

THE LEGAL SCHOLAR

The Statutory Bases For Suing Terrorist Countries

By Nadia N. Blaine

In the wake of the September 11, 2001 terrorist attacks, many victims have sued or are planning to sue foreign countries victims believe were behind the attacks. As other articles in this issue make clear, this is not the first time U.S. citizens have sued foreign entities or countries for sponsoring terrorist acts. However, unlike earlier victims, September 11 victims have a choice in seeking compensation. They can file a claim for compensation under the federal September 11th Victim Compensation Fund or they can file a civil lawsuit against the airlines, airport security companies, or any other person or agency they feel is responsible. Victims may not both seek compensation from the Fund and file a civil lawsuit, unless the suit is against the terrorists and the countries that allegedly sponsored the terrorist acts. The Foreign Sovereign Immunities Act and the Justice for Victims of Terrorism Act are two statutes which make it possible to sue foreign terrorists and their sponsors. This article will analyze these two acts and evaluate what they mean for September 11 victims.

The Foreign Sovereign Immunities Act of 1976

History of the Act

Until the beginning of the twentieth century, foreign countries enjoyed immunity from suit in U.S. courts as a matter of foreign policy.ⁱ However, the United States eventually embraced the “restrictive” theory of foreign sovereign immunity. Under this theory, countries were not immune from liability in foreign courts for commercial activity or private acts.ⁱⁱ In other words, countries could only be immune for public and sovereign acts.

Congress further defined sovereign immunity when it passed the Foreign Sovereign Immunities Act of 1976 (FSIA).ⁱⁱⁱ FSIA enumerates various exceptions to sovereign immunity. Originally, FSIA did not state that a country would waive its immunity by engaging in or supporting an act of terrorism.

One exception that was in the statute was that foreign states could waive their immunity either explicitly or implicitly.^{iv} This concept was the source of controversy in early terrorism-related suits. Because U.S. courts strictly adhered to the enumerated exceptions in FSIA, victims could not successfully sue foreign states for sponsoring terrorism. Victims attempted to argue that states had implicitly waived immunity by participating in or sponsoring acts that contradicted international law.^v The plaintiffs invoked *jus cogens*, “a principle of international law that is based on values taken to be fundamental to the international community and that cannot be set aside.”^{vi} Unfortunately, courts refused to accept this argument.

Victims sought a legislative remedy. Families, like that of Alisa Flatow, a college student who was killed in a bombing in Israel, petitioned Congress to adopt legislation that would enable private citizens to sue foreign countries for sponsoring terrorism. The U.S. State Department was opposed to broadening the statutory exceptions to sovereign immunity, concluding that the adoption of a provision that allowed private citizens to sue foreign countries would damage foreign relations with those countries.^{vii}

The Antiterrorism and Effective Death Penalty Act of 1996

Ultimately, Congress responded to the victims' concerns by enacting the Antiterrorism and Effective Death Penalty Act of 1996. This legislation amended § 1605(a) of FSIA by adding a "state sponsored terrorism exception" to the list of enumerated exceptions. Only those countries which are formally designated by the U.S. State Department as state sponsors of terrorism can be sued.^{viii} Currently, the State Department gives seven countries this designation: Iran, Iraq, Cuba, Libya, North Korea, Sudan, and Syria. During the Congressional debate over the 1996 amendment, the House of Representatives favored broader legislation which would have allowed private citizens to sue any country that did not provide for adequate legal redress.^{ix} This broader approach did not prevail.

The Problem of Damages

The original 1996 amendment did not address the issue of damages. Under FSIA, foreign states could be responsible only for compensatory damages, not punitives.^x A subsequent amendment, which is commonly referred to as the "Flatow Amendment," amended FSIA by allowing courts to award punitive damages under the state-sponsored terrorism exception.^{xi}

With the passage of these new laws, Congress greatly enhanced victims' ability to pursue civil litigation arising out of state-sponsored terrorism. Victims could sue foreign countries, and they could be awarded compensatory and punitive damages. Unfortunately, the 1996 amendments did not resolve all of the problems associated with pursuing this type of suit. Victims brought a number of lawsuits against countries that had allegedly sponsored terrorism, but the countries did not appear in the suits,

resulting in default judgments. Many victims were left with large compensatory and punitive damages awards, but no means of collecting.

Justice for Victims of Terrorism Act

In the Fall of 2000, Congress passed the Justice for Victims of Terrorism Act, which enables some terrorism victims to collect on judgments which they have been awarded.^{xii} The law only applies to a very small group of victims. In order to be covered, victims must have received a final judgment in a FSIA suit against Iran or Cuba by July 20, 2000. The Act also applies to specific, but (at the time) unresolved lawsuits that were filed on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, and July 27, 2000.^{xiii} In exchange for giving up rights related to the collection of their compensatory and punitive damages from the foreign countries, the victims will receive their compensatory damages awards in payments from the U.S. government—with the payments coming from funds tied to the foreign countries' frozen assets.

It is difficult to predict how suits brought by September 11 victims will fare. While some allegedly responsible countries are on the State Department's list of terrorism sponsors (e.g., Iraq, Iran, and Sudan), others (e.g., Afghanistan and Saudi Arabia) are not. No September 11 suits will be included under the payment mechanism of the Justice for Victims of Terrorism Act. Ultimately, if civil lawsuits against foreign entities and countries are going to bring about any meaningful results for September 11 victims, it may require new legislation modifying the way such defendants are sued.

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Digest of Cases

The following is a sampling of terrorism civil lawsuits brought by U.S. citizens.

Name of Case: *Alejandro v. Republic of Cuba*

Facts: On February 24, 1996, the Cuban Air Force shot down two unarmed, civilian airplanes that were flying over international waters on a humanitarian mission with the group Brothers to the Rescue. There were no survivors. The victims' families sued Cuba under FSIA.

Outcome: The U.S. District Court for the Southern District of Florida entered a default judgment for the plaintiffs with a total award of approximately \$187 million.

Name of Case: *Anderson v. Islamic Republic of Iran*

Facts: See article in this issue of *Victim Advocate*. Anderson, his wife, and his daughter sued Iran.

Outcome: A federal judge entered a default judgment in favor of Anderson and ordered Iran to pay \$324 million in damages. The judge also awarded \$10 million in damages to Anderson's wife and \$6.7 million to his daughter. The judge noted that the evidence overwhelmingly proved that Iran supported terrorism and that it was behind Anderson's kidnapping.

Name of Case: *Cicippio v. Islamic Republic of Iran*

Facts: Joseph Cicippio was kidnapped and held hostage for five years. Two other men, David Jacobsen and Frank Reed, were held hostage as well. Their captors were members of Hizbollah, which had been financed by Iran. After the men gained their freedom, they and their families sued Iran.

Outcome: The U.S. District Court for the District of Columbia entered a default judgment in favor of Cicippio, Jacobsen, and Reed, and ordered Iran to pay \$20 million to Cicippio, \$16 million to Reed, and \$9 million to Jacobsen. Reed and Cicippio's wives were awarded \$10 million each.

Name of Case: *Eisenfeld and Duker v. Islamic Republic of Iran*

Facts: Matthew Eisenfeld and Sara Duker were Americans who were killed when a bus they were riding on was bombed. Eisenfeld and Duker were studying in Israel and planned to marry. Their families sued Iran.

Outcome: The U.S. District Court for the District of Columbia entered a default judgment in favor of the families and awarded \$327 million in damages. The court found that Iran had provided training, money, and other resources to those responsible

for the bombing in Israel.

Name of Case: *Flatow v. Islamic Republic of Iran*

Facts: Alisa Flatow, a student from New Jersey, was killed when the bus she was riding on in Israel was bombed. The Palestinian group, Islamic Jihad, claimed responsibility for the attack. Flatow's parents sued Iran. The court heard testimony from the FBI and the Israeli security service describing Iran's funding and training of Islamic Jihad.

Outcome: A federal court entered a default judgment in favor of the Flatows and awarded them \$247.5 million in damages, including \$22.5 million in compensatory damages.

Name of Case: *Hill v. Republic of Iraq*

Facts: Eight American citizens were held captive by the Iraqi military during Desert Storm. After their release, the captives sued Iraq and Saddam Hussein for hostage taking, false imprisonment, personal injury, intentional infliction of emotional distress, and in some cases, assault, battery, and loss of consortium.

Outcome: A federal judge entered a default judgment against Iraq and ordered it to pay each victim between \$3,000 and \$5,000 per day of confinement, plus lump sum awards of \$100,000 and \$500,000 for emotional injuries. The spouses of some of the plaintiffs were awarded between \$100,000 and \$300,000 for loss of consortium. One of the plaintiffs was also awarded \$1 million for exacerbation of his diabetic condition. The court ordered Saddam Hussein to pay \$300,000 million in punitive damages.

Name of Case: *Price v. Socialist People's Libyan Arab Jamahiriya*

Facts: Michael Price and Roger Frey were Americans living in Libya. In March of 1980, they were arrested for taking pictures around Tripoli. They were kept in a political prison under deplorable conditions for 105 days. They were beaten by guards, forced to sleep on urine-soaked mattresses, and rarely fed. After Frey and Price were acquitted of charges in Libya, the Libyan government held their passports for another sixty days while the prosecution pursued an appeal. After the appeal was rejected, Frey and Price were finally allowed to leave the country. Back in the United States, they sued Libya for hostage taking and torture and sought \$20 million in damages for each man. Libya filed a motion to dismiss claiming that the court's jurisdiction was unconstitutional. The trial court rejected this argument. Libya sought an interlocutory appeal, arguing that under the Due Process Clause, U.S. courts had no jurisdiction over Libya.

Outcome: The appeals court held that the plaintiffs failed to state a claim for hostage taking adequate to abrogate sovereign immunity. However, the court also found that plaintiffs might be able to state a FSIA claim for torture, and remanded the case to allow the plaintiffs to amend their complaint. The court also found that Libya, as a foreign state, is not a person within the meaning of the Due Process Clause, and that U.S. courts can have jurisdiction over Libya.

Name of Case: *Stethem v. Islamic Republic of Iran*

Facts: On June 14, 1985, TWA Flight 847 from Greece to Italy was hijacked and forced to land in Beirut. Passengers were beaten and tortured, and American serviceman Robert Stethem was shot and killed. Stethem's family and several passengers on the flight sued Iran and its intelligence service, alleging that the defendants were ultimately responsible for the hijacking. The court heard testimony that the hijackers belonged to Hizbollah.

Outcome: A federal judge entered a default judgment against Iran and ordered it to pay approximately \$29 million in compensatory damages and \$300 million in punitive damages.

Name of Case: *Wagner v. Islamic Republic of Iran*

Facts: Michael Wagner was a U.S. Navy intelligence specialist on assignment in Beirut. On the morning of September 20, 1983, a car bomb exploded at the U.S. Embassy. Wagner sustained severe injuries from which he later died. Wagner's father and younger siblings sued Iran and the Iranian Ministry of Information and Security.

Outcome: The U.S. District Court for the District of Columbia entered a default judgment against Iran and ordered it to pay \$13 million in compensatory damages and \$300 million in punitive damages.

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i. Dan Daly, *A Legislative History of the "State Sponsored Terrorism Exception" to the Foreign Sovereign Immunities Act*, 6 CRIME VICTIMS LITIG. Q., Mar. 1999, at 14.

ii. *Id.*

iii. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2002).

iv. *Id.* at §§ 1605, 1607.

v. Daly at 15.

vi. MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996), available at <http://dictionary.lp.findlaw.com>.

vii. Thomas W. Lippman, *Panels Lift Immunity in Terrorism; Proposals Open Nations to Lawsuits by Victims*, WASH. POST, July 3, 1995, at A10.

viii. 28 U.S.C. § 1605 (2002).

ix. Lippman, at A10.

x. 28 U.S.C. § 1606 (2002).

xi. Daly, at 15.

xii. Pub.L.No. 106-386, § 2002, 114 Stat. 1464, 1542-43.

xiii. *Id.*