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Lawsuits Against State Supporters of Terrorism: An Overview

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Summary

A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) enables American victims of international terrorist acts supported by certain States designated by the State Department as supporters of terrorism — Cuba, Iran, Libya, North Korea, Sudan, Syria, and until recently, Iraq — to bring suit in federal court to seek monetary damages. Holders of judgments against these States, however, have encountered difficulties in their efforts to collect, despite congressional efforts to make blocked (or “frozen”) assets of such States available for attachment by judgment creditors. A recent court decision invalidating plaintiffs’ cause of action under the 1996 law raises uncertainties about the future of lawsuits against terrorist States. This report provides an overview of these issues, including a summary of a lawsuit against Iran by former hostages, *Roeder v. Islamic Republic of Iran*, and a lawsuit against Iraq by former prisoners of war (POWs), *Acree v. Republic of Iraq*, as well as a brief synopsis of relevant legislative proposals (H.R. 1321, H.R. 865, H.Con.Res. 93). These issues are covered in greater depth in CRS Report RL31258, *Suits Against Terrorist States By Victims of Terrorism*. The report will be updated.

Ordinarily, foreign States, including their agencies and instrumentalities, may not be sued in U.S. courts unless they waive their sovereign immunity or an exception under the Foreign Sovereign Immunities Act (FSIA) (28 U.S.C. §§ 1602 *et seq.*) applies. The FSIA provides a list of circumstances where U.S. federal courts will not recognize foreign sovereign immunity. In these circumstances, U.S. courts may exercise jurisdiction over a dispute and treat a foreign state as if it were a private entity. It does not establish liability or a cause of action; it merely removes foreign sovereign immunity as a defense to the courts’ jurisdiction. The property of foreign States is also immune from judicial attachment to enforce judgments, unless the property is excepted under 28 U.S.C. § 1610.

In 1996 Congress amended the FSIA to allow civil suits by U.S. victims of terrorism against designated State sponsors of terrorism (DSST)¹ responsible for, or complicit in,

¹ The list, established by the State Department, currently includes Cuba, Iran, Libya, North
(continued...)

such terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage taking. 28 U.S.C. § 1605(a)(7). After a court found that the waiver of sovereign immunity did not itself create a cause of action,² Congress passed the "Flatow Amendment" (28 U.S.C.A. § 1605 note), to create a cause of action for such cases. Courts initially interpreted the statute as creating a cause of action against foreign States and their agencies and instrumentalities, although its plain language referred only to officials, employees, and agents of such States. Numerous court judgments, generally rendered after the defendants' default, succeeded under the exception, resulting in awards to plaintiffs of substantial damages.³

Future plaintiffs will likely find it more difficult to prevail in lawsuits against DSSTs after the D.C. Circuit Court of Appeals held in *Cicippio-Puelo v. Islamic Republic of Iran*⁴ that neither the terrorism exception to the FSIA nor the Flatow Amendment creates a private right of action against the foreign government itself, including its agencies and instrumentalities. Despite the language in the Flatow Amendment seemingly to the contrary,⁵ the court found that agents, officials or employees retain immunity for conduct performed in their official capacity. Under this ruling, plaintiffs seeking recovery for state-supported acts of terrorism under the Flatow Amendment must file suit against specific foreign officials or agents who are alleged to be responsible for the terrorist acts causing their injuries. Additionally, judgments may be harder to collect because the foreign State might not be liable to pay the judgment.

Victims of terrorism can continue to bring lawsuits against DSSTs, including their agencies and instrumentalities, but they must assert causes of action arising from other statutes or common law. Even if officials, employees and agents of DSSTs are held to be potentially liable for their official acts, however, it appears that the most frequently asserted cause of action, based on the provision of material support to terrorists, would be unavailable against the officers and employees allegedly responsible.⁶ The Supreme

¹ (...continued)

Korea, Sudan, and Syria. See 22 CFR Part 126(1)(d) (2004). Iraq was removed from the list in 2003 by the President's Determination, see 69 Fed. Reg. 18,810 (April 9, 2004), and its designation was officially rescinded in October of 2004, 69 Fed. Reg. 61,702 (Oct. 20, 2004).

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

³ See Suits Against Terrorist States By Victims of Terrorism, CRS Report RL31258.

⁴ 353 F.3d 1024 (D.C. Cir. 2004)(remanding to allow plaintiffs to amend their complaint).

⁵ 28 U.S.C.A. § 1605 note ("an official, employee, or agent of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency shall be liable to a United States national . . ." for injury caused by acts for which immunity is unavailable under the terrorism exception to the FSIA).

⁶ 18 U.S.C.A. § 2333 creates a civil remedy for U.S. nationals injured by an act of terrorism, and permits plaintiffs to recover threefold their damages as well as litigation costs. However, 18 U.S.C. § 2337 exempts from suit under § 2333 agencies, officers, or employees of the U.S. or any foreign government. While the Flatow Amendment creates a cause of action against agents and employees of DSSTs, it does so only to the extent that U.S. officers and employees are amenable to lawsuit for similar conduct. 28 U.S.C. § 1605 note.

Court may have an opportunity to decide the issue, if it agrees to hear Iran's plea to invalidate a default judgment against it.⁷

Enforcement of Judgments Against Terrorist States

When the claimants in the initial suits against Cuba and Iran in 1997 and 1998 sought to satisfy their judgments by attaching the States' diplomatic and consular property as well as their assets in the United States that had been blocked pursuant to the Trading with the Enemy Act (TWEA) (50 App. U.S.C.A. § 5), or the International Economic Emergency Powers Act (IEEPA) (50 U.S.C.A. §§ 1701 *et seq.*), the Clinton Administration intervened to oppose the attachments, arguing that the United States has international treaty obligations to protect all countries' diplomatic and consular properties, that the blocked assets of foreign States provide useful diplomatic leverage and should remain available for future use, that the attachment of the blocked assets by early claimants under the FSIA exception would mean that nothing would be left to compensate future claimants, and that the attachment of both kinds of assets would expose U.S. assets to reciprocal action in certain foreign States. The courts agreed.

The plaintiffs and their attorneys then sought Congress' help in collecting on their judgments; and Congress has repeatedly responded. In section 117 of the Treasury and General Government Appropriations Act for Fiscal Year 1999 (P.L. 105-277), the 105th Congress provided that victims who obtained judgments against terrorist States could attach both the terrorist States' frozen assets and their diplomatic and consular property. But because of the Administration's continuing objections, section 117 also gave the President authority to waive these provisions in the interest of national security, which President Clinton exercised on signing the bill into law.

In response, the 106th Congress enacted legislation to pay portions of selected judgments largely out of U.S. funds. Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) (P.L. 106-386), directed the Secretary of the Treasury to pay the compensatory damages portion of one judgment against Cuba⁸ out of Cuba's frozen assets. The VTVPA further directed that the compensatory damages portions of ten judgments against Iran be made out of appropriated funds (up to a maximum of about \$400 million) and that the United States would then be obligated to seek reimbursement for those payments from Iran. Claimants could opt to receive an amount equal to 110 percent of their compensatory damages, but had to relinquish the right to seek to enforce the judgment in court. Claimants could also opt to receive an amount equal to 100 percent of the compensatory damages, in which case they could continue to pursue enforcement of the punitive damages, but relinquished the right to attach certain property of the DSST, including blocked assets and diplomatic property. As a consequence, \$96.7 million of the Cuban assets frozen in this country was paid to

⁷ Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., 385 F.3d 1206 (9th Cir. 2004), *petition for cert. filed sub nom* Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi, 73 USLW 3498 (Feb 11, 2005)(NO. 04-1095)

⁸ In *Alejandro v. Republic of Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997), a federal district court awarded the families of three of the four occupants of the "Brothers to the Rescue" planes shot down by Cuba in 1996 a total of \$187.7 million in damages against Cuba.

the claimants in the one judgment against Cuba; and more than \$380 million in U.S. funds was paid out with respect to the ten judgments against Iran.

The TVTPA did not satisfy all claimants. Its *ad hoc* coverage provided relief in only eleven designated suits; it provided no compensation to other claimants who had obtained, or might obtain, judgments under the terrorist state exception to the FSIA. It did not provide any compensation for the nearly six thousand claims against Cuba for death, injury, and expropriation during and after Castro's takeover, which were determined to be legitimate by the Foreign Claims Settlement Commission (FCSC) in the late 1960s, but depleted Cuba's frozen assets in the United States by half. Additionally, the payment of the ten judgments against Iran out of U.S. funds seemed to some observers to contradict one of the major justifications for enacting the terrorist state exception to the FSIA in the first place, namely, to force terrorist States to pay a price for their actions and to deter them from engaging in such acts in the future.

The 107th Congress directed the Administration to submit a legislative proposal to establish "a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism" with its proposed budget for FY2003 (P.L. 107-77), but none was offered. Congress added more suits to those listed as compensable under §2002 and sought to make more frozen assets available to satisfy judgments. The Terrorism Risk Insurance Act of 2002 (TRIA) (P. L. 107-297) made more frozen assets of DSSTs available for attachment by restricting the presidential waiver authority to property protected by international treaty.

In the 108th Congress, Senator Lugar (R-IN) introduced an Administration proposal that would establish an administrative procedure to provide compensation to victims of international terrorism. The measure would have made DSSTs' blocked assets unavailable for future judgment holders, but would have established the "Benefits for Victims of International Terrorism Program," which would have been authorized to pay up to \$262,000 per claim. The bill was the subject of a hearing by the Senate Committee on Foreign Relations, but no further action was taken.

The Iran Hostages

A further complication arose in connection with a suit against Iran by those who were held hostage from 1979-81, whose previous efforts to sue Iran for their ordeal had failed due to Iran's sovereign immunity. In late 2000, the 52 persons who were held hostage and their families initiated a new suit against Iran under the terrorist state exception to the FSIA. After a federal district court held Iran to be liable but before it assessed damages in 2001, the U.S. government intervened and argued that the case should be dismissed because Iran had not been designated a terrorist state at the time of the hostage incident — one of the requirements of the FSIA exception allowing suits against terrorist States — and because one part of the Algiers Accords that led to the hostages' release in 1981 required the United States to bar any suits from being adjudicated based on the incident. Congress enacted riders to pending appropriations bills to allow the suit to proceed. Nonetheless, the federal district court in 2002 dismissed the suit on the grounds the Algiers Accords, although entered into as a series of executive agreements, are binding on the United States and Congress had not acted with sufficient

clarity to abrogate the provision precluding suit.⁹ Subsequent efforts in the 107th and 108th Congress expressly to abrogate the Algiers Accords did not succeed.

Suits Against Iraq

The ouster of Saddam Hussein's regime raised new issues with respect to judgments or claims against Iraq, namely, whether Congress and the President can retroactively restore sovereign immunity to Iraq for causes of action that arose prior to the war. President Bush issued Executive Order 13290 providing for the confiscation and vesting of Iraq's \$1.7 billion in frozen assets and directing that they be deposited in the Development Fund for Iraq and used for Iraq's reconstruction. The order excepted from that confiscation assets already ordered attached pursuant to two existing judgments against Iraq (which amounted to about \$300 million) as well as Iraq's diplomatic and consular property. But it otherwise vested title to Iraq's frozen assets in the United States and, consequently, seemed to make those assets unavailable to those who might later obtain judgments against Iraq under the terrorist state exception to the FSIA. Subsequently, on the basis of a provision in the Supplemental Appropriations Act for Fiscal 2003 (P.L. 108-11), President Bush then issued a Presidential Determination declaring a number of provisions concerning terrorist States, including the FSIA exception and the provision for payment of judgments out of blocked assets, inapplicable to Iraq.¹⁰ He also issued Executive Order 13303 providing that the Development Fund of Iraq cannot be attached or made subject to any other kind of judicial process. The validity of these actions has been contested in two lawsuits.

World Trade Center Victims. Plaintiffs who were awarded \$64 million against Iraq in connection with the September, 2001 attacks on the World Trade Center (WTC) were rebuffed in their effort to attach the vested Iraqi assets.¹¹ The Second Circuit Court of Appeals affirmed the district court's finding that those assets, after their transfer to the U.S. Treasury, were protected by U.S. sovereign immunity, and validated the President's determination making them unavailable for judicial attachment.

Former U.S. POWs in Iraq. Seventeen Americans who were held captive and brutally tortured by Iraq during the first Gulf War and their families, who were awarded nearly \$1 billion in damages,¹² initially obtained a temporary restraining order (TRO) requiring the government to retain at least \$653 million of Iraq's assets (enough to cover the compensatory damages) pending further decision by the court. The Justice Department sought to intervene, arguing that Iraq was entitled to sovereign immunity in court actions by terrorism victims after the President's determination, and that the funds were needed for the reconstruction of Iraq. After an expedited hearing on the matter, the court held that the Iraqi assets were not subject to attachment by the plaintiffs and

⁹ *Roeder v. Islamic Republic of Iran*, 195 F.Supp.2d 140 (D. D.C. 2002), *aff'd* 333 F.3d 228 (D.C. Cir. 2003), *cert. denied* 124 S.Ct. 2836 (2004).

¹⁰ See Memorandum for the Secretary of State (Presidential Determination No. 2003-23) (May 7, 2003).

¹¹ *Smith v. Federal Reserve Bank of New York*, 280 F.Supp.2d 314 (S.D.N.Y.), *aff'd* 346 F.3d 264 (2nd Cir. 2003).

¹² See *Acree v. Republic of Iraq*, 271 F.Supp.2d 179 (D.D.C. 2003).

dissolved the TRO, but declined to vacate the judgment, holding that only Iraq could assert a defense based on sovereign immunity, and that Congress and the President could not retroactively restore Iraq's previously abrogated sovereign immunity. Both sides cross-appealed to the Court of Appeals for the D.C. Circuit, which held that the district court had abused its discretion by denying the government's motion to intervene.¹³ However, the court reversed the President's Determination insofar as it nullified the FSIA provisions with respect to Iraq, finding that Congress had not intended to permit the President to revoke those provisions. The plaintiffs were nonetheless prevented from collecting because the court of appeals vacated their judgment based on their failure to state a valid cause of action against Iraq, and because Saddam Hussein retained immunity for official conduct. The Supreme Court denied the POWs' petition for certiorari.

Proposed Legislation. One bill was introduced in the House of Representatives in the 108th Congress to provide relief for the former POWs. H.R. 2224, the "Prisoner of War Protection Act of 2003," would have allowed the plaintiffs, as well as any POWs who might later assert a cause of action in the more recent war against Iraq, to recover damages out of the \$1.73 billion in frozen Iraqi assets that were vested by order of the President to pay for the reconstruction of Iraq. No similar bill has yet been introduced in the 109th Congress, but H.Con.Res. 93 would "express[] the sense of the Congress that the Department of Justice should halt efforts to block compensation for torture inflicted by the Government of Iraq on American prisoners of war during the 1991 Gulf War." H.R. 1321, introduced March 15, 2005, would authorize the payment of \$1 million dollars to each of the seventeen plaintiffs out of unobligated funds appropriated under the heading of "Iraq Relief and Reconstruction Fund" in the 2004 Emergency Supplemental.¹⁴

Another bill, H.R. 865, would amend 28 U.S.C. § 1605(a)(7) by explicitly creating a cause of action against foreign DSSTs themselves, which would survive that State's removal from the DSST list. It would allow punitive damages against the DSST and make it vicariously liable for the actions of its officials, employees, or agents; and would restrict appeals of actions brought under § 1605(a)(7). The bill would also alter the factors for determining which property interests of a DSST are subject to execution on a terrorism judgment, make U.S. sovereign immunity unavailable to protect frozen assets, and establish liens on the property of a DSST when a terrorism suit is filed. The bill would revive all suits dismissed prior to its enactment that would be cognizable by reason of its amendments, tolling the 10-year statute of limitations for such suits.

¹³ *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004).

¹⁴ P.L. 108-106, 117 STAT. 1209 (2003). Presumably, the "17 plaintiffs in the [*Acree* case]" in H.R. 1321 refers to those plaintiffs who were actually held prisoner, but excludes 37 family members and relatives, who also participated as plaintiffs and were awarded damages of from \$5 - 10 million each. *Acree v. Republic of Iraq*, 271 F.Supp.2d 179 (D.D.C. 2003), *vacated by* 370 F.3d 41 (D.C. Cir. 2004), *cert. denied* __ U.S. __ (2005).