

The Justice for Victims of State Sponsored Terrorism Act: a boost for civil litigation against state sponsors of terrorism

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The confrontation that we are calling for with the apostate regimes does not know Socratic debates..., Platonic ideals..., nor Aristotelian diplomacy. But it knows the dialogue of bullets, the ideals of assassination, bombing, and destruction, and the diplomacy of the cannon and machine gun.

Excerpt from the al-Qa'ida Manual¹

It is the tradition of a civilized nation to allow redress for wrongs through an appeal to the rule of law and justice. Law is at the foundation of civilization, thus it is particularly fitting that the rule of law respond to an attack of savagery. For it is the rule of law, and the voices of freedom, that separate civilization from barbarism and anarchy.

Excerpt from Complaint filed in Thomas Burnett, Sr. et al., v. Al Bakara Investment and Development Corporation et al., in the United States District Court for the District of Columbia

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act),² enacted shortly after the murderous attacks of 11 September 2001, is probably the best known American legislative response to international terrorism. Its stated purpose is to “deter and punish terrorist acts in the United States and around the world...”³ It has advocates and many loud critics.⁴ The point made by some of the critics of the USA Patriot Act is not too dissimilar to that made by the critics of certain US interrogation techniques, Abu Ghraib, renditions and Guantanamo – these measures are imperfect, because in seeking to restore the Rule of Law, they may violate certain bedrock civil liberties that are fundamental to the Rule of Law. Many working in the international financial centres would also add, I have no doubt,

that Title III of the USA Patriot Act may be less about fighting money laundering and terrorism than it is about implementing the tax policies of the Organisation for Economic Co-operation and Development.

International terrorism is an assault on the Rule of Law, and on the values, methods and institutions of democracy that depend on the Rule of Law. It is appropriate, then, that the Law itself should respond effectively to international terrorism. Thanks to the courage and indefatigable political lobbying efforts of the victims of international terrorism, it has.

On 28 January 2008, the President of the United States signed into law the Justice for Victims of Terrorism Act (JVTA).⁵ JVTA provides victims of State sponsored terrorism with a new set of powerful tools for bringing civil litigation in US courts against foreign States that have committed, or that have provided material support or resources to others who have committed, terrorist attacks. As a legislative response to international terrorism, JVTA stands in sharp contrast to the USA Patriot Act. JVTA keeps a disciplined focus on the most crucial source of the problem of international terrorism, namely, the States that fund, plan, equip and order it, and it forces these States to bear the full cost of their actions. The legislation is already having profound effects.

JVTA must be understood within the context of the doctrine of foreign sovereign immunity. The modern doctrine, which regulates the exercise of jurisdiction by the courts of one State, over another State, descends ultimately from the ancient principle of the divine right of monarchs. The monarch rules by divine right. In a constitutional monarchy, the monarch may exercise its powers to create one or more legislatures or courts, and these then exist and serve at the pleasure of the monarch, exercising powers and authority that are derivative of the monarch's powers and

authority. Thus the courts have no real power to review and correct the actions and decisions of the monarch.

In the English system, for example, the Queen appoints the Prime Minister and dissolves Parliament. The Queen must give the royal assent to all legislation, and all legislation includes the enacting formula “Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of same, as follows...” The High Court does have inherent supervisory jurisdiction to review the decisions of government ministers, inferior courts, tribunals and other administrative bodies to ensure that they do not act illegally or irrationally, or commit a procedural impropriety. But this power of judicial review is quite restricted. The High Court is not challenging the merits of a decision, but rather whether the decision is one the decision-maker had the power to make. Lord Scarman stressed the limited nature of judicial review when he wrote: “Judicial review is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power.”⁶

At the international level, foreign sovereign immunity developed into a principle of customary international law, binding on all States. Initially, its primary function was to address the problem of concurrent jurisdiction that arose when a foreign sovereign physically entered the territory of a host sovereign, thus potentially subjecting itself to the jurisdiction of the courts of the host sovereign. In *The Schooner Exchange v M'Faddon*,⁷ the Chief Justice of the US Supreme Court John Marshall dealt with the possibility that a French military vessel might enter a US port, France at that time

being an ally of the United States and engaged in the War of 1812:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to this independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other...

This was a more or less absolute view of foreign sovereign immunity. As the US doctrine evolved to meet circumstances more complicated than the physical presence of a foreign sovereign in the jurisdiction, it became far more complex and nuanced.

In the 1940s, US courts treated foreign sovereign immunity as a “political question”;⁸ with decisions whether or not to exercise jurisdiction over a foreign sovereign being made not on the basis of judicial interpretations of the requirements of international law, but instead on the basis of recommendations made by the Department of State, the executive agency responsible for conducting US diplomacy. The Department of State adopted a more restrictive theory of foreign sovereign immunity than the absolute theory articulated by Chief Justice Marshall, and recommended immunity from jurisdiction only in cases involving the *jure imperii* or public acts of a foreign sovereign, not in those involving *jure gestionis*, commercial acts that could be carried on by private parties.

Under political and diplomatic pressure, the Department of State gave inconsistent guidance, which led to the enactment of the Foreign Sovereign Immunities Act of 1978 (the FSIA 1978).⁹ The FSIA 1978 codified the restrictive theory of sovereign immunity; it preserved the immunity from lawsuit of foreign sovereigns in all but a limited number of specifically enumerated exceptional circumstances. Most of these exceptions were intended to benefit American business, competing and transacting in an increasingly global market with powerful State owned corporations. Without clear exceptions for commercial acts, their State owned corporate counterparts could breach agreements with impunity.

While there was a discernible trend in the cases restricting sovereign immunity and expanding the exceptions to it, there was still no exception for acts of terrorism or for the material support or sponsorship

of acts of terrorism. Lawyers seeking to entice US courts to assert jurisdiction over foreign State sponsors of terrorism were forced to make strained arguments like the one presented by counsel to the Estate of Ingrid Smith, who was murdered in the terrorist bombing of Pan Am Flight 103:¹⁰

Because the activities in question in this suit are not within a State’s sovereign prerogatives, they must necessarily be deemed to be commercial within the meaning of that term in the Foreign Sovereign Immunities Act. These activities include, but are not limited to, the training and hiring of terrorists to conduct unlawful activities against foreign and domestic nationals. Such training is the same as that provided by a private security company in training private foreign security services. Libya has also accepted remuneration for the training of terrorists.... Seen in this light, Libya’s program of worldwide terrorism constituted commercial activities directed particularly at the United States.... As such, these activities have a “substantial connection” to the United States which renders Libya subject to the jurisdiction of the United States Courts over commercial activities in the United States.

The victims of terrorism intensified their efforts to force Congress to create a special terrorism exception to foreign sovereign immunity. The exception met with support in Congress, but resistance from the Clinton Administration. President Clinton eventually signed an amendment to the FSIA 1978 into law after the Cuban Air Force shot down a civilian airplane over international waters. The amendment, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) created a new terrorism exception from immunity as follows:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case –
 ...in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such 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...
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The terrorism exception was not categorical, but carefully qualified in important respects. Either the claimant (if not the same as the victim) or the victim must have been a national of the United States at the time of the act. Furthermore, the offending State must have been officially designated a State sponsor of terrorism at the time of the terrorist act, or so designated after the act because of the terrorist act. The second qualifier provided the executive branch of the government

with important diplomatic stick and carrot: by placing a particular State on the list of officially designated State sponsors, or removing it from the list, the executive branch could alternatively expose that State to, or shield that State from, civil lawsuits for its terrorist acts.

Over time, as courts interpreted the AEDPA in different cases, they did so in sometimes surprising ways that departed from the likely intent of Congress when the AEDPA was first enacted. Serious defects in the terrorism exception emerged. For example, courts rendered decisions which, variously, restricted the generous limitation period (effectively closing the courthouse doors on claimants victimised by terrorist acts occurring prior to 1996), denied that the AEDPA had created a federal substantive cause of action (destroying uniformity in this important area of the law by forcing claimants to plead causes of action under the law of the 50 American States), denied that the waiver extended to property loss even where arising from terrorist acts which also caused personal injury or death (leaving an entire class of claimants without a remedy), permitted defendant States to delay and obstruct litigation interminably by making frivolous appeals even before a final judgment had been rendered, and insulated the assets of a State that had been carefully structured in state owned corporations and other entities from attachment. Even where victims had succeeded in obtaining judgments, successive administrations intervened to block the attachment of frozen assets to satisfy those judgments. US courts had awarded approximately USD 18 billion in judgments against State sponsors and their officials, most of which remained uncollected.

The AEDPA had become a dead letter, and the victims of terrorism paper tigers. The Department of State, perhaps because it was protective of the constitutional role of the president in conducting the foreign relations of the United States, perhaps for other political or diplomatic reasons, seemed in many cases unable to advance government-to-government negotiations for the resolution of outstanding claims. The victims and their counsel began the back-breaking work of lobbying Congress for further changes that would bring the law closer to its original intention. JAVTA was included within the National Defense Authorisation Act of 2008 (NDAA 2008), enacted by Congress with overwhelming bipartisan majorities, and sent to President Bush for his signature.

However, in December 2007, before JAVTA had been signed into law, Iraq’s President Nouri al-Maliki threatened to withdraw billions in Iraqi oil revenues from U.S. capital markets if JAVTA were actually brought into force. He feared that US

victims of Iraqi terrorism would use the new law to seize the assets. It is good evidence of the potency of JVTa that President Bush was willing to and in fact did veto¹² the entire NDAA 2008 – which sets forth the sovereign national defence policy of the United States, and includes important appropriations items such as pay and benefits levels for US military personnel – in order to spare Iraq from the effects of JVTa. Congress returned NDAA 2008 to the president with a provision granting the president the authority to waive JVTa for Iraq. The president signed JVTa into law, and promptly issued a waiver for Iraq.

Other State sponsors of terrorism, having witnessed the Iraqi waiver, are now pressing the Bush Administration and Congress for exemptions and waivers of their own. In October, 2003, a German registered ship with the name “BBC China” painted on its hull left the Suez Canal and entered the Mediterranean Sea bound for Libya. It was being tracked by US spy satellites. At the request of the United States, the Italian Coast Guard intercepted the vessel and inspected it. The cargo included containers bearing stamps from a Malaysian factory used by the A. Q. Khan network, and that contained Pakistani-designed centrifuge parts that had been manufactured at the factory. In December 2003, the memory of the American invasions of Iraq no doubt foremost in its mind, Libya agreed to abandon its covert nuclear, biological and chemical weapons programmes.¹³ Libya now points to its abandonment of WMD, and its partial settlement of the claims of the American victims of Pan Am 103, and asks for its own exemption from the provisions of JAVTA. Such an exemption would have the effect of terminating a dozen or so cases that were launched by the victims of Libya’s terrorism, and that are now pending against Libya in US courts. At this point in time, the Bush Administration and Congress seem unwilling to grant the exemption unless at least some of these outstanding cases are fairly resolved, and the two governments are negotiating a settlement mechanism.¹⁴

Oil has emerged as a powerful lobby against the victims of terrorism. The US-Libya Business Association, for example, was founded by Hess, Occidental Petroleum, Chevron, ConocoPhillips and the Marathon Oil Corporation. Its membership also includes the petroleum companies Dow Chemical, Fluor, Shell and Valmont, and the mammoth American law firm White & Case. Libya has appointed White & Case as its national co-ordinating counsel for all terrorism lawsuits pending in the United States. Libya has also retained former Louisiana Congressman Bob Livingston for USD2.4 million to lobby Congress for a waiver from the application

of JVTa. Thus JVTa has brought into focus the nexus between US foreign policy toward State sponsors of terrorism, and US energy policy, and raises important questions. In an era of declining worldwide oil production and increasing worldwide demand and competition for oil, what are the implications of a State sponsor of terrorism also being a producer of cheap oil? At what price would any US Administration be willing to abandon the victims of international terrorism in their struggle for accountability, in favour of a cheap supply of oil from those State sponsors?

Among the provisions that account for the potency of JVTa, are the following: (1) a provision that is intended to curb the abuse of interlocutory appeals taken frivolously for the purpose of delaying litigation, by requiring the trial court to first certify the question for appeal; (2) a provision clarifying that plaintiffs suing under the AEDPA had until the later of 10 years from the enactment of the AEDPA on 24 April 1996, or 10 years from the date on which the cause of action arose, to file their complaints; (3) a provision allowing any member of the United States armed forces, any employee of the government of the United States, and any individual performing a contract awarded by the US government, even if not a US national, to sue; (4) a provision clarifying that there is a private, federal, substantive right of action, not merely a waiver of immunity from the jurisdiction of the courts; (5) a provision permitting plaintiffs to sue for property damage; (6) a provision that stops short of allowing pre-judgment attachment of assets, but permits an automatic lien of *lis pendens* with respect to property in the jurisdiction; and (7) the following key provision enabling plaintiffs with judgments to attach assets that have been structured by a State in separate juridical entity:

... and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The language of JVTa empowers the victims of international terrorism to bring effective civil litigation against State sponsors of terrorism. This kind of litigation increases the probability that State perpetrators will be exposed and held legally accountable, shifts back onto these States the full financial costs of their crimes, and forces these States to deal with the public relations fallout. This targeted, direct application of disincentives should operate as an important deterrent against future State sponsorship of acts of international terrorism.

Our enemy has rejected words – the words of Socratic debates, the words of Platonic ideals, the words of Aristotelian diplomacy. We may ask, then, in the response to international terrorism, is there any place for words? Yes. Emphatically, yes – the words of the Law. The Rule of Law, the blessed Rule of Law which is the foundation and strength of every true democracy, is embodied in words – words that flow in great political speeches, words that breathe life into constitutions, words that are the flesh and bones of statutes and regulations, words that are the justice of judges.

END NOTES:

1. As quoted in *Civil Litigation Against Terrorism* p.3 (John Norton Moore ed., Carolina Academic Press 2004).
2. Public Law No. 107-56, 115 Stat. 272 (2001).
3. USA Patriot Act of 2001, Title X, § 1001.
4. For a balanced presentation of both sides of the civil liberties versus national security argument, see the American Bar Association Standing Committee on Law and National Security’s Patriot Debates: Experts Debate the USA Patriot Act (Stewart A. Baker and John Kavanagh eds., ABA Publishing 2005).
5. Public Law No. 110-181, Section 1083 (2008).
6. *Nottinghamshire CC v Secretary of State for the Environment* (House of Lords, 1986).
7. 11 U.S. 116, 144 (1812).
8. *Ex parte Peru*, 318 U.S. 578, 588-589 (1943).
9. 28 U.S.C. §§ 1602-11.
10. Complaint filed in Bruce Smith as Personal Representative of Ingrid Smith, deceased, v. The Socialist People’s Libyan Arab Jamahariyah, Libyan External Security Organization, Libyan Atab Airlines, et al., as quoted in Allan Gerson and Jerry Adler, *The Price of Terror: How the Families of the Victims of Pan Am 103 Brought Libya to Justice*, p. 181 (HarperCollins Publishers, Inc. 2001).
11. 28 U.S.C. § 1605(a)(7).
12. See Notification of H.R. 1585, the National Defense Authorisation Act for FY 2008, H.R. Doc. No. 110-88
13. Douglas Frantz and William C. Rempel, *New Branch Found in Nuclear Network*, Los Angeles Times (28 November 2004).
14. CNN, *Libya-US Negotiating Settlement in Terror Attacks*, <http://cnnwire.blogs.cnn.com/2008/05/30/libya-us-negotiating-settlement-in-terror-attacks/>.