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Mr. Chairman, Ranking Member Sessions, thank you for inviting me to appear before you today to address Senate Bill 2930, entitled the "Justice Against Sponsors of Terrorism Act." This bill seeks to address some very difficult issues relating to the sovereign immunity of foreign governments that have been the subject of intensive discussion and debate through the years within the United States Government, in U.S. courts, and in the general public, regarding the most appropriate and effective ways to address acts of terrorism when U.S. persons are victims and wish to seek redress in U.S. courts.

I have had the opportunity to consider the issues related to the immunity of foreign governments from several perspectives during my career, including as Counsel for National Security Matters in the Justice Department's Criminal Division during the 1990s, as Legal Adviser to the National Security Council at the White House from 2001-2005, and as the Legal Adviser for the U.S. Department of State from 2005-2009. In addition to my current work in private legal practice at Arnold & Porter, I am currently an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations, where I am directing a project on international justice. I have thus through the years focused on the hard issue of what the role of U.S. courts should be with respect to the alleged wrongful conduct of foreign governments where U.S. persons suffer as the result of terrorist acts.

Needless to say, my sympathies are with the victims of international terrorism, especially with the families of victims of the horrific 9-11 attacks. I was in the White House Situation Room on September 11 and witnessed the attacks and our government's response first hand. I have met with the families of numerous victims of terrorist attacks, including the families of 9-11 victims and of State Department officials killed in the bombings of our embassies in Kenya and Tanzania. I share the desire of these families to ensure that those responsible for these acts of terrorism are held accountable, and I spent considerable amounts of time while at the White House and the State Department working on compensation plans for victims of terrorism.

The bill before the Judiciary Committee, S. 2930, would amend the Foreign Sovereign Immunities Act (FSIA) to permit individuals to bring tort claims against foreign governments in U.S. courts based on a foreign government's acts of terrorism or material support of terrorism anywhere in the world that cause injury or damage to or loss of property in the U.S. I am not here to take a position on the bill, but instead to draw on my experience to raise several issues for the Committee's consideration.

<u>Congress Should Be Cautious When Creating New Exceptions to Accepted International Law Principles of Foreign Sovereign Immunity Codified in the FSIA</u>

Sovereign immunity is a centuries-old doctrine of customary international law that affords sovereign states immunity from being sued in the courts of other states. This long-recognized principle developed by common consent among nations because generally granting immunity is in each nation's interest.[1] The Supreme Court has long recognized that sovereign immunity is an important international legal principle that should be recognized by U.S. courts.[2]

The FSIA, as currently enacted, is the result of decades of difficult debate on the circumstances in which U.S. courts should be available to private litigants to seek redress from foreign governments. It provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. In this respect, immunity for sovereign nations against suits in U.S. courts has a long history and is based on the principle that conflicts with foreign nations are generally more effectively addressed through diplomatic efforts and other means rather than through U.S. domestic judicial proceedings.[3] When Congress enacted the FSIA in 1976, it recognized the importance of these historic principles of international law. The Senate Judiciary Committee noted during its consideration of the relevant bill that it was intended to codify principles of international law.[4] President Gerald Ford stated in his signing statement for FSIA that "This legislation, proposed by my Administration, continues the long-standing commitment of the United States to seek a stable international order under law."[5] The Supreme Court has also recognized that the FSIA represents the "codification of international law at the time of the FSIA's enactment," and certain "pre-existing" exceptions to sovereign immunity "recognized by international practice."[6]

While the FSIA has been amended several times since 1976, in each case, amendments have been developed with caution, in light of the serious consequences of opening U.S. courts to additional litigation against foreign governments.

The public debate about expansions of U.S. jurisdiction has included concerns about the consistency of amendments with international law; the consequences for the United States in terms of reciprocal treatment in foreign courts and the increase in litigation relating to U.S. Government conduct overseas; and the unintended consequences of possible FSIA amendments for litigation here against U.S. allies for conduct that our Executive and Legislative Branches

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[1] *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008); *see also Schooner Exch. v. McFaddon*, 11 U.S. 116, 135-36 (1812); *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004).

[2] *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007); *see also Schooner Exch.*, 11 U.S. at 136-36.

[3] *Pimentel*, 128 S. Ct. at 2189-2190 ("The doctrine of foreign sovereign immunity has been recognized since early in the history of our Nation. It is premised upon the perfect equality and absolute independence of sovereigns, and the common interest impelling them to mutual intercourse.") (internal quotation omitted).

[4] S. REP. NO. 94-1310, at 9 (1976).

[5] Presidential Statement on Signing the Foreign Sovereign Immunities Act of 1976, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

[6] *Permanent Mission of India*, 551 U.S. at 199-200.

would not view as problematic or would view as inappropriate for judicial review because of the friction that could be created in U.S. foreign relations as the result of U.S. courts engaging in matters that are most appropriately handled by other branches of the U.S. Government.

Thus, when an exception was written into the FSIA in 1996 to permit additional litigation for acts of terrorism, the amendment was written narrowly so as to limit the potential additional litigation to those countries that had been determined by the President to have repeatedly provided support for acts of international terrorism.[7] This solution balanced the desire to add a remedy in U.S. courts for victims of terrorism with the legal and diplomatic concerns raised by the Executive Branch relating to additional litigation in U.S. courts against foreign governments.

I would note, however, that even this targeted amendment of the FSIA to permit litigation against U.S.-designated state sponsors of terrorism is not consistent with generally accepted principles of international law regarding sovereign immunity, which provides no such exception. Moreover, the U.S. Government's decision to enact its own exception to these principles based on an internal U.S. Government judgment of which governments "sponsor terrorism" has resulted in other governments' labeling the United States a terrorist government and has made our government agencies and employees potential targets for litigation in foreign courts. The same kinds of reciprocity concerns should apply to the Senate's consideration of S. 2930.

In this respect, I must emphasize that I am not advocating that the U.S. Congress should repeal the FSIA's current exception to immunity for state sponsors of terrorism. Rather, I am highlighting that a decision to derogate further from the customary international law of sovereign immunity would weaken substantially our arguments against other governments taking analogous action against the United States.

Beyond that, however, I would urge the Committee to consider whether there are any unintended consequences to the legislation. For example, courts had previously interpreted FSIA's tort exception to require that the tortious act or omission be committed within the United States.[8] By expanding this narrowly crafted exception to apply to tortious acts wherever they occur so long as there is injury or damage to or loss of property in the U.S., the bill could potentially have two distinct consequences.

First, although the provision expanding the tort exception to include certain terrorist acts outside the United States was drafted with specific countries in mind, it could potentially be used to bring suits against other nations, including even close U.S. allies like Israel, if their actions outside the U.S. result in personal injury or loss of property in the U.S. For instance, it is conceivable that this bill could remove Afghanistan's immunity from suit for a military action in Afghanistan, or Israel's immunity from suit for a security action in Gaza, that results in personal

[7] 28 U.S.C. §1605A (2008) (amending and recodifying original enactment at 28 U.S.C. § 1605(a)(7) (1996)).

[8] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (rejecting the argument that domestic effects of a foreign state's tortious conduct abroad satisfy the exception because, in contrast to the FSIA's commercial activity exception, the tort exception "makes no mention of 'territory outside the United States' or of 'direct effects' in the United States."); *see also Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) ("the entire tort" committed by the foreign state must "have occurred here").

injury or loss of property by an Afghan or Palestinian family member in the U.S. Lawsuits have already been brought against Israeli officials in U.S. courts for alleged extrajudicial killings in Gaza, and this bill could potentially remove the immunity of the state of Israel itself.[9]

Second, this extraterritorial reach could be expansively interpreted as extending to classic torts such as negligence leading to injury, instead of being limited to terrorism. The phrase "including without limit any tort claim"[10] could generate a flood of litigation in U.S. courts for traditional torts committed abroad by any country in the world or their officials if the torts in question cause injury or damage to or loss of property in the U.S. It is therefore imperative that Congress act cautiously in considering amendments to the FSIA.

Additional Considerations Regarding Reciprocity

Apart from these general considerations, I believe that Congress should be particularly cautious at this time when considering amendments to the Foreign Sovereign Immunities Act. The U.S. is engaged internationally in two wars and countless efforts to protect our country from terrorist attacks. U.S. agencies are engaged in necessary acts of lethal force in distant parts of the world. Congress should carefully consider the risk that removing the protections foreign governments enjoy in our courts could invite lawsuits in other countries against the U.S. or its officials for alleged extrajudicial killings or acts of terrorism if the U.S. is seen as departing from the sovereign immunity principles recognized in customary international law.

This concern is not theoretical. Iran and Cuba have already passed legislation removing U.S. sovereign immunity in their courts in response to U.S. legislation that allowed large judgments against them in U.S. courts. The U.S. has been sued in both countries and faces billions of dollars in default judgments as a result.[11] And over the last decade, numerous legal actions have been brought against U.S. officials in Europe arising out of official actions they have taken to fight terrorism.

Moreover, the ability of the United States to enter into multilateral agreements that would enshrine the very principles of international law that we ourselves have championed for years will be even more limited if Congress carves out new exceptions to the FSIA. For example, at U.S. urging, members of the United Nations agreed upon the text of a UN Convention on Jurisdictional Immunities of States and Their Property in 2004.[12] The Convention provides a comprehensive approach to sovereign immunity and embraces the so-called restrictive theory of immunity on which our FSIA, as originally enacted, is based. Despite a quarter of a century of

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[9] *See Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (class action under the Alien Torts Statute and Torture Victim Protection Act against Avraham Dichter, the former head of the Israeli General Security Service, for the 2002 Israeli bombing of an apartment complex in Gaza City. The Second Circuit held that former foreign government officials enjoy immunity for their official acts under common law.).

[10] Justice Against Sponsors of Terrorism Act, S. 2930, 111th Cong. § 3(a)(1)(B) (2010).

[11] JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 67-68 (2008).

[12] UN Convention on Jurisdictional Immunities of States and Their Property, *adopted* Dec. 2, 2004, 44 I.L.M. 803.

intense international negotiation during which the U.S. advocated for the treaty, we are now unable to become a party because of FSIA's terrorism exception. Thus, our existing exceptions to sovereign immunity in U.S. courts have prevented the U.S. from joining an international convention that we advocated for years and that is generally in U.S. interests. Further amendments should therefore be approached with caution.

Other provisions in the bill may raise similar reciprocity concerns, such as the elimination of the provision related to foreign states and their officers or employees in 18 U.S.C. § 2337.

Considerations Relating to the Conduct of Foreign Policy

Congress should also consider the foreign policy friction that could be caused by exposing foreign sovereigns, beyond the designated state sponsors of terrorism, to new avenues of liability − and potentially massive judgments − in U.S. courts. Broadening the exceptions to the FSIA would open the door to unprecedented civil lawsuits against countries with which our leaders are conducting sensitive diplomatic business. I would note, in this regard, that President Bush was forced to veto the National Defense Authorization Act for FY08 after Congress included an amendment to the FSIA that allowed Iraq to be sued for terrorists acts under the Saddam Hussein regime, which complicated the political and financial reconstruction of Iraq.

If immunity is lifted and litigation against foreign governments is allowed to proceed in U.S. courts, it could lead the Executive Branch to believe it needs to intervene in a series of new cases that are adverse to fundamental U.S. policy interests. Increased Executive Branch intervention would undermine the entire regime created by the FSIA to develop neutral principles of immunity that could be applied in all situations.[13]

Final Considerations Relating to Other Potential Remedies

Protecting a foreign government from lawsuits because of its sovereign immunity can be difficult to accept in horrific acts of terrorism. That said, where creating a new remedy can cause other problems such as those I have just described, I believe a careful discussion of the consequences of this legislation, including unintended consequences, is needed. This discussion should examine the advantages and disadvantages of the additional litigation, and what other options might be available.

In this respect, claims brought by individual plaintiffs are not the only means to deter foreign governments from supporting terrorism. The U.S. can and does use strong tools such as sanctions, trade embargos, diplomacy, or even military action to achieve its objective of protecting the American people and deterring or punishing foreign sovereigns who support terrorist groups.

[13] H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 (a "principal purpose" of the FSIA is "assuring litigants that these often crucial [immunity] decisions are made on purely legal grounds and under procedures that insure due process"); *see Samantar v. Yousef*, 130 S. Ct. 2278, 2285 (2010) ("Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976.").

Moreover, in some difficult situations around the world, even where Americans are aggrieved and would like to litigate in U.S. courts, the best approach may be to seek justice and accountability for those who perpetrate acts of terrorism or provide material support in other, more direct ways. These other avenues include pressing their own countries to hold them accountable (or waive their immunity), supporting international criminal tribunals, and funding international rule of law and victim rehabilitation programs. This approach would respect international rules of immunity, protect the United States itself, and still promote international justice.

Finally, I would note that Judge Royce Lamberth, the Chief Judge of the U.S. District Court for the District of Columbia who has extensive experience hearing lawsuits brought under the terrorism exception to the FSIA, has raised legitimate questions about the efficacy of litigation against foreign governments in U.S. courts in a recent and well-reasoned opinion.[14] While I do not necessarily endorse everything in Judge Lamberth's opinion, I do believe he makes important observations both about the challenges of litigating these kinds of cases in U.S. courts and the ability of plaintiffs to recover damages, even if they prevail at trial. I commend his opinion to the Committee.

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Thank you again for the opportunity to appear before you today. This Committee deserves special recognition for helping the victims of 9-11 and their families and for giving careful consideration to the issues raised by this legislation. I will be pleased to address any questions the Committee may have.

[14] *See In re Islamic Republic of Iran Terrorism Litigation*, 659 F.Supp.2d 31, 129 (2009).