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IN SEARCH OF JUSTICE: INCREASING THE RISK OF BUSINESS WITH STATE SPONSORS OF TERROR

*Gabriel C. Lajeunesse** †

INTRODUCTION

If the aims of tort law are deterrence, compensation, and provision of equitable distribution of risks, U.S. anti-terrorism laws have been marginally effective at best. Though Congress has passed legislation providing causes of action to U.S. victims of terrorism, compensation of victims is often difficult and terrorists are rarely deterred. Attempts to provide such recourse include the Antiterrorism Act of 1991 (“ATA”), the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), and the Flatow Amendment to the Foreign Sovereign Immunities Act (“FSIA”). These attempts, however, are not enough.

I. THE CHALLENGE OF DETERRING TERRORIST FUNDING

Generally, state sponsors of terrorism have not curtailed their activities as a result of U.S. legal action. For example, Iran, the most significant state sponsor of terrorism, continues unchecked in its campaign of terror for political ends, despite the significant outstanding judgments against it in U.S. courts. Iran provides lethal support in the way of training, finance, logistics, and weapons to groups such as the Taliban, Shia militias in Iraq, Lebanese Hizballah, and HAMAS; it foments terrorism and violence from the Kingdom of Saudi Arabia to Egypt, from the Sudan, and onward across Africa to Morocco. It does all this while charging ahead on a course toward nuclearization that, once achieved, will enable it to ratchet up its terroristic adventures abroad unchecked.

The challenge of suits against state sponsors of terror like Iran is that, with the various others sanctions against them, they have very few assets remaining in the United States to be attached. Those that they have are either frozen or secreted away under layers of business entities whose connections to Iran are masked in ways that make it difficult for courts to provide recourse to their assets. For example, in *Flatow v. Alavi Foundation*, the Fourth Circuit upheld a refusal to attach the assets of an Iranian non-profit

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based in the United States due to the difficulty of showing Iranian government control of the assets and actions of the foundation.

To achieve deterrence, compensation of victims, and equal distribution of risks, there must be a means of attaching assets related to the state sponsor's activities in order to force the sponsor to make a real decision about the policies chosen and the potential liability to be incurred.

II. U.S. ATTEMPTS AT DETERRING TERRORIST FINANCING

As documented by Robin Wright in her *New York Times* article, *Stuart Levey's War* (October 31, 2008), the U.S. government has attempted to make a case for greater Iranian accountability within the international community and business world for the last several years. The U.S. Department of the Treasury has been actively engaged in convincing banks and other financial entities essential to Iranian terror operations, such as the insurers of Iran's commercial shipping sector, that doing business with Iran is just too risky. Of all the United States' efforts against Iran, this has been the most effective, resulting in the 2008 E.U. sanctions against Iran's Bank Melli—a known facilitator of terror financing. However, not all nations have clamped down on Iranian business activities, and even those that did initially have since returned to an open door policy with Iranian banking and industry: Iranian terror banks Bank Melli and Bank Saderat flourish in the Arabian financial capital of Dubai; Bank Saderat continues to operate in the United Kingdom; Chinese-Iranian trade flourishes; Chinese-Iranian banking relations continue apace following a brief cessation; and the insurers of Iranian shipping appear unconvinced of the risks associated with Iranian business.

It should be of little surprise that banks and other multi-national corporations view the risks associated with cutting business ties to Iran as greater than those associated with continuing them. Iran is an oil and gas rich nation with its own import and trade needs, and very little has happened thus far to convince these entities to cease their relations with Iran. With no accountability, there is little distribution of liability risk—innocents who travel abroad have no recourse against either the murder and mayhem of Iran's terror regime or the financial structures that support it. However, it is possible to change this risk assessment, and force a change in behavior of both state sponsors of terrorism and the financial enterprises that currently do business with them. To effectively deter terrorism, recompense victims, and balance risk, tort law must include liability for financial enterprises that currently feel they can do business with a state sponsor of terrorism without assuming any risk. Such organizations are, or should be, at risk, because their business and services facilitate known terrorist entities in their campaigns of terror.

III. FINANCIAL SUPPORT OF TERRORISM UNDER THE CURRENT LEGAL REGIME

Under 18 U.S.C. § 2339A(b), material support to terrorism includes providing “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance.” In determining the culpability of financial institutions that transfer funds on behalf of terrorist organizations, the Eastern District of New York held in *Weiss v. National Westminster Bank PLC* that a bank, in dealing with an entity that was *not* a designated terrorist organization, could *still* be liable. The court determined that the bank had “reason to know of the activities of its clients because of its legal and self-imposed obligations to know its customers.” In enacting AEDPA, Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Stephen I. Landman discusses the liability of financial institutions in cases of state-sponsored terror in further depth in his thoughtful 2008 article, *Bank Liability Under the Anti-Terrorism Act*.

In a number of recent cases, victims have sought redress from U.S. subsidiaries of financial institutions that provided financial services to terrorists. These cases focus on the provision of financial services to terrorist persons and entities; if the institutions knew or should have known that their services were being used by terrorists, they should be liable under the statutory definition of material support, interpreted in light of the Congressional findings in AEDPA. For example, in *Little v. Arab Bank, PLC*, victims of terrorism are seeking a judgment against the bank for its provision of banking services to individuals associated with HAMAS, the Palestinian Islamic Jihad (PIJ), and other terrorist entities. Similarly, in *Zahavi v. Bank of China*, victims of terrorist acts carried out by the PIJ are looking to hold the Bank of China liable for the Bank’s provision of services.

In the case of Iran, those providing financial services to Iran’s Bank Melli, Bank Saderat, or the Islamic Republic of Iran Shipping Lines (IRISL) should know that they are dealing with terrorist entities so “tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” As such, there can be no “legitimate” business with these organizations. Bank Saderat and its subsidiaries have been designated as terrorist entities under Executive Order 13224. The U.S. Department of the Treasury has made public statements that Bank Melli transferred over \$100 million to the Iranian Revolutionary Guards Corp-Qods Force, the Treasury designated entity responsible for managing Iran’s terror portfolio abroad. In 2009, the United Nations determined that a Syria-bound IRISL chartered ship was used to violate a Security Council resolution prohibiting arms transfers, and the suspected recipients were Lebanese Hizballah and HAMAS. Iran’s uses of shipping to facilitate its adventures abroad are not new, as documented by former Deputy Assistant Secretary for Intelligence and Analysis at the Treasury, Matthew Levitt. There can be no doubt that

those working with Bank Melli, Bank Saderat, and IRISL should have known that the organizations were involved in terrorist activities and, therefore, were so tainted that any provision of financial services would facilitate terrorist conduct. In addition to these entities, the Financial Action Task Force (FATF) has warned that the significant deficiencies in Iran's efforts to combat money laundering and terrorist financing threaten international markets and has cautioned "financial institutions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions." This warning was not the first by FATF—though it was the strongest—and was reiterated by a statement to all financial institutions operating in the United States by the Financial Crimes Enforcement Network.

IV. INCREASING THE SCOPE OF LIABILITY FOR TERRORIST SUPPORTERS

Victim advocates should bring claims against those financial institutions (i.e. banks and insurance companies) that continue to do business with Iranian entities engaged in terrorist activities—specifically those doing business with Bank Melli, Bank Saderat, or IRISL. It is possible that judges may have difficulty attributing liability to these entities, who will surely argue that their distance from transactions directly related to terrorism shields them from culpability. Congress should be ready to enact clear enabling legislation in unambiguous language that codifies the liability of financial institutions for any services provided to people and organizations where their identities as terrorists were known or should have been known.

Congress should also look at strengthening the legal regime supporting U.S. residents that were aliens at the time they were victimized by state sponsors of terrorism. These victims are not currently covered under the FSIA, and instead must seek redress under the Alien Tort Statute and Torture Victim Protection Act. To withstand a motion to dismiss, victims must present a heightened pleading prior to discovery that includes (at least according to the Eleventh Circuit) "clear statements of [foreign] government action and clear identification of the scope and participants in an alleged conspiracy." Unless U.S. or foreign treasury departments are inclined to provide extraordinary assistance to victims in developing their cases, it will be difficult for victims to obtain such evidence prior to discovery. This double standard in the treatment of U.S. persons based upon their nationality at the time of the incident further erodes the effectiveness of the deterrent effect of such claims, and victims are, in effect, left without a forum. As the Second Circuit stated in *Wiwa v. Royal Dutch Petroleum Company*: "Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, merely returning to that place would endanger the victim. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable." Congress should act to make U.S. courts more hospitable to those living here, such as refugees, who have suffered at the hands of state-sponsored terror abroad.

CONCLUSION

Until international banks and insurers realize the potential risk of doing business with terrorist entities, state sponsors of terror will face no hard policy choices, and the goals of deterrence, compensation, and equitable distribution of risks will not be realized. Legal mechanisms in this country must be strengthened to increase the costs of providing assistance to terrorism. Only then will the U.S. legal system provide an effective deterrent to state sponsored terror.