The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?

By
Naomi Roht-Arriaza†

On December 17, 1997, a federal judge in Miami ordered the Cuban government to pay $187.6 million in damages to the families of pilots whose plane was shot down over international airspace by the Cuban military.[1] Four months later, a D.C. District Court awarded nearly $250 million in a case brought against Iran for financing terrorist attacks which killed an American student.[2] Although neither government is likely to satisfy the judgments, the cases marked the first published applications of the recently-enacted provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[3] That Act amends the Foreign Sovereign Immunities Act (FSIA)[4] to allow suits by U.S. nationals for certain international crimes and human rights violations against states designated as "terrorist" by the U.S. State Department.

Human rights advocates have attempted to overcome the bar to suit for state-sponsored human rights violations posed by the FSIA in a number of different ways—both judicial and legislative—over the last two decades. While the courts have been almost universally reluctant to allow jurisdiction over these cases, Congress has recently proven more responsive. This responsiveness has been fueled in part by a small number of high-profile terrorist acts involving U.S. citizens and in part by a more general heightened awareness of the dangers of terrorist states. In addition to the expanded jurisdiction provided by the AEDPA, a number of proposals are now before Congress to further erode foreign sovereign immunity in response to specific terrorism or human rights-related cases. While these developments open the door to further potential shrinkage of the zone of sovereign immunity, either through further legislation or judicial interpretation, they also reintroduce a political element and a depen-

† Professor of Law, University of California, Hastings College of Law.

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

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

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214(1996).

4. Pub. L. No. 94-583, 90 Stat. 2891 (1976), codified at 28 U.S.C. § 1330, 1332, 1391(f), 1441(d), 1602-1611 (1990).

dence on executive branch decisions that the 1976 FSIA was designed in part to eliminate. Advocates today may be largely comfortable with the State Department's designation of which states are "terrorist," but not-so-distant past debates over categorizing states should raise some degree of alarm.

In this essay, I first briefly explore the origins of the FSIA and the initial move from an explicitly political to a more legalistic view of the limits of sovereign immunity. I then trace some of the efforts in the courts to expand the exceptions to sovereign immunity to encompass serious violations of human rights. I then turn to the AEDPA and related legislation in light of that history. Finally, I suggest some future directions for legislative or judicial action.

I.
THE FOREIGN SOVEREIGN IMMUNITIES ACT AND THE ROLE OF THE EXECUTIVE BRANCH

A. Enactment of the FSIA

Congress enacted the FSIA in 1976. Prior to its enactment, the law on sovereign immunity led courts in inexplicable and contradictory directions. In 1952, the State Department abandoned the principle of absolute sovereign immunity in favor of a distinction between public acts, for which there was immunity, and private or commercial acts, for which there was none.[5] As a result, foreign states began asking the State Department to recommend immunity to the court hearing a case against them; the Department's recommendation was often colored by a state's ability to apply diplomatic pressure or by the Department's own internal agenda.[6] Where the State Department recommended immunity, the courts almost always granted it. By the late 1960s, foreign states were presenting their immunity claims to the Office of the Legal Advisor in informal, quasi-judicial hearings where both sides presented written and oral arguments.[7] Courts differed in their views as to whether the State Department's immunity determinations were binding.[8]

Given this background, one of the FSIA's principal objectives was to transfer the determination of sovereign immunity from the State Department to the

5. Letter from Jack B. Tate, Acting Legal Adviser to the Secretary of State, to Phillip B. Perlman, Acting Attorney General of the United States (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL 984 (1952).

6. *See, e.g.*, Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974); *see generally* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB.ORD. 1, 34-36 (1976) (discussing the impact of political factors on State Department immunity determinations).

7. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, 1977 DIGEST OF U.S. PRACTICE IN INT'L LAW 1018-19 (1977).

8. While some courts thought a State Department determination was binding, *e.g.*, Renchard v. Humphreys & Harding, Inc., 381 F. Supp. 382, 384 (D.D.C. 1974), others thought it was merely entitled to "great weight." Ocean Transport Co. v. Gov't of the Republic of the Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967).

courts.[9] It was hoped that this would remove the unpredictability and uncertainty inherent in the existing system, and remove the diplomatic pressures on the executive branch to influence the process. Further, it would place decision-making in the hands of the judicial rather than the executive branch, and thereby eliminate the issue of the State Department's ability to bind the courts. It would also set out clear legal rules codifying the restrictive theory of immunity and the procedures for suing foreign states in U.S. courts.

B. The structure of the FSIA

The statute starts from a presumption that states are immune from suit, unless otherwise provided by international agreement, and then creates exceptions to that rule.[10] Most of these exceptions relate to commercial activity. However, other exceptions cover cases of waiver (express and implied), expropriation in violation of international law, noncommercial torts occurring in the U.S., and disputes over rights in real property and estates located in the U.S. Significantly, the pre-1996 Act allows execution of a judgment on the assets of a foreign sovereign only if the assets were used for the commercial activity upon which the claim was based.[11]

The legislative history of the Act indicates that its drafters intended it to "incorporate standards recognized under international law."[12] Nonetheless, the FSIA until recently contained no provision allowing suit against a foreign sovereign for violations of recognized human rights. Nothing in the legislative history suggests that Congress considered the issue of human rights one way or the other, and, until recently, pleas for statutory amendment to facilitate such suits fell on deaf ears.

Other U.S. statutes allow suit against individuals for human rights violations, many of which were committed in their roles as officials of a state.[13] However, the Alien Tort Claims Act (ATCA), the most well known of these, does not override or limit the provisions of the FSIA.[14] Moreover, the ATCA

9. See HOUSE REPORT NO. 1487, 94th Cong., 2d Sess., 7, *reprinted in* 1976 U.S.CODE CONG. & ADMIN. NEWS 6604, 6605-06. *See also* Feldman, *The United States Foreign Sovereign Immunity Act in Perspective: A Founder's View*, 33 INT'L & COMP. L. Q. 302, 304 (1986).

10. 28 U.S.C. § 1604 (1992). The exceptions are at 28 U.S.C. § 1605-1607.

11. 28 U.S.C. § 1610(a) (1992). Execution on a judgment against an agency or instrumentality of a foreign state (as opposed to the state itself) is not so limited. 28 U.S.C. § 16110(b).

12. HOUSE REPORT, supra note 9, at 14, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613.

13. The Alien Tort Claims Act, 28 U.S.C. § 1350, provides jurisdiction in U.S. district court for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It has been the principal vehicle for suits involving human rights violations outside the U.S. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539 (9th Cir. 1995). Many but not all claims under the ATCA require the defendant to be a state official. For an exception, *see* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1994). The Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73, also allows for civil suits against individual torturers.

Some courts have held that foreign officials acting within the scope of their duties are entitled to immunity under the FSIA. *See, e.g.,* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990). Where an official acts beyond the scope of officially sanctioned duties, however, such immunity will not apply. *Id.*

14. Argentine Republic v. Amerada Hess Shipping Co., 488 U.S. 428 (1989).

does not extend to torts against United States citizens. While other statutes like the Torture Victims Protection Act do apply to U.S. citizens, they have significant limitations. Individual assets have almost always proven inadequate or unavailable to compensate winning plaintiffs, and the difficulties of proof in identifying and obtaining jurisdiction over the correct individual defendant can be formidable. The ability to sue the state directly for the tortious conduct of its officials, at least under certain circumstances, would obviate many of these problems.

In recent years, plaintiffs have attempted to fit certain violations of international law, especially the law of human rights, within the recognized statutory exceptions to the FSIA on a number of theories. To date, these theories have been uniformly unsuccessful in making inroads into the doctrine of immunity.

One theory is based on the "international agreement" exception, whereby immunity is "subject to existing international agreements to which the United States is a party."[15] In *Frolova v. U.S.S.R.*,[16] plaintiff sued for damages caused by mental anguish when the Soviet Union denied her husband permission to emmigrate. She cited the provisions on free movement of persons and human rights of the U.N. Charter and the Helsinki Accords as the relevant international agreements which modified the U.S.S.R.'s immunity. The court held that neither agreement could create rights enforceable by private parties because neither was self-executing, and therefore neither could abrogate a state's immunity.[17] Other treaty-based arguments have met a similar fate.[18] A line of cases based on the non-commercial tort exception[19] also failed, either because the exception applies only to tortious conduct within United States territory,[20] or because it does not apply to libel and misrepresentation.[21]

Another line of cases attempted to pry open the limited door of sovereign immunity through the FSIA's implied waiver provision.[22] That provision pro-

15. 28 U.S.C. § 1604.

16. 761 F.2d 370 (7th Cir. 1985).

17. *Id.* at 378.

18. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (1996) (With respect to Security Council decisions under Chapter VII of U.N. Charter, the court holds that post-FSIA U.N. action cannot abrogate immunity without an indication of explicit Congressional intent to do so); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441 (1989) (International agreements contain no mention of waiver of immunity); Princz v. Fed. Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994) (Hague Conventions requiring compensation are not self-executing).

19. 28 U.S.C. § 1605(a)(5).

20. *See, e.g.*, McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), *cert.denied* 469 U.S. 880, 83 L.Ed. 2d 182, 105 S.Ct. 243 (1984).

21. Kozorowski v. The Russian Federation, 1997 U.S. App. LEXIS 26266 (9th Cir. 1997). This case involved claims for wrongful death, intentional infliction of emotional distress, fraud, conspiracy and other torts arising out of the Soviet massacre of Polish Army officers in the Katyn Forest during WWII. The plaintiffs sued for the massacre itself and for the lies by Russian media attributing the killings to the Nazis. The Ninth Circuit considered whether the wrongful death claims arose under the FSIA, but decided that in any case it was highly unlikely that the State Department in 1940 (when the killings took place) would have denied immunity to a then-allied government. It found that therefore under the FSIA no exception to immunity applied, because the only torts occurring in the U.S. were those related to the media's misrepresentation of facts, and these were specifically excluded.

22. 28 U.S.C. § 1605(a)(1).

vides that a foreign state shall not be immune from jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication."[23] As illustrations of this exception, the legislative history of FISA cites an agreement stipulating to arbitration in another state, a contractual choice-of-law provision, and a responsive filing in an action that does not raise the defense of sovereign immunity.[24] In 1989, with guidance from Professor Riesenfeld, this author argued (with Adam Belsky and Mark Merva) that the FSIA's implied waiver provision should be interpreted in light of evolving international law.[25] Specifically, we urged that violations of the small subset of human rights considered *jus cogens* or peremptory law[26] should automatically waive a state's sovereign immunity, because a state, by the very act of holding itself out as a state, impliedly accepts observance of those norms as a condition of statehood.[27] Therefore, a violation could not be protected by an attribute—sovereign immunity—that only inhered in statehood.

While a number of courts have found this theory "appealing,"[28] none have found it persuasive. The *jus cogens* basis for finding an implied waiver was raised in a case involving two Chilean students who were seriously injured, and one who was killed, by Chilean soldiers who arbitrarily detained them and set them on fire.[29] The district court found that *Amerada Hess*, the statutory language, and legislative history of the FSIA all counseled against the implied waiver theory. A peculiar set of facts led to a finding of implied waiver in *Siderman v. The Republic of Argentina,* a case involving an Argentine businessman whose property had been seized and who had been imprisoned and tortured by military authorities.[30] The Ninth Circuit held that a violation of even *jus cogens* norms could not itself give rise to an exception to immunity without explicit authorization from Congress.[31] Nonetheless, because Argentina had

23. *Id.*

24. HOUSE REPORT, *supra* note 9, at 18, 1976 U.S.C.A.N. at 6617.

25. Belsky, Merva and Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

26. A *jus cogens* or peremptory norm is one "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. *Jus cogens* norms differ from customary international law norms in that they do not depend on the consent of states, but rather are derived from values taken to be fundamental by the international community. Siderman v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). Such norms include those against genocide, slavery, murder or causing the disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination. *Id.* at 717; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. n.

27. Belsky, Merva and Roht-Arriaza, *supra* note 25, at 395-401.

28. Smith v. Libya, 101 F.3d 239 at 242. *See also* Siderman, 965 F.2d at 718 ("As a matter of international law, the Sidermans' argument carries much force. . . . Unfortunately, we do not write on a clean slate."). Judge Patricia Wald, in dissent, also agreed that an implied waiver for violations of *jus cogens* existed. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1994).

29. DeNegri v. Republic of Chile, 1992 U.S. Dist. LEXIS 4233 (1992).

30. Siderman v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

31. *Id.* at 719.

earlier attempted to avail itself of the U.S. courts,[32] the court held the implied waiver exception applied and remanded the case for trial.[33]

In *Princz v. Federal Republic of Germany,* a U.S. citizen who survived the Nazi death camps, enslavement, and the murder of his entire family sued Germany to obtain a Holocaust survivor's pension denied him solely because of his U.S. citizenship.[34] While the district court found the compelling facts of the case sufficient to estop Germany from claiming immunity,[35] a majority of the Court of Appeals for the D.C. Circuit disagreed.[36] The court found that neither the Third Reich nor the modern German government had ever indicated its amenability to suit in the U.S., and that therefore to imply a waiver of immunity based on Germany's admitted violation of *jus cogens* norms would be "incompatible with the intentionality requirement implicit in sec. 1605(a)(1)."[37] The majority wanted a more express statement from Congress before imputing an intention to open the federal courts to victims of "all the ruthless military juntas, presidents-for-life, and murderous dictators of the world. . . ."[38]

In dissent, Judge Wald argued for the applicability of an implied waiver for violations of *jus cogens.* After reviewing the significance of such peremptory norms, she argued that the FSIA should be interpreted to be consistent with evolving international law. Congress' silence on the subject should not be construed to limit the implied waiver exception to the types of waivers discussed in the legislative history; even admitting that "intentionality" was a requirement of waiver, Nazi Germany "could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States.[39]

The most recent case to raise the implied waiver theory involved the American survivors and family members of the passengers of Pan Am Flight 103, which crashed over Lockerbie, Scotland, allegedly as a result of a bomb placed by Libyan agents. In *Smith v. Socialist People's Libyan Arab Jamahiriya,* the Court of Appeals for the Second Circuit rejected plaintiffs' arguments that because terrorism is a violation of *jus cogens,* Libya had implicitly waived its immunity to suit in the U.S.[40] While the court agreed that terrorism violated *jus cogens* norms, it could not find the requisite Congressional intent to include such violations within the concept of "implied waiver."[41] Rather, it held that

32. *Id.* at 722. Argentina sent a letter rogatory aimed at serving Mr. Siderman with process in sham criminal proceedings against him for "fraudulent sale" of his property.

33. The case eventually settled, and no full trial was ever held.

34. Princz v. Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992).

35. *Id.*

36. Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1995), *cert. denied* 130 L.Ed. 2d 803, 115 S.Ct. 923 (1995).

37. *Id.* at 1168-69. The court also considered the "commercial activity" exception discussed below, but decided that even if enslaving Mr. Princz was a "commercial activity," it did not have a "direct effect in the United States." *Id.* at 1172.

38. *Id.* at 1174 n.1.

39. *Id.* at 1184.

40. 101 F.3d 239 (2d Cir. 1996).

41. *Id.* at 244.

Congress meant implied waivers to have a close relationship to the litigation process, or at least not to extend "so far as to include a state's existence in the community of nations."[42]

Another failed line of argument involved the "commercial acts" exception in the FSIA. In *Saudi Arabia v. Nelson*, a U.S. citizen alleged that he had suffered personal injuries as a result of his unlawful detention and torture by the Saudi government.[43] Nelson had been hired as a hospital safety administrator for a Saudi government hospital. He alleged that when he began to blow the whistle on unsafe practices, he was arrested by the Saudi police, imprisoned, and beaten. He argued that Saudi Arabia was not entitled to immunity because his recruitment and hiring in the U.S. were "commercial activit[ies] carried on in the United States," which the FSIA defines as activities "having substantial contact with the United States."[44] While the Court of Appeals agreed, the Supreme Court reversed. The Court disagreed with Nelson's "commercial acts" analysis because his recruitment and hiring were not the torts upon which the action was based and because the intentional torts at issue did not qualify as "commercial activity." Rather, Saudi Arabia's arrest, imprisonment and torture of Nelson were abuses of its police power, which constituted a peculiarly sovereign attribute rather than a commercial one.[45] Therefore, Saudi Arabia was immune from suit in the United States. Subsequent cases have followed the analysis in *Nelson*.[46]

In all these cases, plaintiffs in human rights-related cases failed to breach the wall of foreign sovereign immunity because they could not show adequate Congressional intent to cover these sorts of cases, or because they were forced to stretch facts into exceptions where they fit very uncomfortably. Human rights

42. *Id.* at 244. The court also rejected a number of other potential bases for abrogating Libya's sovereign immunity. First, it found that there was no implied waiver in a letter from the Libyan government to the U.N. Secretary General guaranteeing payment of any compensation that might be incurred by the responsibility of their nationals, because the guarantee said nothing about suit in the United States nor waived Libya's immunity. *Id.* at 245. Second, it found that a U.S. plane was not "territory of the United States" for purposes of the tortious acts exception to the FSIA. *Id.* at 246. Third, it found that a Security Council resolution under Chapter VII of the U.N. Charter does not create judicially enforceable rights and is thus not the type of "existing international agreement" contemplated in the FSIA. *Id.*

43. 507 U.S. 349, 123 L.Ed. 2d 47, 113 S.Ct. 1471 (1993).

44. *Id.* at 355. Section 1605(a)(2) provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the State in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

45. *Id.* at 358-362.

46. For example, in Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994), two U.S. citizens working in Lebanon were kidnaped by militants allegedly hired by Iran, held for ransom and tortured. Their release was conditioned on the return of Iranian assets frozen in the U.S. The D.C. Circuit relied on *Nelson* to hold that, even though the acts were committed by private agents acting on the State's behalf, they did not take place in a commercial context and were not acts typically carried out by private actors in a market: therefore, they were not "commercial." *Id.* at 168. *See also* Habtemicael v. Saudia, 1995 U.S. Dist. LEXIS 10420 (N.D.Ill. 1995) (detention and deportation by Saudi government officials).

advocates had always followed a two-track strategy, seeking amendment of the FSIA while trying to develop favorable judicial interpretations of its provisions. With the impetus from these cases, particularly *Smith* and *Nelson*, they were able to point to several outrageous incidents where U.S. citizens had been left without a remedy. In a climate of increased concern about domestic and international terrorism, Congress eventually took notice.

II.
THE PROVISIONS OF THE AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) covers a vast range of issues, from *habeas corpus* reform to victim restitution to the exclusion of aliens to prohibiting support for terrorist groups abroad to plastic explosives.[47] The act is fundamentally concerned with stopping terrorism, both within the U.S. and abroad.[48] Section 221 is entitled "Jurisdiction for Lawsuits Against Terrorist States." It amends the FSIA by adding a section to the exceptions to immunity in section 1605(a), which covers cases:

> (7) not otherwise covered by paragraph (2), 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 (as defined in section 2339a of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency. . . .

The offenses covered are defined in the Torture Victim Protection Act[49] and in the treaties on hostage-taking and aircraft sabotage.[50]

Provision of material support or resources is defined broadly to include provision of currency or other financial securities, financial services, lodging, training, safehouses, weapons, personnel and the like.[51] The *Flatow* court ruled that a plaintiff need not show a nexus between her claim and the material support provided.[52]

A parallel provision allows attachment of property belonging to the foreign state in satisfaction of a judgment relating to a claim under this subsection. Unlike the more limited provisions relating to commercial activities, the new provision permits attachment of property regardless of whether it is or was involved with the act upon which the claim is based.[53]

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

48. *See, e.g.*, Title III of the Act, prohibiting assistance to terrorist states and terrorist organizations.

49. Pub. L. No. 102-256, 106 Stat. 73 (1991).

50. Respectively, the International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 1, U.N.G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46), U.N. Doc. A/C6/34/46 (1979) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 1, 24 U.S.T. 565, T.I.A.S. No. 7570, U.N. Doc. ST/LEG/SER.C/9.

51. 18 U.S.C. § 2339A(a) (1997).

52. *Flatow*, 999 F. Supp. 1, 42 (D.D.C. 1998).

53. AEDPA, § 211 (b)(1)(B), amending § 1610(a) of the FSIA.

The action must be commenced not later than ten years after the date on which the cause of action arose, but all principles of equitable tolling, including the period during which the foreign sovereign was immune from suit, apply in calculating the limitation period.[54] Moreover, Congress expressly directed that § 1605(a)(7) applies retroactively.[55]

Several other limitations apply. Most importantly, the amendment makes the abrogation of immunity turn on the U.S. State Department's designation of a state as a "state sponsor of terrorism."[56] Even once a state is so designated, two additional constraints apply. First, if the act occurred in the foreign state against which the claim was brought, the claimant must afford the foreign state a reasonable opportunity to arbitrate the claim.[57] Second, either the claimant or the victim must have been a national of the U.S. when the act occurred.[58]

III.
WHAT DOES AEDPA DO?

A. The legislative history

The 1996 amendments had their genesis in a stand-alone bill to amend the FSIA that was introduced in 1991.[59] Early versions of the bill differed from the final product in several crucial aspects. The version introduced in the 102nd Congress applied only to U.S. citizens seeking damages for torture or extrajudicial killing.[60] It required exhaustion of adequate and available remedies in the place where the act occurred, and had a ten year limitations period.

The House Report justified the legislation by pointing out that several U.S. citizens had found themselves without a remedy after being tortured abroad, and that State Department intervention was not always fruitful, in part because the Department's "familiar role of being a conciliator and maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens."[61] The Committee pointed specifically to the State Department's brief on behalf of

54. AEDPA, § 221(f).

55. AEDPA, § 221(c).

56. The exact language reads that "the court shall decline to hear a claim under this paragraph . . . if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961 at the time the act occurred, unless later so designated as a result of such act." *Id.* at (7)(A).

57. *Id.* at (a)(7)(B)(i).

58. *Id.* at (a)(7)(B)(ii). The original language read: "the court shall decline to hear a claim if . . . the claimant or victim was not a national of the U.S." At least one court read that language to preclude cases where the victim was not a United States national, but the claimant was — for instance, a non-U.S. citizen husband with a U.S. citizen wife. *See* Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997). The original language would also have precluded the claims of some of the Pan Am 103 plaintiffs. A 1997 technical correction aimed at ensuring that either the victim or the survivor could be a U.S. national. *See* HOUSE REP. 105-48 (1997).

59. H.R. 2357, 102d Cong. (1991) was introduced by Representative Lawrence J. Smith on May 15, 1991, in the 102d Congress. It wound its way through various House committees until 1996 when it was incorporated into H.R. 2703, The Effective Death Penalty and Public Safety Act of 1996, which eventually became AEDPA. *See* H.R. Rep. No. 104-480 (1996).

60. H.R. REP. No. 102-900 (1992) (to accompany H.R. 2357).

61. *Id.* at 3.

Saudi Arabia in the *Nelson* case, then at the 11th Circuit. Responding to administration concerns that the bill might create irritations in foreign relations, the Committee replied that the administration's attitude "reflects an abdication of the United States' moral responsibility to provide leadership in the area of human rights by undertaking efforts to extend the scope of international laws protecting those rights."[62]

Thus, at its inception the House bill was designed to provide broad remedies in human rights-related cases without State Department intervention. A 1994 version of the bill added genocide to the causes of action and permitted claims beyond the 10 year limit if brought within the first 18 months of the bill's enactment.[63] By 1996, a related House bill, now entitled "The Effective Death Penalty and Public Safety Act of 1996" had dropped genocide and added aircraft sabotage, hostage taking, and the provision of material support or resources for such acts. In addition, it provided that a court could not hear the claim if the foreign state established the existence of available procedures and remedies that comport with fundamental fairness and due process.

The Senate bill apparently originated in concerns over possible terrorist acts committed with the support or aid of a small number of rogue states. An early version of the bill denied sovereign immunity in actions based on an act of international terrorism within the U.S., or elsewhere if the action sought damages for the personal injury or death of a U.S. citizen or permanent resident alien.[64] The act must have been committed or aided and abetted "by a foreign state that was designated by the Secretary of State as a State repeatedly providing support for acts of international terrorism under section 40(d) of the Arms Export Control Act."[65] This version for the first time introduced a dependence on a State Department determination into the proposed amendment. The 1995 version contained both this section and a section modeled on the House version.[66] In conference committee, the Senate version largely prevailed.[67]

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62. *Id.* In addition to the *Nelson* case, Committee members may have been influenced by the circumstances described in Martin v. Republic of South Africa, 836 F.2d 91 (2d Cir. 1987), in which a black U.S. citizen was denied medical treatment in South Africa because of his race, and suffered serious injury as a result.

63. H.R. REP. No. 103-702 (1994) (to accompany H.R. 934). The Committee again noted that "[b]y allowing suit only for torture, extrajudicial killing and genocide which are violations of international law, the United States would not be imposing its own law on another government, but would simply be providing a local forum for an internationally recognized wrong." *Id.* at 4-5. While this version would still restrict U.S. courts' jurisdiction to U.S. citizens, it would have gone farther than any other to establish jurisdiction over some of the worst *jus cogens* violations.

64. S. 825, 103rd Cong. (1993). An act of international terrorism was defined as "an act (1) which is violent or dangerous to human life and that is a violation of the criminal laws of the United State or of any state or that would be a criminal violation if committed within the jurisdiction of the United States or any state; and (2) which appears to be intended - (a) to intimidate or coerce a civilian population; (b) to influence the policy of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnaping." *Id.* at 1(a).

65. *Id.*

66. S. 735, 104 Cong., 1st Sess. (1995), included a section that removed immunity from foreign countries designated as state sponsors of terrorism under section 6(j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961. It also contained a section similar to the 1994 House version.

B. The link to State Department designation as a terrorist state

The most striking feature of the new legislation is its explicit reliance on the U.S. State Department to designate a potential defendant as a "terrorist state" before the sovereign immunity provision is overcome. Both the Export Administration Act and the Foreign Assistance Act require the Secretary to determine whether the government in question "has repeatedly provided support for acts of international terrorism."[68] Such determinations are to be published, and may not be rescinded without a certification that the country is not supporting acts of international terrorism and has given assurances to that effect.[69] As of 1996, Libya, Cuba, North Korea, Iran, Iraq, Sudan and Syria had been designated as terrorist states under section 6(j).[70]

The reliance on a State Department determination that the state at issue is "terrorist" is likely designed to avoid inadvertent interference with the conduct of foreign relations, and to provide a clear screen which avoids judicial inquiries into the political context surrounding an act of violence. In addition, during debates over earlier versions of the provision, the State Department expressed concerns, echoed by Republican members of Congress, that passage of the bill would lead other countries to modify their own laws relating to foreign sovereign immunity in ways that go beyond potential liability for torture or the like, potentially exposing the U.S. to suit in foreign court for acts which the U.S. might take against foreign nationals.[71] However, those states likely to do so are precisely those most likely to be on a list of "terrorist" states. In fact, the provision requiring State Department designation before immunity is abrogated seems designed merely to assure that "friendly" governments are not subject to suit notwithstanding their treatment of U.S. citizens.

Ironically, the inclusion of section 7(A) (requiring State Department designation) returns sovereign immunity law to the pre-FSIA era, when Executive branch discretion played a large role in immunity determinations. Indeed, as outlined above, one of the principal reasons for enacting the FSIA was to remove the element of State Department discretion, vesting immunity decisions in the courts out of fears that the Executive Branch was too swayed by unrelated political considerations. By conflating the threat of terrorism with the threat of serious violations of human rights, Congress may have made such fears again justifiable.

If the purpose of the legislation is to provide relief to U.S. citizens who are now left without a remedy for grievous violations of their rights, the door has only been opened slightly, and without any assurance that it will stay open. Not only is the list of "terrorist" countries limited, but the countries on the list are

67. H.R. CONF. REP. No. 104-518, AEDPA, Joint Explanatory Statement of the Committee of Conference, p. 112.

68. 50 U.S.C.S. app. § 2405 (j)(1)(A) (1997).

69. See 50 U.S.C.S. app. § 2405 (j)(3), (j)(4); 22 U.S.C.S. § 2371(b), (c) (1997).

70. Terrorism List Governments Sanctions Regulations; Implementation of Section 321 of the Antiterrorism and Effective Death Penalty Act of 1996, 61 Fed. Reg. 43,462 (1996).

71. *See* H.R. REP. No. 103-702 (1994) (Dissenting Views).

those least likely to have significant assets within reach that might be used to satisfy a judgment. Moreover, it seems anomalous that an identical act of torture committed by two states may give rise to a cause of action in U.S. courts only for the act committed by a state on the "terrorism list"—even though many states not on the list may be known to commit torture.[72]

As a shield against potential interference with U.S. foreign policy goals, furthermore, the restriction to "terrorist" states may prove less useful where U.S. foreign policy interests change over time. A U.S. decision to normalize relations with a future Iranian or Cuban government may make the existence of huge unexecuted default judgments against the state an embarrassment or an impediment to normalization, notwithstanding the state's one-time inclusion on a list of "terrorist" states. Finally, the contentious nature of State Department determinations about which states are "terrorist," which are human rights violators, and which are supporting "liberation struggles" should give us pause. It was not so long ago that Congress, the executive branch and a large segment of the U.S. public disagreed about such determinations in the case of Central America, among others.[73] Given the expressed Congressional intent to clarify the existence of a forum for injured U.S. citizens, it seems inconsistent to make that forum depend on the vagaries of U.S. foreign policy.[74]

IV.
THE FUTURE EXPANSION OF SOVEREIGN IMMUNITY?

The AEDPA marks the first successful expansion of exceptions to sovereign immunity in 30 years. The provisions of AEDPA may facilitate lawsuits in several of the cases discussed above, which concern states currently on the State Department's "terrorist" list. The victims of Pan Am 103 and Joseph Ciccipio will be able to reopen their causes of action. For other victims of similarly heinous acts, however, no such relief is available.

A number of further amendments to the FSIA have been introduced since 1996. Less than six months after passage of AEDPA Congress passed the "Flatow amendment."[75] That amendment, designed to increase the penalties available in suits under 28 U.S.C. § 1605(a)(7), allows for non-economic and punitive damages against an official, employee or agent of a foreign state designated as "terrorist." As interpreted by the district court in *Flatow*, the provision extends to governmental units acting as agents in the implementation of policy

72. *See* State Department Country Reports acknowledging acts of torture in numerous countries not now on the "terrorism" list.

73. *See, e.g.*, certification that El Salvador was not violating human rights, or that Nicaragua was, during the mid-1980's under the Reagan administration. Such restrictions continue into the 1990's. *See, e.g., Congress Trims Clinton's Funding Requests; for Four Countries, Prior Political Conditions,* LATIN AMERICA WEEKLY REPORT, June 24, 1993, at 283.

74. Congress clearly has the *power* to delegate such a determination to the Executive Branch, despite allegations by Libya in the Pan Am 103 case that such delegation is unlawful. Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y. 1998).

75. Civil Liability for Acts of State Sponsored Terrorism, Sept. 30, 1996, Pub. L. No. 104-208, Div. A, Title I, § 101(c) [Title V § 589], 110 Stat. 3009-172, *reprinted at* 42 U.S.C. sec. 1983.

and, through joint and several liability, to the state itself.[76] The amendment also establishes the statute of limitations and adds that liability will only lie if U.S. officials would be liable if the act in question were carried out within the U.S., thus potentially establishing a link to 28 U.S.C. § 1983 and related liability and immunity doctrines.

Passage of the bill has also opened a door to efforts tied to compelling cases that AEDPA leaves with no U.S. forum. While the ultimate fate of these amendments are still unknown, they raise the interesting possibility of a series of small "technical corrections" aimed at redressing specific cases of injustice which, taken together, will substantially expand the jurisdiction of the U.S. courts.

One proposed amendment, entitled the "Foreign Sovereign Immunity Technical Corrections Act of 1997,"[77] would abrogate sovereign immunity in cases where the foreign state "had no extradition treaty with the United States at the time the act occurred and no adequate and available remedies conforming with fundamental fairness and due process exist in such state."[78] The claim must not have arisen more than 20 years before the date of enactment. If adopted, this amendment would allow the plaintiffs in *Saudi Arabia v. Nelson* to maintain their suit.

A second proposal would respond to the plight of Mr. Princz. H.R. 1531 would grant jurisdiction to U.S. courts in cases involving acts of genocide committed against a U.S. citizen during World War II by, or under the direction or supervision of the predecessor states of the Federal Republic of Germany or their officials or employees acting within the scope of employment.[79] The claimant need not have been a U.S. citizen at the time the injury occurred,[80] but must exhaust adequate and available remedies unless doing so would cause undue hardship, and must bring the action within 24 months after enactment.[81]

A third bill specifically authorizes jurisdiction in U.S. courts for claims involving U.S. victims of the bombing of Pan Am Flight 103. Arguably, such claims are already authorized under AEDPA, because Libya is on the list of "terrorist" states. Nonetheless, the proposed bill notes the "unique circumstances" surrounding, *inter alia*, Libya's deliberate noncompliance with U.N. resolutions, which compel extraordinary measures against Libya.[82] It would abrogate immunity for actions against Libya for claims arising out of the destruction of Pan Am flight 103 and brought within six months after enactment of the amendment. The proposed amendment is aimed specifically at reversing ad-

76. *Flatow*, 999 F. Supp. at 72-73.

77. S. 1302, 105th Cong. (1997).

78. *Id.* at 2(a)(7)(B)(ii).

79. H.R. 1531, 105th Cong. (1997).

80. A limitation to those survivors who were U.S. citizens at the time would apparently benefit only Mr. Princz. He believes he is one of only two U.S. nationals who survived internment during the Holocaust, and the other is receiving a pension. Princz v. Rep. of Germany, 813 F. Supp. 22, 25 (D.D.C. 1992).

81. *Id.* at (8)(A).

82. H.R. 3026, 105th Cong. (1997).

verse judicial rulings in the course of the Pan Am 103 litigation: it specifies that damages actions pass to the estate of the claimant, and that "[i]f an action . . . brought before the date of the enactment of this paragraph was dismissed on account of the inapplicability of this section, such action shall be reinstated upon motion by the claimant not later than 60 days after such date of enactment."[83]

As of Summer 1998, all three bills were awaiting action by the Committee on the Judiciary. Each bill seems to be tailored to meet the needs of a specific, existing plaintiff—in that sense these may be seen as akin to private bills for relief. We may expect other sympathetic cases to lead to more nibbles around the edges of sovereign immunity.

CONCLUSION

The potential success of the AEDPA amendment to the FSIA depends on whether one views it in terms of the fight against terrorist states or as a remedy for gross violations of the rights of U.S. citizens. As a weapon in the arsenal of the United States in fighting governments designated as "terrorist," the Act allows the courts to order huge awards against such states on the basis of even minimal or tenuous official support for terrorist groups or individuals. The breadth of its potential reach provides another avenue to pressure such states to change their policies (albeit one limited by the difficulties in enforcing judgments, as noted).

As a human rights measure, however, these attempts at further reform reflect the inadequacy of the changes codified in AEDPA, which excludes the vast majority of worthy claims, even those brought by U.S. citizens. Rather than continue to carve out narrowly-tailored exceptions which as a body lack coherence, Congress should simply acknowledge that the common denominator of the violations is that they are so serious and universally condemned that their transgression necessarily implies a foregoing of immunity whether or not the state is considered at the time to be a sponsor of terrorism. It should, in short, codify an implied waiver for violations of *jus cogens* norms.

83. *Id.* at 2(8)(B).