at least have knowledge that the moneys forwarded to Hamas would be used to support the terrorists who murdered the plaintiffs' son. Mere funding of a terrorist organization, standing alone, was not an act of terrorism under the ATA. But the court nonetheless held that the ATA may apply to the provision of material resources to a terrorist organization because of two subsequent amendments to the federal criminal laws on terrorism—18 U.S.C. Sections 2339A and 2339B. Section 2339A makes it a crime to knowingly provide material support or resources to be used in preparation for or carrying out terrorist acts. Section 2339B prohibits knowingly providing material support or resources to a designated foreign terrorist organization. Although Congress enacted these criminal prohibitions with no express reference to civil liability, the court relied on these provisions as an alternative basis for imposing civil liability under the ATA. It held that violations of Sections 2339A and 2339B gave rise to civil liability under Section 2333 so long as knowledge and intent were also shown. The court further held that defendants could be held civilly liable for aiding and abetting an act of terrorism, although the ATA did not explicitly provide for aiding and abetting liability. It based this holding on the language, structure and legislative history of Section 2333. Lastly, the court rejected defendants' arguments that its holdings were inconsistent with their First Amendment rights.

Although it has been suggested that the "reasoning in *Boim* is not entirely convincing," and that "Congress could clarify the relationship between criminal statutes concerning the provision of resources to terrorists

190. 291 F.3d 1000 (7th Cir. 2002).
192. Recently, court decisions have held that the Department of State's procedures for designating certain groups as terrorist organizations violate the group's due process rights under the Constitution. See, e.g., Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001). At this writing it is unclear what implications, if any, these decisions may have for the result and the reasoning in *Boim v. Quranic Literacy Institute*.
and the ATA," at this writing, this has not happened. Moreover, as to the First Amendment issue, the Boim decision has been cited, and its analysis followed, in at least two other opinions. There have also been other decisions upholding the constitutionality of Section 2339B.

In general, one may say that most of the cases brought under the ATA have survived challenges posed by motions to dismiss on the basis of lack of personal or subject matter jurisdiction or alleged unconstitutionality of the ATA's provisions and now plaintiffs will have to prove their factual allegations. The major exception to this observation is Smith v. Islamic Emirate of Afghanistan, where the court awarded treble damages against the Al Qaeda defendants under the ATA, but it is unclear whether they will be able to collect against assets currently frozen by the U.S. government.

One may also observe that U.S. courts have been willing to surmount possible barriers to successful suits under the ATA. In Smith, for example, the court interpreted the definition of "international terrorism" under the ATA broadly enough to cover the attacks of September 11th, even though they took place and killed or injured their victims entirely within the United States. Similarly, the court in Knox v. Palestine Liberation Organization held that the political question doctrine constituted no barrier to an action for damages under the ATA. In Pugh v. Socialist People's Libyan Arab Jamhiriya, the court rendered an expansive reading of the "minimum contacts" necessary to meet the due process requirements for an exercise of personal jurisdiction over individual alleged terrorists acting in their personal capacities. The court's ruling in Pugh belies Jack Goldsmith's and Ryan Goodman's suggestion that "[t]he due process clause, which still has a powerful territorial orientation, probably does not permit the assertion of specific personal jurisdiction over foreign defendants for acts of terrorism directed and committed abroad, even against U.S. citizens." Lastly, in Boim and other cases, United States courts have so far largely dismissed constitutional challenges to the ATA based on the First

194. Id. at 149.
196. The most recent decision is the en banc decision of the U.S. Court of Appeals for the Fourth Circuit in United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004). In Hammoud, the court declined to apply the narrowing construction applied by a Ninth Circuit panel in Humanitarian Law Project v. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003), which required a showing that the defendant knew either of a Foreign Terrorist Organization designation as such or of its related illegal activities. The Ninth Circuit decision will be reheard en banc.
198. Id. at 236.
201. See Goldsmith & Goodman, supra note 193, at 117.
Amendment, although at this writing there are cases to the contrary and litigation on this issue continues.202

Examining the cases discussed above, one may also conclude that United States courts have been willing to award substantial damages to plaintiffs bringing civil suits against states on the Department of State's list of state sponsors of terrorism.203 As the decision in Smith v. Federal Reserve Bank of New York204 demonstrates, however, these decisions may often amount to no more than pyrrhic victories for successful plaintiffs. The next section of this Article briefly explores some of the reasons for these difficulties.

B. Civil Suits Against State Sponsors of Terrorism: Barriers to Enforcement of Judgments

The basic problem plaintiffs' face in seeking to enforce United States judgments against state sponsors of terrorism is twofold. First, there is no prospect of enforcing such judgments abroad,205 and enforcement of these judgments against the assets of state sponsors located in the United States is subject to political vagaries, both in the United States and in the international arena. The Smith case is a good example. Although the September 11th plaintiffs in that case were able to cite specific federal legislation that permitted them to execute a judgment against the blocked assets of a state on the list of state sponsors of terrorism,206 they were unable to do so because prior to the entry of the plaintiffs' judgment, President Bush had issued an executive order confiscating all frozen Iraqi assets held by the government and vesting title to those assets in the U.S. Department of the Treasury.207 The reason for the President's action, of course, was

203. See, e.g., Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 405 (9th Cir. 2003) (granting plaintiffs summary judgment and permanent injunction to extent that court finds prohibition in 18 U.S.C. § 2339 of providing “training” and “personnel” to organizations designated as “Foreign Terrorist Organizations” is unconstitutionally vague); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1204 (C.D. Cal. 2004) (granting plaintiffs summary judgment and permanent injunction to extent that court finds prohibition in 18 U.S.C. § 2339 of providing “expert advice or assistance” to organizations designated by United States Secretary of State as “Foreign Terrorist Organizations” is impermissibly vague).
204. 346 F.3d 264 (2d Cir. 2003). For another case in which plaintiffs were awarded substantial damages against a state sponsor of terrorism, see Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003). Based on a suicide bombing in Jerusalem, Israel, damages for pain and suffering ranging from 7 to 15 million dollars were awarded to those present at the bombings against Iran; compensatory damages of 2.5 million to 7 million were awarded to family members; and Iranian government officials were held liable for punitive damages of 300 million dollars. See id.
205. See Murphy, supra note 120, at 73-75, 104-05 (discussing difficulty of enforcing U.S. court decisions abroad).
the need to have these assets available to aid in the reconstruction of Iraq after the overthrow of the Saddam Hussein regime. Hence, the international development resulted in the plaintiffs being unable to rely on legislation adopted by Congress with a view to aiding plaintiffs in the September 11th plaintiffs' position to enforce their judgments against the assets of state sponsors of terrorism.

The *Smith* case is a recent example of a long-standing tension between Congress and the executive branch over the disposition of the frozen assets of states on the list of state sponsors of terrorism. In addition to amending FSIA to permit suits for money damages against state sponsors of terrorism in 1996, Congress also amended FSIA to permit the attachment of, or execution upon a judgment against, the property of a foreign state used for a commercial activity in the United States. The action is taken when the judgment relates to a claim for which the foreign state is not immune as a state sponsor of terrorism, "regardless of whether the property is or was involved with the act upon which the claim is based." Normally, the property of a foreign state is immune from attachment if the property was not involved with the act upon which the claim is based.

Despite this amendment to FSIA, plaintiffs in cases against Cuba and Iran faced grave difficulties because Cuban and Iranian assets in the United States were frozen and the executive branch was opposed to making them available for the payment of judgments based on the foreign states' support of terrorism. The plaintiffs in the successful cases against Cuba and Iran first sought relief from the executive branch in the form of an order to unblock the defendants' assets, but they were unsuccessful. Turning next to Congress, they achieved what at first appeared to be a pyrrhic victory.

210. Id. § 1610(a).
212. See John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, 12 HARV. HUM. RTS. J. 1, 45 (1999). Michael Reisman and Monica Hakimi have suggested that: 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, unenforce-
Specifically, on October 21, 1998, the President signed into law Section 117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidate and Emergency Supplemental Appropriations Act of 1999. Section 117, *inter alia*, amends 28 U.S.C. Section 1610 to provide that “any property,” including property frozen under various provisions of the U.S. law, “shall be 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).” Under another provision of Section 117, however, the President “may waive the requirements of this section in the interests of national security.” On October 21, 1998, the same day he signed the legislation, President Clinton exercised this waiver authority on the ground that application of the other provisions of Section 117 “would impede the ability of the President to conduct foreign policy in the interest of national security . . . .”

In the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), Congress took another tack. Under the VTVPA the United States paid specific identified claimants compensatory, but not punitive, damages awarded in terrorism exception suits against Cuba and Iran. The President was able to block the attachment of diplomatic property and the attachment of frozen assets of U.S. designated state sponsors of terrorism, but not attachment of proceeds from property used for any non-diplomatic purpose or proceeds from any asset sold or transferred for

able. 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.

Reisman & Hakimi, *supra* note 211, at 573.


218. Under the Act, claimants have three options: (1) they may obtain from the Treasury Department 110 percent of the compensatory damages, plus interest, if they relinquish all rights to compensatory and punitive damages awarded by a U.S. court; (2) they may obtain 100 percent of compensatory damages, plus interest, if they relinquish all rights to compensatory damages and all rights to execute against or attach property; or (3) they may decline to obtain any payment from the Treasury Department and continue to pursue their judgments. *Id.*

value to a third party.\textsuperscript{220} Under the VTVPA, Congress directed the Secretary of the Treasury to pay a portion of the damages in one case against Cuba and nine cases against Iran.\textsuperscript{221} Reportedly, the United States government liquidated approximately half of Cuba's frozen assets to pay the judgment against Cuba.\textsuperscript{222} By contrast, the Clinton Administration refused to release any of Iran's frozen assets. As a result, the United States Treasury paid the judgments out of general funds, on the understanding that reimbursement from Iran would be sought at a later date. Doubts have been raised as to whether reimbursement will be obtained, and the Treasury's actions have been sharply criticized.\textsuperscript{223}

It is unclear at this writing what the effect of TRIA will be. As we have seen, TRIA was of no assistance to the plaintiffs in \textit{Smith} when President Bush confiscated the frozen assets of Iraq and vested title to those assets in the United States Department of the Treasury.\textsuperscript{224} On the other hand, TRIA, unlike previous legislation, limits the President's waiver authority to an asset-by-asset determination that a "waiver is necessary in the national security interest . . . . "\textsuperscript{225} Moreover, the President can utilize his waiver authority only to protect a few types of diplomatic property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.\textsuperscript{226} Court judgments can be executed against all other types of blocked assets.\textsuperscript{227} TRIA also specifies that certain judgments against Iran are to be paid.\textsuperscript{228}

Whether TRIA will prove helpful to future plaintiffs trying to execute judgments against the assets of state sponsors of terrorism remains to be seen. Suits against Libya for its role in the destruction of Pan Am Flight 103\textsuperscript{229} have now been settled with Libya's acknowledgment of state re-
sponsibility and its offer to pay compensation to the families and heirs of the victims. There is, moreover, a serious debate over whether lawsuits are the appropriate vehicle for providing compensation to the victims of terrorism, especially so-called "catastrophic terrorism," where the total damage suffered numbers in the millions. It is noteworthy that on September 22, 2001, Congress adopted legislation that, for the first time in U.S. history, set up a disaster compensation system for compensating the victims of the attack on the World Trade Center and the Pentagon (both passengers on the aircraft as well as other victims of the disaster). To seek an award from the fund, claimants had to waive their right to sue over the disaster, a requirement intended to limit airline liability but, by its terms, not limited to suits against airlines. It therefore covered any lawsuits filed or to be filed against terrorists or state sponsors of terrorism based on the events of September 11th. As of April 2, 2004, the Victim Compensation Fund had paid $2.6 billion to 7,371 victims; the average payout to the relatives of victims at that point was $1.8 million, with awards ranging from $250,000 to $7 million. The Fund completed the processing and award determinations for all claims filed with the program on June 15, 2004. In his closing statement, the Special Master of the Fund, Kenneth R. Feinberg, reported that "over 98% of eligible families who lost a loved one voluntarily decided to participate and submitted claims to the Fund. At the same time, over 4,400 physical injury applications were processed by the Fund."

There remains, however, the issue posed most starkly by the passage of the Victims Compensation Act: how to effect equitable compensation for all United States victims of international terrorism, rather than just for victims of the event of September 11th or for victims who, despite difficulties erected by the executive branch, have managed to recover on their judgments against the frozen assets of Cuba and Iran. Congress has recognized the problem. Title VI, Section 626(a) and (b) of the legislation appropriating monies for the Departments of Commerce, Justice and State,


233. Id. § 405(c)(3)(B)(i).


the Judiciary and related agencies for fiscal year 2002, \textsuperscript{236} which was adopted and signed into law on November 29, 2001, provides:

Sec. 626. (a) The President shall submit, by not later than the time of submission of the Budget of the United States Government for Fiscal Year 2003, 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.

(b) The legislative proposal shall include, among other things, which types of events should be covered; which categories of individuals should be covered by a compensation program; the means by which United States victims of prior or future acts of international terrorism, including those with hostage claims against foreign states, will be covered; the establishment of a Special Master to administer the program; the categories of injuries for which there should be compensation; the process by which any collateral source of compensation to a victim (or a relative of a deceased victim for an act of international terrorism shall be offset from any compensation that may be paid to that victim or that relative) under the program established by this section; and identifiable sources of funds including assets of any state sponsor of terrorism to make payments under the program. \textsuperscript{237}

The need for such a comprehensive program would become especially acute, if, heaven forbid, there were future acts of “catastrophic terrorism” that involved the death of large numbers of U.S. citizens. Under such circumstances, relief through the normal procedures of the tort system would be clearly inadequate. \textsuperscript{238} Unfortunately, at this writing the President has not yet submitted a proposal for an alternative program.

V. \textbf{Coercive Measures Against State Sponsors of Terrorism Other Than the Use of Armed Force}

The focus of this section of the Article is on economic sanctions against state sponsors of terrorism, and more specifically, mandatory economic sanctions imposed by the U.N. Security Council under Chapter VII of the U.N. Charter. Economic sanctions imposed unilaterally by the United States, or in concert with like-minded states, not pursuant to Security Council mandate, are outside the scope of this Article.


\textsuperscript{237} Id.

\textsuperscript{238} For some thoughts on the form an alternative program might take, see Alexander, \textit{supra} note 231, at 661-89.
Although it was its invasion of Kuwait rather than its sponsorship of terrorism that precipitated Security Council action against Iraq, in its far reaching Resolution 687, the Council "[r]equires Iraq to inform the Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism." Evidence that Iraq failed to carry out this requirement was considerable.

Economic sanctions imposed by the Security Council against Iraq became a highly contentious issue, with critics contending that they hurt the people but not the government of Iraq and that the Security Council actions were lacking in legitimacy because of dominance by the permanent members. To meet these criticisms and to ensure the continuance of economic sanctions against Iraq, the Security Council, beginning in 2001 and continuing in 2002, agreed to major revisions of the sanctions, including the adoption of new so-called "smart sanctions." Under the new sanctions regime, U.N. export controls on purely civilian goods purchased by Iraq were lifted. Indeed, all contracts for export of goods to Iraq under the Oil-for-Food program were presumed approved unless found to contain items on a "Goods Review List" (GRL). The GRL consisted of so-called "dual use" items that might have both a legitimate civilian use and a potential military use in a prohibited nuclear, chemical, biological, ballistic missile or conventional military program. These items were subjected to additional scrutiny by the Iraq Sanctions Committee, established by the Security Council. Security Council Resolution 687 remained in force, with its requirements that Iraq destroy its nuclear, chemical and biological weapons programs, and limit its ballistic missile range to 150km.

Because the invasion of Iraq in May 2003 removed the Saddam Hussein regime from power, there was insufficient time to see whether the "smart" sanctions would be any more effective than the old "dumb" sanctions in inducing Iraq to fulfill its obligations under Resolution 687. It is now clear, however, that they would not have made any difference. As noted in excruciating detail in the Comprehensive Report of the Special Advisor to the DCI [Director of Central Intelligence] on Iraq's WMD [Weapons of Mass Destruction],...
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245. Id. at 10.
246. Id.
248. See Craig S. Smith, The Conflict in Iraq: Oil for Food; French Play Down Report of Bribes in Iraq Scandal, N.Y. TIMES, Oct. 8, 2004, at A 14, col.4. Saddam reportedly worked directly with “governments in Syria, Belarus, Yemen, North Korea, the former Yugoslavia and possibly Russia . . . .” Lipton & Shane, supra note 247, at A1, col.2. France’s military industry supposedly had “extensive contacts with Iraqi officials,” as did “private companies from Jordan, China, India, South Korea, Bulgaria, Ukraine, Cyprus, Egypt, Lebanon, Georgia, Poland, Romania, Taiwan, Italy and Turkey.” Id. at A14, cols. 4-5.
249. For example, Security Council measures against Afghanistan prior to September 11th and against Sudan were ineffective. For discussion, see John F. Murphy, International Law and the War on Terrorism: The Road Ahead, in 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 117, 152 (2002).
mightily to the sharp division of opinion, both in the United States and in other countries, over how to deal with this "Brave New World". Some of these differences are reflected in the articles in this symposium. The discussion and the debate will surely continue for some time to come.

One may fervently hope, however, that in the future we will be less concerned with the law of armed conflict and the constraints placed on the use of armed force by the U.N. Charter and more involved in cooperative efforts to prevent and punish international crimes. One may further hope that such cooperative efforts will result in a better balance between law enforcement and the protection of human rights, so Abu Ghraib may become a distant memory.

Lastly, it is worth noting that both George Orwell's and Aldous Huxley's dystopias eliminated human freedom, although their techniques for doing so differed. The primary challenge facing us now is to ensure not only the survival of freedom, but also its flourishing on a worldwide basis. This is a challenge we must not fail to meet.