The Foreign Sovereign Immunities Act: The Roadblocks to Recovery

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THE FOREIGN SOVEREIGN IMMUNITIES ACT:
THE ROADBLOCKS TO RECOVERY

SIVONNIA L. HUNT*


INTRODUCTION

When U.S. citizens, like photographers and journalists, are killed by acts of terrorism abroad while performing their jobs, it sends shockwaves through the American home front. “[I]n the long term, the sudden death of a loved one may manifest itself as ‘a deep inner feeling of pain and anguish often borne in silence.’”¹ Thus, the pain and anguish of a loved one may manifest itself as the Intentional Infliction of Emotional Distress (IIED) although individuals react differently under like circumstances.²

Foreign nationals face many challenges when filing civil claims, like IIED, in U.S. courts against foreign states.³ Foreign nationals are faced with the difficult task of breaking through jurisdictional roadblocks under the Foreign Sovereign Immunities Act (“FSIA”) in an effort to hold the foreign state liable for conduct that seriously

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¹ Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 31 (D.C. Cir. 1998) (citing Connell v. Steel Haulers, Inc., 455 F.2d 688 (8th Cir. 1972)).

² Id. at 31.

³ Id.
harmed or caused death to a U.S. citizen relative. Remedies, such as the ability to sue a foreign state for supporting terrorist acts, help to maintain uniformity in U.S. courts and conformity with international law litigation.

Before a U.S. state or federal court can hear a case, it has to exercise jurisdiction over the claim. The court is able to resolve the issue if there is a “case or controversy” between adverse parties with legal standing to bring the suit. Specifically, U.S. federal courts “shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The FSIA, a federal statute, provides the “sole basis” for asserting jurisdiction over foreign states. The FSIA allows a court to remove an essential state law claim from state to federal court through subject matter jurisdiction. Moreover, the FSIA provides that “in personam jurisdiction over a foreign stated defendant has been accommodated inherently in the statute for the acts enumerated in 28 U.S.C. § 1605(a)(7).” Under this statute, U.S. courts have the power to exercise personal jurisdiction over claims against foreign state sponsors of terrorism that cause personal injury or death to U.S. citizens.

Regardless of the United States’ jurisdiction, foreign states enjoy sovereign immunity under the FSIA unless the foreign national (or

4 Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 562 (7th Cir. 2012).
9 Id.
10 Levin v. Islamic Republic of Iran, 529 F. Supp. 2d 1, 15 (D.C. Cir. 2007).
11 Id. (citing Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 19-23 (D.C. Cir. 1998)).
claimant) asserts an exception, such as the state-sponsored terrorism exception.\textsuperscript{13} Foreign states are treated like the U.S. under the FSIA.\textsuperscript{14} Neither sovereign can have a default judgment entered against it—or a political subdivision, agency or instrumentality of it—unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.\textsuperscript{15} Essentially, the claimant must plead a cause-of-action that the court can redress.

If a cause-of-action is properly plead by showing substantial evidence that the claimant or the victim was, at the time of the terrorist act, a United States citizen, and the foreign state was designated as a state sponsor of terrorism, U.S. federal courts can exercise subject-matter jurisdiction over claims which cause death or injury to U.S. citizens.\textsuperscript{16} Subject-matter jurisdiction created a roadblock to recovery for the Leibovitch family during their suit against the Republic of Iran in U.S. federal court.\textsuperscript{17}

In that case, the Seventh Circuit analyzed the FSIA and its state-sponsored terrorism exception to determine whether subject matter jurisdiction over essential state law claims against a foreign state existed.\textsuperscript{18} In \textit{Leibovitch v. Islamic Republic of Iran}, foreign family members brought suit in a U.S. federal court for injuries that resulted from Iran’s material support of terrorist actions.\textsuperscript{19} The district court dismissed the claims brought by the other members of the Leibovitch family, asserting that it lacked subject matter jurisdiction over their claims because they were not U.S. citizens.\textsuperscript{20} The Leibovitches appealed to the Seventh Circuit, arguing that subject matter

\begin{footnotesize}
\begin{enumerate}
\item[14] Id.
\item[16] \textit{Leibovitch}, 697 F.3d at 570.
\item[17] Id. at 561-62.
\item[18] Id. at 561.
\item[19] Id. at 562-63.
\item[20] Id. at 563.
\end{enumerate}
\end{footnotesize}
jurisdiction existed over their IIED claims arising from S.L.’s injuries under Israeli law because of S.L.’s status as an American citizen.21

This article analyzes the FSIA and the state-sponsored terrorism exception to determine whether the Seventh Circuit correctly reversed the district court. This Comment proposes that the Seventh Circuit correctly reversed the district court and found that the court had subject matter jurisdiction to hear the Leibovitch’s case. Moreover, this Comment argues that S.L. could recover because she is a victim under the state-sponsored terrorism exception. The Comment will proceed as follows. Part I provides an overview of the FSIA. Part II addresses case law that helped shape the current state-sponsored terrorism exception. Then, Part III will analyze the current effect of the state-sponsored terrorism exception, and explain why the Seventh Circuit correctly reversed the district court’s ruling. However, to comprehend the court’s decision, one must understand the FSIA and the basis for asserting an exception under the Act.

I. FOREIGN SOVEREIGN IMMUNITIES ACT & U.S. JURISDICTION

A. The FSIA

The FSIA originated in 1976 when foreign states could easily bypass civil liability to personal injury suits by raising foreign sovereign immunity.22 Specifically, there were “uncertainties [of] then current American judicial practices and Department of State policies with regard to a foreign nation's sovereign immunity.”23 Because of those uncertainties, U.S. courts refused to extend the sovereign immunity exception beyond commercial activities to reach public acts

21 Id.
23 Wright, supra note 5.
outside the U.S. As a result, “foreign states [used] the FSIA as a shield against civil liability for violations of the law of nations committed against [U.S.] nationals overseas.” “Consequently, American victims of International terrorism were deterred from suing foreign states that supported terrorist organizations” if they could not point to the commercial activities exception under the FSIA. To combat against international terrorism against U.S. citizens, the state-sponsored terrorism exception was enacted.

**B. The State-Sponsored Terrorism Exception** and Subject Matter Jurisdiction.

To disassemble the FSIA’s shield, victims needed a sword that would pierce the FSIA’s protection and permit subject matter jurisdiction over their claims. In 1996, as part of the Anti-Terrorism and Effective Death Penalty Act, (AEDPA), Congress passed a terrorism exception to the FSIA that granted American citizens the right to sue foreign states designated as “State Sponsors of Terrorism.” Congress’s purpose in lifting the sovereign immunity

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26 Israel Law Center, FSIA (February 4, 2013, 3:00 PM), http://www.israellawcenter.org/hebrew/page.asp?id=334&show=reports#Foreign.
28 Id. (citing 28 U.S.C.A. § 1605A(a)(1) (2008)) (a “foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case to otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an
under the AEDPA was to “affect the conduct of terrorist states outside the U.S. [by promoting] safety of U.S. citizens who travel overseas.” As a result of the AEDPA, raising sovereign immunity as a shield against U.S. jurisdiction was eradicated. Foreign states could not assert sovereign immunity where a victim claims money damages for personal injuries or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency, except that the court shall decline to hear a claim under this paragraph.”


30 Id.

31 28 U.S.C.A. § 1605(e)(1) (2008) (defines “torture” pursuant to the Torture Victim Protection Act of 1991, §3(a) 28 U.S.C. § 1350 (b), as “any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person or for any reason based on discrimination of any kind.”).

32 See id. (defining extrajudicial killing pursuant to the Torture Victim Protection Act of 1991, §3(a) 28 U.S.C. § 1350 (a) as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” This term “does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”).

33 Suppression of Unlawful Acts against the Safety of Civil Aviation art. I, Sept. 23, 1971, 24 U.S.T. 565(1) (defining aircraft sabotage and declaring that if any person commits an offence unlawfully and intentionally, such as:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
material support or resources\(^{35}\) “for such an act if the act or provision is engaged in by an [official] or agent of [the] foreign state while acting within the scope of his or her office [] or agency.”\(^{36}\) Essentially, the state-sponsored terrorism exception dismantled jurisdictional roadblocks by giving U.S. federal courts the power to exercise subject-matter jurisdiction over claims against foreign states.\(^{37}\)

\(^{(c)}\) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

\(^{(d)}\) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

\(^{(e)}\) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

This article also makes an individual liable if under subsection 2(b), that individual “is an accomplice of a person who commits or attempts to commit any such offence” as stated in section 1.

\(^{34}\) See Terrorism Taking of Hostages Convention Between the United States and other Governments, art. 1, June 3, 1983, T.I.A.S. No. 11081 (stating that “[any] person who seizes or detains and threatens to kill, to injure or to continue to detain another person ([“hostage”]), in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of person, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of this Convention.”).

\(^{35}\) 28 U.S.C.A. § 2339A (2009) (material support or resources “means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”).


\(^{37}\) See Fisher v. Great Socialist People’s Libyan Arab Jamahiriya, 541 F. Supp. 2d 46 (D.C. Cir. 2008) (conferring subject matter jurisdiction over Libya in an action arising out of a bombing of an airliner over Scotland); see also Kilburn v. Islamic Republic of Iran, 699 F. Supp. 2d 136 (D.C. Cir. 2010) (where the court had subject matter jurisdiction over a plaintiff’s claims for personal injury and wrongful death after victim of terrorist actions was kidnapped and ultimately killed in Iran).
Moreover, the district court exercises original jurisdiction as to any nonjury civil action against a foreign state where the court has jurisdiction over the person with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 of the FSIA or under any international agreement.\textsuperscript{38} The FSIA protects a foreign state from the jurisdiction of U.S. courts unless a specified exception applies; only then will the federal court exercise subject-matter jurisdiction over a claim against a foreign state.\textsuperscript{39} However, once a court has the power to exercise subject matter jurisdiction over the suit, it may exercise all powers necessary to resolve the suit and enforce whatever judgment it deems proper.\textsuperscript{40}

In \textit{Oveissi v. Islamic Republic of Iran}, the former chief of the Iranian armed forces was assassinated by Hezbollah, a terrorist organization operating under the Islamic Jihad.\textsuperscript{41} His grandson brought a suit on his behalf suing both the Islamic Republic of Iran and the Iranian Ministry of Information and Security (MOIS) in the U.S. District Court of D.C., claiming IIED and wrongful death.\textsuperscript{42} The grandson further alleged that Iran and the MOIS materially supported the Islamic Jihad by funding the terrorist group, and thus could not assert sovereign immunity.\textsuperscript{43} The district court agreed and found that Iran and MOIS were liable for the former chief’s murder.\textsuperscript{44} However, after analyzing the grandson’s IIED claim, the district determined that he lacked standing to bring suit.\textsuperscript{45} The court further determined that because the former chief could not have brought an action if he was still alive, the court had to dismiss the grandson’s wrongful-death

\textsuperscript{38} Sampson v. Federal Republic of Germany, 240 F.3d 1145, 1149 (7th Cir. 2001) (citing 28 U.S.C. § 1330(a) (1976)).
\textsuperscript{39} \textit{Id}. at 1149 (citing Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).
\textsuperscript{40} Autotech Technologies LP v. Integral Research & Development Corp., 499 F.3d 737, 743 (7th Cir. 2007), \textit{cert. denied}, 128 S. Ct. 1451 (2008).
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Id}.
\textsuperscript{43} \textit{Id}.
\textsuperscript{44} \textit{Id}. at 839 (citing Oveissi v. Islamic Republic of Iran, 498 F.Supp.2d 268, 279 (D.C. Cir. 2007)).
\textsuperscript{45} \textit{Id}. (citing \textit{Oveissi}, 498 F.Supp.2d at 283).
The grandson appealed and the D.C. Circuit determined that subject-matter jurisdiction existed over the grandson’s claims because (1) Iran was designated as a state sponsor of terrorism; (2) the grandson was U.S. citizen, and thus able to bring the claim on behalf of his grandfather; and (3) his grandfather was assassinated in France.\textsuperscript{47}

Altogether, the FSIA confers jurisdiction over a plaintiff’s claims presuming the plaintiff pleads an enumerated exception, such as the state-sponsored terrorism exception. However, because the FSIA only confers jurisdiction for the court to hear the plaintiff’s claim, the plaintiff is obligated to plead a sufficient cause of action by pointing to a viable state law claim like wrongful death and IIED.

\section*{II. Cause-of-Action Against a Foreign State}

\subsection*{A. Liability under § 1605(a)(7)—the Flatow Amendment & Ciccipio-Puelo.}

A viable claim must be asserted to hold a foreign state liable once U.S. courts have the power to exercise jurisdiction: “[The] FSIA is not generally intended to affect the substantive law of liability or to affect the primary conduct of foreign states.”\textsuperscript{48} Therefore, failing to assert a viable cause of action could result in the foreign national’s claims being dismissed. The FSIA does not provide for a substantive cause of action or a choice-of-law provision once jurisdiction has been asserted.\textsuperscript{49} However, section 1606 under the FSIA provides that where a “foreign state [is] stripped of its immunity [‘it] shall be liable in the same manner and to the same extent as a private individual under like circumstances.”\textsuperscript{50} Therefore, where sovereign immunity is annulled, the plaintiff may bring “state law claims that they could have brought

\begin{footnotesize}
\begin{enumerate}
\item Id. at 839 (citing \textit{Oveissi}, 498 F.Supp.2d at 279).
\item Id. at 844.
\item Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 565 (7th Cir. 2012).
\item \textit{Oveissi}, 573 F.3d at 841.
\item Id. (citing 28 U.S.C. § 1606 (2002)).
\end{enumerate}
\end{footnotesize}
if the defendant were a private individual." Since plaintiffs are required to indicate a specific substantive law, the FSIA is a conduit of state-law principals, thus creating a pass-through effect on liability.

This section explores the legal impact that the Flatow Amendment and Cicippio-Puleo v. Islamic Republic of Iran had on the state-sponsored terrorism exception. The Flatow Amendment, applied in Flatow v. Islamic Republic of Iran, allowed for increased compensatory damages for terrorist victims and made punitive damages available against foreign states. Cicippio-Puleo, contrarily, refused to recognize a federal right to sue a foreign state without pleading a state law claim.

1. The Flatow Amendment and its Role.

The Flatow Amendment played a huge role in expanding the FSIA subsequent to the AEDPA. The Flatow Amendment was enacted under the Omnibus Consolidated Appropriations Act. It was enacted on September 30, 1996 after Alisa Flatow, a Brandeis University student who was killed by a suicide bombing in the Gaza strip. The Flatow Amendment expressly provided for punitive damages in hopes of combatting terrorism. Furthermore, with the Flatow Amendment, Congress sought to advance the broader goal of the terrorism exception by altering a foreign state’s conduct that engaged in terrorism. Congressman Saxton, an active player in enacting the Flatow Amendment, believed that “the only way to achieve the goal of altering state conduct was to impose massive civil liability on foreign

51 Id. at 841.
52 Leibovitch, 697 F.3d at 563 (citing 28 U.S.C. § 1605(a)(7) (repealed 2008)).
53 Id. at 565 (one purpose of the Flatow Amendment was to increase the measure of damages for terrorist victims. After enacting the Flatow Amendment, it was essential for Congress to ensure the availability of receiving punitive damages against agents of state sponsored terrorism to victims who died as a result of terrorist acts, or who were severely injured).
55 Leibovitch, 697 F.3d at 565.
state sponsors of terrorism whose conduct results in the death or personal injury of United States citizens” by increasing punitive damages. Therefore, the Flatow Amendment sought to expand the state-sponsored terrorism exception by increasing punitive damages as a means of altering a foreign state’s conduct that materially supports terrorist organizations.

Flatow v. Islamic Republic of Iran was the first case to apply the Flatow Amendment. In Flatow, Alisa Flatow, a U.S. citizen and university student, was killed when a suicide bomber in Israel attacked her tourist bus. Alisa was severely injured by a piece of shrapnel that pierced into her skull casing and lodged into her brain. Alisa eventually died from her injuries. Her family brought a wrongful death action on her behalf against Iran and its officials. The court held that, inter alia, the Flatows could recover under a state law theory for wrongful death. In addition, the Flatow Amendment provided a federal cause of action by expressly providing for punitive damages in wrongful death cases.

The Flatow court explained that the Flatow Amendment was a departure from the prior state-sponsored terrorism exception because the FSIA completely prohibited the recovery of punitive damages against a foreign state. However, the Flatow Amendment disregarded that prior prohibition by expressly providing for a cause of action for punitive damages because the FSIA was silent on the type of remedies available. Where a terrorism victim brings a claim directly against a foreign state under the state sponsored exception and the

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56 Id. at 566.
58 Leibovitch, 697 F.3d at 565; see Flatow, 999 F.Supp at 1.
60 Id.
61 Id. at 7-8.
62 Id. at 1.
63 Id. at 16, 18.
64 Id. at 25.
65 Id.
Flatow Amendment, a foreign state can be indirectly liable for punitive damages under the *respondeat superior* doctrine.\(^{66}\) *Respondeat superior* applies where a foreign state “materially supports” a terrorist organization because its tortious actions are the fault of the individual foreign state.\(^{67}\)

Providing “material support or assistance to a terrorist group” is defined as providing currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations.\(^{68}\)

Consequently, if a foreign state provides routine financial assistance to a terrorist group to help advance their terrorist activities, that foreign state is vicariously liable for the personal injuries caused by that terrorist group.\(^{69}\)

The *Flatow* court determined that the Flatows’ were entitled to punitive damages in addition to compensatory damages.\(^{70}\) In addition to finding subject matter and personal jurisdiction, the court found that Iran and MOIS were liable because they materially supported and provided resources to the terrorist group that caused Alisa’s death. After *Flatow* and the Flatow Amendment, those injured by terrorist organizations were afforded a federal cause of action to receive

\(^{66}\) *Id.* at 25-26.

\(^{67}\) *Id.* at 18.


\(^{69}\) *See* Wachsman ex rel Wachsman v. Islamic Rep. of Iran, 537 F. Supp. 2d 85 (D.C. Cir. 2008) (where the “Islamic Republic of Iran and the Iranian Ministry of Information and Security were not immune from suit under [FSIA] for the extrajudicial killing a U.S. citizen who was abducted and executed by members of terrorist group while residing in Israel; victim’s survivors established that Iran’s material support to terrorist group proximately caused victim’s kidnapping and execution, that Iran provided sanctioned support for terrorism through the [MOIS], and that United States had designated Iran a state sponsor of terrorism.”).

\(^{70}\) *Flatow*, 999 F.Supp. at 33-34.
punitive damages in addition to large compensatory damages. Punitive damages were sought as a measure of deterrence to illustrate to foreign states that their conduct will not be tolerated against U.S. citizens. The following cases are examples of how the Flatow Amendment’s large punitive damage awards were applied.

For example, in *Wultz v. Islamic Republic of Iran*, the court held that $300,000,000 in punitive damages was an appropriate award against Iran and Syria where several people were seriously injured during a suicide bombing attack.\(^71\) The suicide bombing attack took place at Rosh Ha’ir restaurant in Tel Aviv, Israel.\(^72\) A sixteen-year-old boy, Daniel Wultz, and his father, Yekutiel “Tuly” Wultz, were among those injured by the explosion.\(^73\) Daniel later died from his injuries; his mother and siblings sued Iran and Syria under the state-sponsored terrorism exception.\(^74\) The *Wultz* court stated that punitive damages were made available under the revised FSIA terrorism exception in an effort to punish and deter terrorist actions that are supported by foreign states.\(^75\)

Similarly, in *Gates v. Syrian Arab Republic*, $300,000,000 ($150,000,000 per victim) in punitive damages was awarded where two contractors were “kidnapped, held hostage, and finally, while their captors videotaped the event, viciously slaughtered.”\(^76\) Their families “brought state law claims against Syria, Syrian Military Intelligence, President Bashar al-Assad, and director of Military Intelligence Asif Shawkat, under the [FSIA].”\(^77\) The families alleged that the foreign

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\(^72\) *Id.*
\(^73\) *Id.*
\(^74\) *Id.* at 27.
\(^75\) *Id.* at 41 (explaining that punitive damages meant to punish outrageous behavior and deter such outrageous conduct in the future by foreign states).
\(^77\) *Id.*
state “provided material support” to both Zarqawi and al-Qaeda which led to the deaths of the U.S.-citizen contractors.\textsuperscript{78}

In \textit{Acosta v. Islamic Republic of Iran}, the court awarded $300,000,000 in punitive damages against Iran for assassinating Rabbi Kahane and wounding two American citizens in 1990.\textsuperscript{79} The court recognized that although a shooting is less horrific than a bombing, both are deadly.\textsuperscript{80} The court stated that “[r]egardless of the severity of the act, [it had] no doubt that Iran’s intention [] in supporting terrorist groups . . . [was] to create maximum harm through terrorist acts.”\textsuperscript{81} With the aim of deterring further terrorist attacks, large punitive damage awards should be instituted as an effective deterrent measure.\textsuperscript{82}

Therefore, although the Flatow Amendment was only enacted as a note to the state-sponsored terrorism exception, courts applied it as an implied amendment; thus, expanding the realms of the FSIA.


After the FSIA’s expansion, the D.C. Circuit court refused to follow \textit{Flatow} and established its own position. In \textit{Cicippio-Puleo}, the D.C. Circuit ruled that Section 1605(a)(7) only allowed waiver of immunity and that some other source of law was required to bring a claim against a foreign state.\textsuperscript{83} \textit{Cicippio-Puleo} states that the Flatow Amendment only allows “a private right of action to sue “officials, employees, and agents of foreign states for the conduct described in §1605(a)(7),” which is different from pursuing actions against a

\textsuperscript{78} Id.
\textsuperscript{79} Acosta v. The Islamic Republic of Iran, 574 F. Supp. 2d 15, 30-31 (D.C. Cir. 2008).
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Cicippio-Puelo v. Islamic Rep. of Iran, 353 F.3d 1024, 1028 (D.C. Cir. 2004).
foreign state.  

Section 1605(a)(7) waives sovereign immunity where money damages are sought for personal injury or death caused by an act of terrorism, but it does not create a private cause of action. Where “an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment, or agency is engaged in terrorism or materially supporting terrorism, sovereign immunity will be deemed waived.”

In essence, the D.C. Circuit found that the FSIA creates a pass-through approach; neither §1605(a)(7) nor the Flatow Amendment creates a private right of action against a foreign government.

Therefore, without a sufficient state law claim, the plaintiff risks dismissal without recovery.

Mr. Cicippio was a comptroller of the American University of Beirut. He was kidnapped in Beirut, Lebanon by a terrorist group named Hezbollah, beaten, kept in inhumane cells, and bound by chains. Mr. Cicippio also suffered an array of medical problems and he was forced to undergo abdomen surgery from which he bears a ten-inch scar. Mr. Cicippio and his wife brought actions against Iran and MOIS and were awarded compensatory and punitive damages. Thereafter, Mr. Cicippio’s adult children brought suit several years later claiming loss of solatium (injury to a person’s feelings) and IIED pursuant to the FSIA’s state-sponsored terrorism exception and the Flatow Amendment.

The district court dismissed the children’s claims, stating that the court did not have jurisdiction and they failed to state a claim upon which relief could be granted. On appeal, the D.C. Circuit affirmed the district court’s dismissal, reasoning that “[t]he language and
history of the FSIA clearly established that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality.’’ The court stated that the Flatow Amendment creates a cause of action and it imposes liability, but that liability only reaches to “an official, employee, or agent of a foreign state designated as a state sponsor of terrorism.” The Flatow Amendment does not include a foreign state. The D.C. Circuit stressed its point by recognizing that the Flatow Amendment was headed in the right direction. However, the court concluded “it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states.” In that instance, the court refused “to imply a clause of action against foreign states when Congress has not expressly recognized one in the language of § 1605(a)(7) or the Flatow Amendment.”

The Cicippio-Puleo court posits that the “Supreme Court has also made it clear that the federal courts should be loathe to ‘imply’ a cause of action from a jurisdictional provision that ‘creates no cause of action of its own force and effect … [and] imposes no liabilities.’” As mentioned previously, the FSIA does not affect substantive liability, it only provides subject matter jurisdiction, assuming the plaintiff points to an enumerated exception. Therefore, pleading an exception to the FSIA waives sovereign immunity and the plaintiff must “state a cause of action under some other source of law, including state law,” to impose liability.

Other courts soon followed suit and applied Cicippio-Puleo’s determination to cases under the FSIA. For example, Nikbin v. Islamic

93 Cicippio-Puelo, 353 F.3d at 1033.
94 Id. at 1034.
95 Id.
96 Id.
97 Id.
98 Id. at 1036.
99 Id. at 1033 (citing Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)).
101 Cicippio-Puelo, 353 F.3d at 1036.
Rep. of Iran ruled there is no cause of action against a foreign state without creating a cause of action in substantive state law since the FSIA only waives the foreign state’s sovereign immunity.\textsuperscript{102} Similarly, Pugh v. Socialist People’s Libyan Arab Jamahiriya follows Cicippio-Puleo’s ruling by stating that Section 1605(a)(7) is “merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents.”\textsuperscript{103} There, several American citizens were injured when their flight was bombed in Brazzaville, Congo.\textsuperscript{104} As a result, six Libyan officers were sued civilly and criminally tried. After the criminal trial, family members of the bombing victims brought civil suits claiming IIED and wrongful death. Defendants moved for a motion to dismiss, stating that plaintiffs need to state claims with particularity. The court agreed and reasoned that according to Cicippio-Puleo, their FSIA complaint has to allege more in order to survive a motion to dismiss.\textsuperscript{105}

Taken together, Cicippio-Puleo sought to halt a plaintiff’s ability to recover damages over foreign states under the FSIA’s state-sponsored terrorism exception and the Flatow Amendment.\textsuperscript{106} Cicippio-Puleo and its progenies required plaintiffs to plead a sufficient claim that justifies liability separate from gaining subject matter jurisdiction by the FSIA.\textsuperscript{107} Therefore, after Cicippio-Puleo’s decision, plaintiffs incurred additional roadblocks in other jurisdictions because Congress had not created a federal cause of action against foreign states.\textsuperscript{108} The Seventh Circuit’s discussion and analysis of Cicippio-Puelo illustrates a curtailing of plaintiffs’ rights; therefore,

\begin{itemize}
\item \textsuperscript{102} Nikbin v. Islamic Rep. of Iran, 517 F. Supp. 2d 416 (D.C. Cir. 2007).
\item \textsuperscript{103} Pugh v. Socialist People’s Libyan Arab Jamahiriya, 2006 WL 23849151, at 5* (D.C. Cir. 2006) (citing Cicippio-Puleo, 353 F.3d at 1032).
\item \textsuperscript{104} \textit{Id.} at 1.
\item \textsuperscript{105} \textit{Id.} at 5.
\item \textsuperscript{106} See Cicippio-Puelo, 353 F.3d at 1024.
\item \textsuperscript{107} \textit{Id.}; see also Holland v. Islamic Republic of Iran, 496 F.Supp. 2d. 1*, 35* (D.C. Cir. 2005) (concluding as Cicippio-Puelo does that suing a foreign state under the FSIA’s exception requires more than a bare bones pleading of a state law cause-of-action).
\item \textsuperscript{108} Cicippio-Puleo, 353 F.3d at 1036.
\end{itemize}
Congress responded swiftly by repealing the state-sponsored terrorism statute.

B. Amendment and Repealing of §1605(a)(7) by Congress.

In 2008, Congress amended the Act so its intention would have full effect after Cicippio-Puleo interpreted and applied the state-sponsored terrorism exception so narrowly.\textsuperscript{109} Congress enacted section1605A, providing a private right of action under subsection (c) where:

- a foreign state that is or was a state sponsor of terrorism [] and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—
- (1) a national of the United States, (2) a member of the armed forces, (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee’s employment, or (4) the legal representative of a person described in paragraph[s] (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents. (emphasis added).

By amending the Act, Congress afforded comfort to victims by granting a private right of action to sue a foreign state.\textsuperscript{110}

\textsuperscript{110} Id.
Puleo had said that a federal cause of action to sue a foreign state would be in the right direction but that Congress had to act; it was not the courts’ duty to find an action where one did not exist.\textsuperscript{111} Victims of state-sponsored terrorism now enjoy expanded rights under the amended Act because Congress eliminated the inconsistent application of the law by clarifying its original intent to U.S. courts.\textsuperscript{112}

The D.C. Circuit was one of the first courts to apply this new Amendment. For example, in Estate of Doe v. Islamic Rep. of Iran, an action was brought against Iran alleging that it materially supported a terrorist group which was responsible for bombing two U.S. Embassy facilities in Beirut, Lebanon where 58 foreign national employees and one U.S. national employee of the U.S. Government were working and therefore injured or killed as a result of the attack.\textsuperscript{113} The court held that where the plaintiffs had originally filed suit under the original FSIA exception and commenced a new action in a timely manner under the new FSIA exception, an action was available.\textsuperscript{114} Similarly, in Wyatt v. Syrian Arab Rep., the court reached the same conclusion and allowed the plaintiffs to proceed under the new FSIA terrorism exception.\textsuperscript{115} Providing plaintiffs met the FSIA’s state-sponsored terrorism exception under Section 1605A, a private cause of action attached to the foreign state as well as an agent of the state.\textsuperscript{116}

Although still challenging, the new FSIA exception provided relief to American citizens, employees or soldiers of the U.S. government, and sent a signal that their claims mattered. Courts have held that those who brought claims under the original FSIA terrorism exception had a right of action under the new FSIA terrorism

\textsuperscript{111} Cicippio-Puelo, 353 F.3d at 1036.
\textsuperscript{112} Israel Law Center, FSIA (Feb. 4, 2013, 3:30 PM), http://www.israelawcenter.org/hebrew/page.asp?id=334&show=reports#Foreign.
\textsuperscript{113} Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 6 (D.C. Cir. 2011).
\textsuperscript{114} Id. at 16-17.
exception. The courts retroactively applied the new right of action provided plaintiffs commenced an action within 60 days after the entry of judgment against the foreign state in a timely filed related action which arose out of the same incident. It is apparent that some jurisdictional and cause-of-action roadblocks were dismantled; families could start their healing processes.

117 See Taylor v. Islamic Republic of Iran, 811 F.Supp.2d *1 (D.C. Cir. 2011); Haim v. Islamic Republic of Iran, 784 F. Supp.2d *1 (D.C. Cir. 2011); Anderson v. Islamic Republic of Iran, 753 F. Supp.2d 68 (D.C. Cir. 2010) (for a retroactive application analysis to claims that were previously rejected by terrorism victims).

118 See Haim, 784 F. Supp. 2d *1 (plaintiffs allowed to retroactively apply the FSIA new amendment that created a new independent federal cause of action against foreign sovereign for terrorism-related claims, in an effort to seek punitive damages); Anderson v. The Islamic Rep. of Iran, 753 F. Supp. 2d 68 (D.C. Cir. 2010) (where states-sponsored terrorism exception applied retroactively to the suit brought by several family members of servicemen who were severely injured during a bombing of the U.S. marine barracks in Beirut against Islamic Rep. of Iran and the Iranian Ministry of Information and Security); Murphy v. Islamic Rep. of Iran, 740 F. Supp. 2d 51 (D.C. Cir. 2010) (allowing plaintiffs and intervenors the right to retroactively apply the new FSIA provision against Iran for the bombing of the Marine barracks in Lebanon).


Mr. Lautenberg speaks in the Congressional hearing of the 110th Congress, Second Session about the original intent and effects of the FSIA. Mr. Lautenberg states, in part:

In 1996, Congress created the “state sponsored terrorism exception” to the Foreign Sovereign Immunities Act, FSIA. This exception allows victims of terrorism to sue those nations designated as state sponsors of terrorism by the Department of State for terrorist acts they commit or for which they provide material support. Congress subsequently passed the Flatow Amendment to the FSIA, which allows victims of terrorism to seek meaningful damages, such as punitive damages, from state sponsors of terrorism for the horrific acts of terrorist murder and injury committed or supported by them.

Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions. For example, the courts decided in Cicippio-Puleo v. Islamic Republic of Iran that there is no private right of action against foreign governments-as opposed to individuals-under the Flatow Amendment. Since this
III. CURRENT EFFECT OF THE STATE-SPONSORED TERRORIST EXCEPTION & THE LEIBOVITCH DECISION

A. Limitations of §1605A

Certain limitations still exist before a U.S. court will hear a claim under the FSIA’s terrorism exception: (1) the foreign state has to be designated as a state sponsor of terrorism; (2) the claimant or victim has to be a U.S. national, member of the armed forces, or employee of the government; or (3) is an individual performing a contract awarded by the United States Government and acting within the scope of their employment. If the claimant fulfills these three elements, a U.S. decision, judges have been prevented from applying a uniform damages standard to all victims in a single case because a victim's right to pursue an action against a foreign government depends upon State law. My provision in this bill fixes this problem by reaffirming the private right of action under the Flatow Amendment against the foreign state sponsors of terrorism themselves.

My provision in this bill also addresses a part of the law which until now has granted foreign states an unusual procedural advantage. As a general rule, interim court orders cannot be appealed until the court has reached a final disposition on the case as a whole. However, foreign states have abused a narrow exception to this bar on interim appeals-the collateral order doctrine-to delay justice for, and the resolution of, victim's suits. In Beecham v. Socialist People’s Libyan Arab Jamahiriya, Libya has delayed the claims of dead and injured U.S. service personnel who were off duty when attacked by Libyan agents at the Labelle Discothe2que in Berlin in 1986. These delays have lasted for many years, as the Libyans have taken or threatened to take frivolous collateral order doctrine appeals whenever possible. My provision will eliminate the ability of state sponsors of terrorism to utilize the collateral order doctrine. My legislation sends a clear and unequivocal message to Libya. Its refusal to act in good faith will no longer be tolerated by Congress.

120 28 U.S.C. § 1605A(2)(i)-(iii)(2008); see also Michael Rosenhouse, J.D., Annotation, State-Sponsored Terrorism Exception to Immunity of Foreign States and
court will exercise subject matter and personal jurisdiction over their claims. However, courts must be knowledgeable in their application of the federal cause of action or the private right of action enumerated under section 1605A(c).

B. Leibovitch’s Outcome

During the summer of 2003, the Leibovitch family was traveling in their minivan on the Trans Israel highway near, Kalkilya, a town bordering the West Bank. Soon after crossing the West Bank, members of the Palestine Islamic Jihad (“PIJ”) crossed into Israel from the West Bank and opened fire on the Leibovitch family, causing grave harm to two of the Leibovitch children. As a result of the attack, N.L., a seven-year-old Israeli national, died and S.L., a three-year-old American citizen, was seriously wounded by bullets that shattered bones in her right wrist and pierced her torso. The girls had two grandparents and two siblings in the minivan that also survived the attack. They all witnessed N.L’s tragic death and S.L.’s horrific injuries.

In 2008, the Leibovitch family brought suit against Iran for each family member in the minivan that was attacked by the PIJ and for N.L. and S.L.’s parents (foreign nationals) who were not present during the attack. After the trial court entered a default order against Iran, the court determined that “S.L. was injured in an act of


121 Leibovitch v. Islamic Republic of Iran, 697 F.3d 561, 562 (7th Cir. 2012).
122 Id.; see also Meir Litvak, Palestine Islamic Jihad – Background Information, Jewish Virtual Library, (April 27, 2013, 3:00 PM), www.jewishvirtuallibrary.org/jsource/Terrorism/tau56.html.
123 Leibovitch, 697 F.3d at 562.
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
… extrajudicial killing’ under the FSIA exception for terrorism.”

In addition, the district court found Iran vicariously liable for injuries that resulted from the PIJ’s attack because Iran had provided material support and resources to the PIJ for its campaign on extrajudicial killing. The Leibovitch court faced two determinations regarding section 1605A’s jurisdictional scope. The first issue was whether section 1605A specifically tracks the new private right of action which excludes most foreign nationals even if they are family members, or whether Cicippio-Puleo’s pass-through approach (merely granting jurisdiction but no right to sue) survives Congress’ substantial revision of the FSIA’s terrorism provision. The second issue was whether S.L. is considered a victim under section 1605A(a)(7).

C. Analysis

First, the Seventh Circuit concluded that § 1605A tracks a new private right of action. The court concluded “that Congress intended to confer jurisdiction over the Leibovitchs’ [IIED] claim.” In doing so, the court analyzed Congress’ revision of Section 1605A and disengaged Cicippio-Puleo and its progenies’ previous arguments. The Seventh Circuit found that Congress eliminated a huge inconsistency created by Cicippio-Puleo by “slightly amend[ing] the language to waive sovereign immunity if ‘neither the claimant nor the victim was a national of the U.S. … when the act upon which the claim is based occurred.’” Therefore, the court found that Congress “established a private right of action principally for American

130 Leibovitch, 697 F.3d at 562.
131 Id. at 564.
132 Id. at 572.
133 Id. at 569.
134 Id.
135 Id. at 570.
136 Id. at 570.
claimants while waiving sovereign immunity in a broader set of cases also involving American victims.\footnote{Id. at 571.} The court noted that Congress did not indicate that its Amendment narrowed the original scope of jurisdiction.\footnote{Id.} Rather, the purpose of § 1605A(c) was to “extend punitive damages to foreign nations sponsoring terrorism and thereby allow the massive liability judgments [to] deter state support for terrorism.”\footnote{Id. at 570.} Essentially, the court found that Congress intended for the Leibovitch’s to “‘have the benefit’ of the FSIA’s jurisdictional provisions even if they could not make use of the federal cause of action” created under the Flatow Amendment.\footnote{Id. at 570 (citing H.R. Rep. No.105-48, pt. 1, 2 (1996)).}

Second, the Seventh Circuit determined that S.L. was a victim although her sister, N.L., was a foreign national and S.L. was killed by an extrajudicial killing.\footnote{Id. at 570.} Based on § 1605A’s House Report, “‘[the] intent of the drafters was that a family should have the benefit of these provisions if either the victim of the act or the survivor who brings the claim is an American citizen.”\footnote{Id. at 570 (citing § 1605A(a)(1) (2008)).}

Valore v. Islamic Republic of Iran defines victim as “those who suffered injury or died as a result of the attack and claimants as those whose claims arise out of those injuries or deaths but who might not be victims themselves.”\footnote{Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 68 (D.C. Cir. 2010).} S.L. was an American citizen and a victim of state sponsored terrorism when she was severely injured by bullets that shattered her torso and wrist.\footnote{Leibovitch, 697 F.3d. at 562, 570.} N.L., however, was murdered by an act of extrajudicial killing.\footnote{Id. at 572 (citing § 1605A(a)(1) (2008)).}

The Seventh Circuit concluded that although S.L. was not a victim of extrajudicial killing, she was a victim of the same terrorist act that killed her sister because she suffered severe injuries as a result

\begin{footnotes}
\item [137] Id. at 571.
\item [138] Id.
\item [139] Id.
\item [140] Id. at 570.
\item [141] Id.
\item [142] Id. at 570 (citing H.R. Rep. No.105-48, pt. 1, 2 (1996)).
\item [143] Valore v. Islamic Republic of Iran, 700 F. Supp. 2d 52, 68 (D.C. Cir. 2010).
\item [144] Leibovitch, 697 F.3d. at 562, 570.
\item [145] Id. at 572 (citing § 1605A(a)(1) (2008)).
\end{footnotes}
of the attack.\textsuperscript{146} Therefore, jurisdiction existed over the Leibovitches claims that were derived from S.L.’s injuries.\textsuperscript{147} The Seventh Circuit reversed the district court’s ruling and remanded it for further proceedings consistent with its holding.\textsuperscript{148} The Seventh Circuit concluded that Section 1605A “not only confers jurisdiction but also includes a private right of action, a remedy not offered under any other exception to sovereign immunity.”\textsuperscript{149} The Seventh Circuit made the right decision by following Congressional intent and the language of the new Amendment to hold in favor of the Leibovitches. Like many other families, the Leibovitches could receive a remedy for their horrific ordeal and began their healing process.

CONCLUSION

After the FSIA’s state-sponsored terrorism exception was expanded and narrowed, Congress eliminated legal inconsistencies enacted by U.S. courts. The Seventh Circuit has yet to decide many of these state-sponsored terrorism cases. However, \textit{Leibovitch} set a groundwork that lower courts in the Seventh Circuit must follow. In \textit{Leibovitch}, the Seventh Circuit brilliantly explained and applied Congress’s intent to make this exception broader and more available to claimants because victims like S.L. will be deprived of adequate relief for their injuries without it. The FSIA’s state-sponsored terrorism exception was created and has always been advanced as a measure to deter foreign states from harming or killing American citizens. Furthermore, although it appears that the roadblocks to FSIA litigation have been dismantled, only time will tell when the Seventh Circuit decides more cases on this limited issue of the state-sponsored terrorism exception.

\textsuperscript{146} \textit{Id.}  
\textsuperscript{147} \textit{Id.}  
\textsuperscript{148} \textit{Id.} at 573.  
\textsuperscript{149} \textit{Id.} at 570.