The Legacy of Rux v. Republic of Sudan and the Future of the Judicial War on Terror

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THE LEGACY OF RUX V. REPUBLIC OF SUDAN AND THE FUTURE OF THE JUDICIAL WAR ON TERROR

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This Article shares a factual foundation, some discussion, and several conclusions with a previous article written by the author entitled Liability for Terrorism in American Courts: Aiding-And-Abetting Liability Under the FSIA State Sponsor of Terrorism Exception and the Alien Tort Statute, 25 T.M. Cooley L. Rev. 503 (2008).
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“The United States will continue to support the aspirations of all Sudanese – north and south, east and west. We will work with the governments of Sudan and Southern Sudan to ensure a smooth and peaceful transition to independence. For those who meet all of their obligations, there is a path to greater prosperity and normal relations with the United States, including examining Sudan’s designation as a State Sponsor of Terrorism. And while the road ahead will be difficult, those who seek a future of dignity and peace can be assured that they will have a steady partner in the United States.” – President Barack Obama

INTRODUCTION

For years, the Republic of Sudan has been embroiled in war and conflict. For over two decades, from 1983 to 2005, the largely Islamic-dominated government of President Omar al-Bashir fought the mainly Christian rebel movement of the Sudanese People’s Liberation Movement/Army (SPLM/A) in a violent civil war. Then, in 2003, two western Sudanese rebel groups, the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), began an uprising in the Darfur region of Sudan. Armed militias retaliated against the rebel groups in an effort to drive black Sudanese persons from the region,

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3 Id. (“The SLA and JEM, made up largely of black Muslims from the Fur, Masaalit, and Zaghawa tribes, resisted what they saw as government-sponsored seizures of their farmland by nomadic Arab herders.”).
and a number of atrocities are alleged to have occurred in this campaign. In fact, many commentators, politicians, and human

4 Id. ("Armed militias retaliated against the rebel groups by targeting their villages, killing men and boys, raping women, razing crops, and destroying wells—while government forces reportedly provided air and logistical support—in what many observers characterize as a deliberate, coordinated campaign to drive black Sudanese out of Darfur."); Sudan: As South Split Looms, Abuses Grow in Darfur, HUM. RTS. WATCH (June 6, 2011), http://www.hrw.org/news/2011/06/06/sudan-south-split-looms-abuses-grow-darfur ("A surge in government-led attacks on populated areas and a campaign of aerial bombing have killed and injured scores of civilians, destroyed property, and displaced more than 70,000 people, largely from ethnic Zaghawa and Fur communities linked to rebel groups."); Lucien J. Dhooge, Darfur, State Directment Initiatives, and the Commerce Clause, 32 N.C. J. INT’L. L & COM. REG. 391, 398 (2007) ("Numerous serious human rights violations have been committed by all parties to the Darfur conflict. The primary target of these violations has been civilian populations. Darfurians have suffered numerous and significant violations of their personal integrity and well-being.").

5 Nicholas D. Kristof, The Secret Genocide Archive, N.Y. TIMES, Feb. 23, 2005, http://www.nytimes.com/2005/02/23/opinion/23kristof.html ("During past genocides against Armenians, Jews and Cambodians, it was possible to claim that we didn’t fully know what was going on. This time, President Bush, Congress and the European Parliament have already declared genocide to be under way."); Joyce Apsel, On Our Watch: The Genocide Convention and the Deadly, Ongoing Case of Darfur and the Sudan, 61 RUTGERS L. REV. 53, 68-69 (2008) ("Darfur is the most recent, and not necessarily the last, in a series of ongoing genocidal politics and practices in Sudan that include scorched earth campaigns, targeted killings, and rape. Many features of Darfur follow the patterns of a series of other twentieth-century genocides and mass violence, including state sponsorship; use of proxy groups; the targeting of civilian populations, which takes place under the cover of violent state, regional, and international conflicts; heightened tensions of internally displaced persons caused by a scarcity of resources and environmental degradation; destruction of lives and livelihoods; economic incentives ranging from booty to land; the radicalization of opposition groups who also carry out atrocities; and perpetrator denial."); Jamie A. Mathew, The Darfur Debate: Whether the ICC Should Determine That the Atrocities in Darfur Constitute Genocide, 18 FLA. INT’L L. 517, 547 (2006) ("The United Nations is incorrect in concluding that genocidal intent is lacking in Darfur. Instead, the ICC should conclude that there is sufficient evidence of genocidal intent and hold the government of Sudan and the Janjaweed responsible for genocide in Darfur."); Jennifer Trahan, Why the Killing in Darfur is Genocide, 31 FORDHAM INT’L L.J. 990, 990-92 (2008) ("The world has shamelessly stood by as the atrocities committed in Darfur, Sudan have occurred over the last several years. While 200,000-400,000 have been killed and an estimated 2.5 million displaced, all based on tribal ethnicity, pledges of “never again” made both after the Holocaust and the Rwandan genocide, have once again rung hollow. It should not matter whether the killing in Darfur is characterized as “genocide,” mass murder, extermination or ethnic cleansing for the world community—and particularly, the United Nations Security Council—to have acted forcefully before now. It matters little to those on the ground what legal nomenclature is used to characterize the crimes by which they were killed. Yet, sometimes semantics do appear to matter, particularly in terms of garnering media and public attention on the crowded world stage. While various countries and institutions have characterized the killing as “genocide”—including the United States Government and others—various other key international actors, such as the United Nations . . . and certain international non-governmental organizations . . .
rights, religious, and cultural organizations have labeled the crisis in Darfur "genocide."

In response to the situation in Darfur, the United Nations Security Council referred the grave situation in the region to the International Criminal Court in 2005. The Chief Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, announced the launch of a formal inquiry into the situation in 2005. This resulted in the issuance of arrest warrants on charges of war crimes, crimes against humanity, and genocide for Ahmed Haroun, the governor of the state of Kordofan, and Ali Kosheib, a militia leader. Most significantly, an arrest warrant was issued in 2009 for the arrest of Sudanese President Omar al-Bashir on charges of war crimes, crimes against humanity, and genocide. When President al-Bashir was indicted, it was the very first time an incumbent head of state had ever been indicted by the International Criminal Court.  

have not done so. In fact, there is good reason to conclude that the killing is genocide.


About Us, Save Darfur Coalition, http://www.savedarfur.org/pages/about (last visited Apr. 18, 2012) ("Around the country and across the globe, the Save Darfur Coalition is inspiring action, raising awareness and speaking truth to power on behalf of the people of Darfur. Working with world leaders, we are demanding an end to the genocide, and our efforts are getting results."). The Save Darfur Coalition consists of approximately 180 religious, political, and human rights organizations which are advocating for a response to the events in Darfur.


Sudan: As South Split Looms, Abuses Grow in Darfur, supra note 4.


Sudan: As South Split Looms, Abuses Grow in Darfur, supra note 4.

For a comprehensive academic discussion concerning the indictment of President al-Bashir, see Matthew H. Charity, The Criminalized State: The International Criminal Court, the Responsibility to Protect, and Darfur, Republic of Sudan, 37 Ohio N.U. L. Rev. 67 (2011); Gwen P. Barnes, Note, The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of
Even prior to the al-Bashir indictment, Sudan saw promise for a move away from the darkness of war and conflict and began to look towards a new era of increased promise for peace. In 2005, a monumental Comprehensive Peace Agreement was entered into by the SPLM/A and the government of Sudan, which formally ended the ongoing civil war.12 The Comprehensive Peace Agreement also provided a timetable which would allow southern Sudan the opportunity to vote on a referendum of independence.13 From January 9 through January 15, 2011, the people of southern Sudan voted for independence, with 98.8% voting to secede.14 On July 9, 2011, the Republic of South Sudan formally became a new, independent African nation.15

But overshadowing this new era of a greater promise for peace is a long history of Sudanese support for terrorism.16 In fact, Sudan is still

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13 Id.


15 Background Note: Sudan, U.S. DEPARTMENT OF ST. (Jan. 10, 2012), http://www.state.gov/e/eb/ebud/sad/5424.htm (“In the early and mid-1990s, Carlos the Jackal, Osama bin Laden, Abu Nidal, and other terrorist leaders resided in Khartoum. Sudan’s role in
designated as a “state sponsor of terrorism” by the United States Department of State, despite the increasingly promising prospects for United States security interests in the region. One of the three main critical objectives of the Obama administration concerning its current policy with Sudan is to ensure that Sudan does not provide a safe haven for international terrorists. This is part of the ongoing fight against terrorism.

The fight against terrorism, however, is not comprised exclusively of the counterterrorism efforts of federal agencies and military operations in Afghanistan and other locations throughout the world. It is also a judicial war, where the family members of those injured or killed by acts of international terrorism materially supported by a state sponsor of terrorism can obtain justice and relief in American courts.

the radical Pan-Arab Islamic Conference represented a matter of great concern to the security of American officials and dependents in Khartoum, resulting in several draw downs and/or evacuations of U.S. personnel from Khartoum in the early-mid 1990s. Sudan’s Islamist links with international terrorist organizations represented a special matter of concern for the U.S. Government, leading to Sudan’s 1993 designation as a state sponsor of terrorism and a suspension of U.S. Embassy operations in Khartoum in 1996.); Lucien J. Dhooge, Condemning Khartoum: The Illinois Divestment Act and Foreign Relations, 43 AM. BUS. L.J. 245, 261-62 (2006) (“The United States designated Sudan as a state sponsor of terrorism in August 1993 as a result of its offering of sanctuary to numerous terrorist leaders and its support of insurrections and radical organizations in Algeria, Egypt, Eritrea, Ethiopia, Tunisia, and Uganda.”); Ruth Wedgwood, Responding to Terrorism: The Strikes Against Bin Laden, 24 YALE J. INT’L L. 559, 565 (1999) (footnotes omitted) (“Sudan has been in turn a well-known way station for paramilitary and terrorist operations, including those of Carlos the Jackal and Abu Nidal. Sudan sheltered suspects in the 1995 assassination attempt against President Hosni Mubarak of Egypt, leading to U.N. Security Council sanctions. Sudan also cooperated openly with bin Laden until 1996. The former defense minister of Sudan’s Islamic Front government, Ghazi Salah-al-Din, maintains close personal relations with bin Laden, and bin Laden reportedly made major economic investments in the country, including bank deposits of $500 million that helped to support the Sudanese currency. Bin Laden has retained close ties with the “Military Industrial Complex” of Sudan, a state-owned company that has managed Sudan’s efforts to produce chemical weapons.”).

17 Background Note: Sudan, supra note 16.
18 Statement, President Barack Obama, supra note 1.
20 Danica Curavic, Note, Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act’s Terrorism Provisions, 43 CORNELL INT’L L.J. 381 (2010); Debra Strauss, Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism, 19 DUKE J. COMP. & INT’L L. 307 (2009); John
Sudan’s material support of terrorism has contributed to the loss of innocent American lives. In *Rux v. Republic of Sudan*, a group of more than fifty surviving family members of seventeen United States sailors killed in the October 12, 2000 *U.S.S. Cole* bombing, one of the deadliest bombings in United States Naval history, recovered a $7,956,344 judgment against Sudan for its material support of Al-Qaeda that enabled Al-Qaeda to carry out the attack (*Rux III*). 21

The *Rux* plaintiffs first filed suit in the United States District Court for the Eastern District of Virginia on July 16, 2004 (*Rux I*) to recover damages from Sudan for its “material support in the form of funding, direction, training, and cover to Al-Qaeda, a worldwide terrorist organization whose operatives facilitated the planning and execution of the bombing of the *U.S.S. Cole*,” Sudan initially did not appear to respond to the complaint and soon fell into default. 24 Despite the default, the court permitted Sudan to answer plaintiffs’ allegations and Sudan filed a motion to dismiss on the basis that subject-matter jurisdiction did not exist since the allegations would not permit a waiver of its sovereign immunity. 25 In *Rux I*, the Eastern District of Virginia denied Sudan’s motion to dismiss, but on appeal, the United States Court of Appeals for the Fourth Circuit upheld the...
ruling of Rux I by denying Sudan’s motion to dismiss (Rux II).  

In Rux III, the Eastern District of Virginia entered judgment for the plaintiffs. However, the award included damages for the sailors’ lost wages and earning potential pursuant to the Death on the High Seas Act (DOHSA), but not for emotional loss. In 2008, Congress responded by enacting the Justice for Victims of State Sponsored Terrorism Act within the National Defense Authorization Act, which allows the recovery of damages for emotional loss under 28 U.S.C. § 1605A of the Foreign Sovereign Immunities Act.

Despite congressional action, the family members of the deceased sailors still have not recovered damages for emotional loss suffered as a result of the bombing. Following the decision in Rux III, the plaintiffs appealed to the Fourth Circuit (Rux IV), contending that Congress’s creation of the private right of action in 28 U.S.C. §1605A took precedence over the exclusive remedy of the DOHSA. The Fourth Circuit rejected the plaintiffs’ arguments in Rux IV and held that the DOHSA provided an exclusive remedy. The plaintiffs moved for leave to supplement their fourth amended complaint, but the Fourth Circuit held the appeal to be moot (Rux V).

Prior to the decision in Rux V, but shortly following the decision in Rux IV, the plaintiffs refilled the case, with a different lead plaintiff (Avinesh Kumar).

Most recently, in September 2011, all but four family members were denied recovery of emotional loss by the Eastern District of Virginia in the Kumar v. Republic of Sudan decision on the grounds that their claims for emotional loss were barred by res judicata and because a contrary decision would violate the doctrine of separation of powers. The pursuit of damages for emotional loss continues, as the decision is currently on appeal with the Fourth Circuit. This Article

28 Rux v. Republic of Sudan, 461 F.3d 461, 477 (4th Cir. 2006) [hereinafter Rux II].
30 Id.
33 Id. at 738.
36 Id. at *9-11.
argues that *Kumar* was incorrectly decided and, that in the wake of the progression of the *Rux* line of cases, the Fourth Circuit is in a position to uphold the clear intent of Congress to allow recovery of damages for emotional loss by family members of victims of terrorism pursuant to the policies and purposes of 28 U.S.C. § 1605A.

Overall, the *Rux* line of cases provides a particularly instructive, yet tragic, story of the pursuit of civil damages for terrorism in American courts. This Article discusses the background, legal issues, and legacy of the *Rux* line of cases, the policies and purposes behind the state sponsor of terrorism exception and the Foreign Sovereign Immunities Act, and the future of the judicial war on terror in the wake of the implementation of 28 U.S.C. § 1605A. Rather than hindering U.S. foreign policy interests, the story of the *Rux* line of cases and Sudan illustrates that the state sponsor of terrorism exception can actually promote U.S. foreign policy interests and serve as a strong tool in the war on terrorism. Since September 11, 2001, however, Sudan has actually become more of a silent counterterrorism partner whose very status as a state sponsor of terrorism may conceivably be removed in the near future. Despite this progress, continued violence between the Sudanese government and the Sudan People’s Liberation Movement–North (SPLM-North), a group traditionally allied with the south but located just north of the new border between Sudan and South Sudan, along with the commission of possible war crimes by the Sudanese military, threatens the continued stability of the region. If this conflict is peacefully resolved, a more positive future concerning relations between the United States and Sudan may be on the horizon.

I. FOREIGN SOVEREIGN IMMUNITY AND CIVIL LIABILITY FOR TERRORISM

A. The Historical Development of Foreign Sovereign Immunity

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38 Clooney Uses Star Power to Shine Light on Sudanese Atrocities, FOX NEWS (Mar. 18, 2012), http://www.foxnews.com/politics/2012/03/18/clooney-uses-star-power-to-shine-light-on-sudanese-atrocities (discussing actor George Clooney’s testimony before the United States Senate Foreign Relations Committee reporting his observations of a military bombing campaign in the southern part of the Sudan being conducted by the Sudanese military against rebels affiliated with the SPLM–North and civilians in the Nuba Mountains region).
At the founding of the United States, foreign states enjoyed absolute immunity from jurisdiction in United States courts. This principle was affirmed most eloquently in 1812 by the United States Supreme Court in *Schooner Exchange v. McFaddon*, which stated the following:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.40

For nearly two centuries, from the founding of the United States until the 1950s, absolute immunity remained the default doctrinal rule concerning the liability of a foreign state in American courts. However, following World War II, foreign states began performing roles outside of the sphere of official governmental acts, such as private and commercial functions.41 A shift away from the doctrinal rule of absolute immunity started to occur in the 1950s, when the executive and judicial branch started to adopt a more “restrictive view” of sovereign immunity.42 This shift toward the restrictive view was finally codified in the 1970s by congressional action with the adoption of the Foreign Sovereign Immunities Act.43

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41 Keller, supra note 39.

42 See Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (“N]ational interest will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings.”); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (“O]ur national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of diplomatic proceedings.”); M. Scott Bucci, Comment, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. Int’l L. Stud. 293, 297-98 (1997).

B. Congressional Adoption of the Foreign Sovereign Immunities Act, the State Sponsor of Terrorism Exception, and the Flatow Amendment

Congress adopted the Foreign Sovereign Immunities Act in 1976. Unless an exception applies, a foreign state remains immune from the jurisdiction of American courts. However, foreign states are not immune from jurisdiction if their activities venture outside of official governmental functions and into the private, commercial realm, among other exceptions. Therefore, when a foreign state operates a commercial enterprise, such as a bank, the activities of the entity subject the foreign state to jurisdiction.

Despite exceptions for cases of implied and explicit waiver, commercial activities, and noncommercial torts, the original text of the Foreign Sovereign Immunities Act in 1976 did not include an exception in cases where a foreign state violated peremptory norms of international law. However, in 1980, the United States Court of Appeals for the Second Circuit, in the landmark *Filartiga v. Peña-Irala* decision, held that official torture constituted a “violation of the law of nations” and thus was actionable under the Alien Tort Claims Act.

With official torture actionable under the Alien Tort Claims Act,
skeptics soon began to contend that foreign states which violate jus cogens norms of international law, such as torture, genocide, or terrorism,51 should not be conferred immunity from jurisdiction in American courts.52 Soon thereafter, victims of terrorism began to lobby Congress for a change in the Foreign Sovereign Immunities Act to allow the filing of civil lawsuits against a foreign state sponsor of terrorism which commits a terrorist act or provides aid to a group which commits a terrorist act.53

In 1996, Congress responded to the lobbying by victims of terrorism by enacting the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act.54 This law denied foreign states (who are designated as state sponsors of terrorism by the State Department) immunity from jurisdiction in a case of “an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking.”55 It is important to note that the Foreign Sovereign Immunities Act is a statute which concerns exceptions to jurisdictional immunity of foreign states, but does not provide a private cause of action.56 In addition, for the state sponsor of terrorism exception of the Foreign Sovereign Immunities Act to apply, a foreign state must be designated as a state sponsor of terrorism by the State Department.57 Currently, that

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51 See, e.g., Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) (“In sum, in light of the universal condemnation of organized and systemic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that such conduct violates an established norm of international law.”).
56 Id.
57 Id. at 898 (“The State Department classifies a state as a sponsor of terrorism pursuant to § 6(j) of the Export Administration Act of 1979, 50 App. U.S.C. § 2405(j) (2000), § 620A of the Foreign Assistance Act, 22 U.S.C. § 2371 (2000), and § 40(d) of the Arms Export Control Act, 22 U.S.C. § 2780(d) (2000) . . . . The principal effects of being a listed state do not relate to the [Foreign Sovereign Immunities Act], but rather to four categories of sanctions that the designation triggers: restrictions on U.S. foreign assistance; a ban on U.S. defense exports and
designation encompasses only four states: Syria (designated on December 29, 1979), Cuba (designated on March 1, 1982), Iran (designated on January 19, 1984), and Sudan (designated on August 12, 1993). 58

Within several months of the passage of the state sponsor of terrorism exception, Congress acted further by passing the “Flatow Amendment,” 59 which gave plaintiffs the ability to recover damages against officials, employees, and/or agents of a foreign state. 60 Prior to 2004, courts generally ruled that the Flatow Amendment also conferred a private right of action against terrorist states themselves. 61 However, the liability landscape changed in 2004 with the decision of the United States District Court for the District of Columbia in Cicippio-Puleo v. Islamic Republic of Iran. 62 The Cicippio-Puleo court held that the text of the Flatow Amendment only extended a private right of action to a foreign state’s officials, employees, and agents, and not to a foreign state itself. 63 The court reasoned that Congress did not explicitly create a private cause of action against a foreign state when it had the opportunity to do so, 64 and to hold that the Flatow Amendment created a private cause of action would accentuate concerns within the executive branch of the United States that the sales; certain controls over exports of dual use items; and miscellaneous financial and other restrictions.

59 See Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7-9 (D.D.C. 1998). The “Flatow Amendment” was named after Alisa Michelle Flatow, a twenty-year-old junior at Brandeis University who was studying abroad in Israel when she was killed while a passenger in a bus that exploded on April 9, 1995 due to a suicide bomber sponsored by the Shaqaqi faction of the Palestine Islamic Jihad. Id.
62 Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1034 (D.C. Cir. 2004).
63 Id.
64 Id. at 1036 (“Clearly, Congress’s authorization of a cause of action against officials, employees, and agents of a foreign state was a significant step toward providing a judicial forum for the compensation of terrorism victims. Recognizing a federal cause of action against foreign states undoubtedly would be an even greater step toward that end, but it is a step that Congress has yet to take. And it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states.”).
United States may be subject to more lawsuits in foreign states.\(^65\)

_Cicippio-Puleo_ did not stand as the final authority concerning the private cause of action. By the end of 2008, Congress would take that very action discussed in _Cicippio-Puleo_ and unambiguously confer a private cause of action against foreign states.


_Cicippio-Puleo_ stood as a stern setback to the efforts to hold foreign states accountable for acts of international terrorism. In 2007, the _Rux_ court awarded the family members of seventeen American sailors $7,956,344 in a judgment against the Republic of Sudan.\(^66\) Despite this significant award, the plaintiffs in the case were limited to damages for pecuniary loss under the Death on the High Seas Act.\(^67\)

Just as it did with the Flatow Amendment, Congress soon acted to provide recovery of damages for emotional loss under the state sponsor of terrorism exception. In 2008, Congress passed the Justice for Victims of Terrorism Act, included within the National Defense Authorization Act for Fiscal Year 2008 (NDAA). The law essentially overruled the decision of _Cicippio-Puleo_ and definitively created a cause of action against foreign states.\(^68\) Significantly, the law also provided for recovery of economic damages, solatium, pain and suffering, and punitive damages.\(^69\)

When the bill was enacted into law, Senator Frank Lautenberg of

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\(^{65}\) _Id._ at 1035 (“While Congress sought to create a judicial forum for the compensation of victims and the punishment of terrorist states, it proceeded with caution, in part due to executive branch officials’ concern that other nations would respond by subjecting the American government to suits in foreign countries.”).

\(^{66}\) _Rux III_, 495 F. Supp. 2d 541, 569 (E.D. Va. 2007).

\(^{67}\) _Id._ at 564.

\(^{68}\) 28 U.S.C. § 1605A(c) (2006) (“A foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—(1) a national of the United States, (2) a member of the armed forces, (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of an employee’s employment, or (4) the legal representative of a person . . . for personal injury or death caused by acts . . . of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages.”). _See also DAMROSCHE_ et al., _supra_ note 55, at 898.

\(^{69}\) 28 U.S.C. § 1605(A)(c)(4) provides that: “In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees or agents.” _See also DAMROSCHE_ et al., _supra_ note 55, at 898.
New Jersey, one of the sponsors of the legislation, stated that the “law achieves my goal of providing justice for American victims of terrorism at the hands of terrorist states like Iran and Libya. I will not rest until all American victims of terrorism get the justice they deserve.” As will be discussed below, the Rux line of cases continues in the courts, with the denial of relief for damages for emotional loss in Kumar. For victims of terrorism, the fight for justice continues today.

II. RUX V. REPUBLIC OF SUDAN: JURISDICTIONAL AND LIABILITY ISSUES

Prior to the Rux line of cases, Sudan gave documented material support to terrorism. Among many activities, Sudan gave material support to an attempted assassination of then-President Hosni Mubarak of Egypt in 1996, gave “safe harbor” to Osama bin Laden from 1991 to 1996 for the purpose of providing shelter to train militants for terrorist operations, allowed its banking institutions to be used by Al-Qaeda to launder money, and provided Al-Qaeda members with diplomatic passports. Further, its military cooperated with Osama bin Laden and Al-Qaeda in the financing of at least three terrorist camps in northern Sudan.

72 Rux III, 495 F. Supp. 2d 541, 569 (E.D. Va. 2007) (“In 1996, the United States imposed comprehensive economic, trade, and financial sanctions against Sudan. That same year, the United Nations Security Council approved sanctions against Sudan for its alleged connections to the attempted assassination of Egyptian President Hosni Mubarak.”).
73 See Wedgwood, supra note 16, at 565 (“If a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take responsible action, the host government cannot expect to insulate those facilities against proportionate measures of self-defense.”).
74 Rux III, 495 F. Supp. 2d at 549 (“Bin Laden lived in Sudan from 1991 until May 1996, when he was expelled from the country under international pressure. He then relocated to Afghanistan.”).
75 Id. (“Sudan provided Bin Laden’s fledging terrorist group with a sanctuary within which it could freely meet, organize, and train militants for operations.”).
76 Id.
77 Id. at 550 (“As early as 1998, Sudan provided Al-Qaeda members with Sudanese diplomatic passports as well as regular Sudanese travel documentation that facilitated the movement of Al-Qaeda operatives in and out of Sudan.”).
78 Id. (“Bin Laden’s Al-Hijrah for Construction and Development Company worked
With Sudan’s support of terrorism, and Congress’s approval of the Flatow Amendment, the family members of those killed in the U.S.S. Cole bombing sought justice and relief in American courts. This long and still ongoing journey for justice began with jurisdictional hurdles to overcome.

A. Jurisdictional Issues Under the Foreign Sovereign Immunities Act—Rux I and II

In Rux I, the issue of jurisdictional causation was the first main legal issue presented. For the case to proceed through the jurisdictional hurdle, the plaintiffs were required to show three distinct elements: 1) the provision of material support by a state sponsor of terrorism; 2) the provision of such support by an official of the state “while acting within the scope of his or her office, employment, or agency;” and 3) a causal link between the material support and damages resulting from an act of terrorism. The plaintiffs’ allegations concerning Sudan’s “aiding and abetting” Al-Qaeda operatives towards the planning and execution of the bombing survived Sudan’s motion to dismiss at both the district and appellate court.

Most significantly, the court in Rux II was faced with the decision of adopting either a “but for” or “proximate cause” standard of jurisdictional causation. The Fourth Circuit followed the United States Court of Appeals for the District of Columbia Circuit’s decision in Kilburn v. Socialist People’s Libyan Arab Jamahiriya in adopting the “proximate cause” standard of jurisdictional causation, contending that such a standard struck a balance between discarding the “most insubstantial cases” and permitting more meritorious cases to

directly with Sudanese military officials to transport and provision the camps, where terrorists of Egyptian, Algerian, Tunisian, and Palestinian origin received training. From as early as 1997 to at least 1999, Sudan served as a “training hub” for Al-Qaeda and other terrorist groups that used Sudan as a secure base for assisting compatriots elsewhere. Furthermore, starting as early as 1997 the Sudanese Government provided paramilitary training to terrorist organizations in Sudan."

79 Rux II, 461 F.3d 461, 467 (4th Cir. 2006).
81 Rux II, 461 F.3d at 474.
82 Id. at 472-73.
84 Rux II, 461 F.3d at 473.
In the wake of *Rux II*, plaintiffs need not necessarily chart a direct link between a state sponsor of terrorism’s actions and a terrorist event. Instead, the court adopted a “reasonable connection” standard—all that is necessary is for plaintiffs to plead a “reasonable connection” between the actions of a state sponsor of terrorism and a terrorist event.

The “proximate cause” standard correctly balances the interests of plaintiffs and defendants in civil litigation concerning terrorism, enabling more meritorious cases to proceed. A “but for” requirement would have likely been fatal to the plaintiffs’ claims in *Rux*, as the allegations did not create a direct line between Sudan and its support of Al-Qaeda’s commission of the *U.S.S. Cole* bombing, and would render the state sponsor of terrorism exception virtually ineffectual for similar cases. While only a “low causational threshold” is necessary for cases to proceed, it is still necessary for plaintiffs to make a substantive showing concerning liability in order to recover. State sponsor of terrorism defendants are arguably not substantially burdened by the jurisdictional causation requirement. While jurisdictional causation issues were decided favorably for the plaintiffs in the *Rux II* decision in 2006, *Rux III* would cause a substantial hurdle for full recovery.

### B. Liability Issues Under the Foreign Sovereign Immunities Act—*Rux III*

On March 13-14, 2007, *Rux III* was tried. Sudan attended, but did not proffer any evidence and only made a brief argument at the end of the trial. The court noted that of the fifty-nine plaintiffs in the case, many experienced depression, among other physical ailments, following the *U.S.S. Cole* bombing. It found, with substantial evidence, that Sudan’s material support of Al-Qaeda led to the murders

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85 Id. ("[The proximate cause standard] serves simultaneously to weed out the most insubstantial cases without posing too high a hurdle to surmount at a threshold stage of the litigation.").
86 Id.
87 Id.
88 Marzen, supra note 53, at 513; see also Kilburn, 76 F.3d at 1130.
89 Kotlarczyk, supra note 20, at 2041.
90 *Kilburn*, 76 F.3d at 1129; Kotlarczyk, *supra* note 20, at 2041.
92 Id. at 544.
93 Id. at 547.
of the seventeen American servicemen and servicewomen on the \textit{U.S.S. Cole}.\footnote{Id. at 554.} While the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act bestows on the courts jurisdiction to hear cases against foreign states, it does not provide a corresponding private cause of action to establish liability.\footnote{Id. at 555 ("While the [Foreign Sovereign Immunities Act] vests jurisdiction in federal courts to hear cases against foreign states, it does not afford plaintiffs with a substantive cause of action.").} However, cases have firmly established that a private cause of action can be derived from state common or statutory law, or federal law.\footnote{See Blais v. Islamic Republic of Iran, 495 F. Supp. 2d 40 (D.D.C. 2006) (applying the state laws of battery and intentional infliction of emotional distress); Price v. Socialist People’s Libyan Arab Jamahiriya, 384 F. Supp. 2d 120 (D.D.C. 2005) (applying the state laws of assault, battery, and intentional infliction of emotional distress).} Many of these cases involved recovery of state law damages for emotional loss, including intentional infliction of emotional distress. But the court fell short for the plaintiffs in \textit{Rux III}, and damages for emotional loss were barred.

The court in \textit{Rux III} faced the question of which law to apply—federal maritime law, state common or statutory law, the DOHSA, or a combination of laws. \textit{Rux III} was a case of first impression concerning the application of the DOHSA since it involved a terrorist attack of a U.S. vessel on foreign territorial waters.\footnote{\textit{Rux III}, 495 F. Supp. 2d at 559.} The plaintiffs contended that liability should be governed by Virginia law concerning intentional infliction of emotional distress, which would allow for recovery of emotional loss,\footnote{Id. at 555.} but Sudan argued that the only basis for recovery was under the DOHSA,\footnote{Id. at 556; \textit{Death on the High Seas Act}, 46 U.S.C.A. §§ 30301-30308 (West 2011).} which limits damages to pecuniary losses sustained by plaintiffs.\footnote{\textit{Rux III}, 495 F. Supp. 2d at 563.}

The court agreed with Sudan that the DOHSA applied to the case,\footnote{Id. at 565.} and that plaintiffs’ exclusive remedy lay with the DOHSA.\footnote{Id. at 564.} The court articulated the rationale that Congress intended to create a
uniform statutory remedy for wrongful death on the high seas.\textsuperscript{103} In addition, the court indicated that Congress had amended the DOHSA in 2000 to permit recovery of non-pecuniary damages involving commercial aviation accidents on the high seas beyond twelve nautical miles from the shore of any country,\textsuperscript{104} but had not explicitly done so for accidents on the high seas.\textsuperscript{105} Thus, the family member plaintiffs of the seventeen deceased American servicemen and servicewomen were limited to recovery in the amount of $7,956,344.\textsuperscript{106}

The \textit{Rux III} court had the opportunity to write a “clean slate”\textsuperscript{107} concerning the state sponsor of terrorism exception and permitting recovery of nonpecuniary damages, but tragically chose not to do so. The court essentially abdicated this question to the legislative branch, but as will be discussed later with the \textit{Kumar} case, the \textit{Kumar} court inapositely held that the legislative branch exceeded its constitutional authority in response to the holding in \textit{Rux III} when it enacted the Justice for Victims of Terrorism Act, included as part of the NDAA.

One of the great tragedies in the \textit{Rux} line of cases is that the family members’ attempts at relief for emotional loss could have been resolved in \textit{Rux III}, but were not. The court in \textit{Rux III} grounded its decision on the basis that the DOHSA had preemptive effect over Virginia state law claims of intentional infliction of emotional distress, in essence becoming an exclusive remedy. Outside of the court’s analysis, taking this rationale a step further are traditional tort cases involving the exclusive remedy defense of an employer concerning worker’s compensation. It is a general doctrinal rule today that an employee who is injured within the scope of his or her employment is limited to the exclusive remedy of worker’s compensation.\textsuperscript{108} However, certain exceptions apply, such as the exception for intentional torts, because of the policy reason that to hold otherwise would create the potential effect where employers could intentionally abuse employees and still only be liable to the employee under the state worker’s

\textsuperscript{103} Id. ("The Court’s creation of a terrorism exception to DOHSA would not only be contrary to the text of DOHSA, it would also undermine Congress’[s] purpose of enacting a uniform statutory remedy for wrongful death on the high seas.”).


\textsuperscript{105} \textit{Rux III}, 495 F. Supp. 2d at 565.

\textsuperscript{106} Id. at 569.

\textsuperscript{107} Id. at 563.

compensation system and receive immunity from tort action.\textsuperscript{109}

Similar to the exception of intentional torts from worker’s compensation, which is a policy exception to the exclusive remedy rule, the court in \textit{Rux III} should have fashioned a public policy exception for the DOHSA. To do so would have upheld the clear intent of Congress in permitting family members of victims of terrorism the ability to obtain justice in the courts.\textsuperscript{110} Furthermore, it prevents inequitable results concerning relief relating to the location of acts of terrorism materially supported by state sponsors of terrorism. If the \textit{U.S.S. Cole} bombing had occurred on a commercial airliner less than twelve miles off the coast of Yemen on the high seas, non-pecuniary damages could be recovered under the DOHSA by the family members; but in the case of the \textit{U.S.S. Cole}, since the bombing occurred on an American naval vessel on the high seas, non-pecuniary damages were not allowed to be recovered. It is highly unlikely that Congress, considering the purposes and policies of the state sponsor of terrorism exception, could have intended such an inequitable result to occur.

Another influential commentator has recently noted this inconsistency where loss of society damages are recoverable for torts on land, but not for a death on the high seas on a vessel.\textsuperscript{111} The court in \textit{Rux III} even remarked it sympathized “greatly” with the plaintiffs\textsuperscript{112} despite its decision denying non-pecuniary damages. With this gap in remedies, and the inequitable result of \textit{Rux III}, Congress soon roared back into the picture with the passage of the Justice for Victims of Terrorism Act.

\textsuperscript{109} See Note, \textit{Exceptions to the Exclusive Remedy Requirements of Workers’ Compensation Statutes}, 96 \textit{Harv. L. Rev.} 1641, 1650-1651 (“Refusing to deem workers’ compensation a license for employers to abuse employees, these courts find it unacceptable to immunize employers from bearing full tort damages for intentional injuries. Most courts reconcile this exception with the exclusive remedy language by arguing that intentional torts fall outside the statutory scheme because they are not accidental or employment related as required by the statutes. Thus, tort action is permitted as an alternative, rather than an addition, to the workers’ compensation remedy.”).

\textsuperscript{110} Marzen, supra note 53, at 523 (“In enacting the exception, Congress had three goals in mind: (1) provide a means of relief for the victims of terrorism and their families to obtain justice in the courts, (2) punish guilty state sponsors of terrorism for their actions in supporting terrorist activities, and (3) deter states from supporting terrorism or committing terrorist acts in the future.”).

\textsuperscript{111} Thomas C. Galligan, Jr., \textit{Death At Sea: A Sad Tale of Disaster, Injustice, and Unnecessary Risk}, 71 L.A. L.R. 787, 800 (2011) (“Where a tortious death occurs on land, the majority rule is that loss of society damages are recoverable, but not on the high seas.”).

\textsuperscript{112} \textit{Rux III}, 495 F. Supp. 2d at 565.

Following the decision in \textit{Rux III}, Congress responded by passing the Justice for Victims of Terrorism Act as part of the NDAA\textsuperscript{113} which created a new private right of action\textsuperscript{114} under the Foreign Sovereign Immunities Act to allow recovery for “solatium, pain and suffering, and punitive damages” against state sponsors of terrorism.\textsuperscript{115} This action directly responded to the decision in \textit{Rux III}. The family member plaintiffs then filed a motion in the Eastern District of Virginia to reopen the case and enter judgment under the new private cause of action in \textit{Rux IV}\.\textsuperscript{116} With the enactment of the new private cause of action, a corresponding legal question arose—would the new private cause of action apply retroactively to pending cases?

Congress permitted retroactive application of the new private cause of action in 28 U.S.C. § 1605A in one circumstance under the NDAA—through the “refiling” of an action under § 1083(c)(2). However, the same effect could also be achieved by the filing of a completely new action (“related action”) under § 1083(c)(3) of the NDAA.\textsuperscript{117} Under the “refiling” procedure, if a plaintiff detrimentally relied upon the former 28 U.S.C. § 1605(a)(7) (the state sponsor of terrorism exception) as “creating a cause of action” and if the case was pending when the NDAA became law, the plaintiff was mandated to “refile” the suit within sixty days, including a cause of action based upon the new 28 U.S.C. § 1605A(c).\textsuperscript{118}

If the plaintiff did not detrimentally rely upon the former 28 U.S.C. § 1605(a)(7) as creating a private cause of action, then all hope was not lost. The NDAA permitted the filing of a “related action” arising out of the same act or incident under § 1083(c)(3) if a plaintiff had timely commenced a related action under § 1605(a)(7), and then filed the new action within sixty days from the later of the date of the entry of judgment in the original action or the date of the NDAA’s


\textsuperscript{116} \textit{Rux IV}, 672 F. Supp. 2d at 730.

\textsuperscript{117} Id. at 733.

\textsuperscript{118} Id.
enactment.\textsuperscript{119}

In \textit{Rux IV}, once again, the family members’ quest for damages for emotional pain and suffering was denied. The court held that the plaintiffs could not invoke 28 U.S.C. § 1605A retroactively since they did not rely upon the former 28 U.S.C. §1605(a)(7) as creating a private cause of action.\textsuperscript{120} In its holding, the court followed \textit{Simon v. Republic of Iraq} in holding that the new statute is not automatically retroactive.\textsuperscript{121} The court also reserved ruling on the separation of powers issues concerning the NDAA, stating in dictum that Congress arguably transferred the conduct of foreign affairs from the executive branch to private litigants in violation of Article II of the United States Constitution.\textsuperscript{122}

Once again, the judiciary had the clear opportunity to fashion a remedy for the family members to recover damages for their emotional loss in \textit{Rux IV}, and once again, the court failed to act to permit a remedy. While the court described the situation that the plaintiffs encountered as a “tragedy,”\textsuperscript{123} it held that no judicial remedy was fashioned although the clear intention of Congress, as a policy rationale, was to provide relief for emotional loss. Furthermore, the court failed to fashion a remedy when the circumstances surrounding the jurisprudence of the former § 1605(a)(7) clearly prejudiced plaintiffs’ remedies in this instance. The court acknowledged that the likely reason for the former § 1605(a)(7) not being pleaded specifically as creating a private cause of action in the instant case was that the court had ruled otherwise in \textit{Cicippio-Puleo}.\textsuperscript{124} For the plaintiffs to rely upon the former § 1605(a)(7) as creating a private cause of action at the time their original complaint was filed would be to completely disregard the current state of caselaw at the time. Thus, holding that “refiling” would not be permitted under the circumstances yielded an unfair and tragic result.

With the ruling in \textit{Rux IV}, all of the plaintiffs’ avenues of relief were not foreclosed as the “related action” provision of § 1083(c)(3) still remained. The plaintiffs filed a notice of appeal five days after the

\textsuperscript{119} Id.
\textsuperscript{120} Id. at 734.
\textsuperscript{121} See \textit{Simon v. Republic of Iraq}, 529 F.3d 1187 (D.C. Cir. 2009).
\textsuperscript{122} \textit{Rux IV}, 672 F. Supp. 2d at 736.
\textsuperscript{123} Id. at 738.
\textsuperscript{124} Id. at 735.
decision, but then the plaintiffs filed a completely new action prior to the disposition of the appeal. The appeal was rendered moot in a decision by the Fourth Circuit on February 3, 2011 in Rux V. The stage was then set for the Eastern District of Virginia, once again, for a third time, to examine the issue of providing relief for the family members of the victims of the U.S.S. Cole bombing for emotional loss.

III. Kumar v. Republic of Sudan: The Third Attempt to Recover Emotional Loss Damages

Undeterred by the holding in Rux IV, the plaintiffs filed a completely new action on April 15, 2010 seeking emotional loss damages under 28 U.S.C. § 1605A, including two additional plaintiffs who were not parties in the Rux line of cases. The third opportunity would not be a charm for the plaintiffs.

Despite the filing of the new action, the district court denied the plaintiffs any relief for damages for emotional loss in the Kumar v. Republic of Sudan decision on September 19, 2011. The court found that the plaintiffs could not file a “related” suit pursuant to § 1083(c) of the NDAA since they did not file the suit within sixty days after the entry of judgment (December 8, 2009) in the underlying Rux case, as was required by § 1083(c). The court noted the plaintiffs filed the new complaint on April 15, 2010—128 days after the court’s entry of judgment.

Secondly, the court also found that the doctrine of res judicata barred all of the plaintiffs’ claims (with the exception of the plaintiffs not named at the time the Rux judgment was entered). The court made this finding despite caselaw holding that cases involving the state sponsor of terrorism exception were not barred by res judicata if they involved claims which could not have been raised in prior litigation.

Once again, the district court circumvented the clear intention of

126 Id. at *5-6.
127 Id. at *8.
129 Id. at *11.
130 Id. at *10.
131 Id. at *9.
132 Id. at *11.
Congress in denying the plaintiffs’ relief for damages for emotional loss. Instead, the court found ample room to criticize Congress in its creation of § 1083, contending Congress violated the doctrine of separation of powers in enacting § 1605A. There is still room for change, however, and a different final outcome—the decision in Kumar, which is currently set for appeal before the Fourth Circuit.

Even despite the decision in Kumar, the overall legacy of the Rux line of cases remains positive. Rather than hindering U.S. foreign policy interests, the Sudan example overall actually remains a relatively positive illustration for U.S. foreign policy interests.

IV. AN ANALYSIS OF KUMAR V. REPUBLIC OF SUDAN, THE LEGACY OF THE RUX CASES, AND THE FUTURE OF THE JUDICIAL WAR ON TERROR

A. Analysis of the Kumar Decision

With the Kumar decision, the prospect of judicial relief for victims and family members of terrorism to recover damages for emotional loss is in serious peril. On the one hand, the court in Rux IV called the fact that the plaintiffs could not receive damages for emotional loss a “tragedy.” On the other hand, that same court in Kumar definitely slammed the door on any possibility of relief, despite congressional action, and blasted Congress’s efforts as a “deliberate effort to change the outcome in cases that have already been fully decided.” In essence, the court was trying to eat cake, but yet have it too. However, the end result and criticism of § 1083 on separation of powers grounds places the future of § 1605A, and the future of the judicial war on terror, in jeopardy.

In Kumar, the court had the opportunity to follow the precedent set by the United States District Court for the District of Columbia in the In re Islamic Republic of Iran Terrorism Litigation case in declining to give res judicata effect to prior actions under the prior state sponsor of terrorism exception statute (28 U.S.C. § 1605(a)(7)). In that case, the court found that res judicata did not preclude claims that were litigated

134 Kumar, 2011 WL 4369122, at *10-11.
135 This was confirmed with a telephone conversation the author had with a representative of the office of Hall, Lamb and Hall, P.A., counsel for plaintiffs in the matter.
137 Kumar, 2011 WL 4369122, at *11.
138 In re Islamic Republic of Iran Terrorism Litigation, 659 F. Supp. 2d at 31.
under state law under the old 28 U.S.C. § 1605(a)(7) statute at a time when no direct federal cause of action existed. Thus, independent actions would be permitted to be filed as a result of the decision.

But no such relief has been granted by the Kumar court. The Kumar court appeared to hinge most of its hesitance to allow an independent action on res judicata and the separation of powers, depriving judgments of their conclusive effect. But the court completely glossed over the fact that the former state sponsor of terrorism exception and new 28 U.S.C. § 1605A are completely different statutes—the former state sponsor of terrorism exception statute is a jurisdictional “pass-through” statute while the new § 1605A confers a specific new regime of statutory rights and remedies. In fact, as the court in In re Islamic Republic of Iran Terrorism Litigation noted, the new § 1605A “includes greater remedies, more robust judgment enforcement provisions, and other mechanisms intended to better promote and execute the federal interest in deterring terrorist attacks and compensating victims.” It is also critical to note that § 1083 of the NDAA, which created 28 U.S.C. § 1605A, has no provision that expressly allows for the reopening, reexamination, or abrogation of prior judgments. Since 28 U.S.C. § 1605A is a completely new federal statutory cause of action, and could not have been asserted in the underlying action in the Rux line of cases, the Fourth Circuit should permit this cause of action to be asserted by the Kumar plaintiffs.

Permitting the Kumar plaintiffs to assert the 28 U.S.C. § 1605A claim would also fulfill Congress’s intent to provide relief for emotional loss damages for family members of terrorism victims. Significantly, the House Conference Report for § 1083 envisioned a retroactive and expansive reach of 28 U.S.C. § 1605A. In addition, two years earlier,
Congress had also raised the death gratuity benefit for eligible armed forces survivors who die in active duty from $12,000 to $100,000.\textsuperscript{147} Not permitting the family members of victims of the \textit{U.S.S. Cole} bombing to recover damages for emotional loss would frustrate Congress’s intent and once again put Congress in the position of having to remedy judicial error.

Also, to permit the family members of the victims of the \textit{U.S.S. Cole} bombing to recover emotional loss damages through 28 U.S.C. § 1605A does not violate the doctrine of separation of powers. The court in \textit{Kumar} expressed the concern that Congress in § 1083 attempted to deliberately change the outcome in cases already fully decided on the merits.\textsuperscript{148} As the court in \textit{In re Islamic Republic of Iran Terrorism Litigation} indicated, in enacting § 1083, Congress and the executive branch reached a “delicate legislative compromise”—and thus “the Judicial Branch should be extremely hesitant about intervening in a way that would unravel those efforts.”\textsuperscript{149} The court’s holding in \textit{Kumar}, denying relief for emotional loss damages, hinders those efforts, and thus violates the separation of powers doctrine.

Furthermore, the United States Supreme Court’s holding in \textit{Japan Whaling Ass’n v. American Cetacean Society} dictates that the \textit{Kumar} plaintiffs’ claims not be discarded on separation of powers grounds. In \textit{Japan Whaling Ass’n}, the Supreme Court examined a declaratory relief and injunction action filed by several wildlife conservation groups, which alleged that the Secretary of Commerce breached a statutory duty with respect to enforcement of international whaling quotas.\textsuperscript{150} The Supreme Court stated that “one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”\textsuperscript{151} One noted scholar has argued that where liability is created by a federal statute (as in the case of the “state sponsor of terrorism exception” to the Foreign Sovereign Immunities Act), then separation of powers...
concerns “simply have no relevance.” The Kumar plaintiffs’ claims for emotional loss damages must be allowed to move forward, since the legislative and executive branch authorized § 1605A.

Finally, the court in Kumar overlooked the fact that the ultimate responsibility for designating state sponsors of terrorism lies with the executive branch. The way § 1605A is codified allows only “state sponsors of terrorism,” as designated by the State Department, to be held liable in court. At any point, if the executive branch held serious concerns about the effects of civil judgments on state sponsors of terrorism, the State Department could always revoke that designation at any time; instead, the executive branch has implicitly encouraged civil lawsuits against state sponsors of terrorism with the adoption and implementation of § 1605A.

The Fourth Circuit currently has the opportunity to correctly resolve this question and to allow recovery of damages for emotional loss and fulfill the intention of Congress and the executive branch. Even despite the recent decision in Kumar, the Rux line of cases presents a current example of modest success in the judicial war on terror. However, 28 U.S.C. § 1605A faces additional challenges moving forward and has faced a number of academic critiques.


Perhaps the most vocal critique of the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act as well as of 28 U.S.C. § 1605A is that private civil lawsuits will adversely affect U.S. foreign policy interests. A large part of this critique centers around the adequacy of domestic courts to examine complex foreign policy issues. An official in the administration of President George W. Bush, Professor John Yoo, contends that American courts are not effective at measuring the costs and benefits of such cases, and instead, decide the cases using a more normative, moral judgment.

American courts have also been criticized on their ability to make

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153 Id.
155 Id.
findings of fact in cases involving terrorism. One commentator has argued that when the judiciary makes findings of fact on policy and intelligence issues, U.S. foreign policy interests are adversely affected. In addition, the state sponsor of terrorism exception has been criticized on the grounds that premature findings of fact are made and that large judgments could be awarded on “barely-ripe intelligence evidence.”

In examining the Rux line of cases, none of these concerns are even closely warranted. In the trial stage of the case on the liability issues in Rux III, the plaintiffs presented much more than “barely-ripe” evidence. The findings of fact concerning liability in the Rux III trial was not only based on concrete evidence, but based on “substantial evidence” that Sudan’s material support of Al-Qaeda led to the deaths of the seventeen American servicemen and servicewomen on the U.S.S. Cole. Furthermore, in the Rux line of cases, expert testimony was proffered by the plaintiffs which chartered a causal link between Sudan and Al-Qaeda. The experts included R. James Woolsey, the Director of the CIA from 1993 to 1995. Any such concerns over “premature” fact-finding were certainly alleviated with the experts in the Rux III case. In the future, courts can alleviate the concern of “premature” fact-finding by requiring expert testimony in cases involving 28 U.S.C. § 1605A. This requirement is certainly reasonable and alleviates any concerns over hindering U.S. foreign policy interests.


Another critique of the state sponsor of terrorism exception concerns its legality under customary international law. One
commentator, William P. Hoye, argues that the general rule is that sovereign governments are immune from civil suit to the extent that they have not waived their immunity.\(^\text{161}\) Hoye also states that there is no “legal authority under which international law would permit one state to brand another sovereign state a sponsor of terrorism unilaterally and declare its own domestic courts as the final arbiter of victim compensation for acts of terrorism sponsored by the branded terrorist state.”\(^\text{162}\) Finally, according to the doctrine of sovereign equality, since states are sovereign and equal, Hoye contends that one sovereign state cannot impose its will upon another sovereign state.\(^\text{163}\)

Hoye’s critique, and critiques of 28 U.S.C. § 1605A under international law, overlook the emerging acceptance of the doctrines of passive personality jurisdiction and universal jurisdiction. Passive personality jurisdiction permits a state to exercise extraterritorial jurisdiction based upon a victim’s nationality.\(^\text{164}\) Under the passive personality principle, since the servicemen and servicewomen killed on the *U.S.S. Cole* were U.S. nationals, the United States could permissibly exercise extraterritorial jurisdiction over Sudan.

At one time, the United States disfavored the exercise of passive personality jurisdiction.\(^\text{165}\) But over time, it has not only been accepted in the United States\(^\text{166}\) but arguably has emerged as a norm of customary international law as objections to it have decreased.\(^\text{167}\) 28 U.S.C. § 1605A is justified under international law under the passive personality principle.

Furthermore, it has also been argued that American courts may exercise jurisdiction over human rights abuses committed abroad through the principle of universal jurisdiction.\(^\text{168}\) Universal jurisdiction allows any state to exercise jurisdiction over egregious violations of international law in order to uphold the international community’s

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\(^\text{161}\) Hoye, *supra* note 20, at 138.
\(^\text{162}\) *Id.*
\(^\text{163}\) *Id.*
\(^\text{165}\) DAMROSCH ET AL., *supra* note 55, at 797.
\(^\text{166}\) See, e.g., United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (finding that several statutes under which several defendants were charged, following the bombings of the United States embassies in Kenya and Tanzania in 2000, were permissible under the passive personality principle of international law).
\(^\text{167}\) DAMROSCH ET AL., *supra* note 55, at 797.
collective interest in preventing such acts. Material support for terrorism has become one such actionable norm under international law. Universal jurisdiction thus also sanctions 28 U.S.C. § 1605A under international law.


Other commentators have suggested the replacement of the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act with a victim’s compensation fund for the family members of victims of terrorism, to be administered at either the international or domestic level. A victim’s compensation system has been advocated on the international level on the basis that the system would be global, multilateral, not be subject to challenges under international law, and would be more “legitimate, efficient, and fair.” It has also been argued it could provide for a more efficient and expeditious compensation system, and that it would eliminate inequalities in compensation. Finally, it is contended that elimination of the exception and replacement with a compensation system may better deter terrorism.

As for the establishment of an international compensation system, numerous issues prevent this alternative from ever being a realistic possibility. Where would the money to compensate victims come from? Given the fact the United States has still not become a member of the International Criminal Court, would all nations even participate in such a system? Would a fund even work to deter terrorism? Would it even be fair to subject the emotional loss of domestic citizens of terrorism to a global entity which may or may not even provide any form of meaningful relief? An international compensation system is implausible.

As for a domestic victim’s compensation system, such a system

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169 Id. at 469.
171 Hoye, supra note 20, at 150-51.
172 Krallarczyk, supra note 20, at 2054-55; Taylor, supra note 20, at 557.
173 Hoye, supra note 20, at 151.
174 Krallarczyk, supra note 20, at 2054.
175 Taylor, supra note 20, at 557.
176 Krallarczyk, supra note 20, at 2054-55.
appears in many ways similar to the domestic worker’s compensation system. The worker’s compensation system represents in essence a “trade off” between the interests of employers and employees—employers are granted immunity from tort actions, and employees are guaranteed swift compensation. However, the trade-off for victims of terrorism is not favorable for their interests: arguably, a compensation fund would guarantee compensation, but would come with the loss of litigation rights under 28 U.S.C. § 1605A, a statute which provides rights and remedies guaranteed by Congress. Furthermore, worker’s compensation is a system where compensation is guaranteed irrespective of fault. The establishment of a victim’s compensation fund would take the fault inquiry out of litigated cases involving 28 U.S.C. § 1605A and leave victims with one less avenue for bringing closure to their losses. Such a result would be unsympathetic to the family members of victims of terrorism.


28 U.S.C. § 1605A is an important tool in the war on terrorism. Arguably, civil litigation will bring greater accountability to the nations on the state sponsors of terrorism list who give material support to terrorism, and thus make it less likely that these acts occur in the future.

The example of the Rux line of cases gives anecdotal evidence of this positive effect.

As in Rux III, Sudan’s material support of terrorism and Al-Qaeda in the late 1990s had a causal connection to the U.S.S. Cole bombing. President Omar al-Bashir was President of Sudan at the time. He remains President. But instead of civil lawsuits against Sudan jeopardizing U.S.–Sudanese relations, foreign policy relations have actually become less hostile. Sudan and South Sudan divided, relatively peacefully, into two nations in 2011. And the specter of the Republic

177 Marzen, supra note 108, at 872.
178 Shipman, supra note 20, at 569 ("While judgments rendered in American courts may often be unenforceable, victims may nevertheless gain some closure by establishing liability—a crucial part of the healing process.").
179 Id. at 570.
of Sudan being taken off of the State Department’s list of state sponsors of terrorism does not seem as remote as it once appeared.

Despite this progress, violence still continues in the Nuba mountains region of the southern part of Sudan. Since June 2011, reports indicate that the Sudanese military has been engaged in an indiscriminate bombing campaign of the Nuba mountains region in an offensive against the SPLM–North.\textsuperscript{181} Reports have recently indicated that the Sudanese government has been bombarding the region and blocking road access for aid workers delivering necessary emergency supplies to the civilians in the area.\textsuperscript{182} These reports have also garnered the attention of Congress. Actor George Clooney testified before the United States Senate Committee on Foreign Relations in March 2012 to report on a visit during which he witnessed violence in the region. He was also arrested for protesting at the Sudanese embassy in Washington, D.C.\textsuperscript{183} Further, a former key United Nations official, Mukesh Kapila, has described the violence as “literally a score-earthy policy” and has compared it to the former situation in Darfur.\textsuperscript{184}

This violence threatens the progress of the promising developing relationship between the governments of Sudan and South Sudan. While it is unclear if the situation will result in a full-blown conflict between the two countries, this development makes it less likely the Obama administration will consider removing Sudan’s designation as a state sponsor of terrorism in the immediate future.

Today, one of the three main policy goals in the administration of President Obama is to ensure that Sudan does not provide a safe haven for international terrorists.\textsuperscript{185} That goal does not run inimical to permitting family members of victims of terrorism to seek remedies in judicial lawsuits against Sudan for its past material support of terrorism. With civil litigation, the errors of the past can be addressed. In


\textsuperscript{182} Id.

\textsuperscript{183} Clooney Uses Star Power to Shine Light on Sudanese Atrocities, supra note 38.


\textsuperscript{185} \textit{Sudan: A Critical Moment, A Comprehensive Approach}, supra note 19.
addition, the specter of potential civil lawsuits, as well as the possibility of being taken off of the State Department state sponsors of terrorism list, can be an incentive for Sudan to continue to cooperate in the war on terrorism, and also to cease its attacks in the Nuba mountains region of the southern part of Sudan.

CONCLUSION

The case of Sudan lies as a bright spot of hope in the judicial war on terror. While much criticism has been leveled at the state sponsor of terrorism exception on the basis that judicial action may actually impede the war on terror, the Sudan case can be viewed as a modest success. Sudan has cooperated heavily with the United States in the fight against Al-Qaeda in the aftermath of the September 11, 2001 attacks and allowed the people of South Sudan to peacefully hold a referendum to determine their future. It has also cooperated enough with the United States for the Obama administration to reexamine the issue of the State Department designation of Sudan as a state sponsor of terrorism. In addition, in Rux III, the family members of victims of the U.S.S. Cole bombing recovered damages for their pecuniary losses for Sudan’s material support of terrorism. Despite these developments, great challenges remain with the disturbing reports of continued violence in the Nuba mountains region and possible indiscriminate bombing of civilians in the region by the Sudanese military.

Promise may be on the horizon, and assuming the current conflict in the Nuba mountains region is peacefully resolved, the State Department may conceivably remove Sudan’s designation as a state sponsor of terrorism if it continues to cooperate in the worldwide coalition against Al-Qaeda and takes meaningful steps toward peace with South Sudan.

Despite promise with Sudan, the pursuit of justice for the family members of the victims of the U.S.S. Cole bombing continues. Unfortunately, the Kumar case has placed a major roadblock in the recovery of emotional losses.186

The future relevance of 28 U.S.C. § 1605A, as well as justice for victims of terrorism, currently lies in the hands of the Fourth Circuit. A famous legal maxim is the saying, “Justice delayed, is justice denied.”

Complete justice might arguably be delayed for the victims of the U.S.S. Cole bombing, but it need not necessarily be denied. Justice can still be achieved, and closure be placed, concerning the ongoing saga of the Rux/Kumar line of cases.