Foreign Claims

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This year's report on foreign claims takes a different approach to the subject than that followed last year.[1] The subjects covered in last year's report included the Helms-Burton Act, the Antiterrorism and Effective Death Penalty Act of 1996, the International Law Commission and State Responsibility, the Iran-U.S. Claims Tribunal, Claims against Iraq, and one miscellaneous topic. The Helms-Burton Act, the Iran-U.S. Claims Tribunal, and Claims against Iraq are covered in other contributions to *International Legal Developments in Review: 1997*.[2] Since the International Law Commission is still gathering submissions of United Nations (UN) member states' views on the sixty draft articles it adopted in the summer of 1996, it limited its work on State Responsibility at its 1997 summer session to the appointment of a new special rapporteur and to deciding to complete its work by the end of the Commission's present term of office (i.e., by the year 2001).[3] Because no miscellaneous topics are worthy of note this year, the report is limited to a discussion of some significant developments under amendments to the Foreign Sovereign Immunity Act (FSIA) effected by the Antiterrorism and Effective Death Penalty Act and subsequent legislation.

The report is organized in the following fashion. First, it examines the backdrop to the Antiterrorism and Effective Death Penalty Act, including efforts prior to the passage of the Act to hold foreign states civilly liable in U.S. courts for acts of terrorism. Second, it examines three decisions recently rendered under the FSIA, two of which upheld the constitutionality of the 1996 amendments to the FSIA. Third, it considers the amendments and the cases rendered under them in the context of the wider issue of holding states accountable for the commission of international crimes. Finally, it reaches some tentative conclusions.

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1. For last year's contribution, *see* John F. Murphy, *Foreign Claims*, 31 INT'L LAW. 579 (1997).

2. For discussion of the Helms-Burton Act, *see* Wynn H. Segall, *Running on Empty: U.S. Economic Sanctions and Export Controls in 1997* in this issue. For brief consideration of the Iran-U.S. Claims Tribunal and Claims Against Iraq, *see* Roger Alford and Peter H. F. Bekker, *International Courts and Tribunals* in this issue.

3. For discussion, *see* Robert Rosenstock, *The Forty-Ninth Session of the International Law Commission*, 93 AM. J. INT'L L. 107, 111-12 (1998).

I. Brief Backdrop to the Antiterrorism and Effective Death Penalty Act

This report is not the forum to examine in detail the history of foreign sovereign immunity.[4] It is worth noting in passing, however, that until relatively recently foreign sovereigns enjoyed absolute immunity from the jurisdiction of national courts. Only during the twentieth century, as governments increasingly engaged in state trading and other commercial ventures, did the restrictive theory of sovereign immunity emerge. This restrictive theory denied immunity in cases arising out of commercial transactions on the ground that absolute immunity was unfair because it deprived private parties of their judicial remedies when dealing with states, and gave the latter an unfair competitive advantage over private commercial enterprises. This rationale, then, distinguished between private, commercial acts for which foreign states enjoyed no immunity and public acts for which they continued to enjoy immunity.

The terms of the FSIA as it was adopted in 1976 reflected a restrictive theory of sovereign immunity.[5] Aside from the commercial activity exception, however, the exceptions to sovereign immunity under the FSIA were few. Indeed, prior to 1996, absent an explicit or implicit waiver of immunity, the liability of a foreign sovereign for noncommercial, public acts was largely limited to noncommercial torts that were committed and had their injurious consequences in the United States.[6] With rare exceptions, foreign sovereigns enjoyed complete immunity under the FSIA from possible civil liability for terrorist acts. The immunity was complete for terrorist acts committed against U.S. nationals overseas.[7]

Some creative efforts were used to bring suits in U.S. courts against foreign sovereigns for violations of the law of nations committed outside the territorial boundaries of the United States. One such action enjoyed momentary success. In *Argentine Republic v. Amerada Hess Shipping Company*,[8] an oil tanker, owned by one Liberian corporation and chartered by another Liberian corporation to transport oil from Alaska to the Virgin Islands by sailing around the southern tip of South America, was allegedly bombed without provocation or warning by an Argentinian military aircraft. Argentina was engaged in a war with Great Britain over the Falkland Islands at the time. The owner and charterer of the tanker filed suit in federal district court under the Alien Tort Statute, which provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[9] The district court granted Argentina's motion to dismiss for lack of subject matter jurisdiction under the FSIA. The United States Court of Appeals for the Second Circuit reversed and remanded for further proceedings, on the ground

4. For a brief but excellent discussion of this background, *see* G.B. Born and D. Westin, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 450 (2d ed. 1992).

5. For the text of the Foreign Sovereign Immunities Act, *see* 28 U.S.C.A. §§ 1330, 1602-1611 (West Supp. 1998).

6. For the noncommercial tort exception, *see* 28 U.S.C.A. § 1605(5) (West Supp. 1998). For cases where terrorist activity occurred in the United States and therefore fell within the noncommercial tort exception, *see* Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980) and Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989).

7. One arguable exception to this statement is Siderman v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993), where the court found that alleged torture by Argentine officials of three Argentine and one U.S. citizen fell within the commercial activity exception of 28 U.S.C. § 1605(2). It is questionable, however, whether *Siderman* is still valid after the Supreme Court's decision in Saudi Arabia v. Nelson, 507 U.S. 349 (1993), where a majority of the Supreme Court held that Saudi Arabia's alleged torture of Mr. Nelson did not constitute a commercial activity within the meaning of the FSIA.

8. 488 U.S. 428 (1989).

9. 28 U.S.C. § 1350 (1994).

that the FSIA was not intended to eliminate the preexisting remedies of the Alien Tort Statute. The Supreme Court, however, unanimously reversed, holding that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States and that none of the exceptions to foreign sovereign immunity enumerated in the FSIA applied to this case.

In *Smith v. Socialist People's Libyan Arab Jamahiriya*,[10] the plaintiffs were the personal representatives of the victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988 and their estates. In response to defendants' motion to dismiss, the plaintiffs advanced a number of arguments to support their contention that defendants did not enjoy immunity under the FSIA. According to the plaintiffs, Libya, by participating in the bombing of Pan Am Flight 103, had violated a peremptory or jus cogens norm of international law and thereby waived its immunity under the FSIA. Although it found this argument "appealing," the United States Court of Appeals for the Second Circuit determined that there was no evidence in the legislative history of the FSIA that Congress contemplated an implied waiver of that sort by its use of the phrase "waiver . . . by implication." The court noted that two other circuits had considered whether a violation of a jus cogens standard constitutes an implied waiver within the meaning of the FSIA, and both had rejected the claim.[11]

The plaintiffs also argued that Pan Am Flight 103 should have been considered the "territory" of the United States for purposes of the FSIA. The court rejected this argument on the ground that merely because a location is subject to an assertion of U.S. authority it does not necessarily follow that it is the "territory" of the United States for purposes of the FSIA. Accordingly, the court held, the bombing did not fall within the noncommercial tort exception to immunity under the FSIA.

Lastly, the plaintiffs made an argument based on the language in the FSIA that a foreign state's immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]."[12] According to the plaintiffs, Security Council Resolution 748,[13] which commits Libya to pay compensation to the victims of Pan Am Flight 103, is a binding treaty obligation under article 25 of the UN Charter and is therefore covered by the above quoted language of the FSIA. The court disagreed. In its view, this FSIA displacement of immunity is applicable only to international agreements in effect at the time the FSIA was adopted and cannot be interpreted to provide a "dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted."[14]

The frustrations of the plaintiffs in the *Smith* case, as well as those of similarly situated plaintiffs in other cases, provided the political momentum that led to the revisions to the FSIA contained in the Antiterrorism and Effective Death Penalty Act of 1996. These revisions amend the FSIA to permit a suit for money damages 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 the act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of

10. 101 F.3d 239 (2d Cir. 1996).

11. *Id.* at 245. The two cases the court referred to are Princz v. F.R.G., 26 F.3d 1166, 1174 (D.C. Cir. 1994) and Siderman v. Republic of Arg., 965 F.2d 699, 714-19 (9th Cir. 1992).

12. *See* 28 U.S.C. § 1604 (1994).

13. UN Security Council Resolution Deciding that Libya Must Comply with Previous Request and Imposing Certain Sanctions, Letters Regarding Venezuelan Diplomat Mission in Libya and Sec.-General Report, March 31, 1992, 31 I.L.M. 749, 750 [hereinafter Security Council Resolution 748].

14. *Smith v. Socialist People's Libya Arab Jamahiriya*, 101 F.3d at 247.

his or her duties.[15] The court shall decline to hear such a claim if: (1) the foreign state was not designated as a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979[16] or Section 620A of the Foreign Assistance Act of 1961[17] at the time the act occurred, unless later so designated as a result of such acts; (2) the act occurred within the designated foreign state against which the claim was brought and the claimant did not afford the foreign state a reasonable opportunity to arbitrate the claim; or (3) the claimant or victim was not a U.S. national. At this writing, the states designated as sponsors of terrorism include Cuba, Iraq, Iran, Libya, North Korea, Sudan, and Syria.

The Antiterrorism and Effective Death Penalty Act also amended the FSIA in another significant respect. In addition to lifting immunity from suit for state sponsors of terrorism, the Act also revises the 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. This 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.[18] Normally, the property of a foreign state is immune from attachment or execution if the property was not involved with the act upon which the claim is based.[19]

Under separate legislation,[20] the FSIA was subsequently amended to grant a cause of action against an official, employee, or agent of a foreign state designated as a state sponsor of terrorism who commits any of the acts covered by the Antiterrorism and Effective Death Penalty Act's amendments to the FSIA, if the official, employee, or agent acts within the scope of his or her office, employment, or agency. This is significant, because the FSIA as otherwise enacted is not intended to affect the substantive law of liability in actions against foreign states.[21]

II. Court Decisions under FSIA as Amended by the Antiterrorism and Effective Death Penalty Act and Subsequent Legislation

A. Alejandre v. Cuba[22]

The first decision rendered under the amended FSIA arose out of the same facts that induced President Clinton to sign the Helms-Burton Act, namely, the shooting down of two unarmed civilian planes over international waters by the Cuban Air Force. Four persons died as a result of this incident, and the personal representatives of three of them filed suit to recover monetary damages against Cuba and the Cuban Air Force in the U.S. Southern District Court of Florida. One of the victims was not a U.S. citizen and his family therefore could not join the suit. Neither Cuba nor the Cuban Air Force defended the suit, asserting through a diplomatic note

15. 28 U.S.C. § 1605(a)(7) (1994).
16. 50 U.S.C. § 2405(j) (1994).
17. 22 U.S.C. § 2371 (1994).
18. 28 U.S.C. § 1610(a)(7) (1994).
19. 28 U.S.C. § 1610(a) (1994).
20. Civil Liability for Acts of State Sponsored Terrorism, enacted on September 30, 1996 as part of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. No.104-208, Div. A, Title I § 101(c) [Title V, § 589], 110 Stat. 3009-3172 (codified at 28 U.S.C.A. § 1605 (West Supp. 1998)).
21. *See e.g.*, Liu v. Republic of China, 892 F.2d 1419, 1425 (9th Cir. 1989).
22. No. 96-10127-CIV-KING, 96-10128-CIV-KING, 1997 WL 847062, at *1 (S.D. Fla. Dec. 17, 1997).

that the court had no jurisdiction over Cuba or its political subdivisions. The court nonetheless rendered judgment in favor of the plaintiffs.[23]

The court found that the Cuban Air Force never notified or warned the civilian planes, never attempted other methods of interception, and never gave them the opportunity to land. In the court's view, these omissions clearly violated international norms requiring the exhaustion of all measures before resorting to force against any aircraft and banning the use of force against civilian aircraft altogether.

The court further found that plaintiffs had met all requirements under FSIA as amended to establish an exception to foreign sovereign immunity. The unprovoked firing of deadly rockets came within the statute's definition of "extrajudicial killing." The Cuban Air Force was acting as an agent of Cuba when it committed the killings and Cuba had been designated as a state sponsor of terrorism. The act occurred outside of Cuban territory and the plaintiffs were all U.S. citizens at the time of the shoot down. The court also held that the plaintiffs could base their substantive cause of action on the FSIA, because, as amended, the FSIA creates a cause of action against agents of a foreign state that act under the conditions that result in a loss of foreign sovereign immunity.[24] Morever, since the plaintiffs had proved the Cuban Air Force's liability under the FSIA, Cuba itself was liable under the doctrine of respondeat superior.

The court turned next to the issue of damages. It noted that the FSIA as amended provides that an agent of a foreign state who commits an extrajudicial killing shall be liable for "money damages which may include economic damages, solatium, pain and suffering, and punitive damages,"[25] and accordingly held that the Cuban Air Force was liable for both compensatory and punitive damages. Under the doctrine of respondeat superior, the court stated, Cuba was liable for the same amount of damages as its agent, with the exception of punitive damages, which the FSIA expressly prohibits against foreign states.[26] The court found that the plaintiffs should be awarded compensatory damages of over $49 million against Cuba and the Cuban Air Force and punitive damages of over $137 million against the Cuban Air Force.

B. Flatow v. Iran[27]

Strictly speaking, the second decision under the recent amendments to the FSIA was handed down on March 11, 1998, rather than in 1997. Most of the proceedings before the court, however, took place in 1997 and were a natural consequence of the adoption of the Antiterrorism and Effective Death Penalty Act in 1996.

In *Flatow* the plaintiff alleged that his daughter, Alisa Michelle Flatow, was the victim of a terrorist suicide bombing of a bus on which she was a passenger. On April 9, 1995, a suicide bomber drove a van loaded with explosives into an Israeli bus while it was traveling in the Gaza Strip. The resulting explosion destroyed the bus and caused a piece of shrapnel to pierce Alisa's skull. Suffering from a severe head injury, she died in an Israeli hospital. The Shaqaqi

23. In the case of a lawsuit against a foreign state, the FSIA does not permit the entry of a default judgment. Rather, the plaintiffs must establish their "claim or right to relief by evidence that is satisfactory to the court." 28 U.S.C.A. § 1608(e) (West Supp. 1998).

24. *See* Civil Liability for Acts of State Sponsored Terrorism, *supra* note 20.

25. *Id.*

26. 28 U.S.C. § 1606 provides, in pertinent part: "[t]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages."

27. No. 97-396 (RCL), 1998 WL 111500 (D.D.C. Mar. 11, 1998).

faction of Palestine Islamic Jihad claimed responsibility for the bombing, and investigations by Israeli authorities and by U.S. Department of State officials confirmed this claim. The Department of State also reported that Iran had provided approximately $2 million to Palestine Islamic Jihad annually in support of its terrorist activities.

As in the *Alejandre* case, defendants did not enter an appearance. The court nonetheless proceeded to render judgment against them. The court found that the death of the plaintiff's daughter was caused by a willful and deliberate act of extrajudicial killing and that the suicide bomber had acted under the direction of the defendants including Iran, the Iranian Ministry of Information and Security, and several Iranian officials acting within the scope of their offices. Finding that plaintiff had successfully proved facts necessary for a finding of no immunity under the FSIA and a cause of action under the Act, the court held that defendants were liable. The most noteworthy aspects of the court's holding, however, were its discussion of constitutional issues and its calculation of damages.

While noting that Congress had expressly directed the retroactive application of the amendments to the FSIA, the court rejected the defendants' contention that such retroactive application was unconstitutional. In the court's view,

> the state sponsored terrorism exception to foreign sovereign immunity is a remedial statute. It creates no new responsibilities or obligations; it only creates a forum for the enforcement of pre-existing universally recognized rights under federal common law and international law . . . As international terrorism is subject to universal jurisdiction, defendants had adequate notice that their actions were wrong and susceptible to adjudication in the United States.[28]

The court next addressed the question of whether there was a constitutional basis for exercising personal jurisdiction over the defendants. The court first suggested that dicta in Supreme Court decisions[29] indicated that a foreign state might not be a "person" for purposes of constitutional due process analysis. Even if it is, the court concluded, "a foreign state that sponsors terrorist activities which causes(sic) the death or personal injury of a United States national will *invariably* have sufficient contacts with the United States to satisfy Due Process."[30] The court supported this conclusion by noting that the suit was brought against Iran and its officials for actions in their sovereign capacity and by suggesting that sovereign contacts should therefore be sufficient to sustain general jurisdiction over defendants. Moreover, applying the "fair play and substantial justice" standard of *International Shoe*,[31] the court held that since terrorism has been almost universally condemned, fair play and substantial justice are well served by the exercise of jurisdiction over state sponsors of terrorism.

Turning to the question of damages, the court determined that, in addition to compensatory damages, plaintiff could recover punitive damages, not only against officials, employees, or agents of Iran but against Iran itself. Although, as noted by the court in *Alexandre*,[32] the FSIA, by its terms, limits the imposition of punitive damages to officials, employees, or agents of a foreign state, and appears expressly to rule out punitive damages against a foreign state, the court in *Flatow* held that punitive damages awarded against a foreign state's officials, agents, or employees for the provision of material support and resources to a terrorist group whose

28. *Id.* at *10.

29. *Id.* at *16. The Supreme Court decisions referred to by the court were Verlinden v. Central Bank of Nig., 461 U.S. 480, 484 n.5 (1982) and Republic of Arg. v. Weltover, 504 U.S. 607, 619-20 (1992).

30. *Id.* at *19 (emphasis supplied).

31. *See* Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945).

32. *See supra* note 10 and accompanying text.

acts result in personal injury or wrongful death of a U.S. national can be imputed to the foreign state under the doctrines of respondeat superior and vicarious liability. Stressing the deterrent effect of punitive damages, the court determined, with the assistance of expert testimony, that an award of punitive damages in the amount of three times Iran's annual expenditure for terrorist activities, or $225 million, would be appropriate. The total damages awarded to the plaintiff came to $247.5 million.

C. Rein v. Socialist People's Libyan Arab Jamahiriya[33]

As pointed out by the court, the plaintiffs in *Rein* were seeking the same relief that had been denied in *Smith v. Socialist People's Libyan Arab Jamahiriya*, discussed above. The plaintiffs in *Rein* were, of course, relying on the 1996 amendments to the FSIA. Libya's defense this time was to mount a constitutional challenge to the 1996 amendments. Unlike Cuba and Iran, Libya has from the outset vigorously defended itself in U.S. court proceedings.

Libya first argued that the 1996 amendments to the FSIA are unconstitutional because they provide that federal court jurisdiction is to be determined by the Secretary of State. The court ruled that the amendments merely confirmed the power or subject matter jurisdiction of U.S. courts to hear controversies between citizens of the United States and foreign states and directed the courts to decline to hear claims against states not designated as terrorist states. As to claims against states so designated, the amendments left open the discretion of the courts to hear such claims. Moreover, the court stated, Congress clearly had the power to delegate to the executive branch the responsibility of determining those foreign nations that may be accorded sovereign immunity by the courts.

Libya next contended that the court had no personal jurisdiction over it. The court felt that the relevant inquiry was whether the effects of a foreign state's actions upon the United States are sufficient to give that state fair warning that it may be subject to the jurisdiction of U.S. courts. In the court's view, any foreign state would "know that the United states has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in U.S. courts."[34]

Libya then claimed that the provisions providing for the designation of states as sponsors of terrorism violated their due process rights to a fair trial. The court noted, however, that the Secretary of State's designation went only to establishing jurisdiction in particular cases and had no effect on the plaintiffs' burden to prove the merits of their case. Because the Secretary's designation implicated no fundamental right, the court said, Libya's contention that a strict scrutiny test should be applied to the amendments was incorrect. Rather, the proper test was the rational basis approach, and, the court held, the 1996 amendments were "a reasonable means of achieving the legitimate government purpose of protecting Untied States nationals and air carriers in international travel to and from the United States."[35]

Lastly, the court found that Libya's claim that the 1996 amendments were an impermissible ex post facto law had no merit. According to the court, the ex post facto doctrine was inapplicable to the question of whether a foreign state is immune from liability in civil tort actions. A foreign state is not criminally punished merely because the United States decides not to grant sovereign immunity to it in a civil action in a U.S. court.

33. No. 96-CV-2077 (TCP), 1998 WL 84609, at *3 (E.D.N.Y. Feb. 26, 1998).
34. *Id.* at *4.
35. *Id.* at *5.

In conclusion the court denied defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted.

III. The Amendments to the FSIA and Holding States Accountable for International Crimes

A full discussion of the significance of the 1996 amendments to the FSIA for efforts to hold states accountable for international crimes would require book-length treatment. For present purposes, a few brief comments will have to suffice. First, it is important to note that the plaintiffs' victories in the *Alejandre* and *Flatow* cases, while of considerable symbolic significance, may also serve to demonstrate the unsatisfactory nature of current law and practice if the plaintiffs are ultimately unable to collect on their judgments. The plaintiffs in the *Alejandre* case are currently unable to execute against any of Cuba's assets in the United States, since the same are presently "frozen" under executive orders and await final resolution of a variety of U.S. claims against Cuba. Although Iran's assets in the United States do not suffer from the same disability, it is unclear at this writing whether Iran has assets in this country that are used for a commercial activity, and if so, the extent of such assets. If there are no assets or insufficient assets to execute judgment upon in the United States, it will be exceedingly difficult, if not impossible, to execute the judgment against Iranian assets in other countries.[36]

For their part, the plaintiffs in the *Rein* case now have to prove their case against Libya, and this may be difficult to do. Plaintiffs will have to prove that officials, employees, or agents of Libya caused the bombing of Pan Am Flight 103 while acting within the scope of their office, employment, or agency. This burden of proof may be especially onerous because of a limitation on discovery in civil cases brought under the antiterrorism exception created by the Antiterrorism and Effective Death Penalty Act.[37] Under this provision, if the Attorney General determines that discovery in a case brought under the antiterrorism amendments would "significantly interfere with a criminal investigation or prosecution, or a national security operation related to the incident,"[38] he or she may so advise the court, and the court shall stay such discovery for twelve months subject to renewal for additional twelve month periods. Even if they succeed in proving their case and obtaining a judgment, the plaintiffs in *Rein* will face grave difficulties in recovering their judgment because Libyan assets in the United States are frozen and because of the difficulties they would encounter in enforcing their judgment abroad.

These efforts to hold states responsible for the commission of international crimes in U.S. courts should be considered in the context of recent efforts to hold them accountable through international institutions. Two examples are particularly noteworthy.

First, the International Court of Justice (ICJ) is currently considering a claim by Bosnia-Herzegovina that Yugoslavia committed genocide during the war in Bosnia, in violation of its obligations as a party to the Genocide Convention[39] and customary international law. Also being considered is a counterclaim by Yugoslavia that Bosnia-Herzegovina itself committed

36. For discussion of some of these difficulties, *see, e.g.*, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD (Ronald A. Brand, ed. 1992).

37. 28 U.S.C.A. § 1605(g)(1)(A)-(B) (West Supp. 1998).

38. 28 U.S.C.A. § 1605(g)(1)(A) (West Supp. 1998).

39. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 13, 1951, 78 U.N.T.S. 277.

genocide that the ICJ has just ruled is admissible.[40] This case represents the first meaningful action taken under the Genocide Convention during the fifty years since its adoption by the UN General Assembly in 1948.

Second, the United States and Great Britain have undertaken efforts against Libya in the UN Security Council for its support of international terrorism and the counteraction that Libya has taken before the ICJ. The U.S. and British initiatives in the Security Council came about because of Libya's refusal to surrender two Libyan members of the Libyan secret service who were indicted by a Grand Jury of the District of Columbia in November 1991. In response the Security Council adopted several resolutions that, inter alia, demanded that Libya surrender the two accused, as well as cease its support for all terrorist activity. In addition, it imposed economic sanctions against Libya.[41]

For its part Libya claimed that, under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[42] the only obligation on Libya was to decide, in its absolute discretion, whether it would extradite the accused persons or submit them to its own courts for purposes of prosecution. Since Libya has allegedly submitted the two accused persons to its competent authorities to be prosecuted under Libyan law, it claims it has fulfilled its obligations under the Montreal Convention and that the United States and Great Britain, in insisting that Libya surrender the accused, are violating the Convention. On March 3, 1992, Libya brought an action against the United States and the United Kingdom before the ICJ and requested that the Court "indicate provisional measures" (roughly issue an injunction) against the United States and Great Britain in an effort to prevent them from imposing the sanctions against it. The court declined to do so.[43] More recently, however, on February 27, 1998, the ICJ ruled by a thirteen to two vote that it has jurisdiction to consider the merits of Libya's claims against the United States and Great Britain.[44]

It remains to be seen what the outcomes of these proceedings in the Security Council and the ICJ will be. Potentially, they could constitute major advances in the struggle to hold states accountable for the commission of international crimes—at least if (1) the ICJ finds that one or more of the states parties to the Bosnian war and the Genocide Convention committed genocide and rules against Libya on the merits of its claims, and (2) the Security Council continues its economic sanctions against Libya. In any event, holding sovereign states civilly liable for the commission of terrorism and other international crimes is a major development. The basic question now is what additional steps, if any, might be taken to strengthen the use of civil suits as a method for holding state sponsors accountable for the commission of international crimes. What follows are a few tentative proposals that might be considered at greater length in other forums.

40. The *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* was decided by the ICJ on December 17, 1997. The full text of the decision can be found through the ICJ web site, <http://www.icj-cij.org>. For a summary of this decision, *see* Peter H. F. Bekker, *Recent Developments at the World Court*, ASIL NEWSLETTER, Mar.-Apr. 1998, at 1.

41. UN Security Council Resolution Urging Libya to Respond to Requests for Cooperation in Investigation of Aerial Incident, Jan. 21, 1992, 31 I.L.M. 731; Security Council Resolution 748, *supra* note 13.

42. Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

43. Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libya v. U.K., Libya v. U.S.), 1992 I.C.J. 3, 114 (Orders of Apr. 14).

44. For a summary of this decision, *see* Peter H. F. Bekker, *The ICJ Upholds Its Jurisdiction in Lockerbie Cases*, ASIL NEWSLETTER, Mar.-Apr. 1998, at 2. The full text of the decision may be found on the ICJ web site at <http://www.icj-cij.org>.

One possibility would be for the United States and other like-minded states to propose an international convention. This convention would require states parties to adopt national legislation that would permit suits against sovereign states by the victims or their representatives for the commission of certain international crimes, such as, the crimes covered by the 1996 amendments to the FSIA. Sovereign immunity should no longer be a shield for state sponsors of such egregious international crimes to hide behind. Since these crimes are already subject to universal jurisdiction when committed by individuals, it may be time to consider the application of the principle of universal jurisdiction to state sponsors of such crimes.

Such a convention might also contain provisions requiring state parties to enforce money judgments rendered by the courts of other state parties—subject to certain exceptions in the event of judgments rendered under circumstances that offended strong public policy of the state requested to enforce the judgment. These provisions might be coupled with a requirement that the state party enforcing the judgment allow execution of the judgment against the civilly liable state's assets located in its territory.

Finally, the convention might contain a compromissory clause that permits reference to the ICJ of disputes between states parties over the interpretation or application of the convention. This could serve as a safeguard against a state party permitting a suit to be brought and a judgment to be rendered against a state that was not grounded in fact or law, but was instead designed simply to punish the state defendant as an adversary of the state party permitting the suit. It would also be necessary for the convention to contain provisions ensuring that states would be subject to civil liability for international crimes only after a court proceeding that was conducted in accordance with principles of due process.

More modest proposals might also be considered. Thought might be given, for example, to amending the FSIA to permit the execution of judgments obtained under the Act's antiterrorism provisions against *any* property of the state sponsor located in the United States, whether used for commercial or public purposes. Just as a foreign sovereign can be held civilly liable under the FSIA for noncommercial public acts if they constitute the specified crimes, so too, arguably, should the property of the foreign sovereign be subject to execution of a judgment based on such crimes, even if the property is used for the public functions of the sovereign.

Assuming that conclusion of a multilateral convention along the lines described above would not be possible, an alternative approach might be to attempt to conclude bilateral agreements along such lines, especially with states that serve as major financial centers such as Great Britain and Germany. Such bilateral agreements might be especially useful in improving the chances that successful plaintiffs would be able to find assets of defendant foreign sovereigns that they would be able to execute judgments against.

In conclusion, it should be emphasized that the proposals advanced above are highly tentative and preliminary in nature. Moreover, they raise complex political issues, a discussion of which is beyond the scope of this brief essay.[45]

45. The major political issue is the one raised by executive branch officials during hearings on the Antiterrorism and Effective Death Penalty Act: whether holding foreign sovereigns civilly liable for international crimes will result in retaliatory suits filed against the U.S. government in foreign courts or undermine important U.S. foreign policy interests. For testimony expressing this concern, *see, e.g., Foreign Terrorism and U.S. Courts: Hearings Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong.14 (1994) (statement of Jamison S. Borek, Deputy Legal Adviser to the U.S. Dept. of State).