

# Civil Remedies for Victims of Terrorist Attacks\*

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hen a crime is committed, the state prosecutes the alleged perpetrator and, after a conviction, incarcerates or fines the wrong-doer, both to punish and to deter future similar misconduct. This may satisfy some victims, but others demand more. Some victims demand justice for themselves and file civil suits seeking compensation for injuries, wrongful death, or pain and suffering. Although it may be difficult, if not impossible, to collect any

military action by the United States and its allies is a form of punishment and, hopefully, also serves a deterrent effect. But what about justice for the victims themselves? What can be done to make the terrorists and their sponsoring states pay, quite literally, for what they have done?

Victims of terrorist attacks may avail themselves of a limited set of criminal remedies in certain circumstances, and the proposed International Criminal Court may help to broaden the range of conduct that can be punished across national borders. Individual victims may also avail themselves of the usual civil remedies against the terrorists themselves in some circumstances. But, as with criminal defendants in domestic cases, terrorists may lack sufficient personal funds to compensate for the death and destruction caused by their actions, and the difficulty in collecting any judgment may increase if foreign-national defendants are involved. Consequently, victims and survivors seeking compensation may look for deeper pockets — that is, the states that sponsor or support the terrorists.

Historically, however, foreign governments and their agents have enjoyed broad common-law and statutory immunity from

provide an adequate mechanism by which to impose criminal or civil penalties on states or governments that finance or otherwise support terrorist activities.

In the mid-1990s, the U.S. Congress attempted to remedy this situation by creating a new civil remedy with respect to certain designated state sponsors of terrorism. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act to abrogate the immunity of foreign states involved in funding or sponsoring terrorist acts against U.S. citizens abroad.<sup>2</sup> The act allows U.S. citizens victimized by state-sponsored terrorism to pursue civil lawsuits in U.S. courts against states identified by the U.S. Department of State as supporting, ordering, sponsoring or funding acts of terror directed at American citizens abroad.

But the act was not entirely successful in achieving Congress' goals. Although a number of plaintiffs were awarded large judgments under the act, they had difficulties collecting monetary judgments from foreign states, their agents or their instrumentalities. Consequently, in October 1998, Congress enacted a measure calling upon the U.S. Department of State and the U.S. Treasury Department to assist

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monetary judgment against a convicted defendant, such legal actions may provide some sense of closure for the victims, as grievances are heard in a public forum and wrongs are redressed by a financial judgment against the offender.

With a mass-atrocity like the terrorist acts of September 11, however, how may the victims and their survivors achieve similar justice? Certainly, the sustained

criminal prosecutions and civil lawsuits under international law, even for international terrorist acts in which they have played key roles. And although at least 10 resolutions of the United Nations General Assembly have reaffirmed the "unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed,"<sup>3</sup> international law does not

victims of state-sponsored terrorism in locating money and other assets to satisfy judgments. Again, however, this measure has had mixed success, because it contains a "national security" waiver that allows the executive branch to refuse such assistance in the interest of national security.

In October 2000, then, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000<sup>3</sup> to make

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subject to attachment and execution any funds due to the United States from any state against which a judgment is pending under the Antiterrorism Act. As a result, victims of state-sponsored terrorism and their families have received more than \$410 million from the frozen assets of certain state sponsors of terrorist acts, including Cuba and Iran. Significantly, however, in each of these successful cases, the defendant-states failed to respond to the plaintiffs' complaints and were tried in absentia.

Although several U.S. federal courts have enforced the provisions of the Antiterrorism Act, the legality of the act under principles of international law has not yet been adequately tested or fully litigated in an adversary proceeding. The act seems susceptible to challenge under principles of customary international law on three fronts. First, the act might violate the sovereignty rights of foreign states by subjecting such states to suit, despite the fact that sovereign governments customarily are immune from civil suits. Second, the act might violate the "act of state" doctrine, which is a recognized matter of comity among sovereign states that requires a state to respect the independence of every other sovereign state. Third, the act might violate the principle of reciprocity, which requires that the United States treat a judgment of a non-U.S. court in the same way that a foreign court would treat the judgment of a U.S. court. It is unlikely that the United States would recognize domestic legal proceedings or judgments of certain identified state-sponsors of terrorism such as Iran or Cuba, for example.

Assuming for the sake of argument that the Antiterrorism Act is legal under customary international law, the question then must turn to whether the act can effectively or appropriately combat state-sponsored terrorism. Significantly, any assessment of the act's effectiveness must turn on the goals ascribed to the act. For example, if the act is aimed at giving victims their day in court or publicly shaming foreign state-defendants, then the act appears to be quite effective, because cases brought under the act provide a forum through which to publicize particular atrocities. If the act is aimed at financially compensating victims, then its effectiveness is mixed, because, although plaintiffs do

receive judgments, many have had difficulty collecting any actual money, until very recently. If the act is aimed at punishing defendant-states, again its effectiveness is mixed, as only Iran and Cuba have suffered because of the attachment of assets in the United States. Finally, it may never be known if the act has any deterrent effect, because it is impossible to know whether the penalties imposed by the act have caused any states to forego engaging in terrorist acts.

If the act is deemed effective, again for the sake of argument, questions still remain regarding whether the act is an appropriate normative tool for combating state-sponsored terrorism.<sup>4</sup> Is the act just an example of fighting fire with the mire of years of litigation and procedural wrangling? By unleashing lawyers, lawsuits, procedural rules, delays and other characteristics of American-style tort litigation, has the U.S. government partially abrogated its own responsibility to fight state-sponsored terrorism and to obtain justice and compensation for victims and their families? Does the act's one-sided victim-compensation system interfere with or undermine diplomatic efforts to resolve issues of state-sponsored terror among sovereign states? Or, is the act merely one arrow in the quiver of the U.S. government's fight against state-sponsored terrorism?

Potential conflicts could arise between the judicial remedies provided for in the act and other remedies available to the president as the final arbiter of U.S. foreign policy. The act's legislative scheme, for example, could place the interests of a few victims of state-sponsored terrorist acts and their families above, or at least in conflict with, the government's broader foreign-policy interests and goals.

Another potential problem involves the issue of collateral estoppel and the protection of the constitutional rights of individual criminal defendants. If an incident of state-sponsored terrorism were adjudicated in a civil action under the act, those same facts and circumstances may be deemed finally adjudicated under the doctrine of collateral estoppel in a subsequent domestic or international criminal proceeding.

These problems could be avoided almost entirely, however, if domestic

proceedings under the act were replaced with an international tribunal that would merge criminal and civil remedies into a single proceeding before an independent international court such as the proposed International Criminal Court (ICC). A single tribunal that could adjudicate criminal culpability, punishment and victim compensation for alleged international crimes could also adjudicate alleged acts of state-sponsored terrorism.

Historically, however, the challenge with the proposed ICC has been in persuading states to surrender some aspects of sovereignty and submit to the jurisdiction of an independent international tribunal with full legal authority to impose criminal and civil penalties based on a state's involvement in terrorist acts. In light of the tragic events of September 11, 2001, however, there may never be a greater opportunity or greater political will to expand the jurisdiction of the envisaged ICC to include the crime of terrorism and to provide a forum for civil claims arising from acts of state-sponsored terrorism.

If the world community fails to take full advantage of this unique window of opportunity to act, while the consensus against state-sponsored terror is at its peak, then the chance to make the necessary changes may be lost forever. Then, the best the global community can hope for is a flawed, lopsided and inequitable system whose legitimacy, independence and legality under international law is questionable at best. The victims of the September 11 attacks, their families, the world community and future victims of state-sponsored terrorism deserve and are entitled to demand more, especially if the new war on state-sponsored terrorism is to be a long-term success.

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<sup>1</sup>International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, art. 2(1)(b), 39 I.L.M. 270, 271.

<sup>2</sup>28 U.S.C. § 1605.

<sup>3</sup>28 U.S.C. § 1610.

<sup>4</sup>An additional problem relevant to September 11, 2001, is whether the Taliban could be brought to trial under the terms of the act, since the United States never recognized the Taliban as the ruling authority in Afghanistan and, thus, the Taliban may not be considered a sovereign nation under the statute.