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## A New Take on Antiterrorism: Smith v. Socialist People's Libyan Arab Jamabiriya

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# A NEW TAKE ON ANTITERRORISM: *SMITH* *V. SOCIALIST PEOPLE'S LIBYAN ARAB* *JAMAHIRIYA*

LESLIE MCKAY\*

[I]t is equally true that within the class of targets there is considerable randomness . . . . Thus, any American carrier and any other Pan Am flight would have served the bombers' purposes as well as the ill-fated flight 103. At this point, we are confronted with the paradox and tragedy of innocence.<sup>1</sup>

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\* J.D. Candidate, 1999, American University, Washington College of Law; B.A., Political Science and Business, 1996, Linfield College. Thanks to all my family and friends for their constant support and good humor, especially my parents. This Note is dedicated to Professors Elliot Tenofsky and Howard Leichter, who spent four years forcing me to write without this many footnotes and, in the process, taught me to think.

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## INTRODUCTION

It has been almost ten years since Pan Am Flight 103 exploded over Lockerbie, Scotland en route from Frankfurt to Detroit.<sup>2</sup> Of the 270 people killed in the terrorist<sup>3</sup> attack, 189 were Americans.<sup>4</sup> Among them were business people, airline employees, and college students—including thirty-eight from Syracuse University returning home from a semester of studying abroad.<sup>5</sup> In 1994, families of the Lockerbie victims won a judgment<sup>6</sup> against Pan Am for its role in allowing a suitcase containing a bomb to be loaded on board the plane.<sup>7</sup> The damages phase of this case created standards for damage

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2. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 309, *aff'd with modifying order* 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1996) (describing the events leading up to the civil suit against Libya for the bombing of Pan Am Flight 103).

3. See 18 U.S.C. § 3077 (1994). An "act of terrorism" is a violent act, dangerous to human life, which is a violation of the criminal laws of the United States and is intended: "(1) to intimidate or coerce a civilian population; (2) to influence the policy of a government by intimidation or coercion; or (3) to affect the conduct of a government by assassination or kidnapping." *Id.*

4. See *In re Air Disaster*, 37 F.3d 804, 810 (2d Cir. 1994) (characterizing the passengers aboard Pan Am 103 and specifically detailing the American citizens).

5. See *id.* (describing the American passengers killed in the bombing); see also Toni Locy, *Families Suing Libya Over Pan Am Blast*, WASH. POST, May 7, 1996, at A13 (describing the victims of the bombing). See generally Peter Marks, *Remembering Pan Am 103: Off Long Island, Echoes From Lockerbie*, N.Y. TIMES, July 28, 1996, § 4 (Magazine), at 1 (comparing the Pan Am 103 aftermath to TWA Flight 800).

6. See *In re Air Disaster*, 37 F.3d at 830 (affirming jury verdicts in three cases regarding liability and vacating awards for loss of society damages and loss of parental care damages). See generally John H. Cushman, Jr., *Civil Trial of Lockerbie Bombing Case Under Way*, N.Y. TIMES, Apr. 28, 1992, at A5 (explaining the theories and strategies of both sides in the case).

7. See *In re Air Disaster*, 37 F.3d at 811 (describing plaintiff's theory that Libyan agents concealed the bomb inside a radio-cassette player and packed it in a

awards in future cases against Pan Am resulting from the bombing.<sup>8</sup> Based on the *In re Air Disaster*<sup>9</sup> decision, the lead attorney for all 225 plaintiffs approximated total damage awards at \$500 million, making it among the largest disaster liability awards in history.<sup>10</sup> In fact, a subsequent civil suit against Pan Am yielded \$19 million in damages to a widow, one of the largest awards to an individual in the history of commercial airline disasters.<sup>11</sup>

Criminal cases are currently pending against the alleged Libyan perpetrators, Abd-al Basit al-Magrahi and Lamin Fhima, in both the United States and the United Kingdom. Maintaining that it condemns all terrorist activities, Libya considers itself a prime victim of terrorism and firmly denies any connection with the Pan Am bombing.<sup>12</sup> Despite repeated demands by the United States, the United Kingdom, and the United Nations, Libya steadfastly refuses to turn either of the suspects over to authorities.<sup>13</sup> Using a variety of tactics in an attempt to escape the current sanctions,<sup>14</sup> Libya continues to ignore the de-

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bronze suitcase loaded onto an Air Malta flight to Frankfurt, Germany from which it was transferred to Flight 103).

8. See *id.* at 810 (considering the effect of the damage award in the civil trial on future cases against the carrier).

9. 37 F.3d 804 (2d Cir. 1994).

10. See Ronald Sullivan, *Court Upholds Pan Am 103 Awards*, N.Y. TIMES, Feb. 1, 1994, at D2 (reviewing the civil judgments against Pan Am for the airline's role in the bombing).

11. See Peter Marks, *Widow of a Pan Am Crash Victim is Awarded \$19 Million*, N.Y. TIMES, Apr. 19, 1995, at B5 (commenting on the size and importance of the fourth civil judgment against Pan Am).

12. See *Letter Dated 14 May 1992 From the Permanent Representative of the Libyan Arab Jamhuriya to the United Nations Addressed to the Secretary-General*, U.N. SCOR, U.N. Doc. S/23918, Annex at 2-3 (1992) [hereinafter *Libyan Letter to U.N. Secretary-General*] (responding to Security Council statements calling for Libyan cooperation in the Pan Am 103 investigation).

13. See *id.* (noting that the two agents remained in Libya following the indictments); see also U.N. Security Council Resolution 731, U.N. SCOR, 47th Sess., 3033d mtg., at 1, U.N. Doc. S/RES 1731 (1992) (condemning the Pan Am 103 bombing and urging the Libyan government to immediately cooperate in establishing responsibility for the incident); U.N. Security Council Resolution 748, U.N. SCOR, 47th Sess., 3063d mtg., at 1, U.N. Doc. S/RES 1748 (1992) (reaffirming Resolution 731 and describing sanctions to be imposed until the Security Council decides that the Libyan government has complied with the requirements of Resolution 731). The adoption of resolution 748 imposed sanctions on Libya restricting international air travel, the provision of aircraft technology, and the provision of arms or arms-related material. See *id.*

14. See *supra* note 13 (describing U.N. Security Council Resolution 748 im-

mands of the international community.<sup>15</sup>

Recently, personal representatives of victims killed in the bombing<sup>16</sup> sued Libya<sup>17</sup> in New York district court, alleging that through its agents,<sup>18</sup> the Libyan government deliberately caused the bomb to be placed on board Flight 103.<sup>19</sup> The Foreign Sovereign Immunities Act<sup>20</sup> ("FSIA") stymied the efforts of these plaintiffs by immunizing

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posing international sanctions on Libya); *infra* notes 133-135 (discussing the imposition of sanctions on Libya by the United States).

15. See Declaration on Libyan Terrorism, DEP'T ST. DISPATCH, Aug. 23, 1993, available in LEXIS, Intlaw Library, Dstate File (observing impatiently that "envoys of the Secretary-General of the United Nations to Tripoli repeatedly come back empty-handed, without indications of compliance although with many assurances of Libya's cooperation").

16. See *Smith*, 886 F. Supp. at 309 (identifying the plaintiffs and their respective claims). Plaintiff Bruce Smith lost his wife on the flight and brought suit on behalf of a class of family members of all passengers and crew killed in the bombing. See *id.* Plaintiff Paul Hudson sued as personal representative for his wife and daughter, both passengers on Flight 103. See *id.*

17. The Socialist People's Libyan Arab Jamahiriya is referred to throughout this Note as Libya.

18. See Pan Am Flight 103 Indictments, DEP'T ST. DISPATCH, Nov. 18, 1991, available in LEXIS, Intlaw Library, Dstate File (announcing the United States indictments in the Lockerbie bombing). Both the United States and the United Kingdom indicted Abd-al Basit al-Magrahi, a senior Libyan intelligence official, and Lamin Fhima, the former manager of the Libyan Arab Airlines office in Malta. See *id.* The United States emphasized that "[t]his was a Libyan Government operation from start to finish". *Id.*; see also Additional Information on the Bombing of Pan Am Flight 103, DEP'T ST. DISPATCH, Nov. 18, 1991, available in LEXIS, Intlaw Library, Dstate File (detailing specific information about all aspects of the planning and execution of the bombing). But see Stephen Breen, *Foreign Office Acts After New Lockerbie Claim*, SCOTSMAN, July 9, 1997, at 8 (disclosing new information regarding the testimony of a former high-ranking Iranian intelligence officer who claims Iran, not Libya, organized and perpetrated the bombing of Flight 103); *Defector Says Iran is Behind Lockerbie Blast*, HOUS. CHRON., July 7, 1997, at 12 (considering new information that Iran is responsible for placing the bomb aboard Flight 103).

Recently, Libya sent a letter directly to the families of the victims charging that the "government of the United States is neither interested in the incident nor does it care about the victims." See Thomas W. Lippman, *Pan Am 103 Families Sent Letter by Libya Declaring Interest in "Negotiations"*, WASH. POST, June 7, 1997, at A19. For a debate by two family members of Flight 103 victims on the merit of the Libyan-proposed negotiations, see *Libya and Pan Am 103*, WASH. POST, Oct. 26, 1997, at C3.

19. See *Smith*, 886 F. Supp. at 309 (detailing plaintiffs' claims).

20. 28 U.S.C. § 1602-1611 (1994). For a general discussion of the purpose and evolution of the FSIA, see William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257 (1997).

Libya against the jurisdiction of American courts.<sup>21</sup> In response to these difficulties, the recently enacted Antiterrorism and Effective Death Penalty Act of 1996<sup>22</sup> ("AEDPA") adds a new subsection to the FSIA<sup>23</sup> that removes the sovereign immunity of a foreign state sponsoring terrorist activities.<sup>24</sup>

This Note examines the FSIA, both before and after its recent amendment, in light of the Second Circuit holding in *Smith v. Socialist People's Libyan Arab Jamahiriya*.<sup>25</sup> Part I explains sovereign immunity,<sup>26</sup> the FSIA, and the principle of *jus cogens*.<sup>27</sup> Part II discusses the facts of *Smith* and describes the court's analysis in holding that Libya's violation of *jus cogens* did not implicitly waive its sovereign immunity. Part III considers the text of the antiterrorism exception and the limitations therein for plaintiffs bringing suits against foreign sovereigns for terrorist activities. Part IV analyzes the four primary concerns of the executive branch in granting civil jurisdiction over cases of this type and concludes that these concerns are insufficient to prevent prosecution of Libya in this case. Part V recommends federal cooperation with the *Smith* plaintiffs on remand, consistent with both congressional intent under the FSIA and with past United States actions in the fight against state-sponsored terrorism.

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21. See Locy, *supra* note 5, at A13 (stating that in the past the FSIA doomed civil lawsuits against foreign sovereigns sponsoring terrorism).

22. Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA].

23. 28 U.S.C. §1605(a)(7) (1994).

24. See *id.* (creating an antiterrorism exception to sovereign immunity under the FSIA); see also Locy, *supra* note 5, at A13 (describing the effect of the antiterrorism exception).

25. 121 F.3d 239 (2d Cir.), *cert. denied* 117 S. Ct. 1569 (1996).

26. See *infra* notes 28-31 and accompanying text (defining sovereign immunity as a jurisdictional doctrine protecting foreign states from prosecution in the domestic courts of another state).

27. See *infra* notes 53-60 and accompanying text (discussing *jus cogens*). A *jus cogens* norm is a peremptory norm of international law from which no derogation is permitted. See *id.*

## I. BACKGROUND

### A. SOVEREIGN IMMUNITY

Expressed by the maxim *par in parem non habet jurisdictionem*,<sup>28</sup> the international community widely accepts the notion that a foreign state enjoys some jurisdictional immunity in the domestic courts of another state.<sup>29</sup> Because this doctrine is jurisdictional rather than substantive,<sup>30</sup> the immunity granted foreign states is therefore not absolute.<sup>31</sup> A state may choose not to plead sovereign immunity<sup>32</sup> or may explicitly waive its sovereign immunity, thereby submitting to the jurisdiction of a foreign state.<sup>33</sup> Further, a forum state<sup>34</sup> has no obligation to accept a plea of sovereign immunity before determining that the foreign state acted as a sovereign.<sup>35</sup>

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28. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 316 (2d ed. 1973) (defining the principles on which sovereign immunity rests). "[L]egal persons of equal standing cannot have their disputes settled in the courts of one of them." *Id.*

29. See Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL L. REV. 365, 368-70 (1989) (providing information on the origins and evolution of sovereign immunity).

30. See VEIJO HEISKANEN, *INTERNATIONAL LEGAL TOPICS* 133-34 (1992) (explaining the basic principles of sovereign immunity). A substantive law creates rights or duties of parties rather than prescribing the method of enforcing those rights as a jurisdictional law does. See BLACK'S LAW DICTIONARY 1429 (6th ed. 1990) (defining the term "substantive law").

31. See HEISKANEN, *supra* note 30, at 133-34 (setting forth the fundamental tenets of sovereign immunity).

32. See H.R. REP. NO. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 (commenting on implied waivers and providing examples). Choosing not to plead sovereign immunity is one type of an implicit waiver of sovereign immunity. Other implicit waivers recognized by Congress include cases where a foreign state agrees to arbitration in another country and cases where a foreign state agrees that the law of another country should govern a contract. *See id.*

33. See HEISKANEN, *supra* note 30, at 134 n.136 (explaining that a foreign state may waive its immunity after the claim arises, or in advance). Explicit waivers occur when a foreign state renounces its immunity by treaty or in a contract with a private party. *See* H.R. REP. NO. 94-1487, *supra* note 32, at 18 (describing waivers of immunity); *see also* BROWNLIE, *supra* note 28, at 327 (stating that an explicit waiver may occur, *inter alia*, by treaty or other diplomatic communication, and by domestic legislation establishing legal responsibility for an action).

34. See BLACK'S LAW DICTIONARY 655 (6th ed. 1990). A forum is the "particular place where judicial or administrative remedy is pursued." *Id.*

35. See HEISKANEN, *supra* note 30, at 134-35 (explaining that the state is under

A forum state may determine the sovereignty of another state based on one of two doctrines. If the forum state follows the restrictive view of sovereign immunity, it grants immunity to foreign states only for acts of a public law nature, or acts *jure imperii*, and not to acts *jure gestionis*, or acts of a private law nature.<sup>36</sup> Conversely, if the forum state adheres to the doctrine of absolute immunity it allows immunity for all acts of foreign states regardless of their substantive nature.<sup>37</sup>

## B. THE FOREIGN SOVEREIGN IMMUNITIES ACT

"Prior to the enactment of the FSIA in 1976, United States law on sovereign immunity bordered on the incoherent."<sup>38</sup> The United States adopted the restrictive theory of sovereign immunity in 1952 in a document known commonly as the "Tate Letter."<sup>39</sup> This shift, from absolute to restrictive immunity,<sup>40</sup> brought United States law in line with the law of many foreign states around the world.<sup>41</sup> The adoption of restrictive immunity, however, resulted in considerable confusion

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no immediate obligation to grant a plea of sovereign immunity before it examines the foreign state's actions in light of the forum state's laws).

36. See *id.* at 134-35 (contrasting restrictive immunity from absolute immunity). But cf. BROWNLIE, *supra* note 28, at 323-25 (discussing the debate over distinguishing *jure imperii* and *jure gestionis* and asserting that the classification of acts as *jure gestionis* "requires value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies").

37. See *id.* (defining absolute immunity).

38. Belsky, *supra* note 29, at 368; see also H.R. REP. NO. 94-1487, *supra* note 32, at 7 (stating that prior to the FSIA, United States law, unlike other legal systems, did not provide clear standards informing citizens when they have recourse against a foreign state in a domestic court, or when a foreign state may assert sovereign immunity).

39. See THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* 187 (1970). This letter, from Jack B. Tate, Acting Legal Adviser to the Secretary of State, to Phillip B. Perlman, Acting Attorney General of the United States, "has become in effect the basic point of departure for the judicial decisions on sovereign immunity questions rendered in its aftermath." *Id.*

40. See *supra* note 36 (differentiating between absolute and restrictive immunity). See generally H.R. REP. NO. 94-1487, *supra* note 32, at 8 (providing background on the historical development and interpretation of United States sovereign immunity law and the shift from absolute to restrictive immunity). Disallowing absolute immunity for foreign sovereigns in United States courts is consistent with the established practice of the Justice Department to avoid pleading sovereign immunity in suits against the United States abroad. See *id.* at 9.

41. See H.R. REP. NO. 94-1487, *supra* note 32, at 7-8 (emphasizing that foreign courts apply restrictive immunity against the United States).



among United States courts applying the sovereign immunity doctrine.<sup>42</sup>

Congress enacted the FSIA in an attempt to provide clear standards for the application of the restrictive immunity doctrine.<sup>43</sup> A principle objective of this legislation at the time of its enactment was to ensure that determinations of sovereign immunity occurred in the judicial branch rather than the executive branch.<sup>44</sup> This transfer freed the State Department from case-by-case diplomatic pressures and ensured that legal grounds would provide the sole basis for sovereign immunity decisions.<sup>45</sup> Thus, the FSIA codified the restrictive theory of immunity, clarifying the applicable legal standards and establishing uniform procedures for litigation against foreign states in American courts.<sup>46</sup>

The FSIA is the only means to gain jurisdiction over a foreign sovereign in a United States court.<sup>47</sup> The FSIA embraces the presumption that states generally are immune from suit and creates a number of limited exceptions to this rule.<sup>48</sup> Foreign states do not benefit from immunity under the FSIA in cases concerning express or implied waiver, commercial activities, rights to property taken in

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42. See Belsky, *supra* note 29, at 369 (discussing the history of sovereign immunity law in the United States and the need for the FSIA).

43. See H.R. REP. NO. 94-1487, *supra* note 33, at 7 (stating that the FSIA will ensure that all United States courts apply restrictive immunity and noting that in the absence of the FSIA this was not always the case).

44. See *id.* at 8 (stating that "virtually every other country" makes sovereign immunity decisions exclusively in the judiciary).

45. See *id.* (discussing the intent of Congress to prevent the State Department from reacting to diplomatic pressure from a foreign state trying to assert sovereign immunity).

46. See *id.* at 7-8 (outlining the purposes of the FSIA).

47. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 439 (1989) (holding that the FSIA is the sole basis for acquiring jurisdiction over a foreign state in a federal court), *rev'g* 830 F.2d 421 (2d Cir. 1987) (holding that the Alien Tort Claims Act provided a basis for jurisdiction over a foreign sovereign). The Alien Tort Claims Act provides that "[t]he 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." 28 U.S.C. § 1350 (1994); see also H.R. REP. NO. 94-1487, *supra* note 32, at 12 (declaring that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States").

48. See 28 U.S.C. § 1605(a)(1)-(7) (1994) (setting out general exceptions to the jurisdictional immunity of a foreign state).

violation of international law, personal injury or death claims, and enforcement of arbitration agreements.<sup>49</sup>

There is not a categorical exception for torts violating international law in the FSIA.<sup>50</sup> Before the 1996 amendment, this presented a serious impediment to citizens attempting to hold a foreign state liable for its actions.<sup>51</sup> If the plaintiffs could not fit their claim within one of the specified exceptions to immunity, the foreign state evaded all legal responsibility for its actions.<sup>52</sup>

### C. *JUS COGENS*

A relatively recent concept,<sup>53</sup> a *jus cogens* norm is "a peremptory norm<sup>54</sup> of general international law."<sup>55</sup> These norms are recognized by the international community as vital to its functioning, and are therefore considered non-derogable standards.<sup>56</sup> *Jus cogens* norms are

49. See *id.* at § 1605(a)(1)-(6) (defining the first six exceptions to sovereign immunity).

50. See Belsky, *supra* note 29, at 370 (describing the framework of the FSIA).

51. See *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (holding that the non-commercial tort exception of the FSIA did not apply to actions of the Saudi Arabian police); *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (holding that because plaintiffs based their claim on the noncommercial tort exception, they could not execute the judgment against Chile's commercial assets); see also Senate Judiciary Committee News Conference, available in 1996 WL 199479 (statement of Bruce Smith) (stating that the FSIA is protecting Libya rather than assisting the American family members of Pan Am 103 victims); David Mack-usick, Comment, *Human Rights v. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 767 (1996) (commenting that the *Smith* plaintiffs were fortunate to have an alternate forum in Scotland and noting that plaintiffs in other cases, without an alternate forum, lost their claims).

52. See Belsky, *supra* note 29, at 370 (discussing the limitations of the FSIA prior to the 1996 amendment and hypothesizing that these limitations spurred the Second Circuit "to pursue a novel approach" in *Amerada Hess*).

53. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 391, § 102 reporter's note 6 (1987) (discussing peremptory norms and stating that the concept of *jus cogens* is of recent origin).

54. See BLACK'S LAW DICTIONARY 1136 (6th ed. 1990) (defining "peremptory" as "imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative"). A peremptory rule is defined as "an absolute rule; a rule without any condition or alternative of showing cause." *Id.* at 1137.

55. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679, 698.

56. See *id.* (defining a peremptory norm of general international law); see also

universally binding by their nature and do not depend upon the consent of individual states. Instead, a state, by its mere existence, implies acceptance of *jus cogens*.<sup>57</sup>

The term *jus cogens* describes peremptory norms "whose perceived importance, based on certain values and interests, rises to a level which is acknowledged to be superior to another principle, norm, or rule and thus overrides it."<sup>58</sup> Acts of slavery, genocide, and torture, among others, are considered to be violations of *jus cogens*.<sup>59</sup> Once established, only a subsequent norm of the same character may modify a *jus cogens* standard.<sup>60</sup>

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Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (citing The Vienna Convention on the Law of Treaties); HEISKANEN, *supra* note 30, at 393 (describing the prohibition of the use of force as a *jus cogens* norm).

57. See Belsky, *supra* note 29, at 399 (contrasting *jus cogens* norms from customary law norms on the basis that customary law relies on the consent of individual states while *jus cogens* norms do not).

58 M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 472 (1992); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 53, at § 102 cmt. k (explaining the interaction between *jus cogens* norms and other international laws); see also Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393, 438-441 (1988) (recognizing that when a conflict exists between a federal statute and customary international law, especially *jus cogens*, customary international law prevails).

59. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 840 (1997) (providing examples of actions commonly considered to violate *jus cogens*). It is generally accepted that the United Nations Charter principles prohibiting the use of force are considered to be *jus cogens*. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 53, at § 102 cmt. k (defining *jus cogens*). Some scholars support expanding the scope of *jus cogens* to include such concepts as the right to life and the prohibition of apartheid. See generally Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990) (remarking skeptically that an increasing number of human rights are being labeled as *jus cogens* norms).

60. See *id.* (stating how a *jus cogens* norm may be modified); see also BROWNLIE, *supra* note 28, at 499-500 (observing that the important distinguishing feature of *jus cogens* norms is their relative indelibility).

## II. SMITH V. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

### A. BACKGROUND

In 1995, Bruce Smith and Paul Hudson, both of whom lost their wives on Flight 103, brought suit against Libya and its agents in the United States District Court for the Eastern District of New York,<sup>61</sup> alleging responsibility for the bombing.<sup>62</sup> Granting Libya's motion to dismiss,<sup>63</sup> the district court held that the plaintiffs lacked jurisdiction under the FSIA.<sup>64</sup>

Plaintiffs subsequently appealed to the Second Circuit,<sup>65</sup> advancing four reasons for asserting United States jurisdiction over Libya: (1) implied waiver of immunity under the FSIA arising from Libya's alleged participation in actions that violate *jus cogens* norms;<sup>66</sup> (2) implied waiver of immunity under the FSIA arising from Libya's alleged guaranty of any damage judgment against defendants al-Megrahi and Fhima;<sup>67</sup> (3) the occurrence of the bombing on "terri-

61. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 309, *aff'd with modifying order* 101 F.3d 239 (2d Cir.), *cert. denied*, 117 S. Ct. 1569 (1996).

62. *See id.* (describing the background and posture of *Smith*). Mr. Smith alleged in his complaint that "[t]he actions of Libya in encouraging and sustaining these private acts [of terrorism] led to the deliberate and willful destruction of [the plane]." *Id.* (citing *Smith Complaint* ¶ 11). Mr. Hudson maintained that "the alleged bomb 'was placed on board the aircraft and detonated by and at the direction of Libya.'" *Id.* (citing *Hudson Complaint* ¶ 11).

63. *See id.* (stating that the motion to dismiss was pursuant to Federal Rule of Civil Procedure 12(b) for lack of subject matter jurisdiction and lack of personal jurisdiction).

64. *See id.* at 315 (explaining that the federal courts do not have the authority to determine that a state impliedly waived its sovereign immunity only by showing it acted in violation of *jus cogens*).

65. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir.), *cert. denied*, 117 S. Ct. 1569 (1996).

66. *See id.* at 242-45 (discussing the implied waiver argument).

67. *See id.* at 245-46 (reviewing the Libyan guaranty of damages). A February 27, 1992 letter from Ibrahim M. Bishari, Secretary of the Libyan People's Committee for Foreign Liaison and International Cooperation, to the Secretary General of the United Nations contained the damages guaranty, stating: "Despite the fact that discussion of the question of compensation is premature . . . Libya guarantees the payment of any compensation that might be incurred by the responsibility of the two suspects who are its nationals in the event that they were unable to pay."

tory” of the United States;<sup>68</sup> and (4) the argument that Libya’s immunity conflicts with the United Nations Charter.<sup>69</sup> The court concentrated its reasoning on the implied waiver argument, holding that a *jus cogens* violation was not an implied waiver of sovereign immunity within the meaning of the FSIA.<sup>70</sup> Accordingly, the Second Circuit affirmed the judgment of the district court.<sup>71</sup>

Although subsequent to the passage of the AEDPA, the court did not consider the antiterrorism exception in its opinion.<sup>72</sup> The Second Circuit later modified its order in this case to permit remand to the district court, so that the plaintiffs could amend their complaint.<sup>73</sup> Plaintiffs likely will amend their claims against Libya to take into account the FSIA’s new language.<sup>74</sup>

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*Id.* at 245. The court accepted Libya’s narrow construction of implied waiver, and concluded that even if the text of this letter gave rise to a binding guarantee, without a waiver of immunity the United States lacked jurisdiction to enforce the obligation. *See id.*

68. *See id.* at 246 (asserting that merely because a civil aircraft is subject to United States authority does not necessarily mean it is included in the territory of the United States); *see also* 28 U.S.C. § 1605(a)(5) (1994) (removing immunity “in any case . . . in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state”).

69. *See Smith*, 101 F.3d at 246 (analyzing the possibility of conflict between sovereign immunity and the United Nations Charter). Mr. Smith and Mr. Hudson urged the court that Article 25 of the United Nations Charter obligates all member nations to accept Security Council Resolutions, thereby committing Libya to pay compensation to the victims of Pan Am Flight 103 as mandated in Resolution 748. *See id.* The court concluded that “the FSIA’s displacement of immunity, applicable to international agreements in effect at the time the FSIA was adopted, does not contemplate a dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted.” *Smith*, 101 F.3d at 246.

70. *See Smith*, 101 F.3d at 247 (holding that a *jus cogens* violation does not implicitly waive sovereign immunity).

71. *See id.*

72. *See id.* (holding that the FSIA, “prior to the recent amendment,” does not allow the district court jurisdiction over Libya and stating “[w]hether the recent amendment affords a remedy to some or all of the appellants remains to be determined in subsequent litigation”).

73. *See id.* (modifying the judgment and remanding the case to the district court).

74. *See infra* notes 103-104 (explaining that the antiterrorism exception in the AEDPA was specifically formulated to assist the families of Pan Am 103 victims in bringing civil suits against Libya).

B. IMPLIED WAIVER FROM *JUS COGENS* VIOLATION

The court devoted most of its attention to the plaintiffs' argument that Libya impliedly waived its sovereign immunity by acting in violation of *jus cogens* norms.<sup>75</sup> Libya, arguing for a narrow construction of implied waiver, agreed that its participation in the bombing of a passenger aircraft would be a violation of *jus cogens*, but disputed that a *jus cogens* violation constitutes an implied waiver of sovereign immunity under the language and meaning of the FSIA.<sup>76</sup> After examining the terms of the FSIA and its legislative history, the court agreed with Libya and rejected the broad construction of implied waiver urged by the plaintiffs.<sup>77</sup>

## 1. The Congressional Intent of "Waiver by Implication"

Determining the congressional intent of the implied waiver provision of the FSIA was critical to the outcome in Smith.<sup>78</sup> Proponents of plaintiffs' argument contend that foreign states relinquish sovereign immunity upon engaging in conduct that violates fundamental humanitarian standards.<sup>79</sup> Through such actions, a state effectively withdraws from the community of nations and waives any immunity rights that belong to members of the community. The Second Circuit

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75. See *Smith*, 101 F.3d at 242-45 (stating that the issue before the court is what Congress meant by the term implied waiver, not whether an implied waiver based on a *jus cogens* violation is appropriate).

76. See *id.* at 242 (relating the Libyan response to the implied waiver argument); see also *supra* notes 38-52 and accompanying text (discussing the history and text of the FSIA).

77. See *Smith*, 101 F.3d at 244 (concluding that a *jus cogens* violation does not comprise an implied waiver of sovereign immunity).

78. See *id.* at 242 (stating that the issue before the court was "not whether an implied waiver derived from a nation's existence is a good idea, but whether an implied waiver of that sort is what Congress contemplated.")

79. See, e.g., Belsky, *supra* note 29, at 368-76 (arguing that courts should recognize implied waiver for *jus cogens* violations); *Smith*, 101 F.3d at 242 (recognizing that "[t]he argument is premised on the idea that because observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation impliedly waives its traditional sovereign immunity for violations of such fundamental standards by the very act of holding itself out as a state"); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting) (asserting that Germany implicitly waived its sovereign immunity for its role in the atrocities of the Holocaust).

acknowledged that this argument is appealing,<sup>80</sup> but nonetheless examined the text and legislative history of the FSIA.<sup>81</sup>

The FSIA simply states that 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 the foreign state has waived its immunity either explicitly or by implication."<sup>82</sup> Although this language does not clearly manifest congressional intent, the court advanced three plausible meanings for implied waiver based on this text: (1) "such a waiver can mean that an actor intended to waive a protection, even though [the actor] did not say so expressly;"<sup>83</sup> (2) "an implied waiver might arise whenever an act has been taken under circumstances that would lead a reasonable observer to conclude that the act generally manifests an intent to waive, whether or not the actor had such intent in the particular case;"<sup>84</sup> and (3) "that the law deems an actor to have surrendered a protection, regardless of the actor's subjective or objectively reasonable intent."<sup>85</sup> Without expressly deciding which of these three possibilities Congress intended, the Court found that Congress did not intend "implied waiver" to be as broadly construed as the plaintiffs argued.<sup>86</sup>

The ambiguity of the statutory language is lessened by the committee report accompanying the FSIA, wherein Congress sets forth three situations in which sovereign immunity is impliedly waived. First, agreeing to foreign arbitration.<sup>87</sup> Second, agreeing to apply foreign law to contract interpretation.<sup>88</sup> Third, filing a responsive pleading without asserting a sovereign immunity defense.<sup>89</sup> From this legislative history, the court concluded that Congress "primarily ex-

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80. See *Smith*, 101 F.3d at 242.

81. See *id.* at 242-45 (analyzing the legislative history of the FSIA to determine the congressional intent of implied waiver).

82. 28 U.S.C. § 1605(a)(1) (1994).

83. *Smith*, 101 F.3d at 243.

84. *Id.*

85. *Id.*

86. See *id.* at 243-44; see also Louise Ellen Teitz, et al., *International Legal Developments in Review: 1996 Business Transactions and Disputes*, 1997 INT'L LAW. 317, 328.

87. See H.R. REP. NO. 94-1487, *supra* note 32, at 18 (describing circumstances under which a foreign state impliedly waives its sovereign immunity).

88. See *id.*

89. See *id.*; see also *supra* notes 32-33 and accompanying text (distinguishing between express and implied waivers).

pected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions in relation to the conduct of litigation."<sup>90</sup> Thus, the court held that the implied waiver provisions of the FSIA do not include waiver by the mere existence of the state in the international community.<sup>91</sup>

## 2. *The Second Circuit's Application of Precedent*

Although the court did not find a clear congressional intent in the text or history of the bill, it did recognize that "[this court] and other courts have observed that 'the implied waiver provision of Section 1605(a)(1) must be construed narrowly.'"<sup>92</sup> In *Shapiro v. Republic of Bolivia*,<sup>93</sup> the Second Circuit held that the implied waiver doctrine did not include counterclaims based on a suit filed by a foreign sovereign in a United States court.<sup>94</sup> The court states that the three types of implied waivers in the House Report<sup>95</sup> "involve circumstances in which the waiver was unmistakable."<sup>96</sup> The opinion notes that courts are hesitant to find an implied waiver in circumstances where the intent to waive sovereign immunity is equivocal.<sup>97</sup>

Similarly, in *Princz v. Federal Republic of Germany*,<sup>98</sup> the District of Columbia Circuit determined that the basis for implied waiver under the FSIA is the foreign state's amenability to the suit in the United States.<sup>99</sup> The court refused to accept that Nazi atrocities dur-

90. See *Smith*, 101 F.3d at 243-44 (discussing congressional examples of implied waivers and concluding that all three "share a close relationship to the litigation process").

91. See *id.* at 244 (commenting that a sovereign state is expected to be amenable to foreign suits against it for *jus cogens* violations).

92. See *id.* at 243 (citing *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)) "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Id.*; accord *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (recognizing that there is "substantial precedent construing the implied waiver provision narrowly").

93. *Shapiro*, 930 F.2d 1013, 1017 (2d Cir. 1991).

94. See *id.* (holding that associated claims did not fall under the implied waiver doctrine).

95. See H.R. REP. NO. 94-1487, *supra* note 32, at 18 (describing three situations in which courts have found implicit waivers of sovereign immunity).

96. 930 F.2d at 1017.

97. See *id.* (noting that implied waivers must be unequivocal).

98. 26 F.3d 1166, 1174 (D.C. Cir. 1994).

99. See *id.* The court based this holding on the three examples of implied



ing World War II, inarguably in violation of even the most narrow reading of *jus cogens* standards, gave rise to an implied waiver of sovereign immunity.<sup>100</sup>

While the Second Circuit took care to keep it's holding within the bounds of applicable precedent, it did not consider the effects of the AEDPA on the case. Congress designed a portion of this legislation, the antiterrorism exception, to markedly impact the plaintiffs' case against Libya.<sup>101</sup> This legislation, as discussed below, obviates the necessity of the plaintiffs' implied waiver argument by creating an explicit exception to sovereign immunity for state support of certain terrorist activities.

### III. THE ANTITERRORISM EXCEPTION

"In the aftermath of the World Trade Center and Oklahoma City explosions, terrorism is at the center stage of American political discourse."<sup>102</sup> It was in the wake of these events that the Antiterrorism Act originated.<sup>103</sup> Congress specifically formulated the antiterrorism exception to the FSIA to provide a remedy to the families of the Lockerbie victims.<sup>104</sup>

#### A. TEXT OF THE EXCEPTION

Under the terms of the exception, sovereign immunity shall not be available in "any case . . . in which money damages are sought

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waivers provided by Congress in H.R. REP. NO. 94-1487, *supra* note 32, at 18.

100. See *Princz*, 26 F.3d at 1174 (holding that German actions in World War II did not constitute an implied waiver of sovereign immunity).

101. See *infra* notes 103-104 (explaining that Congress designed the antiterrorism exception for the families of Flight 103 victims).

102. ZULAICA & DOUGLASS, *supra* note 1, at ix.

103. See H.R. REP. NO. 104-383, at 37, 62 (1995) (providing legislative history for the Comprehensive Antiterrorism Act of 1995 and noting that the origin of antiterrorism legislation is tied to a series of terrorist events including the bombing of Pan Am 103, the World Trade Center bombing, and the Oklahoma City bombing); see also Statement by President William J. Clinton upon signing S. 735, 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996) (commenting that the AEDPA is a tribute to the victims of terrorism).

104. See H.R. Rep. No. 105-48, at 2 (1997), available in 1997 WL 177368 (pg. unavail. online) (explaining that the foreign sovereign immunity provisions of the Antiterrorism Act respond to the "revelation that the Libyan government assisted in blowing up Pan Am 103").

against a foreign state for personal injury or death that was caused by an act of torture,<sup>105</sup> extrajudicial killing,<sup>106</sup> aircraft sabotage,<sup>107</sup> hostage taking,<sup>108</sup> or the provision of material support or resources . . .

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105. Torture Victim Protection Act of 1991 § 3(b), 28 U.S.C.A. § 1350 (1994). The term "torture" is defined as:

[A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

*Id.*

106. *See id.* at § 3(a). "Extrajudicial killing" means:

[A] deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

*Id.*

107. *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, art. 1, 24 U.S.T. 564, 568. A person is guilty of "aircraft sabotage" if he intentionally and unlawfully:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damages to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of the aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

*Id.*

108. *See International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR, 34<sup>th</sup> Sess., Annex, Agenda Item 113, at 2, U.N. Doc. A/C.6/34/L.23 (1979). A "hostage taker" is:

- 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention.
- 2. Any person who:
  - (a) attempts to commit an act of hostage-taking, or

for such an act.”<sup>109</sup> The obvious effect is to eliminate the defense of foreign sovereign immunity from certain claims for damages arising from terrorist and terrorist sponsored activities.

## B. LIMITATIONS OF THE EXCEPTION

Presumably, this exception should begin a new era in civil litigation against foreign sovereigns supporting terrorist activities. Foreign policy concerns in the executive branch, however, led to the inclusion of language that significantly reduces the efficacy of the antiterrorism exception.<sup>110</sup>

First, the new language of the FSIA provides that a court should decline to hear the case if: (1) the foreign state, at the time the terrorist act occurred, is not designated by the Export Administration Act<sup>111</sup> or the Foreign Assistance Act<sup>112</sup> as a terrorist sponsor;<sup>113</sup> (2) the above acts designate the foreign state as a state sponsor of terror-

(b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

*Id.*

109. 28 U.S.C.A. § 1605(a)(7) (1994).

110. See *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 Advisor to the United States State Department) (discussing the concerns of the State Department regarding antiterrorism amendments to the FSIA) [hereinafter Borek Statement]. “[P]roceedings could in some instances interfere with U.S. counter-terrorism objectives. They could also raise difficult issues involving sensitive intelligence and national security information.” *Id.*; see *Foreign Terrorism and U.S. Courts: Hearings before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 9 (1994) (statement of Stuart Schiffer, Deputy Assistant Attorney General) (noting that expanding United States jurisdiction would have foreign policy ramifications and deferring to the comments of the State Department on the substance of the legislation) [hereinafter Schiffer Statement]; Monroe Leigh, *1996 Amendments to the Foreign Sovereign Immunities Act with Respect to Terrorist Activities*, 91 AM. J. INT’L L. 187, 188 (1997) (observing that the Justice Department “insisted on adding” language limiting discovery against the United States).

111. 50 U.S.C. §2405(j) (1994); see also H.R. REP. NO. 104-383, *supra* note 102, at 41-62 (describing the existence of state-sponsored terrorism and identifying Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as terrorist sponsors).

112. 22 U.S.C. § 2371 (1994) (denying assistance under multiple laws to any country the Secretary of State determines is a recurrent supporter of international terrorism).

113. See 28 U.S.C.A. § 1605(a)(7)(A) (1997) (noting that a state must be designated as a state sponsor of terrorism for the antiterrorism exception to apply).

ism but there was no attempt by the claimant to pursue the claim through arbitration;<sup>114</sup> or (3) the claimant or victim was not a United States citizen when the terrorist act occurred.<sup>115</sup>

Additionally, plaintiffs filing suit under the amended FSIA must do so within ten years of accrual of the cause of action.<sup>116</sup> This statute of limitations poses a significant problem that stems from the long delays in identifying terrorist parties.<sup>117</sup> The clandestine nature of terrorists potentially bars many civil suits.

Finally, the provision of the exception posing the greatest obstacle for the Pan Am families, and similar plaintiffs, is the section detailing "limitation[s] on discovery."<sup>118</sup> A court must stay any discovery demand on the United States if the Attorney General "certifies [it] would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action."<sup>119</sup> The stay is to remain in effect<sup>120</sup>

114. *See id.* § 1605(a)(7)(B)(i) (explaining that the claimant must allow a reasonable time for the foreign state to arbitrate the claim).

115. *See id.* § 1605(a)(7)(B)(ii) (requiring the claimant or victim to be a citizen of the United States). This provision is the subject of H.R. 1225, which makes a "technical correction" to the FSIA provisions of the AEDPA. *See* H.R. REP. NO. 105-48 *supra* note 104, at 4. The original version of the exception required that both the claimant and the victim be American nationals. *See id.* H.R. 1225 brought the language of the exception into conformity with the intent of the drafters, which "was that a family should have the benefit of these provisions if either the victim of the act or the survivor who brings the claim is an American national." *Id.* This correction prevented several Pan Am families from losing their claims entirely. *See id.*

116. *See* 28 U.S.C.A. § 1605(f) (1997) (defining the limitations period and explaining that equitable tolling principles, including any time in which the foreign state was immune from suit, applies in calculating the limitation period).

117. *See Foreign Terrorism and U.S. Courts: Hearings before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 60 (1994) (statement of David P. Jacobsen) (opposing inclusion of the ten-year statute of limitations in the antiterrorism exception) [hereinafter Jacobsen Statement].

118. *See* 28 U.S.C.A. §§ 1605(g)(1)(A)-(B) (1997) (setting out the procedures for limiting discovery in civil cases brought under the antiterrorism exception). If families are successful in winning a judgment against a foreign sovereign, a companion amendment gives them a better chance of actually recovering awarded damages. *See id.* § 1610(a)(7); *see also* Leigh, *supra* note 110, at 188 (describing the antiterrorism exception to the FSIA and its significance to pending and future civil suits). For the purposes of executing a judgment against state-owned property under the antiterrorism exception, it is irrelevant whether that property is related to the act upon which the claim is based. *See* Leigh, *supra* note 110, at 188.

119. 28 U.S.C.A. § 1605(g)(1)(A) (1997).

until the Attorney General decides that discovery no longer interferes with any official investigation or operation.<sup>121</sup> Consequently, the Justice Department can, almost indefinitely, withhold potentially critical information from civil litigants.<sup>122</sup>

These limitations are crucial because they significantly limit the number of plaintiffs able to bring suit under the new sovereign immunity exception. A discussion of the motives and considerations of the executive branch, in supporting this limiting language, is warranted.

## IV. CONCERNS OVER THE ANTITERRORISM EXCEPTION

### A. RECIPROCITY

A concern exists that the United States risks reciprocal treatment from other states if it expands jurisdiction over them.<sup>123</sup> Currently, the FSIA extends United States jurisdiction over foreign sovereigns

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120. *See id.* § 1605(g)(1)(B) (describing discovery limitations under the antiterrorism exception). A stay granted, according to this paragraph, is effective for twelve months from the date of the court order. The court shall renew the order for additional twelve-month increments, so long as the Attorney General moves for renewal and certifies that discovery impairs its efforts in the same manner. *See id.* A court may not grant or continue a stay if the incident giving rise to the cause of action is more than ten years old unless the court finds a:

substantial likelihood [discovery] would create a threat of death or bodily injury to any person; adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for conviction in such case.

*Id.* §§ 1605(g)(2)(A)-(B).

121. *See id.* § 1605(g)(1)(A) (identifying when a court must stay a discovery request from the United States).

122. *See* Senate Judiciary Committee News Conference, *supra* note 51 (pg. unavail. online) (statement of Bruce Smith) (commenting that the Department of Justice has not held a criminal trial for the Pan Am bombing and that language in the FSIA denies the chance of a civil trial by allowing the attorney general to stay discovery indefinitely).

123. *See* Schiffer Statement, *supra* note 110, at 21 (questioning whether legislation enacted by other countries would be as carefully limited to terrorist acts as the FSIA); *see also*, Borek Statement, *supra* note 110, at 15 (commenting that not only does the United States look to the FSIA as a guide to asserting immunity abroad, but foreign states may also apply these same standards against us).

only in particular cases involving terrorist activities.<sup>124</sup> It is impossible to ensure that similar legislation, enacted by foreign states, would be as narrowly tailored as the American law is.<sup>125</sup> Executive branch officials also worry that although the United States typically does not plead sovereign immunity in foreign cases against it,<sup>126</sup> other states nonetheless may expand the jurisdiction of their courts into areas considered to be properly immune from their jurisdiction.<sup>127</sup>

The possibility of civil actions against Libya for the Flight 103 bombing presents an uncertain danger of reciprocation against the United States. The history of relations between the two countries is replete with distrust,<sup>128</sup> animosity,<sup>129</sup> threats,<sup>130</sup> and outright vio-

124. See *supra* notes 105-109 and accompanying text (discussing the language of the AEDPA amendment to the FSIA).

125. See Schiffer Statement, *supra* note 110 (observing that other nations might respond to the amended FSIA by broadly expanding their own jurisdiction).

126. See H.R. REP. NO. 94-1487, *supra* note 32, at 9 (stating that the Justice Department's policy is to avoid pleading sovereign immunity in suits against the United States in foreign courts). The United States generally waived non-tort action immunity in the Tucker Act, 28 U.S.C. § 1346(a)(2) (1994), and tort immunity in the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1994).

127. See Schiffer Statement, *supra* note 110, at 15 (asserting that the United States risks reciprocal treatment by foreign states by expanding its jurisdiction with the antiterrorism exception). But see *Foreign Terrorism and U.S. Courts: Hearing on S. 825 Before the Subcomm. on Courts and Admin. Practice of the Senate Judiciary Comm.*, 103d Cong. 38 (1994) (addendum to testimony of Hugo Princz) (suggesting that the antiterrorism exception would not only provide a solution for victims of terrorism, but also prevents some foreign states from ever beginning a course of egregious conduct) [hereinafter Princz Testimony].

128. See The President's News Conference, 22 WEEKLY COMP. PRES. DOC. 22, 26 (Jan. 7, 1986). President Reagan, discussing the role of Libya in training the terrorists who carried out attacks on international airports in Vienna and Rome, suggested that Libyan leader Colonel Mu'ammar Qadhafi was not capable of telling the truth about his country's participation in the bombings. See *id.*

129. See Interview With Washington-based Independent Network Bureau Chiefs, 22 WEEKLY COMP. PRES. DOC. 30, 32 (Jan. 8, 1986). In 1986, America imposed strict sanctions against Libya. See *infra* note 134 and accompanying text. Libya responded to these sanctions by asserting that the United States' position was "tantamount to a declaration of war." See *id.* Qadhafi is considered to focus his hostilities on the United States because he sees the United States as a barrier to his ideological and expansionist goals in the Third World. See *Libya Under Qadhafi: A Pattern of Aggression*, 25 I.L.M. 182 (1986) (reviewing Libyan terrorist policies against Middle Eastern and Western countries). Recently, South African President Nelson Mandela bestowed South Africa's highest award for a foreigner to Qadhafi, praising him as "my dear brother leader." See *Mandela Bestows High Honor on Qadhafi*, WASH. POST, Oct. 30, 1997, at A30. The Libyan crowds at the

lence.<sup>131</sup> Almost twenty years have passed since the United States officially designated Libya as a state supporter of terrorism.<sup>132</sup> Hostilities between the two countries increased in the late 1980s, resulting in the imposition of strict sanctions on Libya by President Reagan.<sup>133</sup> This followed the United States declaration that Libya posed an "unusual and extraordinary threat to the national security and foreign policy of the United States" and implementation of a national emergency in response to this danger.<sup>134</sup>

The financial and trade embargo against Libya currently prohibits all trade with Libya and freezes all assets owned or controlled by the Libyan government in the United States.<sup>135</sup> This lack of any formal

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award ceremony lashed out at the United States, holding banners that said "[d]own, down U.S.A., the enemy of the peoples!" See *id.*

130. See *Libya Under Qadhafi: A Pattern of Aggression*, *supra* note 129, at 183. In January, 1986 Qadhafi, in a press conference, threatened to "pursue U.S. citizens in their country and streets." *Id.* In April of that year, after the United States airstrike on Tripoli, a poem read on Libyan state television threatened death to President Reagan: "You will be killed in a contemptible manner, instantly, like a pig, with something small, and people will be puzzled and your heart will be like a sieve." *Poem on Libyan Television Threatens Death to Reagan*, HOUS. CHRON., Apr. 30, 1986, at 15. See generally George Church, *Hitting the Source*, TIME, Apr. 28, 1986, at 17 (providing history and analysis of relations between the United States and Libya, including an account of threats made by Qadhafi against Reagan and the United States).

131. See *Libya Under Qadhafi: A Pattern of Aggression*, *supra* note 129, at 183 (mentioning several instances of Libyan-sponsored attacks against United States interests). In 1979, Libya sponsored an attack on the American Embassy in Tripoli. See *id.* In 1981, Libyan jets attacked American jets in the Gulf of Sidra, resulting in the downing of two Libyan aircraft. See Church, *supra* note 130.

132. See Letter to the Speaker of the House and the President of the Senate from the President of the United States, 22 WEEKLY COMP. PRES. DOC. 21 (Jan. 7, 1986) (stating that Libya was initially designated a state supporter of international terrorism in 1979). For a detailed chronology of Libyan support for terrorism against many countries, including the United States, see *Chronology of Libyan Support for Terrorism 1980-85*, 25 I.L.M. 186 (1986).

133. See Letter to Congressional Leaders on Libya From President Bill Clinton, Jan. 10, 1997, 33 WEEKLY COMP. PRES. DOC. 30 (Jan. 13, 1997) (discussing American sanctions on Libya and their effect on relations between the two countries) [hereinafter Letter to Congressional Leaders].

134. Exec. Order 12543, 3 C.F.R. 181 (1986), 22 WEEKLY COMP. PRES. DOC. 19 (Jan. 13, 1986). These restrictions included a prohibition of purchases of Libyan imports and exports, and a prohibition on transactions relating to the travel of Americans to, or in, Libya. See *id.* The national emergency declared in President Reagan's executive order has remained in effect and was renewed in January 1997 for another year. See Letter to Congressional Leaders, *supra* note 133, at 30.

135. See Letter to Congressional Leaders, *supra* note 133, at 30 (discussing

relationship between the United States and Libya makes it unlikely that the United States considers itself subject to suit there at all—no matter how broadly Libyan jurisdiction is defined.

Ultimately, the Libyan response to even the most hostile of American actions<sup>136</sup> amounted to little more than empty threats.<sup>137</sup> It follows that any anticipated reciprocation by Libya could not generate enough concern in the executive branch of the United States government to justify preventing *Smith* from going forward in the district court.

## B. DELICATE NATURE OF INTERNATIONAL RELATIONSHIPS

During Senate hearings prior to the antiterrorism amendments to the FSIA, the State Department urged that the possibility of civil suits and potential judgments against foreign supporters of terrorism could introduce an element of unpredictability into delicately maintained international relationships with those terrorist states.<sup>138</sup> Given the nature of relations between the United States and Libya, however, it seems facetious to assert that any delicacy between the two countries exists. The existing United Nations sanctions, spurred on and supported at the behest of the United States,<sup>139</sup> continue to have a

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sanctions currently in effect against Libya).

136. See, e.g., Church, *supra* note 130, at 17 (providing a detailed account of the airstrike). On April 15, 1986 President Reagan ordered an air strike on Libya targeting military and intelligence structures in and around Tripoli including the living quarters and command center of Qadhafi. See *id.* Qadhafi's eighteen-month-old daughter was one of the thirty-seven civilian casualties in the raid. See *id.* at 18. Domestic support for the attack was widespread crossing party and economic barriers. See *id.* at 23. But see *Hatfield Points to 'Folly' of Libya Attack*, SEATTLE TIMES, Apr. 27, 1986, at B3 (noting that longtime Oregon Republican Senator Mark O. Hatfield, in an address from the Senate floor, called the airstrike on Libya an "immoral act").

137. See *supra* note 18 (discussing Libya's response to American and Scottish criminal indictments). Because Libya denies its involvement in the Lockerbie bombing, the Pan Am 103 bombing cannot be properly considered a Libyan response to any United States actions. See *id.*

138. See Borek Statement, *supra* note 110 (pg. unavail. online) (voicing the concern that international relations could be affected by the antiterrorism exception and urging that any changes should be approached with caution).

139. See *Fighting Terrorism: Challenges for Peacemakers*, Address by Secretary of State Warren Christopher to the Washington Institute for Near East Policy, reprinted in DEP'T ST. DISPATCH, June 1996, available in LEXIS, Intlaw Library, Dstate File [hereinafter Christopher Address] (describing America's leadership role in the fight against terrorism, using U.N. sanctions against Libya as one ex-



much bigger impact financially on Libya and are, therefore, more likely to upset relations between the countries than the mere prospect of a civil judgment.<sup>140</sup>

Historically, there has been extensive coordination with other countries regarding Libyan terrorism, especially between the United States, the United Kingdom, and France.<sup>141</sup> This history of interna-

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ample).

140. See WAYMAN C. MULLINS, A SOURCEBOOK ON DOMESTIC AND INTERNATIONAL TERRORISM 371 (2d ed. 1997) (discussing political responses to terrorism). Economic sanctions that isolate terrorist-sponsoring third-world nations can have the greatest impact of all sanctions. See *id.* These sanctions often compel a violent response from the sanctioned nation. See *id.* For example, the late 1970s Iranian takeover of the United States embassy was in direct response to American-imposed economic sanctions. See *id.*

141. See, e.g., Text of Statement Released by the Office of the White House Press Secretary, Washington, DC, Nov. 27, 1991, DEP'T ST. BULL., Dec. 1991, available in LEXIS, Dstate Library, Intlaw File (explaining that close consultation between the United States, the United Kingdom, and France led to the development of joint resolutions reaffirming a condemnation of terrorism and calling on Libya to comply with U.N. resolutions); Questions of Interpretation and Application of The 1971 Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, 1992 I.C.J. 114 (Apr. 14) (Weeramantry, J. dissenting), reprinted in 31 I.L.M. 665, 697 (commenting that most of the international conventions concerning terrorism have been ratified by over one hundred countries).

Terrorist incidents in the late 1980s increased support among Western nations for United States terrorism policies. See DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM 105 (David A. Charters ed., 1991). For example, in May 1986 major industrial countries at an annual summit in Tokyo issued a communiqué condemning state-sponsored terrorism after Japanese terrorists attempted to fire homemade bazookas at the building where the leaders were meeting. See *id.* Reagan found "firm support for vigorous action against state-sponsored terrorism" from Prime Ministers Margaret Thatcher of Britain and Brian Mulroney of Canada. See *id.* Britain, Canada, France, Holland, India, Israel, Jordan, Kuwait, South Korea, and West Germany all followed the United States in adopting a "hard-line approach" to dealing with terrorism. See *id.* at 108. In 1992, the United Nations Security Council adopted United Nations Resolution 748, imposing worldwide sanctions on air travel and prohibiting sales of aircraft or arms technology to Libya, by a vote of ten in favor to none against, with five countries abstaining. See U.N. Security Council Resolution 748, *supra* note 18, at 749. But see DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra*, at 106-07 (describing the diplomatic strategies supported by Western Europe in response to terrorist acts and noting that these strategies reflected distaste for the prospect of military operations against terrorists); Church, *supra* note 130, at 26 (explaining that all but three United States allies withheld their support for the air strike on Libya and pointing out that France and Spain further refused permission for the bombers to fly over their territory).

tional cooperation regarding Libyan terrorism makes it unlikely that the possibility of a civil judgment in *Smith* will infringe upon existing foreign relations between the United States and its allies.

### C. ANTITERRORISM EXCEPTION INCONSISTENT WITH INTERNATIONAL SOVEREIGN IMMUNITY STANDARDS

The State Department further argued that the new provisions of the FSIA were inconsistent with established international practice and that this divergence may upset careful balances reflected in American law on sovereign immunity.<sup>142</sup> In past dealings with Libyan terrorist practices, however, the United States led the development and implementation of policies and sanctions.<sup>143</sup> Often it required the encouragement of the executive branch to persuade United States allies to participate in policies against Libya.<sup>144</sup> At times, the United States stood alone in refusing to maintain relations with Libya.<sup>145</sup> Therefore, prior policy does not bar the United States from determining its own course with respect to Libya, regardless of the support of its allies.

The United States should again take the lead in establishing

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142. See Borek Statement, *supra* note 110 (pg. unavail. online) (withholding the Department of State's support for the antiterrorism exception based on its inconsistency with international sovereign immunity standards).

143. See Christopher Address, *supra* note 139 (stating that America "spear-headed efforts" to fight global terrorism, especially in the Middle East).

144. See The President's News Conference of Jan. 7, 1986, *supra* note 128, at 26 (stating that the United States repeatedly urged the world community to act together to stop Libyan support for terrorism); see also Statement by the Principal Deputy Press Secretary to the President, 22 WEEKLY COMP. PRES. DOC. 30 (Jan. 8, 1986) (announcing that the United States would consult with its allies in Europe and the Middle East to urge cooperation in imposing economic and political sanctions on Libya). Many European countries had strong economic ties with Libya and were unwilling to forego these relationships in favor of sanctions. See Interview With Washington-based Independent Network Bureau Chiefs, *supra* note 129, at 32. At that time, most European countries were slowly recovering from economic recession and continued to experience excessive unemployment rates. See *id.* Nevertheless, the sanctions the United States imposed are still in effect today. See Letter to Congressional Leaders, *supra* note 133, at 30 (Jan. 10, 1997).

145. See President's News Conference of January 7, 1986, *supra* note 128, at 31 (recognizing that many Europeans may be economically unable to join the U.S. in imposing sanctions against Libya and noting that America is "going to go on with what [it] think[s] has to be done"); see also DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 141, at 105 (stating that the American air-strike on Libya put the European allies on notice that, in the absence of a collective response, the United States would act unilaterally).

antiterrorism policy. That no other country currently bars sovereign immunity in cases of state-sponsored terrorism is no reason for the United States to reticently provide this solution for its citizens.<sup>146</sup> The fact that Congress clearly intended the antiterrorism exception to provide a remedy to the Pan Am 103 families provides an even stronger justification for executive branch cooperation in *Smith*.<sup>147</sup> In time, other countries may also find themselves in the same position, without any truly viable non-violent alternatives other than making civil judgments available to their citizens.<sup>148</sup>

#### D. DIFFICULTIES DEFINING "INTERNATIONAL TERRORISM"

Finally, opponents of the antiterrorism exception suggested that "international terrorism" is an imprecise term not suitable as a subject for important legislation.<sup>149</sup> Antiterrorism exception opponents assert that these conflicting interpretations do not provide a sufficient basis for asserting jurisdiction over foreign sovereigns. According to Judge Abraham Sofaer's testimony before the Senate Judiciary Committee: "International law provides no support for asserting the jurisdiction of [United States] courts against a foreign state in cases involving allegations of an offense so vague and politically charged as 'international terrorism.'" <sup>150</sup> The difficulty Mr. Sofaer identifies

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146. See DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 141, at 112 (explaining that nations hesitant to cooperate with international efforts against terrorism will take their lead from the policies of stronger nations).

147. See *supra* note 103 and accompanying text (stating that the recent antiterrorism legislation was a specific response to the bombing of Pan Am 103); see also H.R. REP. NO. 104-383, *supra* note 103, at 41-62 (explaining that the antiterrorism exception gives American citizens a "financial weapon" against terrorist sponsoring states).

148. See DEMOCRATIC RESPONSES TO INTERNATIONAL TERRORISM, *supra* note 141, at 109-10 (stating that only joint action by governments will effectively prevent terrorist attacks on civil aviation).

149. See *Foreign Terrorism and U.S. Courts: Hearings before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 103d Cong. 83 (1994) (statement of Abraham D. Sofaer) [hereinafter Sofaer statement] (asserting that the FSIA is too broadly construed given the lack of consensus on terrorism in the international community). Professor Mullins defines international terrorism as a type of terrorism consisting of acts conducted by persons or groups being controlled by a sovereign nation. See MULLINS, *supra* note 140, at 33, 36.

150. Sofaer statement, *supra* note 149, at 83. Because it is emotionally evocative, the word "terrorism" sometimes is used as a label for a wide variety of conduct including political violence and guerilla warfare. See DAVID E. LONG, THE

arises in the definition of terrorism itself.<sup>151</sup> The United States, however, should not waver in the fight against state-sponsored terrorist activities simply because varying definitions of terrorism exist. "[W]e cannot opt out of every contest. We cannot wait for absolute certainty and clarity. If we do, the world's future will be determined by others—most likely by those who are the most brutal, the most unscrupulous, and the most hostile to everything we believe in."<sup>152</sup>

Critics argue that because the antiterrorism exception uses a definition of terrorism incompatible with definitions used by other countries, the FSIA's credibility is strained. This neglects to consider, however, that long-standing beliefs about restrictive immunity underlie the FSIA.<sup>153</sup> Attitudes about terrorism are often just as strong.<sup>154</sup> These fundamental views should allow countries to over-

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ANATOMY OF TERRORISM 3-4 (1990) *But cf.* Address by Secretary of State George Schultz Before the Low-Intensity Warfare Conference, National Defense University, Jan. 15, 1986, *reprinted in* 25 I.L.M. 204, 205 (1986) [hereinafter Schultz Address] (discussing the possibility of a military response against Libya) Schultz stated: "We are right to be reluctant to unsheathe our sword. But we cannot let the ambiguities of the terrorist threat reduce us to total impotence." *Id.*

151. See LONG, *supra* note 150, at 3 (stating that there are hundreds of definitions for terrorism and there is not likely to be an international consensus on which definition to use in the near future); STEVEN LIVINGSTON, THE TERRORISM SPECTACLE 4-7 (1994) (emphasizing the ambiguity of terrorism by describing some of the numerous definitions); TERRORISM IN CONTEXT 4 (Martha Crenshaw ed., 1995) (stating that dispute invariably arises when trying to "specify the unique qualities of terrorism and to establish the boundaries between terrorism and other forms of political violence"). Agreements on terrorism in the United Nations prove impossible because members are so divided over definitions. See STEPHEN E. ATKINS, TERRORISM 26 (1992). Some member nations argue that certain terrorist activities are legitimate and should not be subject to international regulation. See MULLINS, *supra* note 140, at 380.

152. Schultz Address, *supra* note 150.

153. See Dorsey, *supra* note 20, at 258-59 (stating that the first international convention on restrictive immunity was signed in 1926 and by 1973 many nations had adopted the convention). By 1976, almost every Western European country adopted the restrictive immunity doctrine, and restrictive immunity was generally recognized as the rule of international law. See *id.* at 259 (discussing the history of the restrictive immunity doctrine); see also H.R. Rep. No. 94-1487, *supra* note 32, at 7 (noting that general international law recognizes restrictive immunity).

154. See, e.g., LONG, *supra* note 150, at 2 (denying that terrorism is a new phenomenon); ATKINS, *supra* note 151, at 1 (stating that terrorism originated before Biblical times). The use of political violence is centuries old. See generally, TOLERATING TERRORISM IN THE WEST (Noemi Gal-Or ed. 1991) (using case studies to depict how governmental and societal attitudes towards terrorism have developed in Belgium, Germany, Israel, Italy, and Spain).

come any dissatisfaction with the FSIA.

## V. RECOMMENDATIONS

The Justice Department should not request a stay of discovery and instead should provide full support and cooperation to the families of Pan Am 103 victims.<sup>155</sup> In the context of this case, the primary fears of the executive branch are less important than they might be in other cases. There is no danger of straining diplomatic relations with Libya—the support of our allies is almost certain,<sup>156</sup> and the risk of reciprocity is small.<sup>157</sup> Releasing discovery information will not impede the ongoing efforts of the investigation or the possibility for a criminal trial. The federal criminal investigation is complete and all that remains is for Libya to extradite the suspects. The failure to force the terrorists out of Libya prevents a criminal trial.<sup>158</sup> Instead, information from the federal investigation should substantially assist the families in bringing about a civil suit.

Additionally, executive branch cooperation with the *Smith* plaintiffs would further the stated terrorism policy of the United States.

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155. See MULLINS, *supra* note 140, at 363-64 (suggesting that fragmentation and inconsistency in the government assists terrorists and weakens the ability of the government to fight terrorism).

156. See *Report of the Secretary-General Pursuant to Para. 1 of Security Council Resolution 748*, U.N. Doc. S/23992/Add. 2 (1992) (identifying the 84 United Nations members supporting Resolution 748 implementing sanctions against Libya); see also *supra* note 141 (describing international support for United States military and economic actions against Libya).

157. See *supra* notes 125-137 and accompanying text (discussing the possibility of reciprocation).

158. See *Further Report by the Secretary-General Pursuant to Paragraph 4 of Security Council Resolution 731*, U.N. SCOR, U.N. Doc S/23672 at 4-5 (1992) (outlining a meeting between a United Nations official and Qadhafi in which Qadhafi stated that there are constitutional constraints that prevent Libya from turning Libyan citizens over for trial in the absence of an extradition treaty); see also Libyan Letter to U.N. Secretary-General, *supra* note 18, at 2-3 (describing the good faith efforts of the Libyan government to cooperate with the international investigation into the Pan Am bombing). The United States refused to agree to Libya's requests for trial in a neutral country. See *id.* at 2-4. Some Pan Am 103 family members agree with this stance. See Rosemary Wolf, *Gadhafi's Deal Is No Deal at All*, WASH. POST, Oct. 26, 1997, at C3. But see Aphrodite Thevos Tsairis, *Call Gadhafi's Bluff: Hold a Trial at the Hague*, WASH. POST, Oct. 26, 1997, at C3 (expressing the author's "deep disappointment in our government's failed foreign policy").

This policy requires the United States: (1) to make no concessions to terrorists; (2) to pressure states sponsoring terrorism to stop those activities; and (3) to bring terrorists to justice.<sup>159</sup> Supporting a civil suit against Libya accomplishes all three goals.

First, a civil trial against Libya demonstrates to the world that the United States is a leader in combating state-sponsored terrorism. It specifically demonstrates to Libya that the United States will take every opportunity to bring terrorists to justice.<sup>160</sup>

Second, the prospect of a civil judgment may deter state-sponsors of terrorism, previously protected by sovereign immunity, from providing resources to terrorists.<sup>161</sup> The possibility of large damage awards, as well as the negative attention from the international media could act as a powerful deterrent. For Libya, a civil trial, coupled with the existing sanctions, makes it clear that the United States will not tolerate state-sponsored terrorism and will use every economic penalty to deter these activities.<sup>162</sup> Civil suits are already used with great success on terrorists within the United States.<sup>163</sup> "Civil action may become the most effective *modus operandi* of combating terrorism in the future . . . . Taking the financial resources from the terror-

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159. See Current Trends in Global Terrorism, Address to the American Society for Industrial Security by Director for Regional Counterterrorism Affairs Patrick N. Theros, June 7, 1994, *reprinted in* 5 DEP'T ST. DISPATCH, June 1994, *available in* LEXIS, Intlaw Library, Dstate File (describing the U.S. counterterrorism policy as designed to meet the high expectations of American citizens for protection of their persons and interests abroad).

160. See Princz Testimony, *supra* note 127, at 38 (asserting that the antiterrorism exception may prevent states from sponsoring terrorism). *Cf.* Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALBANY L. REV. 579, 605 (1997) (explaining that legislative history of the Torture Victim Protection Act indicates that Congress views civil remedies as a means of complying with international law).

161. See Jacobsen Statement, *supra* note 117, at 60 (stating that military retaliation and economic sanctions do not deter terrorist sponsors as effectively as monetary penalties).

162. See *id.* at 60-1 (asserting that punishment under the antiterrorism exception is critical to ending international terrorism); see also *United States Counterterrorism Policy Hearings before the Intl. Security, Intl. Organizations and Human Rights Subcomm. of the House Foreign Affairs Comm.*, 103d Cong. 82 (1994) (statement of Timothy E. Wirth, Counselor of the Department of State) (declaring that the United States will not compromise on the issue of justice against Libya for the Pan Am bombing).

163. See MULLINS, *supra* note 140, at 393 (discussing the efficacy of civil recourse on domestic terrorism).

ists through civil action may prove to be the Achilles' heel of terrorism." <sup>164</sup>

Third, though a civil judgment will not imprison the terrorists responsible for the Pan Am bombing, a civil damage award brings monetary justice.<sup>165</sup> Even where the prospect of collecting a monetary judgment is unlikely, the families may be satisfied by the judicial proceedings and finding of liability.<sup>166</sup> Clearly the criminal indictments were ineffective in producing a response from Libya.<sup>167</sup> In almost ten years, Libya has shown no signs of true cooperation with the United States that would enable justice for the family members of the Pan Am 103 victims.<sup>168</sup> A civil trial gives the families a chance to bring this episode of their lives to a close,<sup>169</sup> while punishing the terrorists responsible for the bombing and the country responsible for supporting those terrorists.

## CONCLUSION

Ultimately, the balance between foreign policy considerations and the principle that American citizens suffering a serious injury at the hands of a foreign sovereign should have redress in United States courts weighs in favor of the citizens. Some American citizens are able to seek redress through the State Department's diplomatic chan-

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164. *Id.*

165. See Stephens, *supra* note 160, at 605 (discussing the benefits of civil litigation for victims of international torts, including terrorism); see also MULLINS, *supra* note 140, at 377 (pointing out that legal remedies are the most successful at stopping both domestic and international terrorism).

166. See *id.* (stating that a civil remedy is an important option for victims of human rights abuses); see also MULLINS, *supra* note 140, at 377 (asserting that civil actions provide moral satisfaction to the victims of terrorism as well as to American society). Civil litigation may be preferable to plaintiffs because they have a greater degree of control over the timing and direction the case takes. See Stephens, *supra* note 160, at 605.

167. See Stephens, *supra* note 160, at 589-90; see also MULLINS, *supra* note 140, at 370-71 (asserting that severing diplomatic ties with a terrorist sponsor has no positive effect and usually serves to increase terrorism directed against the United States). Trade restrictions and arms embargoes are equally as ineffective. See *id.* at 371. Economic sanctions are not "particularly effective, even if applied in the long term." See *id.* Further, they may serve to encourage terrorism. See *id.*

168. See *supra* note 13 (discussing Libya's lack of cooperation with the allies).

169. See Tsairis, *supra* note 158, at C13 (describing the author's "intense longing for a final resolution to the murders").

nels. The same foreign policy considerations, however, often get in the way of enforcing the rights of these citizens.<sup>170</sup> Bruce Smith and Paul Hudson do not have any hope that diplomatic channels will produce a damage payment compensating them for their respective losses. In addition, plaintiffs have a very real fear that, if allowed to proceed with their suit under the amended FSIA in district court, the Justice Department will seek and be granted a stay on any discovery requests, effectively ending any chance for a civil judgment.

The United States consistently leads the international fight against state-sponsored terrorism. Now is not the time to shy away from this role. The United States must move forward with a new response to the problem of international terrorism by supporting the *Smith* plaintiffs in their struggle for justice.

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170. See *Foreign Terrorism and U.S. Courts: Hearings before the Courts and Admin. Practice Subcomm. of the Senate Judiciary Comm.*, 103d Cong. 3 (1994) (statement of Hon. Romano L. Mazzoli) (observing that foreign policy considerations often compromise the ability of the State Department to protect and enforce the rights of American citizens).