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Preparations for a Storm: A Proposal for Managing the Litigation Stemming from September 11th, 2001

A. David E. Balahadia¹

I. INTRODUCTION

In the two years since September 11th, 2001, the United States government has overthrown the Taliban, liberated Iraq, and captured Saddam Hussein. Despite these victories abroad, the United States government has unresolved issues on the home front. The attacks of September 11th, 2001 resulted in the deaths of 2,749 people while thousands more were injured both directly and indirectly as a result of the attacks.² It has been estimated that the attacks caused economic losses of more than \$70 billion.³

After the attacks, the United States government immediately began to address the exorbitant number of problems and issues that resulted. One of the first issues the government addressed was victim compensation. The creation of the September 11th Victim Compensation Fund by virtue of the Air Transportation Safety and System Stabilization Act was the first step towards victim compensation.⁴ The VCF would help relatives and families of those killed in the attacks. However, the VCF has several limitations that narrow the scope of those eligible for compensation.⁵

The limitations of the VCF are indirectly creating a new two-pronged problem: the first prong is that many have found the VCF to be an inadequate method of exacting a measure of justice; some relatives and individuals repre-

1. J.D. Candidate, 2004, Pepperdine University School of Law. My thanks to Mom and Dad, for all that they have done.

2. Eric Lipton, *New York Settles on a Number That Defines Tragedy: 2,749 Dead in Trade Center Attack*, N.Y. TIMES, Jan. 23, 2004, at B7. In the days after the attacks, New York City estimated an initial death toll of 6,700; that number has been reduced after a thorough investigative process. *Id.* This number is not reflective of the impact of that day: Nikki Stern, whose husband was killed in the attacks, states: "Whether it was 3,000, 2,900, or 2,700, I don't believe it makes a difference to individual families that suffered a loss or to those who witnessed or were touched by the event...[w]hat matters is that magnitude of the loss and the way it affected us all." *Id.*

3. John W. Stamper, *Looking At The Events Of September 11: Some Effects And Implications*, 69 DEF. COUNS. J. 152, 158 (2002).

4. Air Transportation Safety and System Stabilization Act (hereinafter referred to as "ATSSSA"), Pub. L. No. 107-42, 115 Stat. 230, 230 (2001)(codified as amended at 49 U.S.C.). See also *infra* notes 14 – 15 and accompanying text.

5. See *infra* notes 26 – 43 and accompanying text.

senting those killed on September 11th have filed lawsuits against foreign parties and organizations believed to be partially or directly responsible.⁶ These litigants will likely find the same frustrating conclusion that previous litigants have found when dealing with this type of litigation scenario.⁷ The second prong, embedded in the limitations of the VCF, has precluded many from participating in the compensation fund; as a result, they have begun to seek other means of compensation by filing lawsuits against United States companies and governmental agencies.⁸ This second prong has the potential to create a relative legal crisis that could be comparable to the asbestos litigation of the 1980s and 1990s.⁹

I propose an alternative means to the litigation which stems from the events of September 11th in this article: the United States should establish a compensatory fund and tribunal. This will serve as a means of dealing with the litigation stemming from the events of September 11th, 2001. This model balances the resources and constraints of the United States government and legal system against the needs of the victims of September 11th. The model proposed here goes beyond the VCF: it is more inclusive in its scope and coverage and is modeled after international reparations tribunals.

I will start by reviewing the VCF and discuss its history, policies, and limitations.¹⁰ I will then explore the two-pronged problem mentioned above by first looking at lawsuits being filed against foreign parties and then examine lawsuits being filed in the domestic arena.¹¹ Next, I will review various international reparations tribunals that have been used in recent decades.¹² Based on these factors, I propose that some form of a compensatory fund and tribunal be established to address these problems. In the final section of this article, I will discuss some particular matters and issues relevant to the idea of establishing a compensatory fund of this type.¹³ The morning of September 11th, 2001 created myriad problems, issues, and challenges which will occupy our country for years. Accordingly, the solution to these problems lies in extraordinary measures.

6. See *infra* notes 55 – 67 and accompanying text.

7. See *infra* notes 70 – 90 and accompanying text.

8. See *infra* notes 95 – 103 and accompanying text.

9. See *infra* note 129 and accompanying text.

10. See *infra* notes 14 – 54 and accompanying text.

11. See *infra* notes 55 – 130 and accompanying text. This paper will focus on litigation that is being brought by relatives and families of victims who were killed on September 11th in the World Trade Center, the Pentagon, and Harrisville, Pennsylvania, as well as other potential litigation (such as actions regarding property loss, general personal injury, lawsuits due to dust cloud fallout, etc.) proximately stemming out of September 11th. For the purposes of this paper, this discussion will be limited to only U.S. citizens or nationals as claimants, and thus not include lawsuits or actions brought by families or relatives of foreign nationals residing or visiting in the United States.

12. See *infra* notes 131 – 158 and accompanying text.

13. See *infra* notes 159 – 177 and accompanying text.

II. CURRENT MEANS TO COMPENSATE THOSE KILLED OR DIRECTLY INJURED ON SEPTEMBER 11TH

A. An Overview of the September 11th Victim Compensation Fund of 2001

Less than two weeks after the attacks took place, President George W. Bush signed into law the Air Transportation Safety and System Stabilization Act (hereinafter referred to as "ATSSSA") as a means of compensating those individuals and companies who sustained losses as a result of the terrorist attacks on September 22, 2001.¹⁴ Title IV of the ATSSSA called for the establishment of the September 11th Victim Compensation Fund of 2001 (hereinafter referred to as "VCF").¹⁵

The purpose of the VCF was to "provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11th, 2001."¹⁶ It was designed to present a no-fault alternative to civil litigation, which by its nature is risky, expensive, and protracted by offering a means of compensation which is predictable, inexpensive, and swift.¹⁷ The fund has been described as the single largest no-fault statute ever enacted.¹⁸ Progress in the set up and administration of the Fund was swift, with the Final Rule regarding implementation of the program taking effect on March 13th, 2002.¹⁹ The VCF provides for compensation via monies, with an expected minimum of at least \$250,000 for beneficiaries, such as widows and children.²⁰ The payments to beneficiaries are tax free.²¹

14. See ATSSSA, *supra* note 4. See also Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1867 (2002). Rabin postulates that the ATSSSA and VCF were created out of a mix of sympathy for the victims as well as the great concern that the airline industry would collapse. *Id.*

15. See ATSSSA, *supra* note 4.

16. *Id.*

17. See September 11th Victim Compensation Fund of 2001 Action: Final Rule, Statement by the Special Master (hereinafter "Statement by the Special Master"), available at <http://www.usdoj.gov/victimcompensation/finalrule.html>.

18. See Richard P. Campbell, *Implementing the 9/11 Victim Compensation Fund: Two Steps Forward, One Step Back*, 69 DEF. COUNS. J. 409, 409 (2002).

19. See Statement by the Special Master, *supra* note 17. The final rule was the third and final step in establishing the VCF, following the November 5, 2001 Notice of Inquiry and Advance Notice of Rulemaking ("Notice of Inquiry") and the December 21, 2001 interim final rule. *Id.*

20. 28 C.F.R. § 104.3 (2004). See also Statement by the Special Master, *supra* note 17. The VCF is administered in the following way: all claims are to be determined within 120 days, and payments are made 20 days after that determination. *Id.* All determinations are made by a Special Master, Kenneth Feinberg, who was appointed by Attorney General John Ashcroft. *Id.* The deter-

The last date to submit a claim to the VCF was December 22nd, 2003;²² as of January 24th, 2004, the total number of claims submitted to the VCF was 7,298.²³ The VCF has issued awards to 1,892 claimants with the average award being \$1,827,435 after offsets.²⁴ Unfortunately, it is likely that the total number of submitted claims to the fund (7,298) does not reflect the actual number of potential claims which stem from September 11th, as will be explained *infra*.²⁵

B. Limitations of the Victim Compensation Fund

There are several key limitations imposed by the VCF. The first key limitation is that the VCF has a narrow scope in its eligibility. The VCF is limited in space and time to individuals present at the World Trade Center, Pentagon, or Shanksville, Pennsylvania site *at the time of or in the immediate aftermath* of the crashes and *who suffered physical harm as a direct result* of the terrorist-related aircraft crashes.²⁶ The VCF defined the term “immediate aftermath” as a time period of: from the time of the crashes to twelve hours after the event, with an exception to rescue workers, for whom the time period extends to ninety-six hours after the event.²⁷ The term “physical harm” is defined as having a physical injury to the body within twenty-four hours of the injury, or within seventy-two hours for those who did not immediately realize the extent of their injuries or for whom medical treatment was not readily available.²⁸ This requirement of “physical harm” has stringent additional requirements: either hospitalization for twenty-four hours, or partial/total physical disability, incapacity, or disfigurement.²⁹

These eligibility requirements have severely limited who may qualify for compensation under the VCF. Groups potentially excluded include cleanup crews who were at the site weeks and/or months after the event³⁰ as well as the

minations are final and not subject to judicial review by any court. *Id.* However, the process allows a right to hearing but is designed to fast track claims. *Id.* See also Rabin, *supra* note 14, at 1837.

21. See Statement by the Special Master, *supra* note 17.

22. 28 C.F.R. § 104.62 (2004).

23. General Award Statistics, at the September 11th Victim Compensation Fund of 2001 Website, at http://www.usdoj.gov/victimcompensation/payments_deceased.html.

24. *Id.*

25. See *infra* notes 108 – 129 and accompanying text.

26. 28 C.F.R. § 104.2(a)(1) (2004) (emphasis added).

27. 28 C.F.R. § 104.2(b) (2004).

28. 28 C.F.R. § 104.2(c)(1) (2004).

29. 28 C.F.R. § 104.2(c)(1)(i-ii) (2004).

30. See Rabin, *supra* note 14, at 1848-49. See also Campbell, *supra* note 18, at 420-21, 429-30 (Campbell anticipates that there will be mass tort litigation stemming from the aftermath and effects of September 11th, partially because of toxic substance fallout from the collapse of the Twin Towers); Kenneth G. Kubes, “United We Stand”: *Managing Choice-of-Law Problems in September-11-Based Toxic Torts Through Federal Substantive Mass-Tort Law*, 77 IND. L.J. 825, 855-56 (2002).

thousands exposed to the dust cloud arising as a result of the fall of the World Trade Center.³¹ The basic language of the regulations would also exclude those who suffered only minor bodily harm, emotional harm, or property damage as a result of the events.³² Thus, while it does help *some* people, the VCF simply does not help *enough* people—there are many more who were injured by the attacks as well as previous terrorist acts than the VCF allows for in its compensation scheme.³³

The VCF also limits compensation by collateral sources. Collateral sources, which includes “life insurance, pension funds, death benefits programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes of September 11, 2001” are deducted from the final award given to those who qualify before the issuance of VCF compensation.³⁴ The original collateral source deduction scheme included charitable gifts, donations, and tax benefits as a deductible collateral source; however, public outcry swayed the drafters of the regulations, and now these gifts, donations, and tax benefits do not constitute collateral source deductions.³⁵

The final major limitation is the restriction of the ability to file a civil action. Upon submission of a claim to the VCF, a claimant automatically waives the right to file or be a party to an action in any federal or state court for damages sustained in September 11th.³⁶ This waiver seemingly applies regardless of whether a claim is approved or denied.³⁷ Furthermore, should a person who is engaged in a civil action for damages stemming out of September 11th wish to submit a claim to the VCF, that person must withdraw from the lawsuit in order to be eligible to submit a claim.³⁸ Thus, in accepting compensation from the VCF, the tradeoff is that a party’s ability to file a civil action is severely lim-

31. See Rabin, *supra* note 14, at 1843-44.

32. A person who lost employment because of September 11th or suffered psychological trauma would be excluded from this program—the VCF is limited to severe physical injury and wrongful death claims only. See Campbell, *supra* note 18, at 410.

33. Cf. Richard P. Campbell, *The View from the Chair: Tort-Model Compensation*, 31 WINTER BRIEF 4, 6 (2002) (debating the compensation for victims of bioterror, families of soldiers in Afghanistan and Iraq, and the attack on the U.S.S. Cole). Many commentators have anticipated the likelihood of mass tort litigation after September 11th in the context of personal injury, property damage, and other related issues. See, e.g., Kubes, *supra* note 30, at 851-52 (detailing some who have given intent to sue as well as those who have sued over issues resulting from September 11th).

34. 28 C.F.R. § 104.47(a) (2004).

35. 28 C.F.R. § 104.47(b) (2004). See also Kenneth P. Nolan & Jeanne M. O’Grady, *A Year Later—The September 11th Victim Compensation Fund*, 17 AIR & SPACE LAW. 6, 6-7 (2002).

36. 28 C.F.R. § 104.61(a) (2004).

37. *Id.*

38. 28 C.F.R. § 104.61(b) (2004).

ited.³⁹ However, under 28 C.F.R. § 104.61(b), the legislation does allow for lawsuits against “any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act” and also allows for actions for the recovery of collateral source obligations.⁴⁰

The United States government explicitly enacted the ATSSSA to function, in part, as a means to curtail litigation of claims for damages sustained as a result of September 11th.⁴¹ This limitation is clearly intended to discourage civil lawsuits against airlines, airports, and those domestic companies and agencies who theoretically may be partly to blame. In the actual language of the ATSSSA, there is a provision limiting liability and actions for damages in any civil lawsuit stemming from September 11th to the maximum amount of liability coverage that an airline possesses.⁴² The VCF works to limit lawsuits on the domestic front; however, the VCF does not limit⁴³ lawsuits on the international front.

C. *The Pros and Cons of the Victim Compensation Fund*

Critics have both praised and criticized the VCF from nearly every angle.⁴⁴ Praise for the VCF has been everything from discussions on its fairness, “about as fair as it could possibly be”,⁴⁵ to its ability to heal, “a good start on the road to recovery.”⁴⁶ Some theorize that the VCF presents a new way of dealing with mass tort litigation.⁴⁷ Others have said that the ATSSSA served to preserve the economy, save the airlines, and also ensure compensation.⁴⁸

However, there are critics who target the negative aspects of the VCF as well, particularly in the area of limitation of recovery by collateral sources. In response to criticism that the collateral sources limitation takes away from what is given, collateral sources were limited to exclude certain government bene-

39. See Nolan & O’Grady, *supra* note 35, at 6. See also Noah H. Kushlefsky, *The Choice Between the Victim Compensation Fund and Litigation*, LOS ANGELES LAWYER, September 2002, at 13.

40. 28 C.F.R. § 104.61(b) (2004).

41. See ATSSSA, *supra* note 4.

42. *Id.* Given the theoretical amounts recoverable absent such a limitation, it is a sound provision. However, even absent lawsuits from those affected by September 11th, a number of U.S. airlines have had significant financial difficulties after September 11th, and some have filed for bankruptcy.

43. 28 C.F.R. § 104.61(b) (2004).

44. See Rabin, *supra* note 14, at 1868 n.140. See also Stamper, *supra* note 3, at 162.

45. See Statement by the Special Master, *supra* note 17 (quoting NEWSWEEK, Dec. 31, 2001). See also Rabin, *supra* note 14, at 1836. Rabin recognizes that in implementing the VCF, Congress did the best job possible under the unique and singular circumstances presented by the attacks. *Id.*

46. See Statement by the Special Master, *supra* note 17 (quoting N.Y. TIMES, Dec. 23, 2001).

47. See Martha Neil, *Taking Mass Torts out of Court*, 10 A.B.A. J. E-REPORT 11 (2002).

48. See Stephen P. Watters & Joseph S. Lawder, *The Impact of September 11th on Tort Law and Insurance*, 29 WM. MITCHELL L. REV. 809, 810 (2003).

fits.⁴⁹ Many critics are just plain skeptical about the nature of the program.⁵⁰ Criticism has also arisen as to the amounts distributed by the VCF: namely, the formula that the VCF uses to calculate compensation shortchanged victims' families whose deceased relative's earning power was relatively large.⁵¹ Some do not see the VCF as an altruistic government gift; they see it for its ulterior motive in preventing lawsuits against corporations.⁵² Others criticized the program because of the limitation of lawsuits for damages.⁵³ Finally, some have complained about the nature of the program itself, arguing that the VCF should not only be about financial compensation, but also about emotional healing.⁵⁴

III. LITIGATION ARISING FROM SEPTEMBER 11TH: THE POTENTIAL FOR A NEW WAVE OF MASS TORT LITIGATION

A. *The International Side of Lawsuits Stemming from September 11th: Terrorists, Foreign Organizations and Companies, and Countries*

28 C.F.R. § 104.61(b), as enacted by the ATSSSA, allows for the filing of lawsuits against "any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act" regardless of whether the person is pursuing a claim with the VCF.⁵⁵ As such, some parties have filed civil lawsuits against those believed to be responsible or partly responsible for September 11th. These suits were filed not only to help compensate those who sustained deep losses, but also to inflict damage on terrorists by financially bankrupting

49. "Certain government benefits, such as tax relief, contingent Social Security benefits, and contingent workers' compensation benefits (or comparable contingent benefits for government employees), need not be treated as collateral source compensation. Also, because we do not believe that Congress intended to treat a victim's savings accounts or similar investments as collateral source compensation, the collateral-source offsets will not include moneys or other investments in victims' 401(k) accounts." Statement by the Special Master, *supra* note 17.

50. See Kushlefsky, *supra* note 39, at 14.

51. Martin Kasindorf, *Some 9/11 Families Choose Lawsuits Over Federal Fund: Relatives Say Goal Isn't Just Money But To 'Get Answers'*, U.S.A. TODAY, July 14, 2003, at 1A. At a certain point, families sued Feinberg on those grounds; a New York federal judge later upheld Feinberg's rules. *Id.*

52. Nolan & O'Grady, *supra* note 35, at 6. Many families see the government as favoring business over victims and are dissatisfied with the compensation they would see from the VCF against that given to airlines. *Id.*

53. See Statement by the Special Master, *supra* note 17.

54. Nolan & O'Grady, *supra* note 35, at 7. See also Roger P. Alford, *On War As Hell*, 3 CHI. J. INT'L L. 207, 214 (2002).

55. 28 C.F.R. § 104.61(b) (2004).

their funding.⁵⁶ The American military has been fighting back with bombs and bullets, while American attorneys have begun fighting back with summonses and legal briefs, adding another layer to the complexity of September 11th.

Several United States law firms across different states have begun the process of civil litigation.⁵⁷ Complaints have been filed and litigation has begun. There are two major cases which have received national exposure.⁵⁸ The first of these, *Burnett v. al Barada Investment and Dev. Corp.*, is seeking damages against numerous companies, banks, charities, organizations, and individuals who are believed to be fully or partly responsible for assisting in the funding or support of terrorism.⁵⁹ The plaintiffs in this case, as of the Third Amended Complaint filed on November 22, 2002, number approximately 2,600.⁶⁰ The *Burnett* lawsuit alleges claims under the Foreign Sovereign Immunities Act (hereinafter referred to as "FSIA"),⁶¹ the Torture Victim Protection Act,⁶² and

56. See September 11 Class Action website, at <http://www.september11classaction.com/>. See also 7 *Families Sue bin Laden and Others for Billions*, N.Y. TIMES, Feb. 20, 2002, at A11.

57. The cases discussed here deal with recovery in tort. A minor insurance case of note is being litigated by Larry Silverstein, the leaseholder of the World Trade Center. See *Insurance Battle Over Twin Towers*, BBC NEWS WORLD EDITION, July 23, 2003, available at <http://news.bbc.co.uk/1/hi/business/3089447.stm>. Silverstein is alleging that the attacks on the World Trade Center constituted two separate attacks, which would mean double the insurance money received from insurers. *Id.*

58. The plaintiffs' cases discussed herein are being litigated by plaintiffs who are relatives, spouses, and children of people killed or seriously wounded in the attacks. Another case has been filed in the United States District Court for the Southern District of New York by five major insurance companies, including Chubb Corporation, Zurich American Insurance Company, One Beacon Insurance Group, American Reinsurance Company, and Crum & Forster. See Jeff Blumenthal, *Insurers Sue Over 9/11 Attacks*, THE LEGAL INTELLIGENCER, Sept. 11, 2003, at 1. This complaint is aimed at bin-Laden, al-Qaida, dozens of terrorist organizations, and five countries (Iran, Iraq, Saudi Arabia, Sudan, and Syria). *Id.* The insurance companies are seeking over \$300 billion for claims paid out to victims of the attacks. *Id.* The insurance companies are hoping to consolidate their case with the cases of Burnett and Havlish described herein. *Id.*

59. Third Amended Complaint, *Burnett v. al Barada Investment and Dev. Corp.*, filed November 22, 2002, in the United States District Court for the District of Columbia, available at <http://news.findlaw.com/hdocs/docs/terrorism/burnettba112202acmp.pdf>.

60. *Id.*

61. 28 U.S.C.A. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-1611 (2004). The FSIA, as originally enacted, was not meant as a means of pursuing claims of victims of terrorism. However, the FSIA was amended in two key ways to satisfactorily permit using it as a tool against terrorism. See S. Jason Baletsa, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1247 (2000). The first amendment was made by the Anti-Terrorism and Effective Death Penalty Act of 1996 (28 U.S.C.A. § 1605 (2004)), which provides that nations designated as supporting terrorism are not immune from United States civil lawsuits that they had a part in and also allows the attachment of property or assets to satisfy a judgment related to the civil lawsuit. *Id.* at 1261. Claims for personal injury or death, such as the ones being sought by Burnett, et al. are permissible under the FSIA. *Id.* at 1262. The second amendment to the FSIA was made by the Civil Liability for Acts of State-Sponsored Terrorism Act in 1997 (Pub. L. No. 104-208, 110 Stat. 3009-172 (1996)), more commonly known as the Flatow amendment, after whom it was created. *Id.* at 1263. Alisa Flatow was

the Alien Tort Claims Act⁶³ for damages by reason of wrongful death, negligence, survival, conspiracy, and various RICO violations.⁶⁴ The second case is *Havlish v. Sheikh Usamah bin-Muhammad bin-Laden*, in which damages are sought against not only bin-Laden himself, but also hundreds of companies, organizations, individuals, and even the countries of Iran and Iraq as they are believed to be responsible or partly responsible for the events of September 11th.⁶⁵ The seven plaintiffs in the case applied for class certification on May 9, 2002.⁶⁶ This suit seeks damages under the same rationale as the *Burnett* lawsuit.⁶⁷

What seems like a straightforward attempt to help bring justice to those responsible is actually a much more complicated problem. As will be discussed, *infra*, victims of past terrorist attacks against United States citizens have brought lawsuits against the individuals who were responsible and have won default judgments in their favor.⁶⁸ In trying to collect and enforce the judgments, the plaintiffs turned to the United States to ask that frozen assets be liquidated to help satisfy the judgments. Herein lies the difficulty: it is the general policy of the United States to hold frozen assets so that they can be used as bargaining chips and incentives in diplomatic negotiations and relations. This policy has served to frustrate the efforts of past plaintiffs. The same will likely happen

an American undergraduate student killed by a terrorist act in Israel. *Id.* Her father subsequently brought suit, and the Flatow amendment was created to broaden the FSIA to impose civil liability for recovery for non-economic harms. *Id.* at 1261. Effectively, these two amendments gave the FSIA real teeth and reach. For further discussions of the FSIA, see also generally Sean D. Murphy, *U.S. Judgments Against Terrorist States*, 95 AM. J. INT'L L. 134 (2001); Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L LAW & DISP. RESOL. 57 (2001);

62. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

63. 28 U.S.C. § 1350 (2004).

64. See *Burnett* Complaint, *supra* note 59.

65. Amended Complaint, *Havlish v. Sheikh Usamah bin-Muhammad bin-Laden*, filed May 3, 2002, in the United States District Court for the District of Columbia, available at http://www.september11classaction.com/Amended_Complaint-Final.pdf. It should be noted that the FSIA only permits suing foreign countries if those countries are designated as terrorist states (these countries include Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria). See Lori Fisler Damrosch, *Sanctions Against Perpetrators of Terrorism*, 22 HOUS. J. INT'L L. 63, 65 (1999).

66. Plaintiffs' Motion for Class Certification, *Havlish v. Sheikh Usamah bin-Muhammad bin-Laden*, filed May 9, 2002, in the United States District Court for the District of Columbia, available at http://www.september11classaction.com/Class_Certification_Complete_Document.pdf.

67. See Amended *Havlish* Complaint, *supra* note 65.

68. See *infra* notes 74 – 94 and accompanying text.

again with this litigation.⁶⁹ Despite potentially winning, the plaintiffs' efforts may ultimately be for naught.

1. Inherent Problems in Attempting Recovery

All plaintiffs face an inherent danger in litigation: they face a process which by its nature tends to be long, risky, and complicated. There are several issues present in pursuing this particular type of lawsuit. The first is the issue of time. The average case takes several years to reach trial. With a case where defendants number in the thousands, how long will it take for the case to reach any sort of real resolution? Such litigation has the possibility of dragging on for years.⁷⁰ And then there is the issue of risk: each of the lawsuits are seeking defendants so elusive that the State Department itself is having trouble finding them. How does one litigate an action with defendants whose respective locations remain unknown? In previous actions, plaintiffs typically obtained default judgments: the key reason is the defendants never actually appeared.⁷¹ It is likely that situation will manifest here as well. Even if plaintiffs win a proper judgment, there remains the issue of collection: how are the plaintiffs going to be able to collect and enforce a judgment?⁷² While plaintiffs may obtain a judgment through default, enforcing a judgment against defendants as ephemeral as these will prove to be more than problematic.⁷³

2. Lawsuits of Victims of Previous Terrorist Acts

Victims of other terrorist attacks prior to September 11th have filed (and quite often, won usually by default judgment) lawsuits seeking damages.⁷⁴ While these plaintiffs have obtained favorable judgments in terrorism-related actions, approximately 190 judgments are currently outstanding.⁷⁵ The vast majority of these judgments have been against Iraq for injuries in the Gulf War,

69. In an unfortunate legal irony, it was reported recently that assets which were sought in September 11th related litigation have been liquidated to pay for the legal fees and attorneys' fees in the cases. See Gregory L. Vistica, *Frozen Assets Going to Legal Bills*, WASH. POST, Nov. 1, 2003, at A06.

70. See Kushlefsky, *supra* note 39, at 16.

71. See Baletsa, *supra* note 61, at 1289.

72. See Kushlefsky, *supra* note 39, at 16. See also Stamper, *supra* note 3, at 161. Stamper suggests that the best course would be to file a claim under 28 U.S.C. §§ 2333, 2339(A), and 2339(B) which would allow a later possible claim against the frozen assets of defendants. *Id.* However, he does concede that procedural issues would be difficult to overcome. *Id.*

73. See Baletsa, *supra* note 61, at 1289.

74. *Id.* at 1289-90.

75. Melissa B. Robinson, *Terror Victims Seek Frozen Assets*, LEDGER-ENQUIRER.COM, Oct. 31, 2002, at <http://www.ledger-enquirer.com/mld/ledgerenquirer/news/politics/4409443.htm>.

while some are against Iran for various terrorist acts.⁷⁶ As a matter of practical purpose, an extraordinary difficulty lies in enforcing and collecting on these judgments, because of two factors: foreign state attitudes and United States foreign policy.

a. Foreign State Attitudes towards United States Judgments

The first factor is that many foreign states are simply unwilling to recognize or respect the judgments of American courts.⁷⁷ It is likely that this is a problem which those litigating September 11th claims will face. Some anticipate that the collection of these judgments will “inevitably result in prolonged, complex legal actions that will deny families closure for years to come.”⁷⁸ Repeated attempts to collect on judgments have turned positive judgments into “Pyrrhic victories.”⁷⁹ While these previous lawsuits are a legal success, they are also a practical failure.

b. United States Foreign Policy and Frozen Assets

The second factor prohibiting many plaintiffs from collecting on judgments is the foreign policy objectives of the United States. In light of the difficulty that foreign states have presented when plaintiffs attempt to collect a judgment, many plaintiffs have asked the United States to have previously frozen foreign assets liquidated in order to help satisfy a judgment.⁸⁰ These frozen assets are in the form of actual cash holdings as well as foreign and diplomatic properties.⁸¹ However, the foreign policy of the United States presents several difficulties.

Previous lawsuits involving terrorist actions frequently raised this question: how are the federal courts going to interact (or potentially interfere) with United

76. *Id.* See also Joel Mowbray, *Who's The Enemy?*, PITTSBURGH TRIBUNE-REVIEW, Nov. 17, 2002, available at http://www.pittsburghlive.com/x/tribune-review/opinion/guest/s_102767.html.

77. See Mowbray, *supra* note 76. See also Baletsa, *supra* note 61, at 1292-93.

78. Baletsa, *supra* note 61, at 1295.

79. *Id.* at 1298.

80. Jeffrey Donovan, *Iran: Hostage Case Highlights U.S. Diplomatic Dilemma*, RFE/RL, Dec. 14, 2001, available at <http://www.rferl.org/nca/features/2001/12/14122001095030.asp>. The Havlish lawsuit is also seeking to take title to assets frozen by the United States (but title is not claimed by the United States) and give them to the families of those killed on September 11th. See September 11 Class Action website, available at <http://www.september11classaction.com/>.

81. See Baletsa, *supra* note 61, at 1292-93, 1298-99 (stating that diplomatic property sought in enforcing judgments, in particular, is quite difficult to obtain).

States foreign policy?⁸² The State Department believes that the United States government should retain possession and control of the frozen assets.⁸³ Assets are typically frozen as economic sanctions against a foreign power, or utilized “against targeted countries, terrorists, international drug traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.”⁸⁴ The U.S. Government believes that freezing assets proves useful for diplomatic relations and should not be liquidated to help satisfy outstanding claims and judgments.⁸⁵ The government has repeatedly stopped or blocked efforts by litigants to attach or possess assets held by foreign governments, or connected to foreign companies and corporations.⁸⁶ The rationale behind this decision is that foreign countries will be more likely to help in the fighting and stopping of terrorism, as well as being more cooperative overall on other matters if they are able to regain their frozen assets⁸⁷ — thus, the frozen assets act as bargaining chips in the game of diplomacy.⁸⁸ For example, in 1979, during the Islamic revolution in Iran, the U.S. government used frozen assets to help facilitate the negotiation process: they traded frozen assets to assist in the release of American hostages under the Algiers Declarations.⁸⁹

Another concern of the U.S. government is the precedence created when assets of foreign countries are frozen and the resulting potential for reciprocal actions. The government is concerned that if victims of terrorism are compensated using the assets of foreign countries, other countries may commit similar-

82. *Id.* at 1287-88. “[V]ictims of terrorism [are subjected] to the uncertain political climate of foreign relations--a situation over which they have no control.” *Id.*

83. *See* Damrosch, *supra* note 65, at 64-65. *See also* Donovan, *supra* note 80; Baletsa, *supra* note 61, at 1292-93; Murphy, *supra* note 61, at 139.

84. Robinson, *supra* note 75. *See also* Damrosch, *supra* note 65, at 64-65; Stamper, *supra* note 3, at 159 (stating that despite tens of millions being seized by the U.S. Government after September 11th, these seized assets may be insufficient to address the vast damages involved).

85. *See* Murphy, *supra* note 61, at 139. *See also* Donovan, *supra* note 80; Baletsa, *supra* note 61, at 1269 (attempts at seizing or attaching diplomatic property are even less likely to succeed, given the “sacrosanct nature of diplomatic property.”)

86. *See* Baletsa, *supra* note 61, at 1295-99 (detailing accounts of litigants attempting to attach pieces of property yet being blocked from doing so constantly). *See also* Nancy Amoury Combs, Carter, Reagan, and Khomeini: *Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 317 (2001) (detailing how the Carter administration, during the Iran hostage crisis, blocked the entry of final judgments which would have allowed claimants to receive compensation from frozen assets out of concern that the lawsuits would antagonize Iran and worsen the hostage crisis); Murphy, *supra* note 61, at 138-39.

87. Robinson, *supra* note 75. *See also* Donovan, *supra* note 80; Mowbray, *supra* note 76; Murphy, *supra* note 61, at 139.

88. *See* Sean K. Mangan, *Compensation for "Certain" Victims of Terrorism Under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000: Individual Payments at an Institutional Cost*, 42 VA. J. INT'L L. 1037, 1069 (2002).

89. *See* Combs, *supra* note 86, at 327-28, 344. *See also infra* footnotes 136 – 143 and accompanying text, discussing the establishment of the Iran-United States Claims Tribunal.

mindful retaliation by using our own justifications in a manner against us: seizing American assets held abroad as enforcement in civil actions against us.⁹⁰

There exist few exceptions to this policy — there is only one notable example of the United States allowing frozen assets to be used to compensate victims of terrorism-related attacks. The Victims of Trafficking and Violence Protection Act of 2000⁹¹ liquidated frozen assets for families of ‘Brothers to the Rescue’, a group of fliers who were shot down by Cuban jets in 1996,⁹² as well as a scant few other lawsuits in which judgments had already been obtained, such as and including the *Flatow* case.⁹³

Given this policy, the United States will likely engage in the same course of action that it used in previous types of litigation. However, the situation at bar is anticipated to be far different. The number of voices of those clamoring is far greater than those of previous terrorist actions, and the scale of destruction is far worse than has been seen in terrorist actions involving the United States previously.⁹⁴ The United States must adopt a different strategy in dealing with this issue.

B. The Domestic Side of Lawsuits Stemming from September 11th: Airlines, Aviation Security Companies, and Governmental Agencies

More than 100 lawsuits have already been filed against those believed to be proximately responsible for the events of September 11th.⁹⁵ For some of the

90. See Baletsa, *supra* note 61, at 1289-93 (arguing that foreign nations may enact similar steps against the United States, as a matter of reciprocity). See also Murphy, *supra* note 61, at 139 (stating that the Iranian parliament has passed a law allowing Iranian victims of “U.S. interference” to sue the United States government in Iranian courts).

91. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1542-43 (2000). See also Murphy, *supra* note 61, at 138-39 (discussing the VTPVA and its effects on obtaining redress for claimants in greater depth). Murphy states that this new act amends the FSIA to give the President power to prevent and manage attachment of property of foreign terrorist states in the United States. *Id.* See also generally Mangan, *supra* note 88 (providing another analysis of the VTPVA).

92. *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). See also Damrosch, *supra* note 65, at 70-71; Baletsa, *supra* note 61, at 1281-83; Murphy, *supra* note 61, at 135.

93. See Murphy, *supra* note 61, at 138 (discussing the extent and to whom the VTPVA applies).

94. It has been noted that as a result of the government’s refusal and attempts to block the seizure or attachment of property forces the families of victims of attacks to have to “relieve their personal tragedies on a daily basis.” Baletsa, *supra* note 61, at 1299. In past cases, such as *Flatow*, the number of citizens affected by the attacks were relatively few. That is certainly not the case here.

95. See Kasindorf, *supra* note 51.

plaintiffs, the lawsuits revolve around achieving higher compensation than could be achieved by accepting settlement under the VCF.⁹⁶ For other plaintiffs, the lawsuits seek to obtain answers and finding out what went wrong on that day.⁹⁷ These lawsuits target airlines, aviation security companies, and governmental agencies. One of the first of these type of lawsuits was *Mariani v. United Air Lines*.⁹⁸ The *Mariani* case is but a portent of the potential litigation stemming out of September 11th, having been filed in United States District Court in New York shortly after the attacks. Mariani seeks damages under a theory of wrongful death and survival due to United Air Lines' failure to exercise due care on September 11th.⁹⁹ Another case, *In re September 11 Litigation*, is comprised of cases which have been consolidated into five master complaints—four for each one of the plane crashes and the fifth for property damage.¹⁰⁰ In that case, United States District Court Judge Alvin K. Hellerstein recently ruled that plaintiffs could proceed with lawsuits against American and United Air Lines, aviation security companies, and the Port Authority of New York and New Jersey by finding that the harm to those in the World Trade Center and surrounding area was reasonably foreseeable by airport screeners and the managers of the World Trade Center.¹⁰¹ The defendants have countered that they hold no responsibility as the suicide attacks had been impossible to guard against and were accordingly not foreseeable: they claim the issue was terrorism, not negligence.¹⁰² Whether or not this litigation will be fruitful remains to be seen, but according to plaintiffs' counsel, the plaintiffs believe they can win.¹⁰³

1. Problems in Attempting Recovery

As noted before, parties to this litigation face a process which is looks to be long and uncertain.¹⁰⁴ Furthermore, the ATSSSA has created two key issues which limit the extent to which a plaintiff will be able to litigate his case. The

96. See, e.g., Gary Younge, *Most 9/11 Families Fail To File Claims*, THE GUARDIAN, Sept. 1, 2003, available at <http://www.guardian.co.uk/international/story/0,3604,1033096,00.html>.

97. See Kasindorf, *supra* note 51. To go with the VCF is to be out of the loop, according to one litigant. *Id.*

98. Complaint, *Mariani v. United Air Lines*, filed December 20, 2001 in the United States District Court for the Southern District of New York, available at <http://news.findlaw.com/hdocs/docs/terrorism/marianual122001cmp.pdf>.

99. *Id.*

100. Mark Hamblett, *Judge Refuses to Dismiss 9/11 Suits Against Airlines: Duty of Care Is Owed to Hijackers' Victims on Ground as Well as in Flight*, N.Y. L. J., Sept. 10, 2003, at 1.

101. See *In re September 11 Litigation*, No. 21 M.C. 97, 2003 WL 22251325, at *3 (S.D.N.Y. Oct. 1, 2003). See also Hamblett, *supra* note 100, at 1.

102. *9/11 Liability Cases Given Go-Ahead*, BBC NEWS WORLD EDITION, Sep. 9, 2003, available at <http://news.bbc.co.uk/1/hi/world/americas/3094758.stm>. See also Hamblett, *supra* note 100, at 1.

103. Hamblett, *supra* note 100, at 1.

104. See, e.g., *supra* notes 70 – 73 and accompanying text.

first issue is by pursuing this type of civil lawsuit, parties to this action will be unable to file a claim under the VCF.¹⁰⁵ According to reports, less than half of those who are entitled to file a claim with the VCF have actually expressed interest in the VCF.¹⁰⁶ The second issue is that the VCF has imposed limitations on the recovery allowable by these actions as against certain defendants: liability can only be incurred to the maximum amount of liability coverage possessed by an airline.¹⁰⁷ These two issues are functionally analogous to the problems faced by the litigants who are pursuing lawsuits on the international front: larger federal policies are intervening in the pursuit of this litigation. Once again, what should be a relatively straightforward lawsuit is laced with many thorns.

C. Anticipated Lawsuits Stemming from September 11th

There is huge potential (some of which has already coming to fruition) for lawsuits which do not stem from direct victims (such as those who sustained direct personal injury or those who were killed) of September 11th. The prospect of proximately-related lawsuits is potentially overwhelming. Experts in mass-tort litigation and practitioners alike anticipate thousands of lawsuits stemming out of the events of September 11th — these cases and claims could be “beyond imagination.”¹⁰⁸ Several factors add themselves to the prospect of additional litigation.

The first and largest of these factors is the air quality issue. After the Twin Towers fell, a huge dust cloud spread throughout lower Manhattan and into the New York metropolitan area.¹⁰⁹ Despite this huge dust cloud, Christine Whitman, the Administrator of the Environmental Protection Agency, claimed the air was safe and told the public they could return to their homes and continue work in the vicinity of Ground Zero.¹¹⁰ Between 30,000 to 50,000 workers, compro-

105. See *supra* notes 36 – 40 and accompanying text.

106. See *9/11 Liability Cases Given Go-Ahead*, *supra* note 102.

107. See *supra* notes 41 – 42 and accompanying text.

108. Kubes, *supra* note 30, at 851. See also Rabin, *supra* note 14, at 1848-49.

109. See Campbell, *supra* note 18, at 421 (stating that “remote victims,” such as those who were enveloped by grit as a result of the debris spreading around lower Manhattan and who sustained harm will be excluded by the VCF regulations addressing this problem). See also Kubes, *supra* note 30, at 845-49 (stating that the dust cloud created by the collapse of the Towers released a “chemical soup” of chemical compounds and carcinogens which have lingered and have the potential to put tens of thousands at risk from exposure to toxic substances); Rabin, *supra* note 14, at 1848-49.

110. Jane Kay, *9.11.01: Two Years Later: Ground Zero Air Quality Was 'Brutal' for Months: UC Davis Scientist Concur That EPA Reports Mised the Public*, S.F. CHRON., Sept. 10, 2003, at A1. See also Marc Kaufman, *Details on 9/11 Air Quality Questioned*, WASH. POST, Aug. 27, 2003, at A23.

mised of rescuers, day laborers, and construction crews, joined in the Ground Zero cleanup and recovery efforts.¹¹¹ In the days and weeks after September 11th, these rescuers and workers, as well as nearby residents, began experiencing harsh coughing as well as other symptoms which became known as “World Trade Center Syndrome.”¹¹² Thousands of New Yorkers contacted the World Trade Center health registry, reporting coughs, wheezing, shortness of breath, and sinus inflammation.¹¹³ The dust cloud has also been alleged to be the cause of why pregnant women who were around or near to the World Trade Center site were bearing babies which were smaller — the effects of the dust cloud upon pregnancies was postulated to have the same effects as cigarette smoke.¹¹⁴

Subsequently, it was determined that the EPA made assurances that the air was safe to breathe *despite* 1) not having enough information to make such assurances, and, 2) not knowing what exactly was circulating in the air.¹¹⁵ The EPA then later said that workers and others exposed to debris were at risk for acute and chronic lung and heart problems.¹¹⁶ It was found that workers, rescuers, and nearby residents were exposed to “a toxic brew of contaminants” that included lead, silica, dioxins, asbestos, and sulfuric acid, as well as pulverized glass fibers from shattered windows.¹¹⁷ The government commissioned a \$90 million study to examine the effects of toxin exposure upon workers present at Ground Zero.¹¹⁸ This study, conducted in part by Mount Sinai Medical Center, found that of a sample of 8,000 workers, 75% now have persistent respiratory problems.¹¹⁹ Elevated levels of airborne contaminants were detected for three months after the attacks — it was not until January of 2002 that the air levels returned to normal.¹²⁰

111. Stephanie Armour, *Health Problems Plague Ground Zero Workers*, U.S.A. TODAY, Mar. 3, 2003, at B01.

112. Rabin, *supra* note 14, at 1843-44.

113. See Kay, *supra* note 110, at A1.

114. See Christine Haugney, *Trade Center Debris May Have Affected Pregnancies*, WASH. POST, Aug. 6, 2003, at A03. The condition of intrauterine growth restriction has been linked to exposure from air pollution. *Id.*

115. See Kay, *supra* note 110, at A1 (emphasis added). See also Kaufman, *supra* note 110, at A23. Before it made its announcement to the public, the White House toned down the initial EPA report (for as of yet unfound reasons). *Id.*

116. Armour, *supra* note 111, at B01.

117. *Id.* See also Kay, *supra* note 110, at A1.

118. Armour, *supra* note 111, at B01.

119. Amy Westfeldt, *Doctors: Most 9-11 Workers Still Ailing*, ASSOCIATED PRESS, Oct. 28, 2003. In an unfortunate irony, it has been theorized that it is likely that many of these respiratory problems could have been either prevented or minimized: Congressional inquires about the attack found that OSHA had distributed 131,000 respirators after the attack but many workers did not wear them, either finding them uncomfortable or thinking that they were unnecessary. *Id.* Other workers had no training in how to use the masks while others didn't use them because the conditions at Ground Zero were so severe that they had to remove the masks to be able to see. Armour, *supra* note 111, at B01.

120. Armour, *supra* note 111, at B01.

Stress is another factor which could lead to additional litigation. Doctors believe now that stress created by the attacks may have left some women infertile.¹²¹ It has been estimated that 25% of pregnant women who found out they were pregnant after September 11th were more likely to miscarry than those who knew they were pregnant before the attacks.¹²² In the Mount Sinai Medical Center study, 40% of the workers sampled now have mental health problems because of the attacks.¹²³ The final factor is the potential for other lawsuits by those who, while not directly or proximately connected to September 11th, are remotely connected, such as victims of anthrax attacks, soldiers killed during the attacks, and soldiers killed by subsequent military actions in Afghanistan and abroad.¹²⁴ Critics have observed that they are as deserving of compensation as those killed on September 11th.¹²⁵

Thus, there is a potential for many thousands of lawsuits, which could adversely affect not only the functioning of our legal system, but also the welfare of our cities. In a statement to the National Commission on Terrorist Attacks, Mayor Michael Bloomberg of New York City warned that the personal injury lawsuits filed by plaintiffs claiming damages from cleaning up Ground Zero could bankrupt the city in 20 years.¹²⁶ He has asked for “retrospective indemnification” from personal injury lawsuits stemming from the clean up.¹²⁷ New York City’s Legal Department has already allocated \$3 million dollars and twenty-one lawyers in a special legal defense unit to defend the approximately 1,700 cases already stemming from September 11th.¹²⁸

The events of September 11th created a massive problem for our legal system. The lawsuits described here are simply the tip of the iceberg — many more have been filed and more will be filed due to September 11th. These lawsuits could create a situation like the asbestos litigation of the 1980s and 1990s: litigation some describe as a continuing deluge which “bankrupted an industry [and] disrupted the judicial system far beyond any other mass tort episode in history,” all with no end in sight.¹²⁹ The present and future September 11th litigation has

121. Ania Lichtarowicz, *Infertility Linked to 9/11 Stress*, BBC NEWS UK EDITION, Oct. 15, 2003, available at <http://news.bbc.co.uk/1/hi/health/3192836.stm>.

122. *Id.*

123. Westfeldt, *supra* note 119.

124. See generally Campbell, *supra* note 33, at 6.

125. *Id.*

126. Joan Gralla, *Mayor: WTC Personal Injury Suits Could Bankrupt NYC*, REUTERS, Mar. 31, 2003.

127. *Id.*

128. *Lawyer: NYC Firefighters' Claims Top \$12B*, ASSOCIATED PRESS, Mar. 15, 2003.

129. Rabin, *supra* note 14, at 1831.

the potential to be on par with that litigation. The ATSSSA and VCF made strong contributions to help address the problems of September 11th,¹³⁰ in light of the greater problems that we now face, a different solution is suggested.

IV. INTERNATIONAL REPARATIONS AND COMPENSATIONS TRIBUNALS

A. In General

International courts and tribunals are being increasingly used in the resolution of disputes.¹³¹ Within the last twenty-five years, seven new major international claim and compensation bodies and tribunals have been established, and have collectively resolved more than 160,000 claims.¹³² Clearly, these institutions are an efficacious means in solving large-scale disputes and achieving fair measures of justice.¹³³ The numerous resolutions many claimants have already achieved by using these systems proves its efficacy. The scale of the litigation stemming from September 11th, as well as the issues present in this litigation, demonstrate that these tribunals should serve as models for resolving these disputes.¹³⁴ The next section discusses three of these bodies (the Iran-United States Claim Tribunal, the United Nations Compensation Commission, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland) which have

130. See *id.* at 1833 (alleging that Congress was either inattentive or unconcerned about the “exposure only victims” of the attacks).

131. Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160, 160 (2000). See also John Kim, *International Institutions: International Legal Developments in Review: 1996 Public International Law*, 31 INT’L LAW. 671, 673 (1997); John J. Kim & Gregory Gerdes, *International Institutions: International Legal Developments in Review: 1997 Public International Law*, 32 INT’L LAW. 575, 575 (1998).

132. See *The International Judiciary in Context*, available at <http://www.pict-pcti.org/publications/PICT.Synopic.Chart.2.0.pdf> (providing a more thorough look at the international judiciary system). There are currently seven major international claim and compensation bodies: the Iran-United States Claims Tribunal (est. 1980) (as of 2000, this body had resolved more than 3,000 claims); the Marshall Islands Nuclear Claims Tribunal (est. 1983); the United Nations Compensation Commission (est. 1991) (as of 2000, this body had resolved more than 125,000 claims); the Commission for Real Property Claims of Displaced Persons and Refugees (Bosnia and Herzegovina) (est. 1995) (as of 2000, this body had resolved more than 25,000 claims); the Claims Resolution Tribunal for Dormant Accounts in Switzerland (est. 1997) (as of 2000, this body had resolved more than 7,500 claims); the German Forced Labour Compensation Programme (est. 2000); and, the Eritrea-Ethiopia Claims Commission (est. 2000). *Id.*

133. See Kim & Gerdes, *supra* note 131, at 576.

134. The idea of using reparations in the United States is not a novel one—the idea of using reparations to compensate for slavery has been proposed for years. See generally Ellen Wulffhorst, *U.S. Slave Reburial Fans Question of Reparations*, REUTERS, Oct. 27, 2003.

been used to resolve claims in situations similar to the September 11th related litigation.¹³⁵

B. The Iran-United States Claim Tribunal

The Iran-United States Claim Tribunal (hereinafter referred to as “IUSCT”) was created at the beginning of the Reagan administration.¹³⁶ The IUSCT was established in part by the Claims Settlement Declaration¹³⁷ of the Algiers Declarations to address the numerous claims presented by the two main effects of the Islamic Revolution in Iran: the overthrow of the Shah as well as the Iran hostage crisis.¹³⁸ During the Islamic Revolution, Iran was actually directly sponsoring actions against Americans, namely the taking of hostages at the U.S. Embassy.¹³⁹ Initially, President Carter imposed sanctions on and blocked assets of Iran in response.¹⁴⁰ In the aftermath of the Islamic Revolution and President Carter’s actions, the IUSCT was created in part because many claimants who had lost property and assets as a result of the Islamic Revolution wanted to attach frozen Iranian assets in the hope of satisfying a judgment.¹⁴¹ Their efforts were barred by the Carter administration.¹⁴² In balancing methods of recovery, the IUSCT, as originally presented, offered the best hope for claimants seeking compensation on their claims.¹⁴³

In many ways, the scenario during that time mirrors the problems being faced by some of the September 11th litigants today. Some of the litigants and claimants in the situation at hand are seeking recourse against foreign states and organizations who are alleged to have assisted in terrorist efforts, while the shadow of U.S. foreign policy looms in the background, waiting to intervene. The prospect of successfully litigating claims today echoes the same sort of foreign policy issues presented by the Iran situation. Because of these strong

135. Although the three bodies discussed herein may form the initial framework upon which the idea of a compensation tribunal for September 11th is predicated, these should not be the sole models on which the compensation tribunal should be based.

136. Alford, *supra* note 54, at 208-09 (explaining how the IUSCT is “the darling of the international legal community’s response to revolutions,” and how the IUSCT illustrates the steps taken after a revolution).

137. See Combs, *supra* note 86, at 325-26.

138. See *id.* at 306.

139. See *id.* at 315.

140. See *id.* at 316-17.

141. See generally *id.* at 384-87.

142. *Id.*

143. *Id.* at 346-48.

similarities, the IUSCT has the prospect of being used as a model in implementing a compensation body today.

C. *The United Nations Compensation Commission*

The United Nations Security Council created the United Nations Compensation Commission (hereinafter referred to as "UNCC") in May 1991 — the purpose of this tribunal is to provide redress procedures for Iraq's invasion and occupation of Kuwait, in light of the numerous claims arising from the event.¹⁴⁴ Claimants received compensation from funds derived from the proceeds of Iraq's oil sales and exports.¹⁴⁵ The UNCC has established an excellent track record for adjudicating mass claims.¹⁴⁶ The UNCC is headed by a president and consists of a governing council comprised of representatives of the same fifteen nations which compromise the Security Council.¹⁴⁷ The UNCC has created twenty-one three-person panels of commissioners who hear claims of differing types and suggest awards.¹⁴⁸ The UNCC allows for claims based on personal injury, business, and losses involving tangible and other types of property.¹⁴⁹ Payment of awards derives from proceeds of exports by Iraq of petroleum or petroleum products.¹⁵⁰

Similar to claimants after the Gulf War, September 11th litigants and claimants are in the position of having to assert claims against foreign bodies and organizations for compensation. Additionally, their needs are counter to that of the foreign government, and the presence of a strong U.S. policy interest weighs into the situation as well. Given the large number of claims that have been and

144. See William E. Huth, *The Iraq Claims Tribunal: An Overview of the U.N. Compensation Commission*, 54 DISP. RESOL. J. 25, 25 (1999). The UNCC was established by Security Council Resolution 687 adopted on April 3, 1991. *Id.* See also MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 478 (1997).

145. See JANIS & NOYES, *supra* note 144, at 478.

146. Huth, *supra* note 144, at 25. See also Veijo Heiskanen & Robert O'Brien, *UN Compensation Commission Panel sets Precedents on Government Claims*, 92 AM. J. INT'L L. 339, 340 (1998). See generally Kim, *supra* note 131, at 673; Keith Highet, et al., *International Courts and Tribunals*, 31 INT'L LAW. 599, 602-05 (1997) (discussing various methods used by the UNCC in resolving claims); Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals*, 32 INT'L LAW. 499, 502-06 (1998) (discussing various methods used by the UNCC in resolving claims).

147. Huth, *supra* note 144, at 26. See generally John R. Crook, *The United Nations Compensation Commission--A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993) (giving a detailed discussion of the UNCC administration).

148. Huth, *supra* note 144, at 26. These commissioners are employed on a part-time basis, with their sole responsibility being the adjudication of claims. *Id.* They are supported by a secretariat, whose executive secretary reports to the council and provides support. *Id.* Claims are divided into six categories: A-D handle individuals' and families' claims, E handles corporate claims, and F handles governmental claims. *Id.* The last day to have submitted a claim was January 1, 1996. *Id.*

149. Huth, *supra* note 144, at 28. See also Crook, *supra* note 147, at 153-56.

150. Huth, *supra* note 144, at 32-33.

will be presented as a result of September 11th, the case management system utilized by the UNCC could provide a good basis upon which to devise a management scheme for September 11th. These factors, as well as the proven efficacy of the UNCC, provide ample support for using this international compensation body as a model for the September 11th litigation.

D. The Claims Resolution Tribunal for Dormant Accounts in Switzerland

On June 25, 1997, the Volcker Commission¹⁵¹ announced the establishment of a claims resolution body known as the Claims Resolution Tribunal for Dormant Accounts in Switzerland (hereinafter referred to as "CRT").¹⁵² The CRT was established by private parties and created to be an international arbitration tribunal that would serve as a balancing mechanism to resolve claims to Holocaust-era Swiss bank accounts in light of class-action litigation.¹⁵³ This class-action litigation had been filed in New York by the families of victims of the Holocaust against Swiss banks.¹⁵⁴ Instead of litigating directly against those responsible (namely the German government and German companies), the litigants in the Holocaust litigation sued the Swiss banks who were holding funds of those killed during the Holocaust.¹⁵⁵

Originally, the CRT was created separately from the class-action litigation; however, in 1998, the CRT was merged into the class-action litigation:¹⁵⁶ as part of the global settlement between the class-action litigants and the Swiss banks,

151. Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKELEY J. INT'L L. 250, 259 (2002). The Volcker Commission was an independent body established by various Jewish organizations and Swiss banks to provide for the restitution and full accounting of monies owed to victims of the Holocaust that were being held by Swiss banks. *Id.*

152. *Id.*

153. Michael J. Bazzyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 14-20 (2002) (detailing the litigation process against various banks).

154. Alford, *supra* note 151, at 252, 259. See also Michael J. Bazzyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 608 (1999) (explaining that at one point the State Department claimed that the aggressive tactics used to force a settlement were interfering with American foreign policy).

155. See Bazzyler, *supra* note 154, at 604. A frequently asked question is: why is it only now that this litigation is proceeding? *Id.* at 605. Bazzyler argues that relatively recent U.S. legislation such as the Alien Tort Claims Act and the Torture Victim Protection Act have permitted this litigation to move forward. *Id.* at 605-06. In the absence of this legislation, past lawsuits would have been laughed out of court. *Id.* at 606. See also Bazzyler, *supra* note 153, at 13. Bazzyler, in this article, argues further that the development of human rights law has allowed lawsuits like the Holocaust litigation to be able to flourish. *Id.*

156. Alford, *supra* note 151, at 259-60. The tribunal was merged into the litigation by consent of the parties, a rare move in international arbitration. *Id.* at 260.

the CRT melded into the class-action litigation as an additional means for dispensing settlement funds stemming from the litigation.¹⁵⁷ The CRT has inspired other movements for justice to follow in its wake, such as victims of Armenian genocide who are seeking reimbursement for insurance proceeds paid by relatives who were killed.¹⁵⁸

The unique situation posed by the attempt of the resolution of accounts bears similarities to the situation being faced by those entering into September 11th litigation. Similar to the September 11th claimants, the interests of the class suing the Swiss banks were opposite the interests of the Swiss banks, and there is a strong public policy interest (the U.S. government) providing an intervening factor. The current and prospective plaintiffs of the September 11th litigation face analogous hurdles.

V. A PROPOSAL FOR MANAGING THE LITIGATION STEMMING FROM SEPTEMBER 11TH, 2001

Given all the factors discussed thus far: the limited nature and criticisms of the VCF; the current September 11th lawsuits; the anticipated litigation from September 11th; the problems inherent in recovery; and finally, the proven efficacy of international reparation and compensation bodies, it is proposed that the United States government establish and utilize some form of a compensation tribunal to compensate those victims of September 11th who have filed and who will file lawsuits based on September 11th. This tribunal would be modeled after previous mass claim tribunals and would be appropriate to address the scope of the problems here. This tribunal could serve to head off future litigation, and it underscores the critical theme of balancing: all involved here have many disparate interests and needs which need to be addressed.¹⁵⁹ There is a storm facing our courts if we do not something to try to head it off. The idea presented here is a possible means of heading off that storm.

In this next section, I will address some of the particular concerns that a tribunal of this type could present: first, I will examine some potential funding issues as well as eligibility issues. I will then discuss the ramifications of put-

157. *Id.* at 260. The CRT is limited in its jurisdictional focus to claims stemming from dormant Holocaust-era accounts. *Id.* It utilizes a judicial case-by-case manner to resolve claims that come before it. *Id.* This is contrary to that of other agencies, such as the UNCC and the VCF, which use an administrative procedure to process claims.

158. Bazyler, *supra* note 153, at 33-34. Bazyler also discusses two other notable movements which are an outgrowth of the CRT: that of victims of slave labor by Japan and Japanese industry (*Id.* at 25-33) as well as African-American reparations for slavery (*Id.* at 34-38).

159. Concededly, it is acknowledged that in trying to find a middle ground, neither side will be fully satisfied. *See, e.g.,* Alford, *supra* note 54, at 212 (arguing that even through reparations may try to embrace both parties, neither side will be truly satisfied, as illustrated in the context of the UNCC).

ting such a system into effect and review arguments both for and against this method.

A. *Thoughts on Funding*

In developing a compensation tribunal of this type, one of the principal concerns is: if a compensatory tribunal is being established, where exactly would the money to compensate derive from? It is likely that much of the funds would have to be provided from governmental funds. However, some of the funding could draw from other sources, such as foreign assets that are frozen by the U.S. government. According to the Terrorist Assets Report of 2002 issued by the Treasury Department, more than \$6 million in assets (in which there exists an interest of an international terrorist organization or other related designated party) have been blocked.¹⁶⁰ Another \$4 billion in assets of countries being designated as state sponsors of terrorism are within the jurisdictional reach of the United States.¹⁶¹ Of this money, more than \$3.8 billion has been blocked by the Treasury Department pursuant to economic sanctions imposed by the United States.¹⁶² Being mindful of the fact that the government uses these frozen assets as diplomatic bargaining chips,¹⁶³ it is still possible that *some* of these assets could be liquidated to provide compensation, similar to the Victims of Trafficking and Violence Protection Act of 2000.¹⁶⁴ The rationale in using these assets is purely utilitarian: diverting some of these assets to help satisfy claims could serve both the needs of the government (diplomatic needs and also appeasing the needs of its citizens) as well as September 11th claimants.

Funding could also come from sources abroad. The United States was a signatory to the UN-adopted International Convention for the Suppression of the

160. Terrorist Assets Report, Calendar Year 2002: Annual Report to the Congress on Assets in the United States of Terrorist Countries and International Terrorism Program Designees, *available at* <http://www.treas.gov/offices/eotffc/ofac/reports/tar2002.pdf>. This \$6 million includes assets from al Qaeda, Hamas, the Palestinian Islamic Jihad, the Kahane Chai, and the Taliban. *Id.* This money taken from these terrorist groups and used instead to help claimants could serve to help satisfy the goal of the Havlish and Burnett lawsuits: namely, to deprive terrorists of financial means.

161. Terrorist Assets Report, *supra* note 160.

162. *Id.* These blocked assets are from Cuba, Iran, Iraq, Libya, North Korea, and Sudan. *Id.* Syria, the seventh country designated by the Secretary of State as a state sponsor of terrorism, has not had assets blocked. *Id.*

163. *See supra* notes 82 – 89 and accompanying text.

164. *See supra* notes 91 – 93 and accompanying text. The U.S. government could still retain control of much of the assets, but using at least part of them could help satisfy potential claimants.

Financing of Terrorism¹⁶⁵ (hereinafter referred to as “SFT”) on January 10, 2000.¹⁶⁶ The United Nations subsequently ratified the SFT on April 10, 2002.¹⁶⁷ One of the purposes of this convention is to use monies seized or obtained by forfeiture to compensate victims of terrorist offenses.¹⁶⁸ This is the first time an international scheme has been used to target financial sponsors of terrorist activity in addition to actual perpetrators.¹⁶⁹ While the SFT is principally used for criminal offenses, monies derived from the SFT could also be used as compensation in civil cases.¹⁷⁰

Finally, a potential (yet admittedly, highly unlikely) source of funding may be through settlement agreements. The Holocaust litigation ultimately led to a settlement which provided the funding base for the CRT.¹⁷¹ In theory, (assuming, of course, that defendants actually appear and litigate the case¹⁷²) it is possible the litigants may reach a settlement agreement, which could then provide additional funds for compensation. Again, although highly unlikely, it could be a theoretical source of funding following the results in the Holocaust Litigation.

B. Thoughts on Eligibility

The VCF has a major flaw in its design: it has a limited scope as to who can qualify for compensation. Accordingly, many are filing lawsuits to obtain compensation.¹⁷³ The tribunal proposed here would expand the scope of those who

165. International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109 (Dec. 9, 1999), 39 ILM 270 (2000). See generally Sean D. Murphy, *Conventions on the Suppression of Terrorist Bombings and on Financing*, 96 AM. J. INT’L L. 255, 257 (2002) (discussing recommendations and implications of the SFT).

166. U.S. Signs International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, USUN Press Release, available at http://www.un.int/usa/00_004.htm. See also Murphy, *supra* note 165, at 257.

167. Treaty on Suppression of Financing of Terrorism Comes into Force, Apr. 9, 2002, available at <http://www.unis.unvienna.org/en/news/2002/pressrels/lt4366e.htm>. Of note here is the fact that the United States has not been a full participant in its commitment to international institutions like the UN. See Kim & Gerdes, *supra* note 131, at 575. The U.S. is behind in payments to the UN for approximately \$1.5 billion dollars, and its lack of commitment in other areas seriously undermines the United States’ commitment to the UN.

168. See International Convention for the Suppression of the Financing of Terrorism, *supra* note 165.

169. Judy Aita, *U.S. Signs International Treaty Targeting the Financing of Terrorism*, Washington File, available at <http://usinfo.state.gov/topical/pol/terror/00011201.htm>.

170. See International Convention for the Suppression of the Financing of Terrorism, *supra* note 165.

171. See Bazylar, *supra* note 154, at 608-09, 616, 623. Bazylar details the process of how a multiparty settlement (amongst Swiss banks, German banks, government, and industries, as well as Austrian banks) was reached in the Holocaust litigation which would, in part, later be used as a key funding source of the CRT. *Id.*

172. See *supra* notes 70 – 73 and accompanying text.

173. See *supra* notes 95 – 103 and accompanying text.

could receive compensation. A tribunal of this type could preempt the many anticipated lawsuits that are being sought as a result of September 11th and supplant the VCF as the principal means of compensation for September 11th related injuries. Furthermore, it would disallow suits against foreign parties in the interests of balancing government needs against private needs. It would reduce the overall amount of litigation in the courts; conversely, it would disallow many from pursuing normal legal means. Many questions would have to be addressed if this tribunal were to be implemented: How would this tribunal be implemented?¹⁷⁴ What should the standard of proof be?¹⁷⁵ Who exactly would qualify?¹⁷⁶ What about other victims of other terrorist acts?¹⁷⁷

C. *Ramifications of a Tribunal of This Type: In Favor Of and Against*

One of the most natural counterarguments to the idea of this tribunal is enacting such a form would suspend due process and other fundamental Constitutional rights. To a certain degree, that is true. However, the problem we face is an extraordinary one, to say the least. An appropriate means of dealing with this problem is therefore demanded: extraordinary problems require innovative solutions. Furthermore, methods of this type are not radical nor untested — they have been used in other contexts before with great success.

Another argument would be the positional arguments from each side; namely, by the implementation of this tribunal, their needs will not be fully met or served. That is likely to be true, but the fact of the matter is that it is practi-

174. Implementation could be designed along the lines of the VCF, only with a much larger scope in eligibility.

175. The compensation bodies discussed previously have varying standards of proof when bringing a claim — a claimant before the CRT is required to show that it is “plausible” in light of all the circumstances that he or she is entitled to the dormant account, while a claimant before the UNCC must show a “reasonable degree of certainty” for each element of the claim through documentary evidence. See Alford, *supra* note 131, at 169.

176. The VCF is limited to those “present at the site” during “the immediate aftermath” of September 11th. See *supra* notes 26 – 33 and accompanying text. As demonstrated, many more were adversely affected. *Id.* The obvious problem here is inclusion: at what point should people be disallowed from compensation? Questions of proximity are beyond the scope of this paper.

177. American citizens have the target of other terrorist actions, such as the World Trade Center bombing in 1993, the attack on the U.S.S. Cole, and the Oklahoma City bombing. This tribunal could be expanded to assist all who are victims of terrorist attacks. But the key problem in expansion is definitional scope: the government has adopted varying definitions of “terrorism” in various contexts. See, e.g., Louis Rene Beres, *The Meaning of Terrorism — Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT’L L. 239, 240 (discussing various concepts of terrorism and arguing for a single definitive standard as to what “terrorism” means). Questions of this type are beyond the scope of this paper.

cally impossible to be able to meet the needs of all the parties involved here. The interests of the government and legal system, the interests of those suing foreign states and terrorist-related organizations, and the interests of those suing for September 11th related injuries all have direct conflicts with each other. Mindful of that, the operative theme of the idea presented here is balance. Some interests may be lost, but many other interests can be won.

VI. CONCLUSION

The situation presented to us today by September 11th is a complex web of issues that needs to be untangled. The ATSSSA and VCF provided a good start on the road to recovery — but Congress could not have anticipated the myriad of other problems that would be caused by September 11th. It is hoped that the ideas presented here can be a viable potential mechanism for resolving this dispute, and serve to balance the needs of all involved.